



EUROPEAN COMMISSION
Competition DG

CASE AT.39523 – SLOVAK TELEKOM

(Only the German and English text are authentic)

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 15/10/2014

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Brussels, 15.10.2014
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COMMISSION DECISION

of 15.10.2014

**relating to proceedings under Article 102 of the Treaty on the Functioning of the
European Union and Article 54 of the EEA Agreement**

(AT.39523 - Slovak Telekom)

(Only the German and English texts are authentic)

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COMMISSION DECISION

of 15.10.2014

relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement

(AT.39523 - Slovak Telekom)

(Only the German and English texts are authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decisions to initiate proceedings in this case on 8 April 2009 against Slovak Telekom a.s. and on 13 December 2010 against Deutsche Telekom AG,

Having given Slovak Telekom a.s. and Deutsche Telekom AG the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty²,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case,

Whereas:

1. INTRODUCTION

- (1) This Decision relates to anticompetitive practices of the undertaking Slovak Telekom/Deutsche Telekom ('ST/DT', which comprises Slovak Telekom a.s. ('ST') and Deutsche Telekom AG ('DT'), with respect to broadband services in the Slovak Republic.

¹ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". Where the meaning remains unchanged, the terminology of the TFEU will be used throughout this Decision.

² OJ L 123, 27.4.2004, p. 18.

- (2) Between 12 August 2005 and 31 December 2010, ST/DT committed a single and continuous infringement of Article 102 of the Treaty and Article 54 of the EEA Agreement that consisted of the following practices:
- (a) withholding from alternative operators ('AOs') network information necessary for the unbundling of local loops;
 - (b) reducing the scope of its obligations regarding unbundled local loops;
 - (c) setting unfair terms and conditions in its Reference Unbundling Offer ('RUO') regarding collocation, qualification, forecasting, repairs and bank guarantees;
 - (d) applying unfair tariffs which did not allow an equally efficient competitor to rely on wholesale access to ST's unbundled local loops to replicate the retail broadband services offered by ST without incurring a loss.

2. PARTIES TO THE PROCEEDINGS

2.1. Slovak Telekom a.s. ('ST')

- (3) ST is the incumbent telecommunications operator in the Slovak Republic, which was partially privatised in 2000. ST is a member of the multinational Deutsche Telekom Group. The Company's majority shareholder holding 51% is DT. The Slovak Republic, represented by the Ministry of Economy of the Slovak Republic, holds a 34% share and the National Property Fund of the Slovak Republic holds a 15% share of ST³.

2.1.1. The relationship between the shareholders of ST

- (4) The relationship between the shareholders of ST is governed by an agreement concluded between DT, ST, the Slovak State (at that time acting through the Ministry of Transport, Post and Telecommunications) and the National Property Fund on [...] ⁴ ('Shareholders' Agreement'). The Shareholders' Agreement was concluded for the duration of ownership of ST's shares by the Slovak State ⁵ and sets out in particular the basic principles of corporate governance, the long and medium term objectives of ST as well as the rights of shareholders in case of sale of ST's shares. Following negotiations [Reference to an Agreement between the shareholders of ST] ⁶ which amends the Shareholders' Agreement.

2.1.2. The corporate structure of ST

- (5) ST ⁷ is a joint stock company (in Slovak 'akciová spoločnosť'), incorporated under Slovak law ⁸. In line with Slovak law (the Commercial Code), ST's corporate

³ ST's reply to the request for information of 17 April 2009, p. 3, 4, Doc ID0444.

⁴ [Reference to the shareholders' agreement] Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253; and Doc ID 2352 (DT's reply of 4 August 2010), Non confidential Doc ID3248.

⁵ [Reference to the shareholders' agreement] Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

⁶ [Reference to an Agreement between the shareholders of ST] Doc ID3293.

⁷ According to the Extract from the Commercial Register, Slovak Telekom a.s. was registered as a joint stock company on 4 April 1999, Company ID (IČO) 35763469, with a fully paid up registered capital in the amount 864 113 million EUR divided into 26 027 500 shares with a nominal value 33.2 EUR per share. Slovak Telekom, a.s. is a private joint stock company (that is to say its shares are currently not traded at a stock exchange).

structure and the specifics of the functioning of the various corporate bodies are governed by ST's Statute⁹. In ST's case the main rules relating to the corporate structure and the functioning of the corporate bodies were first set out in the Shareholders' Agreement concluded on [...] ¹⁰. These rules were then transposed into ST's Statute, the main corporate document of the company¹¹. ST has the following corporate bodies¹²: Board of Directors ('BoD'); Supervisory Board ('SuB'); and General Assembly of Shareholders ('GAS'):

2.1.2.1. The Board of Directors ('BoD')

- (6) The Board of Directors (in Slovak 'predstavenstvo')¹³ is the statutory body of the company in charge of its management and of most commercial/operational decisions; it acts on behalf of the company vis-à-vis third parties. According to ST's Statute¹⁴ and the Shareholders' Agreement¹⁵, ST's BoD is composed of seven members elected for [...] years by the GAS¹⁶. According to the Shareholders' Agreement, DT is entitled to nominate four of the seven members, including the Chairman. The Slovak State nominates three members, including the Deputy Chairman. Based on these nominations, the GAS elects the BoD members¹⁷.

2.1.2.2. The Supervisory Board ('SuB')

- (7) The SuB (in Slovak 'dozorná rada') is a supervisory body of ST. It supervises the BoD and the business activities of the company. It reports to the GAS. [Description

⁸ Act No. 513/1991, Official Journal (Zbierka zákonov) č. 513/1991, part (Čiastka) 98, page (Strana) 2474 Coll., Commercial Code, Doc ID4831, as further amended and supplemented (last amended by Zbierka zákonov č. 357/2013, part (Čiastka) 88, page (Strana) 4398), Doc ID4832), part 5, sections 154-220.

⁹ [Information about ST's Statute], Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁰ [Information about the Shareholders' Agreement], Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253; and Doc ID2352 (DT's reply of 4 August 2010), Non confidential Doc ID3248.

¹¹ [Information about ST's Statute and Shareholders' Agreement], Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, doc ID3253.

¹² Article [...] of ST's Statute, version [...], Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹³ Predstavenstvo spoločnosti (Section 191 of the Commercial Code – see footnote 8) decides all matters that do not fall within the competence of the General Assembly of Shareholders and the Supervisory Board. Each BoD member can act for the company, but the Statute or the decisions of the GAS or the SuB may limit this power. According to Section 191(2) of the Commercial Code such limitations are however not effective vis-a-vis third parties. For a general description of BoD's role see Article [...] of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁴ Article [...] of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174, and Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

¹⁵ Article [...] of the Shareholders' Agreement, [...], Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174, and Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

¹⁶ Article [...] of ST's Statute, [...], Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷ Article [...] of ST's Statute, [...], Attachment Q4_10 to ST's reply to the RFI of 24 June 2010, Doc ID3174, and Attachment Q9_Annex 2j to DT's reply to RFI of 24/06/2010, Doc ID3254; and DT's reply of 4 August 2010 to the RFI of 24 June 2010, p. 9-10, Doc ID2352, Non confidential ID3248.

of the powers of the SuB]¹⁸. ST's SuB has nine members, [Description of the composition and the rights of different groups to vote for SuB members]¹⁹. [Description of the duration of the SuB members's mandate]²⁰. [Description of the election procedure for SuB members elected by the employees]²¹.

- (8) Decisions in the SuB are adopted by a simple majority, whilst a dissenting opinion of the minority is notified to the GAS²².

2.1.2.3. The General Assembly of Shareholders ('GAS')

- (9) The General Assembly of Shareholders ('GAS', in Slovak 'valné zhromaždenie')²³ is the highest corporate body of a joint stock company; it appoints and recalls members of the BoD and SuB, takes decisions on modification of company's statute, decides on increases and decreases of registered capital, mergers, acquisitions, liquidation of the company, sale of large properties and listings, and approves the annual report, balance sheet and accounts of the company, rules of remuneration of BoD and SuB members, etc. The GAS consists of all shareholders of ST. It meets at least once per year. The GAS can take decisions if shareholders with shares representing together at least [More than 50%] of the registered capital of the company are present²⁴. Decisions are normally taken by a simple majority (based on the nominal value of shares owned by the voting shareholder)²⁵.

2.1.2.4. The non-statutory management bodies within ST - the Executive Management Board ('EMB')

- (10) Further to the above corporate/statutory bodies foreseen by Slovak law and by ST's Statute, the Executive Management Board ('EMB') is ST's executive body charged with managing the day-to-day operations at ST. It consists of employees of first

¹⁸ Article [...] of ST's Statute, [...], Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁹ Section [...] of the Shareholders' Agreement [...], Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253, and Article 9(4) and (5) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

²⁰ [Reference to a change of the functioning period of the GAS] see Article [...] of ST's Statute, Attachment Q4_6 to ST's reply to RFI of 24/06/2010, Doc ID3175.

²¹ See Section 200 of the Commercial Code (see footnote 8): in companies with more than 50 full time employees 1/3 of members of the SuB have to be elected by the employees.

²² Article [...] of ST's Statute, [...], Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

²³ Valné zhromaždenie (Sections 184 – 190f of the Commercial Code - see footnote 8) is the assembly of all company's shareholders and the highest corporate body of a joint stock company; it meets at least once a year and under normal circumstances it is summoned by the BoD (or the SuB). The decisions are taken by a simple majority of present shareholders (depending on their stakes in the company) unless otherwise set out in the Statute. Section 187 of the Commercial Code (see footnote 8) provides a non-exhaustive overview of the GAS' competencies. The actual competencies of ST's GAS are set in the Statute.

²⁴ Article [...] of ST's Statute, [...], Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

²⁵ Article [...] of ST's Statute, [...], Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

management level, appointed by ST's BoD²⁶. It acts within the scope of the powers delegated to it by ST's BoD and it reports and is liable for its activities to ST's BoD²⁷.

2.2. Deutsche Telekom AG ('DT')

- (11) DT is the German incumbent telecommunications operator and the parent company of the Deutsche Telekom group. DT is owned 16.9% by the KfW banking group, 14.8% by the Federal Republic of Germany and the remaining 68.3% are free floating²⁸. The company is quoted on all German stock exchanges, in New York (NYSE) and in Tokyo (TSE). The group is present in 50 countries worldwide and more than half of its revenue is generated outside Germany.

3. PROCEDURE

- (12) The present case was initiated *ex officio*. Following requests for information under Article 18 of Regulation (EC) No 1/2003²⁹ to AOs on 13 June 2008 and an unannounced inspection at ST's premises on 13-15 January 2009, the Commission opened formal proceedings against ST on 8 April 2009. The investigation continued with additional requests for information to AOs as well as to the Telecommunications Office of the Slovak Republic ('TUSR'). Above that, the Commission conducted an announced inspection at ST's premises on 13-14 July 2009 and requested further information from ST on several occasions.
- (13) On its own initiative ST lodged with the Commission on 11 August 2009 an "Issues Paper".³⁰ In the "Issues Paper" ST argued that there are no grounds for intervening against ST on the basis of Article 102 of the Treaty. On 29 January 2010, ST sent to the Commission on its own initiative a "Supplementary Issues Paper"³¹ where it summarised its replies to the Commission's requests for information from October 2009 onwards. On 30 and 31 August 2010, ST submitted to the Commission on its own initiative a "Third Issues Paper"³² accompanied by a legal opinion of [Name]³³ and an expert opinion.³⁴ In the "Third Issues Paper" ST reiterates its argument that there is no basis for intervening against ST on the basis of Article 102 of the Treaty.
- (14) In line with the DG Competition best practices on the conduct of proceedings concerning Articles 101 and 102 of the Treaty³⁵, provisionally applied as of

²⁶ [ST corporate document], Doc ID3292; [Description of the contractual situation of personnel of DT made available to ST] Doc ID 3250.

²⁷ [ST corporate document], section 1.1 doc ID3292.

²⁸ ST's reply to the request for information of 17 April 2009, Doc ID0444; ST's Annual Report 2008, p.12-16, Doc ID2379; Deutsche Telekom website, Doc ID3374.

²⁹ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1 (hereinafter "Regulation 1/2003").

³⁰ ST's Issues Paper of 10 August 2009, Doc ID0953; Annex to the Issues Paper of 10 August 2009, Doc ID0954.

³¹ Supplementary Issues Paper, Doc ID1934.

³² Third Issues Paper, Doc ID2401.

³³ Legal Opinion related to Third Issues Paper of 27 August 2010, Doc. ID2419.

³⁴ Expert opinion related to Third Issues Paper, 31 August 2010, Doc. ID2418.

³⁵ *DG Competition best practices on the conduct of proceedings concerning Articles 101 and 102 TFEU*, provisionally applied as of 6 January 2010, available at http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_articles.pdf.

6 January 2010, a State of Play meeting between ST and the Commission's services took place on 28 January 2011.

- (15) ST objected to the provision of the information from the period prior to 1 May 2004 (the date of entry of the Slovak Republic in the European Union) and lodged an application for annulment of the Commission decision of 3 September 2009 and of the Commission decision of 8 February 2010 under Article 18(3) of Regulation No 1/2003 with the General Court on 13 November 2009 and on 14 April 2010. On 22 March 2012 the General Court held that the Commission was entitled to request ST to provide information and documents pre-dating Slovakia's accession to the Union³⁶.
- (16) Following requests of information to DT, the Commission opened formal proceedings against DT on 13 December 2010. On 3 February 2011 the first State of Play meeting took place between DT and the Commission services. The Commission's services informed DT about the preliminary outcome of Commission's investigation as regards DT's liability for the possible infringement. The second State of Play meeting between DT and the Commission services took place on 5 July 2011.
- (17) On 7 May 2012, the Statement of Objections was sent to ST and on 8 May 2012 to DT. On 22 August 2012 a Commission Decision adopted on 21 August 2012 was sent to DT.³⁷ It contained a corrigendum of the section on parental liability of DT and the addressees of the SO addressed to DT on 8 May 2012. ST and DT were granted access to the file on 15 May 2012 and 18 May 2012 respectively and responded to the Statement of Objections with their respective Replies of 5 September 2012. ST and DT developed their arguments at the Oral Hearing held on 6-7 November 2012 and had the opportunity to comment on a number of factual and legal points made by the Commission services at the Oral Hearing.
- (18) On 21 June 2013, ST submitted a high level description of possible commitments and requested the Commission to adopt a commitments decision instead of a prohibition decision. ST explained its proposal in meetings on 10 July 2013 and on 9 August 2013. [Description of the content of the commitments.] The commitments, which the Commission may accept under Article 9 of Regulation 1/2003, were considered insufficient to resolve the concerns raised by the Commission. The Commission nonetheless decided in its discretion³⁸ to pursue the proceedings under Article 7 of Regulation No 1/2003.
- (19) On 6 December 2013 a letter of facts ('LoF') was sent to ST and on 10 January 2014 to DT in order to provide them with the opportunity to comment on additional evidence mainly originating from documents collected after the issuing of the Statement of Objections, which the Commission indicated it might use in a potential final Decision. Along with the LoF the Commission granted ST and DT access to all documents which were included in the file after issuing the Statement of Objections.
- (20) ST responded to the letter of facts in its reply of 21 February 2014 and DT in its reply of 6 March 2014.

³⁶ Joined Cases T-458/09 and T-171/10 *Slovak Telekom a.s. v Commission*, EU:T:2012:145.

³⁷ Doc ID3614 and Doc ID3615.

³⁸ Case T-491/07 *CB*, paragraphs 429-430, EU:T:2012:633; and case C-441/07 *Alrosa*, paragraph 40 [2010] ECR I-05949.

- (21) State of Play meetings were held with ST on 16 September 2014 and with DT on 29 September 2014. In those meetings the Commission services provided information about the envisaged decision under Article 7 of Regulation No 1/2003.

4. THE INDUSTRY: SLOVAK TELEKOM A.S. AND OTHER RELEVANT MARKET PLAYERS OFFERING BROADBAND SERVICES IN THE SLOVAK REPUBLIC

4.1. Introduction

- (22) This Decision concerns the broadband markets in the Slovak Republic. These services are offered by ST and other operators

4.2. Slovak Telekom a.s.

- (23) ST is the largest telecommunications company and broadband provider in the Slovak Republic. It is the indirect successor of the state-owned enterprise Správa pôšt a telekomunikácií (Post and Telecom Administration) which ceased to exist at the end of 1992. The legal monopoly for telecommunication services was abolished by the telecommunications law adopted in the year 2000.³⁹ ST offers a full array of data and voice services, and owns and operates fixed copper and fibre networks and a mobile telecommunications network. The copper and mobile networks cover almost the entire territory of the Slovak Republic. Hereafter ST's activities will be described in more detail.

4.2.1. ST's activities in the telecommunication sector

- (24) On 19 July 2000 ST acquired a license to establish, operate and maintain the fixed public telephone network, providing all types of telecommunications services through the public switch telephone network ('PSTN'), using radio telecommunications equipment (including satellite facilities) to provide the same telecommunications services it provided before the date of issue of the licence.
- (25) ST owns and operates the fixed telecommunication network in the Slovak Republic that was originally built using public resources. ST's network covers the territory of the Slovak Republic.
- (26) ST provides national and international fixed and mobile voice services and a wide range of narrowband and broadband data services under the 'T-Com' brand. It offers broadband internet access services for mass market customers as well as tailor-made services for business customers. ST's retail broadband access services were launched on 1 June 2003⁴⁰. A new 'Vysokorýchlostný internet' ('VRI' – 'high speed internet') portfolio was launched on 8 March 2006. On 29 December 2006, triple play bundle 'Magio' was launched over ADSL2+⁴¹ technology, consisting of IPTV (Internet Protocol Television), broadband internet access and fixed telephony VoIP (Voice over IP). 'Magio' is available with a telephone line or in a naked version (with VoIP). On 1 April 2007, ST launched 'Internet Comfort' over its fibre network⁴².

³⁹ 195 Z Á K O N z 19. mája 2000 o telekomunikáciách Zbierka, zákonov č. 195/2000, strana 2458.

⁴⁰ ST launched its retail broadband access services in 2002 (pilot launch), but it had to withdraw the services following an injunction from the national competition authority.

⁴¹ ADSL2+ = Asymmetric Digital Subscriber Line 2+ is an International Telecommunication Union standard. An ADSL2+ compatible line offers higher downstream data rates than a line which is based on the ADSL2 or even the ADSL standard.

⁴² ST's reply to the request for information of 17 April 2009, p. 2, Doc ID0478.

Table 1: ST's financial results (in million SKK/million EUR)⁴³

Year	2003 (SKK)	2004 (SKK)	2005 (SKK)	2006 (SKK)	2007 (SKK)	2008 (SKK)/ (EUR)	2009 (EUR)	2010 (EUR)
Revenue	17 776	16 844	28 276	29 647	30 740	31 001/ 1 029.034	974.2	934.2
Profit before taxation	3 633	2 588	2 484	2 426	5 206	4 423/ 146.822	183.879	149.7

- (27) In 2010 the payment of dividends took place for the financial year 2009 as follows: (i) DT received EUR 67.79 million, (ii) the Slovak State received EUR 45.19 million and the National Property Fund received EUR 19.94 million⁴⁴. In 2011 DT refused the distribution of dividends (GAS of 28 April 2011)⁴⁵. Subsequently, the Extraordinary GAS of 8 July 2011 agreed to a payment of dividends up to EUR 130 million only (out of EUR 258 million of undistributed profits for the financial year 2010)⁴⁶. The Slovak State expressed publicly its dissatisfaction over the situation and stated that it will continue to negotiate further payment of dividends. [Description of result of voting at shareholder meetings in 2011]⁴⁷.

4.3. Other relevant market players

- (28) Following the liberalisation of the Slovak telecommunications sector in 1998 and the launch of retail broadband internet access services in 2003, a variety of players entered the Slovak retail broadband market. Based on their territorial coverage and the type of telecommunication services provided they can be divided into the following broad categories: (i) fixed national level operators; (ii) fixed operators with a specific focus; (iii) fixed regional and local fixed operators and (iv) mobile operators.

4.3.1. Fixed national level operators

- (29) The operators with national retail broadband offers are listed in Table 2 presented hereunder. In 2006 there were a number of changes of control and concentrations. As a consequence the number of players decreased from 14 players in 2004 to 5 players in 2009/2010. An important development in the industry structure was the 2006 entry

⁴³ ST's Annual Reports 2004, p. 64, Doc ID2873; 2006, p. 72, Doc ID2875; 2008, p. 90, Doc ID2379 and 2009, p. 75, Doc ID2877, 2010, p. 74, Doc ID3071.

⁴⁴ ST's press release of 27 April 2010, 'The Ordinary General Meeting of Slovak Telekom', available at: <http://www.slovaktelekom.sk/?press-releases&sprava=the-ordinary-general-meeting-of-slovak-telekom>, Doc ID3110.

⁴⁵ ST's Minutes from the GAS of 28 April 2011, Doc ID3118; and Reuters' Press Release of 28 April 2011, Doc ID3117.

⁴⁶ ST's Minutes from the GAS of 8 July 2011, Doc ID3119; and Reuters' Press Release of 9 July 2011, Doc ID3122.

⁴⁷ [Reference to the General Assembly of ST] Doc ID 3120 and [Reference to the General Assembly of ST], Doc ID3121.

of Orange which rolled out its own FTTH⁴⁸ infrastructure, mainly in densely populated areas.

Table 2: Overview of other fixed market players

2004	2005	2006	2007	2008	2009	2010
		Orange ⁴⁹	Orange	Orange	Orange	Orange
UPC	UPC	UPC	UPC	UPC	UPC	UPC
Slovanet	Slovanet	Slovanet	Slovanet	Slovanet	Slovanet	Slovanet ⁵⁰
SWAN	SWAN	SWAN ⁵¹	SWAN ⁵²	SWAN	SWAN	SWAN
GlobalTel	GlobalTel					
SUBNET plus	SUBNET plus					
M.B.C.	M.B.C.					
NET SLOVAKIA	NET SLOVAKIA					
Dial Telecom	Dial Telecom	Dial Telecom	Dial Telecom	Dial Telecom ⁵³	Dial Telecom	GTS Slovakia ⁵⁴
E-Tel Slovensko	E-Tel Slovensko	E-Tel Slovensko	E-Tel Slovensko			
Telenor Networks	Telenor Networks	GTS Nextra ⁵⁵	GTS Nextra	GTS Nextra	GTS Slovakia	
Aliatel	Aliatel					
GTS Slovakia	GTS Slovakia					
Nextra	Nextra					
Quadia DCT	Quadia DCT					

⁴⁸ FTTH = Fibre to the home.

⁴⁹ Orange entered the retail broadband internet access market only in 2006 with the launch of its retail services based on its FTTH infrastructure.

⁵⁰ On 12 May 2011, Slovanet acquired Wimax, a regional operator, Doc ID3145.

⁵¹ On 1 February 2006 SWAN acquired GlobalTel, a.s. and SUBNET plus s.r.o., Doc ID2374. On 1 June 2006 SWAN, a.s. acquired M.B.C., s.r.o.; Doc ID2374.

⁵² On 9 February 2007 SWAN, a.s. acquired NET SLOVAKIA, s.r.o., Doc ID2374.

⁵³ On 5 December 2008 Dial Telecom, a.s. acquired E-Tel Slovensko s.r.o.; Dial Telecom's reply to the request for information of 7 April 2009, p. 2, 3, Doc ID0287.

⁵⁴ GTS Slovakia acquired Dial Telecom in 2010.

⁵⁵ On 30 June 2006 four other telecommunications companies merged with GTS Nextra; GTS Nextra's reply to the request for information of 13 June 2008, p. 1, Doc ID0035.

- (30) This category includes the following types of players:
- (a) AOs with limited own access networks (such as Slovanet, GTS Slovakia, SWAN and Dial Telekom) that are using ST's wholesale broadband services. Over time these operators shifted their focus from residential subscribers to business clients:
 - (1) GTS Slovakia, a.s. ('**GTS Slovakia**'), owned by GTS Central European Holding B.V. It was the first and so far the only undertaking that concluded agreement with ST over unbundled access to the local loop⁵⁶.
 - (2) Slovanet, a.s. ('**Slovanet**'), which belongs to the ASSECO group⁵⁷ and owns a fibre access infrastructure and possesses FWA⁵⁸ licences.
 - (3) SWAN, a.s. ('**SWAN**'), which is owned by DanubiaTel, a.s. and offers integrated services based on its own access FWA / 3.5 GHz WiMax access infrastructure⁵⁹ and retail services over a limited fibre access infrastructure.
 - (4) GTS Slovakia also owns Dial Telecom, a.s. ('**Dial Telecom**')⁶⁰, which offers voice and internet access retail services.
 - (b) the largest cable operator, UPC Broadband Slovakia, s.r.o. ('**UPC**'), which belongs to the Liberty Global group, operates its own mixed fibre-cable access and metropolitan infrastructure.
 - (c) the mobile and fixed operator '**Orange**', belonging to the France Telekom group⁶¹, provides retail services over its FTTH (GPON) network⁶².

4.3.2. *Fixed operators with a specific focus*

- (31) The operators with a specific focus provide broadband internet access services over the telecommunications infrastructure owned by their parent companies. There are two such operators in Slovakia:
- (a) Železničné telekomunikácie Bratislava, o.z. ('**ZT**'), the telecommunications unit of the state-owned National Railways Company ('**ZSR**'), which operates telecommunications infrastructure owned by ZSR, comprising the fibre backbone, the transport networks and a very limited access network located mostly in ZSR-owned buildings.
 - (b) Energotel a.s. ('**Energotel**'), a subsidiary of the various Slovak energy companies, which operates the telecommunications infrastructure owned by its parent companies consisting of a fibre backbone network, transport network and a very limited access network based on FWA technologies.

⁵⁶ GTS Slovakia's reply to the request for information of 13 June 2008, p. 1-6, Doc ID0035.

⁵⁷ Slovanet's Annual Report 2004, Doc ID0014, p. 9; Slovanet's Annual Report 2005, Doc ID0015, p. 11.

⁵⁸ FWA = Fixed Wireless Access

⁵⁹ TUSR Decision No. 9510721012, Doc ID2378.

⁶⁰ GTS Slovakia's press release available at <http://www.gts.sk/en/for-media/press-releases/gts-central-europe-strengthens-slovak-operations-with-acquisition-of-dial-telecom-slovakia-24.shtml>; Doc ID 3111.

⁶¹ Orange's reply to the request for information of 24 April 2009, Doc ID0330, p. 3.

⁶² Orange's reply to the request for information of 17 March 2010, Doc ID2055, p. 1.

4.3.3. Fixed regional and local operators

- (32) ST in its Issues Paper submits that in Slovakia there is a large number of regional players that compete with ST in the retail broadband access market. According to ST its main regional competitors include Satro (cable), Antik (fibre), Imafex (fibre) and Gaya (fibre). In addition there are hundreds of small local operators offering broadband access⁶³.
- (33) Table 3 presented hereunder provides an overview of the main regional and local fixed operators, including those referred to by ST in its Issues Paper.

Table 3: Regional and local fixed broadband operators

Name	Technology	Coverage
WiMAX Telecom Slovakia, s.r.o. (founded in February 2005)	Broadband internet access and internet telephony via wireless WiMAX technology ⁶⁴ .	Mostly Western Slovakia, parts of Central and Eastern Slovakia. It was acquired by Slovanet on 17 May 2011 ⁶⁵ .
SATRO s.r.o. (founded in August 1992)	Cable television and broadband internet access, using its own optical-coaxial and MMDS networks ⁶⁶ .	Nitra, Bratislava, Topoľčany, Galanta, Myjava (internet) + Považská Bystrica, Žiar nad Hronom (TV).
ANTI-K computers & communications s.r.o. (founded in January 1999)	Broadband internet connections via its optical and wireless access networks, voice services (VoIP), IPTV ⁶⁷ .	Towns and villages in the Košický region (Košice, Poprad, Sečovce, Svit, Trebišov).
IMAFEX, spol. s r.o. (founded in January 2001)	Internet and data services, network based on wireless and fibre technology, triple-play packages on its optical fibre network, voice services via VoIP, IPTV ⁶⁸ .	Liptovský Mikuláš, Ružomberok, Liptovský Hrádok, Banská Bystrica, Sásová, Radvaň, Podlavice.
GAYA, s.r.o. (founded in May 2005)	Broadband internet access via WiFi, triple-play services on the optical fibre network, VoIP ⁶⁹ .	Region of Turiec (Central Slovakia).

4.3.4. Mobile operators

- (34) There are three mobile operators in the Slovak Republic: (i) T-Mobile, (ii) Orange and (iii) the recent entrant Telefónica O2 Slovakia, s.r.o. ('O2').
- (35) At wholesale level ST offers access to the unbundled local loops⁷⁰ (ULL) within its metallic (mostly copper) PSTN telephone network. Access to ULL is provided in or next to a Main Distribution Frame (MDF), to which the AO which seeks access, has rolled out its own backbone network.

⁶³ ST's Issues Paper of 10 August 2009, Doc ID0953, p. 17.

⁶⁴ ST's Annex to the Issues Paper of 10 August 2009, Doc ID0954, p.28.

⁶⁵ Slovanet's press release of 17 May 2011, Doc ID3112. As of 1 September 2011 Wimax Telecom was merged with Slovanet, Doc ID3145, Slovanet's Press Release of 6 September 2011.

⁶⁶ ST's Annex to the Issues Paper of 10 August 2009, Doc ID0954, p.28.

⁶⁷ Antik's reply to the request for information of 7 April 2009, Doc ID3165.

⁶⁸ Imafex's reply to the request for information of 10 December 2009, Doc ID1926, p. 26, 27.

⁶⁹ Gaya's website as at 17 August 2010, Doc ID2385.

⁷⁰ A local loop is the metallic twisted wire (also called line) connecting a concentration point, the so called Main Distribution Frame (MDF) within ST's PSTN network, to the premises of a customer.

4.4. Regulatory framework for unbundling access to the local loop in the Slovak Republic

- (36) This and the following sub-sections of this decision will first describe ST's obligations relating to unbundling of its metallic local loops and thereafter explain the coverage of ST's metallic local access network which could be used for the supply of broadband retail services, either by ST or by an AO after the line has been unbundled from ST's network. In this context the decision will identify how many Slovak households could be supplied with broadband retail services over ST's metallic access network. The result will be a statistical value indicating the percentage of all households and retail customers potentially affected by the abusive behaviour of ST.
- (37) EC Regulation 2887/2000⁷¹ on local loop unbundling, which has been directly applicable in Member States since 2 January 2001, required operators holding "significant market power" ('SMP') on the fixed public telephone network to give access to unbundled local loops ('ULL') and to publish a Reference Unbundling Offer ('RUO'). This Regulation was part of the previous regulatory regime in the Union, that consisted of several Directives which set out rules for access to networks owned by the SMP operator.⁷²
- (38) Although Slovakia did not enter the Union until 1 May 2004, it started to adapt its legislation in accordance with the *acquis communautaire* from 1 February 1995.⁷³ As a consequence, the Act No. 610/2003 Coll., on electronic communications (the 'Communications Act')⁷⁴ providing for a framework for regulation in the sector of electronic communications in the Slovak Republic entered into effect with some exceptions on 1 January 2004⁷⁵. According to its Annex I, the Communications Act transposes into Slovak law the Union regulatory framework for electronic communications⁷⁶.

⁷¹ Regulation (EC) 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop, OJ [2000] L 336/4.

⁷² *Inter alia*, Directive 97/33/EC on interconnection in telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP) (OJ[1997] L199/32) and Directive 98/10/EC on the application of ONP to voice telephony and on universal service for telecommunications in a competitive environment (OJ [1998] L 101/24).

⁷³ The date of entering into force of the Europe Agreement (OJ [1994] L 359), which constituted the legal framework of relation between Slovakia and Member States.

⁷⁴ Zákon č. 610/2003 Z.z. o elektronických komunikáciách, v znení neskorších predpisov.

⁷⁵ Sections 78 of the Communications Act contains a list of provisions that enter into effect on the date of the Slovak Republic's accession to the European Union (that is to say on 1 May 2004).

⁷⁶ The Union regulatory framework for electronic communications consists of the 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 L 108, 24.04.2002, p. 33, Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), OJ L 108, 24.4.2002, p. 21 (hereinafter "Authorisation Directive"), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), OJ L 108, 24.4.2002. p. 7, Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), OJ L 108, 24.4.2002, p. 51, Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services, OJ L 249, 17.9.2002, p. 21 and Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18

- (39) The Communications Act in its part II deals with the regulation of electronic communication services in Slovakia. It sets conditions for determining of (an) undertaking(s) with significant market power in the electronic communication markets and for the imposition of obligations on such undertaking(s). It among others stipulates that before any obligation can be imposed on an undertaking the national regulatory authority has to analyse the relevant markets and determine whether an undertaking holds a significant market position (Sections 16-17 of the Communications Act).
- (40) Pursuant to Section 16 of the Communications Act the national regulatory authority at least once per two years analyses whether in the relevant markets concerned there is effective competition. Effective competition means that no undertaking in the relevant market has significant market power.
- (41) Once the national regulatory authority has established that an undertaking has a significant market position it imposes one or more of the obligations in Sections 18-22 of the Communications Act. These include: (i) an obligation of access transparency (Section 18 of the Communications Act, including a publication of certain information and a publication of a reference offer for the respective wholesale service; (ii) a non-discrimination obligation (Section 19 of the Communications Act); (iii) accounting separation obligation (Section 20 of the Communications Act); (iv) access to certain network elements (Section 21 of the Communications Act), including an obligation to give access to infrastructure and to negotiate in good faith over access to it; and (v) price regulation (Section 22 of the Communications Act), including cost-orientation of prices.
- (42) Pursuant to Section 10 of the Communications Act the national regulatory authority shall publish the outcome of the relevant market analysis, the market definition, the determination of the undertaking with significant market power pursuant to Sections 18-22 of the Communications Act that it proposes to adopt. The parties concerned by the measure have one month to submit their positions as regards the measure. The national regulatory authority shall to the extent possible take into account the position of the undertaking concerned (Section 10(2) of the Communications Act).
- (43) Pursuant to Sections 10(1) and (3) of the Communications Act the European Commission shall be consulted about draft measures as well as the analysis of the relevant market and the determination of the undertaking with significant market power as well as the obligations. The national regulatory authority shall take into account the position of the European Commission. Where the European Commission has serious doubts about the compliance of the measure with Union law the national regulatory authority shall postpone the adoption of the measure by two months (Section 10(5) of the Communications Act). If within the period of two months the European Commission asks the national regulatory authority to withdraw the measure the authority will close the procedure and will not adopt the measure (Section 10(5) of the Communications Act).
- (44) According to Section 6(3) of the Communications Act the Telecommunications Office of the Slovak Republic ('TUSR') is the competent national regulatory

December 2000 on unbundled access to the local loop, OJ L 336, 30.12.2000, p. 4, as well as the implementing instruments adopted by the Commission.

authority in the area of electronic communications. TUSR is among others competent to enact regulation, implement it and supervise the compliance therewith. According to Section 16(1) of the Communications Act TUSR shall analyse the state of competition in the electronic communications markets *"to ascertain whether there is on the relevant market effective competition and whether corrective measures pursuant to special acts or pursuant to legally binding acts of the European Communities and the European Union in the area of competition law for the provision of networks and services are sufficient to ensure it."*⁷⁷

- (45) Following the market analysis and the consultation of the measure in line with the European regulatory framework, TUSR adopted on 8 March 2005 first instance Decision No 205/14/2005 designating ST as an operator with significant market power in the wholesale market for access to the unbundled local loop. TUSR imposed on ST the following regulatory obligations: (i) non-discrimination; (ii) transparency (including submission of a reference offer to TUSR for publication within 60 days from the decision); (iii) accounting separation; (iv) access obligation, including negotiations in good faith, interoperability, collocation and other support services⁷⁸.
- (46) Following ST's appeal of 30 March 2005 the TUSR Chairman adopted on 14 June 2005 the second instance decision whereby he confirmed the finding that ST was an operator with significant market power in this market. The TUSR Chairman modified the details of the non-discrimination, the access and the transparency obligations⁷⁹. ST had to send the RUO to TUSR in written and electronic version, it was also obliged to submit the contracts on access to its local loops 15 days after their conclusion to TUSR. ST was also obliged to publish all considered changes to the RUO at least 45 days before (in the first instance decision 60 days) and to submit them to TUSR (this obligation was not included in the first instance decision). In the second decision TUSR specified that the costs, revenues and the amount of capital invested in the unbundled access to the local loop must be based on a financial statement of ST checked by an auditor. The second instance decision became final and entered into effect on 14 June 2005.⁸⁰
- (47) On 12 August 2005 ST published the RUO.⁸¹ The 2005 RUO consisted of an Introduction, 17 Annexes and 2 templates of agreements. After the 2009 modification the RUO included 16 Annexes (Annex 14 – Principles of setting of fees, was removed), 3 templates of agreements and 19 templates of requests. Between its publication and the end of 2010 the RUO has been changed in total nine times. Five of these modifications concerned prices only and four modifications

⁷⁷ Section 16(1) of Act No 610/2003 Z.z., on electronic communications: '[...] *Cieľom analýzy je zistiť, či na relevantnom trhu je efektívna súťaž a či nápravné opatrenia podľa osobitných predpisov alebo právne záväzných aktov Európskych spoločností a Európskej únie v oblasti súťažného práva pri poskytovaní sietí a služieb sú dostatočné na jej zabezpečenie.*'

⁷⁸ TUSR Decision No. 205/14/2005, dated 8 March 2005, Doc ID0948. Details of the various obligations imposed on ST are set in the decision.

⁷⁹ TUSR Chairman's Decision No. 63/01/2005 of 14 June 2005, available at <http://www.teleoff.gov.sk/index.php?ID=146>. TUSR Rozhodnutie o rozklade č. 63/01/2005 zo 14 júna 2005, the details of the modifications are set in the decision. Doc ID3124

⁸⁰ TUSR Chairman's decision No. 63/01/2005 of 14 June 2005, available at <http://www.teleoff.gov.sk/index.php?ID=146>. TUSR Rozhodnutie o rozklade č. 63/01/2005 zo 14 júna 2005, Doc ID3124.

⁸¹ RUO dated 12 August 2005, Doc ID0817, p.106.

concerned other RUO terms. An overview of the RUO changes since its publication on 12 August 2005 is provided in Table 4: Overview of the RUO changes (12 August 2005 – present).

Table 4: Overview of the RUO changes (12 August 2005 – present)

RUO changes	Price terms ⁸²	Other terms
1 December 2005	-	Change of Annex 12 Forecasts Annex 5 – Conclusion of agreements, procedures
27 December 2005		Change of the terms of Confidentiality Agreement Annex 5 – Conclusion of agreements, procedures Annex 15 – Fees (without change in the amount of fees) Annex 16 – Invoicing Introduction to the RUO
1 August 2006	Annex 15 – change of prices: monthly rental fee for metallic pair.	
1 July 2007	Annex 15 – change of prices: monthly rental fee for metallic pair, installation fees.	
1 July 2008	Annex 15 – change of prices: monthly rental fee for metallic pair.	
9 May 2009	Annex 14 (ex Annex 15): added distant collocation prices and multiple installation prices, no price changes for monthly rental fee and installation fee since 1 July 2008, only recalculation to EUR.	Extensive changes to the Introduction to the RUO and to Annexes 1-19 as a consequence of conclusion of the Framework Agreement on unbundled access to the local loop with GTS Slovakia.
1 July 2009	Annex 14 (ex Annex 15): monthly rental fees and installation fees modified (reduced).	
15 August 2010	Annex 14 (ex Annex 15): monthly rental fees and installation fees modified (reduced).	
1 November 2010	Annex 14 and related annexes: decrease or cancellation of several fees (e.g. processing of forecasts and forecast refusal, standard cancellation fee, fee for rejection of an application for concluding a non-disclosure agreement and for incomplete applications), increase of the fee for sending a notification of overdue payments	Introduction – new article on the submission of requests for examination and installation of related collocation equipment and of forecasting terms Further changes throughout the RUO include among others voluntary forecasting of the number of lines the AO plans to unbundle; upon request of the AO the voluntary qualification of the local loop; shortening of the maximum period for ST to submit the draft Framework agreement and the non-disclosure agreement; shortening of the maximum lead-times for

⁸²

For the development of the RUO price terms see section 4.3.4.6. of the SO Doc ID3416.

		providing a new connection; introduction of a new type of collocation self-provided by the AO
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- (48) In the period covered by this decision, only very few of ST's local loops were unbundled and used by GTS, an AO, to provide broadband retail services to business customers. The first loops were unbundled on 18 December 2009 and until end of March 2010 no more than 3,⁸³ by 25 October 2010 14 local loops⁸⁴ had been unbundled by GTS Slovakia. During the period covered by this decision ST did not provide any access to its fibre local access network.
- (49) Further to access to its ULL, ST has offered since 23 April 2003 wholesale broadband access (WBA) at national level on a voluntary basis. Following TUSR's decision of 2 November 2006,⁸⁵ which was however appealed by ST and thereafter suspended until new regulation was adopted by TUSR on 30 August 2009.⁸⁶ ST also offered regional WBA from 4 June 2007. However, ST did not supply any regional WBA to AOs.

4.5. Unbundling of metallic local loops

- (50) The RUO specifies the contractual and technical conditions under which ST is willing to give access to its ULL. The obligatory content of the RUO is not prescribed by TUSR in detail. TUSR only laid down a number of high level principles in its regulatory decision: the regulatory measure requires ST to ensure: (i) Non-discrimination⁸⁷; (ii) Transparency⁸⁸; (iii) Accounting separation⁸⁹; and (iv) fair

⁸³ ST's reply to the request for information of 25 March 2010, Doc ID2079, p. 6.

⁸⁴ See SO recital 378, Doc ID3416.

⁸⁵ TUSR Decision No. 21/01/2007 of 2 April 2007, p. 14, Doc ID3141.

⁸⁶ TUSR Decision No. 2/01/2009 of 30 January 2009, Doc ID0817.

⁸⁷ ST may in particular not offer the ULL services under less favourable conditions than those that exist for itself. This obligation follows from pt. 2a of the second instance decision of TUSR 63/01/2005 of 14 June 2005, Doc ID3124, which reads: "*Obligation of non-discrimination regarding the access pursuant to "19 para. 1 and 2 of the Law on Electronic Communication. ST is obliged to publish the Reference Unbundling Offer pursuant to §18 para.2 and 3 of the Law and submit this Reference Offer to the Authority in writing and in electronic form for publishing within 60 days from the date the present decision enters into force. ST is obliged to submit the Agreement on Access to the Local Loops to the Authority within 15 days from the date of its conclusion."*

⁸⁸ To ensure transparency ST has in particular to publish all information related to technical specifications, properties of networks as well as all other information related to providing unbundled access to user connections, including the pricing schedule for these services. This obligation follows from pt. 2b of the second instance decision of TUSR 63/01/2005 of 14 June 2005 Doc ID3124 which reads "*The Obligation of the Transparency of the Access pursuant to § 18 of the Law on Electronic Communication. ST is obliged to publish on its website and submit to the Authority any kind of proposal to amend the contractual provisions of the Reference Unbundling Offer having an impact on undertakings defined in § 4 para. 8 of the Law on Electronic Communication within 45 days before the envisaged alteration at the latest.*" This is also in line with EC Regulation 2887/2000 and Directive 2002/19/EC of 7 March 2002 (Access Directive) which establish in the Annex "*a minimum list of items to be included in a reference offer for unbundled access to the local loop to be published by notified operators*".

⁸⁹ The separate accounting which ST put in place obliges it to provide TUSR with objective and transparent information on the cost structure, earnings and capital investment related to providing service in wholesale unbundled access to user connections where the costs related to the services must be separated into: depreciation, personnel, material, energy, and other non-stockable deliveries, services

access to certain network elements within acceptable time limits, and fair access to information and ancillary services needed by a wholesale buyer of access to ST's ULL, in order to enable efficient competition⁹⁰.

- (51) The access to the local loop, that is to say to the physical twisted metallic pair circuit that connects the network termination point at the subscriber's premises to the MDF or equivalent facility in the fixed public telephone network takes place in or nearby the MDF⁹¹. Access to the local loops can be full or shared access⁹². In order to be able to use a local loop to provide broadband retail services, the local loop is in the case of full unbundling disconnected ("unbundled") from ST's network and connected to the AO's equipment so that the AO can use the full frequency spectrum of the local loop; in the case of shared access the local loop will not be fully disconnected from ST's network; however in this case a connection from ST's MDF to the network of the AO needs to be made allowing it to use the spectrum not used for the telephone service⁹³. In the case of ADSL or ADSL2+ networks, unbundling takes place at ST's MDF within which or next to which the AO will normally have to install its DSLAM or MSAN⁹⁴ and connect it with the relevant ULL.
- (52) ST has to give access to all unbundling requests which can be classified as reasonable and justified⁹⁵. ST explains that it is thus not obliged to provide access to lines where such access would, for example, not be objectively technically feasible⁹⁶. This was confirmed by TUSR⁹⁷. Despite these limitations of its regulatory obligations, the Slovak law does not empower TUSR to exclude certain local loops, which from a purely technical point of view can be unbundled, from the unbundling obligation; moreover, ST has never made a request to TUSR to exclude certain local loops from the unbundling obligation⁹⁸. Therefore it is for the AO which requests access to unbundle local loops and not for ST to assess whether the market conditions are such that there is a viable business case for its broadband business.
- (53) [...] metallic lines were connected to ST's MDFs by mid-2009⁹⁹. ST also underlined that exact figures for the years earlier than 2009 or the period thereafter are not

and other costs. This obligation follows from point 2c of the second instance decision of TUSR 63/01/2005 of 14 June 2005, Doc ID3124.

⁹⁰ ST is obliged to: accept a reasoned request for access to its network; allow use of certain network elements and joined systems; provide unbundled access to user connections for third parties; see point 2d of the second instance decision of TUSR 63/01/2005 of 14 June 2005 Doc ID3124.

⁹¹ See Article 1 (d) 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 L 336 of 30.12.2000, p. 4.

⁹² See case SK/2004/0107.

⁹³ Reply to the RFI of 7 June 2013, page 5, footnote 17, Doc ID3804; see also Article 1 lit. (e) to (g) 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 L 336 of 30.12.2000, p. 4.

⁹⁴ MSAN = Multi Service Access Node. A MSAN is a device typically installed in a telephone exchange (although sometimes in a roadside serving area interface cabinet) which connects customers' telephone lines to the core network, to provide telephone, ISDN, and broadband services such as DSL.

⁹⁵ Decision N° 63/01/2005 of the Chairman of TUSR of 14 June 2005, see *inter alia* reply to the RFI of 4 June, page 5, footnote 12, Doc ID3804.

⁹⁶ ST's reply to the RFI of 7 June 2013, reply to question 4, Doc ID3804, p. 5.

⁹⁷ TUSR reply to the Commission's questions Doc ID4339, p. 4.

⁹⁸ ST's reply to the RFI of 7 June 2013, reply to question 4, Doc ID3804, p. 5.

⁹⁹ Technical paper, table 2, p. 7 Doc ID1637 and ST's reply to the request for information of 7 June 2013, reply to question 11, p. 12, Doc ID3804; this number corresponds to the status mid-2009.

available but that there are no reasons to believe that the situation would be better for the period before or after 2009¹⁰⁰.

- (54) As to the lines which are subject to the unbundling obligation, ST has drawn the Commission's attention to the fact that not all PSTN lines ending in its MDFs can be used to provide broadband retail services, either by ST or - after their unbundling from ST's network - by an AO¹⁰¹. Lines which from a purely technical point of view are unsuitable for the transmission of a xDSL signal are thus outside the unbundling obligation and have to be discounted from the total number of PSTN lines within ST's network which end at one of its MDFs¹⁰².
- (55) In order to establish which local loops can be used, after having been unbundled from ST's network for the provision of broadband retail services, the following sections will discuss the different categories of limitations of ST's local loops.

4.6. Network coverage of ST's DSL network which can be used for the provision of retail broadband services after the local loops have been unbundled from ST's network

4.6.1. Number of households that could in theory be supplied over ST's local loops with broadband services

- (56) The following table, Table 5, shows the total number of households in the Slovak Republic in the years covered by this decision within the reach of ST's metallic PSTN¹⁰³ local access network. It also shows the so called service coverage of this network, that is to say the number of lines connecting households which could be used to supply broadband retail services as there is a physical local loop between one of ST's MDFs and a household. Finally the table also shows the so called technical coverage in terms of households. This figure indicates how many households could in theory be supplied over ST's local loops (whether by ST or after their unbundling by an AO) with broadband services. The different reasons for these two categories of limitations of ST's metallic local access network will be set out in greater detail in the next recitals.

¹⁰⁰ ST's reply to the request for information of 7 June 2013, reply to question 12(i), p. 13, Doc ID3804.

¹⁰¹ Please note that in order to use such PSTN-lines to carry a DSL signal it is necessary to install a DSLAM at the MDF in which the line concerned terminates.

¹⁰² ST's reply to the request for information of 7 June 2013, reply to question 5, p. 6, Doc ID3804.

¹⁰³ PSTN = Public Switched Telephone Network.

Table 5: ST's metallic access network coverage (2005-2010) in terms of households – lines able to be used to supply DSL retail services after the lines have been unbundled from ST's network¹⁰⁴

	Coverage of ST's copper lines connecting households (HH) able to carry a DSL signal once they have been unbundled (based on the assumption that AOs deploy DSL technology (that is to say install DSLAMs) at all MDFs)											
Technology	2005		2006		2007		2008 ¹⁰⁵		2009 ¹⁰⁶		2010 ¹⁰⁷	
<i>Total HH</i>	1 667 839		1 681 905		1 697 000		1 713 600		1 756 500		1 795 766	
	HH	%	HH	%	HH	%	HH	%	HH	%	HH	%
Households within the reach of ST's metallic PSTN local access network	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
ULL service coverage	[...]	[...] ¹⁰⁸	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]
ULL technical coverage	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]	[...]

(57) The figures contained in the above table have been supplied by ST and are accepted by the Commission. The "households within the reach of ST's PSTN local access network", the "service coverage" and the "technical coverage" of ST's network as regards ULL contained in the above table are illustrated in the following graph ("Table 6"): the upper line in the graph shows the percentage of all Slovak households which are reached by a metallic line belonging to ST's PSTN or local access network, whether in use ("active line") or not ("passive line"). The dashed line shows the percentage of all Slovak households within the service coverage of all local loops and the dotted line shows the percentage of all Slovak households within the technical coverage of the local loops within ST's network. The graph shows that the different coverage types of ST's local loop network were stable during the period covered by this Decision.

¹⁰⁴ The Table (Doc ID 3805) contains figures supplied by ST in reply to the Commission's request for information of 7 June 2013 Doc ID3804 and figures supplied by ST in reply to the request for information to question 2 of 12 July 2013, Attachment Q2_1, Doc ID3906/23.

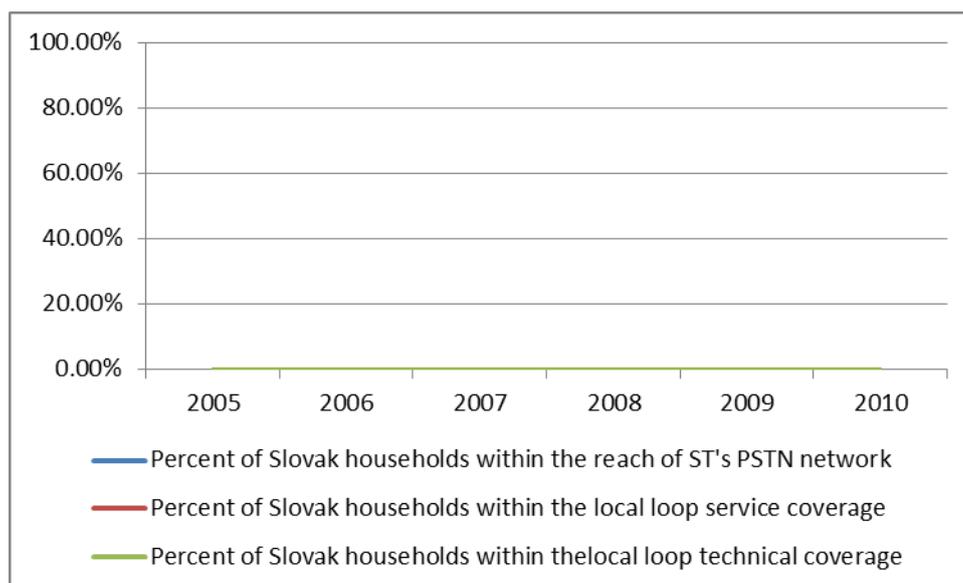
¹⁰⁵ ST's reply to the request for information of 17 July 2009, Doc ID1079, p. 3; ST's Issues Paper, p. 7-8, Doc ID0953 and Annex to the Issues Paper, p. 2, 16-17, Doc ID0954.

¹⁰⁶ ST's reply to the request for information of 22 October 2010, Doc ID2611, Table I; The households covered by each technology were calculated based on the total number of HH in Slovakia according to Eurostat and the share of HH (%) covered by the respective technology, as provided by ST.

¹⁰⁷ ST's reply to the request for information of 31 May 2011, (reply of 11 July), Doc ID3027, Table Q16, p. 2; The households covered by each technology were calculated based on the total number of HH in Slovakia reported by ST in its reply of 20 June 2011 (Doc ID3011) and the share of HH (%) covered by the respective technology, as provided by ST.

¹⁰⁸ The figure of [...] is based on the following calculation: the number of all households which are located within the reach of ST's metallic access network is [...]. However the households within the reach of the service coverage of ST's DSL network is around [...]. [...] multiplied by [...] is [...].

Table 6¹⁰⁹



- (58) ST's metallic PSTN local loop network covers about [...] of all households. These lines can be used to provide traditional telephone services. They could in theory also be used to supply xDSL broadband services. However, the number of local loops which could be used for xDSL broadband services and consequently the "coverage" of ST's xDSL network is more limited. In the following sections the notion of "service coverage" (dashed line) and of "technical coverage" (dotted line) of ST's metallic local loop network are further explained.

4.6.2. "Service coverage" of ST's local loop network

- (59) The starting point of the process of identification of local loops which could be used to transmit a broadband signal after having been unbundled from ST's network and connected to the network of a third party access seeker (AO) are the local loops ending in ST's MDFs.
- (60) Some of these local loops ending in ST's MDFs are not subject to the unbundling obligation for a number of reasons:
- Local loops used by ST to connect and operate network elements within its network. These lines are used for operational purposes, such as the operation of switches, remote switched units, etc. These lines are necessary to operate ST's network, are not available for the provision of broadband retail services by ST or third parties and are also not subject to the unbundling obligation. ST estimates that about [...] of all lines ending in MDFs are used to connect other ST network elements¹¹⁰. These lines do not connect households to ST's network and are thus outside the unbundling obligation.

¹⁰⁹ Graph based on Table 5 and the graph supplied in reply to the RFI of 12 July 2013, p. 4, Doc ID3906-30.

¹¹⁰ See Additional information regarding technical limitations on ST's copper based access network, Doc ID1637, p. 7-8; ST's reply to the SO p. 85 Doc ID3630; reply to the request for information of 7 June 2013, p. 12, Doc ID3804.

- (b) Local loops ending in STs MDFs directly routed to business premises: certain of these lines are directly routed to business premises (factories, security centres providing remote security monitoring services etc.). These lines are legacy lines in separate cables. Despite being recorded in ST's inventory systems, they have never been used for offering services to residential customers and can thus not be used for this purpose. ST indicates that about [...] % of its lines are affected by this limitation¹¹¹. These lines do not connect households to ST's network and are thus outside the unbundling obligation.
- (c) Local loops blocked by pair gain systems: pair gain is a method of transmitting multiple analogue Plain Old Telephone Signals (POTS) over the twisted copper pairs used for a single traditional subscriber line. Pair gain systems have the effect of creating additional subscriber lines¹¹². About [...] of ST's local loops ending in Slovak households are affected by this limitation, which affects [...] of its network¹¹³.
- (d) Aluminium local loops: aluminium lines still exist in Slovakia during the period subject to the current decision. ST explains that even in exceptional cases to which the Commission referred during the investigation of the present case¹¹⁴ aluminium lines could be used for broadband services (if the cables are in good condition and deployed using reasonable quality installation technology), ST has pointed out that its own aluminium local loops belong to the oldest parts of the access network [Explanation relating to the quality of the aluminium local loops]. These lines will only offer transmission speeds not likely to exceed [...] Kbit/s¹¹⁵. In this decision, the Commission accepts that these local loops should be excluded from the coverage of ST's local metallic access network as they seem indeed unsuitable for the transmission of the xDSL signal. Based on ST's estimates about [...] % of its lines ending in its MDFs are aluminium lines¹¹⁶.
- (e) Lines longer than 5 km: it is generally accepted that lines longer than 5 km lead to a strong reduction of the speed of the DSL signal. Although technical solutions exist to remedy this problem, such as installing loop extenders or DSL repeaters, ST explains that tests of devices aimed at solving this problem proved to be inefficient or triggered high implementation costs. ST therefore decided against the massive use of such technologies due to their high costs. [Description of the impact on the quality of broadband services if the line is

¹¹¹ Doc ID1637, p. 5 and 9; reply to the SO p. 85 Doc ID3630; reply to the request for information of 7 June 2013, p. 12, Doc ID3804.

¹¹² A pair gain system consists of concentrators or multiplexers which combine the separate signals into a single signal which is transmitted through the existing copper cable pair. The signals are then separated into individual subscriber lines at the customer premises. The subscriber lines to which the pair gain system is applied are not usable for the transmission of a broadband signal.

¹¹³ Reply to the SO, p. 85, Doc ID3630 and its annex IV 2 Doc ID3633; Technical paper p. 5 Doc ID1637, p. 5; reply to the request for information of 7 June 2013, p. 12, Doc ID 804.

¹¹⁴ See e.g. the study published by the Scottish Government on the broadband reach study which states under point 3.4.3: "Aluminium has been used in some local loops instead of copper. The resistivity of aluminium is worse than copper, by about 50%, which means it will attenuate the signal more, and thus reduce the coverage of DSL on that line. DSL can still be provided over aluminium, it is the distance that will be limited". see: <http://scotland.gov.uk/Publications/2006/12/20130045/3>

¹¹⁵ ST's reply to the Commission's RFI of 7 June, reply to question 12, pt. 12 vi, p. 15, Doc ID3804.

¹¹⁶ Doc ID1637, p. 5, Reply to the SO p. 86 Doc ID 3630.

longer than 5 km]¹¹⁷. Against this background the Commission accepts in the context of this decision that these lines are considered to be unsuitable to transmit a xDSL signal and may be excluded from the coverage of ST's local metallic access network that could be used to supply broadband retail services¹¹⁸.

(f) Lines affected by impedance mismatching and poor connections: ST argues that its local access network suffers especially in rural areas from the fact that there are a high number of connection points between the MDFs and the Network Termination Points ("NTPs") in the end user premises, especially in areas covered by aerial cables and poles. ST indicates that about [...] % of all lines are affected by this issue and the lines can thus not be used for the transmission of a DSL signal¹¹⁹.

(61) The Commission takes the view that ST's local loop network, which could be used to supply a broadband signal after the lines concerned have been unbundled from ST's network, covers [...] % of all Slovak households as indicated in the above Table 5 and Table 6¹²⁰.

4.6.3. "Technical coverage" of ST's local loop network

(62) ST submits further that [...] of all lines within its local loop network included in the service coverage of its network are affected by "limitations resulting from interferences between transmission systems in cables"¹²¹, also sometimes referred to as "cross-talk",¹²² and are thus unable to carry a xDSL signal. ST estimates that only [...] ¹²³ of all lines connecting Slovak households and ending in its MDFs and not affected by one of the technical limitations described above under the heading "service coverage" could be used for the supply of broadband services achieving speeds of up to [...]. ST submits that the actual values may differ throughout different geographic parts of Slovakia, depending on the quality of the different individual multi-pair cables which are used to connect a certain number households to ST's MDFs that is to say the multi-pair cables which contain the local loops of these households¹²⁴.

¹¹⁷ ST points out that the use of such solutions would not have materially improved the capabilities of ST's network to carry DSL signals, see ST's reply to the request for information of 7 June 2013, pt. 12 (iii) and (iv), p. 13-14, Doc ID3804.

¹¹⁸ See also reply to the SO p. 86, Doc ID3630.

¹¹⁹ Technical paper, p. 12-13, Doc ID1637; Reply to the SO p. 87, Doc ID3630; see ST's reply to the request for information of 7 June 2013, lit. f, p. 13, Doc ID3804.

¹²⁰ Table and graph supplied by ST reply to the request for information of 12 July 2013, p. 4, Doc ID3906-23 and 3030.

¹²¹ ST's submission 'Additional information regarding technical limitations on Slovak Telekom's copper based access network following the Commission request at the meeting of 2 October 2009', dated 6 November 2009, Doc ID1637, p. 6.

¹²² ST's reply to the RFI of 4 June 2013, reply to questions 8, footnote 24, and 13, Doc ID3804.

¹²³ This figure takes account of the fact that in case a line is affected by cross-talk or interference, ST tries to remedy the problem by using spectrum management tools aimed at optimising broadband usage, minimising negative influences, and guaranteeing to the extent possible QoS. The remedy can be e.g. to use another pair of wire with better parameters within the same cable, repairing a damaged wire or cable; ST's reply to the RFI of 4 June 2013, reply to questions 13 (b)(i), Doc ID3804.

¹²⁴ ST's submission 'Additional information regarding technical limitations on Slovak Telekom's copper based access network following the Commission request at the meeting of 2 October 2009', dated 6 November 2009, Doc ID1637, p. 17.

- (63) The Commission notes that ST sets in its RUO a stricter rule for using local loops, whereby only 25% of the local loops contained in a multi-pair cable could be used for the provision of broadband services, in order to avoid cross-talk and interferences¹²⁵.
- (64) In the reply to the letter of facts ST points out that it would be wrong to simply relate the [...] % figure to ST's entire local loop network. Cross-talk and interferences occur in the multi-pair cables which begin in the MDF and first run as a part in of a multi-pair cable to line distribution frames, where these cables are divided into smaller multi-pair cables before these are finally split into the local loops which end in the end user premises¹²⁶. It is also the Commission's understanding and it concurs in this regard with ST that only [...] % of each relevant multi-pair cable can be used for the provision of broadband services. This limitation of ST's metallic access network, as ST rightly points out, applies both to ST and AOs who would seek access to a certain local loop: if the multi-pair cable(s) concerned has/have reached the [...] % saturation level there is no more room for either the provision of retail broadband services by ST to additional ST customers or, after unbundling of the relevant local loop(s), to an AO customer whose premises are connected to the MDF in ST's network concerned via the same multi-pair cable(s). The Commission also notes that ST has no regulatory obligation to offer access to a ULL which at some point is running in a cable which has reached saturation¹²⁷.
- (65) Saturation of the network due to cross-talk and interference has to be assessed on a multi-pair cable to multi-pair cable basis. Consequently, if the local loop ending at the premises of an end user happens to go through a cable which has reached saturation, it cannot be used by ST or an AO (after its unbundling) for the supply of retail broadband services. It goes without saying that multi-pair cables which connect premises in other streets or houses and which are used to a lesser extent may not be affected by saturation. Nevertheless, before a multi-pair cable has reached the saturation limit of 63%, the local loops within it are subject to the unbundling obligation and these loops can be used by an AO after their unbundling for the provision of broadband retail services. Taking the [...] % saturation limit on a cable to cable basis as a starting point, it follows that the number of households indicated in Table 5 and Table 6, that is to say [...] % of all Slovak households, could from a technical point of view, be supplied by ST itself and/or after the unbundling of the local loops concerned, by AOs with broadband retail services¹²⁸. This [...] % , which is based on ST's own calculations, indicates the highest possible coverage of ST's DSL network in terms of households if the full technical capacity of its network to transmit a broadband signal would be used.
- (66) Based on ST's explanations regarding the capability of the network to be used for the provision of retail broadband services, the 25% limitation rule contained in its RUO narrows down the potential of using its network for the provision of broadband retail

¹²⁵ See recital (606).

¹²⁶ See ST's reply to the LoF, pts.68ss, Doc ID4671-36.

¹²⁷ See TUSR's reply to the Commission's RFI in which TUSR specified that ST has to honour reasonable and justified requests for the use of certain network elements, namely unbundled local loops, that ST can refuse requests based on objective criteria, such as technical feasibility or the need to maintain network integrity Doc ID4339, p. 4 et seq. This concurs with ST's reply to question 5 of the RFI of 7 June 2013 Doc ID3804.

¹²⁸ ST seems to agree with this conclusion in pt. 113 of the reply to the LoF, Doc ID4671-36.

services. As explained in recital (648) the 25% limitation, if applied throughout the network, leads to a technical coverage of only [...]%, as opposed to the technical coverage put forward by ST throughout the proceedings of [...]% of households being able to be supplied with broadband retail services. The 25% limitation contained in the RUO lacks any technical justifications, as explained in section "ST's 25% rule is a general limitation which is not justified by the concrete situation of ST's access network", in recitals (607) to (620) and leads therefore to an excessive and - from a technical point of view - unjustified reduction of the capacity of ST's network to be used for the provision of broadband services.

4.6.4. *Rejected requests of new ST broadband retail customers due to technical network limitations*

(67) The technical limitations described above play a considerable role as evidenced by the fact that e.g. in 2008 ST received [...] orders for the supply of DSL retail services but had to refuse [...] orders (more than [...] of the orders received) from customers whose households were connected to network nodes that are DSL enabled, but where, due to the technical limitations described above, ST was unable to provide DSL.¹²⁹ Comparing these figures with those presented in Table 5 and Table 6 show that these tables indicate the technical limits of ST's metallic access network. Furthermore the figures in Table 5 and Table 6 are averages and do not reflect the fact that at the local level the technical capabilities and the coverage of specific local loops also depend on the quality of the multi-pair access cables involved.¹³⁰

4.6.5. *ST's network included in the technical coverage is far from being fully used*

(68) The limitations described above allow to calculate a percentage of all Slovak households which could be supplied with DSL services in case of a full utilisation of ST's xDSL network. ST had until late in 2010 no technical tool which would allow it [Explanation about ST's means and possibilities to monitor the performance of its ULL network].¹³¹ [Explanation about ST's means and possibilities to monitor the performance of its ULL network]¹³². These local loops are nevertheless subject to the unbundling obligation. Until late 2010 it was thus not possible for ST to identify upfront the specific local loops and households, which are affected by the technical limitations described above, unless the loop concerned was already in use for the supply of broadband services (by ST, an AO relying on ST's WBA or GTS, which used very few of ST's ULL from the end of 2009 on). Before late 2010 ST did thus not know whether a specific unused line connecting a household to its network could be used to provide xDSL services. It follows that the abusive conduct of ST covered by this decision was not limited to the local loops within the technical coverage, as ST had not identified them individually, but affected all local loops within the service coverage, whether or not the loops were already in use (active loops) or not (passive loops)¹³³.

¹²⁹ Annex to the issues paper (section II), p.15, pt. 33, Doc ID0954.

¹³⁰ ST's submission 'Additional information regarding technical limitations on Slovak Telekom's copper based access network following the Commission request at the meeting of 2 October 2009', dated 6 November 2009, Doc ID1637, p. 17.

¹³¹ ST's reply to the RFI of 4 June 2013, reply to question 9, Doc ID3804.

¹³² That is to say the local loops which are connected to an MDF equipped with DSLAMs and MSANs.

¹³³ ST's obligations to make available to independent third party access seekers all local loops for which unbundling is reasonable and justified covers active and passive local loops.

- (69) Moreover, throughout the period covered by this decision, ST's local loops within the technical coverage, that is to say [...] % of all local loops, were never fully used (by itself or by AOs) through the period covered by this decision, as follows from the following Table 7 in which the Commission indicates the percentage of the lines within the technical coverage which were used in each year (last row of Table 7).

Table 7: Coverage, xDSL lines in use by ST, by ST and AOs and utilisation of the network included in the technical coverage¹³⁴

Technology	2005	2006	2007	2008	2009	2010
Number of households included in the technical coverage of ST's metallic local access network able to carry a xDSL signal	[...]	[...]	[...]	[...]	[...]	[...]
ST's xDSL metallic local access lines in use (by ST or AOs ("AOs"))	[...]	[...]	[...]	[...]	[...]	[...]
ST's xDSL metallic local access lines <u>in use by ST only</u>	[...]	[...]	[...]	[...]	[...]	[...]
ST's xDSL metallic local access lines <u>in use by AOs</u>	[...]	[...]	[...]	[...]	[...]	[...]
<u>Lines used by AOs in percent of all lines in use</u> (by ST of AOs)	[...]	[...]	[...]	[...]	[...]	[...]
<u>Percentage of the lines within the technical coverage of ST's network used by AOs</u>	[...]	[...]	[...]	[...]	[...]	[...]
Percentage of lines within the technical coverage in use by <u>ST or AOs</u>	[...]	[...]	[...]	[...]	[...]	[...]

- (70) Taking account of the fact that the local loops included in the technical coverage of ST's local access network were used (see last line of the above table) by between [...] (2005) and [...] (2010), it is unlikely that the limitations of ST's local access network described above under the heading technical coverage¹³⁵ matter in reality in the time

¹³⁴ Reply to the RFI of 12 July 2013, annex to reply to question 13, Doc ID3898-15.

¹³⁵ Interference between transmission systems in cables depends on the number of wires in cable which are in use and also on the cable quality. The higher the number of the wires in use, the lower the quality of the signal. As broadband demand is not equally spread over the territory of Slovakia, it may well be that in certain cases a cable with many wires in use may have no spare wires left, whereas other cables do

span covered by this Decision and set a real limit to the possibility to unbundle further local loops which can then also be used for the supply of broadband services. ST's own records show to which extent customers could not be supplied with DSL services because of *inter alia* technical reasons. Indeed, as already mentioned in subsection 4.6.4 above, in 2008 ST received [...] orders for the supply of DSL retail services but had to refuse only [...] orders (more than [...] of the orders received) which means that the technical limitations described under the headings of technical and service coverage do in reality and as long as the network is not fully utilised, play a much more limited role (more than [...] of refusal instead of more than [...] ¹³⁶) as one would expect based on the general limitations of ST's network described above. Orange, which relies partly on ST's WBA in areas outside its fibre network, registered approximately [...] of refused WBA requests.¹³⁷ These figures coincide with those presented by ST.

- (71) The above percentages of refusals, which are not further broken down to the level of households connected to an MDF or even to households connected to an MDF *via* a multi-pair cable, where cross-talk and interferences occur, show that overall the technical limitations of ST's network played a limited role during the infringement period. They also show that the use of ST's metallic access network for the supply of broadband services by itself or AOs is far from saturation, as in accordance with Table 7 above, more than half of the lines within the technical coverage of ST's network were not used for the supply of broadband services.

4.6.6. *The coverage of ST's ULL network is larger than the coverage of its "DSL enabled network"*

- (72) The SO described (i) the coverage of ST's "DSL enabled network", which can be accessed by AOs who wish to rely on ST's WBA offerings, and (ii) the coverage of ST's network subject to the unbundling obligation¹³⁸. This description was based on the one hand on figures supplied by ST in several technical papers, on the Commission's assessment of these figures and on public figures. The Commission considered that the large differences between the figures presented by ST and those contained in public reports were contradictory and unreliable. However, as this decision no longer covers any alleged infringement regarding national (IP-) and regional (ATM- / Ethernet-) wholesale broadband accesses (WBA) the investigation carried out after the reply to the SO focussed on further clarifying the coverage of ST's metallic access network subject to the unbundling obligation.

not reach saturation. As a consequence the technical limitations of ST's network are difficult to precisely calculate but should be relevant in a more limited number of cases as compared to a situation where the network which is included in the technical coverage is nearly fully used.

¹³⁶ The impossibility to supply a household with broadband retail services can be due to various reasons, such as the fact that the line is made out of aluminium, more than 5 km long, affected by mismatch, or by cross-talk and interference. When looking at the figures presented by ST in the context of the explanation of the technical and service coverage of the whole network (presented above) if fully used, one has to expect that the refusal rate should be [...] due to cross-talk and interference, plus [...] due to impedance and mismatch, plus [...] for lines made out of aluminium, plus a unknown percentage for lines longer than 5 km, that is to say the refusal rate should be more than [...] as compared to the [...] real refusal rate observed by ST in 2008 or Orange.

¹³⁷ Orange submission of 31 May 2013, reply to question 2, p. 1, Doc ID4188.

¹³⁸ SO recitals 73 et seq., Doc ID3416.

- (73) Based on the information and further explanations supplied by ST, which the Commission accepts, the Commission considers that the coverage of ST's metallic local access network subject to the unbundling obligations and to which ST is offering access based on its RUO is as described in the previous subsections in this decision. The Commission also considers that the coverage was stable over the entire period covered by this decision, as ST's metallic network was not subject to appreciable changes during the period covered by this decision.¹³⁹
- (74) The Commission informed ST in the LoF of its intention to consider that the network coverage of ST's network subject to the unbundling obligation had the dimension described above throughout the whole period covered by this decision.
- (75) In the reply to the LoF, as in reply to a previous RFI¹⁴⁰, ST considers that the Commission's approach is misguided, unrealistic and entirely speculative because it would completely disregard economic reality. In support of this view ST puts forward that even absent the alleged margin squeeze and refusal to supply policy ULL based market entry, irrespective of whether a MDF has been equipped by ST with a DSLAM, would not have taken place for three reasons:
- (a) ST refers to the fact that the Commission includes in the coverage of the ULL network also areas where the MDF covering the area has not been equipped by ST with DSLAMs. It considers that this is in contradiction with the Commission's claim that an AO in order to be in a position to effectively compete needs to be able to progressively climb the ladder of investment. Consequently ULL is, according to ST, only used in areas and for lines which are connected to a MDF equipped by ST with a DSLAM. It considers that in these areas the AO can enter the market by first relying on ST's WBA offer and then at a later stage when it has a sufficiently large customer base replace the WBA by wholesale access *via* ULL.

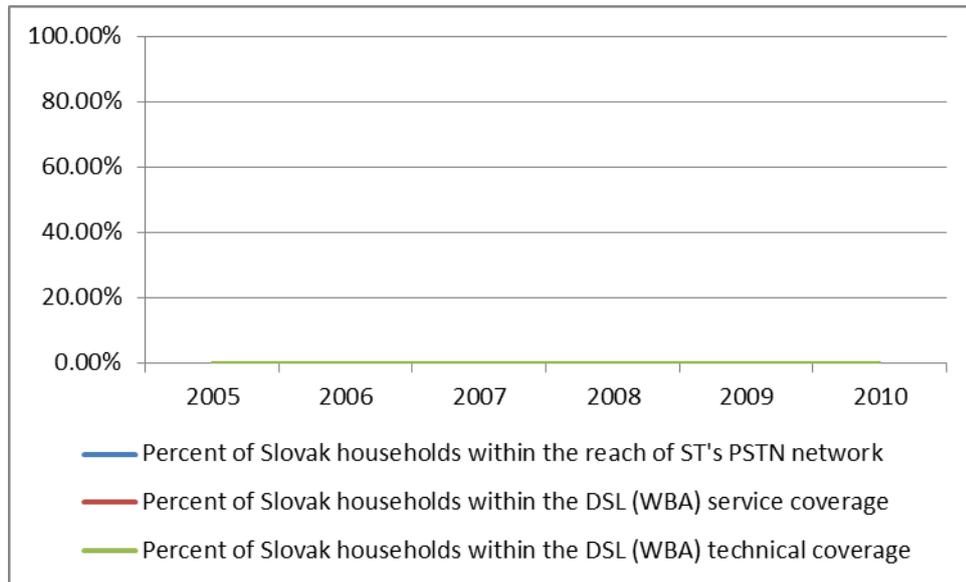
ST claims that due to this sequence, the service and technical coverage of ST's ULL network should be the same as the relevant coverage of ST's WBA network (= ST's "DSL enabled network").

In order to illustrate this claim, the Commission refers to the following graph which depicts the evolution of the coverage ST's "DSL enabled network" and shows that it grew over time from [...] in 2005 to [...] in 2010 in line with the increasing installation of DSLAMs in ST's MDFs. As can be seen from the graph in Table 6 above the relevant coverage of ST's local loop network where stable during the whole period covered by this decision.

¹³⁹ ST's reply of 28 June 2013 to the RFI of 7 June 2013, point 12 (i), p. 13, Doc ID3804.

¹⁴⁰ ST's reply of 1 August 2013 to the RFI of 12 July 2013, point 2 (b), p. 3, Doc ID3906-30. ST criticises the starting point of the analysis of the coverage of ST's metallic local loop network, which is subject to the unbundling obligation and could be used by an AO to supply a retail customer with retail broadband services. In order to be able to establish the technical limits of ST's local loop network, the Commission has to consider how many of the existing local loops could be used for the provision of such services. It therefore tried to establish what would happen in the hypothetical case that third party access seekers would unbundle all local loops belonging to ST's network. ST considers that this starting point of the analysis of the network coverage is "unrealistic and entirely speculative, because it completely disregards economic reality" despite the fact that it is obliged to offer unbundling of all lines where unbundling is reasonable and justified.

Table 8: ST's copper access network coverage (2005-2010) in terms of households which are connected to ST's "DSL enabled network", that is to say the network which can be accessed by third parties *via* WBA and (also ULL)



- (b) ST considers that the Commission's reasoning as regards network coverage is purely hypothetical because no AO had ever requested unbundled access to a ULL or to an MDF that ST had not already equipped with a DSLAM.
 - (c) ST also points to the analysis conducted by [Name of a consultant]¹⁴¹ which shows that it would not have been economic for a new entrant to roll-out ULL in the vast majority of exchanges located in suburban and rural areas.
- (76) The Commission takes the view that ST's argumentation that AOs would only rely on ULL in areas where ST has equipped its MDFs with DSLAMs and therefore provide retail broadband services cannot be accepted. An AO which relies on ULL uses its own DSLAMs to supply broadband retail services over the unbundled local loops. Therefore, the geographical scope of ST's DSL enabled network does not necessarily overlap with the areas where AOs could supply retail broadband services over ULL connected with their own DSLAMs.
- (77) Furthermore, ST's remarks are misplaced in the context of the discussion of the coverage of ST's ULL network. Section 4.6 of this decision on network coverage has the sole aim to identify the number of households and potential users which could be reached over ST's ULLs by AOs who wish to use them for the provision of broadband retail services. This analysis builds on ST's RUO by which it offers wholesale access to its ULLs - in line with the regulatory obligations - for any local

¹⁴¹ [Name of a consultant], "[Title of a study]", February 2014, Doc ID4671-30. [Name of a consultant] indicates that in Slovakia there are all together [...] MDFs (in urban, suburban and rural areas). [Consultant] considers that from the [...] MDFs in sub-urban and rural areas only [...] could be profitably used for ULL entry in 2010. Based on these figures there are [...] MDF in urban areas. ULL entry would thus only be profitable in [...] MDF areas.

loop belonging to its network, the unbundling of which is reasonable and justified, that is to say where it is technically feasible.¹⁴²

- (78) Establishing the coverage of ST's network which can - from a technical point of view - be unbundled and the unbundling of which is offered in the RUO is not in contradiction with the ladder of investment concept. After having considered ST's reply to the SO and its explanations during the hearing, the Commission has dropped its allegations under Article 102 of the Treaty of a margin squeeze on the markets for national and regional WBA and of a refusal to supply policy in the regional WBA market. Dropping these allegations means that normally any AO can rely on national or regional WBA to enter broadband markets in Slovakia by relying on any of these wholesale products within the reach of ST's DSL enabled network, that is to say in the geographic areas covered by an MDF which have been equipped by ST with DSLAMs. In other areas the AO would have to leapfrog the first rung of the ladder of investment and rely on ST's ULL should it wish to offer broadband services to retail customers without a network of its own.
- (79) ST's observation has to be rejected. The ladder of investment concept is a model which explains how one would expect a typical progressive and efficient market entry of AOs. However, there is no rule in the ladder of investment model that AOs must supply first broadband retail services to all their retail customers by relying on WBA and only convert them to ULL once they have a sufficient customer base. GTS, up to now the only local loop unbundler in Slovakia, which supplies retail customers using WBA, seems for example not to have relied on WBA access as regards those end customers which it now supplies over ST's ULLs with symmetrical broadband SHDSL services¹⁴³, whereas it relies on WBA for the residential customers it has in Slovakia. A mixed approach where the AO partly relies on WBA and partly on ULL is possible and does even exist in Slovakia.
- (80) In conclusion, from a technical point of view the coverage of ST's ULL network comprises all lines which can be used to supply broadband retail service is thus larger and stable throughout the period covered by this decision than the coverage of its "*DSL enabled network*", which grew over time due to the ever increasing equipment of ST's MDFs with DSLAMs. The coverage of ST's network, in line with its regulatory obligations and RUO, thus extends to all local loops within its metallic access network which can be used to transmit a broadband signal whether or not these lines are connected to a MDF which has been equipped by ST with a DSLAM or MSAN (see Table 5 and Table 6 above). These are the lines within the technical coverage of ST's metallic access network (for details see recitals (65) to (71) above.
- (81) Moreover, the Commission notes that until late 2010, it was not possible for ST to identify those specific local loops and households which were affected by the technical limitations of its xDSL network and also that ST's local loops within its technical coverage were far from being used to the saturation level.

¹⁴² Decision N° 63/01/2005 of the Chairman of TUSR of 14 June 2005, see *inter alia* reply to the RFI of 4 June, page 5, footnote 12, Doc ID 3804; TUSR reply of 14.6.2013 to the Commission's questions, Doc ID4339, p. 4.

¹⁴³ Minutes of the conference call with GTS Slovakia on 27 June 2013, Doc ID3871.

5. MARKET DEFINITION

5.1. Relevant product markets

5.1.1. Introduction

- (82) In line with the Notice on market definition, relevant product markets are defined as follows: 'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their price and their intended use'.¹⁴⁴ Throughout this decision the term product market or services market will be used indistinctly.
- (83) The identification of the relevant markets derives from the existence of competitive constraints. Undertakings are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product¹⁴⁵.
- (84) However, supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. Supply-side substitution is particularly relevant for network industries, such as electronic communications where the same network may be used to provide different types of services. There is supply-side substitution when suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved¹⁴⁶.
- (85) On the other hand, supply-side substitutability is not taken into account for the definition of a relevant market each time it would entail the need to adjust significantly existing tangible and intangible assets, additional investments, strategic decisions or time delays¹⁴⁷.
- (86) In the present section, the Commission defines two relevant product markets in broadband access which are closely linked to each other:
- (a) **the retail mass market for broadband services at a fixed location**, which is the downstream market for broadband services offered at a fixed location ('fixed broadband services') by telecommunications operators to final consumers (discussed in detail in section 5.1.2);
 - and
 - (b) **the wholesale market for access to the unbundled local loops** (discussed in detail in section 5.1.3)

¹⁴⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law 97/C 372/03, OJ C 372, 09/12/1997, p. 5 ("*Notice on market definition*"), paragraph 7.

¹⁴⁵ *Notice on market definition*, paragraph 13.

¹⁴⁶ *Notice on market definition*, paragraph 20.

¹⁴⁷ *Notice on market definition*, paragraph 23.

5.1.2. *The retail mass market for broadband services offered at a fixed location*

- (87) The relevant retail product market comprises all the mass market fixed broadband services, whether provided through xDSL or any other fixed access technology (fibre-, cable- or fixed wireless access (FWA)-based).
- (88) In line with the Commission's decisional practice¹⁴⁸, this market does not include tailor made broadband access services. Such services are designed to meet the specific needs of individual customers in terms of electronic communications in general and of data transmission services in particular. Tailor made broadband services incorporate more advanced functionalities (higher data rates, greater web hosting capacities, the possibility of multi-terminal use and networking operation) than for standardized broadband services offered in the mass market. The large majority of customers for mass marketed broadband accesses are residential customers or small and medium sized enterprises whose needs are satisfied with the same standard products as those used for the residential market. In contrast, tailor made access services are designed to meet the specific needs of large enterprises and public administrations.
- (89) As regards the usage made of mass market broadband accesses, research¹⁴⁹ shows that this has commonly become multi-fold. The following is a non-exhaustive list of common applications for final consumers using a broadband Internet access in 2009: browse the web to find information, e-mail, chat, telephone and Video conferencing (for instance VoIP such as Skype), social networking, Internet banking, e-commerce, working – teleworking – learning, downloading (music, films, videos, software or games), on line gaming, listening to the radio, streaming video (You Tube, Daily Motion), watching television, blogging and website design and maintenance, communication with public offices.
- (90) Broadband services may be categorised according to the technology they rely upon (see section 4.3) or according to the technical characteristics of the service. Moreover, the latter, next to prices of the products, have a direct bearing on the suitability or not of a particular broadband access service for the above end-user applications.

¹⁴⁸ See Commission Decision of 4 July 2007 in Case COMP/38.784 – *Wanadoo España/Telefónica*, section V.A.2; the retail market definition was not challenged by Telefónica, whereas the wholesale market definition applied in that case was upheld by the General Court in Case T-336/07, *Telefónica v Commission* [2012], EU:T:2012:172, paragraphs 110 et seq., the judgement of the General Court has been appealed to the Court of Justice, case C-295/12 P. The summary of the Commission Decision is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2008.083.01.0006.01.ENG, OJ C 83, 2.4.2008, p. 6–9. Full text of the Commission decision is available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/38784/38784_311_10.pdf.

¹⁴⁹ See *inter alia* [Title of a study], Doc ID1551, p. 23 and [Title of a study], Doc ID1555, p. 12.

- (91) In line with its previous decision practice¹⁵⁰, the Commission considers that broadband accesses offered on the basis of fixed wire line access technologies (DSL, Cable TV and Fibre) are substitutes for one another. From the end user's perspective, ADSL based, cable TV based and fibre based retail products can be considered as substitutes since all three technologies are able to provide standard broadband transmission services suitable for a wide range of the typical mass market applications, and their prices are similar. Although supply-side switching between these three access technologies does not appear possible, demand-side substitutability is sufficient to justify the inclusion of these three access technologies in the relevant retail market.
- (92) Alongside fixed wire line broadband access technologies, FWA technologies are also used in the Slovak Republic to market retail broadband offers. ST explains that fixed wireless access technologies have played a significant role in the Slovak Republic since the early days of broadband and that the providers of FWA broadband are mostly active at a regional level.¹⁵¹
- (93) In its recent decisional practice¹⁵² applying Article 102 of the Treaty, the Commission has found that broadband fixed wireless access technologies are substitutes to fixed wire line access technologies. This view was also taken by the Slovak regulator, TUSR, when analysing for the first time broadband services retail markets in the context of its analysis of the wholesale broadband access market of July 2006¹⁵³, even though in its first analysis of the market for access to unbundled local loops carried out in 2004 it did not analyse retail broadband markets,¹⁵⁴ whereas in the further reviews carried out in 2009 and later¹⁵⁵ and the later analysis in 2012¹⁵⁶ notified to the Commission under the Article 7 of the Framework Directive consultation mechanism¹⁵⁷, TUSR analysed retail competition on broadband markets and found that broadband services provided over fixed wireless access networks are not substitutes for broadband services supplied over a xDSL

¹⁵⁰ Commission Decision of 4 July 2007 in Case COMP/38.784 – *Wanadoo España/Telefonica*, see in particular paragraph 160, Case COMP/39.525 *Telekomunikacja Polska*, paragraph 592. The summary of the Commission Decision in Case COMP/39.525 *Telekomunikacja Polska* is available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2011.324.01.0007.01.ENG, OJ C 324, 2.11.2011, p. 7–10. Full text of the Commission decision in Case COMP/39.525 *Telekomunikacja Polska* is available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39525/39525_1916_7.pdf.

¹⁵¹ ST's Issues Paper, Doc ID953, paragraph 40.

¹⁵² Case COMP/39.525 *Telekomunikacja Polska*, recital 598.

¹⁵³ Case SK/2006/0465.

¹⁵⁴ Case SK/2004/0107.

¹⁵⁵ Cases SK/2009/929 (withdrawn by TUSR); SK/2011/1210; SK/2011/1262 (withdrawn by TUSR) and SK/2012/1308.

¹⁵⁶ Cases SK/2012/1307 (withdrawn by TUSR) and SK/2012/1345.

¹⁵⁷ See Article 15 (1), last sentence 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, OJ L 108, 24.4.2002, p.33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation 544/2009 OJ L 167, 18.6.2009, p. 12 (hereinafter 'the article 7 of the Framework Directive consultation mechanism'); see also Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/ED of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344, 28.12.2007, p.65.

network¹⁵⁸. In the present case, considering the existence of many small scale regional operators relying on fixed wireless access technologies in the Slovak Republic, the Commission accepts that the fixed wireless access technologies used are in principle valid substitutes to fixed wire line access technologies. Even though they are positioned rather at the low-end of the relevant market and cannot compete directly with high-end broadband products, they provide a relatively good substitute for basic fixed-line broadband offers, because of their attractiveness for consumers due to low prices.

- (94) FWA became less and less attractive for consumers compared to the existing wireline technologies offers (for example by not allowing IPTV, VoD or other value-added services¹⁵⁹). Moreover, local FWA operators mainly concentrate on areas with no access to DSL technology.¹⁶⁰ However, the share of FWA subscribers out of the total fixed broadband subscribers in the Slovak Republic remains significant (around 20% in 2009 and 2010¹⁶¹).
- (95) In the light of the foregoing, the Commission considers that all the broadband accesses offered in the Slovak Republic on the basis of a fixed access technology, whether wire line or wireless, are included in the relevant downstream market. The existing differentiation of various products and technologies within the overall retail broadband market (for instance lower-end FWA as compared to high-speed fibre) is taken into account when relevant for the assessment of the case¹⁶².

5.1.2.1. Substitutability between fixed broadband services and mobile broadband services

- (96) Throughout the investigation ST argued that its broadband access services based on xDSL also face competition on price and performance from mobile broadband access providers¹⁶³.
- (97) There are two types of mobile broadband connectivity, namely connectivity for dedicated data services connecting the users' computers *via* modems, cards or USB keys, whether a desktop or a laptop, to the internet (according to ST 'full connectivity') and connectivity for handsets such as smartphones (according to ST

¹⁵⁸ Case SK/2011/1210 and TUSR's Analysis of the wholesale market No. 4 published in August 2011, ID3170. See also the last version of TUSR's Analysis of the wholesale market No. 4 published in January 2012, ID3169, p. 21-25. See also Doc ID4130, TUSR's Analysis of Wholesale Market No. 5 notified under Article 7 of the Framework Directive consultation mechanism, case SK/2012/1345, p. 22-26.

¹⁵⁹ Replies to RFI Dial Telecom/eTel Doc ID0287, p.22, Slovanet Doc ID0418, p.13 or WiMax Doc ID0272, p.8.

¹⁶⁰ Doc ID4339, TUSR's reply to RFI of 14 June 2013, Doc ID3170, Case SK/2011/1210 TUSR's Analysis of the wholesale market No. 4 published in August 2011, see also Doc ID3169 the last version of TUSR's Analysis of the wholesale market No. 4 published in January 2012, Doc ID 4130, TUSR Analysis of Wholesale Market No. 5, notified under Article 7 of the Framework Directive consultation mechanism, case SK12012/1345, Doc ID 3959, Minutes of the conference call with Slovanet of 7 August 2013, point 2.6. Doc ID 4189, Minutes of the meeting with Orange of 3 June 2013, point 15. See also subsection 6.1.3.

¹⁶¹ Based on the broadband subscriber data available at the website of the Ministry of Transport, Posts and Telecommunications (http://www.telecom.gov.sk/files/statistika_vud/pristup_tel.htm).

¹⁶² See for instance section 6.1.3.

¹⁶³ ST's Issues Paper, Doc ID0953, paragraphs 41 and 42 and ST's reply to the SO, Doc ID 3630, paragraphs 230-330.

'confined connectivity').¹⁶⁴ In this regard, the Commission notes that Orange emphasises that mobile broadband users, which Orange "tried to" convince that mobile is a substitute for fixed broadband services, are those "which have a dongle or a mobile data card in their notebook or PC", not smartphone users.¹⁶⁵

- (98) Two operators offered mobile broadband services in the Slovak Republic during the infringement period: Orange and T-Mobile¹⁶⁶. The Commission is of the view that only the mobile broadband services of Orange may have represented a competitive constraint to ST's fixed broadband services if at all.¹⁶⁷ Orange does not report any mobile broadband subscribers and ST reports only few subscribers using dedicated data modems, cards or USB keys before 2006.
- (99) In order to reach a conclusion on the substitutability between fixed and mobile broadband services the Commission will notably analyse (i) quality, (ii) data usage profiles, (iii) prices of fixed and mobile broadband services and (iv) switching between those services.
- (100) As to the supply side substitutability, this substitution from the mobile to the fixed broadband services, that is to say between the services offered on the basis of different access technologies, does not exist as the mobile network operators use different equipment and network assets than the fixed network operators and thus are not able to serve the customers on the relevant retail mass market for fixed broadband services using their cellular networks, that is to say they would effectively have to opt for the roll-out of a fixed network to enter the retail market concerned.

¹⁶⁴ The Commission notes that the figures presented by ST in the Issues Paper concerning mobile broadband include only 'full connectivity' as a relevant broadband service. These figures do not include connections based on the EDGE mobile standard and connections for handsets such as smartphones. EDGE (Enhanced Data rates for GSM Evolution) provides a much lower level of data transfer speed as compared to a 3rd generation mobile network based on the UMTS or HSPA standard. In fact, it is only since the roll-out of third generation mobile networks (UMTS and HSPA in particular) that mobile Internet can be referred to as broadband. Previously mobile networks were based on the following standards: GSM (Global System for Mobile communications) mobile networks (allowed data transfer speeds of up to 9.6 kbps; The next generation (GPRS - General Packet Radio Service) offered throughput rates of up to 40 kbps, which gave users a similar access speed to dial-up modems; the subsequent evolution of the above mobile standards EDGE allowed data rates up to three times higher than GPRS. UMTS (Universal Mobile Telecommunications System) is one of the 3rd generation mobile technologies. Its standard is defined within the IMT-2000 family of standards of ITU. UMTS offers data rates of 384 kbps. It has evolved towards the HSPA (High Speed Packet Access) standard which allows data rates from 5 to 35 times higher than UMTS. For further details see also paragraphs 171-173 of the SO Doc ID3416.

¹⁶⁵ Minutes of the meeting with Orange of 3 June 2013, Doc ID 4189, paragraph 18.

¹⁶⁶ Mobile operator O2 only offered mobile data based on GPRS or EDGE, that is to say not broadband services (see Doc ID1905, p.10).

¹⁶⁷ Because it is controlled by the same group as Slovak Telekom moreover, T-Mobile Slovensko cannot be presumed to have exerted an appreciable competitive pressure on the fixed broadband access services offered by its sister company, Slovak Telekom, in the retail market. This is further evidenced by the series of internal documents of Slovak Telekom concerning the Joint Broadband Strategy it has elaborated together with T-Mobile and the follow up thereof (see the Joint Broadband Strategy (Doc IDs 1202, 1221, 1226, 1229, 1234, 1235, 1238, 1240, 1242, 1244, 1247, 1248, 1251, 1253, 1256, 1259, 1261, 1262, 1264, 1266, 1268, 1269, 1271, 1275) and the Group Broadband Report (Doc IDs 1272, 1278, 1284, 1288, 1293, 1301, 1306, 1308, 1326, 1332, 1333, 1352, 1374, 1400, 1419, 1664, 1665, 1666, 1667) series of internal documents.) These documents constitute solid evidence that close co-operation between Slovak Telekom and T-Mobile Slovensko was initiated as of March 2006.

5.1.2.1.1 Quality of fixed and mobile broadband services

(101) The Commission found evidence in ST and T-Mobile Slovensko's internal documents suggesting consistently over time that there are appreciable qualitative differences between fixed and mobile broadband services.¹⁶⁸ In particular:

- The presentation of April 2007 prepared for the Executive Management Board of the ST Group states: "*real bandwidth* (that is to say data rate - available from mobile broadband services using the Flash OFDM network technology) *depends on location and actual traffic load. Further bandwidth increase possible after build-up of additional network capacity, but not feasible to match fixed BB (DSL, FTTH)*"¹⁶⁹. This presentation even takes the view that it would not be feasible to match the quality of fixed broadband connections, such as DSL or FttH.
 - T-Mobile's presentation of December 2007 emphasises that communication strategy of T-Mobile should [...].¹⁷⁰ This presentation shows that consumers have a negative perception on the quality of mobile broadband services.
 - T-Mobile's presentation of April 2008 states that as regards "*Speed/Bandwidth*": there is [...].¹⁷¹ The same slide recognizes that quality of service ("*QoS*") is [...].
 - The presentation of May 2009 on TMSK mobile broadband strategy states that [...]¹⁷².
 - The presentation of August 2009 for the Executive Management Board of the ST Group states that the "Current DSL offer is superior in service parameters to F-OFDM / HSPA (flat data, stability, speed), thus favouring DSL"¹⁷³.
 - In addition, in December 2007, T-Mobile Slovensko considered a municipality to be covered by its broadband service based on the Flash OFDM network technology from the moment that it was able to offer a download rate of [...] Kbit per second to [...] % or more of the population of this municipality¹⁷⁴. Such a download rate is around [...] of the headline download rate of the slowest retail DSL broadband access available from ST at the time¹⁷⁵.
- (102) ST argues that numerous internal documents of ST refer to direct substitutability between DSL and mobile broadband services.¹⁷⁶ During the proceedings ST also argued that "*Most mobile broadband consumers are satisfied with their connection [...]*"¹⁷⁷.

¹⁶⁸ In particular see the presentation "[Title of the presentation]", Doc ID1294, p. 17; [Workshop presentation], Doc ID1897, p. 4; [Workshop presentation] Doc ID1902, p. 13; [Title of the presentation]" Doc ID1405, p. 7 and "[Title of the presentation]", Doc ID1428, p. 7; [Title of the presentation] Doc ID1905, p. 17; [Title of the presentation]" Doc ID1892, p. 11 and 14.

¹⁶⁹ Doc ID1294, p. 17.

¹⁷⁰ Doc ID1892, p. 14.

¹⁷¹ Doc ID1897, p. 4.

¹⁷² Doc ID1902, p. 13.

¹⁷³ Doc ID1905, p. 17.

¹⁷⁴ "Rychly Internet Strategy 2008" presentation, Doc ID1892, p. 5.

¹⁷⁵ Turbo 1 DSL access offered a 1536 kbps download rate until April 2008 (Doc ID1656, p. 6).

¹⁷⁶ In that regard see the documents quoted by ST in its reply to the SO, paragraphs 320-325.

¹⁷⁷ Supplementary Issues Paper, Doc ID1934, paragraph 61 and ST's reply to the SO. Doc ID3630, paragraphs 305-317.

- (103) However, the Commission found that vast majority of internal documents quoted by ST concern only predictions for the future (mobile broadband is considered as a possible future, and not actual, threat), they cannot be interpreted as evidence of substitutability between fixed and mobile broadband services or are not relevant to fixed to mobile broadband substitution.¹⁷⁸ There are some ST's internal documents¹⁷⁹, of which only two are after 2006¹⁸⁰, which refer to a certain level of actual substitutability between DSL and mobile broadband services. At the same time, none of these internal documents quoted by ST suggest that mobile broadband services offer comparable quality to DSL broadband services. Therefore, the Commission is of the view that the content of internal documents quoted by ST cannot be interpreted as evidence supporting ST's allegations as to fixed to mobile broadband substitution throughout the infringement period.
- (104) Further, the Commission is of the view that qualitative differences between fixed and mobile broadband services were actually perceived by consumers. The evolution of customer perception is also documented over time in the internal documents of T-Mobile Slovensko ('TMSK'). Several documents summarising the results of customer surveys for the attention of management underline that mobile broadband is known amongst consumers as [...] ¹⁸¹.

¹⁷⁸ Doc ID0154, p. 41 (This internal document stresses "*increasing trends of other technologies*"); Doc ID1195, p. 2 (ST states that [Confidential quote on current and future actions of alternative networks towards ST].); Doc ID868, p. 50 (It contains ST's prediction to the future. Interestingly, in the same internal presentation ST also foresaw that [Confidential quote on the role of DSL among BB technologies].); Doc ID3182, p. 22 (ST foresaw that [...]); Doc ID1221, p. 37 (It shows that the "*current situation*" scenario between T-Com and TMSK [...].); Doc ID 865, 9 and 14 (It contains ST's prediction to the future that "*mobile BB will grow more rapidly*". Interestingly, on the slide 14 of the same internal document ST stresses that [...]); Doc ID1419, p. 2 and Doc ID1666, p. 2 (Both internal documents suggest that [confidential information on effect of pressure from other market players on the market shares of ST in 2007 and 2008] Doc ID1241, p. 2 [confidential information on ST's Christmas campaign and its effect on the market]; Doc ID197, p. 6-7 (ST's claim that TMSK considered [...] cannot be considered as a proof of substitutability from fixed to mobile broadband services.); Doc ID1419, p. 14 and Doc ID869, p. 99 (ST's prediction that (i) mobile broadband will further increase, "[confidential quote on the drivers of this increase]", and that (ii) there will be "*Growing need for mobility*", does not prove that there exists actual substitutability from fixed to mobile broadband services); Doc ID1194 and Doc ID1218 – see also footnote 206 of the reply to the SO (ST's claim that ST started to include mobile technology in the charts that it produced to compare the strength of the different broadband technologies available on the Slovak market cannot be considered as a proof of substitutability between fixed and mobile broadband services).

¹⁷⁹ Doc ID0202, p. 12 (ST presents factors influencing broadband market in 2004 and mentions that "*Alternative access technologies Mobile (UMTS, CDMA), FWA (WiMax, WiFi) CATV (Chello), Metro-Ethernet... = complete substitute of ST products*"); Doc ID1122, p. 3 and 8 (ST states that [...]); Doc ID0147, p. 11 (ST explained that in 2005 "*ADSL [was the] preferred BB option only for [...] of customers, followed by Mobile internet (EDGE, CDMA) with [...] and CATV [...]*"; Doc ID2515, p. 2 ("*Current development on the Slovak BB market is heavily influenced by steadily increasing demand for mobile BB, which [...]*"); Doc ID106, p. 7 ("*As [in 2006] alternative technologies became cheaper (WiFi, Cable, UMTS, Flarion) competition started growing very fast*"); Doc ID0138, p. 8 (In 2006 ST stated that there were "[Confidential quote on new, fully comparable BB infrastructure players, their names and their action towards DSL platforms]").

¹⁸⁰ Doc ID2512, p. 2. Doc ID0106, p. 7.

¹⁸¹ Doc ID1892 p. 11 (presentation from [...], market research from [...]), Doc ID1894, p. 15 (presentation of [...], market research data [...]), Doc ID1896, p. 10 (presentation from [...], market research from [...]), Doc ID1902, p. 13 (presentation from [...], market research from [...]).

- (105) An internal presentation of TMSK of May 2009¹⁸² discusses customer service satisfaction and informs management that "*Satisfaction of TMSK customers with mobile Internet* [Description of a trend] "and that [Statement on future customer churn]¹⁸³", which suggests that customer dissatisfaction is important, on the rise and a source of concern for management. In this regard, the same internal document of TMSK mentions that:
- T-Mobile Slovensko has been confronted with a [...] in the churn of mobile broadband users;
 - most of the subscribers leaving T-Mobile Slovensko actually switch "*to flat / high speed fixed broadband*"; and
 - the major negative aspects underpinning customer dissatisfaction are precisely those where "[Features of fixed compared to mobile broadband access]".¹⁸⁴
- (106) The above internal documents give a genuine representation of TMSK view on the substitutability between mobile and fixed broadband services. Moreover, dissatisfaction of mobile users relates to essential differences between fixed and mobile broadband services (unlimited data, high speed). Also, the figures presented by ST in its reply to the SO¹⁸⁵ indicate that the satisfaction levels of mobile users significantly decreased during the infringement period.
- (107) ST further refers to the launch of a mobile broadband service by Orange that was, according to ST, intended to compete directly with the fixed broadband services offered on the basis of xDSL¹⁸⁶. ST argues that numerous statements made by Orange regarding its mobile broadband technology confirm full substitutability between fixed and mobile broadband.¹⁸⁷ In that regard ST relies on Orange press releases or annual reports.
- (108) However, the Commission is of the view that such public statements have to be put into the proper context. If Orange wanted to take over fixed broadband customers for its newly launched products it apparently needed to convey the impression that its mobile offer is excellent and that it will fully satisfy the needs of current customers of fixed connection. What matters is whether Orange's mobile broadband products were indeed recognized by customers as substitute for fixed broadband products. In that regard Orange recognizes that it has had limited success in convincing customers to opt for mobile broadband in exchange for DSL ("*no stable transmission up- and download speeds*"¹⁸⁸). Orange appears to believe that the reason is that DSL and mobile broadband are not perceived by consumers as substitutes¹⁸⁹. This outcome is in line with Orange's internal presentation "*Strategic Framework*" of March 2007, which points out that "*Mobile broadband is positioning to be supplement to the fix*

¹⁸² Presentation "[Title of the presentation]" of 21 May 2009, Doc ID1902, page 13.

¹⁸³ The monthly churn rate is the number of subscribers who left the company during the month divided by the average number of subscribers during that month.

¹⁸⁴ Presentation "TMSK Mobile Broadband Strategy" of 21 May 2009 Doc ID1902, p. 3, 7.

¹⁸⁵ ST's reply to the SO, Doc ID3630, Figure 17.

¹⁸⁶ Supplementary Issues Paper, Doc ID1934, paragraph 56. See also footnote 194 of the reply to the SO, Doc ID3630.

¹⁸⁷ ST's reply to the SO, Doc ID3630, paragraphs 326-328.

¹⁸⁸ Minutes of the meeting with Orange of 3 June 2013, Doc ID4189, paragraph 18.

¹⁸⁹ See Minute of conference call with Orange, 30 November 2009, Doc ID1920, p. 1 and Minutes of the meeting with Orange of 3 June 2013, Doc ID4189, paragraph 18.

one".¹⁹⁰ In that regard, ST argues that a survey commissioned by Orange itself in 2009 confirms the substitutability of fixed and mobile broadband services.¹⁹¹ However, this internal presentation of Orange of 27 May 2009 stresses that the negative experience "*with the service [Orange mobile internet] is prevailing*" and that the main reasons are "*connection stability, speed and signal*".¹⁹²

- (109) Another national provider of broadband services, Slovanet, also considers that there is a noticeable difference in quality of services between fixed wireless offers, which are positioned rather at the low-end of the relevant market and provide a relatively good substitute for basic fixed-line broadband offers, and mobile broadband offers.¹⁹³ FWA offers are designed and adjusted to the non-mobile customers living in the area covered by the network and can thus deliver a rather stable quality of service in terms of upload and download speeds, whereas in case of mobile broadband connections, the same network is used to supply broadband services to 'stationary' and 'mobile' customers. If there are more customers in a cell of the mobile network, download speeds will be affected and the mobile connection no longer delivers 'the announced' quality of service.
- (110) ST also refers to an 'independent network testing' mentioned and analysed in an article on a website of September 2009¹⁹⁴ which according to ST confirms that the actual speed of mobile broadband is comparable, and in some municipalities faster, than DSL. However, the article quoted by ST concludes that T-Mobile's F-OFDM network is "*prone to fluctuations*" and that its main disadvantage is also "*poor coverage of interiors, which often reduces connection speed or causes instability*". The article also stresses that T-Mobile's 3G network (HSDPA/HSUPA) can be "*a better choice than F-OFDM*" but it has "*a poor coverage*".
- (111) In order to further support its claims about the quality of mobile broadband access in the Slovak Republic, ST commissioned a study from [...], a consulting firm, comparing ST's DSL network and [...] mobile broadband services.¹⁹⁵ The tests were carried out in July and August 2012. The DSL network test was carried out either directly on the DSLAM port or on the last distribution frame close to the customer or in one case at the customer's premises.
- (112) The Commission notes that the test was carried out in summer 2012, that is to say one and a half year after the end of the period covered by this decision. Its probative value in respect of the network quality is limited, especially for the earlier years covered by this infringement.¹⁹⁶ As already pointed out in recital (101), the

¹⁹⁰ Doc ID 4330, page "Orange Homebox (FTTH)".

¹⁹¹ ST's reply to the letter of facts, paragraphs 164 (see also paragraphs 141, 144 and 146 of ST's reply to the letter of facts).

¹⁹² In addition, very few respondents reported positive experience with Orange mobile internet. See the presentation "Orange Mobile Internet" of 27 May 2009 prepared by TNS AISA Slovakia, Doc ID 3502, pages 14 and 15.

¹⁹³ Doc ID 3959, Minutes of the conference call with Slovanet of 7 August 2013, paragraph 7.3.

¹⁹⁴ See footnote 172 of ST's reply to the SO Doc ID3630 (<http://www.mobilmania.sk/clanky/otestovalis-me-hsdpa-t-mobilu-prijemneprekvapilo/sc-3-a-1122423/default.aspx>).

¹⁹⁵ ST's reply to the SO paragraphs 272ss., Doc ID3630; P 3 Communications, Slovakia Broadband Networks – Mobile Broadband versus DSL, Doc ID4730-20.

¹⁹⁶ The measurement of the mobile network is based on a mixture between test drives [ST proprietary information] and stationary tests at points of interest in these cities [ST proprietary information], Doc ID4730-20.

Commission has found contemporaneous evidence in the file where the quality of the mobile broadband access networks was considered to be lower than the quality of broadband services provided over ST's DSL network.

- (113) In view of these contemporaneous statements made in ST internal presentations the Commission does not consider that the findings of the [...] is informative and that it is justified to consider that in the years covered by this decision mobile broadband services were of the same quality as broadband services provided over ST's DSL network. Furthermore, also Orange, which offers broadband services over its mobile phone network and over its fixed fibre network, indicated that it failed to convince consumers that fixed and mobile broadband offerings are substitutes. This is due to the fact that mobile broadband services are supplied over a shared network. In such a network the transmission upload and download speeds are not stable as capacity depends on the number of users connected which makes the cells shrink and leads to connecting certain customers to a neighbouring cell.¹⁹⁷
- (114) ST referred to two mobile offers provided by O2 and Orange in 2012 (for instance, according to ST, in August 2012 O2 launched its first commercial pilot of LTE mobile networks in three municipalities in the Slovak Republic). This information on the performance of mobile networks in the Slovak Republic in 2012 does not inform about the performance of mobile networks within the timespan covered by this Decision.
- (115) ST has presented figures on the "reliability" of its DSL network and of T-Mobile's UMTS network.¹⁹⁸ The figures show that there is no relevant difference between the reliability of the two networks, which in 2006 was [...] % for ST's DSL network and in the years 2007-2010 for both technologies above [...] %.¹⁹⁹ The term "reliability" of the relevant network has not been further clarified by ST but seems to indicate the time span during which the network concerned is down or otherwise unavailable.
- (116) However, even if both DSL and UMTS networks provided similar levels of reliability as defined by ST this cannot be interpreted as evidence showing that DSL and UMTS networks offer similar quality of services to consumers (notably in terms of real bandwidth or speed).
- (117) Further, the Commission notes that the internal documents of ST²⁰⁰ show that it was fully aware of the fact that the *"real bandwidth available depends on the location and actual traffic load and that even with additional network capacity it would not be feasible to match fixed BB (DSL, FTTH)"*²⁰¹ or that *"QoS is not possible to guarantee for mobile broadband technologies"*²⁰². ST was thus fully aware of these drawbacks of mobile broadband connections. As also already pointed out in paragraphs 552 to 553 of the SO, contemporaneous documents from ST show that consumers perceived a large difference between fixed and mobile broadband connections for instance as regards stability of the network and availability of the services, which may be unavailable in a specific room of a house or a location where

¹⁹⁷ See Minutes of the meeting with Orange Slovakia on 3 June 2013, pt. 18, Doc ID3997.

¹⁹⁸ Paragraphs 279-280 of the reply to the SO, Doc ID3630.

¹⁹⁹ ST's reply to the SO, paras 279 s., Doc ID3630.

²⁰⁰ As described in detail in paragraph 551 of the SO, Doc ID3416.

²⁰¹ "[...]" [...] Meeting [...], Doc ID1294, p. 17.

²⁰² [...] presentation, Doc ID1897, p. 4.

the mobile signal is too weak to permit to connect to the internet whereas a fixed broadband would not show such deficiencies, which occur even in case the relevant network is fully operational.

- (118) Also, according to ST, Orange is the largest mobile operator in the Slovak Republic, exerting significant competitive pressure on ST's broadband services.²⁰³ However, if mobile broadband would provide the same quality of service as fixed broadband services²⁰⁴ as claimed by ST, Orange's decision to seek ULL access to ST's network²⁰⁵ and to invest into the costly and geographically limited roll-out of fibre network²⁰⁶ would not be a rational decision. This rather suggests that mobile broadband is not a sufficient substitute for fixed broadband services.
- (119) The Commission disagrees with the view taken by ST that mobile broadband was a comparable alternative to fixed broadband, notably as regards download rates or the reliability of the service²⁰⁷, and against this background, the Commission concludes that there was an appreciable qualitative difference between fixed and mobile broadband services available in the Slovak Republic throughout the infringement period.

5.1.2.1.2 Data usage profiles of fixed and mobile broadband services

- (120) If mobile and fixed broadband services were substitutes, they would be expected to show similar data usage profiles. The Commission, however, found evidence suggesting that the data usage profiles between fixed and mobile broadband services were appreciably different and increasingly so over time.
- (121) In that regard, the Commission refers to ST's internal presentation [...], where it is explained that²⁰⁸:
- The average monthly [...] of fixed broadband customers (download and upload) is significantly growing (from [...] GByte in 2007 to [...] GByte in 2008); whereas
 - The average monthly [...] of mobile broadband customers (Flash OFDM network technology) increased only slightly: it was [...] GByte in 2007, [...] GByte in 2008 and [...] GByte during the first half of 2009.
- (122) Moreover, it is manifest from the internal documents from T-Mobile Slovensko over time that there was a consumer demand for high (unlimited) data allowances, that is to say, the ability for users to consume large (unlimited) volumes of data, and that data allowance constitutes one of the decisive factors influencing actual customer choices²⁰⁹, for instance:

²⁰³ See for instance paragraph 508 of ST's reply to the SO, Doc ID3630.

²⁰⁴ During the meeting with the Commission services on 3 June 2013, Orange indicated that it had tried to persuade customers that mobile is a substitute, but customers realized that it is not the case (no stable transmission upload and download speeds as capacity depends on the number of users connected, which makes the cells shrink and leads to connecting customers to a neighbouring cell; this may again negatively impact on the quality of the connection). See recital (108).

²⁰⁵ See section 7. See also Orange's reply to RFI of 7 April 2009, Doc ID330, Questions 28 and 36.

²⁰⁶ See section 6.

²⁰⁷ See in particular ST's Issues Paper, Doc ID0953, paragraph 36, Supplementary Issues Paper, Doc ID1934, paragraph 58 and ST's reply to the SO, Doc ID3630, paragraphs 272-289.

²⁰⁸ Presentation "[...]" of 31 July 2009, Doc ID1904, p. 9.

²⁰⁹ Doc ID1892, p. 12 (December 2007), Doc ID1897, p. 3 (April 2008), Doc ID1901, p. 7 (April 2009), Doc ID1902, p. 9, 10, 13 (May 2009).

- T-Mobile's internal presentation of December 2007 emphasises that customers are asking for "(...) [...] *internet connection* ([...])"²¹⁰ and
 - T-Mobile's internal presentation of May 2009 shows that [...] " for most customers. In this regard, the same presentation stresses that "*Major negative aspects are those, [...]* " (emphasis added).²¹¹
- (123) Further, the average monthly volume of mobile data used by subscribers of Orange and T-Mobile and average monthly volume of DSL data used by subscribers of ST and Slovanet were as follows:

Table 9: The average monthly volume of data used by subscribers of Orange and T Mobile (mobile data) and ST and Slovanet (DSL data)

Average monthly volume of data by subscriber (GByte)	2006	2007	2008	2009	2010
T-Mobile ²¹²	[0-1] GB	[1-2] GB	[1-2] GB	[1-2] GB	[1-2] GB
Orange ²¹³	[0-1] GB	[0-1] GB	[1-2] GB	[1-2] GB	n.a.
ST's DSL subscribers ²¹⁴	[6-7] GB	[8-9] GB	[11-12] GB	[13-14] GB	[17-18] GB
Slovanet's DSL subscribers ²¹⁵	[6-7] GB	[5-6] GB	[6-7] GB	[7-8] GB	n.a.

- (124) The Commission observes that the difference between the average volumes of data actually consumed was very important: the average volume consumed by DSL subscribers of ST was between 8 and 12 times the average of that consumed by mobile subscribers. Similarly, the average volume consumed by DSL subscribers of Slovanet²¹⁶ was several times the average of that consumed by mobile broadband subscribers. This suggests an important difference in terms of the actual usage being

²¹⁰ Doc ID1892, p. 12.

²¹¹ Doc ID1902, p. 13.

²¹² Doc ID1858, p. 1 and Attachment Q5_1, p.1, ST's reply to the request for information of 31 May 2011, Doc ID3246. The Commission observes that these figures are slightly below those found in the internal documents for T-Mobile Slovensko. However, the order of magnitude is the same, especially when compared to the actual data usage of fixed broadband subscribers.

²¹³ As exact figures were considered confidential, Orange agreed with the Commission on approximate ranges for the exact figures as indicated in doc ID3151, p.1.

²¹⁴ ST's reply to RFI of 4 December 2009, Attachment Q5 Doc ID1858, p. 1.

²¹⁵ Reply to follow-up question on DSL data volumes of 24 November 2009, Doc ID1684.

²¹⁶ Moreover, Slovanet constrained actively the actual data usage of its customers using specific aggregation network parameters and/or by implementing a fair use policy. Slovanet did so because the price of Slovak Telekom's wholesale products on which it depended to offer DSL based broadband services was based on the actual data volumes consumed, Doc ID1684.

made between DSL based broadband accesses and mobile broadband accesses. This also indicates that most of DSL and mobile users had different data consumption.

- (125) These Commission findings are in line with the recent conclusions of TUSR. In its recent analysis, TUSR for instance stresses that an average user of mobile broadband access *"transmitted approximately 10 times less data per month than an xDSL access user and incomparably less than FTTx access users"*.²¹⁷
- (126) The Commission also requested ST to provide a limited number of key statistical aggregates (arithmetic average (the mean²¹⁸), the deciles²¹⁹ and standard deviation)²²⁰ of data volumes used by its fixed and mobile subscribers²²¹. This data also provides evidence that ST's DSL and T-Mobile's broadband subscribers had distinctively different data volume usage patterns. For instance every decile in the distribution of data volume for 2006 is between [100% and 800%] higher for DSL users than for mobile broadband users.²²² It shows that the two distributions are far apart and the spread between the two distributions increases consistently over time. The Commission also observes that the spread between DSL and mobile mean substantially increased over the time.
- (127) Moreover, the data on statistical aggregates indicates that low proportion of DSL users (potential 'marginal' customers) were in a position to switch to mobile broadband in terms of data consumption. For instance, in 2010 only [10-20]% of DSL customers used less than [1-2] GB whereas [60-70 %] of mobile customers used less than [1-2] GB (and [80-90]% less than [3-4] GB). Also in 2009 only [30-40 %] of DSL customers used less than [2-3] GB (and about 2 GB in 2008) whereas [80-90]% of mobile customers used less than [2-3] GB (and [2-3] GB in 2008).
- (128) ST presented evidence based on the survey conducted by [...], according to which the fixed and mobile connections are used, to a large extent, for the same purposes.²²³ Even if the Commission were to take the view that the survey data was informative throughout the infringement period, similar data usage patterns presented by ST do not prove the substitutability between mobile and fixed broadband services. They only show that fixed and mobile subscribers may use their connection for similar purposes, but not with the same intensity (indeed, data volumes consumed are not the same as evidenced in Table 9).

²¹⁷ Doc ID 4130 – TUSR's Analysis of Wholesale Market No. 5, notified under Article 7 of the Framework Directive consultation mechanism, case SK12012/1345, Graph 11.

²¹⁸ The arithmetic mean (or simply the mean) of a list of numbers is the sum of all of the list divided by the number of items in the list.

²¹⁹ Having ranked a series of statistical observations in ascending order, the deciles of this statistical series are the values of each of the observations which divide this series in 10 groups of observations consisting in an equal number of observations.

²²⁰ The standard deviation of a series of statistical observations is the square root of its variance. Standard deviation is a widely used measure of the dispersion of statistical series.

²²¹ ST's reply to RFI of 4 December 2009, Attachment Q5 Doc ID1858, p. 1-9 and ST's reply to RFI of 31 May 2011, Attachment Q5 Doc ID 3246.

²²² See Table 43 of the SO, Doc ID 3416.

²²³ Figure 9 of ST's reply to the SO, Doc ID 3630.

- (129) Finally, Orange confirms that *"the main differentiation between mobile broadband and fixed broadband is based upon factors such as price (per MB or GB), cost and traffic of data"* (emphasis added)²²⁴.
- (130) Against this background, the Commission takes the view that data usage profiles were appreciably different and increasingly so over time during the infringement period. An appreciable difference in data usage profiles between fixed and mobile broadband services suggests that these services were used for different purpose and cannot be considered as substitutes.

5.1.2.1.3 Prices of fixed and mobile broadband services

- (131) When it investigated the similarity of prices, the Commission found evidence suggesting that mobile broadband services were meant to be offered at a substantial premium over fixed broadband services as it is apparent from a presentation of October 2005, that is to say predating the actual launch of mobile broadband services by T-Mobile Slovensko. This presentation refers to the business case of mobile broadband services and recalls one of the underlying assumptions of this business case: mobile broadband services were to be charged at a [...] % premium over their fixed equivalent²²⁵.
- (132) Secondly, it is manifest from successive internal documents of T-Mobile Slovensko that this plan actually became reality after the effective launch of mobile broadband services:
- *"Rychly Internet [is] a premium product over fixed line internet"*²²⁶
 - *"Rychly Internet 2 is currently sold at [...] % price premium over T COM offer of a similar bundle"*²²⁷
 - *"Mobility premium is [...] % compared to T-COM (RI2 vs. 4G Turbo1)"*²²⁸
 - *"Current TMSK mobility premium vs. fixed of some [...] % (vs. T-Com 2GB product)"*²²⁹
 - *"Current price positioning of F/M offers: mobility premium of [...] %"*²³⁰
- (133) Moreover, consumers are aware of the substantial price premium associated with mobile broadband as evidenced by the results of successive customer surveys reported to the management of T-Mobile Slovensko. Again, this awareness is well evidenced over time in the internal documents of T-Mobile Slovensko: price is known to consumers as disadvantageous compared to fixed broadband services²³¹.
- (134) Also, UPC (largest cable operator) does not consider mobile broadband as a substitute for fixed broadband because of *"less quality and higher prices"* (emphasis added). UPC also stresses that as regards its pricing *"only the offers of fixed*

²²⁴ Summary of a conference call with Orange as follow up to RFI of 28 October 2009, Doc ID1920, p. 2.

²²⁵ Presentation "[...]" of [...], Doc ID1871 p. 7.

²²⁶ Doc ID1892 p. 15 (December 2007).

²²⁷ Doc ID1894, p. 8 (February 2008), Doc ID1896, p. 7 (April 2008).

²²⁸ Doc ID1897, p. 3 (April 2008).

²²⁹ Doc ID1902, p. 8 (May 2009).

²³⁰ Doc ID1905, p. 18 (July 2009).

²³¹ Doc ID1892, p. 11, 14 (December 2007), Doc ID1894, p. 16, 28 (February 2008), Doc ID1902, p. 13 (May 2009).

broadband services from other companies are taken into account, as they are constraining our [UPC] offers".²³²

- (135) ST argues that a large proportion of ST DSL users paid similar prices (in terms of ARPA per GB) compared to T-Mobile²³³ customers and that those customers would consider DSL and mobile ('full connectivity' only) broadband services to be substitutes in terms of price.²³⁴ For this purpose, ST presented its own data on the ARPA²³⁵ per GByte (GB) actually paid by each individual subscriber.
- (136) The Commission investigated the ARPA per GB actually consumed (based on average volume of data used) of ST for DSL broadband services, of T-Mobile Slovakia and of Orange for their mobile broadband services. This has evolved as follows between 2006 and 2009²³⁶:

Table 10: ARPA per GByte for DSL and mobile broadband services

EUR per month per GB	2006	2007	2008	2009
ST DSL fixed broadband	[1-4]	[1-4]	[1-4]	[1-4]
T-Mobile Broadband	[10-25]	[10-25]	[10-25]	[10-25]
Orange Mobile Broadband	N/A	N/A	[10-25]	[10-25]

- (137) The Commission observes the striking difference between the ARPA per GB of data actually consumed. The ARPA per GB of data consumed for mobile broadband services of both Orange and T-Mobile was at least 10 times higher than ARPA per GB for ST's DSL based broadband services. Also, in a telephone conference on 30 November 2008, Orange Slovakia confirmed that "*the main differentiation between mobile broadband and fixed broadband is based upon factors such as **price (per MB or GB)**, cost and traffic of data*" (emphasis added)²³⁷.
- (138) Therefore, the Commission is of the view that its analysis of ARPA per GB indicates that the majority of DSL and mobile users face different prices, which also reflects striking differences in data usage profiles between fixed and mobile broadband services.²³⁸ There can certainly be a portion of DSL and mobile users which pay similar prices. Mobile users can reach the same ARPA per GB, in particular *via* cheap mobile programs (with low data allowance) and low data consumption. However, this finding cannot be interpreted as a proof of substitutability between

²³² Doc ID4146, Minutes of the conference call with UPC of 31 July 2013, paragraphs 14 and 15.

²³³ The Commission notes that T-Mobile's data contains only 'full connectivity' (i.e the traffic through dongles/data cards).

²³⁴ Supplementary Issues Paper, Doc ID1934, paragraph 60 and Table 6 and ST's reply to the SO, Doc ID 3630, paragraphs 293-297. See also ST's reply to RFI of 12 July 2013, Doc ID3897, paragraphs 4 and 5 and Annex Q4.

²³⁵ Average revenue per access (ARPA).

²³⁶ For detailed calculation see paragraphs 573 and 574 of the SO, Doc ID3416.

²³⁷ Summary of a conference call with Orange as follow up to RFI of 28 October 2009 Doc ID1920, p.2.

²³⁸ See recitals (120)-(130).

fixed and mobile broadband services, nor does it mean that users of fixed broadband service considered mobile broadband as a substitute. Also, TUSR in its recent analysis stresses that *"the cheapest programmes [of mobile broadband] offered only 500 to 600 MB of prepaid data, while charging for data transmission beyond the extent of prepaid data. When customers would use such connections to the extent it is normal for connecting through xDSL, invoiced monthly payments for mobile broadband access would be several times higher than in the case of xDSL. Based on the above-mentioned, the Office [TUSR] observes that the services being compared have incomparable qualitative parameters"*.²³⁹

- (139) The Commission notes the reference made by ST to the decision of the Commission in case AT/2009/0970 under the Article 7 of the Framework Directive consultation mechanism, in which the Commission recognised that mobile broadband and DSL in the Republic of Austria are substitutable and that mobile broadband services impose an effective competitive constraint on fixed broadband services. ST particularly refers to Austrian telecoms regulator (RTR²⁴⁰) analysis of (i) the price elasticities between fixed and mobile broadband, (ii) the evolution of prices of fixed and mobile broadband and (iii) the price reductions introduced by mobile broadband operators. In that regard, ST argues that the same approach should be followed in the present case.²⁴¹
- (140) The Commission is of the view that the reasoning of the Austrian decision cannot be applied in the context of the present case. First, the Commission notes that an internal document of T-Mobile of February 2008 shows that the mobility premium (calculated as a percentage difference in prices of mobile data products compared to the average fixed broadband product indicating thus a price premium for mobile products compared to the fixed products) is negative in the Republic of Austria, where prices of mobile data products are lower than fixed products by around -35%, unlike the equivalent prices in the Slovak Republic.²⁴² Second, the Commission also notes that [T-Mobile's residential mobile broadband ARPA is higher than ST's DSL ARPA]²⁴³. Third, TUSR in its analysis of wholesale broadband access ("WBA") market emphasises that the situation in the Republic of Austria *"cannot be compared with the situation in Slovakia"*.²⁴⁴
- (141) Fourth, as to ST's argument that the same approach as in the Austrian case should be followed in the present case, the Commission takes the view that estimates of price elasticities presented by ST are not relevant regarding the product market definition in the present case²⁴⁵.
- (142) ST argues that the prices of comparable fixed and mobile products have moved together over time and that this illustrates demand-side substitutability between fixed

²³⁹ Doc ID4130 - TUSR Analysis of Wholesale Market No. 5, notified under Article 7 of the Framework Directive consultation mechanism, case SK12012/1345.

²⁴⁰ Rundfunk und Telekom Regulierungs-GmbH

²⁴¹ See ST's reply to the SO, Doc ID3630, paragraphs 298 and 302 and ST's reply to the letter of facts, paragraph 149.

²⁴² Presentation "[...]" Doc ID1894, p. 4, 6.

²⁴³ ST's reply to RFI of 28 October 2009, Doc ID1672, p. 2. See also Table 44 of the SO, Doc ID3416.

²⁴⁴ TUSR's Analysis of Wholesale Broadband Access Market No. 5 notified under Article 7 of the Framework Directive consultation mechanism, case SK/2012/1345, Doc ID4130.

²⁴⁵ See recitals (151)-(169).

and mobile products.²⁴⁶ The Commission notes that ST's analysis comprises a subset of ST's DSL and Orange mobile broadband products and that the prices of those products were decreasing over time.²⁴⁷

- (143) First, a downwards trend in prices cannot in itself be considered as proof of substitutability between fixed and mobile broadband services. In industries such as telecoms it is quite common that the prices decrease over time because the unit costs of services decrease due to reasons not necessarily related to the level of competition between services (for instance due to the economies of scale or learning curve process).
- (144) Secondly, the ratio between the prices of ST's Turbo 1 (DSL broadband service) and Orange's MI Mini (mobile broadband service)²⁴⁸ is decreasing, which indicates that the prices of those products diverged over the time. This would suggest that these products are not in the same relevant market.
- (145) Against this background, the Commission takes the view that prices and price developments in the present case do not allow to conclude that fixed and mobile broadband services are part of the same relevant market.

5.1.2.1.4 Switching between fixed and mobile broadband services

- (146) ST argues that "*mobile broadband [is one of] the main reasons for the declining growth of DSL*". This statement is made with reference to "*the switching behaviour of consumers from DSL*" and is said to be supported with market research data which "*demonstrate substantial switching from fixed to mobile broadband*". To prove its argument ST provided data as follows:
- the DSL annual churn rates (the proportion of DSL customers leaving ST) which are in the range of [5-10]% for 2006-2010²⁴⁹,
 - of which the proportion of customers leaving DSL for a mobile broadband services evolved as follows: [10-20]% (December 2006), [20-30]% (August 2007), [10-20]% (May 2009) and [10-20]% (November 2009)²⁵⁰.
- (147) The Commission observes that the switching data presented by ST show that the proportion of customers switching to mobile broadband in total DSL customers evolved as follows: [up to 5]% (December 2006), [up to 5]% (August 2007) and [up to 5]% (December 2009). This means that just about [up to 5]% of DSL customers switched to mobile broadband solutions in 2006-2009. Contrary to ST's view, the Commission does not consider this switching to be significant. Moreover, the share of customers switching to a mobile broadband solution significantly decreased after 2007. Also the proportion of customers switching to mobile broadband is well below the proportion of switchers to other fixed broadband technologies (each of them having substantially lower overlap with ST's DSL network than mobile networks):

²⁴⁶ ST's reply to the SO, Doc ID3630, paragraphs 303 and 304.

²⁴⁷ In its reply to the SO, ST itself points out "the significant downwards trend in ST's and other operators' retail broadband prices since 2007" (paragraph 454 of the reply to the SO, Doc ID3630).

²⁴⁸ See Figure 15 of ST's reply to the SO, Doc ID3630 and ST's Response to RFI of 1 August 2013, point 6, Doc ID 3897.

²⁴⁹ ST's reply to the SO, Doc ID3630, paragraph 311 and Table 12.

²⁵⁰ Supplementary Issues Paper, Doc ID1934, paragraph 63 and figure 1 and ST's reply to the SO, Doc ID3630, paragraph 312 and Table 13.

[65-75]% (December 2006), [50-60]% (August 2007), [60-70]% (May 2009) and [60-70]% (November 2009)²⁵¹. This means that more than two thirds of those customers leaving DSL during the infringement period preferred to switch to other fixed broadband services (cable-, fibre- and FWA-based).

- (148) ST argues that there was an exceptionally high rate of switching from DSL to mobile broadband in 2007 as T-Mobile and Orange invested heavily in the marketing of their mobile broadband products.²⁵²
- (149) However, the Commission notes that despite these "heavy" investments (as claimed by ST) the increase of the proportion of customers switching to mobile broadband services in total DSL customers increased from [up to 5]% (December 2006) to only [up to 5]% (August 2007).
- (150) Against this background, the Commission is of the view that switching evidence does not prove that fixed broadband services and mobile broadband services are part of the same relevant market.

5.1.2.1.5 Quantitative analysis which estimates retail demand for broadband internet access in the Slovak Republic presented by ST

- (151) In its reply to the SO, ST provides an econometric study which estimates retail demand for broadband internet access in order to draw inferences on market definition for retail broadband internet access in the Slovak Republic²⁵³ (hereinafter "[...]" *et al* or "*the study*"). [...] *et al* conclude that mobile broadband should be included in the relevant product market.²⁵⁴
- (152) [...] *et al* first estimate demand elasticities of different technologies at the observed prices in 2011. They then ask the question whether a hypothetical monopolist that owns all fixed broadband technologies would find it profitable to increase prices of all fixed technologies by 10%.²⁵⁵ The estimated elasticity of 1.99 for all fixed broadband technologies implies that this would not be the case if the hypothetical monopolist's margin exceeded 40%. A 5% price increase would be unprofitable if the hypothetical monopolist's margin exceeded 45%. Assuming a retail operating margin of 60%, [...] *et al* conclude a SSNIP would not be profitable for a hypothetical monopolist of all fixed broadband technologies and that the relevant market should include mobile broadband technology in addition to fixed broadband technologies.
- (153) The Commission considers that the study by [...] *et al* does not allow a meaningful conclusion on whether or not fixed and mobile broadband products are in the same relevant retail market during the infringement period. The reasons for this conclusion are discussed in detail below.

²⁵¹ ST's reply to the SO, Doc ID3630, Figure 18. Other fixed broadband technologies include DSL, Fibre, Fixed Wireless Access and Cable.

²⁵² ST's reply to the SO, Doc ID3630, paragraph 313 and footnote 194.

²⁵³ The analysis was prepared by Professor [...] and [...] (together "[...] *et al*"). [...] *et al*'s analysis focuses on estimating the price elasticities of broadband Internet access using discrete choice modelling. The full report by [...] *et al* with all results is provided in Annex V.2 of the reply to the SO, Doc ID3630. In ST's reply to the SO see in particular paragraphs 230-246.

²⁵⁴ ST also provided quantitative analysis of indirect constraints on the wholesale market arising from retail market switching by consumers to different broadband technologies. [...] *et al*'s analysis relies on the results of the demand estimation exercise conducted by [...] *et al*. For detailed assessment of [...] *et al*'s analysis see section 6.1.2.6.

²⁵⁵ So called SSNIP test (Small but Significant and Non-transitory Increase in Price).

- (154) The study is based on three datasets from 2010 and 2011 concerning the Slovak broadband market.²⁵⁶ The data used in the study purports to reflect the broadband technologies and prices available to Slovak households in different municipalities in 2011 as well as household's chosen technologies as of 2010/2011.²⁵⁷ However, there are a number of limitations as to how accurate this reflection is, even for 2010/2011. For example, the information of available technologies at the municipality level may not reflect a household's true choice set of technologies if some broadband technologies (for instance fibre, cable or WiFi) are not available to all households in the municipality.
- (155) Furthermore, it is clear that the different broadband technologies in the Slovak Republic have evolved significantly, in terms of availability, quality (such as speed), and price since 2005. In particular, mobile broadband was not available prior to 2006.²⁵⁸ Similarly, a fibre roll out started in 2007 and cable and DSL networks have been upgraded significantly in terms of speed offered during the infringement period. Prices of different technologies have also significantly changed over time.²⁵⁹ The study itself emphasises the developments in the Slovak Republic in recent years and acknowledges that "*(...) the availability of alternative technologies was limited before 2007 and many households did not have the same choice of technologies which they have now.*"²⁶⁰
- (156) In addition, an analysis based on data from 2010/11 might reflect the situation on the market at most in the latest part of the infringement period, but cannot provide insights into substitutability between different technologies (from households' perspective) in the other part of the infringement period.²⁶¹
- (157) Even if the Commission were to take the view that the data used by [...] et al was relevant to assess the substitutability of different broadband technologies during the whole infringement period (quod non), the fact would remain that the approach to market definition by [...] et al is inappropriate in the context of the present case against ST.
- (158) In cases which are brought under Article 102 of the Treaty, the SSNIP test would need to be applied using the competitive price as a starting point for the measurement of margins and demand elasticities. A SSNIP test which starts from observed prices would tend to lead to market definition that is wider than what one would find if the SSNIP test was performed at the (lower) competitive price if, as it will be typical in

²⁵⁶ (i) Data from a [...] telephone survey, conducted in April 2011 and July 2011, of a sample of Slovak households collecting information on households' current broadband connection and on household characteristics; (ii) a VUS database providing information on the availability of different internet technologies at the municipality level in the first quarter of 2010; and (iii) database of broadband tariffs collected in the second quarter of 2011.

²⁵⁷ Similarly, the constructed prices may not reflect actual prices of available technologies.

²⁵⁸ And as a share of all broadband subscriptions has evolved from 13% in 2006 to [...] in 2011 – see ST's response to RFI of 12 July 2013, Annex Q13 (only full connectivity is included).

²⁵⁹ ST itself emphasises downwards trend of broadband prices. See for instance ST's reply to the SO, Doc ID3630, paragraphs 593-595

²⁶⁰ [...] et al, page 18.

²⁶¹ Moreover, although the 2011 [...] survey data includes households that have had their current broadband connection for a number of years, an analysis of choices in earlier years (which [...] et al do not perform) would be based on a highly biased sample of households and hence unreliable. This is because the [...] survey contains no information on previous choices of households that have changed their connection at some point in time.

cases brought under Article 102 of the Treaty, the observed price is already inflated relative to the competitive price.²⁶² This is because margin and demand elasticity faced by the hypothetical monopolist would typically be lower²⁶³ at the competitive price than at the observed price. A SSNIP analysis starting from the correct competitive price would therefore tend to find narrower markets than the SSNIP analysis which (wrongly) starts from the (inflated) observed price. The fact that a SSNIP test analysis starting at an already inflated price will tend to lead to the wrong conclusion of wide relevant markets is called 'cellophane fallacy'. For this reason, the Commission does not normally rely on the SSNIP-test exercise in the context of cases which are based on Article 102 of the Treaty.²⁶⁴

- (159) In particular, the Commission's theory of harm in the present case is that ST's infringement made entry by AOs via ST's copper network artificially more difficult and negatively impacted the competitive structure of the market. This would moreover likely have caused other broadband providers (cable, WiFi or fibre operators) to lower their prices.
- (160) At the Oral Hearing held on 6 and 7 November 2012, ST argued that its market definition exercise did not suffer from the so-called cellophane fallacy, because ST had a share of less than [...] of fixed broadband accesses, there were alternative fixed broadband technologies to ST's network and the prices in the Slovak Republic were not higher than in neighbouring countries.
- (161) The Commission does not accept these arguments. In a market where ST controls the technology (xDSL) that accounts for [...] of the fixed broadband subscriptions on the retail mass market for broadband services offered at a fixed location and where ST's conduct was likely to foreclose AOs, the cellophane fallacy would remain an issue despite the existence of other fixed broadband technologies. Moreover, in the absence of ST's conduct the retail broadband prices in the Slovak Republic could have been lower²⁶⁵
- (162) In light of the foregoing, the Commission therefore concludes that a SSNIP test approach based on current (observed) prices is not appropriate to define the relevant market.
- (163) In addition to the data and conceptual problems discussed above, the results of the study also have a number of implications which cast doubt on the methodology and assumptions used as well as on the conclusions drawn by ST.
- (164) First, the results of the study suggest that even a hypothetical monopolist of all fixed and mobile broadband technologies would not find it profitable to increase the prices by 10%.²⁶⁶ At the Oral Hearing held on 6 and 7 November 2012, ST [...] that,

²⁶² *Notice on market definition*, paragraph 19.

²⁶³ The demand elasticity in absolute value.

²⁶⁴ ST's approach to market definition (subject to using correct estimates of demand elasticities and margin) would be appropriate in the context of a merger investigation, which seeks to define the relevant market with a view of subsequently assessing whether a merger within the defined market would likely lead to price increases.

²⁶⁵ See section 10.4.2.4.

²⁶⁶ According to [...] et al, the critical elasticity above which a monopolist will not find a 10% price increase profitable is [1.4-1.5] ([...] et al, footnote 1). The estimated demand elasticity for a candidate market of all broadband technologies in [...] et al's preferred specification is [1.50-1.55] at the national level ([...] et al, Table 8 at page 38). The elasticities at municipality level or in other regression

according to the logic of its study, this would imply that the market should be wider than all available broadband technologies taken together, without specifying what such additional technologies might be.²⁶⁷ ST's approach to market definition, including [...], would in its view be "conservative".

- (165) The Commission does not agree with this view. A conclusion that the market should be even wider than all available broadband technologies is highly implausible and casts doubt on the methodology or results of the study.
- (166) Second, according to ST's estimates, ST's margin²⁶⁸ would be close to the optimal margin of a monopolist in a wide market comprising all (fixed and mobile) broadband technologies²⁶⁹.
- (167) Third, according to ST's estimates, the prices of fixed broadband in the Slovak Republic would be above the price a hypothetical monopolist of all fixed broadband technologies (but without an interest in mobile broadband) would charge.²⁷⁰
- (168) The implications of [...] et al's study about the level of broadband prices in the Slovak Republic appear to be inconsistent with ST's position that consumers in the Slovak Republic benefit from intense competition between different broadband technologies. Moreover, while the Commission considers that the available pricing evidence, together with the other Commission findings on the likely impact of ST's behaviour on competition and thereby consumers, suggest that in the absence of ST's conduct the retail broadband prices in the Slovak Republic could have been lower²⁷¹, it does not consider that prices in 2011 (which is the period covered by the data of [...] et al) were close to or above monopoly levels.
- (169) Regardless of data period and the cellophane fallacy issues discussed above, the combination of demand elasticity and margin estimates of [...] et al has highly implausible implications (such as that the market should be wider than all available broadband technologies taken together). As a result, the Commission does not consider these estimates (or the conclusions drawn from them) to be reliable.
- (170) ST also argues that the conclusions from its [...] et al study are corroborated by [...] in 2011. ST concludes that the survey results confirm the conclusions in [...] et al.
- (171) The [...] survey may reflect customers' market behaviour and possibilities in 2011 (if correctly applied) but not in the early years of the infringement period. Further, the hypothetical price increase also starts from the current (observed) prices. Therefore,

specifications ([...] et al, Table 6 at page 32) are even higher. Therefore the SSNIP test approach proposed by [...] et al would lead to the conclusion that the market is even wider than all (fixed and mobile) broadband technologies.

²⁶⁷ ST only made a vague reference to "other entertainment products" (at the Oral Hearing).

²⁶⁸ ST assumes a contribution margin of [...]; according to ST, this margin is consistent with the contribution margin obtained from [...] - for details see paragraph 239 of ST's reply to the SO.

²⁶⁹ According to ST's demand elasticity estimate of [...] for all (fixed and mobile) broadband technologies, the optimal margin of a hypothetical monopolist over these technologies would be [...] % (this is calculated by the standard Lerner Index formulae which gives the optimal margin for the monopoly as one over the elasticity of demand, that is to [...]).

²⁷⁰ The margin for fixed broadband assumed by [...] et al is [...] %, while a hypothetical monopolist of all fixed broadband technologies would, at an aggregate elasticity estimate of [...] % for fixed broadband, lower the price to increase the number of customers until its (optimal) margin is approximately [...] % ([...]).

²⁷¹ See section 10.4.2.4.

the SSNIP question in the survey suffers from the same conceptual problems regarding data period and cellophane fallacy issues as the [...] et al study. As a consequence, the Commission considers the responses to the SSNIP question of the [...] survey uninformative for the market definition in the present case.

5.1.2.2. Conclusion on the exclusion of mobile broadband services from the retail mass market for broadband services

(172) Taking into account the factors above, notably an appreciable qualitative difference between fixed and mobile broadband services, an appreciable difference in the data usage patterns of fixed and mobile broadband users and the fact that prices and price developments do not allow to conclude that fixed and mobile broadband services are part of the same relevant market, the Commission takes the view that DSL broadband services in the Slovak Republic are not subject to sufficient price and performance competition from mobile broadband services. Accordingly and in the absence of supply side substitutability between mobile and fixed broadband services, the Commission concludes that mobile broadband services in the Slovak Republic are in a market distinct from that of fixed broadband services.²⁷² This view is also taken by the Slovak regulator, TUSR, in its analyses notified to the Commission under the article 7 of the Framework Directive consultation mechanism²⁷³. The exclusion of mobile broadband services from the relevant market is also in line with the Commission's decisional practice.²⁷⁴

(173) The Commission concludes that the relevant product market includes retail broadband services provided *via* DSL, fibre, cable TV and FWA networks. Mobile broadband services are not included in the relevant market. The existing differentiation of various products and technologies within the overall fixed-line retail broadband market (for instance lower-end FWA as compared to high-speed fibre) will be taken into account when relevant for the assessment of the case²⁷⁵.

5.1.3. *The wholesale market for access to unbundled local loops*

5.1.3.1. Introduction

(174) This section of the decision will define the relevant product market for wholesale access to unbundled local loops ("ULL") in the Slovak Republic. It also explains why indirect constraints stemming from retail competition by broadband service providers who use other local access infrastructures (fibre, television cable ("cable"), fixed wireless access technology ("FWA") and possibly also mobile broadband access) to provide broadband retail services to end users by way of self-supply are of no relevance for the definition of the wholesale market but will be taken into account in the analysis of dominance²⁷⁶.

²⁷² See recital (100).

²⁷³ Case SK/2011/1210 (Doc ID3170 and Doc ID 3169) and Case SK/2012/1345 (Doc ID4130).

²⁷⁴ See the Commission Decision of 22 June 2011 in Case COMP/39.525 - *Telekomunikacja Polska*, paragraph 598.

²⁷⁵ See for instance section 6.

²⁷⁶ See in particular the Commission's comments in cases assessed under Article 7 of the Framework Directive consultation mechanism, where the Commission stressed relating to NRA's proposals to assess indirect constraints at the stage of market definition that indirect constraints should not be assessed in the context of market definition, but in the context of the analysis of dominance (in the context of regulation this is called Significant Market Power ("SMP")); see cases UK/2003/32 and

- (175) In the cases *Deutsche Telekom*²⁷⁷ and *Wanadoo España vs. Telefónica*²⁷⁸ the Commission has already concluded that the market for access to the unbundled local loop (ULL) is a relevant wholesale access product market.
- (176) In the same vein, the Commission Recommendations 2003/311²⁷⁹ and 2007/879/EC²⁸⁰, which are based as regards the definition of relevant product markets, on competition law principles,²⁸¹ clarify that ULL is a separate relevant wholesale product market. All European regulators when analysing the relevant wholesale markets in their respective Member States under the regulatory framework for electronic communications²⁸² came to the conclusion that the market for ULL access is a distinct relevant wholesale product market. The Slovak regulator (TUSR) came to the same conclusion when reviewing the wholesale markets for broadband services in its respective decisions notified to the Commission pursuant to Article 7 Framework Directive consultation mechanism²⁸³. ST did not contest TUSR's market analysis in which TUSR identified a specific wholesale access to ULL market and in which TUSR also found that ST holds significant market power ("SMP"), which is the equivalent to dominance under Article 102 of the Treaty²⁸⁴.
- (177) In the following section the Commission will analyse alternative wholesale access products to ULL available in the Slovak Republic during the infringement period.

UK/2003/733; FI/2012/1328-1329; PT/2008/850-851; CZ/2012/1322 in particular pt. 45 et seq., in which the Commission refers in this regard also to point 44 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002. This principle was initially laid down in Case 6/72 Europemballage Corporation and Continental Can Co Inc v Commission [1973] ECR 215 at para 32.

²⁷⁷ Commission decision of 21 May 2003 in Cases COMP/37.451, 37578 and 37.579 – *Deutsche Telekom AG*, OJ L 263, 14.10.2003, p. 9 et seq., 19, pts. 64 et seq.

²⁷⁸ Commission decision of 4 July 2007 in Case COMP/38.784 – *Wanadoo España/Telefónica*, sections 3.1 and 3.2.

²⁷⁹ Commission Recommendation 2003/311/EC on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European parliament and of the Council on a common regulatory framework for electronic communications networks and services ("Commission Recommendation on relevant markets"); OJ L 114, 8.5.2003, p. 45.

²⁸⁰ Commission Recommendation 2007/879/EC on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European parliament and of the Council on a common regulatory framework for electronic communications networks and services ("*Commission Recommendation on relevant markets*"); OJ L 344, 28.12.2007, p. 65.

²⁸¹ Art. 15 (2) 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 L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37 and Regulation 544/2009, OJ L 167, 18.6.2009, p. 12.

²⁸² See e.g. Art. 7 cases: PL/2006/418, PL/2006/472, FR/2008/0780, FR/2008/0781, FI/2008/0839, FI/2008/0848, CY/2009/0869, CY/2009/0870 and FI/2009/0900, PL/2010/1137, PL/2011/1184.

²⁸³ See cases SK/2004/0107 (ULL), SK/2012/1308 (ULL, second round).

²⁸⁴ TUSR first instance Decision No. 205/14/2005, dated 8 March 2005, Doc ID0948. Following ST's appeal, the TUSR Chairman adopted a second instance Decision No. 63/01/2005 of 14 June 2005, available at <http://www.teleoff.gov.sk/index.php?ID=146>. TUSR Rozhodnutie o rozklade č. 63/01/2005 zo 14 júna 2005, the details of the modifications are set in the decision. Doc ID3124, which became final and entered into effect on 14 June 2005. For further details see also section 4.3.4.1 of the SO Doc ID3416.

(178) ST has not contested the Commission's assessment in the SO that none of the other wholesale local access technologies is a direct substitute to wholesale access to ST's ULL.

5.1.3.2. Access to unbundled local loops (ULL)

(179) The wholesale access to ULL consists of the physical access to end users *via* the traditional twisted pair of metallic (in most cases copper) wires, which connect the end user's premises (household or office) to a local exchange of the incumbent, which is in most cases a main distribution frame (MDF). There are two types of wholesale access to ULL: full unbundled access and shared access to the local loop. With the full unbundled access to the local loop AOs can use the full frequency spectrum of the twisted metallic pair. With the shared access the AO can use the non-voice band frequency spectrum of the twisted metallic pair and the incumbent retains the narrowband part of the frequency spectrum for fixed telephony services. In both cases AOs do not rely on any active equipment of the incumbent and have thus the possibility to use the frequency spectrum made available according to their own business plan.

(180) The following sections will analyse whether from a demand and supply side point of view other technologies are substitutes for ULL wholesale access.

5.1.3.2.1 Unbundling of fibre networks is not part of the wholesale market for unbundling metallic local loops

(181) In view of the fact that ST's and Orange' fibre network, the biggest alternative local access networks in terms of household covered after ST's ULL network it is necessary to consider whether access to them could be a potential substitute for the access to ST's ULL.

(182) Since a significant fibre roll out started in 2006, this local access technology will be considered for the purposes of market definition as of 2007.

(183) As discussed in section 4.3, currently several operators (national or regional) offer retail broadband services over fibre networks in the Slovak Republic. The largest AO of a fibre local access network, Orange, started to build this local access network in the years 2006-2009²⁸⁵. The coverage of Orange's fibre network in terms of households amounted to over 300 000 households in 17 cities at the end of 2009²⁸⁶. ST followed shortly with its fibre network roll out targeting the most densely-populated areas, since this is where costs are lower²⁸⁷. ST's FTTx network covered 315 000 households in 19 cities at the end of 2009²⁸⁸ and by the end of 2010 the number of households with the option to use services provided over ST's fibre network reached 338 000 in 22 cities²⁸⁹. Slovak Telekom's optical services were also available in selected development projects outside these cities. The coverage of the

²⁸⁵ Minutes of the meeting with Orange Slovensko, a.s. on 3 June 2013, p. Doc ID 4189, pt. 8.

²⁸⁶ Annex to the Third Issues Paper, Doc ID2405, p. 14.

²⁸⁷ See ST's additional information regarding the competition in fibre in the Slovak Republic following the Commission's request at the meeting of 2 October 2009, Doc ID1636, p. 1; Minutes of the meeting with Orange Slovensko, a.s. on 3 June 2013, p. Doc ID4189, pt. 8.

²⁸⁸ See ST's Annual Report 2009, Doc ID2877, p. 9 and Annex to the Third Issues Paper, Doc ID2405, p. 14.

²⁸⁹ See ST's Annual Report 2010 at:
http://www.telekom.sk/swift_data/source/eng/pdf/annual_report_ST_2010.pdf

fibre networks of ST and Orange is significantly overlapping, because both operators have focused on deploying fibre in larger cities and densely populated areas, but there are still some limited areas within these cities/areas where only xDSL is available²⁹⁰.

- (184) There exist also other providers of broadband services through FTTx networks in the Slovak Republic such as Antik, SWAN and Slovanet²⁹¹ and further operators, which have built and are still building fibre access networks. All of these operators which are focussing on much more limited areas, such as the households located in a region, a few cities or certain housing areas, have much smaller networks in terms of households covered than the above mentioned operators.
- (185) As regards the substitution of local access *via* ULL and *via* fibre and their possible inclusion into one relevant wholesale market, it should be noted that TUSR proposed to mandate such access to ST's fibre network for the first time in 2011 in its draft decision notified to the Commission, which was, however, never adopted by TUSR.²⁹² Only on 15 October 2012, long after the period subject to this decision, TUSR adopted a decision in which it designated ST with Significant Market Power²⁹³ ("SMP") and mandated wholesale access to ST's metallic and fibre local access network²⁹⁴.
- (186) Furthermore, according to TUSR²⁹⁵ and AOs,²⁹⁶ most of the fibre networks in the Slovak Republic are based on a GPON²⁹⁷, a "*point to multipoint network*" architecture. Although in the future some forms of unbundling of point-to-multipoint networks will be possible (for example wavelength unbundling or the unbundling at the concentration point where the one fibre connected to the optical exchange is split into several dedicated fibres per end-user), this is not the case for the period covered by this decision.
- (187) Orange, the AO with the largest FTTH network, confirmed that it is not possible to unbundle its GPON network due to a lack of capacity in its passive fibre infrastructure for more than one provider of broadband services²⁹⁸. Orange

²⁹⁰ See ST's additional information regarding the competition in fibre in Slovakia following the Commission's request at the meeting of 2 October 2009, Doc ID1636, p. 2. See also in this respect TUSR's Analysis of the wholesale market No. 4 published in August 2011, ID3170, p. 14 (case SK/2011/1210). See also the last version of TUSR's Analysis of the wholesale market No. 4 published in January 2012, ID3169, p. 16.

²⁹¹ In 2011, Antik had fibre networks in at least part of 7 Slovak cities, SWAN in 10 cities and Slovanet in 6 cities (see TUSR's Analysis of the wholesale market No. 4, published in January 2012, ID3169, p. 67).

²⁹² Case SK/2011/1211; the notified draft measure was never adopted due to a legal challenge.

²⁹³ The term Significant Market Power is a synonym for dominance; see Article 14(2) of the Directive 2002/21.

²⁹⁴ See case SK/2012/1308; TUSR issued a the first instance SMP decision number 1679/OER/2012 on 26 July 2012 and second instance SMP decision number 216/PÚ/2012 on 15 October 2012, see letter of TUSR to the Commission informing it of the adopted regulatory measures published in the Circa data base.

²⁹⁵ See in this respect TUSR's Analysis of the wholesale market No. 4 published in August 2011, Doc ID3170 (case SK/2011/1210). See also the last version of TUSR's Analysis of the wholesale market No. 4 published in January 2012, Doc ID3169.

²⁹⁶ Reply by Slovanet to RFI 29/06/2009, Doc ID0815 and Orange, Attachment H2 Doc ID2594.

²⁹⁷ Gigabit Passive Optical Network.

²⁹⁸ Orange's Reply to RFI 29/06/2009, Attachment H2 Doc ID2594, question 2a.

underlines that WDM (wavelength-division multiplexing) could not be used either for unbundling as its active and passive infrastructure is not equipped with the devices that would allow the deployment of WDM. Orange considers that even if it would make the necessary investment in order to enable WDM on its network, this would not be an optimal access technology in terms of price/quality ratio. This is also the view of Slovanet²⁹⁹. As regards other solutions than WDM, unbundled third party access to its fibre loops would make it necessary for Orange to build a parallel PON infrastructure to connect the final customers concerned, which would require an extremely high investment³⁰⁰. In addition, Orange did not receive any requests from AOs to access its fibre loops³⁰¹. All these considerations show that switching to Orange's network is not a substitute for access to ST's ULL. Hence, unbundled access to Orange's fibre local access infrastructure is not part of the relevant market.

- (188) Other fibre networks in the Slovak Republic are of a small scale³⁰², mostly in parts of larger cities or newly built housing estates³⁰³. At the beginning of 2009, all fibre networks taken together covered around 20% of all households³⁰⁴. This is very limited compared to the coverage of ST's ULL network which covers [...] of all households throughout the period covered by this decision³⁰⁵. In addition to the limited coverage of fibre networks, the same technical limitations as addressed with regard to Orange's network apply also to other fibre networks using a GPON technology. No AO ever considered in the period covered by this decision to access the market this way, even if it was only interested in having access to a regionally limited customer base. It follows from the above that even if fibre network operators were in 2010 in a position to deliver fibre-based broadband retail services by way of self-supply to around 20% of the Slovak households, these local fibre access networks are not accessible for an AO. The fibre networks present in the Slovak Republic were thus not available alternative sources of supply for AOs wishing to access existing fibre local access loops and are thus not on the same market as wholesale access to ULL. Also from a supply side point of view, neither ST nor any other of the fibre network operators offers wholesale access to its local fibre loops.
- (189) Finally, the investigation has revealed that during the period under investigation no fibre operator, including ST, has ever offered wholesale access to other operators, which is also confirmed by the Slovak telecoms regulator, TUSR³⁰⁶.
- (190) As neither from a demand side nor a supply side substitutability point of view effective and immediately available wholesale offers exist in the Slovak wholesale local infrastructure access market, wholesale access to the fibre networks in the Slovak Republic is not a substitute to the wholesale access to ULL.

²⁹⁹ Reply by Slovanet to RFI 29/06/2009, Doc ID0815.

³⁰⁰ Orange's Reply to RFI 29/06/2009, Attachment H2 Doc ID2594, question 4a .

³⁰¹ Orange's Reply to RFI 29/06/2009, Attachment H2 Doc ID2594, question 2b.

³⁰² According to TUSR's Analysis of the wholesale market No. 4 published in January 2012, doc ID3169, p. 67, ST provides fibre services in 35 cities, Orange in 17 cities, Swan in 10 cities, Antik in 7 cities, Slovanet in 6 cities and other operators are active with fibre networks only locally.

³⁰³ TUSR's Analysis of the wholesale market No. 4 published in August 2011, doc ID3170, p. 33 (case SK/2011/1210); see also the latest version of the analysis of January 2012, doc ID3169, for example pages 43 and 67.

³⁰⁴ OECD Broadband Portal, FTTH/B coverage (up to 2009), doc ID3356.

³⁰⁵ See above section 4.6 on network coverage. See also in this respect case SK/2011/1210.

³⁰⁶ Case SK/2012/1308.

5.1.3.2.2 Unbundling of cable networks is not part of the wholesale market for unbundling metallic local loops

- (191) UPC has the largest cable network in the Slovak Republic, which covers densely populated areas. In 2008 UPC covered with broadband almost 395 000 households³⁰⁷ and in August 2010 399 000 households, that is to say 24% of all households in the Slovak Republic³⁰⁸.
- (192) From a technical point of view, cable network operators in the Slovak Republic are not in a position to provide ULL access to third parties over their cable infrastructure³⁰⁹. UPC explains that under the term "local loop" it understands a "twisted pair of copper wire dedicated to individual customer so the unbundling of such local loop means transferring operation and management of such lines among operators"³¹⁰. Furthermore, the cable net of UPC is a network using the same coaxial cable to connect all end users in a certain geographic area. It is a shared network. A cable network does not have a dedicated local loop comparable to the local loop in a traditional copper or a FttH network connect the premises of the end user to a network concentration point, such as an MDF, in which the AO could dispose freely of the non-voice band frequency spectrum. Unbundling of UPC's cable network is therefore technically not possible. Consequently, there is no supply side substitutability between ULL access and TV cable local access.
- (193) In addition, as one AO points out³¹¹, it would be necessary for an AO to buy access to the entire cable network and not only to a part of it, because the coaxial network does not enable selective access points, as it is one homogeneous complex network.
- (194) Moreover, none of the AOs has an interest in using wholesale access to cable networks to reach its customers³¹² as these networks only provide a limited coverage to households in densely populated areas³¹³.
- (195) Hence, the cable networks in the Slovak Republic are not a substitute to wholesale access to the ULL.
- (196) This conclusion is consistent with the approach followed in the *Deutsche Telekom*³¹⁴, *Telefonica*³¹⁵ and *Telekomunikacja Polska*³¹⁶ decisions and with the regulatory principles and practice established by the Commission and the Slovak

³⁰⁷ Annex to the Third Issues Paper, Doc ID2405, paragraph 28.

³⁰⁸ Issues Paper, Doc ID0953, paragraph 34.

³⁰⁹ UPC's replies to the requests for information of April 2009 and October 2010, Doc IDs 0800 and 2540, Non confidential Doc ID3107.

³¹⁰ "Pod pojmom účastnicke vedenie rozumieme skrúcaný medený pár vlákien, ktoré sú dedikované individuálnemu zákazníkovi a teda uvoľnenie takéhoto účastnickeho vedenia znamená prenos obsluhovania a spravovania takéhoto vedenia medzi operátormi.", UPC's Reply to RFI 29/06/2009 Doc ID0800

³¹¹ Slovanet's Reply to RFI of 29/06/2009, Doc ID0815, p. 5.

³¹² Replies to RFI by Orange, Slovanet, Dial Telecom, SWAN, WiMax, Energotel and ZSR (Doc IDs 0807, 0815, 0805, 1469, 0945, 0803 Non confidential ID3040 and 0796).

³¹³ ST itself speaks about UPC's much lower coverage in its internal document of 12 April 2006 "[...]", Doc ID0171, p. 76.

³¹⁴ Case COMP/ 37.451, 37.578, 37.579 – *Deutsche Telekom AG*, paragraphs 87-88.

³¹⁵ Commission Decision of 4 July 2007 in Case COMP/38.784 – *Wanadoo España/Telefonica*, paragraphs 196-207.

³¹⁶ Case COMP/39.525 *Telekomunikacja Polska*, paragraphs 620-621.

regulator³¹⁷. As pointed out by the Commission in its Explanatory Note accompanying the Recommendation on relevant markets³¹⁸, "*wholesale access to [cable] networks does not constitute a direct substitute for DSL-based wholesale access products from the demand or the supply side, so that inclusion in the same product market is not justified.*"³¹⁹

5.1.3.2.3 Unbundling of the fixed wireless access (FWA) networks in the Slovak Republic is not possible and is not part of the market for access to ULL

- (197) Wireless local access is a technology which offers Internet Service Providers direct access to final customers *via* radio frequencies without having to either lay cable to connect to their customer's premises or to rely on wholesale access offered by other local access network operators.
- (198) According to ST's internal document "[...]"³²⁰ there are some 200 local or regional broadband providers operating a range of different technologies, amongst which FWA networks. The research institute VÚS for statistical purposes is monitoring in total around 800 operators, most of which are very small FWA operators (mainly WiFi in non-licensed spectrum band), often with only a few individual connections on a local level³²¹. These radio access networks remain until today fragmented.³²²
- (199) Moreover, as already set out in the SO,³²³ it is technically not possible to "unbundle" lines in a FWA network. Due to the need to rely on the FWA network operator's active electronic equipment, such an access would not offer the same degree of over the local wireless access connection as the operator who has built the FWA network has. Furthermore, limitations of this technology do not allow to provide the same range of products as *via* ULL; for instance IPTV or VoD services cannot be supplied over these networks whereas they can be provided over a copper, fibre or cable local access networks³²⁴. In addition, the transmission quality of FWA may be affected by visibility and weather conditions³²⁵, these networks require higher installation costs for the users and involve higher network operating costs for the operators³²⁶. Furthermore, FWA networks are usually operated by small operators, apart from WiMax³²⁷, with insignificant national presence, some covering only a few streets of a

³¹⁷ Cases SK/2004/0107, SK/2009/0929 and SK/2011/1210.

³¹⁸ SEC(2007)1483 Final, [C(2007)5406], p. 34.

³¹⁹ For existing wholesale customers, migrating from DSL-based access to cable-based access would give rise to substantial switching costs so that switching is unlikely to occur in reaction to a small but significant non-transitory price increase. Suppliers would also be in a position to price discriminate between existing wholesale customers and wholesale customers that have not yet committed to a particular technology so that existing customers would not benefit from any constraining effect of uncommitted customers.

³²⁰ ST's Reply to RFI of 17/07/2009 Attachment Q17 Doc ID1400.

³²¹ Doc ID2776 confirmed by VUS in Doc ID2774.

³²² WiMAX Telecom Slovakia's reply to the request for information of 7 April 2009, Doc ID0272, p. 1, 3.

³²³ SO Doc ID3416, points 623 et seq.

³²⁴ Replies to RFI of 07/04/2009 Dial Telecom/eTel, Doc ID0287, p. 22; Slovanet, Doc ID0418, p. 13 or WiMax, Doc ID0272, p. 8.

³²⁵ Slovanet Reply to RFI of 07/04/2009, Doc ID0418, p. 6.

³²⁶ Replies to RFI of 07/04/2009; Slovanet, Doc ID0418, p. 13; WiMAX, Doc ID0272, p. 8 and GTS's reply to question 10, Doc ID0375.

³²⁷ According to its own reply to the request for information, Wimax has a coverage of 250,000 households at the beginning of 2009, Doc ID272, p.7). However, it has to be noted that its market share in the overall broadband market remains well below 5%.

town or selected parts of a specific region³²⁸. Due to the fragmented ownership structure and the limited geographic coverage of most of these individual networks, a new entrant wishing to offer retail broadband access in an appreciable portion of the Slovak territory would have to turn to many local/regional FWA operators for wholesale access which raises transaction costs and is a considerable constraint on demand-side substitution between FWA and copper based wholesale access. For all these reasons already from a demand side point of view FWA is not a substitute to ULL and access to a FWA network is not in the same relevant market as ULL access.

- (200) As regards supply-side substitutability, there are no offers of any FWA operator similar to ST's wholesale access to its ULL.
- (201) As a wholesale access to FWA networks does not exist, operators would have to build their own FWA network. In case the operator would like to build a network using the Wimax technology to offer wireless retail broadband products, it would need first to get a licence whereas in case of the use of WiFi technology this is not a requirement. WiFi connections are currently only offered by small local operators in the Slovak Republic. TUSR in its review of the ULL market in the Slovak Republic came also to the same conclusion: neither access to retail customers through FWA connections based on individual licenses to operate a Wimax network nor *via* the use of WiFi networks are part of the relevant product market³²⁹.
- (202) In its reply to the SO ST has not contested this analysis.³³⁰
- (203) In conclusion, there is neither supply- nor demand-side substitutability between FWA and ULL access products to warrant the inclusion of FWA and ULL into the same relevant product market.

5.1.3.2.4 Unbundling of the mobile networks is not part of the wholesale market for unbundling metallic local loops

- (204) In the reply to the SO ST criticised that the Commission had overlooked wholesale access to mobile networks as a substitute to ULL, however, without explaining why it considers that such access can be considered a substitute to ULL.³³¹
- (205) Indeed, some mobile network operators have concluded agreements with Mobile Virtual Network Operators (MVNOs), which do not dispose of a network of their own. An operator becomes an MVNO by entering a business agreement with a mobile network operator to obtain bulk access to network services at wholesale rates. It sets its retail prices independently.
- (206) However, as already set out in the SO³³², the MVNO gets only access to the MNO's network and services and resells these services. It has no control over the infrastructure of the MNO which ensures the local connection of the antenna network to the end customer, including the necessary frequencies needed for the transmission of the mobile signal, and can thus not freely use the mobile connections which

³²⁸ See recital (33) and Table 2.

³²⁹ TUSR's Analysis of the wholesale market No. 4 published in August 2011, doc ID3170, pages 18-20. (case SK/2011/1210). See also the last version of TUSR's Analysis of the wholesale market No. 4 published in January 2012, ID3169, p. 21-25.

³³⁰ ST's reply to the SO Doc ID 3630, points 397 et seq.

³³¹ ST's reply to the SO Doc ID 3630, points 398, first bullet point.

³³² SO, pts. 629, Doc ID3416.

connect the MNO's network to a specific customer and to provide mobile broadband services to this specific customer which are different from those of the MNO, for instance which offer greater up - or download speeds as the MNO's offers to its own customers. This is due to the fact that the MVNO has no control over any of the MNOs network parameters.

- (207) Moreover, technically it is impossible to "unbundle" the mobile connection over which the data traffic from and to a specific end user is transmitted. As mobile users are constantly moving and expecting to be connected to the mobile network anytime anywhere within the reach of the relevant mobile network, such unbundling would require that the MVNO builds its own backbone connections to all masts within the MNOs network in order to be able to get a at least similar control over the local airwave connection to its own as a local loop unbundler gets to the customers of the fixed metallic lines which have been unbundled. This is neither technically nor economically feasible. Only access at a higher level of the MNOs network might be possible, but this does not, however, give the same level of control over the connection to mobile customers as access to the passive local loop connection. In any event, the limitations of the mobile technology do also not allow for providing the same range of products as *via* ULL, for instance IPTV and video on demand (see also section 5.1.2.1) and mobile broadband access cannot be considered as a substitute to ULL access.
- (208) In its reply to the SO ST has [ST's view on the Commission's claims made in the SO that wholesale access to ULL and mobile broadband access are not substitutes from a technical point of view].³³³
- (209) Finally, as has been demonstrated in the section on the retail markets concerned by this decision (see section 5.1.2), broadband services provided over mobile networks, whether the customer uses full or confined connectivity, are not substitutes for broadband retail services provided over fixed networks or FWA networks. Also from that point of view it has to be concluded that wholesale access to mobile networks is not a substitute for ULL access. The fact that Orange, the biggest mobile operator in the Slovak Republic, was seeking ULL access to ST's network and finally decided to roll out its own fibre local access network is strong evidence that these two types of access, ULL and access to a mobile network are not substitutes. Therefore, they do not belong to the same market. The Slovak regulator, TUSR, arrived at the same conclusion in its latest draft decision on market 4 under the Article 7 Framework Directive consultation mechanism³³⁴.

5.1.3.2.5 WBA (national (at IP-level) or regional (at ATM/Ethernet-level)) is not part of the relevant wholesale market in the Slovak Republic

- (210) WBA or bitstream access is a wholesale product providing data transmission capacity over the incumbent operator's network to AOs allowing the transmission of data between a national (in the case of IP-bitstream) or regional (in the case of ATM/Ethernet bitstream) traffic hand-over point accessible to an AO and an end-user connected to the incumbents local access network.

³³³ ST's reply to the SO Doc ID 3630, points 397 et seq.

³³⁴ See case SK/2011/1210 point B. d), (concerning ULL, second round).

- (211) WBA enables the AOs to adjust some technical features of bitstream transmission and to offer broadband retail services to their end-users.³³⁵
- (212) Compared to ULL, WBA does not allow an AO to influence most of the technical and quality parameters of the network connection,³³⁶ which relies on the incumbents backbone and active operating equipment and the local access lines to supply "better" types of services to its retail customers as ST (for instance high speed Internet, VoD or IPTV).
- (213) On the other hand, as already set out in the SO in pts. 631 et seq., ULL requires that AOs make significant investments in their infrastructure and equipment as they have to roll out their own backbone infrastructure to all MDFs to which the local loops of their retail customers are connected.
- (214) AOs wishing to use either national (IP-level) or regional (ATM or Ethernet-level) WBA have to invest much less in own infrastructure as they can interconnect in the Slovak Republic either at one interconnection point for national (IP-level) WBA with ST's network in Bratislava or they have to only set up a backhaul connection to the four regional interconnection points³³⁷ in case of regional (ATM/Ethernet-level) WBA in order to be able to reach all customers in the Slovak Republic within the reach of ST's DSL network.
- (215) An AO wishing to sell retail broadband services by using ST's ULL would need to build backhaul connections and install equipment (DSLAMs) in some or all of ST's main distribution frames (MDF) in the Slovak Republic. In June 2003 ST had [...] MDF sites in the Slovak Republic³³⁸ and in April 2010 ST reported that there were some [...] MDF sites in the Slovak Republic³³⁹.
- (216) GTS Nextra has indicated, *"based on a rough estimation, building access points to ULL with coverage duplicating the current coverage of ST's network would be extremely costly (hundreds of millions SKK³⁴⁰) and even high investments in marketing could not ensure enough customers to ensure effectiveness of the investments made. Investment to such a network would be time-demanding and return on investments would be uncertain."*³⁴¹ On top of this, the AO would have to cover other costs, such as collocation fees or monthly rental fees requested by ST or imposed by ST for the access to its ULL.³⁴²

³³⁵ ERG, Common Position on Bitstream Access, adopted on 2 April 2004 and amended on 25 May 2005, doc ID3373, p.4.

³³⁶ See e.g. SO para 399, (iii); ISPs purchasing the 2007 WBA could not change any parameters of the retail service. The ISP was offered predefined packages with maximum speeds and defined aggregation. See also ST's internal document [...], Doc ID1123, p. 6.

³³⁷ The Broadband Access Reference offer (BSA RO) of 4 April 2009, as further amended, foresees traffic hand over at ATM-level in four places in Slovakia (2 in Bratislava, 1 in Kosice and 1 in Banska Bystrica – see Annex 4 to the Reference offer – Collocation) and ST's reply to the request for information of 17 July 2009, Doc ID1079, p. 14.

³³⁸ ST's presentation [...], Attachment QIV_20 to ST's reply to Commission Decision of 3 September 2009, Doc ID1498, p. 6. This reflects the situation as at the beginning of the preparation of the Reference Offer for Unbundled Access to the Local Loop in Slovakia.

³³⁹ ST's reply to the request for information of 25 March 2010, Doc ID2079, p. 5.

³⁴⁰ The Slovak Republic switched its currency from the koruna to the euro on 1 January 2009, at a rate of 30.1260 korunas to the euro.

³⁴¹ GTS Nextra's reply to the request for information of 13 June 2008, Doc ID0035, p. 24.

³⁴² See section 5.1.3 on ULL.

- (217) Also other AOs refer to the high costs³⁴³ (one off fees and recurring monthly fees) and the cumbersome, long activation process³⁴⁴ of ULL, which taken together made it impossible for them to access the Slovak broadband access retail market *via* ULL, even after the changes of the RUO, which took place on 9 May 2009.
- (218) Wholesale access to ULL gives an AO the possibility to influence most of the technical and quality parameters, to innovate and, as it fully controls the local loop, to supply other and also better types of services to its retail customers than ST (for instance high speed Internet, voice, VoD), without interfering with other telecommunication services provided by ST and without the need to rely on ST's active equipment which are needed for ST's own broadband offers and also for the offers of those third party access seekers which rely on ST's wholesale broadband access offerings.
- (219) Therefore, the Commission concludes that in the Slovak Republic, like in all other Member States, wholesale access *via* ULL and wholesale access *via* WBA are not substitutes and therefore they are not in the same relevant product market.³⁴⁵
- 5.1.3.2.6 Conclusion on the definition of the relevant wholesale market for access to the unbundled local loops
- (220) As shown above, wholesale access to ULL is a relevant wholesale product market and there are no direct substitutes for it. This finding has not been contested by ST or DT in their replies to the SO.
- 5.1.3.3. No need to show indispensability of ULL as wholesale input for the provision of broadband retail services, as claimed by ST in the reply to the SO
- (221) In its reply to the SO ST³⁴⁶ (pts. 106 et seq., 402 et seq.) claims that there exist parallel infrastructures in the Slovak Republic which are able to provide retail broadband services in the Slovak Republic and that there is no need to define an upstream ULL market. In this regard ST refers to the *IMS Health* judgment³⁴⁷ and points out that a hypothetical wholesale market should only be identified (i) where the wholesale input, here ULL, is indispensable in order to carry out a particular business, here the provision of mass market broadband retail services, and (ii) where there is actual demand for the wholesale input on the part of undertakings which seek to carry out the business for which these inputs are indispensable.
- (222) In this regard the Commission notes that ST offers - following the regulatory obligations imposed on it by TUSR, which it has not contested - access to its ULL since 12 August 2005 when it published its RUO which was upgraded on 9 May 2009. In such a case where an operator provides a wholesale service, for which there is also demand³⁴⁸, the scenario as regards the existence of a wholesale market is not

³⁴³ Reply of Orange to RFI 29/06/2009, Doc ID0807; Slovanet, Doc ID0815.

³⁴⁴ Reply of Orange to RFI 29/06/2009, Doc ID0807.

³⁴⁵ See also Commission staff working document SEC(2007)1483 final accompanying the Commission recommendation on Relevant Product and Service Markets within the electronic communications sector, section 4.2.2, subsection "Wholesale inputs to broadband Internet access", paragraphs 10-11.

³⁴⁶ Doc ID3630.

³⁴⁷ Case C-418/01, *IMS Health* [2004] ECR I-5039, paragraph 44; Case CT-301/04 *Clearstream Banking AG*, [2004] ECR II-3155, paragraph 66.

³⁴⁸ For details, see paragraph 349 of the SO, table 28, Doc ID3416; the operator which has concluded after length negotiations a framework agreement was GTS. , Solavanet, Amtel, ŽSR and Vadium had only

the same as in the case *IMS Health*³⁴⁹, where the alleged dominant player was not providing the wholesale input necessary to offer a downstream service. The Commission does therefore in the present case not have to identify a (hypothetical) wholesale market; rather it has, as done in the previous section, to assess whether access to ULL is interchangeable or substitutable from an AO's perspective with other local access products by reason of the products characteristics, the prices and the intended use as foreseen in the Commission's notice on the definition of relevant markets for the purposes of Community competition law.³⁵⁰

- (223) However, even if indispensability would have to be shown in the present case in view of the need to define a relevant hypothetical ULL wholesale access market, the relevant first criterion for demonstrating indispensability is that there exists no readily available substitutes for ULL and secondly, that it is impossible to build a local access network which has the same coverage as the ST network³⁵¹.
- (224) As to the first criterion, it has already been shown above that there exist no direct substitutes for access to ST's ULL.
- (225) As to the second criterion, it should be noted that up to now no AO has been able to replicate the local access network of ST, which reaches [...] % of all households in the Slovak Republic, totally in terms of geographic coverage or at least to a sufficient extent in all areas where ST offers broadband services. Orange³⁵², which has rolled out its own fibre local access network in the Slovak Republic explained that it built this network in some of the densely populated areas where a reasonable payback of the investment could be expected from the viewpoint of a strategic investor (in a period of up to around 20 years), whereas Orange also informed that from an investor's point of view most of such investment would never have been realised, that is to say a network which has roughly a 15% population coverage³⁵³. Moreover, it pointed out that its own fibre local access network covers only dense areas, but not areas with remote houses.³⁵⁴ For other geographic areas in Slovak Republic Orange considers that under the prevailing conditions no further roll out of its network can be expected because of the low prospects of getting a return³⁵⁵. Orange underlined that for the areas outside its fibre network the xDSL infrastructure of ST is essential as it cannot be replicated.³⁵⁶ As regards WiMax, according to its reply to the request for information, it has coverage of 250 000 households at the beginning of 2009,³⁵⁷ which is less than 15% of all Slovak households. Experience with the building of parallel local access networks in the Slovak Republic shows that only networks covering a very limited part of the households could be rolled out.

concluded a confidentiality agreement with ST whereas Orange requested a change of the RUO prior to starting any negotiations.

³⁴⁹ Case C-418/01, *IMS Health* [2004] ECR I-5039, paragraph 45 et seq.

³⁵⁰ OJ C 372, 9.12.1997, p. 5, paragraph 7.

³⁵¹ See Court judgment 26 November 1998, case C-7/97, *Oscar Bronner*, pts. 44 to 46.

³⁵² Orange Doc ID4669-00043.

³⁵³ According to its own reply to the request for information, Wimax has a coverage of 250,000 households at the beginning of 2009, Doc ID0272, p.7). However, it has to be noted that its market share in the overall broadband market remains well below 5%.

³⁵⁴ Orange, Minutes on a meeting with Orange Slovensko on 03/06/2013, pts. 4 and 8, Doc ID 4492.

³⁵⁵ Orange, Minutes on a meeting with Orange Slovensko on 03/06/2013, pts. 4 and 8, Doc ID4492; Orange, reply to questions 4,5 and 6 10, 13 and 14, Doc ID3993.

³⁵⁶ Orange, reply to questions 10, 13 and 14, Doc ID3993.

³⁵⁷ Doc ID0272, p.7).

- (226) Slovanet also indicated that even for an operator which had the business plan to offer a full portfolio of broadband services to business and residential customers, access to ST's wholesale inputs was a prerequisite to generate the capital needed for the gradual construction of its own network, which even continued to exist after it had acquired WiMax Slovensko s.r.o., which covers 250 000 households, in 2011 through which it obtained a nationwide licence authorising Slovanet to implement FWA in the 3.5 GHz frequency.³⁵⁸
- (227) As to the second requirement about the existence of demand, it suffices to refer to the long lasting discussions which for instance GTS, Slovanet, Amtel, ŽSR and Vadium had with ST as regards access to ST's ULL³⁵⁹ and Oranges requests to ST and to TUSR to change the terms of the 2005 RUO, which also shows that Orange was also potentially interested in accessing ST's ULL.³⁶⁰
- 5.1.3.4. There is no rule requiring an analysis of the retail markets concerned first, before a wholesale market can be defined
- (228) ST claims that defining a wholesale market is not an aim in itself, but is only justified if there is a competition problem at the downstream market³⁶¹. ST's view refers to the way in which markets are to be analysed in the context of *ex ante* regulation. The Commission has indeed clarified that for the identification of markets susceptible to *ex ante* regulation the starting point is the definition of retail markets.³⁶² However, in the context of the present case – as explained above – where a wholesale market exists because of ST's offer described in further detail in the RUO and if there is also demand for ULL access from third parties (such as GTS or Slovanet), the issue is not to identify a market susceptible to *ex ante* regulation, but to analyse whether or not the services offered by ST and further described in the RUO can be substituted by wholesale accesses *via* other infrastructures or *via* self-supply.
- 5.1.3.5. The definition of the relevant market can take account of *inter alia* the legally binding regulatory obligations
- (229) ST claims in the reply to the SO³⁶³ that the Commission makes market definition "*depend*" on the existence of a regulatory obligation. ST points out that this approach would lead to the conclusion that if an access obligation is imposed with regard to a certain network, this network becomes part of the relevant upstream market and that

³⁵⁸ Slovanet, reply to question 2.7. during the conference call on 7.8.2013, Doc ID 3959.

³⁵⁹ As to GTS, see table 28 in the SO Doc ID 3416, GTS started negotiations with ST on the basis of the RUO on 7 December 2005 and continued until 18 December 2009 at the latest, when the first local loops were unbundled for GTS; as to Slovanet, see point 2 of the minutes on the conference call on 7.8.2013, Doc ID 3959; see also table 28 in the SO Doc ID 3416; Slovanet started negotiations with ST on 25 October 2005, discontinued them after a meeting with ST on 11 May 2006 and reentered negotiations in July 2010. As regards Amtel, ŽSR and Vadium negotiations started in 2005/6 and were abandoned lateron, see SO table 28 Doc ID 3416.

³⁶⁰ Orange's letter to ST dated 20 October 2005, Doc FO0299; Orange's submission to TUSR dated 20 October 2005, Doc ID0297, p. 6.

³⁶¹ ST's reply to the SO Doc ID 3630, paragraph 403ss.

³⁶² See point 2.1, 4th. paragraph of the Explanatory Note accompanying the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2001/21/ES of the European Parliament and the Council on a common regulatory framework for electronic communications networks and services, Second detion (C (2007) 5406, SEC(2007) 1483 final.

³⁶³ ST's reply to the SO Doc ID 3630, paragraph 406ss

conversely, in the absence of a regulatory obligation, if telecommunications operators do not voluntarily grant access to their networks, then these networks would not constitute a relevant market.

- (230) This reasoning has to be rejected. The approach followed in the current decision is the one followed in all other Article 102 of the Treaty cases where a national regulatory authority (NRA) had defined a relevant product market.³⁶⁴ The definition of the relevant product and geographic markets (and the finding of dominance) is carried out by the NRA by applying competition law principles as required by the relevant rules.³⁶⁵ This procedure was also followed by TUSR when defining the relevant market for wholesale access to ULL.³⁶⁶ This draft measure was notified to the Commission under the Article 7 of the Framework Directive consultation mechanism and endorsed by the Commission, for the first time shortly before the period covered by this decision,³⁶⁷ where TUSR found that the wholesale market for ULL access is a relevant product market and for the second time in 2012.³⁶⁸ Although ST has commented on both regulatory proposals and criticised the market definition by TUSR, which has rejected ST's arguments. ST has also introduced an appeal against the second round market review decision adopted by TUSR on procedural reasons. This appeal was rejected by the High court by decision of 26 March 2014.³⁶⁹ Both market reviews are therefore binding on ST.
- (231) ST's view that the Commission has to show the existence of a wholesale ULL access market in the present case which rests on ST's RUO as will be shown in the next recital, also absent the regulatory obligation (which ST has not challenged) would amount to simply ignoring that ST and AOs operate in the Slovak market within a legal framework applicable to ST and AOs which contributes to the competitive conditions under which they carry out their business and which makes the regulatory framework a relevant factor in the application of Article 102 of the Treaty, including for the purposes of defining the relevant markets.³⁷⁰
- (232) Furthermore, ST considers (paragraph 411 et seq.) that the Commission's reasoning is circular because the Commission has issued, for the purposes of *ex ante* regulation, a recommendation which defines *inter alia* a market for access to ULL³⁷¹ and that

³⁶⁴ Commission decision of 21 May 2003, Deutsche Telekom, OJ L 263 14 October 2003, p. 9, pts. 16-18; Commission decision of 4 July 2007 Wanadoo España vs. Telefónica, pts 120 et seq.; Commission decision of 22 June 2011, Telekomunikacja Polska), pts 599 et seq.;

³⁶⁵ See Article 15 (1), last sentence 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 L 108, 24.4.2002, p.33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation 544/2009 OJ L 167, 18.6.2009, p. 12; see also Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/ED of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344, 28.12.2007, p.65.

³⁶⁶ Case SK/2004/0107.

³⁶⁷ Case SK/2004/0107.

³⁶⁸ Case SK/2012/1308.

³⁶⁹ See: <http://www.teleoff.gov.sk/index.php?ID=9081>

³⁷⁰ Case C-280/08 P, Deutsche Telekom, [2010] DER 1-955, paragraph 224.

³⁷¹ The draft regulatory measure concerning the relevant market n° 11 of the Commission's Recommendation of 11 February 2003 on relevant Product and Service Markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of

TUSR applied this recommendation without a proper market analysis and arrives at the conclusion that the upstream market only consists of the copper local access network, which the Commission then uses to consider that the relevant wholesale market is limited to ST's copper network. This reasoning does not properly reflect the process applied by the Commission in the SO and in this decision to define the relevant wholesale market. The starting point of the Commission's analysis in the SO and in this decision is that ST made, following the market analysis made by TUSR and the resulting regulatory obligations,³⁷² which it has not challenged, an access offer by way of publishing the RUO which contains the terms and conditions under which it is prepared to make available, against a fee, its ULL to third party access seekers. There is also actual (in particular from GTS) and potential demand from third party access seekers to ULL. Market definition serves to identify the competitive constraints that the undertaking offering a service is facing.³⁷³ The notice stipulates: *"A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumers, by reason of the product's characteristics, their prices and their intended use"*.³⁷⁴ Taking account of the fact that demand side substitution is the most immediate and effective disciplinary force on the suppliers of a given product,³⁷⁵ the Commission analyses (see previous sections) whether or not there are actual or potential substitutes for ULL wholesale access offered by ST. When looking at other possible local access technologies the Commission finds, as explained above, that there are no direct substitutes to ULL access. This analysis is made independently from the findings of TUSR³⁷⁶ and is based on the technical and economic considerations described above. The results of this analysis coincide with the markets identified in the Commission's Recommendations on relevant markets susceptible to ex ante regulation³⁷⁷, but do

the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ Official Journal L 114 , 08/05/2003 P. 0045 - 0049

³⁷² TUSR Decision No. 205/14/2005, dated 8 March 2005, Doc ID0948; the draft of the Decision was notified to the Commission under the Article 7 consultation procedure under Case No. SK/2004/0107. The Commission endorsed the market review with comments relating to the remedies and the duty to carry out a public consultation.

³⁷³ Commission Notice on the definition of relevant market for the purposes of Community competition law, paragraph 2, OJ C 372 9.12.1997, p. 5.

³⁷⁴ Commission Notice on the definition of relevant market for the purposes of Community competition law, paragraph 7, OJ C 372 9.12.1997, p. 5.

³⁷⁵ Commission Notice on the definition of relevant market for the purposes of Community competition law, paragraph 13, OJ C 372 9.12.1997, p. 5.

³⁷⁶ ST's argument (pt. 418, 1st bullet, of the reply to the SO) that the Commission should analyse whether TUSR's findings on retail competition are still correct for the entire infringement period is therefore not relevant. Moreover, ST's claim that the Commission should assess retail competition in the present case because a regulator can mandate access pursuant to Art. 12 Directive 2002/19/EC of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities, (Access Directive) 2002 OJ L 108 p. 7, even if there is no competition problem at the retail level on condition that denial of access "would not be in the end-user's interest" (pt. 418, 2nd bullet, of the reply to the SO), is not pertinent. Art. 12 of Directive 2002/19/EC, which lists access remedies and their motivation, comes only into play once a national regulator has identified at the wholesale level an operator with Significant Market Power (SMP) (see Article 8(2) Directive 2002/19/EC).

³⁷⁷ Second Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, market 4, OJ L 344, 28.12.2007, p. 65; and first Commission Recommendation of 11 February 2003 on relevant product and services

not make the market analysis carried out above dependent on the regulatory obligations imposed by TUSR, as ST claims.

- 5.1.3.6. Indirect constraints from competition in retail broadband market should not be taken into account when defining the wholesale market for access to ULL
- (233) ST considers (paras 416 et seq. of the reply to the SO) that the Commission's definition of a wholesale access ULL market leads to absurd results because it ignores the fact that there is retail competition and that alternative technologies are used to provide for example [...] % of all broadband retail accesses in Bratislava and Košice where only [...] % and [...] % respectively of all broadband accesses (mobile included) or [...] % and respectively less than [...] % of all fixed broadband accesses are based on ST's DSL network³⁷⁸.
- (234) ST's claim mixes up wholesale market definition, which aims at identifying all products which are perceived by an access seeker as readily available substitutes³⁷⁹, and the need to properly assess possible indirect constraints stemming from retail competition and their possible impact on the wholesale market.
- (235) Based on the established principles for the definition of relevant markets which have been applied above, the relevant wholesale market in this case is confined to wholesale access to ST's ULL. There is no readily available substitute for ULL access during the period covered by this decision.
- (236) In order to assess indirect constraints on ST's conduct on the wholesale market for access to ULL it needs to be analysed whether retail competition restrains ST's behaviour on the wholesale market as regards for instance the setting of prices and other supply conditions relating to ULL access. Operators which could possibly exert such an indirect constraint could be for instance the TV-cable network operators, Orange or FWA operators, which all compete with ST at retail level. Assessing such indirect constraints is, however, relevant for establishing dominance and not to define the relevant market, because the alternative infrastructures are not readily available substitutes to the access to ST's ULL³⁸⁰.
- (237) In order to support its view that indirect constraints stemming from retail competition should be analysed when defining the wholesale market, ST refers to merger cases where the General Court or the Commission allegedly considered indirect constraints when defining wholesale markets. It also points to cases where national regulators have assessed indirect constraints in the context of the definition of wholesale markets.
- (238) The first case to which ST refers is the judgment in the Schneider/Legrand case. In that case the Commission had defined several upstream markets for equipment

markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, market 11, OJ L 114/45, 8.5.2003, p. 45.

³⁷⁸ See pt. 440 of ST's reply to the SO, Doc ID 3630.

³⁷⁹ See Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, m 9.12.1997, p. 5, pt. 17.

³⁸⁰ Market definition is about identifying the effective alternative sources of supply or the readily available substitutes for a given product see Commission notice on the definition of relevant market for the purposes of Community competition law, pts. 13 and 17, OJ C 372 9.12.1997, p. 5.

produced by Schneider for panel boards, which it sells either to end users or to independent panel board assemblers. Some producers of such equipment, such as ABB and Siemens, were vertically integrated and self-supplied such equipment to their wholly owned, integrated panel board assemblers. In its decision on the merger, the Commission did not take account of these internal supplies when analysing the relevant market for panel board components.

- (239) The General Court upheld Schneider's appeal against this reasoning and held "*that large construction projects are normally carried out following an invitation to tender and that the manufacturers submit bids directly*". The Court then went on stating: "*It cannot be denied that, in the context of such competitive procedures, ABB and Siemens, as integrated producers, compete with their non-integrated counterparts such as Schneider, either directly where the non-integrated manufacturers agree with switchboard assemblers or installation engineers to submit their bids or indirectly where those manufacturers sell panel-board components to a switchboard assembler whose bid has been accepted. In both cases, the prices of the non-integrated manufacturers are subject directly to competitive pressure from the parallel bids made by ABB and Siemens in response to the same invitation to tender*"³⁸¹.
- (240) These principles cannot be transposed to the current case for the reasons already mentioned in recitals 720ss. of the SO: The market mechanisms present in the Schneider/Legrand case, where switchboard components were traded and the prices and sales conditions were and had to be set in a way which takes account of the competitive situation and constraints in the retail market (that is to say that the buyers of the components had to meet the conditions of a tender or deliver a panel board after they had won a tender), cannot be observed in the ST case. Differently from the behaviour observed in the Schneider/Legrand case, ST's strategy was "*keeping the life of AOs difficult*"³⁸². Also the minutes from the internal meeting of 17 March 2005 concerning the RUO publication, confirm ST's reluctance to actively sell ULL access: "[confidential quote on why active sale of access to the local loop is considered a threat for ST and that therefore the RUO will be published in a form disadvantageous for other authorised providers]. *The strategy of delaying the RUO stays unchanged, it will however be considered whether* [confidential quote]"³⁸³
- (241) Furthermore, the reductions of the wholesale prices over time were, as internal documents show, motivated by regulatory concerns and not by pressure on wholesale prices linked to retail competition.³⁸⁴ For instance, an internal email exchange between the wholesale business manager and the head of ST's wholesale dated 9 May 2007³⁸⁵ (concerning the reduction of the monthly fees for the full/shared access and the installation fee) illustrates the underlying considerations in setting these fees: "[Confidential quote on the very high installation fee in comparison with other countries. Considering reducing it to reach the EU average (for year 2006) as this attracts attention from TUSR and European Commission. Considering to keep higher

³⁸¹ Case T-310/01, Schneider v. Commission [2002] ECR II-4071, paragraph 282.

³⁸² The wording comes from the document [...], Doc ID0119, p. 21-30.

³⁸³ [...], Doc ID0160, p. 57. [...]."

³⁸⁴ [...], Doc ID1360, [...] Doc ID1297 or Doc ID1194.

³⁸⁵ E-mail from ST's wholesale business manager to the head of the wholesale department, dated 9 May 2007, EV 17/1, Doc ID0159, p. 4 of 14.

prices for all other fees given that nobody monitors them referring to] [confidential quote]. *For this reason* [confidential quote on the effects of a reduction of the installation fee]" Moreover, in an e-mail addressed to ST's wholesale director, the ULL project manager commented regarding the proposed price changes as follows: "[confidential quote]"³⁸⁶

- (242) ST's access prices and retail prices were set at levels which would not even allow a competitor as efficient a ST to enter broadband retail markets using ST's ULL. Also the refusal to supply policy regarding ULL implemented by ST shows that it is, unlike Schneider, not willing to offer "components", here ULL, needed for the provision of a competitive retail service, at prices and conditions which are in any way responsive to the fact that other operators self-supply the local access³⁸⁷.
- (243) ST also refers to the Commission's assessment of the GE/Honeywell merger case³⁸⁸. In that case the Commission considered that jet engine manufacturers were also subject to "indirect" constraints which stem from the fact that airlines choose between different aircrafts which are already fitted with engines.
- (244) The Commission considers that the ways in which the airplane engine market and the ULL access market in the Slovak Republic function are not comparable. In GE/Honeywell, the Commission acknowledged that engine suppliers compete at two levels, first, they compete to place their engines on offer in a given aircraft platform and second they also compete to have their aircraft/engine combination selected by the final purchaser of the aircraft. The ULL market subject to this decision does not function in a similar way as the airplane engine market: Access to ST's ULLs is not offered at terms and conditions which would allow unbundlers to effectively compete in the retail broadband services market as the ULL access is subject to a margin squeeze and refusal to supply policy. All this is not comparable to the scenario in GE/Honeywell where there were transactions at the wholesale level at prices which reflect a competitive environment on the downstream market.
- (245) Finally, in the current case the question whether indirect constraints should be assessed in an Art. 102 of the Treaty case at the stage of market definition or at the stage of the assessment of dominance can be left open because, as will be shown in recital (307), retail competition in the broadband services market does not sufficiently constrain competition in the market for ULL.
- (246) This finding is in line with the Commission's policy: As explained in the Commission's documents competition at the retail level from vertically integrated undertakings may be such as to exert an indirect constraint on the market for wholesale access services and that such indirect pricing constraints, where they are

³⁸⁶ Email from the ULL project manager to the Wholesale Director, dated 16 April 2007, Doc ID 0193, p. 5.

³⁸⁷ In view of ST's margin squeeze and refusal to supply strategies and its reluctance to sell ULL the question whether retail competition constrains ST's ability to raise the ULL price cannot be verified and the analysis proposed in the OFT guidelines on market definition, to which ST refers in pt. 430 of the reply to the SO, regarding the assessment of possible indirect constraints in the context of market definition cannot be carried out. The guidelines can be found at: http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of403.pdf

³⁸⁸ Commission decision of 3 July 2002, Case COMP/M.2220, General Electric/Honeywell, para 9; see also para 34.

found to exist, should be taken into account when assessing if the incumbent operator has dominance on the relevant market.³⁸⁹

5.1.3.7. Conclusion on the definition of the relevant wholesale product market

(247) The product market identified in the present case is the market for wholesale access to the unbundled local loops.

5.1.4. *The relevant geographic markets*

5.1.4.1. Geographic scope of the retail mass market for broadband services offered at a fixed location

(248) The present case concerns the abusive behaviour of ST on the market for wholesale ULL services. It is therefore not necessary to analyse the retail markets and their geographic dimension. Nevertheless, for the sake of completeness this section analyses the geographic dimension of the retail mass market for broadband services offered at a fixed location, which, as explained in sections 5.1.2.1 and 5.1.2.2, does not contain mobile broadband services.

(249) In line with the Notice on market definition, relevant geographic markets are defined as follows: *'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of*

³⁸⁹ Explanatory Note to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (C(2007) 5406), pp. 34-35). See also the Commission's comments letter on the broadband access market reviews in cases UK/2003/32 and UK/2003/733. As underlined in the Commission's letter of 14 February 2008 in the last sentence of comment 1, it did not oppose the analysis of Ofcom, which assessed indirect constraints at the level of market definition, only because this had no material impact on the outcome of the market analysis. The same applies to the Finnish notifications in cases FI/2012/1328-1329 concerning the ULL and WBA markets, where indirect constraints (from the presence of cable operators) were taken into account at the level of market definition and was not opposed by the Commission because it had no impact on the regulatory outcome of the case. Also in the Portuguese notifications in cases PT/2008/850-851 concerning the ULL and WBA markets the Commission did not oppose the fact that Anacom took account of indirect constraints from other infrastructures at the level of market definition because this had no impact on the regulatory outcome. In all these cases the Commission underlined that indirect constraints should be assessed in the context of the analysis of Significant Market Power (SMP) or dominance. As ST rightly points out in pts 456ss of the reply to the SO, the Commission vetoed a draft regulatory measure submitted under Art. 7 of the Framework Directive consultation mechanism by CTU, the Czech telecoms regulator, concerning wholesale broadband access, by decision of 10 August 2012. The Commission considered that CTU had not shown indirect constraints at wholesale level stemming from the retail competition and that there was a lack of evidence and of a substantive analysis of the available evidence. The veto decision clearly and in line with previous case law indicates "that the indirect constraints that have been presented by ČTÚ could constitute an element in the assessment of SMP in the market and, potentially, could affect the determination of remedies" Contrary to the claims of ST, the Commission did therefore not accept in this case an assessment of indirect constraints at the level of market definition, as ST claims. As to the analysis of potential competition see Commission Notice on the definition of relevant market for the purposes of Community competition law, paragraph 24, OJ C 372 9.12.1997, p. 5, which also indicates that the implication of potential competition should be assessed at the subsequent stage to the market definition, that is to say in the context of the assessment of dominance.

competition are appreciably different in those areas.³⁹⁰ The definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous, and accordingly only those areas in which the conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market.³⁹¹

- (250) ST, which offers its retail services throughout the Slovak territory, competes with a number of operators who offer their services in geographically limited areas, such as Orange, UPC and many local operators like Antik or smaller FWA operators, most of which cover only smaller areas of the Slovak Republic. ST offers all its DSL products throughout the Slovak Republic at uniform prices, supply terms and conditions and has maintained this policy also in relation to its current broadband offerings³⁹². Other operators also sell their services throughout their network at the same prices, terms and conditions³⁹³. All this indicates that - despite the fact that in some areas more operators are present than in others - the competitive dynamics throughout the Slovak Republic are very similar. The price constraints on ST stemming from other operators are not sufficiently strong to induce ST to differentiate its prices in certain areas to defend its customer base or win new customers. ST confirmed that "[Citation from ST's reply to the SO confirming the facts described previously in this recital]"³⁹⁴ Furthermore, ST also points out that "*all national providers of broadband services (incl. Slovak Telekom, Orange, UPC, Slovanet, Swan, GTS) employ national pricing strategies*"³⁹⁵. Under these conditions the retail market is, absent other indications, national. This market definition is in line with the Commission's decisional practice.³⁹⁶
- (251) ST argues that the relevant market is local in scope. ST provided several arguments (which are summarized below) in support of its argument:³⁹⁷
- (a) broadband services are, by their nature, provided to a specific location, to meet local customer demand, and customers would not consider travelling outside their local area in order to seek an alternative supplier of broadband services,
 - (b) there are substantial geographic variations in the degree of facility-based competition and in the market shares of different operators, including ST,

³⁹⁰ Notice on market definition, paragraph 8; See Commission Decisions in case COMP/39.525, Telekomunikacja Polska, paragraph 627, COMP/3745, Deutsche Telekom AG, - paragraph 92-93 and Commission's decision of 16 July 2003 in Case No COMP/38.233 – Wanadoo Interactive (full text is available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/38233/38233_87_1.pdf), paragraph 205; see also judgment in case Case C-27/76 United Brands vs. Commission [1978] ECR 00207, paragraph 11; judgment in Case 322/81, Michelin v Commission [1983] ECR 03461, paragraph 26; judgment in case 247/86, Alsatel v Novasam [1988] ECR 05987, paragraph 15.

³⁹¹ See judgment in case T-229/94, Deutsche Bahn v Commission [1997] ECR II-01689, paragraph 92. See also judgment in case T-139/98, AAMS v Commission [2001] ECR II-03413, paragraph 39.

³⁹² Doc ID 0478, p. 7, ST's reply to RFI 17/04/2009 and Doc ID3897, ST's answer to RFI of 1 August 2013, paragraphs 9 and 10.

³⁹³ Docs ID 0287, 0330, 3165, 0385, 0375, 0418, 0278, 4146, 4189, 3959.

³⁹⁴ Doc ID 0478, p. 7, ST reply of 26 May 2009 to the request for information.

³⁹⁵ Doc ID 0954, Annex to the First Issues Paper, paragraph 117.

³⁹⁶ See the Commission Decision of 4 July 2007 in Case COMP/38.784 – *Wanadoo España/Telefonica*, section V.B and the Commission Decision of 22 June 2011 in Case COMP/39.525 - *Telekomunikacja Polska*, section X.2.

³⁹⁷ ST's reply to the SO, Doc ID3630, paragraphs 331-396.

- (c) ST's commercial strategies and AOs' commercial strategies vary by region and ST and its competitors consider the relevant geographic market to be local,
 - (d) national pricing cannot be seen as leading to a national geographic market if it is shown that the demand-side substitution possibilities are local,
 - (e) ST has attempted to implement local pricing but decided not to pursue this strategy due to various risks³⁹⁸.
 - (f) average quality-adjusted prices paid by consumers differ considerably by locality, and
 - (g) several NRAs have defined local markets in the electronic telecommunications sector³⁹⁹.
- (252) The Commission is of the view that arguments concerning local customer demand are not in themselves proof of the local dimension of the relevant market⁴⁰⁰ as the homogeneity of conditions of competition across areas is important.
- (253) Further, a geographically differentiated price of the market players can be an indicator of differences in competitive conditions. However, ST and other operators act uniformly (same price, terms and conditions) across their network area. Also the uniform price of ST across the Slovak Republic was not the result of a SMP⁴⁰¹ obligation in the markets under investigation. ST argues that differentiation in prices according to the technology used by the operator suggests that prices also vary locally, since the coverage of technologies offered in the Slovak Republic varies by locality.⁴⁰² However, it is quite common that the broadband services are offered *via* different technologies/networks with different underlying cost structure, which the prices normally reflect (that is to say prices differ due to cost differences but not due to different levels of competition). This cannot be interpreted as a proof of sufficient heterogeneity of competitive conditions.
- (254) Concerning ST's argument that its national pricing policy is not relevant for the purpose of geographic market definition as ST attempted to implement local pricing but decided not to pursue this strategy due to various risks, the Commission notes that in this regard ST namely refers to two internal email communications (one of which is from 2004⁴⁰³). As regards the internal email communication of June 2008 the Commission notes that this email emphasises that as to the prepared DSL campaign "*the geographic segmentation solely concerns communication [not pricing]*".⁴⁰⁴ Therefore, the Commission is of the view that email communications presented by ST cannot be interpreted as evidence that ST's national pricing policy was throughout the infringement period self-imposed (in order to mitigate various risks) and that such pricing policy is not relevant for the purpose of geographic market definition. Even if the Commission were to take the view that it accepts ST's

³⁹⁸ ST identified following risks: [...] (see paragraph 385 of the reply to the SO).

³⁹⁹ ST's reply to the SO, Doc ID3630, paragraphs 340-347.

⁴⁰⁰ Such reasoning might lead to the definition of local markets in most of the competition cases. For instance, the fact that customer would not travel outside his/her local area to seek an alternative supplier of gas or electricity does not mean that the retail gas or electricity market is local.

⁴⁰¹ Significant Market Power (SMP).

⁴⁰² ST's reply to the letter of facts, paragraph 208.

⁴⁰³ Doc ID0202, p. 34-35.

⁴⁰⁴ Doc ID135, page 3 [...].

argument concerning 'self-imposed' uniform pricing policy, it would rather indicate that possible competitive pressures in some municipalities within a national market in the Slovak Republic were not strong enough for ST to decrease its nationally uniform price.

- (255) ST has not tracked the profitability (and costs) of DSL products by subnational geographical units. This suggests that ST does not consider the relevant market as subnational.⁴⁰⁵
- (256) As regards ST's argument that there are substantial geographic variations in the degree of facility-based competition and in the market shares⁴⁰⁶ of different operators, the Commission is of the view that various degrees of facility based competition itself is not a sufficient indicator of local markets. In telecoms markets entry often takes place first at the local level, usually in most densely populated areas (especially big cities), where economies of scale are easier to achieve and allow the roll out of some technologies (for example fibre networks). In those areas more operators are present, the quality of providers changes and the customers may have wider range of choices and better price conditions. However, as long as such variations do not affect pricing and commercial strategies of operators it cannot be concluded that markets are local.⁴⁰⁷
- (257) Also, the fact that certain operators are interested in investing in certain areas only (and therefore they target more intensively these areas with their commercial offers), does not prove that the conditions of competition in these areas are sufficiently 'heterogeneous' and that these areas may be considered to constitute a separate market. What matters is whether some municipalities within a national market, possibly identified as more competitive, put a sufficient pressure on competitors to differentiate their prices, business strategies and marketing strategies from national (uniform) ones. However, this does not hold in the present case.
- (258) In its reply to the letter of facts, ST quotes several recent documents (namely a BEREC report, an ECORYS report and the Commission draft Explanatory Note)⁴⁰⁸

⁴⁰⁵ According to ST, [...]. See ST's reply to the letter of facts, paragraphs 202 and 203.

⁴⁰⁶ The Commission is of the view that the market share data in selected municipalities presented by ST (see paragraphs 362-365 of the reply to the SO) may reflect the situation on the market at most in the latest years of the infringement period. However, the different broadband technologies in the Slovak Republic have evolved significantly, in terms of availability, since 2005. ST itself emphasizes the developments in the Slovak Republic in recent years and acknowledges that "*the availability of alternative technologies was limited before 2007 and many households did not have the same choice of technologies which they have now*" (see the Annex V.2 ([...] et al) of the reply to the SO, page 18).

⁴⁰⁷ See the Commission Decision of 4 July 2007 in Case COMP/38.784 – *Wanadoo España/Telefonica*, paragraph 214 and the Commission Decision of 22 June 2011 in Case COMP/39.525 - *Telekomunikacja Polska*, paragraph 631.

⁴⁰⁸ ST's reply to the letter of facts, paragraphs 187-189. ST refers to (i) BEREC, "Draft review of the BEREC Common Position on geographic aspects of market analysis (definition and remedies)" of 5 December 2013 (available at http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/3917-review-of-berec-common-position-on-geogr_0.pdf), accessed on 9 October 2014, Doc ID4836, (ii) the Draft Explanatory Note accompanying the document "Commission Recommendation on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services" (available at <http://ec.europa.eu/digital-agenda/en/news/draft-revised-recommendation-relevant-markets>), access also on 9 October 2014, Doc ID4837 and (iii) ECORYS, "Final report on future electronic communications

which according to ST support its approach to geographic market definition presented in the reply to the SO. In this regard ST in particular emphasises its assessment of variations in the local shares of technologies and competitors across the Slovak Republic. However, the Commission is of the view that its assessment of the geographic market in the present case is by no means in contradiction with the documents quoted by ST in the reply to the letter of facts. For instance, in its Draft Explanatory Note, the Commission emphasises that the fact that competitors have a supply area which is not national *"does not suffice to conclude that there are distinct geographic markets"*.⁴⁰⁹ Also, BEREC stresses that if prices of the incumbent and the AOs are geographically uniform, that is, do not differ between geographical areas, *"this may be an indication of insufficient geographical variations in competitive conditions to justify the definition of subnational geographical markets"*⁴¹⁰.

- (259) As to ST's argument that its and AOs' commercial strategies vary by region and that ST and its competitors consider the relevant geographic market to be local, the Commission notes that regional promotional offers and marketing campaigns presented by ST relate to its fibre services (or 4G mobile broadband service) and not to the DSL services.⁴¹¹ Therefore, the Commission concludes that there were no regional DSL marketing campaigns and that ST had not been offering different conditions and prices for the same DSL products throughout the infringement period. As regards fibre campaigns, the Commission notes that there was only one ST regional promotional fibre campaign in 2005-2010 (fibre campaign in Košice in 2009⁴¹²). ST fibre campaign in 2011⁴¹³ falls outside the infringement period and was implemented after the investigation against ST was opened. The fact that there was one ST regional promotional fibre campaign in 2005-2010 cannot be interpreted as evidence supporting ST's allegations as to subnational market definition.
- (260) Also, some examples of regional campaigns of AOs presented by ST do not prove subnational market definition in the present case as these campaigns either fall outside the infringement period⁴¹⁴ or ST does not provide evidence they are local in scope⁴¹⁵. The Commission reiterates that other operators confirm they sell their services throughout their network at the same prices, terms and conditions.⁴¹⁶
- (261) Finally, as regards ST's argument that several NRAs have defined local markets in the electronic telecommunications sector in the past, the Commission notes that the circumstances (and the aspects of the incumbents' behaviour)⁴¹⁷ in the NRAs' cases

market subject to ex-ante regulation" of 18 September 2013 (available at http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?doc_id=3148), access also on 9 October 2014, Doc ID4850.

⁴⁰⁹ See Draft Explanatory Note, Doc ID4837, page 15.

⁴¹⁰ See BEREC Opinion, paragraph 48.

⁴¹¹ Doc ID 3897, ST's answer to RFI of 1 August 2013, paragraphs 9 and 10.

⁴¹² Paragraphs 374-376 of ST's reply to the SO, Doc ID3630.

⁴¹³ Paragraphs 372 and 373 of ST's reply to the SO, Doc ID3630.

⁴¹⁴ For instance, SWAN's campaign in 2011 and Antik's campaign in 2012 (see paragraph 377 of the reply to the SO).

⁴¹⁵ For instance, Orange's campaign in 2009 (see paragraph 377 of the reply to the SO).

⁴¹⁶ Docs ID 0287, 0330, 3165, 0385, 0375, 0418, 0278, 4146, 4189, 3959.

⁴¹⁷ Doc ID 4241, see paragraph 2.21 of the measure adopted by Ofcom in case UK/2007/733; Doc ID 4325, see paragraph 3.86 and 3.101 of the measure adopted by Ofcom in case UKI2011/1064; Doc ID 4326, see paragraph 3.166 of the Ofcom consultation document in case UKJ201 1/1064; Doc ID 4327, see page 7, 1st. paragraph of Ficoras market analysis of market 4 Doc ID 4313 and the Commission

enumerated by ST substantially differ from those in the present case, on the wholesale as well as on the retail level of the market.⁴¹⁸ In particular, the prices of wholesale broadband access products and the prices of incumbent's retail broadband products were geographically differentiated unlike those prices in the Slovak Republic.⁴¹⁹ Therefore, the Commission is of the view that the NRAs' cases presented by ST by no means support subnational market definition in the present case.

5.1.4.2. Geographic scope of the wholesale market for access to ULL

- (262) In the electronic communications sector, the geographical scope of the relevant market has traditionally been determined by reference to two main criteria,⁴²⁰ namely the area covered by the network and the existence of legal and other regulatory instruments.
- (263) It is established case law that the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different⁴²¹. The definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous. It is sufficient that they are similar or sufficiently homogeneous, and accordingly, only those areas in which the conditions of competition are 'heterogeneous' may not be considered to constitute a uniform market.⁴²²
- (264) ST is the only operator offering wholesale access to all ULL within its metallic local access network with a national coverage. Access is granted on the basis of the RUO published on 12 August 2005. Neither this RUO nor the subsequent updates⁴²³ and modifications differentiate the access prices depending on whether or not in a certain area covered by a MDF competition, in particular at the retail level, is stronger than in other MDF areas. Variations of ULL access prices are due to local specificities, such as that collocation takes place in a specific building or the necessary

decision under Article 7 of the Framework Directive consultation mechanism in cases HU/201 1/1190 and 1191: National Media and Infocommunications Authority (NMHH) notification of market for registered under case number HU/201 1/1190 doc ID 4328.

⁴¹⁸ For details see also recitals (269)-(272).

⁴¹⁹ In the Republic of Finland and Hungary there are also several local incumbent operators, whose territories do not overlap. In the Portuguese Republic the cable penetration was above 60%.

⁴²⁰ See for instance: Commission Decision in case COMP/38.784 *Wanadoo España/Telefónica*, paragraph 211, Commission Decision in case IV/M.1025 *Mannesmann/Olivetti/Infostrada*, paragraph 17 and Commission Decision in COMP/JV.23 *Telefónica Portugal Telecom/Médi Telecom*, paragraph 18.

⁴²¹ Case 27/76, *United Brands v. Commission* [1978] ECR 207, paragraph 44; Case 322/81, *Michelin v. Commission* [1983] ECR 3461, paragraph 26; Case 247/86, *Alsatel v Novasam* [1988] ECR 5987, paragraph 15; in this context, see also the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ C 165, 11.7.2002, paragraph 56.

⁴²² Case Y-229/94, *Deutsche Bahn v. Commission* [1997] ECR II-1689, paragraph 92; case T-139/98, *AAMS v Commission* [2001] ECR0000-II, paragraph 39.

⁴²³ The RUO published on 12 August 2005 set out the ULL access fees in its Annex 14. It was updated 9 May 2009 and the fees for ULL access were set out in Annex 15. As set out in the SO in § 292 et seq. and 336 et seq. some of the various access prices have been modified once or even several times during the period covered by this decision.

construction work needed to make collocation possible.⁴²⁴ Some of the costs, such as the one in relation to the setting of the collocation space, are divided among the interested AOs on an equal basis. This means that if there is a single AO interested in a specific MDF it has to pay all the cost and only later, once another AO requests access at that MDF an aliquot part of the fee would be repaid.⁴²⁵

(265) Based on the above the Commission concludes that the geographic scope of the wholesale market for access to ULL in the Slovak Republic is national.

5.1.4.2.1. ST's and DT's views on the definition of the relevant geographic wholesale market for access to ULL

(266) ST disagrees with the Commission's conclusion that the geographic dimension of the wholesale market for access to ULL is national. It points out that the ULL market should be divided into sub-national markets which can be regrouped in three clusters. Key for this argumentation are the indirect constraints stemming from the different existing parallel local access infrastructures in the Slovak Republic which are used to provide broadband retail services and which indirectly constrain ST's behaviour on the wholesale market. As the number of broadband retail service providers present in different geographic areas of the Slovak Republic varies and also the fact that the average value for money achieved by consumers varies from area to area⁴²⁶, ST considers that three different clusters of local markets can be identified: Two clusters where ST's retail market share is below [35%-45%]: Cluster A1 consisting of [40%-50%] of Slovak households, where there is strong facility based competition and where ST's retail market share in all broadband services (including mobile) is [20-30%] and [20%-30%] if only fixed broadband services are included; this cluster includes in essence the larger cities of the Slovak Republic and a number of smaller cities where ST's market share is less than [35%-45%]; cluster A2 accounting for [10%-20%] of Slovak households and covering rural areas where ST's retail market share in all broadband services (including mobile broadband) is [30%-40%] if only fixed broadband services are included. Cluster B accounts for [35%-45%] of Slovak households and consists of areas where ST's retail market share in all broadband connections (including mobile broadband) is [60%-70%], if only fixed broadband connections are taken into account⁴²⁷. Moreover, ST put forward that average retail prices are reflecting to a large extent the varying availability at the local level of different broadband infrastructures⁴²⁸.

(267) These conclusions are the result of ST's assessment of retail competition in the Slovak Republic and its view that indirect constraints stemming from retail competition should be taken into account when defining the geographic dimension of the wholesale ULL access market.

(268) The Commission considers, as already explained above in section 5.1.3.6, that indirect constraints should be analysed in relation to dominance and not at the stage of market definition. Moreover, the Commission refers to the assessment in section 6.1.2.5 of this decision where it showed that there are insufficient indirect constraints

⁴²⁴ For further details see pt. 336 of the SO Doc ID3416.

⁴²⁵ For details see pt. 332 of the SO Doc ID3416.

⁴²⁶ See pt. 368 of ST's reply to the SO Doc ID3630.

⁴²⁷ See ST's reply to the SO, in particular pts. 348 et seq., 396, Doc ID3630.

⁴²⁸ See ST's reply to the SO, in particular pts. 366 et seq., 368, Doc ID3630.

on wholesale competition stemming from competition on the retail mass market for broadband services offered at a fixed location in the Slovak Republic.

- (269) ST also refers to a number of cases relating to broadband market regulation where the Commission has allegedly accepted the definition of sub-national markets⁴²⁹. As regards cases UK/2007/733 and UK/2010/1065, the Commission notes that these cases refer to the British WBA, not the ULL market, which Ofcom continues to consider to extend to the whole network of BT and to thus have a quasi-national dimension⁴³⁰. As regards the WBA market in the UK Ofcom analysed retail competition at the level of each MDF and identified relevant geographic sub-national WBA markets in case of the cumulative presence of structural (the presence of 4 principal operators (including BT), the cable operator and/or local loop unbundlers or three principal operators if BT's market share is below 50%⁴³¹) and behavioural differences (lower retail prices and discounts from the standard wholesale access prices in the areas concerned) where the competitive conditions differ sufficiently from all other MDF areas that a geographic market segmentation was justified. As regards the ULL wholesale access market in the Slovak Republic no such differences as regards ST's wholesale price setting can be observed. If ULL access prices differ geographically, this is due to cost differences but not due to the level of retail competition in the local MDF area concerned⁴³².
- (270) As to case PT/2008/850, ANACOM, the Portuguese Telecoms Regulator, considered that the market for ULL access was national in scope while considering, similarly to Ofcom in the cases cited above, that there existed subnational markets for WBA as competition at the retail level was stronger in those geographic areas which were largely covered by cable or where local loop unbundlers were present as it recognised that operators having access to ULL were a key driver of retail competition in this market.⁴³³ The market structure in the Slovak Republic is different as there is only one local loop unbundler, GTS, which has unbundled a very small number of local loops which it uses to supply business customers, but not mass market broadband services. GTS does also not, like unbundlers in the United Kingdom, offer WBA to third party access seekers based on commercial agreements.
- (271) In the Republic of Finland and in Hungary several fixed telecoms operators exist which cover parts of the territory of the relevant Member State. Their networks do not overlap. Ficora, the Finish telecoms regulator (case FI/2008/0900) and Nemzeti Média- és Hírközlési Hatóság (NMHH), the Hungarian telecoms regulator (case HU/2011/1190) considered that the relevant geographic market for ULL access extends to the whole area covered by each local incumbent and did not further sub

⁴²⁹ Paragraph 342 of the reply to the SO Doc ID3630.

⁴³⁰ See cases UK/2004/0094 and UK/2010/1064 The word "national dimension" is imprecise regarding the UK because BT's metallic access network does not cover the area of Hull, where Kingston Communications ("KCOM") operates the local access network which does geographically not overlap with BT's local access network.

⁴³¹ Principal operators are operators which provide broadband services over their own access networks (BT or Virgin Media) or which have deployed LLU in more than 10 % of the UK. Virgin Media was considered to be a principal operator in an individual exchange area only if it was able to provide services to 65 % or more of the delivery points (see the Commission's comments letter in case UK/2010/1065).

⁴³² See eg. ST's reply to the SO pts. 1053 and 1061, Doc ID 3630.

⁴³³ Retail offers based on LLU were responsible for more than 50% of new broadband accesses registered between the end of 2006 and 2007.

segment these areas. It should be noted that in case FI/2008/0848 FICORA had identified in the operating areas of five of the 31 Finnish incumbent operators submarkets consisting of 25 municipalities where it considered that competition⁴³⁴ was different from competition in the rest of the operating area. The Commission opened a second phase investigation on 5 January 2009 concerning the identification of submarkets in the operating area of the 5 incumbents because FICORA had not shown that the competitive conditions were sufficiently homogenous within the selected 25 municipalities or that they are appreciably different compared to neighbouring areas for which FICORA continued to find SMP and to impose regulation. FICORA withdrew on 26 January 2009 the proposal regarding the five operating areas of Finnish incumbent regarding which the Commission had opened a second phase investigation.

- (272) All Regulators cited by ST in the reply to the SO in pts. 342 et seq., 430 et seq., which have considered that there may be sub-national markets for WBA, have considered that the relevant geographic market for ULL wholesale access extends to the whole metallic network of the relevant incumbent and if that network extends to the territory of one Member State that the geographic dimension is national.

5.2. Conclusion

- (273) There are two relevant product markets:
- (a) the retail mass market for broadband services offered at a fixed location and
 - (b) the wholesale market for access to the unbundled local loops
- (274) Both relevant product markets are national in scope, that is to say, the relevant geographic market is the territory of the Slovak Republic.

6. DOMINANCE

6.1.1. Introduction

- (275) According to settled case law, dominance is *"a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers."*⁴³⁵

⁴³⁴ Ficora considered that "areas where there are several players with their own DSL network in the broadband market" can be distinguished from all other areas. Further conditions identifying these areas were: "At least one MDF area is located in the municipality area, where at least three competitors have a DSL network of their own, or at least two competitors have a DSL network of their own, and there is wireless broadband supply with geographic coverage in the municipality area. In addition, the retail pricing of broadband subscriptions in the municipality area is below the average price level in Finland. Also wholesale broadband product prices are below the average price level in Finland, and an efficient competitor can enter the market by using the wholesale broadband product in all speed categories. Furthermore, the wholesale broadband price of the current SMP operator cannot be higher than the retail price for a similar broadband connection in the area. Moreover, the DSL network broadband retail market share of the incumbent operator may not exceed 70% in these municipalities." The Commission vetoed this proposal because Ficora had not shown that

⁴³⁵ Case C-27/76 *United Brands vs. Commission* [1978] ECR 207, paragraph 65.

- (276) The notion of independence, which is a special feature of dominance⁴³⁶, is related to the level of competitive constraints facing the undertaking in question. It is not required for a finding of dominance that the undertaking in question has eliminated all opportunity for competition on the market.⁴³⁷ However, for dominance to exist, the undertaking concerned must have substantial market power so as to have an appreciable influence on the conditions under which competition will develop.⁴³⁸
- (277) The existence of a dominant position derives in general from a combination of several factors which, taken separately, are not necessarily determinative.⁴³⁹ One important factor is the existence of very large market shares, over 50%, which are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position.⁴⁴⁰ In *Hilti* the Court of Justice accepted that market shares between 70% and 80% are so high to have been held to be in themselves a clear indication of the existence of a dominant position.⁴⁴¹ Other important factors when assessing dominance are the existence of barriers, preventing either potential competitors from having access to the market and /or actual ones from expanding their activities on the market.⁴⁴²
- (278) It is not necessary to demonstrate that ST is dominant in the retail market to prove the existence of an abuse of a dominant position at wholesale level.⁴⁴³ In the following sections the Commission meets the relevant legal standard by demonstrating that ST has had a dominant position in the wholesale market for access to the unbundled local loops (section 6.1.2) and in addition, demonstrates that ST has had a dominant position also in the retail market (section 6.1.3).

6.1.2. *Dominance in the wholesale market for access to the unbundled local loops*

6.1.2.1. Market structure of the wholesale market for access to the unbundled local loops

- (279) ST has been the only operator providing wholesale access to unbundled the local loops in the Slovak Republic since 2005. As already shown above in the section 5.1.3 on ULL market definition, ST is the owner of the only nation-wide local loop network. The fact that there are no alternative wholesale products to ST's unbundled local loops is also acknowledged by ST itself.⁴⁴⁴ ST thus itself confirms that the only

⁴³⁶ Case 85/76 *Hoffmann-La Roche v Commission*, [1979] ECR 461, paragraphs 42-48.

⁴³⁷ Case C-27/76 *United Brands vs. Commission* [1978] ECR 207, paragraph 113.

⁴³⁸ Case 85/76 *Hoffmann-La Roche v Commission*, [1979] ECR 461, paragraph 39.

⁴³⁹ Case 27/76 *United Brands and United Brands Continental v Commission* [1978] ECR 207, cited above, paragraph 66.

⁴⁴⁰ Case T-321/05, *AstraZeneca AB* [2010] ECR II-02805, paragraph 242; Case C-62/86 *Akzo v Commission* [1991] ECR-I 3359, paragraph 60, Case T-228/97, *Irish Sugar v Commission* [1999] ECR II 2969, paragraph 70, Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, paragraph 41; Case T-65/98 *Van den Bergh Foods v Commission* [2003] ECR II-4653, paragraph 154.

⁴⁴¹ Case C-53/92 P *Hilti AG v Commission* [1994] ECR I-667.

⁴⁴² Case 27/76 *United Brands and United Brands Continental v Commission* [1978] ECR 207, cited above, paragraph 129; and Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, cited above, which found various market shares depending on the particular vitamin.

⁴⁴³ Case T-336/07, *Telefónica and Telefónica de España v Commission*, ECLI:EU:T:2012:172, paragraph 146. See also case C-333/94 P *Tetra Pak v Commission* ("*Tetra Pak II*") [1996] ECR I-5951, at paragraph 25. See also Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, at paragraphs 19 to 22.

⁴⁴⁴ ST's Reply to RFI of 17 April 2009 Section II.III Doc ID 0460, p.9; ST's Third Issues Paper Doc ID 2401, p.10 and ST's reply to the SO, Doc ID3630, paragraph 616.

alternative to its wholesale broadband access ULL offers available to other operators is rolling-out their own access network⁴⁴⁵.

(280) Therefore, there are no other competitors on the wholesale market for access to the unbundled local loops and ST has a monopoly position on the relevant market.

6.1.2.2. Barriers to entry in the wholesale market for access to the unbundled local loops

(281) In addition to ST's monopoly, the Commission has identified significant barriers to entry in the relevant market which will be outlined below.

(282) The establishment of a new nationwide local loop infrastructure entails very significant capital investments. In particular, it requires major investment in the provision of suitable ducting to house cables or wires, providing the cable or wire itself and also installing suitable equipment (for instance MDFs)⁴⁴⁶. Moreover, "*time to market*" for rolling out any own infrastructure is too long to represent an effective competition constraint. In addition, next generation access networks, which operators prefer to deploy nowadays, since they offer higher speeds and more sophisticated services to the consumers, are a solution much more costly than copper.

(283) The example of Orange, which is the main AO rolling-out fibre, shows that entering the broadband market with the roll-out of a new fibre network is expensive, time consuming and risky. Orange confirms "*the demanding character of FTTH investment as regards time and finance*".⁴⁴⁷ The officially communicated investments into FTTH of Orange were SKK 1bn (around EUR 33 million) only in 2007⁴⁴⁸. After having invested for three years significant amounts into fibre network roll-out, Orange covers only around 17% (300 000 households) of all households (1 795 766 households) in the Slovak Republic in 2010⁴⁴⁹. This is still a fraction of service coverage of ST's ULL network amounting to [70-80%] of all households in the Slovak Republic and of coverage of ST's metallic PSTN local loop network amounting to [80%-90%] of all households in the Slovak Republic⁴⁵⁰. In addition, the number of acquired subscribers of Orange amounted to only 43 000 in December 2010⁴⁵¹ (Orange remains only a marginal market player with 4.9% market share in 2010) and its operation is, in view of the huge investments, not expected to be profitable in the near future⁴⁵².

(284) As Orange underlined, it "*did not reach any economies of scope. In view of the extent of services provided and ownership of an essential facility, only Slovak Telekom is*

⁴⁴⁵ Other access networks in the Slovak Republic started being rolled out, e.g. Orange's FTTH network, which is the biggest alternative access network in the Slovak Republic in terms of number of lines. However, as analysed under section 5.1.3, these networks are not included in the relevant wholesale product markets.

⁴⁴⁶ See section 5.1.3.

⁴⁴⁷ See reply of Orange Slovakia to RFI of 7 April 2009, Question 36, Doc ID330, p. 18.

⁴⁴⁸ Presentation "No. 1 in Broadband and TV Project, Cooperation between ST/T-com and Orange Slovensko a.s." Doc ID1291, p.2.

⁴⁴⁹ See Minutes of the meeting with Orange of 3 June 2013, Doc ID4189, paragraph 8 and ST's own data used, for instance annex to the third issues paper paragraph 22, Doc ID2405.

⁴⁵⁰ See section 4.6 on coverage of ST's network.

⁴⁵¹ Orange's 2010 annual report, Doc ID3347.

⁴⁵² Orange's Reply to RFI of 7 April 2009 Doc ID0330, p.10 and Minutes of the meeting with Orange of 3 June 2013, Doc ID4189, paragraph 33.

able to reach economies of scope."⁴⁵³ Set aside the need to make an investment in which economies of scope cannot be reached, at least in the medium term, building a fibre local access network is not an immediate way to access retail customers. The time and investment necessary to roll-out a local loop network comparable to ST's with a nationwide coverage would obviously be high. In addition, given the scale of work Orange was required to undertake in order to duplicate only a portion of ST's network, deployment would take a considerable period of time and would not be economically rational.⁴⁵⁴ For instance, Orange is of the view that further roll-out of its fibre network would not be realised "by profit-maximizing undertaking"⁴⁵⁵. For comparison, according to the figures provided by ST itself⁴⁵⁶, the economically rational coverage⁴⁵⁷ of ST's ULL network would be above [55%-65%] of all households in the Slovak Republic in 2010.

- (285) According to an internal document of ST of March 2009 called "[...]"⁴⁵⁸, if ST was to roll-out FTTH in [...] additional cities, it would not recover the planned investment costs before [...]. In fact, in the same internal document, ST presents the substantial financial differences between rolling-out fibre and DSL, especially in sub-urban, as well as in rural areas. The fibre roll-out costs are sometimes [...] times higher than those for DSL roll-out⁴⁵⁹.
- (286) Even operators using less capital intensive access technologies, namely wireless access technologies, were deterred from rolling out an extensive access network. For example, the largest FWA operator, WiMax, whose network covered around 250 000 households, stopped its extension in 2009 while looking for a partner to provide financing⁴⁶⁰.
- (287) Operators considering building a completely new infrastructure would face considerable investments which are much greater than the broadband enabling costs incurred by ST on its pre-existing PSTN access network, rendering the duplication of ST's local access network uneconomical.⁴⁶¹ In fact, AOs consider ST's access

⁴⁵³ Reply of Orange Slovakia to the request for information of 7 April 2009, Question 18, ID330,p.10, original text: "*Spoločnosť Orange Slovensko, a.s. nedosiahla žiadne úspory z rozsahu. Vzhľadom na rozsah poskytovaných služieb a vlastníctvo unikátneho zariadenia jedine spoločnosť Slovak Telekom je schopná dosahovať úspory z rozsahu. Navyiac pri tak rozsiahlej investícii spoločnosti Orange Slovensko, a.s. do FTTH nie je možné v najbližšom období očakávať zisk z poskytovania služieb alebo siete.*"

⁴⁵⁴ See in this respect the TUSR's Analysis of the wholesale market No. 4 published in August 2011, ID3170, in particular page 38. See also the last version of TUSR's Analysis of the wholesale market No. 4 published in January 2012, ID3169, p. 49. See also Doc ID 4189, Minutes of the meeting with Orange of 3 June 2013, paragraph 33 and Doc ID 3959, Minutes of the conference call with Slovanet of 7 August 2013, paragraph 1.3. See also section 6.1.3 on retail dominance.

⁴⁵⁵ Doc ID 4189, Minutes of the meeting with Orange of 3 June 2013, paragraph 33.

⁴⁵⁶ See Figure 1 of the Annex II. of ST's reply to the letter of facts.

⁴⁵⁷ ST considered whether the expected revenues from offering DSL services exceeded the incremental costs of offering these services in each Main Distribution Frame (MDF) area (see the Annex II of ST's reply to the letter of facts, page 7).

⁴⁵⁸ ST's Reply to the request for information of 11 October 2010, attachment Q_2_MM_161, p. 38 *et f.*, Doc ID3230

⁴⁵⁹ ST's Reply to the request for information of 11 October 2010, attachment Q_2_MM_161, p. 40-41, Doc ID3230.

⁴⁶⁰ WiMax's Reply to RFI Doc ID0272, p.8 and Doc ID2447, p.1.

⁴⁶¹ See for instance Orange's reply (Doc ID 807 p.7) and section 5.1.3.

network a non-replicable asset in the short-to-medium term⁴⁶². Also TUSR in its analysis of the Slovak ULL market and in its reply to RFI of 14 June 2013 stresses that *"No other company in Slovakia has infrastructure [ST's DSL network] with such extensive coverage."* and that *"[ST's DSL network] clearly comprises the most extensive infrastructure, which cannot in any way be effectively duplicated in the foreseeable future"*.⁴⁶³

(288) In addition, the costs associated with investment in infrastructure are largely sunk, that is to say irreversible. They cannot be recovered if the access provider were to exit the market. These investments and high sunk costs represent a significant barrier to entry.

6.1.2.3. Absence of countervailing buyer power and of appropriate demand-side negotiating power

(289) ST's ability to exploit its market position as a supplier of wholesale ULL access could be theoretically constrained by countervailing buyer power. However, for this to be the case, purchasers of the wholesale ULL product should be able to switch their demand away from ST. As already stressed in section 5.1.3, there is no alternative offer to ST's local loop infrastructure on a national level to which such purchasers could turn and new entry into the market is highly unlikely. Therefore, no purchasers of wholesale ULL access can exert countervailing buyer power in the wholesale ULL access market.

(290) This is also demonstrated by the fact that despite an interest and effort of a number of AOs, none of them was able to negotiate favourable ULL terms with ST for a mass-market entry. In fact there was no ULL contract signed between 2005 and 25 March 2009 when GTS Slovakia, after several years of negotiations, finally signed a first (and in the period 2005-2010 also the only) ULL agreement⁴⁶⁴ in the Slovak Republic. However, GTS Slovakia publicly stated that it is going to use the unbundled local loops solely for business customers as *"[w]ith the cost prices resulting from the agreement, it is not possible to provide profitably services to households"*⁴⁶⁵. In addition, the number of access lines actually unbundled by GTS Slovakia remains negligible⁴⁶⁶.

(291) Moreover, ST is a vertically integrated undertaking and as it will be shown (see section 6.1.3), it holds a dominant position in the retail market. This implies that its

⁴⁶² For instance, Orange states that none of the alternative networks is built in the same geographic scope as the metallic network of ST, which is the only to be considered as an essential facility (doc ID 807, p.7).

⁴⁶³ See TUSR's Analysis of the wholesale market No. 4 published in August 2011, ID3170, in particular pages 37-38 (see also the last version of TUSR's Analysis of the wholesale market No. 4 published in January 2012, ID3169, p. 49-50) and Doc ID4339 TUSR's reply to RFI of 14 June 2013.

⁴⁶⁴ See paragraph 348 of the SO Doc ID3416; this agreement entered into effect on 9 May 2009; see paragraph 376 of the SO DocID3416.

⁴⁶⁵ News article of 24 March 2009, title: *"GTS Slovakia zatiaľ orientáciu na firemných klientov nemení"* (in English: *GTS is so far not changing its focus on business clients*), ID1968, original text: *"S nákladovými cenami vyplývajúcimi zo zmluvy nie je možné poskytovať služby pre domácnosti s profitom"*.

⁴⁶⁶ In the period between 18 December 2009 and 25 October 2010 a total of 14 local loops were unbundled. In June 2011 the number of ULL used by GTS amounted to 53; see ST's reply to the request for information of 31 May 2011, Doc ID3011, p. 4; ST's reply to the request for information of 22 October 2010, Attachment Q10_1, Doc ID3237, p. 1.

downstream competitors cannot exercise sufficient pressure or influence on ST's decisions in the wholesale market for access to ULL.

6.1.2.4. Arguments of ST based on an incorrect definition of the relevant market⁴⁶⁷

(292) ST argues that it is not dominant in the local ULL access wholesale market.⁴⁶⁸ However, given that the relevant geographic market is national and not local⁴⁶⁹, this argument must be rejected. ST also argues that it is not dominant on the wholesale ULL market even at the national level.⁴⁷⁰ However, this argument must be rejected because it is based on the incorrect premise that the wholesale market should include all alternative broadband networks such as fibre or mobile networks.⁴⁷¹

6.1.2.5. Indirect constraints stemming from competition in the retail market

(293) ST repeatedly argued that *"the analysis of competition at the wholesale level must be based on the competitive situation at retail level"* and that this is also recognised by NRAs.⁴⁷²

(294) The Commission has previously noted that competition at the retail level from vertically integrated undertakings may be such as to exert an indirect constraint on the market for wholesale access services and that such indirect pricing constraints, where they are found to exist, should be taken into account when assessing if the incumbent operator has significant market power on the relevant market^{473 474}.

(295) In its comments letter on the second broadband access market review in the United Kingdom (case UK/2007/0733), the Commission referred to three concrete criteria to be satisfied when assessing the effect of indirect constraints:

- (a) ISPs would be forced to pass on a hypothetical wholesale price increase to their consumers at the retail level based on the wholesale/retail price ratio;
- (b) there would be sufficient demand substitution at the retail level to retail services based on indirect constraints such as to render the wholesale price increase unprofitable; and
- (c) the customers of the ISPs would not switch to a significant extent to the retail arm of the integrated hypothetical monopolist, in particular if the latter does not raise its own retail prices⁴⁷⁵.

⁴⁶⁷ See also sections 6.1.2.5 and 6.1.2.6.

⁴⁶⁸ ST's reply to the SO, Doc ID3630, paragraphs 610-618.

⁴⁶⁹ See sections 5.1.4.2 and 5.2.

⁴⁷⁰ ST's reply to the SO, Doc ID3630, paragraphs 619-624.

⁴⁷¹ See section 5.1.3.

⁴⁷² Third Issues Paper, Doc ID 2401, p. 12 or ST's reply to the SO, paragraphs 423-432.

⁴⁷³ Explanatory Note to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (C(2007) 5406), pp. 34-35. See also the Commission's comments letter on the first broadband access market review in case UK/2003/32, as well as its comments letter on the second broadband access market review in case UK/2007/0733.

⁴⁷⁴ See also section 5.1.3.6.

⁴⁷⁵ For example, the hypothetical monopolist could increase its wholesale price while sustaining lower retail prices than the ISPs which purchase its wholesale product without exercising a margin squeeze and could thus gain retail customers from the ISPs while not losing customers to alternative platforms. This could make the price rise profitable.

- (296) The Commission, while noting that this issue was initially discussed in an ex ante, regulatory environment, nevertheless examines below whether ST was indirectly constrained on the wholesale markets by any competing retail broadband services.
- (297) As already described in section 5.1.2 on the retail market definition and demonstrated in section 6.1.3 on the retail market dominance, ST's strongest competitors are Orange, with its FTTH network, and UPC, the main cable operator. Fibre and cable accesses, which are not readily available for purchase by AOs on the Slovak merchant wholesale markets, as explained under section 5.1.3 on the wholesale ULL market definition, are nevertheless by way of self-supply inputs to retail broadband services which may be considered as close substitutes to ST's DSL-based services at the retail level.
- (298) As indicated below in the section 6.1.3 on retail dominance the Commission takes the view that there is some competition by alternative technologies at the retail level but that ST still maintains its dominant position even on that market. This finding as to ST's market power on the retail market shows that there is no sufficient competition at the retail level which would constrain the pricing of ST's DSL-based wholesale inputs.
- (299) Further, indirect constraints as described above are based on the possibility that final customers switch to retail services offered *via* alternative technologies as a result of an increase in wholesale prices, which translates in higher retail prices, with the consequence that a higher wholesale price would lead to ST losing its wholesale customers.
- (300) However, the fact that between 12 August 2005 and 9 May 2009⁴⁷⁶ no agreement on access to the local loop entered into effect and until December 2009 no local loop had been unbundled in the Slovak Republic⁴⁷⁷ suggests that ST was not interested in attracting a significant number of wholesale customers, which in turn implies that there were no indirect constraints to ST. ST's strategy was "*keeping the life of AOs difficult*"⁴⁷⁸. Also the minutes from the internal meeting of 17 March 2005 concerning the RUO publication, confirms ST's reluctance to actively sell ULL access: "*the RUO will be published in a form disadvantageous for other authorised providers*"⁴⁷⁹. While the ULL access prices were gradually decreasing over the analysed period, these price decreases were not motivated by retail competition but rather by regulatory considerations⁴⁸⁰. Moreover, in an e-mail addressed to ST's wholesale director, the ULL project manager commented regarding the proposed ULL price changes as follows: "*obviously it would be better for WS [wholesale] if the*

⁴⁷⁶ The first framework agreement on unbundled access to the local loop was concluded only on 25 March 2009 following the Commission inspection at the premises of ST in January 2009 and after the opening of the proceedings in this case in April 2009. For details see paragraph 348 of the SO Doc ID3416; this agreement entered into effect on 9 May 2009; see paragraph 376 of the SO DocID3416.

⁴⁷⁷ For details on the conclusion of the framework agreement on unbundled access to the local loop and the subsequent development please see section 4.3.4.9 of the SO, Doc ID3416.

⁴⁷⁸ [...], Doc ID0119, p. 21-30.

⁴⁷⁹ [...], Doc ID0160, p.57.

⁴⁸⁰ [...], Doc ID1360, stating among others that the "[confidential quote why the decrease of ULL prices reduces regulatory risks]". Similarly, see also internal documents Doc ID1297 or Doc ID1194. In this respect see also paragraph (241) of this decision and subsection 4.3.4.6. of the SO Doc ID3416 on the development of the price terms of ULL.

ULL was not sold at all."⁴⁸¹. Further, ST's ULL access prices and retail prices were set at levels which would not allow even competitor as efficient as ST to enter the retail broadband market using ST's ULL wholesale offer.⁴⁸² In view of the above, the Commission takes the view that with respect to the ULL market there were no indirect constraints to ST stemming from the retail market.

6.1.2.6. Quantitative analysis which estimates indirect constraints presented by ST

- (301) In its reply to the SO, ST provided a quantitative analysis of indirect constraints on the wholesale market arising from retail market switching by consumers to different broadband technologies⁴⁸³ (hereinafter "[...] analysis"). [...]’s analysis relies on the results of the demand estimation exercise conducted by [...] et al⁴⁸⁴. According to [...]’s analysis, the wholesale market should be wider than access to ST’s DSL technology, as ST faces very significant indirect constraints from other technologies.
- (302) The Commission does not agree with this argument.
- (303) First, as the analysis relies on the data and estimates from ST’s [...] et al study, the Commission’s concerns that the data (and hence estimation results) might reflect the situation on the market at most in the latest years of the infringement period but cannot reflect the situation in the early years of the infringement period apply (as [...] et al study is based on data from 2010/11)⁴⁸⁵.
- (304) Second, the study applies the critical loss analysis to ST’s wholesale product portfolio⁴⁸⁶ at current prices and finds that ST would not find it profitable to increase prices of its wholesale product portfolio by 10%. However, this cannot be interpreted as implying that the wholesale market should be wider than ST’s DSL technology. As ST is already a "monopolist" over the wholesale products it provides, it will already have set its wholesale price optimally so that any further price increases are no longer profitable (taking into account its own downstream profits from DSL and other technologies). Therefore, none of the critical loss calculations presented by ST can be used to draw inferences on wholesale relevant market definition in the present case.
- (305) The cellophane fallacy issue is particularly acute here⁴⁸⁷. While ST seems to acknowledge that this may be a "potential concern" with its analysis⁴⁸⁸ its proposed approach of varying wholesale margins between [55-80%] does not solve the concern. A finding that ST would still not find it profitable to increase wholesale prices by 10% even if its wholesale margin was 60% instead of [60-75%] as argued by ST, could be the result of a number of factors that are not captured in [...]’s

⁴⁸¹ Email from the ULL project manager to the Wholesale Director, dated 16 April 2007, Doc ID 0193, p. 5.

⁴⁸² See section 8.3 on the margin squeeze calculation.

⁴⁸³ The analysis was prepared by [...] using the standard critical loss analysis. The full report by [...] is provided in Annex V.1 of the reply to the SO. In ST’s reply to the SO see in particular paragraphs 438-455, Doc ID3630.

⁴⁸⁴ See ST’s reply to the SO, Doc ID3630, paragraph 442 and section 5.1.2.1.5.

⁴⁸⁵ See recitals (154)-(156).

⁴⁸⁶ ST’s analysis concentrates on IP-level and ATM-level bitstream services. However, ST stresses that the principle of the analysis would be expected to apply also to ULL services. See footnote 316 of ST’s reply to the SO.

⁴⁸⁷ In this regard see recitals (157)-(162).

⁴⁸⁸ ST’s reply to the SO, Doc ID3630, paragraphs 451-452.

analysis. In particular, in order to benefit ST's own retail DSL business, ST might have the incentive to set wholesale prices high to generate a margin squeeze of competitors seeking access *via* ULL. This would be fully consistent with the Commission's theory of harm in the present case. It would also imply that even at a wholesale margin that is lower than the observed margin, cellophane fallacy issues are still a concern and, as a result, ST's critical loss analysis at the wholesale level is not relevant for market definition.

(306) For the reasons explained above, the Commission considers ST's analysis of indirect constraints, which relies on the data and estimates from ST's [...] et al. study, as uninformative for the wholesale market definition in the present case.

(307) In conclusion, in view of the above considerations, the Commission considers that ST's ability to set wholesale prices for access to unbundled local loops and thus its dominant position on this market was to no appreciable extent indirectly constrained by competitive access products (fibre-, cable- and FWA-based) in the retail market.

6.1.2.7. Conclusion on the dominance on the wholesale market for access to the unbundled local loops

(308) In view of the above, the Commission concludes that ST holds a monopoly position on the relevant market and there are no direct constraints in the form of actual or potential competition or countervailing buyer power which would limit the market power of ST as a monopoly ULL services provider. Therefore, between 12 August 2005 and 31 December 2010, ST held a dominant position within the meaning of Article 102 of the Treaty on the wholesale market for access to the unbundled local loops.

6.1.3. *Dominance on the retail mass market for broadband services offered at a fixed location*

6.1.3.1. Introduction

(309) In order to assess the position of ST in the market, the following recitals analyse the structure of the relevant market (section 6.1.3.2), the competitive constraints exercised by ST's competitors (section 6.1.3.3), barriers to entry and expansion on the market (section 6.1.3.4); and the possible countervailing buyer power of ST's customers (section 6.1.3.5).

6.1.3.2. The analysis of market shares

(310) The market shares of ST and its main competitors on the retail broadband access market throughout the analysed period are indicated in the following Table 11.

Table 11: Market shares on the retail mass market for broadband services offered at a fixed location based on number of subscribers (as ranges for third parties' confidential data)

	2005	2006	2007	2008	2009 ⁴⁸⁹	06/2010	2010
ST	[40-50]%	[40-50]%	[40-50]%	[50-60]%	[40-50]%	[40%-50%]	[40%-50%]
UPC	[10-15]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%
Slovanet	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5] ⁴⁹⁰
Orange	0.0%	0.0%	[0-5]%	[0-5]%	[0-5]%	[5-10]%	4.9% ⁴⁹¹
GTS Slovakia	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5] ⁴⁹²
WiMA X	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5] ⁴⁹³
Antik	n.a.	n.a.	[0-5]%	[0-5]%	[0-5]%	[0-5]%	n.a.
e-Tel/ Dial Telecom (merged 05/2008)	n.a.	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	n.a.

Source: Commission table based on data provided by ST, AOs and the Ministry of Transport, Posts and Telecommunications and publicly available data⁴⁹⁴.

⁴⁸⁹ As of 2009, there was a minor methodological change in the statistics of the Ministry of Transport, Posts and Telecommunications used to identify the total number of fixed broadband connections in the Slovak market. In that year, the Ministry asked Výskumný ústav spojov (VUS), which collected the data for the statistical survey, to extend the survey to a number of very small local fixed wireless (in particular WiFi) operators. This extension also affected the overall total market figures. Doc ID2776 confirmed by VUS in doc ID2774. See also recital (339).

⁴⁹⁰ Slovanet in its 2010 Annual report indicates that its total number of customers (including residential and non-residential customers as well) as of 31 December 2012 was 40 270 (available at http://www.slovanet.net/files/rocne-spravy/slovanet_rocnasprava2010.pdf, page 6). Slovanet's market share as of 31 December 2010 thus was quite below 5%.

⁴⁹¹ Orange 2010 market share is based on the number of Orange's fibre subscribers of 43 000 as indicated in Orange's 2010 Annual Report, Doc ID3347, page 7 (also available at http://www.orange.sk/fileadmin/orange/user_uploads/dokumenty/onas/tlacove-centrum/vyrocnaspravy/Annual_Report_2010.pdf).

⁴⁹² GTS Slovakia confirms that its number of residential customers gradually decreased over time (Minutes of the conference call with GTS Slovakia of 27 June 2013, Doc ID3873, paragraph 12). GTS Slovakia's market share as of 31 December 2010 thus was well below 5%.

⁴⁹³ Wimax was acquired by Slovanet in May 2011. At that time Wimax had 8 000 customers (of which 95% households) - see Slovanet's press releases, Doc ID3112 and Doc ID3402. Wimax's market share as of 31 December 2010 thus was well below 5%.

⁴⁹⁴ For details see paragraph 727 of the SO Doc ID3416. UPC 2010 market share is based on UPC's 2010 Annual report, available at <http://www.libertyglobal.com/PDF/AR/2010-Liberty-Global-Annual->

- (311) The figures in the table indicate that the market share of ST on the basis of the number of subscribers was throughout the analysed period close to [40-50%].
- (312) The above market share table also shows a significant gap between the market share of ST and its competitors. The second largest competitor UPC had a market share not exceeding 10%, that is to say almost five times less than ST. In addition, UPC's market share was decreasing over time. All other individual competitors' market shares were below or at most around 5% throughout the analysed period. Even Orange with its huge investments into fibre roll-out and marketing⁴⁹⁵ was able to reach only a market share of around 5% in 2009 and 2010 (that is to say 3 years after the launch of its fibre broadband services)⁴⁹⁶.
- (313) With respect to market shares based on revenues, these are difficult to establish objectively as the total market revenue data are not available. However, ST's internal document of July 2009⁴⁹⁷ emphasises the premium price positioning of ST in fixed broadband which may suggest that ST's market share on the basis of revenues is even higher⁴⁹⁸.
- (314) The market share figures demonstrate that ST was able to foster its strong position despite the dynamic development of the overall market. The development of ST's market shares in 2004-2008 also contrasts with the overall decreasing market shares of incumbents in the Member States⁴⁹⁹. Even though the market share of ST decreased in 2009, this sudden decrease is to a large extent caused by the change in the statistical collection practice of the Slovak authorities as described in recital (310)⁵⁰⁰. While the inclusion of the large number of very small fixed wireless operators may better reflect the situation regarding the overall broadband accesses used in the Slovak Republic, it is questionable to what extent these small local operators (including a number of those with only a few subscribers) exert effective competitive constraints on ST. However, even with a market share above [40%-50%] remains to be clearly the leading operator in the Slovak market.
- (315) In addition, ST presents on a number of occasions in its internal documents its market share on the fixed broadband market as including the DSL connections sold by other operators on the basis of ST's wholesale products ISP Gate/ADSL Partner⁵⁰¹, (that is to say the products which gives operators limited possibility to

[Report.pdf](#), page 23 (71 300 subscribers). See also UPC's press release of 6 December 2010, Doc ID3163.

⁴⁹⁵ See in more details recital (331).

⁴⁹⁶ The number of fibre subscribers of Orange amounted to 38 000 in December 2009 (see press release of Orange of 9 December 2009, ID2011) and 43 000 in December 2010 (see Orange's 2010 Annual Report, Doc ID3347, page 7), which represented only 4.8% (in 2009) and 4.9% (in 2010) of total fixed broadband subscribers.

⁴⁹⁷ See ST internal presentation [...], Doc ID1904, p.21.

⁴⁹⁸ [...] (for more detail, see paragraph 1412 and Figure 16 of the SO Doc ID3416). In this regard see also recitals (342)-(346).

⁴⁹⁹ See in this respect Figure 12 of the SO Doc ID3416.

⁵⁰⁰ In case the number of 2009 fixed wireless subscribers grew by the same percentage as between 2008 and 2007, the market share of ST would be around [40-50] %.

⁵⁰¹ Doc ID1904, p.4, reporting ST's market share in fixed broadband as amounting to [50-60] % for 2007, [50-60] % for 2008 and estimated [50-60] % for 2009; doc ID1419, p. 13, reporting ST's market share in fixed broadband amounting to [50-60] % in 2007 and [50-60] % in 2008; or Attachment Q2_SEEB_4 to the Reply of ST to the request for information of 11 November 2010, page 5 (slide 4), Doc ID3233, reporting ST's market share in July 2009 as amounting to [50-60] %.

differentiate their products from those of ST⁵⁰²). ST viewed these operators as "[...]" or even as an additional "[...]"⁵⁰³. The Commission is of the view that this provides a useful insight on how ST viewed its position on this segment of the retail market.

- (316) The market share figures of ST and its competitors as well as their development over time are thus strongly indicative of dominance of ST, in line with the case-law⁵⁰⁴. In addition to market share figures the Commission notes the premium price positioning of ST which is also indicative of dominance of ST.

6.1.3.3. Existing competitors do not provide sufficient constraints to ST

- (317) While the existing competitors' market shares are throughout the analysed period significantly below the market share of ST, the Commission acknowledges that they provide some competitive pressure on ST. This is also evidenced by internal documents of ST which analyse the competitive situation of the retail broadband market⁵⁰⁵. However, the key question for the analysis of dominance by ST is whether they provide effective competitive constraints to limit the market power of ST. In this respect the Court confirmed that "[e]ven the existence of lively competition on a particular market does not rule out the possibility that there is a dominant position on that market [...]"⁵⁰⁶.

- (318) The development of the market shares of ST's competitors described in section 6.1.3.2 demonstrates that they were not able to challenge ST as market leader. In addition to the market structure, the Commission found evidence of several other factors which lower the ability of competitors to provide sufficient competitive constraints on ST to limit its market power.

- (319) Other fixed broadband access technologies (in particular coaxial cable TV networks, fixed wireless networks, Ethernet networks or FTTx), despite enabling some entry and expansion of competitors, have significant drawbacks for mass-market expansion compared to the DSL network.

- (320) Cable television networks have overall limited coverage⁵⁰⁷. The cable modem coverage in the Slovak Republic is only 31% of population and thus belongs among the lowest in the EU, while being practically non-existent in rural areas.⁵⁰⁸ Limitations of this platform due to "*geographical and technological constraints*" are

⁵⁰² For details see sections 4.3.5.3 and 4.3.5.4 of the SO Doc ID3416 as well as ST's internal documents Doc ID0141, p.25 or Doc ID1195, p.23.

⁵⁰³ See e.g. internal email [...], ID0157, p.25; presentation [...]", Doc ID0139, p. 9; or presentation [...]%, ID1254, p. 10.

⁵⁰⁴ Case 85/76 *Hoffmann-La Roche & Co. v Commission* [1979] ECR 461, paragraph 39-41; Case C-62/86 *AKZO v Commission* [1991] ECR I-3359, paragraph 60; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, paragraphs 90, 91 and 92; Case T-340/03 *France Télécom v Commission* [2007] ECR II-107, paragraph 100.

⁵⁰⁵ Documents ID1904, ID1332, p.12, ID1286, p.13, ID1293, p.9, ID1374, ID1905, p.5 and others.

⁵⁰⁶ Case T-340/03 *v Commission* [2007] ECR II-107, *France Télécom*, paragraph 101.

⁵⁰⁷ Slovanet's Reply to RFI of 7 April 2009 Doc ID0418, p.6.

⁵⁰⁸ Page pages 18 and 19 of the report "*Broadband Coverage of Europe, Final Report, 2009 Survey*" of December 2009, prepared by IDATE for the Commission, available at the website http://ec.europa.eu/information_society/eeurope/i2010/docs/benchmarking/broadband_coverage_in_europe.pdf.

also acknowledged by the 15th Progress Report⁵⁰⁹. Even though the main operators such as UPC invest into upgrading their networks to be able to offer high-speed services, the geographic coverage of these services was limited and did not cover the whole network of UPC⁵¹⁰. UPC, the largest cable network operator in the Slovak Republic, covered with broadband around 399 000 households in 2010⁵¹¹, that is to say only 22% of all households in the Slovak Republic.

- (321) As regards fixed wireless networks such as Wi-Fi or WiMax, their technical limitations provide a lower scope to offer a portfolio of retail services compared to DSL as IPTV or VoD are practically excluded on these networks⁵¹². Further, the transmission quality of fixed wireless networks may be affected by visibility and weather conditions⁵¹³, these networks require higher installation costs for the users and involve higher network operating costs for the operators⁵¹⁴. Even though the costs and time necessary for network roll-out is lower than in case of other fixed networks, they still constitute a disadvantage compared to the expansion of DSL on the existing copper access networks⁵¹⁵. These networks also concentrate mainly on areas with limited wire-line broadband possibilities⁵¹⁶. In addition, even though these networks represented overall close to 20% of all fixed broadband accesses in the Slovak Republic⁵¹⁷, they are usually operated by smaller operators with insignificant national presence. For illustration, the market share of the largest Slovak wireless operator WiMax remains well below 5%.
- (322) As regards fibre (in particular FTTx) and Ethernet networks, these have been rolled-out rapidly in the Slovak Republic starting in 2007. Even though they became gradually more important after 2006, their growth has not challenged the dominant position of ST for a number of reasons. The FTTx roll-out is in general very expensive, risky and time-consuming⁵¹⁸. Despite its heavy investment into fibre-roll out and marketing Orange managed to attract in three years only around 38 000

⁵⁰⁹ Commission Staff Working Document accompanying the Commission's Progress Report on the Single European Electronic Communications Market 2009 (15th Report), SEC(2010)630 final/2, Doc ID4247, page 356.

⁵¹⁰ In case of the largest operator UPC, broadband access *via* cable TV networks was enabled gradually in only 19 Slovak cities between 2003 and 2008 – see Doc ID0278, p.8.

⁵¹¹ Annex to the Third Issues Paper, Doc ID2405, paragraph 28.

⁵¹² Replies to RFI Dial Telecom/eTel doc ID0287, p.22, Slovanet Doc ID0418, p.13 or WiMax Doc ID0272, p.8.

⁵¹³ Slovanet's Reply to RFI of 7 April 2009 Doc ID0418, p.6.

⁵¹⁴ Replies to RFI Slovanet's Doc ID0418, p.13, WiMAX Doc ID0272, p.8.

⁵¹⁵ WiMAX's Reply to RFI of 7 April 2009 Doc ID0272, p.8.

⁵¹⁶ Replies to RFI of 7 April 2009 UPC Doc ID0278, p.9-10, WiMAX Doc ID0272, p.8. Minutes of the conference call with Slovanet of 7 August 2013 Doc ID 3959, point 2.6, Minutes of the meeting with Orange of 3 June 2013, Doc ID 4189, point 15, Case SK/2011/1210 TUSR's Analysis of the wholesale market No. 4 published in August 2011, see also Doc ID3169 the last version of TUSR's Analysis of the wholesale market No. 4 published in January 2012, and Doc ID 4130, TUSR's Analysis of Wholesale Market No. 5, notified under Article 7 of the Framework Directive consultation mechanism, case SK12012/1345. See also the results of the [...] survey commissioned by ST, Doc ID2690.

⁵¹⁷ Based on the number of broadband accesses per technology available from the Ministry of Transport, Posts and Telecommunications, http://www.telecom.gov.sk/files/statistika_vud/internet_tel.htm. See also Table 27 of ST's reply to the SO Doc ID 3630 (Share of FWA out of all fixed broadband connections).

⁵¹⁸ See *e.g.* a discussion on the costs and risks of FTTH roll-out discussed in the OECD document "*Developments in fibre technologies and investment*", DSTI/ICCP/CISP(2007)4/FINAL, of 03/04/2008, doc ID3364.

subscribers out of more than 300 000 households covered by its network.⁵¹⁹ Orange remains only a marginal market player with 43 000 subscribers and 4.9% market share even in 2010. In comparison, the total number of ST's DSL broadband subscribers increased by [200.000-300.000] from 2006 to 2009⁵²⁰. This means that although the service coverage of ST's local loop network was approximately [3 to 6] times greater than the coverage of Orange's fibre network, the increase in total number of ST's DSL subscribers was almost [5-9] times greater than the number of subscribers acquired by Orange *via* its fibre network. Finally, the most important operator rolling-out fibre is ST itself as the coverage of its fibre network exceeded the coverage of Orange's network in 2009, amounting in total to 315 000 households⁵²¹. This fact also suggests that FTTx was seen rather as premium, next generation product, competing for a different customer segment compared to the standard mass-market DSL products.

(323) ST continues to invest into upgrading and extending the coverage of its DSL network.⁵²² [Description of ST's DSL strategy]⁵²³. [Description of those areas where DSL will continue to play a role]⁵²⁴.

(324) Moreover, ST's competitors are at a competitive disadvantage on the nation-wide mass-market due to the foreclosed access to ST's ULL network⁵²⁵. As a result, ST's share of the DSL market segment gradually increased during the whole period (from [70-80]% in 2005) and exceeded [90-100]% as of 2008⁵²⁶ while AOs had to rely on WBA (at national level), another wholesale broadband product offered by ST, which, however, is not a substitute for access *via* unbundled local loop.⁵²⁷ The DSL network represents the most cost effective and widely available technology to provide mass-market broadband services to the majority of customers⁵²⁸ and ULL access allows the AOs to control the connection in ST's network to the customer premises, to differentiate their retail broadband offerings from those of ST and thus to effectively compete on the retail market in a manner which WBA (at national level) does not allow⁵²⁹. This is not invalidated by a lower penetration of DSL in the Slovak Republic (compared with other Member States) as ST's DSL network is, with around a [80-90]% ULL service coverage and [80-90]% PSTN local loop network coverage⁵³⁰, still the most widespread fixed broadband network in the Slovak Republic.

⁵¹⁹ Press release of Orange of 9 December 2009, Doc ID2011.

⁵²⁰ ST's Reply to RFI of 12 July 2013, Doc ID3897, answer to question 13 (Annex Q.13).

⁵²¹ ST's Annual Report 2009, page 42, Doc ID2877

⁵²² Only during 2009, ST increased its coverage by 75 000 households in 400 small municipalities by installing miniDSLAM equipment and it continues to invest into increasing ADSL2+ coverage (See ST's Annual Report 2009, p. 37. Doc ID2877).

⁵²³ ST's Reply to RFI of 17 July 2009 Doc ID1405, p.16.

⁵²⁴ ST's internal presentation of November 2009 Doc ID1907, p. 14.

⁵²⁵ See sections 0 and 0 for the evidence of the foreclosure due to ST's exclusionary behaviour with respect to its wholesale ULL access.

⁵²⁶ See Table 47 of the SO Doc ID3416.

⁵²⁷ See section 5.1.3.

⁵²⁸ Replies to RFI of 7 April 2009 Dial Telecom/e-Tel Doc ID0287, p.6-7, Slovanet Doc ID0418, p. 6, Minutes of the meeting with Orange of 3 June 2013, Doc ID 4189, paragraphs 11, 27, 29 and 33, Minutes of the conference call with Slovanet of 7 August 2013, paragraphs 1.3 and 2.8.

⁵²⁹ See recital (315) or (333).

⁵³⁰ See the description of ST's network coverage in section 4.6.

- (325) All these differentiating factors show that while some market entry and expansion on the basis of alternative technologies is possible, they do not provide sufficient competitive constraints to the mass-market DSL services provided by ST. This is also documented by the fact that most of the main AOs rolling-out new alternative networks (including Orange, Slovanet, GTS Slovakia, SWAN or e-Tel/Dial Telecom) were clearly interested in obtaining wholesale access to ST's ULL network⁵³¹. These operators decided to roll-out their own networks not primarily because of their advantages compared to DSL (as claimed by ST⁵³²) but in particular because the exclusionary conditions under which ST offered ULL wholesale access did not allow them to compete effectively with ST and they had no other alternative⁵³³.
- (326) Therefore, ST was able to behave in this regard independently and without being constrained by AOs.⁵³⁴
- (327) For those reasons many competitors of ST, for which the available networks are viable, were not able to provide efficiently and on a sufficiently large scale the whole portfolio of broadband products and had to focus on specific segments of the broadband market. For the main competitors, this can be described as follows:
- (a) Orange – focused on a high quality fibre broadband providing very high speed and possibility for value added products⁵³⁵ which is reflected in the very low market share of Orange despite its significant investments into network and marketing. ST refers in its June 2008 document to the *"lower FTTH success so far"* of Orange⁵³⁶. Orange itself acknowledges that *"access to DSL remained crucial, without it Orange could not compete effectively"* and that *"costs for fibre are high. Orange's position is much weaker in comparison with ST's"*.⁵³⁷ Also Orange's internal presentation of March 2007 points out that there is *"No reasonable way to get via fixed infrastructure to customer premises - T-Com successfully holds its dominant position (no ULL)"*.⁵³⁸;
 - (b) UPC – primarily a cable TV company⁵³⁹ focused on using the existing infrastructure (with "poor" or "limited" coverage as described by ST itself⁵⁴⁰) also for broadband/triple play but still not all its cable networks were upgraded for triple-play⁵⁴¹ in view of its limited investment capabilities⁵⁴²; this is also

⁵³¹ For details see for instance section 7.5.

⁵³² ST's Issues Paper, p. 9 Doc ID0953.

⁵³³ Orange Doc ID0330, p.18 and Doc ID1920, Dial Telecom/eTel Doc ID0287, p.21, Slovanet Doc ID0418, p.3 and 11-12.

⁵³⁴ It should be noted that at the end of 2011, according to ST itself it had [...] broadband customers which had a subscription including IPTV, which amount to [...] of its [...] DSL subscribers and that [...] of its customers had subscribed to VoD services, which is also a high end broadband retail service; see reply to the SO paragraphs 556 and 557, doc ID3630.

⁵³⁵ At the beginning of 2009, the most popular product of Orange was FiberNet Klasik with speed up to 30 Mbit/s (see Orange press release of 18 March 2009, [Doc ID3125]) while ST's most popular mass-market product Turbo 2 offered speed only up to 1.5 Mbit/s (Doc ID0552 and ID0553).

⁵³⁶ ST's internal document of June 2008, Doc ID1374, p. 24.

⁵³⁷ Doc ID4189, Minutes of the meeting with Orange of 03 June 2013, point 11 and 29.

⁵³⁸ Doc ID4330, page 5.

⁵³⁹ See in this respect also ST's own internal evaluation of UPC's position, e.g. Doc ID1666, P. 20.

⁵⁴⁰ ST's Reply to RFI of 4 December 2009 Attachment Q7_37 Doc ID1288, p.13 and Doc ID1904, p.21 respectively.

⁵⁴¹ UPC's Reply to RFI of 7 April 2009 Doc ID0278, p.8, and Doc ID2540 Non confidential Doc ID3107.

confirmed by ST's own internal analysis which describes UPC in August 2009 as "*not fully leveraging coverage due to limited market invest (shareholder profitability focus)*"⁵⁴³. In addition, UPC itself stresses that "*ST is the market leader and defines the level of prices*".⁵⁴⁴;

(c) GTS Slovakia, Dial Telecom/eTel and to some extent also Slovanet⁵⁴⁵ – focus on the business segment of the market and do not invest into acquiring customers in the mass-market residential segment⁵⁴⁶; as regards GTS Slovakia ST itself stresses that it "*focuses on business customers*"⁵⁴⁷,

(d) WiMax – focuses in essence on rural areas not covered by other fixed broadband technologies⁵⁴⁸,

(e) Local/regional players – focus on low-price and simple broadband services⁵⁴⁹ in their respective local/regional areas with no national aspirations; while they do represent an important part of the overall fixed broadband market (around 20%⁵⁵⁰) this group consists of a large number of usually very small individual operators with no possibility to challenge the market leader.

(328) In view of these limitations and different positioning compared to ST (internally also acknowledged by ST⁵⁵¹), competitors were not able to provide sufficient competitive constraints to limit the market power of ST, who was thus able to maintain or even strengthen its position as a clear market leader. In this regard the Commission reiterates that the relevant market is national in scope and that ST's argument concerning 'self-imposed' uniform pricing policy⁵⁵² indicates that possible competitive pressures in some municipalities within a national market in the Slovak Republic were not strong enough for ST to decrease its nationally uniform price⁵⁵³. Moreover, the data on retail prices presented by ST also indicates that ST's competitors did not exercise sufficient competitive constraint on ST's DSL pricing and that ST was able to behave to an appreciable extent independently of its competitors when setting its DSL retail prices.⁵⁵⁴ Also, the availability of fibre technology was very limited before 2007 and Orange, despite its heavy investment into the fibre roll-out and reaching a coverage of 17% of the Slovak households in 2010, remains only a marginal market player with 43 000 subscribers and 4.9% market share in 2010. The market share of UPC, a second largest operator, was decreasing over time and UPC itself stresses that "*ST is the market leader and*

⁵⁴² UPC's Reply to RFI of 7 April 2009 Doc ID0278, p.8-9.

⁵⁴³ ST's internal document Doc ID1905, p.5.

⁵⁴⁴ Doc ID4146, Minutes of the conference call with UPC of 31 July 2013, point 2.

⁵⁴⁵ Even though Slovanet is more active in the residential segment these customers are targeted mainly by its higher-end products (triple play) in the very limited areas covered by its own fibre network – see Slovanet's Reply to RFI of 7 April 2009 Doc ID0418, p.7-8 and Doc ID3959, paragraph 5.7.

⁵⁴⁶ GTS Slovakia Doc ID0374 Non confidential Doc ID0375, p.2, Doc ID 3873, paragraph12 or Doc ID1968, Dial Telecom/eTel Doc ID0287, p.5 or 22.

⁵⁴⁷ See ST's reply to the SO, paragraph 506.

⁵⁴⁸ WiMAX's Reply to RFI of 7 April 2009 Doc ID0272, p.3.

⁵⁴⁹ ST's internal document of July 2009, Doc ID1904, p.21.

⁵⁵⁰ ST's internal document Doc ID1374, p.22.

⁵⁵¹ ST's internal document of July 2009 Doc ID1904, p.21.

⁵⁵² See recital (254).

⁵⁵³ In this regard see also recital (259).

⁵⁵⁴ See recitals (342)-(346).

*defines the level of prices*⁵⁵⁵. A large number of small and fragmented local fixed wireless operators cannot be seen as exerting significant competitive constraints on ST, while there are also indications that these operators mainly concentrates on areas with limited wire-line broadband possibilities.⁵⁵⁶

6.1.3.4. AOs face significant barriers to entry and expansion

- (329) In the present case, the circumstances under which ST rolled out its infrastructure are relevant. ST rolled out its local access infrastructure over a significant period of time protected by exclusive rights and was for decades able to fund investment costs through monopoly rents from the provision of voice telephony services and from State funds. Also, as described in section 5.1.3 there is no alternative infrastructure which would enable AOs to offer retail broadband services on a national scale in the Slovak Republic and which is substitutable to ST's local access network. It would be time consuming and a significant investments and high sunk costs would be needed to roll out a nationwide fixed network, irrespective of the type⁵⁵⁷, which constitutes a main barrier to entry.
- (330) ST is the only Slovak operator enjoying significant economies of scale in the retail broadband market.⁵⁵⁸ Economies of scale are present both at the technical and the commercial level.⁵⁵⁹ As evidenced by the market shares of ST and AOs, ST had throughout the period a significantly larger fixed broadband subscriber base than any other individual competitor. This enables significant investments into network expansion, marketing, sales or customer care to be spread over a large number of subscribers. In addition, the significant DSL customer base provides ST with an advantage also in the new fibre segment of the broadband market as ST has the possibility of a "*managed migration of xDSL customer base to FTTx in overlapped locations*"⁵⁶⁰. Another ST document refers to its intention to [Description of ST's sales strategy].⁵⁶¹ Also Orange stresses that ST "*had a strong customer basis for DSL and leveraged its market power from DSL to fibre competition*".⁵⁶²
- (331) ST's brands have a very strong position in the Slovak broadband market. The brand awareness of ST exceeds significantly that of all smaller AOs and is higher even in comparison to Orange. This is manifest from several internal documents of ST.⁵⁶³ According to [...] research only Orange (with its brand Fibernet) managed to increase its brand awareness as Internet provider.⁵⁶⁴ However, it took Orange (which was even before its fibre roll-out a well-known telecommunications provider in the Slovak Republic and the leader in mobile telephony⁵⁶⁵) more than three years (and

⁵⁵⁵ Doc ID4146, Minutes of the conference call with UPC of 31 July 2013, point 2.

⁵⁵⁶ See for instance recitals (321),(327) and (350).

⁵⁵⁷ See recital (287).

⁵⁵⁸ Orange's Reply to RFI of 7 April 2009 Doc ID0330, p.10.

⁵⁵⁹ This is also recognized by ST itself, see for instance ST's reply to the SO (paragraph 1357) or ST's reply to the letter of facts (paragraph 758). See also Minutes of the conference call with Slovanet of 7 August 2013, Doc ID3959, paragraph 1.1.

⁵⁶⁰ ST's internal document of November 2009, Doc ID1907, p.6 (similarly also p. 9 or 14).

⁵⁶¹ ST's internal document of June 2008, Doc ID1374, p.24.

⁵⁶² Doc ID 4189, Minutes of the meeting with Orange of 3 June 2013, point 11.

⁵⁶³ ST's internal document of May 2004, Doc ID1128, p.3; ST's internal document of April 2007, Doc ID1294, p. 7 and 14; Presentation "[...]" Doc ID1551, p.71 and 78.

⁵⁶⁴ Presentation "[...]" Doc ID1551.

⁵⁶⁵ ST's Issues Paper, page 18 Doc ID0953.

significant marketing expenses⁵⁶⁶) to catch up with the high brand awareness of ST⁵⁶⁷. All other internet operators' brand awareness stays significantly below ST⁵⁶⁸.

- (332) ST is – due to its financial strength and large broadband customer base – able to invest heavily into maintaining this position through nation-wide marketing campaigns. Moreover, ST's fixed-line arm and T-Mobile (a significant player on the mobile telephony and data services market in the Slovak Republic) were cooperating in a number of areas (marketing and sales, bundling of products or network investments). They were gradually developing a joint Group Broadband Strategy aimed at benefiting from unique position of the integrated ST group in the Slovak market⁵⁶⁹. In this respect, ST enjoys important economies of scope in its network of sales agencies which do not only commercialise retail broadband products but also fixed and mobile telephony services. These are difficult to match by any other competitor, with only Orange⁵⁷⁰ being able to reach some of these advantages. This is also recognised by ST in several of its business plans which indicate that [...] AOs in broadband and VoIP⁵⁷¹.
- (333) Further, ST has the only network with national coverage (DSL network). Due to the foreclosed access to ST's ULL network⁵⁷², AOs had no other choice than to invest into the roll-out of own alternative networks⁵⁷³ or to rely on national WBA offered by ST which is, however, not a substitute for ULL access⁵⁷⁴ and which gives operators only a limited possibility to differentiate their products from those of ST⁵⁷⁵. However, the development of an electronic communications network requires overcoming numerous administrative obstacles, such as obtaining permits from local authorities and complying with local development plans. This would make the network roll-out process even more costly, longer and difficult. Consequently, it is economically unfeasible and unreasonably difficult to duplicate at least a significant portion of ST's infrastructure within a reasonable time period (see also section 5.1.3). This further limits the ability of AOs to challenge the position of ST in the retail market.
- (334) AOs which have invested in own networks, such as UPC and Orange, which started to build a fibre network in 2006, had to carry out major investments as also acknowledged by ST which stated that "*[i]n terms of capital expenditure, fibre networks tend to be the most expensive to build*".⁵⁷⁶ However, these operators still

⁵⁶⁶ According to press information, Orange Slovensko spent 95 million EUR on advertising only in 2008 and was the biggest advertiser in the Slovak Republic in 2008 and second biggest in 2007, see http://www.almanachy.sk/media/file/01_orange_full.pdf, Doc ID3164. See also UPC, Doc ID0278, p.9.

⁵⁶⁷ Presentation [...] Doc ID1551, p. 72.

⁵⁶⁸ Presentation [...] Doc ID1551, p. 72.

⁵⁶⁹ Various ST's internal presentations, including Doc ID1904 (and namely page 24), Doc ID1432, Doc ID1907 and others. See also Doc ID3959, paragraphs 1.3 and 7.5.

⁵⁷⁰ Replies to RFI Slovanet Doc ID0815, p.8, or UPC Doc ID0278, p.9.

⁵⁷¹ ST's 10-year Business Plans for years 2009-2018 (Doc ID0865, slide 22), 2008-2017 (Doc ID0864, slide 24) or 2007-2016 (Doc ID0863, slide 24).

⁵⁷² See sections 7 on refusal to supply and 8 on margin squeeze.

⁵⁷³ See also section 5.1.3 demonstrating that there were no viable alternatives to ST's ULL wholesale access offer available to the AOs.

⁵⁷⁴ See section 5.1.3.

⁵⁷⁵ For details see sections 4.3.5.3 and 4.3.5.4 of the SO Doc ID3416 as well as ST's internal documents Doc ID0141, p.25 or Doc ID1195, p.23.

⁵⁷⁶ ST's Reply to RFI of 7 April 2009, Section II.III.Doc ID0460, p.9.

only reach a limited number of Slovak retail customers. For instance Orange covers only around 17% (300 000 households) of all households (1 795 766 households) in the Slovak Republic in 2010 and remains only a marginal market player with 43 000 subscribers and 4.9% market share in 2010. The same applies to UPC, which mainly covers cities which correspond to about 22% of all Slovak households. Further network roll out even by these largest AOs is not possible. According to Orange a further roll out of its fibre network would not be economically rational under the market circumstances in the Slovak Republic.⁵⁷⁷ Orange explains that *"the main obstacles in gaining new customers are that continuing investments in fibre is expensive, while financial sources are scarce and also the fact that 47% of the Slovak population live in rural area"*⁵⁷⁸ and confirms that it was not able to effectively compete *"for the most of the addressable customers (more than 80% of households)"*⁵⁷⁹. Orange underlined that for the areas outside its fibre network the xDSL infrastructure of ST is essential as it cannot be replicated.⁵⁸⁰ As to UPC it does not have sufficient financial resources to further extend its network^{581 582} and its market share was decreasing over time and remained well below 10% in 2010. Experience with the building of parallel local access networks in the Slovak Republic therefore shows that only networks covering a very limited part of the households could be rolled out.

(335) In view of these reasons, the Commission concludes that there are significant barriers to entry and expansion which shield ST from significant competition of AOs.

6.1.3.5. Customers do not exercise any appreciable countervailing buyer power

(336) Each individual customer in the retail mass-market for broadband services represents only an insignificant share of the total sales as individual solutions for large undertakings are outside the defined relevant market⁵⁸³. None of the customers for standard broadband products is thus in a position to exercise any appreciable countervailing buyer power on ST.

6.1.3.6. Arguments of ST

(337) ST throughout the investigation argued that it is not dominant in the retail broadband market and that there is fierce competition in particular from operators using alternative technologies to DSL⁵⁸⁴.

⁵⁷⁷ See in this respect the TUSR's Analysis of the wholesale market No. 4 published in August 2011, ID3170, in particular page 38. See also the last version of TUSR's Analysis of the wholesale market No. 4 published in January 2012, ID3169, p. 49. See also Doc ID 4189, Minutes of the meeting with Orange of 3 June 2013, paragraph 33 and Doc ID 3959, Minutes of the conference call with Slovanet of 7 August 2013, paragraph 1.3.

⁵⁷⁸ Doc ID4189, Minutes of the meeting with Orange of 3 June 2013, paragraph 33.

⁵⁷⁹ Doc ID4188, Orange's submission of 31 May 2013, point 17.

⁵⁸⁰ Orange, reply to questions 10, 13 and 14, Doc ID3993.

⁵⁸¹ UPC's Reply to RFI of 7 April 2009 Doc ID0278

⁵⁸² In order to reach Slovak households located outside the area of their limited networks AOs could only rely on ST's WBA wholesale input which allows them, however, in essence to only resell ST's services and gives them very little opportunity to differentiate their offers from ST's retail services.

⁵⁸³ See section 5.1.2.

⁵⁸⁴ In particular, see ST's reply to the SO (Doc ID3630, paragraphs 465-607), ST's three Issues Papers (Doc ID0953, Doc ID1934 and Doc ID2401) as well as their annexes and related submissions, including a study by [...] (Doc ID2418).

- (338) The structure of the market as presented above (see Table 11) differs significantly from ST's market share figures presented in various submissions⁵⁸⁵. However, these submissions of ST were based on an incorrect inclusion of the mobile broadband services in the relevant market and thus the resulting market share data does not reflect correctly the position of ST and its competitors on the market. For that reason, a number of arguments of ST against its dominance on the retail market based on these market share data cannot be taken into account.
- (339) Further, ST argues that until 2009 the size of fixed broadband market was underestimated and, correspondingly, ST's share of fixed broadband connections at national level was overestimated due to the change of the Výskumný ústav spojov ('VUS', the leading telecoms research institute in the Slovak Republic) methodology.⁵⁸⁶ The differences between the market shares calculated by the Commission and those presented by ST⁵⁸⁷ are as follows:

Table 12: ST's market share on the retail market based on number of subscribers

ST's market share according to:	2005	2006	2007	2008	2009	2010
European Commission	[40-50]%	[40-50]%	[50-60]%	[50-60]%	[40-50]%	[40-50]%
ST	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%	[40-50]%
Difference	1.3%	1.5%	1.7%	1.5%	-1%	0%

- (340) Even if the estimates of ST were correct the difference remains negligible (at most [below 5]% in 2007)⁵⁸⁸ and would not change the Commission's findings in this regard. According to the adjusted figures presented by ST it can still be stated that throughout the infringement period ST's market share was close to [40-50]%. Even with a market share above [40]% (and below [50]%) ST remains the leading operator in the retail market with the significant gap that exists between ST's market shares and that of its competitors. Also, small and fragmented local fixed wireless operators cannot be seen as exerting a significant competitive constraint on ST.
- (341) ST's arguments regarding the lack of dominance in some municipalities within a national market⁵⁸⁹ are based on an incorrect geographic market definition and

⁵⁸⁵ "The Third Issues Paper" and its Annex (Doc ID2401 and Doc ID2405), the reply to the SO (Doc ID3630, e.g. paragraph 492) or the paper "Observations on the broadband market in Slovakia" by [...] (Doc ID2418).

⁵⁸⁶ See ST's reply to the SO, Doc ID3630, paragraphs 484-490 and Table 24. According to ST, the total number of providers reporting to VUS more than doubled between 2008 and 2009 and the total number of wireless subscribers taken into account by VUS increased by an additional 15% in 2009.

⁵⁸⁷ Table 25 of ST's reply to the SO and ST's Reply to RFI of 12 July 2013, Doc ID3897, answer to question 13 (Annex Q.13).

⁵⁸⁸ Moreover, according to ST itself: "[ST and the Commission] has reached almost identical conclusions" – see paragraph 497 of the reply to the SO.

⁵⁸⁹ ST's reply to the SO Doc ID3630, paragraphs 467-479.

therefore, cannot be taken into account.⁵⁹⁰ The fact that in some municipalities individual competitors of ST account for about 40% to over 50% of fixed broadband connections cannot be interpreted as evidence that ST has no dominant position on the national market. Moreover, the Commission notes that ST's own estimates show that ST was the leading operator in [...] out of the [...] largest cities in the Slovak Republic in 2010⁵⁹¹. In addition, TUSR in its analysis of wholesale broadband access ("WBA") market emphasises that *"a large part of towns with high market shares of AOs, indicating a competitive situation, is still largely covered only by xDSL infrastructure"*.⁵⁹²

- (342) In its reply to the SO, ST presented an analysis of retail prices and speeds of ST's and its competitors' products of different market segments ('lower-end', 'mid-range' and 'high-end') based on data from 2011.⁵⁹³ According to ST, its analysis shows that AOs exercise a strong competitive constraint on ST across the full range of ST's portfolio of products.
- (343) The Commission does not agree with this argument and is of the view that data on prices presented by ST cannot be interpreted as evidence supporting ST's allegations that AOs exercised a strong competitive constraint on ST throughout the infringement period. This is for the following reasons.
- (344) First, the data on prices from 2010/11 presented by ST might be informative at most for the latest years of the infringement period.⁵⁹⁴
- (345) Further, the price differentials can be expected to persist in equilibrium in competitive markets characterized by differentiated production. The market for the supply of retail broadband services is a differentiated market. In that regard, for instance UPC stresses that there should be differences in prices between fibre and DSL because *"fibre offers better quality of services and is more expensive and the prices should reflect this"*.⁵⁹⁵ On the contrary, ST argues that [...].⁵⁹⁶ However, the Commission notes that a snapshots of prices provided by ST show that ST's DSL

⁵⁹⁰ See section 5.1.4.1.

⁵⁹¹ See Table 21 of ST's reply to the SO Doc ID3630.

⁵⁹² Doc ID 4130, TUSR Analysis of Wholesale Market No. 5, notified under Article 7 of the Framework Directive consultation mechanism, case SK12012/1345.

⁵⁹³ See ST's reply to the SO Doc ID3630, paragraphs 523-528. In this regard see also similar analysis based on data from 2010 presented by ST in the Third Issues Paper, Doc ID2405, pages 26 and 27.

⁵⁹⁴ The Commission also notes that the discounts (used by ST to calculate effective monthly prices) are applied almost only as to ST's products (while competitors' prices were mostly taken from their websites) – see Doc ID3804, ST's answer to RFI of 28 June 2013, paragraph 19 and attachments Q19_1 and Q19_2.

⁵⁹⁵ Doc ID4146, Minutes of the conference call with UPC of 31 July 2013, paragraph 9.

⁵⁹⁶ ST's reply to the letter of facts, Doc ID4671-36, paragraphs 241-244 (see also DT's reply to the Letter of facts, paragraph 155). However, in its reply to the letter of facts ST also stresses that *"the potential revenues from offering fibre are higher, as it can offer much higher speeds than DSL"* (see Annex II of ST's reply to the letter of facts Doc ID 4671-30, page 28) and according to [...] 's report "[...]" prepared for ST: *"the potential revenues from fibre should be expected to be higher over the longer-term, given that it is a superior product"* (see Annex II of ST's reply to the letter of facts, p. 5). Also, according to Figure 14 of Annex II of ST's reply to the letter of facts ST's fibre costs per subscriber are higher than ST's DSL costs per subscriber in 2010.

prices were significantly higher than prices of comparable or even superior products of its competitors (in particular fibre- and cable-based operators)⁵⁹⁷.

- (346) Therefore, the Commission is of the view that data on prices presented by ST would rather illustrate that AOs and other technologies did not exercise sufficient competitive constraint on ST's DSL pricing and that ST was able to behave to an appreciable extent independently of its competitors when setting its DSL retail prices.
- (347) ST also argues that there has been a large rise in the number of subscribers using cable, fibre and FWA broadband and that the Commission overstates barriers to entry and expansion.⁵⁹⁸ However, ST's argument on the increase of the number of non-ST subscribers cannot be considered as evidence of the lack of ST's market power. ST's market share figures demonstrate that ST was able to foster its strong position throughout the infringement period despite the dynamic development of the overall market.
- (348) Furthermore, despite the gradual roll-out of other fixed technologies by AOs, they are not able to challenge the position of ST in the retail mass market for broadband services and hold only marginal market shares in the market. This is not contradicted by the fact that ST faced some competition from AOs and possibly reacted to this competition⁵⁹⁹. Based on the above assessment⁶⁰⁰ the Commission is of the view that the level of competition is insufficient to eliminate the market power of ST in the retail market.
- (349) ST also argues that there is a significant overlap between FWA and DSL networks in the Slovak Republic (notably ST refers to VUS data for the second quarter of 2011).⁶⁰¹ However, the data presented by ST may reflect the situation on the market at most in the latest years of infringement period. Further, even if the Commission were to take the view the data was informative for the assessment of competitive constraints exerted by FWA providers throughout the infringement period, it could not change the Commission's findings that a large number of small and fragmented local fixed wireless operators cannot be seen as exerting significant competitive constraint on ST.⁶⁰²

⁵⁹⁷ As regards the snapshot of prices provided by ST in its reply to the SO the Commission took into account the price of Turbo 2 for the 'low-speed' segment (ST's most popular product - see paragraph 526 of the reply to the SO) and the prices of Turbo 3 and Turbo 4 for the 'mid-speed' and 'high-speed' segment. The prices of mobile broadband services were not taken into account as they are not part of the same relevant market (see section 5.1.2.2). In this context, the Commission reiterates that the prices of competitors do not include discounts unlike ST's DSL prices. Overall picture and conclusions drawn from the charts presented by ST remain unchanged also in the first quarter of 2010 (based on the data provided by ST in the Third Issues Paper).

⁵⁹⁸ ST's reply to the SO, Doc ID3630 paragraph 569.

⁵⁹⁹ See for instance ST's Annex to the Third Issues Paper, Doc ID2405, p. 27-36 and ST's reply to the SO, Doc ID3630, paragraphs 596-606.

⁶⁰⁰ Section 6.1.3.

⁶⁰¹ ST's reply to the SO, Doc ID3630, paragraph 561 and Annex V.2 of the reply to the SO, pages 11 and 31.

⁶⁰² Interestingly, ST's demand elasticity estimate of [...] for all fixed broadband technologies (that is to say including FWA) and demand elasticity estimate of [...] for fixed broadband technologies excluding FWA is almost equal (see section 5.1.2.1.5 above and paragraph 545 of ST's reply to the SO Doc ID3630). According to estimates of ST, the optimal margin of a hypothetical monopolist would be approximately [...] (this is calculated by the standard Lerner Index formulae which gives the optimal

- (350) Furthermore, as regards the competitive constraints exerted by FWA operators the Commission notes that the letter of the President of the Slovak Association of Local Internet Providers of 10 October 2011 (submitted by ST with the aim to prove competitive constraints exerted by FWA providers⁶⁰³) also indicates that FWA networks mainly concentrates on areas with limited wire-line broadband possibilities. For instance, the letter stresses that the local telecoms operators "*were able to replace and finish the construction of the **missing infrastructure** (emphasis added)*" and that in the recent years they have already covered "*perhaps all areas where demand for internet services remained unsatisfied - where internet services were not present*".⁶⁰⁴
- (351) Finally, contrary to ST's claims, the fact that the absolute price level of ST's broadband services went down and that there was a downward trend of broadband prices in the Slovak Republic⁶⁰⁵ is not in itself proof of a competitive market. Moreover, the available pricing evidence, together with the other Commission's findings on the likely impact of ST's behaviour on competition and thereby consumers, suggest that in the absence of ST's conduct the retail broadband prices in the Slovak Republic could have been lower.⁶⁰⁶ Furthermore, the prices of broadband services decreased also in other Member States and in Hungary and the Czech Republic the DSL prices decreased more sharply than in the Slovak Republic over the period 2005-2008, while at the same time the average speed of DSL increased much more in these two countries⁶⁰⁷.
- (352) In view of the findings of the investigation presented above, the Commission considers that the evidence and claims of ST are not sufficient to disprove a dominant position of ST in this market.
- 6.1.3.7. Conclusion on dominance of ST on the retail mass market for broadband services offered at a fixed location
- (353) In view of the above, the Commission concludes that between 12 August 2005 and 31 December 2010 ST held a dominant position on the retail mass market for broadband services offered at a fixed location.
- (354) This conclusion is also in line with the findings of TUSR within the framework of its actions under the telecommunications regulatory framework⁶⁰⁸.

margin for the monopoly as one over the elasticity of demand, that is to say [...] and [...] whether or not a hypothetical monopolist of fixed broadband technologies has an interest in FWA technology.

⁶⁰³ ST's reply to the letter of facts, paragraphs 207, 223, 227 and 235 and Annex V.

⁶⁰⁴ Annex V of ST's reply to the letter of facts, page 1 and 2.

⁶⁰⁵ ST's Supplementary Issues Paper, Doc ID1934, p.5-7 and ST's reply to the SO Doc ID3630, paragraphs 593-595.

⁶⁰⁶ See section 10.4.2.4.

⁶⁰⁷ OECD Broadband statistics, table "4k. Evolution of a representative broadband subscription over time (2005-2008)", doc ID3357. According to this table, the average price of DSL in the Slovak Republic decreased annually by 37% CAGR and speed increased by 26% CAGR. In case of the Czech Republic and Hungary, price decreased by 46% CAGR and 44% CAGR, respectively, while speed increased by 100% and 59%, respectively.

⁶⁰⁸ See section 4.4.

7. REFUSAL TO SUPPLY

7.1. Legal framework for the assessment of abusive refusal to supply

- (355) Article 102 of the Treaty prohibits any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it, insofar as it may affect trade between Member States. The Court of Justice defined the concept of abuse under Article 102 of the Treaty as follows: "*The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition*"⁶⁰⁹. "*It follows that Article [102 of the Treaty] prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the merits.*"⁶¹⁰
- (356) The fact that an undertaking holds a dominant position is not in itself contrary to Union competition rules. However, an undertaking enjoying a dominant position is under a special responsibility not to engage in conduct that may distort competition.⁶¹¹ It follows from the nature of the obligations imposed by Article 102 of the Treaty that, in specific circumstances, an undertaking in a dominant position may be deprived of the right to adopt a course of conduct or take measures which are not in themselves abuses and which would even be unobjectionable if adopted or taken by non-dominant undertakings⁶¹².
- (357) Similarly, the Court of Justice held that an abuse of a dominant position is prohibited under Article 102 of the Treaty "*regardless of the means and procedure by which it is achieved*", and "*irrespective of any fault*"⁶¹³. Article 102 of the Treaty is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure⁶¹⁴.
- (358) According to consistent case law, the list of abusive practices contained in Article 102 of the Treaty is not an exhaustive list of the methods of abusing a dominant position prohibited by Article 102 of the Treaty.⁶¹⁵ In *Tetra Pak II*, the Court of

⁶⁰⁹ Case 85/76, *Hoffmann-La Roche*, paragraph 91.

⁶¹⁰ Case C-457/10, *AstraZeneca*, paragraph 75. See also Case C-202/07 P *France Télécom* [2009] ECR I-2369, paragraph 106.

⁶¹¹ Case 322/81, *Michelin*, paragraph 57.

⁶¹² See, to that effect, Case 322/81, *Michelin*, paragraph 57, and Case T- 111/96, *ITT Promedia v Commission* [1998] ECR II-2937, paragraph 139.

⁶¹³ Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraphs 27 and 29; Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR II-3929, paragraph 170

⁶¹⁴ Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 26; Case C-95/04 P, *British Airways*, [2007] ECR I-2331, paragraphs 106-107; of 2 April 2009, C-202/07 P *France Télécom Wanadoo* [2009] ECR I-2369, paragraph 104; see also, as regards Art. 101 of the Treaty, C-501/06 P, *GlaxoSmithKline v. Commission* [2009] ECR-9291, paragraph 63.

⁶¹⁵ Case C-95/04 P, *British Airways*, paragraph 57; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 26; Joined Cases C-395/96 P and C-396/96P *Compagnie maritime belge transports a.o. v Commission* [2000] ECR I-1365, paragraph 112.

Justice highlighted that the fact that a dominant undertaking's abusive conduct has adverse effects on a market distinct from the dominated one does not detract from the applicability of Article 102 of the Treaty⁶¹⁶.

- (359) Refusal to supply may in some cases amount to an abuse of a dominant position and be prohibited under Article 102 of the Treaty. In particular in *Commercial Solvents*, the Court of Justice found that an undertaking in a dominant position as regards the production of a raw material and therefore able to control the supply to manufacturers of derivatives, cannot, without objective justification, act in such a way as to eliminate their competition which in that case, would have amounted to eliminating one of the principal manufacturers of the downstream product in the common market.⁶¹⁷
- (360) The Court of Justice has also held that an abuse within the meaning of Article 102 of the Treaty is committed where, without any objective justification, an undertaking holding a dominant position on a particular market reserves to itself or to an undertaking belonging to the same group an ancillary activity which might be carried out by another undertaking as part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such an undertaking⁶¹⁸. The Union judicature has specified that it is not necessary to demonstrate that all competition on the market would be eliminated.⁶¹⁹ The fact that the competitors of the dominant undertaking retain a marginal presence in certain niches on the market cannot suffice to substantiate the existence of such competition.⁶²⁰ Competitors should have the opportunity to benefit from whatever degree of competition is possible on the market and competitors should be able to compete on the merits for the entire market and not just for a part of it.⁶²¹ A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between various economic operators.⁶²²
- (361) For establishing a refusal to supply under Art. 102, the effects that need to be proved are the capability of the dominant undertaking's conduct to make the entry of other

⁶¹⁶ Case C-333/94 P *Tetra Pak v Commission* (“*Tetra Pak II*”) [1996] E.C.R. I-5951, at paragraph 25. In that regard, Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223 and Case 311/84 *CBEM v CLT and IPB* [1985] ECR 3261 provide examples of abuses having effects on markets other than the dominated markets Case C-62/86 *AKZO v Commission* [1991] ECR I-3359 and Case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389 the Union courts found to be abusive certain conduct on markets other than the dominated markets and having effects on the dominated markets.

⁶¹⁷ Joined Cases 6/73 and 7/73 *Istituto Chimioterapico and Commercial Solvents v Commission* [1974] ECR 223, paragraph 25.

⁶¹⁸ Case 311/84 *CBEM v. CLT*, [1985] ECR, page 03261, paragraph 27.

⁶¹⁹ Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, paras 561 and 563; case T-301/04, *Clearstream Banking AG and Clearstream International SA v Commission*, paragraph 148; see also to this effect Joined cases C-468/96 – 478/06, *Lelos*, [2008] ECRI-07139, paragraph 35.

⁶²⁰ Case T-201/04, *Microsoft v Commission* [2007] ECR II-3601, paras 561 and 563; case T-301/04, *Clearstream Banking AG and Clearstream International SA v Commission*, paragraph 148.

⁶²¹ Case C-549/10 P *Tomra*, cit., paragraphs 42 and 46; case T-286/09, *Intel*, EU:T:2014:547, paragraph 117.

⁶²² Case C-49/07 *MOTOE*, [2008] ECR II-02217, paragraph 51.

operators or their activity on the market more difficult or impossible⁶²³. The concept of refusal to supply is not confined to practices that amount to an outright or definitive refusal to grant access to the product or service in question⁶²⁴.

- (362) ST considers that in order to establish that ST's conduct is abusive, the Commission must demonstrate that ST's copper network is indispensable within the meaning of the *Bronner* line of case-law⁶²⁵, that is to say that, if there are no alternative products or services, it is impossible or at least unreasonably difficult for AOs to develop a network that allows them to compete on the downstream market⁶²⁶.
- (363) The Commission considers that the circumstances of the present case, and in particular the existence of a regulatory framework for the access to ULL market and the existence of ST's obligation to give access to its local loop are different from the circumstances in the *Bronner* case.
- (364) The Court of Justice has clarified that it cannot be inferred from the *Bronner* judgment that the indispensability condition 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.⁶²⁷ This is also the situation in this case: ST's conduct consisted of offering access to ULL subject to conditions that were unacceptable or unfair or unreasonably delayed access.
- (365) It is contrary to the Court of Justice's judgment in *TeliaSonera* that ST considers that the *Bronner* conditions, including that of "*indispensability*", must also be fulfilled in situations where an undertaking is accused of imposing unfair trading conditions on its competitors, which do not fall into any specific category of abusive conduct and which are said to amount to a (constructive) refusal to supply⁶²⁸. ST argues that the Court's finding was made in reply to a preliminary reference question that related to a margin squeeze, and not to a constructive refusal to supply⁶²⁹. ST also considers that it would be illogical for outright refusal to supply to be subject to a stricter test than a constructive refusal to supply, which it considers a "*less severe*" form of abuse⁶³⁰.
- (366) The Commission considers first that the Court of Justice is not referring at paragraph 55 of its *TeliaSonera* judgment only to margin squeeze, but generally, to "*conduct such as supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser*". The Court of Justice explains at paragraph

⁶²³ See *inter alia* judgment of the General Court in T-336/07, *Telefónica*, EU:T:2012:172, paragraphs 268-283, confirmed by the Court of Justice in C-295/12 P; *Tomra*, cit., paragraph 79; *TeliaSonera*, cit., paragraphs 63-64.

⁶²⁴ See for ex. case T-301/04, *Clearstream Banking AG and Clearstream International SA v Commission*, paragraph 151. See also Commission Decision of 21 May 2003 in case COMP/37.451, 37.578, 37.579 – *Deutsche Telekom*, paragraph 153.

⁶²⁵ ST's reply to the SO, paragraphs 632, 645.

⁶²⁶ *IMS Health*, paragraph 28: "*it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services*".

⁶²⁷ Case C-52/09, *TeliaSonera Sverige*, EU:C:2011:83, paragraph 55.

⁶²⁸ ST's reply to the SO, paragraph 643.

⁶²⁹ ST's reply to the SO, paragraph 638.

⁶³⁰ ST's reply to the SO, paragraph 637.

58 that if *Bronner* were to be interpreted as applying also to such conduct, that would amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 of the Treaty.

- (367) Second, a “constructive refusal” to supply is not necessarily a “less severe” form of abuse than an outright refusal to supply: whereas an outright refusal to supply implies an explicit refusal, article 102 TFEU may also be violated when supply is made subject to unfair conditions or unreasonably delayed. The Commission considers that, given in particular ST’s *ex-ante* regulatory obligation to provide access and its potential anticompetitive character, such a refusal to supply is not a “less severe” form of abuse than an outright refusal to supply.
- (368) ST considers that the Commission should show, in accordance with paragraph 94 of the Commission Access Notice⁶³¹, that: (i) ST caused undue and inexplicable or unjustified delays during the negotiations, (ii) the RUO’s commercial terms are unusual and objectively abusive compared to contemporaneous RUOs elsewhere in the Union and (iii) the RUO’s technical terms are completely unjustified and cannot be reasonably explained but for the anti-competitive intent.
- (369) However, the legal test that ST proposes as the sole basis for the assessment of whether ST’s access conditions are abusive would amount to replacing the relevant case-law as regards the criteria for the assessment of “unfair” conditions under Article 102 of the Treaty, with a different, more demanding legal test. For instance, the Court of Justice refers in *TeliaSonera* to conditions that are “disadvantageous” or “on which there might be no purchaser”⁶³². Moreover, proving that ST’s conditions cannot be reasonably explained but for ST’s anti-competitive intent would be contrary to Court of Justice’s position that the existence of any anti-competitive intent constitutes only one of a number of facts which may be taken into account in order to determine that a dominant position has been abused and that the Commission is under no obligation to establish the existence of such intent on the part of the dominant undertaking in order to render Article 102 of the Treaty applicable.⁶³³
- (370) In the Commission’s view, there is no reason to extend the case law on abusive refusal to supply essential facilities developed in *Bronner*, to all types of refusal to supply. The judgment in *Bronner* related to specific situations where the application of Art. 102 TFEU would impose an obligation to supply of an asset in which the undertaking has invested with a view to reserving it for itself. It is in this context that the Court of Justice in view of all the specificities of that case laid down strict conditions for an obligation to supply under Art. 102 TFEU to kick in. By contrast, in the present case the telecommunications network at issue owned by Slovak Telekom was developed by the government under a monopolistic regime; this circumstance also needs to be taken into account for the purposes of Article 102

⁶³¹ Commission Notice on the application of the competition rules to access agreements in the telecommunications sector - framework, relevant markets and principles. Official Journal C 265, 22.8.1998, p. 2–28.

⁶³² Case C-52/09, *TeliaSonera Sverige*, ECR I-527, paragraph 55.

⁶³³ Case C-549/10 P, *Tomra Systems ASA*, published in the electronic Reports of Cases (Court Reports - general), paragraph 20-21.

TFEU⁶³⁴. Moreover, ST was already bound by an ex-ante obligation to give access to ULL to AOs, which was imposed by the competent Slovak telecoms authorities under the applicable regulatory regime⁶³⁵.

(371) In conclusion, in a case like the present one it is not necessary to establish that the relevant upstream input is indispensable within the meaning of the *Bronner* case law.

7.2. The ex-ante obligation to give access to ULL to AOs which was imposed on ST by the competent Slovak telecoms authorities under the applicable regulatory regime

(372) In the following recitals the Commission will demonstrate that ST is already bound by an ex-ante obligation to give access to ULL to AOs, which was imposed by the competent Slovak telecoms authorities under the applicable regulatory regime⁶³⁶. Indeed, TUSR has imposed by its decision of 14 June 2005⁶³⁷ an obligation on ST to provide unbundled access to the local loop under fair and reasonable terms⁶³⁸. That is a legal obligation to provide access, which precedes the Commission's investigation of ST's behaviour for compatibility with Article 102, and has been imposed by the national telecommunications regulator under the Slovak Electronic Communication Act, in implementation of the Union regulatory framework for electronic communications⁶³⁹.

(373) In that regard it should be pointed out that, it follows from the considerations underlying both the Union regulatory framework and the Slovak Electronic Communication Act that ST's obligation to supply results from a decision taking into account *inter alia* its incentives and those of its competitors to invest and innovate, whilst ensuring that competition in the market is preserved⁶⁴⁰. Moreover, the

⁶³⁴ See TeliaSonera, paragraph 109; Postdanmark, paragraph 23.

⁶³⁵ See footnote 614.

⁶³⁶ See footnote 614.

⁶³⁷ TUSR Chairman's Decision No. 63/01/2005 of 14 June 2005, TUSR Rozhodnutie o rozklade č. 63/01/2005 zo 14 júna 2005, Doc ID3124.

⁶³⁸ See subsection "4.4. Regulatory framework for unbundling access to the local loop in the Slovak Republic"

⁶³⁹ 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 L 336, 30.12.2000, p. 4), Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), (OJ L 108, 24.04.2002, p. 7) and 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 L 337, 18.12.2009, p. 37).

⁶⁴⁰ In accordance with Article 8 of Directive (EC) 2002/21, the national regulatory authority shall ensure that "*any access obligation takes appropriate account of the risk incurred by the investing undertakings and by permitting various cooperative arrangements between investors and parties seeking access to diversify the risk of investment, whilst ensuring that competition in the market and the principle of non discrimination are preserved*". In accordance with Article 12 of Directive (EC) 2002/19, "*When national regulatory authorities are considering whether to impose [those] obligations referred, and in particular when assessing whether such obligations would be proportionate to the objectives set out in Article 8 of [the Framework Directive], they shall take account in particular of the following factors: (...) (c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment; (d) the need to safeguard competition in the long term (...)*." Section 21(3) of the Communications Act further establishes the obligation for the NRA when imposing the obligation of access to: "*take into account: (...) c) initial investment of owners of telecommunication facilities,*

imposition of an obligation to give access or to supply may not have an impact on the incentives to invest and innovate where the market position of the dominant undertaking has been developed under the protection of special or exclusive rights or has been financed by state resources, as has happened in this case. The Court of Justice has also held that when the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account.⁶⁴¹ In that regard, Recital 3 of Regulation (EC) No 2887/2000 regarding unbundled access to the local loop, states that one of the reasons why the local access network was amongst the "*least competitive segments of the liberalised telecommunications markets*" was that new entrants did not have widespread alternative network infrastructures, as operators such as ST rolled out their local access infrastructure over a significant period of time protected by exclusive rights and were for decades able to fund investment costs through monopoly rents from the provision of voice telephony services and from State funds. As shown in recital (23), ST's dominant position has its origins in a former legal monopoly, which has to be taken into account⁶⁴².

- (374) Indeed, ST's duty to supply the upstream inputs is imposed by the Slovak telecoms regulator in consideration *inter alia* of the fact that a denial of access to the upstream products or access on unreasonable terms and conditions would hinder the emergence and/or continuation of sustainable competition at retail level⁶⁴³. In accordance with recital 7 of Regulation (EC) No 2887/2000 regarding unbundled access to the local loop, "*Unbundled access to the local loop allows new entrants to compete with notified operators (...). 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*". In that regard TUSR found that imposing an *ex-ante*

bearing in mind the risks connected with such an investment; d) the need to safeguard competitive environment in the long term; e) protection of rights of investing undertakings and protection of intellectual property rights (...)."

⁶⁴¹ C-209/10 Post Danmark, paragraph 23.

⁶⁴² C-209/10 Post Danmark, paragraph 23.

⁶⁴³ See Recital 19 of Directive (EC) 2002/19 according to which "*mandating access to network infrastructure can be justified as a means of increasing competition, but national regulatory authorities need to balance the rights of an infrastructure owner to exploit its infrastructure for its own benefit, and the rights of other service providers to access facilities that are essential for the provision of competing services.*" See also Article 12 of Directive (EC) 2002/19 which establishes that "*A national regulatory authority may (...) impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest. Operators may be required inter alia: (a) to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop; (...) (c) not to withdraw access to facilities already granted; (d) to provide specified services on a wholesale basis for resale by third parties*". Also, Section 21(1) of the Communications Act establishes that: "*in connection with access or interconnection the Authority is entitled to impose on the undertaking with significant market power the obligation to accept a reasoned and substantiated request for access, use of certain network elements and related facilities and for interconnection of networks in particular in cases where it considers that denial of access or disproportionate circumstances or terms would not lead to effective competition on the market for end-users or would not be in their interest.*"

obligation to supply on ST was necessary to ensure the development of effective competition in the downstream markets⁶⁴⁴.

- (375) ST argues that the balancing of incentives that is carried out by national regulatory authorities when imposing an obligation to supply differs from that which is to be carried out by competition authorities⁶⁴⁵, as competition law and regulation have different objectives⁶⁴⁶. Also, ST emphasises that the imposition of an obligation to deal is very different under regulatory law and Union competition law – while the imposition of an obligation to grant access may be quasi-automatic when a vertically integrated telecommunications operator is identified as having SMP on a wholesale market, an obligation to deal under Union competition law can be imposed only in "exceptional cases", in accordance with the *Bronner* conditions⁶⁴⁷. That means in ST's view that the Commission should not substitute its own assessment for that of the regulator⁶⁴⁸ because there may be an important time lag between the period during which the significant market power analysis was made (for example, several years earlier) and the moment the competition analysis is carried out by the Commission. ST explains that during that interval, market circumstances may have considerably changed with, for instance, the entry of facility-based competitors with the consequence that the Commission could "*mandate access to infrastructure, which is no longer essential*"⁶⁴⁹.
- (376) ST's objections are unfounded. The Commission does not substitute its own assessment for that of the regulator, as the Commission does not seek to impose *ex-novo* an obligation to provide access to a service. That access obligation was already imposed on ST by TUSR on 14 June 2005⁶⁵⁰ and was not contested by ST. As the Court of Justice stated in *Deutsche Telekom*⁶⁵¹, "*the legislation relating to the telecommunications sector defines the legal framework applicable to it, and in so doing, contributes to the determination of the competitive conditions under which an undertaking [...] carries on its business in the relevant markets, it is [...] a relevant factor in the application of Article 82 EC to the conduct of that undertaking, whether for the purposes of defining relevant markets, assessing the abusive nature of such conduct or setting the amount of the fines.*"⁶⁵² That means that the pre-existing regulatory obligation to supply needs to be taken into account when assessing ST's conduct under Article 102 of the Treaty. As explained by the Court of Justice in *Deutsche Telekom*, even if the national legislation relating to the telecommunications sector may have different objectives from those envisaged by Union competition policy, "*that point has no bearing on the issue whether legislation relating to the telecommunications sector may be taken into account for the purpose of the application of Article 82 EC to the conduct of a dominant undertaking*"⁶⁵³.

⁶⁴⁴ TUSR Chairman's Decision No. 63/01/2005 of 14 June 2005, TUSR Rozhodnutie o rozklade č. 63/01/2005 zo 14 júna 2005, Doc ID 3124.

⁶⁴⁵ ST's reply to the SO, paragraph 658.

⁶⁴⁶ ST's reply to the SO, paragraph 663.

⁶⁴⁷ ST's reply to the SO, paragraph 659.

⁶⁴⁸ ST's reply to the SO, paragraph 662.

⁶⁴⁹ See ST's Reply to the SO paragraph 662.

⁶⁵⁰ See recital (46).

⁶⁵¹ Case C-280/08 P, *Deutsche Telekom v Commission*, ECR I-09555.

⁶⁵² Case C-280/08P, *Deutsche Telekom v Commission*, ECR I-09555, paragraph 224.

⁶⁵³ Case C-280/08P, *Deutsche Telekom v Commission*, ECR I-09555, paragraph 227.

(377) As regards the fact that the market conditions might have changed between the national regulatory authority's assessment and the Commission's competition analysis, the Commission notes that, in accordance with Directive 2002/21/EC, NRAs impose *ex-ante* forward-looking regulatory obligations only where there is no effective and sustainable competition and relax or lift such obligations as soon as that condition is fulfilled⁶⁵⁴. Apart from the fact that the Commission carried out its own *ex-post* analysis of the relevant markets and found that the situation did not significantly change in that regard during the infringement period⁶⁵⁵, for the reasons set out in the preceding recitals the question of refusal to supply under Article 102 of the Treaty must be assessed on the basis of the regulatory obligations which were imposed on the dominant undertaking during the relevant time period, that is to say between 12 August 2005 and 31 December 2010.

7.3. The importance for AOs of an efficient ULL-based wholesale access to xDSL

(378) xDSL technology is very important for the provision of competitive retail broadband products. For instance, the Communications Committee ("CoCom") finds in its Working Document of November 2010 that "*DSL continues to be the main technology in the EU broadband market, although slightly decreasing (from 78.7% one year ago to 77.9% in July 2010)*".

(379) In Slovakia, the position of xDSL in the overall retail market has been significant, representing between 46 and 56% of all fixed broadband connections in the period from 2005 to 2010⁶⁵⁶. For instance, the Progress Report on the Single European Electronic Communications Market 2007 (13th Report) – Commission Staff Working Document, Part 1⁶⁵⁷, chapter on Slovakia, finds that "*DSL technology, with a 58.3% share of the fixed retail market, remains the single most important platform providing broadband services*". Also, the Progress Report on the Single European Electronic Communications Market 2008 (14th Report) – Commission Staff Working Document, Part 1, chapter on Slovakia⁶⁵⁸, provides that "*DSL remains the main broadband platform*".

(380) Further, the number of xDSL subscribers has been growing very strongly with an average year-on-year growth of the number of xDSL subscribers in the overall period 2004-2010 comparable in percentage terms to the growth of alternative new technologies, as illustrated by Figure 13:

⁶⁵⁴ Directive (EC) 2002/21 (Framework Directive), Article 8, paragraph 5 f).

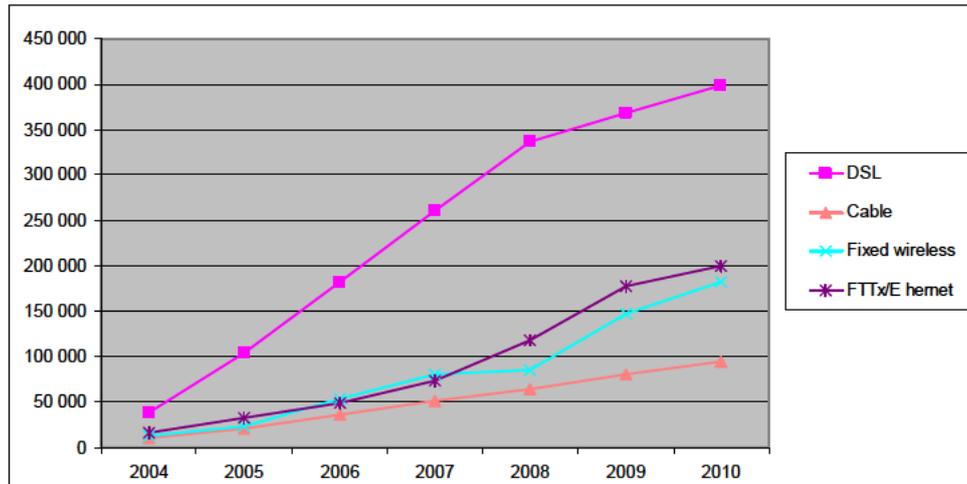
⁶⁵⁵ See section 5.1. Relevant product markets.

⁶⁵⁶ See data of the Ministry of Transport, Posts and Telecommunications of the Slovak Republic, provided in the submission of Slovak Telekom of 25/09/2009, ID1572, p.1. and available (including the 2010 figures) at the Ministry website http://www.telecom.gov.sk/files/statistika_vud/internet_tel.htm

⁶⁵⁷ Doc ID 4243.

⁶⁵⁸ Doc ID 4245.

Figure 13 – Number of subscribers in Slovakia per fixed broadband technology



Source: Ministry of Transport, Posts and Telecommunications of the Slovak Republic, provided in the submission of ST of 25/09/2009, ID1572, p.1 and available (including the 2010 figures) at the Ministry website http://www.telecom.gov.sk/files/statistika_vud/internet_tel.htm.

- (381) The importance of wholesale access to the incumbent's network for the development of efficient competition in the broadband market in Slovakia was recognised by the decisions of the national regulatory authority, TUSR. TUSR considered the nationwide metallic access network of ST as a unique system providing ST with a technological advantage over its competitors as duplicating such an access network is practically impossible. Based on that TUSR imposed on ST an obligation to provide access to ULL as well as regional (Asynchronous Transfer Mode ("ATM")/Ethernet) and national (Internet Protocol – ("IP")) level wholesale broadband access ("WBA")⁶⁵⁹. Even in 2011, when it reviewed the ULL market, TUSR observed that *"the existing long-term constructed public telephone network, including local loops, in the ownership of ST, represents a technological advantage compared to other undertakings which recently entered the electronic communications market and constructed their own access networks. The ownership of local loops enables Slovak Telekom to adapt to market demands, satisfy customer needs and thus gain an advantage over competitive undertakings"*⁶⁶⁰.
- (382) The Commission's investigation confirmed that the various fixed broadband technologies differ as regards a number of parameters that are important for the competitiveness of operators⁶⁶¹. Because of its relatively high speed, reliability and suitability for innovative services, in particular compared to FWA, and its relatively broad coverage, in particular compared to fibre and cable TV, xDSL is a key broadband technology for addressing mass market customers. That is also confirmed by the fact that several AOs unable to obtain access to Slovak Telekom's xDSL

⁶⁵⁹ See decisions of TUSR concerning ULL and wholesale broadband access as described in recital (45)ss. above for ULL and in section 4.3.5.2 of the SO as regards wholesale broadband access.

⁶⁶⁰ See TUSR's analysis of Wholesale Market No 4 of August 2011, Doc ID 3170.

⁶⁶¹ See in this respect section "5.1.2. The retail mass market for broadband services offered at a fixed location"

network on competitive conditions decided to focus on providing broadband products to business customers often with tailor-made and higher-value products⁶⁶². Providing xDSL services on the basis of ST's network is the only viable solution to compete with ST on a large scale on the retail mass market for broadband services offered at a fixed location.

- (383) Further, the wholesale xDSL access provides the least costly means of offering broadband services to mass market customers throughout the Slovak territory, since all other comparable technologies require significant investment and time for roll-out of the network (see in this respect recital (334) and footnote 1565).
- (384) In spite of the continued roll-out of fibre by some operators, the possibility for an AO to use xDSL to offer in a timely manner and without significant investment a competitive broadband product in areas not covered by its fibre network remains a significant advantage, as also recognised by internal documents of ST⁶⁶³.
- (385) xDSL is the main technology in the retail broadband market and ULL is the main channel enabling AOs to provide xDSL on the retail broadband market. For instance, the Progress Report on the Single European Electronic Communications Market of 2007 (13th Report) considers ULL as the most important form of access to the retail broadband services market for AOs⁶⁶⁴.
- (386) CoCom also finds in its Working Document of November 2010 that in Europe ULL is the main form of competition in the xDSL market, with 74.8% of the new entrants' DSL lines, whereas bitstream represents 15.4%, resale represents 8.9% and own network represents 0.9%⁶⁶⁵. In 2009, the Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 1⁶⁶⁶, provides that "*Local loop unbundling (fully unbundled lines and shared access) has recorded positive growth and has become the main form of wholesale access for new entrants with 73.7% of DSL lines, up from 69.2% in January 2009 (Figure 27)*". In 2008 and 2007, ULL continues growing at European Union level at a high rate, as shown by the Progress Report on the Single European Electronic Communications Market 2008 (14th Report) – Commission Staff Working Document, Part 1⁶⁶⁷, according to which: "*Competitive trends are evident from the take-up of unbundled local loop products, reflecting growing infrastructure-based competition. These continue to grow at a high rate, largely as a result of effective regulation in the past couple of years. On average, 69.3% (27.4 million lines) of all AOs' DSL lines are either fully or partially unbundled, compared to 60% in January 2008 and 49.2% in January 2007*".
- (387) In contrast with the situation at European Union level, in Slovakia, ULL was far from being the main form of competition in the xDSL market, as it was non-existent

⁶⁶² See replies of GTS Slovakia (Reply to RFI of 07/04/2009, Question 6, ID0375, p.11) or eTel Slovensko/Dial Telecom (Reply to RFI of 07/04/2009, Question 6 Doc ID 0287, p. 5).

⁶⁶³ See for example [...], Doc ID 1405, p.15-16.

⁶⁶⁴ See Progress Report on the Single European Electronic Communications Market 2007 (13th Report) – Commission Staff Working Document, Part 1, Doc ID 4243, p.35.

⁶⁶⁵ See Communications Committee, Working Document "*Broadband access in the EU: situation at 1 July 2010*", dated 21 November 2010, Doc ID 4175, pages 35 and 18.

⁶⁶⁶ Doc ID 4247, p. 29 and Figure 27 "*New entrants' DSL lines by type of access (EU27 - January 2010)*", p.30.

⁶⁶⁷ Doc ID 4245, p.27.

until December 2009, when the first 3 local loops were unbundled by GTS Slovakia⁶⁶⁸. That is also confirmed by the Progress Report on the Single European Electronic Communications Market 2007 (13th Report) – Commission Staff Working Document, Part 2⁶⁶⁹, showing that in January 2006, 2007 and 2008, no agreements on fully unbundled lines or shared access were concluded in Slovakia, in contrast with the situation in the vast majority of the European Union Member States. For instance, Orange mentioned that in France, currently "*about 30% of the DSL retail services are sold by LLU unbundlers*"⁶⁷⁰. The Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 2⁶⁷¹, shows that in 2009, there were no fully unbundled lines nor shared access lines supplied by the incumbent to new entrants in Slovakia, in contrast with the great majority of the European Union Member States.

- (388) As opposed to WBA, wholesale access to ULL gives an AO the possibility to influence most of the technical and quality parameters, to innovate and, as it fully controls the local loop, to supply services other than ST and more innovative types of services than ST to its retail customers (for example high speed Internet, voice, VoD). As indicated in section 5.1.3.2 the Commission considers that WBA and wholesale ULL access are not substitutes.

7.4. ST's exclusionary strategy to protect its dominant position on the relevant market

- (389) ST acknowledges, in its internal documents, that ST's copper network represents "*an advantage compared to competition*"⁶⁷² ST tried to preserve its competitive advantage on the retail broadband services market by preventing AOs from unbundling local loops, as part of an overall deliberate strategy to protect its retail market position. Several internal documents show ST's intentions to limit access to its network and its awareness of the existence of unfair terms and conditions for access to ULL. One of ST's "*Main Principles of Work*" on the RUO, established in an internal document for the Direction Committee⁶⁷³, was: "*Keep life of OLO [other licensed operator] complicated; minimum requirement (minimum requests for ULL) solution.*"⁶⁷⁴ The minutes from the meeting of the Direction Committee of the same date records the agreement over the Main Working Principles on the RUO project, as stated above.⁶⁷⁵ In 2005, the Director of ST's Strategy and Regulatory Affairs Department advised in an internal email that: "*ST should maintain the principle of competition based on infrastructure (i.e. not allow competitors to share easily our*

⁶⁶⁸ See recital (394) and (408).

⁶⁶⁹ Doc ID 4248, Figure 90, p.92.

⁶⁷⁰ Doc ID 4189, Minutes of the meeting with Orange of 03/06/2013, point 23.

⁶⁷¹ Doc ID 4250, Figure 47 "*Number of alternative operators using full unbundled local loops as a % of active alternative operators, July 2009*", p.48.

⁶⁷² See [...], Doc ID 1405, p.15-16.

⁶⁷³ The Direction Committee is composed of the members of the different departments taking part in the RUO project and chaired by the Member of the Board of Directors responsible for the regulatory matters.

⁶⁷⁴ Presentation [...] Doc ID 0119, p. 25.

⁶⁷⁵ Minutes from the meeting of the Direction Committee of 29 April 2004, Doc ID0119, p. 31-33.

network)". Otherwise, ST feared that it would lower the barriers to entry on the market and would not be able to use its "first mover advantage".⁶⁷⁶

(390) ST was afraid that it might lose retail customers, in particular as access to ST's xDSL network would allow the successful development by AOs of innovative services such as [...]. AOs would have therefore achieved an important competitive advantage over ST on the retail market. The relevance of the wholesale access to xDSL for AOs' ability to compete effectively on the retail broadband market is also confirmed by various internal documents of ST:

- Agenda and minutes from an internal meeting concerning ULL, dated 30 November 2005 provide: "*ULL price should not allow the operators to provide over cheap access services with large added value for a low price – for instance in comparison with our retail – it is necessary to consider risk in (a) voice; (b) DSL; (c) business products.*"⁶⁷⁷
- A presentation to the Executive Management Board ("EMB" Strategic Workshop of August 2005 indicates that an extended xDSL portfolio on the wholesale level would lead to the following risk: "*Competitors in position to be successful on retail market, ST not having real competitive advantage on retail, as a consequence loses on retail share.*"⁶⁷⁸ The presentation also states: "*[Names of two retail services] positioned as ST differentiator on retail markets while WS offer enabling competitors to offer services with lower value to actively push BB penetration, but not allowing them to defeat ST on Retail. [...] ST keeps and fights to retain differentiation and value on Retail ([Names of three services including the ones mentioned before]). [...] Competitive advantage in retail needs to be ensured before any reselling model launched!*"⁶⁷⁹
- A document for the EMB meeting of 16/01/2006 suggests to "avoid options enabling competitors offer [Name of retail service mentioned before] on ST infrastructure, however enabling competitors resale ST access services"⁶⁸⁰.
- A presentation to the EMB of February 2006 provided: "Altnets, driving [Name of retail service mentioned before] initiatives in WE [Western Europe], are very competitive to incumbent offers, exploiting ULL [...]. Altnets in Slovakia currently not a big threat for ST in launching [Name of retail service mentioned before] offers – ULL in practice expected only in 2007[...]."⁶⁸¹
- A wholesale product development manager stated in an internal email of June 2006: "*In many countries, the AOs thanks to the use of ULL came earlier than the incumbent not only with [Name of retail service also mentioned before], but also with [Name of technology] and even [Name of other technology].*"⁶⁸²

⁶⁷⁶ See internal email by the Director of Strategy and Regulatory Affairs Department of 20/05/2005, Doc ID 0174, p.39-40.

⁶⁷⁷ Agenda and minutes from an internal meeting concerning ULL, dated 30 November 2005, Doc ID 0125, p. 9-11.

⁶⁷⁸ See presentation [...], slide 39, Doc ID 0141, p.22 or Doc ID 0209, p. 84.

⁶⁷⁹ See presentation [...], slide 45 (Doc ID0141, p.25 or ID0209, p. 87).

⁶⁸⁰ See presentation [...], slide 23 (Doc ID1195, p.23).

⁶⁸¹ See presentation to EMB of 15/02/2006 "[...]", Doc ID1206, p. 25.

⁶⁸² See internal email by the Head of the WS Product Development and Innovation Department, of 08/11/2006, Doc ID 0141, p.31).

- Another presentation to the EMB of October 2006 indicated: "*Moreover, decreasing naked DSL WS price could also mean easier access for Orange to our infrastructure, what could consequently speed up Orange's [Name of retail service mentioned before] services launch all over Slovakia*".⁶⁸³
 - An email exchange between ST's regulatory affairs managers and wholesale managers (dated 7-8 November 2006) reads: "(...) *for the incumbent a situation is not acceptable where AOs thanks to ULL can create almost independently from the incumbent their offers as they wish. Only thanks to ULL it could happen that AOs have a better market position, better products, better customer perception than the former monopoly.(...) In many countries thanks to ULL use AOs entered the market before the incumbent not only with [Name of retail service also mentioned before], but also with [Name of technology mentioned before] or with [Name of other technology mentioned before] etc.*"⁶⁸⁴.
 - In November 2006, a wholesale product development manager stated in an internal email: "*In many countries, the AOs thanks to the use of ULL came earlier than the incumbent not only with [Name of retail service also mentioned before], but also with [Name of technology service mentioned before] and even [Name of other technology mentioned before].*"⁶⁸⁵
 - A presentation to the EMB Strategy Workshop of April 2007 draw the attention to the fact that ULL is "*likely to be a way for competition to provide own [Name of retail service also mentioned before]*"⁶⁸⁶.
 - ST's ULL project manager called up a meeting to discuss the ULL strategy "*because the views whether to sign at least one ULL agreement or to continue to protect the loops differed.*"⁶⁸⁷
- (391) Those documents provide an extensive body of evidence concerning the intentions of ST to limit "*its market share from the time of the legal monopoly.*"⁶⁸⁸ ST's internal documents also confirm that the exclusionary conduct of ST is capable of affecting competition on the downstream broadband market and thus limiting the choice of retail products for final customers ST's and also show that the presence of alternative technologies does not diminish the importance of an efficient wholesale access to xDSL, even when alternative technologies are available.
- (392) ST denies that it feared the xDSL-based competition and argues that it actually viewed facility-based competition as a much greater threat than the xDSL-based competition⁶⁸⁹: "*Although attractive wholesale prices mean competition with our*

⁶⁸³ See presentation to EMB of 18/10/2006 "[*Wholesale Strategy – Action Plan*", Doc ID1254, p. 20.

⁶⁸⁴ [...] Doc ID0141, p. 30-34. The quote is from p. 31. [...], DocID0119, p. 101, which gives an overview of the '*expected services on the ULL platform*', mentions among others [...].

⁶⁸⁵ See internal email by the Head of the WS Product Development and Innovation Department, of 08/11/2006, ID0141.

⁶⁸⁶ See presentation to the EMB Strategy Workshop of 04/04/2007 "*Goal Setting: iPF 2008-2010*", Doc ID0148, p. 8.

⁶⁸⁷ Meeting invitation from the wholesale business director to selected wholesale, retail and regulatory departments' employees, dated 7 November 2007, Doc ID0159, p. 11.

⁶⁸⁸ See Minutes of the conference call with Slovanet of 07/08/2013, Doc ID 3959, point 8.2, referring to point 550 of the decision of the PMU SR No. 2007/DZ/2/1/111 of 21.12.2007 and point 300 of the Decision of the board of PMU SR No. 2009/DZJ2/017 of 9.4.2009.

⁶⁸⁹ See ST's Reply to the SO, Recital 1589.

DSL retail, this price pressure is lower than that by infrastructure-based competition"⁶⁹⁰. *"DSL speed increase can't compete to upcoming FTTx technologies"*"⁶⁹¹. ST concludes that *"in fact, ST actually had an interest to share its infrastructure with competitors to develop the broadband market"*"⁶⁹².

- (393) ST's reply to the SO is in stark contrast with the documents obtained from the inspection. The evidence available only shows the opposite, that is to say that ST feared in reality both xDSL-based competition and infrastructure-based competition, in particular fibre-based competition and that its strategy to prevent access to ULL was likely to restrict both xDSL-based competition and infrastructure-based competition. ST was well aware of the fact that AOs need access to ULL in order to be able to compete effectively at retail level through infrastructure-based competition and that by preventing an effective xDSL access, AOs would not be able to efficiently deploy their own network from a cost and time perspective and effectively compete with ST. In other words, hindering or excluding the xDSL-based competition, would also hinder infrastructure-based competition⁶⁹³.

7.5. AOs were strongly interested in having access to ST's local loops

- (394) In the period between 12 August 2005 and 18 December 2009 no local loop was unbundled in the Slovak Republic. Until 25 October 2010, only a very small number of local loops were unbundled by GTS Slovakia⁶⁹⁴ - [...] local loops⁶⁹⁵ out of ST's [...] local loops, part of the technical coverage of its network⁶⁹⁶ and only for business customers. However, several AOs expressed their interest for unbundling local loops. ST received six requests for opening negotiations made by the following AOs: Slovanet, Amtel Slovensko, GTS Slovakia, GTS Nextra⁶⁹⁷ (former Telenor), Železničné Telekomunikácie and Vadium. Five undertakings signed the Confidentiality Agreement with ST (Slovanet, GTS Nextra, Amtel Slovensko, Železničné Telekomunikácie and Vadium)⁶⁹⁸.
- (395) More undertakings, in addition to the ones that have requested the opening of negotiations, have been interested in ULL, but at the end they considered ST's unfair terms and conditions unacceptable, resulting in a long and complicated ULL process. That is confirmed both by TUSR and AOs' submissions to TUSR.
- (396) TUSR's analysis of Wholesale Market No 4 of August 2011⁶⁹⁹ shows that *"the Office ascertained that more undertakings from the first round of the analysis were interested in access to local loops of ST (...) eventually they cancelled their intention*

⁶⁹⁰ ST's internal document *"Re-definition of DSL strategy. Overview of original strategy and proposal for update"*, 3 September 2007, Doc ID 1317, p.2.

⁶⁹¹ ST's internal document *"Network strategy 2009-2011- The Network Future"*, November 2008, Doc ID 1405, p.6.

⁶⁹² ST's reply to the SO, paragraph 1590.

⁶⁹³ See section "9. Potential anticompetitive effects of ST's conduct".

⁶⁹⁴ In June 2011 the number of unbundled local loops amounted to [...] - ST's reply to the request for information of 31 May 2011, Doc ID3011, p. 4.

⁶⁹⁵ ST's reply to the request for information of 25 March 2010, Doc ID 2079, p.6.

⁶⁹⁶ See SO recital 378, Doc ID3416.

⁶⁹⁷ 'GTS Nextra' and 'GTS Slovakia' merged into a single entity 'GTS Nextra', which was later renamed to GTS Slovakia.

⁶⁹⁸ ST's letter to TUSR, dated 22 August 2008, *'Informácie k analýze veľkoobchodného trhu č. 4'*, Doc ID0173.

⁶⁹⁹ Doc ID 3170.

to take the broadband access to local loops from ST. The decision by the undertakings was influenced by the position of ST and the weak negotiating power of these undertakings".

- (397) UPC, which is the largest competitor of ST on the retail broadband services market in Slovakia, was initially interested in ULL: *"UPC discussed ST's reference offer on ULL in the past internally as it envisaged possible negotiations, but ST's conditions were disadvantageous and the prices were too high, so it decided not to even start negotiations with ST"*⁷⁰⁰.
- (398) Orange, the second largest competitor of ST, explained that given the 2005 RUO terms, it did not formally request unbundled access to the local loop from ST. By a letter dated 20 October 2005 Orange asked ST to change the terms of the RUO⁷⁰¹: *"The level of efficiency on the relevant market did not change in the period. There is no RUO which would be acceptable, and a change of it cannot be expected without the interference of a regulator because of a weak bargaining power of other players on the market towards ST (at least, in procedural and financial conditions)"*. Orange also informed ST that it had simultaneously requested TUSR to order a change of the RUO terms⁷⁰². According to Orange TUSR remained inactive and did not follow the matter up. As a consequence, there were no negotiations between Orange and ST over unbundled access to the local loop⁷⁰³.
- (399) Orange remained interested in ULL during the whole infringement period. It explained that: *"Orange is still interested in ULL and therefore regularly checked the evolution of the RUO, but there was no significant progress at all in time"*⁷⁰⁴.
- (400) In its submission of 2008 to TUSR⁷⁰⁵, Orange emphasised that it *"is very interested in unbundling the local loop of ST. However, Orange Slovensko does not see a possibility to conclude an agreement because of the reasons stated in the letter from 26/02/2007, i.e. mainly the fact that the RUO is useless due to prices and deadlines"*. Orange also complained to TUSR about the long and complicated process that ST put in place within the RUO: *"the administrative process is artificially complicated, it is unilaterally in the benefit of ST and it enables (e.g. by obstructions) to prolong the time disproportionately"*. That can occur for example, *"by repeating certain steps (deadlines on ST's advantage, not on the side of the undertaking)"*. In addition, *"several steps in the process are conditioned upon the fulfilment of previous steps in the process and in case the applicant misses the deadlines, all steps have to be repeated"*. Orange considered ST's RUO *"contradictory to the legislation (RUO is not transparent, it does not have the requirements according to annex no. 2 of the Act on Electronic Communications, it is not sufficiently structured"* and pointed out *"the extensive time framework due to STs unwillingness"* to give access to their network.

⁷⁰⁰ Minutes of the conference call with UPC of 31/07/2013 - Doc ID 4146.

⁷⁰¹ Orange's letter to ST dated 20 October 2005, Doc ID0299.

⁷⁰² Orange's reply to the request for information of 24 April 2009, non-confidential version, Doc ID0330, p. 14-15.

⁷⁰³ Orange's reply to the request for information of 7 April 2009, Doc ID0330, p. 14-15.

⁷⁰⁴ Minutes of the meeting between the Commission and Orange of 3 June 2013, Doc ID 4189.

⁷⁰⁵ Orange's reply to TUSR's analysis of market 4 - Doc ID 4349.

- (401) Orange's internal presentation "*Slovakia ULL*"⁷⁰⁶ of February 2009 indicates that from the publication of the RUO in August 2005 only minor changes in prices occurred, but no change in the process took place. The whole process is considered to be complicated, with the consequence that the unbundling of a first line "*could take more than 155 days!*" On the slide "*Summary*", Orange concludes that there is a "*long negotiation process to reach change in RUO*". An internal document from Orange⁷⁰⁷ explains that the 155 day time period foreseen for the unbundling of the local loop is only a minimum, and will becoming a reality only if several conditions are cumulatively met⁷⁰⁸.
- (402) Other smaller AOs which were interested in ULL, signalled to TUSR that ST's RUO was unacceptable. ZSR, in its reply of 2007 to TUSR's analysis of market 4⁷⁰⁹, provides that "*the barrier to entry on the relevant market is mainly due to conditions of RUO, which do not enable to alternative telecommunication operators to use the local loop of ST without risk of a loss, which presents a risk to endanger the business*". Dial Telecom's submission to TUSR of 2007⁷¹⁰, in the context of TUSR's analysis of market 4 provides that "*on the relevant market in question, the competition does not exist. As far as we know, because of the conditions, no one has concluded the RUO with Slovak Telekom yet*". Also, Swan replied to TUSR's analysis of market 4 of 2004⁷¹¹ that "*Swan is interested in starting negotiations with ST if conditions to use the access were acceptable, i.e. they would create a real possibility to create competitive products which would bring the return of investment needed to use the access*". Etel's submission of 2007 to TUSR⁷¹², in reply to analysis of market 4, provides that "*In our opinion, the bargaining power of undertakings in relation to ST has not changed which is, among others, evident from ST's intransigence in negotiations with undertakings interested in the access to the unbundled local loop*".
- (403) In the end negotiations started with only two AOs, that is to say Slovanet and GTS Slovakia in 2005/2006.
- (404) Slovanet was interested in ULL during the whole infringement period. Slovanet explained that it "*was very interested in signing the RUO. Slovanet spent large transaction costs for this process including employing experts*"⁷¹³.
- (405) However, it abandoned the negotiations with ST due to the RUO terms and the administratively burdensome unbundling process set out in the RUO⁷¹⁴. Slovanet's

⁷⁰⁶ Doc ID 4192, Orange - Presentation "Slovakia ULL", slide "*Incumbents' DSL shares in EU and Slovakia*".

⁷⁰⁷ Doc ID 3843, Orange - Internal Document "T-Com RUO".

⁷⁰⁸ These conditions are the following: "*AP (Authorized Provider) accepts all T-com proposals in first round and does not negotiate any counterproposals; all requests going out from AP are accepted in first round and no one gets rejected by T-Com; we calculate zero time and costs for mail/delivery services; all proposals from T-Com are answered and delivered in the same day (no time for AP reactions); we calculate zero time for collocation place/point construction and building act terms (no information about conditions and prices); no step will be repeated, in case the AP provides an incorrect forecast (e.g. get more customers than forecasted); T-Com is not obliged to keep any time schedule above according to RUO!!!*".

⁷⁰⁹ Doc ID 4353, ZSR - Reply of 2007 to TUSR's analysis of market 4. Also see ZSR Reply to RFI of 07/04/2009 Doc ID0274.

⁷¹⁰ Doc ID 4345, Dial Telecom - Reply to TUSR's analysis of market 4.

⁷¹¹ Doc ID 4351, Swan - Reply of 2008 to TUSR's analysis of market 4.

⁷¹² Doc ID 4346, Etel - Reply to TUSR's analysis of market 4.

⁷¹³ Doc ID 3959, Minutes of the conference call with Slovanet of 07/08/2013.

internal presentation⁷¹⁵, entitled *"Bitstream & LLU conditions allowing the development of competition in the Slovak DSL market"* of 3 May 2010, provides on slide *"LLU RUO: uncertain conditions and a high cost level"* that *"RUO represents only formal fulfilment of duties based on applicable regulation and is not compliant with the very basic EU and national requirements"*. Slovanet's perception was also confirmed by ST, whose view was that the availability of LLU post RUO would be *de jure* rather than *de facto*⁷¹⁶. Slovanet also emphasises the *"heavy and complicated process, not transparent: does not include all applicable fees and timelines, undue limitations: high bank guarantee, equipment testing, restriction for certain PSTN lines"*. That presentation also indicates the existence of discriminatory conditions because of *"multiple undue steps leading either to further prolongations of already too long process or to unsuccessful unbundling"* and also due to the fact that the *"liability of ST is restricted below industry best practices"*. The presentation concludes that it is necessary to *"establish a fair and transparent RUO encompassing all conditions based on EU best practices"*.

- (406) Under those circumstances, Slovanet stopped negotiations with ST. In its submission of 2008 to TUSR, Slovanet explained that *"ST is not willing to make a compromise regarding the wording of RUO. As it is apparent, the conditions of RUO have not changed since the date of publishing. We are of the opinion that the situation still continues"*⁷¹⁷. Slovanet also acknowledged that the negotiation period was longer than any internal estimation made at the beginning of the negotiations. Slovanet also mentioned that the fact that GTS Slovakia signed an agreement with ST on the unbundling of the local loop incentivised Slovanet to try to restart negotiations, as they were hoping for improved conditions. However, nothing changed and therefore Slovanet discontinued any further discussions with ST⁷¹⁸.
- (407) Also, Slovanet clarified that it stopped negotiations with ST because of the *"unacceptable conditions set by ST"* and not because it focused on dial-up or because Slovanet thought ULL could not be implemented in the old town, as ST claimed. Slovanet also put forward that *"the fact that after some time changes to RUO were made (such as lower access prices, distant collocation through streetboxes), is evidence confirming the justification of our comments"*⁷¹⁹.
- (408) The only framework agreement on local loop unbundling was signed by GTS Slovakia on 25 March 2009 and the first local loops were unbundled⁷²⁰ on 18 December 2009, after three years of discussions with ST⁷²¹. That reaching an acceptable solution for GTS Slovakia took so long is explained by the fact that ST's initial RUO was unacceptable. GTS Slovakia complained to TUSR that *"the existing regulatory measures on the wholesale market 4 did not have any significant impact*

⁷¹⁴ Slovanet's reply to the request for information of 25 October 2010, Doc ID2575, as well as other Slovanet's replies to Commission RFI from June 2008 and from 2009.

⁷¹⁵ Doc ID 3929, slide *"LLU RUO: uncertain conditions and a high cost level"*.

⁷¹⁶ See Doc ID3266, p.10 (reply of DT to RFI of 24/06/2010, attachment Q4 [...] 021).

⁷¹⁷ Doc ID 4350, Slovanet – Reply of 2008 to TUSR's analysis of market 4.

⁷¹⁸ Doc ID 3959, Minutes of the conference call with Slovanet of 07/08/2013.

⁷¹⁹ *Ibidem*.

⁷²⁰ ST's reply to the request for information of 22 October 2010, Attachment Q10_1, Doc ID3237, p. 1.

⁷²¹ By a letter of 7 December 2005 GTS Slovakia requested the opening of negotiations on unbundled access to the local loop – GTS Slovakia's letter to ST, dated 7 December 2005, Doc ID 0378, p.2 and submitted its formal request in September 2006.

on the development of the bargaining power, because they were implemented only formally, however, in reality, the existing RUO does not comply, in our opinion, with the legally binding conditions concerning the extent, the details, minimum set of items, which RUO shall contain, publication of prices and moreover, the RUO is restrictive in its contain towards authorized providers"⁷²².

- (409) GTS Slovakia explained that "*As far as the length of the negotiations is concerned, GTS did not anticipate it to be so long but they were aware that it would not be easy to finally reach an agreement with ST*". GTS Slovakia also explained why they afforded long negotiations with ST: "*There were several factors which played a role during negotiations. Firstly, GTS was focused on business customers. Secondly, for GTS, providing the services via ULL was not a part of their essential business; it was rather a complementary method as it already had a Fibre and FWA network. The issue of ULL was not a major priority; therefore GTS did not push into the negotiations with such an effort as if it were a priority business (fibre, wireless)*"⁷²³.
- (410) ST was aware of its RUO's shortcomings not only from AOs' comments but also from the VUS ⁷²⁴ report. In December 2005 ST procured from VUS an assessment of the RUO terms as at 12 August 2005. The VUS delivered a document "*Assessment and analysis of ST a.s. reference offer for unbundled access to local loop ('2005 Assessment Report')*"⁷²⁵ of 19 December 2005. In that document VUS assessed the RUO technical aspects from the perspective of the Slovak Communications Act, the European Union regulatory framework as well as the reference offers of other European telecoms operators and the European Telecommunications Platform ("ETP") recommendations⁷²⁶. The conclusions of the VUS assessment will be discussed in section "7.6. *ST's unfair terms and conditions*" with respect to each relevant technical/commercial aspect of the RUO. The Commission also notes that until 9 May 2009, that is to say for more than 3 years, none of the suggestions of the VUS Assessment Report concerning modifications of the restrictive RUO terms were implemented.

7.5.1. *Negotiations with GTS Slovakia*

- (411) From the beginning of its negotiations with ST, GTS Slovakia showed its disapproval of ST's RUO by joining Orange's request for TUSR's intervention in order to modify ST's terms and conditions in the RUO. During that three year time period GTS Slovakia sent, on several occasions, its list of comments and proposals

⁷²² GTS's submission of 2008, in reply to TUSR's analysis of market 4 – Doc ID 4347.

⁷²³ Minutes of the phone call with GTS of 27 June 2013, Doc ID 3873.

⁷²⁴ Výzkumný ústav spojov, n.o. is a non-for-profit research institute in the area of electronic communications and postal services. It participates in various state and private research projects, metrology and equipment security trials, etc. For details see the website of the institute at <http://www.vus.sk/>.

⁷²⁵ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID0136, p. 35-70.

⁷²⁶ The European Telecommunications Platform ('ETP') was formed on 4 February 1998 as a consultative body of telecoms operators, equipment manufacturers, service providers and users and consumers. For details see http://www.etp-online.org/html/masterset_public.asp. ST is a member of ETP as of August 2003. ETP No. (01)-018 is ETP Recommendation on shared access to the local loop of June 2001. ETP No. (01)-020 [4,5] is ETP Recommendation on the local loop unbundling: provisioning and O&M issues (September 2001).

regarding the RUO terms and conditions it wished to have changed⁷²⁷ and had numerous meetings⁷²⁸ with ST where it reiterated its requests. The Commission notes that most of GTS Slovakia's requests for changes correspond to the RUO terms and conditions that the Commission reviews in section "7.6. *ST's unfair terms and conditions*". Indeed, they refer to: provision of detailed information on ST's network and ST's conditions for collocation (such as prices and technical terms), removal of the restrictions on access to "passive" local loops and to local loops providing "conflicting services", removal of the 25% spectrum management limitation, simplification of the RUO proceedings, in particular of the forecasting obligation, of the qualification of the local loop process and removal of some of the contractual penalties.

- (412) Although the parties managed to reach an agreement on some of those issues, the improved solutions negotiated between ST and GTS Slovakia were only implemented by ST in its RUO years later, although ST was aware of the fact that "*OLOs (other licensed operators) consider current RUO conditions as unacceptable and as a result of obstructive behaviour of ST.*"⁷²⁹ For instance, during the meeting of 13 March 2007, ST agreed to give access to non-active local loops and to remove the restriction based on "conflicting services"⁷³⁰. However, this did not lead to GTS having access to ULL at that time. GTS needed more than two additional years before it could unbundle its first local loops. Moreover, it is only in May 2009 that ST modified its public RUO to reflect those changes.

⁷²⁷ 'List of comments to the proposal submitted by Slovak Telecom a.s.' (Version 18 September 2006) signed by GTS Slovakia on 20 September 2006 and received by ST on 2 October 2006, Doc ID0378, p.1, "*Principal comments of GTS Nextra, a.s. to the proposal of framework agreement on access to local loops*" of 6 February 2007 - GTS Slovakia's reply to the request for information of 7 April 2009, Doc ID0378, p. 20-26; according to GTS Slovakia's reply to the request for information of 25 October 2010 Doc ID2512; Email from GTS Slovakia addressed to ST, dated 12 February 2007, Doc ID2128 and document '*Zásadné pripomienky spoločnosti GTS Slovakia, a.s. k návrhu Rámcovej zmluvy o prístupe k účastníckym vedeniam*', dated 6 February 2007, Doc ID2129; "*Principal comments of GTS Nextra, a.s. to the proposal of framework agreement on access to local loops*" (version of 20 August 2007) - GTS Slovakia's reply to the request for information of 7 April 2009, Doc ID0378, p.23-26 (version 20/08/2007 and version 18/08/2007), according to GTS Slovakia's reply to the request for information of 25 October 2010 (Doc ID2512), this document is not confidential vis-a-vis ST; Email from GTS Slovakia to ST, dated 29 November 2007, Doc ID2143; GTS Slovakia's email to ST, dated 9 May 2008, Attachment Q6(i)_020 to ST's reply to the request for information of 25 March 2010, Doc ID2147 and '*Pripomienky a návrhy k Referenčnej ponuke ST na prístup k účastníckemu vedeniu*', Attachment Q6(i)_021 to ST's reply to the request for information of 25 March 2010, Doc ID2148; "*Comments and proposals to ST's reference offer on access to local loop*" (status as of 9 December 2008) - ST's email to GTS Slovakia, dated 20 January 2009, Attachment Q6(i)_046 to ST's reply to the request for information of 25 March 2010, Doc ID2173.

⁷²⁸ Minutes from the meetings between ST and GTS of 13 March 2007, Attachment Q6(i)_004 to ST's reply to the request for information of 25 March 2010, Doc ID2131 and GTS's comments to the minutes, Attachment Q6(i)_005 to ST's reply to the request for information of 25 March 2010, Doc ID2132; ST's minutes from the meeting with GTS Slovakia of 21 September 2007, Doc ID0378, p. 9-12 and Doc ID2140 and Doc ID2142; Minutes from the meeting between ST and GTS Slovakia, 13 December 2007 (dated 14 December 2007), submitted by ST in reply to the request for information of 25 March 2010, Doc ID2267; GTS Slovakia's email to ST, dated 16 June 2008, Attachment Q6(i)_022 to ST's reply to the request for information of 25 March 2010, Doc ID2149 mentions as a date of the meeting 28 May 2008 whilst the draft minutes from the meeting mention as a meeting date 3 June 2008, Attachment Q6(i)_024 to ST's reply to the request for information of 25 March 2010, Doc ID2151.

⁷²⁹ Presentation [...], Doc ID0133 p. 39.

⁷³⁰ ST's minute from the meeting with GTS Slovakia of 13 March 2007, Doc ID0378, p. 5-8 and p. 9-12.

- (413) The negotiation process was long not only because ST's terms and conditions were considered to be unreasonable by AOs, but also because ST delayed on several occasions the conclusion of an agreement on several occasions. For instance, ST referred to the need to first notify any changes to the RUO to TUSR before any negotiations could start or continue⁷³¹.
- (414) The Commission considers that while regulation obliges ST to notify to TUSR any changes to the RUO before they come into effect ST is under no obligation to interrupt all negotiations, including negotiations on other points of the RUO, while awaiting TUSR's approval. That was not required under the applicable regulatory rules and contradicts ST's claim that its aim was always to conclude ULL contracts as soon as possible⁷³².
- (415) Another example of prolongations within negotiations is that ST insisted that it needs, after reaching the final consensus, at least 3 months for implementing the changes before the framework agreement comes into effect⁷³³. GTS Slovakia replied to ST's email on 7 November 2008 that the procedural delay had not been mentioned to it so far and that such delay was not justified given the small volume of requests that could be expected during the initial period. GTS Slovakia proposed to have a discussion with ST on the dates of implementation of the first collocation spaces⁷³⁴.
- (416) GTS Slovakia tried to speed-up negotiations on several occasions. For instance, on 16 June 2008 GTS Slovakia sent ST an email requesting it to speed up the negotiations given that since the meeting of 28 May 2008 GTS Slovakia had not received any feed-back from ST⁷³⁵. By an email dated 21 October 2008 GTS Slovakia invited ST *"in the interest of speeding up the negotiations"* to a meeting/working lunch on 24 October 2008 to finalise the collocation solution⁷³⁶.
- (417) ST points to one of its internal documents allegedly showing that it expected that the first ULL contracts would be signed in May 2006 and the first lines would be unbundled in August 2006⁷³⁷. However, the first lines were only unbundled in December 2009.

7.5.2. *Negotiations with Slovanet*

- (418) By letter dated 25 October 2005 Slovanet formally requested ST to open negotiations over an agreement on access to the local loop⁷³⁸. Slovanet requested TUSR to intervene in its negotiations with ST concerning the conclusion of an agreement on the protection of confidential information⁷³⁹ and joined Orange's request for TUSR

⁷³¹ See ST's Reply to the SO paragraph 1097.

⁷³² See ST's Reply to the SO paragraph 1083.

⁷³³ ST's email to GTS Slovakia, dated 6 November 2008, Attachment Q6(i)_043 to ST's reply to the request for information of 25 March 2010, Doc ID2170.

⁷³⁴ GTS Slovakia's email to ST dated 7 November 2008, Attachment Q6(i)_043 to ST's reply to the request for information of 25 March 2010, Doc ID2170.

⁷³⁵ GTS Slovakia's email to ST, dated 16 June 2008, Attachment Q6(i)_022 to ST's reply to the request for information of 25 March 2010, Doc ID2149.

⁷³⁶ GTS Slovakia's email to ST, dated 21 October 2008, Doc ID2154 and ST's reply, dated 24 October 2008, Doc ID2154.

⁷³⁷ See ST's Reply to the SO paragraph 1084.

⁷³⁸ Slovanet's letter to ST, dated 25 October 2005, Doc ID0485.

⁷³⁹ Slovanet's letter to TUSR dated 25 October 2005, Doc ID0817, p. 39 and Doc ID0482.

intervention to modify the RUO terms⁷⁴⁰. In addition, in the context of ST claiming that before the negotiations could start the 45 day period for submission of RUO changes to TUSR must expire, Slovanet informed TUSR that ST refused to open negotiations with Slovanet over the RUO terms.⁷⁴¹

- (419) The majority of Slovanet's comments and proposals regarding a change in the RUO terms relate to issues that also GTS Slovakia and Orange also considered to be unreasonable⁷⁴². Also, Slovanet and ST also held several meetings discussing these issues⁷⁴³. In the Commission's view, all of that illustrates Slovanet's strong interest in ULL, contrary to ST's argument that Slovanet was not eager to engage in serious negotiations⁷⁴⁴. By email of 12 May 2006 ST informed TUSR about the development of negotiations with Slovanet⁷⁴⁵. According to ST, the fact that Slovanet did not request TUSR to intervene in the negotiations shows that Slovanet was not genuinely interested in ULL⁷⁴⁶. The Commission notes that ST contradicts itself on the question of whether requesting TUSR's intervention is a sign of genuine interest in the ULL service or not. Indeed, ST has stated that Orange's choice to solicit TUSR's intervention instead of pursuing negotiations with ST more vigorously demonstrated its lack of interest in ULL⁷⁴⁷.
- (420) The negotiations were discontinued in 2006⁷⁴⁸. The reasons for discontinuing the negotiations are according to ST unknown⁷⁴⁹. According to Slovanet "*in light of no substantial change on ST's side or on the side of TUSR, in the second half of 2006 we have decided to finish activities in connection with the RUO (active commenting of the RUO terms towards ST as well as towards the Telecommunications Office of SR) given that no substantial rectification from ST's side or from the side of TUSR [took place].*"⁷⁵⁰ In May 2007 Slovanet sent comments and proposals to ST regarding modifications in the RUO. Slovanet explained that, "*subsequently, one meeting took place (without a meeting minute) with the outcome that ST will inform us about the measures adopted, resp. about the reasons for not accepting our proposal of RUO changes. Until today we have received no reaction to our comments from ST, a.s.*"⁷⁵¹ ST explains that on 15 May 2009, it informed Slovanet that it had entered into a ULL agreement with GTS and that ST inquired whether Slovanet wished to re-open ULL

⁷⁴⁰ Orange's submission to TUSR dated 20 October 2005, Doc ID0297, Slovanet's letter to TUSR, dated 2 February 2006, Doc ID0484.

⁷⁴¹ Slovanet's letter to TUSR, dated 2 February 2006, Doc ID0484, p. 1.

⁷⁴² Slovanet raised in particular the following issues: (i) restrictions of access to the local loop (access to active lines only, conflicting services, other limitations); (ii) collocation and installation of access; (iii) frequency spectrum (25% capacity limitation); (iv) equipment testing terms; (v) fees and prices - Email exchange between ST and Slovanet 10-11 May 2006, Doc ID0191, p. 34-38. Also, email of 12 May 2006 whereby ST informed TUSR about the progress of negotiations with third parties over the RUO, Doc ID0817, p. 31.

⁷⁴³ Minutes from the meeting between ST and Slovanet (11 May 2006), Doc ID0181.

⁷⁴⁴ See ST's Reply to the SO paragraph 1094.

⁷⁴⁵ Email of 12 May 2006 whereby ST informed TUSR about the progress of negotiations with third parties over the RUO, Doc ID0817, p. 31.

⁷⁴⁶ See ST's Reply to the SO paragraph 1100.

⁷⁴⁷ See ST's Reply to the SO paragraph 1092.

⁷⁴⁸ Slovanet's reply to the request for information of 11 May 2009, Doc ID0418.

⁷⁴⁹ ST's letter to TUSR, dated 22 August 2008, Annex 2 'Negotiations over the RUO', Doc ID0173, p. 22.

⁷⁵⁰ Slovanet's reply to the request for information of 25 October 2010, Doc ID2575.

⁷⁵¹ Slovanet's reply to the request for information of 25 October 2010, Doc ID2575.

negotiations. ST notes that Slovanet did not express any further interest in ULL⁷⁵². Slovanet explains that it was waiting to see how GTS' experience with ULL would turn out before approaching ST once more on that issue⁷⁵³.

- (421) In July 2010 ST and Slovanet re-entered the negotiations on the RUO and two meetings were held between the parties. However, in June 2011 ST informed the Commission that in its understanding [ST's view on Slovanet's market entry experience and plans]⁷⁵⁴ Slovanet disputes this and explains that "*we came to the conclusion that there were no changes in the RUO that enabled us to sign it because our interest was to use released local loops more extensively, i.e. unrestricted use as GTS Slovakia (which in 2010 established only about ten lines for business clients in the centre of Bratislava).*"⁷⁵⁵

7.5.3. Orange's request for intervention to TUSR

- (422) In its letter to TUSR⁷⁵⁶ Orange argued that the RUO "*contains conditions and procedures that are contradicting the law and the European regulation (...). Currently it is not possible to request ST to provide access to local loops due to the legal and the factual defects of the RUO.*"⁷⁵⁷ Orange submitted to TUSR a detailed description of the RUO defaults, including the proposals for the modification of the respective parts of the RUO.

- (423) ST replied by a letter dated 10 November 2005 whereby it informed Orange that it had submitted modifications of the RUO to TUSR⁷⁵⁸. However, those proposed modifications concerned only limited issues such as the agreement on the protection of confidential information and the fee for the access to non-public information systems. On 13 December 2005 Orange replied to ST's letter of 10 November 2005. It stated that it considers the changes proposed by ST to be minimal and that they do not address the fundamental shortcomings⁷⁵⁹ of the RUO. It further annexed a letter sent on 12 December 2005 to TUSR⁷⁶⁰ and requested ST to implement the necessary changes so that negotiations on unbundled access to the local loop could start.

- (424) ST also argues that Orange's choice to solicit TUSR's intervention in 2005 instead of engaging in negotiations with ST demonstrates its lack of interest in ULL. ST adds that if ULL access was critically important to Orange it would have pursued those discussions much more vigorously⁷⁶¹. However, the Commission considers that ST is obliged to engage in good faith negotiations with AOs once they show an interest in ULL, which was the case for Orange. Also, Orange explained in its reply to a request for information that: "*the process as proposed by Slovak Telekom, a.s. was overly obstructive and complicated and given that the RUO was incomplete (did not even*

⁷⁵² See ST's Reply to the SO paragraph 1106.

⁷⁵³ Doc ID 3960 Minutes of the conference call with Slovanet.

⁷⁵⁴ ST's reply to the request for information of 31 May 2011, Doc ID3011, p. 4.

⁷⁵⁵ Doc ID 3960 Minutes of the conference call with Slovanet pages 4-6.

⁷⁵⁶ Orange's submission to TUSR dated 20 October 2005, Doc ID0297, p. 6.

⁷⁵⁷ Orange's submission to TUSR dated 20 October 2005, Doc ID0297, p. 2.

⁷⁵⁸ ST's modifications of the RUO submitted to TUSR, dated 10 November 2005, Doc ID0817, p. 101; ST's letter to Orange, dated 10 November 2005, Attachment 11, Doc ID0302.

⁷⁵⁹ Orange's letter to ST dated 13 December 2005, Doc ID0301,

⁷⁶⁰ Orange's follow up request to TUSR after the meeting of 30 November 2005, letter dated 12 December 2005, Doc ID0817, p. 41.

⁷⁶¹ See ST's Reply to the SO paragraph 1092.

contain the templates of the contracts), in contradiction to 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 steps. At the same time, given the market situation and given that the outcome of the regulation was difficult to foresee we have decided to invest in our own infrastructure based on FTTH⁷⁶².

- (425) ST disputes Orange's views⁷⁶³ and insists that the reason Orange never requested access is that its commercial strategy was to gain a competitive advantage by investing in fibre. ST adds that this is confirmed by Orange's public announcements regarding its long-standing strategy to invest in fibre⁷⁶⁴. However, the Commission notes that the press statement quoted in support of that argument originates from 2007 and shows nothing about Orange's position in 2005.
- (426) Moreover, the minutes of the meeting between the Commission services and Orange Slovakia, of 3 June 2013⁷⁶⁵ mention that "*Orange tried to negotiate with ST over the Reference Offer (RUO), by exchanging several letters, organising meetings with ST and explaining how other RUOs from other Member States where more appropriate models to be followed. However, that was not successful, as ST kept on arguing that their RUO was officially accepted by the Regulator (TUSR) (...). After 12 months of arguing, Orange could not expect any change. Finally, Orange stepped out from the project as they saw no business case*".
- (427) The Commission therefore considers that several AOs were interested in having access to ULL. However, the RUO's terms and conditions, as well as ST's attitude delayed the process and prevented interested AOs from accessing ST's local loops.

7.6. ST's unfair terms and conditions

7.6.1. Overview of the RUO contracting process

- (428) Under the RUO, in order to unbundle a local loop, the AO has to take the following consecutive steps⁷⁶⁶, where each step is a pre-condition for taking of the next step, unless stated otherwise below:
- (a) Conclusion of the Confidentiality Agreement; this is a precondition for the opening of the negotiations over access to the local loop; the AO only obtain access to the information concerning ST's access network after its conclusion⁷⁶⁷.
 - (b) Conclusion of the Framework Agreement on access to the local loop; by concluding this agreement the AO accepts the RUO terms.

⁷⁶² Orange's reply to the request for information of 7 April 2009, Doc ID0330, p. 14-15.

⁷⁶³ See ST's Reply to the SO paragraph 1093.

⁷⁶⁴ See ST's Reply to the SO paragraph 1093.

⁷⁶⁵ Doc ID 4189, Minutes of the meeting with Orange of 03/06/2013, point 22.

⁷⁶⁶ Introduction to the RUO, part 4, provides an overview of the steps in the contractual process; details are provided by the respective Annexes to the RUO.

⁷⁶⁷ According to the RUO of 12 August 2005, the payment of the fee for access to information was among the terms of the Confidentiality Agreement and the access to information was provided following the conclusion of the Confidentiality Agreement. According to the RUO in effect as of 9 May 2009 the access to information is only provided once the framework agreement on access to the local loop has been concluded.

- (c) Access to information on ST's access network against a payment of a fee for the access to information systems in the amount of SKK 200 000 (EUR 6 638.78) and a fee for updates and administration of information systems per annum SKK 48 024 (EUR 1 594.10)⁷⁶⁸. The latter fee was cancelled as of 1 November 2010.
- (d) Bank guarantee – following the conclusion of the framework agreement the AO submits a bank guarantee pursuant to the terms of Annex 16 (ex Annex 17) to the RUO.
- (e) Request for a preliminary inquiry - the preliminary inquiry determines the form of collocation offered to the AO. The preliminary inquiry is subject to a fee of SKK 13 794 (EUR 457.88) per collocation location. As of 9 May 2009 this step is voluntary and does not oblige the AO to submit a request for a detailed inquiry.
- (f) Request for a detailed inquiry – its outcome is the determination of a specific collocation space and a collocation place, the necessary construction works and other modifications; as well as the cost thereof. The detailed inquiry is subject to a fee of SKK 31 918 (EUR 1 059.48) per collocation location.
- (g) Conclusion of the collocation agreement – once the AO accepts the results of the detailed inquiry ST will submit a proposal of the collocation agreement. Once the agreement is signed ST will implement the chosen collocation solution.
- (h) Submission of forecasts – after the signature of the collocation agreement the AO submits monthly forecasts of the requests for "*qualification of the local loop*"; according to the RUO the purpose of this step is to allow ST to plan its capacities and resources.
- (i) Identification of the place of access, the outcome of which is the identification of the MDF to which a particular local loop is connected. Although this step is not foreseen as a mandatory step in the RUO, the Commission finds that in light of the limited scope of the information provided by ST from its non-public information systems to the AO this step appears to be necessary where it is unclear to which MDF a particular local loop is connected. The identification of the place of access is subject to a fee of SKK 2 711 (EUR 89.99) per local loop.
- (j) Qualification of the local loop – according to the RUO the purpose of this step is to ascertain whether the local loop is appropriate for the provision of the services by the AO; the qualification of the local loop was subject to a fee of SKK 3 282 (EUR 108.94) until 14 August 2010. The fee was reduced to EUR 89.05 on 15 August 2010.⁷⁶⁹

⁷⁶⁸ Although Part 4 of the Introduction to the RUO does not foresee access to information as a separate step, it follows from the terms of the Confidentiality Agreement as well as from Annex 14 (former Annex 15) on fees that access to information takes place only against the payment of the respective fee. According to Annex 5 to the RUO (effective on 9 May 2009) access to information became conditional upon signature of the Framework Agreement. In the period between 12 August 2005 and 9 May 2009 access to information could take place before signature of the Framework Agreement, in fact, initially (until 27 December 2005) it was foreseen as a mandatory step in the Confidentiality Agreement.

⁷⁶⁹ Annex 14 to the RUO, ST's Reply to the RFI 22/10/2010, Attachment Q7_3, Doc ID3243.

- (k) Request for access to the local loop – can only be made within 10 days from the notification of the positive qualification of the local loop and must fulfil the terms of Annex 5 to the RUO⁷⁷⁰.
- (l) Local loop hand-over to the AO.
- (429) The unbundling process set out in this section was modified three times between 12 August 2005 and the end of 2010. The first modification of 27 December 2005 concerned the confidentiality agreement and the payment of the fee for access to information systems. The second modification of 9 May 2009 was made with regard to the conclusion of the framework agreement with GTS Slovakia. It made the preliminary inquiry step in the collocation process voluntary. On 1 November 2010 a third modification became effective making the forecasting of the number of lines to be unbundled as well as qualification of the local loop voluntary. Details on these modifications are further explained below. Otherwise the contracting process remained unchanged. The Commission in this context notes that the second and the third RUO modifications took place following the opening of the proceedings in this case.
- (430) In the following section the Commission will establish that ST has withheld network information necessary for the unbundling of the local loops from AOs (section 7.6.2), that ST unjustifiably reduced the scope of its unbundling obligation (section 7.6.3) and that ST imposed other unfair terms and conditions in its RUO regarding collocation, qualification, forecasting, repairs, service and maintenance and bank guarantee (section 7.6.4).
- 7.6.2. *ST withheld from AOs network information necessary for the unbundling of the local loops*
- (431) In order to successfully unbundle the local loop an AO needs to obtain sufficient and adequate information concerning the incumbent's network. That information allows the AOs to assess their business opportunities and to prepare appropriate business plans for their future retail services based on unbundled access to the local loop.
- (432) The ETP Recommendation on Local Loop Unbundling of September 2001⁷⁷¹, that ST provided in its defence, emphasises the importance of network information for the AOs' investing decisions: *"Provision of network information is another key product. Information about the MDF sites, coverage, maps or postcodes covered by particular MDFs, is necessary in order to enable operators to evaluate the market for LLU prior to investing in equipment and resources"*.
- (433) ST itself acknowledges the need to provide sufficient information to AOs in its RUO: Annex 5 to the RUO, point 1.6.4 provides that *"Access to information on the public telecommunications network processed from non-public information systems allows the alternative operator to obtain mainly information needed for the design of its material and human resources, planning and assessment of the necessary data for forecasting"*⁷⁷².
- (434) However, as will be demonstrated in this section, ST withheld from AOs the information necessary for the unbundling of the local loop. Withholding such

⁷⁷⁰ Annex 5 to the RUO, point 3; Annex Q41_1 of ST's reply to RFI of 17/04/2009, Doc ID3191.

⁷⁷¹ Annex XI.6 to ST's Reply to the SO, page 11.

⁷⁷² Doc ID 3198.

information from AOs disrupts the unbundling process, delays it and raises the cost of the AOs.

7.6.2.1. ST's RUO does not contain appropriate information about ST's access network

- (435) Regulation (EC) No 2887/2000 and Directive 2002/19/EC establish "*a minimum list of items to be included in a reference offer for unbundled access to the local loop to be published by notified operators*". In accordance with this list of items, the incumbent has to include in its reference offer at least "*information concerning the locations of physical access sites, availability of local loops in specific parts of the access network*" (Article A.2. of the Annex to Regulation (EC) No 2887/2000 and Article A.2. of the Annex II to Directive 2002/19/EC), as well as "*technical conditions related to access and use of local loops, including the technical characteristics of the twisted metallic pair in the local loop*" (Article A.3. of the Annex to Regulation (EC) No 2887/2000 and Article A.3. of the Annex II to Directive 2002/19/EC). The same minimum set of information that has to be provided to AOs is also set in Annex 2 to the Slovak Communications Act. In accordance with recital 12 of Regulation (EC) No 2887/2000, notified operators such as ST should "*provide information under the same conditions and of the same quality as they provide for their own services or to their associated companies*".
- (436) In its market analysis of August 2011, TUSR considered that ST should publish in the RUO specific information concerning the locations of physical access and information on the availability of the local loops, in accordance with its transparency of access obligation provided by Article 18 of the Communications Act. That obligation refers, in particular to the information mentioned in the list of minimum items of the RUO and refers to information on the location of physical access points, accessibility of local metallic loops, information on the location of cable ducts and free capacity in cable ducts. The list of minimum items to be published in the RUO also comprises technical conditions concerning access and use of local metallic loops, including technical characteristics of the metallic twisted part of the local loops, cable switchboards and associated means⁷⁷³.
- (437) TUSR recalled that the minimum list of items is derived from Directive 2002/19/EC, according to which the information about the respective physical places should include a minimum amount of details. TUSR also explained that by requiring the publication by ST of specific information in the RUO, TUSR ensures that the undertakings interested in accessing ST's metallic loops obtain "*basic information*" on the conditions for the provision of access by ST⁷⁷⁴. Also, TUSR explains that the non-discrimination obligation that ST has originates from the need to ensure equal conditions, between entering undertakings and the undertaking having significant market power. Therefore, "*the undertaking having significant market power must provide the other undertakings with all necessary information on the characteristics of its infrastructure*"⁷⁷⁵.
- (438) Despite those legal obligations, the Commission notes that ST's RUO does not provide any such basic information regarding the locations of physical access sites and the availability of local loops in specific parts of the access network. AOs have

⁷⁷³ Doc ID 3170, p.67-68.

⁷⁷⁴ Doc ID 3170, p.76.

⁷⁷⁵ Doc ID 3170, p.75.

access to such information only on request, subject to an access fee, within 5 days of the entry into effect of the confidentiality agreement and only after the provision of a bank guarantee.

- (439) AOs complained about the lack of necessary network information in the RUO: Orange, in its letter to TUSR dated 20 October 2005, asking TUSR to intervene and order ST to modify its RUO⁷⁷⁶, signalled that the RUO does not contain information on the ST's interconnection points with a description of each of them. Orange considers that the absence of such information is contrary to section 17(2) of the Communications Act⁷⁷⁷. Slovanet also complained about the "*insufficient identification of places for establishing access and insufficient qualification of the state of local loops*"⁷⁷⁸.
- (440) ST argues that it was not obliged to publish network information in its RUO⁷⁷⁹, as Regulation (EC) No 2887/2000 specifies that the availability of the information on physical access points may be restricted to interested parties only, in order to avoid public security concerns.
- (441) However, the Commission considers that this exception only applies to cases where it is necessary to avoid public security concerns. As clarified by TUSR in its market analysis of August 2011, the accessibility of the information on physical access points can only be restricted in the case of public security interests, in relation to some specific physical access points⁷⁸⁰. Also, as it is an exception from a rule, the need to apply it has to be substantiated. ST did not provide any explanation as to why network information regarding all its physical access sites would raise public security concerns.
- (442) In addition, EC Regulation 2887/2000 provides that exception from the rule only in relation to information regarding the locations of physical access, but not in relation to information regarding the availability of the local loops and technical conditions related to access and use of local loops, including information on the technical characteristics of the twisted metallic pair in the local loop, that has to be provided in the RUO⁷⁸¹. The Commission considers that there is no reason why such information was not part of the RUO.

7.6.2.2. ST provides upon AOs' request only insufficient network information

7.6.2.2.1 ST does not provide any network information regarding the availability of its local loops

7.6.2.2.1.1 *The scope of the information provided by ST*

- (443) The Commission inquired about the scope of the information provided by ST to GTS Slovakia following the conclusion between the two parties of the Framework Agreement in 2009. ST clarified the scope of the information provided as follows: "*the information provided to GTS Slovakia includes the identification number and*

⁷⁷⁶ Doc ID 297.

⁷⁷⁷ Doc ID 297, page 7.

⁷⁷⁸ Doc ID 3959, point 3.2.

⁷⁷⁹ ST's reply to the SO, paragraph 863.

⁷⁸⁰ Doc ID 3170, p.77.

⁷⁸¹ Article A 2) of the Annex "*Minimum list of items to be included in a reference offer for unbundled access to the local loop to be published by notified operators*" to EC Regulation 2887/2000.

*address of all Main Distribution Frames, Cross-connection Points, Secondary Cross-connection Points and Distribution Points of Slovak Telekom's network. These are the points of possible collocation. The Distribution Frames topology can be inferred from the provided information"*⁷⁸².

- (444) That approach was confirmed by ST in its reply to the SO, where ST informed the Commission that it "normally" provides upon an AO's request the following non-publicly available information: "(i) The location of MDFs and their identifiers and (ii) Catchment areas of the MDFs by providing the logical path between an MDF, other cross-connection points and the distribution point including its identifiers"⁷⁸³.
- (445) ST provided GTS Slovakia, in May 2009, with a Report from its database, containing the information referred to in recital (444). A sample of that report is provided in Table 14:

Table 14: Sample report

Type of information	Sample of information
Town	Bratislava
UR (účastnícky rozvádzač) / Distribution Point	[...]
SR (sieťový rozvádzač) / Secondary Cross-connection Point	[...]
TR (traťový rozvádzač) / Cross-connection Point	[...] ⁷⁸⁴
HR (hlavný rozvádzač) / Main Distribution Frame	[...]

7.6.2.2.1.2 *ST does not provide any information regarding the availability of its local loops, contrary to its legal and regulatory obligations*

- (446) ST argues in its reply to the SO that "ST provides sufficient information on its network to allow AOs to proceed with the unbundling of local loops"⁷⁸⁵. ST considers that AOs merely need to know where a specific customer is connected, as once AOs are given the address of such a customer, they can find the closest distribution point by checking its address against the data ST provides and therefore determine to which MDF a specific customer is connected to.
- (447) ST considers that the information provided to GTS allowed the latter to follow the logical path that connects a particular street address of a customer with a specific MDF. For instance, it could be inferred that a customer having its address in Bratislava, Stara Prievozka Street, house number xy, was connected to the MDF

⁷⁸² ST's reply to the request for information of 25 March 2010, Doc ID2079, p. 3.

⁷⁸³ ST's reply to the SO, p.350-351.

⁷⁸⁴ There does not always have to be a cross-connection point between the distribution point and the MDF. The existence (or absence) of other cross-connection points differs on a case by case basis.

⁷⁸⁵ ST's reply to the SO, p.350.

located in Bratislava, Jarabinkova Street. ST considers that this is the relevant information for proceeding to unbundling of the local loops, which would be "plainly" sufficient for that purpose⁷⁸⁶.

- (448) However, for successful local loop unbundling more information is needed than just knowing the MDF to which an individual customer is connected. Given that AOs have to roll out their own network to the site, they need to be in a position to understand the business potential of each exchange point (usually at the MDF level), in order to be able to decide whether the site has sufficient business potential to support collocation costs and network roll out costs. For that purpose, the AOs need to know not only the location and geographic parameters of each MDF, but also, as explained in recitals (455) to (467), their availability, in terms of number of lines per MDF and degree of broadband deployment.
- (449) In its reply to the SO, ST submitted that it provided "*all the information required by the legal and regulatory framework*"⁷⁸⁷. ST considers that "*the regulatory framework requires the incumbent operator to provide information that allows an alternative operator to identify an MDF (location of physical access sites) to which a particular customer would be connected. Such information is entirely sufficient*"⁷⁸⁸.
- (450) However, there is no evidence that ST provided all the information required by the legal and the regulatory framework. On the contrary, in accordance with its regulatory and legal obligations, the incumbent also has to provide, in addition to information on the location of physical access sites, information on the "*availability of local loops in specific parts of the network*", as shown in recital (435) above. No information about the number of connected lines, broadband deployment rate and pulse code modulation ("PCM") equipment deployment⁷⁸⁹ is provided by ST, contrary to its regulatory and legal obligations. Moreover, ST only furnishes limited information regarding "*technical conditions related to access and use of local loops, including the technical characteristics of the twisted metallic pair in the local loop*"⁷⁹⁰.
- (451) The Commission considers that the missing information is crucial for AOs to prepare their business plans on time and to identify the business potential of local loop unbundling in different locations as well as the potential of the deployment of broadband technologies before they incur substantial costs. In particular, without the information about the number of connected lines and degree of broadband and PCM equipment deployment rate, AOs are not able to determine the viability of the local loop unbundling. Without the information about the number of connected lines per MDF, AOs are not able to properly prepare their business plans, as they would not know how many workable lines they would be able to unbundle per MDF and therefore, how many potential clients they would reach through ULL. Moreover, the lack of information concerning the broadband deployment rate and the PCM equipment deployment rate could limit AOs' ability to unbundle local loops and deploy broadband technologies, in particular as ST put in place limitations on DSL

⁷⁸⁶ ST's reply to the SO, p.350.

⁷⁸⁷ ST's reply to the SO, p.350.

⁷⁸⁸ ST's reply to the SO, p. 353.

⁷⁸⁹ PCM equipment = technologies used for the provision of narrowband services. These technologies may interfere with the deployment of DSL/broadband services.

⁷⁹⁰ See section 7.6.4.3.2 "Qualification" versus availability of ST's network information.

deployment for spectrum management purposes (use of one pair only for digital equipment if the pairs are in quoad cable; limitation to only 25% of pairs per cable that can be used for DSL deployment).

- (452) Such detailed information could only be provided by ST as a result of the qualification requests and detailed surveys, which are subject to fees and which occur at an advanced stage in the process and only concern particular lines for which AOs make specific requests, as opposed to information providing AOs with an overall image of the business and technical potential of the access network.
- (453) ST considers that neither the Slovak Communications Act nor the TUSR's decisions imposed any legal obligations on ST to provide such detailed information⁷⁹¹ and that the information listed in the VUS's *Assessment Report* as information that should be made available "*is actually not required by Slovak law*"⁷⁹².
- (454) However, there was no need for the Slovak legislator or the Slovak Telecoms regulator to enumerate all the detailed types of information that the incumbents should provide. It is for the latter to decide the precise types of accessibility, availability and technical information they have to provide in order to comply with their legal and regulatory obligations. The *Assessment Report* contains detailed information that VUS considered necessary for the incumbent to provide to AOs, in order to comply with its legal obligations, "*in accordance with Annex 2 to the ECA*"⁷⁹³.

7.6.2.2.1.3 AOs need network information on the availability of ST's local loops

- (455) Receiving sufficient network information regarding the availability of the local loops is key for AOs. That is for instance acknowledged in the OECD Report "*Developments in Local Loop Unbundling*" of 10 September 2003⁷⁹⁴, which emphasises that AOs also need to receive information regarding the availability of local loops: "*in response to pre-ordering information by the new entrants, the incumbents must inform new entrants of their network information as well as line qualification information and individual customer information*". The Report also confirms the importance for AOs of receiving information on the number of local loops per Main Distribution Frame (MDF): "*Network information, such as the number of loops per local exchange area, enables new entrants to plan their services using LLU. It will also help to give new entrants choices as to whether they wish to request LLU at a particular MDF without a formal enquiry process for collocation space and individual lines*".
- (456) Also, the ETP Recommendation on Local Loop Unbundling of September 2001 enumerates, amongst the types of information provided by the incumbent, information regarding not only the locations of physical access sites ("*postcode coverage or MDF to postcode mapping, location and postcode associated with the MDFs and the name of the associated local switch*"), but also information regarding the availability of local loops ("*size of MDFs, i.e. number of lines, maps – paper or electronic, list of street names, number ranges associated with MDFs*"), as well as technical information related to access and use of local loops ("*information*

⁷⁹¹ ST's reply to the SO, page 353.

⁷⁹² ST's reply to the SO, page 302.

⁷⁹³ VUS's Assessment Report – Doc ID 136, p.15

⁷⁹⁴ Doc ID 4240, p.11.

concerning line characteristics, line length distribution per MDF, type of disturbers per MDF, distribution of each class of spectrum management per MDF").

- (457) VUS⁷⁹⁵, in its 2005 *Assessment Report*, provides an overview of the information that ST should have provided to AOs based on Annex 2 to the Communications Act and based on the reference offers of BT and Deutsche Telekom.
- (458) VUS considers that this information includes not only the list of all MDFs and similar facilities, but also the description of their geographic coverage, information on the ranges of telephone numbers served by those exchanges, information on the actual use of cables (in %) for DSL technologies and information on the ratio of PCM equipment deployment regarding the cables connected to the respective MDFs. In other words, VUS considered necessary that ST also provides to AOs information on the availability of ST's local loops in terms of number of connected lines per MDF and cable utilisation rate.
- (459) The VUS further states that the RUO does not contain all the necessary technical information regarding ST's access network. Annex 6 to the RUO – *"Description of the Access Network"*, does not contain the names or functions of the distribution frames, explanations as to how they are used in ST's technical and methodological regulations (main, intermediate, network, subscriber), or characteristics of the cable structure (for example, encompassing the typical distance from the distribution frames to the exchange). Annex 7 – *"Technical terms of access to the local loop"* does not contain maximum lengths of homogenous local loops or information on the typical specific operational (or image) attenuation of cables used in the access network at frequencies relevant to xDSL operations.⁷⁹⁶

7.6.2.2.1.4 AOs's concerns regarding insufficient information on the availability of ST's local loops

- (460) GTS Slovakia requested samples of network information database from ST *"in order to be able to assess whether it contains all data needed for the goals of the authorized provider"*⁷⁹⁷. In accordance with the minutes of the first documented meeting that took place between ST and GTS on 13 March 2007⁷⁹⁸, ST provided GTS with a sample of the network information database, containing information on the *"town, location of the main and subscriber distribution frames and the catchment area which a given distribution frame covers"*. As mentioned in the minutes, the database did not include information on the capacity and the percentage of DSL services take-up.
- (461) However, GTS Slovakia insisted during its following meetings with ST on receiving additional information necessary for the purposes of network planning and assessment of their business potential and in particular information on the number of lines for each MDF and information on the degree of broadband deployment (percentage of lines occupancy for the broadband services and information on the number of lines which are connected to an unsuitably located MDF). In accordance

⁷⁹⁵ "Regulatory Standpoint to proposal of DSL for Doma Mini and SCP", 19 December 2005, Doc ID0136.

⁷⁹⁶ "Regulatory Standpoint to proposal of DSL for Doma Mini and SCP", 19 December 2005, Doc ID0136, p 18-19.

⁷⁹⁷ Doc ID2128.

⁷⁹⁸ Doc ID2264.

with the minutes of the meeting of 13 March 2007, GTS Slovakia requested that the information provided also include information on the lines occupancy.

- (462) The same request was made during the meeting of September 2007⁷⁹⁹. GTS Slovakia also explained that it needed information on the coverage areas of ADSL2+ technology and that ideally it would need a plan on ST's DSLAM deployment.
- (463) GTS Slovakia reiterated its request during the meeting of 13 December 2007⁸⁰⁰, when ST responded that the percentage of lines occupancy for broadband services would be provided only within the framework of the preliminary inquiry for collocation, so that GTS Slovakia *"will be able to evaluate the BB potential of a given point when planning"*⁸⁰¹. However, as shown in recital (655), that information is provided only after the coming into effect of the Framework Agreement on access to the local loop and after the provision of a bank guarantee by the AO. Therefore, that information is provided too late in the process for any meaningful *"planning"* ahead.
- (464) During the same meeting, GTS Slovakia also requested access to information on the number of lines for each MDF. According to the minutes, ST refused to provide such information and no explanations were given as to the reasons for its refusal: *"ST will not provide information on the number of lines installed at a given MDF"*⁸⁰².
- (465) GTS Slovakia pointed out, in its e-mail to the Commission of 15 October 2013 to several impediments originating from lack of sufficient information: *"Incomplete information results in increased numbers of qualification requests or rejected orders, all of which increases the cost and decreases the time to install"*⁸⁰³.
- (466) GTS Slovakia also explained why such incomplete information constitutes less of a problem for an AO such as GTS than for a company that would use LLU for mass market services rollout: *"As we use LLU only for low-volume deployment, at this moment it does not constitute a major complication for us, number of such cases is very low, and because we use LLU only as one method of access, we are almost always able to find alternative solution (wireless connection, other provider etc.). However, lack of information might be a problem for a company that would need/like to use LLU for mass market service rollout"*⁸⁰⁴.
- (467) Orange also noted that ST provided incomplete network information. Orange signalled to TUSR that Annex 10 to ST's RUO contains certain technical irregularities: *"in paragraph 1.4 it is unclear under which point the routers and switches are covered, and in paragraph 2, no rack cables are described. There are discrepancies between the abbreviations ICDF (interconnection distribution frame) and HDF (handover distribution frame)"*⁸⁰⁵.

799 Doc ID 2266.

800 Minutes from the meeting of 13 December 2007, Doc ID0378 Doc ID 2267, point 1.

801 Doc ID 2267, point 1.

802 Doc ID 2267, point 1.

803 Doc ID 4105, e-mail from GTS of 15 October 2013.

804 Doc ID 4105, e-mail from GTS of 15 October 2013.

805 Doc ID 297, page 9.

7.6.2.2.1.5 *Other RUOs from other European Union telecoms incumbents show that AOs are entitled to receive a wide range of network information*

- (468) ST provides several examples of RUOs from other Member States, in order to demonstrate that "*provision of information is a widespread issue for all European operators*"⁸⁰⁶.
- (469) However, the examples chosen do not prove such an allegation. On the contrary, they show that, in comparison with ST's RUO and on the basis of the RUOs in question, AOs are entitled to receive more information than the AOs in Slovakia.
- (470) For instance, ST chose Ireland to show that the incumbent, Eircom, "*faced similar difficulties providing network related information*" and that "*its 2001 ULL Service Level Agreement provides generic network information only with respect to eircom local exchanges*"⁸⁰⁷.
- (471) However, the provision in question has a wide scope and refers to a "*set of generic information regarding all local exchanges in the Eircom network, to aid the Access Seeker in its business planning*"⁸⁰⁸. On the basis of that provision, it cannot be inferred that Eircom had any difficulties providing network related information.
- (472) Moreover, the next versions of that document, applicable as from 2005 until the present, are more precise as to the scope of the generic information provided, as they contain an enumeration of the types of information that Eircom makes available "*about each of its exchanges to allow Access Seekers to undertake business planning activities*"⁸⁰⁹.
- (473) In accordance with Section 3.5.1 Business Planning Information of the "*Process Manual for eircom Physical Co-location Service*" of 2005⁸¹⁰, but also of the 2009 version⁸¹¹, as well as of the currently applicable version issued in 2012⁸¹², generic information refers not only to physical access locations (exchange names, short code identifiers for exchanges, full postal addresses of exchanges and/or grid co-ordinates of exchanges), but also to information on the availability of local loops and their technical conditions (PSTN number ranges associated with each exchange, number of working lines, geographical coverage of each exchange and type of MDF - small, medium or large).
- (474) ST also quotes from EPT's 2005 RUO in Luxembourg, to show that it "*also provided a minimum set of network related information to AOs*"⁸¹³.
- (475) However, in accordance with Section 6.1 "*Preliminary exchange of information*" of Schedule 6 – "*Planning and Operation*" in the EPT's 2005 RUO⁸¹⁴ and EPT's 2007-2008 RUO⁸¹⁵, the AOs in Luxembourg have access to the following network

806 ST's reply to SO, p.359.

807 ST's reply to the SO, p.360.

808 ULL Service Level Agreements for Collocation and ULMP/Line sharing, p.7, provided in Annex X1.3 to ST's reply to the SO.

809 Doc ID 4567 and Doc ID 4567, page 6.

810 Doc ID 4567, p.6.

811 Doc ID 4566, p.6.

812 Doc ID 4233, p.11.

813 ST's reply to the SO, p.361.

814 Doc ID 4572.

815 Doc ID 4573.

information: the location of MDF sites, a module to find for each postal address the correspondent MDF site and the type of collocation foreseen for each MDF site, together with the actual status of deployed collocation at each location. That shows that EPT offers, free of charge, more network information than ST, as the latter does not provide *"for each MDF site, the type of Collocation foreseen and the actual status of deployed Collocation at each location"*. In accordance with EPT's RUO of 2009-2010⁸¹⁶, additional network information, that is to say *"a module to find for each phone number if the current route is on copper and, if so, an indication regarding the length of the access line"* is provided. Moreover, as ST itself points out, EPT offers, for a service charge, *"additional network information"*⁸¹⁷. ST does not offer any supplementary network information, even against a charge.

- (476) ST also submits the example of the Telefónica O2's ("TO2") 2006 RUO in the Czech Republic, to emphasise that the information in Annex 17 of TO2's 2006 RUO includes a list of TO2's local exchanges and remote subscriber units, but that no information on the catchment areas was provided. As regards the information on the total volume of copper pairs in use that TO2 provides following the signature of a Non-Disclosure Agreement, ST considers that *"the exact scope of such information remains unclear"*⁸¹⁸.
- (477) However, those assertions are incorrect. The scope of the network information provided after signing the Non-Disclosure Agreement is clear and information on the catchment areas is also provided. In accordance with Annex 14 of the TO2's 2006 and 2007 RUOs⁸¹⁹, *"TO2 will offer the following information about its exchanges: the name of the exchange, the code of the exchange, the numerical ranges for the given exchange, the list of MDFs in the given exchange, the ID of the MDFs, the range of active lines, the address of the MDFs and the extent of coverage of the MDF on the given address"*.
- (478) In addition, TO2's obligations as regards the scope of the network information provided are wider than ST's. In Accordance with Annex 14 of the TO2's 2006 and 2007 RUOs⁸²⁰, AOs receive, upon request, certain network information that ST does not make available to AOs. For instance, the Czech Telecoms Regulator confirmed that the number of operational lines per MDF is provided to AOs upon request, in accordance with the reference offer⁸²¹. Moreover, TO2 also makes available to AOs information on the total volume of copper pairs in use and ST does not explain why it considers that the scope of this information is unclear. Moreover, that is information that ST is not offering.

⁸¹⁶ Doc ID 4574, Section 6.1 *"Preliminary exchange of information"* in Schedule 6 – *"Planning and Operation"*.

⁸¹⁷ ST's reply to the SO, p. 361, referring to Schedule 8, p.2, of EPT's 2005 RUO (Doc ID 4572).

⁸¹⁸ ST's reply to the SO, p.362.

⁸¹⁹ Doc ID 4578, 4577 and 4576.

⁸²⁰ Doc ID 4578, 4577 and 4576.

⁸²¹ Doc ID 4343, e-mail from the Czech Telecoms Regulator of 27 November 2013.

7.6.2.2.1.6 *ST's argument that it was not capable of providing additional information on the availability of its local loops, as it "was not available, due to technical limitations"*⁸²²

- (479) ST argued that it was not capable of providing "additional information" to AOs as ST did not have access to such information [...] ⁸²³. [...] ⁸²⁴. ST ensured the Commission that "ST provided all information that it was capable of providing at that time [...]" ⁸²⁵.
- (480) The Commission believes that first, it is not credible that ST did not possess, for its own internal purposes, information on the availability of its network and on the technical conditions related to access and use of local loops, besides "physical" and "logical" information (geographical locations and catchment areas of MDFs, Cross-Connection Points and Distribution Points).
- (481) As referred to in recital (535), the unbundling of the local loops was possible in the period 2005 to 2009 only as regards active lines, that is to say lines over which ST provided services to subscribers. ST should therefore possess information about those lines, otherwise it would not itself be able to serve those customers. ST should also have other relevant information, such as information regarding the size and capacity of the MDFs. Otherwise, it would not be able to calculate its total number of lines, coverage, the potential of its network and other variables necessary for business planning, network development planning and investments.
- (482) Moreover, in accordance with the minutes of the meetings between ST and GTS, ST never mentioned, in reply to GTS's request of additional and precise information that it did not possess such information. For instance, when GTS asked for information regarding the number of lines per MDF, ST simply refused to provide access to this information, without any additional explanations ⁸²⁶. In addition, after long negotiations, ST agreed to furnish the additional information on the degree of broadband deployment, but only during the collocation place inquiries ⁸²⁷. That shows that, contrary to ST's allegations, ST in fact possessed such additional network information.
- (483) Second, ST's argument that ST did not have itself such additional information is unacceptable, as "*Nemo auditur propriam turpitudinem allegans*" ⁸²⁸. Indeed, ST should have made the necessary efforts to gather the information required by the regulatory and legal framework, in order to furnish it to AOs and therefore comply with its regulatory and legal obligations.
- (484) In conclusion, ST provides to AOs only insufficient information about its network resources. ST was well aware of the problematic nature of the terms of access to information and the scope of information provided. Not only did the VUS raise those issues in its 2005 report, but also GTS Slovakia raised them several times in

⁸²² ST's reply to the SO, page 352.

⁸²³ ST's reply to the SO, p. 354.

⁸²⁴ ST's reply to the SO, p. 354.

⁸²⁵ ST's reply to the SO, p. 354.

⁸²⁶ ST's reply to the SO, p. 354.

⁸²⁷ Annex 4 of the RUO defines collocation as "*the provision of the physical space and the technical equipment necessary for the appropriate placement of the telecommunications equipment of the Authorized Provider via access to the local loop*".

⁸²⁸ "*No one can be heard to invoke his own turpitude*".

negotiations with ST⁸²⁹. Orange and Slovanet also raised the issue of insufficient information in their letters to ST⁸³⁰.

- (485) ST thereby caused delays in the unbundling process and raised the costs of AOs as they could only receive network information for a fee. Due to ST's behaviour, AOs were not in a position to prepare adequate business plans and make informed business decisions about local loop unbundling. The lack of information coupled with the onerous terms of access to some of the necessary information were set to deter AOs from unbundling ST's local loops and entering or expanding in the downstream retail mass market for broadband services offered at a fixed location.
- (486) Therefore, the Commission considers that ST unreasonably withheld from AOs the information necessary for the unbundling of the local loop.

7.6.2.2.2 The network information provided by ST regarding the location of its physical access sites and their catchment areas is incomplete, unclear, given late in the process and onerous

7.6.2.2.2.1 *The network information which ST does provide is incomplete*

- (487) According to the minutes of the meeting that took place between ST and GTS on 13 March 2007⁸³¹, ST provided GTS with a sample of the network information database, containing information on the "*town, location of the main and subscriber distribution frames and the catchment area which a given distribution frame covers*". GTS Slovakia insisted that the information provided must include "a precise description" of the access points, their locations and their catchment areas. The information provided by ST only included a list of ST's MDFs and similar equipment (cross-connection points and secondary cross-connection points) together with their locations.⁸³²
- (488) The incompleteness and the lack of clarity of the ST's network information were also confirmed by ST itself, in its reply to the SO, due to the [...] ⁸³³. For instance, ST's information system [...] ⁸³⁴. ST explained that it possessed:
- (1) information about the physical layer of ST's infrastructure (ST's databases [...]), which refers to geographic location of the ST's infrastructure and its potential technical capacity, with the exclusion of its usage. The collection of "geographic" information started in [Date], when ST engaged [Name of an IT company] to create an information system that would comprise geographic and technical documentation on ST's network. However, this project was terminated [Name of a data base] [Date]. Following its termination, ST's EMB decided in May 2007 to implement [Name of a data base] which ST continues developing to date.
 - (2) information about the logical connection between certain elements ([Name of a data base])⁸³⁵, comprising identification numbers and addresses of all ST's

⁸²⁹ "Regulatory Standpoint to proposal of DSL for Doma Mini and SCP", 19 December 2005, Doc ID 0136.

⁸³⁰ Doc ID 485 (letter from Slovanet to ST of 25 October 2005) and Doc ID 301 (letter from Orange to Slovanet of 13 December 2005).

⁸³¹ Doc ID 2264.

⁸³² Doc ID 0378.

⁸³³ ST's reply to the SO, paragraph 864

⁸³⁴ ST's reply to the SO, paragraph 878.

MDFs, cross-connection points, secondary cross-connection points and distribution points and also allowing the creation of a logical path between a particular MDF and the corresponding distribution point for ULL purposes.

- (489) ST explained in the reply to the SO that the information that it had did not allow ST to provide information covering the whole network. In relation to [Name of two data bases]), ST referred to the [Report], showing that the quality and completeness started from a low basis, but improved over time. ST also explained [Quantity] of the geographic information was at that time only available in paper format, which did not allow ST to provide information covering the whole network⁸³⁶. ST considers that "at the time when ST published its RUO, the nature of information available about ST's network was [Comparison of completeness at tht time compared to today]"⁸³⁷. ST considers that the situation was [...]. Indeed, ST's Status Report [...] shows that the data collection process, data processing and digitalisation works had not even started at that date in [...] cities on which ST focused its efforts. In [Number of cities], work was in progress but the completion ratio was below [...] % and in [Number of cities], ST completed its works at a level between [...] %⁸³⁸.

Table 15: Data Capture Status Report as per 6.4.2009

[Map of Slovakia indicating for the different areas the data capture status]



- (490) ST considers that the situation "has significantly improved" [Indication on point in time], as with the exception of [Name of a city] ([...] % of network infrastructure covered) and [Number] other cities, the mapping of ST's network has now been completed⁸³⁹.
- (491) The Commission notes therefore that even the "physical" network information on the accessibility of ST's network that ST was obliged to provide to AOs in compliance with its regulatory and legal obligations was incomplete. ST recognises itself that they possess: [...] ⁸⁴⁰. That is also confirmed by the fact that ST mentioned that the [...] database does not necessarily involve precise information about the physical location of the various distribution points, but that once completed, [Name of a database] will fulfil that role. However, "[...]"⁸⁴¹.

⁸³⁵ ST's reply to the SO, p. 358.

⁸³⁶ ST's reply to the SO, p. 354.

⁸³⁷ ST's reply to the SO, p. 358.

⁸³⁸ ST's reply to the SO, Figure 56. "Status of mapping ST's network in April 2009", page 358.

⁸³⁹ ST's reply to the SO, page 358.

⁸⁴⁰ ST's reply to the SO, page 352.

⁸⁴¹ ST's reply to the SO, page 357.

- (492) Also, the Commission considers that the difficulties that GTS encountered show the incompleteness of ST's information: ST informed the Commission that GTS occasionally approached its ST account manager to clarify the geographic location of certain distribution points as, for instance, the geographical location was sometimes described in "a rather vague way in ST's internal systems", for instance: "on the corner across the road opposite to butchery".⁸⁴² Despite this, ST argues that GTS "did not encounter any problems in identifying the distribution point of MDF to which a particular customer was connected", although, at the same time, ST contradicts itself by mentioning that actually those identification issues did exist: "when GTS encountered such issues, it always contacted the ST account manager, who provided precise identification free of charge"⁸⁴³.
- (493) An additional proof that the network information provided was insufficient and did not allow AOs to identify with certainty to which distribution frame a specific local loop is connected is the very existence of the "identification of the place of access" procedure in ST's RUO.
- (494) According to section 2.7.1 of Annex 5 to the RUO, ST will upon an AO's request and subject to payment of a fee of EUR 89.99 (SKK 2 711)⁸⁴⁴ per local loop, identify the place of access, that is to say the distribution frame to which a specific local loop is connected. According to Annex 5 to the RUO, that may be needed when the AO cannot clearly determine to which distribution frame a specific local loop is connected.
- (495) VUS remarked in its *Assessment Report* that the service of "identification of the place of access" puts in doubt the sufficiency and the adequacy of the information provided because the AO should in principle know to which distribution frame a certain local loop is connected⁸⁴⁵.
- (496) Orange also complained to TUSR that paying additional fees for the "identification of the place of access" is a "nonsensical, artificially generated cost. Information on which local loops are connected to the main or local switchboard should be included in the paid access to protected information"⁸⁴⁶.
- (497) ST maintains that GTS never required "identification of the place of access", as the information ST provided to GTS was sufficient for the latter to identify the MDF. That optional step was included mainly to offer "additional assistance" to AOs when they might have difficulties determining to which MDF a particular line is connected, but it proved unnecessary in practice.
- (498) It is not clear why any difficulties in determining to which MDF a particular line is connected could have occurred, if, as ST submits, the information provided was sufficient to determine that. In addition, the fact that such a step was not necessary in practice was also due to the fact that, as explained by GTS⁸⁴⁷, the company was able

⁸⁴² ST's reply to the SO, page 352.

⁸⁴³ ST's reply to the SO, page 352.

⁸⁴⁴ Annex 14 (ex Annex 15) to the RUO, item 2.1.16 (formerly item 2.1.8, then 2.1.11) – fee for identification of place of access (poplatok za identifikáciu miesta prístupu); the amount of the fee has not changed since 12 August 2005, Q7_4, ST's Reply to the RFI 22/10/2010, Doc ID3242.

⁸⁴⁵ "Regulatory Standpoint to proposal of DSL for Doma Mini and SCP", 19 December 2005, Doc ID 0136 (p. 12 of the Report / p. 46 of Doc ID 0136).

⁸⁴⁶ Doc ID 298, Annex 1 to Orange's submission to TUSR, p.1.

⁸⁴⁷ E-mail from GTS Slovakia of 15 October 2013 – Doc ID 4105.

to overcome difficulties stemming from lack of information due to other reasons, that is to say because they used ULL only for low-volume deployment, only for business customers and also because they had certain alternative methods for providing broadband services at their disposal (GTS also had fibre and fixed wireless access networks)⁸⁴⁸.

- (499) The Commission considers that the "*identification of the place of access*" appears to be necessary because of the limited information ST provides to AOs about its network.
- (500) As regards the [...] database, ST argued that although ST can browse through it and if provided with a specific address, the system can find the closest MDF to which end-users living at that address are connected, [...] database has certain "shortcomings" and is "*incapable of [...]*"⁸⁴⁹.
- (501) However, ST has not submitted any additional explanations as to whether the issuance of such reports is technically impossible in absolute terms or whether it is impossible because such technical development was never implemented. In addition, it is unclear what technical limitations would impede ST from generating even partial reports or network mapping that would allow AOs to form at least a partial opinion, regarding the size, structure and location of ST's network, in order for AOs to appreciate their business potential.
- (502) The fact that ST itself can only search the database regarding particular customers means that ST itself does not possess any reports, statistics, mapping, regarding its overall network situation, which, as provided above, in recital (480), is not credible.

7.6.2.2.2 *The scope of ST's network information regarding the accessibility to its local loops is unclear*

- (503) Point 1.6.4 of Annex 5 to the RUO only gives examples of items that ST will provide upon request to AOs: "*Data on the ST public telecommunications network processed from non-public information systems contain information on individual, main, trunk, network and subscriber distribution frames with their identification numbers and the exact address of their location*"⁸⁵⁰.
- (504) The VUS in its 2005 *Assessment Report* points to the lack of clarity as regards the scope of the information provided to AOs⁸⁵¹. VUS states in that context that the RUO should also list the information that will be provided to AOs upon request.
- (505) On the same subject, Slovanet complained to TUSR, amongst others, that ST's fee for access to non-public information systems has never been substantiated⁸⁵². In other words, for Slovanet it was not clear what was the exact information for which it would have to pay to ST 200 000 SKK (EUR 6 638.78).
- (506) ST specified, in reply to the SO, the information that ST "*normally*" provides upon request (see recital (444) above). The adverb "*normally*" that ST used reinforces the

⁸⁴⁸ Minutes of the phone call with GTS Slovakia of 27 June 2013 – Doc ID 3873.

⁸⁴⁹ ST's reply to the SO, p.359.

⁸⁵⁰ Doc ID 3198.

⁸⁵¹ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID 0136 (p. 13 of the Report / p. 47 of Doc ID 0136).

⁸⁵² Doc ID 482, Slovanet's letter to TUSR of 25/10/2005, "*Request for intervention in a dispute*".

discretionary character of ST's behaviour and shows that AOs do not know in advance the information that ST is willing to provide.

- (507) The Commission considers that ST should have determined at least the exact scope of the network information that it would make available to AOs, by specifying the categories of network information to be provided.
- (508) In its reply to the SO, ST gives the example of the incumbent in Austria - A1 Telekom Austria ("A1TA"), which, in ST's opinion, has the same behaviour as ST, that is to say it does not specify the exact scope of the information to be provided to AOs⁸⁵³. However, the two situations cannot be compared. A1TA has the general obligation to provide AOs, on request, with "*all information that is reasonably necessary for the efficient fulfilment of the RUO according to the RUO's objectives*"⁸⁵⁴. ST never undertook in the RUO or in any other contracting document such a general obligation to provide all necessary network information, whereas A1TA is, according to the 2005 and 2007 RUOs, obliged to provide such complete information. The types of network information to be provided are specified in Annex 6 of the 2005 and 2007 RUO⁸⁵⁵, which provide that the AO will receive upon request information on the addresses of the MDFs, their ID numbers and their catchment areas.
- (509) Moreover, in Austria, certain information has to be given following the conclusion of the ULL framework contract; other information is provided in the course of the execution of the ULL framework contract, when or before ordering the individual service. In that sense, the Austrian Telecoms Regulator considers that "*The statement by ST that A1TA does not specify the exact scope of information to be provided to AOs is not correct*"⁸⁵⁶.

7.6.2.2.2.3 *ST's network information regarding the accessibility of its local loops is given late in the process*

- (510) Annex 5 to the RUO foresees access to information from the non-public information systems following the conclusion of the Framework Agreement on access to the local loop⁸⁵⁷. Access to information is afforded by ST after the provision of a bank guarantee by the AO and once it has made other payments connected therewith.
- (511) Obtaining sufficient information at an early stage of the unbundling process is crucial for the AOs' ability to prepare adequate business plans and make informed business decisions. Providing the necessary information at a late stage of the unbundling process also disturbs the AOs' ability to prepare adequate business plans.

⁸⁵³ ST's reply to the SO, p.359.

⁸⁵⁴ Doc ID 4065, e-mail from the Austrian Telecoms Regulator of 3 October 2013. Also, Telecom Austria, Agreement on Access to the Local Loop, 2005, p.8 provided in Annex XI.3 to ST's reply to the SO.

⁸⁵⁵ Doc ID 4599 and Doc ID 4544.

⁸⁵⁶ Doc ID 4065, e-mail from the Austrian Telecoms Regulator of 3 October 2013.

⁸⁵⁷ The 2005 RUO, Annex 5, Annexes of ST's reply to RFI of 17/04/2009, Q.41_1 priloha_5 (Doc ID3191) and Q.41_3 priloha_5 (Doc ID3198) foresaw the provision of the information upon conclusion of the Confidentiality Agreement. This had the effect that the payment of the fee for access to this information became a precondition for conclusion of the Confidentiality Agreement. Following Slovanet's submission to TUSR these terms were modified on 27 December 2005.

- (512) As emphasised by Slovanet⁸⁵⁸, ST "*must prepare the reference offer to the extent and quality that it provides the applicant with all the necessary data for preparing a business plan, otherwise, applicants cannot be expected to sign a contract that will not even allow them to estimate the investments and the level of costs*".
- (513) Slovanet also complained that access to network information is given too late in the process, which "*prevents Slovanet from assessing the investment difficulties related to the network coverage, number of connection points, etc. before the signature of the agreement*"⁸⁵⁹.
- (514) As mentioned in recital (482), GTS Slovakia has requested on several occasions access to information on the degree of broadband deployment. However, in order to receive this information, the AO had to at least incur the cost of preliminary inquiry for collocation or of detailed inquiry. Hence, without incurring that cost the AO was not in a position to assess the viability of the location for broadband deployment.
- (515) Moreover, information on whether a specific local loop that AOs intend to unbundle can technically be unbundled ("yes" or "no" answer) is provided by ST to AOs only at the very end of the process, through the "*qualification of the local loop*" procedure, which is the last step before the AO can request access (installation) to the local loop. According to the RUO, "*qualification of the local loop provides the alternative operator with information about the quality of the network resources and the appropriateness of the provision of access to the local loop with respect to the RUO terms*". That means that until ST completes the qualification of each local loop, the AO cannot estimate how many local loops can be unbundled in the given location at the given MDF and hence cannot prepare an adequate business plan and assess whether it makes sense to invest in collocation in that location.
- (516) The VUS in its 2005 Assessment Report remarks the following with regard to this step: "*The basic information concerning the 'quality of the network resources' should be included in the documents provided within the framework of the 'Confidentiality Agreement'. If the alternative operator were to obtain information about quality of the local loop in the given place at such a late phase of the local loop unbundling it would be questionable whether such process is sufficiently transparent*"⁸⁶⁰.
- (517) Orange has the same view and, supported by Slovanet, complained to TUSR that "*qualitative information about the lines should be part of the non-public information database, or should be part of the access procedure, no additional fees requested*"⁸⁶¹.
- (518) The Commission considers that information about the suitability of the loop for unbundling should be provided at a much earlier stage of the unbundling process, to give the AO a possibility to decide whether it wishes to incur the cost of unbundling of a specific local loop. Had ST provided sufficient information about its network to AOs in advance, no such step would have been needed.

⁸⁵⁸ Doc ID 3959, Minutes of the conference call between the Commission services and Slovanet of 07/08/2013.

⁸⁵⁹ Doc ID 191, "*The list of points to be discussed during the meeting of 11 May 2006 with ST*", point 4.2, page 36.

⁸⁶⁰ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID 0136 (p. 16 of the Report / p. 50 of Doc ID 0136).

⁸⁶¹ Orange's submission to TUSR of 20 October 2005, Annex on steps in the unbundling process, timing and cost, Doc ID 0298, p. 2-3.

7.6.2.2.2.4 *ST only provides network information against payment*

- (519) The RUO, a public document, should contain network information. As the information is public, it is therefore provided at no cost. As explained in section, 7.6.2.1. ST's RUO does not contain appropriate information about ST's access network and the limited network information provided upon request by ST is subject to a 200 000 SKK (EUR 6 638.78) fee for "*access to non-public information systems*". In addition, Annex 5 (Section 1.6) to the RUO foresees, upon request of the AO and subject to a fee of 48 024 SKK (EUR 1 594), an update of this information. The update covers the "*monthly updating (for a 1 year period) and management of the database of disclosed non-public information systems*".
- (520) Slovanet mentioned, amongst the "*unacceptable conditions*" set by ST, the "*inadequate fees, for instance for information about access points and the accessibility of local loops*"⁸⁶². Slovanet considers⁸⁶³ that information about the accessibility of local loops and the physical access locations is not by its character a business secret of the incumbent and should be offered free of charge. Therefore, "*ST was not entitled to keep this information secret and to charge for it, which was confirmed by the regulator in the last analysis of the wholesale market 4*". Slovanet also complained to TUSR about ST's one-off fee for access to non-public information systems and requested TUSR to ask ST to delete that provision from the Confidentiality Agreement that AOs had to sign with ST before starting negotiations. Slovanet submitted that this fee should be subject to negotiation and should not be charged before negotiations started, when it is not even certain that such negotiations would ever start. Slovanet considers that the primary purpose of those fees is to delay the initiation of any negotiations. Slovanet concludes that "*requiring payment of this fee (whose amount has never been substantiated) before negotiations can begin (...) is an abusive act by ST which violates the principles of negotiations in good faith*"⁸⁶⁴.
- (521) As regards the fees charged by ST for updating its network information, VUS remarks that "*the updating and administration of the so-called non-public, resp. internal information systems is a natural part of the running of ST's PSTN (regardless of whether other operators take part in this). It is therefore unclear why this should, according to point 1.6.4, be paid by the alternative operator.*"⁸⁶⁵
- (522) ST gave several examples of RUOs from other Member States, to argue that the provision of information is a "*widespread issue for all European operators*". However, those examples show that network information was actually provided free of charge by the incumbents in question, in contrast with ST's behaviour.
- (523) The generic network information that Eircom provides in Ireland, in accordance with Section 3.5.1 "*Business Planning Information*" in the "*Process Manual for eircom Physical Co-location Service*" of 2005⁸⁶⁶, but also in 2009⁸⁶⁷ as well as in the

⁸⁶² Doc ID 3959, point 2.2

⁸⁶³ Doc ID 3959, Minutes of the conference call with Slovanet of 7 August 2013.

⁸⁶⁴ Doc ID 482, Slovanet's letter to TUSR of 25/10/2005, "*Request for intervention in a dispute*".

⁸⁶⁵ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID0136, p 13.

⁸⁶⁶ Doc ID 4567, p.6.

⁸⁶⁷ Doc ID 4566, p.6.

currently applicable version (issued in 2012)⁸⁶⁸, is offered free of charge. That was also confirmed by the Irish Telecoms Regulator⁸⁶⁹.

- (524) The same applies to the incumbent in Luxembourg (POST Luxembourg), which confirmed that *"the information in itself is not subject to fees except if value-added services need to be performed (availability checks, etc). (...) A fee is only applied in case an operator asks measurements to be done in the field on a dedicated line"*⁸⁷⁰. In accordance with section 6.1 *"Preliminary exchange of information"* in Schedule 6 *"Planning and Operation"* of the 2005 RUO⁸⁷¹, of the 2007-2008⁸⁷² and of the 2009-2010⁸⁷³ RUO, POST Luxembourg provides the AOs with an Internet access address and password to enable the latter to view network information. That information is provided free of charge, *"for the sole purpose of enabling the OLO to consider whether to request services from EPT (POST Luxembourg)"*.
- (525) Another example is TO2 in the Czech Republic, where the Czech Telecoms Regulator confirmed that access to the network information and to the ordering systems (interface) of TO2 is free of charge⁸⁷⁴. Indeed, Annex 7, which lists all fees required in Telefonica's RUOs applicable from 2006 onwards⁸⁷⁵, does not mention any charges for the network information provided in accordance with Annex 14 and Annex 17.
- (526) ST also gives the example of the incumbent in Austria (A1TA), to show that this incumbent also applied a fee for information on catchment areas of MDFs⁸⁷⁶, exactly as ST. However, in Austria, the fees charged for network information, such as the information relating to the ordering an unbundled local loop, are cost oriented⁸⁷⁷. In accordance with Annex 8 of the 2005 and 2007 RUOs, the network information mentioned in Annex 6 (addresses of MDFs, together with their IDs and their catchment area) should be provided according to the efforts deployed. The fee for information on the catchment areas of MDFs amounts to EUR 54. In Slovakia, the fees charged for access to the same network information amount to SKK 200 000 (EUR 6 638.78) and were therefore much higher than those in Austria. Moreover, there is no evidence that the fees in Slovakia are cost-oriented. On the contrary, in ST's RUO of November 2010⁸⁷⁸, those fees have been changed to EUR 345.90 from EUR 6 638.78, that is to say a reduction by nearly a factor of 20 in comparison with the previous amount, which indicates that the fees previously charged were not cost-oriented.
- (527) The Commission therefore considers that ST's network information is onerous and represents a further deterrent for AOs from having access to ULL.

⁸⁶⁸ Doc ID 4233, p.11.

⁸⁶⁹ Doc ID 4197 – e-mail from the Irish Telecoms Regulator of 24 October 2013, at 15:57.

⁸⁷⁰ Doc ID 4232, e-mail from POST Luxembourg of 8 November 2013.

⁸⁷¹ Doc ID 4572.

⁸⁷² Doc ID 4573.

⁸⁷³ Doc ID 4574.

⁸⁷⁴ Doc ID 4211, e-mail from the Czech Telecoms Regulator of 16 October 2013.

⁸⁷⁵ Czech RUO of 2006 (Doc ID 4578), Czech RUO of March 2007 (Doc ID 4576), Czech RUO of September 2007 (Doc ID 4577).

⁸⁷⁶ ST's reply to the SO, page 360.

⁸⁷⁷ E-mail from the Austrian Telecoms Regulator of 3 October 2013 (Doc ID 4065).

⁸⁷⁸ Doc ID 3242.

- (528) In conclusion, the Commission considers that the fact that no appropriate network information was available combined with the lack of precision regarding the scope of the information provided upon request, and also with the fact that the information provided by ST was incomplete, made available late in the process and against an onerous fee, made the unbundling process uncertain and difficult.
- 7.6.2.3. ST did not include in the RUO any templates for requests to be submitted by AOs but nevertheless requested penalty payments for requests considered as incomplete
- (529) Annex 5 to the RUO foresaw numerous requests that AOs had to submit on ST's templates, such as: requests for access to information from the non-public information system, requests for preliminary or detailed inquiries, requests for access to collocation, requests for qualification of the local loops, submissions of forecasts, etc. However, until RUO's modification of 9 May 2009, no templates other than the Confidentiality Agreement and the Framework Agreement were available⁸⁷⁹,
- (530) ST provides no explanations as to why no templates were publicly available between August 2005 and May 2009, when ST published most of the templates foreseen in the RUO. The penalty fee was only abolished with the change of the RUO on 1 November 2010.⁸⁸⁰
- (531) The VUS's *2005 Assessment Report* also points out that due to the absence of the relevant templates for requests from the RUO, the AOs are left in uncertainty over the exact content of the requests foreseen in Annex 5 to the RUO.⁸⁸¹ Orange also complained that not all templates for requests were included in the RUO and that there were no model agreements attached to the RUO⁸⁸²: "*the RUO was incomplete (it did not even include model agreements), in violation of the law and the TUSR's decision*"⁸⁸³.
- (532) That means that AOs first had to request a template from ST, before filling in their request to ST. As provided in paragraph 809 of the SO, that situation caused considerable uncertainty for AOs. Indeed, they were not able to identify and assess right from the beginning the necessary information to be filled in, as it was not publicly available. Therefore, they did not have an overall picture enabling them to make informed business decisions.
- (533) In addition, according to Annex 5 to the RUO in combination with Annex 14 to the RUO, the submission of an incomplete or an unacceptable request triggered a penalty fee for rejection of the request. For instance, as provided in Annex 5 to the RUO, ST charged SKK 4 396 (EUR 145.62) for the rejection of a request to conclude a Confidentiality Agreement. The penalty fee has only been abolished with the change of the RUO on 1 November 2010⁸⁸⁴.

⁸⁷⁹ ST's reply to the request for information of 17 April 2009, Annexes Q.41_1, Q.41_3, Q.41_7, Doc ID0453 (CD list).

⁸⁸⁰ Attachment Q7_4 PRILOHA 5 and Attachment Q7_4 Priloha 14 to ST's reply to the request for information of 22 October 2010, Doc ID3240 and ID3242 respectively.

⁸⁸¹ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID0136, p. 12.

⁸⁸² Doc ID0297, page 6.

⁸⁸³ Doc ID0330, reply to question 28 b).

⁸⁸⁴ Attachment Q7_4 PRILOHA 5 and Attachment Q7_4 Priloha 14 to ST's reply to the request for information of 22 October 2010, Doc ID3240 and ID3242 respectively.

(534) The Commission considers that the fact that the AOs risked penalty payments for requests refused by ST for not being provided on ST's templates, in a context where such templates were not part of the RUO, made the ST's ULL service unattractive.

7.6.3. *ST unjustifiably reduced the scope of its ULL obligation*

7.6.3.1. ST unjustifiably excluded passive lines from the scope of its ULL obligation

(535) In the Introduction to the RUO, point 5.2, ST limited access to the local loop to the "active lines" only. An "active line" is "a subscribers' line, over which ST and/or an alternative operator provides electronic communications services to a subscriber based on a valid and effective access contract". As ST recognises, "ST did not offer ULL access to lines over which no service was provided at the time of the order for ULL access"⁸⁸⁵. Therefore, ST did not give access to the "non-active" or "passive lines".

(536) That means that all ST's lines, which existed physically, but were not in use, were considered by ST as being outside its obligation to unbundle local loops. Therefore, ST reserved for itself those potential customers which were not purchasing its services, but were covered by its network. AOs did not have access to that potential customer pool, but were restricted to customers already served by ST. AOs were thereby disadvantaged because their sole option was to convince ST's existing customers to switch the operator in a situation where many of those customers were bound by contracts with commitments for 12 or even 24 months.

7.6.3.1.1 The legal and regulatory framework applicable does not provide any limitation of the unbundling obligation to "active lines" only

(537) ST considers that the restriction of ULL access to active lines only was in "perfect compliance" with applicable laws, including Regulation (EC) No 2887/2000 and the Slovak Communications Act⁸⁸⁶. ST argues that, in accordance with the Communications Act, it is only "required to provide access to subscriber lines, i.e. lines over which it provides a service based on a contract with the subscriber"⁸⁸⁷.

(538) In its 2005 Assessment Report the VUS considered the limitation of access to "active lines only" unjustified and argued that neither the Communications Act nor Regulation (EC) No 2887/2000 on unbundled access to the local loop provides such an exception⁸⁸⁸.

(539) Indeed, no such exception is provided by the legal and the regulatory framework applicable. Article 2(c) and Recital 3 of Regulation (EC) No 2887/2000 define the local loop as: "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". Article 3 of Regulation (EC) No 2887/2000 provides that "Notified operators shall publish from 31 December 2000, and keep updated, a reference offer for unbundled access to their local loops and their related facilities". The same definition of the local loop is provided in Article 1(e) of Directive 2002/19/EC. Article 12 (a) of that Directive also provides that

⁸⁸⁵ ST's reply to the SO, paragraph 754.

⁸⁸⁶ ST's reply to the SO, paragraph 755 first point and ST's reply to the LoF (paragraph 370).

⁸⁸⁷ ST's reply to the SO, paragraph 755, first point.

⁸⁸⁸ "Regulatory Standpoint to proposal of DSL for Doma Mini and SCP", 19 December 2005, Doc ID0136, p. 36 and following.

"operators may be required, inter alia, to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop".

- (540) Therefore, both Regulation (EC) No 2887/2000 and Directive 2002/19/EC provide for a general obligation of access to all the notified operator's local loops ("*physical twisted metallic pair circuit*"). That Regulation and that Directive do not distinguish between active and passive loops, but only refer to "*local loops*", no exception being made for the lines that physically existed, but over which no service was provided at the time of the ULL order (the "*non-active*" or "*passive lines*"). That means that both active and non-active loops should be subject to ST's obligation to unbundle local loops.
- (541) Moreover, Article 12 (a) of Directive 2002/19/EC was modified by Directive 2009/140/EC⁸⁸⁹ and makes clear that non-active lines are included in the incumbent's unbundling obligation: "*operators may be required, inter alia, to give third parties access to specified network elements and/or facilities, including access to network elements which are not active (...)*".
- (542) ST refers to the definition of "*subscriber*" in the Communications Act, Part One, paragraph 5(7)⁸⁹⁰, in order to argue that ST is only required to give access to lines over which it provides a service based on a contract, that is to say subscriber lines⁸⁹¹: "*Subscriber means such end-user that concluded a contract on connection with an undertaking providing public services*". ST agreed in its reply to the LoF that the text does not only refer to subscriber lines to which ST provides a service, but also to subscriber lines to which other undertakings provide ST's wholesale services. ST explained that it made no reference to subscriber lines for which the end-user has a contract with another authorised provider in its reply to the SO, because it referred to the situation in 2005, when all the metallic loops in ST's access network over which some service was provided were loops where the end-user had a direct contract with ST⁸⁹². ST also explained that as from 2006, AOs could use an ST line without the need for its subscribers to have a direct contract with ST and that these lines were "*active*" and therefore could be unbundled⁸⁹³.
- (543) However, the Commission considers that the definition of "*subscriber*" does not necessarily request, as a pre-condition for unbundling, the conclusion of a contract for a service provided on ST's lines, by ST or by a provider of ST's wholesale services, as ST argues. The unbundling of the local loop only requires the physical existence of ST's lines. For instance, an end-consumer whose house is connected to ST's network might have a contract in place with Orange or Slovanet, for a service provided over fibre for instance. He would be a "*subscriber*" in the sense of the Communications Act, even if he does not have a contract in place for a service

⁸⁸⁹ 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 L337L, 18.12.2009, p.37.

⁸⁹⁰ Act No 610/2003 Coll of 3 December 2003 on Electronic Communications, as amended.

⁸⁹¹ ST's reply to the SO, paragraph 755, first point.

⁸⁹² ST's reply to the LoF, paragraph 389.

⁸⁹³ *Ibidem*.

received on ST's line. There are no reasons why ST's lines covering his house would not be part of ST's obligation to unbundle.

- (544) The notion of "*subscriber*" is not defined in Regulation (EC) No 2887/2000 and in Directive 2002/19/EC, therefore it should not be interpreted restrictively, as only covering ST's customers. That notion could refer to AOs' subscribers, as the Orange's customer example in recital (543), but also to end-consumers which do not have any contract in place, but which are covered by ST's network. There are no reasons why such "potential" subscribers would be reserved to ST.
- (545) When asked about the interpretation of this notion, TUSR recognized that the notion of "*subscriber*" in the Slovak ECA might leave room for interpretation, as it refers to a contract concluded with an undertaking and therefore might be interpreted as referring only to active lines⁸⁹⁴. However, TUSR considers that "*the obligation to provide access should apply to all lines, both active and passive*", as the definition of the local loop in the Communications Act does not include any exception as regards passive lines and is in compliance with Regulation (EC) No 2887/2000 and Directive 2002/19/EC, which do not distinguish between active and passive lines⁸⁹⁵.
- (546) Moreover, where the Slovak and the Czech electronic communications legislations are very similar, as also pointed out by ST in its reply to the SO⁸⁹⁶, they are also similarly interpreted by the Telecoms Regulators in those countries. Indeed, TUSR's interpretation is similar to the Czech Telecoms Regulator's approach, which considers that the restriction to active lines only is not consistent with the applicable regulatory framework, which provided that the obligation to make local loop unbundling is related also to the subscriber lines that are not active⁸⁹⁷, in line with Regulation (EC) No 2887/2000 and the Czech Communications Act⁸⁹⁸. That also proves that ST's limitation is unjustified.
- (547) ST considers that TUSR's market analysis of the relevant market 4 shows that in TUSR's view, the scope of the unbundling obligation related to active lines⁸⁹⁹: "*ST adopted significant amendments to its reference offer as of 9 May 2009, the changes related to access to the unbundled local loops and collocation. From that date, it is possible to unbundle also non-active loops (before that date, access was possible only to active local loops)*". In the Commission's opinion, TUSR only refers to the modifications ST made to its RUO on 9 May 2009, including the removal of the unbundling obligation limitation to active lines only. However, TUSR does not take any position on whether that limitation was in line or otherwise with ST's unbundling obligations.

⁸⁹⁴ E-mail of 26 September 2013 from the Commission to TUSR – Doc ID 4078.

⁸⁹⁵ Minutes of the phone-call of 24 November 2013 between TUSR and the Commission – Doc ID 4342, E-mail of 26 September 2013 from the Commission to TUSR – Doc ID 4078: "*(...) However, you consider that regulatory obligations should actually apply to all lines, either active or passive*", understanding confirmed by an E-mail of 8 October 2013 from TUSR to the Commission – Doc ID 4078: "*(...) your understanding is correct. I am happy to see substantiations from the legal point of view helping to confirm the statement to have all the lines included*".

⁸⁹⁶ ST's reply to the SO, paragraph 775.

⁸⁹⁷ The Measure of General Nature No. OOP/8/07.2005-11.

⁸⁹⁸ E-mail of 23 August 2013 from the Czech NRA to the Commission – Doc ID 3994.

⁸⁹⁹ ST's reply to the LoF, paragraph 401.

(548) In conclusion, in accordance with the applicable legal and regulatory framework, ST's unbundling obligation does not depend on whether the end-consumers which are covered by ST's network have a contract in place with ST, an alternative provider, or otherwise, on ST's lines or on an alternative provider's lines. Therefore, ST's restriction to active lines only was not in compliance with the legal and regulatory framework applicable.

7.6.3.1.2 ST excluded from its access obligation the non-active lines that could be unbundled

(549) In its reply to the SO⁹⁰⁰ and to the LoF⁹⁰¹, ST explained that there are two types of non-active lines which are outside the scope of its unbundling obligation: (i) non-active lines that could be unbundled (that is to say a "*physical circuit*" existed) and (ii) non-active lines that could not be unbundled. In ST's view, there are two types of non-active lines that could not be unbundled: (i) lines over which no physical circuit has ever been established between the customer's premises and the MDF and (ii) "*deactivated lines*", that is to say non-active lines that could not be unbundled due to cancellation of an active line by a particular customer and its take up by a different customer in the meantime, hence exhausting available capacity⁹⁰².

(550) First the Commission notes that although ST acknowledges that there exist non-active lines that could actually be unbundled, ST decided to apply a blanket limitation to all types of non-active lines and therefore leave the lines which could be unbundled outside the scope of its obligation to unbundle, as it argues that ST did not have the information that would allow it to clearly distinguish between the non-active lines that could be unbundled and the non-active ones that could not be unbundled⁹⁰³. Contrary to that explanation, ST's internal presentation dated 23 March 2004 shows that ST's limitation was in fact "*strategic*": "*Current RUO offer is prepared with the strategic rule that ULL shall be offered only on active loop. It means where are the actual ST customers (...) In case there will be pressure of the TO and Alternative Operators for passive lines, it shall be defended with the argumentation*"⁹⁰⁴. Moreover, ST cannot validly argue that it does not have information on the non-active lines that could be unbundled, for which a physical circuit exists. Indeed, ST has information on the total lines, active and non-active, that are considered as capable for broadband usage, for which a physical circuit between the customer's premises and the MDF exists⁹⁰⁵. The notion of "*active lines*" comprises, in ST's view, the lines over which some services were provided by ST or over which AOs provided services, using ST's wholesale services such as "*ADSL Partner Naked*" as from 2006⁹⁰⁶. Therefore, the number of active lines, over which a

⁹⁰⁰ ST's reply to the SO, paragraph 757, 758 and 762.

⁹⁰¹ ST's reply to the LoF, paragraph 383.

⁹⁰² ST's reply to the SO, paragraph 757.

⁹⁰³ ST's reply to the SO, paragraph 763 and ST's reply to the LoF, paragraph 386.

⁹⁰⁴ [...] Doc ID 142, Slide 2.

⁹⁰⁵ This number amounts to [...] lines and is provided under point 10 "*Total number of lines that are expected as capable for broadband usage*" in Table 1 "*Estimation of Slovak Telekom's copper based access network technical coverage based on number of lines (copper pairs) deployed at MDFs with DSLAMs and/or MSANs*" of ST's submission "*Additional information regarding technical limitations on Slovak Telekom's copper based access network following the Commission's request at the meeting of 2 October 2009*" – Doc ID 1637.

⁹⁰⁶ ST's reply to the LoF, paragraph 390.

service is provided by ST or by an AO with whom ST has a wholesale contract in place, should be known to ST. The difference between the total number of lines capable of broadband usage and ST's active lines is represented by ST's non-active lines for which there is a physical circuit in place and which could be unbundled.

- (551) As regards the situation where no physical circuit exists between the customer's premises and the MDF, the non-active lines in question are normally not comprised within ST's obligation to unbundle and any other possible arrangements whereby ST would build such circuits and unbundle them would be part of separate commercial arrangements between ST and the AO in question. As to the "deactivated" lines, ST considers that such lines cannot be unbundled because *"pending their deactivation, other customers might have requested new lines in the same area, hence exhausting available capacity"*⁹⁰⁷. ST recognises therefore that the lack of capacity would only be a possibility affecting some of the deactivated lines, but not all of them.
- (552) The Commission considers that there is no reason why such deactivated lines would be outside ST's obligation to unbundle. For instance, the incumbent in Luxembourg (POST Luxembourg) confirmed that *"such deactivated lines are fully covered by the unbundling obligation"*, but that the incumbent will strictly observe a *"first in first out"* rule, independently of whether the order comes from another operator or from the incumbent's retail branch⁹⁰⁸. Therefore, ST could have considered those lines as being part of their unbundling obligation and could have checked whether a *"deactivated"* line could be subsequently reactivated or not, as opposed to including all such lines in the category of lines that cannot be unbundled by definition.
- (553) The Commission takes the view that ST's approach to exclude from its access obligation all non-active lines is not in line with ST's unbundling obligation, which applies to all the lines that could be unbundled, for which the request for unbundling can be classified as *"reasonable and justified"*⁹⁰⁹, to *"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"*⁹¹⁰. That comprises both the *"active lines"* and the *"non-active lines"* that could be unbundled, no exception being made.
- (554) Even supposing that ST did not have enough information to allow it to distinguish between the non-active lines that could be unbundled and the non-active lines that could not be unbundled, ST could have applied a case-by-case approach instead of generally deciding from the beginning that no passive lines should be unbundled. ST could have checked, once an ULL order was received from an AO, whether the passive lines in question could be unbundled or not. ST is an incumbent that has the duty to provide those checks, possibly against payment of the cost by the access seeker, and cannot just simply exclude all those lines from the RUO, as this reduces the scope of the unbundling obligation below the legal requirements and the real capabilities of ST's network.

⁹⁰⁷ ST's reply to the SO, paragraph 757, second point.

⁹⁰⁸ E-mail of 8 November 2013 from POST Luxembourg to the Commission – Doc ID 4232.

⁹⁰⁹ ST's reply to the RFI of 7 June 2013, page 5, footnote 17, Doc ID 3804.

⁹¹⁰ Article 2(c) and Recital 3 of Regulation (EC) No 2887/2000 as well as Article 1(e) of Directive 2002/19/EC.

- (555) In fact, ST put in practice a similar case-by-case approach with GTS Slovakia, who complained that such limitation was unjustified⁹¹¹. As explained by ST, "*ST and GTS reached a mutually acceptable agreement that addressed the absence of sufficient records on the non-active local loops*"⁹¹². ST agreed to remove the limitation related to passive lines and therefore to also unbundle such passive lines, which meant that ST would verify the line ordered by GTS Slovakia and if the line was non-active, but physically existed and could be unbundled, the line would be within ST's unbundling obligation. If ST discovered that no metallic circuit has been established between its network and the end-users premises on the line ordered by GTS Slovakia, ST would assess the technical situation and prepare a calculation of the investment required to construct a line. GTS would then decide whether or not it wished ST to construct such a line⁹¹³.
- (556) ST emphasises in its reply to the LoF that a solution for the unbundling of non-active lines "*was reached already in the first meeting on ULL between ST and GTS that was held on 13 March 2007*"⁹¹⁴ and that once its concerns that it would not be able to guarantee access to non-active loops "*were addressed by a mutually accepted solution found by ST and GTS, ST voluntarily removed the limitation*"⁹¹⁵.
- (557) However, ST waited until 9 May 2009, that is to say more than two years after the agreement with GTS Slovakia and after the Commission investigation in this case had been opened, to also remove that limitation in its RUO. In the negotiations between ST and GTS Slovakia, and between Slovanet and ST, one of the main points was the removal of the limitation on access to active lines only⁹¹⁶. Orange also submitted that such a limitation was unjustified⁹¹⁷. It is not clear why ST could not find a similar solution for its alleged lack of information on the passive lines as from the adoption of its RUO of 2005 or at least since it became aware of the problematic nature of that restriction for AOs. Moreover, the removal of the limitation has not been communicated to Slovanet which in May 2007, after a workable solution had been found with GTS Slovakia, raised the issue of the restriction of access to the active lines again⁹¹⁸.
- (558) ST argues that it decided to only unbundle the lines on which "*ST can fully guarantee availability of a workable and uninterrupted line, which exists throughout the entire path between the customer premises and the MDF*", that is to say the active

⁹¹¹ GTS Slovakia's reply to the request for information of 18 July 2008, Doc ID0035, point 4.14, second indent.

⁹¹² ST's reply to the SO, paragraph 769.

⁹¹³ *Ibidem*.

⁹¹⁴ ST's reply to the LoF, paragraph 391.

⁹¹⁵ ST's reply to the LoF, paragraph 392.

⁹¹⁶ GTS Slovakia raised this issue since the beginning of the negotiations with ST, around March 2007 – see for example Minutes from the meeting between ST and GTS Slovakia, 13 March 2007, p. 5-8 – Doc ID2264. ST accepted GTS Slovakia's request for access to all lines, irrespective of whether they are passive or active. Also see Slovanet's reply to the request for information of 31 July 2008, Doc ID 0066, p. 13.

⁹¹⁷ Orange's submission to TUSR, dated 20 October 2005, p. 9, Doc ID 0298.

⁹¹⁸ See Slovanet's letter to ST dated 10 May 2007 containing an overview of comments and proposals for modifications of the RUO, p. 1, point 1 (a), Attachment Q6(ii)04 to ST's reply to the request for information of 25 March 2010, DocID2273. Slovanet argues that given the decreasing number of active lines the scope of the local loops that are available for unbundling should not be reduced by limiting the local loops available for unbundling to the active lines only.

lines. However, it seems that ST cannot fully guarantee a workable and uninterrupted line as regards active lines either. ST considers that it can only "*fully guarantee*" whether an active line can be unbundled or not after double-checking it through the qualification procedure. Indeed, ST recognises that [Statement on ST's knowledge about the existence of uninterrupted local loop and how this can be determined]⁹¹⁹. That means that even for the active lines, ST is applying a case-by-case approach as it has to verify if there is an "*interrupted line*". There is no reason why that approach has not been put in place from the beginning for the passive lines as well.

7.6.3.1.3 ST reserves for itself a large part of the customers

- (559) According to ST's internal document "[...]"⁹²⁰ in 2007, ST estimated that the potential for naked DSL is growing and represents approximately to [Business secret: number in the order of several hundred thousand, hereafter "X"] households with non-active lines, which would be interested in purchasing naked DSL in the next 3 years (from 2008 to 2010). Therefore, due to ST's exclusion of the non-active lines from its unbundling obligation, ST reserved for itself [Number = X] households that would be interested in DSL.
- (560) ST's internal document also provides that ST had in 2007 about [Number = roughly three times higher than X] households "*that had a voice line from ST*"⁹²¹, that is to say households with active lines. ST considered that its potential to sell DSL to these households was reduced to only around [Number = less than half of X] households. That means that the potential to acquire new DSL customers from the end-consumers with passive lines was much higher than its potential to acquire new customers from the end-consumers with active lines ([Number = X] versus [Number = less than half of X]). As a consequence, ST's limitation had a considerable impact on AOs' ability to unbundle local loops and conferred to ST a substantial advantage in acquiring additional DSL customers.
- (561) ST argues that its presentation reflects marketing considerations as to the number of Slovak households that could be potentially interested in DSL without checking whether these households were covered by ST's DSL network and located within the DSL service availability areas. The Commission considers that the figures related to the number of households in ST's internal document only refer to households covered by ST's DSL network. Otherwise, it would be impossible for ST to make a reliable presentation on the "*broadband penetration potential in households*"⁹²² and refer to the number of [Number = X] households as having "[...]", as any households outside ST's DSL network would not have any broadband potential at all and therefore should be discarded from the beginning from such presentation. Also, ST's argument that ST did not check whether the households referred to in ST's presentation were located within or outside the DSL service availability areas is not credible, as ST's presentation provides that [Number = roughly three quarters of X] customers are "*out of DSL coverage*"⁹²³, which means that ST already took into account that criterion in its presentation.

⁹¹⁹ ST's reply to the SO, paragraph 767.

⁹²⁰ [...], Doc ID1296, p. 5.

⁹²¹ *Ibidem*.

⁹²² [...], Doc ID1296, p. 5.

⁹²³ *Ibidem*.

(562) Moreover, ST argues that the presentation bears no relationship to the terms of ST's RUO and also that the SO cannot rely on a presentation concerning strategic business considerations, as they existed in 2007, to explain why ST introduced a technical limitation in its RUO in 2005⁹²⁴. ST also emphasised that its presentation focused on increasing DSL penetration and boosting overall DSL take-up⁹²⁵. The Commission considers that ST's presentation does not amount to an explanation of why ST introduced its limitation to active lines only in its RUO, but that, independently of its focus on increasing DSL penetration, which is not contested, it shows the considerable effects of the limitation contained in ST's RUO in terms of number of potential customers connected to non-active lines, that ST reserved for itself.

7.6.3.1.4 Non-active lines are part of the incumbent's unbundling obligation in other Member States

(563) In order to show that its limitation to active lines "*was by no means exceptional and could not be considered as anti-competitive*"⁹²⁶, ST argues that it "*followed international standards when adhering to the active line rule*" and that "*in most Member States, unbundling of non-active lines is not part of the standard ULL practice or, at least, was not part of the practice when the unbundling of local loops was introduced*"⁹²⁷. In order to reach that conclusion, ST gives the example of three Member States (Czech Republic, Luxembourg and Ireland). ST also submits the example of the United Kingdom to show that, in that country, non-active lines are subject to unbundling but only under certain conditions.

(564) First, ST explains that TO2 in the Czech Republic applied the same limitation to active lines as ST⁹²⁸. However, in the Czech Republic, the fact that TO2's RUO of 2006 did not allow access to the non-active lines was considered by the Telecoms Regulator in that country as one of the reasons why it started with TO2 administrative proceedings to amend the RUO. The Telecoms Regulator considered that this restriction was not consistent with Regulation (EC) No 2887/2000 and with the Czech Communications Act. As a follow-up, TO2 itself changed the RUO during the administrative proceedings, so that the local loop unbundling to non-active lines was allowed⁹²⁹. Therefore, the Czech example, where the limitation of the unbundling obligation to active lines only was considered by the relevant Telecoms Regulator as not being in line with the applicable national and Union regulatory framework, cannot be considered as an appropriate "*international standard*" to be followed. This example rather shows that non-active lines should have been included, from the beginning, within the scope of the unbundling obligation, in line with the legal and regulatory framework.

(565) Second, ST argues in its reply to the SO that POST Luxembourg "*similarly restricted access to unbundled local loops to active lines*"⁹³⁰ and that Eircom in Ireland "*also restricted the local loop unbundling to active and existing lines*"⁹³¹. However, non-

⁹²⁴ ST's reply to the SO, paragraph 781, first and second point.

⁹²⁵ ST's reply to the SO, paragraph 781, third point.

⁹²⁶ ST's reply to the SO, section 2.3, p. 321.

⁹²⁷ ST's reply to the SO, paragraph 773.

⁹²⁸ ST's reply to the SO, paragraph 775.

⁹²⁹ E-mail of 23 August 2013 from the Czech Telecoms Regulator to the Commission – Doc ID 3994.

⁹³⁰ ST's reply to the SO, paragraph 776.

⁹³¹ ST's reply to the SO, paragraph 777.

active lines are included in the incumbents' unbundling obligation in both Luxemburg and Ireland and therefore those examples cannot be considered as international standards that ST followed when putting in place its limitation to active lines only, contrary to what ST pretends.

- (566) ST quotes POST Luxembourg's 2005 RUO conditions regarding the provision of local loop unbundling services, to conclude that in Luxemburg only active lines can be unbundled⁹³². However, POST Luxembourg has dismissed such interpretation of the RUO, explaining that "*It is not possible to draw from the above text the conclusion that EPT (POST Luxembourg) can refuse the access to non-active lines*"⁹³³. POST Luxembourg confirmed that if at a certain address there is an active Network Termination Point ("NTP") and also there is a continuous copper line from the MDF to the NTP, then the non-active line in question could be made available to the AO⁹³⁴. In cases where there is a ULL request from an AO, but there is no NTP (for instance, in new buildings) or there is no continuous copper line between the MDF and the NTP, it is possible that POST Luxembourg constructs such a NTP or establishes a continuous copper pair line and therefore the local loop in question can be unbundled, subject to commercial negotiations⁹³⁵.
- (567) ST considers that Eircom in Ireland also restricted the local loop unbundling to active lines only and, in that sense, it refers to Eircom's 2006 RUO⁹³⁶. However, the Irish Telecoms Regulator confirmed that Eircom's unbundling obligation covers all lines⁹³⁷, not only situations where a customer is availing of a telecommunication service from Eircom, which corresponds to the notion of "*active lines*" in ST's RUO, but also where a customer is not availing of a telecommunication service from Eircom, but the local loop is still connected to the Eircom switching infrastructure, as well as where the local loop is not completed, that is to say not fully built, in which case Eircom will install a drop wire from local distribution point to customer's premises or install jumpers in the street cabinets to complete the local loop⁹³⁸. The Irish Telecoms Regulator recalled⁹³⁹ that those three types of access are outlined in more detail in section 4.1 to 4.3 of the Local Loop Unbundling Industry Process Manual (LLU IPM)⁹⁴⁰. Therefore, contrary to ST's submission, Eircom's unbundling obligation covers not only active, but also non-active lines.
- (568) Third, ST also gives the example of the United Kingdom to conclude that although the incumbent in that Member State (BT Openreach) did not exclude passive lines in its RUO, it took BT almost six years to introduce a service that involves reactivation of non-active lines when providing ULL from 2000 to 2006 and its offering is

⁹³² ST's reply to the SO, paragraph 776.

⁹³³ E-mail of 12 August 2013 from POST Luxembourg to the Commission – Doc ID3921.

⁹³⁴ E-mail of 12 August 2013 from POST Luxembourg to the Commission – Doc ID3921.

⁹³⁵ In accordance with EPT 2005 RUO, p15 (p.1 of Schedule 1 – Service Description – Metallic Path Facility), section 1.1 Description - "*The construction of new metallic circuits is outside the scope of this RUO and is subject to commercial negotiations*".

⁹³⁶ ST's reply to the SO, paragraph 777, making reference to Eircom's Access Reference Offer, 2006, p.61, provided in Annex XI.3 of ST's reply to the SO.

⁹³⁷ E-mail from the Irish Telecoms Regulator of 24 October 2013, at 15:57 - Doc ID4197.

⁹³⁸ E-mail of 20 August 2013 from the Irish Telecoms Regulator – Doc ID4070.

⁹³⁹ E-mail from the Irish Telecoms Regulator of 24 October 2013, at 15:57 - Doc ID4197.

⁹⁴⁰ Section 4.1 to 4.3 of the Process Manual Local Loop Unbundling – Doc ID4582 (valid in 2005) and of the Local Loop Unbundling Industry Process Manual (IPM) – Doc ID 581 (valid in 2010).

dependent on certain technical conditions⁹⁴¹. However, the Commission considers that the situation in Slovakia is not comparable with the one in the United Kingdom, where, irrespective of the technical conditions under which access is given, non-active lines are part of BT's obligation to unbundle. Moreover, given that since 2006, non-active lines were also included in BT's ULL obligation, ST could have followed BT's example and remove the limitation to active lines only in its RUO much earlier, as from 2006, and not as from May 2009, as it did.

(569) Therefore, ST's limitation of the scope of its unbundling obligation to active lines only was not justified by any objective technical reasons. Moreover, there are no international standards that ST followed in deciding that passive lines should be excluded from its unbundling obligation, as in the examples of RUOs that ST considered as being such standards, passive lines are also included in the unbundling obligation. By limiting its unbundling obligation to active lines only, ST reserved for itself a considerable part of customers, thereby making the unbundling of the local loops unacceptable for the AOs.

7.6.3.2. ST unjustifiably excluded the "*conflicting services*" from the scope of its ULL obligation

7.6.3.2.1 ST's list of "conflicting services" is unilaterally and arbitrarily decided by ST

(570) At point 1.15 of Annex 3 to ST's 2005 RUO, ST introduces the principle whereby it may unilaterally decide to include a certain product under the heading of "*conflicting services*"⁹⁴²: "*If ST introduces to the market a product that could be in conflict with the provision of access to the local loop ST reserves the right to include it under the heading of conflicting services (conflicting service)*". The consequence of qualifying a product as a "*conflicting service*" is that the lines dedicated to the provision of such product are removed from the scope of ST's ULL obligation and cannot be unbundled by AOs.

(571) ST refers to some products qualified as "*conflicting services*" in Annexes 2 and 3 of the RUO. As regards full access to ULL, these are: (i) services provided to ST's employees that enjoy special employee benefits⁹⁴³, (ii) loops dedicated to ST's internal operational purposes⁹⁴⁴, (iii) pair gain systems⁹⁴⁵ and (iv) lines that serve the

⁹⁴¹ ST's reply to the SO, paragraph 778. ULL operators can get access to non-active lines if: (i) a "stopped" line (that is to say a line that has previously been active and that could be re-activated without an engineer site visit) already exists; and (ii) at the time when the order for unbundling is placed there is an uninterrupted loop from the MDF to the Network Termination Equipment (NTE at the customer's premises; and (iii) the access provider has sufficiently detailed technical records relating to the requested lines.

⁹⁴² Annex 3 to ST's RUO of 12.08.2005, point 1.15 - Doc ID0453.

⁹⁴³ ST's reply to the SO, paragraph 789, first point: "*These lines were installed as part of ST employee benefits and were thus not part of ST's commercial operations*".

⁹⁴⁴ ST's reply to the SO, paragraph 789, second point: "*Every fixed line operator reserves a certain limited volume of lines for internal (non-commercial) purposes (i.e. testing, intra-company communication, technical reserves, etc.)*".

⁹⁴⁵ ST's reply to the SO, paragraph 789, third point: "*Pair gain systems refer to situations where two subscribers share the same (physical) copper line due to the scarcity of workable lines. Unbundling would lead to a termination of service to the other subscriber*".

central security systems⁹⁴⁶. With regard to shared ULL access, two additional services were considered as "*conflicting services*" by ST, that is to say: (i) services featuring technical characteristics that would harmfully interfere with the provision of telephony services using the part of the frequency spectrum that is reserved for voice services over the same copper lines⁹⁴⁷ and (ii) social programmes including ST's Mini programme⁹⁴⁸.

- (572) The Commission observes that, apart from a list of sample "*conflicting services*", ST's RUO does not contain any definition of the notion of "*conflicting services*" and does not provide any explanations as to the criteria ST uses to decide whether one of its products should be included on the list of "*conflicting services*". Moreover, in ST's RUO "*conflicting services*" are an open list, which ST may unilaterally and arbitrarily decide to extend to additional services and hence reduce the scope of its ULL obligation. As also pointed out in the SO, AOs thus face a considerable uncertainty as to whether any ST's service was already or could be deemed as a "*conflicting service*" in the future⁹⁴⁹. Hence, AOs are not able to estimate the number of local loops that are or might be affected by that limitation⁹⁵⁰.
- (573) In its *2005 Assessment Report* the VUS pointed out that the concept of "*conflicting service*" was not in line with the philosophy of unbundled access to the local loop: "*The so-called 'conflicting services' are restricting the provision of the LLU and it is therefore inevitable that the RUO should be amended to include a definition that would clearly determine such cases, and that in line with the ZoEK [Communications Act] and the Regulation*"⁹⁵¹. Furthermore, Orange complained in its submission to TUSR that "*the term conflicting service as a reason for restricting access to the local loop is not defined*" and that "*ST is entitled to unilaterally determine which service it deems conflicting though it is not defined and thereby limit the access to the local loop*"⁹⁵². In addition, it is clear from the internal document "*Regulatory Strategy 2007 Evaluation Slovak Telekom*" that ST was well aware that the exclusion of lines over which the "*conflicting services*" are provided is one of the "*critical parts of RUO*" for AOs. Yet, as mentioned above, ST set it as its regulatory strategy to change these terms only individually in negotiations with AOs⁹⁵³ and continues to rely on this limitation also after 9 May 2009.
- (574) ST considers that instead of providing "*abstract criteria to assess whether a service is 'conflicting'*", the RUO provides a definition in the form of a "*clearly defined list*", the services listed in the RUO being "*exhaustive*"⁹⁵⁴. ST acknowledges that it "*reserves its rights in the RUO to add to the list of conflicting services in the future*", but considers that the introduction of that clause highlights the fact that the list

⁹⁴⁶ ST's reply to the SO, paragraph 789, fourth point: these are "*metallic lines that serve the central security systems and are dedicated lines that were not constructed for purposes of offering commercial telecommunications services, but to connect individual premises with the security monitoring centres*".

⁹⁴⁷ ST's reply to the SO, paragraph 790, first point.

⁹⁴⁸ ST's reply to the SO, paragraph 790, second point.

⁹⁴⁹ Recital 847 of the SO.

⁹⁵⁰ Recital 851 of the SO.

⁹⁵¹ [...], Doc ID0136, p. 45-46.

⁹⁵² Orange's submission to TUSR dated 20 October 2005, p. 9, Doc ID0297

⁹⁵³ Presentation [...] Doc ID0133, p. 23 (slide 14).

⁹⁵⁴ ST's reply to the SO, paragraph 788.

provided in the RUO was exhaustive⁹⁵⁵. ST puts forward that *"the fact that ST reserved its right to add to the list of conflicting services does not mean that AOs faced uncertainty regarding the scope of the restriction"*⁹⁵⁶.

- (575) Those arguments cannot be accepted. First, nothing prevented ST from providing a list of *"conflicting services"* in parallel with providing the criteria it uses to assess whether a service is *"conflicting"*, in particular in light of the fact that ST is the only one carrying out the assessment. Second, the fact that ST can unilaterally add some additional services to the existing list of *"conflicting services"* means that Annexes 2 and 3 of ST's RUO contain an open list and not an *"exhaustive"* one, as ST argues. ST itself referred in its reply to the SO to the *"main conflicting services"* in ST's RUO⁹⁵⁷, which indicates that ST's *"conflicting services"* are not an exhaustive and *"clearly defined list"*. Therefore, contrary to ST's opinion, AOs faced and still face uncertainty regarding the scope of ST's unbundling obligation.
- (576) ST considers that reserving its right in the RUO to add to the list of *"conflicting services"* in the future was a *"precautionary measure"*, as due to rapid technological developments, it was impossible for ST to foresee all potential future services required by its customers that could prevent unbundling of its copper lines⁹⁵⁸. However, incumbents in other Member States also face new technological developments and still have no need for a contractual right to unilaterally exclude products from their ULL obligation under the pretext of *"conflicting services"*. In addition, it was never stated in the RUO that the reason for arbitrarily adding *"conflicting services"* is technical development. Also, there is no need for a preliminary and forward-looking provision in case of technological development because in case of any changes of a contract due to such technical developments, it is common business practice and in accordance with the law on contracts that the parties mutually agree on a solution and an amendment to the existing contract.
- (577) Moreover, ST's explanation only reinforces the discretionary character of ST's clause in the RUO. It also shows that ST intended to unilaterally limit the scope of its unbundling obligations not only for technical, objective reasons, independent of ST's will, but also for economic, subjective reasons, depending on ST's business strategy. Indeed, ST explains in its reply to the SO that *"the clause was necessary for ST to protect its legitimate business interests"*⁹⁵⁹.
- (578) ST also insists on the fact that the clause *"was never actually relied upon by ST"*⁹⁶⁰. However, the mere existence of the clause led to uncertainty, even if ST never added a supplementary restriction to the *"conflicting services"* already existing in the RUO.
- (579) Moreover, ST claims that *"there is nothing unusual about the conflicting services provisions contained in ST's RUO"* and it brings a number of examples of conflicting services provisions contained in the RUOs of other incumbents (from Luxembourg, Ireland, Austria and the Czech Republic), which ST considers that are *"either*

⁹⁵⁵ ST's reply to the SO, paragraph 791: *"If the list was merely illustrative, there would be no need for ST to insert a clause of this nature"*.

⁹⁵⁶ ST's reply to the SO, paragraph 791.

⁹⁵⁷ ST's reply to the SO, paragraph 789.

⁹⁵⁸ ST's reply to the SO, paragraph 791, first point.

⁹⁵⁹ ST's reply to the SO, paragraph 791, first point.

⁹⁶⁰ ST's reply to the SO, paragraph 791, second point.

*identical or very similar to those contained in ST's RUO*⁹⁶¹. Those examples have in common that, in case of technical issues on the lines, for example in case of pair gain systems, access to those lines cannot be provided to AOs due to technical constraints. That is not contested by the Commission. However, none of those examples involves the incumbent reserving the right to unilaterally decide on additional limitations of its unbundling obligation, on a commercial basis, by including certain services on the list of exceptions from the scope of its unbundling obligation.

- (580) In Luxembourg the access to the corresponding copper pairs is restricted in case of pair gain systems. However, as clarified by POST Luxembourg, *"there exists no list of 'conflicting services'. EPT (POST Luxembourg) can certainly not add such 'conflicting services' unilaterally"*⁹⁶².
- (581) In Ireland, local loop unbundling could also be limited in the case of pair gain systems on the local loop. In such a case the incumbent will attempt to provide alternative local loop where available to fulfil the access request⁹⁶³. However, the Irish Telecoms Regulator indicated that the incumbent (Eircom) cannot apply a *"blanket restriction on categories of local loops that can be unbundled"*⁹⁶⁴. It also mentioned that there are at least two safeguards to stop the incumbent from unilaterally extending the exclusions list further: (i) the removal of certain categories of local loops (that is to say *"conflicting services"*) would be considered a withdrawal of access and would require the prior permission of the ComReg⁹⁶⁵ and (ii) the incumbent cannot unilaterally change the contract with the access seeker, who would have to agree with the exclusion of certain categories of local loops, in accordance with section 26 of the Access Reference Offer ("ARO")⁹⁶⁶.
- (582) The Austrian Telecoms Regulator considers that in Austria there are no *"conflicting services"* within the RUO⁹⁶⁷. It also clarified that the incumbent (AITA) *"does not have to grant access to an unbundled loop if it can prove a lack of technical feasibility or a potential detriment to network integrity (...)"*. In addition, the incumbent *"may refuse access to an unbundled loop if this loop forms part of the technical reserve capacity"*⁹⁶⁸. The Austrian Telecoms Regulator also clarified that *"besides these reasons and the technical network reserve as well as the limitation to certain transmission systems in the NBA build-out context, AITA is not allowed to unilaterally add reasons for a refusal to grant unbundled access"*⁹⁶⁹.
- (583) Finally, in the Czech Republic, neither TO2's 2006 RUO nor TO2's 2012 RUO⁹⁷⁰ entitle TO2 to unilaterally include its products on a *"conflicting services"* list

⁹⁶¹ ST's reply to the SO, paragraph 800.

⁹⁶² E-mail from POST Luxembourg of 8 November 2013 – Doc ID 4232.

⁹⁶³ E-mail from the Irish Telecoms Regulator of 24 October 2013, at 15:57 - Doc ID 4197.

⁹⁶⁴ *Ibidem*.

⁹⁶⁵ The ComReg would have to grant its approval in accordance with the decision D03/13, p. 63-64 available at: <http://www.comreg.ie/fileupload/publications/ComReg1311.pdf>.

⁹⁶⁶ Doc ID 4563 and 4564.

⁹⁶⁷ E-mail from the Austrian Telecoms Regulator of 3 October 2013 – Doc ID 4065.

⁹⁶⁸ *Ibidem*.

⁹⁶⁹ *Ibidem*.

⁹⁷⁰ TO2's RUO of 21/09/2007, Annex 2 – Doc ID 4577, p. 4; Update of RUO regarding the conditions for LLU with "Mini", Annex 2 – Doc ID 4575, p. 3-4; TO2's RUO 2012 as amended on 1 June 2012 http://www.o2.cz/public_part/3f/a6/230437_363259_RUO_6_Priloha_02_SPV_03_2009.pdf (18/03/2014), p. 3-4.

allowing it to arbitrarily exclude additional lines from its unbundling obligation, in contrast to ST's 2005 RUO⁹⁷¹. That shows that ST's practice in that regard has nothing to do with standard industry practice of an incumbent.

7.6.3.2.2 Restrictions related to "ST Mini" and other Social Calling Programmes ("SCP")

7.6.3.2.2.1 ST's alleged "access deficit" is not a valid reason for restraining access to ULL

- (584) ST's RUO listed "ST Mini" and other "selective" calling plans as "conflicting services" for shared ULL. In Annex 3 to the RUO, titled "Shared access to the local loop", point 1.13, ST stipulated that it "will not provide shared access to the lines with advantageous selective calling program and selective program ST Mini (conflicting service)"⁹⁷².
- (585) ST explains that "ST Mini" (subsequently renamed "Doma Mini"⁹⁷³) was a calling programme aimed at customers that wished to mainly receive calls, rather than make them⁹⁷⁴. "Social Calling Plans" refers to "social" tariffs that were developed to serve a specific category of disabled subscribers⁹⁷⁵ ("disabled" in the sense of "less affluent social groups of population"⁹⁷⁶).
- (586) According to ST's internal documents, "Doma Mini" and the "Social Calling Programs" retail access fees were significantly lower than the retail access fees of other calling programs⁹⁷⁷. In its reply to the SO, ST explains that the monthly subscription fee of "ST Mini" was more than 30% cheaper than ST's standard retail subscription fees; however, this was offset by higher call charges⁹⁷⁸. ST argues that ST removed those services from the scope of its unbundling obligation, as, due to the political and social conditions in Slovakia, "certain ST retail tariffs had to be offered below cost, meaning that ST suffered from a significant access deficit"⁹⁷⁹. In other words, the retail access prices of the respective services did not cover the cost of access to ST's network (referred to as the "access deficit"). In that context, ST excluded from its unbundling obligation for shared access the lines over which it provided those services.
- (587) The Commission considers that the restriction of shared access for the local loops over which ST provided "ST Mini" and other "Social Calling Plans" is not objectively justified, contrary to ST's opinion.
- (588) First, according to ST, its low access retail prices were offset by higher calling charges⁹⁸⁰, and thus its "access deficit" was likely to be covered, at least partially.
- (589) Second, it is unclear how the alleged existence of the access deficit would be solved by the exclusion of the lines in question from ST's unbundling obligation for shared access. It is rather the contrary, as ST included the access deficit in its wholesale

⁹⁷¹ Point 1.15. of Annex 3 to ST's 2005 RUO, Doc ID 453.

⁹⁷² Point 1.13. of Annex 3 to ST's 2005 RUO, Doc ID 453.

⁹⁷³ On 8 March 2006 "ST Mini" was renamed "Doma Mini", see ST's website: <http://www.slovaktelekom.sk/?tlacove-spravy&sprava=zmena-nazvoslovia-produktov>, Doc ID3113.

⁹⁷⁴ ST's reply to the SO, paragraph 793, first point.

⁹⁷⁵ ST's reply to the SO, paragraph 793, second point.

⁹⁷⁶ Cf. Decision of TUSR of 13 July 2005, 529/14/2005, p. 14.

⁹⁷⁷ [...], Doc ID0136, p. 27-28 and [...], Doc ID0194, p. 3-16.

⁹⁷⁸ ST's reply to the SO, paragraph 793, first point.

⁹⁷⁹ ST's reply to the SO, paragraph 794 and 795.

⁹⁸⁰ ST's reply to the SO, paragraph 793, first point and [...], Doc ID0194, p. 9.

ULL price for shared access⁹⁸¹. The Commission notes that ST has not denied in its reply to the SO that the access deficit was included in the wholesale ULL price for shared access. On the contrary, ST emphasises that there is a "*direct relationship between the retail tariffs and the wholesale price for ULL*"⁹⁸². As also mentioned by the Austrian Telecoms Regulator, "*for the calculation of a potential access deficit, all revenues from wholesale and retail services using network elements within the access network would have to be considered*"⁹⁸³.

- (590) In addition, the wholesale ULL price for shared access was set to cover the loss incurred in connection with the sale of retail access below costs⁹⁸⁴. That means that the "*access deficit*" was meant to be rebalanced through wholesale prices, in connection with other access or calling products provided on lines which have not been excluded from ST's obligation to unbundle. This shows that "*access deficit*" can be compensated through the wholesale price for ULL. In accordance with ST's internal presentation, ST was considering "*upselling*" its "*Doma Mini*" customers to "*Doma Standard*", meaning that those customers were to be offered, as from the 1st of December 2007, "*Doma Standard*" for the price of "*Doma Mini*", in order for ST "[commercial consideration]". Therefore, ST was not concerned about a potential increase of the "*access deficit*" or its inability to compensate the "*access deficit*" when upselling "*Doma Mini*" customers to "*Doma Standard*"⁹⁸⁵. This shows that even internally, ST did not see the "*access deficit*" as an obstacle to providing broadband services to "*Doma Mini*" customers. Nevertheless, ST considered that as an issue preventing it from providing access to those lines to AOs. In those circumstances, ST's justification of the ban of shared access for the lines providing these calling plans based on the alleged "*access deficit*" incurred cannot be sustained. Against that background it is clear that any potential "*access deficit*" ST was suffering from providing "*ST Mini*" was meant to be compensated by the wholesale price of ULL, so that there was no cost-based need whatsoever to exclude those lines and the affected customers from ST's unbundling obligation.
- (591) Moreover, even supposing that such an "*access deficit*" existed, while all the other restrictions enumerated by ST under the heading "*conflicting services*" are allegedly based on technical reasons, such as the existence of technical obstacles on the lines or the fact that the lines in question were not used to serve end-customers, ST's removal of the lines over which it provides "*ST Mini*" and other "*Social Calling Plans*" from its unbundling obligation is purely based on commercial considerations and left to ST's unilateral appreciation, which cannot be accepted. In fact there is no technical restraint whatsoever that would prevent ST from providing shared access to those lines. For instance, according to ST's presentation "*Local loop Unbundling -*

⁹⁸¹ ST's internal presentation [...], DocID0119, slide 10 p. 43. Argumentation of ST against regulation of ratio between shared access/ full access price: '*There is lower penetration and ARPU in SR than in EU => ST has higher access deficit => cost are not covered by retail rental => cost will be included in shared ULL price*'. Also, ST's internal document "*Reasoning concerning the share increase of shared access in full access (ULL)*" dated 10 August 2004, in English, Doc ID0187, p. 9-11: "[...]"

⁹⁸² ST's reply to the LoF, paragraph 496 and 497.

⁹⁸³ E-mail from the Austrian Telecoms Regulator of 3 October 2013 – Doc ID 4065.

⁹⁸⁴ Also the access fees applied to other calling programmes of ST were, according to ST's internal documents below cost because ST did not sufficiently rebalance the tariffs (the 'access deficit'). See for instance ST's document [...], Doc ID0142, p. 5-8 in Slovak, [...], in English, Doc ID0187, p. 9-11.

⁹⁸⁵ ST's internal document '[...]- Doc ID1296, p.14.

pricing and costing principles", dated 23 March 2003, slide 18, [...] ⁹⁸⁶. As also explained by the Austrian Telecoms Regulator, the use of a social calling scheme is an economic argument and not a technical obstacle for granting shared access to a copper line ⁹⁸⁷. VUS has the same opinion: *"the RUO does not explain why ST Mini is a conflicting service. In this case, no technical limitations exist that would prevent ST from providing this service [ST Mini] within the framework of the shared access, so as defined by the ZoEK [the Communications Act] and by the Regulation"* ⁹⁸⁸.

(592) Although TUSR excluded "ST Mini" and other selective calling programmes from the obligation of Carrier Selection and Pre-selection ⁹⁸⁹, TUSR considers that this is not an argument in favour of ST's exclusion of those services from its local loop unbundling obligation, as there are no connections between *"these two independent markets"*. TUSR *"definitely denies any considerations not to include local loop into the scope of the access obligation on Market 4 (ULL) in case where the voice services were provided by ST on the local loop. There is no such limitation in the wording of the access obligation"* ⁹⁹⁰.

(593) In its reply to the LoF, ST *"questions the accuracy"* of TUSR's statement and argues ⁹⁹¹ that ST's obligation of non-discrimination applied not only to comparable conditions to other undertakings, but also to comparable conditions between ST's own retail services and the conditions of its wholesale offers, which results in *"a clear connection"* between limitations on retail market 1 ⁹⁹² and other wholesale markets 4 ⁹⁹³ and 5 ⁹⁹⁴. ST implies therefore, that if it decides not to offer DSL on certain lines for commercial reasons, the lines in question should be outside its ULL wholesale offer, in accordance with the non-discrimination principle. However, the non-discrimination principle enshrined in Article 10 of Directive 2002/19/EC and Article 3(2) of Regulation (EC) No 2887/2000 requests the incumbent to apply *"equivalent conditions under equivalent circumstances"* to other undertakings only as regards ST's wholesale offers and not in connection with ST's retail offers. Otherwise, ST would have to align its retail offers to its wholesale offers, which is not required by regulation. Indeed, Regulation (EC) No 2887/2000 and Directive 2002/19/EC regulate the wholesale broadband market and not the retail market; there is no retail broadband regulation in place either at Union level or in Slovakia. In addition, in accordance with the Commission Recommendation of

⁹⁸⁶ [...], Doc ID0142, p. 10.

⁹⁸⁷ E-mail from the Austrian Telecoms Regulator of 3 October 2013 – Doc ID 4065.

⁹⁸⁸ [...], Doc ID 0136, p. 45-46.

⁹⁸⁹ Decision of TUSR of 13 July 2005, 529/14/2005, p. 14.

⁹⁹⁰ E-mail from TUSR of 8 October 2013 – Doc ID 4078.

⁹⁹¹ ST's reply to the LoF, paragraph 495.

⁹⁹² Market 1 is in accordance with the Commission Recommendation of 17 December 2007 defined as follows: *"Access to the public telephone network at a fixed location for residential and non-residential customers"*.

⁹⁹³ Market 4 is in accordance with the Commission Recommendation of 17 December 2007 defined as follows: *"Wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location"*.

⁹⁹⁴ Market 5 is in accordance with the Commission Recommendation of 17 December 2007 defined as follows: *"Wholesale broadband access. This market comprises non-physical or virtual network access including "bit-stream" access at a fixed location. This market is situated downstream from the physical access covered by market 4 listed above, in that wholesale broadband access can be constructed using this input combined with other elements"*.

17 December 2007⁹⁹⁵, market 1 concerning retail voice services is distinct from markets 4 concerning physical wholesale network infrastructure and market 5 concerning wholesale broadband access. Therefore, any obligations imposed by TUSR regarding a given market cannot be applied, by analogy, to another market.

7.6.3.2.2.2 *ST reserved for itself a large number of customers*

- (594) Due to ST's limitation regarding "*conflicting services*", AOs could not access a large number of potential customers, which were reserved for ST and hence withdrawn from the retail market. The restrictive effect of ST's limitation of its unbundling obligation is considerable. According to ST's internal document "*New Approach to DSL*" of 23 April 2007⁹⁹⁶, prepared to explore the possibilities to sell further DSL lines, in 2007 "*Doma Mini*" was activated on some [Number in the order of several hundred thousand, hereafter "Y"] lines and SCP on some [Number less than one third of Y] lines. "*Doma Mini*" together with SCP thus accounted for some [Number = sum of the two previous numbers] lines, which is [15-30%] of the total number of lines [Number = less than Y multiplied by 5] that, in ST's opinion, can actually be used to provide broadband services to end-users⁹⁹⁷. It follows that ST reserved almost [15-30]% of the lines for itself, preventing any form of competition from taking place.
- (595) ST argues that it would not be "*economically rational*" for an AO to unbundle lines serving those customers, which sought the lowest value services available⁹⁹⁸, implying therefore that AOs would not be interested in acquiring these customers.
- (596) The Commission considers that it is not for ST to decide what potential customers an AO would or would not be interested in ULL and considerably limit on that basis the scope of its unbundling obligation. The AOs themselves are the best placed to take that type of business decisions. Moreover, those potential clients cannot always be labelled as seeking the lowest value services available. The fact that "*ST Mini*" was structured as a program with low access fee and high calling charges is not indicative of the potential for broadband of its subscribers. Indeed, their needs might evolve towards broadband services that AOs as well as ST would seek to provide. That potential was recognised by ST itself. Although ST did not provide DSL to those customers⁹⁹⁹, ST explained in its internal presentation "[...]" that "[...]" and one of its "*proposed portfolio changes*" was the "[...]"¹⁰⁰⁰. Also, ST mentioned that there would be "*Doma Mini and Social Calling Plan customers willing to have DSL connection*" in its internal presentation for EMB "[...]", dated 1 December 2008,

⁹⁹⁵ Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 344, 28.12.2007, p. 65.

⁹⁹⁶ ST's internal document "*New approach to DSL*", EMB decision paper, dated 23 April 2007, Doc ID1296, p. 5.

⁹⁹⁷ Table 1 "*Estimation of Slovak Telekom's copper based access network technical coverage based on number of lines (copper pairs) deployed at MDFs with DSLAMs and/or MSANs*" of ST's submission "*Additional information regarding technical limitations on Slovak Telekom's copper based access network following the Commission's request at the meeting of 2 October 2009*" – Doc ID 1637.

⁹⁹⁸ ST's reply to the SO, paragraph 797.

⁹⁹⁹ E.g. ST's internal document [...] Doc ID1296, [...] Doc ID0194, p. 9. In accordance with this presentation, [...]. In addition, there would have been a [...].

¹⁰⁰⁰ [...] Doc ID1296, p. 5 and 6.

where ST also concluded that "[...]"¹⁰⁰¹. Therefore, the customers of those calling programmes are also potential customers for DSL and there is no reason why they should be reserved to ST. By excluding its "*ST Mini*" customers, ST ruled out not only actual competition but also potential competition, artificially fixing its market share.

7.6.3.2.2.3 *Exclusion of the lines over which social calling programmes like "ST Mini" are provided is not a common industry standard*

- (597) Contrary to ST's statement, the exclusion of lines over which social calling programmes are provided is not common industry practice. Out of all the examples that ST brought in its reply to the SO to show that the conflicting services provisions in the RUOs of other incumbents are "*either identical or very similar to those contained in ST's RUO*"¹⁰⁰², none excludes from the scope of the unbundling obligation the lines over which social calling programmes are provided.
- (598) ST claims that TO2's 2006 RUO in the Czech Republic "*includes an identical limitation of ULL shared access in relation to lines used for special calling plans, such as Telefon Mini (i.e. analogous to ST Mini)*". In addition, ST argues that this particular limitation of ULL shared access was the result of significant "*access deficit*" with respect to social calling plans, such as "*Telefon Mini*". Finally, ST claims that the current version of TO2's 2012 RUO still maintains this particular limitation of ULL shared access¹⁰⁰³. In support of the last contention, ST specifies in its reply to the LoF that unbundling of lines over which TO2 provides "*Telefon Mini*" is subject to the condition that the access seeker obtains the consent of the subscriber to migrate from "*Telefon Mini*" to another calling plan. Allegedly, that condition makes it in practice impossible to unbundle lines over which TO2 provides "*Telefon Mini*"¹⁰⁰⁴.
- (599) The Commission notes that first, TO2's 2006 RUO did not include an "*identical limitation*" of ULL shared access in relation to lines used for social calling plans, such as "*Telefon Mini*". While ST's 2005 RUO plainly and without any explanation excludes shared access to lines over which ST provides "*ST Mini*"¹⁰⁰⁵, TO2's 2006 RUO provides shared access to such lines in case the AO presents the written consent of the respective subscriber to migrate to another retail tariff¹⁰⁰⁶. Contrary to ST's opinion that TO2 continues to restrict shared ULL access over lines where a specific retail tariff (that is to say "*Telefon Mini*") is applied, the Czech Telecoms Regulator explained in an e-mail of 16 October 2013 that it is possible to

¹⁰⁰¹ [...] Doc ID0194, p.3, 4 and "Executive summary".

¹⁰⁰² ST's reply to the SO, p.800.

¹⁰⁰³ ST's Reply to the SO, p. 333.

¹⁰⁰⁴ ST's Reply to the LoF, p. 143-146.

¹⁰⁰⁵ Point 1.13 of Annex 3 of ST's 2005 RUO states that ST "*will not provide shared access to the lines with advantaged selected calling program and selective program ST Mini (conflicting service)*" - Doc ID 453, p. 4.

¹⁰⁰⁶ Point 1.1.9. of Annex 2 of TO2's 2006 RUO - Doc ID 4578, p. 4, states that the "[p]rovider acknowledges, that Telefónica O2, in accordance with defined operational and pricing conditions, is not entitled to provide shared access to metallic local loops, over which Telefónica O2 is providing the retail tariff Telefon Mini. [...]. In case the provider requests the access to metallic local loops, over which Telefónica O2 is providing the retail tariff Telefon Mini, the provider is responsible to obtain a written consent of the respective subscriber to migrate to another retail tariff, which covers the costs for using also the non-voice band of the frequency spectrum, before submitting this request".

implement shared LLU when *"Telefon Mini"* is applied. Although in an e-mail of 14 January 2014, the Czech Telecoms Regulator mistakenly stated the contrary, that it is *"still impossible to implement shared LLU when Mini was applied"*¹⁰⁰⁷, it corrected its error in an e-mail of 30 January 2014, where it explained to the Commission *"the conditions of providing shared access with the price plan 'Mini'"*¹⁰⁰⁸. The Czech Telecoms Regulator would not have explained any of those conditions if it considered that shared LLU was excluded on lines providing *"Telefon Mini"*.

- (600) Therefore, TO2's 2006 RUO enabled AOs to gain shared access to those lines and approach customers with *"Telefon Mini"* and convince them to migrate, while ST's 2005 RUO deliberately excluded AOs from the unbundling obligation, making it impossible for AOs to access those lines and hence preventing them from competing for those end-customers. Contrary to ST's assumption, the presentation of the written consent is not a condition that would make it impossible for AOs to obtain shared access on those lines.
- (601) Secondly, the fact that TO2's 2006 RUO is allowing shared access to lines over which TO2 provides *"Telefon Mini"* (subject to the presentation of subscriber's consent to migrate to another tariff covering the costs for using also the non-voice band of the frequency spectrum) shows that TO2 was able to compensate its *"access deficit"* without excluding those lines from shared access. As also shown in recital (590), ST's alleged *"access deficit"* could also have been compensated, still ST chose not to provide AOs with access to those lines.
- (602) Thirdly, as can be seen from all versions of TO2's RUO, the possibility of gaining shared access to lines over which TO2 provided *"Telefon Mini"* subject to the presentation of subscriber's written consent has been much the same since the very first version of TO2's RUO (2006) till the current version, TO2's 2012 RUO, contrary to what ST claims¹⁰⁰⁹. That provision was namely amended only by TO2's 2007 RUO¹⁰¹⁰ of 10 March 2007, which merely clarified the wording of the provision. That provision has not been changed ever since¹⁰¹¹.
- (603) In Austria, the Telecoms Regulator specified that *"there is no exclusion of lines with social calling schemes provided to AITA's rental subscribers from the obligation to grant shared access"*¹⁰¹². Also, the Irish Telecoms Regulator mentioned that *"full loop unbundling and shared loop unbundling is available from all Eircom access lines (subject to pair gain issues, etc.), regardless of any social calling programs at the retail level"*¹⁰¹³. In Luxembourg, there are no similar limitations either - the Telecoms Regulator explained that *"in Luxembourg there is no "social offer" for pstn/isdn lines in the market"*¹⁰¹⁴.

¹⁰⁰⁷ E-mail from the Czech Telecoms Regulator of 14 January 2014 – Doc ID 4540.

¹⁰⁰⁸ E-mail from the Czech Telecoms Regulator of 30 January 2014 – Doc ID 4571.

¹⁰⁰⁹ ST's reply to the SO, paragraph 803.

¹⁰¹⁰ TO2's RUO of 10/03/2007, Annex 2 – Doc ID 4576, p. 4.

¹⁰¹¹ TO2's RUO of 21/09/2007, Annex 2 – Doc ID 4577, p. 4; Update of RUO regarding the conditions for LLU with "Mini", Annex 2 – Doc ID 4575, p. 3-4; TO2's RUO 2012 as amended on 1 June 2012 http://www.o2.cz/public_part/3f/a6/230437_363259_RUO_6_Priloha_02_SPV_03_2009.pdf (18/03/2014), p. 3-4.

¹⁰¹² E-mail from the Austrian Telecoms Regulator of 7 October 2013 – Doc ID 4065.

¹⁰¹³ E-mail from the Irish Telecoms Regulator of 24 October 2013, at 15:57 – Doc ID 4197.

¹⁰¹⁴ E-mail from POST Luxembourg of 8 November 2013 - Doc ID 4232.

(604) In conclusion, ST's conduct regarding "*conflicting services*" had a two-stage deteriorating effect. As a first step, contrary to its regulatory obligations ST excluded lines over which it provided "*ST Mini*" and other "*Social Calling Programs*" and thus reserved [15-30]% of the lines to itself. The customers served by those lines could not be reached by AOs. As a second step, ST entitled itself to unilaterally, arbitrarily and without any objective justification include additional products as "*conflicting services*" as an option to reserve even more customers for itself in the future. The Commission therefore considers that this limitation brought considerable uncertainty as to whether certain lines were subject to unbundling or otherwise. The Commission considers that those limitations further contributed to making access to ST's local loops commercially unattractive.

7.6.3.3. ST's spectrum management rules arbitrarily reduced the scope of its ULL obligation

(605) Telecoms operators usually put in place spectrum management rules in order to deal with spectral interferences due to the utilisation of several services over a line. The European Telecommunications Standard Institute (ETSI) considers that "*The objective for spectral management is to control the maximum spectral pollution, thus enabling an efficient use of the access network for all connected systems*"¹⁰¹⁵.

(606) ST's spectrum management plan is based on a "*safe harbour*" 25% cable fill-in limitation rule, set in Annex 8 to the RUO, which stipulates that in multi-pair access cables only one pair can be used and that only 25% per pair cable section can be used for DSL deployment. In accordance with that 25% rule, only 25% of the lines could be used for DSL deployment for AOs, which means that local loop unbundling is not made available by ST for 75% of the lines which are part of ST's obligation to unbundle.

7.6.3.3.1 ST's 25% rule is a general limitation which is not justified by the concrete situation of ST's access network

7.6.3.3.1.1 *ST's 25% rule is not technically justified*

(607) Putting in place cable fill-in limitations may be, indeed, an option for operators, aimed at controlling interferences, as also recognized by the ETP 2001 Recommendation on Local Loop Unbundling: "*It may be necessary to limit the allowed number of xDSL systems per cable or per cable bundle in order to achieve reasonable performance*"¹⁰¹⁶. Also, ETSI provides that in order to control spectral pollution, putting limits on signals (levels, spectra), on technological diversity and on cable fill, is possible¹⁰¹⁷.

(608) However, such cable fill-in limitations cannot be decided *in abstracto*, as a general "safe harbour" restriction, applicable to all lines alike, irrespective of their characteristics and of the technology mixture that they involve. For instance, the "cable fill" represents for ETSI "*the number and mixture of transmission techniques connected to the ports of a binder or cable bundle that are injecting signals into the*

¹⁰¹⁵ Doc ID 4219 - Standard TR 101 830-1 "*Transmission and Multiplexing; Access networks; Spectral management on metallic access networks; Part1: Definitions and signal library*" of May 2009, p.15.

¹⁰¹⁶ Annex XI.6 to ST's reply to the SO, p.31.

¹⁰¹⁷ Doc ID 4219 - Standard TR 101 830-1 "*Transmission and Multiplexing; Access networks; Spectral management on metallic access networks; Part1: Definitions and signal library*" of May 2009, p.15.

access ports"¹⁰¹⁸. That means that any cable fill-in limitations depend on the specific transmission techniques connected at the cables in question.

- (609) TUSR also considers in its analysis of Wholesale Market No 4 of August 2011 that any cable fill-in limitations must be based on the concrete conditions of the network: "*Optimising must be based on the investigation of the actual conditions in cables and therefore must be implemented at regional as well as local level*"¹⁰¹⁹. In addition, TUSR recalled that "*a 50% use factor was stated during which the optimal balance between the use and the risk of high loss of the cable quality is achieved*". A 50% limitation means that 50% of the lines could not be used for the supply of broadband services by ST or AO's after the unbundling, which is less restrictive than the 75% limitation put in place by ST.
- (610) Moreover, the "*High Capacity DSL Systems*" Report of March 2006 of the European Conference of Postal and Telecommunications Administrations (CEPT ECC) also emphasises that cable limitations are put in place after taking into account the concrete situation in a cable: "*The characteristics of the cables used in the access network are also a key factor in the deployment of DSL systems (...). In order to have sufficient margin against crosstalk and interference, network operators usually apply a set of planning rules for how many copper pairs within a certain cable that can be allocated to DSL systems*"¹⁰²⁰.
- (611) ST explains in its reply to the SO that its 25% rule is technically necessary in order to prevent interferences and cross-talk problems which are likely to appear when several services are used in the same cable¹⁰²¹. However, the Commission believes that ST has not given any technical justification for access restriction and therefore relies on general statements which show that the 25% rule was put in place *in abstracto*, as a general safe harbour: "*ST's network was of a very poor quality, which explains the necessity of a 25% limitation*"¹⁰²².
- (612) Contrary to ST's opinion, which considers that ST's spectrum management terms "*cannot be viewed as being abusive because they were simply meant as a safe-harbour*"¹⁰²³, the Commission considers that ST's 25% rule is a general cable fill-in limitation of the number of systems present in a cable section, which does not take into account the cables' characteristics and the concrete mix of transmission techniques. The Commission considers that precisely because it is a restrictive "*safe-harbour*", decided *ex-ante* and *in abstracto* and bearing no link with the real characteristics of ST's access network, ST's 25% rule is an additional limitation of broadband deployment for the AOs.
- (613) ST argues that the 25% rule "*was never applied as a restriction on ULL access*"¹⁰²⁴ as ST could not apply the 25% rule as it was not able to check the compliance of this rule in the course of the ULL provisioning process due to insufficient internal

¹⁰¹⁸ *Ibidem*, p.11.

¹⁰¹⁹ Doc ID 4498.

¹⁰²⁰ Document mentioned at footnote 669 of ST's reply to the SO – document available at <http://www.erodocdb.dk/docs/doc98/official/pdf/eccrep079.pdf>, p.10.

¹⁰²¹ ST's reply to the SO, paragraph 929.

¹⁰²² Paragraph 939 of ST's reply to the SO.

¹⁰²³ ST's reply to the LoF, paragraph 521.

¹⁰²⁴ Paragraph 950 of ST's reply to the SO.

records¹⁰²⁵ and no procedure was established to check compliance with that rule¹⁰²⁶. As a result, "*ST never rejected a single ULL provision order or qualification request on the basis of this rule*"¹⁰²⁷.

- (614) However, the reason why ST never rejected qualification requests on the basis of that rule is that a solution was found during negotiations with GTS Slovakia, which is the only AO which unbundled local loops in Slovakia.
- (615) Several AOs complained against ST's 25% rule on DSL deployment. GTS Slovakia questioned the need for this restriction during its negotiations with ST. It argued that this rule grossly simplifies the issue of technical limitation of DSL deployment and that such a limitation may not be needed for each cable bundle because it may not reflect the situation in each cable bundle¹⁰²⁸. That observation was reinforced by GTS's remark of 21 October 2013, summarising its practical experience with ST's 25% rule: "*there are cables in which share of DSL services exceeds 25%, yet they work normally. It is more a question of individual conditions in particular cable, so the rule is not necessarily needed*"¹⁰²⁹. In GTS's opinion, ST's 25% restriction appears more as a "*rule of thumb*"¹⁰³⁰, than as a rule based on ST's testing and other studies.
- (616) Also, Orange considered that limitation to be unjustified because, if applied, it would allow Orange to offer broadband services to only 25% of customers on the given section¹⁰³¹. Slovanet also questioned the need for that rule in the negotiations with ST¹⁰³². The VUS in its 2005 Assessment Report remarked that the RUO does not provide adequate explanations on the application of the 25% rule.¹⁰³³
- (617) Moreover, ST's argument that it never applied in practice the 25% rule only shows that ST put in place an artificial rule, which was not technically necessary, at least not in all cases, but which had a deterring effect with regard to AOs. Indeed, it is not clear on what basis ST set the 25% limitation if ST had no knowledge of its own network resources and was not able to check compliance with that rule in practice.
- (618) ST argues that before introducing this "*safe harbour*", ST "*analysed the technical capabilities of its copper access network by laboratory testing.*"¹⁰³⁴.
- (619) However, the Commission considers that ST has not put forward any study concluding that a 75% access limitation was indeed needed throughout the whole ST's access network and for all technologies alike. The "*pre-qualification studies*" that ST considers that would confirm its approach are focused only on the implementation of one single technology: [...], whereas ST acknowledges the fact

¹⁰²⁵ Paragraph 945 of ST's reply to the SO.

¹⁰²⁶ Paragraph 948 of ST's reply to the SO.

¹⁰²⁷ Paragraph 950 of ST's reply to the SO.

¹⁰²⁸ Minutes from the meeting between GTS Slovakia and ST, dated 13 December 2007, Doc ID2267, p. 4, point 14.

¹⁰²⁹ Doc ID 4105.

¹⁰³⁰ E-mail from GTS to the Commission of 21 October 2013 – Doc ID 4105.

¹⁰³¹ Orange's submission to TUSR dated 20 October 2005, p. 9, Doc ID0297, p. 7.

¹⁰³² Slovanet's list of point for negotiation with ST over the RUO, attached to an email dated 11 May 2006, Doc ID0191, p. 34-38.

¹⁰³³ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID0136, p. 56.

¹⁰³⁴ ST's reply to the SO, paragraph 931.

that the concrete limit on DSL deployment varies, amongst other factors, with the technologies deployed over such network (for example ADSL, ADSL 2+, ShDSL). Moreover, these pre-qualification studies only concern very small parts of ST's network (for instance, for the study "*Cable access network prequalification study – Bratislava (phase 1)*", only [...] lines were tested and for the study "*Cable access network prequalification study 2006-2009*" (phase 2), only approximately [...] lines were tested out of [Number in the order of several hundred thousand] xDSL lines that ST had in use in 2010¹⁰³⁵. That would only represent 1.26% and, respectively, 3.77% of ST's lines in use in 2010, which the Commission considers non-representative.

- (620) Moreover, testing selected parts of ST's network has very limited use as regards other parts of ST's network where different technologies coexist or where the network topology is different. As ST itself points out in its reply to the SO¹⁰³⁶, it is difficult to determine the exact impact of the interferences, as "*the interactions between different technologies depend on the specific features of the access network*"¹⁰³⁷. The interactions also depend on the technology choice of the AOs wishing to unbundle. That means that putting in place a 25% safe harbour rule, applying to all cables alike, independent of the specific variables features of ST's access network and also independent of the AOs' envisaged technologies, is an abusive broadband deployment limitation.

7.6.3.3.1.2 Cable-fill limitations in other Member States are based on the technical characteristics of the access network in that Member State

- (621) ST also explains that its 25% limitation "*relied on external studies, which revealed that optimal coverage of all broadband services (...) was dependent upon the coverage not exceeding 25% of the capacity of the copper wires*"¹⁰³⁸. As to the external studies ST mentions, that is to say the Norwegian studies¹⁰³⁹ and the University of Zagreb study¹⁰⁴⁰, the Commission considers that they can only draw relevant conclusions for the particular network access of those countries. Their findings cannot be applied, *mutatis mutandis* to Slovakia and therefore are not relevant to ST's access network. Indeed, they are based on the specific mixture of technologies and topologies of those networks¹⁰⁴¹.

¹⁰³⁵ See Table 7.

¹⁰³⁶ ST's reply to the SO, paragraphs 929 and 930.

¹⁰³⁷ These specific features of the access network refer to "*its topology, quality of the cables used (copper, aluminium, diameters), average lengths of the cables from the MDF, the technical profile of the high frequency based service and the corresponding provided bandwidth, the technologies deployed over such network (ADSL, ADSL 2+, ShDSL), etc.*" – ST's reply to the SO, paragraphs 929 and 930.

¹⁰³⁸ ST's reply to the SO, paragraph 931.

¹⁰³⁹ SINTEF Report "Plan for the use of frequencies in the Norwegian access network – a proposal" of 2002, provided in Annex XI.21 of ST's reply to the SO and "Simulation of DSL systems", 2007, provided in Annex XI.23 of ST's reply to the SO.

¹⁰⁴⁰ University of Zagreb, "Static Plan for Frequency Spectrum Management", 2007, provided in Annex XI.22 of the ST's Reply to the SO.

¹⁰⁴¹ As ST itself remarks in paragraphs 939 and 940 of its reply to the SO, "*the concrete limit on DSL deployment cannot be determined in the abstract and may differ from one country to the other*".

- (622) The Dutch study ST refers to in its reply to the LoF¹⁰⁴² provides that the preferred spectral management approach is country specific and that this is caused by "*significant technical differences between European access networks*", which differ in many aspects, including: "*the deployed mixture of legacy systems, the installed cable types, number of wire-pairs per cable, the distinction between multiple binder groups per cable and/or concentric layered cables, the average length of these cables, etc.*"¹⁰⁴³.
- (623) Also, the University of Zagreb study emphasises the importance of concrete measurements applicable to a given network: "*models presented in the study differ more or less from theoretical models, because they were created on the basis of measurements performed on the cable infrastructure in production, and therefore they reflect the real situation in the network*"¹⁰⁴⁴. It refers to concrete elements of the access network, specific to Croatia, such as the line length and the level of penetration of particular DSL technologies on the most common type of cable deployed in HT's access network. The study concludes that a penetration between 40% and 50% in a common basic cable group is a realistic expectation, for a transmission range of 1350 meters on cables of type TH-59 and to a transmission range of 1150 meters on cables of type TK-00, respectively¹⁰⁴⁵. However, the study also concludes that on shorter subscriber lines of 750 meters or less, penetration can be even 100% at 6Mbit/s downstream¹⁰⁴⁶, meaning that in some cases no limitation is necessary. In comparison, ST's limitation is much more restrictive and general, referring to a 75% limitation, for all the lines.
- (624) As to the Norwegian study entitled "*Plan for the use of frequencies in the Norwegian access network – a proposal*", the study does not recommend a 75% limitation, but only recommends "*frequency planning*" in the pair cables of the access network, "*as a trade-off between the fundamental physical limitations and compatibility between existing and future planned transmission systems*"¹⁰⁴⁷. The other Norwegian study mentioned by ST, "*Simulation of DSL systems*", does not conclude either on the necessity of a limitation rule, as suggested by ST, but only concludes that "*downstream ADSL and ADSL2+ is compatible with both SHDSL and HDSL systems. The degradation in bitrate of downstream ADSL due to these systems is moderate, less than 13% compared to a cable containing only ADSL systems*"¹⁰⁴⁸. Therefore, the 13% quoted by ST is not a cable fill-in limitation, but a comparison of the degradation involved by different technologies.
- (625) ST alleges that "*at the time ST published its first RUO (i.e. in August 2005), spectrum management rules in the RUO were fully justified*". However, ST could not have relied on those studies to put in place its 25% rule as: (i) none of them recommends a

¹⁰⁴² Spectral Management approach in the Netherlands, ETSI STC TM6 meeting, 16-20 February 2004 TD26, available at http://www.joepeesoft.com/Public/DSL_Corner/Docs_ETSI_TM6/041t26.pdf and mentioned at paragraph 530 of ST's reply to the LoF.

¹⁰⁴³ *Ibidem*, p.1.

¹⁰⁴⁴ Annex XI.22 of ST's reply to the SO, p.101.

¹⁰⁴⁵ University of Zagreb, "*Static Plan for Frequency Spectrum Management*", 2007, provided in Annex XI.22 of the ST's Reply to the SO, p.102.

¹⁰⁴⁶ *Ibidem*, p 102.

¹⁰⁴⁷ SINTEF Report "*Plan for the use of frequencies in the Norwegian access network – a proposal*" of 2002, provided in Annex XI.21 of the ST's Reply to the SO, p.46.

¹⁰⁴⁸ "*Simulation of DSL systems*", 2007, provided in Annex XI.23 of ST's reply to the SO, p.1.

75% general limitation, (ii) their results are only applicable to the network which has been analysed and cannot be transposed to ST's network and (iii) the Norwegian study entitled "*Simulation of DSL systems*" dates from 2007, the same as the University of Zagreb one, "*Static Plan for Frequency Spectrum Management*", which means that they could not have served ST as a reference for its 25% rule in 2005.

- (626) ST gives the examples of a few European operators that conducted technical studies, the result of which supported the necessity for them to introduce restrictions on the deployment of broadband over ULL. Those examples prompt ST to conclude that "*the 25% rule followed international standards*"¹⁰⁴⁹.
- (627) However, when other incumbents in the Union put in place such cable fill-in limitations, they did it on the basis of specific measurements and studies and the number of systems allowed depended in each case on the technology mix in the cables in question, contrary to ST's "*safe harbour*" 25% rule. ST itself agrees in its reply to the LoF that "*the concrete limit on DSL deployment varies from one country to another as it depends on the specific features of the access network*"¹⁰⁵⁰. Therefore, based on these examples, it cannot be concluded that "*the 25% rule followed international standards*".
- (628) For instance, HT did not put in place a general limitation in Croatia, as ST did, but applied different cable fill-in limitations, depending on both the different services which AOs may wish to provide to their customers, as well as the number and average lengths of copper pairs in a particular cable (short distance, medium distance and long distance). The respective cable fill-in limitations are very different, depending on the combination of those parameters¹⁰⁵¹.
- (629) ST also submits the example of Telefonica in Spain, which allegedly introduced similar limitations on the ULL use. However, those limitations are not put in place as general restrictions, but depend on the concrete situation of the Spanish access network and take into account both the type of service that the AO intends to provide to its retail customer and the existing usage of the cable¹⁰⁵². For instance, for certain technology combinations, certain limitations appear to be needed: "*The SDL technology used in combination with UBC shall have a default penetration rate of 16/25*". However, for other technology mixes, there is no need for any deployment limitation: "*The ADSL technology combined with POTS and UBC shall have a default penetration rate of 25/25*"¹⁰⁵³.

¹⁰⁴⁹ ST's reply to the SO, section 7.2 "*The 25% rule followed international standards*", p. 379.

¹⁰⁵⁰ ST's reply to the LoF, paragraph 512.

¹⁰⁵¹ ST's reply to the SO, paragraph 942 and Table 38 "*Restrictions on usage of copper lines applied by Hrvatske telekomunikacije*". For instance, when it comes to ADSL/ADS/2/ADS/ 2+ (B,M,J) P2 technology, the maximum allowable number of pairs occupied by broadband transmission systems is 5 out of 10 for Short distance cables, 3 out of 7 for Medium distance and 1 out of 5 for Long distance. However, for certain technologies, no cable fill-in limitations are needed: for instance, for ADSL/ADS/2/ADS/ 2+ (B,M,J) P1, the maximum allowable number of pairs occupied by broadband transmission systems is 10 out of 10 for Short distance cables, 7 out of 7 for Medium distance and 5 out of 5 for Long distance.

¹⁰⁵² Paragraph 943 and table 39 "*Restrictions on usage of copper lines applied by Telefonica*", p.162 of ST's reply to the SO.

¹⁰⁵³ Table 39 "*Restrictions on usage of copper lines applied by Telefonica*", p.162 of ST's reply to the SO.

- (630) ST refers to the Table entitled "*Utilisation rates in Telefonica's RUO*" in its reply to the LoF¹⁰⁵⁴, in order to conclude that "*the limits applied by Telefonica in Spain are even stricter than those applied by ST in Slovakia*"¹⁰⁵⁵. In order to illustrate its conclusion, it gives the example of the applicable limit of 16% (that is to say 4/25) for ADSL over ISDN or ADSL2+ (Annex B, Annex J, Annex M). However, the Commission believes that those results originate from real studies and testing of Telefonica's network, contrary to ST's 25% rule which was decided *in abstracto*. In addition, these limitations are not stricter than the ones applied in Slovakia. On the contrary, in several instances, no limitations at all were suggested and 100% cable fill-in could be achieved: for ADSL over POTS, for ADSL2 (Annex A, Annex I), for ADSL 2+ (Annex A, Annex I), in all cases for UBC and UBM¹⁰⁵⁶.
- (631) ST also refers to a document from a 2004 ETSI meeting regarding Spectral Management approach in the Netherlands¹⁰⁵⁷, in order to conclude that the best estimates by Dutch operators at that time resulted in a similar limit (28% broadband cable fill-in on average) as that applied by ST. However, the limitation ST is referring to is based on a concrete study, taking into account both a technology mix and the length of the cables (short, medium and long range). In addition, the prevailing principle was not, as ST suggested, a 28% cable fill in, but a 100% cable fill in, with any restrictions being subject to further studies.
- (632) Another example that ST submits is that of TO2 in the Czech Republic, to show that this incumbent put in place a similar rule to ST, as an ULL order is rejected if the penetration of broadband technologies in any cable within the same part of the cable tree exceeds 40%¹⁰⁵⁸. However, the situation in Slovakia is different from the one in the Czech Republic: ST's rule is more restrictive, as it only allows 25% of the copper pairs to be used for broadband provision, while TO2 in the Czech Republic allows for 40% of the cables to be used. In addition, as explained in ST's reply to the LoF, the cable fill-in limitations put in place by TO2 are based on studies that take into account various types of technologies and various cable lengths of the Czech access network¹⁰⁵⁹. Also, in the Czech Republic an ULL order can be rejected after a case-by-case analysis, and not based on an *ex-ante* "safe harbour" rule, as in ST's case in Slovakia¹⁰⁶⁰.

7.6.3.3.1.3 *Other less restrictive methods of spectrum management could have been implemented*

- (633) Given that cable fill-in limitations represent broadband deployment restrictions for AOs, they are not systematically implemented by other incumbents in the European Union. For instance, the French Telecoms Regulator recommended the principle of 100% cable fill-in in its documents "*Recommandations de l'Autorité de régulation des télécommunications relatives à la définition du Plan de Gestion du Spectre (PGS) pour le deployment de services large bande sur la boucle locale*" of 18 June

¹⁰⁵⁴ Figure 5 – "*Utilisation rates in Telefonica's RUO*", p. 162 of ST's reply to the LoF.

¹⁰⁵⁵ ST's reply to the LoF, paragraph 528.

¹⁰⁵⁶ Figure 5 – "*Utilisation rates in Telefonica's RUO*", p. 162 of ST's reply to the LoF.

¹⁰⁵⁷ ST's reply to the LoF, paragraph 530.

¹⁰⁵⁸ Paragraph 944 of ST's reply to the SO.

¹⁰⁵⁹ ST's reply to the LoF, paragraph 533.

¹⁰⁶⁰ 2006 CT RUO, Annex 14, p.50, section 8.2.2, referred to at paragraph 944 and footnote 682 of ST's reply to the SO.

2001¹⁰⁶¹ and "Synthèse des travaux du groupe de travail "Spécifications techniques" de l'ART sur le dégroupage", of March 2002¹⁰⁶². The French Spectrum Management Plan is based on Power Spectral Density (PSD) principles and not on cable fill-in limitations. For instance, in its document "Recommandations de l'Autorité de régulation des télécommunications relatives à la définition des prestations d'accès à la boucle locale et à sa mise en oeuvre opérationnelle" of 30 October 2000¹⁰⁶³, the French Telecoms Regulator recommends in section 4.3.2 "Service suspension", a case-by-case *a posteriori* resolution of any concrete problems stemming from spectrum interferences¹⁰⁶⁴.

- (634) A similar solution is put in place in the United Kingdom - the document issued by the United Kingdom Telecoms Regulator ("Ofcom"): "*Access to Bandwidth: Proposed Solution for the Access Network Frequency Plan (ANFP) for BT's Metallic Access Network*"¹⁰⁶⁵, refers to Spectrum Management Plans, without any references to cable fill-in limitations such as the ones ST applied. Spectrum Management Plans are based on frequency plans to which all deployed systems need to conform - Power Spectral Density (PSD) principles¹⁰⁶⁶, the same as the French Telecoms Regulator referred to in recital (633).
- (635) Instead of putting in place such a wide restriction on broadband deployment, ST could have set up a case-by-case, *a-posteriori* individual approach at the level of each cable bundle. Any potential access limitations would have therefore stemmed from the particular situation of the network.
- (636) That case-by-case approach has already been implemented in practice with GTS, who declared that: "*In several cases, due to increased deployment of DSL within the particular cable we experience higher levels of distortion/interference; in such cases the problem is usually solved by ST which switches us to another pair with sufficient quality*". Solutions have been found in practice, which explains why, as ST specifies, "*not a single request from GTS has been rejected on ground of application of the 25% rule*"¹⁰⁶⁷.
- (637) Although ST committed vis-à-vis GTS in 2007 to further study the need for the 25% restriction¹⁰⁶⁸, no revision of that rule took place on 9 May 2009 and the restriction has remained in place during the whole investigation period.
- (638) In the VUS's opinion, the 25% rule is only an "*approximate limit*", which is expected to change once the outdated PCM technologies are removed¹⁰⁶⁹. However, the RUO contains no information as regards the rules applicable in the next phases of broadband deployment. Indeed, due account should be taken of the development of

¹⁰⁶¹ Doc ID 4221, p.5.

¹⁰⁶² Doc ID 4217, p.10.

¹⁰⁶³ Doc ID 4220.

¹⁰⁶⁴ Ibidem, p.22.

¹⁰⁶⁵ Doc ID 4305.

¹⁰⁶⁶ Ibidem, p.3.

¹⁰⁶⁷ ST's reply to the SO, paragraph 951.

¹⁰⁶⁸ Minutes of the meeting between GTS Slovakia and St, dated 13 December 2007, Doc ID 2267, p.4, point 14: "(...) *further study is being made to specify these parameters*".

¹⁰⁶⁹ "Regulatory Standpoint to proposal of DSL for Doma Mini and SCP", 19 December 2005, pa. 22, 4th and 5th paragraph, Doc ID0136, p. 56.

new technologies in the future which may reduce interferences and render such rule unnecessary.

- (639) Given that the broadband penetration rate has been growing since 2005 until 2010, reviewing the 25% rule has become increasingly important as well. One of ST's arguments given in its reply to the SO is that "*due to the relatively low broadband penetration at the time of introduction of ULL, the 25% restriction could not have affected the rollout of broadband by alternative providers*". In that sense, ST explained to GTS in 2007 that "*in the initial phase of broadband deployment this rule should not result in the reduction of the number of installed services because the actual broadband deployment accounts for 10-12% of the cables*"¹⁰⁷⁰.
- (640) ST also considers that with increasing broadband usage of copper cables in ST's access network, the 25% rule was needed¹⁰⁷¹. Whereas the percentage of lines within use by ST or AOs was [10-20]% in 2005, it increased gradually to [40-50]% in 2010, in accordance with Table 5 in section "4.6. Network coverage of ST's DSL network which can be used for the provision of retail broadband services after the local loops have been unbundled from ST's network". This means that the 25% rule had an increasing impact, affecting more and more the rollout of broadband by alternative providers over time.
- (641) The increasing restrictive effect of broadband deployment limitations such as ST's 25% rule is also emphasised in the Electronic Communications Committee within the European Conference of Postal and Telecommunications Administrations (CEPT ECC) Report "High Capacity DSL Systems" of March 2006: "*Until now, restrictions in cable utilization have probably not been a major problem in most countries since the overall volume of DSL systems has been relatively low compared to the total number of available copper pairs. However, as the number of DSL systems increases rapidly this situation could change creating "bottlenecks" against further expansion. Regulators therefore need to ensure that dimensioning rules for cable utilization are fair and not discriminating*"¹⁰⁷².
- (642) In its current RUO¹⁰⁷³, ST introduced mutual negotiations as a preferred method of solving non-compliance with spectrum management rules. That appears more as a consecration of the ST's actual practice with GTS. In order to show that ST's 25% rule was necessary during the investigation period, but "is no longer necessary" in the present, ST vaguely refers to "technology developments, practical experience with DSL systems gained over the last 8 years and contemporary technical knowledge"¹⁰⁷⁴. ST has therefore not submitted any evidence showing a concrete change in the technical conditions of the 2005 access network that warranted the 25% rule during the investigation period. In other words, it is not clear what network parameter changed, so that cable fill-in limitations are no longer necessary and "may have become superfluous today"¹⁰⁷⁵. That change only shows that the 25% rule was not needed during the infringement period either.

¹⁰⁷⁰ *Ibidem*.

¹⁰⁷¹ ST's reply to the SO, paragraph 933, Doc ID3630.

¹⁰⁷² Document mentioned at footnote 669 of ST's reply to the SO – document available at <http://www.erodocdb.dk/docs/doc98/official/pdf/eccrep079.pdf>, p.10.

¹⁰⁷³ Doc ID 4318, Doc ID 4319.

¹⁰⁷⁴ ST's reply to the LoF, paragraph 505.

¹⁰⁷⁵ ST's reply to the LoF, paragraph 501.

(643) Such a case-by-case approach would have avoided a general 75% access limitation, put in place *in abstracto*, irrespective of the concrete situation in the cable. The Commission considers that a strict application of such a limitation on broadband deployment, without providing for the possibility for AOs to request the individual verification of the real technical situation of a specific cable bundle is unjustified and unreasonable.

7.6.3.3.2 ST applies a more advantageous rule of spectrum management to itself

(644) ST uses internally various different limitations on DSL deployment when estimating coverage of its DSL network for its own purposes. This results in a disadvantageous rule for AOs, limiting their access to customers.

(645) As mentioned in section "4.6. *Network coverage of ST's DSL network which can be used for the provision of retail broadband services after the local loops have been unbundled from ST's network*", ST's metallic network covers [80-90]% of all households; certain of these lines are unsuited for the transmission of the xDSL signal from a purely technical point of view and therefore only [70-80%] of all households are thus within the "*service coverage*" of ST's network.

(646) Furthermore, from the lines within the "*service coverage*" of ST's network, that is to say from the lines defined as capable for broadband, ST considers that only [60-70]% can actually be used to provide DSL services because of the so called "*cross talk or interference between the transmission systems in the cables*"¹⁰⁷⁶. As a result, ST's local metallic access network, which is capable of carrying a DSL signal, can be used to reach [40-50%] of all Slovak households. Those households are within the "*technical coverage*" of ST's metallic local access network which could be used to supply broadband retail services after their unbundling.

(647) However, the 25% rule was put in place by ST with regard to AOs with the same aim as the [60-70]% rule applicable to its own usage, which is to take account of the fact that the same cable infrastructure may be used to provide several services, which may create interferences and cross talk. In accordance with ST's 25% spectrum management rule, from the lines within the "*service coverage*" of ST's network only 25% can be used for unbundling by AOs, whereas ST can use, for its own purposes, [60-70]% to supply DSL retail services. That means that the total access lines which can be unbundled by AOs are much less numerous than the access lines that ST can use to supply DSL retail services.

(648) ST considers that the application of the 25% rule "*guarantees that a maximum range of customers could benefit from high speed Internet services*"¹⁰⁷⁷. However, that is not accurate: as a result of the 25% rule, only [10-20]% of all Slovak households¹⁰⁷⁸ could be reached by AOs through unbundling, as opposed to [40-50]% of all Slovak households, that ST itself could provide with DSL services. ST has not provided any explanation for such discrepancies.

¹⁰⁷⁶ See for example ST's reply to RFI of 7 June 2013, reply to question 13, p. 16, Doc ID 3804, Paper on additional information regarding technical limitations on Slovak Telekom's copper based access network, p. 16 et seq., ID 1637.

¹⁰⁷⁷ ST's reply to the SO, paragraph 933.

¹⁰⁷⁸ This represents 25% of the [70-80]% households covered by the "*service coverage*" in Table 4.

- (649) Moreover, the VUS in its 2005 *Assessment Report* also emphasises the importance of spectrum management rules in that they "*must apply to all providers using ST's PSTN access network.*"
- (650) Therefore, whereas ST applies the 25% rule vis-à-vis AOs, it applies the more favourable [60-70]% rule to itself. The Commission considers that the 25% rule gives ST advantages, with the aim of artificially limiting the access of AOs to ST's network.
- (651) In conclusion, the Commission considers that ST's 25% rule appreciably limits AOs' ability to deploy broadband services. This rule is an arbitrary "safe harbour", set up *in abstracto* and without any consideration of the characteristics of ST's access network, which deters AOs from accepting the RUO and from unbundling ST's local loops.
- 7.6.4. *ST set unfair terms and conditions in its RUO regarding collocation, qualification, forecasting, repairs, service and maintenance and bank guarantee*
- 7.6.4.1. Unfair collocation terms and conditions
- (652) ST's RUO in its Annex 4 defines collocation as "*the provision of the physical space and the technical equipment necessary for the appropriate placement of the telecommunication equipment of the Authorised Provider with the purpose of provision of services to the end users of the Authorised Provider via access to the local loop.*"¹⁰⁷⁹
- (653) Before 1 November 2010 the RUO foresaw in principle two forms of collocation: physical collocation and distant collocation. According to Annex 4 to the RUO, in the case of physical collocation ST provides a collocation place located in the collocation space exclusively designed for that purpose in the building where ST's main distribution frame is located, with the exception of cases where it is limited for technical capacity, security or other relevant reasons. Physical collocation terms thus foresee a "*collocation space*" which is a designated space in ST's building where individual "*collocation places*" assigned to the different third parties are located.¹⁰⁸⁰ Distant collocation allows the AO to access the local loop *via* the Handover Distribution Frame located in a switch-over box in the collocation place determined by ST in the facility or outside the facility where ST's main distribution frame is located.¹⁰⁸¹
- (654) On 1 November 2010 ST introduced the option that the AO itself may provide the collocation space (self-supplied collocation)¹⁰⁸², in cases where ST does not own the collocation site. The AO may then choose to negotiate with the owner the conditions of access to the site.
- (655) According to section 2.1.1.1 of Annex 5 to the RUO the pre-condition for opening negotiations over collocation is the entry into effect of the Framework Agreement on

¹⁰⁷⁹ Annex 4 to the RUO, point 1.3., Annexes of ST's reply to RFI of 17/04/2009; Q.41_7, Doc ID3203.

¹⁰⁸⁰ Annex 4 to the RUO, points 2.1.1. and 2.1.2., Annexes of ST's reply to RFI of 17/04/2009; Q.41_7, Doc ID3203.

¹⁰⁸¹ Annex 4 to the RUO, points 2.2.1. and 2.2.2., Annexes of ST's reply to RFI of 17/04/2009; Q.41_7, Doc ID3203.

¹⁰⁸² Annex 5 to the RUO as of 1 November 2010 - Attachment Q7_4, PRÍLOHA 5, ST's Reply to the RFI 22/10/2010 Doc ID3240.

access to the local loop and the submission of the bank guarantee as foreseen in Annex 16 to the RUO. In addition the AO should have no debts registered with ST in connection with the local loop provision. The RUO foresees the following steps in the implementation of collocation.

- (a) Preliminary inquiry: it aims to ascertain the possibilities of collocation in a given place, including its form. The step was mandatory in the collocation setting process between 12 August 2005 and 9 May 2009 and was subject to a fee set in Annex 14, point 2.1.1 to the RUO of EUR 457.88 (SKK 13 794) per collocation place.
- (b) Detailed inquiry: it aims to ascertain the possible forms of collocation and to provide details of the proposed collocation solution, within 25 working days (before 9 May 2009 the period was 25 days) from the acceptance of the request. The step was mandatory since 12 August 2005 and subject to a fee set in Annex 14, point 2.1.2 to the RUO of EUR 1 059.48 (SKK 31 918). The AO may also, based on an agreement with ST, submit a request for an additional detailed inquiry where it will specify its new requirements for the collocation place. If the changes required by the AO need more substantial assessment than an administrative assessment ST will charge the AO an additional fee. The RUO does not specify any deadlines for treating such requests.
- (c) Visit to the collocation space: the AO may request a visit to the collocation space once it has received the findings of the preliminary inquiry or the findings of the detailed inquiry. The visit to a collocation space is subject to a fee of EUR 793.67 (SKK 23 910) per collocation space per visit, in accordance with Annex 14, point 2.1.4 to the RUO.
- (d) AO 's comments on the findings of the detailed inquiry: between 12 August 2005 and 9 May 2009 the terms were as follows: the AO had 10 days to submit to ST its comments on the findings. As of 9 May 2009, the AO has 60 days for comments from the delivery of ST's findings. If the AO disagrees with the outcome of the detailed inquiry ST has the obligation to contact it immediately to reach an agreement.
- (e) Proposal of the collocation agreement and its acceptance: once the AO agrees with the results of the detailed inquiry, ST will submit to it a proposal of the collocation agreement. The AO has 60 days from the delivery of the outcome of the detailed inquiry to conclude the collocation agreement, otherwise the reservation of the collocation place expires.
- (f) Implementation of the collocation solution: ST will begin implementing the collocation solution only after all the fees and the costs had been advanced by the AO.

7.6.4.1.1 Unreasonable collocation conditions – ST's strategic approach to collocation

- (656) Collocation is an important pre-condition for the successful implementation of the local loop access and all AOs addressed pointed this out during the Commission investigation in this case¹⁰⁸³. In that context, ST's collocation terms and conditions

¹⁰⁸³ See GTS Slovakia's (GTS Nextra) reply to the request for information of 18 July 2008, non-confidential version, Doc ID0035, p. 22-23.

set in its RUO made collocation unfeasible for AOs. Without the possibility to place its equipment close to incumbent's MDFs the AO cannot unbundle the local loop.

- (657) The Commission notes that ST was from the outset of the telecoms markets liberalisation in Slovakia hostile to provision of collocation to third parties. That is apparent from ST's internal document "*Strategic rule for handling of requests for dark fibre, collocation and facility sharing*" (2002, "Strategic Rule"), which states that it is "*unacceptable for ST to give collocation (placing switch or related facilities of a competitor on ST's premises where ST has switches or related facilities) [...]*"¹⁰⁸⁴.
- (658) ST actively implemented its strategy to avoid providing collocation throughout 2002-2004, by reviewing the existing contracts and terminating those that could be considered unsuitable precedents of commercially provided collocation. For instance, ST's internal document "*Placing of Eurotel data network nodes in ST buildings in Kys. Nové Mesto and Bytča*" (8 July 2003) refers to the 2002 Strategic Rule stating that: "*placement of equipment of other operators in ST technological buildings would be a bad precedence for collocation, and thus for ULL and IC [Interconnection]. [...]* In spite of that there is already some equipment of other operators in ST buildings, especially data network facilities. For the cases where contracts are already signed, [...]"¹⁰⁸⁵ ST's internal document "[...]"¹⁰⁸⁶ contains a similar wording.
- (659) ST argues that its 2002 Strategic Rule does not refer to the term "collocation" under Regulation (EC) No 2887/2000, but to the term "collocation" under Article 11 of Directive 97/33/EC of the European Parliament and of the Council (the "ONP Directive")¹⁰⁸⁷, which is "*entirely different*" from ULL collocation¹⁰⁸⁸. The Commission considers that although the provision of physical collocation is governed by different rules, in accordance with that Regulation and that Directive, the notion of "*collocation*" has the same meaning in both. Also, in ST's internal document "*Placing of Eurotel data network nodes in ST buildings in Kys. Nové Mesto and Bytča*" (8 July 2003), which refers to the 2002 Strategic Rule, ST's Regulatory Affairs Department establishes ST's strategy in order to avoid a "*bad precedence for collocation, and thus for ULL*". That shows that ST's attitude of considering collocation as "*unacceptable*" refers to ULL collocation.
- (660) As will be demonstrated in recitals (661) to (681), in spite of the change of the regulatory framework and therefore of the regulatory obligation to provide collocation, ST retained this strategy for unbundled access to the local loop and set the collocation terms and conditions in the RUO so as to prevent third parties from implementing collocation and consequently from unbundling ST's local loops. In particular: (i) the preliminary inquiry was not objectively necessary, (ii) the form of collocation established by ST could only be reviewed *via* a visit of the collocation space, subject to additional fees (iii) ST was not bound by any deadlines for dealing

¹⁰⁸⁴ [...], Doc ID0144, p. 27.

¹⁰⁸⁵ Regulatory Affairs Department document "*Placing of Eurotel data network nodes in ST buildings in Kys. Nové Mesto and Bytča*", dated 8 July 2003, Doc ID0144, p. 17-19

¹⁰⁸⁶ ST's document [...], dated 4 April 2002, Doc ID0144, p. 23-25.

¹⁰⁸⁷ Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP), OJ L 199, 26.07.1997, p. 32.

¹⁰⁸⁸ ST's reply to the SO, paragraphs 1013 to 1015.

with additional detailed inquiries triggered by negotiations, (iv) the expiry of the reservation period leads to a repetition of the inquiry in question and (v) ST does not commit to any precise timeline for implementing collocation.

7.6.4.1.1.1 *The preliminary inquiry was not objectively necessary*

- (661) In accordance with the RUO, the aim of the preliminary inquiry was to ascertain the possibilities of collocation in a given place, including its form. However, the preliminary inquiry had exactly the same purpose as the detailed inquiry, which, in addition, provided details of the proposed collocation solution, including the prices. That means that it was not necessary for ST to impose a preliminary inquiry, in addition to a detailed inquiry, in particular as both inquiries were subject to fees and therefore made collocation more expensive and delayed the entire process. Orange in its 2005 submission to TUSR found the collocation terms were "*procedurally and time wise demanding (...). The process is divided into several phases (preliminary inquiry, detailed inquiry), whereas the completion of all phases is a precondition for the signature of the collocation agreement*"¹⁰⁸⁹.
- (662) ST argues that without the preliminary inquiry, AOs would not be able to estimate the costs, as well as the lead times for constructing a collocation place¹⁰⁹⁰. The Commissions finds this justification unfounded. First, the estimation of the prices involved in the collocation process, which would enable AOs to decide whether or not to invest into collocation at a particular site, was according to the RUO offered after the outcome of the detailed inquiry and not of the preliminary inquiry, which only furnishes, as ST itself acknowledges, "*high level information about the possibility to establish collocation, including its form*". Second, even if such detailed estimations on costs were to be performed by ST within the framework of the preliminary inquiry, the same type of information was also to be provided after the outcome of the detailed inquiry. That means that it was not necessary for ST to impose a preliminary inquiry, whose results overlapped with the outcome of the detailed inquiry. Both were subject to fees and therefore made collocation more expensive and delayed the entire process.
- (663) ST also explains that it expected that AOs would be interested in obtaining "*high level information*" about the possibility of establishing collocation, including its form, before investing in a detailed inquiry¹⁰⁹¹. However, the AO does not receive any information about the conditions, timing and the collocation prices in the outcome of the preliminary inquiry, but is only informed about the type of collocation that is possible. Therefore, in order to receive meaningful information for its business decisions, an AO would, in fact, need the type of information that only a detailed inquiry provides and therefore, would have to pay not only for the preliminary inquiry, but also for the detailed inquiry. In addition, the preliminary inquiry was mandatory until 9 May 2009, which means that the AO was obliged to obtain only "*high level information*", without being given the possibility to obtain from the start the complete set of information provided in the outcome of the detailed inquiry.

¹⁰⁸⁹ Orange's submission to TUSR of 20 October 2005, p. 5, Doc ID0297.

¹⁰⁹⁰ ST's reply to the SO, paragraph 1031.

¹⁰⁹¹ ST's reply to the SO, FN 730.

- (664) Moreover, information on the places where collocation is possible is already available in ST's network database provided to AOs. According to ST's reply to the Commission's Request for Information of 25 March 2010, ST's network database contains "*information on the identification number and address of all Main Distribution Frameworks (MDFs), Cross-connection points, Connection points and Distribution points of ST's network. These are the points of possible collocation*"¹⁰⁹². Also, in accordance with the Annex to Regulation (EC) No 2887/2000 on unbundled access to the local loop, the reference offer for ULL should include at least the following, in relation to collocation services: (i) information on the notified operator's relevant sites and (ii) collocation options at these sites, including physical and, as appropriate, distant collocation and virtual collocation.
- (665) The fact that the preliminary inquiry about the possibility and the form of collocation in a given place is superfluous is also emphasised by the VUS in its *2005 Assessment Report*, which remarks that: "*the need for a preliminary inquiry about the possibilities and the form of collocation in a given place against a payment could be acceptable where an alternative operator wishes to verify the possibility of use of the LLU in a place which has not been on the list of towns with the possibility of the LLU provision yet. Or if it concerns access to the sub loop. If the information provided about ST's network included also the information listed in the comment to section 1.6.4, the preliminary inquiry would not have to be a mandatory part of the collocation ordering*"¹⁰⁹³. That means that ascertaining within the preliminary inquiry whether collocation is possible in a given place is superfluous, as that data is already part of the information normally provided by ST. Determining whether physical or distant collocation is the appropriate solution for a specific place is part of the detailed inquiry. That means that making the preliminary inquiry results mandatory and subject to a fee complicates the unbundling process and makes it more expensive.
- (666) ST considers that ST's collocation setting process was not burdensome, given that it was aligned with standard industry practice and in particular with the 2001 ETP Recommendation on Local Loop Unbundling, which ST followed¹⁰⁹⁴. Also, ST considers that the process of collocation in France is similar to the one in Slovakia¹⁰⁹⁵. However, the ETP Recommendation only provides for a study request from the AO and not for two mandatory requests, whose aims overlap, as ST does. Also, the French Telecoms Regulator foresaw only one inquiry and not two overlapping ones, providing detailed information, including on prices, on collocation at a certain MDF site, upon receipt of a first intent to order together with a refundable deposit¹⁰⁹⁶.
- (667) ST insists that the collocation process established by ST was "*objectively reasonable as it included only those steps that were objectively necessary to implement a collocation. This is not altered by the fact that ST initially included a preliminary*

¹⁰⁹² Doc ID 2079, question 7, p.3.

¹⁰⁹³ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID0136, p. 48.

¹⁰⁹⁴ ST's reply to the SO, paragraph 1029.

¹⁰⁹⁵ ST's reply to the LoF, paragraph 612.

¹⁰⁹⁶ Document issued by the French Telecoms Regulator (ARCEP): "*Recommandation de l'Autorité de régulation des télécommunications relatives à la définition des prestations d'accès à la boucle locale et à sa mise en œuvre opérationnelle*" – Doc ID 4220, p.28.

inquiry that later became optional"¹⁰⁹⁷. Indeed, the preliminary inquiry became optional as from 9 May 2009, but that was only following negotiations between ST and GTS, during which, as ST recognises¹⁰⁹⁸, GTS insisted that the process of collocation be simplified and the associated lead-times shortened. ST also clarifies that "*the activities that would have otherwise been conducted within the preliminary inquiry were moved to the detailed technical inquiry*". The fact that some activities were simply moved from the preliminary inquiry to the detailed inquiry only emphasises the fact that drawing a distinction between the two types of inquiries, while making them mandatory and subject to separate fees, was artificial and not objectively necessary.

7.6.4.1.1.2 AOs can only challenge ST's findings by paying additional fees

- (668) The form of collocation was determined by ST in the outcome of the preliminary inquiry or, since 9 May 2009, when the preliminary inquiry became optional, in the outcome of the detailed inquiry. The form of collocation, that is to say, physical collocation or, if that was not possible, distant collocation, was binding on the AOs without them having an opportunity to review ST's findings, other than *via* a visit to the collocation space. For instance, if an AO wished to verify whether, indeed, physical collocation, which was the preferred option was not feasible at a certain MDF, it had to pay ST a fee amounting to EUR 793.67 (SKK 23 910) per collocation space or per visit, in addition to fees already charged by ST for the preliminary and the detailed inquiry. Therefore, the payment of the associated fees for the visit of the collocation space was obligatory *de facto*, although ST emphasises that the visit was always optional¹⁰⁹⁹.
- (669) Moreover, the collocation setting process provided by the 2001 ETP Recommendation on Local Loop Unbundling, that ST allegedly followed, does not comprise, as a separate step subject to additional fees, the visit of the collocation space by the AO. Also, Orange complained about that aspect in its submission to TUSR: "*The form of collocation is binding for the authorised provider whilst no obligations follow from it for ST. The mentioned process shows that ST's RUO is not transparent [...]*"¹¹⁰⁰.

7.6.4.1.1.3 The expiry of the reservation period leads to an unnecessary repetition of the preliminary inquiry or of the detailed inquiry

- (670) Based on the outcome of the preliminary inquiry, ST reserves the collocation place for the AO (section 2.1.1.5 of Annex 5 to the RUO). The reservation is valid for a period of 30 days from the delivery of the notice on the outcome of preliminary inquiry to the AO. If the AO does not submit the request for a detailed inquiry within that deadline, the reservation expires.
- (671) Where the AO only submits a request for a detailed inquiry, without requesting a preliminary inquiry first, which option is possible as from 9 May 2009 onwards, ST reserves the collocation place for the AO during the detailed inquiry and for a period of 60 days following the delivery of the notice of detailed inquiry to the AO (section 2.1.2.1 of Annex 5 to the RUO). The AO has, therefore, 60 days from the delivery of

¹⁰⁹⁷ ST's reply to the SO, paragraph 1030.

¹⁰⁹⁸ ST's reply to the SO, paragraphs 1031 and 1127.

¹⁰⁹⁹ ST's reply to the SO, paragraph 1028.

¹¹⁰⁰ Orange's submission to TUSR of 20 October 2005, p. 5, Doc ID0297.

the outcome of the detailed inquiry to conclude the collocation agreement; otherwise the reservation of the collocation place expires. In addition, according to section 2.3.3 of Annex 5 to the RUO once the reservation of the collocation place expires and no collocation agreement has been concluded, the detailed inquiry outcome is no longer binding and the AO has to make a new request for a detailed inquiry and pay a new fee.

- (672) ST argues that *"by reserving the space, ST makes sure that another operator coming later cannot be granted the same space requested by the first operator"* and *"if the first operator could block the requested space indefinitely, it would not only delay the collocation provisioning process, but also allow operators to hoard capacity that they do not need"*¹¹⁰¹. The Commission does not contest the principle of a reasonable reservation period, but ST's terms and conditions, whereby the outcome of the detailed inquiry expires together with the reservation period, obliging AOs to repeat the detailed inquiry in case the reservation period expires, are unreasonable. That puts additional pressure on AOs to accept ST's conditions and sign the collocation agreement within the reservation period. Orange pointed out in its 2005 submission to TUSR that this procedure *"is disadvantageous for the alternative operator [...] It foresees automatically that the counterparty will in its own interest agree with any contractual terms [...] Otherwise, the alternative operator must repeat the process"*¹¹⁰².
- (673) ST emphasises the fact that ST's RUO provides that failure to conclude a collocation agreement within 60 days after the delivery of the detailed inquiry *"could result"*, but does not automatically result, in a change of the type of collocation available including associated technical and construction parameters contained in the detailed inquiry results¹¹⁰³. It also adds that, in accordance with section 2.3.3 of Annex 5 to the RUO, *"in case of a repeated application for a detailed inquiry, ST shall – to the maximum extent possible – protect the interests of the alternative operator as well as the original outcome of the detailed inquiry dealing with the same site"*. ST also submits an example where ST and GTS concluded the collocation contract after the expiry of the reservation period¹¹⁰⁴. However, the RUO's provisions and ST's example only show that ST has a large margin of discretion, in particular that no criteria are established for deciding in a particular case whether, once the reservation period expires, another detailed inquiry needs to be performed or otherwise.

7.6.4.1.1.4 *ST was not bound by any deadlines in case of additional detailed inquiries triggered by negotiations, or in case of the withdrawal of its proposal for collocation*

- (674) Between 12 August 2005 and 9 May 2009 the terms were as follows: the AO had 10 days to submit to ST its comments on the findings of the detailed inquiry. As of 9 May 2009 the AO has 60 days for comments from the delivery of ST's findings.
- (675) If the AO disagrees with the outcome of the detailed inquiry, ST contacts it to reach an agreement. The AO may also, based on an agreement with ST, submit a request for an additional detailed inquiry where it will specify its new requirements for the collocation place. According to section 2.1.2.5 of Annex 5 to the RUO, such request

¹¹⁰¹ ST's reply to the SO, paragraph 1069.

¹¹⁰² Orange's submission to TUSR, dated 20 October 2005, p. 6, Doc ID0297.

¹¹⁰³ ST's reply to the SO, paragraph 1070.

¹¹⁰⁴ ST's reply to the SO, paragraph 1071.

can only be made once an agreement with ST over changed items has been reached. If the changes required by the AO need more substantial assessment than an administrative assessment, ST will charge the AO an additional fee. However, the RUO does not specify any deadlines for ST for treating such requests, in contrast with the short deadline of 10 days that the RUO set for AOs to submit comments until 9 May 2009. That allows ST to delay the entire process in a discretionary way, while AOs have to comply with tight deadlines.

- (676) Also, in accordance with point 2.3.1 of Annex 5 to the RUO, ST has the right to withdraw without stating any reasons and without any legal consequences a proposal of collocation agreement during the term for acceptance of the proposal by the AO within established deadlines. Orange complained to TUSR in its 2005 submission that "[t]his procedure allows ST to extend repeatedly without any punishment deadlines that are clearly set disadvantageously for the alternative operator."¹¹⁰⁵

7.6.4.1.1.5 *ST does not commit to any precise timeline for implementing collocation*

- (677) The concrete terms of the collocation agreement are unknown to the AO and are to be proposed by ST only after the detailed inquiry outcome is accepted by the AO including the acceptance of the proposed prices. For instance, the time necessary for the implementation of collocation is to be set in each collocation agreement, but it excludes the time necessary to obtain any permits, without the AO being aware of that aspect at the time of the acceptance of the detailed inquiry.
- (678) The VUS in that context remarks that *"the agreed deadline for the implementation of the collocation solution should include the legal deadlines binding the institutions competent to issue the respective permits. (...) the legal deadline for the approval should be taken into account in the collocation agreement. The uncertainties in the agreed deadlines and the risk of unforeseeable delays could complicate the contracting parties' relationship as well as the practical use of the ULL."*¹¹⁰⁶
- (679) ST argues that *"ST has no control over lead times: it cannot guarantee that public authorities would issue their permits by a certain deadline"*, also adding that *"contractual clauses that refer to the time required for obtaining necessary permits without committing to any exact date are a standard industry practice"*.
- (680) The Commission believes that first, ST refers to *"standard industry practice"* in relation to the access provider not committing to any specific deadlines for implementing collocation, without proving it and without giving any concrete examples underpinning ST's assertion. Second, it cannot be accepted that ST does not take any responsibility regarding the overall timeframe of implementing collocation. That leads to substantial uncertainty as regards the duration of the entire process, as was confirmed by GTS, which reported that *"[p]roblems were found later during the construction of the collocation sites: ST was not able to get all permissions for constructions within a reasonable period of time"*¹¹⁰⁷.
- (681) Moreover, the non-transparency of the terms of the collocation agreement allows for discrimination between the AOs concerned because an individual collocation

¹¹⁰⁵ Orange's submission to TUSR of 20 October 2005, p. 5, Doc ID0297.

¹¹⁰⁶ "Regulatory Standpoint to proposal of DSL for Doma Mini and SCP," 19 December 2005, DocID 0136, p. 14.

¹¹⁰⁷ Minutes of the conference call with GTS Slovakia of 27/26/2013, Doc ID 3873.

agreement is proposed to each party individually without the operators being able to check whether they have not been disadvantaged.

7.6.4.1.2. Unfair and non-transparent collocation fees

7.6.4.1.2.1 *ST's RUO does not provide any pricing information to AOs on the setting of the collocation space and place, nor on the collocation rental*

- (682) ST's RUO foresees several mandatory standard fees, whose amount is already determined in the RUO, that an AO has to pay in connection with collocation: (i) a fee for the preliminary inquiry, (ii) a fee for the detailed inquiry, (iii) a fee for the identification of the place of access, (iv) a fee for the visit of the collocation space, (v) a fee for the accompanied access, (vi) a fee for the authorisation of access to the specified collocation spaces for the period of three months, (vii) a fee for a certificate needed for access to the collocation space for the period until 31 December of a given year, (viii) a fee for the test of equipment and (ix) a fee for the administrative assessment of the equipment (this fee was removed as of 1 November 2010).
- (683) However, the bulk of the collocation fees that an AO has to pay is individually set in the outcome of the detailed inquiry and these fees are the following:
- (1) a fee for setting of the collocation space, foreseen at point 2.1.5 of Annex 14 to the 2005 RUO, which mainly consists of the cost connected with building of the collocation space according to the terms agreed within the framework of the detailed inquiry, including the expenses incurred in connection with physical access to the collocation space. As of 9 May 2009¹¹⁰⁸ the fee for the setting of the collocation space applies to physical collocation only. The terms described above remained unchanged as regards physical collocation since the publication of the RUO on 12 August 2005.
 - (2) a fee for setting of the collocation place, foreseen at point 2.1.6 of Annex 15 to the 2005 RUO, which includes in particular the costs connected with the building of the individual collocation place and with the setting of the AO 's connection unit according to the agreed individual terms, including expenses incurred in connection with physical access to the collocation place. Only effective as of 1 July 2009¹¹⁰⁹, the RUO introduces certain specific fees for setting and extending a "standard" distance collocation.
 - (3) rent for the collocation space or place including the fee for related services and the use of equipment (Annex 15 to the 2005 RUO, point 3.1.1). Annex 16 to the 2005 RUO, point 1.5, foresees that the rent will be paid on a monthly basis, one month in advance. Those terms have not been changed since 12 August 2005.
- (684) As regards physical collocation, ST did not provide to AOs any upfront pricing information related to those categories of fees, such as a breakdown of cost categories and associated fees. In accordance with ST's RUO, the only pricing

¹¹⁰⁸ Annex 14 to the RUO, point 2.1.5, in effect as of 1 July 2009.

¹¹⁰⁹ See Annex 14 of the RUO, points 2.1.6 - 2.1.9, published on 9 May 2009 and effective as of 1 July 2009, Annexes of ST's reply to RFI of 17/04/2009; Q.41_8, Doc ID3209.

information regarding those fees is part of the individually set collocation fees by ST for each case, as part of the "Notification of the results of the detailed inquiry".¹¹¹⁰

- (685) However, in accordance with Recital 11 of Regulation EC No 2887/2000 on unbundled access to the local loop, "*costing and pricing rules for local loops and related facilities should be transparent, non-discriminatory and objective to ensure fairness*". Moreover, the access provider needs to supply in the RUO itself, collocation "*prices or pricing formulae*"¹¹¹¹. However, none of these prices or pricing formulae were known to AOs in respect of physical collocation, which, as explained at recital (715), is the preferred option for AOs; as to the distant collocation, as explained at recitals (683) and (701), ST introduced in the RUO certain specific fees for setting and extending a "*standard*" distance collocation, but only as of 1 July 2009.
- (686) The fact that ST failed to offer AOs upfront pricing information resulted in substantial uncertainty for AOs, as they were not in a position to establish any business plans in advance.
- (687) Several AOs complained about that issue. According to GTS Slovakia, collocation is indispensable for the local loop services and it constitutes a major part of the AO's costs and a high barrier to the use of that type of access. GTS Slovakia pointed out that as long as the collocation fees are set "*individually*" by ST, the AO cannot include them in its business plan and thus cannot create a viable business model¹¹¹². In a conference call with the Commission of 27 June 2013, GTS Slovakia mentioned that "*GTS started negotiations in 2006 and then the main blocking factor was the cost of the collocation/construction of the collocation sites. Discussions on the collocation price delayed the negotiations (...). As ST was still the owner, it was not very satisfactory because of the difficulty to calculate the cost*". GTS also clarified that "[a]fter some time, the negotiations advanced to a situation where GTS was able to create a compromise solution, i.e. to select methods of the construction of the collocation sites which could have limited and predictable costs (...). Finally, GTS was able to find a pre-defined solution (...) which enabled to reach a defined and stable price (almost flat fee prices). The final compromise with ST was almost all about the collocation sites, about how to build them and about reasonable and pre-defined prices"¹¹¹³.
- (688) Slovanet in its reply to the request for information concerning the collocation terms remarked that: "*under the terms of Slovak Telekom our company could not even on a theoretical level consider the foreseen collocation cost. According to our information the amount of collocation costs for one interconnection point between Slovak Telekom and ZSR – Telekomunikacie a.s. was in the range of millions of SKK. [...] Many of these fees [fees related to collocation] are set unilaterally and individually by ST, i.e. it is impossible to estimate them in advance, hence we do not know what*

¹¹¹⁰ Annex 15 to the 2005 RUO, point 2.1.5., Annexes of ST's reply to RFI of 17/04/2009; Q.41_1, Doc ID3195.

¹¹¹¹ Section D "*Supply conditions*" of the Annex "*Minimum list of items to be included in a reference offer for unbundled access to the local loop to be published by notified operators*" to Regulation EC 2887/2000 refers, at point 3, to "*prices or pricing formulae for each feature, function and facility listed above*", amongst which collocation services.

¹¹¹² GTS Slovakia's reply to the request for information of 18 July 2008, Doc ID0035, p. 22-23.

¹¹¹³ Minutes of the conference call with GTS Slovakia of 27/06/2013 – Doc ID 3873.

will be the end price for setting of the collocation space, which does not allow us to assess the cost model."¹¹¹⁴ ST provided an overview of the costs of setting physical collocation for ZSR for the purposes of network interconnection for voice-traffic hand-over. The cost of the setting of the collocation space ranges between SKK [...] (EUR) [...] and SKK [...] (EUR [...]) depending on the number of collocation places available in the given collocation space. The costs of the setting of a collocation place within the collocation space ranges between SKK [...] (EUR [...]) and SKK [...] (EUR [...])¹¹¹⁵. Slovanet confirmed its views during a conference call with the Commission of 7 August 2013, when Slovanet mentioned the "*unknown collocation prices*", amongst the "*unacceptable conditions set by ST*" and concluded that "*if the connected operator does not know all the costs of connecting, it cannot produce a relevant business plan!*"¹¹¹⁶.

- (689) Etel's submission of 2007 to TUSR's analysis of market 4 provided that "*The wholesale offer of ST was not accepted by any undertaking due to disadvantages in the part on pricing, but mainly because of costs for the collocation*"¹¹¹⁷.
- (690) Also, Orange's presentation to Slovanet entitled "*Regulatory improvements to foster BB development & competition in Slovakia: the experience of a fixed incumbent in France & Poland*" concludes that the "*lack of clarity regarding prices for collocation is considered to be the main obstacle in the LLU implementation process*"¹¹¹⁸. Also, Orange Slovakia's presentation "*Slovakia ULL*" emphasises that collocation costs are not published in the RUO and are stated as not negotiable. It concludes that the RUO is incomplete - "*RUO is (...) missing details (collocation)*"¹¹¹⁹.
- (691) The final fees for establishing the collocation place and space can amount to tens of thousands of euros - according to ST's internal document "*Preliminary non-binding proposal of calculation of maximum price of building of collocation space for the purposes of ULL*" of 24 January 2007¹¹²⁰, which was prepared for the purposes of negotiation with GTS Slovakia, the fee for the setting of one physical collocation space (physical collocation) was estimated at SKK [...] (EUR [...]). In that context, a total lack of transparency on price information is a strong deterrent from proceeding with the unbundling of the local loop for AOs.
- (692) According to ST, the AOs did not receive upfront any information on the fees for the implementation of the collocation place and space because ST was "*objectively unable to develop a standard physical collocation solution for a flat fee that could be replicated at all its MDF sites*", as its 2002 and 2003 survey of a sample of its MDF sites "*revealed that the sites differed significantly*". Therefore, ST decided to charge a cost-based price for each site based on the real cost that would be incurred for establishing a collocation¹¹²¹. ST was not able to offer a detailed list of prices for establishing physical collocation at each of its almost 1 700 MDF sites in its 2005

¹¹¹⁴ Slovanet's reply to the request for information of 7 April 2009, p. 10-11, Doc ID0418.

¹¹¹⁵ ST's reply to the request for information of 25 March 2010, Doc ID2079, p. 4.

¹¹¹⁶ Minutes of the conference call with Slovanet of 07/08/2013 – Doc ID 3959.

¹¹¹⁷ Reply to TUSR's analysis of market 4 – Doc ID 4346.

¹¹¹⁸ Orange's presentation to Slovanet "*Regulatory improvements to foster BB development & competition in Slovakia: the experience of a fixed incumbent in France & Poland*" of 10 May 2010, slide "*EC conclusions (14th implementation report)- on the regulatory situation of fixed BB*" – Doc ID 3930.

¹¹¹⁹ Orange Slovakia's presentation "*Slovakia ULL*", Slide "*RUO highlights*" – Doc ID 4192.

¹¹²⁰ Attached to an email dated 24 January 2007, Doc ID0159, p. 3.

¹¹²¹ ST's reply to the SO, paragraph 1050.

RUO as "*these prices were largely unknown to ST*"¹¹²². The Commission finds these arguments unconvincing.

- (693) First, ST's approach to physical collocation stems from its decision that physical collocation should systematically involve the construction of a dedicated collocation room ("collocation space") that would host several cages of AOs ("collocation places")¹¹²³. That approach involves systematic construction or refurbishment works, whose final real costs are determined individually by ST only in the outcome of the detailed inquiry.
- (694) However, that approach should remain exceptional, reserved to cases where it is impossible to provide a standardized physical collocation solution, such as the placement of the AO's equipment in a collocation room which is already arranged (for instance the room where ST's equipment is placed) or in a collocation room which needs to be adapted, as also foreseen in the 2001 ETP Recommendation on Local Loop Unbundling that ST refers to: "*in cases where space is deemed unsuitable for collocation, the possibility of redevelopment of that space, where this is reasonable, shall be thoroughly investigated, particularly in cases where rejection is on the grounds of insufficient lighting, powering, access to the loop or air conditioning resources or because of issues surrounding security of the alternative operator's and/or access provider's equipment. The cost of any required redevelopment may be incorporated in the collocation fees*"¹¹²⁴.
- (695) For instance the French Telecoms Regulator's decision n° 02-323 of 16 April 2002 obliged France Télécom to offer all AOs the option of placing their equipment in the existing rooms containing France Télécom's equipment when there is available space, in all the sites where there is no firm order by an operator for a specific room ("co-mingling"). The French Telecoms Regulator concluded that in such cases the reference offer should contain *a priori* identified tariffs, the same as in Spain and in the United Kingdom, and that this solution should trigger a great reduction of the entry costs and also of the implementation delays, compared with the previous solution, which consisted of creating new rooms specifically dedicated to the operators. That decision was adopted in the context where the French Telecoms Regulator observed that creating dedicated collocation rooms resulted in high and unpredictable entry costs, depending for each AO on the number of AOs sharing the costs, which did not allow AOs to make informed business decisions and eventually created a barrier to the entry of competitors on the ULL market¹¹²⁵.
- (696) ST has turned an exceptional tailor-made solution into a standard approach to implement collocation, implying that it possessed no space that would be suitable for a standardized collocation solution and that in every single case major works need to be done to allow for physical collocation. However, ST's MDF survey of 2003¹¹²⁶ shows that there is a need to create a separate collocation room only at [Number = "Z"] out of the [Number = Z multiplied by 7] MDF sites of the sample. That means that the remaining MDF sites (the large majority) were already fit for collocation,

¹¹²² ST's reply to the LoF, paragraph 661.

¹¹²³ ST's reply to the SO, paragraphs 1035 to 1037.

¹¹²⁴ ETP 2001 Recommendation on Local Loop Unbundling, section 2.2.2, p. 16. Annex XI.6 to ST's Reply to the SO.

¹¹²⁵ Doc ID 4235, p.8-9.

¹¹²⁶ Doc ID 3809.

possibly subject to minimal refurbishing works, without building a new collocation room¹¹²⁷. ST's MDF survey, although only covering a sample of MDF sites, gives a strong indication that building separate collocation rooms was far from objectively needed at all MDF sites.

- (697) Second, while the exact final collocation fees might be affected by certain specificities of ST's MDF sites or by certain specific requirements of AOs, the breakdown of cost categories linked to the nature of the construction works required can be foreseen in advance for all ST's MDF sites. Those cost categories and associated fees, or at least ranges of fees, could have been provided to AOs in advance, so that they could make appropriate business plans on that basis.
- (698) ST's MDF survey, which was not accessible to AOs, reveals that ST identified most of the cost categories related to collocation construction and also gave a precise estimation of the overall associated fees. Also, the estimated collocation fees do not differ significantly, but are rather identical or very similar from one MDF site to another. ST's MDF survey distinguishes between minimal construction works and more complicated works and within those two main categories, several works subcategories are being described and evaluated. Minimal construction works (doors, floor, electro-installation) are evaluated at SKK [...] (EUR [...]) for [...] MDF sites and at SKK [...] (EUR [...]) for [...] MDF sites. As regards the more complicated works, for instance works for creating a separate collocation room, the costs in Levice are the same as the ones foreseen for the same operation in Bratislava, that is to say SKK [...] (EUR [...]), for a total of [...] MDF sites. Other works such as removal of walls, reparation of plasters, electro-installation works, flooring and air-conditioning works are evaluated to the same amount of SKK [...] (EUR [...]) at the MDFs of Presov, Kosice and Zvolen. Overall, minimal construction works vary between SKK [...] and [...] (between EUR [...] and [...]) for [...] MDF sites, whereas all ST's more complicated works, including the creation of separate collocation rooms vary between SKK [...] and [...] (between EUR [...] and [...]) for [...] MDF sites. Also, ST's MDF survey reveals that ST's cost of one connection is estimated, depending on the length of the connector, at SKK [...] (EUR [...]) and the costs of individual air conditioning – around SKK [...] (EUR [...])¹¹²⁸.
- (699) ST argues that the MDF survey only referred to [...] out of the almost 1700 MDF sites, for which no upfront information about the costs of establishing collocation was available¹¹²⁹. ST also adds that the estimates used in that document were very broad and high level and that those costs are linked to building only a collocation basic space for ULL – for instance the real costs of building collocation for GTS in 2012 were actually different from the 2003 estimates.¹¹³⁰ However, ST's MDF survey shows that ST actually possessed a breakdown of costs categories, as well as associated pricing information on the basis of which the overall costs per MDF were calculated. Although the overall costs might have been different from one MDF site to another, there is no reason to believe that the cost categories and associated prices for building collocation per square meter and by working hour were different from one MDF to another. Also, the alleged price difference between 2003 and 2012 does

¹¹²⁷ Doc ID 3809, p. 1-2.

¹¹²⁸ Doc ID 3809, p. 1.

¹¹²⁹ ST's reply to the LoF, paragraph 601.

¹¹³⁰ ST's reply to the LoF, paragraphs 603 to 605.

not take into account the strong inflation rate in Slovakia – for instance, in 2003, the inflation rate was 9.18% and in 2004, it was 6%, whereas in 2012, it was 3.23%.¹¹³¹

- (700) Third, not only ST's MDF survey, but also ST's document "[...]"¹¹³² provides a breakdown and description of cost categories similar to the ones in ST's current RUO of 9 November 2012, which provides associated costs in euros with very few exceptions¹¹³³. ST's MDF sites still differ significantly today, which did not prevent ST from being transparent in the current RUO on cost categories and associated costs. Therefore, nothing prevented ST from providing AOs with similar cost categories and associated costs also during the investigation period.
- (701) Moreover, ST included in the RUO fees for a "standard" distance collocation as from 1 July 2009 onwards:

Table 16: Fees for a "standard" distance collocation

Fee	Amount (EUR)	Further Terms
Fee for setting distance collocation place (p-2.1.6a)	9 690.63	
Fee for setting distance collocation place with the length of the connection cable above 100m (p-2.1.6b)	266.81	Per each additional 10m.
Fee for low-voltage connection (p-2.1.6c)	To be set individually	
Fee for extending capacity of the connection cables by using the existing duct (p-2.1.7a)	886.44	
Fee for extending capacity of the connection cables involving ground work (p-2.1.7b)	5 148.04	
Fee for relocation of the distance collocation cabinet (p-2.1.8)	5,691.26	
Fee for a non-standard solution of distance collocation (p-2.1.9)	To be set individually	

- (702) That means that it was feasible to calculate and establish such collocation fees and that no obstacle prevented ST from providing them to AOs before 2009 as well.
- (703) As regards the rental fees for collocation space for different sites, there is no reason why ST did not provide the rental fees per square meter in advance. ST argues that ST was not obliged to set uniform rental fees that would apply across the entire

¹¹³¹ <http://www.inflation.eu/inflation-rates/slovakia/historic-inflation/cpi-inflation-slovakia.aspx>, consulted on 08/05/2014; Doc ID4841.

¹¹³² Doc ID 3808.

¹¹³³ See Produktový concept_2003_5, Doc ID 3809, p. 18-19, 27-29 – for instance: (i) Fee for the test of access cables: costs connected with meetings and transport of ST's technicians; (ii) One-time installation fee for off-set of the MDF; (iii) Fees for non-standard requests.

portfolio of its MDF sites¹¹³⁴. However, even so, ST knew and therefore was able to provide the rental fees in advance, whether it was set by ST or by the landlord owning the premises.

- (704) Furthermore, in other Member States, where the MDF sites must have differed significantly from each other, the incumbents were able to provide upfront information on collocation prices. For instance in the Czech Republic TO2 provided in the Framework Agreement on Collocation, a complete breakdown of cost categories and associated prices, including collocation fees related to the refurbishment of the collocation space, as well as monthly prices for the rental of the collocation space¹¹³⁵. Also, in Ireland, Eircom's Access Reference Offer Price List provides all charges linked to physical collocation, including site preparation charges (standby generator, air conditioning, false floor, MDF terminations), as well as site licence charges (basic rental per square meter, per site)¹¹³⁶. Although the exact final collocation costs were to be determined individually for each case, providing an upfront breakdown of costs and associated fees was feasible.
- (705) Moreover, the Commission considers that due to ST's lack of transparency, prices could be set not only "individually" for each collocation site, but also for each third party. Such approach not only lacks transparency towards third parties who are not in a position to review the prices in detail, but also gives ST ample opportunity to discriminate between the various third parties concerned or to take arbitrary decisions.
- (706) ST explains that starting around 2005, it had a contract in place with an external provider, Strabag, for technology support activities, including works related to implementing collocation. ST adds that *"whenever there was a need to conduct construction works, such as refurbishment of ST buildings or installation of new power supply or air-conditioning, (...) ST had to go to Strabag. The framework contract with Strabag also included prices for construction works (hourly rates per various type of work), as well as fixed prices for material (list prices per item)"*¹¹³⁷. Also, Strabag suggested concrete technical solutions and prepared cost estimates in case of collocation¹¹³⁸. It follows that ST was aware of the pricing information regarding collocation, and could have disclosed to AOs the breakdown of cost categories, as well as the associated collocation prices before the detailed inquiry.

7.6.4.1.2.2 *ST's collocation fees are unilaterally set by ST*

- (707) In the period between 12 August 2005 and 9 May 2009, if the AOs did not agree with the conditions ST proposed in the outcome of the detailed inquiry, the RUO foresaw negotiations. However, in accordance with the RUO, AOs were not allowed to negotiate the collocation prices that ST set.¹¹³⁹ That means that ST set the respective collocation fees not only "individually" but also unilaterally. The 2001

¹¹³⁴ ST's reply to the SO, paragraph 1057.

¹¹³⁵ Annex 5 of the Framework Agreement on Collocation – "Prices", Doc ID 4238, p. 42-50.

¹¹³⁶ Annex C of Eircom's Access Reference Offer Price List, Doc ID 4237, p. 5-21.

¹¹³⁷ ST's reply to the SO, paragraph 1060.

¹¹³⁸ Ibidem.

¹¹³⁹ Annex 5 to the RUO valid until 9 May 2009, point 2.1.2.5, Annexes of ST's reply to RFI of 17/04/2009; Q.41_2, Doc ID3197: *"the prices and the fees for the items contained in the findings of the detailed inquiry cannot be subject to negotiation with the exception of the modifications due to the change of quantity, capacity or other parameters that may affect the total price or the fee"*.

EPT Recommendation on Local Loop Unbundling emphasises the need to negotiate the access provider's offer "*physical collocation...raises a number of issues that need to be negotiated and agreed before equipment can be installed*"¹¹⁴⁰. Also, Orange complained to TUSR that it was not given the opportunity to negotiate the contractual terms and that was even banned from negotiating the price, which is not set in the RUO and therefore cannot be checked¹¹⁴¹.

- (708) ST denies that it established collocation fees unilaterally and argues that it was not in a position to renegotiate prices for either construction works or material once asked for collocation by an AO because it had a framework contract with its subcontractor, Strabag, including prices for construction works and for material. ST ensures that the same price, pursuant to the identical framework contract with Strabag, applied to ST retail operations and to AOs requesting collocation and that this approach is consistent with the standard industry practice¹¹⁴².
- (709) The Commission considers first that ST does not submit any evidence showing that the same prices applied to ST and that this approach is standard industry practice. Second, the prohibition to negotiate collocation prices was removed from the RUO as from 9 May 2009 onwards, although ST explains that the situation remained unchanged until 2011, that is to say that it was not able to renegotiate prices, as Strabag remained its subcontractor until 2011¹¹⁴³. That means that the prohibition to negotiate collocation prices remained de facto in place until 2011, that is to say during the whole investigation period. Or, if that is not the case, given that ST was able to negotiate collocation prices with Strabag between 2009 and 2011, nothing prevented ST from negotiating prices before 2009. Third, not being able to renegotiate the final collocation costs proposed by ST in the outcome of the detailed inquiry is even more unfair as it is combined with the total lack of upfront transparency on prices, leaving the AO in a "take-it or leave-it" position at an advanced stage of the process, when the AO has already invested substantial resources.
- (710) Moreover, ST's prices were not satisfactory for GTS, which managed to "*find external collocation sites with cabinets and with fixed prices (below 10.000 EUR/site at that time)*", which was "*much below the price offered by ST for the collocation space*". Also, when GTS was able to build its own collocation sites, "*the price was less than half of the initial solution*"¹¹⁴⁴. In this context, the fact that prices could not be negotiated appears as even more restrictive.

7.6.4.1.2.3 *Collocation fees fall on the first AO requiring access at a specific MDF and deter entry*

- (711) The fee for setting of the collocation space is determined based on Annex 5 to the RUO and based on the point 1.3 of the table in Annex 15 to the RUO. According to the RUO¹¹⁴⁵, ST set a system of recovery of the costs of building of a collocation space that in the Commission's view places a substantial barrier to entry for the first

¹¹⁴⁰ EPT 2001 Recommendation on Local Loop Unbundling, section 2.1., p.13, provided in Annex XI.6.

¹¹⁴¹ Orange's submission to TUSR of 20 October 2005, p. 6, Doc ID0297.

¹¹⁴² ST's reply to the SO, paragraph 1061.

¹¹⁴³ ST's reply to the SO, paragraph 1060.

¹¹⁴⁴ Minutes of the phone call with GTS of 27 June 2013 – Doc ID 3873.

¹¹⁴⁵ See Annex 16 of ST's 2005 RUO, Doc ID 453, p. [2].

AO interested in unbundling of the local loop at a certain exchange. According to that system, the first AO wishing to use collocation at a given location has to pay upfront the entire cost of building the collocation space. Only once a new AO decides to enter that location, the first AO will be reimbursed an aliquot part of the cost paid up front. Those terms have not been modified since 12 August 2005. That makes the entry of the first AO at a particular local exchange economically unviable as the expected cost of building of a single collocation space is elevated - according to an internal document "*Preliminary non-binding proposal of calculation of the maximum price of building of the collocation space for the purposes of the ULL*" of 24 January 2007¹¹⁴⁶, which was prepared for the purposes of negotiating with GTS Slovakia, the fee for setting one physical collocation space is estimated at SKK [...] (EUR [...]). Moreover, apart from this cost the prospective entrant would have to finance the building of the collocation place and pay a monthly rent for the use of the space.

- (712) That is confirmed by AOs: for instance, GTS Slovakia, which is the only AO which requested collocation, in its reply to the request for information points out that: "*the costs of this solution [physical collocation] are high because according to the RUO the so-called collocation space will be built for several interested parties on the expense of the first interested party [...] We consider this method of price setting as an effective creation of a barrier to entry of the first interested party on the market and the physical collocation becomes thereby unacceptable given that the estimated cost could reach 1 million SKK per collocation space whilst there are dozens of those needed to ensure coverage.*"¹¹⁴⁷ Also, the OECD Report "*Developments in Local Loop Unbundling*" of 10 September 2003¹¹⁴⁸ provides that "*if collocation prices are high, this will be a strong disincentive to access seekers to take advantage of LLU. New entrants often claim that the collocation costs for the conditioning or preparatory work undertaken by incumbents are often prohibitive*".
- (713) ST argues that if the first operator, which triggers the necessity to build collocation does not bear the cost, it is not clear who else will bear it¹¹⁴⁹. ST gives several examples of other RUOs in other Member States (Luxembourg, Germany, Ireland and France) to show that charging the first operator the full amount is in line with standard industry practice¹¹⁵⁰. However, the situation in those Member States is not the same as in Slovakia: in all the Member States cited the ULL provision by several AOs was in 2010 much higher than in Slovakia as it amounted to 41% in Germany¹¹⁵¹, 45% in France¹¹⁵², 7% in Ireland¹¹⁵³ and 13% in Luxembourg¹¹⁵⁴, whereas in Slovakia it was only 0.02%¹¹⁵⁵, with only one AO (GTS Slovakia)

¹¹⁴⁶ Attached to an email dated 24 January 2007, Doc ID0159, p. 3.

¹¹⁴⁷ GTS Slovakia's reply to the request for information of 18 July 2008, non-confidential version, Doc ID0035, p. 23.

¹¹⁴⁸ Doc ID 4240.

¹¹⁴⁹ ST's reply to the SO, paragraph 1063.

¹¹⁵⁰ ST's reply to the SO, paragraphs 1065 to 1067.

¹¹⁵¹ Broadband Coverage in Europe, Final Report, 2011 Survey, Data as of 31 December 2010, Graph "*Percentage of DSL connections by type of providers*" – Doc ID 4179, p.117.

¹¹⁵² Ibidem, p.110.

¹¹⁵³ Ibidem, p.146.

¹¹⁵⁴ Ibidem, p.177.

¹¹⁵⁵ Ibidem, p.228.

unbundling the local loop. That means that GTS Slovakia was the only one supposed to bear the cost of such a heavy investment.

- (714) Also, collocation costs are high because of ST's decision to systematically build a distinct collocation room and to always discard from the start other standard solutions involving lower costs, such as placing the AO's equipment in the existing rooms containing ST's equipment. ST itself explains that *"physical collocation involving construction of a collocation room is a standard solution in case the access provider expects that several AOs may be interested in collocating at the same site"*¹¹⁵⁶. However, in this case, ST did not have any concrete indications that several operators intended to collocate at the same site, as GTS was the only operator who signed a Framework Agreement with ST. ST was also aware that other AOs, such as Orange and Slovanet, although interested in the local loop unbundling, were discouraged by ST's terms and conditions.
- (715) ST also argues that AOs can choose distant collocation¹¹⁵⁷, which does not involve construction of a collocation space, with the result that the first operator coming to a particular site does not necessarily have to bear those costs¹¹⁵⁸. However, physical collocation and not distant collocation is the preferred option for AOs *"because of the associated limitations on the length of the copper (wire) with such technologies"*, which *"will result in AOs wishing to collocate their equipment with, or as near as possible to, that of the access provider"*¹¹⁵⁹. EPT's 2001 Recommendation on Local Loop Unbundling advises that only where there is insufficient space for physical collocation the access provider shall offer AOs distant or virtual collocation¹¹⁶⁰. Therefore, it is difficult to conceive that AOs would prefer distant collocation instead of physical collocation.
- (716) As pointed out by GTS in its reply to TUSR's request for information of 18 November 2008, distant collocation was only a second best solution: *"Considering the non-acceptability of the current model of physical collocation, in which our company would have to finance the construction of the whole collocation place including a place for other potential operators that would, in the future, be interested in lines in that access point, we decided to focus on the negotiation of the terms of the second option of collocation – distant collocation"*¹¹⁶¹. GTS Slovakia therefore resorted to distant collocation, which was an individual solution, the costs of which were less elevated. However, the solution negotiated by GTS Slovakia did not allow it to provide services to the mass market. According to GTS Slovakia's CEO: *"based on the cost oriented prices of the RUO it was not possible to provide services for households profitably and our goal continues to be primarily to focus on services for business customers"*¹¹⁶². The retail prices that could have been reasonably charged by GTS Slovakia for mass market broadband products would not have allowed it to recover the cost of implementing even a distant collocation solution. Indeed,

¹¹⁵⁶ ST's reply to the SO, paragraph 1040.

¹¹⁵⁷ As mentioned in recital (715).

¹¹⁵⁸ ST's reply to the SO, paragraph 1064.

¹¹⁵⁹ ETP 2001 Recommendation on Local Loop Unbundling, section 2.1., p. 13, provided in Annex XI.6 to ST's reply to the SO and quoted in ST's reply to the SO, paragraph 1033.

¹¹⁶⁰ *Ibidem*, quoted in ST's reply to the SO, paragraph 1034.

¹¹⁶¹ Doc ID 4616 – GTS Slovakia's reply to TUSR's RFI, dated 18 November 2008, p. 1.

¹¹⁶² Webnoviny article '*GTS so far does not change orientation on business clients*' including quotes of GTS Slovakia's CEO, dated 24 March 2009, Doc ID1968.

according to a ST's document "*Overview of costs necessary for setting of the distant collocation*" (22 August 2007)¹¹⁶³ the cost of distant collocation (1 location) amounts to SKK [...] (EUR [...]). An internal email exchange between ST's business managers in preparation of a meeting with GTS Slovakia of 3 June 2008¹¹⁶⁴ provides another overview of the costs of setting of the distant collocation. The proposal distinguishes three variants based on the distance between the respective distribution frame and the outdoor cabinet (20m, 50m and 100m). The costs range between SKK [...] (EUR [...]) (20m) and SKK [...] (EUR [...]) (100m).

- (717) In a context where none of the collocation types proposed by ST in its RUO were economically viable, GTS Slovakia had to negotiate with ST another solution, that is to say the "*self-provided collocation*", whereby GTS Slovakia built the collocation space, whilst ST only provided the necessary cable connections to the MDF. That acceptable solution was implemented in the RUO only as from 1st November 2010 onwards.
- (718) In conclusion, ST set the RUO collocation terms so as to render the collocation process burdensome to AOs, refrained from providing upfront pricing information on the basis of which AOs could have established their business decisions and implemented a strategy whereby collocation costs became prohibitive, with the aim of deterring AOs from unbundling ST's local loops.

7.6.4.2. The forecasting obligation by AOs

- (719) According to Annex 12 of ST's 2005 RUO the AOs were obliged to submit forecasts of the requests for qualification of the local loop¹¹⁶⁵ after the signature of the collocation agreement 12 months in advance for each collocation space on a month-by-month rolling basis, within 10 days of the conclusion of the collocation agreement¹¹⁶⁶. As of 1 November 2010 the AOs were obliged to submit forecasts of the requests for installation of the local loop as opposed to forecasts of the requests for qualification, as the qualification of the local loop, which was mandatory until that date, became a voluntary step in the unbundling process¹¹⁶⁷. The period of forecast and the methodology remained unchanged. In accordance with point 2.8.4 of Annex 5 to the RUO, a request for "*qualification of the local loop*" could only be submitted once the relevant forecasts of the requests for qualification had been submitted by AOs in accordance with Annex 12 to the RUO¹¹⁶⁸.
- (720) In this context the Commission points out as disadvantageous terms of forecasting, in particular (i) the requirement that AOs submit their forecasts at a time when they are not able to precisely estimate their needs in terms of ULL, (ii) that failure to comply with ST's forecasting conditions triggers payment of penalty fees, (iii) the mandatory character of the AOs' forecasting obligation and d) the fact that in case of non-compliance with the forecasting, no deadlines for ST's reply applied.

¹¹⁶³ [...], Doc ID0159, p. 7.

¹¹⁶⁴ Internal email exchange [...], Doc ID0159, p. 13-14.

¹¹⁶⁵ The qualification process allows AOs to determine whether a specific local loop can be unbundled, before the placement of a firm unbundling order.

¹¹⁶⁶ Annex 12 of ST's 2005 RUO, Doc ID 453, p. 3-9.

¹¹⁶⁷ As explained in paragraph 1258 above. See ST's reply to the RFI of 22/10/2010, Q7_4 Annex 12 to the RUO (dated 1 November 2010), section 1.1, Doc ID 3241.

¹¹⁶⁸ See Point 2.8.4. of Annex 5 of ST's 2005 RUO, Doc ID 453, p. [23].

7.6.4.2.1 The requirement that AOs submit their forecasts at a time when they are not able to precisely estimate their needs in terms of ULL

- (721) AOs are obliged to submit their forecasts of requests for qualification or requests for installation of the local loops¹¹⁶⁹ 12 months in advance for each month and for each collocation space, within 10 days from the conclusion of the collocation agreement¹¹⁷⁰.
- (722) Once the collocation agreement is signed, ST will implement the chosen collocation solution. However, ST's 2005 RUO does not contain deadlines for ST's implementation of the collocation solution or an estimate of the necessary time. In addition, AOs have to give forecasts one year in advance for each month and for each collocation place. That means that AOs are required to submit forecasts at a time when they are not in a position to estimate precisely their needs in terms of ULL. AOs can only meaningfully request the qualification of the local loop at a later stage, for instance once the collocation is implemented¹¹⁷¹ and not within only 10 days from the conclusion of the collocation agreement.
- (723) GTS Slovakia argued during the negotiations with ST that such a precise and detailed forecasting is not sustainable in particular in the initial period, after the signature of the collocation agreement, because at that point in time the AO is not able to provide such accurate estimates of requests for qualification¹¹⁷².
- (724) The VUS in its 2005 Assessment Report finds the terms of forecasting "*unusual*" and considered that: "*the requirements of Annex 12 [to the RUO] (up to annual forecasting period, detailed monthly list of number requests for number of qualifications of the local loop with prescribed forecasting deviation) are in light of the experience thus far unnecessary and could be considered to constitute a barrier to ULL implementation*"¹¹⁷³. The VUS considers that "*an example of a more rational and a more logical approach may be the terms of Deutsche Telekom's RUO that foresees primarily forecasting of collocation and only afterwards follows a forecast respectively an agreement on the plan of implementation of the access to the local loop. Also, in the British Telecom's RUO, the forecast concerns collocation (place; requirements for the space for the equipment of the alternative operator). [...] Preparation of a forecast of requests for qualification of the local loops according to ST's terms set in Annex 12 requires that the alternative operator has the detailed information about the collocation possibilities, the main distribution frames and the respective local loops the provision of which ST so far does not declare.[...]*"¹¹⁷⁴.

¹¹⁶⁹ Since 1 November 2010, when the qualification became voluntary, AOs had the option of placing an installation request without first requesting the "qualification" of the local loop they intended to unbundle.

¹¹⁷⁰ Annex 12 of ST's 2005 RUO, Doc ID 453, p. 3-9.

¹¹⁷¹ As explained in recital (757) below, within the "qualification" process of a local loop, ST verifies whether collocation is in place at a given MDF.

¹¹⁷² For instance Minutes from the meeting between GTS Slovakia and ST concerning the RUO, dated 21 September 2007, Doc ID 2142, p. 3-4.

¹¹⁷³ VUS 2005 Assessment Report: "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID 0136, text from p. 64.

¹¹⁷⁴ Idem, p. 63-64.

(725) There is no such requirement in TO2's 2006 RUO¹¹⁷⁵ in the Czech Republic, that ST gives as an example of similar forecasting provisions.

7.6.4.2.2 Failure to comply with ST's forecasting conditions triggers payment of penalty fees

(726) According to Annex 14 of ST's 2005 RUO the AO is subject to a penalty where it submits a smaller number of requests for qualification or installation than forecasted.

(727) Annex 12, section 3.4 of ST's 2005 RUO provides that deviations from the forecasted requests of up to 20% are accepted deviations. If the AO submits more requests than forecasted and the allowed deviation, ST is not bound by any deadlines set in Annex 5¹¹⁷⁶.

(728) The penalty is set "individually" based on the formula set in point 3.5 of Annex 12 to ST's 2005 RUO. The penalties for failure to comply with the forecasted amounts were until 1 November 2010 based on the fees for qualification of the local loop and as of 1 November 2010 on the fees for installation of the local loop.

(729) According to Orange, the penalty fee was set in such a way that even a small deviation from the forecasted amount may result in a substantial penalty, in particular when the forecasted volumes are small¹¹⁷⁷.

(730) Moreover, contrary to ST's assertion¹¹⁷⁸, contractual penalties for deviations are not standard industry practice. For instance, ST attempts to justify the penalties by referring to conditions applied by POST Luxembourg when deviations from forecasts occur.¹¹⁷⁹ However, ST does not mention that in Luxembourg there are no penalties fees associated with such deviations.¹¹⁸⁰ There are no penalties fees with regard to forecasting in Austria¹¹⁸¹ either. Also, in the Czech Republic, there are no sanctions linked to the AO's potential failure to comply with its forecasting¹¹⁸². Furthermore, the mere fact that ST never applied that contractual penalty in practice¹¹⁸³ is irrelevant as *inter alia* these penalties rendered the unbundling of ST's local loops unacceptable in the first place.

(731) In addition, Annex 14 of the RUO also foresaw fees for the "*processing of forecasts*" and a "*penalty fee*" for the refusal of a forecast that has not been established in the format requested by ST and that does not contain all the requested information. Those fees were removed from the RUO as of 1 November 2010.

(732) The Commission considers that ST's penalty fees requested in the context where, as shown in recitals (721) to (725), it is very difficult for AOs to make precise forecasts on the number of their requests only 10 days after the conclusion of the collocation agreement and also given that ST's RUO did not contain any forecasting templates

¹¹⁷⁵ Czech RUO of 2006 Doc ID 4578.

¹¹⁷⁶ ST's reply to the RFI 22/10/2010, Q7_4 Annex 12 to the RUO (dated 1 November 2010), section 3.4.3., Doc ID3241.

¹¹⁷⁷ Orange's submission to TUSR, Annex on calculation of cost of access to the local loop, DocID0298, p. 4.

¹¹⁷⁸ ST's Reply to the SO, paragraphs 965-967.

¹¹⁷⁹ ST's Reply to the SO, paragraphs 965-967.

¹¹⁸⁰ E-mail from POST Luxembourg of 8 November 2013, Doc ID 4243.

¹¹⁸¹ E-mail from the Austrian Telecoms Regulator of 9 October 2013 at 03:33, Doc ID 4091.

¹¹⁸² E-mail from the Czech Telecoms Regulator of 16 October 2013 – Doc ID 4211.

¹¹⁸³ ST's Reply to the SO, Recital 968; see also ST's Reply to the LoF, Recital 540.

and therefore made the forecasting process disproportionately onerous in relation to ST's risks and costs.

7.6.4.2.3 The mandatory character of the forecasting

- (733) The disadvantageous terms of forecasting described in recitals (721) to (732) are aggravated by the fact that forecasting was *de jure* mandatory until 1 November 2010 and still remained a *de facto* obligation after that date.
- (734) In the period between 12 August 2005 and 1 November 2010 forecasting was mandatory for AOs. Since 1 November 2010 forecasting is *de jure* voluntary¹¹⁸⁴. However, this does not mean that AOs may decide not to forecast as requested by ST in Annex 12 without consequences for their ability to offer installation of retail services within a predictable timeframe. If the AO chooses not to submit a forecast, ST will not be bound by any deadlines in the unbundling process if the AO submits more than 10 requests for access to the local loop per calendar month¹¹⁸⁵. If, on the other hand, the AO decides to submit forecasts, it is subject to the forecasting terms set in Annex 12 to the RUO.
- (735) Although such situation may be sustainable initially or for very small operators (operators which acquire no more than 120 retail customers per calendar year) it is unsustainable in the long term and for larger operators from the very beginning. Hence, to avoid this uncertainty as regards ST's timeline for the installation of local loops, the AOs have an incentive to comply with the forecasting terms set in Annex 12 to the RUO. Hence, in effect for most operators that would be serving the mass market (unlike GTS Slovakia that serves business customers) the forecasting set in Annex 12 to the RUO will continue to be necessary and *de facto* mandatory.
- (736) Moreover, the mandatory character of forecasting cannot be deemed as standard industry practice – for instance this particular step is not mandatory in Austria¹¹⁸⁶ or Luxembourg¹¹⁸⁷. The Austrian Telecoms Regulator clarified that in Austria "*neither the forecast meetings nor the qualification procedure are requirements before ordering an unbundled loop*"¹¹⁸⁸. The incumbent in Luxembourg explained that in that Member State, the forecasting is done on a voluntary basis and no penalties fees are associated with it¹¹⁸⁹.

7.6.4.2.4 In case of non-compliance with the forecasting, there was no deadline for ST's reply

- (737) ST has 10 working days to conduct the "*qualification of the local loop*". Before 1 November 2010 that deadline however only applied if the request for "*qualification of the local loop*" complied with the forecasted volume of requests in accordance with Annex 12 to the RUO¹¹⁹⁰. If the request fell outside the forecasted volume of requests, there was no deadline for ST's reply. This means that ST had the possibility

¹¹⁸⁴ ST's reply to the RFI 22/10/2010, Q7_4 Annex 12 to the RUO (dated 1 November 2010), section 1.4, Doc ID3241.

¹¹⁸⁵ ST's reply to the RFI 22/10/2010, Q7_4 Annex 12 to the RUO (dated 1 November 2010), section 1.4, Doc ID3241.

¹¹⁸⁶ E-mail from the Austrian Telecoms Regulator of 9 October 2013 at 03:33, Doc ID 4091.

¹¹⁸⁷ E-mail from POST Luxembourg of 8 November 2013, Doc ID 4243.

¹¹⁸⁸ E-mail from the Austrian Telecoms Regulator of 9 October 2013, at 17:26 – Doc ID 4092.

¹¹⁸⁹ E-mail from POST Luxembourg of 8 November 2013 – Doc ID 4232.

¹¹⁹⁰ For details on the binding character of the AO's forecasts of requests for qualification of the local loop see para (719) and the following.

to delay the unbundling process at its discretion. Indeed, in accordance with Table 16, the average length of the qualification process for the requests submitted by GTS Slovakia between 1 January 2010 and 25 October 2010 was 14 days, that is to say beyond ST's deadline of 10 days. Although there have been instances where the qualification process took only 4 days, there have been also instances where the qualification process took more than 40 days¹¹⁹¹.

(738) The Commission considers that there is no logic behind linking the AOs' potential non-compliance with their forecasting with the absence of deadlines for ST in replying to the AOs' qualification requests. ST has not provided any explanations either.

(739) The Commission therefore considers that ST set the forecasting terms so as to make unbundled access to the local loop difficult and unattractive for AOs and to raise the cost of unbundling the local loop.

7.6.4.3. The "qualification" procedure deters AOs from access to ULL

(740) According to the RUO, *"the qualification of the local loop provides the alternative operator with information about the quality of the network resources and the appropriateness of the provision of access to the local loop with respect to the RUO terms"*¹¹⁹². The *"qualification of the local loop"* is the last step before the AO can request access to the local loop, after collocation was put in place.

(741) ST explains that the qualification phase allows AOs to determine whether a specific local loop is suitable for xDSL technology or any other broadband technology they might intend to use before actually placing a firm unbundling order. ST adds that in practice, if ST receives a request from an AO to obtain access to a particular line, it will carry out a physical examination of the line to confirm that the line is suitable for providing broadband service, including the specific service requested¹¹⁹³. ST also clarifies that the qualification phase is usually concluded by submitting either an acceptance or a rejection response to the AO¹¹⁹⁴. In case of acceptance, the AO submits a firm access or installation request or order for provisioning. Within that last phase, ST establishes physical access to the local loop, that is to say establishes the connection to a particular line between the MDF and the AO's equipment¹¹⁹⁵.

(742) In the period between 12 August 2005 and 1 November 2010, qualification of the local loop was mandatory as well as separate from the submission of the requests for access to the local loop¹¹⁹⁶. It was subject to a fee for "administrative qualification of the local loop" of EUR 108.94 (SKK 3 282)¹¹⁹⁷). This fee amounts to EUR 89.05¹¹⁹⁸ since 15 August 2010.

¹¹⁹¹ Based on ST's reply to the Commission RFI of 25 March 2010, DocID2079, p. 5-6 and ST's reply to the Commission RFI of 22 October 2010, Attachment Q10_1, Doc ID3237.

¹¹⁹² See Points 2.8 and 3.1.1.1 of Annex 5 of ST's 2005 RUO, Doc ID 453, p. [22-23, 29]; point 2.13 of Annex 5 of ST's 2009 RUO, Doc ID 3240, p. [20-22] as amended on 01 November 2010.

¹¹⁹³ ST's reply to the SO, paragraph 815.

¹¹⁹⁴ ST's reply to the SO, paragraph 818.

¹¹⁹⁵ ST's reply to the SO, paragraph 819.

¹¹⁹⁶ See Points 3.1.1.1 (full access to ULL) and 3.1.2.1 (shared access to ULL) of Annex 5 of ST's 2005 RUO, Doc ID 453, p. [29, 32]; points 3.1.1.1 (full access to ULL) and 3.1.2.1 (shared access to ULL) of Annex 5 of ST's 2009 RUO, Doc ID 3240, p. [26, 28] as amended on 01 November 2010.

¹¹⁹⁷ Point 2.2.1. of Annex 15 to the RUO, ST's reply to RFI of 17/04/2009; Q_41_1_15, Doc ID 3195.

7.6.4.3.1 "*Qualification*" was mandatory and a separate step from the access to the local loop

- (743) In the period between 12 August 2005 and 1 November 2010, the "*qualification*" of the local loop was mandatory, meaning that AOs were obliged to submit their qualification requests before and separately from their access requests, instead of having the option to do it either way, depending on their concrete needs. After 1 November 2010, the qualification procedure became optional in the sense that the "*qualification*" or the "*verification*" of a line could be performed by ST as before, that is to say within a distinct qualification phase, or directly, in response to the access requests, within the installation phase. AOs had the right to choose between those two alternatives.¹¹⁹⁹ In the latter scenario, it could happen that the AO's access request could be rejected following the verification of the appropriateness of the local loop for the provision of the services requested by the AO.
- (744) The VUS remarks that "*from a technical point of view of the local loop implementation it is illogical to separate the access request for the local loop from the request for qualification of the local loop*"¹²⁰⁰. Orange, supported by Slovanet¹²⁰¹, commented also that: "*the qualification information on local loops should be part of the database of non-public information or simply the qualification should be part of the process of installation of access without additional fees*".
- (745) The Commission considers that the mandatory character of the qualification procedure and the splitting of the "*qualification*" of a local loop from the very request for access to the local loop allowed ST to delay the unbundling and charge AOs additional unnecessary fees. For instance, GTS Slovakia explained that it only orders qualification if ST's database does not contain a certain location; otherwise, given that it considers qualification "*quite expensive*", it simply orders the line without the request for qualification, as the qualification does not give GTS Slovakia significant information ("*it is rather a form of yes/no answer than any provision of detailed measurement data*"). GTS Slovakia specified that currently it submits qualification for only approximately 5-10% of its access requests¹²⁰², which shows that there is no need for qualification in all cases.
- (746) ST provides no explanations as to why the qualification phase was mandatory until 1 November 2010, but argues that "*after qualification became entirely optional, GTS continued to request qualification in a significant number of cases*"¹²⁰³ and bases this affirmation on the fact that in 2011, qualification was provided for [...] of the local loops installed, in 2012, for [...] and in 2013, for [...]. In 2010 (September – December), the percentage that ST presented was [...]¹²⁰⁴, but that should not be considered, as it is irrelevant - until 10 November 2010 qualification was mandatory. The Commission considers that those percentages are even lower in fact, as the qualification requests that ST used also included qualifications that showed positive

¹¹⁹⁸ Point 2.2.1. of Annex 14 to the RUO, Attachment Q7_4 Príloha 14 to ST's reply to the request for information of 22 October 2010, Doc ID3242.

¹¹⁹⁹ Points 2.13, 3.1.1.1 and 3.1.2.1 of Annex 5 of ST's 2009 RUO, Doc ID 3240, p. [20-22, 26, 28] as amended on 01 November 2010.

¹²⁰⁰ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID0136, p. 52.

¹²⁰¹ Slovanet joined Orange's request for TUSR intervention to modify the RUO terms – Doc ID 0484.

¹²⁰² E-mail from GTS Slovakia of 15 October 2013 – Doc ID 4105.

¹²⁰³ ST's reply to the LoF, paragraph 450.

¹²⁰⁴ ST's reply to the LoF, paragraph 449.

outcome, but for which GTS Slovakia eventually decided not to place a firm order for unbundling¹²⁰⁵. ST's figures only show that for a significant number of cases, more than half, GTS Slovakia did not need qualification. It follows that GTS Slovakia could have chosen not to request qualifications in a similar number of cases during the period when qualification was mandatory. The mandatory character of the qualification phase resulted therefore in unnecessary fees and additional delays of the unbundling process.

- (747) ST argues that "*the qualification phase is a standard step in the ULL provisioning process in Europe*"¹²⁰⁶. While "*qualification*" in the sense of "*verification*" of the technical conditions of a line against specific technical requests from AOs, either within a distinct qualification phase or within the ordering process is, indeed, standard in the Union and is not contested by the Commission, none of the incumbents mentioned by ST obliged AOs to undertake qualification of local loops separately from the access requests process, as ST did until November 2010, but allowed the AOs to choose how to proceed.
- (748) ST gives the example of TO2 in the Czech Republic to emphasise the mandatory nature of the qualification procedure in that country. However, contrary to ST's assessment, the qualification procedure was not mandatory in that country, as the qualification process could be separated from the access request or can be submitted together with the latter, at the AO's choice. Indeed, as provided in TO2's 2006 RUO, the AO "*does not have to submit the provide order as well*"¹²⁰⁷. ST bases its conclusion on Annex 14, Section 8.1 of TO2's 2006 RUO: "*Orders that include the qualification, i.e. Provide, Convert, Transfer and Change COS require qualification of subscriber's metallic loop*"¹²⁰⁸. However, that quote does not show that qualification is mandatory, but only provides that when the AO decides to undertake qualification within the ordering process, the access to ULL includes the "*qualification of the subscriber's metallic loop*".
- (749) In its reply to the SO, ST refers to POST Luxembourg's 2001 and 2005 RUO provisions to show that other European incumbents have also implemented a qualification procedure¹²⁰⁹. ST argues that POST Luxembourg's RUO provisions in Luxembourg are similar to the qualification terms in ST's RUO¹²¹⁰. However, the situation in Luxembourg is not comparable to the situation in Slovakia: in Luxembourg qualification was, even in 2001, part of the ordering procedure and therefore not mandatory as a separate step¹²¹¹. As the incumbent explained, if the AOs submit orders after qualification, the qualification fees are part of the

¹²⁰⁵ ST's reply to the SO, foot note 593.

¹²⁰⁶ ST's reply to the SO, paragraph 848.

¹²⁰⁷ Point 3.1.1.7. of Annex 14 of TO2's 2006 RUO - Doc ID 4578, p. 104.

¹²⁰⁸ ST's reply to the SO, paragraph 840.

¹²⁰⁹ ST's reply to the SO, section 4.7 "*Other European incumbents have implemented a qualification procedure*".

¹²¹⁰ ST's reply to the LoF, paragraph 446.

¹²¹¹ Schedule 7 to EPT Luxembourg's 2001 RUO, provided by ST in Annex XI.3 of its reply to the SO: "*The ordering procedure for MPF without migration of services covers the following 2 tiered inter-Party activities:*

- *The OLO's submission of a survey request and EPT's reply to that request in a positive or negative way.*
- *In case of a positive survey the OLO can submit a formal order for the provisioning of MPF".*

installation fees. AOs also have the option of asking for qualification separately – if qualification is requested without ordering afterwards, a special fee is requested¹²¹². Since 2005, the qualification request within the ordering procedure is considered already as an order for unbundling, while during 2001-2005, there was no such presumption and the AO had the possibility to submit a firm order after the qualification request¹²¹³.

- (750) There was no mandatory qualification procedure in Austria either. The Austrian Telecoms Regulator explained that "*an optional pre-qualification procedure prior to order unbundled loops – subject to a charge – existed until 2009*", but that procedure "*was abolished due to lack of interest by unbundling partners*". After that date, the first technical information on a loop was usually given during the ordering process, in the order confirmation sent by the incumbent¹²¹⁴. In the United Kingdom, there is no mandatory "*qualification*" of local loops for full ULL access, as the system is different¹²¹⁵.

7.6.4.3.2 "Qualification" versus availability of ST's network information

- (751) ST specifies in its reply to the SO that, during the qualification phase, it must check certain "*basic preconditions for unbundling a line*", (i) whether a workable and uninterrupted line between the end-users' premises and the MDF exists, (ii) whether an AO has established its presence at a particular MDF by collocation, and (iii) whether the particular MDF has sufficient capacity. In addition, ST would also need to check "*parameters that depend of the nature of the alternative operator's request*" such as (i) the concrete technical parameters of a line depending on a specific technology or (ii) the exact length of a specific line¹²¹⁶.
- (752) The Commission does not contest the necessity of verifying the detailed technical information on a specific loop, including the "*parameters that depend of the nature of the alternative operator's request*", which cannot be provided on each and every line before a specific request is introduced by an AO¹²¹⁷.
- (753) However, the Commission considers that it is not necessary that ST verifies the "*suitability*" of the local loops for unbundling or the "*basic preconditions for unbundling a line*" within the qualification process, at such a late stage of the unbundling process and against additional fees. That information should have been provided at the stage of the provision of relevant network information, as shown in

¹²¹² E-mail from POST Luxembourg of 8 November 2013 – Doc ID 4232: "*If an operator submits a survey request without ordering afterwards the unbundling service, a special survey fee has to be paid. If the operator submits a survey request with ordering afterwards the unbundled service, this survey fee is part of the installation fee for the unbundled line*".

¹²¹³ *Ibidem*: "*In the years 2001-2005, the operator could submit after this survey a firm order for this unbundling service, nowadays the first survey request is already considered as an order for the unbundling service under condition of a positive survey*".

¹²¹⁴ E-mail from the Austrian Telecoms Regulator of 11 October 2013 at 09:33 – Doc ID 4091.

¹²¹⁵ If an AO, after having been granted access to a local loop by BT Openreach, realises that the line is not capable of being used for DSL, it can order a chargeable service called special fault investigation, which is aimed at identifying and resolving the problems.

¹²¹⁶ ST's reply to the SO, paragraph 828.

¹²¹⁷ ST's reply to the SO, paragraph 829, where it explains that "*ST cannot collect and maintain information on the specific technical parameters of its lines for all possible technologies that could potentially be used by alternative operators*" as well that "*technical parameters of local loops change regularly as they are influenced by technologies and services deployed on neighbouring lines in the same cable*".

section "7.6.2. *ST withheld from AOs network information necessary for the unbundling of the local loops*". As also emphasised by VUS: "*The basic information concerning the 'quality of the network resources' should be included in the documents provided within the framework of the "Confidentiality Agreement". If the alternative operator were to obtain information about quality of the local loop in the given place at such a late phase of the local loop unbundling it would be questionable whether such process is sufficiently transparent.*"¹²¹⁸

7.6.4.3.2.1 *Verifying within the qualification process whether a workable and uninterrupted line exists is superfluous*

- (754) ST argues that it needs to verify, within the qualification process, whether a workable and uninterrupted line between the end-users' premises and the MDF exists. However, verifying the existence of a workable and uninterrupted line between the end-users' premises and the MDF was superfluous in particular between 12 August 2005 and 9 May 2009, when only active lines were subject to unbundling, although ST's unbundling obligation applied to passive lines as well¹²¹⁹. Indeed, all the active lines, meaning lines over which ST provided a service to end-users¹²²⁰ were inevitably in fact continuous, workable and uninterrupted lines between the customer's premises and the MDF, as otherwise ST would not have been able to provide services to end-users over those particular lines.
- (755) After 9 May 2009, not only active lines over which ST provided a service to consumers, but also passive lines – for which there was a physical circuit in place and which could be unbundled – were made available for unbundling by ST. ST could have provided AOs with information on which lines were active and which were passive within ST's network information database. Indeed, ST knew, without the physical examinations that a qualification process requires, which were the lines over which services to consumers were provided, that is to say active lines. The notion of "active lines" comprises, in ST's view, the lines over which some services were provided by ST or over which AOs provided services, using ST's wholesale services such as "ADSL Partner Naked" as from 2006¹²²¹. Therefore, the number of active lines, over which a service is provided by ST or by an AO with whom ST has a wholesale contract in place, should be known to ST. As also mentioned at recital (550), ST is aware of the "*passive lines*" that could be unbundled, that is to say the lines for which a physical circuit is in place, as those are the lines capable of broadband usage, which are not "*active*".
- (756) As already emphasised at recital (451), without the information about the number of connected lines per MDF, which is part of the information on "*availability of local loops*" within the meaning of Article A.2. of the Annex to Regulation (EC) No 2887/2000 and of Article A.2. of the Annex II to Directive 2002/19/EC, the AOs are not able to properly prepare their business plans, in accordance with their real business potential at a particular MDF. There is no objective reason why ST was providing that information at such a late stage of the unbundling process and subject to additional fees. Indeed, an AO would not have submitted a qualification request

¹²¹⁸ See "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID 0136, p. 50.

¹²¹⁹ See section, "7.6.3.1. *ST unjustifiably excluded passive lines from the scope of its ULL obligation*".

¹²²⁰ ST's reply to the SO, paragraph 754.

¹²²¹ ST's reply to the LoF, paragraph 390.

regarding a line that it knew, from the beginning, that it was a passive line that could not have been unbundled. Therefore, it can be concluded that the only reason for the qualification is to delay the process and deter AOs from unbundling.

7.6.4.3.2.2 *Verifying within the qualification process whether an AO has established its presence at a particular MDF by collocation is not necessary*

- (757) ST argues that it has to verify the existence of collocation at MDF level where the line in question is connected. The Commission observes that, as a matter of principle, there is no need for ST to verify that aspect within the qualification process, as that information is normally already available, as part of ST's information database, before an AO requests qualification of that line. Indeed, the AO only needs to know to which MDF the line in question is connected, in order to check whether it has collocation installed at the particular MDF. In that context, ST emphasises in its reply to the SO that it provided the necessary information to AOs, on the basis of the information contained in its database. In principle, as ST claims, once AOs are given the address of a specific customer, they can find the closest MDF and determine which lines are connected to it¹²²², which means that there is no "qualification" needed in this respect. In addition, ST acknowledged that information on whether collocation works are being conducted and when they will be completed is available in ST's central office in Bratislava and is also available to AOs, in the database on ST's network¹²²³. Hence, there is no reason to examine whether an AO has installed its collocation at a particular MDF.
- (758) One of the reasons for a negative outcome of GTS Slovakia's qualification requests between 1 January 2010 and 25 October 2010¹²²⁴ was that "GTS Slovakia did not have a fully installed collocation space/place"¹²²⁵. That means that, contrary to ST's assertions, ST's database does not contain all the information necessary for unbundling of the local loops. It is clear that GTS Slovakia would not ask whether it has collocation in place at a particular MDF, as GTS Slovakia knows exactly at which MDFs its collocation has been installed. It follows that GTS Slovakia's qualification requests were rejected because GTS Slovakia was not able to identify, on the basis of ST's network information, to which MDF a particular line is connected. This was confirmed by GTS Slovakia, who explained that, given that qualification is quite expensive (over EUR 80 per line), it uses it only in cases where GTS has a potential customer that might be within the reach from its collocation site, but it is not featured in the database of connected streets or places provided by ST¹²²⁶. It follows that there are situations when GTS does not know whether there is collocation installed for a specific line that it intends to unbundle, and that is due to the fact that ST did not provide the relevant information in its database, contrary to its legal and regulatory obligations. Due to ST's misconduct, GTS Slovakia was therefore obliged to ask for the relevant information through qualification requests and incur the additional fees stemming from it.
- (759) Once a qualification request is submitted, an AO can also receive a negative response from ST due to incomplete verification by ST of whether there is collocation in place

¹²²² ST's reply to the SO, paragraph 853.

¹²²³ ST's reply to the SO, paragraphs 834 and 835.

¹²²⁴ As of 1 November 2010 qualification of a local loop is a voluntary step in the unbundling process.

¹²²⁵ ST's reply to the Commission RFI of 22 October 2010, Attachment Q10_1, Doc ID 3237.

¹²²⁶ E-mail from GTS to the Commission, of 15 October 2013 – Doc ID 4105.

at a particular MDF. Indeed, ST explains that the engineer responsible for the physical work at the MDF level is only able to check the existence or absence of collocation against the data on ST's systems, but he cannot verify if collocation works are being conducted and when they will be completed, as that information is only available in ST's central office in Bratislava¹²²⁷. However, nothing prevents the engineer in question to request the relevant information from the ST's central office in Bratislava, in order to deal in a diligent manner with the AO's qualification request. It might be, for instance, that collocation works are due to be ready, in accordance with the collocation agreement, in a matter of days. Therefore, instead of continuing with the examination of the technical conditions of the line, ST prefers to stop the unbundling process at this stage and formally reject the qualification request in question, although, from a technical point of view, the line in question could have been fit for unbundling within a very short timeframe. That results in further delays of the unbundling process and supplementary fees, as the AO would have to request qualification again for that particular line.

- (760) ST argues that in several instances GTS submitted a request for qualification of specific lines without first checking the database on ST's network, which resulted in a negative response of qualification because [...] ¹²²⁸. Those instances would explain why several of the GTS's Slovakia qualification requests resulted in a negative outcome because of lack of fully installed collocation space or place. That cannot be accepted for the following reasons: First, ST only gives one such example and not several, and hence it cannot be concluded that GTS Slovakia usually behaved in a negligent way and did not check ST's database before submitting a qualification request. Second, it is clear from the context of the e-mail-correspondence submitted by ST that GTS Slovakia's oversight was based on lack of information on ST's MDFs and not on negligence. It can notably be deducted from the e-mail-correspondence that GTS Slovakia's employee requested "*qualification*" of lines of further customers living on the same square for a second time. He was assuming that those lines would be connected to the same MDF, namely the one on the square. However, it turned out that those lines were actually connected to a completely different MDF, where GTS Slovakia had no collocation. However, such cases constitute a rare exception and not a regular phenomenon when requesting "*qualification*". Third, even in such exceptional cases, ST only has to double-check its database in order to deal with GTS's request. ST explains in its reply to the SO that the qualification process involves a "*physical examination of the line*" ¹²²⁹. However, in those cases, that physical examination is not necessary, as the relevant information is already available in ST's database. It follows that a negative response from ST, on the basis of verification of its database, is considered by ST as being part of the qualification process, subject to the same qualification fees (EUR 80) as the ones applicable by ST for a physical examination of the line.

¹²²⁷ ST's reply to the SO, paragraph 834.

¹²²⁸ ST's reply to the SO, paragraph 835.

¹²²⁹ ST's reply to the SO, paragraph 818: "*Within the 'qualification phase', the access provider conducts physical examinations of the relevant local loop in order to verify its existence at a given location, measure the technical parameters of the local loops, and ensure that there will be no interference between the line subject to qualification and the other lines providing other services in the same cable tree*".

(761) The Commission considers that had ST provided sufficient information about its network to AOs at an early stage of the provision of network information, no such verification within the qualification procedure would have been needed. There is no reason for ST not to provide that information as it is already in its possession, so that the only reason for providing it within the qualification process and against an administrative fee is to delay and deter AOs from local loop unbundling.

7.6.4.3.2.3 *Verifying within the qualification process whether there is enough capacity at the MDF level is not necessary*

(762) The last element that ST verifies within the qualification process, as part of the "*basic preconditions for unbundling a line*", is whether there is enough capacity at MDF level. ST explains that an active line serving a particular customer could be cancelled and therefore have a "*deactivated*" status. That line might not be reactivated subsequently, as other customers might have requested new lines in the same area, hence exhausting available capacity¹²³⁰.

(763) However, ST did not have to undertake that verification at all between 12 August 2005 and 9 May 2009, as all the lines for which there was no capacity at MDF level were not subject to unbundling of the local loop. Indeed, those lines were considered by ST as "*non-active*" and therefore excluded from the scope of ST's obligation to unbundle¹²³¹. After 9 May 2009, the passive lines, which were subject to unbundling as they had a physical connection between the MDF and the customer's premises, but for which there was no enough capacity at the MDF level, should have been identified by ST within its network information provision to AOs, so that the AO could assess the business potential at a certain MDF, before the AO makes investments into collocation.

(764) That late provision of essential information allows ST not only to further delay the unbundling process, but also to keep the AO uninformed until the very late stage of it. AOs have to first invest into collocation at MDF level, with the risk that they are informed, at the later stage of the qualification process, that there is no sufficient capacity at the MDF. ST argues that "*the likelihood that qualification of all lines connected to a particular MDF would show unsatisfactory results is very low*"¹²³² and refers to a "*below [...] %*" ratio¹²³³. However, that percentage is far from being "very low" and the possibility that [...] % of lines are not ready for unbundling at a particular MDF, after collocation is built, only underlines the importance for AOs of receiving appropriate information before they build collocation. In addition, it is unclear how ST was able to give such an approximation when it argues that final assessment depends on the concrete technical parameters of the lines at a particular MDF and of the AO's technical requests.

(765) The qualification of a certain line could not help AOs to decide whether to invest or not in collocation at a certain MDF as it is done at much later stage than the time the investment decisions need to be taken. Qualification cannot therefore compensate for

¹²³⁰ ST's reply to the SO, paragraph 757, second point.

¹²³¹ ST's reply to the SO, paragraph 758: "*It may thus frequently happen that a non-active line cannot be unbundled either because of the absence of physical circuits (...) or because there is no available capacity*".

¹²³² ST's reply to the SO, paragraph 836, second point.

¹²³³ ST's reply to the SO, footnote 595.

the lack of information on the connected lines to be unbundled at an earlier stage of the process. As ST explains, "*the decision of an alternative operator to collocate at a specific MDF site is not based on the qualification of one particular line for one particular customer*"¹²³⁴. Until ST completes the qualification of each local loop, the AO cannot estimate how many local loops can be unbundled in the given location at the given MDF and hence cannot prepare an adequate business plan and assess whether it makes sense to invest into collocation at that location.

- (766) Had ST provided that type of information to AOs in advance, no such verification would have been needed at such a late stage, within the qualification process and against a qualification fee. Indeed, the other reason for rejection of GTS Slovakia's requests in the period between 1 January 2010 and 25 October 2010, in addition to the absence of fully installed collocation at a given MDF, was insufficient capacity on the respective MDF¹²³⁵. Again, that shows that this information should have been known earlier. If GTS Slovakia knew in advance that, for a particular line, there was no sufficient capacity at the MDF level, it would not have requested qualification for that particular line. Therefore, unnecessary delays and fees for AOs could have been avoided.
- (767) According to Annex 5 to the RUO¹²³⁶, the AO could also request qualification of the local loops before building collocation. However, that would not help the AO to decide whether it makes sense to build collocation or otherwise. Indeed, the AO would have to ask for qualification of all lines connected to a particular MDF, in order to assess its business potential. As also acknowledged by ST, "*basin a decision to collocate on the qualification of one line would not be economically rational*"¹²³⁷.
- (768) In addition, the AO would incur the costs of qualification twice. Given that the results of the qualification of the local loops are only valid for 10 days (between 12 August 2005 and 1 November 2010) and 20 days after that date¹²³⁸, the AOs would have maximum 10 and respectively 20 days to build the collocation and also submit the requests for access to the local loop. That is impossible in practice, as the duration foreseen by ST for implementing collocation (that is to say construction time, not including investigation and planning prior to the conclusion of the collocation agreement) is 9 weeks¹²³⁹. That means that the qualifications, which were mandatory until 1st November 2010, had to be requested again just before the requests for access to the local loop. Orange, supported by Slovanet, also complained about this issue to TUSR: "*So, to have a 100% certainty that the alternative operator's customer will have a quality line for the receipt of services from the alternative operator, the alternative operator needs a double qualification!*"¹²⁴⁰. Therefore, the AO's option to request qualification of the local loop before building collocation has no practical relevance, as the AO would have to pay twice, without

¹²³⁴ *Ibidem*.

¹²³⁵ ST's reply to the Commission RFI of 22 October 2010, Attachment Q10_1, Doc ID 3237.

¹²³⁶ See Point 2.8.1 of Annex 5 of ST's 2005 RUO, Doc ID 453, p. [22].

¹²³⁷ ST's reply to the SO, paragraph 836, second point..

¹²³⁸ Points 2.8.5 of Annex 5 of ST's 2005 RUO, Doc ID 453, p. [23] and Point 2.13.5 of Annex 5 of ST's 2009 RUO, Doc ID 3240, p. [21] as amended on 01 November 2010.

¹²³⁹ Doc ID 2079 – ST's reply to the Commission's RFI of 25 March 2010, reply to Question 9 (vi).

¹²⁴⁰ Orange's submission to TUSR of 20 October 2005, Annex on steps in the unbundling process, timing and cost, DocID0298, p. 2-3 and Slovanet's letter to TUSR dated 2 February 2006 Doc ID0484.

being able to obtain information on the business potential of a particular MDF, unless it requests qualification for all lines and therefore has to incur double fees for all these lines.

- (769) The Commission checked the rejection rate and the reasons for rejection of qualification requests submitted by GTS Slovakia (the only AO which requested qualification of local loop lines to ST) in the period between 1 January 2010 and 25 October 2010¹²⁴¹. Table 17 provides an overview of the degree of acceptance or rejection of the qualification requests and of the access to the local loop requests.

Table 17: Overview of requests for qualification of the local loop (all of which were submitted by GTS Slovakia) for the period 1 January 2010 to 25 October 2010¹²⁴²

Qualification of local loop	Number
Qualification requests total	[...]
Requests for which no answer was provided (on-going)	[...]
Accepted qualification requests	[...]
Qualification requests rejected	[...]
Requests for access to the local loop	[...]
Requests for access to the local loop accepted	[...]
Local loops installed	[...]

- (770) During that period ST received [...] requests for qualification of the local loop in total from GTS Slovakia. ST "qualified" [...] of them and gave a positive result for [...] lines and a negative one for [...] lines. ST rejected [...] requests out of [...], that is to say [...] of GTS's qualification requests during this period, which represents a high rejection rate.
- (771) According to ST¹²⁴³, there were only two rejection reasons, the lack of fully installed collocation (for [...] requests) and lack of sufficient capacity at the MDF level in question (for [...] request). That means that all rejections of GTS Slovakia's requests were based on verification of information that was available beforehand and should have been already communicated at an early stage of the unbundling process. None of the qualification requests submitted by GTS Slovakia triggered the analysis of the specific technical parameters of the lines in question and of GTS Slovakia's technical requirements. ST's high rejection rate could have substantially diminished or even disappeared as if GTS Slovakia had had appropriate information, it would have never submitted qualification requests for lines connected to a MDF where collocation was

¹²⁴¹ As of 1 November 2010 qualification of a local loop is a voluntary step in the unbundling process.

¹²⁴² Based on ST's reply to the Commission RFI of 25 March 2010, DocID2079, p. 5-6 and ST's reply to the Commission RFI of 22 October 2010, Attachment Q10_1, Doc ID3237.

¹²⁴³ Doc ID 3237.

not installed or where there was insufficient capacity. Therefore, unnecessary fees and delays could have been avoided.

- (772) ST argues that this rejection rate corresponds to a "[...] from *GTS for qualification of the local loop where both operators had minimal experience with the process*" and explains that between 1 November 2010 and June 2012, out of the [...] qualification/ULL provide orders that had been submitted to ST, only [...]% ([...]) were rejected¹²⁴⁴. However, that period of time is after the Commission's investigation period, therefore ST's statistics are not relevant. In addition, the [...] % rejection rate corresponds to a time period (1st January 2010 - 25 October 2010) when qualification was mandatory and had to be requested separately and before any access requests. That is in contrast to the [...] % rejection rate, which corresponds to a time period when qualification was optional and when, as ST specifies, some loops have been activated without a previous qualification¹²⁴⁵. That difference in percentages shows in fact that when qualification was mandatory, a higher rejection rate was registered in comparison with the time period when qualification was optional, meaning that mandatory qualification led to additional fees and further delays, as opposed to optional qualification.
- (773) The Commission further observes that although section 2.8.5 of Annex 5 to the RUO foresees the possibility of a negative outcome of the qualification process, the criteria for qualification are unknown to the AOs, which is also emphasised by the VUS in its 2005 Assessment Report¹²⁴⁶. Indeed, it is not clear what assessment, if any, ST undertakes during the qualification of the local loop process, in order to decide whether a particular local loop is fit for unbundling or otherwise and under what technical conditions. As also emphasised by GTS, the AO only receives a yes or no answer¹²⁴⁷ and does not know the reasons for rejection of its qualification request. In addition, ST's RUO does not contain any templates for qualification requests, as also noted by the VUS¹²⁴⁸.

7.6.4.3.3 The results of the "qualification" should not expire with the reservation

- (774) In the period between 12 August 2005 and 1 November 2010, once the AO obtained a positive qualification of the local loop, it had to submit a request for access to the local loop within a 10 day deadline until 1 November 2010 and within a 20 days' deadline after that date, as otherwise the qualification of the local loop was no longer valid.¹²⁴⁹ ST submits that this deadline corresponds to a reservation period, on the principle of "*first come, first served*". During the 20 day deadline a particular line is reserved for the first operator who made the original request and cannot be unbundled for another operator or used by ST for its retail operations. ST explains that if the 10 day period and, respectively, the 20 day period expire whilst there is no

¹²⁴⁴ ST's reply to the SO, paragraph 833.

¹²⁴⁵ ST's reply to the SO, foot note 593.

¹²⁴⁶ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID0136, p. 50.

¹²⁴⁷ E-mail from GTS Slovakia of 15 October 2013 – Doc ID 4105.

¹²⁴⁸ "*ST's RUO contains no template of the request for qualification, for this reason it is not possible to ascertain the technical content of this step from the point of view of the needs of the alternative operator*" - *Ibidem*.

¹²⁴⁹ See Point 2.8.5. of Annex 5 of ST's 2005 RUO, Doc ID 453, p. [23]; point 2.13.5 of Annex 5 of ST's 2009 RUO, Doc ID 3240, p. [21] as amended on 1 November 2010.

competing request for the same line, the line can still be unbundled by the same operator that made the original request¹²⁵⁰. However, ST's explanation cannot be found in the RUO, which only sets the validity of the qualification and not the duration of the reservation. ST's RUO only provides that the qualification is no longer valid, once the deadline expires¹²⁵¹, which means that the AO would have to submit another qualification request for the same line, contrary to ST's interpretation. Moreover, even if the deadline is set for reservation purposes, as ST explains, it is unclear why the results of the qualification, which is a technical inquiry, should also expire together with the reservation. Also, it is unclear whether the reservation disappeared after 1 November 2010, when the qualification procedure became optional, or whether in order to have a reservation the AOs have to order qualification of the local loop first.

- (775) In conclusion, the Commission is of the view that ST's terms and conditions regarding the qualification process were unfair. In particular, ST withheld the necessary information concerning the basic preconditions for unbundling until the qualification phase instead of providing that information within its network database information. That allowed ST to further slowdown the unbundling process and to charge AOs fees for it.
- (776) Moreover, the Commission considers that ST designed the qualification procedure as a mandatory phase, separate from the ordering process and subject to additional fees until 1 November 2010, in order to delay the unbundling process, raise AOs' costs and deter them from unbundling local loops.

7.6.4.4. ST's terms and conditions regarding repairs, service and maintenance

- (777) The purchasing decision of an end-customer is not only influenced by the price and characteristics of the product but also by the quality of repairs, services and maintenance offered by the provider. Additionally, satisfactory terms of repairs, service and maintenance are of vital importance for the end-customer to stay with the provider after the conclusion of the contract and not to switch to another provider with proper repairs, service and maintenance terms.
- (778) When providing services over local loops, the quality of repairs, service and maintenance terms are completely dependent on the incumbent. If the incumbent offers and applies disadvantageous terms in that respect, the AO is not only incapable to acquire and maintain customers but is also disadvantaged in competing with the incumbent, resulting in loss of customers. It follows that disadvantageous repairs, service and maintenance terms offered by an incumbent discourage and even prevent AOs from unbundling local loops and from providing services to customers over that network. Furthermore, the situation continues to deteriorate if the incumbent refuses to improve those terms over the years. Both scenarios took place in this case.
- (779) In this context the Commission notes as disadvantageous terms in particular: (i) the lack of proper definition of the notion "*planned*" and "*unplanned works*" in the RUO, (ii) the unclear distinction between "*unplanned works*" and "*defaults*", which leaves

¹²⁵⁰ ST's reply to the SO, paragraph 836, third point.

¹²⁵¹ See Point 2.8.5. of Annex 5 of ST's 2005 RUO, Doc ID 453, p. [23]; point 2.13.5 of Annex 5 of ST's 2009 RUO, Doc ID 3240, p. [21] as amended on 1 November 2010.

the way open to unjustified behaviour (iii) the short periods for informing the AO in case of "planned" or "unplanned works" conducted by ST and (iv) the shifting of responsibility when the AO is deemed not to be cooperative.

7.6.4.4.1 The lack of proper definition of the notion "planned" and "unplanned works"

- (780) ST's 2005 RUO defines "planned works" in broad terms¹²⁵²: "*Planned works involve scheduled outages of the public telecommunications network operations or planned works and preventive (technical) measurements that could potentially cause service disruptions to the public telecommunications network operations*".
- (781) ST's 2005 RUO defines "unplanned works" in broad terms as well, as they "*include an unplanned interruption of the provision of the electronic communication services or other unplanned activities that may lead to the interruption of provision of the electronic communication services on the ST's side*"¹²⁵³.
- (782) ST explains that "planned works" typically involve activities linked to the development or upgrade of the network¹²⁵⁴ and "unplanned works" refer to "*events that ST could not have objectively envisaged or planned in advance*". ST gives several such examples of "unplanned works", amongst which: situations where ST conducts works to move underground cables upon request of real estate developers or landlords, maintenance of its network, network refurbishment or other necessary modifications¹²⁵⁵. However, the Commission notes that ST refers to the same type of events (maintenance of its network, network refurbishment or other necessary modifications) as "unplanned works"¹²⁵⁶, which shows that ST has a large margin of manoeuvre when qualifying a certain event as requiring "planned" or "unplanned works".
- (783) In addition, ST's referrals to its internal process manual which is not disclosed to AOs are also irrelevant in this regard¹²⁵⁷. For instance, ST's internal schedule of "planned works" is not public, AOs cannot assess which events are qualified as "planned works" or envisage the frequency or verify the occurrence of "planned works"¹²⁵⁸.
- (784) In a context where ST has to inform AOs about "planned works" five working days in advance and one working day in advance about "unplanned works", ST's unclear definitions result in uncertainty for AOs as to the notice period during which they should receive information about envisaged works from ST and also leaves room for potential abuses by ST.

7.6.4.4.2 Unclear distinction between "unplanned works" and "defaults"

- (785) ST's internal documents do not contain a reliable definition or criteria of "unplanned works" or "defaults". ST explains that "*defaults are problems that are reported to ST by its customers, including AOs and which ST is responsible for solving within three working days*". While in the case of unplanned works the AO is given advance notice

¹²⁵² Point 1.8. of Annex 11 of ST's 2005 RUO, Doc ID 453.

¹²⁵³ Point 1.11. of Annex 11 of ST's 2005 RUO, Doc ID 453.

¹²⁵⁴ ST's reply to the SO, paragraph 910.

¹²⁵⁵ ST's reply to the SO, paragraph 906.

¹²⁵⁶ ST's reply to the SO, paragraph 906.

¹²⁵⁷ ST's Reply to the SO, paragraph 909.

¹²⁵⁸ See also Recitals (785) et seq in this respect.

of the interruption of service, in the case of defaults there is no advance notice, as it is the AO that reports the default to ST¹²⁵⁹.

- (786) Both "*unplanned works*" and "*defaults*" may lead to service interruptions. As already shown in recitals (780) to (782), ST's 2005 RUO defines "*unplanned works*" in broad terms, not containing any criteria allowing AOs to differentiate them from "*defaults*". Even after the completion of "*unplanned works*" AOs are not able to verify the reasons for service interruptions and hence to distinguish between "*defaults*" and "*unplanned works*", as also pointed out by the VUS, which believes that ST should consider a possibility for the AO to verify the reasons for the unplanned interruption of service¹²⁶⁰.
- (787) ST is therefore able, due to the lack of transparency around definitions, to qualify other types of events, especially defaults as "*unplanned works*"¹²⁶¹. Whereas ST does not bear any responsibility for the damages caused by the service and removal of defaults due to "*unplanned works*"¹²⁶², ST is responsible for interruptions of the services due to "*defaults*". The distinction between "*unplanned works*" and "*defaults*" hence appears to be artificial and designed to reduce the instances when ST would be liable for the default and obliged to compensate the AO for the service interruption. ST may thus unilaterally decide who will bear the costs and responsibility for default clearance, what is also hardly acceptable for an AO.
- (788) ST explains that the concept of "*unplanned works*" was not designed to reduce ST's liability, but simply reflects the content of ST's internal process manual of 2000¹²⁶³. It also argues that the difference between unplanned works and defaults is neither "*unclear*", nor "*artificial*"¹²⁶⁴. The Commission considers, first, that the operational process in relation to "*unplanned works*" described in the internal documents of ST¹²⁶⁵ is irrelevant in this respect and cannot serve as a justification for the following reasons: first, ST's internal documents are not public, so that AOs (who only have access to ST's RUO) cannot envisage the frequency of "*unplanned works*" or assess which events qualify as "*unplanned works*". Secondly, ST's explanation of differences between "*unplanned works*" and "*defaults*" according to internal documents shows that there are merely differences in handling but not in the qualification of events as "*unplanned works*" or "*defaults*"¹²⁶⁶. Given that both events are "*unplanned*", have to be solved fairly quickly and that appropriate definitions are missing, there is nothing hindering ST in qualifying as "*unplanned works*" an event which was initially reported as a "*default*" and handling it as such.
- (789) Furthermore, the fact that service interruptions almost always affect lines of several AOs and ST's retail customers and are reported to them¹²⁶⁷ is irrelevant as well. ST is namely still able to qualify a "*default*" reported by one AO as "*unplanned works*", announce it to all other affected AOs and its own retail customers and in the end bear

¹²⁵⁹ Ibidem.

¹²⁶⁰ "*Regulatory Standpoint to proposal of DSL for Doma Mini and SCP*", 19 December 2005, Doc ID 0136, p. 35-70, quote from p. 28 of the document.

¹²⁶¹ Ibidem.

¹²⁶² Point 1.7. of Annex 11 of ST's 2005 RUO, Doc ID 453.

¹²⁶³ ST's reply to the SO, paragraph 905.

¹²⁶⁴ ST's reply to the SO, paragraph 907.

¹²⁶⁵ ST's Reply to the SO, paragraph 905 and the following.

¹²⁶⁶ ST's Reply to the SO, paragraph 907 et seq.

¹²⁶⁷ ST's Reply to the SO, paragraph 908.

the costs and responsibility for the repairs only towards its own retail customers but not towards other AOs. In this context ST argues that another differentiating factor is constituted by the fact that all service interruptions are published on a dedicated part of ST's web pages¹²⁶⁸. However, the examination of that website revealed that it provides only information on planned interruptions and not on all service interruptions. Additionally, ST did not adduce any evidence on when this website was created, especially if it already existed in the period between 2005 and 2010 or which defaults have actually been announced and in what manner. Therefore, contrary to ST's assumption, the lack of transparency around the notions of "unplanned works" and "defaults" opens the door to potential abuses and discriminatory behaviour in terms of responsibility for damages due to "unplanned works", that ST does not bear.

7.6.4.4.3 Short periods for informing the AO in case of works conducted by ST

- (790) According to ST's 2005 RUO, ST will inform AOs about "planned works" five working days in advance¹²⁶⁹. As to "unplanned works", ST's 2005 RUO provides that ST will inform AOs one working day in advance¹²⁷⁰.
- (791) In practice those periods for informing AOs are too short and do not allow them to inform their customers adequately and in a timely manner. As regards the "planned works", there is no valid reason to set such short period of time for the notification. As the notion "planned" already indicates, the programme of "planned works" is normally set for a long period ahead. As ST itself indicates in its reply to the SO¹²⁷¹, in accordance with ST's process manual, planned works "were based on annual plans for the scheduled maintenance of ST's network including the necessary technical measurements". That means that ST was actually able to inform AOs much earlier than five days before the start of the "planned works". This was also in line with VUS' remarks in its 2005 Assessment Report: "Given that the program of planned works is set for a relatively long period there should be a possibility to extend the notification period of 5 days that appears to be too short for a timely informing the end user (...)"¹²⁷².
- (792) The short period for informing AOs about "unplanned works" is also not justified. It cannot be imagined that ST could not inform AOs more than one day before about "unplanned works" as those that ST consider as falling under that category, situations where ST conducts works to move underground cables upon the request of real estate developers or landlords, maintenance of its network, network refurbishment or other necessary modifications, normally require minimum advance planning. In addition, ST contradicts itself regarding the "unplanned" nature of those events when it

¹²⁶⁸ See <http://www.telekom.sk/osobne/pomoc-a-podpora/servis-pre-vas/aktualne-vypadky/>, Doc ID 4844.

¹²⁶⁹ Point 1.9. of Annex 11 of ST's 2005 RUO, Doc ID 453.

¹²⁷⁰ Point 1.12. of Annex 11 of ST's 2005 RUO, Doc ID 453; Point 1.12 of Annex 11 of ST's 2005 RUO has been amended by ST's 2009 RUO, Doc ID 3205 insofar as in case of unplanned works the AO will "normally" be informed 3 working days in advance and in exceptional cases only 1 working day in advance. Given that ST's 2009 RUO does not define the notion "extraordinary cases" where ST informs the AO 1 working day in advance the modification does not substantially change the object of this provision.

¹²⁷¹ ST's reply to the SO, paragraph 911.

¹²⁷² "Regulatory Standpoint to proposal of DSL for Doma Mini and SCP", 19 December 2005, Doc ID 0136, p. 35-70, quote from p. 28.

acknowledges that "*unplanned works*" are in fact "*generally scheduled approximately one or two weeks in advance*"¹²⁷³.

- (793) Although ST submits TO2's 2006 RUO example to show that its notice periods are very similar to those defined by ST, those alleged similarities are very relative – whereas ST's notice period for network modifications and refurbishing is one day, TO2's 2006 RUO foresees a notification period of at least five working days¹²⁷⁴.
- (794) The possibility for AOs to raise objections against and to request rescheduling of announced works¹²⁷⁵ is irrelevant in that respect and cannot serve as a justification in particular for two main reasons: first, that possibility is only contained in ST's internal guidelines¹²⁷⁶ which are not published in its RUO, and hence not known by AOs. Secondly, even if an AO complains about the short period, it has no right to reschedule, but only to try to seek a compromise solution with ST, within two days following the receipt of a notice from ST¹²⁷⁷.
- (795) Therefore, there is a considerable risk that ST informs AOs at very short notice of one day even in cases where there is no emergency requiring "*unplanned works*" on such short notice, without the AOs having leeway to reschedule these works.

7.6.4.4.4 Shifting of responsibility when the AO is deemed not to be cooperative

- (796) In accordance with ST's 2005 RUO¹²⁷⁸, the interruptions caused by the fact that the AO fails to cooperate in the repair of the default are the latter's responsibility. The RUO contains no explanation as to what is expected from the AO to satisfy this requirement or what shall be understood by the notion "*cooperation*". According to Orange those terms imply that whenever ST considers that the AO does not render sufficient cooperation in repairs, the responsibility for the default is shifted to the AO¹²⁷⁹.
- (797) That means that whenever ST considers that the AO does not cooperate in repairs, the responsibility for the default is shifted to the AO. ST considers that it is normal and in line with business practice to shift responsibility if the AO is unwilling to cooperate to allow ST to make the necessary repairs¹²⁸⁰. Such clause could only be considered as perfectly normal if it was dependent on an objective and transparent assessment of the AO's cooperation as such and not on ST's subjective qualification of AO's cooperation.
- (798) ST submits a table showing the number of faults caused by reasons extraneous to ST's network¹²⁸¹. ST concludes that all the faults caused by reasons beyond ST's network are necessarily faults due to lack of cooperation by ST's wholesale customers or their end-users¹²⁸². However, it is not because ST considers that a fault

¹²⁷³ ST's reply to the SO, paragraph 907.

¹²⁷⁴ ST's reply to the SO, paragraph 898.

¹²⁷⁵ ST's Reply to SO, paragraph 897.

¹²⁷⁶ Ibidem.

¹²⁷⁷ ST's Reply to SO, paragraph 897.

¹²⁷⁸ Point 1.14 second indent of Annex 11.

¹²⁷⁹ Orange's submission to TUSR dated 20 October 2005, Annex concerning phases of the unbundling process, time frames and cost, p. 2 Doc ID 0298, p. 8.

¹²⁸⁰ ST's reply to the SO, paragraph 921.

¹²⁸¹ Table 37 of ST's reply to the SO.

¹²⁸² ST's reply to the SO, paragraph 922.

is extraneous to its network that it can automatically become a fault due to lack of cooperation of AOs, also triggering a shift of ST's responsibility. That oversimplification of reasoning only shows that ST can arbitrarily decide to shift responsibility for repairs, especially as that approach applies to a high proportion of faults recorded ([...] % in 2008, [...] % in 2009 and [...] % in 2010).

- (799) Against this background the Commission concludes that by applying disadvantageous terms and conditions regarding repairs, service and maintenance ST made it unattractive for AOs to proceed with the unbundling of local loops.

7.6.4.5. ST's terms and conditions regarding the bank guarantee

- (800) One of the major cost factors for the AOs wishing to unbundle local loops is the issuance of a bank guarantee. According to ST's 2005 RUO the AO is obliged to furnish to ST a bank guarantee within 60 days from the entry into effect of the Framework Agreement¹²⁸³. Furnishing the bank guarantee is a pre-condition for the AO to conclude a Collocation Agreement with ST and ultimately for the access to the local loops¹²⁸⁴. The terms of the bank guarantee are set in Annex 16 (former Annex 17) to ST's 2005 RUO.

- (801) While the requirement and the importance of a bank guarantee as such are not contested, the Commission considers as unfair several terms and conditions of the bank guarantee, namely: (i) ST has a discretionary margin in accepting or not a bank guarantee, (ii) the bank guarantee amount is elevated and may be easily increased by ST; (iii) ST's conditions for calling on the bank guarantee are unreasonable and (iv) AOs do not benefit from a similar financial security.

7.6.4.5.1 ST has a broad discretionary margin in the acceptance or non-acceptance of a bank guarantee

- (802) According to ST's 2005 RUO, the AO shall submit the draft bank guarantee to ST for preliminary approval. ST may agree or disagree with the terms of the submitted draft bank guarantee and also propose changes to it. ST only accepts a bank guarantee to which it had previously consented. Furthermore, ST's 2005 RUO does not set any time limits or deadlines for ST to express its consent with the draft bank guarantee or to propose changes to it¹²⁸⁵.
- (803) Although ST claims to accept standard bank guarantees issued by recognized Slovak banks¹²⁸⁶, ST's RUO terms remain discretionary as to ST's possibility to reject or amend their draft bank guarantee under no deadline and discourage AOs from unbundling local loops. ST's wide margin of discretion when assessing the draft bank guarantee allows ST to reject it even if the conditions are in line with the market. Any changes proposed by ST allow it to delay the unbundling process and may lead the AO and its bank to alter the conditions of the bank guarantee resulting in higher costs for the AO.

¹²⁸³ Point 1.8. of Annex 5 of ST's 2005 RUO, Doc ID 453, p. 9.

¹²⁸⁴ Point 2.1.1.1. letter d); Point 2.1.2.1. of Annex 5 to ST's 2005 RUO, Annexes of ST's reply to RFI of 17/04/2009; Q.41_1, Doc ID 3191.

¹²⁸⁵ Point 8 of Annex 17 of ST's 2005 RUO, Doc ID 453, p. 7.

¹²⁸⁶ ST's Reply to the SO, paragraph 977.

- (804) Furthermore, ST's 2005 RUO does not set any time limits or deadlines for ST to express its consent to the draft bank guarantee or to propose changes to it¹²⁸⁷. In practice those terms allow ST to artificially delay the unbundling process by taking more time than necessary and appropriate to express its consent or to propose any changes.
- (805) Although ST accepted the standard bank guarantee presented by GTS Slovakia and claims to accept standard bank guarantees issued by recognized Slovak banks¹²⁸⁸, ST's 2005 RUO terms remain discretionary as to ST's possibility to reject or amend draft bank guarantee under no deadline and discourage AOs from unbundling local loops.

7.6.4.5.2 The bank guarantee amount is elevated and may be easily increased by ST

- (806) The RUO foresees a bank guarantee for the amount of EUR 66 387.84 (SKK 2 000 000)¹²⁸⁹. Additionally, ST is entitled to request the AOs to multiply the amount of the bank guarantee in case ST calls on the bank guarantee for whichever reason more than twice¹²⁹⁰.
- (807) That initial amount, to which ST is entitled to add-up the increased amount established after applying ST's "multiplying system", is elevated insofar as it is out of proportion with ST's risks and costs for providing access to the local loops, as also mentioned by Orange in its submission to TUSR¹²⁹¹. Those terms and conditions cannot be seen as common industry standard. There are Member States such as Ireland, where the bank guarantee is not even required systematically, but only after an assessment of its necessity and proportionality, not to mention any "multiplying system" as the one put in place by ST: *"If a bank guarantee is deemed necessary and reasonable the value in euro terms should be proportionate to the risk"*¹²⁹².
- (808) Although ST argues that the amount of the bank guarantee relates to high risks of potential damages and defaults of payment regarding the unbundling of the local loops, the Commission notes that an incumbent such as TO2 was able to manage those risks with a bank guarantee amounting to approximately 5 800 EUR (161 200 CZK)¹²⁹³ accounting to around 8.7 % of ST's bank guarantee¹²⁹⁴. Also, ST's current version of Annex 13 to the RUO as amended on 22 July 2013 requires a bank guarantee amounting to only 6 500 EUR¹²⁹⁵, that is to say more than ten times less than the amount of bank guarantee requested in 2005-2010. ST does not adduce any evidence that would justify the disproportion between the amount of ST's fees and risks and the amount of the bank guarantee in general. Moreover, there are also other appropriate methods that ST could use to address the risks of default of payment as regards all potential claims in addition to the bank guarantee, such as advance payments.

¹²⁸⁷ Point 8 of Annex 17 of ST's 2005 RUO, Doc ID 453, p. 7.

¹²⁸⁸ ST's Reply to the SO, paragraph 977.

¹²⁸⁹ Point 3.1 of Annex 17 of ST's 2005 RUO, Doc ID 453, p. 4.

¹²⁹⁰ Point 6.2 of Annex 17 of ST's 2005 RUO, Doc ID 453, p. 6.

¹²⁹¹ Orange's submission to TUSR, dated 20 October 2005, Doc ID 0297, p. 11-12.

¹²⁹² E-mail from the Irish Telecoms Regulator of 24 October 2013 at 15:57, Doc ID 4197, p. 7.

¹²⁹³ Point 1.1. of Annex 10 of TO2's 2006 RUO - Doc ID 4578, p. 80.

¹²⁹⁴ Annex 13 of ST's 2013 RUO.

¹²⁹⁵ Point 3.1 of Annex 13 of ST's 2013 RUO, Doc ID 4318.

- (809) Additionally, the respective increases that ST is entitled to put in place within its "multiplying system" in case ST calls on the bank guarantee for whichever reason more than twice are set out in the Table 18¹²⁹⁶:

Table 18: Multiplication of the bank guarantee amount

Number of calls on the bank guarantee	Multiple by which the guarantee amount has to be increased
3 times	3
4 times	5
5 times	7
6 times	12

- (810) Table 18 shows that in case ST calls on the bank guarantee more than six times because the AO has not paid the fee for rejection of a request amounting to around EUR 198, the AO has to increase the amount of the bank guarantee 12 times, which results in the amount of approximately EUR 796 680.49¹²⁹⁷. In other words, ST is entitled to increase the amount of the bank guarantee in a discretionary manner by around 1 100 % even if the AO failed to pay minor fees.
- (811) ST's power to increase the amount of the guarantee in case of a default by the AO is not as such the issue here¹²⁹⁸. The deterring effect of that power stems from its disproportionate character, as ST is entitled to multiply the amount of the guarantee for any type of claims, including claims for damages, as shown in recitals (815) to (817).
- (812) ST itself demonstrates that disproportionality by stating that an AO would have to fail to pay for more than five collocations in order to reach the basic amount (66 387.84 EUR) of the bank guarantee¹²⁹⁹. However, in that case, due to ST's possibility to multiply the amount of the bank guarantee when the bank guarantee is called on 6 times, the AO could be actually required to multiply the amount of the bank guarantee by 12 and therefore reach an amount of 796 680.49 EUR. That result means that in accordance with ST's "multiplying system", ST would not only secure [...] collocations, but around [...] collocations, which means that the initial [...] collocations ST refers to would be disproportionately secured.
- (813) No similar multiplying system is put in place in the neighbouring Czech Republic.
- (814) Given that the amount of the bank guarantee is not proportionate to the risk and may be easily multiplied unilaterally by ST, AOs do not have any control over the real costs triggered by the bank guarantee and are eventually discouraged from unbundling local loops.

¹²⁹⁶ Point 6.2 of Annex 17 of ST's 2005 RUO, Doc ID 453, p. 6.

¹²⁹⁷ Orange's submission to TUSR, dated 20 October 2005, Doc ID 0297, p. 11-12.

¹²⁹⁸ ST's Reply to the SO, paragraph 989.

¹²⁹⁹ ST's Reply to the SO, paragraph 979.

7.6.4.5.3 ST's conditions for calling on the bank guarantee are unreasonable

- (815) Under the terms of ST's 2005 RUO, the bank guarantee covers (i) fees due by AOs, (ii) contractual penalties and (iii) any other claims for damages due to violations of obligations under the Confidentiality Agreement, the Framework Agreement, as well as any other agreement concluded in connection with unbundling local loops¹³⁰⁰. That means that ST's bank guarantee covers not only the failure to pay for actual services provided by ST, but also any claims for damages that ST may raise.
- (816) In addition to that large scope, ST only accepts an unconditional bank guarantee. That means that ST may call on the bank guarantee without the need to prove that it has asked the debtor to pay first and without the debtor having an option to make a counter-claim or settle¹³⁰¹. It follows that ST may draw the bank guarantee for any fee, contractual penalty or claim for damages irrespective of whether those claims are justified or not, the AO was reminded or otherwise, has counter-claims or not, contested the claim before a court or is willing to settle. Hence, the AO is forced to waive its defence rights in advance with regard to any claim it is confronted with by ST. In addition, the terms of calling on the bank guarantee allow ST to draw from any amount after the due date, including for instance any fee for rejection of a request and thereby artificially delay the unbundling process¹³⁰². Those terms also allow ST to increase AO's costs in relation to the bank guarantee, as ST has the right to multiply the guarantee amount several times once ST calls on the bank more than twice, for any type of claims, as explained in recitals (806) to (814) .
- (817) ST has not provided any justification for its unlimited right to call on the bank guarantee with regard to any claim it might have. It follows that ST is without any justification transferring its own business risks to the AOs, who in case of a drawdown based on an ST claim deemed unfounded must compensate the bank and only subsequently contest ST's claim before a court. That cannot be deemed to be in compliance with industry standards. For instance, in the Republic of Austria, "*a bank guarantee may be drawn in case of non-payment of service fees, interest on justified claims and compensation for damages acknowledged by the unbundling partner or by a court decision.*"¹³⁰³ "

7.6.4.5.4 AOs do not benefit from a similar financial security

- (818) ST's 2005 RUO does not contain any obligation on ST to furnish a bank guarantee or an equivalent security to the AO, although the AO could incur losses from ST's conduct in connection with unbundling local loops. AOs do not have any equivalent security regarding their claims against ST. There is no reason why AOs in case of default of payment on part of ST or in case of damages caused by ST cannot simply call on a bank guarantee but must in every case assert their claims or even go to a court.
- (819) The Commission therefore concludes that by applying disadvantageous terms in relation to the bank guarantee, ST prevented AOs from assessing their real costs and rendered unacceptable the unbundling of ST's local loops.

¹³⁰⁰ Point 5.1 of Annex 17 of ST's 2005 RUO, Doc ID 453, p. 6.

¹³⁰¹ Point 4.1 of Annex 17 of ST's 2005 RUO, Doc ID 453, p. 5.

¹³⁰² Orange's submission to TUSR, dated 20 October 2005, Doc ID0297, p.11-12.

¹³⁰³ E-mail from the Austrian Telecoms Regulator of 9 October 2013 at 09:33, Doc ID 4091, p. 3.

7.7. Conclusion

- (820) ST set the RUO's terms and conditions so as to render unbundled access to the local loop unacceptable for AOs. In particular, ST unjustifiably withheld from AOs network information necessary for the unbundling of the local loops, unilaterally reduced the scope of its regulatory obligation to unbundle and set other unfair terms and conditions in relation to several key elements of its RUO, namely in relation to: collocation, qualification, forecasting, repairs, service and maintenance and bank guarantee. The Commission considers that all those elements of ST's behaviour taken together amount to a refusal to supply access to ULL.
- (821) In section 9 the Commission will show that ST's conduct had potential anticompetitive effects and in section 9.2 that ST's exclusionary behaviour artificially raised barrier to entry on the retail mass-market for broadband services at a fix location.

8. MARGIN SQUEEZE

8.1. Legal framework

- (822) Margin squeeze may constitute an abuse within the meaning of Article 102 of the Treaty¹³⁰⁴. Margin squeeze constitutes an independent form of abuse distinct from that of refusal to supply.¹³⁰⁵
- (823) Margin squeeze may occur where a vertically integrated undertaking sells a product or service to competitors on an upstream market where it is dominant and competes with those undertakings on a downstream market for which the product or service is an input. A margin squeeze under Article 102 of the Treaty requires that the spread between the price charged to competitors upstream and the price charged to the dominant undertaking's own customers downstream is either negative or insufficient for competitors as efficient as the dominant undertaking to cover the specific costs which the dominant undertaking has to incur to supply its downstream products or services¹³⁰⁶. In such circumstances, although the competitors may be as efficient as the dominant undertaking, they may only be able to operate on the downstream market at a loss or at artificially reduced levels of profitability¹³⁰⁷. The potential anti-competitive effect of a margin squeeze usually results from increased entry costs of competitors or their delayed prospects of becoming profitable.¹³⁰⁸
- (824) The unfairness, within the meaning of Article 102 of the Treaty, of a margin squeeze is linked to its very existence and not to its precise spread. Therefore, it is not

¹³⁰⁴ Case C-280/08 P *Deutsche Telekom v Commission* [2010], ECR I-9601, paragraph 183; Case C-52/09 *Konkurrensverket v TeliaSonera* [2011], ECR I-527, paragraph 56.

¹³⁰⁵ Case C-295/12 P *Telefónica v Commission* [2014], EU:C:2013:619, paragraphs 74-75, 96 and 150.

¹³⁰⁶ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraph 32.

¹³⁰⁷ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraph 33. The General Court held in Case T-5/97, *Industrie des Poudres Sphériques v Commission* [2000], ECR II-3759, paragraph 178, that a margin squeeze "may be said to take place when an undertaking which is in a dominant position on the market for an unprocessed product and itself uses part of its production for the manufacture of a more processed product, while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such a level that those who purchase it do not have a sufficient profit margin on the processing to remain competitive on the market for the processed product".

¹³⁰⁸ Case T-336/07 *Telefónica v Commission* [2012], EU:T:2012:172, paragraph 279.

necessary to establish that the wholesale prices for input services to operators or the retail prices for services to end users are in themselves abusive on account of their excessive or predatory nature.¹³⁰⁹

- (825) To establish whether a margin squeeze is abusive, that practice must have an anticompetitive effect on the market, but the effect does not necessarily have to be concrete. It is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors from the market who are at least as efficient as the dominant undertaking.¹³¹⁰ The fact that the desired result, namely the exclusion of such competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102 of the Treaty.¹³¹¹
- (826) Where the level of margin squeeze is negative (that is to say the wholesale price is higher than the retail price) an effect which is at least potentially exclusionary is probable given that the competitors would be compelled to sell at a loss¹³¹². If, on the other hand, such a margin remains positive (that is to say the wholesale price is lower than the retail price), it must be demonstrated that the application of that pricing practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned.¹³¹³

8.2. The methodology for calculating the margin squeeze test

- (827) Sections (8.2.1) to (8.2.4) will deal with the four principles of the margin squeeze test, notably the equally efficient competitor test, section (8.2.1), the aggregated approach, section (8.2.2), the appropriate test for assessing profitability over time, section (8.2.3) and the appropriate cost measure, section (8.2.4).

8.2.1. The equally efficient competitor test

- (828) A margin squeeze can be demonstrated by showing that the dominant company's own downstream arm could not operate profitably on the basis of the wholesale price charged to its downstream competitors and the retail price charged by the downstream arm of the dominant undertaking ("equally efficient competitor" test). Competitors which are able to provide downstream services as efficiently as the dominant firm would this way be foreclosed from the market.
- (829) That approach is consistent with that used by the Commission in *Telefónica, Deutsche Telekom*¹³¹⁴ and *Napier Brown vs. British Sugar*¹³¹⁵.

¹³⁰⁹ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraph 34. Case T-271/03 *Deutsche Telekom v Commission* [2008], ECR II-477, paragraph 167.

¹³¹⁰ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraph 64.

¹³¹¹ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraph 65. Case C-295/12 P *Telefónica v Commission* [2014], EU:C:2013:619, paragraph 124.

¹³¹² Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraph 73.

¹³¹³ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraph 74.

¹³¹⁴ Commission's decision of 4 July 2007 in Case No COMP/38.784 – *Wanadoo España v Telefónica*, paragraph 312; confirmed by the Judgment of the General Court in Case T-336/07, *Telefónica v Commission* [2012], EU:T:2012:172, and in Case T-398/07 *Spain v Commission* [2012], EU:T:2012:173. See also Commission Decision 2003/707/EC in Case No COMP/C-1/37.451, 37.578, 37.579 – *Deutsche Telekom AG*, OJ L 263, 14.10.2003 p. 9-41, confirmed by Judgment of the Court of Justice in Case C-280/08P *Deutsche Telekom v Commission* [2010], ECR I-9601. The Commission found that Telefónica and Deutsche Telekom abused their dominant position in the form of a margin squeeze because the difference between the retail prices charged by Telefónica and Deutsche Telekom

(830) The relevance of the equally efficient competitor test for the assessment of margin squeeze was upheld by the Court of Justice in cases *Deutsche Telekom*¹³¹⁶ and *TeliaSonera*¹³¹⁷.

8.2.2. *The aggregated approach based on the mix of services marketed by ST*

(831) The margin squeeze test can be applied either at the highest level of detail (that is to say at the level of each individual offer) or at the aggregate portfolio level (that is to say at the level of the mix of services marketed on the retail market).

(832) In this case, the margin squeeze test has been conducted on the basis of an aggregated approach, that is to say on the basis of the mix of services marketed by ST on the relevant retail market. This approach (referred to as the “aggregated approach”) is based on the principle that competitors must at least be able to profitably replicate ST’s portfolio of retail services. The aggregated approach is consistent with a hypothetical entrant’s internal decision-making process in that it assesses the profitability of its investment based on the complete range of services that it is able to offer on the relevant downstream market.

(833) ST launched its retail broadband services on a commercial basis on 1 June 2003¹³¹⁸. Between 2003 and 2005 the retail broadband services were divided into two services, ST's access service ('DSL Access') consisting of the access to ULL and ST's connectivity service ('DSL Internet') covering the Internet services.¹³¹⁹ The broadband services were available only together with a fixed telephone line. Customers could buy the connectivity service also from other internet service providers, but the access service was only available from ST.

(834) In March 2006 the two retail services (access and connectivity) were merged into a new service, VRI¹³²⁰, still only sold together with a connection to the telephone network and a calling program. The previous services existed alongside the new portfolio¹³²¹. In May 2006, ST launched the naked DSL service (VRI Plus), available without the connection to the telephone network/calling program.

(835) In April 2007 ST launched a new line of retail broadband services over its new FTTX network¹³²².

(836) Local loop unbundling became a theoretical possibility as of 12 August 2005 with the publication of ST's Reference Offer on unbundled access to the local loop

and the wholesale prices they charged to their competitors was negative, or insufficient to cover the product-specific costs to the dominant operator of providing its own retail services on the downstream market.

¹³¹⁵ Commission Decision 88/518/EEC in Case No IV/30.178 – Napier Brown/British Sugar, OJ L 284, 19.10.1988, p. 41-59, paragraph 66. In this case the Commission referred to the dominant undertaking’s failure to reflect its own costs of transforming the raw material into the derived product in the margin between the upstream and downstream price.

¹³¹⁶ Case C-280/08P *Deutsche Telekom v Commission* [2010], ECR I-9601, paragraphs 200-204.

¹³¹⁷ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraphs 31-34.

¹³¹⁸ ST's reply to the request for information of 17 April 2009, Doc ID0531, p. 1.

¹³¹⁹ ST's reply to the request for information of 17 April 2009, Doc ID0531, p. 1.

¹³²⁰ In June 2007, a new generation of retail services were launched under the commercial name VRI-4G Internet Turbo.

¹³²¹ ST's reply to the request for information of 17 April 2009, Doc ID0531, p. 1.

¹³²² ST's Press release of 28 March 2007 Doc ID3144; ST's Annual Report 2007, p.43, Doc ID 2876

(RUO)¹³²³. As from then, save for the instances when refusal to supply by ST was fully successful, an AO which started offering retail broadband services would have been able to offer a service comprising the equivalent of both ST's DSL Access and DSL Internet services. As of the launch of VRI in March 2006, that operator would have been in principle able to offer the equivalent of ST's VRI. In other words on the local loops that the AO would have unbundled, such an operator would have been able to replicate the entirety of ST's retail DSL broadband portfolio as it evolved over time.

- (837) In the Reply to the SO ST argued that the SO wrongly excluded from the margin squeeze test the standalone DSL Access service offered by ST (that is to say the access services on top of which AOs continue to provide connectivity (DSL Internet) only).¹³²⁴ In fact, according to ST, an AO using shared ULL could have replicated ST's standalone DSL Access service. ST concluded that the related revenues and costs should have been included in the margin squeeze calculation.¹³²⁵
- (838) The Commission accepts that, in view of the technical replicability of standalone DSL Access, revenues and costs of standalone DSL Access should be included in the margin squeeze calculation. In view of the technical replicability the inclusion of standalone DSL Access is in line with the equally efficient competitor test. The Commission notes that offering DSL Access was profitable for ST for most of the period under investigation, that is to say between 2007 and 2010.
- (839) According to ST, it is appropriate, in the case of the Slovak Republic, to include the voice access and voice usage services in the margin squeeze assessment.¹³²⁶ In theory, it may indeed be possible that AOs would have the ability and the incentive to offer over the local loop electronic communication services other than DSL broadband services to the consumers (that is to say voice services, IPTV and multi-play services).¹³²⁷
- (840) The Commission will consider in its margin squeeze calculation those additional services in order to establish that in this case, the inclusion of the voice services does not alter the finding of the Commission on margin squeeze. The consideration of those services for the purpose of the margin squeeze test is without prejudice to the Commission's definition of the relevant markets in this case and this investigation is not targeted at the market of voice services but the broadband markets concerned.

¹³²³ For instance see section 4.4.

¹³²⁴ The SO only took into consideration those revenues and costs which ST incurred with a view to serving customers of both DSL Access and DSL Internet so that to the relevant cost and revenue values the redress factor was applied. Slovak consumers who purchased the access service separately from the connectivity services could combine ST's DSL Access service either with ST's DSL Internet or with AOs' connectivity services. Thus, ST had more customers for its DSL Access services than it had for its DSL Internet service. At the same time, the new retail broadband services allowing consumers the possibility to purchase an operational DSL broadband connection in a single package from a single service provider rapidly became the market standard.

¹³²⁵ ST's reply to the SO, paragraph 1460.

¹³²⁶ See for instance paragraph 1386 of ST's reply to the SO.

¹³²⁷ Between 2005 and 2010, AOs could potentially have offered voice telephony using full ULL access, which allows an AO to use the full frequency spectrum of the twisted metallic pair and to offer fixed telephony services through the narrowband part of the frequency spectrum. See for instance http://www.ctu.cz/1/download/Analzy%20relevantnich%20trhu/OOP_A_11_03_2006_2.pdf; Doc ID4840

- (841) The Commission notes that, as of 2007, AOs could have offered broadband access services bundled with an IP television service like ST's multi-play service Magio¹³²⁸. In that regard, the Commission takes into account the profitability of the IPTV service based on ST's UCN spread sheets. The Commission also notes that ST argues that at the end of 2011 "*close to [...] % of DSL customers do not subscribe to the IPTV services*".¹³²⁹
- (842) The Commission will take into consideration voice, IPTV and multi-play services in order to establish whether their inclusion in the mix of downstream retail portfolio which could theoretically be offered on the basis of wholesale access at local loop level would alter the Commission's finding on the existence of margin squeeze.
- 8.2.3. *The appropriate test for assessing profitability over time: period by period*
- (843) As mentioned in recital (823), a margin squeeze test entails assessing whether the vertically integrated company's own downstream operations could operate profitably on the basis of the upstream price charged to its competitors by its upstream operating arm.
- (844) There are two methods by which profitability can be measured over time: the period-by-period approach and the Discounted Cash Flow (hereafter: DCF) method.
- (845) The period-by-period approach consists of determining profits or losses incurred during specific periods. In practice that analysis is usually done year by year but it could be based on shorter or longer periods as well. For the profit or loss calculation observed costs and revenues are extracted from the undertaking's accounts. With this method, standard accounting techniques result in some costs being treated as expenses and allocated only to the period in which they were incurred and other costs being capitalised and allocated to more than one time period, typically through the use of straight-line depreciation.
- (846) The DCF method consists of assessing the overall profitability over an adequate period (in general several years) in order to arrive at a single measure, the net present value (NPV).
- (847) There are two possible approaches to assessing the profitability of ST's downstream activity with the DCF method: a backward-looking and a forward-looking DCF analysis. The backward-looking approach would consist of calculating the NPV on the basis of ST's historical cash flows while a forward-looking analysis would be based on the forecasts made by ST in its initial business plan.
- (848) In its decisional practice the Commission has taken the view that the DCF approach suffers from some shortcomings when used to detect a margin squeeze. Such shortcomings have been explicitly recognised not only by the Commission in *Telefónica*¹³³⁰ and *Wanadoo*¹³³¹, but also by the United Kingdom Competition

¹³²⁸ In December 2006, ST launched triple play services under the commercial name Magio consisting of IP television (IPTV), broadband Internet access and VoIP. Since January 2009 Magio is sold without VoIP and it is available with a telephone line or in a 'naked' version. In November 2009 ST launched Magio Sat, (interactive digital TV) *via* both the fixed (metallic and optic) and DVB-S2 (satellite) network. ST's reply to the request for information of 17 April 2009, Doc ID0478, p. 2.

¹³²⁹ See ST's reply to the SO, paragraph 557.

¹³³⁰ Commission's decision of 4 July 2007 in Case No COMP/38.784 – Wanadoo España v. Telefónica, paragraphs 333 to 335.

Appeals Tribunal¹³³², the United Kingdom Office of Fair Trading¹³³³ and by Ofcom¹³³⁴.

- (849) In the case law of the Court of Justice¹³³⁵ and the practice of the Commission¹³³⁶ cases involving price abuses, in particular predatory pricing and margin squeeze, the assessment of the profitability of the dominant undertaking is carried out using the period-by-period approach.
- (850) The Commission notes that in this case future free cash flow projections have not been available, therefore it is not possible to conduct a pure forward-looking DCF-analysis. The Commission also notes that in its own calculations ST relied on historic costs except certain elements of downstream costs which it based on a current costing methodology elaborated by [...]. The methodology, its purpose and its evaluation will be discussed further in section 8.2.4.
- (851) In light of those arguments, this Decision is based on the observed costs and revenues extracted from ST's accounts and on the period-by-period method where the periods are equal to one year. The Commission will therefore calculate the available margin for each year in the period 2005 to 2010 and will also establish whether an equally efficient competitor could operate profitably in the retail market on a lasting basis.
- (852) ST submits that the Commission accepted the DCF approach in the *Telefónica* case¹³³⁷ and it should also be followed with respect to this case.¹³³⁸
- (853) The Commission notes that in *Telefónica*, the Commission conducted the margin squeeze analysis under the DCF method in addition to the period-by-period approach. That was notably with a view to ensuring that the DCF method proposed by *Telefónica* would not disprove the finding of a margin squeeze¹³³⁹. In that case the Commission considered *Telefónica*'s forward-looking NPV calculations exclusively for the purpose of assessing whether they indicated that *Telefónica*'s pricing policy could be objectively justified.¹³⁴⁰
- (854) ST also argues that according to Ofcom, "*there is no unique method for assessing whether or not a business is profitable over time*" and considers it appropriate to conduct the margin squeeze analysis under both a period-by-period and DCF analysis. ST adds, that "*Ofcom rejects the suggestion that a DCF approach is*

¹³³¹ Commission's decision of 16 July 2003 in Case No COMP/38.233 – Wanadoo Interactive, paragraph 90 to 92.

¹³³² Napp Pharmaceuticals vs. Director General of Fair Trading ("*Napp*") [2002] CAT 1, [2002] CompAR 13., 2002, paragraph 260.

¹³³³ OFT, CA98 Decision - BSkyB investigation, 30.01.03, paragraphs 382 to 390.

¹³³⁴ OFCOM, Investigation by the Director General of Telecommunications into alleged anticompetitive practices by BT in relation to BT Openworld's consumer broadband products, 20.11.03, section 5.

¹³³⁵ Case C-62/86 *Akzo Chemie v Commission* [1991], ECR I-3359, Case C-333/94 P *Tetra Pak v Commission* [1996], ECR I-5951.

¹³³⁶ Commission's decision of 16 July 2003 in Case No COMP/38.233 – Wanadoo Interactive

¹³³⁷ Commission's decision of 4 July 2007 in Case No COMP/38.784 – Wanadoo España v. Telefónica, paragraphs 342 and 349.

¹³³⁸ ST's reply to the SO, point 1281.

¹³³⁹ Commission's decision of 4 July 2007 in Case No COMP/38.784 – Wanadoo España v. Telefónica, paragraph 349.

¹³⁴⁰ Commission's decision of 4 July 2007 in Case No COMP/38.784 – Wanadoo España v. Telefónica, paragraph 382.

inherently incorrect for analysing margin squeezes. (...) a forward-looking DCF approach is one of a number of standard techniques for analysing future investment decisions and is also explicitly designed for the analysis of cashflows over time."

- (855) The Commission is of the view that there are key differences between regulatory and competition authorities in relation to the margin squeeze method applied. While regulatory authorities usually take an *ex ante* approach in order to promote competition on a given market, competition authorities intervene *ex post* in case of an abuse of a dominant position. Therefore, the tests of both authorities are usually based on a different set of data: regulatory authorities, given their forward looking perspective, often rely on a hypothesis concerning the future development of costs, revenues, number of subscribers etc. while competition authorities look at actual figures of the investigated company. Regulatory authorities may establish a margin which would allow a similarly efficient operator to enter the market and recover their costs over a reasonable period of time while competition authorities determine whether market entry was possible during a past period. Regulatory authorities usually calculate regulated wholesale prices and as such use the margin squeeze test to ensure sufficient margin to allow AOs to compete. Competition authorities investigate whether what a dominant undertaking has been actually charging to downstream rivals is causing an equally efficient rival to incur into negative or insufficient margins.
- (856) Moreover, an *ex-ante* margin squeeze test carried out by a regulator would, in no circumstances, prejudice a finding in proceedings under Union competition law.¹³⁴¹ Furthermore, the Commission's implementation of Article 102 of the Treaty is not subject to any prior consideration of action taken by national regulatory authorities.¹³⁴²
- (857) According to ST, in the telecommunications industry operators consider their ability to earn a reasonable return over a longer period. ST therefore argues that the period-by-period analysis should be based on appropriately derived cost estimates that properly reflect the significant investments that telecommunications operators make in the early period of broadband launches, and be complemented by a multi-period analysis, whereby the total margin is assessed over a number of years.¹³⁴³
- (858) ST suggested a multi-period calculation looking at cumulative profits over the period of both four and five years based on observed costs and revenues.¹³⁴⁴ The calculations were made for the periods 2005-2008 and 2005-2009. The Commission notes that ST's multi-period analysis is distinct from backward-looking DCF analysis, which would be based on different input data and methodology.
- (859) The Commission takes note of ST's suggestion as to multi-period analysis and will conduct the margin squeeze test both year by year and also following the multi-period analysis as proposed by ST¹³⁴⁵ in order to establish whether it alters the Commission's finding on the existence of margin squeeze.

¹³⁴¹ Case C-280/08 P *Deutsche Telekom v Commission* [2010], ECR I-9601, paragraphs 90 and 91.

¹³⁴² Case C-295/12 P *Telefónica v Commission* [2014], EU:C:2013:619, paragraphs 135 and 161.

¹³⁴³ ST's reply to the SO, paragraph 1281.

¹³⁴⁴ ST's reply to the SO, paragraph 1500.

¹³⁴⁵ The Commission will notably assess cumulative profits over the period August 2005-2010.

8.2.4. *The appropriate cost measure*

- (860) The Commission uses the long run average incremental costs (LRAIC) as the relevant cost measure for the assessment of a margin squeeze in the telecommunications sector.¹³⁴⁶
- (861) The LRAIC cost is the average of all the variable and fixed costs that an undertaking incurs to produce a particular product or service¹³⁴⁷. It is the difference between the total costs incurred by the undertaking when producing all products, including the individual product under analysis, and the total costs of the undertaking when the output of the individual product is set equal to zero, holding the output of all other products fixed. Such costs include not only all volume sensitive and fixed costs directly attributable to the production of the total volume of output of the product in question but also the increase in the common costs that is attributable to this activity.¹³⁴⁸
- (862) During the inspection in this case and in a series of requests for information, the Commission requested ST to provide the data needed to calculate the costs relative to the additional inputs which are needed to transform its wholesale services into retail services.
- (863) ST's Service Costing¹³⁴⁹ department analyses the costs, the structure of costs, and the origin of the costs incurred by ST when offering commercial services. The cost calculations undertaken in Service Costing are based on the year end audited accounts of ST.
- (864) The results of the Service Costing calculations for the years 2003 to 2010 are contained in the so called UCN ("účelové členenie nákladov") spread sheets. These show by commercial service and service family the total revenues, the total operating costs (amongst which the total depreciation costs), the capital employed and total cost of capital, the operating profit and the economic profit¹³⁵⁰.
- (865) In addition to the UCN sheets, the Commission obtained profitability overviews for each of the broadband commercial services referred to in the UCN spread sheets for the years 2004 to 2010 included¹³⁵¹. Those overviews break down the information available in the UCN reports in the form of a profit & loss statement as follows:

¹³⁴⁶ See Commission decision of 21 May 2003 in Cases COMP/37.451, 37.578 and 37.579 – *Deutsche Telekom AG*, OJ L 263, 14.10.2003 upheld by the Court of Justice in Case C-280/08P *Deutsche Telekom v Commission* [2010], ECR I-9601 and Commission's decision of 4 July 2007 in Case No COMP/38.784 – *Wanadoo España v. Telefónica*, upheld by the General Court in Case T-336/07 *Telefónica v Commission* [2012], EU:T:2012:172.

¹³⁴⁷ See Commission's decision of 4 July 2007 in Case No COMP/38.784 – *Wanadoo España v. Telefónica*, paragraph 319.

¹³⁴⁸ Take the example of a superstore (for example fnac) that markets two categories of products (for example books and discs). If the store had decided to only market books, some common costs would still be incurred (for example the managing director) but other would have been reduced in proportion of the volume of discs (for example the surface of the store would have been lower, the number of cash desks would also have been smaller, etc.). In other words, if a proportion of the common cost is avoidable, such proportion is incremental.

¹³⁴⁹ Presentation [...] (Doc ID846).

¹³⁵⁰ Doc ID1977 (for year 2003), ID834 (2004), ID847 (2005), ID850 (2006), ID848 (2007), ID849 (2008), ID2687 (2009) and ID3031 (2010).

¹³⁵¹ Doc ID2036 (2004), ID1984 (2005), ID1985 (2006), ID1986 (2007), ID1987 (2008), ID2687 (2009) and ID3031 (2010).

Table 19 - Profitability overview (template)

[Product] profitability overview [year]				
	Euro		[Product] (inc. depreciation)	Cost of capital
Revenues			0	
Variable costs			Of which depreciation	
Advertising		Adv		
Sales [...]		Sales		
CPEs/other hardware		CPE		
Licences [...]		Lic		
Other [...]		Var (other)		
Fixed costs				
Network activities [...]		Net (act)		
Of which access network [...]				
DSLAMs				
DSLAMs - ATM handover,				
BRAS - IP handover,				
BRAS - ISP Gate handover,				
Other network costs				
Customer care		Cus		
Marketing costs [...]		Mar		
Common costs [...]		Com		
Other fixed costs [...]		Fix (other)		
EBIT (Operational Profit per UCN)				
Total depreciation		Net (dep)		
Total cost of capital		WACC based		
Economic Profit				

- (866) The Commission also obtained further details for each of the services included in the profitability overview for the years 2004 to 2010¹³⁵². Those detailed results take the form of two tables containing cost data:
- The first table lists for each service all the costs incurred (identified by individual cost item – "sen kod" and "sen name") broken down between "depreciation", "energy", "material" "other costs" "personal costs" and "external services", the total of which is referred to as "OPEX total";
 - The second table lists for each service all the cost items for which capital was employed and the corresponding cost of capital.
- (867) The tables referred to in recital (865) indicate how those detailed cost items are grouped into the cost headers referred to in the profitability overviews. In addition, the Commission obtained the description of each of those detailed cost items¹³⁵³.
- (868) It is apparent from the evidence collected during the investigation that ST differentiates between the profitability figures summarised in the UCN spread sheets and LRAIC profitability figures¹³⁵⁴.
- (869) Therefore the Commission requested ST to provide profitability data for broadband services recalculated by using the LRAIC methodology¹³⁵⁵.

¹³⁵² Doc ID2080 to 2090 (for 2004-2008), ID2795 (2009) and ID3033 (2010).

¹³⁵³ Doc ID2122 to ID2126.

¹³⁵⁴ Presentation [...]Doc ID0846, p.3.

¹³⁵⁵ ST's RFI of 17/07/2009 Doc ID0820, p. 13.

- (870) In response to that request, ST explained that [...] and that the Commission does not have the power to require ST to produce such information.¹³⁵⁶ It explained that it "[...]". *This is done due to the obligations it carries under the Slovak (Tele)Communications Act*". [...]. Further, ST explained [...]. Therefore, in the SO, the Commission used the data which was at its disposal.
- (871) The methodology used by ST to allocate costs across services is described in the presentation "Costing system in ST"¹³⁵⁷ and can be summarised as follows:
- Where possible, costs are allocated directly to individual services: this is in particular the case for personal related costs and other costs, such as advertising expenses, the cost of goods sold for customer premise equipment or the payment of sales commissions to external service providers.
 - Where direct allocation to individual services is not possible, costs (excluding overhead) are allocated across the different elements in the network, that is to say the parts of the network that are used for identical purposes: this is in particular the case for technical activities in the company (network operations and maintenance).
 - The costs allocated at the level of the individual network elements are subsequently allocated onto individual services according to Activity Based Costing principles. The technical allocation keys used to this effect are established on the basis of technical questionnaires which are discussed internally and updated on a yearly basis.
 - Finally, overhead costs are allocated as an equal proportionate mark-up across services.
- (872) The figures computed by Service Costing and summarised in the UCN spread sheets constitute the result of an elaborate calculation. [...]¹³⁵⁸.
- (873) In light of these principles, the Commission took the line in the SO that the financial evidence in its possession can be used to calculate ST's service-specific costs which are a sufficiently good proxy for LRAIC and may be used in the margin squeeze calculations in accordance with the relevant notice¹³⁵⁹ and decisional practice.
- (874) The quality of ST's cost allocation system is also evidenced by the widespread internal use of the data produced, whether at working or at senior management level. The data is used to analyse the profitability of ST's commercial services and serves as a basis for pricing decisions, business cases calculation and other purposes¹³⁶⁰.
- (875) The Commission acknowledged in the SO that *"the UCN cost data based on fully allocated historical costs methodology may to some extent differ from LRAIC."*¹³⁶¹

¹³⁵⁶ ST's Reply to RFI 17/07/2009 Doc ID1079, p. 26-27.

¹³⁵⁷ Presentation [...] Doc ID0846.

¹³⁵⁸ Reference was made to the assistance of [...] in the explanations provided by [...] to the Commission inspectors during the inspection on 13-14 July 2009. This is apparent also from Doc ID0846 p.17.

¹³⁵⁹ See the Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ C 45. 24.2.2009, p. 7).

¹³⁶⁰ Doc ID0833 p. 3, Doc ID0842 p. 39, Doc ID0843 p. 20, Doc ID0845.

¹³⁶¹ See SO §1038. Contrary to what ST claimed in its Reply to the SO (paragraph 1414), the Commission did not *"explicitly acknowledge the fundamentally unsuitable nature of the UCN data for the margin squeeze calculations"*.

However, at that time, in the absence of LRAIC cost data, the figures contained in the UCN sheets were the best available source for the margin squeeze calculations.

(876) In addition, the Commission took the view that it was preferable with a view to legal certainty to perform the margin squeeze tests in this case on the basis of the same cost data as the one used by ST rather than on the basis of data resulting from complex *ex post* adjustments and calculations performed by the Commission.

(877) Although in the SO the Commission conducted the margin squeeze calculations based on ST's UCN data it also undertook adjustments to the costs allocated to ST's broadband services which it considered necessary with a view to determining service-specific costs.¹³⁶² Following those adjustments some cost elements were excluded from the costs or were regrouped between cost categories and some mistakes in the cost data pointed out by ST were corrected.

8.2.4.1. ST's proposal for the calculation of incremental costs based on the [Name of consultant] report

(878) In its Reply to the SO, ST informed the Commission that it had decided [...] which shall enable the company to "*calculate and provide accurate and appropriate information on unit costs and dimensional product profitability, based on which business decisions can be made, while regulatory conditions will be kept.*"

(879) The main objectives of the [...].

(880) ST was supported by [Name of consultant]. [...] ¹³⁶³

(881) In the Reply to the SO, ST submitted its own margin squeeze calculation.¹³⁶⁴ That calculation has been updated on three occasions.¹³⁶⁵ In those calculations ST largely relied on the [Name of consultant report] ¹³⁶⁶ based on which it made estimations with regard to [...]. ST had fully allocated costs information based on historic cost accounting for the period 2005-2010. [...]. For 2005-2010 ST also applied efficiency adjustments to operating expenditure (see recitals (911) to (920)) based on ratios stemming from [...]. Therefore, ST, as part of its margin squeeze analysis, estimated the downstream costs for 2005-2010 also based on data from 2011.¹³⁶⁷

(882) The Commission considers that ST's calculation of downstream costs [...] is flawed. As regards asset costs, the Commission considers that ST's asset revaluation is likely to lead to the underestimation of downstream asset costs because it disregards the entire investment costs incurred by the equally efficient competitor, and ST's adjustments for efficiency are not based on the assets held by the incumbent and are therefore not in line with an equally efficient competitor test. As regards operating expenditure, the Commission considers that ST's adjustments are not in line with an

¹³⁶² These adjustments are described in detail in section 5.9.5.4. of the SO and their impact is summarised in Annex 1 to the SO.

¹³⁶³ [...], Doc ID 3708

¹³⁶⁴ Doc ID4730-129.

¹³⁶⁵ ST's Response to RFI of 7 June 2013 (Annex 2 - Updated margin squeeze calculation), Doc ID3853; ST's Response to RFI of 12 July 2013 (Annex Q16 – Updated margin squeeze calculation), Doc ID3906-44; ST's Response to LoF (Annex 14 – Updated margin squeeze calculation), Doc ID4671-17.

¹³⁶⁶ The Commission notes that [...] was not entrusted by ST to carry out a backward-looking margin squeeze calculation; [...].

¹³⁶⁷ Doc ID4671-14.

equally efficient competitor test as these adjustments assume the existence of a hypothetical cost-effective organization, presumably more efficient than ST.

(883) [...].¹³⁶⁸

(884) [...].

Table 20

[Table displaying the methodology used to adjust certain costs]

8.2.4.1.1 Treatment of asset costs

8.2.4.1.1.1 *Asset re-valuation and depreciation*

(885) [...]. ST argues that in an industry where asset prices are typically dropping over time, using the historical asset prices would impose an unjustified burden on the incumbent allowing less efficient competitors to enter.

(886) The Commission notes that [...]. Furthermore, as it was explained in detail in recitals (828) to (830), the equally efficient competitor test is based on the product-specific costs of the dominant operator of providing its own retail services on the downstream market and not on hypothetical costs of a potential market entrant.

(887) [...]¹³⁶⁹ [...].

(888) In its margin squeeze calculation, ST proxied [...] costs in the years 2005 to 2010 using a 3-step approach.¹³⁷⁰

(1) ST considered the [...] as a proxy for three asset cost categories [...].¹³⁷¹ [...].

(2) ST used the [...] for the basis for calculating adjustment factors for previous years. [...] This provides a proxy [Description how this category was used as the basis for calculating adjustment factors with respect to previous years] in each category.

(3) The index is applied each year to each cost category based on the [...] between 2005 and 2010. The adjustment is made directly to the [...] capital costs and depreciation.¹³⁷²

(889) However, adjusting the asset costs for 2005-2010 as proposed by ST raises several doubts.

(890) ST's approach implies scaling down the historic-value depreciation in each year.¹³⁷³ As a result, depreciations over the asset lifetime would not sum up to the entire

¹³⁶⁸ [...], p. 13.

¹³⁶⁹ The net replacement cost measures the cost of replacing the existing asset with another asset with similar performance characteristics and of a similar vintage. – [...] p. 19.

¹³⁷⁰ Reply to the SO, Annex XV.5 - Estimation of efficient downstream network LRAIC for and calculation of appropriate annual downstream network unit cost for the revised ULL margin squeeze test for 2005-2010, Doc ID 4730-136.

¹³⁷¹ Digital Subscriber Line Access Multiplexer.

¹³⁷² [...].

¹³⁷³ From an economic point of view, depreciation between the periods t and t+1 should simply be the difference between the net replacement cost at t (of the asset of age k) and the net replacement cost at t+1 (of the asset of age k+1).

investment costs (that is to say gross book value) incurred during the period where the viability of an equally efficient competitor's entry is assessed.¹³⁷⁴

- (891) In particular, ST itself confirms it has "*invested in broadband assets consistently over the period 2003-10*" and it puts forward an example showing that it has "*activated more than [...] in each year since 2004*".¹³⁷⁵ Therefore, ST made a considerable part of its broadband investments during 2005-2010. This means that, contrary to what ST claims, the asset prices available to an AO entering the market in 2005 would be comparable to those available to ST and an AO would therefore not benefit from lower asset costs.
- (892) Moreover, both ST and an AO would incur costs of holding assets whose price for the new asset decreases over time. That cost is ignored in ST's approach. Even in a situation when ST buys an asset in 2001 while the AO buys a similar new asset in 2005 this issue remains. To the extent that the price for the new asset decreases after 2005, both ST and the AO would bear the implied costs of falling prices of that asset. ST's adjustments underestimate the downstream assets' costs in such a case.¹³⁷⁶
- (893) In addition, by computing the adjustment on the basis of an index based on the remaining average asset life measured in 2011 and between 2005 and 2010, the adjustment implicitly assumes that the value loss of assets occurred gradually between 2005 and 2011. That implicit assumption implies that the asset costs, especially for new assets whose price only dropped shortly before 2011, would be underestimated.
- (894) The Commission, however, reiterates that the relevant costs measure to conduct the margin squeeze test is LRAIC. In the absence of cost data better reflecting ST's incremental broadband asset costs and because the Commission is not in a position to determine such costs, the Commission includes ST's asset revaluation in its margin squeeze analysis. That is in ST's favour because the asset revaluation is likely to lead to the underestimation of downstream asset costs. Based on properly derived LRAIC figures, the magnitude of the margin squeeze would therefore be likely to be higher.

8.2.4.1.1.2 Treatment of asset inefficiencies

- (895) [Name of Consultant] adjusted the assets to the approximate level of an efficient operator that would build an optimal network scaled to [Description how the assets were adjusted].
- (896) For the purposes of implementing the "optimum" network, [Name of Consultant] lays down a set of rules: [Description how the assets were adjusted with respect to actual assets, but also in order to maintain consistency and how actual usage of assets was considered.]
- (897) In practical terms, ST adjusted the cost of capital and depreciation values of the assets in the years 2005-2010 [Description of adjustment applied]. The optimisation

¹³⁷⁴ ST's suggestion for the adjustment of the depreciations, therefore, disregards the costs of holding an asset with a constantly dropping price. This in practical terms means that for a margin squeeze test the total amount of the downstream costs which an equally efficient competitor would incur is not taken into consideration. The available margins would be higher than in reality.

¹³⁷⁵ Reply to the SO, Annex XV.5 - Estimation of efficient downstream network LRAIC for and calculation of appropriate annual downstream network unit cost for the revised ULL margin squeeze test for 2005-2010, Doc ID 4730-136.

¹³⁷⁶ See footnote 1373.

adjustment was further made to operating expenditures [Specification of operating expenditures related to specific cost categories]. According to ST, such costs are incurred for maintaining the fixed asset base, [Assumption, in what ratio these costs stand towards other specific costs according to ST].¹³⁷⁷

- (898) ST explains that the optimisation adjustments reflect [...]. ST has invested in broadband assets consistently over the period 2003-2010. ST therefore believes that it is reasonable to assume that investments [...] were made over the period 2005 to 2010.¹³⁷⁸
- (899) The proposed adjustment of the assets is unjustified and cannot be accepted for the reasons set out in recitals (900) to (902):
- (900) Replacing existing assets with their more modern equivalents is conceptually similar to adjusting the costs without properly adjusting the depreciations and the same considerations as provided in the recitals (889) to (893) apply.
- (901) In addition, the MEA principle is not in line with the equally efficient competitor test which is based on the same assets as held by the incumbent rather than a hypothetical different set of assets suggested by ST. According to the Court, *"although the Community judicature has not yet explicitly ruled on the method to be applied in determining the existence of a margin squeeze, it nevertheless follows clearly from the case-law that the abusive nature of a dominant undertaking's pricing practices is determined in principle on the basis of its own situation, and therefore on the basis of its own charges and costs, rather than on the basis of the situation of actual or potential competitors."*¹³⁷⁹
- (902) Further, every operator needs to forecast expected demand and invest accordingly. It is therefore inevitable that from an ex-post perspective, there sometimes remains unused capacity.¹³⁸⁰ Usually this is no particularity of the incumbent and therefore there appear to be only very limited circumstances where excess capacity should not be taken into account.
- (903) The Commission therefore rejects ST's adjustments of asset inefficiencies.

8.2.4.1.1.3 Treatment of fixed asset costs

- (904) [Name of consultant] contends that, in principle, [...] should be removed from the asset cost base and should not be allocated to services.
- (905) [...].
- (906) [...].
- (907) [...] are costs specific to an increment and are removed if the increment is removed. Therefore [...] are included in LRAIC calculation as they are incremental. [...].

¹³⁷⁷ Source: ST's Reply to the SO, Annex XV.5, Doc ID 4730-136

¹³⁷⁸ Source: ST's Reply to the SO, Annex XV.5, Doc ID 4730-136.

¹³⁷⁹ Case T-271/03 *Deutsche Telekom v Commission* [2008], ECR II-485, paragraph 188; upheld by the Court of Justice in Case C-280/08P *Deutsche Telekom v Commission* [2010], ECR I-9601.

¹³⁸⁰ For instance, Orange's fibre network covers around 300 000 households in Slovakia in 2010 whereas the number of acquired subscribers of Orange amounted to 43 000 in December 2010 (see subsection 6).

- (908) In this case, with regard to [costs categories specification], [...] are removed from the calculation, because they cannot [reason for why specific categories are not applicable in the methodology].
- (909) Effectively, [Name of consultant's] approach removes from the calculation costs which cannot be considered as [reason for why specific cost categories are not applicable in the methodology with regard to services]. The Commission considers this procedure as appropriate.
- (910) To conclude on ST's treatment of asset costs, the Commission accepts (i) ST's asset revaluation, despite the fact that it might underestimate the downstream asset costs, (ii) dismisses ST's adjustments for efficiency and (iii) accepts ST's treatment of fixed asset costs. The impact thereof will be explained in detail in subsection 8.3.1.2.

8.2.4.1.2 Treatment of operating expenditure (OpEx)

- (911) [Name of consultant] applied adjustments to OpEx which aim at [...] ¹³⁸¹ and removing [...] [Specification of categories, that are excluded from the methodology].
- (912) As far as optimisations are concerned, [Name of consultant] applies two types of OpEx adjustments:
- (913) First, the costs of [description of how costs of efficient operator were derived and stating source (benchmark) used for these derivation]. [...].
- (914) The second approach to OpEx optimisation involves [...] ¹³⁸²[...] ¹³⁸³
- (915) [...] ¹³⁸⁴[...] ¹³⁸⁵ In line with that ST derived [...] with reference to [Source specification-not publicly available] and then applied them to [...]. That way four additional costs categories ¹³⁸⁶ were adjusted in ST's own calculation. ¹³⁸⁷
- (916) As a second stage of OpEx adjustments, [...] were removed. [...]
- (917) The approach suggested by ST [...] is highly questionable:
- (918) First, adjusting the level of efficiency to the first quartile of the IBS 2011 is not in line with the equally efficient competitor test. [Name of consultant] justifies such adjustments (which ST refers to as "optimization") on the grounds that a new entrant on the telecommunications market would also build a cost-effective organization working with the right amount of resources given the demand for its services. However, the equally efficient competitor test clearly states that it is not the costs of

¹³⁸¹ [...], p. 27.

¹³⁸² An example of OpEx adjustments based on assets is cost of electricity. One part of the consumed electrical energy depends on the surface of administrative buildings (and thus also the OpEx generated by organisational units). On the other hand, the majority of electrical power is used to feed network equipment. If network equipment is scaled down, removed or replaced by modern, more efficient assets, the amount of used electrical power will decrease. In order to estimate the cost of electricity consumed under optimal conditions, it is reasonable to make it a dependent cost category driven by all network equipment that is electrically powered. – [...], p. 30.

¹³⁸³ As an example the dependency of direct costs related to repair and maintenance of IT equipment can be used. These costs depend on the number of laptops and desktops purchased and maintained by the operator's IT department. This in turn depends on the percentage of optimised OpEx related to organisational units. – [...], p. 30.

¹³⁸⁴ ST's reply to RFI of 7 June 2013, DocID 3834, paragraph 39.

¹³⁸⁵ Doc ID4671-14, p 11.

¹³⁸⁶ Commercialization Costs, Customer Care, Marketing and Common Costs (e. g. corporate overhead).

¹³⁸⁷ Doc ID4671-17.

a hypothetical downstream competitor (or a reasonably efficient competitor) that should be used, but the costs of the dominant undertaking.¹³⁸⁸ It cannot therefore be assumed that a new entrant has already reached a level of economies of scale or learning curve process comparable to that of the best operators that are covered by the IBS study. When computing LRAIC of the equally efficient competitor as an input for a margin squeeze analysis, feasible efficiency reserves should normally not be taken into account.

- (919) Second, the approach of determining [...] appears not to be in line with the requirement that "*costs that could have been avoided by not producing a particular product or range are not considered to be common costs*"¹³⁸⁹. As long as parts of the organization are not needed if certain products or services are not offered, they should not be included in the common costs. [Name of consultant] should rather define a hypothetical organisation that offers all but the analysed services (instead of [...] in order to determine [...]). Somewhat inconsistently, [...] does not apply a similar consideration when assessing OpEx.
- (920) Therefore, the Commission does not accept the suggested adjustment of operating expenditure. The impact thereof will be explained in detail in sections 8.3.1.3 and 8.3.1.4.
- (921) Independently of the [...] and its findings reflected by ST's margin squeeze calculation, ST suggested further changes as compared to the preliminary calculations in the SO. These will be dealt with in the section 8.3 and any differences between ST's and the Commission's approach will be explained along with the calculation.

8.3. The Commission's margin squeeze calculation

- (922) The *equally efficient competitor* test determines whether a hypothetical competitor that is as efficient as the dominant company's own downstream arm could trade profitably on the basis of the upstream price charged to its competitors by the upstream arm of the dominant company. The test is therefore based on the revenue and cost structure of the downstream arm of the dominant company, in this case the downstream arm of ST.
- (923) The margin squeeze calculation will be conducted on different levels. The Commission will consider first broadband services only, then it will assess whether the inclusion of additional services in the portfolio would alter the finding of the Commission on the presence of margin squeeze.

8.3.1. Broadband products only

- (924) An equally efficient competitor would, *via* the local loops that it would have unbundled, have been able to replicate the entirety of ST's retail DSL offering as it evolved over time. Therefore, the downstream input to the present margin squeeze analysis consists of ST's overall retail DSL offering as it evolved over time, that is to say:
- The "DSL Access" and "DSL Internet" products in 2005;

¹³⁸⁸ Case T-336/07 *Telefónica v Commission* [2012], EU:T:2012:172, paragraphs 192-193 and the case-law cited therein.

¹³⁸⁹ Guidance Paper, p.11, footnote 2.

- The "DSL Access", "DSL Internet" and "VRI" services (excluding fibre based "VRI Comfort") in 2006 to 2010.
- (925) As it was explained in recitals (837) and (838), the Commission agrees that standalone DSL Access services are relevant for the margin squeeze test so that revenues and costs of standalone DSL Access will be included in the margin squeeze calculation.
- (926) The calculation comprises two steps: the first relating to bundled DSL Access and DSL Internet services and the second including the margin on the standalone DSL Access service.

8.3.1.1. Wholesale charges

- (927) The wholesale product concerned is unbundled access to the local loop (ULL) based on the Reference Offer on unbundled access to local loop (RUO) published on 12 August 2005 following the decision of TUSR of 14 June 2005¹³⁹⁰.
- (928) Installation fees and other one-off costs (*for example* for setting up collocation) for ULL are not recurrent costs. The installation fees are taken into account as part of the subscriber acquisition costs. The collocation charges were to be set individually during negotiations with AOs. In view of this and in order to avoid purely hypothetical assumptions of collocation costs, the Commission does not take those costs into account for the margin squeeze calculations. In any case, any additional costs for collocation to be borne by AOs would only increase the resulting margin squeeze.
- (929) The calculation of the wholesale charge is based on a hypothetical price per access which ST would have to pay for its portfolio of retail mass market broadband products if it used ULL as wholesale input. In the period of 2005-2008 ULL was not actually sold by ST. Therefore, there is no data on actual payments by AOs for that product. The sales of ULL in 2009 and 2010 were only negligible and the costs for those few local loops are thus unlikely to be representative.
- (930) Recurrent wholesale charges for ULL in the period 2005-2010 consisted in particular of the monthly rental fees with different rates for full and shared access¹³⁹¹. In view of changes to the RUO, the actual fees evolved throughout the analysed period as indicated in Table 21:

Table 21 - Monthly rental fee for ULL access (2005-2010)

Monthly fees by individual periods	12/08/2005	01/08/2006	01/07/2007	01/07/2008	01/07/2009	15/08/2010
	SKK	SKK	SKK	SKK	EUR	EUR
Full access	[...]	[...]	[...]	[...]	[...]	[...]
Shared access	[...]	[...]	[...]	[...]	[...]	[...]

- (931) Average monthly fees for individual years 2005-2010 are then calculated by weighting these fees by the number of months of their validity in each year.

¹³⁹⁰ For more details, see subsection 4.4.

¹³⁹¹ For details, see description of ULL wholesale service in section 4.3.4 of the SO.

Table 22 – Average monthly fee (2005-2010)

Average monthly fees in each year		2005	2006	2007	2008	2009	2010
Full access	SKK	[...]	[...]	[...]	[...]		
Shared access	SKK	[...]	[...]	[...]	[...]		
Full access	EUR	[...]	[...]	[...]	[...]	[...]	[...]
Shared access	EUR	[...]	[...]	[...]	[...]	[...]	[...]

(932) The calculation of the wholesale charge per access for ST takes into account the actual proportion of naked and non-naked services in the retail offering of ST. Therefore, the total monthly wholesale charge per access would be calculated as an average of shared and full access to the local loop¹³⁹² weighted by the number of ST's retail DSL naked and non-naked retail subscribers' services¹³⁹³ for each year.

Table 23 – Volumes of ST's retail broadband services (2005-2010)

Volumes in each year	2005	2006	2007	2008	2009	2010
Volume DSL Internet	[...]	[...]	[...]	[...]	[...]	[...]
Volume VRI non-naked	[...]	[...]	[...]	[...]	[...]	[...]
Volume VRI naked	[...]	[...]	[...]	[...]	[...]	[...]
Total	[...]	[...]	[...]	[...]	[...]	[...]

(933) The percentage shares of naked and non-naked retail services of ST¹³⁹⁴ and the resulting average¹³⁹⁵ wholesale charges¹³⁹⁶ are summarised in Table 24:

Table 24 – Ratio non-naked/naked and weighted average wholesale charges (2005-2010)

	2005	2006	2007	2008	2009	2010
Ratio non-naked	[...]	[...]	[...]	[...]	[...]	[...]
Ratio naked	[...]	[...]	[...]	[...]	[...]	[...]
Total w holesale charges per access (in EUR)	[...]	[...]	[...]	[...]	[...]	[...]

¹³⁹² The calculations do not take into account the access to a sub-loop. Even though it was also an option in RUO, the access to sub-loop is rather used in specific circumstances, e.g. in order to be able to provide VDSL services (see e.g. explanations concerning sub-loop unbundling on the website of the UK NRA, doc ID3358) or when for some specific reason access to the loop is not possible. In addition, it requires significant further investments by the AO.

¹³⁹³ Source: ST's margin squeeze calculation, Doc ID4730-129. Volume DSL Internet: Worksheet 'ULL data' J426:O426. Volume VRI non-naked: Worksheet 'ULL data' J433:O433. Volume VRI naked: Worksheet 'ULL data' J431:O431.

¹³⁹⁴ Source: ST's margin squeeze calculation, Doc ID4730-129. Worksheet 'Revised ULL' N37:S38.

¹³⁹⁵ In the Reply to the SO, ST pointed out that the weighted average wholesale charges in the SO were overestimated because of the incorrect mapping between ST's retail and wholesale products (incorrect weighting). This has been taken into consideration and corrected in the present Decision.

¹³⁹⁶ Source: ST's margin squeeze calculation, Doc ID4730-129. Worksheet 'Revised ULL' N39:Q39 for the years 2005-2008.

- (934) As to the percentage shares of naked and non-naked products for 2006, ST determined them based on the relative proportion between the number of VRI Plus subscribers at the end of 2006 ([...])¹³⁹⁷, and the number of VRI subscribers at the end of 2006 ([...])¹³⁹⁸. This is because separate reporting of costs and revenues for VRI was only introduced in 2007.¹³⁹⁹
- (935) As to the total wholesale charges, for 2009 and 2010 there is a difference between ST's figures and the figures presented in Table 24. As to the ULL charges valid from May 2011, ST relied on a retail minus calculation based on 2009 data because the official 2010 data was not yet available. The 2009 cost data was adjusted by ST in order to *"correct for inappropriately high cost items [...]"* and *"reflect the decreasing nature of certain cost categories [...]"*.¹⁴⁰⁰
- (936) According to ST, *"in 2009, the wholesale charge considered should be based on the full ULL price ST set in 2010 based on 2009 information. Similarly for 2010, the wholesale charge considered should be based on the full ULL price ST set in 2011."*¹⁴⁰¹
- (937) The Commission disagrees with ST's approach suggesting that wholesale charges should apply retroactively for the purposes of the margin squeeze calculation. Wholesale prices for an AO are set for a given period at the latest in that period, and those are effectively the wholesale costs AOs incur.
- (938) The Commission will therefore use the same calculation method for the wholesale charges for 2009 and 2010 as for the rest of the period.
- (939) The average monthly fees for ULL per access represent the input wholesale charges for ULL products into the margin squeeze calculation as set out in Table 22.

8.3.1.2. Network costs

- (940) In the case of wholesale broadband access at local loop level, the network costs of an equally efficient competitor are equal to ST's network costs between the main distribution frame – at the level of which AOs install their DSLAM¹⁴⁰² – and the peering centre.
- (941) Those costs are found under (i) the "DSLAM" cost header, plus the amounts under (ii) the "DSLAM – ATM" network cost header, plus the amounts under (iii) the "BRAS – IP" network costs header¹⁴⁰³, plus the amounts under the "other network costs" header in the profitability overviews of ST.
- (942) The ISP platform costs attributed to the "DSLAM – ATM", "BRAS – IP" and "Other network costs" cost headers in the profitability overviews are taken into account hereunder as network costs. The ISP platform costs attributed to the "Common costs (e.g. corporate overhead)" cost header in the profitability overviews are taken into account together with all common costs.

1397

Doc ID535

1398

Doc ID536

1399

See paragraph 1080 of the SO.

1400

ST's Reply to the SO, paragraph 1491.

1401

ST's Reply to the SO, paragraph 1493.

1402

Digital Subscriber Line Access Multiplexer.

1403

See Doc ID 1742, p. 1.

- (943) Moreover, ST bears costs to connect its network to the Internet (IP connectivity costs). Those costs are reflected in the "Other (e.g. IP transit)" cost header in the profitability overviews.
- (944) In the reply to the SO and its updates ST provided LRAIC costs estimates for the cost categories DSLAM, DSLAM-ATM and BRAS-IP while relying on historic costs as set out in the SO for Other network costs and IP connectivity costs.
- (945) As explained in recital (910), the Commission will include in the margin squeeze calculation the LRAIC asset costs as submitted by ST except the adjustments for asset inefficiencies¹⁴⁰⁴ due to excessive capacity. This is in favour of ST because the revaluation of assets as proposed by ST lead to lower network costs than those which an equally efficient competitor would incur.
- (946) Against that background, the LRAIC-based network costs¹⁴⁰⁵ of an equally efficient competitor for the period 2005-2010 are as follows:

Table 25 – LRAIC network costs (2005-2010)

in EUR	2005	2006	2007	2008	2009	2010
ST's LRAIC costs (SO)	[...]	[...]	[...]	[...]	[...]	[...]
ST's LRAIC costs (LoF)	[...]	[...]	[...]	[...]	[...]	[...]
ST's LRAIC costs readjusted (LoF)	[...]	[...]	[...]	[...]	[...]	[...]

- (947) As will be demonstrated in Table 38, the inclusion of ST's LRAIC based network costs estimates (which are lower than those which an equally efficient competitor would incur and therefore decrease the overall downstream costs and as such improve the available margins) does not alter the Commission's conclusion on the existence of margin squeeze. The conclusion on the existence of margin squeeze in this case is therefore independent of the choice between historic and ST's estimates of LRAIC network costs.

8.3.1.3. ISP recurrent costs

- (948) The ISP recurrent costs are the recurrent costs distinct from the network costs such as the customer care costs (commercial and technical hotlines), the customer administration costs (relating *inter alia* to invoicing and debt recovery), the costs related to surveying and monitoring the ADSL market and the costs relating to

¹⁴⁰⁴ See Table 2 of Annex I.

¹⁴⁰⁵ Source: ST's margin squeeze calculation, Doc ID4671-17. ST's LRAIC figures: Worksheet 'Revised ULL', Total network costs (revised LRAIC + Other + IP) N70:S70. These figures include both the LRAIC asset costs for the cost categories DSLAM, DSLAM-ATM and BRAS-IP and the Other network costs and IP connectivity costs as set out in the UCN sheets. The Commission notes that ST spontaneously submitted a revised version of its margin squeeze model annexed to its reply to the letter of facts (see point 746 of ST's reply to the letter of facts). The Commission observes that LRAIC network costs figures submitted by ST in its revised calculation annexed to the reply to the letter of facts are slightly lower than those figures submitted by ST in its reply to the SO. For the purpose of its margin squeeze calculation, the Commission will base itself on these slightly lower figures. This approach is in favour of ST because it translates into the lower downstream asset costs.

maintaining a licence as an electronic communications operator in the Slovak Republic.

- (949) These costs are grouped under the "Customer Care", "Marketing (e.g. product managers, billing)", "Common costs (e.g. corporate overhead)" and "Other fixed costs (e.g. Telecom licences)" headers in the profitability overviews received from ST. Therefore, the ISP recurrent costs of an equally efficient competitor are found under these headers in the relevant profitability overviews.
- (950) As explained above¹⁴⁰⁶, ST proposed efficiency adjustments of the cost categories Customer Care ([...]%), Marketing ([...]%) and Common Costs ([...]%).¹⁴⁰⁷ As it was established in recitals (917) and (920) the Commission does not accept such adjustments as they are not in line with the equally efficient competitor test and eliminates these from ST's margin squeeze calculation.
- (951) In addition, ST suggests further adjustments to ISP recurrent costs as follows.

8.3.1.3.1 Marketing costs

- (952) In its Reply to the SO, ST contended that *"the costs of running and marketing the DSL product cannot be recovered from the small number of customers that an operator is able to attract during the early period of the product lifecycle. The recovery of network and commercial start-up costs is only achieved once an increase in the customer base allows for economies of scale."*¹⁴⁰⁸
- (953) ST explained that *"the unit costs ST incurred during the earlier period of implementing broadband are in excess of what should reasonably be expected to be recovered on a per subscriber per month basis. Such excess costs must be, according to ST, considered in the context of generally promoting the uptake of DSL based broadband technology."*¹⁴⁰⁹ ST adds that *"such adjustment should apply to marketing costs during the earlier years of the period of the alleged abuse on the basis that the marketing costs in those years significantly exceed the costs observed in later years."*
- (954) ST therefore has estimated the "reasonable" amount of marketing costs for the years 2005 and 2006. ST attributed the costs in excess of those marketing costs to subscriber acquisition costs. That assumption is, in ST's view, conservative on the basis that investments to promote DSL technology could be expected to be recovered over a much longer period of time. The corresponding adjustment to marketing costs and subscriber acquisition costs are set out in Table 84 in ST's reply to the SO.¹⁴¹⁰
- (955) The Commission disagrees with ST's approach on the reduction of marketing costs in the first two years of the assessed period as there is no reason to assume that an equally efficient competitor would not incur those costs in the first years.
- (956) In any event, since the Commission carries out the margin squeeze test also following a multi-period approach, as suggested by ST, any uneven spread of marketing costs is levelled out over time.

¹⁴⁰⁶ See recital (915).

¹⁴⁰⁷ The percentages express the adjusted level of costs.

¹⁴⁰⁸ ST's reply to the SO, paragraph 1357.

¹⁴⁰⁹ ST's reply to the SO, paragraph 1487.

¹⁴¹⁰ ST's reply to the SO, paragraph 1487.

8.3.1.3.2 Common costs

- (957) As regards the common costs, the Commission notes that ST has been confronted with a rapid decline of the revenues generated by its main legacy service, fixed voice telephony¹⁴¹¹ and made considerable efforts to reverse that trend by transforming from a "*traditional voice provider*" into a "*next generation operator*" based notably on the [...] ¹⁴¹².
- (958) In that process broadband services held a central position both in terms of investing in a new technical platform allowing the convergence of voice and data services, and in terms of developing new and fast growing services to compensate for the decline in revenues from legacy businesses¹⁴¹³.
- (959) For that reason, there is no doubt that a fair proportion of ST's overhead costs are attributable to broadband services. The share of ST's common costs attributable to broadband services is the increase in the common costs resulting from the provision of the service in question¹⁴¹⁴.
- (960) Since ST provides different types of retail services, one of which is broadband, only a share of the common cost should be attributed to broadband when determining the incremental costs. In its reply to the SO, ST claims that the SO included all common costs in the costs of downstream retail broadband services. ST contends that these costs are common to the provision of all of ST's services, and thus not incremental to broadband. ST has assessed which costs items in the "Common cost" category are affected by the downstream broadband activity and which would be avoidable in the long term in the absence of such activities.¹⁴¹⁵
- (961) ST further explains that only a share of costs that are incremental to ST's retail broadband services should be allocated to downstream activities because common costs are allocated between different services as a mark-up on end-to-end (in other words both downstream (retail) and upstream (wholesale) activities) fully allocated costs within UCN.¹⁴¹⁶ ST claims that the SO incorrectly includes common costs attributable to ST's upstream activities into the costs of downstream retail broadband services.¹⁴¹⁷
- (962) ST, in its margin squeeze model provided its calculation of common costs attributed to broadband and, at the same time, attributed to downstream.
- (963) The Commission accepts ST's proposal for the calculation of the common costs (except for the efficiency adjustments). Nevertheless, the common cost figures presented in the Commission's margin squeeze calculation differ from ST's figures. This is in particular due to fact that the Commission does not accept ST's suggestions as to the adjustment of marketing costs, other fixed costs and network costs.

¹⁴¹¹ See among others Doc ID 171 p.18, 27, ID 1547 p.7, ID 121 p. 69, ID 158 p. 40.

¹⁴¹² Doc ID 158 p. 33, ID 861 p. 6 to 10, ID 862 p. 6 to 9, ID 863 p.4, ID 864 p. 4.

¹⁴¹³ Doc ID 158 p.33, ID 861 p. 6 to 10, ID 862 p. 6 to 9, ID 863 p.4, ID 864 p. 4.

¹⁴¹⁴ See Commission's decision of 4 July 2007 in Case No COMP/38.784 – *Wanadoo España v. Telefónica*, paragraph 320.

¹⁴¹⁵ ST's reply to the SO, paragraph 1336.

¹⁴¹⁶ ST's reply to the SO, paragraph 1339.

¹⁴¹⁷ ST's reply to the SO, paragraph 1282.

8.3.1.3.3 Other fixed costs (e. g. telecom licences)

- (964) As to other fixed costs, ST put forward the following arguments in its reply to the SO. ST suggests that at least some of the underlying costs are not incremental to retail broadband activities and mentions as an example two capital cost categories in particular.
- (965) The cost category Y11 FINAN represents the capital costs of holding cash and financial equity allocated to ST's services in proportion to the directly attributed costs. ST considers them as extraordinary financial revenues and costs from a financial accounting point of view which should not be included in the margin squeeze calculation.
- (966) The cost category Y105 POHLAD represents the capital cost of outstanding receivables. These costs are allocated to services on the basis of revenues.
- (967) In the Commission's view, for broadband business, the amount of working capital and receivables increased over the infringement period alongside the cost of capital. Therefore, it cannot be claimed that these costs are not incremental to broadband services and should therefore be excluded from the margin squeeze test. A competitor as efficient as ST would face the same costs and would have to take them into account. The Commission is of the view that the allocation of those costs on the basis of directly attributed costs or revenues is a good proxy for costs incremental to broadband services. In addition, ST did not put forward an alternative calculation. The Commission therefore considers that the equi-proportionate allocation is the best available estimate of incremental costs. Those cost items (that is to say Y11 FINAN and Y105 POHLAD) should thus be included in the input of the margin squeeze test.
- (968) Against that background, the recurrent costs¹⁴¹⁸ of an equally efficient competitor are as follows:

Table 26 – ISP recurrent costs (2005-2010)

in EUR	2005	2006	2007	2008	2009	2010
Customer Care	[...]	[...]	[...]	[...]	[...]	[...]
Marketing (e.g. Product managers, billing)	[...]	[...]	[...]	[...]	[...]	[...]
Common costs	[...]	[...]	[...]	[...]	[...]	[...]
Other fixed costs (e.g. Telecom licences)	[...]	[...]	[...]	[...]	[...]	[...]
Total ISP recurrent costs	[...]	[...]	[...]	[...]	[...]	[...]
ISP recurrent costs per access per month	[...]	[...]	[...]	[...]	[...]	[...]

8.3.1.4. Subscriber acquisition costs

- (969) Subscriber acquisition costs are the costs of acquiring new ADSL subscribers. They can be categorised as follows:

¹⁴¹⁸ Source: ST's margin squeeze calculation, Doc ID4730-129. Customer Care: Worksheet 'Revised ULL' F61:K61. Marketing (e. g. product managers, billing): Worksheet 'Revised ULL' F62:K62. Common costs: Worksheet 'Revised ULL' N71:S71 (see the explanation concerning the modification of ST's figures in paragraph (963)). Other fixed costs: Worksheet 'Revised ULL' F64:K64.

- The net retail installation costs, that is to say the net cost of setting up and activating new DSL broadband access services (to the extent that these are not included in the wholesale setup provided by ST);
 - The net cost of selling to subscribers the required customer premise equipment (CPE), sometimes at subsidized prices;
 - The commercialization costs, that is to say ST's sales and advertising costs; and
 - The wholesale setup fees, that is to say the fees charged by ST to its competitors for setting up wholesale broadband access services.
- (970) ST identifies retail installation revenues and costs in the profitability overviews for several products.¹⁴¹⁹ The net retail installation cost is in principle equal to the economic profit or loss made by ST on these products.
- (971) The review of all the cost items underlying the cost headers¹⁴²⁰ in the overviews of those services shows that the costs concerned relate in particular to sales staff, new order processing and handling or material used for DSL installation. It cannot be excluded, however, that some, or all of the costs summarised under the "Other network cost" header for those services, would in reality not have to be borne by an AO. That is because some of those may be included in the wholesale setup services of ST. In order not to overestimate the retail installation costs of an equally efficient competitor, the Commission has excluded from the calculation the amounts under the "Other network cost" header in the profitability overviews of these DSL installation services. The exclusion of those costs is to the advantage of ST with a view to the margin squeeze test.
- (972) As it was already explained in recital (967), contrary to ST's proposal, the Commission will include the cost items Y11 and Y105 also in relation to DSL installation products.
- (973) The net retail installation costs¹⁴²¹ of an equally efficient competitor is calculated as the average¹⁴²² economic loss (excluding Other network costs¹⁴²³ and accepting ST's Common cost figures) incurred by ST per installation multiplied by the number of new subscribers¹⁴²⁴.

¹⁴¹⁹ "S1151 Installation (ST) DSL access" (in years 2005, 2006, 2007, 2008), "S1151 Installation Broadband access – metallic" (2009, 2010), "S1152_Self-installation DSL access" (2006, 2007, 2008), "S1152 Configuration & Sales Internet metallic" (2009, 2010), "S1153 Installation DSL access naked" (2006) and "S1153 Installation VRI Plus" (2007). Doc ID 1983 to 1987, Doc ID 2687 and Doc ID 3031.

¹⁴²⁰ See Doc ID 2080, 2082 to 2086, Doc ID 2795 and Doc ID 3033 (cost amounts per individual cost item) and Doc ID 2122 to 2166 (description of the individual cost items).

¹⁴²¹ Source: ST's margin squeeze calculation, Doc ID4730-129. Worksheet 'Revised ULL' N114:S114.

¹⁴²² This average is calculated as the total economic loss (excluding "other network costs") incurred for the "DSL Installation" products divided by the total number of installations for these products. The total numbers of installations are found in ST's margin squeeze calculation in Worksheet 'ULL Data' J346:O346 for S1151, K347:O347 for S1152 and K348:L348 for S1153.

¹⁴²³ After this deduction, the retail installation costs include in particular the sales costs, marketing costs and share of common costs of ST's "DSL Installation" products, from which all revenues connected with retail DSL broadband installations (e.g. installation fees paid by retail customers) are deducted.

¹⁴²⁴ Source: ST's margin squeeze calculation, Doc ID4730-129. Number of DSL, VRI, VRI Plus New Customers: Worksheet 'ULL Data' J351:O351.

- (974) As to net costs associated with selling CPE to new subscribers¹⁴²⁵ the Commission does not make any *prima facie* assumptions regarding the number of CPEs that new subscribers purchase. Rather, to allow for the possibility that certain customers may already be equipped, average CPE costs are calculated with reference to the number of new customers for a DSL access rather than with reference to the actual number of CPE sold.
- (975) That average CPE cost is subsequently multiplied by the number of new subscribers¹⁴²⁶ of ST for the products that AOs should be able to replicate. The number of new customers for a DSL access is: the number of new customers for DSL access in 2005 and the number of new customers for DSL access plus the number of new customers for VRI and VRI Plus in 2006-2010.¹⁴²⁷
- (976) ST's commercialisation costs¹⁴²⁸ are identified under the cost headers "Advertising" and "Sales (incl. commissions)" in the profitability overviews.¹⁴²⁹ To recall, ST made efficiency adjustments to the cost category commercialization costs ([...]%). As it was established in recitals (917) and (920), the Commission does not accept such adjustments as they are not in line with the equally efficient competitor test.
- (977) ST drew the Commission's attention to the existence of corporate level advertising campaigns, that is to say campaigns which are not directly driven by any service or group of services¹⁴³⁰. As of 2006, the corresponding cost amounts were identified separately on cost item "[...]"¹⁴³¹. Because the launch, active promotion and development of broadband products in the market were central to ST's business strategy between 2004 and 2010, the Commission takes the view that if ST had not offered broadband services, it would have likely saved a significant portion of its corporate level advertising expenditures. The fact that at least some of those costs should be considered as incremental to broadband services is confirmed by ST itself: *"These costs relate to advertising which is carried out: to [...]"*¹⁴³². According to ST, however, the corresponding cost amounts are identified separately and ST does not have sufficient information to determine the product-specific costs of broadband services. Corporate advertising costs are therefore excluded from advertising costs in favour of ST.
- (978) Finally as regards ULL installation fees, the RUO price list distinguishes between the installation fee per new unbundled line and the fee for administrative qualification of the local loop. The amounts of those fees for years 2005-2010 are summarised in Table 27:

¹⁴²⁵ See profitability overviews for products "S5110 CPE sold DSL" (2005), "S5115 CPE Sold DSL" (2006, 2007, 2008) and "S5115 CPE Sold Internet" (2009, 2010). Doc ID 2080, 2082 to 2086, Doc ID 2795 and Doc ID 3033 (cost amounts per individual cost item) and Doc ID 2122 to 2166 (description of the individual cost items).

¹⁴²⁶ Source: ST's margin squeeze calculation, Doc ID4730-129. Worksheet 'ULL Data' J380:O380.

¹⁴²⁷ Source: ST's margin squeeze calculation, Doc ID4730-129. Worksheet 'ULL Data' J376:O376.

¹⁴²⁸ Source: ST's margin squeeze calculation, Doc ID4730-129. Worksheet 'Revised ULL' F109:K109.

¹⁴²⁹ This is confirmed by the short description of the cost items underlying these headers: Doc ID 2122 to 2126.

¹⁴³⁰ ST's Reply to RFI of 28/01/2010, Doc ID 1982 p. 4.

¹⁴³¹ Doc IDs 2124 to 2126.

¹⁴³² DocID 1982.

Table 27 – ULL setup fees by individual periods (2005-2010)

	12/08/2005	01/07/2007	01/07/2009	15/08/2010
	SKK	SKK	EUR	EUR
Installation fee – full access	[...]	[...]	[...]	[...]
Installation fee – shared access	[...]	[...]	[...]	[...]
Fee for administrative qualification of local loop	[...]	[...]	[...]	[...]

- (979) The average installation fees for a new access in individual years 2005-2010 are calculated by weighting those fees by the number of months of their validity in each year. Further, the average installation fee takes into account the actual proportion of naked and non-naked services in the retail offering of ST. Therefore, the average installation fee per access is calculated as an average of shared and full access to the local loop¹⁴³³ weighted by the number of ST's retail subscribers for DSL naked and non-naked services for each year.
- (980) Until 1 November 2010 AOs had to pay for administrative qualification of the local loop for any new access to the local loop¹⁴³⁴ which therefore constituted part of the overall installation costs. Therefore, the setup fee for each access is composed of the sum of the installation fee and the administrative qualification fee until 1 November 2010. The fee for administrative qualification was made voluntary as of 1 November 2010 so that it will be taken into account only until that date for the purposes of the margin squeeze calculation.
- (981) The resulting average setup fees are then multiplied by the total number of new customers¹⁴³⁵ for all DSL retail services of ST in individual years in order to arrive at the total wholesale setup costs¹⁴³⁶ per year, as summarised in Table 28:

¹⁴³³ The calculations do not take into account the access to a sub-loop. Even though it was also an option in the RUO, the access to sub-loop is rather used in specific circumstances (for example in order to be able to provide VDSL services (see for example explanations concerning sub-loop unbundling on the website of the UK NRA, Doc ID3358) or when for some specific reason access to the loop is not possible. In addition, it requires significant further investments by the AO.

¹⁴³⁴ See ID1982, p. 10-11.

¹⁴³⁵ Source: ST's margin squeeze calculation, Doc ID4730-129. Number of new DSL/VRI (Plus) customers: Worksheet 'Revised ULL' F95:K95.

¹⁴³⁶ Source: ST's margin squeeze calculation, Doc ID4730-129. Total installation fee: Worksheet 'Revised ULL' N100:S100; Total administration fee: Worksheet 'Revised ULL' N101:S101.

Table 28 – ULL setup fees by individual periods (2005-2010)

	12/08/2005	01/07/2007	01/07/2009	15/08/2010		
	SKK	SKK	EUR	EUR		
Installation fee – full access	[...]	[...]	[...]	[...]		
Installation fee – shared access	[...]	[...]	[...]	[...]		
	2005	2006	2007	2008	2009	2010
Ratio naked	[...]	[...]	[...]	[...]	[...]	[...]
Ratio non-naked	[...]	[...]	[...]	[...]	[...]	[...]
Weighted average	[...]	[...]	[...]	[...]	[...]	[...]
Number of new customers	[...]	[...]	[...]	[...]	[...]	[...]
Total installation fee	[...]	[...]	[...]	[...]	[...]	[...]
	12/08/2005	01/07/2007	01/07/2009	15/08/2010		
	SKK	SKK	EUR	EUR		
Administrative qualification fee	[...]	[...]	[...]	[...]		
	2005	2006	2007	2008	2009	2010
Weighted average	[...]	[...]	[...]	[...]	[...]	[...]
Number of new customers	[...]	[...]	[...]	[...]	[...]	[...]
Total administration qualification fee	[...]	[...]	[...]	[...]	[...]	[...]

- (982) The costs of acquiring customers form a substantial proportion of expenditure, the benefit of which lasts for a longer period than the one in which they are incurred. It is appropriate, therefore, to amortize subscriber acquisition costs over a period of longer than one year. Thus, the subscriber acquisition costs in a given year depend not only on the actual expenses incurred for subscriber acquisition purposes in this year but also in previous years. In line with *Telefónica*¹⁴³⁷, in the SO the Commission spread the customer acquisition costs over a period of three years. That period is also in line with the duration considered as appropriate by ST in the [...] ¹⁴³⁸.
- (983) In ST's reply to the SO, ST argued that the amortisation period for most of the aforementioned subscriber acquisition cost elements should at least be four years, with the exception of the administrative qualification fee.
- (984) ST's administrative qualification fee is a charge that ST considered necessary to cover the cost of checking that the loop to a customer is of sufficient quality for the provision of broadband. The costs of such an activity reflect ST's long term activity of cataloguing its network infrastructure which exceeds the lifetime of a customer. ST considers that an average lifetime of [10-20] years is a reasonable estimate of the expected lifetime of a DSL line and that the cost of qualification should be recovered over that period.¹⁴³⁹ The Commission accepts ST's arguments and applies a [10-20]-year-period to the amortisation of administrative qualification fees.

¹⁴³⁷ Commission's decision of 4 July 2007 in Case No COMP/38.784 – Wanadoo España v. Telefónica, paragraph 474.

¹⁴³⁸ See Doc ID 2002, p. 1.

¹⁴³⁹ This estimate is based on an aggressive scenario of migration from ST copper-based DSL to FTTx technology, which assumes that DSL customers would have fully migrated by 2028 and that at ST's expected rate of fibre deployment all new fibre lines are used for migrating DSL customers.

- (985) As to remaining subscriber acquisition costs, ST argues, first, that the Commission should specify the amortisation period taking into account the specifics of the market in question. According to ST, in the *Telefónica* case, the Commission reviewed markets at an earlier stage of development. ST also refers to Analysys Mason which found that the “intend to churn” varied between 7% and 12% per annum in a number of telecommunications markets. According to ST, that is consistent with the churn of 7% to 10% between 2006 and 2010 observed in the Slovak Republic and that such estimates of switching probability indicate that customers can be expected to remain with their provider for periods longer than 3 years.
- (986) Second, ST contends that the amortisation period of three years is a standard period that is used in the regulatory context based on legal precedents. It is used by ST in its submissions to the NRA which follows the precedent set by the Commission. As ST’s submissions to the TUSR have not shown the existence of a margin squeeze, ST argues it had no reason to investigate further whether the amortisation period of three years used was appropriate.
- (987) As regards ST's first argument, the Commission is of the view that in the Slovak market where the number of national level operators is small and the market shares of AOs are low, it is natural that the incumbent's customer churn is lower because customers have less options to switch between operators: not only because of the limited number of larger operators but also because of limited possibilities of AOs to compete with the portfolio of the incumbent. Lower customer churn is thus associated with a less competitive environment. In a competitive market, consumers are unlikely to remain with the same operator for several years due to the growing number of operators, changing offers and the speed at which innovations take place in the telecoms sector.
- (988) In the Reply to the SO, ST argues that it does not oblige its customers to commit to ST for more than two years. ST for example mentions that it re-designed its DSL offering in summer 2007 and decreased its contractual commitment period from 24 months to 18 months. ST also mentions that *"Slovanet's "Start" product had a commitment period of 18 months instead of 24 months, as used by ST"*. The Commission is of the view that the commitment period used by ST does not suggest that the amortization period of subscriber acquisition costs should be set out beyond three years as ST proposes.
- (989) As to ST's second argument, ST itself acknowledges that the three-year amortisation period is considered as a precedent by regulatory authorities which ST itself followed regarding the Slovak NRA. The fact that ST had no reason to assess the appropriateness of the three-year amortization period does not prove that it was inappropriate. ST's argument rather suggests that ST's choice of the amortization period would depend on the desired outcome of the margin squeeze calculation.
- (990) Against that background, subscriber acquisition costs for an equally efficient competitor are calculated and amortised as follows:

Table 29 – Subscriber acquisition costs – amortization over 3 years (2005-2010)

in EUR	2005	2006	2007	2008	2009	2010
Net costs for retail installation	[...]	[...]	[...]	[...]	[...]	[...]
Net costs for CPE	[...]	[...]	[...]	[...]	[...]	[...]
Commercialization costs	[...]	[...]	[...]	[...]	[...]	[...]
Total costs	[...]	[...]	[...]	[...]	[...]	[...]
Total costs amortized (3 years)	[...]	[...]	[...]	[...]	[...]	[...]
Per access per month	[...]	[...]	[...]	[...]	[...]	[...]
Installation fee	[...]	[...]	[...]	[...]	[...]	[...]
Total installation fee amortized (3 years)	[...]	[...]	[...]	[...]	[...]	[...]
Per access per month	[...]	[...]	[...]	[...]	[...]	[...]
Total administrative qualification fee	[...]	[...]	[...]	[...]	[...]	[...]
Administrative qualification fee amortized 15 (years)	[...]	[...]	[...]	[...]	[...]	[...]
Per access per month	[...]	[...]	[...]	[...]	[...]	[...]
SAC per access per month	[...]	[...]	[...]	[...]	[...]	[...]

(991) The Commission, in any case, also conducted the calculation of subscriber acquisition costs considering an amortization period of four years (except for administrative qualification fee where the Commission maintained [10-20] years). As it will be shown in Table 34 and Table 35, the costs per access per month are lower for most of the period but do not change the Commission's finding on the presence of margin squeeze.

Table 30 – Subscriber acquisition costs – amortization over 4 years (2005-2010)

in EUR	2005	2006	2007	2008	2009	2010
Retail installation, CPE and Commercialization Costs	[...]	[...]	[...]	[...]	[...]	[...]
Installation fee	[...]	[...]	[...]	[...]	[...]	[...]
Administrative qualification fee (15 years)	[...]	[...]	[...]	[...]	[...]	[...]
SAC per access per month	[...]	[...]	[...]	[...]	[...]	[...]

8.3.1.5. Revenues from the retail bundled DSL Access and DSL Internet services

(992) The revenues¹⁴⁴⁰ of an equally efficient competitor replicating ST's retail DSL broadband offer as it evolved over time would be as follows:

Table 31 – Revenues from ST's bundled DSL Access and DSL Internet (2005-2010)

	2005	2006	2007	2008	2009	2010
Total revenues (in EUR)	[...]	[...]	[...]	[...]	[...]	[...]
Volumes	[...]	[...]	[...]	[...]	[...]	[...]
ARPA (in EUR)	[...]	[...]	[...]	[...]	[...]	[...]

¹⁴⁴⁰ Source: ST's margin squeeze calculation, Doc ID4730-129. Total revenues: Worksheet 'Revised ULL' F202:K202.

8.3.1.6. Result of the margin squeeze calculation considering bundled DSL Access and DSL Internet services

(993) Table 32 sets out the result of the margin squeeze calculation including bundled DSL Access and DSL Internet:

Table 32 – Results of the margin squeeze calculation - amortization over 3 years (bundled DSL Access and DSL Internet) (2005-2010)

in EUR (per month per access)	2005	2006	2007	2008	2009	2010
Wholesale charges	[...]	[...]	[...]	[...]	[...]	[...]
Network costs	[...]	[...]	[...]	[...]	[...]	[...]
ISP recurrent costs	[...]	[...]	[...]	[...]	[...]	[...]
Amortisation of subscriber acquisition costs	[...]	[...]	[...]	[...]	[...]	[...]
TOTAL COSTS	[...]	[...]	[...]	[...]	[...]	[...]
TOTAL REVENUES	[...]	[...]	[...]	[...]	[...]	[...]
Available margin	[...]	[...]	[...]	[...]	[...]	[...]

(994) The results are as follows if the amortization of subscriber acquisition costs are done over four years (except for the administrative qualification fee which remains unchanged):

Table 33 - Results of the margin squeeze calculation - amortization over 4 years (bundled DSL Access and DSL Internet) (2005-2010)

in EUR (per access per month)	2005	2006	2007	2008	2009	2010
Amortisation of subscriber acquisition costs	[...]	[...]	[...]	[...]	[...]	[...]
TOTAL COSTS	[...]	[...]	[...]	[...]	[...]	[...]
TOTAL REVENUES	[...]	[...]	[...]	[...]	[...]	[...]
Available margin	[...]	[...]	[...]	[...]	[...]	[...]

(995) In order to consider standalone DSL Access as part of ST's downstream broadband portfolio, their costs and revenues should be included in the margin squeeze test. To simplify the calculation, the Commission calculated the margin for all broadband services (including DSL Access only) as a weighted average of the margins calculated for bundled DSL Access and DSL Internet (as set out in Table 32 and Table 33) on one hand and the margins for standalone DSL Access on the other. The results of the margin squeeze calculation in this scenario are as follows:

Table 34 – Final results of the margin squeeze calculation comprising all relevant broadband services – amortization over 3 years (2005-2010)

	2005	2006	2007	2008	2009	2010
Margin (bundled DSL Access and DSL Internet)	[...]	[...]	[...]	[...]	[...]	[...]
Margin DSL Access only	[...]	[...]	[...]	[...]	[...]	[...]
Volumes (bundled DSL Access and DSL Internet)	[...]	[...]	[...]	[...]	[...]	[...]
Volume of DSL Access only	[...]	[...]	[...]	[...]	[...]	[...]
Available margin per access per month (EUR)	[...]	[...]	[...]	[...]	[...]	[...]

- (996) The results are as follows if the amortization of subscriber acquisition costs are done over four years (except for the administrative qualification fee which remains unchanged):

Table 35 – Final results of the margin squeeze calculation comprising all relevant broadband services – amortization over 4 years (2005-2010)

	2005	2006	2007	2008	2009	2010
Margin (bundled DSL Access and DSL Internet)	[...]	[...]	[...]	[...]	[...]	[...]
Margin DSL Access only	[...]	[...]	[...]	[...]	[...]	[...]
Volumes of ST's broadband portfolio	[...]	[...]	[...]	[...]	[...]	[...]
Volume of DSL Access only	[...]	[...]	[...]	[...]	[...]	[...]
Available margin per access per month (EUR)	[...]	[...]	[...]	[...]	[...]	[...]

- (997) The results of the period-by-period analysis show that an equally efficient competitor using ST's ULL wholesale access was facing negative margins and could not replicate profitably the retail broadband portfolio of ST.
- (998) The fact that there is a positive margin for four months in 2005 does not disprove the finding of margin squeeze as an entry over four months cannot be considered as entry on a lasting basis. Indeed, according to ST itself, operators consider their ability to earn a reasonable return over a longer period, which is in ST's view over a number of years.^{1441 1442}

8.3.2. *Inclusion of voice access and voice usage in the portfolio under consideration*

- (999) As it was already mentioned in subsection 8.2.2, between 2005 and 2010, AOs could have offered voice telephony using full ULL access. The Commission reiterates that the present investigation is not targeted at the market of voice services but the broadband markets concerned and the inclusion of voice services in the margin squeeze test is without prejudice to the definition of the relevant market. It will be shown that, in a theoretical scenario, an equally efficient competitor offering voice services *via* ULL in addition to broadband services would not have been able to operate profitably in the relevant retail market during the period of 2005-2010.
- (1000) Regarding the profitability of voice services (voice access and voice usage) the Commission takes as a starting point the calculations provided by ST.¹⁴⁴³ The Commission adjusted some of the costs elements to be included in the calculations which will be explained in detail in recitals (1005) and (1006). This means, in practical terms, that the formulas used by ST in its calculations remained unchanged¹⁴⁴⁴ while in some instances their input changed. A summary table and additional details of the Commission's adjustments are set out in Table 1 of Annex I to this Decision.

¹⁴⁴¹ ST's reply to the SO, paragraph 1281.

¹⁴⁴² In this regard see paragraphs (845), (857), (982) and (983).

¹⁴⁴³ See footnote 1405 above.

¹⁴⁴⁴ The Commission will notably keep the four-year amortisation period for certain subscriber amortisation cost categories.

(1001) The general formula¹⁴⁴⁵ for the calculation of costs and revenues bundles including voice services is as follows:

$$[(BB + \text{Voice} * \%nn) * \text{BB volumes} + (\text{DSL Ao} + \text{Voice}) * \text{DSL Ao volumes}] / (\text{BB volumes} + \text{DSL Ao volumes})]$$

(1002) As to the revenues of voice services (the same as the revenues from broadband services), the Commission includes ST's figures in the calculation unchanged.

(1003) According to ST, the incremental cost of providing voice access is the difference between the charge for the shared and full ULL plus the downstream costs for the voice service.

(1004) As to the wholesale charges, the adjustment thereof in the years 2009 and 2010, as explained in subsection 8.3.1.1, applies for the calculation of the margins available for the bundle of broadband and voice services.

8.3.2.1 Broadband (including standalone DSL Access) + Voice Access

(1005) As to the *downstream costs of the broadband package* including bundled DSL Access and DSL Internet, the Commission's adjustments were explained in detail in section 8.3.1. The Commission applied a four-year-amortization period for the calculation of subscriber acquisition costs. The wholesale one-off charges are identical in both ST's and the Commission's calculation. There is a difference between the values of the remaining subscriber acquisition costs because ST included the amortized marketing costs which were considered by the Commission as part of the ISP recurrent costs without amortization. As to the *downstream costs of voice access*, the Commission includes ST's figures in the calculation.

Table 36 – Results of the margin squeeze calculation including voice access – amortization over 4 years (2005-2010)

in EUR (per month per access)	2005	2006	2007	2008	2009	2010
Revenues	[...]	[...]	[...]	[...]	[...]	[...]
Downstream costs	[...]	[...]	[...]	[...]	[...]	[...]
Wholesale charges	[...]	[...]	[...]	[...]	[...]	[...]
Available margin per access per month	[...]	[...]	[...]	[...]	[...]	[...]

8.3.2.2 Broadband (including standalone DSL Access) + Voice (Access + Usage)

(1006) As regards downstream costs, the Commission made some adjustments of ST's figures. As to the *downstream costs of the broadband package (including voice usage)*, network costs were adjusted as described above, while wholesale one-off charges coincide with ST's figures. As to ISP recurrent costs, the Commission took into consideration the marketing costs and other fixed costs as set out in the SO. The Commission removed the amortized marketing costs from the amortisation of subscriber acquisition costs because they are taken into consideration as part of the ISP recurrent costs and are thus not amortized. As to the *downstream costs of standalone DSL Access (including of voice usage)*, the Commission's figures differ

¹⁴⁴⁵ Where BB = bundled DSL Access and DSL Internet; Voice = Voice Access or Voice (Access+Usage) depending on the bundle considered; %nn = Share of non-naked products (VRI, DSL); DSL Ao = standalone DSL Access.

from ST's figures in particular because the Commission does not accept ST's adjustments of other fixed costs.

Table 37 – Results of the margin squeeze calculation including voice access and usage – amortization over 4 years (2005-2010)

in EUR (per month per access)	2005	2006	2007	2008	2009	2010
Revenues	[...]	[...]	[...]	[...]	[...]	[...]
Downstream costs	[...]	[...]	[...]	[...]	[...]	[...]
Wholesale charges	[...]	[...]	[...]	[...]	[...]	[...]
Available margin per access per month	[...]	[...]	[...]	[...]	[...]	[...]

8.3.3. Summary of the results of the period-by-period (year-by-year) analysis

- (1007) The Commission has considered four cumulative steps to calculate margins for the period 2005-2010. Those steps include bundled DSL Access and DSL Internet service, standalone DSL Access service, voice access service and voice usage service.
- (1008) The relevant retail broadband portfolio includes DSL Access, DSL Internet and standalone DSL Access services.
- (1009) The Commission reiterates that the bundles including voice access and usage services serve as sensitivity check because these markets are not addressed by the present Decision.
- (1010) The result of the calculations are summarised as follows:

Table 38 – Overview of margins – amortization over 4 years (2005-2010)

in EUR (per month per access)	2005	2006	2007	2008	2009	2010
Broadband	[...]	[...]	[...]	[...]	[...]	[...]
BB + Voice Access	[...]	[...]	[...]	[...]	[...]	[...]
BB + Voice Access + Voice Usage	[...]	[...]	[...]	[...]	[...]	[...]

- (1011) As to the three main elements of the margin squeeze calculation, the revenues considered in ST's margin squeeze model remained unchanged in the Commission's calculation.
- (1012) Therefore, the Commission concludes that in the period between 12 August 2005 and 31 December 2010, a competitor as efficient as ST could not have replicated profitably ST's retail portfolio comprising broadband services.

8.3.4. Multi-period analysis

- (1013) As it was already explained, ST put forward that the SO's period-by-period (year-by-year) analysis should be complemented by a multi-period analysis whereby the total margin is assessed over a number of years. The Commission will therefore carry out such analysis taking into account the considerations set out in subsection 8.2.3.

Table 39 – Multi-period analysis (2005-2010)

in EUR	Annual total profits and accumulated profits (6 years)					
	2005	2006	2007	2008	2009	2010
Broadband	[...]	[...]	[...]	[...]	[...]	[...]
2005 - 2010						[...]
BB + Voice Access	[...]	[...]	[...]	[...]	[...]	[...]
2005 - 2010						[...]
BB + Voice Access + Voice Usage	[...]	[...]	[...]	[...]	[...]	[...]
2005 - 2010						[...]

(1014) ST provided a multi-period calculation in response to the SO, looking at cumulative profits over the period of 2005-2008.¹⁴⁴⁶ If the Commission considers the same period, the cumulative profits are as follows:

Table 40 – Cumulative profits 2005-2008 (in EUR)

Broadband	[...]
BB + Voice Access	[...]
BB + Voice Access + Voice Usage	[...]

(1015) Therefore, irrespective of the length of the period applied in a multi-period analysis, the cumulative profits are negative; this means that a multi-period-analysis does not alter the conclusion of the Commission on the presence of margin squeeze and the fact that an equally efficient competitor could not have entered the market profitably on a lasting basis.

8.3.5. Multi-play products

(1016) As of 2007, AOs could have offered broadband services bundled with an IP television service alike ST's multi-play product Magio.

(1017) The Commission analyses those services in this section in order to establish whether their inclusion into the mix of downstream retail services which could theoretically be offered on the basis of wholesale access at local loop level would alter the finding of the Commission on the existence of margin squeeze.

(1018) The multi-play service Magio needs to be analysed separately for 2007-2008 and for 2009-2010 because the methodology for reporting those costs differed in those two periods¹⁴⁴⁷. In the period 2007-2008, the revenues and costs [...]. As regards 2009 and 2010, ST in the UCN reports [...].

¹⁴⁴⁶ ST's Reply to the SO, Table 92.

¹⁴⁴⁷ See Doc ID2860, p.1-2.

(1019) Table 41 summarizes the profitability¹⁴⁴⁸ of ST's multi-play products:

Table 41 – Profitability of ST's 'S1912' service

	2007	2008	2009	2010
Volumes (per access per month)	[...]	[...]	[...]	[...]
Total revenues	[...]	[...]	[...]	[...]

(1020) Even if those revenues were added to the accumulated profits of broadband services displayed in Table 39, the finding of margin squeeze would not be removed.

(1021) The Commission notes that [...].

(1022) In addition, the Commission found evidence suggesting that ST knew that AOs were unlikely to be able to offer competitive multi-play services over local loop unbundling and that ST was able to control the number of ULLs sold to AOs.¹⁴⁴⁹

(1023) Against that background, the Commission concludes that an operator as efficient as ST would have incurred losses if it offered ST's portfolio of broadband services *via* the local loop. None of the other retail services offered by ST over the local loop could have allowed an equally efficient operator to offset the losses incurred as a result of replicating ST's portfolio of broadband services over local loop and the margins for an equally efficient competitor are negative even if such additional services (voice, IPTV and multi-play services) in the downstream portfolio are taken into account.

8.4. Contemporaneous evidence corroborating the finding of a margin squeeze

(1024) Contemporaneous evidence confirms that, at the material time, ST considered that its pricing practices resulted in a margin squeeze¹⁴⁵⁰.

(1025) Even though the provision of ULL was obligatory due to the TUSR's decision, the strategy of ST was "*defensive*" and ULL was among the products "*with interest not to fulfil the plan*" because they are a "*direct threat to other products*"¹⁴⁵¹.

(1026) On 14 April 2005, ST's Regulatory Department drew the attention of the EMB on price squeeze issues in relation to ULL in a presentation called "*Strategy of submission of RUO and ULL prices*"¹⁴⁵². Slide 6 of the presentation explains that "*ULL prices must [...] allow OLOs to compete with ST retail access products, otherwise prize squeeze!*". That slide underlines the difference between the then envisaged monthly rental fees for fully unbundled (SKK [...]) and shared (SKK [...]) local loops with ST's weighted average revenue per access (SKK [...]) and ST's actual price of DSL access (SKK [...]) respectively. That presentation was made in respect of a reference to an "*EC decision [whereby] Full ULL price cannot be higher than weighted average revenues from providing the access to the public telecommunications network ("WARA")*". The slide explains that the solution to this

¹⁴⁴⁸ Source: Doc ID848 (2007), Doc ID849 (2008), Doc ID2687 (2009), Doc ID3031 (2010).

¹⁴⁴⁹ See in particular Doc ID 1194 p. 11, 24 and 28 and Doc ID 1195 p. 8.

¹⁴⁵⁰ See section 5.10.4 of the SO Doc ID 3416, p. 331ss, paragraphs 1223ss.

¹⁴⁵¹ See presentation to EMB of 09/10/2006, "[...]", slide 6, ID1250, p. 6.

¹⁴⁵² Doc ID 1166, p. 6.

problem would be either to rebalance tariffs, that is to say increase fixed telephony access prices, or decrease ULL monthly rental fees. The monthly rental fees which ST eventually published on 12 August 2005 were set at a level of SKK [...] and SKK [...] for full and shared access to the local loop respectively. Even though that is lower than the level contemplated in the presentation of 14 April 2005, it remains much higher than ST's weighted average revenue per access (SKK [...]) and ST's actual price of DSL access (SKK [...]). Thus, ST knew from the outset that the prices for wholesale access at local loop level were squeezing AOs, amongst others in DSL broadband access services.

- (1027) A presentation for the EMB suggested in January 2006 the lowering of ULL prices and analysed various options for lower prices indicating pros and cons of these three alternatives which were (i) high – current price ([...] SKK), (ii) in between (~[...] – [...] SKK) which is also proposed as "*most feasible*" and (iii) low ([...] SKK). With respect to the low option, it indicates the following pros and cons (emphasis as in the original text): "*New low price ([...]), Solving: • ULL Rebalancing with Business calling plans possible • ST portfolio more balanced, basically majority of ST products positioned on the top of ULL, similarly to EU status; Not solving: • Not controlled No. of ULL sold • Too low ULL price used for attack on other ST products (Voice & DSL) • Full rebalancing of ULL versus residential standard calling plans not achieved even if price ULL is [...] SKK [...] Not feasible, Too risky!*"¹⁴⁵³. Another slide warns in a similar way of the threats of the low price option (emphasis as in the original text): "*Too low ULL price below [...] SKK = radical implications (even residential segment endangered if ULL price below [...] SKK).*"¹⁴⁵⁴.
- (1028) In April 2007, a presentation '*ULL vs. Retail monthly rental – Non rebalanced monthly rental fees*' draws the attention of the EMB on regulatory risks, in particular margin squeeze risks, resulting of non-rebalanced monthly rental fees. The presentation reads amongst others: "[...] *ADSL is not fully rebalanced [...]*"¹⁴⁵⁵ and "*Increased pressure on ULL due to decrease of ADSL prices (proposed ADSL Naked promo price [...] SKK)*"¹⁴⁵⁶. Two measures are proposed to the EMB to decrease regulatory risks: "*Proactive ULL price decrease [...] PSQ [Price Squeeze] will not be completely solved however decrease of ULL price will improve current situation and will be our argument for defence of retail campaigns*" and "*stop current and future retail campaigns focused on the monthly rental ... PSQ [Price Squeeze] will not be completely solved however the risk of accusation can be significantly reduced.*"¹⁴⁵⁷
- (1029) In May 2008, a document prepared for EMB indicates that the proposed lowering of ULL prices does not remove the margin squeeze and that this is due to retail considerations: "*Decrease of ULL prices reduces regulatory risk resulting from non-rebalanced WS and RT pricing, however proposed decrease does not eliminate the*

¹⁴⁵³ See presentation to the EMB meeting of 16/01/2006 "*ST Broadband/ULL Portfolio Harmonisation – New challenge ahead of us.*", Doc ID1195, p. 18.

¹⁴⁵⁴ See presentation to the EMB meeting of 16/01/2006 "*ST Broadband/ULL Portfolio Harmonisation – New challenge ahead of us.*", Doc ID1195, p. 16.

¹⁴⁵⁵ Doc ID 1297, p. 3.

¹⁴⁵⁶ Doc ID 1297, p. 4.

¹⁴⁵⁷ Doc ID 1297, p. 6.

risk in the full scope."¹⁴⁵⁸, and "*Prices of MR [ULL monthly rental] have been adjusted to minimum limited by retail needs and threats*"¹⁴⁵⁹. This existence of margin squeeze between wholesale ULL prices and retail prices is not limited to voice products but is valid also for ADSL retail products of ST ("*ADSL is not fully rebalanced as well*" or "*Increased pressure on ULL due to decrease of ADSL prices*"¹⁴⁶⁰).

- (1030) In December 2008, a presentation by the Regulatory Director to the EMB discusses the possible opening for DSL Services of the Doma Mini and Social Calling Services. The presentation recalls that until then DSL services had not been offered on Doma Mini and Social Calling Plan in particular because of "*risks of ULL price squeeze*", before explaining that "*in contradiction with original regulatory reasoning – [the]current naked DSL offer brings risk of ULL price squeeze*"¹⁴⁶¹.
- (1031) Various other internal communications confirm that there was margin squeeze on ULL and that this situation was in fact welcome by both retail and wholesale departments as significant ULL sales would be a threat to both of them:
- (1032) "*It would be of course most convenient for wholesale if ULL would not be sold at all. Each unbundled line means a lower or higher loss of revenues for us or for retail. Theoretically, the proposal is thus not good for us. However, the reality is such that the current situation is untenable, we will have to ease up a bit. The proposal for EMB is good for us at least with respect to the fact that it does not push directly on monthly fees (which are key for other licensed operators) but asks for lower installation and collocation fees, which are still at a rather overcharged level. So I would rather agree to such minor concession than to wait for a prompt stronger attack (and possibly external which would be worse).*"¹⁴⁶².
- (1033) "*As regards ULL squeeze, we are squeezing on ULL already now during the wholesale Naked DSL campaign ([...]%) and nobody has so far escalated that to the office...*"¹⁴⁶³.
- (1034) "*I think that it is also very important to avoid action and fines of the regulator. I personally am not able to explain to TUSR how it is possible that the DSL price is lower than ULL. So even though it is most important to fulfil the DSL accesses plan we have to have an argumentation for TUSR or lower the ULL price. Lower ULL price will have a negative impact on both wholesale and retail revenues. The ULL price was agreed on the current level because further lowering would lead to losses exceeding revenues from ULL*"¹⁴⁶⁴.
- (1035) In its reply to the SO ST does not deny that ST was aware of the margin squeeze risk¹⁴⁶⁵ but contests the conclusion made in the SO that ST intended to squeeze

¹⁴⁵⁸ See document for EMB of May 2008 "*ULL Price Decrease*", slide 2, Doc ID1360, p.2.

¹⁴⁵⁹ See document for EMB of May 2008 "*ULL Price Decrease*", slide 3, Doc ID1360, p.3.

¹⁴⁶⁰ See presentation to EMB "*ULL vs Retail monthly rental*" of 23/04/2007, Doc ID1297, p.3-4.

¹⁴⁶¹ Doc ID 1407, p.3 and 4.

¹⁴⁶² See internal email of the Wholesale business manager responsible for ULL, of 16/04/2007, Doc ID 0193, p. 5., original text: [...].

¹⁴⁶³ See internal email of the Internet Services Project Manager of 17/04/2007, Doc ID 0193, p. 7, original text: [...].

¹⁴⁶⁴ See internal email of the Wholesale business manager responsible for ULL, of 17/04/2007, Doc ID 0193, p. 21.

¹⁴⁶⁵ ST's reply to the SO Doc ID 3630, paragraph 1503.

competitors' margins. ST takes the view that those documents show that ST was struggling to ensure that its ULL prices were consistent with cost estimates while trying at the same time to avoid a margin squeeze.

- (1036) ST also claims that those internal documents would show ST's good faith compliance efforts. The Commission does not deny that those documents show that there within ST reflections were undertaken on how to best adjust certain prices in order to avoid a margin squeeze. However, and more importantly, those documents show that throughout the infringement period ST was aware of the risk that its pricing policy, both at retail and wholesale level, was likely to lead to a margin squeeze.
- (1037) In its reply to the SO,¹⁴⁶⁶ ST also claims that ST's own margin squeeze calculations on ULL were done in a number of different ways, often inconsistent with one another, and that any conclusions based on more disaggregated estimates cannot be relied upon to support knowledge on the part of ST of the existence of a margin squeeze.
- (1038) However, the Commission considers that those internal documents show that even at the disaggregated level ST was aware of the existence of margin squeeze on ULL. In section 8.3 above the Commission established the existence of margin squeeze on ULL at the aggregated level based on an equally efficient competitor test, that is to say based on the wholesale prices, retail prices and downstream costs of ST.
- (1039) Therefore, the internal documents corroborate the finding of margin squeeze on unbundled access to the local loop based on the Commission's own calculations.

8.5. Objective justification

- (1040) An undertaking may demonstrate that its pricing practice, albeit producing an exclusionary effect, is economically justified.¹⁴⁶⁷ ST and DT, however, have not put forward any justification for its exclusionary conduct.

8.6. Conclusion

- (1041) ST's conduct between 12 August 2005 until at least 31 December 2010 amounts to an abusive margin squeeze within the meaning of the case-law.
- (1042) First, ST forms part of a vertically integrated undertaking that sells a product or service to undertakings on an upstream market where it is dominant, namely the wholesale market for access to the unbundled local loop in the Slovak Republic, and competes with those undertakings on a downstream market for which the product or service is an input, namely the retail mass market for broadband services offered at a fixed location in the Slovak Republic.
- (1043) Second, the spread between the price charged to competitors upstream and the price charged to the dominant undertaking's own customers downstream was insufficient for competitors as efficient as the dominant undertaking to cover the specific costs which the dominant undertaking has to incur to supply its downstream products or services. ST set its retail prices and its wholesale prices for access to the local loop at such levels that an operator as efficient as ST would have incurred losses if it had offered ST's portfolio of broadband services *via* the local loops. Therefore an operator as efficient as ST could not enter the retail mass market for broadband

¹⁴⁶⁶ See ST's reply to the SO, paragraphs 1511-1514.

¹⁴⁶⁷ Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraph 75.

services offered at a fixed location and trade profitably in that retail market on a lasting basis.¹⁴⁶⁸

- (1044) Third, although ST's wholesale price for access to its ULL network was lower than its retail price, the margin squeeze was likely to foreclose competitors in the retail mass market for broadband services offered at a fixed location in the Slovak Republic and thereby caused consumer harm.¹⁴⁶⁹ In any event, for the reasons set out in sections 9 and 10, the margin squeeze was at least capable of having anti-competitive effects on the markets concerned by making it more difficult for the operators concerned to trade on the market concerned.
- (1045) Finally, ST has not put forward any justification for its exclusionary conduct.

9. POTENTIAL ANTICOMPETITIVE EFFECTS OF ST'S CONDUCT

9.1. Legal framework

- (1046) Under the case law, for the purposes of establishing an infringement of Article 102 TFEU, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, that is to say that the conduct is capable of having, or likely to have, such an effect.¹⁴⁷⁰ In other words, under the case law, it is enough to show "*potential effects*" of the dominant undertaking's behaviour.¹⁴⁷¹ To establish whether a practice is abusive, that practice must have an anticompetitive effect in the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anticompetitive effect which may potentially exclude competitors from the market who are at least as efficient as the dominant undertaking.¹⁴⁷² The Court also held that: "*the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102 TFEU.*"¹⁴⁷³
- (1047) Article 102 TFEU is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure¹⁴⁷⁴. Article 102 TFEU aims at protecting the structure of the market¹⁴⁷⁵. Article 102 TFEU does not require the Commission to

¹⁴⁶⁸ See subsection 8.3 above.

¹⁴⁶⁹ See subsection 8.3.1.6 above. Case C-52/09 *Konkurrensverket v TeliaSonera Sverige AB* [2011], ECR I-527, paragraph 74.

¹⁴⁷⁰ Case T-219/99 *British Airways plc vs. Commission of the European Communities*, paragraph 293; and Case T-301/04 *Clearstream v Commission*, [2009] ECR II-03155 paragraph 144.

¹⁴⁷¹ Case C-457/10 P, *AstraZeneca*, EU:C:2012:770, paragraph 112; see also Case C-52/09, *TeliaSonera* [2011] ECR I-527, paragraphs 64, 77; Case T-398/07, *Kingdom of Spain* [2012], EU:T:2012:173, paragraph 90.

¹⁴⁷² Case C-52/09 *Konkurrensverket v. TeliaSonera*, [2011] ECR I-527, paragraph 64.

¹⁴⁷³ Case C-52/09 *Konkurrensverket v. TeliaSonera*, [2011] ECR I-527, paragraph 65.

¹⁴⁷⁴ Case C-95/04 P, *British Airways*, [2007] ECR I-02331, paragraphs 106-107; Case 6/72 *Europemballage and Continental Can v Commission*, [1973] ECR 215, paragraph 26.

¹⁴⁷⁵ C-202/07 P *France Télécom Wanadoo*, cit., paragraph 104 and case law cited therein; T-491/07, *CB/COM*, cit., paragraph 148.

examine specifically whether the conduct of the dominant undertaking has actually caused prejudice to consumers¹⁴⁷⁶.

- (1048) The Commission will show that ST's conduct consisting of refusal to supply and margin squeeze was capable of making entry of other operators or their activity on the relevant market more difficult or impossible, as is required in the case law¹⁴⁷⁷.

9.2. ST's exclusionary behaviour artificially raised barriers to entry on the retail mass-market for broadband services at a fix location

- (1049) The Commission considers that ST's behaviour was likely to prevent AOs from relying on ULL to enter the Slovak retail mass-market for broadband services. ST's behaviour was likely therefore to foreclose AOs from the key xDSL segment of the retail broadband market. By doing so, ST artificially put AOs at a disadvantage vis-à-vis ST and prevented AOs from having equal opportunities and from competing on the merits on the retail broadband services market concerned.

- (1050) ST's behaviour, which followed ST's exclusionary strategy to protect its "*first mover advantage*",¹⁴⁷⁸ artificially raised barriers to entry by making more difficult or impossible the entry of these AOs on the retail mass-market for broadband services.

- (1051) ST argues that AOs have two possibilities to compete on the retail broadband services market: either using ST's wholesale access products (WBA and ULL) or rolling out their own fixed broadband infrastructure: "*Broadband access in Slovakia can be offered by all telecoms operators either by using their own infrastructure (e.g. cable, fibre, wireless, mobile etc.) or by using Slovak Telekom's wholesale broadband offers.*"¹⁴⁷⁹

- (1052) However, competition based on AOs' own network (infrastructure-based competition) is rather limited in the Slovak Republic to the densely populated areas as the development of own networks is costly and time consuming. Moreover, as shown below in section 9.3 the Commission considers that ST's behaviour made competition less effective on the retail mass-market for broadband services at a fix location on the whole Slovak territory, including in the densely populated areas where competition was based on AOs' own networks¹⁴⁸⁰.

- (1053) Furthermore, using ST's WBA is not a completely viable alternative for AOs, as this wholesale broadband offer does not allow them to differentiate their offerings from ST's and therefore AOs' services exert less competitive constraints on ST. Unlike WBA, unbundled access to the local loop allows the AOs to influence most of the technical and quality parameters of the retail broadband services and to innovate beyond the mere innovation of services and price competition¹⁴⁸¹. As access to ULL is made de facto unavailable or more difficult by ST due to unfair terms and

¹⁴⁷⁶ Case C-95/04 P, *British Airways*, [2007] ECR I-4003 paragraph 107.

¹⁴⁷⁷ Case T-336/07, *Telefónica v Commission* [2012], EU:T:2012:172, paragraphs 268-283; Case C-549/10 P, *Tomra Systems ASA and Others v Commission*, EU:C:2012:221, paragraph 79; Case C-52/09, *TeliaSonera* [2011] ECR I-527, paragraphs 63-64.

¹⁴⁷⁸ See section "7.4. ST's exclusionary strategy to protect its dominant position on the relevant market".

¹⁴⁷⁹ See ST's reply for information of 17/04/2009, question 34 a), Doc ID 0460, p. 9.

¹⁴⁸⁰ See section "9.3. Despite the possibility of building alternative infrastructure, competition was probably not as effective as it could have been if AOs had had the possibility of competing with ST on the basis of ULL".

¹⁴⁸¹ See also recitals (179) et seq.

conditions or other abusive behaviour hampering access, the AOs did not have equal opportunities on the market.

- (1054) The Commission underlined in section 7.3. the importance for AOs of an efficient ULL-based wholesale access to xDSL. The Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 1¹⁴⁸², finds that "*The wholesale DSL products remain of high importance, in order to allow new entrants to achieve a national coverage or to enable a potential new market entry*". Therefore, access to ULL would have enabled AOs to offer xDSL throughout the whole territory of Slovakia, both in the densely populated areas, where AOs developed their networks, and outside these areas, where ST's network is predominant. As shown in section "7.5. *AOs were strongly interested in having access to ST's local loops*", access has been demanded by several AOs, which indicate their interest in competing on the basis of ULL-based services. That means that if ST's access to ULL had been offered to AOs under fair terms and conditions, competition in the whole of Slovakia would have been on the merits, as AOs would have been given the opportunity to offer ULL-based services in this Member State under equal opportunities.
- (1055) Moreover, the Commission considers that ST's margin squeeze was likely to make entry more difficult or even impossible. For instance, GTS Slovakia, which was the only AO that unbundled an insignificant number of local loops¹⁴⁸³ in Slovakia as from December 2009 onwards, was forced to concentrate rather on specific niche segments such as individual solutions for business clients, because using xDSL from ST to address the mass market was, due to the practices of ST, not profitable¹⁴⁸⁴. The fact that offering xDSL services based on ULL to the broadband mass market on the basis of its wholesale offers is not profitable is shown by the results of the margin squeeze calculations above (see section "8.3. *The Commission's margin squeeze calculation*") and also confirmed by Slovanet, who indicated in its reply to the Commission's request for information that "*Slovanet's costs relating to retail products are unreasonably high already when only the costs connected with the wholesale services are taken into account and this was one of the main reasons why Slovanet decided in the second half of 2006 to suppress its activities aimed at actively gaining ADSL connection customers.*"¹⁴⁸⁵
- (1056) Had the access to xDSL infrastructure at all levels been provided by ST on reasonable terms and conditions, a number of AOs would have been able to compete in this market segment which, importantly, has a large number of additional xDSL potential customers to be connected. Indeed, there would still be considerable scope for further growth of xDSL subscribers, as the total number of xDSL subscribers in Slovakia amounting in December 2010 to 398 056 is still significantly below the

¹⁴⁸² Doc ID 4247, p. 355.

¹⁴⁸³ By 25 October 2010 only [less than 20] local loops out of ST's [700.000 to 1.000.000] local loops, part of the technical coverage of its network had been unbundled by GTS Slovakia – Doc ID 3416. Also see recital (394) above.

¹⁴⁸⁴ While announcing GTS's agreement with ST on ULL, the press reported the following public statements of its chairman of the board of directors Stanislav Molčan: "*With the cost prices resulting from the agreement, it is not possible to provide profitably services to households and our goal is to continue with our focus on providing services to business clients*" (news article of 24/03/2009 "*GTS is so far not changing its focus on business clients*", Doc ID1968).

¹⁴⁸⁵ See reply of Slovanet to the RFI of 13/06/2008, Question4.18 (ii), Doc ID66, p.18.

maximum number of subscribers which could have been connected, that is to say [700.000 to 1.000.000] households¹⁴⁸⁶.

- (1057) ST puts forward the argument that the AOs have chosen to operate only at the local level (in densely populated areas) because it is a cost-effective strategy which allows them to exercise a competitive constraint on ST¹⁴⁸⁷. However, this has not been proved. In fact, AOs indicated that they prefer to offer mass market services at national level. As pointed out by Slovanet: "*The ST metallic network was the monopoly network for many years and, in our opinion, access to this infrastructure was the priority and the primary option of each alternative operator to provide services at the national level*". Also, Orange mentioned during the meeting with the Commission of 3 June 2013¹⁴⁸⁸ that it is "*still interested in DSL because the highest potential is in DSL technologies, especially as regards customers located outside its FTTH network coverage*".
- (1058) Moreover, even if this argument were factually correct, the fact would remain that it does not affect the conclusion whereby ST's conduct was liable to prevent AOs from having equal opportunities and thereby competing on the merits of their products on the market. Moreover, it is probably precisely on account of ST's conduct that the only possibility for AOs was to operate at local, not national level. As observed by Slovanet: "*ST, with its strategy of keeping its dominant position in market share to the maximum (or super dominant) instead of efficiently using its network (...), paradoxically created the space for an exclusively local, not national competition*"¹⁴⁸⁹.
- (1059) Also, the Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 1¹⁴⁹⁰, finds that "*The wholesale DSL products remain of high importance, in order to allow new entrants to achieve a national coverage or to enable a potential new market entry*".
- (1060) ST's attempt to justify its conduct by referring to a study by [...], according to which there was no business case for a ULL based new entrant to offer broadband services in ST's exchanges in suburban and rural areas, that is to say in the majority of Slovakia in the period between 2005 and 2010¹⁴⁹¹, is not relevant in this regard. It is namely not the role of a dominant undertaking like ST to dictate whether AOs have or not a business case¹⁴⁹². AOs must be given equal opportunities to operate throughout the whole Slovak territory on the basis of ULL as well, which would give them the possibility to benefit from the economies of scope and scale and expand their customer and revenue base as well as their market share. The fact that ST's behaviour was liable to foreclose competition in profitable areas suffices to conclude

¹⁴⁸⁶ See Table 7: *Coverage, xDSL lines in use by ST, by ST and AOs and utilisation of the network included in the technical coverage*".

¹⁴⁸⁷ See ST's Reply to the SO, paragraph 1592-1594.

¹⁴⁸⁸ Minutes of the meeting with Orange of 3 June 2013, Doc ID 4189.

¹⁴⁸⁹ Minutes of the conference call with Slovanet of 7 August 2013, Doc ID 3959.

¹⁴⁹⁰ Doc ID 4247, p. 355.

¹⁴⁹¹ See ST's Reply to the LoF, paragraph 816 et seq.

¹⁴⁹² Case C-549/10 P, Tomra Systems ASA, published in the electronic Reports of Cases (Court Reports - general), paragraphs 37-48.

that Article 102 TFEU was violated in the present case because competition on the merits should be possible for the entire market¹⁴⁹³.

- (1061) Moreover, as to the areas estimated non-profitable, AOs could still be interested in accessing ULL in these areas as well. In fact, ST stated the following in its reply of 25 April 2008 to TUSR's question concerning the main reason for the closure of negotiations with third parties: *"investment in the local loop unbundling only makes sense if it takes place on a large scale on the entire territory of the Slovak Republic – it is easier and more advantageous for the companies to use other wholesale services for the provision of their services."*¹⁴⁹⁴ Also, ST's internal presentation of November 2009 indicates that while in densely populated areas fibre will need to replace DSL to a large extent, the copper based DSL services will still be important even in the future in suburban/satellite areas with lower density as well as in rural areas¹⁴⁹⁵. Therefore, [...]s study is incapable to infirm the finding that ST's behaviour had potential anticompetitive effects both in profitable and in non-profitable areas.
- (1062) ST also argues that low ULL uptake was the result of the market situation in Slovakia and that the competitive outcome is better in the countries with low ULL uptake, where infrastructure-based competition developed significantly¹⁴⁹⁶.
- (1063) Contrary to ST's so-called *"counterfactual analysis"* comparing the situation in countries with high ULL uptake with countries with low ULL uptake and arguing that the competitive outcome is better in the latter ones¹⁴⁹⁷, the Commission considers that it has not been proved that low ULL uptake in Slovakia is due to the specific market situation, but is likely to stem from ST's exclusionary conduct. For instance, the Progress Report on the Single European Electronic Communications Market 2008 (14th Report)¹⁴⁹⁸ shows that in Member States such as Slovakia, *"inappropriate technical or economic conditions for the available access products (...) led to low take-up of these products and made it difficult for AOs to compete"*. Low ULL uptake and roll-out of own network by AOs was observed in countries where *"copper networks were undeveloped and lacked the feature of ubiquity"*¹⁴⁹⁹. However, in Slovakia, ST's PSTN network covered [80-90%] of the territory¹⁵⁰⁰.
- (1064) In addition, ST's behaviour was liable to deny AOs the possibility of competing on the basis of ULL, so that it damaged the competitive structure of the market. Moreover, the possibility of ULL uptake by AOs was likely to result in more effective competition on the market, so that the competitive outcome is not better, as

¹⁴⁹³ Case C-549/10 P, *Tomra Systems ASA*, published in the electronic Reports of Cases (Court Reports - general), paragraph 42.

¹⁴⁹⁴ ST's letter to TUSR, reply to TUSR questions, dated 25 April 2008, Doc ID0173, p. 27-28.

¹⁴⁹⁵ ST's internal presentation of November 2009 Doc ID1907, p. 14.

¹⁴⁹⁶ ST's reply to the SO, paragraphs 1617-1622.

¹⁴⁹⁷ See ST's Third Issues Paper, Doc ID 2401, p. 25 ff.

¹⁴⁹⁸ Doc ID 4244, p. 13. See also the Progress Report on the Single European Electronic Communications Market 2007 (13th Report) – Commission Staff Working Document, Part 1 (Doc ID 4243), p.35.

¹⁴⁹⁹ See Report *"Observations on the broadband market in Slovakia"* by [...], Doc ID 2418, p. 3 et seq; see also Progress Report on the Single European Electronic Communications Market 2008 (14th Report), Doc ID 4244.

¹⁵⁰⁰ See section "4.6. Network coverage of ST's DSL network which can be used for the provision of retail broadband services after the local loops have been unbundled from ST's network", Table 5.

ST argues, but is likely to be worse in the countries with low ULL uptake, even if infrastructure-based competition developed in the densely populated areas¹⁵⁰¹.

- (1065) Indeed, as shown in section 7.2, reaching more effective competition on the relevant market is made possible through the putting in place of an ULL access obligation for incumbents as the one adopted by the Slovak telecoms regulator. For instance, the OECD Report "*Developments in Local Loop Unbundling*" of 10 September 2003¹⁵⁰² provides that "*the majority of countries consider that LLU has the potential to enhance local competition. (...) From this perspective, implementation of LLU is expected to benefit consumers by reducing not only local telephony but also broadband Internet access costs and accelerating the supply of new services*".
- (1066) The Commission also observes that, the competitive structure of the retail broadband market in Slovakia contradicts ST's claims: ST's share in the xDSL segment of the relevant market has been constantly growing between 2004 and 2010, as shown in section "10.2. *Quantitative elements indicating foreclosure of the xDSL market segment*" below. Also, ST remains dominant in the retail broadband market and other operators are not able to challenge its position, as shown in section 6.1.3. *Dominance on the retail mass market for broadband services offered at a fixed location* above.

9.3. Despite the possibility of building alternative infrastructure, competition was probably not as effective as it could have been if AOs had had the possibility of competing with ST on the basis of ULL

9.3.1. Access to ULL would have allowed AOs to gradually invest into their own alternative network infrastructure and therefore compete with ST on the merits

- (1067) ST argues that it faced strong infrastructure-based competition from AOs from the early days of liberalisation, new entrants preferring to roll out their own infrastructure as opposed to taking-up ULL¹⁵⁰³.
- (1068) The Commission has already rejected this argument for the reasons explained above (recitals (1046) to (1066)). Moreover, the Commission notes that as of 2007, alternative infrastructure such as fibre developed in particular in densely populated areas in cities. The fact still remains that infrastructure-based competition was not as effective as it could have been if AOs had had the possibility of competing with ST on the basis of ULL. This is so for a number of reasons.
- (1069) First, the deployment of a network involves high investment risks that entail appreciable sunk costs and usually takes a lot of time¹⁵⁰⁴. Therefore, competition through other networks was at least for some time not easily available, whereas competition through ULL access could have been deployed immediately. In addition, not every AO would have had the financial means and the commercial interest to roll out its own network.

¹⁵⁰¹ See section "9.3. *Despite the possibility of building alternative infrastructure, competition was probably not as effective as it could have been if AOs had had the possibility of competing with ST on the basis of ULL*".

¹⁵⁰² Doc ID 4240.

¹⁵⁰³ ST's reply to the SO, paragraphs 1579 and 1581.

¹⁵⁰⁴ See for instance footnote 1565.

- (1070) Second, contrary to ST's submissions¹⁵⁰⁵ referring to an allegedly "*fierce competition*" in the retail broadband market, the Commission notes that infrastructure-based competition in Slovakia is rather limited in terms of coverage to densely populated areas.
- (1071) For instance, the Progress Report on the Single European Electronic Communications Market 2007 (13th Report) – Commission Staff Working Document, Part 1¹⁵⁰⁶, chapter on Slovakia, finds that: "*The broadband market show signs of inter-platform competition. However, the incumbent's position in the DSL section remains unchallenged (...). The fixed market has remained in the hands of the incumbent, while the largest mobile operator entered the fixed market with a substantial roll-out of FTTH infrastructure (...). The biggest mobile operator has made significant investments in the deployment of a new NGN network (FTTH), covering certain parts of all eight district cities plus three additional cities*". The Progress Report on the Single European Electronic Communications Market 2008 (14th Report) – Commission Staff Working Document, Part 1, chapter on Slovakia¹⁵⁰⁷ only notes "*certain increasing signs of interplatform competition*" and the Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 1, chapter on Slovakia¹⁵⁰⁸ concludes that "*competition in broadband based on infrastructure shows further progress, however, the DSL segment of the market remains in the hands of the incumbent*".
- (1072) Also TUSR emphasised the difficulties that AOs have encountered in building alternative infrastructure (such as fibre) outside densely populated areas: "*we can see fibre deployment in urban areas rather than in rural ones, where the costs are much higher. In the rural areas ST has big advantage stemming from DSL network, as the duplication of the infrastructure in these areas is not viable*"¹⁵⁰⁹. For instance, in its submission of 31 May 2013¹⁵¹⁰ Orange Slovakia explained that "*it is actually difficult for OSK to roll out fibre optic in non-dense areas because the prospects of return on investment are low*". Therefore, Orange Slovakia "*spent [a]couple of years investing into own fibre infrastructure where viable*".
- (1073) As in Slovakia the share of population living in densely populated areas is significantly lower than in other countries¹⁵¹¹, it was even more difficult for AOs to roll-out extensive own networks covering a sufficiently large share of the population to compete effectively on a sufficient scale with ST's xDSL network (see also recitals (1088), (1092), (1094), (1095), (1098) to (1108)). As Orange explained during the meeting with the Commission of 3 June 2013: "*the main obstacles in gaining new*

¹⁵⁰⁵ See in particular ST's Third Issues Paper of 30 August 2010, Doc ID 2401, or report "*Observations on the broadband market in Slovakia*" by Martin Cave, Doc ID 2418; ST's Reply to the SO, paragraphs 1575-1582; ST's Reply to the LoF, paragraphs 789-828.

¹⁵⁰⁶ Doc ID 4243, p. 284.

¹⁵⁰⁷ Doc ID 4245, p. 307.

¹⁵⁰⁸ Doc ID 4247, p. 352.

¹⁵⁰⁹ E-mail of 8 October 2013 from TUSR, Doc ID 4078.

¹⁵¹⁰ Doc ID 4188.

¹⁵¹¹ See ST's Annex to the Issues Paper of 10/08/2009, ID954, p. 35 or ST' document "*Additional information regarding the retail broadband prices in Slovakia in the context of international price comparisons following the Commission's request at the meeting of 2 October 2009*" of 06/11/2009, Doc ID1635, p. 15.

customers are that continuing investments in fibre is expensive, while financial sources are scarce and also the fact that 47% of the Slovak population live in rural area[s]"¹⁵¹². Also, TUSR pointed out that the operational costs of fibre networks increase when an AO only has a small proportion of end-users out of the potential ones. Therefore, an AO would need many years to have their investments returned. The consequence is that *"as the real demand is much below the expectations, all more extensive new deployment plans are being frozen for the time being"*¹⁵¹³.

- (1074) Third, in order to be able to roll out a new network efficiently, it is of crucial importance for AOs to be afforded access, at the outset, to a minimum critical network size and customer base that they can gradually expand in order to benefit fully from network effects and economies of scale and be able to make further network investments. This process, commonly referred to as the *"investment ladder"*¹⁵¹⁴, is one that AOs operating in Slovakia ought to have been able to rely upon during the infringement period.
- (1075) The *"investment ladder"* usually comprises several steps: as a first step, an operator targeting a mass market acts merely as a reseller of the incumbent's access product. As a second step, the operator invests in developing its own national backbone network and uses WBA (bitstream) to the incumbent's network. As its customer base increases, the AO makes further investments into the backbone network and connects to the incumbent's network on the basis of ULL, as part of a third step. It is only at the fourth and final step that the operator invests into its own access network and connects its customers directly (own access network).
- (1076) Access to ULL is essential for AOs in order for them to be able to compete effectively. For instance, the Progress Report on the Single European Electronic Communications Market 2007 (13th Report)¹⁵¹⁵ shows that the increasing up take of ULL in Europe helps new entrants to enter readily the market: *"The fact that there are now 23.5 million unbundled lines, compared to 11.6 million resold and 6.0 million bitstream lines, suggests that new entrants are climbing the investment ladder"*. Additionally, as the Working Document of the Communications Committee of November 2010 shows, ULL was the main form of competition and resale lines were not significant anymore at Union level, *"with the unbundlers climbing the ladder of investment to the benefit of more investment intensive forms of competition"*.¹⁵¹⁶ Also, ECTA emphasises the link between increasing take-up of ULL and the gradual climbing of the ladder of investment by the new entrants: *"Evidence is emerging in some countries of the impact of the ladder of investment strategy. For instance in France, it can clearly be seen that the proportion of new entrant lines delivered by full LLU, shared access and bitstream has increased (...)"*¹⁵¹⁷.

¹⁵¹² Doc ID 4189, Minutes of the meeting with Orange of 03/06/2013, point 33.

¹⁵¹³ See e-mail from TUSR of 8 October 2013, Doc ID 4078.

¹⁵¹⁴ See for instance ERG documents *Broadband market competition report*, ERG (05)23, 25/05/2005 (Doc ID3352) or *Report on price consistency in upstream broadband markets*, ERG (09) 21, June 2009 (Doc ID3353).

¹⁵¹⁵ Doc ID 4242, p. 10.

¹⁵¹⁶ See Communications Committee, Working Document "Broadband access in the EU: situation at 1 July 2010, dated 21 November 2010, Doc ID 4175.

¹⁵¹⁷ ECTA's Press release *"Leading broadband countries benefit from competition"* of October 2005 – Doc ID 4170.

- (1077) The fact that a step-by-step approach could be an interesting business model for AOs is also confirmed in the Broadband market competition report of the European Regulators Group (ERG) of May 2005¹⁵¹⁸. It is also described in an ERG Report on price consistency in upstream broadband markets of June 2009: "*The starting point in the dynamics of the ladder of investment is such that entrants initially occupy the lowest "rung" of the ladder, reselling the vertically integrated incumbent's services, operating as an ISP (in a pure services based competition). After that, the entrant climbs up the ladder i.e. investing in infrastructure and deploying a network to offer services progressively closer to the end user. Pricing at the different levels of the value chain should then be set such that the entrant operators can consolidate their market position in particular by increasing their customer and revenue bases, and thus become able to provide more facility-based services to end customers. As a result, efficient entrants who have gained sufficient financial strength can start to move up the ladder for the purpose of searching for better margins created by the wholesale and retail prices differences and the increased scale economies owing to the customer base.*"¹⁵¹⁹.
- (1078) The progressive possibility of investments by AOs in the course of climbing the "*investment ladder*" not only reduces the reliance on the incumbent's network, but also increasingly enables them to add more value to their products to the end-user and differentiate their services from the incumbent's products by offering additional or innovative services. The ERG Report of June 2009 states in this respect that: "*The progressive ascension in the "ladder of investment" (from pure resale to bitstream alternatives and from there to the development of one's own local loop infrastructure or LLU) will require greater investment, but will also afford to third-party operators the possibility of greater differentiation from the vertically integrated incumbent operator (including the direct management of aspects such as the quality of the service or the bandwidth available; the possibility to select the nominal speed for upload/download transmission; or enhanced possibilities to offer integrated retail solutions - including e.g. voice and/or TV as well as broadband Internet services)*"¹⁵²⁰.
- (1079) ST argues that the "*ladder of investment*" is not to be understood as a general theory, that is to say the only way of market entry but as a set of regulatory policies which encourage a certain type of entry, by certain categories of providers¹⁵²¹.
- (1080) Although the "*investment ladder*" concept is not prescriptive and does not entail that AOs must follow a step-by-step approach to invest into (broadband) infrastructure, it

¹⁵¹⁸ See ERG document *Broadband market competition report*, ERG(05)23, 25 May 2005, Doc ID3352, p. 2-3.

¹⁵¹⁹ See *Report on price consistency in upstream broadband markets*, ERG (09) 21 June 2009, Doc ID3353, p. 9.

¹⁵²⁰ See "*Report on price consistency in upstream broadband markets*", ERG (09) 21, June 2009, doc ID3353, page 7. Also, the European Competitive Telecommunications Association (ECTA) considers that "*countries have been able to improve their broadband rankings over time by building a clear path towards competition through the 'ladder of investment'*". ECTA concludes that "*if action is taken by regulators to promote competition by providing certainty about the ladder of investment, improving the product offerings available to competitors and combating discrimination by the incumbents in favour of their own broadband retail offers, there should be further scope to increase choice for consumers and boost broadband penetration (...)*" (ECTA's Press release "*Leading broadband countries benefit from competition*" of October 2005 – Doc ID 4170, page 2).

¹⁵²¹ ST's Reply to the SO, paragraphs 1568-1574.

is recognised as a general principle which encapsulates the observed pattern of market entry and expansion by new entrants in the context where the incumbent's network cannot be easily duplicated. This pattern has prompted regulators in Europe¹⁵²² (including Slovakia) to tackle established barriers to entry and expansion on the markets such as the markets for WBA and wholesale access to ULL by mandating access at various levels of the incumbent's network¹⁵²³. The Communications Committee (CoCom) Working Document "*Broadband access in the EU: situation at 1 July 2010*"¹⁵²⁴ of 21 November 2010 provides that "*Access regulation is based on the "ladder of investment" principle: the assumption that the new entrants will acquire capital assets progressively, as they acquire customers and revenues. In that sense, AOs based on the incumbent copper network would move from low-investment types of competition like bitstream to fully unbundled local loops, eventually replicating the incumbent's access network. Lower prices on the local loop have moved the new entrants to go from low-intensive capital expenditure solutions such as resale to higher investment like the full unbundling of the local loop*". ST's behaviour was liable to make devoid of substance the regulatory obligation imposed on it to provide access to its ULL .

- (1081) In a case like the present one infrastructure-based competition could not develop very rapidly due to high network costs and the fact that the market for mass-market retail broadband services was dominated by ST.¹⁵²⁵ Therefore, 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.
- (1082) In its submission of 31 May 2013¹⁵²⁶, Orange explained that "*accessing to the incumbent network is, normally, the first step of a network deployment*", which allows AOs to "*compete progressively with the incumbent operator*".
- (1083) ST argued in the reply to the LoF¹⁵²⁷ that Orange's position is in contradiction with the submission made by Orange SA in response to the ERG Remedies Consultation in 2003/4¹⁵²⁸ in which Orange raised concerns regarding the concept put forward by ERG that access remedies should be designed to facilitate new entrant's market entry along a "*ladder of investment*", a view shared by other incumbent operators which

¹⁵²² The ERG Report on price consistency in upstream broadband markets of June 2009 also emphasises that the "*ladder of investment*" is implemented in the majority of the Member States in the context where "*all NRAs agree on the fact that efficient access regulation and pricing should stimulate entry by efficient entrants, which would otherwise have difficulties in replicating the network of the incumbent*" (Doc ID 4175, pages 35 and 18).

¹⁵²³ See also Progress Report on the Single European Electronic Communications Market 2007 (13th Report), Doc ID 4242.

¹⁵²⁴ Doc ID 4175, pages 35 and 18.

¹⁵²⁵ See recitals (282), (283), (287), (329) and (334) above and subsection 6.1.3.

¹⁵²⁶ Doc ID 4188.

¹⁵²⁷ Reply to the LoF paragraph 808 et seq. Doc. ID4671-36.

¹⁵²⁸ http://berec.europa.eu/doc/publications/call_input_draft_appropriate_remedies/orange.doc, Doc ID4843.

had replied to this consultation¹⁵²⁹. ST adds that Orange Slovensko's position was opportunistic and expressed with the sole aim to harm ST.

- (1084) This view cannot be accepted because it has no regard to the context and the circumstances in which these views were expressed. The Orange response to the ERG Remedies Consultation was made in 2003 by the parent company of the Orange group and expressed the group's general views. In contrast, the submission from Orange Slovensko was made in 2013 by representatives of a company which had had a documented¹⁵³⁰ and therefore credible interest in accessing ST's broadband infrastructure, despite the general statements made by the Orange group years ago. In the light of these considerations ST's claim that the submission made by Orange Slovensko in 2013 was simply made to harm ST is purely speculative and cannot be accepted by the Commission.
- (1085) Moreover, ERG has thoroughly analysed the criticism expressed by the incumbent and rejected it by pointing to the fact that ladder of investment concept proved to be useful, leading to higher levels of infrastructure investment and broadband markets to be more sustainable competitive¹⁵³¹. ERG pointed out: *"The framework's concept of ladder of investment links a pro-competitive regulation with investment which in turn is pushing broadband penetration..."*¹⁵³². ERG also underlined that: *"regarding the process of climbing the ladder, the data of the 11th Implementation Report"*¹⁵³³ clearly indicate that the mechanism is working as predicted theoretically by the model as the use of LLU (fully unbundled lines and shared access) increased tremendously, LLU now being the main wholesale access for new entrants ..."¹⁵³⁴. In the light of these elements, the Commission's findings on the proven benefits of the "ladder of investment" as applied in the present case, the Commission rejects ST's claim that Orange Slovensko's statements are opportunistic or have been made to harm ST.

9.3.2. *Own infrastructure deployment was the only possibility left to AOs on the retail mass market for broadband services offered at a fixed location*

- (1086) As explained above, the Commission considers that by depriving AOs of access to ULL, ST made more difficult or even impossible for AOs to enter the market on the basis of their own infrastructure. ST's assertions that the AOs were simply not interested in accessing ULL¹⁵³⁵ are unfounded. The AOs did not access ST's ULL

¹⁵²⁹ See ERG (03) 30 rev 1 ERG Common Position on the approach to Appropriate remedies in the new regulatory framework;

¹⁵³⁰ See eg. Orange's submission to TUSR, dated 20 October 2005, Doc ID 0297.

¹⁵³¹ See e.g. Revised ERG Common Position on the approach to Appropriate remedies in the ECNS regulatory framework, final version May 2006, p. 83 http://www.erg.eu/streaming/erg_06_33_remedies_common_position_june_06.pdf?contentId=542920&field=ATTACHED_FILE.

¹⁵³² ERG Revised ERG Common Position on Remedies, ERG (06) 19, Explanatory Memorandum, p. 8, http://www.erg.eu/streaming/erg_06_19_explanatory_memorandum_revised_erg_common_position_on_remedies.pdf?contentId=544951&field=ATTACHED_FILE.

¹⁵³³ 11th Progress Report, Annex I, COM(2006)68, SEC(2006)193, pp. 37, 56/57 (Figure 55), http://www.erg.eu/streaming/erg_06_19_explanatory_memorandum_revised_erg_common_position_on_remedies.pdf?contentId=544951&field=ATTACHED_FILE.

¹⁵³⁴ ERG Revised ERG Common Position on Remedies, ERG (06) 19, Explanatory Memorandum, p. 9.

¹⁵³⁵ ST's Reply to the SO, paragraphs 1597-1598.

because ST deterred them from ULL access by applying a margin squeeze and a refusal to supply, as was already established¹⁵³⁶.

- (1087) The sole deployment of a new network without effective access to ULL is not, contrary to what ST argues¹⁵³⁷, the "preferred" option of AOs. The deployment of the network in such case is, as emphasised by the Progress Report on the Single European Electronic Communications Market 2009 (15th Report), slow and limited in scope¹⁵³⁸.
- (1088) The Commission notes that AOs favour access to the incumbent's network, provided it is possible under viable conditions. In this vein, Orange emphasised in its submission of 31 May 2013¹⁵³⁹ that "*accessing to the incumbent's copper network is possible and allows AOs to develop their network step by step and allow them to compete progressively with the incumbent operator. The access to the xDSL should be the first step before the fibre optic. Thus, all the restrictions to the access of the incumbent's network are a barrier to entry on the market*"¹⁵⁴⁰.
- (1089) In the present case, AOs did not access ST's ULL because ST deterred them by applying a margin squeeze and refusing to supply access to ULL¹⁵⁴¹. Due to the disadvantageous terms upon which access to ULL was granted, Orange considered that the deployment of a fibre network was the only practicable way to enter and expand on the retail broadband market¹⁵⁴². Orange's internal presentation "*Strategic Framework*" of March 2007¹⁵⁴³, points out that there is "*no reasonable way to get via fixed infrastructure to customer premises – T-Com successfully holds its dominant position (no ULL)*". Orange's conclusion is therefore that "*only with own fixed infrastructure OSK will be able to assure further solid growth of the Company*".
- (1090) Slovanet also tried to obtain reasonable access to the wholesale inputs from ST, including ULL. Due to the disadvantageous terms upon which access to ULL was granted, it submitted a number of complaints to the TUSR and the Slovak NCA¹⁵⁴⁴. Slovanet shortly realized that investing into fibre was the only practicable means of continuing its business, so that in the end Slovanet was also forced to deploy its own network without accessing ULL¹⁵⁴⁵. The minutes of the conference call with Slovanet of 7 August 2013¹⁵⁴⁶ explain the context of Slovanet's decision to invest into fibre: "*Our strategic decision at the end of 2006 to restrict as much as possible the use of wholesale ST services was in principle the only possible solution to (...)*

¹⁵³⁶ See sections 7 and 8 above.

¹⁵³⁷ ST's reply to the SO, paragraphs 1617, 1619-1623.

¹⁵³⁸ See also Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 1, Doc ID 4247, page 355: "*The largest fixed alternative players, mainly due to difficulties in competing via use of the incumbent's wholesale DSL products, are gradually moving away from the third party infrastructure to development of their own networks. Such network deployment is however slow and limited in scale*".

¹⁵³⁹ Doc ID 4188.

¹⁵⁴⁰ Doc ID 4189, Minutes of the meeting with Orange of 03/06/2013, point 26.

¹⁵⁴¹ See Sections 7. Refusal to supply and 8. Margin Squeeze.

¹⁵⁴² See Orange's submission of 31 May 2013, Doc ID 4188; Minutes of the meeting with Orange of 3 June 2013, Doc ID 4189, point 8.

¹⁵⁴³ Doc ID 4330.

¹⁵⁴⁴ See Minutes of the conference call with Slovanet of 7 August 2013, Doc ID 3959, point 2.7.

¹⁵⁴⁵ See reply of Slovanet to the RFI of 13/06/2008, Question 4.18 (ii), Doc ID 66.

¹⁵⁴⁶ Doc ID 3959, Minutes of the conference call with Slovanet of 07/08/2013, point 2.7.

how to continue in business at all (as proof, we attach the printed report of Slovanet from November 2006)".

- (1091) This is also a general trend noticed in the Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 1¹⁵⁴⁷: "*The largest fixed alternative players, mainly due to difficulties in competing via use of the incumbent's wholesale DSL products, are gradually moving away from the third party infrastructure to development of their own networks. Such network deployment is however slow and limited in scale*".
- (1092) Moreover, ST itself recognises AOs' interest in unbundling ST's local loops, even in the presence of AOs' fibre network. That was confirmed in an email of T-Mobile Slovakia's CEO reacting to the news that Orange Slovensko concluded a framework agreement for access to the ADSL Partner product of ST: "[...]"¹⁵⁴⁸.
- (1093) ST argues that research relating to broadband markets indicates that the "*investment ladder*" approach has a negative replacement effect on facility-based competition insofar as it reduces the incentives of AOs to invest into their own networks, and hence this concept is not acceptable¹⁵⁴⁹.
- (1094) However, apart from the fact that this assertion is unconvincing and unsubstantiated, Article 102 TFEU protects the competitive structure of the market, which for the reasons set out above, ST's behaviour was liable to damage. Moreover, if AOs had had access to xDSL, they would probably have still invested into their own networks eventually, possibly even at more advantageous financial conditions compared to the situation where they were denied the choice and opportunity to gradually climb the ladder of investment. For instance, Orange pointed out that had it been afforded access to ST's network, it would have nonetheless invested into deployment of its fibre network but in several steps, benefiting from an existent customer base.¹⁵⁵⁰
- (1095) In addition, ST's internal documents demonstrate that fibre roll-out would be inevitable in the middle-term due to technical limitations of the metallic network in Slovakia and the increasing demand of customers for high-speed access¹⁵⁵¹. Therefore, even if alternative competitors had had access to xDSL, roll-out of fibre would have probably taken place in Slovakia in order to ensure sufficient capacity and quality of broadband products. Also, as shown in recitals (322) and (323), ST itself was the most important operator rolling out fibre in Slovakia, as the coverage of its network exceeded the coverage of Orange's network in 2009 and developed its fibre network in parallel with its copper network, therefore benefiting from an existing customer base and economies of scale. That shows that ST was not deterred from investing into fibre just because it had its own copper network. There are no reasons why AOs would act differently from ST and would be deterred from investing into fibre once they would have access to ST's access network through ULL.

¹⁵⁴⁷ Doc ID 4247, p. 355.

¹⁵⁴⁸ See email by the CEO of T-Mobile Slovensko to the vice-president of Slovak Telekom, of 02/04/2008 (Doc ID0197, p. 6-7)

¹⁵⁴⁹ ST's Reply to the SO, paragraphs 1625-1627.

¹⁵⁵⁰ See Minutes of the meeting with Orange of 03/06/2013, Doc ID 41 89, point 26.

¹⁵⁵¹ See e.g. presentation [...], ID1405.

(1096) Against this background it is clear that, apart from the fact that in the market at issue competition can be done on the merits only if AOs are given effective access to ST's ULL, there is furthermore an additional aspect of anticompetitiveness in ST's behaviour: although ULL-based entry is not the only possible form of market entrance, it allows infrastructure-based competition to develop more effectively.

9.3.3. *Lack of access to an initial customer base and network revenues rendered competition by AOs less effective*

(1097) AOs should be afforded the option of obtaining an initial access to the incumbent's network under reasonable conditions, before gradually building up their networks, as opposed to directly investing into their own infrastructure. By refusing access to ULL, the Commission considers that ST put them at a disadvantage vis-à-vis ST, which was able to use its network revenues and initial customer base in order to compete and develop its own fibre-based services.

(1098) Several AOs emphasised the importance of an initial customer base for them to compete effectively. Orange pointed out that *"if Orange ha(s)d had access to DSL at that time, the same investment into fibre would have been done but in several steps, benefiting from an existent customer base and not having to create it from scratch. Orange was therefore forced to leapfrog the ladder of investment"*¹⁵⁵².

(1099) Slovanet also mentioned that *"it was important to keep (and of course expand) the existing DSL client base and gradually migrate it into the expanding qualitative higher (optical) network and offer them other services with added value which generates extra revenue. The conduct of ST forced Slovanet to continuously search for a balance between our profitability and the growth of our market share and the competitive pressure from ST was restricted (...).ST with its issued RUO (...) creates artificial barriers for its competitors, for example by the fact that it increases costs on these wholesale input markets to slow down their prognosis of profitability and so make it hard to create or expand the base of AO's clients, which would enable greater rollout of their own infrastructure"*¹⁵⁵³.

(a) *Access to ULL allows AOs to benefit from an initial customer base*

(1100) Indeed, first, without an effective access to ULL the AO is not able to obtain a customer base at comparatively low costs, which is crucial for the generation of revenue but also allows the AO to induce its ULL customer base to migrate to fibre.

(1101) During its meeting with the Commission of 3 June 2013, Orange pointed out that *"The access to DSL remained crucial, without it Orange could not compete effectively, as ST had a strong customer base for DSL and leveraged its market power from DSL to fibre competition"*¹⁵⁵⁴. Indeed, in areas where AOs manage to deploy their networks without having initial access to ULL, they do not have a sufficient customer base for which to provide services¹⁵⁵⁵, whereas ST has such a customer base. Indeed, it is much easier to convert existing customers from xDSL to fibre-based services, as the ST example of successful conversion shows¹⁵⁵⁶. For

¹⁵⁵² Doc ID 4189, Minutes of the meeting with Orange of 03/06/2013, point 26.

¹⁵⁵³ Doc ID 3959.

¹⁵⁵⁴ Doc ID 4189, Minutes of the meeting with Orange of 03/06/2014, point 26.

¹⁵⁵⁵ See e-mail from TUSR of 8 October 2013, Doc ID 4078 – showing that operational costs of fibre networks increase when an AO has only a small proportion of end-users out of the potential ones.

¹⁵⁵⁶ See section 6.1.3 on Dominance in the retail market.

instance, in one internal document ST refers to its intention to "[...]".¹⁵⁵⁷ ST's behaviour deprived AOs of a similar possibility.

- (1102) The Commission notes that even if Orange rolled out fibre, very few customers from the ones that were covered by Orange's fibre actually switched to Orange: even though Orange invested significant sums into fibre coverage, amounting to SKK 1bn (EUR 33 million) in 2007¹⁵⁵⁸ alone, its actual number of fibre customers remained significantly lower than ST's¹⁵⁵⁹. Although Orange's fibre network covered 300 000 households in 2009, Orange had only 38 000 fibre subscribers (accounting for only 12.6% of the total capacity)¹⁵⁶⁰. Orange explained in its submission of 31 May 2013 that it has been able to compete after it started its service (gradually since September 2007) only for a part of the customers within its FTTH coverage. However, Orange was not able to effectively compete *"for the most of the addressable customers (more than 80% of households)"*¹⁵⁶¹. Orange's internal presentation¹⁵⁶² shows that although Orange and ST had the same starting position regarding fibre deployment and very similar fibre coverage (2011/2012), *"ST was successful in migration from DSL to FTTH"* (which Orange was not able to do). Orange explained that ST *"has 40% more FTTH customers due to migration from initial DSL base, so every second DSL customer in coverage of FTTH was migrated to FTTH"*. Orange's conclusion was that if Orange Slovensko *"ha(ve) had DSL since 2004, OSK (has) would have had now by 12k FTTH customers more thanks to migration from own DSL base"*.
- (1103) This is also confirmed by Slovanet, which emphasised in its conference call with the Commission of 7 August 2013¹⁵⁶³ that: *"from the client base viewpoint, it is important for the operator to keep existing clients because acquiring new clients is much more expensive than keeping old ones"*.
- (1104) Also, offering WBA-based services only is not enough for AOs to build a sufficient customer base, as it is not possible for AOs to differentiate their WBA offers from ST's own services¹⁵⁶⁴. Moreover, it is not possible to offer innovative services such as IPTV and Triple play based on WBA.

(b) Access to ULL allows AOs to benefit from an initial revenue base

- (1105) Without an effective access to ULL it will be more difficult for AOs to gradually invest into their own fibre. Rolling out alternative networks such as fibre is on a larger scale very expensive and risky and involves significant delays¹⁵⁶⁵. Without

¹⁵⁵⁷ ST's internal document of June 2008, Doc ID1374, p.24.

¹⁵⁵⁸ Presentation "No. 1 in Broadband and TV Project, Cooperation between ST/T-com and Orange Slovensko a.s." Doc ID1291, p.2.

¹⁵⁵⁹ In its press release of December 2009 Orange indicates that its fibre network covers in total 300,000 households but the number of fibre customers is only 38,000 – see Orange Slovakia press release of 9.12.2009, Doc ID2011; in December 2010 Orange had only 43,000 fibre customers – see Orange's 2010 Annual Report, Doc ID3347, p. 7

¹⁵⁶⁰ See Orange Slovakia press release of 9.12.2009, Doc ID2011.

¹⁵⁶¹ Doc ID 4188.

¹⁵⁶² Doc ID 3863, Orange Presentation "SVK – FIX BB volume evolution – DSL vs. others", slide 3 "SVK – FIX BB volume evolution – DSL vs. others".

¹⁵⁶³ Doc ID 3959.

¹⁵⁶⁴ See recital 198.

¹⁵⁶⁵ See e.g. reply of Orange to RFI of 07/04/2009, Question 36, ID0330, p.18 referring to the *"demanding character of FTTH investment as regards time and finance"*, similarly see also its reply to Questions 18

revenues and cost savings stemming from ULL-based services, it is more difficult for AOs to invest into their networks, and hence the deployment of their networks proceeds slowly or even not at all¹⁵⁶⁶. The WIK-Consult Report "*Wholesale pricing, NGA take-up and competition*" of 7 April 2011¹⁵⁶⁷ shows that "*An independent fibre investor requires special cost savings or other advantages in order to outcompete the copper incumbent who has such advantages investing in fibre, and may face the threat of the incumbent pre-empting its investment thereby rendering it unprofitable*".

- (1106) In its submission of 31 May 2013¹⁵⁶⁸, Orange considers that having access to ST's network at reasonable economic conditions from the outset "*would have enabled OSK to invest in the xDSL network and have access quicker to more customers with a better return on investment from the beginning*". Also, Slovanet explains that the reason for its interest in ULL was to achieve savings, which would generate capital for the gradual construction of Slovanet's network: "*The reason for our interest in (...) RUO was (...) to achieve savings (...), which would generate capital for the gradual construction of our own network (...)*". Also, Slovanet pointed out that "*Each operator needs to achieve a certain critical volume of operation and revenues from this operation to make economies of scope and scale to be able to invest in its own infrastructure. Therefore the roll-out of our optical network was very restricted because it was limited by the permitted maximum credit loading and restricted available capital*"¹⁵⁶⁹.
- (1107) In the context where ST itself decided to deploy fibre only in parallel with upgrading its copper network, AOs also prefer to roll out their own networks after accessing ST's network through ULL. Indeed, as regards a possible roll-out of fibre as an alternative to ST's xDSL network, ST itself indicated in the business plan for its project "*No. 1 in Broadband and TV*" that rolling-out "*pure*" high-speed fibre broadband access in Slovakia "*was proven [...]*"¹⁵⁷⁰. ST therefore decided for a "*hybrid*" project combining fibre roll-out with upgrading the existing metallic network. However, even the hybrid project limited to the [...] largest cities required according to ST capital expenditure amounting to [...] SKK in 2007-2009 only and the expected discounted payback period of the investment was about [...] years¹⁵⁷¹. In addition, the implementation of the project proved more difficult than expected and in March 2008 ST's internal documents indicated that: [...]"¹⁵⁷².The expected

(page10) or 39 (page 20). In addition, the massive roll-out of fibre network by Orange was enabled by in several respects unique situation in Slovakia in 2005-2006 (no possibility of viable wholesale access combined with an intention of Orange Group to test a massive roll-out in a smaller country - see Doc ID1920,p.2). Also UPC confirms that upgrading their cable TV network for broadband and triple play services requires significant investment and that due to limited financial sources they had to make the investments gradually and are still not able to provide triple play in all cities covered by their networks (see reply of UPC to RFI of 07/04/2009, Doc ID0278, p.9).

¹⁵⁶⁶ See Minutes of the meeting with Orange of 03/06/2013, Doc ID 4189, point 26; WIK-Consult Report "*Wholesale pricing, NGA uptake and competition*" of 7 April 2011, Doc ID 4302.

¹⁵⁶⁷ Doc ID 4302.

¹⁵⁶⁸ Doc ID 4188.

¹⁵⁶⁹ Doc ID 3959, Minutes of the conference call with Slovanet of 7 August 2013.

¹⁵⁷⁰ See [...], Doc ID 1295, p.7.

¹⁵⁷¹ See [...], Doc ID 1295, p.2-3.

¹⁵⁷² See [...], Doc ID 1347,p.5.

discounted payback period was prolonged to [...] years in March 2008¹⁵⁷³ and to [...] years in March 2009¹⁵⁷⁴.

- (1108) ST's submission that the deployment of new networks is in fact less costly and more advantageous for the AOs than ULL entry¹⁵⁷⁵ is unconvincing and unsubstantiated for the reasons explained above in recitals (1105) to (1107). Moreover, Orange emphasised "*...the demanding character of FTTH investment as regards time and finance...*"¹⁵⁷⁶ and explained that: "*...in view of the extensive investments of Orange Slovensko a.s. in FTTH it is not possible to expect in the nearest future any profits from provision of our services or network.*"¹⁵⁷⁷ Orange also expressed the view that from an investor's point of view most of such investment, that is to say a network which has roughly a 15% population coverage, would have never been realised¹⁵⁷⁸.

9.4. Conclusion

- (1109) On the basis of recitals (1046) to (1108), the Commission concludes that the exclusionary behaviour of ST was likely to have negative effects on competition and thereby consumers in the retail mass-market for broadband services at a fixed location in Slovakia. In the present case, trade between Member States may be affected because ST's abusive conduct described above relates to access to ST's ULL, which extends over the entire territory of the Republic of Slovakia, and that territory constitutes a substantial part of the Union. These practices affect the market structure by artificially raising barriers to entry to wholesale market for telecommunications operators in Slovakia and thus at least potentially restrict the possibility for undertakings established in other Member States to establish themselves in the Republic of Slovakia.

10. QUALITATIVE AND QUANTITATIVE INDICATIONS UNDERPINNING THE FINDING OF THE POTENTIAL ANTICOMPETITIVE EFFECTS OF ST'S CONDUCT

- (1110) In accordance with the case-law it is sufficient to demonstrate that ST's behaviour has potential anticompetitive effects on the market, which the Commission showed in particular in section 9 "*Potential anticompetitive effects of ST's conduct*". Despite it not being necessary, the Commission has also reviewed the quantitative indications of the potential negative effects of ST's conduct on the retail broadband services market. The assessment of the qualitative and quantitative indications underpins the finding of the potential anticompetitive effects of ST's practices.

¹⁵⁷³ See [...], Doc ID 1347,p.5.

¹⁵⁷⁴ See [...], Doc ID 1420, p.23.

¹⁵⁷⁵ ST's Reply to the SO, paragraphs 1585-1586.

¹⁵⁷⁶ See reply of Orange Slovakia to RFI of 07/04/2009, Question 36, Doc ID 330,p.18.

¹⁵⁷⁷ See reply of Orange Slovakia to RFI of 07/04/2009, Question 18, ID330,p.10.

¹⁵⁷⁸ According to its own reply to the request for information, Wimax has a coverage of 250,000 households at the beginning of 2009, Doc ID272, p.7). However, it has to be noted that its market share in the overall broadband market remains well below 5%.

10.1. Analysis of the competitive structure of the overall retail broadband market

(1111) ST's abusive conduct has enabled ST to maintain and strengthen its dominance in the xDSL segment¹⁵⁷⁹ and its position in the retail mass market for broadband services offered at a fixed location.

Table 42: Market shares on the retail mass market for broadband services offered at a fixed location based on number of subscribers (as ranges for third parties' confidential data)¹⁵⁸⁰

	2005	2006	2007	2008	2009 ¹⁵⁸¹	06/2010	2010
ST	[40-50]%	[40-50]%	[40-50]%	[50-60]%	[40-50]%	[40-50]%	[40-50]%
UPC	[10-15]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	[5-10]%	8,2%
Slovanet	[5-10]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]
Orange	0.0%	0.0%	[0-5]%	[0-5]%	[0-5]%	[5-10]%	4.9%
GTS Slovakia	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]
WiMAX	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]
Antik	n.a.	n.a.	[0-5]%	[0-5]%	[0-5]%	[0-5]%	n.a.
e-Tel/Dial Telecom	n.a.	[0-5]%	[0-5]%	[0-5]%	[0-5]%	[0-5]%	n.a.

(1112) At the same time, market shares of AOs have lagged significantly behind despite the significant growth of the total market. With the exception of UPC in 2005, no AO has ever had a market share exceeding 10% of the fixed broadband market. In addition, the market shares of a number of nationwide important AOs decreased over this period. Even Orange, despite its important investments into fibre roll-out and marketing,¹⁵⁸² has been able to reach only around 5% of subscribers in 2009/2010 (that is to say 3 years after the launch of its fibre broadband services)¹⁵⁸³. In addition, Orange's market share has stopped growing (and even dropped slightly) in 2010. As

¹⁵⁷⁹ See above subsection 10.2. *Quantitative elements indicating foreclosure of the xDSL market segment.*

¹⁵⁸⁰ For details see recital (310) above.

¹⁵⁸¹ As of 2009, there was a minor methodological change in the statistics of the Ministry of Transport, Posts and Telecommunications used to identify the total number of fixed broadband connections in the Slovak market. In that year, the Ministry asked Výskumný ústav spojov (VUS), which collected the data for the statistical survey, to extend the survey to a number of very small local fixed wireless (in particular WiFi) operators. This extension also affected the overall total market figures. Doc ID2776 confirmed by VUS in doc ID2774.

¹⁵⁸² See footnote 1565.

¹⁵⁸³ The number of fiber subscriber of Orange amounted to 38,000 in December 2009 (see press release of Orange of 9.12.2009, Doc ID2011), which represented only 4.8% of total fixed broadband subscribers.

to UPC its market share was decreasing over time and remained well below 10% in 2010.

- (1113) Also, the Progress Report on the Single European Electronic Communications Market 2007 (13th Report) – Commission Staff Working Document, Part 1¹⁵⁸⁴, chapter on Slovakia of 19 March 2008, finds that: "*The position of the incumbent on the overall broadband market is still very strong, at 54.8% of total fixed retail lines*" and concludes that "*the incumbent's position in the DSL section remains unchallenged*"¹⁵⁸⁵. The Progress Report on the Single European Electronic Communications Market 2008 (14th Report) – Commission Staff Working Document, Part 1, chapter on Slovakia of 30 July 2009¹⁵⁸⁶ shows that the incumbent's position in the fixed market remains largely unchallenged and that "*The new entrants' share of all fixed retail access lines grew by 2.8 percentage points to 48% in January 2009. However, taking into account the incumbent's unchallenged status on the DSL market with 92% of all DSL retail lines, the incumbent still holds a very significant position in the fixed broadband market overall*". Also, the Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 1, chapter on Slovakia, of 25 August 2010, emphasised that in Slovakia "*the DSL segment of the market remains in the hands of the incumbent*"¹⁵⁸⁷.
- (1114) ST argues that in some local areas its market shares are significantly lower because it faces there very important competitors with market shares significantly higher than at the national level¹⁵⁸⁸. Despite reservations as to the quality of this market share data, the Commission acknowledges that in some areas (in particular densely populated areas in cities) the deployment of Orange's fibre network as of 2007 may have reduced the extent of ST's market power.
- (1115) However, the development of the market share of ST in the total fixed access retail broadband market was at least in the period 2004-2008 contrary to the trend in the Union as a whole, as shown by the following chart:

¹⁵⁸⁴ Doc ID 4243, p. 286.

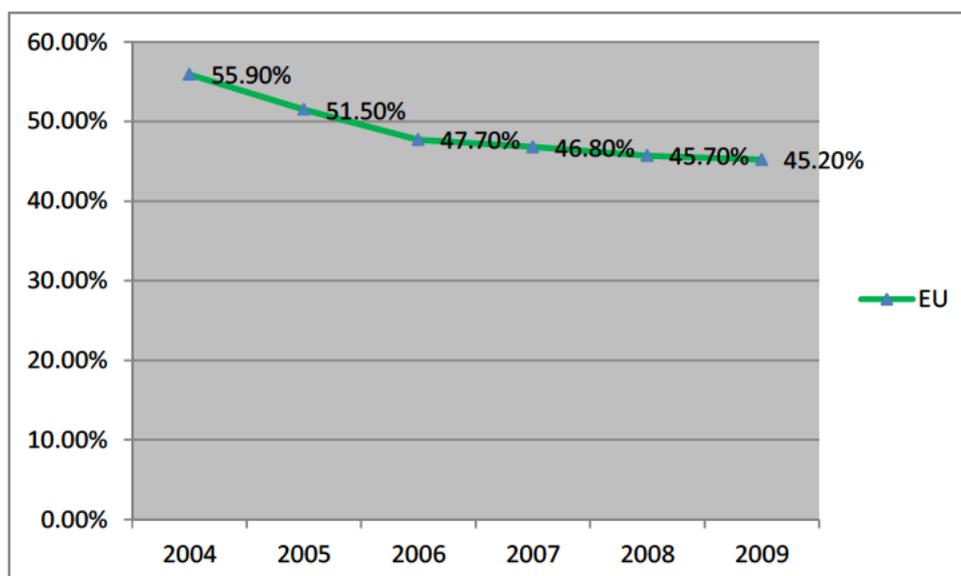
¹⁵⁸⁵ Progress Report on the Single European Electronic Communications Market 2007 (13th Report) – Commission Staff Working Document, Part 1, chapter on Slovakia – Doc ID 4243, p. 284.

¹⁵⁸⁶ Doc ID 4245, p. 310.

¹⁵⁸⁷ Doc ID 4247, p. 352.

¹⁵⁸⁸ See in particular [...] paper based on a [...] survey of the technology and providers' shares of main broadband connections in Slovakia – Results of a [...] survey, December 2010, Doc ID 2657.

Table 43: Share of the incumbent as of total fixed broadband access lines



Sources: Communications Committee Working Document - Broadband access in the EU: situation at 1 July 2009, page 4 (available at the website http://ec.europa.eu/information_society/europe/i2010/docs/interinstitutional/cocom_broadband_july09.pdf, Doc ID4849, and ST data for its number of fixed broadband customers (ID0534, p.1 for 2005-2008, ID0551, p.1 for 2004, ID1982, p.7 correcting figures for 2008, ID2618 for 2009 [removed because of business secrets]).

10.2. Quantitative elements indicating foreclosure of the xDSL market segment

(1116) ST's behaviour resulted in foreclosure of the xDSL market segment. This is also shown by the fact that ST's market share in the xDSL segment grew steadily from around [70-80]% in 2004 to more than [90-100]% in 2010, as shown by the table below:

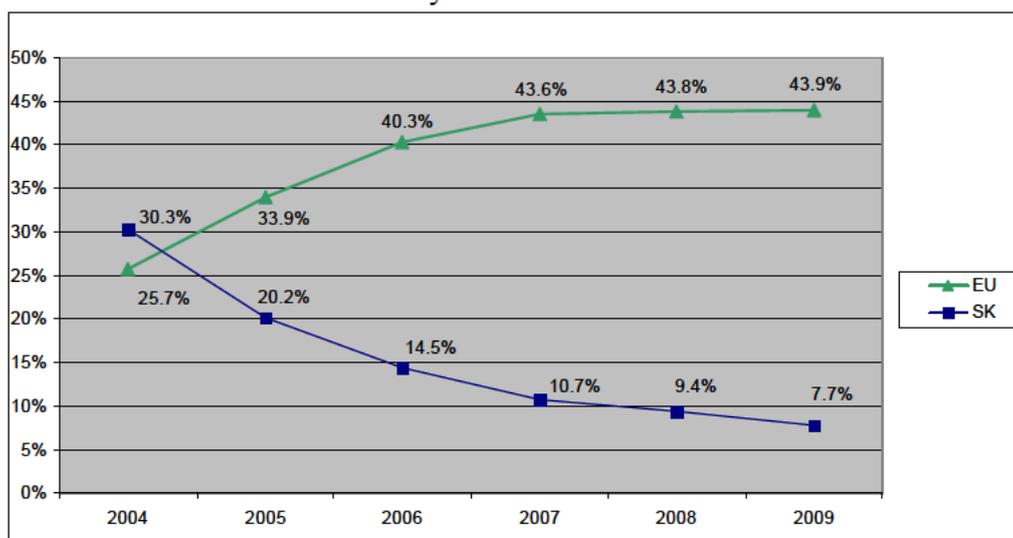
Figure 44 – Shares of ST in the xDSL retail market segment only

	2005	2006	2007	2008	2009	2010
ST	[70-80]%	[70-80]%	[70-80]%	[90-100]%	[90-100]%	[90-100]%

Sources: figures provided by ST for its own number of DSL customers (ID0534, p.1 for 2005-2008, ID0551, p.1 for 2004, doc ID3245 (reply of ST to RFI of 31 May 2011, Attachment Q20_1) for 2010 and ID1982, p.7 correcting figures for 2008) and the total DSL market according to the Ministry of Transport, Posts and Telecommunications (ID1572, p.1. and the updated website of the Ministry http://www.telecom.gov.sk/files/statistika_vud/pristup_tel.htm), accessed on 8 October 2014, Dok ID4835.

(1117) That is in contrast with the general situation in the EU, where the share of new entrants in the DSL segment of the retail market has been much higher and growing and the share of the incumbents is much lower and decreasing (see below Table 45).

Table 45 – DSL lines by new entrants in Slovakia and in EU



Sources: Union figures: 15th Progress Report on the Single European Electronic Communications Market – 2009 – Commission Staff Working Document, Doc ID4247, page 32; SK figures: data provided by ST for its own number of DSL customers (ID0534, p.1 for 2005-2008, ID 0551, p.1 for 2004, ID2618 for 2009) and the total DSL market according to the Ministry of Transport, Posts and Telecommunications (ID1572, p.1. and the updated website of the Ministry http://www.telecom.gov.sk/files/statistika_vud/pristup_tel.htm), Doc ID4846.

- (1118) As also shown by the Progress Reports on the Single European Electronic Communications Market, in Slovakia the number of DSL lines by operator for new entrants remained amongst the lowest in the Union in Slovakia¹⁵⁸⁹. For instance, in 2009, the percentage of DSL lines for new entrants out of all fixed broadband lines in Slovakia was [0-10]%, as opposed to 35% at Union 27 level.
- (1119) The trend at Union level is therefore contrary to the situation in Slovakia, where ST's market share in the xDSL market segment grew steadily from around [80-90]% in 2005 to more than ([90-100]%) in 2010. This shows that despite the interest of several AOs for wholesale xDSL products, it is likely that ST's behaviour foreclosed the alternative xDSL operators' access to the xDSL segment of the retail broadband services market.
- (1120) In addition, AOs were active only in the remaining 10% on the basis of IP-level wholesale broadband access (bitstream), which allowed only a very limited differentiation of broadband services¹⁵⁹⁰.
- (1121) ST's market share in the xDSL segment was much higher than the incumbents' market share at Union level - the CoCom Working Document "*Broadband access in the EU: situation at 1 July 2010*"¹⁵⁹¹, dated 21 November 2010, "*Figure 16 DSL lines – operator market shares at EU level, January 2006-July 2010*", shows that the

¹⁵⁸⁹ Progress Report on the Single European Electronic Communications Market 2008 (14th Report) – Commission Staff Working Document, Part 2, Figure 102 – Doc ID 4249; Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 2, Figure 98: DSL lines by operators: New Entrants – Doc ID 4250.

¹⁵⁹⁰ See recitals (210) et seq. as well as ST's internal documents Doc ID0141, p.25 or Doc ID1195, p.23.

¹⁵⁹¹ Doc ID 4175.

incumbents' market shares at Union level in the xDSL market segment decreased slightly between January 2006 and July 2010, from 59,7% to 55,0% in July 2010.

- (1122) In this context, ST puts forward the argument that ST's xDSL share does not constitute evidence of anticompetitive effects. Given that the relevant retail broadband market includes all fixed technologies, the consumer welfare does not, in ST's view, require a diversity of operators within one segment. Furthermore, ST considers that the AOs independently decided to roll-out their own network due to low popularity of xDSL¹⁵⁹².
- (1123) The Commission finds these assumptions not only irrelevant for the finding of likely anticompetitive effects, but also unfounded for the reasons mentioned above in section "9. *Potential anticompetitive effects of ST's conduct*". There is evidence indicating that ST's exclusionary behaviour is likely to have foreclosed AOs from the mass-market ULL-based xDSL segment, an important segment of the overall retail mass-market for broadband services offered at a fixed location, in view of the significant share of ST in the xDSL segment ([90-100]% in 2010), the overall number of subscribers, importance for final consumers, dynamic growth, its proportion out of all fixed broadband connections ([40-60]% in the period 2005-2010) and its importance for innovative services.

10.3. ST's counterfactual analysis

- (1124) ST attempts to establish a counterfactual (what would have been the situation in case of ULL-uptake) and compare¹⁵⁹³ the retail broadband market situation in high ULL uptake Member States¹⁵⁹⁴ with the market situation in countries with low ULL uptake Member States¹⁵⁹⁵. By comparing average values for two specific parameters (proportion of non-incumbent broadband lines and proportion of broadband lines with download speed greater than or equal to 10 Mbps) for these two groups of countries, ST argues that there is stronger facility-based competition in countries with a lower ULL uptake and thus that a greater uptake of ULL in Slovakia would in fact be to the detriment of consumers¹⁵⁹⁶. However, the Commission considers that this analysis is not only irrelevant for the purposes of establishing potential anticompetitive effects as shown above in section 9.2, but also suffers from a number of methodological problems which invalidate any such general conclusions. In particular:

- (a) It is not clear why ST has chosen these two particular parameters to compare the competitive situation. The Commission notes that by choosing other possible parameters, the conclusion would be exactly the opposite. For example, (i) the average broadband penetration in the high ULL countries was 26.3% compared to only 19.5% in the low ULL uptake countries, (ii) the share of lower-end speed lines (>144 kbps and < 2Mbps) was only 17.6% in the high ULL uptake countries and 23.5% in low ULL uptake countries, (iii) the percentage of population using triple play was 3.8% in high ULL uptake

¹⁵⁹² See ST's Reply to the SO, paragraphs 1634-1635; ST's Reply to the LoF, paragraph 884.

¹⁵⁹³ See ST's Third Issues Paper, Doc ID2401, p.25ff.

¹⁵⁹⁴ Defined by ST as Member States with the proportion of ULL lines greater than 17.6%: Germany, Greece, Finland, France, Italy, Spain, Sweden and the United Kingdom.

¹⁵⁹⁵ Defined by ST as Member States with the proportion of ULL lines lower than 7.6%: Belgium, Bulgaria, Czech Republic, Estonia, Hungary, Ireland, Lithuania, Latvia, Malta, Poland, Romania and Slovakia.

¹⁵⁹⁶ See also ST's Reply to the SO, paragraphs 1617-1622.

countries compared to only 2.3% in low ULL uptake countries¹⁵⁹⁷ and (iv) the average Broadband Leadership 2010 index was 87 for high ULL uptake countries and 80 for low ULL uptake countries¹⁵⁹⁸.

- (b) The analysis does not control for other differences (such as state of development of wholesale broadband offers in new and old Member States) which may affect the results. Therefore, the differences between the competitive situations in the retail broadband markets of countries may be also caused by factors other than ULL uptake. In particular, the composition of the two groups of countries clearly shows that while the high ULL uptake group includes exclusively old EU15 Member States, the low ULL uptake group is mostly composed (with only two exceptions out of 12 countries) by the new Member States. ST itself argues that there are significant differences between the old and new Member States relating to the conditions on the broadband market¹⁵⁹⁹.

10.4. ST's argument invoking the absence of prejudice to consumers

10.4.1. *The potential anticompetitive effects of ST's behaviour entail consumer harm*

- (1125) ST pursues the argument that consumer harm is not evident in the case at hand as it is apparent from diverse international reports that Slovakia is at the forefront in terms of fibre network roll-out¹⁶⁰⁰. The Commission considers that the likely negative effects of ST's behaviour in Slovakia as a whole remain, and that the potential anticompetitive effects illustrated above entail consumer harm. Insofar as ST is suggesting that the Commission should prove actual anti-competitive effects in the present case, it is recalled that such proof is not a pre-requisite for the establishment of a violation of Article 102 of the Treaty. Nor is it necessary for the Commission to prove direct consumer harm in terms for example of higher prices or greater quality of the services.
- (1126) Due to ST's exclusionary conduct regarding access to ULL, the competitiveness of the market was likely to be restricted. As also noticed by Slovanet: "*the purpose of RUO was the accessibility of the network of the historic operator in order for competitive operators to generate market competition for the maximum number of clients profiting from this competition between operators*"¹⁶⁰¹.
- (1127) Moreover, apart from the fact that ST's claims about the absence of consumer harm are irrelevant as shown above, they are also unfounded. Without such constraints on competing AOs, it is likely that the market would have delivered greater benefits to

¹⁵⁹⁷ All these comparisons are based, similarly as in case of ST's examples, on figures contained for individual countries in the Commission's Commission Staff Working Document accompanying the 15th Progress Report, available at the webpage http://ec.europa.eu/information_society/policy/ecomms/library/communications_reports/index_en.htm, Doc ID4247.

¹⁵⁹⁸ See presentation of the results of the study elaborated by Said Business School – University of Oxford and Universidad de Oviedo, sponsored by Cisco, Doc ID3361. The Broadband Leadership index takes into account various criteria measuring broadband quality and penetration in individual countries.

¹⁵⁹⁹ See in particular ST's Third Issues Paper, Doc ID 2401, as well as the report for ST by [...] "*Observations on the broadband market in Slovakia*", Doc ID 2418.

¹⁶⁰⁰ ST's Reply to the SO, paragraphs 1699-1701.

¹⁶⁰¹ See Minutes of the conference call with Slovanet of 07/08/2013, Doc ID 3959, point 4.7.

consumers as a whole, such as increased choice of innovative services throughout the Slovak territory, higher broadband penetration and a downward pressure on prices.

- (1128) While fixed wireless access in general is not sufficient to provide innovative services such as triple play and IPTV¹⁶⁰², other fixed technologies such as fibre or cable TV networks have significantly smaller coverage¹⁶⁰³ limited mainly to densely populated areas in cities¹⁶⁰⁴. Due to ST's behaviour, AOs have not been able to use ULL for the introduction of their own innovative services such as triple play and IPTV on a large geographical scale. For instance, Slovanet explained that it was planning to offer through ULL full scale services, such as analogue narrowband access, digital narrowband access, broadband DSL access and voice services which could have been migrated from bitstream.
- (1129) Also, ST's internal documents cited at recitals (389) and (390) clearly suggest that enabling access to wholesale products was expected to have a "negative" impact in the form of enhanced competition to ST's retail xDSL products, in particular with respect to innovative services such as triple play and IPTV. ST has therefore been aware of the fact that the wholesale access to its network would enable AOs to innovate and increase quality more easily, effectively and in a timely manner. ST's behaviour allowed it to preserve its competitive advantage stemming from the fact that it was alone in providing such innovative services outside densely populated areas and also reduced the pressure on ST to innovate and to increase quality. For instance, Slovanet explained that "*ST introduces on related retail sales markets products that AOs cannot replicate because of the conditions in the input market. Therefore the market shares of AOs are very low compared with countries where incumbents are fair to AOs*".
- (1130) Indeed, there is further scope for competition outside densely populated areas, in particular as the DSL coverage in rural areas in Slovakia is significantly lower in comparison with the DSL coverage in rural areas at Union level. The Europe's Digital Competitiveness Report, main achievements of the i2010 strategy 2005-2009¹⁶⁰⁵, shows that despite an increase regarding the DSL coverage in the EU, Slovakia scores low in terms of DSL rural coverage in 2005 (25% versus 66% at Union 27 level in 2005). As shown by the Progress Report on the Single European Electronic Communications Market 2007 (13th Report)¹⁶⁰⁶, the gap between DSL coverage in Slovakia and the Union 27 average continues in the following years: in 2007, there was a 29.5% DSL coverage in rural areas in Slovakia¹⁶⁰⁷, compared with 71.3% at Union level. In 2008, the DSL coverage in rural areas remains low in

¹⁶⁰² See responses of AOs to the RFI of 07/04/2009, e.g., Orange – Doc ID0330, p.20, Slovanet – Doc ID418, p.13 or Dial Telekom/eTel – Doc ID0287, p.22.

¹⁶⁰³ See e.g. Commission Working Document to the 14th Progress Report on the single European electronic communications market – 2008, p. 309-310. See also presentation by the research institute VÚS "*Digital Divide na Slovensku*" of 19/06/2008, Doc ID3362, p. 10. See also UPC reply to RFI of 07/04/2009, Question 36, Doc ID0278, p.9. Further, by far largest alternative fibre network of Orange covered in December 2009 only 17 cities in Slovakia while further continuing with improving the coverage of these cities (see Orange press release of 09/12/2009, Doc ID 2011).

¹⁶⁰⁴ See Commission Working Document to the 15th Progress Report on the single European electronic communications market - 2009, p. 354, Doc ID4247.

¹⁶⁰⁵ Doc ID 4174, p. 24.

¹⁶⁰⁶ Doc ID 4242, p. 34.

¹⁶⁰⁷ The Chapter dedicated to Slovakia – Doc ID 4243.

Slovakia (43% compared with 77% at Union level)¹⁶⁰⁸. In 2009, Slovakia was still lagging behind in terms of DSL rural coverage (54% rural coverage compared with 80% rural coverage at Union level)¹⁶⁰⁹. That shows that it is even more important to have an effective competition in these rural areas, where DSL coverage is low. Also, the Europe's Digital Competitiveness Report 2010¹⁶¹⁰, chapter dedicated to Slovakia, finds that "*Overall coverage in Slovakia, nevertheless, remains low and the lack of quality electronic services affects rural areas in particular*".

- (1131) Moreover, the mere roll-out of fibre does not guarantee in itself and in all circumstances effective competition in the retail mass market for broadband services offered at a fixed location. Indeed, in areas where AOs rolled out fibre networks without initial access to ULL, they probably do not have a sufficient customer base. Absent ST's exclusionary conduct, it is likely that consumers would have also benefited from innovative services based on fibre. When an operator uses its xDSL network to gain customers and therefore effectively deploys a fibre network, it has a customer base that can then convince to move to fibre¹⁶¹¹.
- (1132) Moreover, in view of the Commission's findings on the potential negative impact of ST's exclusionary behaviour on competitors it is reasonable to assume that if competitors had had access to ULL on reasonable and fair prices and conditions, the prices of retail broadband products would have likely been lower. In addition, competitors were forced to rely from the very beginning almost exclusively on the roll-out of their own networks which is also likely to increase their costs reflected in final prices, in particular that rolling-out their own networks is expensive and time-consuming. Absent ST's exclusionary behaviour, it is likely that the price of retail broadband products based on fibre would have been lower.
- (1133) In addition, it is likely that AOs could have offered innovative broadband services based on fibre sooner and more extensively (that is to say in more geographical areas) to the benefit of consumers¹⁶¹² than they actually did. As Orange explained, "*the money Orange spent that way (i.e. leap-frogging the "ladder of investment") could have been used in getting access to other areas, sooner or to improve the already existing access to the benefit of consumers*"¹⁶¹³.
- (1134) The impact of ST's exclusionary behaviour is potentially even more significant in case of business customers using standard mass-market broadband products (that is to say in particular SoHo¹⁶¹⁴ or SME customers). Even though it is not possible to identify clearly a distinct market for these customers due to the significant overlaps between residential users and small business users, business users are in general more dependent on xDSL products as they are less likely to switch to some alternative technologies such as leisure-time focussed CATV offers or low-quality FWA products.

¹⁶⁰⁸ Europe's Digital Competitiveness Report, main achievements of the i2010 strategy 2005-2009 (Figure 4) – Doc ID 4174, p. 24.

¹⁶⁰⁹ Europe's Digital Competitiveness Report 2010 (Figure 2.16) – Doc ID 4173, p. 49.

¹⁶¹⁰ Doc ID 4173.

¹⁶¹¹ See Orange Presentation "SVK - FIX BB volume evolution - DSL vs. others", Doc ID 3863, slide 3; Minutes of the conference call with Slovanet of 7 August 2013, Doc ID 3959.

¹⁶¹² See Minutes of the meeting with Orange of 03/06/2013, Doc ID 4189, point 26; WIK-Consult Report "*Wholesale pricing, NGA uptake and competition*" of 7 April 2011, Doc ID 4302.

¹⁶¹³ See Minutes of the meeting with Orange of 03/06/2013, Doc ID 4189, point 26.

¹⁶¹⁴ Small Office/Home Office.

10.4.2. The overall development of the prices for broadband services in Slovakia

- (1135) ST argues that there is no evidence of consumer harm because broadband prices in Slovakia "are among the lowest in the OECD and have been falling over time"¹⁶¹⁵.
- (1136) The Commission reviewed several comparisons of retail prices in Slovakia with prices in other Union countries to explore whether retail broadband prices in Slovakia were higher than in other Union countries. However, such comparisons are inherently very difficult in view of differences in product characteristics and often complex and varying pricing structures of broadband services in different countries¹⁶¹⁶. Any comparison thus needs to make a number of simplifications and assumptions affecting the reliability of the comparison and any results need to be assessed with caution.
- (1137) Taking into account these limitations, the Commission identified several international benchmarking studies which provide indications that prices in Slovakia in the most relevant categories of products were during the relevant period significantly above the prices in other Union Member States¹⁶¹⁷.

10.4.2.1. Price comparisons for 2007 and 2008

10.4.2.1.1 The 2008 Van Dijk report - based on data from 2007 and 2008

- (1138) One source of international benchmarking for broadband services prices are reports prepared by Van Dijk Management Consultants for the Information Society and Media Directorate-General of the European Commission. The report analysing prices from the period before the initiation of proceedings against ST was published in December 2008 ("2008 Van Dijk report")¹⁶¹⁸. This study analyses the prices of residential retail broadband offers by operators in 27 Member States as well as Norway, Iceland, Japan, South Korea, Canada and the USA. The analysis concerns all broadband offers of AOs representing at least 80% of the national market in question. In view of the composition of ST's products sold, the most important categories are broadband products with download speeds 1 024-2 048 (incl.) Kbit/s and 2 048-4 096 (incl.) Kbit/s, covering ST's Turbo 1, Turbo 2 and Turbo 3 products.

¹⁶¹⁵ ST's reply to the SO, paragraph 1641.

¹⁶¹⁶ A "difficulty of perfect international comparison of either price or speed" is recognised in the submission of [...], "Observations on the broadband market in Slovakia", Doc ID2418, p.18. Similarly, ST acknowledges in another submission that "[a]ny cross-country price comparison requires a set of simplifying assumptions, which necessarily influence the results", see Doc ID1635, p.3.

¹⁶¹⁷ See "Broadband Internet Access Costs (BIAC) – First half of 2008" by Van Dijk Management Consultants for DG INFSO of the Commission of December 2008, Doc ID 3366; "Broadband Internet Access Costs (BIAC) – Second half of 2009" by Van Dijk Management Consultants for DG INFSO of the Commission of January 2010 ("2009 Van Dijk report"), Doc ID3367; OECD Communications Outlook 2009 published in August 2009, Doc ID 3363; Communications Committee, Working Document "Broadband access in the EU: situation at 1 July 2010, dated 21 November 2010, Doc ID 4175; Progress Report on the Single Electronic Communications Market 2008 (14th Report) – Commission Staff Working Document, Part 1, Doc ID 4245; Europe's Digital Competitiveness Report, main achievements of the i2010 strategy 2005-2009, Doc ID 4174; OECD Communications Outlook 2011, "Figure 7.20: Range of broadband prices for a monthly subscription – no line charge, September 2010, USD PPP", Doc ID4193.

¹⁶¹⁸ See "Broadband Internet Access Costs (BIAC) – First half of 2008" by Van Dijk Management Consultants for DG INFSO of the Commission of December 2008, Doc ID3366.

- (1139) As regards the category 1 024-2 048 (incl.) Kbit/s, Slovakia was in April 2007 the third most expensive country¹⁶¹⁹. In October 2007 and in April 2008, prices increased, as the Slovak Republic had the most expensive median offer of all countries amounting to 82.99 purchasing power parity ("PPP") EUR¹⁶²⁰.
- (1140) As regards the category 2 048-4 096 (incl.) Kbit/s¹⁶²¹, Slovakia was among the three countries with by far the most expensive median offer in October 2007¹⁶²². In April 2008 the Slovak Republic had the second most expensive median offer from the sample (97.45 PPP EUR compared to the EU27 median of 36.89 PPP EUR) and the most expensive lowest offer (88.78 PPP EUR).
- (1141) Also, the Progress Report on the Single European Electronic Communications Market 2008 (14th Report) – Commission Staff Working Document, Part 1¹⁶²³ shows that while prices for broadband subscriptions, with the exception of the lowest speed basket, decreased on average in the Union between April 2007 and April 2008, a few Member States¹⁶²⁴, amongst which Slovakia, experienced an increase in prices for the "1-2 Mbps" basket and for the "2-4 Mbps" basket in that same period.
- (1142) As regards bundled products in the 1 024-2 048 (incl.) Kbit/s and 2 048-4 096 (incl.) Kbit/s speed categories, the 2008 Van Dijk report shows that Slovakia had in April 2008 the most expensive lowest offer for Internet+TV double play bundle with a speed of 1 024-2 048 (incl.) Kbit/s¹⁶²⁵ and a slightly above average (62.24 PPP EUR compared to EU27 average of 58.70 PPP EUR) lowest offer for Internet+TV+fixed telephony bundle in the same speed category. However, the analysis with respect to bundles ranks only the least expensive offers and thus it provides less information about the overall national price level.
- (1143) As to speeds higher than 4 Mbit/s, the prices in Slovakia (where there is any offer available in Slovakia identified) tend to be more in line with the average prices of other countries. However, ST's products having higher speeds than 4 Mbit/s represented in 2008 only a small part of the overall broadband market in Slovakia¹⁶²⁶.
- (1144) ST raised several methodological issues in relation to the 2008 Van Dijk report¹⁶²⁷ such as the fact that the report uses list prices, instead of promotional prices, that the prices include non-recurring charges such as the modem prices, which are higher than the usual modem used in Slovakia and that the PPP used in the report

¹⁶¹⁹ See graph on pages 56-57 of 2008 Van Dijk report.

¹⁶²⁰ See Chapter 4.2.3 of 2008 Van Dijk report.

¹⁶²¹ See pages 60-67 of 2008 Van Dijk report.

¹⁶²² There was no Slovak offer included in this category in April 2007 – see graph on pages 64-65 of the Van Dijk report.

¹⁶²³ Doc ID4245, p.20-21.

¹⁶²⁴ The other Member States are: Finland, Germany, Italy, Ireland, Malta, Poland and Spain, Doc ID4245, p. 21.

¹⁶²⁵ See p. 120 of 2008 Van Dijk report.

¹⁶²⁶ According to the ST's Issues Paper, [...] of ST's DSL broadband accesses had access speeds of [...] Mbps (see Doc ID 953, p.24) while fibre accesses represented at the end of 2008 only a negligible fraction of all ST's fixed broadband accesses ([...] fibre accesses compared to [...] DSL accesses – see Doc ID 0534, p.1).

¹⁶²⁷ ST's reply to the SO, paragraph 1650.

unfavourably distorts prices, creating the illusion that prices in Slovakia are higher than they are in reality¹⁶²⁸.

- (1145) The Commission notes that while the report does not take into account promotions, when the time to subscribe to the offer is less than 12 months or when it is aimed at a specific group of consumers (for example students), the reduced price is taken into account when the contract duration for the promotion is at least 12 months¹⁶²⁹. The study does not include any contract in Slovakia of a shorter duration¹⁶³⁰ and all the promotions for Slovak products of at least 12 months are thus taken into account for the benchmarking exercise.
- (1146) As to the inclusion in the prices of the non-recurring charges, the Commission observes that non-recurring charges are spread over standard period of 12 months unless the actual contractual commitment is longer, in which case the whole actual contract period is considered. The report pays significant attention to identifying offers which are financially and technically comparable, taking into account a number of parameters of these offers¹⁶³¹. Moreover, the Commission considers that the credibility of such studies cannot be questioned based on the particularities of a given national market, such as lower non-recurring costs due to the popularity of a cheaper modem¹⁶³².
- (1147) As regards the PPP, the Commission considers that PPP adjustments seem reasonable, given that there are significant differences in the purchasing power in the OECD or Union countries. Moreover, using PPP adjustments is a valid standard method, as the independent international benchmarking reports identified by the Commission or ST and described in this section generally use PPP adjustments.
- (1148) In addition, the Commission notes that the same alleged methodological issues would also affect the Van Dijk report of 2011 that ST put forward in order to show that prices in Slovakia were low in 2011. However, none of these was considered as a methodological problem by ST in the 2011 Van Dijk report¹⁶³³.

10.4.2.1.2 The OECD Communications Outlook 2009 – based on data from 2008

- (1149) The OECD Communications Outlook 2009¹⁶³⁴ ("the 2009 OECD study") includes a section dedicated to a comparison of prices for retail broadband products for residential customers in individual OECD countries and finds that the average monthly subscription price (expressed in purchasing power parity PPP USD) in September 2008 was in the Slovak Republic the highest from all OECD countries for both medium-speed connections (advertised speed 2 500-10 000 Kbit/s) and high-speed connections (advertised speed 12 000-32 000 Kbit/s), while for very low-speed connections (advertised speed 256-2 048 Kbit/s) Slovakia ranked in the middle of the sample.

¹⁶²⁸ ST's reply to the LoF, paragraph 886 and ST's reply to the SO, in particular paragraphs 173 et seq. and 1658 et seq.

¹⁶²⁹ See 2008 Van Dijk report, page 26 and explanation on page 81 with respect to the Netherlands.

¹⁶³⁰ See page 25 of 2008 Van Dijk report.

¹⁶³¹ See Chapter 3.2 of 2008 Van Dijk report.

¹⁶³² See ST's Reply to the SO, paragraphs 1648-1652; see also ST's Reply to the LoF, paragraphs 889-890.

¹⁶³³ ST only notes that other methodological issues such as the increase of the geographical scope have been solved in the 2011 Van Dijk report – Reply to the SO, paragraph 1655 and FN 1199.

¹⁶³⁴ Doc ID3363.

(1150) ST argues that the 2009 OECD study is affected by several methodological shortcomings, which include in particular the following: (i) a simple comparison of average prices is misleading and the relative importance of each product offering and service provider should be reflected in the average price, (ii) the study does not always control for differences in product offering, (iii) the number of products considered per country varies significantly, (iv) PSTN line rental charges are not taken into account, (v) Slovak average prices are biased by outliers – ST argues that the exclusion of the two highest offers of the 14 offers considered for Slovakia changes the average prices significantly and that these outliers unreasonably increase the total averages for Slovakia reported in the study and (vi) PPP adjustments distort the results for Slovakia.

(1151) The Commission considers that point (i) above is due to a lack of underlying connection data, which, as already noticed by ST itself, affects most of the studies, not only the OECD study. ST argues that using weighted average prices, based on each offering's share of total connections, is the best method to avoid distortions. However, the Commission notes that none of the studies on which ST relies, including its own study, is based on weighted averages. As to points (ii), (iii) and (iv) above, the Commission takes the view that they are related to the fact that international comparisons are inherently difficult and rely on some simplifications. As regards point (v) above, the Commission notes that the study includes not only the highest offers, but also the lowest offers. Given that Slovakia's lowest price offering (USD PPP 15.60) is at the lower end of the sample, it is unlikely that overall these outliers introduce, as ST argues, a "*significant upward bias into the average price result for Slovakia*".

10.4.2.1.3 The Berkman report 2009 - based on OECD data from 2008 and GlobalComms data from 2009

(1152) ST also refers to the Berkman report 2009 prepared for the US Federal Communications Commission¹⁶³⁵. This report combines the OECD Communications Outlook 2009 data with another alternative data source (GlobalComms database) and calculates average prices on the basis of a slightly amended methodology.

(1153) As regards Slovakia, the report finds lower average price in comparison with the 2009 OECD study, for medium-speed connections (advertised speed 2 500-10 000 Kbit/s), close to the average of the sample. However, the Slovak Republic still remains the second most expensive in the high-speed connections category (advertised speed 12 000-32 000 Kbit/s), close to the findings of the 2009 OECD study, which showed that Slovakia was the most expensive country in this speed category¹⁶³⁶.

(1154) The deviations that the Berkman report finds in certain instances vis-à-vis the 2009 OECD study reflect, in the authors of the Berkman report's view, "*the difficulty of*

¹⁶³⁵ See the document "*Next Generation Connectivity*" of October 2009, Doc ID3371, as referred to in ST's document "*Additional information regarding the retail broadband prices in Slovakia in the context of international price comparisons following the Commission's request at the meeting of 2 October 2009*" of 06/11/2009, Doc ID1635, p.12-14; see also ST's Reply to the SO, paragraphs 1665-1667.

¹⁶³⁶ See page 133 of the 2009 Berkman study "*Next Generation Connectivity*" of October 2009.

*getting good price estimates". It is also explained that "we cannot say that our dataset is methodologically more robust than the price data of the OECD"*¹⁶³⁷.

- (1155) Moreover, the Berkman report ordered the countries by their relative performance on prices at the different speed categories, each weighted equally such that it does not place any particular emphasis on one or another speed categories, or on the quality of the OECD vs. Berkman pricing study. Overall, the report ranks the Slovak Republic as the 19th most expensive country out of the 30 countries in the sample¹⁶³⁸. Also, the Slovak Republic is ranked the 13th most expensive out of the 19 Member States included in the sample.
- (1156) In conclusion, as regards the quantitative indications of likely effects on prices in 2007 and 2008, the Commission considers that although the position of Slovakia in 2008 is, according to the Berkman report less extreme than in the 2009 OECD report and in the 2008 Van Dijk report, the findings of these studies are indicative of high prices in Slovakia in 2007 and 2008.

10.4.2.2. Price comparisons for 2009

10.4.2.2.1 Europe's Digital Competitiveness Report, main achievements of the i2010 strategy 2005-2009 - based on data from 2009

- (1157) Europe's Digital Competitiveness Report¹⁶³⁹, main achievements of the i2010 strategy 2005-2009, "*Figure 6: Average monthly price of a 2-4 Mb/s broadband standalone access, April 2009*", indicates that prices in Slovakia were the third highest in the EU.

10.4.2.2.2 The Communications Committee's Working Document "Broadband access in the EU: situation at 1 July 2010" – based on data from 2009

- (1158) The Communications Committee's Working Document "*Broadband access in the EU: situation at 1 July 2010*"¹⁶⁴⁰, dated 21 November 2010, Annex 1 (Retail prices as of October 2009) shows that in terms of total cost/month for median offers, prices in Slovakia are high (EUR 65.21), whereas the EU 27 average is EUR 26.65.

10.4.2.2.3 The 2009 Van Dijk report – based on data from 2009

- (1159) The Commission notes that the Van Dijk report of January 2010 (based on prices of October 2009)¹⁶⁴¹ indicates that prices in Slovakia decreased significantly for the speed category 1 024-2 048 (incl.) Kbit/s¹⁶⁴² and also for some other baskets (with an exception of the category 2 048-4 096 (incl.) Kbit/s, where Slovakia remains one of the most expensive countries¹⁶⁴³). However, the price of the median offer in Slovakia remained higher than the EU average, with EUR 38.52 versus EUR 30.59 at EU level¹⁶⁴⁴. In addition, the Commission notes that all the cheapest broadband offers for Slovakia in individual broadband baskets were those of UPC – with the single

¹⁶³⁷ *Ibidem*, p. 64.

¹⁶³⁸ *Ibidem*, p. 66.

¹⁶³⁹ Doc ID 4174.

¹⁶⁴⁰ Doc ID 4175.

¹⁶⁴¹ See "*Broadband Internet Access Costs (BIAC) – Second half of 2009*" by Van Dijk Management Consultants for DG INFSO of the Commission of January 2010 ("2009 Van Dijk report"), Doc ID3367.

¹⁶⁴² See 2009 Van Dijk report, p. 67.

¹⁶⁴³ See 2009 Van Dijk report, p. 68.

¹⁶⁴⁴ *Ibidem*, p. 65;

exception of the above mentioned 2 048-4 096 (incl.) Kbit/s basket, while ST's offer (Turbo 3 broadband product) is the second most expensive from all analysed countries.

- (1160) ST considers that this report, which only considers offers from two operators, that is to say UPC and ST, is not fully representative of the range of offers available in Slovakia at that time¹⁶⁴⁵.
- (1161) While the Commission acknowledges the reduced representativeness of the price comparison for Slovakia in comparison with the 2008 Van Dijk Report, which considered offers from four operators in Slovakia, the Commission considers that the report remains credible in terms of representativeness as it refers to offers covering more than half of the broadband services market in Slovakia¹⁶⁴⁶. Moreover, the Commission notes that ST's own broadband price comparison of November 2009 referred to in the recital below suffers from an even more obvious reduced representativeness issue, as it only considers offers from one operator (ST) in Slovakia, whereas in other Member States two operators (the incumbent and an AO) have been included¹⁶⁴⁷. In any event, the report does not demonstrate that, even in 2009, the prices in Slovakia are lower than in the majority of other countries as suggested by ST¹⁶⁴⁸.

10.4.2.2.4 ST's own broadband price comparison of November 2009

- (1162) The price comparison of ST¹⁶⁴⁹ involves a comparison of effective monthly fees for 24 months contract for ST's two products (Turbo 1 and Turbo 2) with product offerings of operators abroad with a speed as much as possible similar to these ST products. The Commission, however, notes that this comparison involves substantial shortcomings.
- (1163) While ST included Turbo 2, the product which has achieved highest sales, it is less clear why the low-cost Turbo 1 product is also added while the more expensive Turbo 3 is not. The number of subscribers in 2008 was largely similar for Turbo 1 and Turbo 3 products¹⁶⁵⁰. In addition, Turbo 3 was a more dynamically growing product than the basic non-flat Turbo 1¹⁶⁵¹. As regards the comparative foreign

¹⁶⁴⁵ ST's reply to the SO, paragraph 1653.

¹⁶⁴⁶ ST's market share in 2009 was [40-50]% and UPC's market share was between 5 and 10% - See section 7.1.2.3 above.

¹⁶⁴⁷ For instance, in Poland, ST's study considers offers from both Telekomunikacja Polska and Netia, in Ireland, offers from both Eircom and UPC Ireland, in Sweden, offers from both TeliaSonera and Telenor Sweden, in Latvia, offers from both Lattelecom and Triatel.

¹⁶⁴⁸ See e.g. Doc ID1635, p.10.

¹⁶⁴⁹ See ST's document "*Additional information regarding the retail broadband prices in Slovakia in the context of international price comparisons following the Commission's request at the meeting of 2 October 2009*" of 06/11/2009, Doc ID 1635, p.8-11.

¹⁶⁵⁰ According to ST data submitted in Attachment Q15 to the Reply to RFI of 17/04/2009, ID536, the total number of Turbo 1 subscribers in March 2009 was [...] while the number of Turbo 3 subscribers was [...].

¹⁶⁵¹ The number of subscribers of Turbo 3 grew between December 2008 and March 2009 by around [...] % while the number of Turbo 1 subscribers by only [...] %, see in this respect data in ST's Attachment Q15 to the Reply to RFI of 17/04/2009, Doc ID 536.

offerings, the analysis fails to take any account of the importance of such products since their selection is based solely on the similarity of speed¹⁶⁵².

- (1164) Further, the selection of comparators (countries and individual offers) is for several reasons not clear. First, only 15 countries are selected as opposed to 27 Member States (and in practice only 13 then included in the comparison since apparently there were no "similar" products in two countries analysed) while the selection criteria are not clear (e.g. why similarly populated countries such as Denmark, Finland or Austria are not included). Second, while stating that "*products offered by the incumbent operator and either one or two of the next largest competitors in the market were considered*", which should in principle contain at least two offerings per country, the final summary table includes only 18 offerings. It seems that other operators are not included because they did not offer any products similar to Turbo 1 and Turbo 2. This seems rather unlikely, in particular in view of the spread of the speeds of products which are included in the table (download between 0.64 and 3.1 Mbit/s).
- (1165) In addition, the analysis provides few explanations of how the effective monthly fees for alternative products were calculated in view of varying pricing structures, promotional offers and other complexities of retail broadband offerings in various countries. Further, the average price includes no installation, activation or modem charges while these may constitute an important element of the average 24 month price.
- (1166) In view of these shortcomings¹⁶⁵³, the Commission does not consider the one-off analysis provided by ST as sufficiently reliable or as more reliable than other comparisons prepared by/for organisations such as the OECD or the European Commission itself, which are indicative of high prices in Slovakia in 2009.

10.4.2.3. Price comparisons for 2010

- (1167) ST refers¹⁶⁵⁴ to the OECD pricing statistics contained in the report "*Broadband Bundling: Trends and Policy Implications*" of September 2010¹⁶⁵⁵ in order to show that the minimum price of broadband services in Slovakia in USD PPP was among the lowest of the OECD countries. However, this comparison relates only to the cheapest available "*entry-level broadband plan*"¹⁶⁵⁶ and thus cannot provide any evidence of the overall price level in Slovakia. Indeed, the OECD Communications, Outlook 2011¹⁶⁵⁷ ("the 2011 OECD report") "*Figure 7.20: Range of broadband prices for a monthly subscription – no line charge, September 2010, USD PPP*", shows that in Slovakia, the range of prices is comprised between EUR 14.50 and EUR 575.81, which is one of the widest range in the EU and also internationally.

¹⁶⁵² Contrary to ST's assumptions the Commission is not obliged to prove that the products in other countries were popular - see ST's Reply to the SO, paragraph 1663.

¹⁶⁵³ The Commission's concerns regarding this study were not removed by ST's further assertions – see ST's Reply to the SO, paragraphs 1663-1664.

¹⁶⁵⁴ See ST's "*Policy Briefing Paper*" of 29 October 2010, Doc ID2544.

¹⁶⁵⁵ See OECD document "*Broadband Bundling: Trends and Policy Implications*", 10 September 2010, DSTI/ICCP/CISP(2010)2/REV1, Doc ID3156.

¹⁶⁵⁶ See OECD document "*Broadband Bundling: Trends and Policy Implications*", p. 16, Doc ID3156.

¹⁶⁵⁷ Doc ID 4193.

- (1168) Moreover, ST refers to its own calculations based on the 2011 OECD report in order to show that the Slovak prices were in 2010 amongst the lowest in the OECD¹⁶⁵⁸ and points to the 2011 Van Dijk report in order to show that in 2011 Slovakia reports the sixth lowest price amongst the least expensive offers in the 1-2 Mbit/s basket, the third lowest price amongst the least expensive offers in the 2-4 Mbit/s basket and 15th lowest price amongst the least expensive offers in the 4-8 Mbit/s basket.¹⁶⁵⁹
- (1169) The 2011 OECD report shows Slovakia's ranking across several countries in terms of average monthly subscription for several speed baskets. The Commission notes that while the report shows that in Slovakia prices in USD PPP were amongst the lowest in the OECD countries for some baskets (namely for the below 2.5 Mbit/s basket and for the 15-30 Mbit/s basket), for other baskets the Slovak prices in USD PPP were below, but close to the middle of the range (namely in the 2.5-15 Mbit/s)¹⁶⁶⁰, were in the middle of the range (namely in the 30-45 Mbit/s basket)¹⁶⁶¹ or were amongst the most expensive of the range (namely in the above 45 Mbit/s basket¹⁶⁶²).¹⁶⁶³ As to the 2011 Van Dijk report, the Commission notes that it examines the price levels of February 2011, that is after the infringement period and therefore is irrelevant for the purposes of the current investigation.

10.4.2.4. Conclusion on price comparisons

- (1170) In conclusion, the international benchmarking studies thus provide indications that Slovak retail broadband prices were at least in the period 2007-2009 higher than in most other Union countries. This is true in particular for the 2008 Van Dijk 2008 report, the OECD Communications Outlook 2009, the Europe's Digital Competitiveness Report, main achievements of the i2010 strategy 2005-2009 and the Communications Committee's Working Document "*Broadband access in the EU: situation at 1 July 2010*"¹⁶⁶⁴ of 21 November 2010. The available pricing evidence, together with the Commission's other findings on the likely impact of ST's behaviour on competition and thereby consumers, suggest that in the absence of ST's conduct, broadband prices could have been lower.
- (1171) The international studies also indicate that prices in Slovakia decreased from 2010 as compared to other countries. It cannot be excluded that several factors such as the gradual development of alternative networks (mainly fibre) caused the decrease in the retail prices. Even though the deployment started on a significant scale in 2007, the effects of such investments by AOs on broadband prices were potentially delayed as the uptake of products based on the newly built alternative networks was only gradual. However, it is likely that this decrease could have been achieved much earlier and to a greater extent absent ST's anticompetitive behaviour.

¹⁶⁵⁸ ST's reply to the LoF, paragraphs 892-893.

¹⁶⁵⁹ See ST's Reply to the SO, paragraphs 1654-1657; ST's Reply to the LoF, paragraph 893.

¹⁶⁶⁰ 13th out of 33 countries considered.

¹⁶⁶¹ 5th out of 9 countries considered.

¹⁶⁶² 25th out of 28 countries considered.

¹⁶⁶³ See figures 7.24-7.28 of the 2011 OECD report, Doc ID 4193.

¹⁶⁶⁴ Doc ID 4175.

10.4.3. *The overall development of fixed broadband services in Slovakia*

- (1172) ST claims that Slovakia has performed, as regards broadband penetration levels, "above expectations in recent years, with performance close to expectation in earlier years".¹⁶⁶⁵
- (1173) The available data indicate that Slovakia has been throughout the analysed period at the very bottom of the Union countries as regards the penetration rate of fixed broadband lines (see Table 46).

Table 46: Fixed broadband penetration rate in Slovakia and in the EU¹⁶⁶⁶

Fixed BB penetration rate	2004	2005	2006	2007	2008	2009	2010
Slovakia (%)	0.4%	1.8%	4.3%	8.8%	10.9%	14.8%	16.5%
EU25/27 average (%)	6.5%	11.5%	15.7%	20.0%	22.9%	24.8%	26.6%
Difference SK-Union (perc. points)	6.1	9.6	11.4	11.2	12.0	10.0	10.1
Rank among the Union member states	24 th out of 25	23 rd out of 25	24 th out of 25	25 th out of 27	27 th out of 27	24 th out of 27	24 th out of 27

- (1174) The difference in percentage points between the penetration rate in Slovakia and the EU25/EU27 average grew significantly over the analysed period as well, with an improvement only in 2009-2010. Despite broadband growth in Slovakia, in particular as from 2009 onwards, the broadband penetration rate in Slovakia remained amongst the lowest in Europe during the investigation period, that is to say during the years 2005-2010.
- (1175) The Progress Report on the Single European Electronic Communications Market 2007 (13th Report) – Commission Staff Working Document, Part 1¹⁶⁶⁷, chapter dedicated to Slovakia, states that: "The total fixed broadband penetration has increased by 3.65 percentage points, but its current rate of 8.84% is still one of the lowest in the EU". The Progress Report on the Single European Electronic Communications Market 2008 (14th Report) – Commission Staff Working

¹⁶⁶⁵ ST's reply to the SO, paragraph 1641.

¹⁶⁶⁶ Sources: Progress Report on the Single European Electronic Communications Market 2009 (15th Report), Doc ID 4246; Progress Report on the Single Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 1, Doc ID 4247; Progress Report on the Single Electronic Communications Market 2008 (14th Report) – Commission Staff Working Document, Part 1, Doc ID 4245; Progress Report on the Single European Electronic Communications Market 2007 (13th Report), Doc ID 4242; Progress Report on the Single Electronic Communications Market 2008 (13th Report) – Commission Staff Working Document, Part 1, Doc ID 4243; Table "Evolution of the penetration in Slovakia" and table "Take-up of fixed networks (subscriptions/100 people) in Slovakia", Doc ID 4227, 4228, 4229, 4230; Communications Committee, Working Document "Broadband access in the EU: situation at 1 July 2010, dated 21 November 2010, Doc ID 4175; Broadband Coverage in Europe, Final Report, 2011 Survey, Data as of 31 December 2010, Doc ID 4179; Europe's Digital Competitiveness Report, main achievements of the i2010 strategy 2005-2009, Doc ID 4174; Europe's Digital Competitiveness Report 2010, Doc ID 4173; Phoenix studies, Doc ID 4177, Doc ID 4180; ECTA Press releases and Broadband Scorecards (between 2005 and 2009), Doc ID 4147, 4153, 4156, 4171.

¹⁶⁶⁷ Doc ID 4243, p. 286.

Document, Part 1¹⁶⁶⁸, chapter dedicated to Slovakia considers that "*The fixed broadband market growth has slowed down and the fixed broadband penetration rate is the lowest in the EU. (...)The fixed broadband penetration rate has increased by 2.1 percentage points, but at the rate of 10.9% as of January 2009 it is the lowest in the EU, well below the EU average of 22.9%*". Although the fixed broadband market experienced a notable growth in 2009, as the fixed broadband penetration rate increased by 3.9 percentage points from 10.9% in January 2009 to 14.8% in January 2010, the Progress Report on the Single European Electronic Communications Market 2009 (15th Report) – Commission Staff Working Document, Part 1¹⁶⁶⁹, chapter dedicated to Slovakia, concludes that "*Despite such progress, however, in the context of the European ranking, Slovakia remains well below the EU fixed broadband penetration average of 24.8% and well behind the top performers*".

- (1176) ST argues that it is misleading to measure the broadband penetration rate in a given country only on the basis of the population which has a broadband connection in each Member State, as the Progress Reports on the Single European Electronic Communications Market do. In ST's opinion there are numerous important external drivers of broadband penetration rates unrelated to competition which need to be taken into account when measuring broadband penetration in a given country. ST submitted an empirical study that [...] prepared for ST on fixed broadband penetration rates¹⁶⁷⁰ which is based on the assumption that the level of demand for broadband services is determined by external drivers such as the average income (GDP) per capita, education levels, age, population density and proportion of the population that live in urban areas.
- (1177) The key conclusion of [...]’s study is that once the impact of external drivers is taken into account, Slovakia’s broadband penetration rates have been above expected levels since 2008, with performance below, but close to expectations before 2008¹⁶⁷¹. The level of broadband penetration in Slovakia compared to that expected based on its external drivers show that broadband penetration in 2005-2008 was slightly below average (Slovakia ranked 16th and respectively 14th amongst the 25 Member States analysed). In accordance with [...]’s study, Slovakia performed the 8th and 5th best in the Union in 2009 and 2010 respectively¹⁶⁷².
- (1178) The Commission considers that it is reasonable from a methodology point of view to also take into account such external economic and demographic drivers for the purpose of comparing fixed broadband penetration rates across countries. However, as also recognised by [...]’s study, "*there are also other factors that have been found to influence broadband penetration deployment, such as the price and speed of broadband products, the level of competition or the quality of regulation*"¹⁶⁷³.

¹⁶⁶⁸ Doc ID 4245, p. 307.

¹⁶⁶⁹ Doc ID 4247, p. 355.

¹⁶⁷⁰ Annex XVII.1 of ST's reply to the SO - "*The impact of external drivers on broadband penetration rates*" – September 2012.

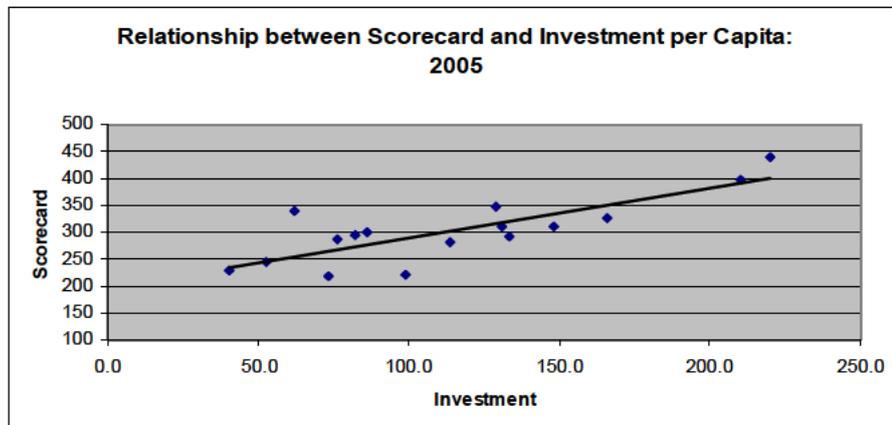
¹⁶⁷¹ Annex XVII.1 of ST's reply to the SO - "*The impact of external drivers on broadband penetration rates*" – September 2012, p.8.

¹⁶⁷² Annex XVII.1 of ST's reply to the SO - "*The impact of external drivers on broadband penetration rates*" – September 2012, p.50 and ST's Reply to the SO, paragraphs 1680-1686.

¹⁶⁷³ Annex XVII.1 of ST's reply to the SO - "*The impact of external drivers on broadband penetration rates*" – September 2012, p. 14.

- (1179) Indeed, there is a positive correlation between the level of competition in the market, as measured by the ECTA Regulatory Scorecard index and the investment per capita level in the telecommunications industry (see Table 47). It can be concluded that an increased competition stimulates the investments in infrastructure which are necessary to improve broadband penetration.

Table 47: Relationship between market competitiveness and telecommunications investment



Source: ECTA Regulatory Scorecard 2007, page 6¹⁶⁷⁴.

- (1180) That means that the external drivers that [...]’s study took into account are not the only ones that studies measuring the level of broadband penetration in a given country could take into account. For instance, Europe’s Digital Competitiveness Report, main achievements of the i2010 strategy 2005-2009¹⁶⁷⁵ established a Broadband Performance Index (BPI), used to measure the relative performance of countries in the wide broadband economy. The BPI is structured along six parameters: broadband rural coverage, degree of competition, broadband speeds, broadband prices, take up of advanced services¹⁶⁷⁶ and socio-economic context).
- (1181) When these drivers are taken into account, Slovakia’s ranking across countries as regards penetration rates is lower than Slovakia’s ranking in [...]’s study. Indeed, the BPI developed within the Europe’s Digital Competitiveness Report, main achievements of the i2010 strategy 2005-2009¹⁶⁷⁷, shows that Slovakia was ranked on the 21st lowest position out of 29 countries, below the Union average, whereas according to [...]’s study, Slovakia was ranked in 2008 on the 14th lowest position and in 2009 on the 9th out of 25 countries. As regards Slovakia’s ranking regarding each of the six drivers taken into account by the BPI, Slovakia occupied the 21st lowest position in terms of broadband competition and coverage, the 26th lowest position in terms of broadband prices, the 26th lowest position in terms of broadband rural coverage, the 7th lowest position in terms of speeds and the 11th lowest position

¹⁶⁷⁴ Available at <http://www.ectaportal.com/en/REPORTS/Regulatory-Scorecards/Regulatory-Scorecard-2007/>, Doc ID4842.

¹⁶⁷⁵ Doc ID 4174.

¹⁶⁷⁶ Such as online films, games and music by individuals, software downloading by individuals, purchasing on-line by individuals, e-banking by individuals, e-invoicing by enterprises, eGovernment by individuals and eGovernment by enterprises.

¹⁶⁷⁷ Doc ID 4174, "Figure 7: Broadband Performance Index, July 2009", p. 27.

in terms of socio-economic¹⁶⁷⁸ context out of the 29 countries compared¹⁶⁷⁹. The Europe's Digital Competitiveness Report, main achievements of the i2010 strategy 2005-2009, chapter dedicated to Slovakia¹⁶⁸⁰, concludes therefore that "*the information society in Slovakia is still lagging behind in comparison to general developments in the EU*". Despite certain strategic advantages for future developments, such as a high level of adoption of internet by the population, "*the slow development of broadband, however, remains a constraint*".

- (1182) Moreover, even when external drivers similar to the ones used in [...]’s study are being analysed by other studies, results are not the same as the ones put forward by ST. For instance, the Phoenix studies¹⁶⁸¹, which have been undertaken by an independent research organization, *in tempore non suspecto*, show that in 2006 and in 2007 Slovakia’s broadband subscription rate falls much below what would be reasonably expected given Slovakia’s demographic and economic endowments¹⁶⁸². In contrast, [...]’s study shows that "*Slovakia’s broadband penetration rate was close to the expected levels*" in these years¹⁶⁸³. Moreover, the two Phoenix studies show that Slovakia had been a relatively poor performer in comparison with other countries. Indeed, Slovakia ranked in 2006 on the 26th lowest position¹⁶⁸⁴ in terms of degree of performance out of 30 countries¹⁶⁸⁵ and in 2007 on the 25th lowest position¹⁶⁸⁶ out of the same 30 countries¹⁶⁸⁷. In contrast, [...]’s study concludes that, for these years, Slovakia’s performance was not so far from the median, with a ranking on the 16th and, respectively, 15th lowest position.
- (1183) It follows from all the foregoing considerations that ST’s claims about the absence of consumer harm are not only irrelevant but also unfounded.

11. DURATION

- (1184) The infringement committed by the undertaking ST/DT, that is to say abuse of a dominant position, commenced on 12 August 2005¹⁶⁸⁸, when ST published its reference unbundling offer setting out unfair terms and conditions for access. In view of the growing importance of alternative infrastructures the focus of the Commission’s investigation extended until 31 December 2010. On the basis of the available evidence, referred to in sections 7 and 8 above, the Commission concludes that the infringement continued at least until 31 December 2010.

¹⁶⁷⁸ This factor takes into account the percentage of population using a mobile phone *via* 3G to access the internet, the household PC penetration and the percentage of population with some internet skills.

¹⁶⁷⁹ Doc ID 4174, "*Annex: Composition of the BPI and detailed results by dimensions*", p.28.

¹⁶⁸⁰ Doc ID 4174.

¹⁶⁸¹ "*The broadband performance index: A policy-relevant method of comparing broadband adoption among countries*", July 2007 - Doc ID 4180 and "*The broadband efficient index: What really drives broadband adoption across the OECD?*", May 2004 - Doc ID 4177.

¹⁶⁸² Doc ID 4180, Figure 1 "*Broadband Performance Index*", p.28.

¹⁶⁸³ Annex XVII.1 of ST’s reply to the SO - "*The impact of external drivers on broadband penetration rates*" – September 2012, p.13.

¹⁶⁸⁴ Doc ID 4180, Figure 1 "*Broadband Performance Index*", p.28.

¹⁶⁸⁵ 19 out of the 30 countries referred to are Union countries. Slovakia was ranked on the 4th lowest position out of 19 if only the Union countries are considered.

¹⁶⁸⁶ Doc ID 4177, Table 4 "*Actual and [...] Subscription Rates and Ranks*", p.25.

¹⁶⁸⁷ 12 out of the 30 countries referred to are Union countries. Slovakia was ranked on the 4th lowest position out of 20 if only the Union countries are considered.

¹⁶⁸⁸ See above Recital (46).

(1185) Therefore, the overall duration of the infringement committed by the undertaking ST/DT to be taken into account for the calculation of the fine to be imposed amounts to 5 years and 4 months.

12. ADDRESSEES

(1186) Article 102 of the Treaty is addressed to undertakings. According to settled case-law, the concept of an undertaking refers to any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed¹⁶⁸⁹. The Court has also repeatedly stated that, in the same context, the term "undertaking" must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal¹⁶⁹⁰.

(1187) When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement¹⁶⁹¹. However, as the Court has also indicated, the infringement of competition law must be imputed unequivocally to a legal person on whom fines may be imposed and the statement of objections must be addressed to that person. It is also necessary that the statement of objections indicates in which capacity a legal person is called on to answer the allegations¹⁶⁹².

(1188) The Commission finds that the undertaking which committed the infringement and is liable for it, is composed of ST and DT. ST and DT are part of the single undertaking ST/DT. Therefore ST and DT are the addressees of this Decision.

12.1. Liability of ST for the infringement

(1189) It follows from the above that Slovak Telekom a.s. is liable for the infringement in the present case because it directly engaged in the conduct that resulted in the infringement (see sections 7 and 8).

12.2. Liability of DT for the infringement

12.2.1. Introduction

(1190) DT is as parent company of ST part of the same undertaking as ST and therefore it shares the personal liability of the undertaking which committed the infringement.

12.2.2. Legal framework for parental liability

(1191) According to the settled case law of the Court of Justice¹⁶⁹³ the conduct of a subsidiary may be imputed to the parent company when the parent company and the subsidiary form a 'single economic entity', that is to say a single 'undertaking' within the meaning of Articles 101 and 102 of the Treaty. As the Court of Justice ruled in the Case C-97/08 P, *Akzo Nobel NV*: "Community competition law is based on the

¹⁶⁸⁹ See Case C-90/09 P *General Química and Others v Commission* [2011] ECR I-1, paragraph 34 and the case-law cited.

¹⁶⁹⁰ See Case C-90/09 P *General Química and Others v Commission*, [2011] ECR I-1, paragraph 35 and the case-law cited.

¹⁶⁹¹ See Case C-90/09 P *General Química and Others v Commission*, [2011] ECR I-1, paragraph 36 and the case-law cited.

¹⁶⁹² Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraph 57.

¹⁶⁹³ For instance Case 52/69 *Geigy v Commission* [1972] ECR 787, paragraph 44; Case 6/72 *Europemballage and Continental Can v Commission* [1973] ECR 215, paragraph 15; and Case C 286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraph 26.

principle of the personal responsibility of the economic entity which has committed the infringement. If the parent company is part of that economic unit, [...], the parent company is regarded as jointly and severally liable with the other legal persons making up that unit for infringements of competition law. Even if the parent company does not participate directly in the infringement, it exercises, in such a case, a decisive influence over the subsidiaries which have participated in it."¹⁶⁹⁴

- (1192) Pursuant to this case law, to make the finding that DT is part of the same undertaking as ST, the Commission must show that: (i) the parent company had the ability to exercise decisive influence over its subsidiary and (ii) it exercised that influence¹⁶⁹⁵. *"In such a situation, since the parent company and its subsidiary are part of the same economic unit and therefore form a single undertaking for the purposes of Art. 101 and 102 of the Treaty, the Commission may address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement.*"¹⁶⁹⁶
- (1193) In the assessment of the first condition, that is to say whether the parent company was at the time of the infringement in a position to exercise a decisive influence on the subsidiary's conduct, the Commission takes into account factors such as ownership or the right to use all or part of the assets of an undertaking and rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking. Decisive influence is constituted by rights, contracts or any other means taken either separately or in combination and having regard to the considerations of facts or law involved.
- (1194) As regards the second condition, that is to say the exercise of the decisive influence, the Court of Justice has held that *"account must be taken of all the relevant factors relating to the economic, organisational and legal links which tie the subsidiary to the parent company, which may vary from case to case and cannot therefore be set out in an exhaustive list"*.¹⁶⁹⁷
- (1195) DT states its opinion that in order to establish parental liability in the present case the Commission needs to put forward evidence of DT's decisive influence over ST for the entire infringement period¹⁶⁹⁸. DT argues that the Commission must carry out a three-step assessment; it must establish (i) the possibility of exercising decisive influence, (ii) the actual exercising of decisive influence and (iii) the significance of the influence¹⁶⁹⁹. DT refers to the Judgment of the Court of Justice in the *Akzo Case*, citing paragraph 58: *"It is clear from settled case-law that 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 decide independently upon its*

¹⁶⁹⁴ Case C-97/08 P *Akzo Nobel NV and others v Commission* [2007] ECR II-5049, paragraph 77.

¹⁶⁹⁵ For instance Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 50; Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraph 28-29 and Case C-179/12P *The Dow Chemical Company v Commission*, EU:C:2013:605, paragraph 55.

¹⁶⁹⁶ See C-90/09 P *General Química and Others v Commission*, [2011] ECR I-1, paragraph 38 and the case-law cited.

¹⁶⁹⁷ Case C-97/08 P, *Akzo Nobel NV and others (Choline Chloride) v Commission*, [2009] ECR I-8237, paragraph 74.

¹⁶⁹⁸ See paragraph 22 of DT's reply to the SO, Doc ID4395, non confidential version Doc ID4417-42.

¹⁶⁹⁹ See paragraph 23 of DT's reply to the SO, Doc ID4395, non confidential version Doc ID4417-42.

*own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company [...]"*¹⁷⁰⁰. [Emphasis added by the Commission.]

- (1196) It is however apparent from the expression "*in particular*" used by the Court of Justice, which it also used in other cases¹⁷⁰¹, that the Commission does not necessarily have to prove the exercise of decisive influence by showing that ST carried out in all material respects the instructions given to it by DT. According to the case law, "*(...) the economic and legal organisational links between the parent company and its subsidiary may establish that the parent exercises influence over the subsidiary's strategy and therefore that they can be viewed as a single economic entity*"¹⁷⁰². It is true that a parent company was considered part of the infringing undertaking when it gave direct instructions to a subsidiary to the effect of carrying out a conduct contrary to the competition rules of the Treaty¹⁷⁰³. However, for the purposes of determining the undertaking to be held liable for an infringement of Article 101 or 102 of the Treaty, decisive influence by the parent company over the subsidiary may occur in other instances besides the one where there are direct instructions of anticompetitive behaviour. This is for example the case where the parent company decisively influences the *lato sensu* commercial policy of the subsidiary¹⁷⁰⁴. Therefore, to impute the conduct of a subsidiary to the parent company it is not necessarily required to prove instructions from the parent company to the subsidiary to engage in anticompetitive conduct; nor is it necessary to establish the actual knowledge of the parent company that an anticompetitive conduct has occurred¹⁷⁰⁵.
- (1197) In this regard the General Court has held that "*the decisive influence of the parent company does not necessarily have to result from specific instructions, guidelines or rights of co-determination in terms of pricing, production and sales activities or similar aspects essential to market conduct. Such instructions are merely a particularly clear indication of the existence of the parent company's decisive influence over its subsidiary's commercial policy. However, autonomy of the subsidiary cannot necessarily be inferred from their absence. A parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy.*"¹⁷⁰⁶

¹⁷⁰⁰ See Case C-97/08 P, *Akzo v. Commission*, paragraph 58.

¹⁷⁰¹ For instance Case C-179/12P *The Dow Chemical Company v Commission*, EU:C:2013:605, paragraph 52 and earlier in Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 49.

¹⁷⁰² Case T-112/05 *Akzo Nobel NV and others v Commission* (vitamins case) [2007] ECR II-5049, paragraphs 83 and Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947, paragraph 58.

¹⁷⁰³ This was precisely the scenario in the case where the Court of Justice used the expression "*in particular where the 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.*" (Case 52/69, *Geigy v Commission* 1972 [ECR] 787, paragraph 44.) This dictum must therefore be read against its factual context.

¹⁷⁰⁴ See, for ex., Case *Arkema*, cit., paragraph 48. The General Court refers to the parent company's influence over the strategy of the subsidiary in case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 80.

¹⁷⁰⁵ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 81.

¹⁷⁰⁶ Case T-77/08 *Dow Chemical v Commission*, EU:T:2012:47, paragraph 77; Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraphs 81 and 99.

- (1198) It should be noted that, as the General Court held, the parent company's decisive influence over its subsidiary for the purposes of the liability for violations of Articles 101 and 102 of the Treaty does not necessarily require influence over the commercial policy *stricto sensu* such as distribution or pricing or the decisive intervention by the parent in the subsidiary's day-to-day management and commercial policy; a certain amount of autonomy by the subsidiary from its parent company does not exclude their constituting an single economic unit under Union competition law¹⁷⁰⁷. For those purposes, management/controlling mechanisms or supervisory power by the parent company over the subsidiary's main strategic decision may be sufficient¹⁷⁰⁸.
- (1199) It is established case law that the existence of an economic unit may 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 a unit¹⁷⁰⁹. It can be established for example where the parent company plays a "*stimulating and coordinating role*"¹⁷¹⁰ vis-à-vis its subsidiaries. The Union Courts have further considered other factors as relevant for the purposes of establishing parental liability for violations of Articles 101 and 102 of the Treaty amongst others: the fact that there are personnel overlaps¹⁷¹¹; the fact that there is upstream reporting between the subsidiary and the parent company and that the parent company kept itself regularly informed of the practices of its subsidiaries in particular markets¹⁷¹²; whether the parent company was able to influence pricing policy¹⁷¹³, production and distribution activities¹⁷¹⁴, or sales objectives, gross margins, sales costs, cash flow, stocks and marketing¹⁷¹⁵; the way in which the parent company and the subsidiary present themselves towards the outside world¹⁷¹⁶. These elements, which can of course be present in the same case, are not necessarily cumulative.
- (1200) In order to establish DT's ability to exercise decisive influence over ST, the Commission will present below evidence showing DT's ownership of ST as well as the relevant rights and contracts (see section 12.2.4.2 below). The Commission will then show that, on the basis of this ownership, rights and contracts, DT exercised decisive influence over ST notably through some legal links and many organisational links tying ST to DT which consist in particular of (i) personnel overlaps between the two companies and the lease of personnel from DT to ST, (ii) evidence of DT's influence over the decision-making process at ST's BoD as well as (iii) the setting up

¹⁷⁰⁷ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraphs 53 and 80.

¹⁷⁰⁸ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 78.

¹⁷⁰⁹ Case C-407/08 P *Knauf Gips v Commission*, paragraph 65 and Case T-399/09 *HSE v Commission*, EU:T:2013:647, paragraph 30.

¹⁷¹⁰ Case T-11/89 *Shell v. Commission* [1992] ECR II-757, paragraph 312.

¹⁷¹¹ Case T-109/02 *Bolloré SA and others v Commission* [2007] ECR II-947, paragraphs 135-140; of 30 September 2009, Case T-175/05 *Akzo Nobel NV and others v Commission* (monochloroacetic acid case) [2009] ECR II-184, paragraph 106; Case T- 85/06 *General Química v. Commission* [2008] ECR II-338, paragraph 73, and Case T-24/05, *Alliance One International and others v. Commission*, [2010] ECR II-05329, paragraphs 173-180.

¹⁷¹² Case T-65/89 *BPB Industries v Commission* [1993] ECR II-389, paragraph 152; Case T-66/99 *Minoan Lines v Commission* [2003] ECR II-5515, paragraph 145.

¹⁷¹³ Case 48/69 *ICI v Commission* [1972] ECR 619, paragraph 137, and Case 52/69 *Geigy v Commission* [1972] ECR 787, paragraph 45.

¹⁷¹⁴ Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, paragraphs 37 and 39 - 41.

¹⁷¹⁵ Case T-102/92 *Vihov v Commission* [1995] ECR II-17, paragraph 48.

¹⁷¹⁶ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraphs 34-39.

by DT of regular group and bilateral meetings covering a wide range of topics in which upstream reporting, and occasionally explicit instructions, from ST to DT occurred.

12.2.3. DT's ability to exercise decisive influence over ST at the time of the infringement

(1201) ST's corporate structure set out above in section 2.1.2 lays the basis – as will be shown below - for the ability of DT as majority shareholder to exercise decisive influence over ST.

12.2.3.1. Description of ST's corporate structure

(1202) The ownership of ST is at present and since the acquisition by DT in 2000 as follows: 51% of its shares are owned by Deutsche Telekom AG and the rest by the Slovak Republic (thereof 34% directly by the Slovak Ministry of Economy¹⁷¹⁷ and 15% *via* the National Property Fund¹⁷¹⁸). ST is a member of the Deutsche Telekom group.¹⁷¹⁹

(1203) The Shareholders' Agreement as amended in 2003 by the "*Agreement on further Co-operation of the Shareholders of Slovenské Telekomunikácie a.s.*" described above in section 2.1.2 sets in particular the basic principles of corporate governance, the long and medium term objectives of ST as well as the rights of shareholders in case of sale of ST's shares. It will be shown below that the composition and structure of ST's corporate bodies, that is to say the Board of Directors ('BoD'), the Supervisory Board ('SuB'), the General Assembly of Shareholders ('GAS') and the Executive Management Board ('EMB') - a non-statutory management body (see recitals (5) to (10) above), allow DT to exercise decisive influence over ST.

12.2.3.2. The Board of Directors

(1204) As set out above in recital (6) the BoD is the statutory body of the company in charge of its management and of most commercial/operational decisions; it acts on behalf of the company vis-à-vis third parties. Of its seven members, elected for [...] years by the GAS, DT is entitled to nominate four BoD members, including the Chairman, and the Slovak Republic is entitled to nominate three BoD members, including the Deputy Chairman.

(1205) Out of the four members nominated by DT, two have no other functions within the DT group – they are the CEO and CFO of ST, which are also members of the

¹⁷¹⁷ These shares were formerly held by the Slovak Ministry of Transport, Post and Telecommunications.
¹⁷¹⁸ ST's reply to the request for information of 17 April 2009, p. 3, 4, Doc ID0444. The Fund of National Property of the Slovak Republic was established on 28 June 1991 on the basis of Act No. 253/1991 (Digest) of the National Council of the Slovak Republic, concerning the jurisdiction of authorities of the Slovak Republic in matters of transfer of state property to other persons and on the Fund of National Property. The Fund is under direct control of the National Council of the Slovak Republic (that is to say the national parliament), to which the Fund submits its budgets, proposals of use of its property, and activity reports. Also, the supreme official bodies of the Fund, that is to say the Presidium and Supervisory Board are elected and recalled by the National Council of the Slovak Republic. See 2006 Report by the Jefferson Institute "The National Property Fund and Privatization in Slovakia" <http://www.jeffersoninst.org/sites/default/files/Slovakiaprivatization.pdf>, pages 4 and 30, accessed on 29 September 2014, Doc ID4809.

¹⁷¹⁹ See the company's description on the website of ST at <https://www.telekom.sk/english/>, accessed on 6 October 2014, Doc ID 4807.

Executive Management Board¹⁷²⁰. The other two ST BoD members nominated by DT have in addition management functions within the DT group¹⁷²¹.

(1206) At least until 31 December 2010, which is the relevant period for the present decision (see section 13), the members of the BoD nominated by DT were¹⁷²²:

- Mr Miroslav Majoroš, the CEO of ST since 2003, who has served as Chairman of ST's BoD since his election on 6 June 2005, is employed by ST;
- Mr Szabolocs Gabojani Szabo (April 2005¹⁷²³ until end of March 2011); he was originally employed by DT and transferred to ST under the Agreement on International Lease of Personnel between DT and ST¹⁷²⁴;
- Dr. Ralph Rentschler (BOD member since before May 2004), Head of DT Finance Europe; within the DT group, Mr. Y heads the Finance function within DT's 'Europe' division¹⁷²⁵ and is also a member of the Board of Directors of Magyar Telecom (MT), member of the Supervisory Board of Hrvatski Telecom, member of the Supervisory Board of DeTe Fleet Services GmbH and member of the Supervisory board of T-Mobile Netherlands Holding B.V.
- Mr Albert Pott (BOD member since April 2010¹⁷²⁶). Within the DT group he is in charge of 'Sales & Customer Service Europe and Area Management for Slovakia and the Czech Republic'¹⁷²⁷ and is also a member of the Board of Directors of T-Mobile Czech Republic¹⁷²⁸.

(1207) The list of members of ST's BoD which were nominated by DT since 1 May 2004 until at least 31 December 2010 is set out in **Annex II** of this decision¹⁷²⁹.

(1208) The three remaining BoD members, nominated by [...], do not participate in the [...].

(1209) Pursuant to the Statute¹⁷³⁰ the BoD meets ordinarily [...] times a year and there is also the possibility to call for extraordinary meetings which has been occasionally used¹⁷³¹.

¹⁷²⁰ DT's reply to the request for information of 24 June 2010, p. 9, Doc ID2352, Non confidential Doc ID3248. For the role of the Executive Management Board see Recital (1219) and following.

¹⁷²¹ DT's reply to the request for information of 24 June 2010, p. 9, Doc ID2352, Non confidential Doc ID3248.

¹⁷²² DT's reply to the request for information of 24 June 2010, p. 9, Doc ID2352, Non confidential Doc ID3248 and ST's 2010 Annual Report, p. 22-27, DocID3071.

¹⁷²³ Prior to April 2005 [XX] [...] held this function and had as well been nominated by DT.

¹⁷²⁴ Prior to his position in ST [X] [...] was Head of Controlling at [...], DT group company. Details on the exchanges of personnel between ST and DT based on the Agreement on International Lease of Personnel between DT and ST are discussed below in section 12.2.6.1.2 in its subsection "The lease of staff by DT to ST".

¹⁷²⁵ DT's reply to the request for information of 24 June 2010, p. 9, Doc ID2352, non-confidential version Doc ID3248.

¹⁷²⁶ [P] was his predecessor September 2008 – April 2010. [I] was [P]'s predecessor before May 2004 - September 2008 (he acted as Chairman until June 2005). Both had as well been nominated by DT.

¹⁷²⁷ DT's reply to the request for information of 24 June 2010, p. 9, Doc ID2352, non-confidential version Doc ID3248.

¹⁷²⁸ 2010 Annual Report of T-Mobile Czech Republic, Doc ID3171.

¹⁷²⁹ The table is based on DT's reply to the request for information of 24 June 2010, Attachment Q3_Annex 2, Doc ID2350 (CD list), Non confidential Doc ID3251, and on the information in the Slovak Commercial Register.

- (1210) For the BoD to take a decision (quorum) at least [...] members of the BoD have to be present¹⁷³². Each BoD member holds [...] vote. The Chairman holds [...] ¹⁷³³. According to ST's Statute, decisions in the BoD are taken by a [...] majority of the present members¹⁷³⁴, except for the items set out below.
- (1211) Section [...of a corporate legal document] clarifies that the Corporate Plan, the Operating Plan and the Budget are approved [...] ¹⁷³⁵. Finally, according to ST's Statute¹⁷³⁶ the relations inside the company are laid out in a set of organisational documents which are issued by the BoD.
- (1212) The following BoD decisions require a qualified voting procedure to be adopted¹⁷³⁷ – [...]. Hence, under the current distribution of shares, at least two BoD members nominated by DT and at least two members nominated by the Slovak State have to agree in order for any of the following decisions to be adopted:
- [List of items coming under the qualified voting procedure];
 - [...];
 - [...];
 - [...];
 - [...];
 - [...]; and
 - [...].
- (1213) Section 3.3 (a) (viii) of the Shareholders Agreement provides, in addition to the items contained in Article 8 of ST's Statute (as outlined above) that the qualified voting procedure shall also apply to any BoD consent [...] ¹⁷³⁸.
- (1214) Apart from the items listed above, the following items fall among others within the competence of the BoD (Article 8(2) of ST's Statute) and require a simple majority vote to get adopted: (i) – (viii) [List of items requiring simple majority]¹⁷³⁹.

¹⁷³⁰ See Article 8(8) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷³¹ Pursuant to the minutes of the BoD meetings there have been [...] extraordinary meetings in the years [...], see DT's Reply to the request for information of 10 December 2009, Q4 Annex 1, Doc ID2772 (CD list)

¹⁷³² [...]. See Article 8(8) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷³³ Article 8(10) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷³⁴ Article 10 of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174, and Section [...] of [corporate legal document] Attachment Q9_Annex 1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

¹⁷³⁵ The Shareholders' Agreement of 18 July 2000, Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

¹⁷³⁶ Article 17 of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷³⁷ Article 8(11) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷³⁸ The Shareholders' Agreement of 18 July 2000, Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

12.2.3.3. The Supervisory Board

(1215) The SuB, as described above in recitals (7) and (8), has nine members, out of which DT nominates three including the Chairman. The Slovak State nominates three members, including the Deputy Chairman, and three members are elected by the employees. Decisions in the SuB are adopted by a [...] majority, whilst a dissenting opinion of the minority is notified [...].

12.2.3.4. The General Assembly of Shareholders

(1216) The 'GAS', as set out above in recital (9), appoints and recalls members of the BoD and SuB and takes major decisions provided for in ST's Statute. Decisions are normally taken by a simple majority (based on the nominal value of shares owned by the voting shareholder). For exceptions to this rule see section 12.2.4.1 below.

(1217) There are two types of GAS meetings: ordinary and extraordinary. [Rules on who can request an extraordinary GAS meeting]¹⁷⁴⁰.

(1218) The functions and powers which may be exercised by the GAS are set out in Article 7(2) of ST's Statute. In addition to the above items, the list includes the election and recalling of the BoD and SuB members, the approval of the annual report and accounts of the company, decisions on distribution of profits and on dividends, decisions on covering of loss, decisions on the use of the reserve fund, the approval of rules for remuneration of the BoD and SuB members, the consent to listing of shares, etc. [Description of two additional competences conferred upon the GAS]¹⁷⁴¹.

12.2.3.5. The Executive Management Board ('EMB')

(1219) As described above in recital (10) the non-statutory EMB¹⁷⁴² is charged with managing the day-to-day operations at ST. It consists of employees of first management level, appointed by ST's BoD. It acts within the scope of the powers delegated to it by ST's BoD and reports to ST's BoD. According to Article 2.2 of the EMB Rules of Procedure the following powers are delegated by the BoD to the EMB¹⁷⁴³:

- [...];
- [...];
- [...]; and
- [...].

(1220) Since 2003 until the merger of ST and T-Mobile Slovensko (1 July 2010) the EMB had seven members¹⁷⁴⁴: the Chief Executive Officer (CEO), the Chief Financial Officer (CFO), the Chief Operating Officer (COO), the Chief Human Resources

¹⁷³⁹ Article 8(2) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174. The list is not exhaustive.

¹⁷⁴⁰ For details see Articles 7(6) and (7) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷⁴¹ ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷⁴² [Details of various company documents]

¹⁷⁴³ The EMB Rules of Procedure (effective as of 1 July 2010), doc ID3292.

¹⁷⁴⁴ DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 6, Doc ID2667, Non confidential Doc ID3289.

Officer (CHRO), the Chief Information Officer (CIO), the Chief Regulatory Affairs and Strategy Officer (COSRA) and the Chief Executive Officer of T-Mobile Slovensko¹⁷⁴⁵. Following the merger of ST and T-Mobile Slovensko, ST's EMB consists of 5 ST Officers: the CEO, the CFO, the Chief Operating Officer Network and Information Technology, the Chief Operating Officer Marketing, Sales and Customer Service and the Chief Human Resources Officer (CHRO)¹⁷⁴⁶.

- (1221) From the 2003 amendment to the Shareholders' Agreement¹⁷⁴⁷ until 1 July 2010, the Slovak Republic¹⁷⁴⁸ was entitled to nominate 3 out of 7 candidates for ST's EMB. These included: the Chief Information Officer (CIO), the Chief Human Resources Officer (CHRO) and the Chief Officer for Strategy and Regulatory Affairs (COSRA). With respect to the other members it was not expressly specified which party could propose those candidates to the BoD, who then elects the EMB members on its own discretion by a simple majority vote. The EMB Rules of Procedure¹⁷⁴⁹ provide that two of the BoD members nominated by DT, that is to say the CEO and the CFO, are members of the EMB. Further two chief officers' posts at the EMB were occupied by leased personnel from DT during part of the infringement period¹⁷⁵⁰. The EMB Rules and Procedures further provide that the number of EMB members shall be determined by the BoD¹⁷⁵¹. According to Article 4.1 of the Rules of Procedure of the EMB, its members are nominated and recalled by the BoD, in which DT nominates the majority of the members.
- (1222) Since the merger of ST and T-Mobile Slovensko in 2010, 2 out of 5 candidates for EMB members are nominated by the Slovak Republic¹⁷⁵². These include: the Chief Officer Marketing, Sales and Customer Care and the Chief Human Resources Officer (CHRO). DT explained that in practice Mr Majoroš, ST's CEO and chairman of the BoD and the EMB, nominates the EMB members with the support of the HR department after consulting with the Slovak Republic and DT on potential candidates.¹⁷⁵³

¹⁷⁴⁵ According to ST's reply to the request for information of 24 June 2010, before the ST/T-Mobile Slovensko merger, the EMB had seven members. Two of these are also members of the BoD (Mr Majoroš President of the EMB and Chief Executive Officer and [X], Senior Executive Vice President and Chief Financial Officer). The other four members of the EMB are the senior managers in charge of ST's operations (Chief Operations Officer - COO), human resources (Chief Human Resources Officer - CHRO), and regulatory strategy (Chief Regulatory Strategy Officer - CSRO) as well as the Chief Executive Officer of T-Mobile Slovensko. Situation as on 24 June 2010, ST's reply to the request for information of 24 June 2010, p.3, Doc ID2344.

¹⁷⁴⁶ DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 6, footnote 10, Doc ID2667, Non confidential Doc ID3289.

¹⁷⁴⁷ [Reference to an agreement between the shareholders], Doc ID3293.

¹⁷⁴⁸ [Explanation of terminology used to identify one of the shareholders of ST]

¹⁷⁴⁹ The EMB Rules of Procedure (effective as of 1 July 2010), Article 4.2, doc ID3292. Beforehand this was already the practice during the infringement period see Annex II of this decision for the CEO and Recital (1276) for the CFO.

¹⁷⁵⁰ See below Recital (1276): Mr. A was COO between 1 August 2003 and 1 January 2006 and Mr. B is COO networks and IT since 1 July 2010.

¹⁷⁵¹ The EMB Rules of Procedure (effective as of 1 July 2010), Article 4.2, doc ID3292.

¹⁷⁵² DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 6, footnote 10, Doc ID2667, Non confidential Doc ID3289.

¹⁷⁵³ DT's reply to the request for information of 13 May 2013, Question 3, p. 11, Doc ID3773, non-confidential version Doc ID4007.

(1223) The EMB is chaired by ST's CEO¹⁷⁵⁴ who was nominated by DT. The EMB has a quorum if at least 3 members are present in person and have together at least 4 votes¹⁷⁵⁵. Each EMB member has one vote; in case of deadlock the chairman holds the casting vote¹⁷⁵⁶. Any EMB member can act as a proxy for other members, but a single member can hold a maximum of two votes¹⁷⁵⁷. The EMB resolutions are adopted by majority of votes of all members (that is to say at least 4 votes in favour, or with the chairman's casting vote in case of deadlock)¹⁷⁵⁸. Voting *per rollam*¹⁷⁵⁹ is also possible if 3/5 of all EMB members participate in it¹⁷⁶⁰. The Rules of Procedure are elaborated by the EMB itself but they need the approval of the BoD¹⁷⁶¹.

12.2.4. The Commission's assessment

12.2.4.1. DT's majority ownership in ST

(1224) DT owns a majority of ST's ordinary shares (51%) that confer voting and other ownership-related rights to DT; the remaining shares are owned by the Slovak State. The ownership of the majority of ST's shares confers on DT the majority of voting rights in ST's GAS. [Description of the voting requirements]¹⁷⁶². Thus DT can prevail in all issues requiring a simple majority voting (see section 12.2.3), including the election of the BoD and SuB members.

(1225) As an exception to the rule of simple majority voting, certain GAS decisions require a qualified majority (75% of all shares or 2/3 of the shareholders present). [List of topics requiring a qualified majority]¹⁷⁶³. This is in line with the Slovak Commercial Code, which for this item requires the consent of a qualified majority of shareholders (2/3 of those present). [Description of voting requirements]¹⁷⁶⁴.

(1226) The following items require the consent of shareholders representing 2/3 of the nominal value of ST's shares owned by the shareholders present in the GAS: [List of topics]¹⁷⁶⁵. These items do not depart from the list of items requiring consent of a qualified majority (present shareholders representing 2/3 of the registered capital) of shareholders under the Commercial Code¹⁷⁶⁶.

(1227) [Description of certain rights of DT as a shareholder]^{1767 1768}.

¹⁷⁵⁴ EMB Rules of Procedure (effective as of 1 July 2010), section 5, Doc ID3292.

¹⁷⁵⁵ EMB Rules of Procedure (effective as of 1 July 2010), section 11.1, Doc ID3292.

¹⁷⁵⁶ EMB Rules of Procedure (effective as of 1 July 2010), section 11.2, Doc ID3292.

¹⁷⁵⁷ EMB Rules of Procedure (effective as of 1 July 2010), sections 11.3 and 11.4, Doc ID3292.

¹⁷⁵⁸ EMB Rules of Procedure (effective as of 1 July 2010), section 11.2, Doc ID3292.

¹⁷⁵⁹ That is to say voting outside a meeting by circulating the resolution among the members.

¹⁷⁶⁰ EMB Rules of Procedure (effective as of 1 July 2010), section 12, Doc ID3292.

¹⁷⁶¹ EMB Rules of Procedure (effective as of 1 July 2010), section 2.2,I Doc ID3292.

¹⁷⁶² Article 7(11) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷⁶³ Article 7(12) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174.

¹⁷⁶⁴ See section 187(2) of the Slovak Commercial Code (see footnote 8).

¹⁷⁶⁵ Article 7(12) of ST's Statute, version dated 17 June 2010, Attachment Q4_10 to ST's reply to the request for information of 24 June 2010, Doc ID3174. This is in line with section 187(2) of the Commercial Code (see footnote 8).

¹⁷⁶⁶ See Section 187(2) of the Slovak Commercial Code (see footnote 8).

¹⁷⁶⁷ According to Section 5.1(b) of the 2000 Shareholders' Agreement, the share transfer restriction expires on the fourth anniversary of the effective date of the actual transfer of ST's shares to DT, that is to say some time in 2004. See the Shareholders' Agreement between DT, ST, the Slovak State (Ministry of

(1228) The above rights do not confer a joint control or a decisive influence to ST's minority shareholders. They concern decisions with an influence on statutory rights or shares, the liquidation of the company or mergers and acquisitions. They concern therefore the protection of the minority shareholders and not the business strategy of the company. They do not go beyond the statutory rights of minority shareholders - as provided *inter alia* under the Slovak Commercial Code - and thus do not limit DT's ability to exercise decisive influence over ST.

12.2.4.2. Rights and contracts conferring the ability to exercise decisive influence

(1229) The relationship between the shareholders of ST is governed by the Shareholders' Agreement¹⁷⁶⁹. The Shareholders' Agreement was concluded for the duration of [Indication on the duration of the validity of the Shareholders' Agreement]¹⁷⁷⁰ and sets in particular the basic principles of corporate governance, the long and medium term objectives of ST as well as the rights of shareholders in case of sale of ST's shares. An "Agreement on further Co-operation of the Shareholders of Slovenské Telekomunikácie a.s." signed by DT, the Slovak Republic and ST¹⁷⁷¹ following negotiations dated 28 April 2003, amends the Shareholders' Agreement.

(1230) The corporate governance set out in the Shareholders' Agreement enables DT to exercise decisive influence over ST. DT nominates the majority of members on ST's BoD, the statutory management body of ST which meets at least [...] times a year. DT also nominates the BoD Chairman, who holds a casting vote in case of deadlock. The necessary quorum in the BoD may be fulfilled by DT nominated BoD members only. Moreover, ST's Statute does not provide for any special veto rights for the BOD members nominated by the minority shareholders with respect to items important for running ST's business such as the adoption of the business plan or the company's budget. The decisions requiring a qualified voting procedure as set out above (see recital (1198)) do not concern business strategy decisions but in particular decisions to protect the value of the minority shares. Given that all ordinary business decisions, including the approval of the corporate (business) plan and the budget are taken by a simple majority of the present BoD members, DT's view can prevail in ST's BoD. DT is also able to request the removal of Directors as only a simple majority of the GAS is necessary for these decisions¹⁷⁷².

(1231) [Description of the rights of ST's shareholders to nominate SuB members, including chairman and vice-chairman]. This structure does not enable DT to exercise decisive

Transport, Post and Telecoms) and the National Property Fund on 18 July 2000, Attachment Q9_Annex1 to DT's reply to the Commission RFI, dated 4 August 2010, Doc ID3253.

¹⁷⁶⁸ Section 5.1(d) of the Shareholders' Agreement between DT, ST, the Slovak State (Ministry of Transport, Post and Telecoms) and the National Property Fund of 18 July 2000, Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

¹⁷⁶⁹ Shareholders' Agreement between DT, ST, the Slovak State (Ministry of Transport, Post and Telecoms) and the National Property Fund on 18 July 2000, Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253; and DT's reply to the request for information of 24 June 2010, p. 14-15, Doc ID2352, non-confidential version Doc ID3248. The agreement was concluded upon the acquisition of ST's shares by DT in 2000, it is dated 18 July 2000.

¹⁷⁷⁰ Section 8.2 of the Shareholders' Agreement between DT, ST, the Slovak State (Ministry of Transport, Post and Telecoms) and the National Property Fund of 18 July 2000, Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

¹⁷⁷¹ "Agreement on further Co-operation of the Shareholders of Slovenske Telekomunikácie a.s.", Doc ID3293.

¹⁷⁷² The Shareholders' Agreement of 18 July 2000, section 3.2 and Article 7.12, Doc ID3253.

influence in this body [Details of voting rules in the SuB]. However as the supervisory body has only a controlling and reporting function and does not take the business strategy decisions the composition of this body is not decisive for the analysis of parental liability.

- (1232) DT also has the majority in the GAS which appoints and recalls the BoD and SuB members (see section 12.2.3.4 above). Only a simple majority is necessary for these nomination decisions. As already set out above (see section 12.2.4.1) the rights of the minority shareholders in the GAS do not go beyond the statutory rights of minority shareholders - as provided *inter alia* under the Slovak Commercial Code. Therefore the views of DT can prevail in this corporate body as well.
- (1233) The EMB is a non-statutory management body. EMB members are nominated and recalled by the BoD, in which DT nominates the majority of the members. Further, two BoD members, both nominated by DT, are also during the whole infringement period members of the EMB, the CEO and the CFO. In this way, these members nominated by DT can as well ensure coordination of both management bodies, that is to say the BoD and the EMB. The Slovak State did not have during the infringement period the same persons as members in both management bodies. Further, the EMB acts within the scope of the powers delegated to it by ST's BoD. As EMB members can be recalled and delegated powers can be withdrawn by the BoD by simple majority, DT has at least the possibility to take action if it disagrees with the EMB's course of action.
- (1234) DT objects that with its 51 % majority, it never was, legally or factually, in a position to exercise decisive influence over ST. [DT's views on its relation to ST].¹⁷⁷³ DT further argues that the Slovak Republic (SR), with its 49% share in ST is a strong co-partner to DT, pursuing its own agenda and providing a counterbalance to DT within ST.
- (1235) ST adopts similar arguments and refers to the "*strong counterweight*" of the SR, "*which pursues its own strategic and political agenda*"¹⁷⁷⁴. ST refers in particular to the Shareholders' Agreement, where [Description of DT's commitment to support certain projects; reference to the Slovak Republic's nomination rights and of a modification of the strength of the position of the CEO position].¹⁷⁷⁵
- (1236) However the Shareholders' Agreement¹⁷⁷⁶ contains clear provisions which disprove DT's and ST's claims. Indeed, according to the Shareholders' Agreement - as set out above (section 12.2.3) - DT nominates the majority of members on ST's BoD, the statutory management body of ST. DT also nominates the BoD Chairman, who holds a casting vote in case of deadlock. The necessary quorum in the BoD may be fulfilled by DT nominated BoD members only. Given that all ordinary business decisions, including the approval of the corporate (business and operating) plan and the budget are taken by a simple majority of the present BoD members DT's view can prevail in ST's BoD. Moreover, ST's Statute does not provide for any special veto rights for the minority shareholders with respect to items important for running

¹⁷⁷³ See paragraph 6 of DT's Reply to the SO, Doc ID4395, non-confidential version Doc ID4417-42.

¹⁷⁷⁴ ST's reply to the SO, Doc ID3630, paragraphs 1721.

¹⁷⁷⁵ ST's reply to the SO, Doc ID3630, paragraphs 1721 and following.

¹⁷⁷⁶ The Shareholders' Agreement of 18 July 2000, Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

ST's business such as the adoption of the business plan or the company's budget. In addition, DT has as well the majority in the GAS which appoints and recalls the BoD and SuB members (see section 12.2.3.4 above). Therefore DT is in a position to overrule the views of the Slovak State. DT is also able to request the removal of Directors of the BoD as only a simple majority of the GAS is necessary for these decisions.¹⁷⁷⁷

- (1237) DT claims that "*ST's BoD plays less of a role than a board of directors normally might*"¹⁷⁷⁸ and emphasises the EMB's importance *vis à vis* the BoD. The EMB's importance would notably result from the delegation of tasks by ST's BoD to the EMB¹⁷⁷⁹. In view of the nature of these tasks, DT concludes that it was the EMB which was responsible for defining ST's commercial strategy.¹⁷⁸⁰
- (1238) ST also refers to the EMB as the "primary management of ST"¹⁷⁸¹. However, it mentions as well that [Statement on whether or not SR-nominated BoD Members play an active role in the day-to-day business] and that further [Statement relating to offices and remuneration of BoD members]¹⁷⁸²
- (1239) [ST's claim on the frequency of the use of offices by DT-nominated BoD members]¹⁷⁸³, the Commission notes that this submission shows the importance of the BoD also in the day-to-day business of ST.
- (1240) It is further clear from the case law that "*the fact that a subsidiary has its own local management and its own resources does not prove, in itself, that that company decides upon its conduct on the market independently of its parent company*".¹⁷⁸⁴ "*The question whether the parent company has interfered in the day-to day management of its subsidiary [...] is not relevant*" pursuant to the case law¹⁷⁸⁵ to prove decisive influence.
- (1241) The Commission emphasises that in the present case any delegation to the EMB may be withdrawn at any moment, based on a decision by ST's BoD, in which DT nominates four out of seven members. Therefore this delegation is not an obstacle to DT's decisive influence over ST. Also, the decisions concerning the appointment of the senior managers that are members of the EMB are taken by a simple majority in the BoD, where DT disposes of the necessary majority to cause the appropriate appointments to be executed. Further, the fact remains that the BoD is the statutory management body with important functions such as the adoption of the corporate and operating plan and the budget and which meets at least 6 times a year.
- (1242) DT also makes a distinction between the "*non-executive members*" and the "*executive members*" of the BoD¹⁷⁸⁶. DT states that "(...) *the non-executive members*

¹⁷⁷⁷ The Shareholders' Agreement of 18 July 2000, section 3.2 and Article 7.12, Doc ID3253.

¹⁷⁷⁸ DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 5, Doc ID2667, Non confidential Doc ID3289.

¹⁷⁷⁹ DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 5, Doc ID2667, Non confidential Doc ID3289.

¹⁷⁸⁰ See paragraph 55 of DT's Reply to the SO, Doc ID4395, non-confidential version Doc ID4417-42.

¹⁷⁸¹ ST's reply to the SO, Doc ID3630, paragraph 1801.

¹⁷⁸² ST's reply to the SO, Doc ID3630, paragraph 1733.

¹⁷⁸³ ST's reply to the SO, Doc ID3630, paragraph 1733.

¹⁷⁸⁴ Case T-39/06 *Transcatab SpA v Commission*, paragraph 106.

¹⁷⁸⁵ Case T-77/08 *Dow Chemical Company v Commission*, EU:T:2012:47, paragraph 107.

¹⁷⁸⁶ See paragraph 54 of DT's Reply to the SO, Doc ID4395, non confidential version Doc ID4417-42.

*of a "Board of Directors" generally do not assume their activities as their full time occupation and have a function that, according to the German legislation, corresponds rather to that in the Supervisory Board; the executive members are generally employed in the company and are responsible for the executive management there, so they are rather comparable with typical German Management Board members deciding on the day-to-day activities of the company"*¹⁷⁸⁷ .

- (1243) In this regard the Commission considers that the distinction between non-executive members and executive members of the BoD is not relevant in view of the fact that both kinds of BoD members have the same rights in ST's BoD. The argument advanced by DT that the non-executive BoD members would have a function that corresponds rather to a supervisory board is also not convincing as ST has a supervisory board to control the BoD activities. Further, even if the functions of these two BoD members were to be regarded as corresponding to supervisory functions this would not mean that DT could not exercise decisive influence through these BoD members together with the two other BoD members it nominates. The General Court has confirmed that the exercise of decisive influence can also be determined from, among other factors,¹⁷⁸⁸ the control of the supervisory board by representatives of the parent company¹⁷⁸⁸ .
- (1244) The ability to exercise decisive influence is also conferred by the fact that the Shareholders' Agreement (see section 12.2.3) confers no special veto rights or similar rights on the minority shareholder in the BoD with respect to items important for running ST's business such as the adoption of the business plan or the company's budget (see above recital (1230)). Moreover, the Shareholders' Agreement defines DT as a 'strategic partner' with specific obligations to fulfil in ST while setting no negative consequences for DT for not fulfilling these obligations, such as sanctions from the minority shareholders.
- (1245) Finally, the Commission considers that in the present case the situation is different from the *Sasol*¹⁷⁸⁹ case which concerned a joint venture pursuant to which joint decisive influence may be established, whereas in the present case DT and the Slovak Republic are not joint venture partners. DT informed the Commission in September 2004 that "*Based on the shareholders' agreement between Deutsche Telekom, the Slovak government and Slovak Telecom, Deutsche Telekom has sole control over Slovak Telecom*"¹⁷⁹⁰. As will be set out below in recital (1251) the Commission considers that this document which is predating the infringement period has still evidential value in the present case. Further, the situation in the present case is different concerning minority rights: While in the *Sasol* case the smaller partner, Vara, had strong minority rights¹⁷⁹¹, this is not so in the present case where the Slovak Republic has no particular minority rights (see section 12.2.3.4 and recital (1250) below).

¹⁷⁸⁷ See paragraph 54 of DT's Reply to the SO, Doc ID4395, non confidential version Doc ID4417-42, translated from original in German by the Commission services.

¹⁷⁸⁸ Case T-399/09 *HSE v Commission*, EU:T:2013:647, paragraph 37.

¹⁷⁸⁹ Case T-541/08 *Sasol and others v Commission*, EU:T:2014:628, paragraph 17.

¹⁷⁹⁰ DT's reply to the request for information of 13 May 2013, Q1 Annex 1.3, Doc ID3778-64, non confidential version Doc ID4117-48, p. 3 .

¹⁷⁹¹ Vara had a blocking minority, as resolutions required a majority of 3/4 of all votes cast and Vara held 1/3 of the votes. See *Case T-541/08 Sasol and others v Commission*, EU:T:2014:628, paragraph 39.

(1246) In conclusion, the Commission considers that the evidence presented in section 12.2.3 above is sufficient to establish that DT had the ability to exercise decisive influence over ST throughout the infringement period, in particular because of its majority shareholding, its position in the BoD and the GAS as well as the other provisions in the Shareholders' Agreement. Nevertheless the Commission presents some supplementary evidence in this regard, below.

12.2.5. *Supplementary evidence of DT's ability to exercise decisive influence over ST*

(1247) The evidence in question was provided to the Commission by DT in the context of DT's proposed acquisition of sole control over EuroTel in 2004 (merger case M.3561 - Deutsche Telekom/EuroTel). It has been requested for the purpose of this investigation by two requests for information sent to DT on 13 May 2013 and 30 July 2013. DT replied to these requests on 14 June 2013¹⁷⁹² and 19 August 2013¹⁷⁹³.

(1248) EuroTel, a Slovak mobile network operator, was owned by ST, holding a 51% share and a 49% share belonged to Atlantic West B.V. (a joint venture of Verizon Communications and AT&T Corp). Following the sale of 51% of the shares in ST to DT on 4 August 2004 also EuroTel became a member of the DT Group.¹⁷⁹⁴ On 31 December 2004 ST acquired the remaining 49% of EuroTel's shares which belonged to Atlantic West B.V., and which previously had strong shareholder- and veto rights¹⁷⁹⁵. In this way ST became EuroTel's sole owner (case M.3561 - Deutsche Telekom/EuroTel). Following the merger, on 2 May 2005, EuroTel changed its name to T-Mobile Slovensko, a. s.. In 2008 ST and T-Mobile Slovensko, a. s. started to merge their retail networks into one and on 1 July 2010 ST and T-Mobile Slovensko integrated¹⁷⁹⁶.

(1249) The following evidence consists of statements made by DT at the time in a submission for a [Internal meeting] and which the Commission considers as additional piece of evidence showing the relationship between DT and ST from DT's point of view.

(1250) The Annex to the notification titled “[Title of document preparing a business decision relating to the purchase of the Eurotel shares by ST]”¹⁷⁹⁷, shows that DT foresaw to gain through this acquisition full management control *via* ST over EuroTel.¹⁷⁹⁸ Although this document was drafted before the beginning of the

¹⁷⁹² DT's reply to the request for information of 13 May 2013, Question 1, Doc ID3773, non confidential version Doc ID4007, and Q1, Annexes 1.1 to 4.2, DOC ID3778-1 to 3778-35, non confidential versions Doc ID4008-4014, 4016, 4018, 4019, 4021-4040.

¹⁷⁹³ DT's reply to the request for information of 30 July 2013 Doc ID3939, non confidential version Doc ID3946 and Q 3 annex 1, DOC ID 3938, non confidential version Doc ID3945.

¹⁷⁹⁴ <http://www.telekom.sk/english/company/history/>, accessed on 6 October 2014, Doc ID4808.

¹⁷⁹⁵ See DT's reply to the LoF, paragraph 8, Doc ID 4693, non confidential version Doc ID4718, the Short Form CO M. 3561 in Q1, Annex 1.3 to DT's reply to the request for information of 13 May 2013, Doc ID3778, non confidential version Doc ID4010, page 4 and the Commission decision in case M. 3561, p. 6, Fn. 12 http://ec.europa.eu/competition/mergers/cases/decisions/m3561_20041215_20310_en.pdf, accessed on 29 September 2014, Doc ID4138.

¹⁷⁹⁶ <http://www.telekom.sk/english/company/history/>, accessed on 6 October 2014, Doc ID4808.

¹⁷⁹⁷ DT's reply to the request for information of 30 July 2013, Q 3 annex 1, page 3, DOC ID 3938, non confidential version Doc ID3945.

¹⁷⁹⁸ DT's reply to the request for information of 30 July 2013, Q 3 annex 1, page 3, DOC ID 3938, Original text in German: [**Confidential Annex IV** - non confidential summary: DT's assessment of the consequences of the acquisition by ST of 49% of Eurotel shares], non confidential version Doc ID3945.

infringement period, it still has evidential value as it is forward looking: it describes the control DT would be able to exercise over EuroTel "via ST" after the acquisition of the further 49 % of the EuroTel shares. This document relates to key provisions of ST's Shareholders' agreement and their interpretation thereof by DT; these provisions are still in force and have not changed. This document contains a description by DT itself of its relationship with ST and the Slovak Republic. It shows (i) that DT acquires full management control *via* ST over EuroTel once ST owns 100% of the shares in EuroTel and that (ii) irrespective of the ST/EuroTel merger, DT considers to have full management control over ST. The document casts light on the balance of power between ST's shareholders as laid out in the Shareholders' Agreement. It shows that the scope of the Slovak Republic's influence over ST is limited. It also shows that DT considers itself to have gained at the time in September 2004 - more than four years after its acquisition of 51% of the shares of ST – full management control over ST. It furthermore shows that based on past behaviour DT could expect consensus with SR on those few matters where SR has minority rights. As the Shareholders' Agreement has last been amended [Date ahead of the start of the infringement] and has therefore not changed since this time and during the period of infringement¹⁷⁹⁹, there are no reasons why this balance of power would have changed; DT does not in any case bring forward any evidence in this sense.

- (1251) The Commission considers that this broad statement, made in a document that pre-dates the merger notification, needs to be read together with two other statements made by DT, in the Short Form CO¹⁸⁰⁰, according to which "[b]ased on the shareholders' agreement between Deutsche Telekom, the Slovak government and Slovak Telecom, Deutsche Telekom has sole control over Slovak Telecom."¹⁸⁰¹ and that "*Deutsche Telekom AG [...] is notifying the transaction as the entity controlling the purchaser of EuroTel's shares, Slovak Telecom*"¹⁸⁰². As this statement refers to the Shareholders' Agreement and the provisions in the Shareholders' Agreement have not changed, the Commission considers that these considerations are relevant with regard to the period of the infringement. Concerning the concept of sole control, paragraph 54 of the Commission's Consolidated Jurisdictional Notice on the control of concentrations between undertakings¹⁸⁰³ states that "*Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking*. This shows that an undertaking having sole control can as well exercise decisive influence and that the concepts of control and the possibility to exercise decisive influence are therefore closely related.
- (1252) DT rejects the Commission's reference to the Consolidated Jurisdictional Notice arguing that the purpose and context of "*control*" in merger rules and in parental

¹⁷⁹⁹ DT joined to its reply to the request for information of 24 June 2010 on 4 August 2010 [reference to the Shareholders' Agreement], Attachment Q9_Annex1, Doc ID3253. [Information relating to a change of the Shareholders' agreement in 2003], Doc ID3293.

¹⁸⁰⁰ DT's reply to the request for information of 13 May 2013, Q1, Annex 1.3, Doc ID3778, non confidential version Doc ID4010.

¹⁸⁰¹ DT's reply to the request for information of 13 May 2013, Q1, Annex 1.3, Doc ID3778, non confidential version Doc ID4010, page 3.

¹⁸⁰² DT's reply to the request for information of 13 May 2013, Q1, Annex 1.3, Doc ID3778, non confidential version Doc ID4010, page 3.

¹⁸⁰³ Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings OJ C95, 16.04.2008, p. 1.

liability are substantially different. According to DT *"the purpose of the merger control legislation is a "control" related to an abstract examination ex ante*¹⁸⁰⁴ whereas *"the possibility to exercise a decisive influence within the framework of investigation of infringement of cartel laws is to be identified specifically and ex post [...] on the basis of an actually lived relationship between two legally independent companies [...]."* The influence on strategic decisions, necessary to establish control" is considered by DT not sufficient to establish an economic unit between undertakings.¹⁸⁰⁵

- (1253) ST also considers that the concept of *"control"* is fundamentally different from the ability and exercise of decisive influence and considers "control" rather a more abstract and formalistic approach from an ex ante perspective.¹⁸⁰⁶
- (1254) Apart from the fact that DT's and ST's determinations of the notion of *"control"* within the meaning of the merger rules as being necessarily used ex ante and in a forward looking perspective is not wholly accurate and does not correspond to the wording of the Consolidated jurisdictional notice cited above which is written in the present tense¹⁸⁰⁷, the crucial point here is that, as seen in recital (1465) above, in this case DT itself used the concept of control to describe its relationship with ST four years after it became one of its shareholders.¹⁸⁰⁸ Therefore this statement is a supplementary piece of evidence of DT's ability to exercise decisive influence over ST.
- (1255) These statements confirm and reinforce the Commission's assessment as set out in sections 12.2.4.1 and 12.2.4.2 above as well as its conclusion that DT has the ability to exercise decisive influence over ST.

12.2.6. *Exercise of decisive influence by DT over ST*

(1256) In the following subsections the Commission will show that, on the basis of its ownership, rights and contracts over ST, DT exercised decisive influence over ST through legal links and organisational links. These links tying the two companies are in particular the following:

- The overlaps in senior management personnel between DT and ST and the lease of staff by DT to ST (subsection 12.2.6.1);
- Evidence of DT's influence over the decision-making process at ST's BoD (subsection 12.2.6.2);
- Upstream reporting from ST to DT in the context of regular [Internal organisation of DT and its subsidiaries] meetings [Description of geographic location of the group companies involved] (subsection 12.2.6.3);

¹⁸⁰⁴ See paragraph 46-47 of DT's Reply to the SO, Doc ID4395, non confidential version Doc ID4417-42; see also DT's reply to the LoF, paragraphs 27 and following, Doc ID 4693, non confidential version Doc ID4718.

¹⁸⁰⁵ See paragraph 47 of DT's Reply to the SO, Doc ID4395, non confidential version Doc ID4417-42.

¹⁸⁰⁶ ST's reply to the LoF, Doc ID 4671-36, paragraph 922.

¹⁸⁰⁷ Indeed, as can be seen in this case, sometimes the concept of control within the meaning of the merger rules is used to describe the relationship between two companies which is already taking place at the time of the notification of a EuroTel merger which takes place four years after DT acquired the 51% shareholding in ST.

¹⁸⁰⁸ DT became a 51% shareholder in ST on 4 August 2000 and DT made these statements on [Date].

- Further upstream reporting from ST to DT in the context of regular bilateral meetings: [Denomination of the meetings involving DT and its subsidiaries] (subsection 12.2.6.4).
- (1257) The Commission will further illustrate how DT exercised decisive influence over ST through these links with respect to a strategic project for ST, for which it followed DT's decision: the selection of the IPTV vendor for its triple play platform (see subsection 12.2.6.5 below).
- (1258) DT argues [DT's motivation for the investment in ST and on the support it provides to ST]¹⁸⁰⁹ while the Slovak Republic acts as a "counterbalance"¹⁸¹⁰ to DT, the Slovak Republic's role being to insist that ST pursues [Description of the interests concerned]. DT claims that because of this its relationship towards ST during the entire period of the infringement [Details of the relationship DT-ST and evaluation of the relationship by DT]¹⁸¹¹. DT further presented certain examples which allegedly show ST's independent behaviour¹⁸¹².
- (1259) The Commission will show in detail below why it cannot accept DT's arguments. Further, the Commission will demonstrate that the examples of ST's allegedly independent behaviour put forward by DT are not able to rebut the arguments establishing the exercise of decisive influence by DT over ST (see in particular subsection 12.2.6.7 below).
- (1260) The body of consistent evidence presented below forms an overall pattern showing that DT exercised decisive influence over ST and therefore DT and ST form a single economic entity.
- 12.2.6.1. The overlaps in senior management personnel between DT and ST and the lease of staff by DT to ST
- (1261) As confirmed by the General Court the "*representation of the parent company in the management bodies of its subsidiary is a relevant piece of evidence of the exercise of effective control over the latter's commercial policy*"¹⁸¹³. Further the General Court recognised that overlaps of personnel at a management level between the subsidiary and the parent company is "*a strong indication that [a parent company] in fact exercised decisive influence over [a subsidiary's] conduct on the market.*"¹⁸¹⁴ A "*very significant presence of members of [... the parent company's] management at the helm of the [... subsidiary's] shows the extent of [... the parent company's] involvement in the management of its subsidiary.*"¹⁸¹⁵
- (1262) Below the overlaps in the management personnel between DT and ST will be detailed before explaining the lease of staff by DT to ST.

¹⁸⁰⁹ DT's reply to the SO, Doc ID4395, paragraph 14, non confidential version Doc ID4417-42.

¹⁸¹⁰ DT's reply to the SO, Doc ID4395, paragraph 69, non confidential version Doc ID4417-42.

¹⁸¹¹ DT's reply to the SO, Doc ID4395, paragraphs 6 and 7, non confidential version Doc ID4417-42.

¹⁸¹² DT's reply to the SO, Doc ID4395, paragraphs 313 and following, non confidential version Doc ID4417-42.

¹⁸¹³ Case T-399/09 *HSE v Commission*, EU:T:2013:647, paragraph 38.

¹⁸¹⁴ Case T-24/05, *Alliance One International and others v. Commission*, [2010] ECR II-5329, paragraph 180 and Case T-109/02 *Bollore and others v Commission* [2007] ECR II-947, paragraphs 135-140.

¹⁸¹⁵ Case T-109/02 *Bollore and others v Commission* [2007] ECR II-947, paragraphs 138.

12.2.6.1.1 The overlaps in senior management personnel between DT and ST

(1263) The Commission has evidence that there exist close senior management personnel overlaps between DT and ST. These overlaps exist at the level of ST's BoD, the statutory body in charge of ST's management which has a total of seven members¹⁸¹⁶. Indeed, two out of the four of BoD members of ST nominated by DT were simultaneously holding important executive management positions in DT throughout most of the period of the infringement¹⁸¹⁷. The persons concerned are:

- Dr. Ralph Rentschler, member of ST's BoD since before 1 May 2004 until at least 31 December 2010. Dr. Rentschler worked at the same time for DT since 2001 in various positions, in particular as the CFO of DT's Fixed net business and, in addition, since July 2009 as the Financial Director of DT's Board Division Southern and Eastern European and since July 2010 as Head of DT Finance Europe;
- Mr Horst Hermann, member of ST's BoD since before 1 May 2004, was chairman of ST's BoD until 6 June 2005 and a member until 25 September 2008. He was, at least throughout the period of his chairmanship in ST's BoD, Senior Executive Vice-President in DT responsible for DT's International Business;
- Mr Albert Pott, member of ST's BoD since 27 April 2010, was in charge of DT's 'Sales & Customer Service Europe and Area Management for Slovakia and the Czech Republic'.

(1264) DT's executives who were also members of ST's BoD took part in the management of ST and in the decisions of this corporate body. This enabled DT to be informed on ST's plans and actions and possibly to influence ST's conduct in the market. In this context, the Commission underlines that Dr. Ralph Rentschler [Description of his role in the DT group as regards the link between] DT's subsidiaries with its parent company (in a key financial area of the DT Group (Head of DT Finance Europe) and having been a member of ST's BoD throughout the period of the infringement.¹⁸¹⁸ Dr. Rentschler's [...] financial responsibilities in the DT Group are combined with his [...] presence in management bodies of DT's subsidiaries¹⁸¹⁹. Dr. Rentschler's duties and responsibilities within the DT Group are at a very high level, as they concern key interests of the DT Group (finance and budget). The implementation of new projects within ST was discussed in the bilateral [...] management meetings (see recital (1353) as new projects are always linked with important financial decisions which may affect DT's general performance and budget. The evidence shows that ST's budget and long term planning for ST has been reported to DT and DT commented on it e.g. in the [...] management meetings¹⁸²⁰ (see section 12.2.6.4

¹⁸¹⁶ See section 12.2.3.2 above.

¹⁸¹⁷ [Information concerning DT designated board members of ST].

¹⁸¹⁸ See for example Case T-109/02 *Bollore and others v Commission* [2007] ECR II-947, paragraphs 138 and Case T-24/05, *Alliance One International and others v. Commission*, [2010] ECR II-5329, paragraph 174-177 in which the General Court found relevant the fact that "*Mr. V. has also been a member of the board of directors of four other subsidiaries (...)*", that "*his duties and responsibilities in the standard group were at a very high level, in particular inasmuch as they concerned one of the two main areas of that group's activity and the whole of Europe*".

¹⁸¹⁹ Since 25 April 2002 he is a member of BoD of Magyar Telekom, since 2001 a CFO of DT's Group Fixed Net division and also a member of SuB of T-Mobile NL, DeTe Fleet and Hrvatski Telekom.

¹⁸²⁰ See [Minutes of an DT-ST meeting] of 27/07/2006, doc. ID 2531, p.2-3 and of 03/04/2008, Doc ID3301, for examples of financial reporting and coordination – see below on page 342 and 342.

below). Dr. Rentschler, who had important financial functions in DT during the infringement period and became its Head of Finance in 2010¹⁸²¹, plays an important role in this regard. Indeed, during various ST managerial meetings, as well as [...] Management Meetings, Dr. Rentschler requested detailed reporting from ST on financial performance and business cases for individual projects and products of ST (in particular DSL and Magio, satellite TV project, broadband and IPTV, and he in turn reported to DT (see subsection 12.2.6.4 below). The evidence also shows that Dr. Rentschler served as an intermediary between DT and ST, and commented on business decisions¹⁸²².

- (1265) Moreover DT states that it "*needs to collect and understand the financial indicators required for the consolidation of ST's results into the group and segment results such as sales figures, EBITDA, Capex and cash flow. The figures reported by ST need to be plausible and explicable for Dr. Rentschler, as he is, as DT's Financial Director Europe, responsible for group and segment results at DT*".¹⁸²³ This is in the Commission's view an indication that DT exercised control over the commercial policy of ST. Indeed, the monitoring of financial data and the possibility of influencing financial indicators such as sales objectives, gross margins, sales costs and cash flow by the parent company has been considered by the case law to be relevant for the assessment of parental liability.¹⁸²⁴ In the present case this quote shows that DT monitored the financial and sales data closely and commented on their plausibility which gave them the possibility to influence these.
- (1266) This significant presence of senior members of DT's management and executives at the helm of ST shows the extent of DT's involvement in the management of ST.
- (1267) [Description of DT's position regarding DT's rights to give instructions to certain BoD members and also of the legal basis for these rights]¹⁸²⁵. The Commission notes that DT recognises with this argument that it can give at least some instructions to its BoD nominees in ST without necessarily infringing the provisions of Slovak corporate law it refers to (see recitals (1281) to (1283)).
- (1268) DT argues it has not used personnel overlaps in order to exercise a decisive influence on the market conduct of ST. As already set out in section 12.2.4.2 above DT states that the BoD has, as a result of a delegation of tasks to the EMB, rather the function of a supervisory board¹⁸²⁶. [Description of the EMB's role as regards BoD initiatives].¹⁸²⁷
- (1269) The Commission notes as already stated in in section 12.2.4.2 above that, the delegation of management and nomination decisions to the EMB are not an obstacle to DT's decisive influence over ST as delegations can be withdrawn at any moment.

¹⁸²¹ See previous recital, first bullet point of this decision.

¹⁸²² See examples below of [Meeting DT-ST] of [date] on page 342 and [date] on page 343.

¹⁸²³ DT's reply to the SO, Doc ID4395, paragraph 157, non confidential version Doc ID4417-42 and Declaration of [Y] in annex 3 to DT's reply to the SO, Doc ID 4398, pages 3-4, non confidential version Doc ID4417-90.

¹⁸²⁴ Case T-112/05 Akzo Nobel NV and others v Commission (vitamins case) [2007] ECR II-5049, paragraph 64.

¹⁸²⁵ DT's Reply to the SO, Doc ID4395, paragraph 42 and following, non confidential version Doc ID4417-42.

¹⁸²⁶ DT's reply to the SO, Doc ID4395, paragraph 55, non confidential version Doc ID4417-42.

¹⁸²⁷ DT's reply to the SO, Doc ID4395, paragraph 187, non confidential version Doc ID4417-42.

Further the EMB reports to the BoD and the corporate and operating plan as well as the budget] need to be approved by the BoD (see above in section 12.2.3.5 recitals (1230) and (1233). Therefore the Commission does not agree with the description of the BoD as having "*rather the function of a supervisory board*" which in addition does not correspond to the fact that ST also has a supervisory board.

- (1270) The General Court referred in the judgment HSE¹⁸²⁸ to a very similar situation where pursuant to the parent company '[t]he members of the supervisory board monitored the operations of the company by means of regular reports thereon, with the general director of the company providing specific clarifications of various issues', and that 'on several occasions, supervisory board members pointed out deficiencies in the reports and requested additional clarifications. Although that document distinguishes that 'monitoring' from 'interference by supervisory board members in the conduct of the company's business', which it claims never occurred, it is clear from those statements that the members of [... the subsidiary's] management were aware that they were subject to the permanent supervision of the supervisory board, composed primarily of representatives of the [... parent company], and therefore, to the latter's supervision. That corresponds to the very definition of decisive influence by a parent company over its subsidiary, demonstrating that the two companies form an economic unit."
- (1271) In the present case the situation is comparable as the EMB members need to report regularly to the BoD [Reference to a corporate legal document]¹⁸²⁹ [Reference to the duties of the EMB inside ST]¹⁸³⁰. In addition, two members of the BoD nominated by DT are EMB members, that is to say the CEO who is the EMB Chairman and the CFO, and all members of the BoD are entitled to attend the EMB meetings¹⁸³¹. It follows that the EMB acts under the supervision of the BoD, in which DT nominates the majority of the members. Further the members of the EMB must have been aware that according to [Reference to a corporate legal document]¹⁸³², EMB members are nominated and recalled by the BoD. Even if - as stated by DT - the nominations of BoD members [Details on the process ahead of the nomination]¹⁸³³, DT was constantly informed and had the power to intervene.
- (1272) DT also argues that personnel overlaps existed only [Details on the BoD members nominated by ST]¹⁸³⁴ (see section 12.2.4.2 above), [Details on the BoD members nominated by ST]¹⁸³⁵.
- (1273) In this regard, as explained in recital (1243), the Commission considers that the distinction between non-executive members and executive members of the BoD ([Reference to a corporate legal document]) is not relevant in view of the fact that both kinds of BoD members have the same rights in ST's BoD. Further pursuant to the case law "*The question whether the parent company has interfered in the day-to*

¹⁸²⁸ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 94.

¹⁸²⁹ [Reference to a corporate legal document] doc ID 3292.

¹⁸³⁰ [Reference to a corporate legal document] doc ID 3292, Article 2.2.III.

¹⁸³¹ [Reference to a corporate legal document], doc ID 3292., [...].

¹⁸³² See recital (1233) above.

¹⁸³³ DT's reply to the request for information of 13 May 2013, Question 3, p. 11, Doc ID3773, non confidential version Doc ID4007.

¹⁸³⁴ DT's reply to the SO, Doc ID4395, see paragraph 14, twelfth bullet, non confidential version Doc ID4417-42.

¹⁸³⁵ DT's reply to the SO, Doc ID4395, paragraph 186, non confidential version Doc ID4417-42.

*day management of its subsidiary [...] is not relevant*¹⁸³⁶ to prove decisive influence. As confirmed by the General Court the *"representation of the parent company in the management bodies of its subsidiary is a relevant piece of evidence of the exercise of effective control over the latter's commercial policy"*¹⁸³⁷. In the present case, even if the day-to-day management was ensured by the EMB, DT had through the reporting of the EMB to the BoD detailed knowledge of it. [Information on the rights of BoD members regarding meetings of the EMB]. DT's members of the BoD were therefore always informed on the activities of the EMB and could always comment. As the members nominated by DT had the majority in the BoD, DT could always intervene through the BoD and had the possibility to withdraw delegated tasks or to recall members of the EMB (see above in section 12.2.3.5 recital (1233)).

(1274) Therefore the Commission considers that the presence of DT managers at the helm of ST's BoD is established and is a first element which shows the exercise of decisive influence by DT over ST.

12.2.6.1.2 The lease of staff by DT to ST

(1275) There exists an established practice of personnel exchanges between DT and ST. A Personnel Lease Agreement concluded between ST and DT in 2003 provides a framework for these exchanges. Under this agreement, DT undertakes to *'provide employees to ST for execution of professional and management services'* and ST undertakes to [...]. The leased persons remain employees of DT. ST may reject the employee if the individual is unable to perform the required tasks adequately. The leased personnel will work based on ST's instructions on the tasks to accomplish; leased personnel who are EMB members receive instructions from the BoD¹⁸³⁸.

(1276) In total, there have been over [...] personnel leases during the infringement period¹⁸³⁹, covering various middle and senior management positions, as well as expert, specialist and adviser functions in ST. The Commission notes in particular the presence of the following DT employees in key management positions in ST, some of which entailed responsibility over all or part of ST's commercial strategy and operations¹⁸⁴⁰:

- [X], at least until 31 December 2010 ST's Chief Financial Officer (CFO), member of ST's EMB and BoD, previously Head of Controlling at Magyar Telecom, a DT group company in Hungary,¹⁸⁴¹
- [A], in the period 11/2002 until 10/2006, successively Vice President, Senior Executive Vice President and Chief Operating Officer (COO) at ST, previously DT's Vice-President for business customers¹⁸⁴²;

¹⁸³⁶ Case T-77/08 *Dow Chemical Company v Commission*, EU:T:2012:47, paragraph 107.

¹⁸³⁷ Case T-399/09 *HSE v Commission*, EU:T:2013:647, paragraph 38.

¹⁸³⁸ DT's Reply to the RFI of 24 June 2010, Attachment Q3 - Annex 1, Doc. ID2350 (CD list), non confidential version Doc ID3250.

¹⁸³⁹ DT's Reply to the RFI of 24 June 2010, Attachment Q6_Annex 1 – [...] Doc ID2350 (CD list), non confidential version 3252, the table covers the period 1 May 2004-24 June 2010 [description of the leasing of employees] (see section 11).

¹⁸⁴⁰ DT's Reply to the RFI of 24 June 2010, Attachment Q6_Annex 1 – List of Leased Personnel, Doc ID2350 (CD list), non confidential version 3252.

¹⁸⁴¹ DT's Reply to the RFI of 24 June 2010, Doc ID 2352, p. 9, non confidential version Doc ID3248.

¹⁸⁴² After the last position in ST he retired.

- [B], 11/2006-10/2011, COO network and IT, at least until 31 December 2010 Senior Executive Vice-President for network and IT, previously Vice-President for North East region in T-Systems Business Services Sales and Service management (DT group);
 - [C], 12/2002-07/2007, Vice-President product marketing, residential marketing and Sales Director in ST, previously Head of Board Member Support Department, T-COM International, at least until 18 May 2010 Chief Commercial Officer for the residential segment in Romtelecom (DT's Romanian subsidiary).¹⁸⁴³
- (1277) DT argues that the [Description of the arrangements relating to the lease of personnel]¹⁸⁴⁴⁻¹⁸⁴⁵.
- (1278) [Description of the arrangements relating to the lease of personnel]¹⁸⁴⁶.¹⁸⁴⁷ [Description of the arrangements relating to the lease of personnel].¹⁸⁴⁸
- (1279) The evidence however shows that DT's expatriates at ST have maintained direct contacts with DT in Germany reporting to DT on commercial matters in ST. For example, subsection 12.2.6.5 illustrates the upstream reporting from DT's leased staff working at ST to DT, which led to the change of the IPTV vendor for ST's triple play platform.
- (1280) Moreover, it is DT which remains the employer of the seconded executives as a matter of labour law. The decision whether or not to sever these employees' lies with DT. In this context the Commission considers it without relevance whether DT actually makes use of this right, as ST¹⁸⁴⁹ submitted that this was – to its knowledge – [...]. Likewise, the decision concerning the continuation of their career within the DT group is in the hands of DT. The leased personnel of DT in ST set out on the previous page as examples had beforehand or afterwards important functions in other subsidiaries of DT or international functions within the DT group (see recital (1276)). This shows that these persons are more attached to the DT group than to ST and this lease of staff creates further organisational links between ST and DT. Therefore the Commission does not agree with ST's claim that the leased personnel always behaved solely in the interest of ST.
- (1281) DT also argues that its leased personnel have always acted exclusively in ST's interests¹⁸⁵⁰. DT adds that they are subject to Slovak labour and commercial law in respect of responsibility for any damage that could arise if they act contrary to ST's interests¹⁸⁵¹.
- (1282) The Commission observes that such provisions serve the purpose of protecting the company and its shareholders against directors acting in bad faith to enrich themselves or third parties. Such provisions are standard company law requirements

¹⁸⁴³ Press release of Romtelecom of 18/05/2010, Doc ID3375.

¹⁸⁴⁴ DT's Reply to the SO Doc ID4395, paragraph 202, non confidential version Doc ID4417-42.

¹⁸⁴⁵ DT's Reply to the SO Doc ID4395, paragraph 218, non confidential version Doc ID4417-42.

¹⁸⁴⁶ ST's Reply to the SO Doc ID3630, paragraph 1785 and 1787.

¹⁸⁴⁷ ST's Reply to the SO Doc ID3630, paragraph 1788.

¹⁸⁴⁸ ST's Reply to the SO Doc ID3630, paragraph 1792.

¹⁸⁴⁹ ST's Reply to the SO Doc ID3630, paragraph 1790.

¹⁸⁵⁰ DT's Reply to the SO Doc ID4395, paragraph 14, twelfth bullet, non confidential version Doc ID4417-42.

¹⁸⁵¹ DT's Reply to the SO, Doc ID4395, paragraph 203, non confidential version Doc ID4417-42.

which establish an obligation of loyalty towards the stakeholders and exist in many other Union countries¹⁸⁵². Nothing in these provisions implies that their purpose is to prevent a parent company from exercising its decisive influence in the subsidiary company. Similarly DT itself states that "*the provisions of the Slovak corporate law do not a priori exclude the possibility that a majority shareholder has a decisive influence*"¹⁸⁵³. Therefore this provision does not prevent DT from exercising decisive influence over ST and acting as one economic unit.

- (1283) Moreover, DT's argument concerning Slovak law implies that DT's exercise of decisive influence would necessarily be in its interests alone and against ST's interests, making it impossible for its leased staff to accept it. However, DT and ST have strong common interests. For instance, DT has a clear interest, as the majority shareholder, in ST's profitability. Thus it can be said that DT's exercise of decisive influence *via* its leased staff would not necessarily be contrary to ST's interests. In this regard the General Court has confirmed that such a reasoning does not call into question an assessment of exercise of decisive influence. The General Court stated in a similar situation where the applicant had argued that the members of the supervisory board were obliged to protect the interest of the company, that "*the integration [of a subsidiary] in an economic unit formed with the [parent company] cannot necessarily be regarded as being contrary to the [... subsidiary's] interests*".¹⁸⁵⁴ Therefore this argument cannot be accepted.
- (1284) DT also states that [Description of the arrangements relating to the lease of personnel]."¹⁸⁵⁵
- (1285) It is the Commission's view that Articles [...] of the [Reference to a corporate legal document] which entered into effect in [...]¹⁸⁵⁶ contradict DT's claim that it provides [...]. Indeed this article notably states that "*DTAG will advise on suitable managers at Director level (selection, remuneration, remuneration policy, development and performance management) [and] the targets for the company and [for] the Management Board members have to be reconciled with DTAG and approved by ST's Board of Directors*", and that "*DTAG will advise on suitable members for the management of fixed line based business (selection, remuneration, remuneration policy, development and performance management)*".
- (1286) Furthermore, the agreed involvement of DT in *the* "[...]" (that is to say in the career development and appraisal) of executives at director level in ST are elements which show DT's involvement in the career decisions of such personnel. This undermines DT's claims that it has no influence on the scope of the duties and the supervision of the executives concerned and that the group perspective is of lesser importance.
- (1287) In conclusion the Commission considers that DT exercised decisive influence over ST through its personnel overlaps and leased personnel in ST. The intervention of

¹⁸⁵² See for example for Austria: § 70 Bundesgesetz über Aktiengesellschaften (BGBl. I Nr. 114/1997, last amendment: BGBl. I Nr. 40/2014). In some other jurisdictions like D, F, UK and Czech Republic this principle is established by the case law from several statutory provisions.

¹⁸⁵³ DT's Reply to the SO, Doc ID4395, paragraph 38, non confidential version Doc ID4417-42.

¹⁸⁵⁴ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 75.

¹⁸⁵⁵ See DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 5, Doc ID2667, Non confidential Doc ID3289.

¹⁸⁵⁶ See DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 2, Doc ID2667, Non confidential Doc ID3289, see section 12.2.6.3.

leased staff also played a role in the decision making in the IPTV project, as will be shown in subsection 12.2.6.5 below.

12.2.6.2. Evidence of DT's influence over the decision-making process at ST's BoD

- (1288) By way of background it is recalled that, as mentioned in section 12.2.4.2, the Commission concludes that DT controls ST's BoD, notably by virtue of ST's Shareholders' Agreement, which gives DT a majority in this body, as well as through personnel overlaps between its BoD members and DT itself.
- (1289) From the evidence in the file the Commission concludes that DT's standard practice is to prepare its representatives which are not EMB members for BoD meetings *via* so-called briefings. These are extensive documents (typically dozens of pages not counting annexes) and notably include¹⁸⁵⁷ a section on the "recommended line to take on selected points" which reviews in sequential order all the points on the proposed agenda. For each point, the briefing recommends whether or not to follow the proposed board resolutions. Where appropriate, and in particular where it is proposed not to accept the proposed resolution as such, this is preceded by background explanations describing the subject matter at issue and/or the state of play¹⁸⁵⁸.
- (1290) DT argues that these briefings do not go beyond established corporate practice and only contained non-binding assistance written by DT personnel which are in the hierarchy below e.g. Dr. Rentschler¹⁸⁵⁹. DT considered that it exercised no influence on the contents of the BoD *via* these briefings.¹⁸⁶⁰
- (1291) The Commission reviewed the briefings for the BoD meetings [Time span of more than 5 years]¹⁸⁶¹ in connection with the minutes from these meetings. Although it is usual corporate practice for a shareholder to prepare its representatives for board meetings, in DT's case this practice sometimes – as set out below - clearly went beyond a mere preparation of its representatives for a BoD meeting so that they could take informed business decisions. The Commission cannot accept DT's arguments; indeed the evidence shows that DT occasionally subjected its approval of certain items to conditions, in particular further coordination, reporting or internal discussion.
- (1292) There are in particular three occasions during the period of the infringement where the BoD meeting as set out in the minutes followed the recommendations by DT expressed in the briefings:
- (a) As regards the BoD meeting of [...], agenda item 10 on Next Generation Networks (NGN) Technology Strategy, the briefing for DT's BoD members

¹⁸⁵⁷ See for example the [Reference to an internal document of DT] in DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 042, Doc ID2579, (CD list), non confidential version Doc ID3305.

¹⁸⁵⁸ See for example the [Reference to an internal document of DT] in DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 042, Doc ID2579, (CD list), non confidential version Doc ID3305, p. 9-18.

¹⁸⁵⁹ For a description of Dr. Rentschler's position see above recital (1206).

¹⁸⁶⁰ DT's Reply to the SO, Doc ID4395, paragraphs 222 and following, in particular 223, 225 and 228, non confidential version Doc ID4417-42.

¹⁸⁶¹ Submitted in DT's reply to the RFI of 9 December 2010 as attachments to Question Q4, Annexes 2 to 34, Doc ID2772, non-confidential version Doc ID2934.

[**Confidential Annex V** - Non confidential summary: gives a short evaluation of the NGN strategy from DT's point of view]¹⁸⁶². The minutes of the BoD meeting show that the respective resolution was unanimously approved with the proviso that: "[Confidential quote on technology decisions and their discussion with DT]"¹⁸⁶³. The meeting minutes of the proviso are therefore reflecting the content of DT's briefing. In the Commission's view the above should also be related to the influence exercised by DT concerning ST's choice of an IPTV vendor for its Triple Play platform¹⁸⁶⁴: the BoD meeting of 7 September 2005, was convened one month before ST's issued its request for proposal to IPTV vendors; it can be concluded that it was used by DT to signal its requirements in terms of technical compatibility and/or group level coordination.

- [DT's interpretation of the above minutes]¹⁸⁶⁵.
 - Nevertheless, it remains that the wording of the minutes reflects DT's concern of technical compatibility as expressed in the briefing and implements a requirement of discussing major technical decisions with DT. It therefore shows DT's influence in the BOD meetings.
- (b) For the BoD meeting of [...], agenda item 14.1 on the "*NoI in BB [broadband] and TV – Progress report*", the briefing for DT's BoD members analyses in detail the execution of this important network rollout project; [**Confidential Annex VI** - Non confidential Summary: gives a short description of Project "N° 1 in broadband and IPTV" from DT's point of view and a short justification for the recommendation on how to vote]¹⁸⁶⁶. The BoD's resolutions on this point, as reflected in the minutes of the meeting, [...]¹⁸⁶⁷. The BOD's resolutions therefore followed the recommendations in the briefing while adding supplementary conditions on coordination with the EMB and on long-term planning for selecting partner companies.
- [DT's statement on the BoD's course of action and standard business practices.]^{1868 1869}
 - Although it is true that the respective BoD's resolutions contain additional items, the fact remains that the BoD's Resolutions incorporate as well DT's recommendations including on how to vote and therefore show its influence. That these recommendations are in line – in DT's

¹⁸⁶² DT Briefing for BoD meeting, doc ID2772, non-confidential doc ID3341, p. 6-7, sent in DT's reply to the RFI of 09 December 2010, attachment Q4 Annex 3. See list of redacted parts of the SO in Doc ID3625 referring to recital 1441, 2nd bullet point of the SO, p.4-5.

¹⁸⁶³ Minutes of the [ST internal meeting], submitted by ST in attachment 9 of the reply to the RFI of 9 December 2010, Doc ID 2750, p. 5.

¹⁸⁶⁴ See section 12.2.6.5.

¹⁸⁶⁵ DT's Reply to the SO, Doc ID4395, paragraph 243, non confidential version Doc ID4417-42.

¹⁸⁶⁶ Doc ID2772, non-confidential doc ID3339, p. 6-7, sent as reply by DT to RFI of 9 December 2010, attachment Q4 Annex 15. See list of redacted parts of the SO in Doc ID3625 referring to recital 1441, 3rd bullet point of the SO, p.5-6.

¹⁸⁶⁷ Minutes of [ST internal meeting] submitted by ST in attachment 24 of the reply to the RFI of 9 December 2010, Doc ID2754, p. 6.

¹⁸⁶⁸ DT's Reply to the SO, Doc ID4395, paragraph 244, non confidential version Doc ID4417-42.

¹⁸⁶⁹ DT's Reply to the SO, Doc ID4395, paragraph 225, non confidential version Doc ID4417-42.

view - with usual business practices is irrelevant. DT's influence is shown as the BoD's resolutions reflect DT's view and recommendations.

(c) For ST's BoD meeting of [...], agenda item 18 concerning the sale of "Radiokomunikacie", the minutes of the meeting record a positive vote from all four BoD members nominated by DT whilst two of the BoD members nominated by the Slovak Republic abstained and the last one voted against¹⁸⁷⁰ thereby following the recommendations on how to vote in the briefing for DT's BoD members¹⁸⁷¹ and imposing DT's business decision.

- [DT's explanation on the voting inside the BoD]. DT also explains in general that Mr Majoroš usually agrees the agenda in preparation of the BoD meetings with the members of the BoD. This would also explain the reason for which the Resolutions are usually taken by unanimity.¹⁸⁷²
- [ST's argumentation regarding the Slovak Republic's voting behaviour]¹⁸⁷³
- In the Commission's view this example nevertheless shows that DT can and does sometimes exercise its decisive influence over and against the opinion and or vote of the BoD members nominated by ST's minority shareholders. Even if DT usually tries to find a solution acceptable for both ST and DT, the reality is that DT through its nominated members in the BoD has the power to supervise the subsidiary's business and also exercises these powers. The power to supervise the subsidiary's business through its nominated board members has been recognised by the General Court as one of the relevant elements to show the exercise of decisive influence by the parent company¹⁸⁷⁴. As the example shows in this case members of the board nominated by DT took a business decision against the will of the members nominated by SR.

(1293) As the General Court pointed out in the HSE judgment concerning the supervisory board of a subsidiary where the parent company had a majority of representatives: "*It is not the content of any instructions that [... the subsidiary's] supervisory board – primarily controlled by the [... parent company's] representatives – may have addressed to [... the subsidiary's] management that is relevant, but rather the fact that the supervisory board and the [... parent company] had detailed knowledge of [... the subsidiary's] business operations and, following discussion, made comments in that respect, regardless of whether those comments should be qualified as instructions.*"¹⁸⁷⁵

(1294) The same reasoning applies a fortiori to the present case where DT nominates the majority of the BoD members (rather than the supervisory board) and prepares

¹⁸⁷⁰ Minutes of [ST internal meeting] submitted by ST in attachment 20 of the reply to the RFI of 9 December 2010, Doc ID2744, p.13.

¹⁸⁷¹ Submitted in DT's reply to the RFI of 9 December 2010 as attachments to Question Q4 Annex 11, Doc ID2772, non-confidential version doc ID3335, p. 17.

¹⁸⁷² DT's Reply to the SO, Doc ID4395, paragraphs 242 and 245, non confidential version Doc ID4417-42.

¹⁸⁷³ ST's Reply to the SO, Doc ID3630, paragraph 1744.

¹⁸⁷⁴ Case T-41/05, *Alliance One International v. Commission*, [2010] ECR II-05329, paragraphs 134 and 135.

¹⁸⁷⁵ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 99.

briefings for its representatives as set out above. The examples above show that DT had detailed knowledge of the items on the agenda for the next BoD meeting and not only briefed its board members but – at least in the examples above – commented through its members in the meetings and influenced the BoD resolutions. As the practice of briefings for the BoD meetings was continued by DT at least between [Period of more than 5 years], it covered nearly the whole duration of the infringement (see section 13) and the examples cited above are as well within the period of the infringement. The briefings cited above concern the commercial policy to be followed by ST as concerns [3 important items of ST's business]. Therefore DT received detailed information on the commercial policy and business activity of ST and could at any time – and even did in the third example cited above, which is undisputed - intervene and impose its view of the commercial policy to be followed through its majority in the BoD.

- (1295) Further, in the same way as in the HSE case before the General Court, DT could always intervene: "*if necessary by replacing members of [... the subsidiary's] management or by evoking that possibility, [therefore] it must be concluded that [... the subsidiary's] behaviour was decisively influenced by the [... parent company]*"¹⁸⁷⁶.
- (1296) In line with the case law¹⁸⁷⁷ such a situation is sufficient to show the exercise of control and, consequently, of a decisive influence by the parent company, in the present case through the Board of Directors, over the subsidiary's behaviour on the market.
- (1297) Furthermore, as will be discussed below, DT also used regular [...] meetings which included ST as means to review in advance and influence the decisions of ST's BoD.

12.2.6.3. Upstream reporting from ST to DT in the context of regular [...] meetings [...]

- (1298) The fact that there is upstream reporting between the parent company and the subsidiary and that the parent company kept itself regularly informed of the practices of its subsidiary's business has been considered by the Union Courts¹⁸⁷⁸ as relevant item to establish the exercise of decisive influence by the parent company over its subsidiary.
- (1299) The Commission will describe below how, on the basis of a "*Framework Strategic Cooperation Agreement*" concluded between DT and ST and the specialised fora it set up in support of it, DT coordinated many activities of its affiliates in [location] and launched several synergy programmes and initiatives which were followed through including by ST. To further follow through on the implementation of the "*Framework Strategic Cooperation Agreement*" bilateral meetings between DT and ST were also introduced, further demonstrating DT's involvement in ST's activities. During these "*Management Meetings*" upstream reporting from ST to DT, and occasionally explicit instructions from DT to ST, occurred.

¹⁸⁷⁶ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 93.

¹⁸⁷⁷ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraphs 93 and 99.

¹⁸⁷⁸ Case T-65/89 *BPB Industries v Commission* [1993] ECR II-389, paragraph 152; Case T-66/99 *Minoan Lines v Commission* [2003] ECR II-5515, paragraph 145 and Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 93.

- (1300) [Description of ST's structure and relationship of DT to its daughter companies, including ST]¹⁸⁷⁹. [...]¹⁸⁸⁰
- (1301) Concerning the alleged [Description of resources devoted by DT to ST], the Commission notes that even if this argument were to be accepted it does not exclude the exercise of decisive influence. In any case, a number of DT departments have been in regular contact with ST during the infringement period (see **Annex III**). Furthermore, as seen above (recitals (1261) to (1297)) the presence of personnel overlaps between DT and ST, leased personnel from DT to ST and the briefings prepared by DT for its representatives at BoD meetings all demonstrate DT's significant involvement in ST's activities.
- (1302) The Commission considers that the regular [...] meetings set out below constitute organisational links further tying ST to DT.

12.2.6.3.1 The Framework Strategic Cooperation Agreement and specialised fora

- (1303) In late 2005 and early 2006, DT reorganized the governance structure for its Central and Eastern Europe (CEE) affiliates as evidenced by presentations made in the International Strategy Board of [...] ¹⁸⁸¹ and in the meeting of the Chief Operating Officers (COOs) of the CEE affiliates [...] ¹⁸⁸². The main item on the agenda of the latter meeting was to "organise the cooperation within [DT's fixed business in CEE] in accordance with corporate governance."¹⁸⁸³
- (1304) The new governance structure in CEE was based among others on entering into Framework Strategic Cooperation Agreements (FSCA) with its CEE affiliates including ST¹⁸⁸⁴. The FSCA between DT and ST, concluded sometime at the beginning of 2006, became effective in March 2006¹⁸⁸⁵. It sets out the framework for their strategic cooperation.
- (1305) According to its preamble, *"ST wishes that ST benefits from DTAG's expertise in fixed line telecommunications business, ST wants DTAG's support in managing the fixed line and online telecommunications business in the Slovak Republic and leverage synergies for ST and thus create benefits for the shareholders of ST. In order to realize this effectively, DTAG and ST want to conclude this Framework Strategic Cooperation Agreement."*¹⁸⁸⁶
- (1306) Article 3 of the FSC sets out the principles of the cooperation, most notably that:

¹⁸⁷⁹ [Information on a new DT internal division]. See DT's Reply to the SO, Doc ID4395, paragraph 7, non confidential version Doc ID4417-42.

¹⁸⁸⁰ DT's Reply to the SO, Doc ID4395, paragraph 9, non confidential version Doc ID4417-42.

¹⁸⁸¹ DT's Reply to RFI of 11 October 2010, attachment Q5 Annex [...] 006a, Doc ID2579, (CD list), non confidential version Doc ID3322, p. 8-9 and 69 to 104 .

¹⁸⁸² DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 151, Doc ID2579, (CD list), non confidential version Doc ID3325.

¹⁸⁸³ See [Internal document] in Doc ID3232, submitted in ST's Reply to RFI of 11 October 2010 Q2_COO_9, page 1.

¹⁸⁸⁴ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 151, Doc ID2579, (CD list), non confidential version Doc ID3325, p.16.

¹⁸⁸⁵ DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 2, Doc ID2667, Non confidential Doc ID3289.

¹⁸⁸⁶ [Reference to an agreement in the context of the cooperation of DT with ST], not dated (fax date 29 March 2006), Attachment RFI_100624Q3(vi)_Annex_1, [...], Doc ID3290.

- "[Confidential provision on DT'S advice on management selection at Director level, its remuneration and development as well as business and targets]", and that
 - "[Confidential provision on DT'S advice on fixed line management selection, its remuneration and development]".
- (1307) The presentation prepared for the [...]meeting with COOs explains that the FSCAs provide the basis for operational cooperation between DT and its CEE affiliates.
- (1308) This operational cooperation complements the governance structure whereby the representatives of DT (see section 12.2.3) on *"the Boards of the affiliates are responsible for CEE affiliate steering in the interest of DT AG and its divisions (esp. alignment of CEE strategy with that of DT AG and its divisions, portfolio and investment decisions)"*¹⁸⁸⁷.
- (1309) The presentation explains that the operational co-operation will span across the various functions in DT and its affiliates. For each of the Strategy, Marketing & Sales, Information Technology, Finance, Network and Human Resources functions, DT will provide strategic advice and guidelines to the CEE affiliates¹⁸⁸⁸. The presentation further explains that the co-operation will materialize in specialized and established fora bringing together DT executives with the senior managers for the different functions in the CEE affiliates (Strategy Board Meetings, CFO (Chief Financial Officer), CIO (Information Technology), CMO (Marketing), CSO (sales) meetings, and so on ...).
- (1310) The Commission notes that, it is not disputed that these specialized fora bringing together DT executives with the senior managers for the different functions in the CEE affiliates held regular meetings over time (see below and in section 12.2.6.4.).
- (1311) The Commission notes that this presentation as well as the Strategic Cooperation Agreement between DT and ST contain mostly wording like *"guidance"*, *"guidelines"* and *"cooperation"*.
- (1312) In this regard DT makes reference to [Explanation of the collaboration of DT with its daughter companies, including ST, as well as the organisational structure thereof, quotes from internal documents and agreements between DT and ST].¹⁸⁸⁹ [...] ¹⁸⁹⁰.
- (1313) The Commission considers that even if the comments made by DT to ST in these particular fora do not consist of instructions, the operational cooperation which takes the form of specialised fora is an important organisational link between the two companies, involving significant upstream reporting and must be seen in addition to the overlaps in senior management personnel between DT and ST, the lease of staff by DT to ST, and the evidence of DT's influence over the decision-making process (see sections 12.2.6.1 and 12.2.6.2 above). Such upstream reporting is considered by

¹⁸⁸⁷ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...], 151, Doc ID2579, (CD list), non confidential version Doc ID3325, p. 10.

¹⁸⁸⁸ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...], 151, Doc ID2579, (CD list), non confidential version Doc ID3325, p. 12.

¹⁸⁸⁹ Framework Strategic Cooperation Agreement between DT and ST, not dated (fax date 29/03/2006), Attachment RFI_100624Q3(vi)_Annex_1, [...], Doc ID3290.

¹⁸⁹⁰ Framework Strategic Cooperation Agreement between DT and ST, not dated (fax date 29/03/2006), Attachment RFI_100624Q3(vi)_Annex_1, [...], Doc ID3290.

the Union Courts to be a relevant element to be taken into account to establish the existence of a single economic unit¹⁸⁹¹.

- (1314) In this regard DT had yet another way of obtaining regular, detailed knowledge of ST's business operations and, following discussion, to make comments in that respect, regardless of whether those comments should be qualified as instructions. Such a situation is considered by the case law¹⁸⁹² sufficient to show the exercise of a decisive influence by the parent over the subsidiary's behaviour on the market. The Court of Justice has further considered that an economic unit may have an informal basis, consisting *inter alia* in personal links between the legal entities comprising such an economic unit¹⁸⁹³.
- (1315) Also, the Commission observes that DT may have had an interest in using "soft words" – as illustrated in the quoted statement below - in order to reduce resistance of subsidiaries to change their way of management or in order to cast doubt on the degree of its liability for such instructions under Slovak, German or Union law. Further DT considers internal documents referring to this strategy as confidential even towards ST. This may be illustrated by the following statement made in an internal DT email exchange in the context of the choice of the IPTV vendor for the triple play platform: [**Confidential Annex VII** - Non confidential summary: Information on DT's planned further action.]¹⁸⁹⁴ Hence, the Commission assesses DT's actions vis-à-vis ST based on their content, the degree of their implementation and their follow up rather than based on their formal description, e.g. as "recommendation", as suggested by DT.
- (1316) Moreover, DT's internal documents suggest that the governance structure for CEE affiliates was intended to improve based on past experiences¹⁸⁹⁵. The programme under the new organisation was expected to yield synergies in the area of [...] millions of Euro over the next three years¹⁸⁹⁶.
- (1317) [Internal communication regarding synergies and savings]¹⁸⁹⁷.

¹⁸⁹¹ Case T-65/89, *BPB Industries Plc and British Gypsum Ltd v Commission*, paragraph 152; Case T-65/06, *FLSmidth & Co. A/S v Commission*, and Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 93.

¹⁸⁹² Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 99.

¹⁸⁹³ Case C-440/11P, *European Commission v Stichting Administratiekantoor Portielje and Gosselin Group NV*, EU:C:2013:514, paragraph 68.

¹⁸⁹⁴ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...], 001, Doc ID2579, (CD list), non confidential version Doc ID3304, page 1: Original text in German: [**Confidential Annex VIII**]. See list of redacted parts of the SO in Doc ID3625 referring to paragraph 1456, footnote 1997 of the SO, p.9.

¹⁸⁹⁵ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...], 151, Doc ID2579, (CD list), non confidential version Doc ID3325, p. 5: Original text in German: [**Confidential Annex IX** - non confidential summary: Experience of DT resulting from the cooperation with companies in which DT holds participations.] See list of redacted parts of the SO in Doc ID3625 referring to paragraph 1397, footnote 1847 of the SO, p.2.

¹⁸⁹⁶ [Assessment of DT of certain effects of the cooperation within the DT group]. DT's Reply to RFI of 11 October 2010, attachment Q5 Annex [...], 006a, Doc ID2579, (CD list), non confidential version Doc ID ID3322, p. 8-9 and 69 to 104.

¹⁸⁹⁷ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...], 151, Doc ID2579, (CD list), non confidential version Doc ID3325, p. 14.

12.2.6.3.2 The subsequent transformation of the specialised fora based on the new SEE organisational structure

- (1318) Shortly after DT acquired participations in further operators in South and Eastern Europe (for example, new participation in OTE from Greece¹⁸⁹⁸ in the first half of 2008), DT's internal organisation was revisited. The former CEE (Central Eastern Europe) region was included in a new and larger SEE (South Eastern Europe) Region which included European countries in which new participations had been acquired. As of the summer 2009, ST became part of the new SEE region.
- (1319) On [...] SEE Board meeting was convened. This [...] SEE Board Meeting brought together the Chief Executive Officers of DT's affiliate companies in South Eastern Europe, amongst which Slovak Telekom but also DT's affiliates in Hungary, Croatia, Greece and Romania¹⁸⁹⁹. The SEE strategy, SEE budget/country prioritization and target setting as well as SEE business reviews and results were identified in the presentation for the [...] SEE Board meeting as responsibilities to be carried out by the SEE Board¹⁹⁰⁰. It follows therefrom that the key objective pursued under these governance structures was to align CEE/SEE affiliates along best practices blueprints (whether of German or CEE/SEE origin) in combination with ambitious synergy objectives to further integrate the operations and the businesses of the undertakings concerned.
- (1320) In the [...] SEE Board meeting, participants discussed *inter alia* the SEE governance structure¹⁹⁰¹, cooperation among DT's affiliate companies in the region and with DT (a cooperation agreement between the SEE affiliates and DT was to be concluded to this effect)¹⁹⁰², and the development of a joint strategy for the SEE region.
- (1321) DT's stimulating and coordination role is manifest from the documents of [...] Board meeting. In particular, it is clear from [...] "¹⁹⁰³ that the material with a view to the discussion was prepared by DT, with the support of a consultancy firm. This is apparent from the references to sources mentioned throughout the presentation as well as from the very nature of some of the presented information which contain e.g. statistics from the whole SEE region¹⁹⁰⁴.
- (1322) The governance structure for the SEE region was supposed to take the form of a matrix where senior executives from DT were responsible for the affiliate(s) in a sub-region or country, and for a particular function over the entire SEE region. [...] ¹⁹⁰⁵. [...] ¹⁹⁰⁶.

¹⁸⁹⁸ See e.g. DT's press release of 19 June 2008, doc ID3351.

¹⁸⁹⁹ DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 001f, Doc ID2579, (CD list), non confidential version Doc ID3318, p. 6.

¹⁹⁰⁰ DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 001f, Doc ID2579, (CD list), non confidential version Doc ID3318, p. 6.

¹⁹⁰¹ DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 001f, Doc ID2579, (CD list), non confidential version Doc ID3318, p. 2 to 6.

¹⁹⁰² DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 001f, Doc ID2579, (CD list), non confidential version Doc ID3318, p. 7 and [...], Doc ID3291.

¹⁹⁰³ DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 001 a, Doc ID2579, (CD list), non confidential version Doc ID3317.

¹⁹⁰⁴ [...]. See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 001 a, Doc ID2579, (CD list), non confidential version Doc ID3317, p. 4, 11, 16, 19, 20-23, 25-39.

¹⁹⁰⁵ See DT's Reply to RFI of 24 June 2010, Doc ID 2352, p. 3, non-confidential version Doc ID3248.

- (1323) Most notably in the [...] SEE Board meetings, a common strategy for the region was discussed and initiated¹⁹⁰⁷. This "*DT SEE Strategy*" consisted of [...] ¹⁹⁰⁸.

Table 48: DT SEE Strategy - [...]

[Table depicting DT strategy in specific areas concerning its subsidiaries]

- (1324) For each of the above levers, project teams were set up across the SEE affiliates with a view to their implementation. The projects under each of the levers were to be steered by a "*regional champion*" (the CEO of one of the affiliates concerned) and a senior executive from DT's corporate SEE structure. Finally in each of the affiliates, managers were appointed as representatives for their affiliate. The resulting structure interlinked closely DT with its SEE affiliates (amongst which ST)¹⁹⁰⁹. This demonstrates DT's involvement in this new SEE structure as well as its wish to implement the SEE Strategy.
- (1325) As mentioned in recital (1318), this close cooperation took place among others on the basis of a cooperation agreement entered into by DT and its SEE affiliates. The FSC agreement describes the areas of cooperation (Article 1.2) and the limits thereof (Article 1.3). Similarly to the FSCA it stipulates that any "*Recommendations of the SEE [Cooperation Committee] have no binding nature. Any opinion expressed [...] is advice only and shall not be interpreted as an instruction or anything similar*"¹⁹¹⁰.
- (1326) [DT's statement regarding its affiliates and their representatives]¹⁹¹¹.
- (1327) [DT's claims about the introduction of certain organisational measures]¹⁹¹².
- (1328) [DT's statement on the influence of certain programmes on its affiliates]¹⁹¹³.
- (1329) However the Commission notes that, several of the strategic levers relate directly to the commercial policy of the SEE affiliates concerned. For example, the rationale identified for lever [...] is, among others, about fending off expected price competition from AOs or optimizing the price-volume trade off¹⁹¹⁴. Likewise, lever [...] (which is steered by [W] and [Z] (member of the BoD of ST, concerned by the personnel overlaps between DT and ST) is about customer service and sales channels. The implementation of each of the strategic levers in the form of a concrete

¹⁹⁰⁶ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex SEE-EU 001f, Doc ID2579, (CD list), non confidential version Doc ID3318, p. 4. The Commission understands that this organisation chart provides a detailed view at the level of the SEE region into the organisation chart provided by DT in response to the Commission's request for information of 24 June 2010, Q2 Annex 1, Doc ID2579, (CD list), non confidential version Doc ID3249.

¹⁹⁰⁷ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 001 a, Doc ID2579, (CD list), non confidential version Doc ID3317, p. 9.

¹⁹⁰⁸ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 002 a, Doc ID2579, (CD list), non confidential version Doc ID3319, in particular p. 6.

¹⁹⁰⁹ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 002 a, Doc ID2579, (CD list), non confidential version Doc ID3319, in particular p. 7.

¹⁹¹⁰ [...], Doc ID3291, p. 2-3.

¹⁹¹¹ See DT's Reply to the SO, Doc ID4395, paragraph 145, non confidential version Doc ID4417-42.

¹⁹¹² DT's Reply to the SO, Doc ID4395, paragraph 14, tenth bullet, non confidential version Doc ID4417-42 and ST's reply to the SO, Doc ID3630, paragraphs 1753 and following.

¹⁹¹³ See DT's Reply to the SO, Doc ID4395, paragraph 133, non confidential version Doc ID4417-42.

¹⁹¹⁴ [...]. See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex SEE-EU 002 a, Doc ID2579, (CD list), non confidential version Doc ID3319, in particular p. 35.

action plan was supported in specialised fora bringing together representatives of the SEE affiliates according to their area of responsibility. In the areas of Strategy, Marketing and 'Sales and Service', this role was devoted to [...] ¹⁹¹⁵".

- (1330) [ST's statement on the organisation of the cooperation with its affiliates]. ¹⁹¹⁶
- (1331) In the Commission's view an agreement between DT and each of the affiliates on the general objectives and action plans to be pursued, shows the influence of DT on these; and further an agreement on the levers to achieve group synergies among all affiliates and DT shows the integration of the subsidiaries in the DT group.
- (1332) Moreover the Commission considers, here again, that the operational cooperation which takes the form of these specialised fora is an important organisational link between ST and DT, involving significant upstream reporting. Such upstream reporting itself is considered by the case law to be a relevant element to be taken into account to establish the existence of a single economic unit ¹⁹¹⁷.
- (1333) In this regard DT had yet another way of obtaining regular, detailed knowledge of ST's business operations and, following discussion, to make comments in that respect.
- (1334) Moreover, the Commission observes the detailed provisions on confidentiality [Reference to relevant provisions in a corporate legal document] ¹⁹¹⁸.
- (1335) In the Commission's view such provisions effectively allowed senior executives of the parties to exchange "freely" sensitive information and business secrets as if belonging to a single integrated undertaking. DT itself put in its presentation that it wanted to achieve a "one company" integration ¹⁹¹⁹.
- (1336) Furthermore, the Commission observes that the degree of integration of DT with its SEE affiliates (including ST) was substantial, as evidenced by the presence of a "Prioritization Management Team (PMT)" in its SEE organisation chart ¹⁹²⁰. The PMT process was presented for information, discussion and agreement in the SEE Board meeting of [...] ¹⁹²¹. It was explained that "*Prioritization management is necessary to allocate scarce resources (e.g. Product Development resources for Mobile Products). Deutsche Telekom has more and more common originated projects requiring common development resources*" and that the PMT process concerned among others common projects in the area of product development and

¹⁹¹⁵ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 001a, Doc ID2579, (CD list), non confidential version Doc ID3311; attachment Q4 Annex [...] 003b, non confidential version Doc ID3312, for lever A4 and attachment Q4 Annex [...] 003h, non confidential version Doc ID3313, for lever A1&A3.

¹⁹¹⁶ ST's reply to the SO, Doc ID 3630, paragraph 1818.

¹⁹¹⁷ Case T-65/89, *BPB Industries Plc and British Gypsum Ltd v Commission*, paragraph 31 and Case T-399/09 *HSE v Commission*, EU:T:2013:647, paragraph 93.

¹⁹¹⁸ See DT's Reply to the SO, Doc ID4395, paragraph 130, non confidential version Doc ID4417-42.

¹⁹¹⁹ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 002 a, Doc ID2579, (CD list), non confidential version Doc ID3319, in particular p. 5 and 71-73.

¹⁹²⁰ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 001f, Doc ID2579, (CD list), non confidential version Doc ID3318, p. 4.

¹⁹²¹ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 005a, Doc ID2579, (CD list), non confidential version Doc ID3320, p. 2.

the resources for such projects¹⁹²². On this basis, the SEE Board agreed that "*Outputs coming out of the SEE strategy implementation program regarding requirements to common products and IT developments will be prioritized within the PMT*¹⁹²³". In other words, the items in the [...] strategic lever programme above, which concerned requirements of common products and IT developments, will be subject to group level prioritization. In order for legally distinct entities to be able to operate as "one company" for certain projects by pooling these projects and the associated resources, complex mechanisms are necessary among others in terms of commitment, planning and intercompany invoicing. Such mechanisms were put in place by DT in agreement with its SEE affiliates¹⁹²⁴. These mechanisms contribute to the further integration of DT together with its SEE affiliates (including ST). As such, they reinforced DT's ability to coordinate and influence its SEE affiliates (including ST).

(1337) In light of the above the Commission considers that these regular group meetings constitute a significant organisational link further tying ST to DT. Moreover, as will be explained below, DT followed through on the implementation of the [...] and the upstream reporting involved in these group meetings with the introduction of regular bilateral meetings with ST; the [...] Management Meetings.

12.2.6.4. Further upstream reporting from ST to DT in the context of regular bilateral meetings: the [...] Management Meetings

(1338) [...] Management Meetings (IMM) are regular bilateral management meetings held between DT and each of the CEE affiliates at the senior management level, including between DT and ST. These meetings allowed DT to review proposals in advance of their submission to the BoD or EMB (see recital (1350)). As explained in a presentation by DT: "*In 2005 several "Business Review Meetings" were held at the CEE [Central Eastern European] subsidiaries. After one year experience [...] both T-Com and subsidiaries expressed a strong wish to further harmonize and standardize these meetings. [...]. Management Meetings T-Com will be introduced [...] to support the execution of [the] SCAs*" [that is to say FSCAs, concluded between DT and the CEE subsidiaries¹⁹²⁵ – already referred to above at recital (1304)].

(1339) The above excerpt is taken from one of the presentations prepared for the meeting with the COOs of the CEE affiliates of [...] that was convened to "*organise the cooperation*" between DT and its CEE affiliates¹⁹²⁶. The presentation gave an overview of DT's renewed governance structure¹⁹²⁷:

Table 49: DT's renewed governance structure

[Graph depicting a new governance structure involving DT and its CEE affiliates.]

¹⁹²² See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 005c, Doc ID2579, (CD list), non confidential version Doc ID3321, in particular p. 2, 4 and 5.

¹⁹²³ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 005a, Doc ID2579, (CD list), non confidential version Doc ID3320, p. 2.

¹⁹²⁴ See DT's Reply to RFI of 11 October 2010, attachment Q4 Annex [...] 005c, Doc ID2579, (CD list), non confidential version Doc ID3321, p. 11 and 12.

¹⁹²⁵ See DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 151, Doc ID2579, (CD list), non confidential version Doc ID3325, p. 16.

¹⁹²⁶ See meeting minutes in Doc ID3232, submitted in ST's Reply to RFI of 11 October 2010 Q2_[...]_9, page 1.

¹⁹²⁷ See DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 151, Doc ID2579, (CD list), non confidential version Doc ID3325, p. 17.

(1340) This illustrates that corporate level control by the Board of DT (upper left corner), that is to say control through the statutory organs of the CEE affiliates, is complemented by the operational cooperation set up through the FSCAs (upper right corner) and performance review of the CEE affiliates based on financial reporting and business reviews (lower half). Accordingly, these management meetings, which were organised [...] times per year, allowed reviewing¹⁹²⁸:

- "Market developments;
 - *Regulatory changes, competitors' actions;*
 - *Subsidiary Actions: New products, Tariff structure, customer service;*
 - *Statistics, KPIs: lines/ churn, traffic trends, ADSL development, market shares;*
- Technical, IT Overview;
- Financial Overview as summary;
 - *YTD Actual vs. Budget and Forecast;*
 - *P&L highlights, CF; OWC, CAPEX, Risks to reach the budget/ Forecast;*
- Processes, projects;
 - *Major organizational changes, headcount optimization, outsourcing;*
 - *Fix-Mobile integration (MT), TSI Hu reorganization (integration of the two TSI Hu & KFKI¹⁹²⁹);*
 - *TSI/T-Com separation (MT), Rebranding (ST);*
 - *Acquisitions;*
- *Re-Invent CEE Program;*
- *Synergy Program;*
 - *Special topics (changing agenda);*
 - *Benchmarking; and*
 - *Strategic planning".*

(1341) In this presentation, a specific issue is mentioned concerning ST which is noteworthy: *"The Management Meeting T-Com [DT] should be held separately from the ST operational reviews, which are held before the BoD (different target group: only T-Com [DT])"*¹⁹³⁰. Thus, the bilateral [...] Management Meetings are distinct from the operational reviews sometimes organised ahead of ST's BoD meetings and

¹⁹²⁸ See DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 151, Doc ID2579, (CD list), non confidential version Doc ID3325, p. 21.

¹⁹²⁹ [...]

¹⁹³⁰ See DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 151, Doc ID2579, (CD list), non confidential version Doc ID3325, p. 22.

to which the members of BoD nominated by the Slovak Republic also participate¹⁹³¹. In other words, the [...] Management Meetings are organised at senior management level in such a way as to allow for a comprehensive review of ST's business and projects in the absence of representatives from the minority shareholder in ST, the Slovak Republic.

- (1342) [...] Management Meetings [...] were attended by top managers of ST (in particular members of the EMB and other managers concerned by the relevant issues discussed) and DT (including [Y] – Head of DT Finance Europe and a member of ST's BoD nominated by DT, [V] – the permanent invitee to ST's BoD and member of DT's BoD responsible for international subsidiaries, [D] – the Head of Strategy and International at DT/T-Com and others)¹⁹³². The meetings were held at least on the following dates, which are all within the period of the infringement as set out below (see section 13): [...] ¹⁹³³, [...] ¹⁹³⁴, [...] ¹⁹³⁵, [...] ¹⁹³⁶, [...] ¹⁹³⁷, [...] ¹⁹³⁸, [...] ¹⁹³⁹, ¹⁹⁴⁰, [...] ¹⁹⁴¹, [...] ¹⁹⁴², [...] ¹⁹⁴³ and [...] ¹⁹⁴⁴. [...] ¹⁹⁴⁵ [...] ¹⁹⁴⁶. The Management Meetings were sometimes supplemented by ad hoc meetings on specific issues¹⁹⁴⁷.
- (1343) The purpose of the Management Meetings is described in the introduction to the first meeting held on [...] by [...] (DT/T-Com's Head of Strategy and International) as follows: "*T-Com [DT] wants to have this meeting more as a preview than as a review. Main objective is to learn from each other – we want to help you to meet your targets*"¹⁹⁴⁸. Therefore, the meetings were focused not only on the past performance or the current situation but in particular on planned future actions and projects of ST. Despite the objective of "*learning from each other*" and "*help[ing] to meet targets*", the minutes of the Management Meetings contain (often as a reaction to comments or requests from DT participants) specific tasks ("*Action Items*") with a

¹⁹³¹ ST seems to refer to these meeting when it notes that: "In fact, meetings to discuss the development of ST's financials and main projects were regularly held with SR's representatives, in particular before upcoming BoD meetings." See ST's reply to the SO, Doc ID3630, paragraph 1766.

¹⁹³² See the participants indicated in the individual [...] minutes indicated below.

¹⁹³³ See [...], doc ID3294.

¹⁹³⁴ See [...], doc ID2531.

¹⁹³⁵ See [...], doc ID3296.

¹⁹³⁶ See [...], doc ID3297.

¹⁹³⁷ See [...], doc ID3298.

¹⁹³⁸ See [...], doc ID3299.

¹⁹³⁹ See [...], doc ID3300.

¹⁹⁴⁰ See [...], doc ID3301.

¹⁹⁴¹ See [...], doc ID3302.

¹⁹⁴² See [...], doc ID2515, with the date of the meeting corrected in doc ID2529, p.3.

¹⁹⁴³ See [...], doc ID3303.

¹⁹⁴⁴ See [...], doc ID3295.

¹⁹⁴⁵ See ST' reply to RFI of 11 October 2010, Response to Qs 1, 2 (1) and 3 (1) of RFI of 11 Oct 10, doc ID2529, p.3.

¹⁹⁴⁶ See ST's reply to RFI of 11 October 2010, doc ID 2553 (CD list), attachments for question 2 [...].

¹⁹⁴⁷ See e.g. reference to "*COO-Meeting*" to discuss some of the Action Items in the IMM minutes of 4 May 2006 (doc ID3294, p.6), "*One-on-One-Meeting*" between ST and DT on possible external call services (mentioned in the status report on Action Items from IMM of 3 May 2007 attached to IMM minutes of 14 September 2007, doc ID3299, p.7) or "*a separate meeting*" to discuss "*an actualised business plan*" for accelerated rollout of broadband which took place on 11 September 2006 (see IMM Minutes of 27 July 2006, doc ID2531, p.4-5).

¹⁹⁴⁸ See IMM Minutes of 04/05/2006, Doc ID3294, p.1.

responsible person, a deadline and a standardised monitoring of fulfilment of these tasks.

- (1344) In this regard it is interesting to note the wording of the very first action item at the first [...] Management Meeting of [...] referring to the "task" which "has to be done" by a specific ST department¹⁹⁴⁹: See [...] Minutes [...] stating the following: "Action Item (1): [...]".
- (1345) In addition, most Action Items establish regular reporting from ST to DT about the status of important projects (e.g. "Action Item [...]: Monthly Reporting of IP TV Status to VBV4 [DT]"¹⁹⁵⁰) or provide for detailed information on ST's activities and planned projects¹⁹⁵¹.
- (1346) DT, [Description of the meaning of a document]"¹⁹⁵²[...]"¹⁹⁵³[...].
- (1347) DT [Explanation relating to the financial results of ST]"¹⁹⁵⁴. [Explanation as to the meaning of action items]"¹⁹⁵⁵.
- (1348) Also, ST considers [Description of the scope and organisation of the information exchange between DT and ST] ."¹⁹⁵⁶
- (1349) The ability by the parent company to gain knowledge about and possibly influence among others cash flows has been considered by the case law to be relevant for the assessment of parental liability¹⁹⁵⁷. As set out by the General Court in the later HSE judgment¹⁹⁵⁸, detailed knowledge by the parent company of business operations of the subsidiary and the possibility to comment thereon are sufficient to show the exercise of decisive influence irrespective of any instructions.
- (1350) The Commission also notes that DT wrongly assumes that showing a decisive influence requires proof of the existence and the application of a sanction mechanism. In this context the Commission points out that the organisational links put in place by DT could avoid a situation of conflict. For example, DT regularly reviewed proposals in advance of their submission to ST's EMB/BoD either in IMMs as set out in the next recital or in bilateral contacts in the [...] and [...] management departments¹⁹⁵⁹, which allowed it to effectively review the material concerned before

¹⁹⁴⁹ IMM Minutes of 04/05/2006, Doc ID3294, p.1.

¹⁹⁵⁰ See [...], doc ID3294, p.5.

¹⁹⁵¹ See examples provided below in recital (1351).

¹⁹⁵² See "Follow-up Paper State of Play-Meeting" submitted spontaneously by DT on 29 April 2011, Doc ID 2922, p.3 Non confidential Doc ID 3076.

¹⁹⁵³ See "Follow-up Paper State of Play-Meeting" submitted spontaneously by DT on 29 April 2011, Doc ID 2922, p.3, non confidential version Doc ID 3076.

¹⁹⁵⁴ See DT's Reply to the SO, Doc ID4395, paragraph 157, non confidential version Doc ID4417-42.

¹⁹⁵⁵ See DT's Reply to the SO, Doc ID4395, paragraph 181, non confidential version Doc ID4417-42.

¹⁹⁵⁶ ST's reply to the SO, Doc ID 3630, paragraphs 1767 and following.

¹⁹⁵⁷ Case T-112/05 *Akzo Nobel NV and others v Commission* (vitamins case) [2007] ECR II-5049, paragraph 64.

¹⁹⁵⁸ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 99.

¹⁹⁵⁹ DT's reply to the RFI of 24 June 2010, Doc. ID 2350 (CD list), p. 4, Non confidential version Doc ID3248 where [...]. DT informed on regular contacts between its department International Regulatory Affairs and ST's regulatory department as well as DT's Area Management Slovakia. In the field of regulatory policy for instance, the above is manifest from numerous exchanges [...] 46 (doc ID3255), 82 (doc ID3257), 83 (doc ID3258), 84 (doc ID3259), 87 (doc ID3260), 111 (doc ID3261), 113 (doc ID3262), 114 (doc ID3263) and 115 (doc ID3264), as well as [...]162 (doc ID3283) and 283 (doc ID3285), attached to DT's reply to RFI of 24 June 2010; and ST's Reply to Q5 of the RFI of 24 June

it is formally presented and decided upon in meetings of ST's BoD/EMB or SuB. This allowed DT to put questions and/or request any modifications it deemed appropriate before or during these meetings. Also, DT - *via* the staff it leased or appointed - was able to receive in advance relevant information. As shown in the example of choice of the IPTV vendor below (section 12.2.6.5) such prior information received from ST executives enabled DT to influence the final decision of ST's EMB. Decision making statistics in the BoD of ST during the time period from June 2004 to September 2010 show that some [more than 90%] of BoD resolutions were adopted unanimously. From the remaining [less than 10%], all but one of the BoD resolutions were adopted with the abstention of one or more BoD members. Many of these abstentions were justified by the fact that [Reason for this]¹⁹⁶⁰. Moreover, it is especially noteworthy that none of the [...] resolutions adopted by ST's BoD in the above-mentioned period attracted a negative vote from any of the four BoD members nominated by DT. This may well be the case because of the preparation of such BoD resolutions through the IMM.

- (1351) Indeed an examination of the minutes of the IMM demonstrates that the IMM enabled DT to be informed in advance and thus have the possibility to influence the future strategy and commercial behaviour of ST in all key areas of its activities. These included the broadband and triple play activities and the underlying infrastructure roll-out and upgrade. In fact, some of the meetings were explicitly focused on these key commercial areas¹⁹⁶¹. Concerning action items addressed to DT it appears that they related at least in one instance to DT's group strategy and initiatives thus clearly serving DT's interests.¹⁹⁶²
- (1352) It is clear from the above that, at the very least, the [...] Management Meetings constituted yet another instance in which there was upstream reporting from ST to DT, which is considered by the Union Courts as a relevant item for the analysis of the exercise of decisive influence¹⁹⁶³. DT kept itself regularly informed, in great detail, of ST's activities through these fora. Moreover there are numerous instances where [...] Management Meetings minutes demonstrate that DT participants actively commented on the issues and projects presented by ST and often asked not only for more detailed information or regular reporting but also for changes or for the submission of certain documents for prior approval.
- (1353) Some of the following quotes from the minutes provide examples of (i) upstream reporting from ST to DT with respect to specific issues, activities or projects, and (ii) explicit instructions by DT to ST's management:

2010, attachments 276A (doc ID3227), 260A (doc ID3226), 285A (doc ID3228), 243A (doc ID3225), 236A (doc ID3224), 227A (doc ID3223), 226A (doc ID3222), 219A (doc ID3221), 215A (doc ID3220), 213A (doc ID3219), 117A (doc ID3218) or 44A (doc ID3229).

¹⁹⁶⁰ For example, when ST's BoD (25/9/2008) [...] (Doc ID2727, p. 6).

¹⁹⁶¹ See [...] (doc ID3298, p.1), [...] (doc ID3299, p.1) or [...] (doc ID3300, p.1) - see below recital (1353).

¹⁹⁶² See for example IMM Minutes of [...], doc ID3294, p.3: "[...]".

¹⁹⁶³ Case T-65/89 *BPB Industries v Commission* [1993] ECR II-389, paragraph 152; Case T-66/99 *Minoan Lines v Commission* [2003] ECR II-5515, paragraph 145 Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 93.

12.2.6.4.1 Examples of upstream reporting from ST to DT with respect to specific issues, activities or projects¹⁹⁶⁴

(1354) These are the following:

- [...] Management Meetings of [...]: ST presents the market situation and its sales in the residential market and in reaction to that it is requested by DT to provide more detailed information about specific residential products: "[...]"¹⁹⁶⁵ [...]"¹⁹⁶⁶
- [...] Management Meetings of [...]: ST presents the status of its preparation for the launch of triple play and its network rollout plan, which leads to several action items on these issues, ensuring not only regular information about the status of the project to DT but also a possibility for DT to review underlying business cases and decide about the best way forward: "[...]"¹⁹⁶⁷
- [...] Management Meetings of [...]: ST presents results of a pilot project for points of sales (PoS) selling both mobile and fixed products and indicates: "[...]"¹⁹⁶⁸ In the Commission's view this demonstrates that the analysis was provided to DT for harmonization with results of other CEE affiliates before the EMB meeting, scheduled eleven days after the IMM, which was supposed to decide on the way forward.
- The minutes of the [...] Management Meetings of [...]: show that DT requested the following with respect to the Accelerated [...] Migration Project: "[...]"¹⁹⁶⁹. This demonstrates in the Commission's view that a draft document for BoD was discussed in detail in advance and agreed with DT.
- IMM of 14 September 2007: ST presents the status of "No 1 in BB and IPTV" project and informs the representatives of DT that "[d]ue to competitive situation (Orange, UPC), additional 40 cities were checked for market potential and will be proposed to BoD to be gradually developed on October 10, 2007. Action Item 6: Inform in detail about status of business plan for 40 new locations and decision proposal for the upcoming BoD meeting. Date/Responsible: Mr [...] [ST], asap"¹⁹⁷⁰.
- [...] Management Meetings of [...]: ST presents its wholesale strategy stating that [...] [V] [DT] mentioned that this is no [...] and – as discussed before – he does not agree to show [...] revenues in TM SK's reporting.¹⁹⁷¹
- [...] Management Meetings of [...]: ST makes a presentation about mobile competition and about measures taken to prevent fixed-to-mobile substitution. This presentation was explicitly asked for by DT as documented in the minutes: "[...]"¹⁹⁷²
- [...] Management Meetings of [...]: During the presentation of ST on financial overview, DT representatives asked several times for detailed information about

¹⁹⁶⁴ The number of examples and their content have been shortened in comparison to the statement of objections of 7 May 2012 only with the purpose of streamlining the content of this decision.

¹⁹⁶⁵ [...].

¹⁹⁶⁶ See [...], doc ID3294, p.2.

¹⁹⁶⁷ See [...], doc ID3294, p.5.

¹⁹⁶⁸ See [...], doc ID2531, p.2-3.

¹⁹⁶⁹ See [...], doc ID3296, p.2.

¹⁹⁷⁰ See [...], doc ID3299, p.3.

¹⁹⁷¹ See [...], doc ID3300, p.3.

¹⁹⁷² See [...], doc ID3300, p.3.

individual projects or products to be able to assess the situation and to consider possible reactions: "[...]"¹⁹⁷³

- [...] Management Meetings of [...] and of [...] ST informs at the [...] Management Meetings of [...] about the status of the [...] project¹⁹⁷⁴: "[...]"¹⁹⁷⁵ At the following [...] Management Meetings of [...], ST again presents the status of the project and presents first assumptions for a business case. ST also informs that "*T-Com [ST] intends to start operations already in [...] Therefore T-Com is asking for EMB decision until end of April. [Y] [DT&ST] asks for more details about the partnership construction to be able to deeper understand the first BC [Business Case] data. [...]"*¹⁹⁷⁶
- [...] Management Meetings of [...]: Within the framework of the "*No. 1 in Broadband and IPTV*" project, ST presents a business case for the next wave of cities to be covered by its fibre network. During the meeting, there was among others a "*[d]etailed discussion of [...]"*. In this respect, "*[Y] [DT&ST] asks for the reason of relatively low planned [...]"*¹⁹⁷⁷ - [...]"¹⁹⁷⁸

(1355) In addition to these [...] Management Meetings which showed detailed examples of upstream reporting often in relation to the commercial policy of ST, there are some examples in minutes which in the Commission's view contain explicit instructions by DT.

12.2.6.4.2 Examples of explicit instructions by DT to ST's management with respect to specific issues, activities or projects

- [...] Management Meetings of [...]: ST presents a "[λ] project" and Action Item (3) requires ST to "[p]resent the actual status of the project on the Managements Meetings in 2007" while the status of this action item indicates "AI3: Presented on IMM on 02.03.07: - Project continuation approved; [...]"¹⁹⁷⁹; demonstrating in the Commission's view that continuation of this project was effectively approved by DT during the IMM.

ST claims that this indicates "*that ST's customer had by then formally decided to continue to further extend the agreement with ST*¹⁹⁸⁰". However, this does not seem to be in line with the comment on the status of this action item where no reference is made to the customers, but to the approval of the continuation of project by this [...] Management Meetings.

- [...] Management Meetings of [...]: ST presents the situation in DSL and IPTV and Mr [N] [DT] intervenes: "T-Com [ST] reaches high TRI*M customer satisfaction rates. Customer retention and Loyalty program are important parts of it. Mr [N] [DT] asks whether the Loyalty program includes TM SK [[T-Mobile Slovensko, in which ST held 100% of the shares]. Action Item 4: Prepare a proposal how TM SK can be

¹⁹⁷³ See [...], Doc ID3301, p.2-3.

¹⁹⁷⁴ [...]. See section 12.2.6.7.

¹⁹⁷⁵ See [...], doc ID2502, p.2.

¹⁹⁷⁶ See [...], doc ID3295, p.2-3.

¹⁹⁷⁷ Fibre to the x (FTTx) is a collective term for various optical fibre delivery topologies that are categorized according to where the fibre terminates.

¹⁹⁷⁸ See [...], doc ID3295, p.1-2.

¹⁹⁷⁹ See [...], doc ID3296, p.2.

¹⁹⁸⁰ ST's reply to the SO, Doc ID3630, paragraph 1773.

included in the Loyalty Program and agree it with TM SK. Date/responsible: Mr [Q] [ST], Next MM¹⁹⁸¹

- [...] Management Meetings of [...]: ST presents the main challenges for 2008 and in this connection mentions an agreement with T- Systems International (TSI)¹⁹⁸² to use the TSI brand in Slovakia. This leads to a general comment of DT with respect to branding: "Mr [N] [DT] states that against the background of actual brand decisions by DT Board of Management he considers it as important to contact Mr [O], Head of DT Brand Management, to discuss the status and elaborate a proposal and a scenario for ST. Action item 1: To agree the further re-branding scenario for ST with Mr [O]. Date/Responsible: Mr Majoroš [ST's CEO], immediately"¹⁹⁸³. Following this task given by a DT representative to ST's CEO with an immediate deadline, ST tried to set up a meeting with Mr [O] (which he cancelled twice) and then "ST sent re-branding proposals to Mr [O] which are – up to now – without reply."¹⁹⁸⁴ In the view of ST the cancelling of the meeting showed the disinterest of DT¹⁹⁸⁵. However ST did not bring forward any evidence on the reasons for the cancelations.
 - [...] Management Meetings of [...]: ST presents the status of the DVB-S project (Digital Video Broadcasting – Satellite) envisaging using satellite television distribution to offer "Magio Light" with limited services in the regions not yet covered by infrastructure necessary for a full Magio triple play. In this respect: "Mr [N] [DT] asks to be updated and to involve International Controlling T-Home [DT] in the business planning process. Action item 8: Involve Int. Controlling T-Home (CBW) in the Business Case preparation. Date/Responsible: asap; ST NBD. Action item 9: Next Status report in Q1 or Q2/2009 depending on project progress. Date/Responsible: MM Q1-2/09; ST NBD/[name] [DT]."¹⁹⁸⁶
- (1356) No elements suggest DT and ST stopped holding regular [...] Management Meetings after [...].¹⁹⁸⁷ Rather, ST indicated that it is not aware of any minutes of Management Meetings having been prepared for the period after 2 April 2009¹⁹⁸⁸. It is noteworthy that this date is concurrent with the opening of formal proceedings by the Commission against ST on 8 April 2009.
- (1357) All the above shows that the regular [...] Management Meetings held at least in [...] were an additional organisational link between ST and DT, involving upstream reporting and in the examples above explicit instructions by DT on specific issues among other things. This organisational link proves that DT was informed in great detail, in advance - and in the absence of ST's minority shareholder - about the situation and plans of ST as well as to, at least on occasion, explicitly steer the commercial behaviour of ST even before the proposals were submitted to ST's

¹⁹⁸¹ See [...], doc ID3297, p.3.

¹⁹⁸² DT's European and global services are operated by its wholly-owned subsidiary T- Systems International GmbH.

¹⁹⁸³ See [...], Doc ID3301, p.1.

¹⁹⁸⁴ See [...], Doc ID3302, p.5.

¹⁹⁸⁵ ST's reply to the SO, paragraph 1876, Doc ID 3630

¹⁹⁸⁶ See [...], doc ID3302, p.4.

¹⁹⁸⁷ ST submitted correspondence related to such meetings [...] See ST's reply to RFI of 11 October 2010, doc ID 2553 (CD list), attachments for question 2 ([...] Management Meetings).

¹⁹⁸⁸ See ST's reply to the RFI of 11 October 2010, doc ID2529, Question II,2, p. 3.

corporate decision-making bodies. In the Commission's view this contributed to establishing that DT exercised decisive influence over ST.

- (1358) ST contests this assessment and mentions in this context that [0-10] ordinary BoD meetings took place per year, compared to only [0-10] IMM, and brought forward that there was no temporary links¹⁹⁸⁹. In the Commission's view this frequency of the [...] Management Meetings in comparison to the statutory management body BoD rather shows their importance than the opposite.
- (1359) The Commission concludes that the [...] Management Meetings are a mechanism that DT has put in place to manage and/or control at least the main strategic decisions of ST. The exercise of decisive influence can be established pursuant to the case law for instance where the parent company had put in place management/controlling mechanisms which allowed it to direct the market behaviour of the subsidiary at least with respect to the main strategic decisions¹⁹⁹⁰.

12.2.6.5. The choice of the IPTV vendor [...]

- (1360) The Commission will illustrate below an example of how DT exercised decisive influence through the legal and organisational links described in the sections above regarding a strategic project for ST.
- (1361) ST was preparing to offer [Description of a new type of broadband services]¹⁹⁹¹ [...] ¹⁹⁹². This implied, amongst others, a number of upgrades in ST's access network with a view to being able to broadcast a television signal over ST's DSL network¹⁹⁹³. Further to these upgrades at network level, ST had to purchase an IPTV platform (a combination of hardware and software components) to be able to broadcast television signals over its DSL network.
- (1362) The launch of [New service] was in the Commission's conviction one of the most important and strategic projects at ST in 2005 and 2006. This is manifest amongst others from:
- [...] ¹⁹⁹⁴;
 - [...] ¹⁹⁹⁵;
 - [...] ¹⁹⁹⁶;
 - The close follow up (bi-weekly reporting¹⁹⁹⁷) of the [New type of broadband services] by ST's EMB¹⁹⁹⁸.

¹⁹⁸⁹ ST's reply to the SO, Doc ID3630, paragraph 1778.

¹⁹⁹⁰ Case 48/69 *ICI*, paragraph 134 and Case 107/82 *AEG*, paragraph 49-51.

¹⁹⁹¹ Triple play offers consist of a bundle of three services, namely broadband Internet access, voice telephony and television over IP (IPTV) services.

¹⁹⁹² See [...] submitted in reply to the RFI of 17 July 2009, Q17, attachment 26 Doc ID 1155, p.5.

¹⁹⁹³ See [...] submitted in reply to the RFI of 17 July 2009, Q17, attachment 26 Doc ID 1155, p. 7 and 13.

¹⁹⁹⁴ *Ibidem*, Doc ID 1155, p.5.

¹⁹⁹⁵ See presentation on " Triple Play, Business Case and Concept" to EMB of 10/10/2005, submitted in reply to the RFI of 17 July 2009, Q17, attachment 53, Doc ID 1182, p.2.

¹⁹⁹⁶ *Ibidem*, Doc ID 1182, p.2.

¹⁹⁹⁷ *Ibidem*, Doc ID 1182, p. 4.

¹⁹⁹⁸ See Documents [...] submitted by ST in reply to the RFI of 17 July 2009, Q17, attachment 53, 57, 59, 62, 64, 68, 69, 71, 75, 89, 111, 115, 123, 139, 143, 147 and 155, Doc IDs 1182, 1186, 1188, 1191, 1193, 1197, 1198, 1200, 1204, 1220, 1245, 1249, 1257, 1273, 1277, 1281 and 1289.

- (1363) DT states that during the selection of the IPTV vendor for ST's [New type of broadband services] it only provided support by means of not binding recommendation or advice and made its know-how available, and that ST analysed all the proposals autonomously and independently and finally selected the best proposal for the company¹⁹⁹⁹.
- (1364) ST also submits that "*DT only provides assistance on technical issues by providing know-how and information on best practices. ST has never been obliged to follow any DT guidance, here about the IPTV vendor. DT was not in a position to give instructions to ST, thus DT did not instruct ST.*"²⁰⁰⁰ ST states: [Assessment of the position of DT to certain business decisions and linked synergies for the whole DT group from the perspective of ST].²⁰⁰¹"
- (1365) The Commission does not agree with this assessment. Indeed the following recitals, based on documents that are internal to ST and DT, explain how DT exercised a decisive influence by issuing precise instructions to ST about the choice made by ST of a vendor for its future IPTV platform:²⁰⁰²
- On [...]ST issued a request for proposal (RFP), that is to say a tender for the project; [...] vendors were included in the tender, including [K/L] ²⁰⁰³;
 - On [...], [C] (member of staff leased by DT to ST²⁰⁰⁴), Director of Product Marketing²⁰⁰⁵, informed DT by e-mail of the results of the tender asking urgently for DT's decision²⁰⁰⁶; he explained in his message that: (i) "[ST] got clear signals from DT to harmonize the project plan in terms of the supplier of [New type of broadband services], with DT suppliers and concretely [K/L] and [M]"; and that (ii) "[K] and [M] did not meet [ST's] KO evaluation criteria"; against this background: "I hereby ask DT to confirm that ST should continue in the tender with selected suppliers or include again [M] and [K/L] that would either mean [...] Therefore your decision is needed till [...]"²⁰⁰⁷ [Emphasis added].
 - On [...], the results of the tender were presented [...]; the management summary of the presentation to the EMB reads: "[confidential quote on harmonization with DT and the need for clear guidelines from DT]" [Emphasis added]. Three possible scenarios were presented to the EMB for decision; the recommended scenario is "[...]"²⁰⁰⁸. This scenario is described as following the T-Com (DT) recommendation.

¹⁹⁹⁹ See DT's Reply to the SO, Doc ID4395, paragraph 14, fifteenth bullet, non confidential version Doc ID4417-42.

²⁰⁰⁰ ST's reply to the SO, Doc ID3630, paragraph 1822.

²⁰⁰¹ ST's reply to the SO, Doc ID3630, paragraph 1824.

²⁰⁰² [...]

²⁰⁰³ See [...], submitted in reply to the RFI of 17 July 2009, Q17, attachment 59, Doc ID 1188, p.2.

²⁰⁰⁴ See section 12.2.6.7.

²⁰⁰⁵ DT's Reply to RFI of 24 June 2010, attachment Q6 Annex 1, p.8, Doc ID2350, (CD list), non confidential version Doc ID3252.

²⁰⁰⁶ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 001, Doc ID2579, (CD list), non confidential version Doc ID3304, pages 1-2.

²⁰⁰⁷ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 001, Doc ID2579, (CD list), non confidential version Doc ID3304, page 2.

²⁰⁰⁸ ST's reply to the RFI of 17 July 2009, Doc ID 1188, p. 6 and 9.

- On [...], “[ST's internal discussion and proposal for the way forward]²⁰⁰⁹”. [ST argumentation]²⁰¹⁰.” In the Commission's view this rather shows that the [management body within ST] accepted DT's "proposal" under the sole condition that [Description of requirements].
- On [...], the status of the [New type of broadband services] was presented to ST's [management body within ST]: [management body within ST]. [A presentation made in this context] reads: "*EMB will harmonise with T-com in case that ST will be able to benefit from DT group contract and meet the planned budget CAPEX/OPEX 2006-08; tender will be stopped*"²⁰¹¹;
- On [...], the status of the [New type of broadband services] project was presented to [management body within ST].: "[Management body within ST] [...] The second vendor for the LAB test due to the strategic reasons and guideline from Germany will be [L]. [...]"²⁰¹² This quote shows in the Commission's view that ST changed its decision about tender rules following guidelines from DT.
- [A] (member of staff leased by DT to ST²⁰¹³), Senior Executive Vice President of ST²⁰¹⁴, reported to DT about difficulties in the evaluation of the [number] of IPTV vendors [...]. In his report, [A] informs DT that [Explanation of the pros and cons of various offers].²⁰¹⁵
- On [...], the final evaluation [Description of ST internal decision process and relevant assessment criteria]^{2016 2017}.
- On [...],[Description of ST's decision for] the final vendor.
- Most notably, in the project closing report presented to the [management body within ST].: on [...], it is recalled that ST "*follow[ed] strategy group decision*" in choosing the vendor, [K/L].²⁰¹⁸
- The choice of IPTV technology was the subject of an International [New type of broadband services] Board meeting on [date] between DT and its CEE affiliates. Presentations from this Board show that "*[IPTV roll-out [across the DT group] is managed in close international cooperation. [Having] one platform [with local look and feel approach] leads to important financial and operational synergies all over the T-Com Group*". The overarching purpose of this coordination is for DT to

²⁰⁰⁹ DT's Submission of 6 September 2012 paragraph 280, Doc ID 4417-42.

²⁰¹⁰ ST's reply to the SO, Doc ID3630, paragraph 1829.

²⁰¹¹ ST's reply to the RFI of 17 July 2009, [...], Attachment Q 17, 62, Doc ID1191, see in particular p. 2, 3, 4, 6, 7, 10 and 14.

²⁰¹² ST's reply to the RFI of 17 July 2009, [...], Attachment Q 17, 64, Doc ID1193, p. 3.

²⁰¹³ See section 12.2.6.7.

²⁰¹⁴ DT's reply to RFI of 24 June 2010, Q6 Annex 1, Doc ID2350, (CD list), non confidential version Doc ID3252, p.8.

²⁰¹⁵ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 139, Doc ID2579, (CD list), non confidential version Doc ID3323 and Q2 Annex [...] 144, Doc ID3324.

²⁰¹⁶ [...], submitted in reply to the RFI of 17 July 2009, Q17, attachment 71, Doc ID1200, in particular p. 11, 13 and 29.

²⁰¹⁷ [...], submitted in reply to the RFI of 17 July 2009, Q17, attachment 75, Doc ID Doc ID1204, p. 2.

²⁰¹⁸ [...], submitted in reply to the RFI of 17 July 2009, Q17, attachment 155, Doc ID1289, p. 8.

[description of aims] ²⁰¹⁹. The presentation material [...] explaining that a "*strategy focusing on a homogeneous technology portfolio requires international commitment to technologies already deployed. Thus, whenever a technology – which is already deployed within DT – should be implemented in a subsidiary an adaptation [of this already deployed technology] has to be considered as the first option*"²⁰²⁰.

(1366) In the light of the foregoing, the Commission considers that the contacts between DT and ST concerning ST's selection of a vendor for its IPTV platform amount to more than just guidance, coordination or exchanges of know-how. Rather, the evidence shows that DT intervened directly in this choice. In this regard, the Commission observes the following:

- DT had the possibility to influence the choice of the IPTV vendor at a very early stage in the decision making process, amongst others by information received directly from two senior executives of ST who were leased by DT to ST ([A] and [C]); the information was passed on to DT at key decision making stages in the project before ST's internal decision making body, the [management body within ST], had had the possibility to come to a decision. This early intervention of DT's leased staff led to choosing a vendor that did not meet the evaluation criteria initially set by ST.
- of the matter concerned an important investment, the purchase of [...] worth more than [...] ²⁰²¹, for which ST proved not to be free to choose its preferred supplier.
- This investment was a key element in the [New type of broadband services] project in ST, which was of strategic importance for ST as explained in recital (1362).

(1367) ST claims [Explanation for ST's independent decision in favour of a certain vendor] ²⁰²² [...] ²⁰²³"

(1368) In view of the clear wording of [...] and the evidence presented in the present section, this argument is not, in the Commission's view, convincing.

(1369) DT claims [Description of the circumstances of a business decision by ST from the perspective of DT]. ²⁰²⁴ [...] ²⁰²⁵. [...] ²⁰²⁶. [...] ²⁰²⁷.

(1370) First, the Commission considers that, contrary to what is argued by DT and as is apparent from [C]'s email of [...], which requested a decision by DT, and the subsequent presentation of [...], at the time there was a lot of uncertainty about DT's wishes. Consequently the Commission does not agree with DT's assertion [...]. Indeed the latter presentation states that "[confidential quote on need for clear

²⁰¹⁹ See DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 051 to 055, Doc ID2579, (CD list), non confidential version Doc ID3306, ID3307, ID3308, ID3309 and ID3310 and in particular doc ID3308, p. 7 to 11.

²⁰²⁰ DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 054, Doc ID2579, (CD list), non confidential version Doc ID3309, p. 11.

²⁰²¹ [...], submitted in reply to the RFI of 17 July 2009, Q17, attachment 62, Doc ID 1191, p. 6-7. [...]

²⁰²² ST's reply to the SO, Doc ID3630, paragraph 1834 and 1835.

²⁰²³ ST's reply to the SO, Doc ID3630, paragraph 1836.

²⁰²⁴ See DT's Reply to the SO, Doc ID4395, paragraph 274, non confidential version Doc ID4417-42 [...] in Annex 10, ID 4407, non confidential version Doc ID4417-44, p. 14.

²⁰²⁵ See DT's Reply to the SO, Doc ID4395, paragraph 276, non confidential version Doc ID4417-42.

²⁰²⁶ See [...], submitted in reply to the RFI of 17 July 2009, Q17, attachment 59, Doc ID 1188, p. 6.

²⁰²⁷ See DT's Reply to the SO, Doc ID4395, paragraph 276, non confidential version Doc ID4417-42.

guidelines from Germany]"²⁰²⁸ which rather shows ST's reluctance to decide on its own on this matter.

- (1371) Second, the Commission reproduces below the slide following the one DT refers to [...] ²⁰²⁹ referred to in recital (1365), third bullet, above). From this slide it is clear that these three alternatives for further action by ST can all be seen as coming from *T-com's* [DT] "guidelines" which were not yet clear concerning that point. Thus, contrary to what is argued by DT, there cannot be question of autonomy by ST on the basis of this document.

Table 50: Overview on the Scenarios

[Graph depicting the decision making process to find a suitable IPTV vendor]

- (1372) DT further argues [...] ²⁰³⁰ However, the Commission has not alleged this and does not need to prove concrete instructions from DT to ST. As already stated it is clear from the case law that a "*parent company may exercise decisive influence over its subsidiaries even when it does not make use of any actual rights of co-determination and refrains from giving any specific instructions or guidelines on individual elements of commercial policy.*"²⁰³¹ The Commission notes that according to its own submission DT subsequently supported ST vis-à-vis [K/L] during their negotiations, which led to significantly better terms for ST and ultimately the approval of [K/L] as the IPTV platform vendor.²⁰³²
- (1373) Finally, DT claims that [...] ²⁰³³. The Commission considers that the selection of the IPTV platform has an impact on the execution of the [New type of broadband service] strategy itself as can be seen by the risks associated with stopping the tender mentioned in [C]'s' email of [...] and from the [management body within ST] presentation of [...] ²⁰³⁴.
- (1374) Furthermore, the broader [New type of broadband services] strategy was subsequently identified by the [...] Board as a potential area for cooperation between DT and its CEE affiliates. A "one-company" approach was to be adopted, whereby the major product and service development initiatives were to be directly transferred to CEE affiliates. Coordination meetings and conference calls bringing together the relevant experts and/or managers of DT and the CEE affiliates were organised.²⁰³⁵

²⁰²⁸ See [...] submitted by ST in reply to the RFI of 17 July 2009, Q17, attachment 59, Doc ID 1188, p. 2.

²⁰²⁹ ST's reply to the RFI of 17 July 2009, Doc ID 1188, p. 7.

²⁰³⁰ See DT's Reply to the SO, Doc ID4395, paragraph 279, non confidential version Doc ID4417-42, paragraph 279. See also [...], submitted in reply to the RFI of 17 July 2009, Q17, attachment 59, Doc ID 1188, p. 9, [...]"

²⁰³¹ Case T-77/08 *Dow Chemical v Commission*, EU:T:2012:47, paragraph 77.

²⁰³² See DT's Reply to the SO, Doc ID4395, paragraph 293, non confidential version Doc ID4417-42 and DT's Reply to RFI of 11 October 2010, attachment Q4 Annex 1, p.5, Doc ID2579, (CD list), non confidential version Doc. ID 3294.

²⁰³³ See DT's Reply to the SO, Doc ID4395, paragraph 309, non confidential version Doc ID4417-42.

²⁰³⁴ See also [...], submitted in reply to the RFI of 17 July 2009, Q17, attachment 62, Doc ID 1191, pages 10 and 11

²⁰³⁵ See DT's reply to RFI of 11 October 2010, attachment Q5 Annex [...] 006a, in particular p. 96-97 and 104, Doc ID2579, (CD list), non confidential version Doc ID3322.

(1375) The example above shows a further instance where DT acquired detailed knowledge of a business decision of ST during the process of decision taking and influenced this decisional process at least through comments if not through instructions. Pursuant to the case law²⁰³⁶ detailed knowledge by the parent company of business operations of the subsidiary and the possibility to comment thereon may be sufficient to show the exercise of decisive influence irrespective of any instructions.

(1376) In conclusion the evidence and the examples set out in sections 12.2.6.1 to 12.2.6.5 show that DT exercised its decisive influence over ST.

12.2.6.6. DT's claim that it is being discriminated against

(1377) DT claims that it is treated unequally to Orange in comparable circumstances. DT's main argument is that Orange was not held liable in the *Telekomunikacja Polska*²⁰³⁷ and *Wanadoo Interactive*²⁰³⁸ cases which are, according to DT, comparable to the present case, in spite of being a major shareholder in both companies.²⁰³⁹

(1378) DT points out that in the case of *Telekomunikacja Polska* (TP) Orange was not held responsible although it owned a 49.78 % share in its subsidiary and "exercised *total control*"²⁰⁴⁰ over it. DT also mentions the *Wanadoo* case where Orange was not fined in spite of owning indirectly 70 % of shares. DT further notes that in the TP case the Commission did not provide any reasons why a fine was not imposed on Orange.²⁰⁴¹

(1379) In this regard DT claims that the Commission, by holding it liable, commits unjustifiable unequal treatment, and "*favours a French company and discriminates a German company*".²⁰⁴²

(1380) DT bases its claims of discrimination on the premise that the circumstances of the present case are comparable to those of *Telekomunikacja Polska* and *Wanadoo* cases, most notably on the fact that Orange was also a major shareholder in its subsidiaries.²⁰⁴³

(1381) However, DT has not put forward any concrete evidence which would demonstrate that the situations of DT and Orange would be comparable in aspects other than shareholding.

(1382) According to the settled case-law, "*the principle of equal treatment is infringed only where comparable situations are treated differently or different situations are treated in the same way*"²⁰⁴⁴ and such treatment is not objectively justified. Further "*it is clear from established case-law of the Court of Justice [...], that the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there might be*

²⁰³⁶ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 99.

²⁰³⁷ Commission decision of 22.06.2011, Case No COMP 39.525, *Telekomunikacja Polska*.

²⁰³⁸ Commission decision of 16.07.2003, Case No COMP 38.233, *Wanadoo Interactive*.

²⁰³⁹ DT's Reply to the SO, Doc ID4395, non confidential version Doc ID4417-42, paras 17 – 21.

²⁰⁴⁰ *Ibidem*, paragraph 19, Doc ID4395, non confidential version Doc ID4417-42.

²⁰⁴¹ *Ibidem*, paragraphs 19 – 20, Doc ID4395, non confidential version Doc ID4417-42.

²⁰⁴² *Ibidem*, paragraph 21, Doc ID4395, non confidential version Doc ID4417-42.

²⁰⁴³ *Ibidem*, paragraph 19, Doc ID4395, non confidential version Doc ID4417-42. DT's presentation at the Oral Hearing, p. 8-9, Doc ID3682.

²⁰⁴⁴ Case T-370/06, *Kuwait Petroleum v. Commission*, EU:T:2012:493, paragraph 72.

*discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same.*²⁰⁴⁵

- (1383) The Commission was in those cases not in possession of evidence on the exercise of decisive influence by Orange over its subsidiaries. This constitutes an objective difference in comparison with the present case, which DT did not take into account when raising its claims. Therefore DT's claims that the Commission committed unjustifiable unequal treatment cannot be accepted.
- (1384) DT also claims that the Commission did not present reasons for not imposing a fine on Orange. On this point it should be clarified that the Commission was not obliged to do so since the Commissions' files in these cases did not contain evidence of the exercise of decisive influence of Orange over TP or Wanadoo. Moreover, in the *Tokai I* judgment the General Court stated that the Commission is not required to give reasons for not imposing sanctions on parent companies when it was entitled to impose a sanction on the undertaking that participated directly in the infringement.²⁰⁴⁶ Therefore also DT's argument that the Commission breached the obligation to state reasons must be rejected.
- (1385) Furthermore DT's arguments that the Commission should not hold DT liable in the present case because it did not hold Orange liable in the *Telekomunikacja Polska* and *Wanadoo* cases cannot be reconciled with the settled case-law which grants wide powers to the Commission in setting its enforcement priorities.
- (1386) The principles concerning the Commission's discretion in setting its enforcement priorities are reflected specifically in judgments relating to the issue of parental liability. In *Dow Chemical* the General Court pointed out that "*the imputation of the infringement to the parent company is a power that is left to the Commission's discretion*".²⁰⁴⁷ *This margin of discretion means that the Commission, upon establishing an infringement, is not obliged to ascertain in every case whether the abusive behaviour of a subsidiary may be imputed to its parent company and, thus, may choose to penalise either the subsidiary that participated in the infringement or the parent company that controlled it during that period*".²⁰⁴⁸
- (1387) DT's arguments can therefore not be accepted.

12.2.6.7. The examples allegedly showing ST's independence

- (1388) DT refers to examples which allegedly show that "DT did not give instructions to ST or exercised decisive influence over ST's conduct [and that] ST rather determined its commercial and regulatory strategies independently, even when such independent conduct was clearly against DT's interests".²⁰⁴⁹ Those examples concern the following projects: (i) – (ix) [Reference to various business decisions; reference to

²⁰⁴⁵ Case C-76/06 P, *Britannia Alloys & Chemicals Ltd v. Commission*, [2007] ECR I -04405, paragraph 60.

²⁰⁴⁶ Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon and Others v. Commission (Toaki I)*, [2004] ECR II-1181, paragraph 285.

²⁰⁴⁷ Case T-42/07, *Dow Chemical and Others v. Commission*, [2011] ECR II-4531, paragraph 75.

²⁰⁴⁸ Case T-190/06, *Total and Elf Aquitaine*, ECR II-05513, paragraphs 87-89. Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon and Others v. Commission (Tokai I)*, (cited above), paragraph 281. Joined cases T 259/02 to T 264/02 and T 271/02 *Raiffeisen Zentralbank Österreich v Commission*, [2006] ECR II-5169, paras 330-331.

²⁰⁴⁹ DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 10, Doc ID2667, Non confidential version Doc ID3289.

DT's practice regarding their board members of ST]²⁰⁵⁰ DT states that *"if DT had been able to exercise decisive influence on ST or on DT nominees these examples would not exist."*²⁰⁵¹

- (1389) In this regard the Commission observes that it is not shown by DT that the allegedly independent business decisions of ST referred to by DT were against DT's interests.
- (1390) The Commission notes that the mechanisms put in place between DT and its affiliates in [...], including ST, do not deprive the subsidiaries from all responsibilities. On the contrary, some *"local responsibility"* has always remained in the hands of the affiliates' management²⁰⁵².
- (1391) Moreover, as the General Court stated in its judgment in the case *HSE v Commission*: *"[a] certain amount of autonomy on the part of the subsidiary, in particular in the management of its commercial policy stricto sensu, is not incompatible with that subsidiary forming part of the same economic unit as its parent company. Furthermore [...] in order to find the existence of an economic unity between the parent company and its subsidiary, it is not necessary that the former intervene decisively in the latter's day-to-day management and commercial policy stricto sensu."*²⁰⁵³

(1392) Below, the Commission assesses the examples referred to by DT.

12.2.6.7.1 ST's decision against the implementation of the [α wholesale telecommunication services] project

- (1393) DT believes that the fact that ST rejected the implementation of the [α] project proves ST's independence from DT. [Description of the aim of the [α] project which had the aim to integrate a number of services into one wholesale sales structure]²⁰⁵⁴. [Motivation for the rejection of the project by ST putting forward commercial reasons for the refusal].²⁰⁵⁵
- (1394) [Further motivation for the rejection].²⁰⁵⁶
- (1395) The Commission does not agree that ST's decision to drop out of the negotiations or not to participate in this project is a sign of independence from DT. In fact, before taking this decision ST had to go through high level discussions with DT in order to

²⁰⁵⁰ DT's Follow-up Paper to the State of Play Meeting, submitted on 29 April 2011, doc ID2922, p. 5, Non confidential version Doc ID3076.

²⁰⁵¹ DT's Follow-up Paper to the State of Play Meeting, submitted on 29 April 2011, doc ID2922, p. 4, Non confidential version Doc ID3076.

²⁰⁵² See for example DT's Reply to RFI of 11 October 2010, attachment Q2 Annex [...] 151, Doc ID2579, (CD list), non confidential version Doc ID3325, page 2 and page 11 [...], and attachment Q4 Annex [...] 001a, Doc ID2579, (CD list), non confidential version Doc ID3317, page 8, [...].

²⁰⁵³ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 80.

²⁰⁵⁴ See DT's Follow-up Paper to the State of Play Meeting, submitted on 29 April 2011, doc ID2922, p. 5 Non confidential version Doc ID3076.

²⁰⁵⁵ See DT's Follow-up Paper to the State of Play Meeting, submitted on 29 April 2011, doc ID2922, p. 5 Non confidential version Doc ID3076.

²⁰⁵⁶ ST's reply to the SO, paragraphs 1848 and following, Doc ID 3630

convince its parent company of its own business reasoning. [...] ²⁰⁵⁷. [Further motivation for ST's decision] ²⁰⁵⁸. [...] ²⁰⁵⁹. [...] ²⁰⁶⁰. [...] ²⁰⁶¹ [...] ²⁰⁶².

- (1396) The [α] project shows that ST was capable of convincing DT that some of its specificities ought to be duly taken into consideration and balanced against the potential interest of group level synergies. This is quite different from suggesting, as argued by DT, that ST developed its commercial strategy independently. The fact that DT, for whatever reason, finally decided not to insist on ST's participation in this project ²⁰⁶³, does not prove ST's independence in its commercial behaviour. In fact, the way in which this decision was taken contributes to proving rather the opposite.

12.2.6.7.2 Project [β] concerning the offer of a specific type of DSL wholesale service]

- (1397) DT claims that ST autonomously and secretly made a decision concerning the introduction of [β], without involving ST's BoD, having it approved only by the EMB members including those nominated by DT. [...] ²⁰⁶⁴. [...] ²⁰⁶⁵ [...] ²⁰⁶⁶.
- (1398) DT invokes that it considered the introduction of [β] as a significant economic risk for DT and for all its fixed-line affiliates including ST and strongly wished to avoid such a precedent in the EU. DT further explains [...]. DT states that despite being aware of DT's position ST nevertheless decided to implement this proposal ²⁰⁶⁷.
- (1399) ST alleges that [Explanation about ST's motivation and view that it considered that it did not need the approval of DT]. ²⁰⁶⁸

²⁰⁵⁷ DT's Reply to RFI of 11 October 2010, attachments Q4 Annex [...] 012.46, Doc ID2579, (CD list), non confidential version Doc ID3331; Q4 Annex [...] 014.44, non confidential version Doc ID3332 and Q4 Annex [...] 015.29 non confidential version Doc ID3334.

²⁰⁵⁸ See DT's Reply to RFI of 11 October 2010, attachments Q4 Annex [...] 12.14, Doc ID2579, (CD list), non confidential version Doc ID3330, p. 6 and 89 to 106 and attachment Q4 Annex [...] 14.52, non confidential version Doc ID3333, p. 36 to 52.

²⁰⁵⁹ See DT's Follow-up Paper to the State of Play Meeting, submitted on 29 April 2011, doc ID2922, pages 5-6 Non confidential version Doc ID3076.

²⁰⁶⁰ Annex 3 to DT's second Follow-up Paper, page 11, Doc ID 3055, Non confidential version Doc ID3098 and See DT's Second Follow-up Paper to the second State of Play Meeting, submitted on 1 August 2011, doc ID3052, pages 5, Non confidential version Doc ID3077. See list of redacted parts of the SO in doc ID3625 referring to recital 1489 of the SO, p.10.

²⁰⁶¹ Annex 1 to DT's second Follow-up Paper, p. 2-3, Doc ID3053, Non confidential version Doc ID3096.

²⁰⁶² See DT's Follow-up Paper to the State of Play Meeting, submitted on 29 April 2011, doc ID2922, page 6 Non confidential version Doc ID3076.

²⁰⁶³ [...] [**Confidential Annex XI** - Non confidential summary: Information on DT's planed further action]. See Annex 1 to DT's second Follow-up Paper, page 3, Doc ID3053, Non confidential version Doc ID3096.

²⁰⁶⁴ See DT's Second Follow-up Paper to the second State of Play Meeting, submitted on 1 August 2011, doc ID3052, pages 5-8, in particular p. 7, non confidential version Doc ID3077.

²⁰⁶⁵ See DT's Second Follow-up Paper to the second State of Play Meeting, submitted on 1 August 2011, doc ID3052, pages 5-8, in particular p. 7, non confidential version Doc ID3077.

²⁰⁶⁶ See DT's Second Follow-up Paper to the second State of Play Meeting, submitted on 1 August 2011, doc ID3052, pages 5-8, in particular p. 7, non confidential version Doc ID3077. See for the whole also [...] submitted in Annex 14 to DT's reply to the SO, Doc ID 4411, page 8, non confidential version Doc ID 4417-85.

²⁰⁶⁷ See DT's Reply to the SO, Doc ID4395, paragraph 325, non confidential version Doc ID4417-42, [...] transmitted in reply to the RFI of 24 June 2010, annexes Q 4_ [...] 12 and 56, Doc ID2347 (CD list) and declaration of [...] submitted in Annex 14 to DT's reply to the SO, Doc ID 4411, page 8, non confidential version Doc ID 4417-85.

²⁰⁶⁸ ST's reply to the SO, paragraphs 1854 following, Doc ID3630.

- (1400) DT [Explanation why there was no need for ST to get the approval for the development or deployment of new products]²⁰⁶⁹
- (1401) In any event the Commission cannot agree with DT's interpretation of the facts. The evidence on file shows that the introduction of [β] was indeed a source of concern for DT's regulatory department, accentuated by the fact [...] ²⁰⁷⁰. However, this issue was not totally new for DT, in so far as two senior executives as well as other departments in DT had already been informed of the project several months before²⁰⁷¹. On [...] a presentation was sent by [...] (ST) to [β] (DT) which mentions [β] as strategic measure to achieve growth.²⁰⁷² The remark by ST that the document was sent to [...] of DT "purely for background information"²⁰⁷³ does not change that she had been informed.
- (1402) Following this it appears that the executives and departments in question did not voice any objections to this project or ask for further information on it. It was only when DT's regulatory department discovered it, on [...] that this topic was raised again.
- (1403) [ST internal statement indicating that DT was informed of project [β]]. ²⁰⁷⁴
- (1404) [ST management internal email indicating that ST takes the view that DT is realising the existence of project [β] at a late stage]²⁰⁷⁵ DT appears to interpret this latter statement as an acknowledgment by ST Representatives that they knew that DT was not aware of their plans before November 2005. Such an interpretation is not borne out by the facts. First, the quotation marks for the word "*realising*" seems to suggest that it was meant ironically and that despite being informed before DT seems to be reacting only rather late. [G] wrote this while he was aware that he had informed some persons and departments within DT. Second, at least [F], [Y] and [E] as well as the [two DT] departments had been informed by ST, as set out in the previous recital. The plan to actively offer [β] as a wholesale product was explicitly indicated at least in a document submitted to DT already in [...] ²⁰⁷⁶. Contrary to the claims of DT, the information is not "*hidden*" in the document but has a prominent place among the five strategic measures which ST plans to take to achieve further growth. Third, [G] [ST] also indicated in the email of [...] to DT that the issue had previously been

²⁰⁶⁹ See DT's Reply to the SO, Doc ID4395, paragraph 340, non confidential version Doc ID4417-42, [...]

²⁰⁷⁰ DT's reply to the request for information of 24 June 2010, attachment Q4 [...] 082, Doc ID2350, (CD list), Non confidential version Doc ID3267 and attachment Q4 [...] 087, Non confidential version Doc ID3272. See list of redacted parts of the SO in doc ID3625 referring to recital 1492 of the SO, p.11.

²⁰⁷¹ DT's reply to the request for information of 24 June 2010, attachment Q4 [...] 098, Doc ID2350, (CD list), Non confidential version Doc ID3279, which, [...], attachment Q4 [...] 107, Doc ID2350, (CD list), Non confidential version Doc ID3282, page 12), [...]The second document (DT's reply to the request for information of 24 June 2010, attachment Q4 [...] 106, Doc ID2350, (CD list), Non confidential version Doc ID3281, page 28), [...].

²⁰⁷² DT's reply to the request for information of 24 June 2010, attachment Q4 [...] 107, Doc ID2350, (CD list), Non confidential version Doc ID3282, page 12.

²⁰⁷³ ST's reply to the SO, paragraph 1858, Doc ID3630.

²⁰⁷⁴ See Annex 6 to DT's second Follow-up Paper, page 2, Doc ID 3058.

²⁰⁷⁵ *Ibidem*, doc ID3058, p.1.

²⁰⁷⁶ See DT's Reply to the request for information of 24 June 2010, attachment Q4 [...] 107, Doc ID2350, (CD list), Non confidential version Doc ID3282, page 12.

discussed with DT on numerous occasions²⁰⁷⁷. DT does not provide any evidence indicating that this statement was inaccurate.

- (1405) In view of the above, the Commission concludes that DT had been informed of the introduction of [β] by ST. [...]. DT suggests that ST "*rather concealed its plan*"²⁰⁷⁸ which may be related to the fact that DT considered it as significant economic risk and communicated this view to its fixed-line affiliates (see above recital (1398)). From the email of [G] referred to in recital (1403) above it seems that ST communicated the information with the departments it considered relevant in DT, although not with the regulatory department.
- (1406) Even if DT's interpretation of these facts were correct (quod non) to the effect that this behaviour was meant to "*run this topic under the radar*", this would still be relevant because it would show that ST feared DT's reaction to its plan, which in turn presupposes DT's influence over ST's commercial policy.
- (1407) DT argues that it had no opportunity to take measures in order to prevent the introduction of [β], and never attempted it. DT states that only a few of the e-mail messages from [...] (from DT's Regulatory Department) were actually sent to ST and that they were merely requests for information or clarification.²⁰⁷⁹
- (1408) The Commission notes, as DT itself has argued, that there is no conclusive evidence that DT ever tried to block the introduction of [β]. On the contrary there is evidence that even though DT's position of principle on [β] may indeed be as described by DT, DT was not as rigid on this subject as it claims. In this regard the following quote from an email of DT from the email exchange between DT and ST on 23 November 2005 referred to in recital (1403) above is self-explanatory: "*You may be aware that Management attention concerning [β] is high. In Germany, [β] is regarded as a strong threat. However, we understand that there may be reasons in Slovakia which may justify a deviating approach.*"²⁰⁸⁰ This shows that DT may accept deviation by a subsidiary from its approach, but this must be justified to DT with reasons. The Commission considers that this does not show that ST can introduce an important business project autonomously.
- (1409) The Commission also observes that, in accordance with DT's latter statement ST justified the commercial rationale of introducing naked DSL on market considerations which are distinctively different from Germany and/or specific to Slovakia, e.g. the low penetration rate of fixed telephony landlines. DT put forward that ST saw in the introduction of [β] a suitable strategy to be able to stand up against the allegedly intensive competition in the market and to bind ST's competitors again more closely to its network also by offering wholesale products²⁰⁸¹. In this regard it seems noteworthy that the evidence of DT's concerns with naked DSL in 2005

²⁰⁷⁷ *Ibidem*, doc ID3058, p.2.

²⁰⁷⁸ See above recital (1400).

²⁰⁷⁹ See DT's Reply to the SO, Doc ID4395, paragraph 354, non confidential version Doc ID4417-42 and DT's reply to the request for information of 24 June 2010, attachment Q4 [...]82, Doc ID2350, (CD list), Non confidential version Doc. ID 3267, and attachment Q4 [...]83, Non confidential version Doc. ID 3268.

²⁰⁸⁰ See DT's reply to the request for information of 24 June 2010, attachment Q4 [...]097, Doc ID2350, (CD list), Non confidential version Doc ID3278.

²⁰⁸¹ See DT's Reply to the SO, Doc ID4395, paragraph 341, non confidential version Doc ID4417-42.

submitted by DT originates from DT's regulatory department²⁰⁸² and there is no evidence that other DT departments consulted in advance would object to the plan. In addition, ST's own regulatory department was also concerned about a possible launch of [β] services. This suggests that the differing views may rather have existed between the DT's regulatory department, on the one hand, and the DT's commercial & strategy department, on the other, rather than between DT and ST.

- (1410) Moreover, DT itself argues that it did not try to influence ST once it allegedly found out about it.²⁰⁸³
- (1411) The Commission considers that the evidence presented by DT does not demonstrate that ST acted autonomously regarding the introduction of [β] or that DT tried but was not able to block its introduction. The evidence rather shows that DT expected to be constantly fully informed on business projects by ST to be able to comment on them and that ST considers itself complying with this obligation. Further it shows that ST needs to justify itself when DT considers ST has not fully informed all relevant departments in a project. Therefore this example cannot be regarded as demonstrating ST's independence from DT.
- (1412) Finally, it is worth noting that shortly after the communication problems relating to this project and the introduction of [β], DT decided to set up the [...] Management Meetings the purpose of which was to allow DT to be better informed of ST's plans²⁰⁸⁴. During the very first [...] Management Meetings, there are several action items by which DT requests specific regular reporting about the development of wholesale and retail [β] of ST²⁰⁸⁵.
- (1413) DT rejects any connection between the [β] case and the introduction of the [...] Management Meetings, which in its view had the objective of exchanging best practices and know-how as well as financial reporting²⁰⁸⁶. The Commission does not contest these objectives of the [...] Management Meetings; it considers however the timing for introducing a further forum for exchanging best practices and know-how shortly after this incident telling and therefore it seems unlikely that this experience was not taken into consideration to improve future communications.

12.2.6.7.3 [Project γ which concerns a specific type of broadband network technology]

- (1414) With respect to the introduction of [γ] in ST's [...] network, DT claims that ST started switching to [γ] well before DT and its other affiliates and that "*no DT expert was involved in the preparation of the project concept and execution*"²⁰⁸⁷. DT further explains that "*DT was against ST introducing the [γ] technology because the capital investment would be very high and would likely not have been compensated by*

²⁰⁸² See DT's Second Follow-up Paper to the second State of Play Meeting, submitted on 1 August 2011, doc ID3052, pages 5-8.

²⁰⁸³ This is confirmed by the following quote: [**Confidential quote in Annex XII**]. See DT's reply to the request for information of 24 June 2010, attachment Q4 [...]107, Doc ID2350, (CD list), Non confidential version Doc ID3282, page 1.

²⁰⁸⁴ See subsection 12.2.6.4 above.

²⁰⁸⁵ See in particular [...] (doc ID3294, p.3), [...] (doc ID2531, p.3) and [...] (doc ID3296, p.5).

²⁰⁸⁶ See DT's Reply to the SO, Doc ID4395, paragraph 356, non confidential version Doc ID4417-42.

²⁰⁸⁷ See DT's reply to the RFI of 24 June 2010, doc ID2352, p.11, non-confidential version Doc ID3248.

possible benefits of the new technology".²⁰⁸⁸ Nevertheless, ST implemented that project, which allegedly shows its independence from DT.

- (1415) The Commission does not agree with such an interpretation of the facts for the following reasons.
- (1416) DT did not provide any evidence of its opposition to the project nor of its recommendations to DT-nominated BoD members in this respect (even though [Technology concerned] was discussed and approved [...])²⁰⁸⁹.
- (1417) DT argues that the Commission fails to recognize that the autonomous behaviour of an affiliated company does not necessitate that such a company necessarily acts against an explicit instruction from the parent company²⁰⁹⁰. DT further argues that the Commission bears the burden of proof to show that DT has exercised a decisive influence on the commercial behaviour of ST²⁰⁹¹. In this regard the Commission considers that it has shown that DT exercises decisive influence over ST in the previous sections²⁰⁹². It is recalled that it is not the Commission who brought up this example to prove the exercise of decisive influence by DT over ST; on the contrary it is DT who brought up this example to argue that ST behaved independently *vis à vis* DT. Thus in order to establish this alleged independence it is DT who bears the burden of proof.
- (1418) The main piece of evidence relied upon by DT to substantiate its claim that it opposed this project is an interview²⁰⁹³ given by [A], a member of DT's staff leased to ST, which was published in 2006, that is to say after the implementation of [γ], and published in the Detecon Management Report. In response to a question on the barriers which had to be overcome internally or externally regarding this project, [A] notably replied that: "*there were a lot of internal objections and resistances and sceptical people had to be convinced*"²⁰⁹⁴. The Commission considers this a general statement which doesn't indicate resistance coming from DT's decision making bodies. It therefore does not show that DT objected to this project but just that the internal decision making process was difficult.
- (1419) ST contests [Description of DT's involvement and ST's claim that it acted autonomously]²⁰⁹⁵.
- (1420) It is however clear that the introduction of [γ] was discussed between ST's and DT's management in several [...] Management Meetings²⁰⁹⁶. In addition, the minutes of these meetings indicate that DT experts were indeed involved in the project and that

²⁰⁸⁸ See DT's Follow-up Paper to the State of Play Meeting, submitted on 29 April 2011, doc ID2922, p. 6 Non confidential version Doc ID3076.

²⁰⁸⁹ See DT's Follow-up Paper to the State of Play Meeting, submitted on 29 April 2011, Annex 5, Doc ID2918.

²⁰⁹⁰ See DT's Reply to the SO, Doc ID4395, paragraph 362, non confidential version Doc ID4417-42.

²⁰⁹¹ See DT's Reply to the SO, Doc ID4395, paragraph 363, non confidential version Doc ID4417-42.

²⁰⁹² See sections 0 to 0.

²⁰⁹³ Interview Slovak Telecom "*Another Example of Successful Strategic Implementation at Slovak Telekom*", Detecon Management Report, 02/2006, submitted as Annex 15 of DT's Reply to the SO, Doc ID 4412, non confidential version Doc ID4417-86.

²⁰⁹⁴ *Ibidem*, Doc ID 4412, p. 3.

²⁰⁹⁵ ST's reply to the SO, paragraph 1862, Doc ID 3630.

²⁰⁹⁶ See [...] (Doc ID3296, p.3), [...] (Doc ID3297, p.5), [...] (Doc ID3299, p.3-4), [...] (Doc ID3300, p.1-2), [...] (Doc ID3301, p.4), [...] (Doc ID3302, p.3) or [...] (Doc ID3295, p.3).

there was cooperation between ST and DT teams involved in the introduction of [γ].
[...]."²⁰⁹⁷ [...] "²⁰⁹⁸, [...]."²⁰⁹⁹

- (1421) Finally, in the same submission, DT contradicts its statement that no DT expert was involved in the execution of the [γ] project. DT states [Explanations and reference to quotes which indicate that DT experts were involved in discussions with ST on the introduction of the [γ] technology]."²¹⁰⁰
- (1422) Therefore, the fact that ST introduced [γ] and the way in which this project was implemented does not support DT's claim that this would constitute an independent initiative of ST despite concerns expressed by DT. It rather confirms, in the Commission's view, the close coordination between DT and ST and the close involvement of DT in such projects of ST. Also ST states that being the first in the group to introduce the [γ] technology for switches, ST considered that it would be able to choose a solution that could in the interest of synergies and know-how exchange, end up becoming the standard for the entire group²¹⁰¹. In this way ST contradicts its claim that the decision was taken independently of group considerations.

12.2.6.7.4 [Project δ relating to the provision of TV services]

- (1423) Another example put forward by DT, relating to the introduction of [δ services] by ST (referred to also as [δ]²¹⁰² or "[...] Project"²¹⁰³) allegedly shows ST's independence. DT notably supports its claim that "*[i]n Germany, DT does not offer a similar product.*"²¹⁰⁴ Also, ST states that it developed [δ services] autonomously.²¹⁰⁵ However, DT itself indicates that ST justified the need for such a product by specific conditions in the Slovak market²¹⁰⁶. As mentioned above (recital (1408)) the fact that the [β] product was not offered in Germany either, this did not prevent DT from telling ST that "*[h]owever, we understand that there may be reasons in Slovakia which may justify a deviating approach.*"²¹⁰⁷
- (1424) Moreover, this project was discussed in advance (as of a very early stage when "*ST started to consider the introduction of [δ]*"²¹⁰⁸ in [...], that is to say around two years before the launch of the service in [...]²¹⁰⁹) between ST and DT management at several [...] Management Meetings²¹¹⁰. In a statement made at an [...] Management Meeting as early as [...], a "*close cooperation is intended*" with respect to this

²⁰⁹⁷ See DT's reply to the RFI of 11 October 2010, Question 4, Annex 3, Doc ID3297, p.5.

²⁰⁹⁸ See DT's reply to the RFI of 11 October 2010, Question 4, Annex 5, Doc ID3299, p.4.

²⁰⁹⁹ See DT's reply to the RFI of 11 October 2010, Question 4, Annex 6, Doc ID3300, p.2.

²¹⁰⁰ See DT's reply to RFI of 24 June 2010, Doc ID2352, p.5, Non confidential Doc ID3248.

²¹⁰¹ ST's reply to the SO, paragraph 1866, Doc ID 3630

²¹⁰² [...].

²¹⁰³ See DT's reply to the RFI of 11 October 2010, Question 4, Annex 9, Doc ID3303, p.2.

²¹⁰⁴ See DT's reply to the RFI of 24 June 2010, Doc ID2352, Question 3, p.11, Non confidential Doc ID3248.

²¹⁰⁵ ST's reply to the SO, paragraph 1870, Doc ID 3630

²¹⁰⁶ See DT's reply to the RFI of 24 June 2010, Doc ID2352, Question 3, p.11, Non confidential Doc ID3248.

²¹⁰⁷ [...] attachment Q4 [...] 097, Doc ID2350, (CD list), Non confidential version Doc ID3278.

²¹⁰⁸ See [...], DT's reply to the RFI of 11 October 2010, Question 4, Annex 7, Doc ID3301, p.4.

²¹⁰⁹ [...]see DT's Reply to the SO, Doc ID4395, paragraph 377, non confidential version Doc ID4417-42.

²¹¹⁰ See [...] (Doc ID3301, p.4), 28/08/2008 (Doc ID3302, p.3-4.) or 29/01/2009 (Doc ID3303, p.2).

project within the DT Group (in particular with [...] and [...])²¹¹¹. As evidenced in the minutes of the [...] Management Meetings of [...] DT representatives also explicitly requested ST management to be updated and to involve DT departments with respect to the preparation of the [δ] services: [...] ²¹¹² [...] ²¹¹³ [...] ²¹¹⁴.

- (1425) In this respect DT has not provided any evidence showing that it was opposed to this project and further DT did not prove that it was not involved in this project; indeed the evidence referenced above rather shows the opposite as well as an explicit instruction from DT to ST in the management meeting of [...] to update "[...] *and to involve* [Name of their relevant department in DT] *in the business planning process*"²¹¹⁵ (see section 12.2.6.3 above).
- (1426) In view of the above facts, the introduction of [δ] by ST cannot be considered as autonomous behaviour of ST towards DT. On the contrary, it represents rather a further example of DT's close and early involvement in ST's projects.

12.2.6.7.5 Re-branding

- (1427) DT argues that ST has always decided autonomously [...] ²¹¹⁶. Also ST states that it [...].²¹¹⁷
- (1428) Before addressing the individual branding examples, the Commission would like to point out that there is evidence that branding issues in general are being discussed and coordinated between ST and DT and that DT even gives explicit instructions to ST with respect to product branding. For example, "[Reference to documents concerning internal procedure concerning rebranding]"²¹¹⁸. This clearly shows that ST was not independent in its branding decisions and that it had to agree its re-branding strategy with DT.
- (1429) Furthermore, as acknowledged by DT, ST implemented DT's "T" brands and changed the overall corporate brand and identity to reflect its affiliation to the DT Group. The Commission notes that this is relatively costly²¹¹⁹. Corporate rebranding made in 2005 followed only two years after previous change of the corporate brand from Slovenské Telekomunikácie to Slovak Telecom, which also involved a change of the logo and all corporate identity²¹²⁰. Already in 2003 the Annual Report uses the name "Slovak Telecom" and states the following: "*In the second half of 2003 our company was preparing for the change of its business name and logo, and for the*

²¹¹¹ See [...], Doc ID3301, p. 5.

²¹¹² See [...], Annex 8 to DT's reply to Question 4 of the RFI of 11 October 2010, Doc ID3302, p.4.

²¹¹³ See [...], doc ID3190; see also [...], doc ID1411, p.3.

²¹¹⁴ See DT's reply to the RFI of 11 October 2010, Question 4, Annex 9, Doc ID3303, p.2.

²¹¹⁵ See [...], doc ID3302, p.4.

²¹¹⁶ See DT's Reply to the SO, Doc ID4395, paragraph 393, non confidential version Doc ID4417-42.

²¹¹⁷ ST's reply to the SO, paragraph 1872, Doc ID 3630.

²¹¹⁸ See DT's reply to Question 4 of the RFI of 11 October 2010, Annex 7, [...], Doc ID3301, p.1.

²¹¹⁹ [...] doc ID2772 (CD list), non-confidential doc ID3343 submitted in DT's reply to the RFI of 6 December 2010, attachment Q4 Annex 4, p.6). See list of redacted parts of the SO in Doc ID3625 referring to recital 1506, Footnote 2098 of the SO, p.12.

²¹²⁰ See ST Annual Report for 2003 – English version, page 17, available at ST's webpage: <https://www.telekom.sk/english/company/financial-and-annual-reports/annual-reports-slovak-telekom-a-s/>, Doc ID4845.

*introduction of the newly created corporate identity*²¹²¹. ST further states that its new corporate identity was implemented in full autonomy²¹²². However, the evidence further shows that a [...] part of the rebranding of ST decided upon in [...] was in fact paid by DT²¹²³. On 8 March 2006 ST changed its corporate name to "Slovak Telekom, a.s.", replacing the letter "c" by the letter "k"²¹²⁴. According to ST's contemporaneous public statements with respect to this rebranding, "*Slovak Telekom, a.s. will thus also outwardly identify itself with the Deutsche Telekom AG Group.*"²¹²⁵ A month earlier ST already communicated in a press release: "*This step will bring Slovak Telecom even closer to its parent company Deutsche Telekom AG.*"²¹²⁶. Therefore, as of March 2006, when this rebranding took effect, ST's corporate name, logo, branding and overall identity to the outside world was aligned with the DT corporate branding.

- (1430) In this regard the General Court held, in Case HSE that: "*It can be inferred from that case-law that, in general, the fact that two companies present themselves towards the outside world as forming part of the same group constitutes relevant evidence which, without necessarily being sufficient in itself, may be taken into consideration along with other evidence in order to justify the conclusion that they form part of the same economic unit, with the result that the infringement committed by one may be imputed to the other.*"²¹²⁷ Therefore the Commission considers that ST's re-branding shows that DT and ST presented themselves in general towards the outside world as forming part of the same economic unit.
- (1431) With respect to the individual examples of some of ST's brands being different from those used by DT, the evidence suggests that, rather than being an expression of ST's independence, they reflect the market reality in Slovakia and the necessity of certain adaptations of DT 's original strategy. The available evidence shows that with respect to most of the examples put forward by DT and ST, ST had to justify or at least to explain to DT the use of its own brands, which indicates that such an approach was considered as an exception to the overall DT aligned corporate branding.
- (1432) DT refers to several examples relating to branding²¹²⁸ where ST allegedly acted independently of DT, pursuing own brands for several products and services. DT refers in particular to ST not using "T-Home" and "Entertain" brand and keeping its own brands such as Magio or Zoznam. It also argues that some features of their

²¹²¹ See ST Annual Report for 2003 – English version, page 17, available at ST's webpage: <https://www.telekom.sk/english/company/financial-and-annual-reports/annual-reports-slovak-telekom-a-s/>, Doc ID4845.

²¹²² ST's reply to the SO, paragraph 1873, Doc ID 3630.

²¹²³ [...], Doc ID2772 (CD list), non-confidential Doc ID3343, attachment Q4 Annex 4, p.6-7 to DT's reply to RFI of 6 December 2010). See list of redacted parts of the SO in Doc ID3625 referring to recital 1506, Footnote 2100 of the SO, p.13.

²¹²⁴ See press release of ST of 08/03/2006 "Customers to meet only the T-Com brand as of today", Doc ID3359

²¹²⁵ See press release of ST of 08/03/2006 "*Customers to meet only the T-Com brand as of today*", Doc ID3359.

²¹²⁶ See press release of ST of 14/02/2006 "*Slovak Telecom is launching the T-Com brand to the Slovak market*", Doc ID3360.

²¹²⁷ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 36.

²¹²⁸ See DT's Reply to the RFI of 24 June 2010, Doc ID2352, Question 3, p.11-12, non-confidential version Doc ID3248 and DT's reply to the request for information of 24 June 2010, Question 3(vi), p. 10, Doc ID2667, Non confidential Doc ID3289.

products are different from DT's products and that marketing campaigns are solely in the responsibility of ST.

- (1433) DT states that to the present, ST markets products which are advertised as "Entertain" products in Germany, under the brand of "Magio", as ST did [Reasons for ST's decision]. DT explains that the IT company PosAm, in which ST acquired a 51 % share effective from January 2010, did not receive, contrary to DT's wish, the name "T-Systems"²¹²⁹.
- (1434) As regards ST not using the "T-Home" brand to replace "T-Com" and not using the "Entertain" brand of DT instead of ST's "Magio" brand, ST's justification is described in [Explanation for ST's decision regarding its branding policy]²¹³⁰. Therefore, the reasons for not introducing the new DT brands [Reasons for this decision]²¹³¹. They were rather related to exogenous factors (the fact that a similar brand is already used for similar services by ST's direct competitor Orange in Slovakia) and to the objective success of the existing brand. Also, the [Internal documents] do not contain any evidence that DT representatives were opposed to these arguments.
- (1435) Similarly, with respect to the [Name] brand, the minutes [Reasons for not changing the name of the brand concerned]²¹³². DT states that according to its logic, [Name] would have to be renamed to "T-Online"²¹³³. The minutes again do not include any indication that DT representatives were not satisfied with this justification or that they would be suggesting that ST renames the [Name of an internet address]²¹³⁴.
- (1436) Therefore, the Commission does not consider the fact that some brands used by ST are different to those of DT as evidence of commercial independence of ST. In this respect the Commission also takes into account the above described general influence of DT on ST's branding, including the necessity for ST to agree on rebranding with the relevant DT department, and the fact that deviations from this had to be justified by ST vis-à-vis DT.
- (1437) Further, the argument of DT that ST products such as [Name of service] have certain features which DT's products do not have, cannot be considered as evidence of the lack of decisive influence of DT over ST. It is not necessary for ST to copy exactly all products and services of DT for a decisive influence to exist. This is the case in particular in view of the fact that there are objective differences between the German and Slovak telecommunications market²¹³⁵.

²¹²⁹ See DT's Reply to the SO, Doc ID4395, paragraph 394, non confidential version Doc ID4417-42.

²¹³⁰ See DT's reply to Question 4 of the RFI of 11 October 2010, Annex 7, [...], Doc ID3301, p.3-4.

²¹³¹ See doc DT's Reply to the RFI of 24 June 2010, Doc ID2352, Question 3, p.12, non-confidential version Doc ID3248.

²¹³² See [...], Annex 2 to DT's reply to Question 4 of the RFI of 11 October 2010, Doc ID3296, p.4.

²¹³³ See DT's Reply to the SO, Doc ID4395, paragraph 395, non confidential version Doc ID4417-42.

²¹³⁴ See e.g. the press article "*The most visited Slovak internet address was zoznam.sk*" of 07/11/2004, Doc ID3349.

²¹³⁵ This was also claimed by ST not only in various discussions with DT but also in its submissions to the Commission (see e.g. the Third Issues Paper of ST, doc ID2401 as well as the expert opinion of [...] submitted by ST, doc ID2418).

12.2.6.7.6 The [λ] project

- (1438) DT states that ST decided for the [λ] project and thus to be active outside Slovakia, despite the fact that in DT's view, possible conflicts with other affiliated companies could arise²¹³⁶. [Description of ST's strategic project]²¹³⁷. [Statement of ST's knowledge about DT's concerns regarding this project]²¹³⁸. ST however does not bring forward any proof of DT's alleged concern.
- (1439) [Description of DT's policy regarding such projects]²¹³⁹.
- (1440) [Statement of DT regarding its policy]²¹⁴⁰.
- (1441) The Commission notes that the latter statement comes from a DT unit and does not appear to be DT's final position on this issue. In this regard the Commission refers to the Management Meeting of [...] where ST presents the [λ] project [... which] demonstrates that continuation of this project was effectively approved by DT during the Management Meeting (see section 12.2.6.4 above).
- (1442) In light of this statement the Commission considers that this example put forward by DT cannot be regarded as showing ST's autonomous behaviour towards DT but shows rather, to the contrary, the close coordination between DT and ST as regards ST's projects.

12.2.6.7.7 [μ] project

- (1443) DT alleges that as regards the [μ] project, "*ST decided, [...] to be active outside Slovakia, even if, from the point of view of DT, a conflict with another affiliated company occurred*"²¹⁴¹.
- (1444) DT explains²¹⁴² [...] ²¹⁴³ ²¹⁴⁴. DT states that although ST knew of these concerns, it decided to develop this business field in any case. [DT reference to the ST internal decision process]. Also ST states that it was aware of DT's concerns but, nevertheless followed through with its plan²¹⁴⁵. It however does not bring forward any proof of DT's concerns.
- (1445) The Commission cannot accept this argument in view of the fact that the only evidence put forward by DT to substantiate its claims about its concerns is a written statement by [A], prepared for the purposes of the present case.

12.2.6.7.8 Outsourcing of ST's [π asset] management department

- (1446) DT refers to another example of alleged independent behaviour by ST, concerning the outsourcing of its [π] management department. DT claims that when ST

²¹³⁶ See DT's Reply to the SO, Doc ID4395, paragraph 421, non confidential version Doc ID4417-42.

²¹³⁷ See DT's Reply to the SO, Doc ID4395, paragraph 422, non confidential version Doc ID4417-42.

²¹³⁸ ST's reply to the SO, paragraph 1883, Doc ID3630.

²¹³⁹ See DT's Reply to the SO, Doc ID4395, paragraph 423, non confidential version Doc ID4417-42.

²¹⁴⁰ DT's Reply to the RFI of 9 December 2010, Q4 Annex 7, p. 12, Doc ID 2772, non confidential version Doc ID2829, see also DT's Reply to the SO, Doc ID4395, paragraph 426, non confidential version Doc ID4417-42, p.142.

²¹⁴¹ See DT's Reply to the SO, Doc ID4395, paragraph 427, non confidential version Doc ID4417-42.

²¹⁴² See DT's Reply to the SO, Doc ID4395, paragraph 428, non confidential version Doc ID4417-42.

²¹⁴³ Doc. ID 543 [...]

²¹⁴⁴ See [...] submitted in Annex 10 to DT's Reply to the SO, p. 19. [...], Doc ID4407, non confidential version Doc ID4361-46.

²¹⁴⁵ ST's reply to the SO, paragraph 1881, Doc ID3630.

considered this project and announced a tender, a DT subsidiary ([XX] GmbH, [...]), which had already been managing T-System's [π] in [...]) expressed its strong interest and as a result opened an office in Bratislava to prepare its offer. DT states it believed that ST could achieve synergies in [π] management and procurement of [assets concerned] with the help of [XX] based on economies of scale²¹⁴⁶. Although, [XX]' offer was allegedly the best compared to other bidders, ST's BoD asked in [...] for a reviewed offer²¹⁴⁷. When [...] refused to review its offer, ST rejected it and decided to continue managing [assets concerned] services internally.²¹⁴⁸

- (1447) The Commission considers this example as being of limited value because such an agreement between ST and [XX] would have fallen within [ST internal corporate legal document]²¹⁴⁹. Decisions on these agreements are part of the limited number of decisions (set out in an exhaustive list) for which a qualified majority is necessary in the BoD. Thus for these decisions the BoD members of ST's minority shareholder, the Slovak Republic needs to give its approval. [Information of the minority shareholders attitude regarding outsourcing of projects].²¹⁵⁰
- (1448) The Commission notes [Description of the minority shareholder's voting rights].
- (1449) Further the example above did not show that in the end ST outsourced the respective management department to a third party but merely decided to continue managing the service internally, which did not seem to be a problem for DT.
- (1450) In conclusion this example cannot have any appreciable effect on the general ability of DT to exercise decisive influence over ST's commercial behaviour as shown above in sections 12.2.6.1 to 12.2.6.5.

12.2.6.7.9 ST's purchases of [φ] [category of internet services]

- (1451) DT explains that on the one hand, operators such as ST purchase [φ] services from [Description of operators who offer these services]²¹⁵¹.
- (1452) DT states that ST acts independently in the purchase of services and does not prefer any DT services. DT explains that ST declined purchasing [φ] services from the [YY] of DT, either completely or on a major scale²¹⁵².
- (1453) DT explains [List of reasons for a DT group solution for the provision of these services rather than sourcing these services from third parties]²¹⁵³. For the implementation of this project, DT required support by the holding companies. DT states that ST, however, decided not to participate in the [φ and other services] Centralization project²¹⁵⁴.

²¹⁴⁶ See DT's Reply to the SO, Doc ID4395, paragraph 414, non confidential version Doc ID4417-42.

²¹⁴⁷ See [...], Doc ID2772, non-confidential version Doc ID3345, p. 17, submitted with DT's reply to the RFI of 9 December 2010, attachment Q4 Annex 6. [...], submitted by ST in attachment 11 of the reply to the RFI of 9 December 2010, Doc ID 2750, p. 6.

²¹⁴⁸ See also ST's reply to the SO, paragraph 1880, Doc ID 3630.

²¹⁴⁹ ST's Shareholders' Agreement page 6, Attachment Q9_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3253.

²¹⁵⁰ See DT's Reply to the SO, Doc ID4395, paragraph 84, non confidential version Doc ID4417-42.

²¹⁵¹ See DT's Reply to the SO, Doc ID4395, paragraph 429-430, non confidential version Doc ID4417-42 and [...], in its Annex 16. Doc ID 4413, non confidential version Doc ID4417-87, p. 4 et seqq.

²¹⁵² See DT's Reply to the SO, Doc ID4395, paragraph 429, non confidential version Doc ID4417-42.

²¹⁵³ [...] Annex 16 to DT's Reply to the SO, Doc ID 4413, non confidential version Doc ID4417-87, p. 5.

²¹⁵⁴ See DT's Reply to the SO, Doc ID4395, paragraph 430, non confidential version Doc ID4417-42.

- (1454) ST refers to an email exchange between its [B] and [P] from DT in which [B] concluded "*we are not really active because we don't see huge benefits for ST*". ST is of the opinion that this shows that it was not willing to put aside its own commercial interests to the benefit of synergies at the group level.²¹⁵⁵
- (1455) The Commission considers this example as being of limited value as it falls as well within the [ST internal corporate legal document] (1447). Thus for these decisions the BoD members of ST's minority shareholder, the Slovak Republic need to give their approval. [Information of the minority shareholders attitude regarding outsourcing of projects]²¹⁵⁶.
- (1456) The Commission notes also here that although the Slovak Republic has influence in this regard the scope of its influence in general is limited by the Shareholders' Agreement as set out above in recital (1448).
- (1457) Also this example cannot have any appreciable effect on the general ability of DT to exercise decisive influence over commercial behaviour of ST in view of the various legal and organisational links put in place for this purpose as described above (see sections 12.2.6.1 to 12.2.6.5).
- (1458) In view of the above considerations and taking into account the numerous evidence of existence of decisive influence by DT over ST described earlier, the Commission does not consider the examples of ST's allegedly independent behaviour put forward by DT as rebutting the existence and exercise of the decisive influence by DT over ST.

12.2.6.8. Supplementary evidence of DT's exercise of decisive influence over ST

- (1459) The Commission considers that the evidence presented in sections 12.2.6.1 to 12.2.6.5 above is sufficient to establish that DT exercised decisive influence over ST. Nevertheless the Commission presents some additional evidence in this regard, which was provided to the Commission by DT in the context of DT's proposed acquisition of sole control over EuroTel in 2004 (merger case M.3561 - Deutsche Telekom/EuroTel). It has been requested for the purpose of this investigation as set out above in recital (1247). This evidence consists of statements made by DT at the time regarding its relationship with ST. In this regard see also section 12.2.5 above.
- (1460) Firstly, the mere fact that DT was the notifying party in case M.3561 Deutsche Telekom/EuroTel, is an additional example of the exercise of decisive influence of DT over ST. The Consolidated jurisdictional notice²¹⁵⁷ provides for a choice: "*Where the target company is acquired by a group through one of its subsidiaries [...] the actual notification, [...] can be made by the subsidiary concerned or by its parent company.*" The proposed transaction which was the subject matter of this case concerned exclusively ST's acquisition of sole control over EuroTel. Yet, this

²¹⁵⁵ ST's reply to the SO, paragraph 1887, Doc ID3630.

²¹⁵⁶ See DT's Reply to the SO, Doc ID4395, paragraph 84, non confidential version Doc ID4417-42.

²¹⁵⁷ Commission notice on the concept of undertakings concerned under Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings, OJ C66 of 2 March 1998, p. 14, paragraph 18.

acquisition, [Assesment of the significant of this acquisition]²¹⁵⁸, was notified not by ST but by DT, which holds 51% of the shares of ST.

- (1461) The allegation by ST²¹⁵⁹ that the transaction was only notified by DT as it "only shows that pursuant to the notion of control under the Merger Regulation, DT "controlled" ST and DT's turnover thus had to be included to calculate the turnover" is not convincing. The Consolidated jurisdictional notice provides in any case that "[w]here the target company is acquired by a group through one of its subsidiaries, the undertakings concerned for the purpose of calculating turnover are the target company and the acquiring subsidiary." Nevertheless, the Consolidated jurisdictional notice as stated above, gives the choice to the parties to decide whether the parent company or the subsidiary does the actual notification.
- (1462) DT's principal submission is that it is of no relevance whether the notification is done by the parent company or the subsidiary and that the transaction [**Confidential Annex XVI**]²¹⁶⁰.
- (1463) However, the fact that the parties exercised the choice in respect of the notifying party in this way can be considered as an indicator that DT considers ST part of its undertaking and therefore part of a single economic entity.²¹⁶¹
- (1464) Secondly the Commission considers an Annex to the notification titled [Title of the internal document]²¹⁶² an important statement by DT concerning its relationship with ST [Reference to an ST internal document submitted to one of its bodies]. DT presented therein its assessment of the consequences of the acquisition by ST of 49% of EuroTel shares²¹⁶³.
- (1465) In the current proceeding DT submits that this statement could only concern its ability to exercise decisive influence as it only concerns the *ex ante* control from the merger control perspective.²¹⁶⁴ DT further stated that it was in any case [**Confidential Annex XIX**]. It claims that it was never in a position and never exercised decisive influence over ST referring thereby to its previous submissions and statements.²¹⁶⁵
- (1466) This explanation by DT does not seem to be convincing considering the clear wording in this [ST internal document submitted to one of its bodies]. The quote is in

²¹⁵⁸ A fact which ST does not contest – See ST's reply to the letter of facts, Doc ID4671-36, paragraph 929 and following.

²¹⁵⁹ ST's reply to the letter of facts, Doc ID4671-36, paragraph 926.

²¹⁶⁰ DT's reply to the letter of facts, Doc ID4693, paragraph 42 and following, non confidential version Doc ID4718.

²¹⁶¹ See case law on the single economic entity: Case C-97/08P, *Akzo Nobel NV and others (Choline Chloride) v Commission*, [2009] ECR I-8237, paragraph 59 Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 63.

²¹⁶² DT's reply to the request for information of 30 July 2013, Q 3 annex 1, page 3, DOC ID 3938, Doc ID 3938, non confidential version Doc ID 3945.

²¹⁶³ [**Confidential quote in Annex XVII** - Non confidential summary: DT's assessment of the consequences of the acquisition by ST of 49% of Eurotel shares.] See DT's reply to the request for information of 30 July 2013, Q 3 annex 1, page 3, DOC ID 3938, page 3, Original text in German in footnote 1798 above, non confidential version Doc ID 3945.

²¹⁶⁴ [...] [**Confidential quote in Annex XVIII**]. See DT's reply to the letter of facts, Doc ID4693, paragraph 69, non confidential version Doc ID4718.

²¹⁶⁵ DT's reply to the letter of facts, Doc ID4693, paragraph 68 and following, non confidential version Doc ID4718.

the Commission's view an assessment by DT of its relationship with ST and the minority shareholder in ST, the Slovak Republic. This document shows (i) that DT acquires full management control *via* ST over EuroTel once ST owns 100% of the shares in EuroTel and that (ii) irrespective of the ST/EuroTel merger, DT considers to have full management control over ST. As has been set out above (recital (1250) this document drafted before the beginning of the infringement period nevertheless has evidential value as it is forward looking and based on provisions of the Shareholders' Agreement which have not changed since. It therefore casts light on the balance of power between ST's shareholders as laid out in the Shareholders' agreement. From a *de jure* perspective it shows that the scope of the Slovak Republic's influence over ST is limited, as the minority rights of the Slovak State on ST primarily relate to the approval of investments exceeding [Amount in EUR]. and to the approval of legal transactions between [Certain companies within the DT group]. From a *de facto* perspective it shows that, based on past experience DT can expect that, in those matters where SR has minority rights, consensus with SR will be reached in the future.

- (1467) Thirdly, the Commission intends to consider that these broad statements, made in a document that pre-dates the merger notification, need to be read in the context of the statements made by DT in the Short Form CO²¹⁶⁶, in which DT states that "*Deutsche Telekom AG [...] is notifying the transaction as the entity controlling the purchaser of EuroTel's shares, Slovak Telekom.*"²¹⁶⁷ In contrast to this, the situation concerning EuroTel, in which ST already held 51% of the shares prior to this acquisition, is described as follows in the Short Form CO: "[Confidential quote from a document]²¹⁶⁸"
- (1468) In conclusion these statements by DT describe in the Commission's view the balance of power between DT and ST at the time of the notification of this merger with EuroTel. As seen above in this case the Commission considers that DT itself used the concept of control to describe its lived relationship with ST four years after it became one of its shareholders.²¹⁶⁹ As these statements refer to the Shareholders' Agreement or to the control derived from it and the provisions in the Shareholders' Agreement have not changed, the Commission considers that these statements continue to be valid for the period of the infringement. These pieces of evidence are therefore supplementary evidence of DT's exercise of decisive influence over ST which has been established above in the section 12.2.6.1 to 12.2.6.5.

12.2.7. *The management of DT could have been aware of the anti-competitive behaviour of ST as the [Denomination] department of DT was involved in decision making concerning this behaviour*

- (1469) In addition to being in a position to exercise decisive influence over ST and exercising it, the Commission found evidence, presented below, that members of

²¹⁶⁶ See DT's reply to the request for information of 13 May 2013, Q1, Annex 1.3, Doc ID3778, non confidential version Doc ID4010.

²¹⁶⁷ See DT's reply to the request for information of 13 May 2013, Q1, Annex 1.3, Doc ID3778, non confidential version Doc ID4010, page 3.

²¹⁶⁸ DT's reply to the request for information of 13 May 2013, Q1, Annex 1.3, Doc ID3778, non confidential version Doc ID4010, page 4.

²¹⁶⁹ DT became a 51% shareholder in ST on 4 August 2000 and DT made these statements on [...].

staff of DT's [Denomination] department²¹⁷⁰ were aware of the infringement and failed to take measures to stop it. Pursuant to established case law, knowledge of such facts can be considered as tacit approval of the subsidiary's conduct and amounts to additional evidence that the parent company exercised decisive influence over the subsidiary²¹⁷¹.

(1470) On [...], ST's [Management body] decided on a strategy for the submission of the RUO and ULL prices based on the presentation "*Strategy of submission of RUO and ULL prices*"²¹⁷².

(1471) Drafts of this presentation were exchanged with DT ahead of the decisive [ST management body] meeting. On 5 April 2005, that is to say nine days ahead of the [ST management body] meeting, a working level discussion between DT and ST took place based on a draft of the presentation²¹⁷³, from which it was already apparent that:

- the availability of local loop post RUO would be *de jure* rather than *de facto* (slides [...]);
- the margin of other licensed operators' was squeezed (slides [...], although not explicitly written);
- prices for access had not been rebalanced in Slovakia (slide [...]); and
- effective competition was not to be expected from AOs based on local loop unbundling according to the proposed RUO (slide [...]).

(1472) Three days later, on [...], a revised version of this presentation was sent for comments to DT. Among the few changes introduced, the new version explicitly stated with respect to ULL pricing proposed that "*price squeeze will not be eliminated even with this price!*"²¹⁷⁴ The final version of the presentation was presented for decision to the [Management body] on [...], with barely any changes compared to the last version submitted for comments to DT.²¹⁷⁵

(1473) ST states that its [Denomination] department is solely responsible for ST's [...] issues and strategy and only asks DT's international [Corresponding department] in some cases for support. No detailed information on prices or conditions was discussed and ST never even sent its RUO to DT.²¹⁷⁶

(1474) However, it is apparent that at least parts of DT's [Denomination] department were informed in due time that:

- The conditions attached to ST's RUO made it a *de jure* rather than a *de facto* wholesale broadband offer to AOs;
- The prices for local loop unbundling could squeeze the margins of AOs; and

²¹⁷⁰ See DT's Reply to the SO, Doc ID4395, paragraphs 445-450, non confidential version Doc ID4417-42.

²¹⁷¹ Case T-41/05, *Alliance One International v. Commission*, [2010] ECR II-05329, paragraph 136.

²¹⁷² See ST's reply to RFI of 17 April 2009 - Annexes to Q 16 11, Doc ID1166.

²¹⁷³ See DT's reply to RFI of 24 June 2010, attachment Q4 [...] 019, Doc ID2350, (CD list), Non confidential version Doc ID3265.

²¹⁷⁴ See DT's reply to RFI of 24 June 2010, attachment Q4 [...] 021, Doc ID2350, (CD list), Non confidential version Doc ID3266, p.10.

²¹⁷⁵ See ST's reply to RFI of 17 April 2009 - Annexes to Q 16 11, Doc ID1166.

²¹⁷⁶ ST's reply to the SO, paragraph 1893 and following, Doc ID3630.

- The behaviour of ST was either explicitly exclusionary or risked having appreciable exclusionary effects to the detriment of AOs in the wholesale market for access to the ULL.
- (1475) DT was therefore also not unaware of the anticompetitive behaviour of ST.
- (1476) DT claims that it was never aware of ST's conduct which is concerned by the present decision, and that it did not support ST in this respect²¹⁷⁷. DT argues that [Clarification on the development and use of the presentation mentioned in recital 1472 at the end and DT's involvement or non-involvement in the development of the RUO]²¹⁷⁸.
- (1477) DT also makes reference to the Judgment of the General Court in *Alliance One*. According to DT's reading of this judgment the parent company is exculpated of knowledge of the abuse if it raises an objection to the subsidiary's practice or takes any other measures that prevent the continuation of the abuse by the subsidiary.²¹⁷⁹ DT argues that in the present case DT's [Denomination] department took at least one measure to prevent the abuse [description of the measure]. DT concludes that DT's [Denomination] department could subsequently assume that ST would do all that was required to prevent a margin squeeze²¹⁸⁰. In view of the fact that this presentation was sent to DT's [Denomination] department with the explicit indication of the presence of a margin squeeze the Commission cannot accept this argument.
- (1478) DT also states²¹⁸¹ that it is essential for the assignment of knowledge of the abuse that it was known to the manager or at least to executives of the parent company. In this regard DT notes that [H] was merely an advisor in DT's regulatory department at the time. However, also [I], the manager of DT's [Denomination] department, received the above-mentioned presentation.
- (1479) The statement by DT that [H], the recipient of the presentations, had not looked at the time into the details of the calculation of the ULL price and the alleged margin squeeze²¹⁸², seem to contradict her comment in the document above. This shows as a minimum that [conclusion on the organization of compliance with competition law within DT during the infringement period]. Such information by a subsidiary should lead a [denomination] department of a parent company in charge of compliance with competition law to at least investigate the facts further and to inform its top management.
- (1480) DT adds that knowledge of conduct contrary to competition law requires positive knowledge of all relevant elements of the situation, which is not the case in view of the information in the presentations, that the assessment of possible margin squeezes is very complicated and impossible without an in-depth knowledge of the facts²¹⁸³.

²¹⁷⁷ DT's Reply to the SO, Doc ID4395, paragraph 26, last bullet, non confidential version Doc ID4417-42.

²¹⁷⁸ See DT's Reply to the SO, Doc ID4395, paragraph 447, non confidential version Doc ID4417-42.

²¹⁷⁹ See DT's Reply to the SO, Doc ID4395, paragraph 468, non confidential version Doc ID4417-42. See Case T-41/05, *Alliance One International*, [2010] ECR II-05329, paragraph 136: „[...] the applicant [...] never raised any objections to the unlawful practices of which it was aware nor did it take any measures aimed at preventing its subsidiary's continuing involvement in the infringement“.

²¹⁸⁰ See DT's Reply to the SO, Doc ID4395, paragraph 468, non confidential version Doc ID4417-42.

²¹⁸¹ See DT's Reply to the SO, Doc ID4395, paragraph 469, non confidential version Doc ID4417-42.

²¹⁸² See DT's Reply to the SO, Doc ID4395, paragraph 469 and following, non confidential version Doc ID4417-42.

²¹⁸³ See DT's Reply to the SO, Doc ID4395, paragraph 457, non confidential version Doc ID4417-42.

The Commission notes that the assessment of margin squeeze was already made by ST in the presentation. Thus this argument cannot be accepted.

- (1481) DT is not held responsible for the infringement at issue on the ground that it had participated in the infringement through the members of its management or its personnel, but on the ground that it formed part of the same economic unit as ST. Therefore it is also of no relevance that the evidence cited in this section relates to documents established prior to the infringement period. As confirmed by the case law "(t)he imputation of a subsidiary's unlawful conduct to the parent company does not require proof that the parent company influences its subsidiary's policy in the specific area in which the infringement occurred"²¹⁸⁴.

12.2.8. Conclusion on the liability of DT

- (1482) In the light of the above, the Commission finds that:

- DT was in a position to exercise a decisive influence over ST; this finding is based on the evidence concerning DT's majority ownership in ST and on the agreements between the shareholders of ST set out in sections 12.2.3 and 12.2.4;
- DT exercised a decisive influence over ST; this finding is based on the evidence of legal and organisational links between ST and DT put in place by DT which establish the existence of a single economic unit (see sections 12.2.6.1 to 12.2.6.5);
- The arguments and examples presented by DT allegedly showing ST's independence are insufficient to rebut the findings of the existence and exercise of the decisive influence (see section 12.2.6.7.)

- (1483) In the light of the foregoing, the Commission concludes that DT had the ability to exercise decisive influence over ST and actually exercised it. ST and DT are part of a single undertaking, the undertaking ST/DT. Therefore both ST and DT are liable for the single and continuous infringement described in this decision.

13. REMEDIES AND FINES

13.1. Article 7(1) of Regulation No 1/2003

- (1484) In accordance with Article 7(1) of Regulation No 1/2003, where the Commission finds that there is an infringement of Article 102 of the Treaty, it may require by decision that the undertaking concerned brings the infringement to an end.²¹⁸⁵

- (1485) To the extent that any of the identified abusive practices are still ongoing, it is necessary to impose on ST and DT an obligation to bring such infringement to an end, and henceforth to refrain from any practices which would have the same or similar object or effect as described in this Decision.

13.2. Article 23(2) of Regulation No 1/2003

- (1486) Under Article 23(2) of Regulation No 1/2003, the Commission may by decision impose on undertakings fines where, either intentionally or negligently, they infringe

²¹⁸⁴ Case T-399/09, *HSE v Commission*, EU:T:2013:647, paragraph 100.

²¹⁸⁵ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1 of 4 January 2003.

Article 102 of the Treaty. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

- (1487) In fixing the amount of the fine, the Commission must have regard to the gravity and duration of the infringement. In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (the "2006 Guidelines on fines")²¹⁸⁶.
- (1488) It appears from the facts as described in section 7.4 regarding refusal to supply and in section 8.4 regarding margin squeeze, that ST/DT committed the infringement intentionally or, at the very least, negligently. ST/DT should have been aware that its practices constituted an infringement of Article 102 of the Treaty and Article 54 of the EEA Agreement.

13.3. The basic amount of the fine

13.3.1. Calculation of the value of sales

- (1489) The basic amount of the fine to be imposed on the undertaking concerned is to be set according to the 2006 Guidelines on fines by reference to the value of sales, that is, the value of the undertakings' sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic market.
- (1490) The products to which the infringement relates are: (i) the unbundled access to the local loop (ULL) and (ii) retail broadband Internet access products over ST's xDSL network.
- (1491) ST/DT's sales in respectively the relevant markets for wholesale access to ST's ULL and for ST's standard broadband internet products supplied over its xDSL networks and the sum of the sales in each of the years 2005-2010 were as follows:²¹⁸⁷

in EUR	Wholesale sales ²¹⁸⁸	Retail sales ²¹⁸⁹	Total sales
2005 ²¹⁹⁰	[...]	[...]	[...]
2006	[...]	[...]	[...]
2007	[...]	[...]	[...]
2008	[...]	[...]	[...]
2009	[...]	[...]	[...]
2010	[...]	[...]	[...]

²¹⁸⁶ OJ C 210, 1.9.2006, p. 2.

²¹⁸⁷ This table is based on the figures provided by ST in Doc ID 3965, ST's reply to the RFI of 26 July 2013; the retail sales volumes take account of ST's retail revenues with standard broadband internet products provided over its xDSL network. It does not contain revenues of ST's standard broadband services provided over its fibre networks.

²¹⁸⁸ Revenues from wholesale access to ST's unbundled local loops (LLU).

²¹⁸⁹ Fixed retail sales revenues of ST for services provided over its xDSL local access networks. It does not operate TV cable networks or fixed wireless networks.

²¹⁹⁰ Turnover in the full year 2005. Please note that the infringement only started on 12 August 2005.

- (1492) The present case concerns an infringement in the form of a refusal to supply and margin squeeze where the abuse took place in the wholesale market for access to ST's local loops. The internal documents of ST presented in sections 7.4 and 8.4 of this Decision show that the aim of ST's conducts was to protect its sales in the downstream retail mass market for broadband services offered at a fixed location. Therefore, the Commission considers that both ST's wholesale sales of access to its ULL and its retail sales are directly related to the infringement. At the very least, the retail sales of broadband products provided over its xDSL network are indirectly related to the infringement because not giving AOs access to ST's ULL aimed at avoiding that new competitors can enter the retail broadband market and compete with ST's retail business, which could have lowered ST's revenues. In accordance with the 2006 Guidelines on fines, point 13, the Commission takes into account for the calculation of the fine both the value of wholesale access to ST's local loops and broadband retail sales of ST in Slovakia.
- (1493) The Commission normally takes into account the sales made by an undertaking during the last full business year of its participation in the infringement.²¹⁹¹ In their replies to the SO and the LoF, ST and DT claim that the Commission should base the calculation of the fine on the average annual sales over the entire period of the infringement due to an exponential growth of ST's turnover by 133% between 2005 and 2010.²¹⁹² To further support their claim, they refer to a number of recent Commission decision where it had also based the fine on the average annual value of sales.²¹⁹³
- (1494) The Commission takes the view that in the present case there are no exceptional reasons to deviate from the basic principle that the fine should be based on the last full business year's turnover because it is representative of the capability of the infringement to distort competition. Unlike in the cases ST and DT referred to, ST's turnover did not grow exponentially over the period of the infringement and ST's sales were also not increasing during the infringement period at a rhythm which was much higher than normal for such a market. Indeed, ST's turnover grew considerably only in 2007 by 33% compared to 2006, whereas the growth in the following four years taken together was only slightly over 9%.²¹⁹⁴
- (1495) The basic amount of the fine will therefore be based on ST's turnover in the ULL and fixed retail broadband market in 2010, which is EUR [...].²¹⁹⁵

13.3.2. *Determination of the basic amount of the fine*

- (1496) In order to determine the proportion of the value of sales to be considered as the basic amount (up to 30%, according to the 2006 Guidelines on fines), the Commission assesses the gravity of the infringement by taking account of a number of factors, such as the nature, the geographic scope of the infringement, the market

²¹⁹¹ 2006 Guidelines on fines, point 13.

²¹⁹² ST's reply to the SO, Doc ID3630, points 1904 et seq., ST's reply to the LoF, Doc ID4671-36, points 956 et seq.; DT's reply to the SO, Doc ID4417-042, points 604 and 605, DT's reply to the LoF, Doc ID 4395, point 188.

²¹⁹³ Case COMP/39.525 *Telekomunikacja Polska*, chapter XII, section 3.1.; Case COMP/39.309 *LCD - Liquid Crystal Displays*, point 384; Case COMP/39.401 *E.ON/GDF*, points 351-353.

²¹⁹⁴ Percentages calculated based on total sales in the relevant years.

²¹⁹⁵ Doc ID 3965, ST's reply to the RFI of 26 July 2013.

share and whether or not the infringement has been implemented.²¹⁹⁶ These will be analysed in the following sections.

13.3.2.1. Gravity

13.3.2.1.1 Nature of the infringement

- (1497) The infringement concerns an abuse of a dominant position in the form of a refusal to supply and a margin squeeze. A refusal to supply by undertakings in a dominant position has already been condemned on several occasions by the Commission and the Union Courts.²¹⁹⁷ Similarly, both the Commission and the Union Courts have dealt with margin squeeze cases.²¹⁹⁸
- (1498) The relevant markets for the purposes of this Decision are markets of considerable economic importance, which play a crucial role in the creation of the information society, especially as regards the distribution of value added services, such as IPTV. Furthermore, ST's ULL cover the whole territory of the Slovak Republic while AOs were only able to roll out their networks in geographically limited areas. In contrast, an effective access to ST's ULL would have given them access to households throughout the territory of Slovakia.
- (1499) Moreover, the wholesale market for access to ST's ULL has significant importance as it is the wholesale market which offers AOs the possibility to gain full control over the local access line to households and to differentiate their offers from those of the incumbent. The access to ULL would have allowed AOs to compete effectively with ST throughout the territory of the Slovak Republic by offering high quality retail broadband services, for example IPTV services. In addition, ST is the only owner of a nationwide telecommunications network which offers access to its network. In order to provide Internet services on the basis of xDSL technology, AOs are dependent on ST.
- (1500) It has also been outlined in sections 7.4 regarding refusal to supply and in section 8.4 regarding margin squeeze that ST's practices form part of a behaviour aimed at excluding competitors from the retail mass market for broadband services offered at a fixed location or at least delaying their entry and/or expansion in this market. ST was, as explained above, aware of the anticompetitive nature of its conduct, including the negative effects this may have on competition in retail broadband

²¹⁹⁶ 2006 Guidelines on fines, point 20.

²¹⁹⁷ See in particular Joined Cases 6/73 and 7/73 *Istituto Chimioterapico and Commercial Solvents v Commission* [1974] ECR 223; Case 7/97 *Oscar Bronner v Mediaprint Zeitungs- und Zeitschriftenverlag, Mediaprint Zeitungsvertriebsgesellschaft and Mediaprint Anzeigengesellschaft* [1998] ECR I-7791; case T-301/04 *Clearstream Banking AG and Clearstream International SA v Commission* [2009] ECR II-03155; case C-418/01 *IMS Health v NDC Health* [2004] ECR I-5039; Joined cases C-241/91 P and C-242/91 P *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission (Magill)* [1995] ECR 743; Case T-201/04 *Microsoft v Commission* [2007] ECR II-3601; Commission Decision 94/19/EC of 21 December 1993 in Case IV/34.689 *Sea Containers v Stena Sealink – Interim Measures* (OJ L 15, 18.1.1994, p. 8) and Commission Decision 92/213/EEC of 26 February 1992 in Case IV/33.544 *British Midland/Air Lingus* – (OJ L 96, 10.4.1992, p. 34).

²¹⁹⁸ See in particular Commission Decision of 22 June 2011 in Case COMP/39.525 *Telekomunikacja Polska*; Commission Decision of 21 May 2003 in Case COMP/C-1/37.451, 37.578, 37.579 — *Deutsche Telekom AG*; Case T-271/03 *Deutsche Telekom v Commission* [2008], ECR II-485; Case C-280/08 P, *Deutsche Telekom AG v European Commission*, [2010] ECR I-09555; Case C-52/09, *Konkurrensverket v. TeliaSonera*, ECR I-527; Commission Decision of 4 July 2007 in Case COMP/38.784 *Wanadoo España v. Telefonica*; Case T-336/07, *Telefónica v Commission* [2012], EU:T:2012:172.

markets, or at least acted negligently in that regard. The Commission considers that also DT could not have been unaware of the anticompetitive nature of ST's conduct (see section 12.2.7 above).

- (1501) In determining the percentage for gravity, the Commission takes also account of the fact that from 9 May 2009 onwards a revised RUO was published by ST which did not end the infringement but removed some of the unfair conditions.
- (1502) In its reply to the SO and the LoF, ST claims that the Commission should not take into account in relation to gravity the fact that refusal to supply and margin squeeze abuses have been repeatedly condemned by the Commission and the Union Courts. In particular, ST does not acknowledge the existence of precedents concerning constructive refusal to supply in the telecommunication sector or concerning margin squeeze before the Court's ruling in *TeliaSonera* in 2011²¹⁹⁹.
- (1503) The gravity of an infringement has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, and no binding or exhaustive list of the criteria which must be applied has been drawn up²²⁰⁰. One factor relevant in assessing the nature of the infringement is whether relevant legal precedents exist, which have clarified the scope of Article 102 of the Treaty. Such precedents²²⁰¹ reinforce and give a more detailed interpretation of the general prohibition of the Treaty and the nature of the infringement.
- (1504) In this regard, the Commission refers to the direct applicability of Article 102 of the Treaty. Neither the prohibition contained in Article 102 of the Treaty nor the Commission's enforcement action depend on whether or not there are precedents in the case law.

13.3.2.1.2 Market share

- (1505) During the entire infringement period, ST held a monopoly position in the wholesale market for access to unbundled local loop and a dominant position in the retail mass market for broadband services offered at a fixed location in Slovakia. ST's retail market shares on the basis of the number of subscribers have ranged during the infringement period between [40-50]% and [50-60]%. In addition, ST had a retail market share well above its competitors. The second largest competitor, UPC, had almost a five times lower (and decreasing) market share on the retail mass market for broadband services offered at a fixed location to final customers.

13.3.2.1.3 Geographic scope

- (1506) Pursuant to the Guidelines regard should also be had to the geographic scope of the infringement.²²⁰² ST's anticompetitive conduct covered the whole territory of a Member State (Slovak Republic).

²¹⁹⁹ Case C-52/09, *TeliaSonera Sverige*, ECR I-527, paragraph 55.

²²⁰⁰ Case C-549/10 P, *Tomra Systems ASA*, published in the electronic Reports of Cases (Court Reports - general), paragraph 107; and case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paragraph 33.

²²⁰¹ See above recital (1497) and the references to case law.

²²⁰² 2006 Guidelines on fines, point 13.

13.3.2.1.4 Single and continuous infringement

- (1507) This Decision has established in detail in sections 7 and 8 above that ST engaged in a margin squeeze and in a refusal to supply strategy regarding access to its ULL. The strategy consisted of a series of measures, namely
- (a) withholding from AOs network information necessary for the unbundling of local loops;
 - (b) reducing the scope of its obligations regarding unbundled local loops;
 - (c) setting unfair terms and conditions in its Reference Unbundling Offer (RUO) regarding collocation, qualification, forecasting, repairs and bank guarantees;
 - (d) applying unfair tariffs which do not allow an equally efficient competitor relying on wholesale access to Slovak Telekom a.s.' unbundled local loops to replicate the retail broadband services offered by Slovak Telekom a.s. without incurring a loss.
- (1508) Each of these measures by ST/DT would constitute an infringement of Article 102 of the Treaty in its own right. The Commission considers, however, that they form, taken together, a single and continuous infringement because all of these measures had the object (and likely effect) to restrict and distort competition within the retail mass market for broadband services at a fixed location in Slovakia.²²⁰³ and to protect ST's revenues and market position on the mass market for broadband services. For instance, ST gave access to its ULL to one AO, GTS, only after discussions lasting several years.
- (1509) Moreover, the exclusionary intent of ST was common to both refusal to supply and margin squeeze and are therefore part of a single and continuous infringement.²²⁰⁴
- (1510) In addition, the measures put in place by ST listed above in recital (1508) were in place during the whole infringement period.
- (1511) The Commission concludes that, although each refusal to supply identified in section 7 and the margin squeeze identified in section 8 in itself constitutes an infringement of Article 102 of the Treaty, ST/DT's conduct must be regarded as a series of actions which form part of an overall plan to restrict competition and thus as a single and continuous infringement.

13.3.2.1.5 Conclusion on the gravity of the infringement

- (1512) When determining the proportion of the value of sales to be used to establish the basic amount of the fine, the Commission took into account the factors set out above, in particular the nature of the infringement, the market share of ST and the geographic scope of the infringement.
- (1513) In view of the above, the proportion of the value of ST's sales to be used to establish the basic amount of the fine should be [...] %.
- (1514) ST argues by referring to the principle of equal treatment that when determining the gravity of the infringement, the Commission should also take account of the fact that the Telekomunikacja Polska (TP) case²²⁰⁵ concerned a company which is almost four

²²⁰³ See case T-286/09, *Intel Corp.*, EU:T:2014:547, paragraph 1562.

²²⁰⁴ Case T-286/09, *Intel Corp.*, EU:T:2014:547, paragraph 1562.

²²⁰⁵ COMP/39.525 – *Telekomunikacja Polska*, Commission Decision of 11 June 2011.

times larger than ST by turnover and that Poland is more than six times larger than Slovakia by GDP.²²⁰⁶ These arguments have to be rejected as the Commission has discretion when setting fines and is not obliged to systematically compare fines imposed in different cases.²²⁰⁷

- (1515) Moreover, the Commission notes that the basic amount of the fine is calculated as a proportion of the value of sales of the infringing undertaking on the relevant geographic markets. In this way account is already taken of the size of the undertaking and indirectly also of the size of the relevant markets affected by the infringement.

13.3.2.2. Duration

- (1516) The abuse of the dominant position committed by the undertaking ST/DT commenced on 12 August 2005, the date of the publication of ST's Reference Offer on unbundled access to the local loop (RUO). On the basis of the available evidence referred to in section 7 and 11 of this Decision the Commission concludes that the infringement continued at least until 31 December 2010.
- (1517) Therefore, the overall duration of ST/DT's infringement to be taken into account for the calculation of the fine to be imposed amounts to 5 years and 4 months.
- (1518) For the purposes of the calculation of the fine, the amount resulting from the application of a gravity percentage of [...] % of ST's relevant turnover in 2010 (EUR [...]) should be multiplied by 5.33 to take account of the duration of the infringement. The basic amount of the fine is thus EUR 38 838 000.
- (1519) ST disagrees with the duration of the infringement. First, it considers the RUO to be a framework contract describing the conditions of access to the local loop which constitute a basis for negotiations. ST also considers that refusal to supply can only exist if such negotiations fail. ST adds that even if the Commission considered that ST's abuse of dominance had started on the day the RUO was published, it should conclude that such an abuse was terminated on 9 May 2009 when a revised RUO was adopted.²²⁰⁸
- (1520) These arguments cannot be accepted. The very purpose of the RUO is to inform AO's about the practical and commercial modalities which have to be met to get access to ST's ULL. Section 7 of this decision shows that the RUO contained unfair terms and conditions, such as it did not contain all relevant information on how to get access, did not cover all lines to which ST had to give access and was designed in an abusive way which made an effective access by AOs impossible or difficult. The RUO which is established in order to implement the regulatory obligation to give access should contain fair terms and conditions from the outset. Such acceptable terms and conditions are needed as a starting point for possible negotiations on ULL access. Furthermore, there are instances where improvements of ST's terms and conditions achieved during bilateral negotiations have immediately been transposed into the RUO.

²²⁰⁶ ST's reply to the SO, Doc ID 3630, point 1903.

²²⁰⁷ See e.g. case C-452/11 P, *Heineken v European Commission*, ECLI:EU:C:2012:829, paragraphs 111 et seq.

²²⁰⁸ ST's reply to the LoF, Doc ID4761-36, points 966 et seq.

(1521) In the State of Play meeting DT took the view that the abuse regarding margin squeeze started only on 1 January 2006 because there was no negative margin in the year 2005, in particular from 12 August until 31 December 2005. This claim cannot be accepted for the reasons explained under recital (998) above. Moreover, the fact that the margin is positive in 2005 does not have an impact on the duration of the infringement. The Commission establishes a single and continuous infringement in the period between 12 August 2005 and 31 December 2010.

13.3.2.3. Parental liability and imposition of the fine jointly and severally on ST and DT

(1522) It has been established in this decision that DT, the parent company of ST, had throughout the infringement period the ability to exercise decisive influence over ST and has also exercised such influence over ST. ST and DT are therefore one single undertaking under Article 102 of the Treaty, the undertaking ST/DT. It is therefore justified to hold ST and DT jointly and severally liable to pay the fine.

13.3.2.4. Conclusion on the basic amount of the fine

(1523) On the basis of the above, the basic amount of the fine to be imposed jointly and severally on ST and DT should be EUR 38 838 000.

13.4. Adjustments to the basic amount

13.4.1. Aggravating circumstances: recidivism

(1524) According to the 2006 Guidelines on fines, the Commission may take into account circumstances that result in an increase or decrease in the basic amount.²²⁰⁹

(1525) Point 28 of the 2006 Guidelines on fines provides that "*The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as: where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article 81 or 82: the basic amount will be increased by up to 100% for each such infringement established (...).*" Recidivism shows that previously imposed sanctions were not sufficiently deterrent and therefore justifies an increase of the basic amount of the fine. The Union Courts²²¹⁰ have held that "[a] repeated infringement is a circumstance that justifies a considerable increase in the basic amount of the fine. Repeated infringement is proof that the penalty previously imposed was not sufficiently deterrent."

(1526) The Commission stated in its Statement of Objections²²¹¹ and in the LoF that it would take into account as an aggravating circumstance previous findings of similar infringements by the same undertaking. At the time this infringement took place, DT had already been held liable for an infringement of Article 102 of the Treaty by a previous Commission Decision (Decision COMP/37.451, 37.578, 37.579 - Deutsche Telekom AG - C(2003) 1536 of 21 May 2003).

²²⁰⁹ 2006 Guidelines on fines, point 27.

²²¹⁰ Case T-203/01, *Michelin v Commission*, [2003] ECR II-4071, paragraph 293; Case T-38/02 *Groupe Danone v Commission*, [2005] ECR II-4407, paragraph 348; Case T-53/03 *BPB v Commission*, [2008] ECR II-1333, paragraph 398 and Case T-38/07, *Shell Petroleum NV, Shell Nederland BV and Shell Nederland Chemie BV v European Commission*, [2011] ECR II-4383, paragraph 98.

²²¹¹ SO, paragraphs 1369-1534, Doc ID3630; LoF paragraphs 50 et seq., Doc ID4421.

- (1527) DT is an addressee of the present decision. The 2003 Commission Decision against DT concerned as well an infringement of Article 102 of the Treaty in the form of margin squeeze in the telecom sector, more precisely relating to the wholesale market for access to DT's ULL and the broadband retail services market at a fixed location in Germany; the Commission considers therefore that DT has already committed a similar infringement.
- (1528) It is irrelevant whether this new infringement is committed in a different geographic market. It is sufficient that the same undertaking has already been found responsible for similar infringements.²²¹²
- (1529) DT, was already at the time of the 2003 Commission decision, the parent company of ST as it had acquired on 4th August 2000 51% of ST's shares. It has been established in section 12.2 of this Decision that DT had the ability to exercise decisive influence over ST and actually exercised it and is therefore liable for the infringement committed by the undertaking ST/DT.
- (1530) The arguments brought forward by DT that it would be discriminated in comparison to France Télécom, which was not held liable for the anticompetitive conduct in the *Telekomunikacja Polska ("TP")*²²¹³ and *Wanadoo Interactive*²²¹⁴ cases for its subsidiaries infringements has to be rejected as set out in section 12.2.6.6 above.
- (1531) In view of the above, the basic amount of the fines for DT should be increased by 50 %.

13.4.2. Specific increase for Deterrence

- (1532) Point 30 of the 2006 Guidelines on fines provides the following: "*The Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.*"
- (1533) The Commission observes
- that the total worldwide turnover of DT was in 2013 EUR 60 132 million²²¹⁵;
 - that the value of sales in the relevant products represent less than [figure less than 0.1] % of the total turnover of DT;
 - that DT is liable for the infringement committed by ST.
- (1534) Therefore in this case, the amount of the fine should be set at a level which ensures sufficient deterrence for DT and it is appropriate to apply a multiplier factor to the fines imposed, based on the size of the undertaking concerned. On that basis, the fine imposed on DT (that is to say, the basic amount of the fine and the increase for DT on account of recidivism) is multiplied by 1.2. In the present case the total turnover of DT, the parent company of ST for which parental liability has been established,

²²¹² Case T-203/01, *Michelin v Commission*, [2003] ECR II-4071, paragraph 284.

²²¹³ COMP/39.525, *Telekomunikacja Polska*.

²²¹⁴ COMP 38.233, *Wanadoo Interactive*.

²²¹⁵ DT's Annual Report 2013: <http://www.annualreport.telekom.com/site0413/en/consolidated-financial-statements/index.php>, Doc ID4839.

amounted in 2013 to EUR 60.132 billion. In line with previous cases²²¹⁶, a multiplier for deterrence of 1.2 should be applied where the total turnover of the undertaking concerned is above EUR 50 billion and below EUR 80 billion.

(1535) In view of the size of DT and in order to ensure sufficient deterrence, the Commission applies to the fine for which DT is liable (that is to say, the basic amount of the fine and the increase for DT on account of recidivism) a multiplier of 1.2 for the purposes of deterrence. Only DT will be liable to pay the resulting increase of the fine.

13.4.3. *Mitigating circumstances*

(1536) In its reply to the SO, ST referred to mitigating circumstances that the Commission should take into account in the calculation of the fines. These include ST's genuine efforts to comply with Union competition law, the fact that Slovak authorities did not object to ST's behaviour, and the fact that ST lacked regulatory expertise which would allow it to deal smoothly with the challenges of liberalisation.²²¹⁷

(1537) The evidence does not support ST's claim that it made efforts to fully comply with Union competition law. On the contrary, contemporaneous evidence indicates that ST was aware of the unlawful nature and legal risks of its behaviour, but nonetheless chose to follow exclusionary strategies. It is irrelevant, in this regard, whether the Slovak authorities have or have not objected to ST's behaviour²²¹⁸.

(1538) Further, the Commission does not agree with ST's claim that it lacked regulatory expertise. According to DT's reply to the SO, the [Denomination] department of DT took the measures required from its point of view for answering the questions of holding companies, including ST, based on its own regulatory know-how. Already in 2005, in a workshop DT presented the 2003 Commission case²²¹⁹ against it and the calculation method for margin squeeze of the Commission as the status quo.²²²⁰ However, organising a workshop on such a topic, which is, as DT admits, very complex and which deals with an important issue affecting competition and risks to lead to heavy fines if prices are set inappropriately, cannot be considered as a mitigating circumstance: There seems to have been no further follow up meetings or other appropriate measures, such as an invitation to audit pricing or instructions to verify pricing in order to prevent ST from engaging in a margin squeeze.²²²¹

(1539) Therefore no justification for reducing the amount of the fine to be imposed on ST and DT applies.

13.5. **Conclusion**

(1540) According to Article 23(2) of Regulation No 1/2003, the final amount of the fine shall not exceed 10 % of the total turnover of the undertaking participating in the

²²¹⁶ COMP/39181 - *Candle waxes* (Repsol, RWE); COMP/39129 - *Power Transformers* (Siemens, Hitachi); COMP/39309 - *LCD* (Samsung); COMP/39600 - *Refrigeration compressors* (Panasonic); COMP/39462 - *Freight forwarding* (Deutsche Post/DHL).

²²¹⁷ See ST's Reply to the SO, Doc ID 3630, paragraphs 1915-1916.

²²¹⁸ Case C-295/12 P, *Telefónica v Commission*, EU:C:2013:619, paragraph 161.

²²¹⁹ COMP/37.451, 37.578, 37.579 - *Deutsche Telekom AG - C(2003) 1536*.

²²²⁰ See section 12.2.7 and DT's Reply to the SO, Doc ID4395, paragraph 466 et seq., non confidential version Doc ID4417-42.

²²²¹ See Case T-41/05, *Alliance One International*, [2010] ECR II-05329, paragraph 136.

infringement.²²²² The worldwide turnover of DT amounted in 2013 to EUR 60 132 million. Therefore, the total amount of fine imposed on DT should not exceed EUR 6 013 million. The worldwide turnover of ST amounted in 2013 to EUR 828 million. The total amount of the fine imposed on ST should not exceed EUR 82.8 million.

- (1541) As the amount of the fine set above is below this legal maximum no adaptation is necessary.
- (1542) The final amount of the fine to be imposed on Slovak Telekom and on Deutsche Telekom, for which they are jointly and severally liable should therefore be EUR 38 838 000.
- (1543) In addition, a fine of EUR 31 070 000, which takes account of DT's recidivism and the specific increase for deterrence, should be imposed on Deutsche Telekom alone.

HAS ADOPTED THIS DECISION:

Article 1

1. The undertaking consisting of Deutsche Telekom AG and Slovak Telekom a.s. has committed a single and continuous infringement of Article 102 of the Treaty and Article 54 of the EEA Agreement.
2. The infringement lasted from 12 August 2005 until 31 December 2010 and consisted of the following practices:
 - (a) withholding from alternative operators network information necessary for the unbundling of local loops;
 - (b) reducing the scope of its obligations regarding unbundled local loops;
 - (c) setting unfair terms and conditions in its Reference Unbundling Offer regarding collocation, qualification, forecasting, repairs and bank guarantees;
 - (d) applying unfair tariffs which do not allow an equally efficient competitor relying on wholesale access to the unbundled local loops of Slovak Telekom a.s. to replicate the retail broadband services offered by Slovak Telekom a.s. without incurring a loss.

²²²² 2006 Guidelines on fines, point 33.

Article 2

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

- (a) a fine of EUR 38 838 000 on Deutsche Telekom AG and Slovak Telekom a.s., jointly and severally.
- (b) a fine of EUR 31 070 000 on Deutsche Telekom AG.

The fines shall be paid in euro within three months of the date of notification of this Decision to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL

Ref.: European Commission – BUFI/AT.39.523

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012²²²³.

Article 3

Deutsche Telekom AG and Slovak Telekom a.s. shall immediately bring to an end the infringement referred to in Article 1 in so far as they have not already done so.

Deutsche Telekom AG and Slovak Telekom a.s. shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or equivalent object or effect.

Article 4

This Decision is addressed to

Deutsche Telekom AG
Friedrich-Ebert-Allee 140
53113 Bonn
Federal Republic of Germany

and to

²²²³ OJ L 362, 31.12.2012, p. 1.

Slovak Telekom a.s.
Bajkalská 28
817 62 Bratislava
Slovak Republic

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 15.10.2014

For the Commission
Vice-President Joaquín ALMUNIA
Vice-President



Annex I – for ST and DT

Table 1 – Summary of the margin squeeze calculation based on ST's own tables

	2005	2006	2007	2008	2009	2010
Bundled DSL Access and DSL Internet						
Wholesale charges for ULL access per month per subscriber	[...]	[...]	[...]	[...]	[...]	[...]
Network costs	[...]	[...]	[...]	[...]	[...]	[...]
ISP recurrent costs	[...]	[...]	[...]	[...]	[...]	[...]
Wholesale one-off charges	[...]	[...]	[...]	[...]	[...]	[...]
Amorisation of subscriber acquisition costs	[...]	[...]	[...]	[...]	[...]	[...]
TOTAL COSTS	[...]	[...]	[...]	[...]	[...]	[...]
TOTAL REVENUES	[...]	[...]	[...]	[...]	[...]	[...]
Corresponding margin	[...]	[...]	[...]	[...]	[...]	[...]
Cost adjustment for voice usage inclusion						
ISP recurrent costs	[...]	[...]	[...]	[...]	[...]	[...]
Amorisation of subscriber acquisition costs	[...]	[...]	[...]	[...]	[...]	[...]
Downstream costs (inclusion of voice usage)	[...]	[...]	[...]	[...]	[...]	[...]
DSL Access Only						
Revenues	[...]	[...]	[...]	[...]	[...]	[...]
Downstream costs	[...]	[...]	[...]	[...]	[...]	[...]
Wholesale charges (shared)	[...]	[...]	[...]	[...]	[...]	[...]
Corresponding margin	[...]	[...]	[...]	[...]	[...]	[...]
Downstream costs (inclusion of voice usage)	[...]	[...]	[...]	[...]	[...]	[...]
Corresponding margin (inclusion of voice usage)	[...]	[...]	[...]	[...]	[...]	[...]
Voice Access						
Revenues	[...]	[...]	[...]	[...]	[...]	[...]
Downstream costs	[...]	[...]	[...]	[...]	[...]	[...]
Wholesale charges (move to full)	[...]	[...]	[...]	[...]	[...]	[...]
Corresponding margin	[...]	[...]	[...]	[...]	[...]	[...]
Voice Usage						
Revenues	[...]	[...]	[...]	[...]	[...]	[...]
Downstream costs	[...]	[...]	[...]	[...]	[...]	[...]
Wholesale charges (no addition)	[...]	[...]	[...]	[...]	[...]	[...]
Corresponding margin	[...]	[...]	[...]	[...]	[...]	[...]
Broadband + Voice Access						
Revenues	[...]	[...]	[...]	[...]	[...]	[...]
Downstream costs	[...]	[...]	[...]	[...]	[...]	[...]
Wholesale charges (full + setup, full)	[...]	[...]	[...]	[...]	[...]	[...]
Corresponding margin	[...]	[...]	[...]	[...]	[...]	[...]
Broadband + Voice (Access + Usage)						
Revenues	[...]	[...]	[...]	[...]	[...]	[...]
Downstream costs	[...]	[...]	[...]	[...]	[...]	[...]
Wholesale charges (full + setup, full)	[...]	[...]	[...]	[...]	[...]	[...]
Corresponding margin	[...]	[...]	[...]	[...]	[...]	[...]
Profit	[...]	[...]	[...]	[...]	[...]	[...]

Table 2 – Changes in ST's calculation following the adjustments of the Commission

Optimisation							
	2005	2006	2007	2008	2009	2010	
OPEX adjustment							
a) DSLAMs	100%	100%	100%	100%	100%	100%	100%
b) DSLAMs - ATM	100%	100%	100%	100%	100%	100%	100%
c) BRAS - IP	100%	100%	100%	100%	100%	100%	100%
Depreciation adjustment							
a) DSLAMs	100%	100%	100%	100%	100%	100%	100%
b) DSLAMs - ATM	100%	100%	100%	100%	100%	100%	100%
c) BRAS - IP	100%	100%	100%	100%	100%	100%	100%
CoC adjustment							
a) DSLAMs	100%	100%	100%	100%	100%	100%	100%
b) DSLAMs - ATM	100%	100%	100%	100%	100%	100%	100%
c) BRAS - IP	100%	100%	100%	100%	100%	100%	100%

See ST's margin squeeze calculation, Doc ID4671-17. Worksheet: 'LRAIC – Adjustments' C106:H121

Annex II (to section 12.2.3.2) – for ST and DT

Table – Members of ST's BoD nominated by DT¹ (until at least 31 December 2010)

Name	Function	Duration of the function	Other positions in the DT group
Horst Hermann	Chairman	Started before 1 May 2004 – 6 June 2005	Member of the BoD of Magyar Telecom, DT group, since 25 April 2003, at least throughout the period of his chairmanship of ST's BoD. Senior Executive Vice-President responsible for International Business (T-COM, DT group) since 2003 at least throughout the period of his chairmanship of ST's BoD ² .
Miroslav Majoroš	Chairman	From 6 June 2005 onwards	None.
Dr. Mark Peter Montagne von Lillienkiold ³	Member	Started before 1 May 2004 – 19 April 2005	None.
Szabolcs Gáborjáni-Szabó	Member	From 19 April 2005 onwards	None.
Miroslav Majoroš	Member	Started before 1 May 2004 – 6 June 2005	None.

¹ The table is based on DT's reply to the request for information of 24 June 2010, Attachment Q3_Annex 2, Doc ID2350 (CD list), Non confidential Doc ID3251, and on the information in the Slovak Commercial Register; see Table 1, paragraph 50 of the Statement of Objections of 7.5.2012 C(2012) 3128 final.

² Annual Reports of Magyar Telecom for 2003-2007 see ID3392.

³ According to ST's 2004 Annual Report Dr Montagne von Lillienkiold was also ST's First Executive Vice-president for finance (Chief Finance Officer). His previous position in the DT group was with Magyar Telecom as a Chief Financial Officer (CFO). In 2005 he became the CFO of T-Venture (DT group). ST's reply to the Commission's request for information of 24 June 2010, Annex Q2_1 List of Leased Personnel, p. 3, DocID3173.

Name	Function	Duration of the function	Other positions in the DT group
Horst Hermann	Member	6 June 2005 – 25 September 2008	<p>Senior Executive Vice-President responsible for International Business (T-COM, DT group) since 2003 at least throughout the period of his chairmanship of ST's BoD.</p> <p>Member of the BoD of Magyar Telecom, DT group, since 25 April 2003 until 15 August 2008 (i.e. throughout the period of his chairmanship of ST's BoD)⁴.</p>
Lutz Schade	Member	25 September 2008 – 27 April 2010	As of 21 April 2010 member of the Hrvatski Telekom Supervisory Board.
Albert Pott	Member	From 27 April 2010-onwards	<p>In the period between 1 May 2004 and 31 December 2010:</p> <p>As of 1 July 2010 member of the BoD of T-Mobile Czech Republic (DT group).⁵</p>

⁴ Annual Reports of Magyar Telecom for 2003-2007, see ID3392.

⁵ 2010 Annual Report of T-Mobile Czech Republic, Doc ID3171.

Name	Function	Duration of the function	Other positions in the DT group
Ralph Rentschler	Member	Started before 1 May 2004 onwards	<p>In the period between 1 May 2004 and 31 December 2010:</p> <p>Since 25 April 2003 member of the Board of Directors of Magyar Telecom;</p> <p>Member of the Supervisory Board in Hrvatski Telecom</p> <p>Member of the Supervisory Board at DeTe Fleet Services GmbH,</p> <p>Member of the Supervisory board at T-Mobile Netherlands Holding B.V.⁶.</p> <p>From July 2009, Dr. Rentschler has taken over the position as the Financial Director of the Board Division Southern and Eastern Europe in addition to his position as the CFO of the Fixed Net business. From July 2010, Dr. Rentschler took over the position of the Financial Director Europe.⁷</p>

⁶ 2010 Annual Report of Magyar Telekom as well as website of Magyar Telekom, Doc ID 3158.

⁷ See doc ID3354, p.4. See also DT's reply to the request for information of 24 June 2010, p. 9, Doc. ID 2352, non-confidential version doc ID3248.

Annex III to paragraph 1301 – for ST and DT

Units and/or officers of DT in regular contact with ST (Extract from the Statement of Objections of 7.5.2012 C(2012) 3128 final, paragraphs 117-128)

117. The following DT departments are in regular contact with ST:

- Area management Slovakia (former 'VBV4'); as of 1 July 2010 within DT's 'Europe' division, previously part of DT's SEE (South Eastern Europe) Sales & Customer Service Department;

Finance Europe (former 'T-COM International Controlling');

Public & Regulatory Affairs - International Regulatory Affairs (former 'VBV61');

Other (network infrastructure, human resources, products & innovations, legal, brand management and corporate communications)⁸.

Area Management – Slovakia ('AM-S')

118. Area Management Slovakia (former 'VBV4') is as of 1 July 2010 part of DT's 'Europe' division; previously it was part of DT's SEE (South Eastern Europe) Sales & Customer Service Department.⁹ According to DT's reply to the request for information, the tasks of this unit include: [...] ¹⁰.

119. The assistance to the BoD and the SuB members nominated by DT consists of review of documents submitted by the EMB to the AM-S (and to the BoD) and of the contacts with the relevant DT departments that have the relevant information. The members of the BoD receive briefings before the BoD meetings that contain background information about the agenda items as well as recommendations and instructions on how to proceed with respect to each item¹¹.

Finance Europe (former 'T-COM International Controlling')

120. According to DT's reply to the request for information the unit discusses with ST the key performance indicators and assists ST to meet its financial goals. This unit is involved in the budget discussions and reporting between DT and ST¹².

Public & Regulatory Affairs - International Regulatory Affairs (former 'VBV61')

121. The unit belongs to DT's Public & Regulatory Affairs Department. The unit and its predecessors are in regular contact with ST's Regulatory Affairs Department and with DT's unit Area Management – Slovakia (see paragraphs 118 – 119). DT in its reply to the request for information argues that this unit is not involved in day to day business of ST and that it provides assistance to ST only on a case-by-case basis¹³.

⁸ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 3, Non confidential Doc I D3248.

⁹ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 3, Non confidential Doc ID3248.

¹⁰ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 3, 4, Non confidential Doc ID3248.

¹¹ [...].

¹² DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 4, Non confidential Doc ID3248.

¹³ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 4 – 5, Non confidential Doc ID3248.

122. According to DT "[DT's explanations on the relationship of its regulatory affairs department with ST's]"¹⁴

Other DT departments

123. DT's business unit 'Technology Europe' assists ST as regards the network infrastructure. DT provided the following explanations concerning these contacts: *"before around 2007/2008, contacts between DT and ST regarding network infrastructure topics were very limited, with only occasional meetings. Since then, those employees responsible for network infrastructure within DT and ST meet on a case-by-case basis to discuss technical issues and exchange know-how and best practices. They discuss for instance, how to deal with difficulties in connection with certain suppliers; they assess projects, organise joint tenders, review general investments and technical concepts. However it is up to ST's BoD to finally decide on network infrastructure issues. Further, contact between DT network technology and ST is limited to technical aspects and does not cover market-related decisions."*¹⁵
124. DT's unit 'IT Europe' (part of the 'Europe division') is also in contact with ST. DT in its reply to the request for information provides the following explanation: *"before 2008, contacts between DT and ST on IT issues were sporadic. While contacts become more frequent after 2008, IT Europe and the departments of ST and other SEE affiliates still only meet from time-to-time to exchange general information. They discuss and assess, for instance, cost saving methods and common standards with respect to the IT infrastructure" and "jointly evaluate common platforms and IT systems"*¹⁶. DT further argues that it does not select systems and platforms for ST, but it rather *"discusses opportunities for selecting common systems and platforms to achieve synergies"*¹⁷ and the affiliates remain free to choose whether they adopt such a system or platform. DT in addition to this remarks *"in general, consultation with DT regarding IT systems only occurs at all if ST intends to deviate from an existing common group standard. In any event, decisions concerning the implementation of IP systems or platforms remain in the sole responsibility of ST's BoD."*¹⁸
125. DT's Human Resources International unit (HR International) cooperates with ST concerning personnel exchanges. The personnel exchanges are based on the 'Agreement on International Lease of Personnel'¹⁹. Under this agreement, DT undertakes to *"provide employees to ST for execution of professional and management services"* and ST undertakes to pay a fee to DT for this. The leased persons remain

¹⁴ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 4 – 5, Non confidential Doc ID3248.

¹⁵ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 5, Non confidential Doc ID3248.

¹⁶ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 6, Non confidential Doc ID3248.

¹⁷ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 6, Non confidential Doc ID3248.

¹⁸ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 6, Non confidential Doc ID3248.

¹⁹ Agreement on International Lease of Personnel concluded between ST and DT on 19 December 2003, Attachment RFI100624_Q3_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3250.

employees of DT²⁰. ST may reject the employee if the individual is unable to perform the required tasks adequately. The leased personnel will work based on ST's instructions; leased personnel who are EMB members receive instructions from the BoD²¹.

126. DT explains in this context that "*DT HR International's main function is to provide support to DT's international affiliates and to put at their disposal the HR tools. [Description of recruitment process for leased personnel].*"²² DT further argues that ST is independent as regard human resources and the recruiting decisions, including those of senior management are taken by ST's BoD²³.
127. As regards other DT units in contact with ST, DT mentions in its reply to the request for information also units dealing with products and innovations, legal affairs (Legal Affairs Auslandsbeteiligungen) and brand management (within DT's corporate headquarters focusing on providing assistance with the use of the T-brands)²⁴. Corporate communications (International Communications Unit established in 2008) is in contact with ST over press and communication issues, occasionally developing joint wording regarding critical communication issues. ST provides DT with overviews of the Slovak press and draft press releases regarding its financial results. DT in this context argues that ST is free to choose whether it will take DT's comments into consideration²⁵.
128. In addition to DT units discussed above the TRIG (Treasury and International Business) is also in contact with ST. An email of 15 February 2006 sent by a DT employee to ST's regulatory department explains that it is "*a recently created unit at DT Headquarters that is reporting directly to Dr. Eick, DT's Chief Financial Officer. This unit deals with the CEE affiliates from a shareholder point of view.*"²⁶ The Commission further observes based on the corporate chart submitted by DT in reply to the request for information²⁷ that numerous other units deal with South and East European affiliates, for instance the department 'Finance SEE' consists of 4 units the functions of which involve financial and functional controlling, corporate finance and corporate governance issues for South and East European affiliates.

²⁰ Article 1 of the Agreement on International Lease of Personnel concluded between ST and DT on 19 December 2003, Attachment RFI100624_Q3_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3250.

²¹ Articles 2 and 4 of the Agreement on International Lease of Personnel concluded between ST and DT on 19 December 2003, Attachment RFI100624_Q3_Annex1 to DT's reply to the request for information of 24 June 2010, Doc ID3250.

²² DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 10, Non confidential Doc ID3248.

²³ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 10, Non confidential Doc ID3248.

²⁴ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 6-8, Non confidential Doc ID3248.

²⁵ DT's reply to the request for information of 24 June 2010, Doc ID2352, p. 8, Non confidential Doc ID3248.

²⁶ Email from 15 February 2006, Annex Q_5_282 to ST's reply to the request for information of 24 June 2010, Doc 3216.

²⁷ Corporate Chart of DT illustrating Area Management Slovakia's position within DT (Attachment RFI_100624_Q2_Annex1 to DT's reply to the request for information of 24 June 2010), Doc ID2350 (CDlist), Non confidential Doc ID3249.

Annex IV to footnote 1798 - for DT only

"Durch den Kauf wird die Deutsche Telekom über ST die volle Managementkontrolle an der EuroTel (die z. Zt. durch starke Minoritätenrechte mitbestimmt wird) erhalten. Diese wird nur durch die bestehenden Minderheitsrechte des slowakischen Staates bei ST eingeschränkt, die sich im Wesentlichen auf [...] beziehen. In der Vergangenheit konnte hierzu immer Einigkeit zwischen den beiden Gesellschaftern der ST erzielt werden."

Translation by the European Commission services: As a consequence of the acquisition, Deutsche Telekom will obtain full management control over EuroTel (which is currently codetermined by strong minority rights) via ST. The obtained management control is only limited by the existing minority rights of the Slovak State on ST, which primarily relate to [...]. In the past, consensus between the two shareholders/partners of ST has always been reached on these matters.

Annex V to paragraph 1292 a) – for DT only

[DT's assessment of a certain technology strategy].

Annex VI to paragraph 1292 b) – for DT only

[Short description of a ST project from DT's point of view and reasons for a certain voting recommendation].

Annex VII to paragraph 1315 – for DT only

"We prepare an appropriate "recommendation" by Dr. Hohmann to ST. Without such a recommendation, with an emphatically pronounced "please", I think it is not possible in the future, to catch up with such a process in time."

Annex VIII to footnote 1894 - for DT only

"Gerne bereiten wir eine entsprechende "Empfehlung" von Herrn Dr. Höhmann an die ST vor. Ohne eine solche, mit Nachdruck ausgesprochene "Bitte", halte ich es auch in Zukunft nicht für möglich, rechtzeitig solche Prozeße aufzufangen."

For translation see **Annex VII**.

Annex IX to footnote 1895 - for DT only

[DT's experience resulting from the cooperation with undertakings in which DT is a shareholder.]

Annex X to paragraph 1347 - for DT only

"IMMs were intended as a means to obtain a general overview of ST's business development with regard to the targets determined in the financial planning, in particular EBITDA and cash flow."

Annex XI to footnote 2063 - for DT only

"pushing project [β] to receive approval via DT Board Members in ST's decision making bodies."

Annex XII to footnote 2083 - for DT only

"[Assessment of the way forward made by a DT department]."

Annex XIII to footnote 2123 - for DT only

[Confidential number]

Annex XIV to footnote 2123- for DT only

[Confidential number]

Annex XV to paragraph 1440 – for DT only

[DT internal position and assessment of the risks associated with project λ and conclusion that this project should not be further pursued and ended.]

Annex XVI to paragraph 1462 – for DT only

[Citation from a confidential document].

Annex XVII to footnote 2163 – for DT only

"Durch den Kauf wird die Deutsche Telekom über ST die volle Managementkontrolle an der EuroTel (die z. Zt. durch starke Minoritätenrechte mitbestimmt wird) erhalten. Diese wird nur durch die bestehenden Minderheitsrechte des slowakischen Staates bei ST eingeschränkt, die sich im Wesentlichen auf [...]. In der Vergangenheit konnte hierzu immer Einigkeit zwischen den beiden Gesellschaftern der ST erzielt werden."

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Annex XVIII to footnote 2164 - for DT only

[Citation from a confidential document].

Annex XIX to paragraph 1465 – for DT only

[Citation from a confidential document].