Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

22 March 2012*

(Competition — Administrative procedure — Decisions requesting information — Necessity for the information sought — Principle of good administration — Obligation to state the reasons on which the decision is based — Proportionality)

In Joined Cases T-458/09 and T-171/10,

Slovak Telekom a.s., established in Bratislava (Slovakia), represented initially by M. Maier, L. Kjølbye and D. Geradin, and subsequently by Kjølbye, Geradin and G. Berrisch, lawyers,

applicant,

v

European Commission, represented, in Case T-458/09, by F. Castillo de la Torre and K. Mojzesowicz and, in Case T-171/10, by F. Castillo de la Torre, K. Mojzesowicz and J. Bourke, acting as Agents,

defendant,

APPLICATIONS for annulment, first, of Commission Decision C(2009) 6840 of 3 September 2009 relating to a proceeding pursuant to Articles 18(3) and 24(1) of Council Regulation (EC) No 1/2003 (Case COMP/39.523 — Slovak Telekom) and, second, of Commission Decision C(2010) 902 of 8 February 2010 relating to a proceeding pursuant to Articles 18(3) and 24(1) of Council Regulation No 1/2003 (Case COMP/39.523 — Slovak Telekom),

THE GENERAL COURT (Eighth Chamber),

composed of L. Truchot, President, M.E. Martins Ribeiro (Rapporteur) and H. Kanninen, Judges,

Registrar: J. Weychert, Administrator,

having regard to the written procedure and further to the hearing on 15 September 2011,

gives the following

* Language of the case: English.

Judgment

Facts at the origin of the dispute

1 The applicant, Slovak Telekom a.s., is a company incorporated on 1 April 1999 in the Slovak Republic, 51% of which is owned by Deutsche Telekom AG and 49% by the Slovak Government. It provides, in particular, national and international telephone services, broadband internet services and a wide range of other telecommunications services including data networks, value added services and leased lines.

2 Between 13 and 16 January 2009 the Commission of the European Communities (now the European Commission) conducted an inspection at the applicant's premises, pursuant to Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

3 By letter of 14 April 2009 the Commission informed the applicant that it had decided on 8 April 2009 to initiate proceedings against it for infringement of Article 82 EC in Case COMP/39.523. The Commission stated in that regard that the initiation of that procedure related to the possible existence, on the part of the applicant and the companies under its control, in the Slovak Republic, of a refusal to enter into agreements concerning wholesale unbundled local loop access and other wholesale broadband access, a possible margin squeeze with respect to wholesale unbundled local loop access and other wholesale broadband access services and other exclusionary and discriminatory practices such as mixed bundling and tying with respect to wholesale and retail broadband access services (recital 1 in the preamble to the contested decision in Case T-458/09, 'contested decision I'; recital 1 in the preamble to the contested decision in Case T-171/10, 'contested decision II').

4 On 17 April 2009 the Commission requested information from the applicant under Article 18(1) and (2) of Regulation No 1/2003 (recital 2 in the preamble to contested decision I; recital 7 in the preamble to contested decision II).

5 By e-mail of 4 June 2009 the applicant informed the Commission that the request for information of 17 April 2009 also related to a period before the date of accession of the Slovak Republic to the European Union and that the Commission had no jurisdiction to apply Articles 81 EC and 82 EC to what was alleged to be unlawful conduct on the applicant's part before 1 May 2004. The applicant thus emphasised that the Commission could not find an infringement for that period or systematically request information relating to that period. The applicant therefore proposed to continue providing general information relating to the period before 1 May 2004. As regards more detailed data and calculations, the applicant proposed to limit its answers to the period after 1 May 2004 (recital 3 in the preamble to contested decision I; recital 8 in the preamble to contested decision II).

6 By e-mail of 5 June 2009 the Commission stated in reply to the applicant that there was no question in the present case of finding an infringement of the European Union competition rules for the period before 1 May 2004, but rather of obtaining concrete factual information, some of which also covered that period. The Commission considered, in effect, that that information was relevant to the assessment of the compatibility of the applicant's conduct with Article 82 EC after 1 May 2004, in full knowledge of the facts and in their correct economic context. The Commission thus insisted that the requested information be provided in its entirety (recital 4 in the preamble to contested decision I; recital 9 in the preamble to contested decision II).

7 By letter attached to an e-mail dated 11 June 2009 the applicant reiterated the objections set out in its e-mail of 4 June 2009 and stated that, in its view, it was not sufficient that the information might be helpful for the purposes of assessing its conduct in its economic context. However, the applicant submitted the information requested by the Commission, stating that it reserved the right to oppose any use of that information by the Commission against the applicant, and also any such use of certain

documents preceding the Slovak Republic's accession to the European Union which had been obtained by the Commission during the inspection carried out in January 2009 (recital 5 in the preamble to contested decision I; recital 10 in the preamble to contested decision II).

8 On 13 and 14 July 2009 the Commission conducted a new inspection.

9 By letter of 17 July 2009 the Commission requested the applicant to provide further information pursuant to Article 18(1) and (2) of Regulation No 1/2003, including information and documents relating to the period before 1 May 2004 (recital 7 in the preamble to contested decision I; recital 11 in the preamble to contested decision II).

10 By letter of 14 August 2009 the applicant reiterated its objections with respect to the provision of information and documents relating to the period before 1 May 2004. The applicant also stated that it had voluntarily supplied the Commission, on 17 April 2009, with general information relating to the period before 1 May 2004 in order to clarify the circumstances applicable to the information communicated to the Commission, but that it would not produce data and more detailed calculations relating to that period. The applicant thus stated that it had decided not to provide the Commission with information relating to the 'pre-accession' period requested, first, in questions 4(a) and 4(b) of the request for information of 17 July 2009 relating to its 'ATM' (Asynchronous Transfer Mode) aggregation and its core network and, second, in questions 16 and 17 of that request for information. However, the applicant observed that that decision did not apply to certain data of 2004 requested in question 12 of the request for information, relating to the profitability of its goods, since it was not possible to split the data concerned in a meaningful way (recital 9 in the preamble to contested decision I; recital 11 in the preamble to contested decision II).

Contested decision I

11 On 3 September 2009 the Commission adopted Decision C(2009) 6840 relating to a proceeding pursuant to Articles 18(3) and 24(1) of Council Regulation No 1/2003 (Case COMP/39.523 — Slovak Telekom).

12 In contested decision I, the Commission stated that, pursuant to Article 18(1) of Regulation No 1/2003, in order to carry out the duties assigned to it by that regulation, it may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information. In the Commission's view, its competence to request such information cannot be limited to the period for which the Commission may legally find an infringement of Articles 81 EC and 82 EC (recital 11 in the preamble to contested decision I).

13 The Commission thus considered that, as a diligent administrator, it was called upon to obtain full factual knowledge of the case. It stated that, in the present case, that task consisted in assessing, in addition to the circumstances of the sales and development of the retail and wholesale broadband and triple play services provided after 1 May 2004, the circumstances of the planning, preparation, investment and launch of those services and also their development up to the time of adoption of contested decision I (in particular as regards 2003 and the first four months of 2004), irrespective of whether some of those events took place before the accession of the Slovak Republic to the European Union. The Commission added that, since it was entitled to include such factual findings in a decision imposing fines, it was competent, on the basis of Article 18(1) of Regulation No 1/2003, to request information and documents that would allow it to make such factual findings (recital 12 in the preamble to contested decision I).

14 In that regard, the Commission considered, first of all, that information from before 2004 relating to the development of the telecommunications markets and the applicant's activities on those markets was relevant for the analysis of the applicant's conduct after 1 May 2004, notably for the purposes of

defining the relevant markets and assessing whether the applicant held a dominant position on those markets after 1 May 2004, as such assessments cannot be based on static figures and must take into account economic developments over time, including during the period preceding 1 May 2004 (recital 13 in the preamble to contested decision I).

15 Next, the Commission stated that the applicant's 'ATM' aggregation and core network (points I and II of Annex I to contested decision I) were launched before 1 May 2004 and that, at the date of that decision, the applicant continued to use them for the provision of retail and wholesale broadband service (recital 14 in the preamble to contested decision I).

16 Finally, the Commission stated that the documents specified in questions 16 and 17 of Annex III to the Commission's request for information and listed in points III and IV of Annex I to contested decision I, concerned wholesale broadband and retail services that were launched in 2003 and which the applicant continued to provide after 1 May 2004. It stated that the information at issue concerned the planning, launch, investment or the development of the retail and wholesale broadband services, their market positioning, their regulation, competing products and other relevant circumstances. The Commission added that other documents concerned the company's strategy on the broadband market, regulatory strategy, forecasts and discussions of the market situation, the applicant's reaction thereto and also the preparation of the reference offer for local loop unbundling and regulatory issues related to local loop unbundling. Those documents are therefore relevant to the Commission's investigation in the present case and are necessary within the meaning of Article 18(1) of Regulation No 1/2003 in order to assess the overall economic and financial context of the launch and the provision of retail and wholesale broadband access services in the territory of the Slovak Republic and also to the assessment of the compatibility of the applicant's conduct with the European Union competition rules (recital 15 in the preamble to contested decision I).

17 The operative part of the contested decision reads as follows:

'*Article 1*

Slovak Telekom a.s. shall supply, by 22 September 2009, the information specified in Annex I to this [d]ecision. Annex I forms an integral part of this [d]ecision.

Article 2

Should Slovak Telekom a.s. fail to supply the complete and correct information requested within the period prescribed in Article 1, it shall incur a periodic penalty payment of 1% of its average daily turnover during the preceding business year which makes EUR 28,114 … per day of delay, calculated from the date appointed by this [d]ecision.

Article 3

This [d]ecision is addressed to Slovak Telekom, a.s., with registered office at Karadžičova 10, 825 13 Bratislava, Slovak Republic together with all undertakings directly or indirectly, solely or jointly controlled by it.'

18 On 22 September 2009 the applicant supplied the Commission with all the information requested by it.

Contested decision II

19 On 8 February 2010 the Commission adopted Decision C(2010) 902 relating to a proceeding pursuant to Articles 18(3) and 24(1) of Regulation No 1/2003 (Case COMP/39.523 — Slovak Telekom).

20 In contested decision II the Commission recalled, in substance, a number of considerations already set out in contested decision I (recitals 2, 5 and 6 in the preamble to contested decision II) (see paragraphs 12 and 13 above).

21 In addition, the Commission stated, first of all, that the 'Standard report DEN' for 2003 requested in point 1 of Annex 1 to contested decision II contained accounting information on the applicant's wholesale and retail broadband services, such as revenues, costs and profitability. The Commission therefore considered that that document was necessary in order for the Commission to appreciate the profitability of the applicant's broadband access services for the entire period from their launch in 2003 until the date of contested decision II (recital 3 in the preamble to contested decision II).

22 Next, as regards the information and documents for 2003 requested in points 2 to 4 of Annex I to contested decision II, relating to costs involved in attracting new customers and certain capital expenses of Slovak Telekom for the provision of certain broadband services, the Commission stated that they were necessary for its assessment of the alleged abusive behaviour after 1 May 2004. It considered that costs such as capital expenditure and operating costs incurred in one business year may be depreciated over a longer period, which would affect the cost and profitability calculation in the subsequent business years (recital 3 in the preamble to contested decision II).

23 Finally, the Commission deemed it appropriate to request the information by decision, in view, in particular, of the risk of delays in the provision of the information, since the applicant had in the past refused to provide information relating to the period before 1 May 2004, and given the action for annulment of contested decision I pending before the General Court in Case T-458/09 (see paragraph 25 below) (recitals 7 and 13 in the preamble to contested decision II).

24 The operative part of contested decision II reads as follows:

'*Article 1*

Slovak Telekom a.s. shall supply, by 23 February 2010, the information specified in Annex I to this [d]ecision. Annex I forms an integral part of this [d]ecision.

Article 2

Should Slovak Telekom a.s. fail to supply the complete and correct information requested within the period prescribed in Article 1, it shall incur a periodic penalty payment of 1% of its average daily turnover during the preceding business year which makes EUR 28, 114 … per day of delay, calculated from the date appointed by this [d]ecision.

Article 3

This [d]ecision is addressed to Slovak Telekom, a.s., with registered office at Karadžičova 10, 825 13 Bratislava, Slovak Republic, … together with all undertakings directly or indirectly, solely or jointly controlled by it.'

Procedure and forms of order sought by the parties

25 By applications lodged at the Court Registry on 13 November 2009 and 15 April 2010 respectively, the applicant brought the present actions relating, so far as concerns Case T-458/09, to contested decision I and, so far as concerns Case T-171/10, to contested decision II.

26 In its applications, the applicant claims that the Court should:

— annul contested decision I and contested decision II;

— order the Commission to pay the costs.

27 In each case, the Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

28 On hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of its Rules of Procedure, requested the Commission to produce certain documents. The Commission did so within the prescribed time-limit.

29 Following an application to that effect by the applicant, to which the Commission raised no objection, Cases T-458/09 and T-171/10 were joined for the purposes of the oral procedure and the judgment, by order of the President of the Eighth Chamber of 30 June 2011.

30 The parties presented oral argument and replied to the Court's oral questions at the hearing on 15 September 2011.

Law

31 In support of each of its actions, the applicant puts forward three pleas in law. The first plea alleges an error of law in the application of Regulation No 1/2003. The second plea alleges an infringement of the 'principle of the fairness of the proceedings'. Finally, the third plea alleges an infringement of the principle of proportionality.

The first plea, alleging an error of law in the application of Regulation No 1/2003

32 By its first plea, the applicant claims that the Commission erred in law in applying Regulation No 1/2003. In the applicant's submission, since the Commission is not competent to apply Article 82 EC and Article 102 TFEU to conduct on the territory of the Slovak Republic before the latter's accession to the European Union, it was not empowered to request information, pursuant to Article 18(3) of that regulation, relating to the pre-accession period.

33 The applicant notes, in that regard, that Article 82 EC and Article 102 TFEU does not apply to the period covered by the contested decisions, as the Commission's competence in that regard is limited to abuse by undertakings in a dominant position within the common market or in a substantial part thereof in so far as it may affect trade between Member States. In the present case, those conditions were not satisfied before 1 May 2004. Prior to that date, the Slovak telecommunications market was not part of the common market and the applicant's conduct could not affect trade between Member States. Moreover, the Commission does not dispute that in contested decisions I and II. Furthermore, the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Slovak Republic, of the other part (OJ 1994 L 359, p. 1) did not render Articles 81 EC and 82 EC or Articles 101 TFEU and 102 TFEU directly applicable to the Slovak Republic before its accession to the European Union.

34 In the applicant's submission, the Commission's duties and competences under Regulation No 1/2003, and in particular Articles 18(3) and 24(1)(d) thereof, are determined and limited by the purpose of the investigation, namely the enforcement of the European Union competition rules, and therefore by the scope of Articles 81 EC and 82 EC and Articles 101 TFEU and 102 TFEU. In that regard, the concept of 'necessary information' in Article 18(1) of Regulation No 1/2003 requires a sufficient nexus between the request for information and the putative infringement. However, in the present cases, there is no nexus between the information requested and the alleged infringement, since no infringement could be found before 1 May 2004. Consequently, the Commission is not entitled to investigate under Article 82 EC and Article 102 TFEU and cannot rely on information relating to the applicant's conduct during the period before the Slovak Republic's accession to the European Union for the purpose of assessing the compatibility of the applicant's practices with European Union competition rules following accession.

35 It should be noted, at the outset, that, as the Commission expressly stated by letter of 5 June 2009 to the applicant (see paragraph 6 above), in recital 4 in the preamble to contested decision I and recital 9 in the preamble to contested decision II, and reiterated in its written pleadings and at the hearing, contested decisions I and II aimed to obtain concrete factual information, some of which pre-dates 1 May 2004, with a view to investigating the possible existence, on the part of the applicant and the companies under its control, of a refusal to enter into agreements, a possible margin squeeze and any other possible exclusionary practices with respect to wholesale access services to the local loop, and other wholesale and retail broadband access services. By contrast, in the Commission's submission, that stage was not about finding an infringement of the competition rules for the period prior to 1 May 2004.

36 The Court notes that, pursuant to Article 3(1)(g) EC, the activities of the European Community are to include, as provided for in the Treaty and in accordance with the timetable set out therein, a system ensuring that competition in the internal market is not distorted. Moreover, since the entry into force of the Treaty of Lisbon, Article 3(3) TEU states that the European Union is to establish an internal market, which, in accordance with Protocol No 27 on the internal market and competition, annexed to the EU Treaty and the TFEU (OJ 2010 C 83, p. 309), is to include a system ensuring that competition is not distorted.

37 Articles 81 EC and 82 EC, and Articles 101 TFEU and 102 TFEU are among the competition rules which Article 3(1)(b) TFEU refers to as being necessary for the functioning of the internal market.

38 The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union (see Case C-52/09 *TeliaSonera* [2011] ECR I-527, paragraph 22, and the case-law cited).

39 The Court also notes that Regulation No 1/2003, adopted pursuant to Article 83(1) EC, is designed, according to Article 83(2)(a) EC, to ensure compliance with the prohibitions laid down in Articles 81 EC and 82 EC.

40 To that end, Article 18(1) of Regulation No 1/2003 grants the Commission broad powers of investigation and review, stating that '[i]n order to carry out the duties assigned to it by this [r]egulation, the Commission may, by simple request or by decision, require undertakings and associations of undertakings to provide all necessary information'. In that regard, recital 23 in the preamble to the regulation states that the Commission 'should be empowered [within the European Union] to require such information to be supplied as is necessary to detect … any abuse of a dominant position prohibited by Article 82 [EC]'.

41 Thus, in order to ensure the effectiveness of Article 18(3) of Regulation No 1/2003, the Commission is entitled to compel undertakings to provide all necessary information concerning such facts as may be known to them and to disclose to the Commission, if necessary, such documents relating thereto as are in their possession, even if the latter may be used to establish the existence of anti-competitive conduct (see recital 23 in the preamble to Regulation No 1/2003; see also, by analogy, in relation to the application of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87); Case 374/87 *Orkem and Commission* [1989] ECR 3283, paragraphs 34 and 35; Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 61; Case C-301/04 P *Commission* v *SGL Carbon* [2006] ECR I-5915, paragraph 41; and Case T-446/05 *Amann & Söhne and Cousin Filterie* v *Commission* [2010] ECR II-1255, paragraph 327).

42 According to the case-law, the term 'necessary information' must be interpreted according to the objectives for the achievement of which the powers of investigation have been conferred upon the Commission. The requirement that there must exist a correlation between the request for information and the putative infringement is satisfied, since at that stage in the proceeding the request may legitimately be regarded as having a connection with the putative infringement, in the sense that the Commission may reasonably suppose that the document would help it to determine whether the alleged infringement had taken place (Case T-39/90 *SEP* v *Commission* [1991] ECR II-1497, paragraph 29, upheld on appeal by the Court of Justice in Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1911, paragraph 21, and the Opinion of Advocate General Jacobs in Case C-36/92 P *SEP* v *Commission* [1994] ECR I-1914, paragraph 21).

43 In addition, the Commission is entitled to require the disclosure only of information which may enable it to investigate putative infringements which justify the conduct of the inquiry and are set out in the request for information (*SEP* v *Commission* (T-39/90), paragraph 25, and Case T-34/93 *Société Générale* v *Commission* [1995] ECR II-545, paragraph 40). Moreover, given its broad powers of investigation and assessment, it is for the Commission to decide whether particular items of information which it requests from the undertakings concerned are necessary (see, to that effect, Case 155/79 *AM & S Europe* v *Commission* [1982] ECR 1575, paragraph 17; *Orkem* v *Commission*, paragraph 41 above, paragraph 15; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 78; and Case T-340/04 *France Télécom* v *Commission* [2007] ECR II-573, paragraph 148).

44 Finally, it should be noted that the Court of Justice has stated, on numerous occasions, in relation to the application of Regulation No 17, that an undertaking which is being investigated is subject to an obligation to cooperate actively, which implies that it must make available to the Commission all information relating to the subject-matter of the investigation (*Orkem* v *Commission*, paragraph 41 above, paragraph 27; *Aalborg Portland and Others* v *Commission*, paragraph 41 above, paragraph 62; and *Commission* v *SGL Carbon*, cited in paragraph 41 above, paragraph 40).

45 In the light of the wording and purpose of Article 18(1) of Regulation No 1/2003, and in accordance with the case-law set out in paragraphs 41 to 44 above, it must be found that the powers of investigation provided for in that provision are subject only to the requirement that the information requested be necessary, which it is for the Commission to evaluate, in order to assess the putative infringements justifying the undertaking of the investigation and, in particular, in the present case, to detect any abuse of a dominant position prohibited by Article 82 EC and Article 102 TFEU. Thus, any interpretation of Article 18(1) of Regulation No 1/2003 which amounts to prohibiting the Commission, as a matter of principle, from requesting from an undertaking information relating to a period during which the competition rules of the European Union did not apply, even though such information is necessary for the detection of a possible infringement of those rules from the point at which they become applicable, would risk depriving that provision of its effectiveness and would go against the Commission's duty to examine carefully and impartially all the relevant evidence in the case under

investigation (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraph 14; Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 86; and Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 404).

46 Such an interpretation would also be based on the false premiss that information relating to a period during which the competition rules of the European Union were not applicable to an undertaking can explain only events which took place during that same period.

47 First of all, the Court of Justice has already confirmed in that regard, in relation to investigations, decided under Article 14(3) of Regulation No 17, into Spanish undertakings slightly after the accession of the Kingdom of Spain to the European Community, that no rule limited the Commission's powers of investigation merely to conduct after accession (Joined Cases 97/87, 98/87 and 99/87 *Dow Chemicals Ibérica and Others* v *Commission* [1989] ECR 3165, paragraph 63).

48 Next, as the General Court held in Case T-198/03 *Bank Austria Creditanstalt* v *Commission* [2006] ECR II-1429, paragraph 89, relating to the application of Article 81 EC, the inclusion, in a decision imposing fines, of findings of fact in respect of a cartel cannot be conditional on the Commission having the power to find an infringement relating thereto or on its actually having found such an infringement. Indeed, it is legitimate for the Commission, in a decision finding an infringement and imposing a penalty, to describe the factual and historical context of the conduct at issue (see also recital 11 in the preamble to contested decision I and recital 5 in the preamble to contested decision II).

49 The applicant cannot claim, in that regard, that the judgment in *Bank Austria Creditanstalt* v *Commission*, paragraph 48 above, is not relevant in the present case on the grounds that, in that case, the General Court did not rule on the Commission's powers in determining the facts in circumstances in which the European Union competition rules did not apply and that it ruled only on the Commission's right to publish certain information on the period prior to the accession of the Republic of Austria to the European Union.

50 First, the applicant in that case expressly argued that the publication of the parts of the decision imposing a fine which related to the period prior to the accession of the Republic of Austria to the European Union was unlawful, in particular, on the ground that the Commission did not have jurisdiction to find that it committed an infringement in Austria during that period. Second, it is apparent from *Bank Austria Creditanstalt* v *Commission* that the General Court not only considered that the inclusion, in a decision imposing fines, of findings of fact in respect of a cartel cannot be conditional on the Commission having the power to find an infringement relating thereto or on its actually having found such an infringement, but also that the same was true for the publication of such findings, given that publication may be of use in allowing persons interested to understand fully the reasoning behind such a decision (*Bank Austria Creditanstalt* v *Commission*, paragraph 48 above, paragraphs 81 and 89).

51 Finally, it should be noted that the European Union judicature has recognised the Commission's need, in cases concerning the application of Article 81 EC, to request information relating to a period predating the period of the infringement in order to set out the context surrounding the conduct during that period. Thus, in Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 150, the General Court stated that it was legitimate for the Commission to describe, in a decision imposing fines, the wider context of the unlawful conduct. The applicant's submission that the undertakings concerned in that case did not contest the accuracy of the specific findings contained in the contested decision by alleging that they were not based on evidence dating from the relevant period (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 151) is irrelevant in that regard. In addition, in the judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commissio*n, not published in the ECR, paragraph 428, the General Court also considered that a note predating the period of infringement could be taken into

account by the Commission 'in order to construct an overall impression of the contacts between the competitors and could also corroborate the interpretation of the other evidence, pursuant to which the competitor undertakings at issue in this case had been in contact in relation to price increases'.

52 In the light of the foregoing, it is appropriate to reject the arguments that, as a matter of principle, the Commission could not rely on information relating to the applicant's conduct prior to the accession of the Slovak Republic to the European Union to assess whether its post-accession practices were compatible with the European Union competition rules.

53 The applicant also claims that conduct prior to 1 May 2004 cannot be relevant to the assessment as to whether it infringed Article 82 EC or Article 102 TFEU after 1 May 2004. It submits that there is no nexus between the infringement at issue and the requested information, since Article 82 EC and Article 102 TFEU did not apply to the facts being investigated by the Commission prior to 1 May 2004.

54 Such an argument must be rejected. First, it must be considered that information or documents relating to the developments on the markets and undertakings active on those markets may enable the Commission, irrespective of the fact that they predate the alleged period of infringement, to define the markets at issue or to determine whether the undertaking concerned holds a dominant position on those markets (recital 13 in the preamble to contested decision I).

55 Second, as regards the abuses alleged by the Commission to justify the initiation of the infringement proceedings (see paragraph 3 above), it must also be noted that certain figures relating to costs prior to 1 May 2004 may have proved necessary for the determination of the possible existence of a margin squeeze, which the applicant accepted at the hearing. Thus, it is possible that certain investment costs need to be depreciated over a period which does not necessarily coincide with the period of infringement (see recital 3 in the preamble to contested decision II). That is also apparent from the Commission's decision-making practice, invoked by the applicant, relating to the abuse of a dominant position (see recitals 76 and 77 in the preamble to the Commission's decision of 16 July 2003 relating to a proceeding under Article 82 EC (COMP/38.233 — Wanadoo Interactive); see also, in particular, recitals 328 and 474 to 489 of the Commission's decision of 4 July 2007 relating to a proceeding under Article 82 EC (COMP/38.784 — Wanadoo España v Telefónica). In that regard, it is appropriate to reject the applicant's argument, raised in Case T-171/10, pursuant to which specific information requested by the Commission should be 'strictly' necessary in the present case to conduct the margin squeeze test. As noted by the Commission, the interpretation of Article 18(1) of Regulation No 1/2003 suggested by the applicant would amount to requiring the Commission, before requesting any information, to be familiar with the content of the requested documents and their relative importance for the investigation.

56 Moreover, in certain cases, the available information relating to costs is not specific to a period which is not concerned by the infringement (see footnote No 64 of the Commission's decision of 16 July 2003 relating to a proceeding under Article 82 EC (COMP/38.233 — Wanadoo Interactive). Such a hypothesis is, moreover, expressly recognised by the applicant, which informed the Commission, by letter of 14 August 2009, that it had decided to communicate to it certain data for 2004, prior to the accession of the Slovak Republic to the European Union, 'since it was not possible to split the data concerned in a meaningful way' (see paragraph 10 above).

57 Finally, as rightly noted by the Commission, documents showing decisions taken by the applicant or agreements entered into by it before 1 May 2004, but implemented after the accession of the Slovak Republic to the European Union, may also be regarded as necessary by the Commission in order to enable it to establish the facts subsequent to that accession and to interpret them correctly.

58 Thus, evidence showing a possible intention to eliminate competitors may prove relevant for the application of Article 82 EC, in order to adequately investigate the case (see, to that effect, in relation to a decision ordering an inspection, *France Télécom* v *Commission*, paragraph 43 above, paragraph 150; see also, to that effect, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraphs 71 and 72; and *TeliaSonera*, paragraph 38 above, paragraph 40, and the case-law cited).

59 Third, it should be noted that, pursuant to Article 23(2) of Regulation No 1/2003, the Commission may, by decision, impose fines on undertakings where, either intentionally or negligently, they infringe Article 82 EC. It has been held that, in assessing the gravity of the infringement of competition rules for which an undertaking is liable, in order to determine a fine which is proportionate, the Commission was able take into account the particular gravity of infringements which formed part of a deliberate and coherent strategy seeking, by various eliminatory practices towards competitors and by a policy of retaining customers, to maintain artificially or to strengthen the dominant position of the undertaking in question on markets where competition was already limited (see, to that effect, Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraph 241, Case T-66/01 *Imperial Chemical Industries* v *Commission* [2010] ECR II-2631, paragraph 372, and the case-law cited).

60 It follows that information and documents, even which predate the period of infringement, such as some of the applicant's internal presentations referred to in point IV of Annex I to contested decision I, the relevance of which is disputed by the applicant, which are capable of establishing the existence of an exclusion strategy on the part of the applicant, may help the Commission to determine the gravity of a possible infringement and, consequently, may be regarded as necessary for the Commission to be able to carry out the duties assigned to it under Regulation No 1/2003, for the purposes of Article 18(1) thereof.

61 Therefore, contrary to what the applicant submits, the fact that the concept of abuse of a dominant position is an objective concept and implies no intention to cause harm does not lead to the conclusion that the intention to resort to practices falling outside the scope of competition on the merits is in all events irrelevant, since that intention can still be taken into account to support the conclusion that the undertaking concerned abused a dominant position, even if that conclusion should primarily be based on an objective finding that the abusive conduct actually took place. The Commission is therefore entitled to examine the internal documentation of the undertakings concerned, since such documentation may indicate whether the exclusion of competition was intended or, on the contrary, suggest another explanation for the practices under consideration.

62 In the light of the foregoing developments, and without it being necessary to rule on the Commission's arguments raised in Case T-458/09, alleging that the applicant used exculpatory evidence predating 1 May 2004, the applicant cannot claim that information and documents which predate 1 May 2004 are not relevant for the Commission's assessment of a possible refusal to supply, a possible margin squeeze or any other possible exclusionary practices (see recital 1 in the preamble to contested decisions I and II), on account of the fact that the finding of such infringements could be based only on objective data which post-dates the infringement.

63 At the hearing, the applicant submitted, lastly, that there was no objective link between the information requested, as a whole, and the alleged infringements, which justifies, in the alternative, partial annulment of the contested decisions, in so far as they concern, at least in part, certain information which does not bear any objective link with the alleged infringements. However, without it being necessary to rule on the admissibility of such an application, which is disputed by the Commission, it is sufficient to note that the applicant has failed to substantiate that claim, with the result that it must be rejected.

64 In the light of all the foregoing, the first plea must be rejected.

The second plea, alleging an infringement of the 'principle of the fairness of the proceedings'

65 By its second plea the applicant maintains that, in adopting contested decisions I and II, the Commission infringed the 'principle of procedural fairness' enshrined in Article 41(1) of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1) ('the Charter'). The applicant essentially submits that the Commission does not conduct its investigation with the requisite care, seriousness and diligence if its assessment of conduct subsequent to the Slovak Republic's accession to the European Union is biased by pre-accession information, even though the pre-accession conduct at issue is perfectly legal under European Union competition law. In the light of the foregoing, the Court considers that, in the context of the second plea, the applicant must be regarded as alleging an infringement of the principle of good administration.

66 It should be noted that recital 37 in the preamble to Regulation No 1/2003 states that the regulation 'respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union' and that it 'should be interpreted and applied with respect to those rights and principles'. Moreover, since the entry into force of the Treaty of Lisbon, pursuant to the first paragraph of Article 6(1) TEU, the Charter has the same legal value as the Treaties.

67 Article 41 of the Charter, entitled 'Right to good administration', states, in paragraph 1, that '[e]very person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'.

68 According to settled case-law of the European Union judicature relating to the principle of good administration, where the institutions of the European Union have a power of appraisal, respect for the rights guaranteed by the legal order of the European Union in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (*Technische Universität München*, paragraph 45 above, paragraph 14; *La Cinq* v *Commission*, paragraph 45 above, paragraph 86; and *Atlantic Container Line and Others* v *Commission*, paragraph 45 above, paragraph 404).

69 It is in the light of these clarifications that it needs to be determined whether, by adopting the contested decisions, the Commission infringed the principle of good administration.

70 In the first place, the applicant maintains that, for the purpose of proving an alleged infringement of that Article 82 EC after 1 May 2004, it is not permissible for the Commission to attempt to obtain information about the applicant's conduct on the market at a time when it was not required to comply with Article 82 EC.

71 Such an argument must be rejected. It is in particular as a result of the Commission's duty to examine carefully and impartially all the relevant aspects of the individual case that it is required to prepare a decision with the required level of diligence and to take its decision on the basis of all the information which might influence that decision. To that end, the Commission has the power to request undertakings to provide 'all necessary information', in accordance with Article 18(1) of Regulation No 1/2003.

72 As is apparent from the considerations set out in the context of the first plea, information and documents, even those which predate the accession of the Slovak Republic to the European Union and the period of infringement, may prove necessary for the Commission to be able to undertake the tasks assigned to it by Regulation No 1/2003 in an impartial and fair manner.

73 In the second place, the applicant claims that the Commission's investigation and its assessment will be distorted in regard to it. It submits that the documents which it is required to produce by virtue of contested decision I are likely to influence the Commission's perception of the applicant's conduct

after the accession of the Slovak Republic to the European Union. However, in the light of the developments in paragraphs 41 to 62 above, that argument cannot be upheld. In any event, such an argument must be rejected since it is based on a purely hypothetical premiss. Contested decisions I and II are not intended to analyse the applicant's conduct after 1 May 2004.

74 In the light of the foregoing, the second plea must be rejected.

The third plea, alleging an infringement of the principle of proportionality

75 In the context of the third plea, the applicant maintains that the Commission infringed the principle of proportionality, since in contested decisions I and II it requested the applicant to supply information and documents relating to the period preceding the Slovak Republic's accession to the European Union which are not necessary for its assessment of the alleged infringement of competition law. It is necessary to take into account, in that regard, the fundamental principle of domestic inviolability, which requires that the Commission does not exercise its investigative powers beyond what is necessary. Moreover, without expressly raising a plea alleging an infringement of Article 253 EC, so far as concerns contested decision I, and Article 296 TFEU, so far as concerns contested decision II, the applicant claims that the Commission offers no plausible explanation as to why the information demanded is necessary for the purposes of its investigation of the alleged infringement after 1 May 2004. In that regard, the applicant also notes that the Commission already obtained information covering more than five years from the accession of the Slovak Republic to the European Union.

76 First of all, in so far as the applicant actually sought to raise a plea alleging an infringement of Article 253 EC and Article 296 TFEU, that plea must be rejected. Just as the Court of Justice held in Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 25, in relation to Article 14(3) of Regulation No 17, and the General Court held in *Société Générale* v *Commission*, paragraph 43 above, paragraph 62, in relation to Article 11(3) of that regulation, Article 18(3) of Regulation No 1/2003 lays down the essential constituents of the statement of reasons for a decision requesting information.

77 Thus, that provision provides that the Commission 'shall state the legal basis and the purpose of the request, specify what information is required and fix the time-limit within which it is to be provided'. Moreover, that provision states that the Commission 'shall also indicate the penalties provided for in Article 23', that it '[shall] indicate or impose the penalties provided for in Article 24', and that it 'shall further indicate the right to have the decision reviewed by the Court of Justice'. In that regard, the Commission is not required to communicate to the addressee of a decision requiring information to be supplied all the information at its disposal concerning presumed infringements or to make a precise legal analysis of those infringements, although it must clearly indicate the presumed facts which it intends to investigate (*Société Générale* v *Commission*, paragraph 43 above, paragraph 62).

78 Besides the fact that, in the present case, recitals 20 and 21 in the preamble to, and the operative part of, contested decision I, on the one hand, and recitals 17 and 18 in the preamble to, and the operative part of, contested decision II, on the other, refer expressly to the penalties and the right to review referred to in paragraph 77 above, it must be found that, in recitals 12 to 15 of contested decision I (see paragraphs 13 to 16 above) and recital 3 in the preamble to contested decision II (see paragraphs 21 and 22 above), the Commission provided, to the requisite legal standard, the reasons why the information and documents requested in the annex to contested decisions I and II were necessary for its investigation of the alleged infringement.

79 In particular, the Commission expressly stated, first, in recital 14 in the preamble to contested decision I, the reasons why it considered that the requests for information in points I and II of Annex I to contested decision I were necessary and, second, in recital 15 in the preamble to contested decision I, the reasons why it requested the documents listed in points III and IV of that annex (see paragraphs 15

and 16 above). The Commission also justified, in recital 3 in the preamble to contested decision II, why it needed the 'Standard report DEN' and information and documents relating to costs involved in attracting new customers and certain capital expenses of Slovak Telekom for the provision of certain broadband services (see paragraphs 21 and 22 above).

80 Secondly, although the applicant submits that contested decisions I and II infringe the principle of proportionality, such a plea must be dismissed.

81 It should be noted, at the outset, that requests for information made by the Commission to an undertaking must comply with the principle of proportionality and the obligation imposed on an undertaking to supply information should not be a burden on that undertaking which is disproportionate to the needs of the inquiry (see *SEP* v *Commission*, paragraph 42 above, paragraphs 51 and 52, and *Atlantic Container Line and Others* v *Commission*, paragraph 45 above, paragraph 418, and the case-law cited). In addition, according to the case-law, the need for protection against arbitrary or disproportionate intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, is recognised as a general principle of law of the European Union (see, to that effect, Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] ECR 2859, paragraph 19, and the case-law cited).

82 First, the applicant submits that the Commission requested from it information and documents on the period prior to the accession of the Slovak Republic to the European Union, even though such information and documents were not necessary and could not be regarded as such for the purposes of assessing the alleged infringement. In that regard, it submits that the Commission had already obtained information covering a period of more than five years from the accession of that Member State to the European Union. Accordingly, the Commission forced it, under the threat of penalties, to invest significant human resources and to submit a broad range of non-public information that is unrelated to the period to which Article 82 EC and Article 102 TFEU apply. Such a finding is accentuated by an examination of the nature of the actual claims brought against the applicant.

83 It must be found that the applicant, in Case T-458/09, has not given any detail as to why the duty imposed on it to provide a broad range of non-public information or to invest significant human resources in that regard amounted to a burden which was disproportionate to the needs of the inquiry. In Case T-171/10, it has stated that the fact that the requested information did not concern the period of the investigation, that it could not be used to find an abuse during the period to which it related and that it did not represent a condition *sine qua non* of the finding of an alleged infringement committed after the accession of the Slovak Republic to the European Union, implied that contested decision II infringed the principle of proportionality.

84 However, since the complaints referred to in paragraphs 82 and 83 above overlap with those which have already been rejected in the context of the first plea and the applicant fails to provide any other explanation as to the disproportionate nature of the burden it claims to have had placed on it, it cannot be found that the Commission infringed the principle of proportionality.

85 In any event, as the Commission submitted in its rejoinders, it actually sought to limit the burden placed on the applicant. Thus, in contested decision I, the Commission merely requested the applicant to provide it with the presentations and other documents which it deemed necessary, following a prior analysis of the minutes of the applicant's management board. In contested decision II, it limited its requests to certain documents, following, inter alia, an interview with the applicant regarding the types of financial and accounting reports and the information in the applicant's possession. As regards the applicant's argument, which it raised at the hearing, that the Commission made 17 requests for information from it and its parent company, some of which requesting an update of existing information, the Commission stated, without being challenged by the applicant, that those requests were made after the contested decisions had been adopted. Since the legality of a European Union measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was

adopted, the applicant's argument must be rejected as ineffective (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 87, and Case C-485/08 P *Gualtieri* v *Commission* [2010] ECR I-3009, paragraph 26).

86 Second, the applicant claims that the Commission infringed the principle of proportionality by requesting it to provide data covering, roughly, the one and a half year period prior to the Slovak Republic's accession to the European Union, which, it claims, shows that the information requested did not bear a sufficient nexus to the alleged infringement.

87 However, such a complaint also seeks, in essence, to show that the requested information was not necessary within the meaning of Article 18(1) of Regulation No 1/2003.

88 A complaint of that nature has been rejected in the context of the first plea. In any event, as regards contested decision I, it must be found that the applicant does not dispute the statements in recital 14 in the preamble to contested decision I, pursuant to which, first, the 'ATM' aggregation and the applicant's core network (points I and II of Annex I to contested decision I) were launched before 1 May 2004 and, second, at the date of contested decision I, the applicant continued to use them for the provision of retail and wholesale broadband service. Similarly, the applicant does not dispute the assertions in recital 15 in the preamble to contested decision I, pursuant to which the documents referred to in points III and IV of Annex I to that decision (i) concern retail and wholesale broadband services that were launched in 2003 and that the applicant continued to provide after 1 May 2004, and (ii) concern the planning, launch, investment or the development of the retail and wholesale broadband services. The Commission was entitled to consider that such information, even though it covered, roughly, the one and a half year period prior to the accession of the Slovak Republic to the European Union, was necessary. The same is true, so far as concerns contested decision II and for the reasons set out in paragraph 55 above, of the requests for information relating to revenue, costs (which may or may not have needed to be depreciated) and the applicant's profitability (see paragraphs 21 and 22 above).

89 In the light of the foregoing, the applicant has failed to show that the principle of proportionality was infringed as a result of the fact that the documents and information requested cover, roughly, the one and a half year period prior to the accession of the Slovak republic to the European Union.

90 Third, the applicant in Case T-171/10 accuses the Commission of having failed to send it a 'simple request for information'. However, the Commission may, in accordance with Article 18 of Regulation No 1/2003, request information from an undertaking 'by simple request or by decision', without being required by that provision to make adoption of a decision subject to a 'simple request' in advance. Consequently, the Commission cannot be considered to have infringed the principle of proportionality by merely having adopted contested decision II without first having sent the applicant such a request. Moreover, it must be considered that the Commission did not infringe the principle of proportionality by requesting information from the applicant in contested decision II without first having sent the applicant such a request, in the light of the circumstances set out in recitals 7 and 13 in the preamble to contested decision II and, in particular, of the risk of delay in their communication since, in the past, the applicant had refused to provide information relating to the period prior to 1 May 2004, and given the action for annulment in relation to contested decision I (see paragraph 23 above).

91 The third plea must therefore be dismissed, as must the action in its entirety.

Costs

92 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicant in Cases T-458/09 and T-171/10 has been unsuccessful, it must be ordered to pay the costs of each of those cases, as applied for by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the actions;

2. Orders Slovak Telekom a.s. to pay the costs.

Truchot Martins Ribeiro Kanninen

Delivered in open court in Luxembourg on 22 March 2012.

[Signatures]