JUDGMENT OF THE COURT (First Chamber)

17 February 2011 *

In Case C-52/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Stockholms tingsrätt (Sweden), made by decision of 30 January 2009, received at the Court on 6 February 2009, in the proceedings

Konkurrensverket

v

TeliaSonera Sverige AB,

intervening parties:

Tele2 Sverige AB,

* Language of the case: Swedish.

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, M. Ilešič, M. Safjan and M. Berger, Judges,

Advocate General: J. Mazák,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 18 March 2010,

after considering the observations submitted on behalf of:

— the Konkurrensverket, by C. Zackari, C. Landström and S. Martinsson, acting as Agents, and by U. Öberg, advokat,

— TeliaSonera Sverige AB, by E. Söderlind and C. Mailund, advokater,

— Tele2 Sverige AB, by C. Wetter and P. Forsberg, advokater,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

— the European Commission, by L. Parpala, E. Gippini Fournier and K. Mojzesowicz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 September 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 102 TFEU with regard to the criteria on the basis of which a pricing practice causing margin squeeze should be held to constitute an abuse of a dominant position.

2 The reference was made in proceedings where the opposing parties are the Konkurrensverket (the Swedish competition authority) and TeliaSonera Sverige AB ('TeliaSonera'), the former having brought an action requesting that the latter be ordered to pay an administrative fine for its infringement of the national competition rules and of Article 82 EC (now Article 102 TFEU).

The dispute in the main proceedings and the questions referred for a preliminary ruling

3 At the end of the 1990s and the beginning of the 2000s, a growing number of Swedish end users of internet services moved from dial-up internet connections, with low transmission speeds, to various types of broadband connection with considerably higher transmission speeds. At that time the most widespread form of broadband connection was that achieved by asymmetric digital subscriber line ('ADSL'). Those connections used a telephone network, or a cable television network, or a local area network.

4 Historically, TeliaSonera, formerly Telia AB, has been the Swedish fixed telephone network operator, the holder in the past of exclusive rights. It has long been the owner of a local metallic access network to which almost all Swedish households are connected. In particular, TeliaSonera owns the local loop, in other words the part of the copper pairs telephone network which connects the telephone operator's exchange to the subscriber's telephone.

5 TeliaSonera offered access to the local loop to other operators, in two ways. On the one hand, it offered unbundled access, in accordance with its obligations under Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4).

6 On the other hand, without being legally obliged to do so, TeliaSonera offered to operators an ADSL product intended for wholesale users. That product enabled the operators concerned to supply their broadband connection services to end users.

7 At the same time, TeliaSonera offered broadband connection services directly to end users.

8 In the opinion of the Konkurrensverket, between April 2000 and January 2003 TeliaSonera abused its dominant position to the extent that it applied a pricing policy under which the spread between the sale prices of ADSL products intended for wholesale users and the sale prices of services offered to end users was not sufficient to cover the costs which TeliaSonera itself had to incur in order to distribute those services to the end users concerned.

9 For that reason, the Konkurrensverket brought an action before the Stockholms tingsrätt (the Stockholm District Court) requesting that the court order TeliaSonera to pay an administrative fine for infringements of the national competition rules, from April 2000 until January 2003, and of Article 82 EC, in the period from 1 January 2001 until January 2003.

10 It is apparent from the order for reference that, even though the parties in the main proceedings are not agreed on a number of factual details, such as whether the practice at issue has any effect on trade between the Member States, how the relevant market in which TeliaSonera holds a dominant position should be defined or even whether such a position exists, the referring court is nevertheless obliged, in the light of domestic procedural rules, to submit its reference for a preliminary ruling at this stage. Those rules, in the context of actions such as that in the main proceedings, provide that the tingsrätt is to assess the evidence and questions of law simultaneously at the time of deliberation.

11 In any event, the referring court adds that, if, after assessing the evidence, it was to conclude that the practice at issue is not liable to affect trade between Member States, the interpretation by the Court of Article 102 TFEU would remain necessary, since

the Swedish legislation relating to competition is modelled on European Union (EU) law and its interpretation takes account of that law.

12 The Stockholms tingsrätt therefore decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Under what conditions does an infringement of Article [102 TFEU] arise on the basis of a difference between the price charged by a vertically integrated dominant undertaking for the sale of ADSL input products to competitors on the wholesale market and the price which the same undertaking charges on the end-user market?

(2) Is it only the prices of the dominant undertaking to end users which are relevant or should the prices of competitors on the end-user market also be taken into account in the consideration of question 1?

(3) Is the answer to question 1 affected by the fact that the dominant undertaking does not have any regulatory obligation to supply on the wholesale market but has, rather, chosen to do so on its own initiative?

(4) Is an anti-competitive effect required in order for a practice of the kind described in question 1 to constitute abuse and, if so, how is that effect to be determined?

(5) Is the answer to question 1 affected by the degree of market strength enjoyed by the dominant undertaking?

(6) Is the dominant position on both the wholesale market and the end-user market of the undertaking engaging in the practice required in order for a practice of the kind described in question 1 to constitute abuse?

(7) For a practice such as that described in question 1 to constitute abuse, must the good or service supplied by the dominant undertaking on the wholesale market be indispensable to competitors?

(8) Is the answer to question 1 affected by the question whether the supply is to a new customer?

(9) Is an expectation that the dominant undertaking will be able to recoup the losses it has incurred required in order for a practice of the kind described in question 1 to constitute abuse?

(10) Is the answer to question 1 affected by the question whether a change of technology is involved on a market with a high investment requirement, for example with regard to reasonable establishment costs and the possible need to sell at a loss during an establishment phase?'

Admissibility of the reference

13 The referring court acknowledges that, because of the procedural rules applicable to the action in the main proceedings, it is unable to provide the Court with a number of factual details. In particular, no relevant market has yet been defined and, consequently, it has not been established that TeliaSonera was in fact dominant. Likewise, it has not yet been possible to determine whether TeliaSonera's conduct affected trade between Member States or whether Article 82 EC was indeed applicable to the case in the main proceedings.

14 In that regard, the Polish Government, in its written observations, maintained that the practices of operators such as TeliaSonera do affect, as a general rule, trade between Member States and that, consequently, the Court has jurisdiction to answer the questions referred. However, the Polish Government added that if, in this particular case, trade between Member States was not affected by TeliaSonera's conduct, the Court would not have jurisdiction since, in that event, only national law would apply.

15 However, it should be recalled that, according to settled case-law, in proceedings under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions referred concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-414/07 *Magoora* [2008] ECR I-10921, paragraph 22; Joined Cases C-316/07, C-358/07 to C-360/07, C-409/07 and C-410/07 *Stoß and Others* [2010] ECR I-8069, paragraph 51; and Case C-45/09 *Rosenbladt* [2010] ECR I-9391, paragraph 32).

16 The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to (Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22; *Magoora*, paragraph 23; and *Stoß and Others*, paragraph 52).

17 In the present case, the absence of findings of fact by the referring court on matters such as whether TeliaSonera is dominant or whether there is evidence to suggest that trade between Member States has been affected by TeliaSonera's conduct cannot by itself mean that the Court is unable to provide useful answers to the questions referred by the Stockholms tingsrätt. The answers to the questions referred may, taking into account, in particular, the considerations mentioned in paragraph 10 of this judgment, be required to enable the Swedish court to give a ruling on the dispute in the main proceedings. It is furthermore clear that this reference for a preliminary ruling is concerned with rules of EU law.

18 In those circumstances, the reference for a preliminary ruling must be held to be admissible.

Consideration of the questions referred for a preliminary ruling

19 By its questions, which can be dealt with together, the referring court, in essence, asks the Court to clarify in what circumstances the spread, between, on the one hand, the wholesale prices for ADSL input services supplied to operators and, on the other hand, the retail prices for broadband connection services supplied to end users,

resulting from the pricing practice applied by a vertically integrated telecommunications undertaking, may constitute an abuse, within the meaning of Article 102 TFEU, by that undertaking of its dominant position. The referring court asks, in particular, for guidance on the following points:

— whether account should be taken solely of the retail prices for broadband connection services to end users applied by that undertaking, or also of the retail prices applied by other operators;

— whether the absence of any regulatory obligation on that undertaking to supply ADSL input services is of any significance;

— whether it is necessary to establish that there is an anti-competitive effect and, if so, how that effect can be determined;

— whether the degree of market strength enjoyed by the dominant undertaking is relevant;

— whether the undertaking concerned has solely to be dominant on the wholesale market for ADSL input services, or must additionally be dominant on the retail market for services to end users;

— whether the good or the service supplied by that undertaking has to be indispensable;

— whether the fact that the services are supplied to a new customer is relevant;

— whether it is necessary that the dominant undertaking be able to recoup the losses caused by the practice at issue, and

— the relevance of the fact that the market concerned involves new technology, requiring high levels of investment.

20 In order to answer those questions, it must be observed at the outset that 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 Treaty of Lisbon (OJ 2010 C 83, p. 309), is to include a system ensuring that competition is not distorted.

21 Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market.

22 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, to that effect, Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 42).

23 In that context, the dominant position referred to in Article 102 TFEU relates to 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 (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 38, and Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph 170).

24 Accordingly, Article 102 TFEU must be interpreted as referring not only to practices which may cause damage to consumers directly (see, to that effect, Joined Cases C-468/06 to C-478/06 *Sot. Lélos kai Sia and Others* [2008] ECR I-7139, paragraph 68, and *Deutsche Telekom* v *Commission*, paragraph 176), but also to those which are detrimental to them through their impact on competition. Whilst Article 102 TFEU does not prohibit an undertaking from acquiring, on its own merits, the dominant position in a market, and while, a fortiori, a finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking concerned (see, to that effect, Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 57, and Joined Cases C-395/96 P and C-396/96 P *Compagnie maritime belge transports and Others* v *Commission* [2000] ECR I-1365, paragraph 37), it remains the case that, in accordance with settled case-law, an undertaking which holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the internal market (see, to that effect, Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 105 and case-law cited).

25 As regards the abusive nature of pricing practices such as those in the main proceedings, it must be noted that subparagraph (a) of the second paragraph of Article 102 TFEU expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices.

26 Furthermore, the list of abusive practices contained in Article 102 TFEU is not exhaustive, so that the list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by EU law (*Deutsche Telekom* v *Commission*, paragraph 173 and case-law cited).

27 The concept of abuse of a dominant position prohibited by that provision is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition (*Deutsche Telekom* v *Commission*, paragraph 174 and case-law cited).

28 In order to determine whether the dominant undertaking has abused its position by the pricing practices it applies, it is necessary to consider all the circumstances and to investigate whether the practice tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties, or to strengthen the dominant position by distorting competition (*Deutsche Telekom* v *Commission*, paragraph 175 and case-law cited).

29 Those are the principles in the light of which the referring court must examine the pricing practice at issue in the main proceedings in order to establish whether it constitutes an abuse of any dominant position that may be held by TeliaSonera.

30 In particular, after ascertaining whether the other conditions for the applicability of Article 102 TFEU are satisfied in the present case – including whether TeliaSonera holds a dominant position and whether trade between Member States was affected by its conduct – it is for the referring court to examine, in essence, whether the pricing practice introduced by TeliaSonera is unfair in so far as it squeezes the margins of its competitors on the retail market for broadband connection services to end users.

31 A margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 183).

32 In the present case, there would be such a margin squeeze if, inter alia, the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users.

33 In such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss or at artificially reduced levels of profitability.

34 It must moreover be made clear that since the unfairness, within the meaning of Article 102 TFEU, of such a pricing practice is linked to the very existence of the margin squeeze and not to its precise spread, it is in no way necessary to establish that the wholesale prices for ADSL input services to operators or the retail prices for broadband connection services to end users are in themselves abusive on account of their excessive or predatory nature, as the case may be (*Deutsche Telekom* v *Commission*, paragraphs 167 and 183).

35 In addition, as maintained by TeliaSonera, before the spread between the prices of those services can be regarded as squeezing the margins of competitors of the dominant undertaking, account must be taken not only of the prices of services supplied to competitors which are comparable to the services which TeliaSonera itself must obtain to have entry to the retail market, but also of the prices of comparable services supplied to end users on the retail market by TeliaSonera and its competitors. Similarly, a comparison must be made between the prices actually applied by TeliaSonera and its competitors over the same period of time.

36 Given the particular circumstances, described in paragraph 10 of this judgment, in which this reference for a preliminary ruling was submitted, it is not possible to provide the referring court with specific guidance in relation to the case in the main proceedings. Likewise, the markets described by that court must be regarded as the relevant markets, without prejudice, of course, to the correct definition of those markets, which it is for that court to provide.

37 However, as regards the criteria an interpretation of which is requested by that court to enable it correctly to assess whether TeliaSonera did infringe Article 102 TFEU by committing an abuse of a dominant position in the form of a margin squeeze, the following points can be made.

The prices to be taken into account

38 The Stockholms tingsrätt seeks to ascertain, first, whether, for that purpose, account should be taken not only of the retail prices applied by the dominant undertaking for services to end users, but also those applied by competitors for those services.

39 It must be recalled, in that regard, that the Court has already made clear that Article 102 TFEU prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 177 and case-law cited).

40 Where an undertaking introduces a pricing policy intended to drive from the market competitors who are perhaps as efficient as that dominant undertaking but who, because of their smaller financial resources, are incapable of withstanding the competition waged against them, that undertaking is, accordingly, abusing its dominant position (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 199).

41 In order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy (see, to that effect, Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 74, and *France Télécom* v *Commission*, paragraph 108).

42 In particular, as regards a pricing practice which causes margin squeeze, the use of such analytical criteria can establish whether that undertaking would have been sufficiently efficient to offer its retail services to end users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for the intermediary services (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 201).

43 If that undertaking would have been unable to offer its retail services otherwise than at a loss, that would mean that competitors who might be excluded by the application of the pricing practice in question could not be considered to be less efficient than the dominant undertaking and, consequently, that the risk of their exclusion was due to distorted competition. Such competition would not be based solely on the respective merits of the undertakings concerned.

44 Furthermore, the validity of such an approach is reinforced by the fact that it conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct, which is consistent with its special responsibility under Article 102 TFEU, as stated in paragraph 24 of this judgment. While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors (*Deutsche Telekom* v *Commission*, paragraph 202).

45 That said, it cannot be ruled out that the costs and prices of competitors may be relevant to the examination of the pricing practice at issue in the main proceedings. That might in particular be the case where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons, or where the service supplied to competitors consists in the mere use of an infrastructure the production cost of

which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it, or again where the particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it.

46 It must therefore be concluded that, when assessing whether a pricing practice which causes a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the undertaking concerned on the retail services market. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined.

The absence of any regulatory obligation to supply

47 It is apparent from the order for reference that, contrary to the case which gave rise to *Deutsche Telekom* v *Commission*, TeliaSonera, as stated in paragraph 6 of this judgment, was not under any regulatory obligation to supply ADSL input services to operators.

48 Accordingly, the Stockholms tingsrätt seeks to ascertain, secondly, whether the absence of any regulatory obligation to supply those services on the wholesale market has any effect on the question of whether the pricing practice at issue in the main proceedings was abusive.

49 In that regard, it must be borne in mind that Article 102 TFEU applies only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 102 TFEU does not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings (see, to that effect, Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraph 33 and case-law cited).

50 Article 102 TFEU may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (see *Commission and France* v *Ladbroke Racing*, paragraph 34).

51 The Court has stated that notwithstanding such legislation, if a dominant vertically integrated undertaking has scope to adjust even its retail prices alone, the margin squeeze may on that ground alone be attributable to it (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 85).

52 It follows from the foregoing that, a fortiori, where an undertaking has complete autonomy in its choice of conduct on the market, Article 102 TFEU is applicable to it.

53 The special responsibility which a dominant undertaking has not to allow its conduct to impair genuine undistorted competition in the internal market concerns specifically the conduct, by commission or omission, which that undertaking decides on

its own initiative to adopt (see, to that effect, the order in Case C-552/03 P *Unilever Bestfoods* v *Commission* [2006] ECR I-9091, paragraph 137).

54 TeliaSonera maintains, in that regard, that, in order specifically to protect the economic initiative of dominant undertakings, they should remain free to fix their terms of trade, unless those terms are so disadvantageous for those entering into contracts with them that those terms may be regarded, in the light of the relevant criteria set out in Case C-7/97 *Bronner* [1998] ECR I-7791, as entailing a refusal to supply.

55 Such an interpretation is based on a misunderstanding of that judgment. In particular, it cannot be inferred from paragraphs 48 and 49 of that judgment that the conditions to be met in order to establish that a refusal to supply is abusive must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser.

56 Such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to supply.

57 Moreover, it must be observed that since the Court was, in the said paragraphs of *Bronner*, called upon, in essence, only to interpret Article 86 of the EC Treaty (thereafter Article 82 EC, now Article 102 TFEU) with regard to the conditions under which a refusal to supply may be abusive, the Court did not make any ruling on whether the fact that an undertaking refuses access to its home-delivery scheme to the publisher of a rival newspaper where the latter does not at the same time entrust to it the

carrying out of other services, such as sales in kiosks or printing, constitutes some other form of abuse of a dominant position, such as tied sales.

58 Moroever, if *Bronner* were to be interpreted otherwise, in the way advocated by TeliaSonera, that would, as submitted by the European Commission, amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 102 TFEU.

59 It follows that the absence of any regulatory obligation to supply the ADSL input services on the wholesale market has no effect on the question of whether the pricing practice at issue in the main proceedings is abusive.

Whether an anti-competitive effect is required and whether the product offered by the undertaking must be indispensable

60 The referring court seeks to ascertain, thirdly, whether the abusive nature of the pricing practice in question depends on whether there actually is an anti-competitive effect and, if so, how that effect can be determined. Moreover, it seeks to ascertain whether the product offered by TeliaSonera on the wholesale market must be indispensable for entry onto the retail market.

61 It must be observed in that regard that, bearing in mind the concept of abuse of a dominant position explained in paragraph 27 of this judgment, the Court has ruled out the possibility that the very existence of a pricing practice of a dominant undertaking which leads to the margin squeeze of its equally efficient competitors

can constitute an abuse within the meaning of Article 102 TFEU without it being necessary to demonstrate an anti-competitive effect (see, to that effect, *Deutsche Telekom* v *Commission*, paragraphs 250 and 251).

62 The case-law has furthermore made clear that the anti-competitive effect must relate to the possible barriers which such a pricing practice may create to the growth on the retail market of the services offered to end users and, therefore, on the degree of competition in that market (*Deutsche Telekom* v *Commission*, paragraph 252).

63 Accordingly, the practice in question, adopted by a dominant undertaking, constitutes an abuse within the meaning of Article 102 TFEU, where, given its effect of excluding competitors who are at least as efficient as itself by squeezing their margins, it is capable of making more difficult, or impossible, the entry of those competitors onto the market concerned (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 253).

64 It follows that, in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking.

65 Where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze on its equally efficient competitors, with the purpose of driving them from the relevant market, 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.

66 However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue in the main proceedings cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 254).

67 In the present case, it is for the referring court to examine whether the effect of Telia-Sonera's pricing practice was likely to hinder the ability of competitors at least as efficient as itself to trade on the retail market for broadband connection services to end users.

68 In that examination that court must take into consideration all the specific circumstances of the case.

69 In particular, the first matter to be analysed must be the functional relationship of the wholesale products to the retail products. Accordingly, when assessing the effects of the margin squeeze, the question whether the wholesale product is indispensable may be relevant.

70 Where access to the supply of the wholesale product is indispensable for the sale of the retail product, competitors who are at least as efficient as the undertaking which dominates the wholesale market and who are unable to operate on the retail market other than at a loss or, in any event, with reduced profitability suffer a competitive disadvantage on that market which is such as to prevent or restrict their access to it

or the growth of their activities on it (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 234).

71 In such circumstances, the at least potentially anti-competitive effect of a margin squeeze is probable.

72 However, taking into account the dominant position of the undertaking concerned in the wholesale market, the possibility cannot be ruled out that, by reason simply of the fact that the wholesale product is not indispensable for the supply of the retail product, a pricing practice which causes margin squeeze may not be able to produce any anti-competitive effect, even potentially. Accordingly, it is again for the referring court to satisfy itself that, even where the wholesale product is not indispensable, the practice may be capable of having anti-competitive effects on the markets concerned.

73 Secondly, it is necessary to determine the level of margin squeeze of competitors at least as efficient as the dominant undertaking. If the margin is negative, in other words if, in the present case, the wholesale price for the ADSL input services is higher than the retail price for services to end users, an effect which is at least potentially exclusionary is probable, taking into account the fact that, in such a situation, the competitors of the dominant undertaking, even if they are as efficient, or even more efficient, compared with it, would be compelled to sell at a loss.

74 If, on the other hand, such a margin remains positive, it must then 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.

75 That said, it must be borne in mind that an undertaking remains at liberty to demonstrate that its pricing practice, albeit producing an exclusionary effect, is economically justified (see, to that effect, Case C-95/04 P *British Airways* v *Commission* [2007] ECR I-2331, paragraph 69, and *France Télécom* v *Commission*, paragraph 111).

76 The assessment of the economic justification for a pricing practice established by an undertaking in a dominant position which is capable of producing an exclusionary effect is to be made on the basis of all the circumstances of the case (see, to that effect, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 73). In that regard, it has to be determined whether the exclusionary effect arising from such a practice, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that practice bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that practice must be regarded as an abuse (*British Airways* v *Commission*, paragraph 86).

77 It must then be concluded that, in order to establish that a pricing practice resulting in margin squeeze is abusive, it is necessary to demonstrate that, taking into account, in particular, the fact that the wholesale product is indispensable, that practice produces, at least potentially, an anti-competitive effect on the retail market which is not in any way economically justified.

The importance of market strength

78 The referring court seeks to ascertain, fourthly, whether the degree of market dominance held by the undertaking concerned is relevant to establishing whether the pricing practice in question constitutes an abuse.

79 As stated in paragraph 23 of this judgment, the dominant position referred to in Article 102 TFEU relates to 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.

80 Accordingly, that provision, as stated by the Advocate General in point 41 of his Opinion, does not envisage any variation in form or degree in the concept of a dominant position. Where an undertaking has an economic strength such as that required by Article 102 TFEU to establish that it holds a dominant position in a particular market, its conduct must be assessed in the light of that provision.

81 Of course, that does not mean that an undertaking's strength is not relevant to the assessment of the lawfulness of the conduct in the market of such an undertaking in the light of Article 102 TFEU. The Court itself has based its analyses on the fact that an undertaking enjoyed a position of super-dominance or a quasi-monopoly (see, to that effect, Case C-333/94 P *Tetra Pak* v *Commission* [1996] ECR I-5951, paragraph 31, and *Compagnie maritime belge transports and Others* v *Commission*, paragraph 119). Nonetheless the degree of market strength is, as a general rule, significant in relation to the extent of the effects of the conduct of the undertaking concerned rather than in relation to the question of whether the abuse as such exists.

82 It follows that the application of a pricing practice resulting in margin squeeze by an undertaking may constitute an abuse of a dominant position where that undertaking has such a position, and, as a general rule, the degree of dominance in the market concerned is not relevant in that regard.

The extent of the dominant position

83 The referring court seeks to ascertain, fifthly, whether the fact that the undertaking concerned has a dominant position solely in the wholesale market for ADSL input services is sufficient for the practice in question to be considered abusive, or whether, rather, it is necessary, for that purpose, that that undertaking also has such a position in the retail market for broadband connection services to end users.

84 It must be stressed, in that regard, that Article 102 TFEU gives no explicit guidance as to what is required in relation to where on the product markets the abuse took place. Accordingly, the actual scope of the special responsibility imposed on a dominant undertaking must be considered in the light of the specific circumstances of each case which show that competition has been weakened (*Tetra Pak* v *Commission*, paragraph 24).

85 It follows that certain conduct on markets other than the dominated markets and having effects either on the dominated markets or on the non-dominated markets themselves can be categorised as abusive (see, to that effect, *Tetra Pak* v *Commission*, paragraph 25).

86 While the application of Article 102 TFEU presupposes a link between the dominant position and the alleged abusive conduct, which is normally not present where conduct on a market distinct from the dominated market produces effects on that distinct market, the fact remains that in the case of distinct, but associated, markets, the application of Article 102 TFEU to conduct found on the associated, non-dominated,

market and having effects on that associated market can be justified by special circumstances (see, to that effect, Case 311/84 *CBEM* [1985] ECR 3261, paragraph 26, and *Tetra Pak* v *Commission*, paragraph 27).

87 Such circumstances can arise where the conduct of a vertically integrated dominant undertaking on an upstream market consists in attempting to drive out at least equally efficient competitors in the downstream market, in particular by applying margin squeeze to them. Such conduct is likely, not least because of the close links between the markets concerned, to have the effect of weakening competition in the downstream market.

88 Further, in such a situation, in the absence of any other economic and objective justification, such conduct can be explained only by the dominant undertaking's intention to prevent the development of competition in the downstream market and to strengthen its position, or even to acquire a dominant position, in that market by using means other than reliance on its own merits.

89 Consequently, the question whether a pricing practice introduced by a vertically integrated dominant undertaking in the wholesale market for ADSL input services and resulting in the margin squeeze of competitors of that undertaking in the retail market for broadband connection services to end users is abusive does not depend on whether that undertaking is dominant in that retail market.

The relevance of the fact that the supply concerned is to a new customer

90 The Stockholms tingsrätt seeks to ascertain, sixth, whether the fact that the pricing practice in question is applied to a new customer rather than to an existing customer of the dominant undertaking is relevant to assessing whether it is abusive.

91 In that regard, suffice it to say that the abusiveness of a pricing practice resulting in a margin squeeze on competitors who are at least as efficient as the dominant undertaking resides, in essence, in the fact that, as stated in paragraph 32 of this judgment, such a practice may prevent normal competition in a market neighbouring the dominated market in so far as it may have the effect of driving out that undertaking's competitors from that market.

92 In that regard, as correctly maintained by the Commission, whether the operators concerned are existing or new customers of the dominant undertaking can be of no relevance.

93 Moreover, the fact that the new clients concerned are not yet active on the market concerned can also be of no relevance.

94 The point must be made that the abusiveness of a pricing practice such as that at issue in the main proceedings must be assessed not only with regard to the possibility that the effect of that practice may be that equally efficient operators who are already active in the relevant market may be driven from it, but also by taking into account

any barriers which the practice is capable of creating in the way of operators who are potentially equally efficient and who are not yet present on the market (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 178).

95 Consequently, whether the pricing practice at issue is liable to drive out from the market concerned existing clients of the dominant undertaking or rather new clients of that undertaking is not, as a general rule, relevant to the assessment of whether the practice is abusive.

The opportunity to recoup losses

96 The seventh issue raised by the referring court is whether, in order for the pricing practice in question to be considered abusive, it is necessary that the dominant undertaking be able to recoup the losses caused by that practice.

97 It must be borne in mind in that regard that, as stated in paragraph 31 of this judgment, a margin squeeze is in itself capable, in the absence of any objective justification, of constituting an abuse within the meaning of Article 102 TFEU.

98 However, a margin squeeze is the result of the spread between the prices for wholesale services and those for retail services and not of the level of those prices as such. In particular, that squeeze may be the result not only of an abnormally low price in the retail market, but also of an abnormally high price in the wholesale market.

99 Consequently, an undertaking which engages in a pricing practice which results in a margin squeeze on its competitors does not necessarily suffer losses.

100 In any event, even if the dominant undertaking suffers losses in order to squeeze the margins of its competitors, there can be no requirement that, in order to establish the existence of an abuse, evidence must be produced of the capacity to recoup any such losses.

101 The possibility that competitors may be driven from the market does not depend on either the fact that the dominant undertaking suffers losses or the fact that that undertaking may be capable of recouping its losses, but depends solely on the spread between the prices applied by the dominant undertaking on the markets concerned, the result of which may be that it is not the dominant undertaking itself which suffer losses but its competitors.

102 Lastly, in the event that the dominant undertaking were nonetheless to apply a price on the retail market which was so low that sales would engender losses, beyond the fact that such conduct is likely to constitute an autonomous form of abuse, namely the application of predatory prices, the Court has in any event already rejected the argument that, even in such a case, proof of the possibility of recoupment of losses suffered by the application, by an undertaking in a dominant position, of prices lower than a certain level of costs constitutes a necessary precondition to establishing that such a pricing policy is abusive (see, to that effect, *France Télécom* v *Commission*, paragraph 110).

103 It follows that whether the dominant undertaking is able to recoup any losses suffered as a result of applying the pricing practice at issue has no relevance to the matter of establishing whether that pricing practice is abusive.

The relevance of the fact that the markets concerned feature new technology

104 The eighth and last issue raised by the Stockholms tingsrätt concerns the relevance, for that same purpose, of the fact that the markets concerned are growing rapidly and involve new technology which requires high levels of investment.

105 In that regard, it must first be observed that the degree to which the markets affected by the exploitation of an undertaking's dominant position are mature is not a point on which Article 102 TFEU makes any distinction.

106 Next, in a rapidly growing market, the competitive advantage flowing from the possession of a dominant position in a second neighbouring market may distort the course of competition in the first market, taking into consideration the fact that in that first market, as stated by TeliaSonera itself, the operators may be inclined to operate for some time at a loss or while accepting lower levels of profitability.

107 It is in precisely such circumstances that the further reduction in the ability of an operator to trade profitably which results from the squeeze of his margins imposed by the pricing practice at issue may prevent the establishment or development on the market concerned of normal conditions of competition.

108 Moreover, taking into account the objective of the competition rules, as stated in paragraph 22 of this judgment, their application cannot depend on whether the market concerned has already reached a certain level of maturity. Particularly in a rapidly growing market, Article 102 TFEU requires action as quickly as possible, to prevent

the formation and consolidation in that market of a competitive structure distorted by the abusive strategy of an undertaking which has a dominant position on that market or on a closely linked neighbouring market, in other words it requires action before the anti-competitive effects of that strategy are realised.

109 That is therefore all the more true of a market, such as that of supplying high speed internet access services, which is closely linked to another market, such as the local loop access market in the telecommunications sector. Not only is that market in no way new or emerging, but its competitive structure is also still highly influenced by the former monopolistic structure. The possibility that undertakings may exploit their dominant position in that market in such a way as to impair the development of competition in a rapidly growing neighbouring market means that no derogation from the application of Article 102 TFEU can be tolerated.

110 Lastly, it must be recalled that, while a dominant undertaking in a market cannot rely on the investment it has made in order to penetrate a neighbouring market when attempting to drive out from that market competitors who are, currently or potentially, equally efficient, the fact remains that the conditions of competition in the dominated market and, in particular, the costs of establishment and investment of the undertaking which has a dominant position in that market, must be taken into consideration as part of the analysis of that undertaking's costs, an analysis which, as stated in paragraphs 38 to 46 of this judgment, must be carried out in order to establish whether a margin squeeze exists.

111 Consequently, the fact that the markets concerned are growing rapidly and involve new technology, requiring high levels of investment, is not, as a general rule, relevant to establishing whether the pricing practice at issue constitutes an abuse within the meaning of Article 102 TFEU.

112 Having regard to all of the foregoing, the answer to the questions referred is that, in the absence of any objective justification, the fact that a vertically integrated undertaking, enjoying a dominant position on the wholesale market for ADSL input services, applies a pricing practice of such a kind that the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end users is not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market may constitute an abuse within the meaning of Article 102 TFEU.

113 When assessing whether such a practice is abusive, all of the circumstances of each individual case should be taken into consideration. In particular:

— as a general rule, primarily the prices and costs of the undertaking concerned on the retail services market should be taken into consideration. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of competitors on the same market be examined, and

— it is necessary to demonstrate that, taking particular account of whether the wholesale product is indispensable, that practice produces an anti-competitive effect, at least potentially, on the retail market, and that the practice is not in any way economically justified.

114 The following factors are, as a general rule, not relevant to such an assessment:

— the absence of any regulatory obligation on the undertaking concerned to supply ADSL input services on the wholesale market in which it holds a dominant position;

— the degree of dominance held by that undertaking in that market;

— the fact that that undertaking does not also hold a dominant position in the retail market for broadband connection services to end users;

— whether the customers to whom such a pricing practice is applied are new or existing customers of the undertaking concerned;

— the fact that the dominant undertaking is unable to recoup any losses which the establishment of such a pricing practice might cause, or

— the extent to which the markets concerned are mature markets and whether they involve new technology, requiring high levels of investment.

Costs

115 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

In the absence of any objective justification, the fact that a vertically integrated undertaking, holding a dominant position on the wholesale market in asymmetric digital subscriber line input services, applies a pricing practice of such a kind that the spread between the prices applied on that market and those applied in the retail market for broadband connection services to end users is not sufficient to cover the specific costs which that undertaking must incur in order to gain access to that retail market may constitute an abuse within the meaning of Article 102 TFEU.

When assessing whether such a practice is abusive, all of the circumstances of each individual case should be taken into consideration. In particular:

— **as a general rule, primarily the prices and costs of the undertaking concerned on the retail services market should be taken into consideration. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of competitors on the same market be examined, and**

— **it is necessary to demonstrate that, taking particular account of whether the wholesale product is indispensable, that practice produces an anti-competitive effect, at least potentially, on the retail market, and that the practice is not in any way economically justified.**

The following factors are, as a general rule, not relevant to such an assessment:

— **the absence of any regulatory obligation on the undertaking concerned to supply asymmetric digital subscriber line input services on the wholesale market in which it holds a dominant position;**

— **the degree of dominance held by that undertaking in that market;**

— **the fact that that undertaking does not also hold a dominant position in the retail market for broadband connection services to end users;**

— **whether the customers to whom such a pricing practice is applied are new or existing customers of the undertaking concerned;**

— **the fact that the dominant undertaking is unable to recoup any losses which the establishment of such a pricing practice might cause, or**

— **the extent to which the markets concerned are mature markets and whether they involve new technology, requiring high levels of investment.**

[Signatures]