Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

29 March 2012*

(Competition — Abuse of dominant position — Spanish markets for broadband internet access — Decision finding an infringement of Article 82 EC — Price fixing — Margin squeeze — Market definition — Dominant position — Abuse — Calculation of margin squeeze — Effects of the abuse — Competence of the Commission — Rights of the defence — Subsidiarity — Proportionality — Legal certainty — Sincere cooperation — Principle of sound administration — Fines)

In Case T-336/07,

Telefónica, SA, established in Madrid (Spain)

Telefónica de España, SA, established in Madrid,

represented initially by F. González Díaz and S. Sorinas Jimeno, and subsequently by F. González Díaz, lawyers,

applicants,

v

European Commission, represented by F. Castillo de la Torre, É. Gippini Fournier and K. Mojzesowicz, acting as Agents,

defendant,

supported by

France Telecom España, SA, established in Pozuelo de Alarcón (Spain), represented by S. Martínez Lage, H. Brokelmann and M. Ganino, lawyers,

by

Asociación de Usuarios de Servicios Bancarios (Ausbanc Consumo), established in Madrid, represented by L. Pineda Salido and M.I. Cámara Rubio, lawyers,

and by

European Competitive Telecommunications Association, established in Wokingham (United Kingdom), represented by M. Di Stefano and A. Salerno, lawyers,

interveners,

* Language of the case: Spanish.

APPLICATION for annulment of Commission Decision C (2007) 3196 final of 4 July 2007 relating to a proceeding under Article 82 [EC] (Case COMP/38.784 — Wanadoo España vs. Telefónica) and, in the alternative, an application for annulment or reduction of the amount of the fine imposed on the applicants,

THE GENERAL COURT (Eighth Chamber),

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

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 May 2011,

gives the following

Judgment

The applicants

1 Telefónica, SA, an applicant in the present case, is the parent company of the Telefónica group, a former State monopoly in the telecommunications sector in Spain. In the period concerned by Commission Decision C (2007) 3196 final of 4 July 2007 relating to a proceeding pursuant to Article 82 [EC] (Case COMP/38.784 — Wanadoo España vs. Telefónica) ('the contested decision'), that is to say, from September 2001 until December 2006, Telefónica supplied broadband services through its subsidiary Telefónica de España, SAU ('TESAU'), also an applicant in the present case, and through two other subsidiaries, Telefónica Data de España, SAU, and Terra Networks España, SA, which merged with TESAU on 30 June 2006 and 7 July 2006 respectively (recitals 11, 13 and 19 to 21 to the contested decision). Telefónica and its subsidiaries (together 'Telefónica') constituted a single economic entity for the entire period concerned by the investigation (recital 12 to the contested decision).

2 Before the full liberalisation of the telecommunications markets in 1998, Telefónica was owned by the Spanish State and had a legal monopoly in the retail provision of fixed-line telecommunications services. Currently, it operates the only nationwide fixed telephone network (recital 13 to the contested decision).

Administrative procedure

3 On 11 July 2003 Wanadoo España, SL (now France Telecom España, SA) ('France Telecom') submitted a complaint to the Commission of the European Communities, claiming that the margin between the wholesale prices which the subsidiaries of Telefónica charged their competitors for the wholesale supply of broadband access in Spain and the retail prices which they charged end-users was not enough to allow competitors of Telefónica to compete with it (recital 26 to the contested decision).

4 After examining the complaint and after receiving further information, the Commission, on 20 February 2006, sent a statement of objections to Telefónica. Telefónica responded on 19 May 2006. A hearing was held on 12 and 13 June 2006 (recitals 27 and 30 to the contested decision).

5 On 11 January 2007 the Commission sent Telefónica a letter inviting it to submit its comments on the conclusions which the Commission proposed to draw on the basis of new facts not referred to in the statement of objections ('the letter of facts'). Telefónica replied to that letter on 12 February 2007 (recital 31 to the contested decision).

The contested decision

6 On 4 July 2007 the Commission adopted the contested decision forming the subject-matter of this action.

7 In the first place, the Commission identified in the contested decision three relevant product markets, namely one retail broadband market and two wholesale broadband markets (recitals 145 to 208).

8 The retail market at issue covers, according to the contested decision, all undifferentiated broadband products, whether supplied by ADSL (Asymmetric Digital Subscriber Line) or by any other technology, marketed on the 'general public market' to residential and non-residential users. By contrast, it does not cover customised broadband access services aimed principally at 'large client accounts' (recital 153 to the contested decision).

9 As regards the wholesale markets, the Commission stated that three main wholesale offers were available, namely a reference offer for local loop unbundling, marketed solely by Telefónica, a regional wholesale offer (GigADSL; 'the regional wholesale product'), also marketed solely by Telefónica, and several national wholesale offers marketed by Telefónica (ADSL-IP and ADSL-IP Total; 'the national wholesale product') and by other operators on the basis of local loop unbundling and/or the regional wholesale product (recital 75 to the contested decision).

10 In order to define the wholesale markets at issue in this case, the Commission analysed whether the wholesale access products described in the preceding paragraph belonged to the same product market or to separate product markets (recital 162 to the contested decision).

11 In that regard, the Commission first of all considered that the regional wholesale product and local loop unbundling were not substitutable (recitals 163 to 182 to the contested decision). As a basis for that conclusion, the Commission referred, with respect to demand-side substitutability, to significant network roll-out investments (recitals 163 and 164 to the contested decision) and to the functional differences between the two types of wholesale access (recital 165 to the contested decision). The Commission also considered that there had been no supply-side substitutability between those products, since that would have entailed an alternative operator being able to offer a network of local loops identical to Telefónica's throughout the Spanish territory, which would have been economically unfeasible within a reasonable time (recital 167 to the contested decision).

12 Next, the Commission took the view that the substitutability of the national and regional wholesale products was not sufficient (recitals 183 to 195 to the contested decision), adding that the precise boundaries between the national and regional wholesale markets were not determinative, because Telefónica was dominant in each of those markets (recital 195 to the contested decision). As regards demand-side substitutability, the Commission considered that the alternative operator wishing to provide retail ADSL services on a national basis using the regional wholesale product must sustain significant one-off and recurrent costs relating to the deployment and maintenance of a network allowing interconnection with Telefónica's 109 indirect access points (recital 183 to the contested decision). Furthermore, switching from a regional wholesale product to the national wholesale product would not make economic sense, since it would be irrational and unlikely that operators that have already invested in the roll-out of a network would bear the cost of not using their network and using the national wholesale product which would not give them the same possibilities with respect to control of the quality of service of the retail product as the regional wholesale product (recital 187 to the contested decision). As regards supply-side substitutability, the Commission observed that while, admittedly, an operator wishing to provide a national wholesale offer could do so on the basis of the regional wholesale offer, which would entail considerable investments, those investments bore no comparison with the investment necessary for the local loop unbundling which was required upstream in order for the operator to be able to offer a regional wholesale access product that would compete with Telefónica's (recital 191 to the contested decision).

13 Last, the Commission considered that broadband access technologies other than ADSL, and in particular cable, could not be regarded as substitutable for ADSL offers (recitals 196 to 207 to the contested decision). As regards demand-side substitutability, the Commission referred to the considerable costs that would have to be borne in the event of a switch from an ADSL wholesale product to a cable-based wholesale product and also to the low coverage and fragmentation of cable networks in Spain (recital 199 to the contested decision). The Commission also observed that, even though it was technically possible for cable operators to provide wholesale broadband access to third parties equivalent to the national and regional wholesale products, practical and economic difficulties would prevent them from doing so, so that such an offer would not be economically viable.

14 The Commission concluded that the wholesale markets at issue for the purposes of the contested decision covered the regional wholesale product and the national wholesale product, excluding wholesale services by cable and technologies other than ADSL (recitals 6 and 208 to the contested decision).

15 The relevant geographic wholesale and retail markets are, according to the contested decision, nationwide (Spain) (recital 209).

16 In the second place, the Commission found that Telefónica had a dominant position on the two wholesale markets at issue (recitals 223 to 242 to the contested decision). Thus, during the period under consideration, Telefónica had a monopoly in the supply of the regional wholesale product and more than 84% of the national wholesale product market (recitals 223 and 235 to the contested decision). According to the contested decision (recitals 243 to 277), Telefónica also had a dominant position on the retail market.

17 In the third place, the Commission examined whether Telefónica had abused its dominant position on the relevant markets (recitals 278 to 694 to the contested decision). In that regard, the Commission considered that Telefónica had infringed Article 82 EC by imposing unfair prices on its competitors in the form of a margin squeeze between the prices for retail broadband access in the Spanish 'mass market' and the prices on the regional and national wholesale broadband access markets, throughout the period from September 2001 until December 2006 (recital 694 to the contested decision).

18 In order to demonstrate that there was a margin squeeze in the present case, the Commission first noted the legislative context of Telefónica's supply of the national and regional wholesale products and, in particular, the obligation imposed on Telefónica by Spanish law to supply wholesale access at regional and national levels under fair conditions. The Commission also noted the obligation imposed by the Comisión del Mercado de las Telecomunicaciones (Spanish Commission for the Telecommunications Markets; 'the CMT') on Telefónica since March 1999 to supply the regional wholesale product and stated that Telefónica had begun offering its ADSL-IP Total product on its own initiative from September 1999 onwards, whereas the CMT had imposed on Telefónica the obligation to supply access to ADSL-IP from April 2002 (recitals 288 and 289 to the contested decision).

19 Second, as regards the method of calculating the margin squeeze, the Commission considered (i) that the efficiency of Telefónica's competitors had to be measured against Telefónica's downstream costs (the 'equally efficient competitor' method) (recitals 311 to 315 to the contested decision); (ii) that the appropriate method for the evaluation of costs was, in the present case, that of long-run average incremental costs ('LRAIC') (recitals 316 to 324 to the contested decision); (iii) that the assessment of profitability over time could be established by two methods, namely the so-called 'period-by-period' method and the discounted cash flow ('the DCF') method (recitals 325 to 385 to the contested decision); (iv) that the margin squeeze had to be calculated on the basis of the range of services marketed by Telefónica in the relevant retail market (recitals 386 to 388 to the contested decision); and (v) as regards the choice of upstream inputs for the calculation of whether the downstream prices

could be reproduced, that Telefónica's tariffs had to be capable of reproduction by an as-efficient competitor using at least one wholesale product of Telefónica in each of the relevant wholesale markets (recitals 389 to 396 to the contested decision).

20 Third, the Commission calculated whether the difference between Telefónica's upstream and downstream prices covered at least Telefónica's downstream LRAIC (recitals 397 to 511 to the contested decision). By applying the methodology described in the preceding paragraph, the Commission calculated that Telefónica's retail prices could not be reproduced on the basis of its national or regional wholesale products between September 2001 and December 2006 (recitals 512 to 542 to the contested decision).

21 Fourth, as regards the effects of the abuse, the Commission considered that Telefónica's conduct had probably restricted the capacity of ADSL operators to achieve sustainable growth in the retail market and had probably harmed the interests of end-users. The Commission also took the view that Telefónica's conduct had had actual exclusionary effects and had harmed the interests of consumers (recitals 544 to 618 to the contested decision).

22 Fifth, the Commission stated that Telefónica's conduct was not objectively justified and had not produced efficiency gains (recitals 619 to 664 to the contested decision).

23 Sixth, and last, the Commission stated that Telefónica had room for manoeuvre to avoid the margin squeeze. Thus, Telefónica could have increased its retail prices or lowered its wholesale prices. The Commission added that the CMT decisions sent to Telefónica and relating to the margin squeeze were not capable of relieving Telefónica of responsibility (recitals 665 to 694 to the contested decision).

24 In the fourth place, the Commission found that in the present case trade between Member States was affected, since Telefónica's pricing policy related to the access services of a dominant operator, extending to the entire Spanish territory, which constitutes a substantial part of the internal market (recitals 695 to 697 to the contested decision).

25 For the purpose of calculating the amount of the fine, the Commission applied in the contested decision the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3; 'the 1998 Guidelines').

26 First, the Commission assessed the gravity and the impact of the infringement and also the size of the relevant geographic market. First of all, as regards the gravity of the infringement, the Commission considered that it was dealing with a clear-cut abuse on the part of an undertaking holding what was virtually a monopoly position, that must be qualified as 'very serious' under the 1998 Guidelines (recitals 739 to 743 to the contested decision). At recitals 744 to 750 to the contested decision, the Commission distinguished the present case from Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article 82 [EC] (Case COMP/C 1/37.451, 37.578, 37.579 – Deutsche Telekom AG) (OJ 2003 L 263, p. 9; 'the Deutsche Telekom decision'), in which the abuse on the part of Deutsche Telekom, which also concerned a margin squeeze, had not been qualified as 'very serious' within the meaning of the 1998 Guidelines. Next, so far as the impact of the infringement found was concerned, the Commission took account of the fact that the relevant markets were of considerable economic importance, that they played a crucial role in the creation of the information society and that the impact of Telefónica's abuse on the retail market had been significant (recitals 751 and 753 to the contested decision). Last, as regards the size of the relevant geographic market, the Commission observed, in particular, that the Spanish broadband market was the fifth largest national broadband market in the European Union (EU) and that, while margin squeeze cases were necessary limited to a single Member State, it prevented operators from other Member States from entering a fast-growing market (recitals 754 and 755 to the contested decision).

27 According to the contested decision, the starting amount of the fine, EUR 90 000 000, takes account of the fact that the gravity of the abusive practice became clear over the period under consideration and, more particularly, after the adoption of the Deutsche Telekom decision (recitals 756 and 757). A multiplier of 1.25 was applied to that amount to take account of Telefónica's significant economic capacity and to ensure that the fine was sufficiently deterrent, and the starting amount of the fine was thus increased to EUR 112 500 000 (recital 758).

28 Second, as the infringement had lasted from September 2001 until December 2006, that is to say, for five years and four months, the Commission increased the starting amount of the fine by 50%. The basic amount of the fine was thus increased to EUR 168 750 000 (recitals 759 to 761 to the contested decision).

29 Third, on the basis of all the evidence available, the Commission considered that the existence of certain attenuating circumstances could be recognised in this case, since the infringement had at least been committed as a result of negligence. A reduction of 10% of the amount of the fine was thus granted to Telefónica, which reduced the amount of the fine to EUR 151 875 000 (recitals 765 and 766 to the contested decision).

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

'*Article 1*

[Telefónica] and [TESAU] have infringed Article 82 EC by applying unfair price tariffs to the supply of wholesale and retail broadband access services from September 2001 to December 2006.

Article 2

For the infringement referred to in Article 1, a fine of EUR 151 875 000 is imposed on [Telefónica] and [TESAU], jointly and severally liable.'

Procedure and forms of order sought by the parties

31 By application lodged at the Court Registry on 1 October 2007, the applicants brought the present action.

32 By documents lodged at the Court Registry on 10 and 24 December 2007, respectively, France Telecom and the Asociación de Usuarios de Servicios Bancarios (Ausbanc Consumo) ('Ausbanc') sought leave to intervene in support of the form of order sought by the Commission.

33 By letter of 7 January 2008 the applicants requested confidential treatment vis-à-vis any interveners of certain material in the application and the annexes thereto.

34 By letter of 22 February 2008 the applicants requested confidential treatment vis-à-vis Ausbanc of certain material in the application and the annexes thereto.

35 By letters of 15 April 2008 the applicants requested confidential treatment vis-à-vis Ausbanc and France Telecom of certain material in the defence and the annexes thereto.

36 By letters of 25 July 2008 the applicants requested confidential treatment vis-à-vis Ausbanc and France Telecom of certain material in the reply and the annexes thereto.

37 By order of the President of the Eighth Chamber of the Court of 31 July 2008 France Telecom and Ausbanc were granted leave to intervene in support of the form of order sought by the Commission. The decision on the merits of the request for confidential treatment was reserved.

38 Non-confidential versions of various procedural documents, prepared by the applicants, were sent to the interveners.

39 By letter of 12 September 2008 Ausbanc disputed the confidential nature of the deleted passages in the non-confidential versions of the procedural documents which it had received.

40 By letter of 15 September 2008 France Telecom disputed the requests for confidential treatment in so far as they related to certain entire annexes to the application, the defence and the reply.

41 On 28 October 2008 France Telecom and Ausbanc lodged their statements in intervention.

42 By letter of 25 November 2008 the applicants informed the Court that the statements in intervention did not contain any confidential data.

43 By letter of 27 November 2008 the applicants requested confidential treatment vis-à-vis Ausbanc and France Telecom of certain material in the rejoinder and the annexes thereto.

44 On 6 February 2009 the applicants lodged their observations on the statements in intervention.

45 By letter of 6 February 2009 the applicants requested confidential treatment of certain material in their observations on France Telecom's statement in intervention and in an annex to those observations.

46 By letter of 9 February 2009 the Commission waived its right to submit observations on the statements in intervention.

47 By order of 2 March 2010 the President of the Eighth Chamber granted in part the applicants' request for confidentiality.

48 By document lodged at the Court Registry on 4 November 2010 the European Competitive Telecommunications Association ('ECTA') also sought leave to intervene in support of the form of order sought by the Commission.

49 By letter of 7 December 2010 the applicants objected to that request.

50 By order of the President of the Eighth Chamber of the Court of 28 February 2011 ECTA was granted leave to intervene in support of the form of order sought by the Commission.

51 The applicants claim that the Court should:

— principally, annul the contested decision, pursuant to Article 230 EC;

— in the alternative, annul or reduce, on the basis of Article 229 EC, the amount of the fine imposed on them in the contested decision;

— in any event, order the Commission to pay the costs.

52 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to pay the costs.

53 Ausbanc claims that the Court should:

— dismiss the applicants' principal and alternative claims;

— order the applicants to pay the costs.

54 France Telecom claims that the Court should:

— dismiss the applicants' application in its entirety;

— order the applicants to pay all the costs resulting from the intervention.

55 Upon hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure. The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 23 May 2011.

56 At the hearing, ECTA claimed that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

A – *Admissibility of the applicants' arguments allegedly contained in the annexes*

57 In the rejoinder, the Commission disputed the admissibility of certain of the applicants' arguments allegedly contained in the annexes to their application and their reply. The Commission claimed that the applicants thus submitted arguments of a legal or economic nature that did not merely support or supplement elements of fact or of law expressly asserted in the text of those procedural documents, but which add new assertions. Thus, in the Commission's submission, 'whole sections of the applicants' pleadings' refer in full to those annexes, without which they would be devoid of content.

58 Under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court, each application is required to state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the action, if necessary without any further information. In order to guarantee legal certainty and the sound administration of justice, it is necessary, in order for an action to be admissible, that the essential matters of law and fact relied on be stated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to certain extracts from documents annexed to it, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential submissions in law, which must appear in the application (see Case T-201/04 *Microsoft* v *Commission* [2007] ECR II-3601, paragraph 94 and the case-law cited).

59 Moreover, it is not for the Court to seek and to identify, in the annexes, the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34; Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, paragraph 154; and Case T-209/01 *Honeywell* v *Commission* [2005] ECR II-5527, paragraph 57). The purely evidential and instrumental function of the annexes means that, provided that they contain elements of law on which certain pleas expressed

in the application are based, those elements must be set out in the actual body of the application or, at the very least, be sufficiently identified in that application (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 99). The application must accordingly specify the nature of the grounds on which the action is based, which means that a mere abstract statement of the grounds does not satisfy the requirements of the Rules of Procedure (Case T-102/92 *Viho* v *Commission* [1995] ECR II-17, paragraph 68, and judgment of 22 November 2006 in Case T-282/04 *Italy* v *Commission*, not published in the ECR, paragraph 60).

60 The annexes cannot therefore be used to develop a plea set out summarily in the application by putting forward complaints or arguments not set out in the application (see Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraph 167 and the case-law cited).

61 That interpretation of Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure also applies to the conditions for admissibility of a reply, which according to Article 47(1) of the Rules of Procedure is intended to supplement the application (see *Microsoft* v *Commission*, paragraph 58 above, paragraph 95 and the case-law cited).

62 In the present case, the applicants have made numerous references in their written pleadings to what are sometimes voluminous documents annexed to those pleadings. However, some of those references mention the annexed documents concerned only in a general way and therefore do not allow the Court to identify precisely the elements that it might regard as supporting or supplementing on specific points, by references to precise passages in those documents, the pleas and arguments set out in the application or the reply. Furthermore, in particular, the documents to which certain references are made are not intended solely to support and supplement on specific points certain arguments in the body of the pleading to which they are annexed, but contain the actual explanation of those arguments, so that, unless the documents are analysed, the arguments cannot be comprehended.

63 It follows that, in the present case, the annexes to the application and the reply will be taken into consideration only in so far as they support or supplement pleas or arguments expressly set out by the applicants in the body of their written pleadings and in so far as it is possible to determine precisely what are the elements contained in those annexes that support or supplement those pleas or arguments (see, to that effect, *Microsoft* v *Commission*, paragraph 58 above, paragraph 99).

B – *Substance*

64 In their action, the applicants put forward a number of principal claims and a number of alternative claims.

65 In support of their principal claims, seeking annulment of the contested decision, the applicants put forward six pleas in law. The first plea alleges breach of the rights of the defence. The second plea alleges errors of fact and of law in the definition of the relevant wholesale markets. The third plea alleges errors of fact and of law in the establishment of Telefónica's dominant position on the relevant markets. The fourth plea alleges errors of law in the application of Article 82 EC as concerns Telefónica's abusive conduct. The fifth plea alleges errors of fact and/or errors of assessment of the facts and errors of law with respect to Telefónica's abusive conduct and its anti-competitive impact. Last, the sixth plea alleges an *ultra vires* application of Article 82 EC and breach of the principles of subsidiarity, proportionality, legal certainty, sincere cooperation and sound administration.

66 In the alternative, the applicants rely on two pleas whereby they seek annulment of the fine or a reduction of its amount. The first plea alleges errors of fact and of law, infringement of Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87), and Article 23(2) 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), and breach of the principles of legal certainty and legitimate expectations. The second plea, which is formulated further in the alternative, alleges errors of fact and of law and breach of the principles of proportionality and equal treatment, the principle that the penalty must be specific to the offender and the offence and the obligation to state reasons in the determination of the amount of the fine.

1. *The principal claims, seeking annulment of the contested decision*

(a) The extent of review by the Courts of the European Union and the burden of proof

67 It follows from Article 2 of Regulation No 1/2003 and from consistent case-law delivered in connection with the application of Articles 81 EC and 82 EC that, where there is a dispute as to the existence of an infringement of competition law, it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 58, and Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23, paragraph 62; see also, to that effect, *Microsoft* v *Commission*, paragraph 58 above, paragraph 688). In order to do so, it must obtain sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see, to that effect, Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 217 and the case-law cited).

68 Next, it must be borne in mind that, in an action for annulment brought under Article 230 EC, all that is required of the EU judicature is to verify the legality of the contested measure (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 174). Thus, the role of a Court hearing an application for annulment of a Commission decision finding the existence of an infringement of competition law and imposing fines on the addressees is to assess whether the evidence and other information relied on by the Commission in its decision are sufficient to establish the existence of the alleged infringement (see, to that effect, Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 891, and *JFE Engineering and Others* v *Commission*, paragraph 175).

69 Furthermore, it should also be borne in mind that, in accordance with settled case-law, although as a general rule the EU judicature undertakes a comprehensive review of the question whether the conditions for applying the competition provisions are or are not met, its review of complex economic appraisals made by the Commission is necessarily limited to verifying whether the relevant rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (Case 42/84 *Remia and Others* v *Commission* [1985] ECR 2545, paragraph 34; Joined Cases 142/84 and 156/84 *British American Tobacco and Reynolds Industries* v *Commission* [1987] ECR 4487, paragraph 62; 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 279; and Case T-271/03 *Deutsche Telekom* v *Commission* [2008] ECR II-477, paragraph 185).

70 Likewise, in so far as the Commission's decision is the result of complex technical appraisals, those appraisals are in principle subject to only limited judicial review, which means that the EU judicature cannot substitute its own assessment of matters of fact for the Commission's (*Microsoft* v *Commission*, paragraph 58 above, paragraph 88, and Case T-301/04 *Clearstream* v *Commission* [2009] ECR II-3155, paragraph 94).

71 However, while the EU judicature recognises that the Commission has a margin of discretion in economic matters, that does not mean that it must decline to review the Commission's interpretation of economic data. The EU judicature must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, paragraph 39; *Microsoft* v *Commission*, paragraph 58 above, paragraph 89; and *Clearstream* v *Commission*, paragraph 70 above, paragraph 95).

72 In that regard, where there is doubt in the Court's mind the benefit of that doubt must be given to the undertaking to which the decision finding an infringement was addressed (see, to that effect, Case 27/76 *United Brands and United Brands Continentaal* v *Commission* [1978] ECR 207, paragraph 265). The Court cannot therefore conclude that the Commission has established the infringement at issue to the requisite legal standard if it still entertains any doubts on that point, in particular in the context of an action for annulment of a decision imposing a fine (*JFE Engineering and Others* v *Commission*, paragraph 68 above, paragraph 177).

73 In the latter situation, it is necessary to take account of the principle of the presumption of innocence resulting in particular from Article 6(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, which is one of the fundamental rights which, according to the case-law of the Court of Justice and as reaffirmed in the preamble to the Single European Act, in Article 6(2) EU and in Article 47 of the Charter of Fundamental Rights of the European Union proclaimed on 7 December 2000 in Nice (OJ 2000 C 364, p. 1), are protected in the EU legal order. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see *JFE Engineering and Others* v *Commission*, paragraph 68 above, paragraph 178 and the case-law cited; see also, to that effect, Case C-199/92 P *Hüls* v *Commission* [1999] ECR I-4287, paragraphs 149 and 150, and Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraphs 175 and 176).

74 The legality of the contested decision must be examined in the light of the foregoing considerations by reference to the applicants' pleas.

(b) First plea, alleging breach of the rights of the defence

75 The applicants claim that in the contested decision the Commission used for the first time, in support of its finding that Telefónica had committed an infringement, certain evidence which had not been communicated to Telefónica during the administrative procedure and on which Telefónica did not have the opportunity to express its views. That evidence cannot be used against Telefónica and should therefore be disregarded as evidence supporting the contested decision. Furthermore, that evidence is vitiated by serious errors and omissions. In the applicants' submission, if Telefónica had been in a position to express its views on the evidence it would have been able to indicate the existence of those errors and omissions to the Commission and, accordingly, enable them to be corrected before the contested decision was adopted, in such a way that its content and findings would necessarily have been different.

76 It should be borne in mind that it is settled case-law that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed observance of the rights of the defence is a fundamental principle of EU law which must be complied with even if the proceedings in question are administrative proceedings (Case 85/76 *Hoffmann-La Roche* v *Commission* [1979] ECR 461, paragraph 9, and Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraph 34).

77 A corollary of the principle of protection of the rights of the defence, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence. Those documents include both incriminating and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (see *Aalborg Portland and Others* v *Commission*, paragraph 69 above, paragraph 68 and the case-law cited).

78 The failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document. If there was other documentary evidence of which the undertakings concerned were aware during the administrative procedure that specifically supported the Commission's findings, the fact that an incriminating document not communicated to the person concerned is inadmissible as evidence does not affect the validity of the objections upheld in the contested decision. It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (see *Aalborg Portland and Others* v *Commission*, paragraph 69 above, paragraphs 71 to 73 and the case-law cited).

79 Furthermore, Article 27(1) of Regulation No 1/2003 provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the proceedings. That statement of objections constitutes the procedural safeguard applying the fundamental principle of EU law which requires observance of the rights of the defence in all proceedings (see, to that effect, *Papierfabrik August Koehler and Others* v *Commission*, paragraph 76 above, paragraph 35 and the case-law cited).

80 That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contains the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative proceedings brought against it (see *Papierfabrik August Koehler and Others* v *Commission*, paragraph 76 above, paragraph 36 and the case-law cited).

81 That requirement is satisfied where the Commission's decision does not allege that the undertakings concerned have committed infringements other than those referred to in the statement of objections and takes into consideration only facts on which they have had the opportunity of providing an explanation (Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraph 94; Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 109; and *France Télécom* v *Commission*, paragraph 60 above, paragraph 18).

82 The Commission's final decision is not, however, necessarily required to be a replica of the statement of objections. Thus, it is permissible to supplement the statement of objections in the light of the response supplied by the parties, whose arguments show that they have in fact been able to exercise their rights of defence. The Commission may also, in the light of the administrative procedure, revise or supplement the arguments of fact or of law on which it has relied in support of its objections (see Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, paragraph 442, and *France Télécom* v *Commission*, paragraph 60 above, paragraph 18 and the case-law cited).

83 In effect, the Commission must take into account the factors emerging from the administrative procedure, in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it

maintains (see Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 68, and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 40 and the case-law cited).

84 Thus, the rights of the defence are breached as a result of a discrepancy between the statement of objections and the final decision only where an objection stated in the final decision was not set out in the statement of objections in a manner sufficient to enable the addressees to defend their interests (see Case T-48/00 *Corus UK* v *Commission* [2004] ECR II-2325, paragraph 100 and the case-law cited).

85 That is not the case where the alleged differences between the statement of objections and the final decision do not concern any conduct other than that in respect of which the undertakings concerned had already submitted observations and are therefore unrelated to any new objection (see, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 103).

86 In the first place, the applicants claim that the Commission relied in the contested decision on 'new factors' in the context of the 'period-by-period' margin squeeze test.

87 First, they maintain that the Commission used 'new factors' to support the need to retain, with respect to the average lifetime of the commercial relationship between Telefónica and its retail market subscribers, an 'average lifetime' of [*confidential*] [1] years, on the one hand by referring to Telefónica's original business plan, which expected that the costs of acquiring customers would be recovered in one or two years and, on the other, by indicating that the calculation formula proposed by Telefónica would not have been appropriate for a growing market (recitals 474 to 489 to the contested decision). The applicants thus claim that if they had been able to comment in that regard before the contested decision was adopted they would have been able to demonstrate that the average lifetime of its subscribers was [*confidential*].

88 In that regard, it must be emphasised, first of all, that the period for amortising subscribers' acquisition costs of [*confidential*] years used at recital 489 to the contested decision is the same as that set out at paragraph 383 of the statement of objections. Annex H to the statement of objections (paragraphs 595 to 598), entitled '[e]stimate of the average lifetime of Telefónica's subscribers', mentioned in that respect Telefónica's estimates relating to that lifetime, and also reasons why the Commission considers that those estimates underestimated that lifetime (paragraph 598 of the statement of objections). Furthermore, Telefónica set out its arguments in that regard in Section 4.1 of and Annex 5 to its response to the statement of objections.

89 Next, as regards the reference, at recital 476 to the contested decision, to the recovery of subscribers' acquisition costs on the basis of Telefónica's initial business plan, it should be observed that the reference, which relies on Annex 10iii to Telefónica's letter of 21 July 2006 which post-dates the statement of objections (see footnote 492 to the contested decision), was not used in the contested decision to fix the period for amortising subscribers' acquisition costs (recitals 476 and 489 to the contested decision), although that indication none the less makes it possible to find that the duration of [*confidential*] years, used by the Commission in order to calculate the 'period-by-period' test, is more favourable to Telefónica that the one set out in the business plan.

90 Last, as regards the Commission's assertion, at recital 482 to the contested decision, that the formula for calculation proposed by Telefónica was not appropriate in a growing market, it should be observed that the applicants were duly informed in the statement of objections of the importance of the calculation of the appropriate amortisation of Telefónica's costs of acquiring new customers, in

1 — Confidential data omitted.

particular in growing markets. Thus, at paragraph 380 of the statement of objections, the Commission had already observed that, in a growing market such as the retail market in the present case, the costs of acquiring customers were significant costs that must be amortised over an appropriate period, so that adjustments should be made to Telefónica's accounts. The assertion at recital 482 to the contested decision constitutes, in that regard, merely a response to the calculations proposed by Telefónica in its letter of 26 March 2004, to which the Commission had already made reference in Annex H (paragraph 595, footnote 504) to the statement of objections.

91 In any event, the Court also rejects the applicants' argument, set out in their reply, that, if they had been aware of the fact that the Commission would not take account of the average lifetime of Telefónica's subscribers, they would have been able to show that that lifetime was very [*confidential*] to that applied by the Commission in the contested decision and that the practice of the national regulatory authorities ('the NRAs') was irrelevant. As already stated at paragraph 88 above, the period for amortising subscribers' acquisition costs of [*confidential*] years had already appeared at paragraph 383 of the statement of objections, and the Commission had already referred to the practice of the national competition authorities and the NRAs at paragraph 382 of the statement of objections. The Commission had also stated in the statement of objections, moreover, that it was possible that, owing to Telefónica's anti-competitive conduct, the average duration of its subscriptions was greater than it would have been in a competitive market (paragraph 381 of the statement of objections).

92 The applicants' complaint that the Commission relied on 'new factors' in order to justify the need to apply an average lifetime of [*confidential*] years must therefore be rejected.

93 Second, in the contested decision the Commission considered that the allocation of the costs achieved by Telefónica underestimated the marginal costs of marketing the broadband services although it had previously stated that that allocation constituted the 'upper limit' (paragraphs 407 and 424 of the statement of objections) or that it included a reasonable part of the marketing structure (paragraph 27 of the letter of facts).

94 In that regard, it should be observed that the Commission had already stated, at paragraphs 401 to 407 and 424 of the statement of objections, that Telefónica had underestimated the marketing costs in its analysis of the LRAIC. Thus, the Commission had observed, at paragraph 401 of the statement of objections, that Telefónica had 'underestimated the [LRAIC] of certain activities, in particular the marketing costs'. The Commission stated that 'TESAU [had] included only the cost directly attributable to each new subscriber ("premiums and commission") but [had] not included any costs linked with its marketing structure'. At paragraph 403 of the statement of objections, moreover, the Commission had also stated that 'TESAU's ADSL retail activity [generated] a significant share of TESAU's marketing structure and [that] a part of that structure [should] therefore be taken into consideration in TESAU's [LRAIC]'. Last, at paragraph 29 of the letter of facts the Commission had emphasised that TESAU's marketing structure was mainly dedicated to broadband growth. Furthermore, the applicants submitted observations in that regard in their response to the statement of objections and to the letter of facts.

95 As regards the applicants' assertion, in relation to marketing costs, that the Commission 'abandoned the lower hypothesis [set out at paragraph 406 of the statement of objections] in favour of the higher hypothesis [set out at paragraph 407 of the statement of objections]', relying for the first time, at recital 468 to the contested decision, on the increase in Telefónica's marketing capabilities, it should be emphasised that that development had already been clearly mentioned at paragraph 402 of the statement of objections and paragraph 27 of the letter of facts. At paragraph 402 of the statement of objections, the Commission had also already stated that the 'lower hypothesis', namely the calculation of the minimum likely level of LRAIC, was likely to reduce them to a level below the real LRAIC. It had also observed, at paragraph 30 of the letter of facts, relying on paragraph 407 of the statement of objections, which itself referred to the maximum level of LRAIC, that the Commission considered that

there was justification for including a part of Telefónica's marketing costs in its evaluation of the LRAIC with a view to a possible decision. Furthermore, at paragraph 424 of the statement of objections, the Commission had emphasised that the marketing network costs did not include just the costs relating to that network (lower hypothesis), but also the increase in costs of TESAU's marketing structure attributable to its ADSL retail activity (higher hypothesis). The applicants' complaint cannot therefore succeed.

96 In the second place, the applicants claim that in the contested decision the Commission introduced elements relating to the DCF method on which Telefónica was not given the opportunity to express its view.

97 First, the applicants maintain that, by altering the reference sources in the context of the 'period-by-period' analysis, the Commission also altered the 'sources of most of the costs and revenues used in its analysis [of the] DCF', so that the applicants' considerations in relation to the 'period-by-period' analysis are also relevant for the purposes of the analysis of the DCF. However, since the applicants' arguments in that regard have been rejected (see paragraphs 86 to 95 above), and in the absence of further information on the applicants' part, in the context of the present plea, concerning any other modifications of the sources of the costs and revenues used in the analysis of the DCF, the present complaint must also be rejected.

98 Second, the applicants submit that in the contested decision the Commission undertook for the first time a 'sensitivity analysis' of the terminal value used in its analysis of the DCF, since it calculated such a value on the basis of a hypothetical estimate of the future profitability of Telefónica's retail trade, using expected future profits for the period 2007 to 2011 generated by customers acquired before 2006, without having mentioned it in the letter of facts. In their reply, the applicants assert in that regard that it follows from recital 372 to the contested decision that the Commission relied on those 'new calculations' in order to justify the choice of the terminal value.

99 However, that argument is based on a false premiss. Contrary to the applicants' contention, the Commission did not calculate a terminal value based on a hypothetical estimate of the future profitability of Telefónica's retail trade, using expected future profits for the period 2007 to 2011. At recital 370 to the contested decision, the Commission stated specifically that it '[was] irrelevant in the present case to assess whether Telefónica's losses over the period 2001-2006 [could] be recovered by hypothetical future profits from 2007 onwards'. Furthermore, it should be observed that recital 372 to the contested decision is intended to reject the alternative approach proposed by Telefónica in the administrative procedure for the purposes of calculating the terminal value (recital 368 to the contested decision), and to show that Telefónica's calculation of the terminal value incorporated a number of major flaws that had the effect of overestimating the terminal value (recital 371 to the contested decision). As stated at paragraphs 82 and 83 above, in its final decision the Commission must take into account the factors emerging from the administrative procedure to amend and supplement, both in fact and in law, its arguments in support of the objections which it maintains.

100 In any event, the Commission has stated that the method which it used to calculate the terminal value in the contested decision had already been announced at paragraph 446 of, footnote 302 to and Table 47 in the statement of objections (see also paragraphs 21 and 22 of the letter of facts). That method was also criticised by Telefónica in Section 6.3 of its response to the statement of objections and in Section 5.1.2 of its response to the letter of facts.

101 When questioned in that regard at the hearing, first of all, the applicants stated that there was an obvious difference between Table 47 in the statement of objections and Table 67 in the contested decision, since the data relating to 2006 are not mentioned in the statement of objections. However, it must be held that the absence of such data, which may be explained by the date of the statement of objections, 21 February 2006, does not invalidate the Commission's assertion that it used the same method in the statement of objections and the contested decision. Next, the applicants reiterate that

Table 67 in the contested decision incorporated an 'analysis of sensitivity' (relating to the years 2007 to 2011) intended to 'confirm' the analysis of terminal value, which is new. However, that argument must be rejected for the reasons set out at paragraph 99 above. Last, the applicants asserted that the Commission had used the minimum LRAIC in the statement of objections, whereas it used the maximum LRAIC in the contested decision. That argument has none the less already been rejected at paragraphs 93 to 95 above.

102 Third, the applicants maintain that the Commission took issue with the use of multiples of revenues proposed by Telefónica in its response to the statement of objections and readjusted the DCF calculations submitted by Telefónica in that response, without Telefónica being heard in that regard (recitals 367 to 377 and 533 to 536 to the contested decision). The Commission also refers in the contested decision to Telefónica's recent acquisitions of Terra Networks SA and O2 plc (recital 377), thus relying on documents not in the file.

103 In that regard, recital 377 to the contested decision is intended merely to reject the argument submitted by Telefónica in its response to the statement of objections. Thus, as observed at paragraphs 82 and 83 above, additions to the statement of objections made in the light of the responses of the parties, whose arguments demonstrate that they were in fact able to exercise the rights of the defence, are permissible. Furthermore, the evaluation method used at the time of Telefónica's acquisition of Terra Networks and O2 was mentioned, for the sake of completeness, at that recital solely by way of example, in order to reject the method of multiples of revenues adopted by Telefónica to evaluate its downstream activities in its response to the statement of objections. The Commission therefore did not rely on the documents in question in order to support, in the present case, its objection relating to the existence of an infringement. In accordance with the case-law set out at paragraph 78 above, the applicants' complaint cannot therefore be upheld. Furthermore, it is apparent from the documentation relating to the hearing of 12 June 2006, placed in the Court's file, that the calculation of terminal value as a multiple of revenues to which the applicants refer was discussed at the hearing in question.

104 In the third place, the applicants claim that the Commission, in the contested decision, compares market shares for broadband products and narrowband products (recitals 574 to 578), whereas no such comparison was made in the statement of objections or mentioned in the letter of facts.

105 It should be observed that the Commission did not deny in its written pleadings or, when questioned on that point, at the hearing that that comparison was not to be found in the statement of objections or in the letter of facts. However, the assessment of the actual effects of the infringement at recitals 564 to 573 and 579 to 613 to the contested decision is based on numerous other facts already set out at paragraphs 475 to 532 of the statement of objections. As it has not been shown that the removal as evidence of the comparison between market shares for broadband products and market shares for narrowband products would undermine the validity of the objections upheld in the contested decision, it must be considered that the statement of objections contained in the present case the essential facts forming the basis of the Commission's finding in relation to the existence of the actual effects of the infringement.

106 In the fourth place, in the applicants' submission, in order to establish the existence of actual effects on the wholesale market, the Commission ought to have used new data concerning Telefónica's additional net additional shares by comparison with its competitors (recitals 579 to 581 to and Figure 18 in the contested decision).

107 As the Commission stated at the hearing, it had already indicated, at paragraph 38 of and footnote 45 to the letter of facts, [*confidential*]. It must be held, moreover, as the Commission emphasises, that Figure 18 in the contested decision is a representation of the data relating to market shares or volumes that already appears in Table 64 in the statement of objections. In that regard, the argument put forward by the applicants at the hearing, that, unlike Figure 18 in the contested decision, Table 64

in the statement of objections also refers to the year 2001 and to the operator British Telecom, must be rejected, as those elements do not appear in the contested decision. The applicants' argument cannot therefore succeed.

108 In the fifth place, the applicants submit that the Commission made criticisms (recitals 606 to 609 to the contested decision) of the price study which Telefónica attached to its response to the statement of objections, which are new and different from those made by the Commission's head economist at the hearing. It is sufficient to observe in that regard that, since the Commission's criticisms are merely a rejection of the calculations proposed by Telefónica in the expert's report attached as Annex 6 to its response to the statement of objections and not new elements in order to support the Commission's finding relating to the actual effects of Telefónica's conduct on the relevant markets, no breach of Telefónica's rights of defence can be established.

109 It follows that the present plea must be rejected in its entirety.

(c) Second plea, alleging errors of fact and of law in the definition of the relevant wholesale markets

110 In the context of the present plea, the applicants dispute the definition of the relevant wholesale markets given by the Commission at recitals 162 to 208 to the contested decision (see paragraphs 9 to 14 above).

111 According to consistent case-law, for the purposes of investigating the possibly dominant position of an undertaking on a given product market, the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products. Moreover, since the determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and to behave to an appreciable extent independently of its competitors, its customers and consumers, an examination to that end cannot be limited solely to the objective characteristics of the relevant products, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration (see Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 37; *France Télécom* v *Commission*, paragraph 60 above, paragraph 78; and *Clearstream* v *Commission*, paragraph 70 above, paragraph 48 and the case-law cited).

112 The concept of the relevant market implies that there can be effective competition between the products which form part of it and this presupposes that there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned (*Hoffmann-La Roche* v *Commission*, paragraph 76 above, paragraph 28, and *Clearstream* v *Commission*, paragraph 70 above, paragraph 49).

113 It also follows from the Commission notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), paragraph 7, that '[a] relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'. From an economic point of view, for the definition of the relevant market, demand-side substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions (paragraph 13 of that notice). Supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand-side substitution in terms of effectiveness and immediacy. That means that suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices (paragraph 20 of that notice).

114 In the first place, the applicants claim that local loop unbundling, the regional wholesale product and the national wholesale product belong to the same relevant product market. As regards the demand-side substitutability of those products, the applicants assert that the products enable alternative operators to offer the same retail broadband services. They maintain that the Commission acknowledged, moreover, at recitals 154 and 155 to the contested decision, that those products belong to the same relevant retail market.

115 First, the applicants claim that the Commission erred in considering that the substitution costs of the national and regional wholesale products by local loop unbundling were 'extremely high' and that such a substitution was a 'long process' and required a 'minimum critical mass'. The applicants also assert that the alternative operators had been able to use the local loop since 2001 and that the local loop made considerable progress between 2004 and 2006.

116 It should be borne in mind that, in the contested decision, the Commission emphasised the considerable investments necessitated by the switch from the national wholesale product to the regional wholesale product (recital 185). The Commission also stated that the switch from the regional wholesale product to local loop unbundling was extremely costly, since it involved rolling out a network from the regional point of interconnection to the local exchanges of Telefónica; significant wholesale charges for switching imposed by Telefónica; and obtaining collocation and other related services in order to be able to provide retail broadband services. Furthermore, according to the Commission, such switching takes a great deal of time, it is not a viable option for the whole of Spanish territory and it requires a minimum critical size (recitals 173 to 177 to the contested decision). The Commission also observed, at recital 180 to the contested decision, that in a letter to the Commission dated 2 March 2005 Telefónica itself had referred to the fact that alternative operators must achieve a critical mass before beginning to invest in their own infrastructure that would enable them to use local loop unbundling.

117 First of all, the applicants have not disputed the findings in the contested decision that, for the purpose of using local loop unbundling, the alternative operators must be physically present and collocate their equipment with that of Telefónica – the only undertaking with a local access network over the whole Spanish territory – and that this required them to install their equipment in Telefónica's 6 836 main distribution frames and entailed very large upfront investments (recitals 80 and 81 to and Table 8 in the contested decision; see also recital 132 to the contested decision). Nor have they disputed, in their written pleadings or at the hearing, that Telefónica's investments in that regard came to more than EUR 1 500 million, to which must be added the investments necessary for the purpose of connecting to the 109 indirect access points to the regional wholesale product, which represent EUR [*confidential*] million (recitals 164 and 185 to, Table 9 in and footnotes 73 and 74 to the contested decision). As the Commission correctly observes, those investments are considerable. Thus, the Commission stated, without being contradicted by the applicants, that even the investment of EUR 200 million, which, according to Telefónica, would have been necessary in order for an alternative operator to be able to roll out its local network, represented more than 130% of the revenues received by Jazztel on the retail market between 2001 and 2006.

118 Next, the Court must reject the applicants' argument that, notwithstanding that Jazztel lacked the 'critical network size' (recital 177 to the contested decision) and had a market share of only less than 1% at the beginning of the period 2001 to 2006, it would none the less have been in a position to make an investment of EUR 200 million, which contradicts the assertion at recital 164 to the contested decision that it would take between EUR 580 million and 670 million to roll out a local loop network of between 550 and 575 exchanges.

119 The applicants' argument is based exclusively on a communication from Jazztel to the Comisión Nacional del Mercado de Valores (Spanish National Securities Commission) of 27 July 2007, in which Jazztel stated that, 'in the business years 2005 and 2006, the undertaking [had] invested more than EUR 200 million in rolling out the most extensive and most modern latest generation local loop

network in Spain' and that 'the undertaking [had] the intention to reduce its investments significantly in 2007, when the network development work [would] be finished'. However, it is not apparent from that assertion that the total costs of rolling out Jazztel's network came to 'more than EUR 200 million', but only that that sum was invested in rolling out the network in 2005 and 2006. As the Commission observes, without being contradicted in that regard by the applicants, the amount of the investments mentioned in that communication does not include the investments already made by Jazztel before 2005 for the purposes of rolling out its network, which include, in particular, the 2 718 km of the local loop network rolled out by Jazztel at the end of 2004, or the investments which Jazztel will still have to make in order to finalise the roll-out of that network.

120 Furthermore, even on the assumption that, as the applicants contend, on 28 February 2007 Jazztel did in fact succeed in being placed in 607 of Telefónica's distribution frames, not only does that post-date the infringement period, but it does not necessarily mean that Jazztel had already made the necessary investments to roll out its network as far as those distribution frames. Thus, in March 2006 Jazztel had connected to its network 38 or 44% (according to the Commission) or 53% (according to the applicant) of the 470 'local exchanges' which it had set up. In fact, the applicants' argument, the accuracy of which is disputed by the Commission, that the connection of the distribution frames to Jazztel's network is a service independent of unbundling, which the alternative operators can obtain from an operator other than Telefónica, does not call in question the fact that that investment is part of the investments necessary in order for an alternative operator to be able to benefit from the unbundled local loop service (recital 132 to the contested decision). Furthermore, since Telefónica has 6 836 main distribution frames, the fact of being placed in 607 of Telefónica's distribution frames covers, from a geographic viewpoint, fewer than 10% of Telefónica's exchanges and according to Telefónica itself makes it possible to reach only around 60% of potential customers. Furthermore, that cover was not reached until late in 2006, or six years after the local loop was made available.

121 In that regard, the applicants' argument that even if the investments required for the purposes of using another wholesale product were actually significant the Commission had still failed to calculate the profits resulting from the use of the local loop (higher revenues, diversity of final retail services and technological independence of Telefónica) must also be rejected. As the Commission correctly stated at recital 176 to the contested decision, an alternative operator wishing to switch from regional wholesale access to local loop unbundling will have to make the investments necessary to roll out its network, but will reap the benefits of that switch only after having achieved a sufficient customer base, which is neither certain nor immediate.

122 Last, the Court rejects the applicants' argument that the considerable and rapid progress of the local loop between 2004 and 2006, resulting in a coverage of more than 60% of Telefónica's installations, shows that the 'time factor' is not an obstacle to the substitution of local loop unbundling for national or regional wholesale products.

123 As is clear from, in particular, paragraphs 16, 20, 21 and 23 of the notice on the definition of the relevant market for the purposes of Community competition law referred to at paragraph 113 above, and as the Commission correctly observed at recital 172 to the contested decision, the necessary substitutability for the purposes of the definition of the relevant market must materialise in the short term, which, according to recitals 172 to 175 to the contested decision, is not the case here.

124 The argument whereby the applicants seek to invalidate that conclusion, namely that the alternative operators did not deem it appropriate to request access to the local loop before 2004, in a period when they had allegedly achieved coverage of more than 60% of Telefónica's installations, must be rejected in that regard.

125 While TESAU has been under a regulatory obligation to rent the copper pair to alternative operators since December 2000 (recital 81 to the contested decision), actual use of the local loop began, to a limited extent, only in late 2004 and early 2005 (recital 96 to and Figure 2 in the contested decision).

Owing to the necessary investments (see paragraphs 117 to 121 above), and as Telefónica itself has acknowledged (recital 180 to the contested decision), it was only in 2004 that the alternative operators achieved a critical mass in terms of connections and market experience which enabled them to invest in the network infrastructures and thus to begin to switch their wholesale indirect access connections to the local unbundled loop (see also recitals 177 to 180 to the contested decision and paragraph 129 above). Furthermore, as is apparent in particular from recital 143 to the contested decision, significant gaps were detected between the time when the alternative operators requested unbundled access to Telefónica's local loops and the time when they were granted such access. It should be pointed out in that regard that, as is apparent from Table 60 in the contested decision, whose figures were not disputed by the applicants, the alleged coverage of more than 60% of Telefónica's installations was achieved only in December 2006, that is to say, at the end of the infringement period.

126 In that regard, the applicants' argument that the existence of barriers to access to the local loop was denied by the Comisión Nacional de la Competencia (Spanish National Competition Commission) in its decision of 22 October 2007 must also be rejected. Even on the assumption that it follows from that decision that in that case the body responsible for protecting competition did not at any time in the investigation 'certify that the presumed delays were really delays', that decision does not call in question the findings made at recitals 139 and 140 to the contested decision, which have not been disputed by Telefónica in its written pleadings, that, since 2002, 55 disputes concerning access to the local loop have been brought before the CMT, most of which resulted in a decision against Telefónica.

127 Second, the applicants maintain that there are wholesale products other than local loop unbundling that make it possible to present a 'different' offer, for example telephone services via the IP (Internet Protocol). However, the parties confirmed, in substance, at the hearing that there were functional differences between the national wholesale products, regional wholesale products and local loop unbundling, which, moreover, is apparent from recitals 66, 70, 82, 85, 87, 89, 165 and 171 and footnote 47 to the contested decision. While, admittedly, at the hearing the applicants maintained that the regional wholesale product allowed a 'certain level of differentiation', it must be considered, as the Commission makes clear at the abovementioned recitals, that an operator choosing Telefónica's local loop unbundling can control a substantial part of the value chain and of numerous aspects of its retail service. As is apparent from recitals 82, 87, 89 and 171 to the contested decision, unlike the local loop unbundling, access to national and regional wholesale products does not allow alternative operators to differentiate their retail product significantly from Telefónica's, which means that they must confine themselves to competing with Telefónica on prices. In that regard, the applicants themselves emphasise in their reply that investment in the local loop results in greater diversity of the final retail services. They refer in that regard to the examples of France Telecom, which was the first undertaking to offer in Spain a product including voice communications and the internet, and Jazztel, which was the first undertaking to market a retail product with a connection speed of up to 20 megabytes per second.

128 Third, the Court must reject the applicants' argument that there is 'sufficient substitutability' between the regional wholesale product, the national wholesale product and local loop unbundling, owing to the fact that in each of Telefónica's exchanges a sufficient number of alternative operators use a combination of different wholesale products that best meet their needs and that that substitutability 'on the margin' is sufficient in the present case for those products to be considered to belong to the same relevant product market.

129 First of all, it should be observed, as the Commission has observed, that the fact that certain operators have invested in order to roll out their own networks and may have increased the use of the local loop with effect from 2004 does not confirm the existence of effective substitutability between the national and regional wholesale products and local loop unbundling during the infringement period, but is the result of a process of progressive switching, described by the Commission, particularly at recitals 93 to 103 to the contested decision. Such switching requires considerable investments over several years,

and, owing to the substantial sunk costs associated with that switching and progression on the 'ladder of investments' (see footnote 82 to the contested decision), it is unlikely that an alternative operator will substitute the national or regional wholesale products for local looping in the event of a small, but significant and permanent, increase in the price of local loop unbundling.

130 Next, the use by the alternative operators, during the infringement period, on each telephone exchange, of an optimal combination of wholesale products, which would include unbundling of the local loop, has not been established. Thus, it is clear from recitals 102 and 103 to the contested decision, which have not been disputed by the applicants in their written pleadings, that until 2002 France Telecom almost exclusively purchased Telefónica's national wholesale product, which was replaced, in late 2002, by an alternative national wholesale offer based on Telefónica's regional wholesale product. Only after February 2005 did the number of France Telecom's unbundled local loops significantly increase, whereas there was a reduction in the number of alternative national wholesale lines based on Telefónica's regional wholesale product. Furthermore, until the last quarter of 2004 Ya.com exclusively purchased Telefónica's national wholesale product and began gradually to use local loop unbundling only from July 2005 onwards, with its acquisition of Albura.

131 Last, the applicants' argument can apply only to Telefónica's competitors with a network enabling them to unbundle the local loop, but not to potential competitors of Telefónica which have not yet made investments for the purposes of using the regional wholesale product or local loop unbundling.

132 Fourth, as regards the applicants' argument that the Servicio de Defensa de la Competencia (Spanish Department for the Protection of Competition) accepted the existence of a single relevant wholesale market in the Telefónica/Iberbanda case (report of the department for the protection of competition N-06038, Telefónica/Iberbanda), it is sufficient to observe that the applicants do not dispute the Commission's assertion in its written pleadings that in that case the assessment of the operation did not depend on a more or less narrow restriction of the markets, since Iberbanda's market shares were very small, and that that authority, in its final decision, expressly referred to the distinction drawn by the CMT between local loop unbundling and indirect wholesale access.

133 Fifth, it should be borne in mind that the applicants themselves stated, in their initial response to France Telecom's complaint, that local loop unbundling and indirect wholesale access were not substitutable (recital 170 to the contested decision). In addition, as the Commission stated at recital 182 to the contested decision, all the NRAs that analysed the wholesale broadband markets in their respective countries, including the CMT in the case of the Spanish market, considered, for similar reasons, that local loop unbundling and the indirect wholesale access products were separate markets. Such an approach is, as the Commission correctly observes, also consistent with Commission Recommendation 2003/311/EC of 11 February 2003 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (OJ 2003 L 114, p. 45), which distinguishes the market for wholesale unbundled access (including shared access) to metallic loops and sub-loops for the purpose of providing broadband and voice services (market 11) from the market for wholesale broadband access (market 12).

134 In the light of the foregoing, it must be considered that the Commission was correct to take the view, at recitals 163 to 182 to the contested decision, that local loop unbundling was not part of the relevant market in the present case.

135 In the second place, the applicants dispute the finding in the contested decision that the regional and national wholesale products do not belong to the same market. First, they claim that the Commission used examples that were theoretical and unconnected with the reality of the Spanish market.

136 In that regard, the Commission did indeed refer, at recital 185 to the contested decision, to the estimates of the French telecommunications regulatory authority (ART) of the costs involved in switching from national wholesale products to regional wholesale products, which would be between EUR 150 million and 300 million, even though it is estimated that in France national coverage could be achieved by interconnecting at 20 indirect access points.

137 However, the ART's estimates, although relating to a different geographic market, are relevant for the purpose of illustrating the investments necessary in order to roll out such a network. As is clear from footnote 166 to the contested decision, the number of indirect access points is around five times greater in Spain than in France and it may therefore be considered that the costs associated with rolling out a network in Spain would clearly be higher than in France. In addition, as observed at recital 723 to the contested decision, the broadband market in France is characterised by a structure similar to that in Spain, in view of the existence of local, national and regional wholesale access.

138 Second, the applicants maintain that the Commission bases its definition of two distinct markets on the lack of economic justification for switching from the regional wholesale product to the national wholesale product, alleged by France Telecom (recital 187 to the contested decision), whereas France Telecom itself contradicted that assertion in certain documents placed in the file by asserting that an alternative operator might decide to switch from the regional wholesale product to the national wholesale product if the price of the national wholesale product should fall. In addition, Albura succeeded in reproducing Telefónica's regional access network.

139 In that regard, it should be observed, first of all, that, as is clear from recital 187 to the contested decision, in view of the sunk costs, the alternative operators which have already made the investments necessary to connect with the 109 indirect access points will capitalise on their investments and choose the regional wholesale product rather than concentrate traffic at a unique national access point. Given the costs associated with switching from the national wholesale product to the regional wholesale product, even in the case of a small but significant non-transitory increase in the price of the regional wholesale product, it would be unlikely and irrational from an economic point of view that operators which have already invested in the roll-out of a network will bear the cost of not using that network and decide to use the national wholesale product, which would not give them the same possibilities in terms of control over the quality of service of the retail product as the regional wholesale product. In addition, when questioned in that respect at the hearing, France Telecom actually confirmed that it considered that there was no economic justification for switching from the regional wholesale product to the national wholesale product. While such a switch was made on one occasion, exceptionally, that was on account of a technical constraint linked with the need for France Telecom to obtain additional capacity at the regional wholesale product level. The applicants' argument cannot therefore be upheld.

140 Third, the applicants' argument that the Commission in the past accepted 'asymmetric substitution' for the purpose of defining the relevant product market must be rejected, since there can be no question of such substitution in the present case, as switching from the national wholesale product to the regional wholesale product takes time and requires significant investment (see paragraph 129 above) and switching from the regional wholesale product to the national wholesale product is irrational from an economic point of view (see paragraph 139 above). Furthermore, it follows from this Court's case-law that a large discrepancy in the rates of switching between two products does not lend credence to the argument that they are interchangeable in the eyes of consumers (*France Télécom* v *Commission*, paragraph 60 above, paragraphs 86 to 91).

141 Fourth, the applicants maintain that the Commission recognised in Recommendation 2003/311 that both the wholesale indirect access products belong to the same market. However, it must be borne in mind that in its statement of grounds Recommendation 2003/311 expressly excludes from its scope the wholesale broadband resale market, that is to say, national access products in a single point like the national wholesale product, in which the alternative operator's traffic passes integrally through Telefónica's network, and emphasises the existence of very significant barriers to entry with respect to

the wholesale supply of broadband access, in so far as it is necessary to roll out a network in order to provide the service. Furthermore, Article 15 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33), to which the preamble to Recommendation 2003/311 makes express reference, and recital 18 to that recommendation provide that the markets identified for the purposes of regulatory intervention are identified without prejudice to markets that may be defined in specific cases under competition law.

142 Fifth, the applicants claim that the CMT, in its decision of 6 April 2006, ratified by its decision of 1 June 2006, also considered that the regional wholesale product and the national wholesale product are part of the same market. In that regard, unlike the contested decision, the decision of the CMT of 1 June 2006 falls within a framework of a prospective analysis. Furthermore, the Commission, in its observations on the proposal for a decision of the CMT, had also indicated that the current characteristics and the conditions of the Spanish broadband market could potentially justify the segmentation of the wholesale broadband access market into two relevant product markets. Last, the CMT, in its decision of 1 June 2006, itself excluded ADSL-IP Total from market 12. However, Telefónica does not deny that ADSL-IP and ADSL-IP Total are part of the same national wholesale access market (see, in that regard, recitals 88 to 95, 109 and 110 to the contested decision).

143 In the light of the foregoing, it must be concluded that the Commission was correct to consider, at recitals 183 to 195 to the contested decision, that the national and regional wholesale products did not belong to the same market.

144 Consequently, the second plea must be rejected.

(d) Third plea, alleging errors of fact and of law in the establishment of Telefónica's alleged dominant position on the relevant markets

145 In the context of their third plea, the applicants claim that the Commission made errors of fact and of law in establishing Telefónica's alleged dominant position on the relevant markets.

146 As a preliminary point, the Court must reject the applicants' arguments that, in order to find an abuse of a dominant position by Telefónica in the form of a margin squeeze, the Commission ought to have established that Telefónica had a dominant position on both the wholesale market and the retail market. It follows from the case-law of the Court of Justice that the question whether a pricing practice introduced by a vertically integrated dominant undertaking in a wholesale market and resulting in the margin squeeze of competitors of that undertaking in the retail market does not depend on whether that undertaking is dominant in that retail market (Case C-52/09 *TeliaSonera* [2011] ECR I-527, paragraph 89). The applicants' arguments concerning the establishment of Telefónica's dominant position therefore need to be examined only in so far as they relate to the relevant wholesale markets.

147 According to consistent case-law, a dominant position may be defined as a position of economic strength held by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, of its customers and ultimately of consumers (*United Brands and United Brands Continentaal* v *Commission*, paragraph 72 above, paragraph 65; Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 47; Case T-139/98 *AAMS* v *Commission* [2001] ECR II-3413, paragraph 51; Case T-65/98 *Van den Bergh Foods* v *Commission* [2003] ECR II-4653, paragraph 154; and *France Télécom* v *Commission*, paragraph 60 above, paragraph 99).

148 The existence of a dominant position derives in general from a combination of several factors which, taken separately, would not necessarily be determinative (*United Brands and United Brands Continentaal* v *Commission*, paragraph 72 above, paragraph 66, and *DLG*, paragraph 147 above, paragraph 47). Among those factors, the existence of large market shares is highly significant (Case T-30/89 *Hilti* v *Commission* [1991] ECR II-1439, paragraph 90, and Case T-66/01 *Imperial Chemical Industries* v *Commission* [2010] ECR II-2631 paragraphs 255 and 256).

149 Thus, it is settled case-law that very large market shares are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the sale of the supply which it stands for — without holders of much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has largest market share — is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position (*Hoffmann-La Roche* v *Commission*, paragraph 76 above, paragraph 41; *Van den Bergh Foods* v *Commission*, paragraph 147 above, paragraph 154; and *Imperial Chemical Industries* v *Commission*, paragraph 148 above, paragraph 256; see also *France Télécom* v *Commission*, paragraph 60 above, paragraph 100).

150 According to the case-law, a market share of 50% constitutes in itself, save in exceptional circumstances, a dominant position (Case C-62/86 *AKZO* v *Commission* [1991] ECR I-3359, paragraph 60, and *Imperial Chemical Industries* v *Commission*, paragraph 148 above, paragraph 256). Likewise, a market share of 70 to 80% is, in itself, a clear indication of the existence of a dominant position (*Hilti* v *Commission*, paragraph 148 above, paragraph 92; Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 907; and *Imperial Chemical Industries* v *Commission*, paragraph 148 above, paragraph 257).

151 In the present case, the applicants maintain that Telefónica does not have a dominant position on the broadband 'wholesale market'.

152 As regards the broadband internet access wholesale markets, it should be borne in mind that, as is apparent from recitals 162 to 208 to the contested decision and from paragraphs 110 to 143 above, the regional wholesale product and the national wholesale product do not belong to the same product market, so that the possibility that Telefónica has a dominant position on each of those markets must be evaluated separately.

153 In the first place, the Commission considered, at recital 232 to the contested decision, that Telefónica was dominant on the regional wholesale market. In order to reach that conclusion, it relied on Telefónica's 100% market share and its de facto monopoly on that market (recital 223 to the contested decision). The Commission also referred to considerable barriers to entry on that market, in particular to the fact that alternative operators must build a new alternative local access network or unbundle Telefónica's local loops.

154 Thus, at recitals 224 to 226 to the contested decision, the Commission emphasised the significant sunk costs for new operators seeking to provide regional wholesale broadband access services through Telefónica's local loop and also the economies of scale and scope from which Telefónica benefited. At recital 227 to the contested decision, moreover, the Commission stated that there were considerable obstacles and delays in securing access to local loop unbundling during the infringement period, so that even an operator that had already rolled out its own network would not have been able to compete with Telefónica. At recital 228 to the contested decision, the Commission observed that the need to secure a sufficient number of broadband customers represented a further market entry barrier for operators which invested in local loop unbundling, so that they were likely to have higher unit costs than Telefónica while rolling out their local networks. The Commission concluded that alternative

operators currently investing in local loop unbundling will not have a significant impact on competition on the regional wholesale access market even in the medium term and that such impact will never be national (recitals 229 and 230 to the contested decision).

155 First, it should be observed that the applicants do not deny that Telefónica had been the only operator to supply the regional wholesale product in Spain since 1999 (recital 223 to the contested decision), thus having a de facto monopoly on that market.

156 Second, the applicants maintain that, in spite of its market share, Telefónica was under constant competitive pressure from its competitors, which consistently and gradually increased their presence on the 'wholesale market'. In that regard, as observed at paragraph 152 above, the Commission was correct to take the view that the national and regional wholesale products did not belong to the same market. Accordingly, the examples given by the applicants in their reply, relating to Arsys, which launched a retail broadband product using exclusively the wholesale offer of Uni2, to Tele2, to Tiscali and to Auna, which used Albura's wholesale services, must be rejected, as they related to the national wholesale offer.

157 Third, the applicants' argument that the 'wholesale market' is a 'contestable market', on which Telefónica's customers and competitors could reproduce its network, and were thus in a position to exert effective competitive pressure irrespective of their market share, must be rejected, given the investments necessary to build a new alternative local access network or to unbundle Telefónica's local loops, which is essential in order for an alternative operator to be able to offer a regional wholesale access product competing with Telefónica's regional wholesale product (see, in particular, paragraph 129 above).

158 It follows that the applicants have adduced no evidence capable of calling in question the Commission's conclusion that Telefónica was in a dominant position on the regional wholesale market during the infringement period.

159 In the second place, the Commission considered that Telefónica had a dominant position on the national wholesale access market. Thus, it asserts, at recital 234 to the contested decision, that until the last quarter of 2002 there was no effective alternative to Telefónica's national wholesale product. Furthermore, since 2002, and throughout the entire infringement period, Telefónica's market share remained constantly above 84% (recital 235 to the contested decision). At recitals 236 to 241 to the contested decision, the Commission also referred (i) to the significant gap between Telefónica's market share and those of its main competitors, Telefónica's market share being more than 11 times greater than its main competitor (recital 236 to the contested decision); (ii) to the economies of scale and of scope and the vertical integration from which Telefónica benefited, which enabled it to recover its costs through the high volumes of traffic generated by its large subscriber base (recital 237 to the contested decision); (iii) to its control of the local loop, which enabled it to influence significantly the availability of competing wholesale products (recital 240 to the contested decision); and (iv) to its network inherited from a former monopoly, which was not easily replicable (recital 241 to the contested decision).

160 For the purposes of showing that Telefónica did not have a dominant position on the national wholesale market, the applicants put forward a number of arguments. First, they maintain that Telefónica's network is capable of being replicated.

161 Thus, they assert that Telefónica's network has been fully replicated by several alternative operators. However, as the Commission correctly stated at recital 239 to the contested decision, those examples do not show that Telefónica did not have a dominant position on the national wholesale market.

162 The possible existence of competition on the market is indeed a relevant factor for the purposes of determining the existence of a dominant position. However, even the existence of lively competition on a particular market does not rule out the possibility that there is a dominant position on that market, since the predominant feature of such a position is the ability of the undertaking concerned to act without having to take account of this competition in its market strategy and without for that reason suffering detrimental effects from such behaviour (see Case T-210/01 *General Electric* v *Commission* [2005] ECR II-5575, paragraph 117 and the case-law cited, and *France Télécom* v *Commission*, paragraph 60 above, paragraph 101).

163 In the present case, the examples given by the applicants do not call in question the matters referred to by the Commission at recitals 235 to 241 to the contested decision, relating in particular to the fact that Telefónica had a market share of over 84% throughout the entire infringement period, the fact that since 2001 that market share had been 11 times greater than its main competitor, or the fact that obstacles prevented Telefónica's competitors from offering, on a profitable basis, a national wholesale product competing with its own product.

164 Second, the applicants assert that the Commission adopts an 'essentially dogmatic position', which in their submission is inconsistent with the position which it adopted in its communications with other European regulatory authorities. In those communications, the Commission considered that competition exercised at retail market level by vertically integrated undertakings may exercise indirect competitive pressure on the wholesale market. Accordingly, the Commission ought to have analysed the question whether the cable and local loop operators exercised indirect competitive pressure on Telefónica's conduct on the wholesale indirect access market.

165 In that regard, it is sufficient to observe that such an argument is unfounded, since the Commission did in fact analyse the competitive pressure of the cable operators and indicated, at recitals 268 to 276 to the contested decision, that the cable operators had not exercised a pricing discipline on Telefónica on the retail market and, moreover, as is apparent from recitals 264 to 266 to the contested decision, that local loop unbundling was really successful only from September 2004 and that its geographic scope was limited.

166 Third, the fact that Telefónica had since 2000 been required to provide access to the local loop at prices based on costs is not sufficient to demonstrate that it did not have a dominant position. Although the ability to impose regular price increases unquestionably constitutes a factor capable of pointing to the existence of a dominant position, it is by no means an indispensable factor, as the independence which a dominant undertaking enjoys in pricing matters has more to do with the ability to set prices without having to take account of the reaction of competitors, customers and suppliers than with the ability to increase prices (see *Atlantic Container Line and Others* v *Commission*, paragraph 150 above, paragraph 1084 and the case-law cited). However, since all the competing wholesale access products are based on Telefónica's local loops or on its regional wholesale product, the availability of competing products depends not only on the actual availability of unbundled local loops and/or the regional wholesale product, but also on the economic conditions under which they are provided (recital 240 to the contested decision).

167 It follows from the foregoing that the Commission was correct to consider that Telefónica was in a dominant position on the national wholesale market.

168 Therefore, and since, as observed at paragraph 146 above, the Commission was not required, in order to establish the existence of a margin squeeze, to show that Telefónica held a dominant position on the retail market, the present plea must be rejected in its entirety.

(e) Fourth plea, alleging errors of law in the application of Article 82 EC as concerns Telefónica's allegedly abusive conduct

169 In the context of the present plea, the applicants claim that the contested decision is vitiated by two serious errors in the application of Article 82 EC so far as concerns Telefónica's allegedly abusive conduct.

170 It should be borne in mind, as a preliminary point, that in prohibiting the abuse of a dominant position on the market, in so far as trade between Member States is capable of being affected, Article 82 EC refers to conduct which is liable to influence the structure of the market where, precisely because of the presence of the undertaking concerned, the degree of competition is already weakened and which, 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 on the market or the growth of that competition (*Hoffman-La Roche* v *Commission*, paragraph 76 above, paragraph 91; *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 111 above, paragraph 70; Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 104; and Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, paragraph 174).

171 Since Article 82 EC thus refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on an effective competition structure, a dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market (see *France Télécom* v *Commission*, paragraph 170 above, paragraph 105, and *TeliaSonera*, paragraph 146 above, paragraph 24 and the case-law cited).

172 As the Court of Justice has already held, it follows that Article 82 EC prohibits a dominant undertaking from eliminating a competitor and from thus strengthening its position by recourse to means other than those based on competition on the merits. From that point of view, therefore, not all competition by means of price can be regarded as legitimate (see *France Télécom* v *Commission*, paragraph 170 above, paragraph 106 and the case-law cited).

173 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 82 EC expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices (*TeliaSonera*, paragraph 146 above, paragraph 25).

174 Furthermore, the list of abusive practices contained in Article 82 EC 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 (see *TeliaSonera*, paragraph 146 above, paragraph 26 and the case-law cited).

175 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 (see *TeliaSonera*, paragraph 146 above, paragraph 28 and the case-law cited).

176 In the first place, the applicants maintain that it is clear from the contested decision that the Commission analyses the alleged margin squeeze as an abuse whose exclusionary effects are analogous to the effects of the de facto refusal to enter into a contract. Yet the Commission did not apply the legal criterion corresponding to that type of conduct, established by the Court of Justice in Case

C-7/97 *Bronner* [1998] ECR I-7791. In particular, the Commission has not demonstrated that the wholesale products concerned constituted essential inputs or infrastructures, or that the refusal to supply is capable of eliminating all competition on the retail market.

177 Such an argument cannot be upheld.

178 Contrary to the applicants' contention, the Commission, in the contested decision, did not analyse the margin squeeze as a de facto refusal to contract. The Commission referred in the contested decision to the concept of abuse within the meaning of Article 82 EC and the resulting obligations (recitals 279 and 280). It also defined the practice of a margin squeeze, relying in particular on the case-law of the EU judicature and on its own practice in taking decisions (recitals 281 to 284). In that regard, the Commission emphasised, at recital 285 to the contested decision, that from September 2001 to December 2006 Telefónica had abused its dominant position on the Spanish broadband access markets in the form of a margin squeeze generated by disproportion between its wholesale and retail charges for broadband access, with the consequence that competition on the retail market was likely to be restricted. The Commission also considered, at recitals 299 to 309 to the contested decision, that the criteria defined in *Bronner*, paragraph 176 above, were not applicable in the present case.

179 In particular, it must be observed that, in the contested decision, the Commission did not require Telefónica to give access to the wholesale products to its competitors, as the obligation to do so arises under the Spanish regulatory framework. Thus, Telefónica had been required to provide the regional wholesale product since March 1999 and the national wholesale product (ADSL-IP) since April 2002, that obligation being the result of the intention of the public authorities to encourage Telefónica and its competitors to invest and innovate (recitals 88, 111, 287 and 303 to the contested decision).

180 Furthermore, the Court of Justice observed in *TeliaSonera*, paragraph 146 above, that it cannot be inferred from *Bronner*, paragraph 176 above, that the conditions to be met in order to establish that a refusal to supply is abusive must necessarily also apply when assessing the abusive nature of conduct which consists in supplying services or selling goods on conditions which are disadvantageous or on which there might be no purchaser. Such conduct may, in itself, constitute an independent form of abuse distinct from that of refusal to supply (*TeliaSonera*, paragraph 146 above, paragraphs 55 and 56).

181 If *Bronner*, paragraph 176 above, were to be interpreted otherwise, that would amount to a requirement that before any conduct of a dominant undertaking in relation to its terms of trade could be regarded as abusive the conditions to be met to establish that there was a refusal to supply would in every case have to be satisfied, and that would unduly reduce the effectiveness of Article 82 EC (see, to that effect, *TeliaSonera*, paragraph 146 above, paragraph 58).

182 In that regard, although in *TeliaSonera*, paragraph 146 above, paragraph 69, the Court of Justice did indeed observe that the indispensable nature of the wholesale product may be relevant in the context of the assessment of the effects of the margin squeeze, it must be emphasised that the applicants have relied on the indispensable nature of the wholesale products only in support of their assertion that the Commission did not apply the appropriate legal criterion to the alleged de facto refusal to contract penalised in the contested decision. Their argument must therefore be rejected.

183 In the second place, the applicants claim that, even on the assumption that Article 82 EC is applicable, the Commission did not apply the legal criterion corresponding to the concept of margin squeeze.

184 First, the applicants claim that the Commission made an error of law in applying its margin squeeze test to a non-essential input. However, such an argument must be rejected, for the reasons set out at paragraphs 180 to 182 above.

185 Second, the applicants assert that in order to establish the existence of an abusive margin squeeze the Commission ought to have proved that Telefónica was also in a dominant position on the retail market. However, such an argument was rejected at paragraph 146 above.

186 Third, the applicants assert that, in accordance with Case T-5/97 *Industrie des poudres sphériques* v *Commission* [2000] ECR II-3755, paragraph 179, there can be no margin squeeze unless the wholesale price charged to competitors for the downstream product is excessive or the retail price for the derived product is predatory.

187 In that regard, it must be borne in mind that it is the margin squeeze that, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 82 EC. 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 on the retail market, but also of an abnormally high price on the wholesale market (see, to that effect, *TeliaSonera*, paragraph 146 above, paragraphs 97 and 98). Accordingly, the Commission was not required to demonstrate in the contested decision that Telefónica charged excessive prices for its wholesale indirect access products or predatory prices for its retail products (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 169, and *Deutsche Telekom* v *Commission*, paragraph 69 above, paragraph 167).

188 Fourth, the applicants' argument that the Commission ought to have supplemented its analysis of the abusive nature of Telefónica's conduct on the basis of the 'equally efficient competitor' criterion by a study of the margins of the main alternative operators on the Spanish market must be rejected.

189 It must be recalled that the Court of Justice has already made clear that Article 82 EC prohibits, in particular, an undertaking in a dominant position from adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors. 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, *TeliaSonera*, paragraph 146 above, paragraphs 39 and 40 and the case-law cited).

190 In order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, in principle, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy (see *Deutsche Telekom* v *Commission* paragraph 170 above, paragraph 198, and *TeliaSonera*, paragraph 146 above, paragraph 41 and the case-law cited; see also *Deutsche Telekom* v *Commission*, paragraph 69 above, paragraphs 188 to 191).

191 In particular, as regards a pricing practice which causes a 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 (*Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 201, and *TeliaSonera*, paragraph 146 above, paragraph 42).

192 The validity of such an approach is reinforced by the fact that it also conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking, in the light of its special responsibility under Article 82 EC, to assess the lawfulness of its own conduct. 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 170 above, paragraph 202, and *TeliaSonera*, paragraph 146 above, paragraph 44). Furthermore, an exclusionary abuse also affects potential competitors of the dominant undertaking, which might be deterred from entering the market by the prospect of a lack of profitability.

193 Admittedly, it also follows from the case-law that it cannot be ruled out that the costs and prices of competitors may be relevant to the examination of the pricing practice at issue. However, it is only where it is not possible, in the light of the particular circumstances indicated by the Court of Justice, to refer to the prices and costs of the dominant undertaking that the prices and costs of competitors on the same market should be examined (*TeliaSonera*, paragraph 146 above, paragraphs 45 and 46), and the applicants have not maintained that this is the case here.

194 The Commission was therefore correct to consider that the appropriate test for establishing the margin squeeze consisted in determining whether a competitor having the same cost structure as that of the downstream activity of the vertically integrated undertaking would be in a position to offer downstream services without incurring a loss if that vertically integrated undertaking had to pay the upstream access price charged to its competitors, by reference to the costs incurred by Telefónica (recitals 311 to 315 to the contested decision), without undertaking a study of the margins of the main alternative operators on the Spanish market.

195 Fifth, the applicants contend that, even on the assumption that the 'hypothetical equally efficient competitor' test is appropriate for demonstrating the existence of an infringement in the present case, the Commission's analysis is vitiated by an error in the choice of wholesale inputs. In their submission, in order to develop its retail activities, an equally efficient competitor would use only the local loop or an optimal combination of wholesale products. However, it was observed at paragraphs 130 and 131 above that the use by the alternative operators, during the infringement period, on each telephone exchange, of an optimal combination of wholesale products, which would include unbundling of the local loop, has not been established.

196 Sixth, the applicants maintain that the 'ladder of investments' theory does not require that all levels be accessible. That argument must, however, be rejected. As the Commission correctly observes, the process that enables alternative operators to invest gradually in their own infrastructure can constitute a viable strategy only where there is no margin squeeze practice at the different levels of the ladder. In fact, the margin squeeze imposed by Telefónica probably delayed the entry and growth of its competitors and their ability to achieve a sufficient level of economies of scale to justify investments in their own infrastructure and the use of local loop unbundling (recital 554 to the contested decision).

197 In the light of the foregoing, the present plea must be rejected.

(f) Fifth plea, alleging errors of fact and/or errors of assessment of the facts and errors of law with respect to Telefónica's allegedly abusive conduct and its allegedly anti-competitive impact

198 This plea, which is raised in the alternative, consists of two parts. The first part alleges errors of fact and/or errors of assessment of the facts in the application of the margin squeeze test. The second part alleges that the Commission did not establish to the requisite legal standard the likely or actual effects of the conduct examined.

First part of the fifth plea, alleging errors of fact and/or errors of assessment of the facts in the application of the margin squeeze test

199 In the context of the first part, the applicants formulate three complaints. The first complaint alleges an error in the choice of the wholesale inputs, while the second alleges errors and omissions in the analysis of the DCFs. Last, the third complaint alleges errors and omissions in the 'period-by-period' analysis.

– First complaint in the first part of the fifth plea, alleging error in the choice of the wholesale inputs

200 By this complaint, which is supported by reference to the arguments relating to the second and fourth pleas, the applicants claim that the Commission was not required to examine the existence of a margin squeeze for each wholesale product taken separately, in view of the fact that the alternative operators would use an optimal combination of wholesale products, including local loop unbundling, permitting economies of cost to be made. In their reply, and at the hearing, the applicants also claimed that it is by reference to the 'equally efficient competitor' principle that the Commission ought to have applied the margin squeeze test on the basis of the combination of wholesale products used by the alternative operators.

201 First, it should be borne in mind that Article 82 EC prohibits, in particular, an undertaking in a dominant position on a specific market from adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors (see paragraph 189 above). In that regard, examination of such a position calls for an assessment of the possibilities of competition in the context of the market consisting of all the products which, according to their characteristics, are particularly appropriate for satisfying consistent needs and are not readily interchangeable with other products, the determination of the relevant market serving to evaluate whether the undertaking concerned is able to hinder effective competition on that market (see paragraph 111 above). In fact, it has been held, first, in the context of the second plea (see paragraphs 110 to 144 above) that the Commission was correct to take the view that local loop unbundling, the national wholesale product and the regional wholesale product did not belong to the same market and, second, in the context of the fourth plea (see paragraphs 169 to 197 above), that a margin squeeze on a relevant market was in itself likely to constitute an abuse within the meaning of Article 82 EC.

202 As the determination of the relevant market serves to evaluate whether the undertaking concerned is able to hinder effective competition on that market, the applicants cannot claim, in reliance on the arguments submitted in the context of their second plea, that the use of an optimal combination of wholesale products would enable Telefónica's competitors to improve their profitability. Those wholesale products are not part of the same product market (see paragraphs 114 to 134 above).

203 Second, it should be observed that the applicants' argument amounts to taking the view that an alternative operator could offset the losses incurred as a result of the margin squeeze at the level of a wholesale product by revenues arising from the use, in certain more profitable geographic areas, of other products of Telefónica which were not subject to a margin squeeze and which belonged to another market, namely local loop unbundling, the use of which required significant investments and was not immediately available (see paragraph 125 above and recitals 227, 231, 266 and 562 to the contested decision). That cannot be permitted.

204 According to the case-law, a system of undistorted competition, as laid down in the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators. Equality of opportunity means that Telefónica and its at least equally efficient competitors are placed on an equal footing on the retail market. That is not the case, first, if the prices of national and regional wholesale products paid to Telefónica by the alternative operators could not be reflected in their retail prices and, second, if the alternative operators, given the prices of Telefónica's national and regional wholesale products, could offer those products only at a loss, which they would have to offset by revenues coming from other markets (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 230, and *Deutsche Telekom* v *Commission*, paragraph 69 above, paragraphs 198 and 199 and the case-law cited).

205 Furthermore, as the Commission has emphasised, the applicants' argument based on the use by the alternative operators during the infringement period, in each exchange, of an optimal combination of wholesale products, which would include local loop unbundling, is inconsistent with the position

expressed by Telefónica itself in its response of 22 September 2003 to France Telecom's complaint, in which Telefónica had maintained that analysis of the possible existence of a margin squeeze must be carried out solely on the basis of the regional wholesale product.

206 Third, as stated at paragraph 131 above, such an optimal combination could be used only by competitors of Telefónica having a network allowing them to unbundle the local loop, and not by Telefónica's potential competitors.

207 Fourth, although the applicants maintain that an equally efficient competitor which used only the local loop would obtain benefits and that, consequently, an equally efficient competitor which used an optimal combination of inputs would also obtain positive results, that argument must be rejected. As observed at paragraph 125 above, the actual use of the local loop began, to a limited extent, only in late 2004 and early 2005. In the light of the necessary investments, moreover, it was only in 2004 that the alternative operators began to switch their wholesale indirect access connections to unbundled access to the local loop.

208 Fifth, the applicants' argument that a possible optimal combination of wholesale products would prevent the establishment of a margin squeeze is in contradiction to the regulatory obligations imposed by the CMT on Telefónica, the aim of which is, in particular, to ensure that all Telefónica's retail offers can be replicated on the basis of its regional wholesale product (recital 114 to the contested decision).

209 Sixth, the Court must reject the argument whereby the applicants dispute the definition of the network of the equally efficient competitor, namely that the only important issue is whether, with the economies of scale and the network costs of Telefónica, an alternative operator could or could not be profitable. As the Commission observed at recital 315 to the contested decision, the application of the equally efficient competitor test does not imply that Telefónica's competitors would be able to replicate its upstream assets. The margin squeeze test applies from the aspect of an equally efficient downstream operator, namely an operator using the wholesale product of the dominant undertaking, in competition with that undertaking on the downstream market and whose costs on that market are the same as those of the dominant undertaking.

210 In any event, the use by the alternative operators, during the infringement period, in each exchange, of an optimal combination of wholesale products, which would include unbundling of the local loop, has not been established. Thus, although TESAU has been under a regulatory obligation to rent the copper pair to alternative operators since December 2000 (recital 81 to the contested decision), it is apparent from recitals 102 and 103 to the contested decision, the figures in which have not been disputed by the applicants, that until 2002 France Telecom almost exclusively purchased the national wholesale product from Telefónica, that product having been replaced in late 2002 by an alternative national wholesale product based on Telefónica's regional wholesale product. Only after February 2005 did the number of France Telecom's unbundled local loops significantly increase, whereas there was a reduction in the number of alternative national wholesale lines based on Telefónica's regional wholesale product. In addition, until the last quarter of 2004, Ya.com exclusively purchased Telefónica's national wholesale product and began gradually to use the unbundling of the local loop only from July 2005 onwards, with its acquisition of Albura.

211 It follows from the foregoing that the Commission did not make a manifest error of assessment in selecting the wholesale inputs for the purpose of calculating the margin squeeze. The first complaint in the first part of the fifth plea cannot therefore be upheld.

– Second complaint in the first part of the fifth plea, alleging errors and omissions in the implementation of the DCF analysis

212 In the context of the present complaint, the applicants take issue with a number of aspects of the Commission's application, in the present case, of the DCF analysis (recitals 350 to 385 to the contested decision).

213 It should be observed that, as the Commission stated at recital 315 to the contested decision, the margin squeeze test is designed, in the present case, to establish whether a competitor having the same cost structure as that of the downstream activity of the vertically integrated undertaking is able to be profitable on the downstream market given the wholesale and retail prices charged by that undertaking. In the contested decision, the Commission recalled that, according to the case-law of the Court of Justice and to its own practice in taking decisions in relation to abusive pricing, the profitability of an undertaking in a dominant position has always been evaluated on the basis of the 'period-by-period' analysis, as the DCF method when used to calculate the margin squeeze has some shortcomings (recitals 331 and 332). When calculating the margin squeeze, the Commission none the less decided to calculate Telefónica's profitability by using two methods, namely the 'period-by-period' method and the DCF method proposed by Telefónica, in order to avoid the finding of a margin squeeze that would be the result of accounting distortions resulting from the lack of maturity of the Spanish broadband market and, furthermore, to ensure that the method proposed by Telefónica did not disprove the finding of a margin squeeze resulting from the 'period-by-period' analysis (recital 349 to the contested decision).

214 The Commission also explains that, in a DCF analysis, a terminal value is calculated in order to reflect the fact that there are key assets that will continue to be used beyond the end of the reference period. Thus, it may be necessary to take account of a terminal value in the analysis since certain costs are not fully covered during the reference period. In the Commission's view, both the appropriate terminal value to be included in the DCF calculation and the appropriate reference period are intended to determine a final date after which the recovery of losses is no longer taken into account in the analysis (recitals 360 and 361 to the contested decision). Since the DCF method allows for initial short-term losses, but provides for their recovery over a reasonable period, the Commission was required to determine the appropriate period of recovery in the present case (recital 351 to the contested decision).

215 In that regard, the Commission considered, at recital 354 to the contested decision, that the most reasonable approach was to limit the period of analysis to the economic lifetime of the assets employed by the undertaking concerned. At recital 359 to the contested decision, the Commission considered that in the present case the appropriate period for the DCF analysis was the period between September 2001 and December 2006 (five years and four months) and, furthermore, that that period was favourable to Telefónica because its downstream margin had increased over time.

216 In the first place, the applicants dispute the method of calculating the terminal value used by the Commission in the DCF analysis (recital 363 to the contested decision). They claim that the Commission's method of calculating the terminal value of the retail broadband services departs from the evaluation methods normally applied to undertakings. They submit that the Commission's approach is incorrect, since what is involved in the present case is an evaluation of an undertaking with complex physical assets. Thus, the expenditure incurred by Telefónica in its retail broadband trading activity makes it possible, in addition to increasing its customer base, to enhance the value of assets such as its trade marks, its relations with its customers, its know-how and its organisational abilities. Such assets have an economic life much longer than the five years and four months applied by the Commission, so that the reference period ought to have been extended beyond December 2006.

217 First, the Court must reject the argument that the extension of the reference period in the DCF analysis would not increase the risk of forecasting errors or the risk that the rewards for anti-competitive conduct would be taken into account in that analysis.

218 As the Commission correctly stated at recitals 333 and 334 to the contested decision, since the DCF method allows the recovery of initial losses by future profits, there is a risk that the outcome of that method will either rely on unreasonable forecasts by the dominant undertaking as to the future profits, which might result in a flawed outcome, or include long-term profits that would be the result of the strengthening of the dominant undertaking's market power.

219 In that regard, the Court rejects the applicants' arguments that the fact of reducing the period analysed leads to Telefónica's 'commercial value' being underestimated and the value of its assets beyond 2006 being ignored.

220 It must be held that the Commission did not ignore the value of Telefónica's assets beyond 2006. On the contrary, it correctly considered that in the present case, unlike a method designed to evaluate a company for the purposes of its purchase or sale, it was not relevant to establish whether Telefónica's losses over the period 2001 to 2006 could be offset by hypothetical future profits from 2007. The Commission did not make a manifest error of assessment when it considered that the dominant undertaking's downstream activity must be profitable over a period corresponding to the lifetime of its assets. Were that not so, Telefónica's pricing policy would be likely to have a negative effect on competition (recital 370 to the contested decision).

221 Second, the argument that the Commission gave no explanation of the length of the period chosen for the DCF analysis, which is thus arbitrary, must also be rejected.

222 First of all, at recitals 351 to 359 to the contested decision, the Commission stated that the most reasonable approach was to limit the period of analysis to the lifetime of the assets employed by the undertaking concerned, as all the economic benefits envisaged arising from the use of those assets are then taken into account in the assessment of its profitability. The Commission also stated that a period of five years coincided with the average economic lifetime of TESAU's network assets that were necessary to provide retail ADSL services on the basis of the regional wholesale product, as indicated in its initial business plan, and also with the average lifetime of the network assets of the alternative operators, such as France Telecom and Auna. The Commission also stated that that period was greater than the period of amortisation of TESAU's subscriber acquisition costs and that it was consistent with the period used by the telecommunications regulator in the United Kingdom. In the light of those factors, which, in any event, do not allow the applicants to claim that the Commission provided no explanation concerning the duration of the period of analysis which it used, it must be held that the duration of the period of analysis was not determined arbitrarily and that it is not vitiated by a manifest error of assessment.

223 In that regard, as regards the determination of the duration of the period over which profitability should be achieved, the applicants dispute the reference to Telefónica's business plans, maintaining that the analysis on which the Commission relies [*confidential*], which confirms that the losses detected by the Commission over the period [*confidential*] are attributable to the lack of maturity of the Spanish broadband market. However, it is clear from the file that the business plan [*confidential*] actually relates to the total value of the entire activity. Furthermore, as the Commission correctly observes, Telefónica's cost accounts and business plan show, first of all, that Telefónica [*confidential*], as it calculated that its profitability threshold was [*confidential*] final ADSL users, a figure that was achieved [*confidential*]; next, that it envisaged a profitability threshold in terms of results before tax, interest, amortisation and provisions (EBITDA) and benefits before tax and financial charges (EBIT) in [*confidential*]; and, last, that it expected a net present value ('NPV') [*confidential*] (excluding any terminal value) over the period [*confidential*]. The Commission therefore did not make a manifest error of assessment in considering that the losses detected over the period [*confidential*] could not be regarded as being attributable to the lack of maturity of the Spanish broadband market.

224 Third, the applicants maintain that it is not true that the methodology adopted by the Commission, which includes a terminal value reflecting the residual economic life of the network assets and customers acquired, is more favourable to Telefónica than that used by Telefónica in its initial business plan (recitals 362 and 363 to the contested decision), owing to the wider temporal horizon ([*confidential*] years) used by Telefónica in that plan. They also maintain that those methodologies are not similar (footnote 810 to the contested decision), as Telefónica considered that its customer base

was constant and not declining. Furthermore, in the applicants' submission, Telefónica's business plans, referred to at recital 367 to the contested decision, are irrelevant in the context of the calculation of the terminal value.

225 It should be observed in that regard that the applicants do not specify in their written pleadings the reasons why their argument, even if it were well founded, would render the contested decision unlawful. First, even on the assumption that, as the applicants maintain, the methodology adopted by the Commission were not more favourable to Telefónica than the methodology which it used in its initial business plan or that the methodologies in question were not similar, it would not follow that the findings relating to terminal value, set out in particular at recitals 360 to 362 to the contested decision, and to the determination of the terminal value in the context of the calculation of the DCFs, would be incorrect. Second, it must be observed that Telefónica's business plans were mentioned at recital 367 to the contested decision for the purpose of demonstrating that, contrary to Telefónica's contention, the Commission's calculation of the terminal value was not unprecedented. Even on the assumption that such a finding were incorrect, that would not render the calculation of the terminal value in the contested decision unlawful.

226 In addition, although the temporal horizon envisaged by Telefónica in its business plans [*confidential*] was indeed actually [*confidential*] years (the period [*confidential*]), which the Commission acknowledged in its defence, it must be held that the Commission did not make a manifest error when it decided that such a period was too long for the purpose of envisaging the profitability of a hypothetical operator downstream (see, to that effect, paragraphs 216 to 220 above).

227 In any event, it should be emphasised that it follows from the file that a calculation of the NPV for the retail activity for the period [*confidential*], carried out according to the same method as that employed by Telefónica in its business plan 'Objetivo Verne 2002', [*confidential*]. The argument which the applicants put forward at the hearing that the Commission ought not to have used Telefónica's forecasts appearing in that plan, but ought to have requested that Telefónica supply its updated forecasts at the time when it carried out the calculation of the terminal value, cannot be upheld. It is reasonable to consider that such forecasts, updated at the time of that calculation, would increase the risk that the rewards for anti-competitive conduct would be taken into account in the analysis.

228 In the second place, the applicants claim that the Commission could have calculated a more appropriate terminal value, based on market data. First, such an alternative approach designed to evaluate cash flows from 2006 would have consisted in using information on comparable transaction values, in application of the 'method of multiples', the objective of which is to evaluate an undertaking's activity by comparing it with the price paid for similar commercial activities. The use of such a method has the advantage of not requiring any premiss concerning the duration of the activity under consideration. Second, the application of multiples of the EBIDTA, at recital 377 to the contested decision, makes no sense for undertakings with a high growth potential. In those circumstances, besides the multiple of revenues used by Telefónica in its response to the statement of objections, the Commission could have used a multiple specific to the sector.

229 It must be considered that the Commission was correct to find, at recital 369 to the contested decision, that the use in the present case of a terminal value encompassing all the future profits of the undertaking concerned was neither reasonable nor appropriate in the context of the calculation of a margin squeeze.

230 First of all, such an approach, in which all future profits of the undertaking concerned are taken into consideration, would not allow it to be determined whether, regard being had in particular to the fees paid to Telefónica by the alternative operators for the national and regional wholesale products, a downstream operator as efficient as Telefónica could recover its initial losses and achieve a balance from the profits created by its activity on the downstream market during a specific reference period. Nor, next, does such a method take account of the average lifetime of the assets concerned, or of the

fact that, on a competitive market, a new entrant is not in a position to rely on all its possible future profits in order to offset the initial losses recorded when it enters the market. Last, as the Commission observed at recital 334 to the contested decision, such an approach allows an undertaking to adopt successfully a margin squeeze strategy by initially setting prices that, after a given period, exclude competitors and then, at a subsequent stage, either increasing prices enabling it, in time, to recover its initial losses, or maintaining those prices above the competitive level, which is made possible by the absence of entry or significant growth by competitors on the relevant market (see also recital 334 to the contested decision).

231 In the third place, the applicants assert that 'the application of a correct evaluation method, based on market data, to calculate the terminal value would have shown that the activity of a possible competitor as efficient as Telefónica would have been profitable'. However, such an argument is neither explained nor developed in the written pleadings, where the applicants make a general reference to 10 pages of an economic study attached as an annex. In the light of paragraphs 58 to 63 above, it must therefore be rejected.

232 In the light of the foregoing, the second complaint in the first part of the fifth plea must be rejected.

– Third complaint in the first part of the fifth plea, alleging errors in the 'period-by-period' analysis

233 In the context of the present complaint, the applicants make a number of criticisms with respect to the 'period-by-period' analysis carried out by the Commission.

234 In the first place, the applicants maintain that the Commission did not correctly estimate the marketing LRAIC.

235 As a preliminary point, it should be borne in mind that in the contested decision the Commission found that the incremental marketing costs were an item of Telefónica's subscribers' acquisition costs (recitals 458 to 463), which include not only incentives and commissions (excluding salaries) granted to Telefónica's sales network for each new subscriber, but also the development of Telefónica's marketing structure, since such expansion was possible by virtue of its broadband activity.

236 As regards the estimate of marketing costs, the Commission asserted at recitals 464 to 473 to the contested decision that Telefónica had underestimated the LRAIC, since it had included only the incentives and commissions granted to the sales network for each new subscriber, excluding any cost relating to the company's marketing structure. According to the Commission, even if Telefónica's marketing structure is part of its common costs, it could not be asserted that Telefónica would have had the same size (in employee numbers) if the company had not offered retail broadband services (recitals 465 and 470 to the contested decision). At recital 472 to the contested decision, the Commission asserts that although, admittedly, in order to arrive at a reasonable estimation of the incremental marketing costs, it would have been possible to take as a basis the actual allocation of Telefónica's marketing staff to the marketing of retail broadband services, in the present case Telefónica, with respect to the turnover of each of its activities, clearly underestimates the cost that is incremental to the retail broadband activity, which had already been criticised by the CMT. Consequently, the Commission concludes, at recital 473 to the contested decision, that in the present case, in the light of the information disclosed by Telefónica and the fact that there is no study, which none the less had been requested by the CMT, analysing the dedication of the marketing staff to each of the company's retail markets, the calculation of the marketing costs in proportion to turnover therefore had to be used as an approximation of the LRAIC that was favourable to the company.

237 First, the applicants' argument that the Commission ought not to have estimated the marketing LRAIC on the basis of Telefónica's accounting data, but ought to have used alternative sources of data, such as Telefónica's scorecards, must be rejected.

238 As is clear from recitals 319 and 320 to the contested decision, the long-run incremental costs of a product corresponds to the product-specific costs borne by the firm in the long term associated with total production of the product and, accordingly, to the costs that the undertaking would have avoided in the long term if it had decided not to produce that product. The Commission thus observed that the long-run incremental cost must include not only all the fixed and variable costs directly associated with the production of the product concerned, but also a proportion of the common costs associated with that activity. The applicants do not challenge that finding. It follows that the correctly calculated LRAIC must include a proportion of the costs associated with Telefónica's marketing structure which the company would have avoided in the long term if it had not provided the retail broadband services.

239 The applicants do not deny that the estimate of the marketing LRAIC, as appearing in the profit and loss analysis of the retail activity (Economics ADSL) (recital 407 to the contested decision) and in the scorecard (ADSL scorecard) of the broadband activity (recitals 408 to 410 to the contested decision), does not include as marketing costs [*confidential*], thus underestimating the LRAIC of Telefónica's retail broadband product. Although the applicants assert that [*confidential*], it must be observed that this [*confidential*], so that the Commission was correct to consider that the LRAIC of Telefónica's retail broadband product were undervalued.

240 Second, as the Commission correctly observes, the applicants' approach cannot be upheld in the present case, since it amounts to considering that the marketing delegates do not devote part of their time to marketing Telefónica's retail broadband products. Furthermore, in a letter to the Commission dated 1 April 2005, cited in footnote 472 to the contested decision, Telefónica itself acknowledged that it was 'clear that the costs in premiums [did] not exhaust the chapter entitled "[marketing] costs"' and that it '[was] necessary to add all the costs arising from TESAU's marketing structure (namely, staff costs other than those relating to staff directly assigned to sales and the costs of fixed assets, structure and support) in what [was] attributable to the retail ADSL offer'.

241 In that regard, the applicants' arguments that Telefónica's marketing structure had remained stable since the undertaking entered the retail broadband market and that Telefónica's staff represented a fixed cost, which was difficult to adjust owing to the inflexibility of the employment market, must be rejected.

242 As the Commission observed at recital 468 to the contested decision, the fact that Telefónica had not increased its marketing staff since 1999 does not mean that a proportion of its marketing structure could not be directly attributable to its retail broadband activity. Thus, the Commission stated at recital 469 to the contested decision that, independently of the alleged inflexibility of the employment market in Spain, it was probable that the size of Telefónica's marketing structure would not have been maintained if the undertaking had not offered its retail broadband services, as the revenues generated by its traditional activities (voice and subscriptions) had fallen between 2002 and 2006 (recital 466 to the contested decision). It must also be considered, as the Commission considers (recital 466 to the contested decision, *in fine*), that TESAU's marketing force is mainly dedicated to the growth of its broadband activity, which the applicants do not dispute. Thus, Telefónica itself considered that the growth of the group would be fed by broadband. Furthermore, the revenues generated by the broadband services increased considerably between 2002 and 2006, while the revenues generated by the traditional activities decreased during that same period (recitals 466 and 467 to the contested decision).

243 Furthermore, it is apparent from the file that between 1999 and 2006 Telefónica significantly reduced the number of its staff (Telefónica itself having reduced its staff by some 14 000 employees between 2003 and 2007), while maintaining a relatively stable marketing staff, and that the percentage of staff assigned to marketing functions increased from [*confidential*] in 2001 to [*confidential*] of its staff in 2006.

244 Since there was no reliable estimate of the actual allocation of Telefónica's marketing team to the marketing of retail broadband products, in terms of the total sum allocated to that marketing in proportion to the time dedicated to those products by the marketing team (recitals 472 and 473 to the contested decision), the Commission did not exceed its discretion in regarding as a reasonable approximation of the marketing LRAIC the proportion of the costs that Telefónica itself attributed to the retail ADSL activity [*confidential*] in its 2005 accounts. It should be observed in that regard that the rule of allocation used by Telefónica until 2004 had been considered inadequate by the CMT, as it was not based on the allocation of the total cost of marketing in proportion to the time dedicated by the marketing staff to the retail broadband products.

245 In the second place, the applicants claim that the Commission underestimated the average lifetime of Telefónica's customers.

246 It should be borne in mind, as a preliminary point, that in the contested decision the Commission stated that a number of adjustments had been made to Telefónica's costs in order to provide an adequate measure, so far as the margin squeeze test is concerned, of the economic equilibrium of Telefónica's retail ADSL services. The Commission thus emphasised that, on the retail market, the acquisition costs of new customers represented a significant proportion of the costs that would be quickly amortised and would generate additional long-term benefits. Accordingly, the Commission made adjustments to Telefónica's accounts by amortising the costs of acquiring new subscribers over an adequate period (recital 474 to the contested decision). In the contested decision, the Commission considered, in that regard, that the appropriate period over which Telefónica's subscribers' acquisition costs should be amortised, for the purposes of the present case, was [*confidential*] years, which was the maximum period used by the national competition authorities and the NRAs, including the CMT, and being longer than the time for recovering those costs envisaged by Telefónica in its initial business plan. The Commission therefore did not use the average lifetime of Telefónica's customers proposed by Telefónica, for the reasons set out at recitals 476 to 485 to the contested decision.

247 First, the applicants claim that the Commission did not explain why the amortisation period used by certain NRAs and competition authorities was more relevant than the estimates applied in the Commission decision of 16 July 2003 (Case COMP/38.233 – Wanadoo Interactive), especially since the maximum period used by certain national authorities, in particular the French authority, is [*confidential*] years on the basis of the average lifetime of subscribers (recital 488 to the contested decision). Such an argument must be rejected, however, since the Commission clearly explained the reasons for that choice at recitals 486 to 489 to the contested decision.

248 Second, in the applicants' submission, the Commission did not properly analyse Telefónica's business plans, since such an analysis would show that the hypotheses underlying those business plans are based on estimates of the value created for [*confidential*]. When questioned on the scope and meaning of that assertion at the hearing, the applicants stated, in substance, that the Commission relied on a flawed interpretation of Telefónica's business plans and did not apply the actual average lifetime of Telefónica's subscribers, which, in Telefónica's submission, was [*confidential*]. However, their argument should not be understood as seeking to establish an average lifetime of Telefónica's subscribers of [*confidential*] years.

249 In that regard, the Court must reject the applicants' argument, since it is based on a flawed premiss. As is apparent from recitals 477 to 489 to the contested decision, the Commission rejected the data relating to the actual average lifetime of Telefónica's customers because (i) the average lifetime of Telefónica's subscribers was very probably greater than it ought to be in a competitive market; (ii) the lifetime proposed by Telefónica was inconsistent with Telefónica's actual assertions that the retail market was characterised by relatively low costs of changing supplier and that the rate of renewal of its subscribers ('the churn rate') was [*confidential*]% per month, which corresponds to a lifetime of [*confidential*] years; (iii) Telefónica's formula could not apply in a developing market; and (iv) the period applied by the Commission constituted the maximum period applied by the national

competition authorities. Thus, the Commission did not rely on Telefónica's business plans in order to reject the average lifetime proposed by Telefónica, but confined itself to asserting, at recital 489 to the contested decision, that the period for amortisation ultimately chosen was [*confidential*] than that appearing in the business plans and thus more favourable to Telefónica.

250 Third, the applicants maintain that the Commission's hypothesis did not correspond to the reality of Telefónica's customers' conduct, as the average duration of Telefónica's subscriptions was more than [*confidential*]. In that regard, the applicants merely assert that the application of the techniques of current statistics to the estimation of the average customer lifetime enables a figure higher than [*confidential*] to be achieved. However, such an argument is neither explained nor developed in the written pleadings and is the subject of a general reference to 10 pages of an economic study annexed to the pleadings. It must therefore be rejected.

251 Fourth, the applicants claim that the Commission could have chosen to apply a different amortisation criterion. However, they merely refer to a possibility, which is not sufficient to support the conclusion that the Commission made a manifest error of assessment in its choice of amortisation criteria. That argument must therefore be rejected.

252 In the third place, the applicants maintain that the Commission overestimated the network costs.

253 First, the applicants claim that the Commission erred in calculating the net accounting value of the investment, which has repercussions on the calculation of the capital cost of Telefónica's IP network. In its defence, the Commission acknowledged the error in calculation alleged by Telefónica. It none the less asserts that that error has no effect on the calculation of the margin squeeze at the level of the national wholesale product, that it does not alter the results of the analysis of the DCFs and that it had only a limited impact on the 'period-by-period' analysis that does not affect the finding of a margin squeeze at the level of the regional wholesale product. In their reply, the applicants no longer rely on arguments relating to the Commission's calculation of the net accounting value of the investment. They confirmed at the hearing, moreover, that the Commission's error had no impact on the outcome of the action. Accordingly, there is no further need to examine that argument.

254 Second, the applicants claim that the Commission applied an excessive and consistent weighted average cost of capital (WACC) throughout the period examined.

255 It should be borne in mind that the cost of capital is the estimated price that the undertaking must pay in order to raise the capital employed, which also reflects the return expected by investors in order to invest in the undertaking's activities (recital 383 to the contested decision). At recital 447 to the contested decision, the Commission states that the cost of capital is calculated using the WACC used by the CMT for the regulation of TESAU's broadband sector and proposed by Telefónica itself, which claimed that the costs in the ADSL sector presented a greater risk by comparison with other sectors. The WACC was thus fixed in the contested decision at [*confidential*]%. That WACC is also the one used by Telefónica in its response to the statement of objections (recitals 384, 385, 447 and 451 to the contested decision).

256 First of all, the applicants maintain, in substance, that the official WACC, approved by the CMT, has never exceeded [*confidential*]%. Furthermore, the average WACC used by Telefónica in its business plan for 2002 to 2011 is [*confidential*]%. Such arguments cannot be accepted, however, as the Commission explained in its written pleadings, without being contradicted on that point by the applicants, since the WACC to which Telefónica refers corresponds to an average WACC, calculated not only for Telefónica's wholesale and retail broadband activities but also for its fixed-line telephone activities. In addition, it is apparent from the file that Telefónica itself considered that the WACC for the retail broadband activity is much higher ([*confidential*]%) than the average WACC for TESAU's activity as a whole. Likewise, the Court rejects the applicants' argument that the rates of remuneration of capital approved by the regulatory bodies or by the analysts in the evaluation of undertakings

involved in the supply of broadband services do not reach the level of the rate applied by the Commission in the contested decision, as those rates of remuneration do not relate specifically to the wholesale and retail broadband activities of those undertakings.

257 Next, in the applicants' submission, the CMT never allowed Telefónica a higher rate of remuneration for the broadband market by comparison with its other activities. That argument cannot be accepted either. Indeed, the WACC used in the contested decision, which was used by the CMT in its 'retail minus' model, is the WACC for TESAU's downstream broadband activity, which was confirmed by the CMT in response to a request for information from the Commission dated 18 November 2004. It is clear from that response that the CMT drew a distinction between, on the one hand, the WACC used in calculating the prices of indirect access services based on costs (of [*confidential*]%) and, on the other, the WACC used in calculating wholesale prices fixed according to the 'retail minus' model (of [*confidential*]%). In addition, the applicants acknowledge that Telefónica itself used a WACC of [*confidential*]% in its response to the statement of objections.

258 Last, the applicants assert that their claims relating to the WACC made in the context of the offer of access to the subscriber loop in 2002 do not justify those claims being used throughout the entire period under examination, since that offer was made at a time when Telefónica was making significant investments in conditions of the utmost technological uncertainty and of demand for the development of broadband. However, as the Commission observed, without having been contradicted in that respect by the applicants at the hearing, when that offer was made by Telefónica in 2002 its broadband activity was already profitable.

259 In the fourth place, the applicants maintain that the Commission 'double counted' a number of cost items (namely the non-recurrent ISP (internet service provider) platform and the costs of the ADSL market studies) and that the cost items are frequently inconsistent in time.

260 On the one hand, as regards the double counting of certain cost items, the applicants claim that the acquisition costs of the ISP platform in Table 29 in the contested decision already appear in the item corresponding to the recurrent costs of that platform, set out in Table 27 in the contested decision. Furthermore, the costs appearing in the item 'Market monitoring' have also been counted twice.

261 In that regard, it must be held that the disputed figures in Tables 27 and 29 in the contested decision are consistent with the figures communicated to the Commission by the applicants themselves in their response to the statement of objections.

262 Furthermore, it should be observed that, in their application, the applicants merely contend that the Commission erred in calculating Telefónica's costs by using inconsistent sources, and they refer to four pages in an annex. In their reply, they maintain that they can only refer to the explanations of costs provided in the application and also refer to three pages in an annex to the application. It should be emphasised that, in their written pleadings, the applicants provide no explanation in relation to that alleged double counting. For its part, the Commission explains that the costs in Table 27 are recurrent costs, while the costs in Table 29 are non-recurrent costs. When questioned on that point at the hearing, the applicants maintained that the Commission used figures taken from Telefónica's scorecards, which do not distinguish between the recurrent costs and the non-recurrent costs in question. However, the documents in the Court's file to which the applicants expressly referred at the hearing in order to support their argument are taken from the document 'Economics ADSL', which is the analysis undertaken by Telefónica of the profits and losses of its retail activity. It follows expressly from recital 407 to the contested decision, not disputed by the applicants, that that document is an analysis 'based on [Telefónica's] own assessment of the incremental costs of its non-network costs (subscribers' acquisition costs and recurrent ISP costs)' and that the ISP platform costs shown in that study do not include the non-recurrent costs. As regards the alleged double counting of the recurrent '[m]arket monitoring' costs, shown in Table 27 in the contested decision,

which in the applicants' submission are already included in the '[o]ther production costs' in the same table, it must be held that it is wholly unsubstantiated. The applicants' argument cannot therefore succeed.

263 Furthermore, as regards the argument that the cost items are inconsistent in time, it should be observed that Telefónica did not provide its unit costs for 2001, in spite of being requested to do so by the Commission (footnote 464 to the contested decision). Accordingly, the Commission did not make a manifest error of assessment in determining Telefónica's costs for 2001 on the basis of the accounting figures in its possession or, failing that, on the basis of the estimates appearing either in the document entitled 'Economics ADSL' or in Telefónica's scorecards. Nor did the applicants dispute that approach in the response to the statement of objections or in the letter of facts. Their argument cannot therefore be accepted.

264 In the light of the foregoing, the third complaint in the first part of the fifth plea must be rejected in its entirety, without there being any need to rule on the impact of the alleged errors on the calculation of the margin squeeze.

265 The first part of the fifth plea must therefore be rejected in its entirety.

Second part of the fifth plea, alleging that the Commission did not establish to the requisite legal standard the likely or actual effects of the conduct examined

266 In the context of the present part of the plea, the applicants claim that the Commission did not establish to the requisite legal standard the likely or actual effects of Telefónica's conduct.

267 In accordance with the case-law referred to at paragraph 170 above, in prohibiting the abusive exploitation of a dominant position, in so far as trade between Member States is capable of being affected, Article 82 EC is aimed at the behaviour of an undertaking in a dominant position which on a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, 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 on the market or the growth of that competition.

268 The effect referred to in the case-law mentioned in the preceding paragraph does not necessarily relate to the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 82 EC, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having, or likely to have, that effect (Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 239; Case T-219/99 *British Airways* v *Commission* [2003] ECR II-5917, paragraph 293; and *Microsoft* v *Commission*, paragraph 58 above, paragraph 867). The pricing practice concerned 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 a potential anti-competitive effect that may exclude competitors who are at least as efficient as the dominant undertaking (*TeliaSonera*, paragraph 146 above, paragraph 64).

269 It also follows from the case-law of the Court of Justice that, 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 partners, thereby placing them at a competitive disadvantage, or to strengthen the dominant position by distorting competition (see *Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 175, and *TeliaSonera*, paragraph 146 above, paragraph 28 and the case-law cited).

270 Since Article 82 EC thus refers not only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition, a dominant undertaking has a special responsibility not to allow its conduct to impair genuine undistorted competition in the common market (see *Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 176 and the case-law cited).

271 It follows that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say, practices which are capable of making market entry more difficult or indeed impossible for such competitors, and of making it more difficult or impossible for its contracting partners to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view, therefore, not all competition on prices can be regarded as legitimate (see *Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 177 and the case-law cited).

272 First, regard being had to the foregoing considerations, the Court rejects the applicants' argument that, in view of the time that elapsed between the beginning of the impugned conduct and the adoption of the contested decision, it was not appropriate to carry out a test of probable effects, as the Commission had the time necessary to show that the alleged anti-competitive effects linked with the conduct in question did in fact materialise. Nor does such an argument have any basis in the case-law.

273 Second, the Court must also reject the argument which the applicants base on Case T-5/02 *Tetra Laval* v *Commission* [2002] ECR II-4381, paragraph 153, namely that, even relying on an analysis of probable effects, the Commission ought to have established that Telefónica's conduct would 'in all likelihood' have had negative effects on competition and also on consumers. That judgment was delivered in a case relating to merger control, in which this Court considered that in the context of a prospective analysis the Commission must prohibit a conglomerate-type merger if it '[was] able to conclude [owing to the conglomerate effects that it found] that a dominant position would, in all likelihood, be created or strengthened in the relatively near future and would lead to effective competition on the market being significantly impeded'. As the Court of Justice observed in *Commission* v *Tetra Laval*, paragraph 71 above, paragraphs 42 and 43, a prospective analysis of the creation or strengthening of a dominant position of the kind necessary in merger control must be carried out with great care since it does not entail the examination of past events, for which often many items of evidence are available which make it possible to understand the causes. Such a situation is not comparable to the present case.

274 Third, regard being had to the case-law referred to at paragraph 268 above, it is necessary to verify the applicants' assertion that the Commission's findings in relation to the likely effects of Telefónica's conduct are purely theoretical and unsubstantiated.

275 In that regard, it should be observed that the likely effects of Telefónica's conduct were examined at recitals 545 to 563 to the contested decision. First, the Commission found that Telefónica's conduct had probably limited the capacity of ADSL operators to achieve sustainable growth on the retail market. First of all, in order to substantiate that finding, it referred to the fact that the ADSL operators had to charge lower retail prices than Telefónica with the aim of gaining customers. The Commission stated that that led to losses that were not recoverable within a reasonable time in a competitive market (recital 546 to the contested decision). It relied, for that purpose, on the findings made at recitals 251 to 253 to the contested decision. Next, referring to recitals 223 to 242 to the contested decision, the Commission considered, in particular, that the ADSL competitors on the retail market did not have a viable alternative input. It thus referred to the relationship of reliance of the alternative operators on Telefónica's wholesale products (recitals 547 and 548 to the contested decision). Accordingly, the Commission considered that Telefónica's conduct had been likely to make the continued presence on the market of equally efficient competitors difficult to sustain and that Telefónica had been able, by its conduct, to force the alternative operators to seek a balance between

profitability and market share growth, thus limiting the competitive pressure on Telefónica (recitals 549 to 552 to the contested decision). Second, the Commission considered that Telefónica's conduct had been likely to harm final consumers, since competition, which was restricted by means of the margin squeeze, could have driven down retail prices (recitals 556 to 559 to the contested decision).

276 The Commission's findings set out at recitals 545 to 563 to the contested decision cannot be regarded as 'purely theoretical' or insufficiently substantiated. On the contrary, they show to the requisite legal standard the possible barriers that Telefónica's pricing practices may have erected to the degree of competition on the retail market. Thus, the Commission did not make a manifest error of assessment when it concluded that Telefónica's conduct had probably reinforced the barriers to entry and expansion on that market and that, in the absence of distortion resulting from the margin squeeze, competition would have been likely to be more lively on the retail market, which would have been of advantage to consumers in terms of price, choice and innovation.

277 The arguments whereby the applicants seek to challenge that conclusion cannot succeed.

278 Thus, the applicants' argument that the margin squeeze test used by the Commission bears no relation to the criteria that determine the strategic decisions of the alternative operators on the retail market must be rejected.

279 First, as regards the argument that a competitor as efficient as Telefónica would not adopt its strategic decisions solely by reference to the lifetime of its assets, but also by reference to the period necessary to make the investment in new infrastructures profitable and to gain customers, it should be observed, as the Commission observes, that the demonstration of the anti-competitive effect of the abuse is to a large extent based on the tendency of the practice envisaged to increase the entry costs of competitors and to delay their prospects of becoming profitable, precisely by making it more difficult to establish a customer base capable of justifying the roll-out of their own infrastructure. Such a situation necessarily influenced the strategic decisions, market conduct and results of Telefónica's competitors and potential new entrants.

280 Second, the arguments whereby the applicants seek to show that the Commission's analysis disregards the fact that Telefónica's competitors would have access to competitive strategies such as that of penetrating the retail market on the basis of their own infrastructures or with the help of a combination of their own infrastructures and Telefónica's, or again by engaging in aggressive competition, enabling them to climb gradually up the ladder of investments, must be rejected. First of all, as regards the applicants' argument that an alternative operator would optimise its investments by putting its own infrastructure in place only in profitable geographic areas, it must be held that, in such a hypothesis, such an operator would have to support losses made in some geographic areas of Spanish territory by revenues obtained in other areas. Next, the Court rejects the argument that the investments made by the alternative operators in their own networks would not be so great, a fortiori because the operators concerned would use an optimal combination of wholesale products. Indeed, as stated at paragraph 117 above, the development of an operator's own infrastructures entails significant costs. Furthermore, as observed at paragraph 130 above, the use of a combination of wholesale products has not been established. Last, the argument that the 'ladder of investments' theory does not require that all levels be accessible must be rejected for the reasons stated at paragraph 196 above.

281 Furthermore, it is appropriate to reject the allegation that the Commission, in the contested decision, ignored the competitive pressure of the cable operators on the retail market. The Commission examined that phenomenon not only in the section of the contested decision dealing with the likely effects of Telefónica's conduct (recitals 559 and 560), but also at recitals 268 to 276, dealing with the definition of the retail market.

282 In the light of all the foregoing considerations, it must be concluded that, at recitals 545 to 563 to the contested decision, the Commission demonstrated to the requisite legal standard the existence of possible barriers that Telefónica's pricing practices might cause with regard to the development of supply on the retail market and, accordingly, to the degree of competition on that market.

283 Since, for the purposes of establishing an infringement of Article 82 EC, it is sufficient to demonstrate that the abusive conduct tends to restrict competition (see paragraph 268 above) and since, according to settled case-law, in so far as certain grounds of a decision in themselves justify the decision to the requisite legal standard, any errors in other grounds of the decision have no effect in any event on its operative part (Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 144; see also, to that effect, Joined Cases C-302/99 and C-308/99 *Commission and France* v *TF1* [2001] ECR I-5603, paragraphs 26 to 29), the applicants' assertions relating to the lack of proof of the actual effects of Telefónica's conduct on the market must be rejected as inoperative in the context of the establishment of the alleged infringement.

284 It follows that the second part of the fifth plea must be rejected.

285 The fifth plea must therefore be rejected in its entirety.

(g) Sixth plea, alleging an *ultra vires* application of Article 82 EC and breach of the principles of subsidiarity, proportionality, legal certainty, sincere cooperation and sound administration

286 The present plea consists of three parts. The first part alleges an *ultra vires* application of Article 82 EC. The second part, which is submitted in the alternative, alleges breach of the principles of subsidiarity, proportionality and legal certainty. The third part alleges breach of the principles of sincere cooperation and sound administration.

First part of the sixth plea, alleging an *ultra vires* application of Article 82 EC

287 In the context of the present part of the sixth plea, the applicants claim that in adopting the contested decision the Commission made an *ultra vires* application of Article 82 EC.

288 As regards the admissibility of the present part of the plea, which is disputed by the Commission, it should be observed that it is apparent from the wording of the application that the arguments which the applicants put forward in this part seek to demonstrate that the Commission applied Article 82 EC beyond the powers conferred on it in the sphere of competition law. In their reply, moreover, the applicants asserted that, contrary to the Commission's suggestion, they are not claiming a misuse of powers. Since the present part seeks to establish that the Commission exceeded its powers in the present case, it must be declared admissible.

289 As regards the merits of the present part of the plea, first, it is necessary to reject the applicants' argument, based on the arguments which they submitted in connection with their fourth plea, that the Commission disregarded the legal criteria applicable to Article 82 EC, since that argument, which in any event does not seek to show that the Commission exceeded its powers, is unfounded (see paragraphs 169 to 197 above). Furthermore, the fact that the abusive conduct took place on a market which the applicants describe as an 'instrumental' market, that is to say, a market 'created for the purposes of regulation', is irrelevant for the application of Article 82 EC, since competition law also applies to those markets (see, to that effect, Case 26/75 *General Motors Continental* v *Commission* [1975] ECR 1367, paragraphs 4 to 10, and Case 226/84 *British Leyland* v *Commission* [1986] ECR 3263, paragraph 5).

290 Second, as regards the applicants' argument that the Commission, in assessing Telefónica's conduct in the contested decision, encroached on the powers of the NRAs and referred to concepts of a regulatory nature, such as the concept of the 'ladder of investments', it should be observed that the applicants merely assert that that concept, the use of which in connection with the application of Article 82 EC is, they claim, wholly unfounded, does not reflect the evolution of the Spanish market or the evolution of the competitive strategy of the alternative operators. However, although the applicants assert that that concept of a regulatory nature does not belong to competition law, they do not explain why the Commission's use of that economic concept for the purposes of describing the evolution of the Spanish broadband market since the liberalisation of the telecommunications sector shows that the Commission exceeded its powers or applied Article 82 EC 'for regulatory purposes'. Their assertion cannot therefore be accepted. Furthermore, as is apparent from recital 180 to the contested decision, Telefónica itself, in a letter to the Commission dated 2 March 2005, referred to the concept of the 'ladder of investments' to describe the evolution of the Spanish internet market since 2001 and confirmed that 'the Spanish broadband market [was] evolving at the rate expected on the "ladder of investments"'. Although the applicants maintain that recourse to that concept led the Commission to disregard the fact that the alternative operators were using an optimal combination of wholesale products or that, as the example of Jazztel shows, they were and are able to make significant investments without having a significant customer base, such an argument, which, too, does not seek to demonstrate that the Commission exceeded its powers, must be rejected for the reasons stated at paragraphs 120 and 201 to 211 above.

291 Third, as regards the argument, put forward in the reply, that the Commission had at its disposal an ad hoc formal instrument of intervention resulting from Article 7 of the Framework Directive, which enabled it to intervene in a situation such as that at issue in the present case, it must be held that that argument is unfounded and there is no need to rule on its admissibility, which the Commission disputes.

292 It should be pointed out that, according to Article 1(1) of the Framework Directive, that directive 'establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities … lays down tasks of [NRAs] and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community'. It should also be observed that the EU legislature wished to give the NRAs a central role in achieving the objectives sought by the Framework Directive, as is clear from the use of the legal instrument of a directive, which is addressed solely to the Member States, from the structure of the directive, which contains, inter alia, two chapters entitled, respectively, '[NRAs]' (Chapter II: Articles 3 to 7) and 'Tasks of [NRAs]' (Chapter III: Articles 8 to 13), and from the specific powers conferred on the NRAs. In that regard, Article 7 of the Framework Directive describes the participation of the Commission and the NRAs in the procedure for consolidating the internal market for electronic communications and, according to recital 15 to that directive, aims to 'ensure that decisions at national level do not have an adverse effect on the single market or other Treaty objectives'.

293 The existence of that measure therefore has no effect whatsoever on the powers which the Commission derives directly from Article 3(1) of Regulation No 17 and, since 1 May 2004, from Article 7(1) of Regulation No 1/2003 to find infringements of Articles 81 EC and 82 EC (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 69 above, paragraph 263). Thus, the competition rules laid down in the EC Treaty supplement, by *ex post* review, the regulatory framework adopted by the EU legislature for *ex ante* regulation of the telecommunications markets (*Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 92).

294 Nor can the applicants claim that it was the duty of the Commission, under Article 7 of the Framework Directive, to monitor the regulatory measures adopted by the CMT. As the Commission observed in its written pleadings, only the measures adopted in June 2006, following the implementation by the CMT of the Framework Directive and the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework

for electronic communications networks and services (OJ 2002 C 165, p. 6) (together 'the 2002 regulatory framework'), were notified to the Commission under the procedure laid down in that article.

295 It follows that the first part of the sixth plea must be rejected.

Second part of the sixth plea, alleging breach of the principles of subsidiarity, proportionality and legal certainty

296 In the context of the second part of the present plea, the applicants claim that, even on the assumption that the Commission were able to use Article 82 EC for regulatory purposes, *quod non*, its intervention in the present case would run counter to the principles of subsidiarity, proportionality and legal certainty, since it interferes without good reason in the exercise of the powers of the CMT.

297 It should be borne in mind that the principle of subsidiarity is referred to in the second paragraph of Article 5 EC — and given actual definition by the Protocol on the application of the principles of subsidiarity and proportionality, annexed to the EC Treaty — which provides that the Community, in areas which do not fall within its exclusive competence, is to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. That protocol, in paragraph 5, also lays down guidelines for the purposes of determining whether those conditions are met.

298 That protocol states, moreover, at paragraph 3, that the principle of subsidiarity does not call in question the powers conferred on the Community by the Treaty, as interpreted by the Court of Justice. Thus, that principle does not call in question the powers conferred on the Commission by the EC Treaty, which include the application of the competition rules necessary for the functioning of the internal market (Article 3(1)(g) EC) set forth in Articles 81 EC and 82 EC and implemented by Regulation No 17 and, since 1 May 2004, by Regulation No 1/2003 (see, to that effect, Case T-339/04 *France Télécom* v *Commission* [2007] ECR II-521, paragraphs 88 and 89).

299 Regard being had to the considerations set out at paragraph 293 above, Telefónica could not be unaware that compliance with the Spanish regulations on telecommunications did not protect it against an action by the Commission on the basis of Article 82 EC, a fortiori because a number of legal instruments in the 2002 regulatory framework reflect the possibility of parallel proceedings before the NRAs and the competition authorities (see, in that regard, Article 15(1) of the Framework Directive and paragraphs 28, 31 and 70 of the Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services).

300 It follows that the decisions adopted by the NRAs on the basis of the 2002 regulatory framework do not deprive the Commission of its powers to take action at a later stage in order to apply Article 82 EC by virtue of Regulation No 17 and, since 1 May 2004, Regulation No 1/2003. Nor does any provision of that framework oblige the Commission to establish the existence of exceptional circumstances in order to justify its action in such a case, as the applicants claim. Accordingly, the Court rejects the applicants' argument that, in substance, neither the Commission nor the national competition authorities ought to have analysed, by reference to competition law, conduct subject to regulatory measures having similar objectives.

301 In any event, first of all, the CMT is not a competition authority but a regulatory authority and it has never intervened to enforce Article 82 EC or adopted decisions relating to the practices penalised in the contested decision (recitals 678 and 683 to the contested decision). Even on the assumption that the CMT were required to consider whether Telefónica's practices were compatible with

Article 82 EC, the Commission would not thereby be precluded from finding that Telefónica was responsible for an infringement. The Commission cannot be bound by a decision taken by a national authority pursuant to Article 82 EC (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 69 above, paragraph 120).

302 Next, the CMT asserted on a number of occasions that it did not have certain information which it needed in order to examine the margin squeeze in relation to Telefónica's prices for wholesale and retail broadband access at regional level (see, in particular, recitals 494, 495, 509 and 511 to the contested decision).

303 Last, according to recital 494 to the contested decision, the cost model used by the CMT in its *ex ante* decisions designed to ensure that there was no margin squeeze was not appropriate either, for the purposes of applying Article 82 EC, since it was based not on recent estimates of Telefónica's historical costs but on estimates made by external consultants on the basis of information provided by Telefónica in October 2001 and, moreover, the cost model used by those consultants had underestimated Telefónica's downstream network costs and had not taken its promotion costs into account. The Court must thus also reject the arguments that the CMT was particularly active with respect to Telefónica's pricing policy and acted *ex post* on many occasions by regulating and reviewing Telefónica's pricing policy since the first stages of the Spanish development of the broadband market.

304 In that context, the applicants' argument that the Commission is not competent to examine the NRAs' action under Article 82 EC if it is not shown that they did not act within their powers or acted in a manifestly incorrect manner must also be rejected. In effect, in the contested decision the Commission did not examine the CMT's action under Article 82 EC, but rather Telefónica's.

305 Accordingly, it has not been established that there was any breach of the principle of subsidiarity.

306 As for the alleged breaches of the principles of proportionality and legal certainty, the applicants do not demonstrate how those principles were breached. They merely claim that there has been a breach of the principle of legal certainty as a result of the Commission's intervention on the basis of Article 82 EC, although it did not call in question the CMT's action. Thus, Telefónica claims, it was entitled to believe that if it complied with the regulatory framework in force its conduct would be compatible with EU law. However, such an argument must be rejected, for the reasons stated at paragraphs 299 to 304 above.

307 As regards, last, the applicants' argument that the Commission ought to have brought an action for failure to fulfil obligations against the Kingdom of Spain under Article 226 EC, if it had come to the conclusion that the decisions of the CMT, as an organ of a Member State, did not ensure the absence of a margin squeeze and, therefore, did not comply with the 2002 regulatory framework, it must be observed that, in the contested decision, the Commission did not make any such finding. Furthermore, even on the assumption that the CMT had infringed a rule of EU law and that the Commission could on that basis have brought an action for failure to fulfil obligations against the Kingdom of Spain, such possibilities can have no effect on the lawfulness of the contested decision. In that decision, the Commission merely found that Telefónica had infringed Article 82 EC, a provision which concerns not the Member States, but only economic operators (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 69 above, paragraph 271). According to the case-law of the Court of Justice, moreover, under the system laid down by Article 226 EC, the Commission has a discretion to bring an action for failure to fulfil obligations, and it is not for the Courts of the European Union to assess whether it was appropriate to do so (*Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 47).

308 It follows that the second part of the sixth plea must be rejected.

Third part of the sixth plea, alleging breach of the principles of sincere cooperation and sound administration

309 As a preliminary point, it must be borne in mind that the obligation of sincere cooperation laid down in Article 10 EC is incumbent both on all authorities of the Member States acting within the scope of their powers and on the institutions of the European Union, which have a reciprocal obligation to afford such sincere cooperation to the Member States (order in Case C-2/88 IMM *Zwartveld and Others* [1990] ECR I-3365, paragraph 17; see Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 31 and the case-law cited). Where, as in the present case, the European Union and national authorities are called upon to assist in the attainment of the objectives of the Treaty by the coordinated exercise of their respective powers, such cooperation is particularly crucial (*Roquette Frères*, paragraph 32).

310 Contrary to the applicants' assertion, the CMT was actually involved in the administrative procedure preceding the adoption of the contested decision. First, the Commission sent it three requests for information, dated 18 November and 17 December 2004 and 17 January 2005 respectively. Second, the Commission sent the CMT a non-confidential version of the statement of objections on 24 May 2006. It also informed the CMT that it was permissible, should it wish to do so, to send the Commission its comments in writing on the statement of objections or to make oral observations or put oral questions at the hearing. However, no written observations were submitted by the CMT. Third, a number of representatives of the CMT were present at the hearing on 12 and 13 June 2006 and the CMT also made oral submissions at the hearing. Fourth, on 26 June 2006 the CMT also answered in writing a series of questions put by the complainant at the hearing. Fifth, the applicants do not dispute the Commission's assertion that the members of the team handling the case met the CMT on several occasions in order to discuss the investigation. Sixth, the applicants do not dispute the Commission's assertions that on 14 June 2007 several representatives of the CMT met the Commission and commented on the wording of certain recitals to the contested decision, those comments being taken into consideration in view of the second meeting of the Advisory Committee referred to in Article 14 of Regulation No 1/2003. The CMT did not submit any further comments in that regard. An expert from the CMT took part in a meeting of that committee, moreover, which took place on 15 June 2007.

311 In that regard, the applicants' argument that the requests for information which the Commission sent to the CMT were of a technical nature and did not concern the objections raised against Telefónica, the reality of the markets alleged to be affected, the methodology followed in order to carry out the margin squeeze tests or again the possible existence of such a squeeze, cannot be upheld. In spite of being asked to do so by the Commission, the CMT did not submit observations in writing to the Commission concerning the statement of objections and, in particular, the Commission's preliminary findings with respect to the abovementioned matters, as set out at paragraphs 142 to 250 and 358 to 469 of that statement.

312 Furthermore, it must be borne in mind, so far as concerns the relationships formed in the context of proceedings conducted by the Commission pursuant to Articles 81 EC and 82 EC, that the rules for the implementation of the duty of sincere cooperation which stems from Article 10 EC and which binds the Commission in its relationships with the Member States have been stated in, inter alia, Articles 11 to 16 of Regulation No 1/2003, in Chapter IV headed 'Cooperation'. Those provisions do not expressly require the Commission to consult the NRAs.

313 Nor can the applicants claim, in that context, that the statement of objections and the invitation to submit comments were sent to the CMT at a late stage, when the Commission had already formed an opinion as to the alleged unlawfulness of Telefónica's conduct. Apart from the fact that the statement of objections is merely a preparatory document containing assessments which are purely provisional in nature and are intended to define the subject-matter of the administrative procedure vis-à-vis the undertakings subject to that procedure (Joined Cases 100/80 to 103/80 *Musique Diffusion française*

and Others v *Commission* [1983] ECR 1825, paragraph 14; *Aalborg Portland and Others* v *Commission*, paragraph 69 above, paragraph 67; and *Prym and Prym Consumer* v *Commission*, paragraph 83 above, paragraph 40), it has already been stated at paragraph 310 above that the Commission had sent the CMT a copy of the statement of objections on 24 May 2006, that is to say, more than one year before it adopted the contested decision.

314 In the light of the foregoing considerations, it cannot therefore be considered that the Commission, in the present case, breached its duty of sincere cooperation. Since the applicants' argument alleging breach of the principle of sound administration is based exclusively on breach of that duty, it must also be rejected.

315 The third part of the present plea must therefore be rejected.

316 The sixth plea must therefore be rejected in its entirety as must, accordingly, all the principal claims seeking annulment of the contested decision.

2. *The alternative claims, seeking annulment or reduction of the amount of the fine*

317 The applicants put forward two pleas in law in support of their claims for annulment or reduction of the amount of the fine. The first plea alleges errors of fact, of assessment of the facts and of law; infringement of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003; and breach of the principles of legal certainty and legitimate expectations. The second plea, put forward in the alternative, alleges errors of fact and of law and breach of the principles of proportionality and equal treatment, the principle that the penalty must be specific to the offender and the offence and the obligation to state reasons in the determination of the amount of the fine.

(a) First plea, alleging errors of fact, of assessment of the facts and of law; infringement of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003; and breach of the principles of legal certainty and legitimate expectations

318 By the present plea, the applicants take issue with the Commission's findings that, first, Telefónica's conduct during the infringement period was intentionally unlawful or, at least, seriously negligent and, second, that Telefónica's infringement constituted a 'clear-cut abuse' for which there were precedents (recitals 720 to 736 to the contested decision).

319 In the first place, as regards the question whether an infringement was committed intentionally or negligently and is therefore liable to be penalised by a fine under the first subparagraph of Article 15(2) of Regulation No 17 and, since 1 May 2004, Article 23(2) of Regulation No 1/2003, it follows from the case-law that that condition is satisfied where the undertaking concerned could not have been unaware that its conduct was anti-competitive, whether or not it was aware that it was infringing the competition rules of the Treaty (see 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 205, and *Deutsche Telekom* v *Commission*, paragraph 69 above, paragraph 295 and the case-law cited; see also, to that effect, Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82 *IAZ International Belgium and Others* v *Commission* [1983] ECR 3369, paragraph 45; *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 111 above, paragraph 107; and *Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 124).

320 According to the case-law, an undertaking is aware of the anti-competitive nature of its conduct where it is aware of the essential facts justifying both the finding of a dominant position on the relevant market and the finding by the Commission of an abuse of that position (see, to that effect, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, paragraph 111 above, paragraph 107, and

Raiffeisen Zentralbank Österreich and Others v *Commission*, paragraph 319 above, paragraphs 207 and 210; see also Opinion of Advocate General Mazák in *Deutsche Telekom* v *Commission*, paragraph 170 above, point 39).

321 First, for the purpose of challenging the Commission's finding that Telefónica's conduct was intentionally unlawful or at least seriously negligent, the applicants claim that Telefónica was not reasonably in a position to foresee that its conduct might constitute an abuse of a dominant position contrary to Article 82 EC, in view of the definition of the product markets previously given by the Spanish competition authorities and the CMT, which is different from that applied in the contested decision, the review carried out by the CMT of Telefónica's prices and conduct during the infringement period and the fact that Telefónica lacked sufficient room for manoeuvre to determine its pricing policy during that period.

322 (i) The applicants' argument that Telefónica could not have foreseen that the Commission would adopt a different definition of the market from that adopted by the Spanish authorities must be rejected.

323 As a diligent economic operator, Telefónica ought to have been familiar with the principles governing market definition in competition cases and, where necessary, taken appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences that a given act may entail. That is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on that account be expected to take special care in assessing the risks that such an activity entails (see, to that effect, *Dansk Rørindustri and Others* v *Commission*, paragraph 59 above, paragraph 219).

324 Furthermore, there can be no doubt, for a prudent economic operator, that, although the possession of large market shares is not necessarily and in every case the only factor determining the existence of a dominant position, it has however a considerable significance which must of necessity be taken into consideration by him in relation to his possible conduct on the market (*Hoffmann-La Roche* v *Commission*, paragraph 76 above, paragraph 133).

325 In that regard, as the Commission correctly observed at recital 721 to the contested decision, Telefónica, the historical operator and owner of the only significant infrastructure for the supply of the regional and national wholesale products, could not be unaware that it held a dominant position on the relevant markets. Accordingly, the significance of the market shares held by Telefónica (see paragraphs 153 and 159 above) on the national and regional wholesale markets means that its belief that it did not occupy a dominant position on those markets could only be the outcome of an inadequate study of the structure of the markets on which it operated or a refusal to take those structures into consideration (see, to that effect, *Hoffmann-La Roche* v *Commission*, paragraph 76 above, paragraph 139). The argument that Telefónica could not have foreseen that the Commission would adopt a different definition of the market from that adopted by the Spanish authorities cannot therefore succeed.

326 In the light of the foregoing, and of the fact that it was observed at paragraphs 110 to 143 above that the Commission was correct to take the view that the local loop, the national wholesale product and the regional wholesale product did not belong to the same product market, the Court cannot accept the applicants' argument that the decisions adopted by the NRAs in France and the United Kingdom concluding that the national and regional wholesale products were not substitutable did not allow them to foresee the market definitions that would be adopted in the present case. The same applies to the applicants' argument relating to the assessment made by the CMT in its decision of 6 April 2006, according to which the national and regional wholesale products belonged to the same relevant market, which, moreover, was expressly rejected at paragraph 142 above.

327 (ii) The applicants' argument that, contrary to what is stated at recital 724 to the contested decision, Telefónica did not have sufficient room for manoeuvre to determine its pricing policy, owing to the sectoral regulation applicable, cannot be accepted either.

328 It must be borne in mind that Article 82 EC 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 82 EC does not apply. In such a situation, the restriction of competition is not attributable, as that provision implicitly requires, to the autonomous conduct of the undertakings (see *TeliaSonera*, paragraph 146 above, paragraph 49 and the case-law cited).

329 By contrast, Article 82 EC may apply if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (see *TeliaSonera*, paragraph 146 above, paragraph 50 and the case-law cited).

330 Thus, the Court of Justice has stated that, notwithstanding such legislation, if a dominant vertically integrated undertaking has scope to adjust even only its retail prices, the margin squeeze may on that ground alone be attributable to it (*Deutsche Telekom* v *Commission*, paragraph 170 above, paragraph 85, and *TeliaSonera*, paragraph 146 above, paragraph 51).

331 In the present case, it should first of all be observed that, as regards the national wholesale product, the applicants do not dispute the finding made at recitals 109, 110 and 671 to the contested decision, first, that the prices of the national wholesale product were never regulated during the infringement period and, second, that since September 2001 Telefónica had been free to reduce those prices.

332 Next, as regards the regional wholesale product, the applicants claim that the prices imposed by the CMT in application of the 'retail minus' mechanism were de facto fixed prices, at least between March 2004 and December 2006.

333 It should be borne in mind that, as is apparent from recital 113 to the contested decision, an order of 29 December 2000 of the Ministry of the Spanish Presidency established the maximum prices for the regional wholesale product. Furthermore, as is apparent from the case-file, the CMT, by letter of 2 February 2005, expressly confirmed that the prices of the regional wholesale product were maximum prices and that Telefónica was free to apply for a reduction of its prices (see also recitals 116 to 118 and 673 to the contested decision).

334 In that regard, the argument which the applicants derive, first, from the CMT's decision of 31 March 2004, in which it stated that it was reasonable that the price of the regional wholesale product should be capable of helping to maintain the cable operators' investments and that the price of the regional wholesale product should be determined on the basis of an absolute amount calculated according to the 'retail minus' method, so that 'the CMT never authorised a reduction of the price of the regional [wholesale] product, since that would have endangered the viability of cable', and, second, from the CMT's decisions of 29 April 2002 and 22 July 2004, in which the CMT stated that it was opposed to significant reductions of the wholesale prices in order to avoid discouraging investments in infrastructures and innovation, is based on the hypothetical premiss that the CMT never authorised a reduction of the price of the wholesale products. It must therefore be rejected.

335 In any event, such an argument is contradicted by the fact that the prices of the regional wholesale product were reduced by the CMT on its own initiative, although Telefónica had not proposed any adjustment of its prices, by decisions of 22 July 2004 (decision of the CMT of 22 July 2004 on the request for an adjustment of the offer of access to the local loop (OBA) of TESAU to adapt it to the change in ADSL speeds at retail level) and of 19 May 2005 (decision of the CMT of 19 May 2005 on the request for an adjustment of the offer of access to the local loop (OBA) of TESAU to adopt it to the increase in ADSL speeds at retail level). The argument put forward by the applicants in their reply that those decisions show that the reduction of the prices of the regional wholesale product required the intervention of the CMT and could not be decided freely by Telefónica must also be rejected, since it was for Telefónica, in the context of the special responsibility which it bore as an undertaking occupying a dominant position on the market for the regional wholesale product, to apply to the CMT

to adjust its tariffs when they had the effect of impairing genuine undistorted competition in the common market (see, to that effect, *Deutsche Telekom* v *Commission*, paragraph 69 above, paragraph 122).

336 Last, as regards Telefónica's retail prices, it should be observed, as the Commission observes, that the applicants do not dispute the Commission's assertion at recital 724 to the contested decision that Telefónica was free to increase its retail prices at any time. Nor do they dispute the findings at recitals 104 to 108 to the contested decision that whereas TESAU's retail prices were subject to administrative authorisation by the Comisión Delegada del Gobierno para Asuntos Económicos (Spanish Commission for Economic Affairs; 'the CDGAE') between 3 August 2001 and 1 November 2003, the retail prices of Telefónica's other subsidiaries were not subject to any regulation; that the retail prices approved on 3 August 2001 by the CDGAE as being fixed prices were proposed by TESAU; and that the retail prices of TESAU's ADSL access services were liberalised by a decision of the CDGAE of 25 September 2003, putting an end to the administrative authorisation regime for the retail prices of TESAU's ADSL access services, while maintaining the obligation for TESAU to communicate any change in those prices 10 days before they were introduced on the market. It must therefore be considered that Telefónica was able to increase its retail prices, but it did not do so.

337 The applicants claim in that regard that the Commission's reasoning is contradictory, since it cannot take issue with Telefónica for having implemented margin squeeze practices which resulted in retail prices in Spain being much higher than in other European countries and at the same time take issue with Telefónica for not having increased its retail prices in order to avoid a margin squeeze. Such an argument must be rejected. The Courts of the European Union have already considered in the past that it could be necessary to increase the prices of retail products in order to avoid a margin squeeze (*Deutsche Telekom* v *Commission*, paragraph 69 above, paragraphs 141 to 151; see, also, *Deutsche Telekom* v *Commission*, paragraph 170 above, paragraphs 88 and 89).

338 (iii) The applicants' argument that Telefónica could not reasonably foresee that its pricing policy, which had already been approved by the CMT, might constitute an infringement of Article 82 EC must be rejected.

339 First of all, it should be borne in mind that the fact that the contested decision concerns regulated products and services is irrelevant. In the absence of express derogation to that effect, competition law is applicable to regulated sectors (see, to that effect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 65 to 72, and Case 66/86 *Saeed Flugreisen and Silver Line Reisebüro* [1989] ECR 803). Thus, the applicability of the competition rules is not ruled out where the sectoral provisions concerned do not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition (see Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraphs 33 and 34 and the case-law cited), which was the case here (see paragraphs 327 to 337 above).

340 As observed at paragraph 299 above, Telefónica could not therefore be unaware that compliance with the Spanish regulations on telecommunications did not protect it against an action by the Commission on the basis of Article 82 EC.

341 Next, although, admittedly, by decision of 26 July 2001, the CMT considered that the prices of Telefónica's regional wholesale product would be fixed on the basis of a 'retail minus' pricing system, whereby the price of each modality of the regional wholesale product should not be higher than a given percentage of TESAU's corresponding retail monthly fee (recitals 114, 290 and footnote 258 to the contested decision), the applicants do not deny that the CMT did not examine the existence of a margin squeeze between Telefónica's regional wholesale product and its retail products on the basis of Telefónica's real historical costs, but did so on the basis of *ex ante* estimates. Nor do they deny that the CMT never analysed the possible existence of a margin squeeze between Telefónica's national

wholesale product and its retail products. However, as the Commission indicated at recitals 725 to 728 to the contested decision, Telefónica, which had detailed information about its real costs and its revenues, could not be unaware that the estimates made *ex ante* by the CMT had not been confirmed in reality by developments in the market which it was in a position to observe.

342 In the light of the foregoing, all the arguments whereby the applicants seek to demonstrate that Telefónica was not reasonably capable of foreseeing the anti-competitive nature of its conduct must be rejected.

343 Second, the applicants claim that Telefónica was entitled to have a legitimate expectation in the actions and decisions of the CMT. They also maintain that the discrepancies between the real *ex post* costs and the estimates used by the CMT in its *ex ante* examination of the existence of a margin squeeze, to which the Commission refers at recitals 728 and 729 to the contested decision (see also Table 59 in the contested decision), would not have been sufficiently clear for Telefónica to have been able to have doubts about the intervention of the CMT.

344 The Court rejects the applicants' argument that Telefónica could not doubt the merits of the method used by the CMT to determine the existence of a margin squeeze, or the relevance of the CMT's requests for information, in view of the Commission's failure to intervene with respect to the action of the Spanish regulator.

345 Such an argument is based on the false premiss that the Commission considered that the method used by the CMT to determine the existence of a margin squeeze was inappropriate, as the regulatory action of the CMT was not the subject-matter of the contested decision. On the contrary, as the Commission stated at recital 733 to the contested decision, the method used in order to establish the existence of a margin squeeze in the contested decision is not inconsistent with the 'retail minus' method used by the CMT.

346 The Commission's failure to intervene with respect to the Spanish regulator could not therefore cause Telefónica to have a legitimate expectation that it was not committing an infringement of Article 82 EC.

347 As regards the argument that, in the light of the CMT's intervention, Telefónica was entitled to have a legitimate expectation that the relationship between its wholesale prices and its retail prices did not entail a margin squeeze, first of all, it should be observed that the applicants do not dispute the findings set out at recital 726 to the contested decision, namely that, first, the CMT never examined the existence of a margin squeeze between Telefónica's national wholesale product and its retail product during the period in question and, second, the national wholesale product was more significant than the regional wholesale product during that period.

348 Next, as regards the regional wholesale product, although, admittedly, the CMT analysed the existence of a margin squeeze resulting from Telefónica's prices for the regional wholesale product in a number of decisions taken during the infringement period, it never analysed the existence of a margin squeeze on the basis of Telefónica's real historical costs.

349 In that regard, the Court rejects the applicants' argument that the discrepancies between the real *ex post* costs and the *ex ante* estimates used by the CMT were not sufficiently clear to give Telefónica cause to doubt the merits of the CMT's action. In order to substantiate that argument, the applicants maintain, in their application, that the alleged inconsistencies between the information which Telefónica supplied to the CMT and that contained in its business plans or its scorecards result from the Commission's misinterpretation of the information made available to it concerning the forecasts of demand which relate to the costs concerning a network of [*confidential*] ADSL lines. Even on the assumption that such an argument is well founded, it is not in itself capable of calling in question all the evidence, set out in particular in Table 59 in the contested decision, establishing that Telefónica

could not be unaware that the costs used in the CMT's 'retail minus' model did not correspond to reality. On the contrary, the other arguments whereby the applicants claim, first, that the consultant Arcome did not use the information supplied by Telefónica, but used, as a reference for preparing the 'retail minus' model, a network of more than [*confidential*] ADSL lines and, second, that the CMT did not use the accounting records of Telefónica's costs, being of the view that they had not been established in sufficient detail, tend to confirm that Telefónica was aware, or ought to have been aware, that the costs used in the CMT's 'retail minus' model did not correspond to the real costs.

350 Furthermore, the Court rejects the applicants' arguments that it does not follow from either the business plans or the scorecards that Telefónica made losses on the retail market. (i) The applicants claim that, [*confidential*]. However, that argument is not substantiated. (ii) The applicants assert that the business plan of 18 April 2002 does not permit such a conclusion to be drawn, since [*confidential*]. However, it is apparent from the forecasts set out in that document that [*confidential*]. Their argument cannot therefore succeed. (iii) As regards Telefónica's scorecards, the applicants themselves assert that those documents, which contain monthly information on revenues and expenditure, make it possible to ensure the proper conduct of the business plan and the development of the activity. Since the business plan envisaged that [*confidential*], it was for the applicants to satisfy themselves that [*confidential*].

351 Last, as the Commission observes, Telefónica does not deny that the actual incremental infrastructure, network and access costs were much higher than those set out in the CMT's 'retail minus' model. As those actual costs appeared in various Telefónica internal documents, Telefónica could not be unaware that the CMT's model underestimated its actual costs.

352 In the light of the foregoing, it must be concluded that the CMT's actions and decisions could not give rise to a legitimate expectation on the applicants' part that its pricing practices were compatible with Article 82 EC. Consequently, the first complaint, alleging that there was no infringement committed intentionally or negligently, must therefore be rejected.

353 In the second place, the applicants take issue with the Commission for not having stated, in the contested decision, any factual or legal base for its conclusion that the infringement constituted a 'clear-cut abuse', for which there were precedents (recitals 731 to 736 to the contested decision).

354 It should be observed, as a preliminary point, that, as is clear from paragraphs 319 to 352 above, the Commission was correct to consider that the infringement found in the contested decision had been committed intentionally or negligently. As stated at paragraph 319 above, such an infringement can be penalised by a fine under the first subparagraph of Article 15(2) of Regulation No 17 and, since 1 May 2004, Article 23(2) of Regulation No 1/2003.

355 In the context of the present complaint, the applicants claim, however, that the principle of legal certainty precludes the Commission from imposing a fine for anti-competitive conduct where the unlawful nature of that conduct is not apparent from clear and foreseeable precedents. In that regard, the Commission's reasoning set out at recitals 731 to 736 to the contested decision is vitiated by errors of fact and errors of assessment of the facts.

356 First, the applicants claim that the margin squeeze attributed to Telefónica is not based on clear precedents.

357 First of all, the Court must reject the argument which the applicants derive from the Commission's previous practice in adopting decisions, according to which the absence of clear precedents establishing the unlawful nature of particular conduct might justify not imposing a fine. It should be observed in that regard that the Commission's decision not to impose a fine in certain decisions on account of the relative novelty of the infringements found does not grant 'immunity' to undertakings subsequently committing the same type of infringement. The Commission exercises its discretion in

the specific context of each case when assessing whether it is appropriate to impose a fine in order to penalise the infringement found and to protect the effectiveness of competition law (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 239).

358 Next, the Court must reject the argument alleging a contradiction in the Commission's reasoning between the assertion at recital 733 to the contested decision that the calculation of the margin squeeze in the present case follows clearly from decisions and case-law that pre-date the Deutsche Telekom decision and the assertion at recital 744 to the contested decision that the calculation method applied in the Deutsche Telekom decision had not previously been used in any formal Commission decision.

359 The Commission was correct to assert, in substance, that it follows from recital 206 to the Deutsche Telekom decision that the calculation method applied in that decision, to which recital 744 to the contested decision makes reference, follows from its practice in previous decisions, although, admittedly, it incorporates a new element, namely the use of a weighted approach. Recital 206 to the Deutsche Telekom decision thus states that 'the margin squeeze test as such forms part of the well-established decision-making practice of the Commission, and the new element is the weighted approach which had to be used in this case to take into account the fact that, in Germany, a single wholesale tariff for local loop unbundling has been fixed, while the tariffs for the corresponding retail services differentiate between analogue, ISDN and ADSL lines'.

360 Furthermore, as regards the applicants' assertion that the precedents cited by the Commission at recital 733 to the contested decision are too general and imprecise to enable Telefónica to foresee that its conduct was likely to be unlawful, it should be observed, independently of the relevance of *Industrie des poudres sphériques* v *Commission*, paragraph 186 above, in the context of the present case, that, in Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article [82 EC] (IV/30.178 — Napier Brown — British Sugar) (OJ 1988 L 284, p. 41), the Commission had already considered, at recital 66, that '[t]he maintaining, by a dominant company, which is dominant in the markets for both a raw material and a corresponding derived product, of a margin between the price which it charges for a raw material to the companies which compete with the dominant company in the production of the derived product and the price which it charges for the derived product, which is insufficient to reflect that dominant company's own costs of transformation …[,] with the result that competition in the derived product is restricted, is an abuse of a dominant position'.

361 Thus, as the Commission observed at recital 735 to the contested decision, the Deutsche Telekom decision also constitutes a clear precedent which clarifies the conditions of application of Article 82 EC to an economic activity subject to sector-specific *ex ante* regulation. The arguments whereby the applicants seek to demonstrate that that decision did not enable Telefónica to determine precisely the circumstances in which the Commission and the Courts of the European Union would consider that the existence of a margin squeeze might constitute an infringement of Article 82 EC cannot be upheld in that regard. (i) The Court rejects the argument that the Deutsche Telekom decision was the subject-matter of an action before the Courts of the European Union, since measures of the EU institutions are presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (see Case C-475/01 *Commission* v *Greece* [2004] ECR I-8923, paragraph 18 and the case-law cited). (ii) The lack of foreseeability of the definition of the product markets must be rejected, for the reasons stated at paragraph 323 above. (iii) As regards the argument that the market was a fast-growing market, it is sufficient to recall that such a circumstance cannot preclude the application of the competition rules, and in particular Article 82 EC (*France Télécom* v *Commission*, paragraph 60 above, paragraph 107). (iv) As regards the fact that the present case concerns a non-essential input, it is sufficient to recall that the finding of the existence of a margin squeeze does not require that the wholesale product concerned be indispensable (see paragraphs 180 to 182 above). (v) The argument relating to the strict sectoral control in Spain cannot be accepted either, for the reasons stated at paragraphs 339 to 342 above.

362 It follows that Telefónica could not be unaware that its conduct was likely to restrict competition. Furthermore, the applicants cannot claim that, even after they had received the statement of objections, they were not in a position to forecast the costs and revenues model that the Commission would adopt in the contested decision, owing to the fact that that model would rely on further evidence which was not mentioned either in the statement of objections or in the letter of facts. As already stated in the context of the examination of the first plea in the applicants' principal claims, no breach of their rights of defence has been found in that respect.

363 Second, the applicants claim that Telefónica was never able to foresee, either before or after October 2003, when the Deutsche Telekom decision was published, the new methodology used by the Commission in its decision in order to determine the existence of a margin squeeze.

364 In that regard, (i) the applicants' arguments that Telefónica could not have foreseen the sources, the method and the calculations used by the Commission in the contested decision must be rejected. The sources used in the calculation of the margin squeeze are Telefónica's historical revenues and costs, which were supplied by the applicants themselves. Furthermore, in the light of the precedents in other decisions referred to at paragraphs 360 and 361 above, Telefónica was reasonably capable of foreseeing that its conduct on the market was likely to restrict competition.

365 (ii) The argument that the definition of the relevant markets by the Commission in the contested decision was not foreseeable for Telefónica has already been rejected at paragraphs 323 to 326 above.

366 (iii) As regards the argument that the margin squeeze test was applied for the first time in the contested decision to a fast-growing market, it was recalled at paragraph 361 above that the fact that a market is experiencing heavy growth cannot preclude the application of the competition rules.

367 (iv) The arguments relating to the need to show that the upstream product is indispensable in the context of the margin squeeze test have been rejected at paragraph 182 above.

368 (v) The applicants' assertion that the Spanish regulation was stricter during the infringement period than the regulations examined in the Deutsche Telekom decision is irrelevant and is in any case unfounded, as is apparent from recital 748 to the contested decision.

369 The second complaint in the first plea, and therefore the first plea in its entirety, must therefore be rejected.

(b) Second plea, alleging errors of fact and of law and breach of the principles of proportionality and equal treatment, the principle that the penalty must be specific to the offender and the offence and the obligation to state reasons in the determination of the amount of the fine.

370 The second plea consists of five parts. The first part alleges errors of fact and of law and breach of the obligation to state reasons as regards the qualification of the infringement as 'very serious' and the setting of the starting amount of the fine at EUR 90 million. The second part alleges breach of the principles of proportionality and equal treatment, the principle that the penalty must be specific to the offender and the offence and the obligation to state reasons in the setting of the starting amount of the fine at EUR 90 million. The third part alleges errors of fact and of law and failure to state reasons in connection with the increase of the starting amount of the fine in order to ensure a deterrent effect. The fourth part alleges errors of fact and of law in the qualification of the infringement as being of 'long duration'. The fifth part alleges errors of fact and of law when the attenuating circumstances were taken into account.

First part of the second plea, alleging errors of fact and of law and breach of the obligation to state reasons as regards the qualification of the infringement as 'very serious' and the setting of the starting amount of the fine at EUR 90 million

371 By the first part of the second plea put forward in support of their alternative claims, the applicants dispute the gravity of the infringement established in the contested decision and, consequently, the setting of the starting amount of the fine imposed on Telefónica (see paragraphs 25 to 29 above).

372 As a preliminary point, it should be borne in mind that it is settled case-law that the Commission enjoys a broad discretion as regards the method of calculating fines. That method, set out in the 1998 Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 23(2) of Regulation No 1/2003 (see, to that effect, *Papierfabrik August Koehler* v *Commission*, paragraph 76 above, paragraph 112 and the case-law cited).

373 The gravity of infringements of EU competition law must be determined by reference to numerous factors such as, in particular, the specific circumstances and context of the case and the deterrent effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 72, and *Prym and Prym Consumer* v *Commission*, paragraph 83 above, paragraph 54).

374 As stated at paragraph 25 above, the Commission, in the present case, determined the amount of the fine by applying the method laid down in the 1998 Guidelines.

375 Although the 1998 Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see *Dansk Rørindustri and Others* v *Commission*, paragraph 59 above, paragraph 209 and the case-law cited, and Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 70).

376 In adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see *Dansk Rørindustri and Others* v *Commission*, paragraph 59 above, paragraph 211 and the case-law cited, and *Carbone-Lorraine* v *Commission*, paragraph 375 above, paragraph 71).

377 Furthermore, the 1998 Guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of fines and, consequently, ensure legal certainty on the part of the undertakings (*Dansk Rørindustri and Others* v *Commission*, paragraph 59 above, paragraphs 211 and 213).

378 It must be borne in mind that, as regards the assessment of the gravity of the infringement, the 1998 Guidelines state, in the first and second paragraphs of Section 1.A, that:

'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.'

379 It follows from the 1998 Guidelines that minor infringements may, for example, be 'trade restrictions, usually of a vertical nature, but with a limited market impact and affecting only a substantial but relatively limited part of the Community market' (first indent of the second paragraph of Section 1.A). As for serious infringements, the Commission states that '[t]hese will more often than not be

horizontal or vertical restrictions of the same type as minor infringements, but more rigorously applied, with a wider market impact, and with effects in extensive areas of the common market'. The Commission also states that '[t]here might also be abuse of a dominant position' (second indent of the second paragraph of Section 1.A). As regards very serious infringements, the Commission states that these will 'generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly' (third indent of the second paragraph of Section 1.A).

380 The Commission also states, first, that within each of those categories, and in particular as far as serious and very serious infringements are concerned, the proposed scale of fines will make it possible to apply differential treatment to undertakings according to the nature of the infringement committed and, second, that it will be necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level that ensures that it has a sufficiently deterrent effect (third and fourth paragraphs of Section 1.A).

381 According to the 1998 Guidelines, for 'very serious' infringements the likely starting amount of the fines is above EUR 20 million; for 'serious' infringements, it may vary between EUR 1 million and 20 million; and, last, for 'minor' infringements, the likely starting amount of the fines is between EUR 1 000 and 1 million (first to third indents of the second paragraph of Section 1.A).

382 In the first place, it is appropriate to examine the arguments whereby the applicants seek to show that the Commission ought not to have qualified the infringement as 'very serious' and that, accordingly, the starting amount of the fine ought to have been set at a level significantly below EUR 90 million.

383 In that regard, first, the argument that the infringement found is not a clear-cut abuse must be rejected, for the reasons stated at paragraphs 353 to 368 above.

384 Second, as regards the applicants' arguments that Telefónica does not have a virtual monopoly on the wholesale markets, it has already been observed, at paragraph 155 above, that Telefónica does not deny having been the sole operator to supply the regional wholesale product in Spain since 1999, thus having a de facto monopoly on that market. Furthermore, as observed at paragraph 163 above, so far as the national wholesale product is concerned, Telefónica's market share was more than 84% throughout the infringement period. The applicants' argument that the existence of a quasi-monopoly is precluded where the products affected by the infringement are not 'essential infrastructures' or are subject to sectoral regulation has no basis in the 1998 Guidelines or in the case-law and cannot be accepted.

385 Third, the argument alleging contradictions between recitals 744 and 746 to the contested decision (the latter recital referring to recital 733 to that decision) must be rejected for the reasons already stated at paragraphs 358 and 359 above. Thus, the calculation method applied in the Deutsche Telekom decision, to which recital 744 to the contested decision makes reference, is the result of the Commission's previous practice in taking decisions, although, admittedly, it incorporates a new element, namely the use of a weighted approach.

386 Fourth, although the applicants maintain that even after the publication of the Deutsche Telekom decision in the *Official Journal of the European Union* on 14 October 2003 Telefónica had no reason to think that its conduct might constitute an infringement of Article 82 EC, in so far as its situation was quite different from the situation analysed in that case, such an argument cannot be upheld, for the reasons stated at paragraph 361 above. As regards the argument which the applicants derive from the Commission's practice in taking decisions, on the basis of which they claim that the infringement ought to have been qualified as 'serious', at least before 2003, it must be rejected, since, as is clear from consistent case-law, the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters, which is defined solely by Regulation

No 17 and, since 1 May 2004, by Regulation No 1/2003. Decisions in other cases can give only an indication for the purposes of determining whether there might be discrimination, since the facts of those cases, such as markets, products, countries, undertakings and periods concerned, are not likely to be the same (see Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 60 and the case-law cited). Furthermore, the other arguments put forward by the applicants in order to show that Telefónica could not foresee that its conduct was likely to constitute an infringement of Article 82 EC were rejected at paragraphs 322 to 352 above.

387 In the light of the foregoing, the applicants' first complaint, as set out at paragraph 382 above, cannot succeed.

388 In the second place, the applicants claim that the starting amount of the fine is excessive in view of the lack of actual impact, or the limited impact, of the impugned practices.

389 It must be borne in mind that, under the first paragraph of Section 1.A of the 1998 Guidelines, the Commission must, in assessing the gravity of the infringement, examine its actual impact on the market only where that impact can be measured (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 83 above, paragraph 74 and the case-law cited).

390 Furthermore, where the Commission considers it appropriate for the purposes of calculating the fine to take that optional element — the actual impact of the infringement on the market — into account, it cannot just put forward a mere presumption but must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition on that market (*Prym and Prym Consumer* v *Commission*, paragraph 83 above, paragraph 82).

391 In the present case, it is apparent from the contested decision that the Commission intended to take account of that optional element, namely the actual impact of the infringement on the market, and, when questioned on that point, it expressly confirmed at the hearing that it intended to do so. As is apparent from recitals 751 and 752 to the contested decision, the Commission considered that 'the impact of Telefónica's abuse on the retail market [had] been significant'. Thus, it stated, first, that in determining the gravity of the infringement it had taken into consideration the fact that the relevant markets were markets of considerable economic importance and played a crucial role in the creation of the information society and, second, referring to the section of the contested decision dealing with the effects of the abuse, it considered that Telefónica's margin squeeze had had direct exclusionary effects on the Spanish retail market and that the fact that Telefónica's conduct had restrained the ability of ADSL operators to grow sustainably in the retail market appeared to have been an important factor that had resulted in Spanish retail prices being among the highest in Europe.

392 Since in the contested decision, for the purposes of establishing the actual impact of the infringement on the market, the Commission relies not only on the considerable economic value and the crucial role of the relevant markets in the creation of the information society, but also on the effects of the abuse, it is appropriate, in the context of the present plea, to examine the arguments raised in the second part of the fifth plea in their principal claims whereby the applicants seek to show that the Commission did not establish to the requisite legal standard the actual effects of Telefónica's abuse.

393 As regards the alleged actual exclusionary effects on the retail market, in the contested decision the Commission asserted that there was empirical evidence that (i) Telefónica's growth had by far exceeded that of its competitors (recitals 567 to 570); (ii) Telefónica had remained by far the largest ADSL supplier on the retail mass market during the period covered by the investigation (recitals 571 to 573); (iii) unlike its ADSL competitors, Telefónica had acquired a larger share of the retail broadband market than it held for narrowband services (recitals 574 to 578); and (iv) Telefónica's conduct had contained competition on the national wholesale market (recitals 579 to 584). The

Commission also asserted that the limited competition that remained on the retail market was insufficient to disprove that the margin squeeze had actual exclusionary effects (recitals 585 to 591 to the contested decision).

394 First, in the applicants' submission, Telefónica's share of the retail market fell considerably during the period analysed, which cannot be reconciled with the development of an exclusionary strategy. The rate at which customers for Telefónica's retail services were acquired (recitals 568 to 570 to the contested decision) was always below Telefónica's share of that market. Furthermore, the data on which the Commission relies relate only to the ADSL retail sector and exclude products based on other broadband products, which form part of the retail market as defined in the contested decision.

395 In that regard, first of all, it should be observed that the applicants do not dispute the data presented by the Commission at recitals 568 to 570 to the contested decision. According to those data, Telefónica developed 4 times as quickly on the retail market as all its ADSL competitors taken together and, respectively, 6 times and 14 times as quickly as its two main competitors between January 2002 and October 2004. During the last quarter of 2004 and the first half of 2005, moreover, Telefónica absorbed almost 70% of the growth in the ADSL market. Last, the progressive strengthening of competitors' retail offers based on local loop unbundling did not prevent Telefónica from taking more than 70% of new subscribers in the ADSL sector between April 2005 and July 2006.

396 Next, it should be observed that, contrary to the applicants' contention, Telefónica's market share in the ADSL sector remained relatively stable throughout the infringement period (Figure 13 in the contested decision), which, after falling by [*confidential*] between December 2001 and July 2002, fell from 58% in July 2002 (that is to say, only six months after the beginning of the infringement period) to 56% at the end of the infringement period, in December 2006. The applicants cannot therefore maintain that their market share in the ADSL retail sector fell appreciably.

397 In that regard, contrary to the applicants' contention, the Commission is not to be criticised for having analysed more particularly the effects of the margin squeeze in the ADSL sector of the retail market. That sector represented between 72 and 78.7% of the broadband lines in Spain between 2002 and 2006 (recitals 39 and 555 to and Table 1 in the contested decision). Furthermore, it was directly affected by the margin squeeze, which was applied to the national and regional wholesale products, which enabled alternative ADSL operators to offer their products on the retail market.

398 Last, as already stated at paragraph 281 above, the Commission took the cable operators into consideration. It considered that they had not been directly affected by the margin squeeze and, moreover, that they had not exercised sufficient competitive constraint on Telefónica on the retail market (recitals 559 and 560 to the contested decision).

399 Second, the applicants claim that the Commission has not substantiated its assertion that the margin squeeze exhausted Telefónica's competitors financially (recitals 587 to 591 to the contested decision). However, that assertion was made solely in order to reject Telefónica's argument in its response to the statement of objections that it faced intense competition from a large number of effective competitors (recital 585 to the contested decision), which, it maintained, undermined the assertion that the margin squeeze had had actual exclusionary effects. However, since the applicants do not dispute the finding at recital 588 to the contested decision that none of the ADSL operators achieved a market share of more than 1% before 2005, their argument cannot succeed. In addition, contrary to the applicants' contention, and as the Commission observed at recital 590 to the contested decision, Jazztel was not able to reach a market share of more than 1% using Telefónica's national and regional wholesale products. Last, as regards the applicants' argument that the numerous acquisitions of alternative operators by other operators, at high values, reflects the high prospects of growth of the alternative operators, it does not demonstrate that Telefónica's conduct had no exclusionary effects during the infringement period. In addition, the acquisition of Ya.com by France Telecom, to which the applicants specifically refer, took place in June 2007 and therefore after the infringement period.

400 Third, the applicants maintain that the Commission distorted the data, and likewise the rates of growth on the retail market, in order to demonstrate that Telefónica's conduct had had the effect of restricting competition on the wholesale market (recitals 579 to 584 to the contested decision). When questioned at the hearing about the meaning and the scope of their argument, the applicants asserted that it did not relate to the rate of growth on the retail market. By contrast, the Commission refers to rates at which wholesale lines were added, without taking account of self-provision, which applies to many operators who integrate vertically. However, that argument, which is not substantiated, cannot be accepted, since it follows from footnote 654 to the contested decision, which relates to Figure 18, at recital 579 to the contested decision, that '[n]et additions [are] calculated on the basis of the evolution of the lines (including self-provision) in the national wholesale market'. The Commission therefore did in fact take account of that self-provision.

401 In any event, it should be observed that, in spite of the fact that Telefónica lost some market share at the level of the national wholesale product (Figure 18 in the contested decision), the applicants do not dispute the Commission's findings that Telefónica's growth with respect to the national wholesale product between January 2002 and October 2004 increased at a rate that was 6 times higher than the rate of its ADSL competitors taken together, 10 times higher than that of its main ADSL competitor, ONO, and 30 times higher than that of its second ADSL competitor, France Telecom (recital 580 to the contested decision). Furthermore, it follows from the contested decision that from October 2004 Telefónica continued to grow with respect to the national wholesale product at a rate that was 3 times higher than that of its ADSL competitors taken together, 7 times higher than that of its main ADSL competitor, France Telecom, and 10 times higher than that of its second ADSL competitor, Jazztel. In addition, the volumes of Auna, which was Telefónica's main competitor on the national wholesale market, decreased during the latter period (recital 581 to the contested decision). Telefónica's growth on the ADSL lines market at the level of the national wholesale product and the decrease in Auna's volumes on the national wholesale market must be regarded as indicia of the actual exclusionary effects vis-à-vis its competitors.

402 In the light of the foregoing, and without there being any need to rule on the arguments whereby the applicants seek to challenge the comparison between narrowband services and broadband services which the Commission makes at recitals 574 to 578 to the contested decision, it must be held that the Commission produced sufficient specific, credible and adequate indicia to establish that Telefónica's conduct had actual exclusionary effects on the market.

403 Fourth, the applicants dispute the alleged harm sustained by consumers. They dispute the Commission's finding that Telefónica's conduct raised retail prices to a level among the highest, indeed to the highest level, in the EU, when it was composed of 15 Member States, and indeed raised them above the highest retail prices in those Member States.

404 In that regard, it should be noted that at recitals 594 to 602 to the contested decision the Commission made the following findings:

— the Organisation for Economic Cooperation and Development (OECD), in a study of 18 June 2004, had concluded that the average monthly fee of a broadband internet connection in Spain was one of the most expensive in Europe in terms of price and performance ratio; that had been confirmed by a study carried out by a Spanish consumers' association, the Organización de Consumidores y Usuarios (OCU) (recital 594);

— the analyses undertaken by the CMT between 2004 and 2006 show that the retail broadband internet access prices in Spain were high, and clearly above the European average (recital 595);

— a study in December 2006 ('the 2006 study'), commissioned by the Irish NRA, the Commission for Communications Regulation (ComReg) and carried out by the consultant Teligen, had concluded that Telefónica's retail prices were 85% higher than the European average (recitals 596 to 601);

— Telefónica calculated, on the basis of its own figures, that the average retail price in Spain was 20% higher than the average price in the EU, when the latter was composed of 15 Member States (recital 602).

405 In their application, the applicants maintained that the Commission had not shown in the contested decision that retail prices in Spain were among the highest in Europe. In order to do so, however, they have merely disputed the results of the 2006 study, claiming that the offers compared were heterogeneous; that the study did not take account of promotions or of the price of the most popular products; and that the sample used related only to the situation of 15 countries at a given moment. However, they did not dispute the other studies to which the Commission referred, which show the high level of the prices of the retail product in Spain, and their argument cannot thus be upheld. In any event, as the Commission stated at recital 602 to the contested decision, Telefónica itself acknowledged in its response to the statement of objections that a mere comparison of retail prices in the Member States led to the conclusion that retail prices in Spain were the highest in the EU, when the latter was composed of 15 Member States, 'over the period 1999-2005'.

406 Furthermore, in their reply and at the hearing, the applicants claimed that none of the studies referred to by the Commission answered the question whether Spanish consumers had borne the highest retail broadband internet access prices because of an anti-competitive margin squeeze effect.

407 However, it was observed at paragraph 390 above that the Commission was required to produce specific, credible and adequate evidence with which to assess what actual influence the infringement might have had on competition on the relevant market. In fact, it must be concluded that the Commission was correct to take the view that the high level of the retail price in Spain constituted such evidence of the actual impact of Telefónica's conduct on the Spanish market.

408 Fifth, the applicants maintain that the Commission's assertion, at recital 603 to the contested decision, that the rate of broadband penetration in Spain was below the European average, is incorrect. To that end, the applicants claim that Spain is only 'slightly' below the European average, that that evolution was already the subject of predictions in 2001 owing to the belated development of broadband internet access in Spain or, again, that that finding may be explained by socio-demographic factors.

409 Thus, although, admittedly, the applicants put forward certain arguments that might explain that the rate in question is below the European average, they do not dispute that it was in fact below that average. So, it must be concluded that the Commission did not make a manifest error of assessment when it considered that the fact that the broadband penetration rate was lower in Spain than in the other Member States also constituted evidence of the actual impact of Telefónica's conduct on the Spanish market.

410 In the light of the foregoing, the applicants' second complaint, as set out at paragraph 388 above, cannot succeed either.

411 In the third place, the applicants maintain that the starting amount of the fine is excessive, given the geographic extent of what are alleged to be the relevant markets.

412 First, the Court rejects the arguments derived from the Commission's practice in taking decisions, namely that, in the decisions issued in relation to abuse of a dominant position in the telecommunications sector, the Commission considered on each occasion that the infringement was 'serious' when the markets in question had characteristics comparable to those of the Spanish broadband internet access market. As observed at paragraph 386 above, the Commission's practice in taking decisions cannot serve as a legal framework for the imposition of fines in competition matters.

413 Second, the Court must reject the applicants' argument that the infringement should be qualified as 'serious' where 'the relevant market is restricted (at most) to the territory of a Member State'. As the Commission correctly stated at recital 755 to the contested decision, even though margin squeeze cases are necessarily confined to a single Member State, they prevent operators from other Member States from entering a fast-growing market and the Spanish broadband market is the fifth largest national broadband market in the EU. Furthermore, as the Commission stated at recital 742 to the contested decision, Telefónica's abuse constitutes a clear-cut abuse by an undertaking holding a virtual monopoly. It also follows from paragraphs 388 to 410 above that the Commission was correct to conclude that Telefónica's conduct had had a significant impact on the retail market. Last, it follows from the case-law that the size of the geographic market is only one of the three criteria which, according to the 1998 Guidelines, are relevant for the purpose of the overall assessment of the gravity of the infringement. Among those interdependent criteria, the nature of the infringement plays a major role. By contrast, the size of the geographic market is not an autonomous criterion in the sense that only infringements affecting several Member States could be qualified as 'very serious'. Neither the EC Treaty, nor Regulation No 17, nor Regulation No 1/2003, nor the 1998 Guidelines, nor the case-law support the conclusion that only geographically very extensive restrictions may be qualified as 'very serious' (see, to that effect, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 319 above, paragraph 311 and the case-law cited). In the light of those factors, the Commission was correct, in the present case, to qualify the infringement as 'very serious', even though the size of the relevant geographic market was limited to Spanish territory.

414 The applicants' third complaint, as set out at paragraph 411 above, must therefore be rejected.

415 In the fourth place, the applicants maintain that the Commission failed to fulfil its obligation to state reasons and made an error of law in not taking the variable degree of the gravity of the infringement during the infringement period into account.

416 First, as regards breach of the obligation to state reasons, it has consistently been held that, in the determination of the amount of the fine in a case of infringement of the competition rules, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the facts which enabled it to determine the gravity of the infringement and its duration (Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraph 73, and *Atlantic Container Line and Others* v *Commission*, paragraph 150 above, paragraph 1521). Those requirements do not oblige the Commission to indicate in its decision the figures relating to the method of calculating the fines (see *Microsoft* v *Commission*, paragraph 58 above, paragraph 1361 and the case-law cited).

417 In the present case, the Commission considered, at recital 750 to the contested decision, that 'the infringement should be considered to be very serious'. At recital 756 to the contested decision, moreover, the Commission stated that 'the infringement must overall be qualified as very serious, although it [might] have not been necessarily of uniform gravity throughout the period' and also that 'the initial amount of the fine [took] into account the fact that the gravity of Telefónica's abuse [had become] in any event clearer in particular after the Deutsche Telekom decision'.

418 In that regard, the Court must reject the argument which the applicants derive from an alleged contradiction in the grounds, which, they claim, is the consequence of the fact that the Commission considered that the infringement was 'very serious' although it might have been less serious before October 2003, when the Deutsche Telekom decision was published. As is apparent from recitals 738 to 758 to the contested decision, the Commission considered that the infringement had been 'very serious' throughout the period concerned, although its gravity had not been uniform throughout that period. Furthermore, the argument alleging a complete failure to state reasons with respect to the 'particular method of calculating the "basic amount"' must, in the light of the case-law cited at paragraph 416 above, also be rejected.

419 Second, the Court must reject the applicants' argument that the Commission did not draw the inferences from the findings set out at paragraph 417 above, with respect to the qualification of the infringement or the setting of the starting amount of the fine, in that it ought, at most, to have qualified the infringement as 'serious' and set the starting amount of the fine at a significantly lower level. That argument is based on a false premiss, since, as is clear from the foregoing (see paragraphs 371 to 414 above), the Commission was correct to take the view that the infringement should be qualified as 'very serious' for the entire period concerned and, moreover, it expressly follows from recitals 750 and 760 to the contested decision that, in spite of the qualification as 'very serious' for the entire period, the Commission did in fact take the variable intensity of the infringement into account when setting the starting amount of the fine (see paragraphs 27 and 417 above).

420 The applicants' fourth complaint, as set out at paragraph 388 above, cannot therefore be upheld.

421 It follows from the foregoing that the first part of the second plea must be rejected in its entirety.

Second part of the second plea, alleging breach of the principles of proportionality and equal treatment, the principle that the penalty must be specific to the offender and the offence and the obligation to state reasons in setting the starting amount of the fine

422 In the context of the present plea, the applicants claim that there has been a breach by the Commission of the principles of proportionality and equal treatment, the principle that the penalty must be specific to the offender and the offence and the obligation to state reasons when it set the starting amount of the fine.

423 In the first place, it is appropriate to examine the applicants' complaint that there has been a breach of the principles of proportionality and equal treatment and the principle that the penalty must be specific to the offender and the offence.

424 First, it should be borne in mind that the principle of equal treatment precludes, in particular, comparable situations from being treated differently, unless such treatment is objectively justified (see Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 40; and Case T-276/04 *Compagnie maritime belge* v *Commission* [2008] ECR II-1277, paragraph 92 and the case-law cited).

425 In the present case, for the purpose of showing that there has been a breach of the principle of equal treatment, the applicants emphasised the differences, in the setting of the starting amount of the fine, between the contested decision and a number of the Commission's earlier decisions. However, as observed at paragraph 386 above, the Commission's practice in taking decisions cannot serve as a legal framework for the imposition of fines in competition matters.

426 Furthermore, according to settled case-law, the fact that the Commission has in the past applied fines of a certain level to certain types of infringements does not mean that it is estopped from raising that level within the limits set by Regulation No 17 and Regulation No 1/2003 if that is necessary in order to ensure the implementation of EU competition policy (see *Dansk Rørindustri and Others* v *Commission*, paragraph 59 above, paragraph 169 and the case-law cited).

427 On the contrary, the proper application of EU competition rules requires that the Commission may at any time adjust the level of fines to the needs of that policy. Such conduct does not constitute a breach by the Commission of the principle of equal treatment by reference to its earlier practice (see *Groupe Danone* v *Commission*, paragraph 67 above, paragraph 154 and the case-law cited). Consequently, it cannot be concluded that there has been a breach of the principle of equal treatment in the present case.

428 Second, it should be borne in mind that, according to consistent case-law, the principle of proportionality, which is one of the general principles of EU law, requires that acts adopted by the institutions do not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81 and the case-law cited).

429 In the context of the calculation of fines, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (see Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 228 and the case-law cited).

430 In that regard, it should first of all be observed that, in the context of Regulation No 1/2003, the Commission has a wide margin of discretion when setting the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules (see *Groupe Danone* v *Commission*, paragraph 67 above, paragraph 134 and the case-law cited).

431 It is also important to bear in mind that the methodology set out in Section 1.A of the 1998 Guidelines reflects a global approach, where the starting amount of the fine, determined by reference to the gravity of the infringement, is calculated by reference to the nature of the infringement, its actual impact on the market, where this can be measured, and the size of the relevant geographic market (Case T-116/04 *Wieland-Werke* v *Commission* [2009] ECR II-1087, paragraph 62).

432 In the present case, it follows from paragraphs 371 to 421 above that the Commission was correct to qualify the infringement as 'very serious'. Since Telefónica's abuse must be regarded as a clear-cut abuse for which there are precedents, which undermines the objective of the attainment of an internal market for telecommunications networks and services, and since that abuse had a significant impact on the Spanish retail market (recitals 738 to 757 to the contested decision), a starting amount of the fine of EUR 90 million cannot be considered disproportionate.

433 Third, the applicants cannot claim that there has been a breach of the principle that the penalty must be specific to the offender and the offence. In assessing the gravity of an infringement for the purpose of setting the amount of the fine, the Commission must ensure that its action has the necessary deterrent effect, especially as regards those types of infringement that are particularly harmful to the attainment of the objectives of the EU (see *Groupe Danone* v *Commission*, paragraph 67 above, paragraph 169 and the case-law cited). Deterrence must be both specific and general. As well as constituting punishment for an individual infringement, a fine also forms part of the general policy of compliance by undertakings with the competition rules (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 313 above, paragraph 106). While the fine may indeed also have a general deterrent effect vis-à-vis other undertakings that might be tempted to infringe the competition rules, it is clear from the contested decision that in the present case the fine was calculated by reference to Telefónica's specific situation, namely the gravity of the infringement in the light of its nature, its effects on the market and the size of the relevant geographic market, the duration of the infringement and the presence of an attenuating circumstance. Accordingly, the applicants cannot claim that the general deterrent effect of the fine was 'the first and last objective of the fine'.

434 In the second place, as regards the complaint alleging breach of the obligation to state reasons, it must be borne in mind that, as observed at paragraph 416 above, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the facts which enabled it to determine the gravity of the infringement and its duration, the Commission not being required to provide in its decision a more detailed account or to indicate the figures relating to the method of calculating the fine. Those elements are set out at recitals 713 to 767 to the contested decision.

Furthermore, the global approach inherent in the calculation of the starting amount of the fine was referred to at paragraph 431 above. The applicants' argument that the Commission ought to have explained in greater detail in the contested decision how it set the starting amount of the fine of EUR 90 million must therefore be rejected.

435 Furthermore, as stated at paragraph 386 above, as the Commission's practice in previous decisions does not serve as a legal framework for the imposition of fines in competition matters, the applicants cannot take issue with the Commission for not having stated in the contested decision the reasons why the starting amount of the fine imposed on Telefónica is significantly higher than the starting amount of the fine imposed in the Wanadoo Interactive decision, or even for not having stated in greater detail the reasons why in the present case there was justification for imposing on Telefónica a higher fine than that set in the Deutsche Telekom decision (see, to that effect, *Michelin* v *Commission*, paragraph 268 above, paragraph 255).

436 In the light of the foregoing, the complaint alleging breach of the obligation to state reasons must be rejected, as must the second part of the second plea in its entirety.

Third part of the second plea, alleging errors of fact and of law and failure to state reasons in connection with the increase of the starting amount of the fine for the purpose of deterrence

437 In the context of the present part of the plea, the applicants claim that the Commission made errors of fact and of law in connection with the increase in the starting amount of the fine for the purpose of deterrence.

438 As a preliminary point, it should be borne in mind that, according to the fourth paragraph of Section 1.A of the 1998 Guidelines, it is necessary, when determining the starting amount of the fine, to 'take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers, and to set the fine at a level which ensures that it has a sufficiently deterrent effect'. According to the fifth paragraph of Section 1.A, moreover, the Commission may take account of the fact that 'large undertakings usually have legal and economic knowledge and infrastructures which enable them more easily to recognise that their conduct constitutes an infringement and be aware of the consequences stemming from it under competition law'.

439 First, as regards the argument that there was a failure to state reasons for the increase for the purpose of deterrence, it should be observed that, at recital 758 to the contested decision, the Commission explained that, '[g]iven Telefónica's significant economic capacity, in order to ensure a sufficient deterrent effect on Telefónica, the initial amount should be adjusted upwards by a factor of 1.25'. At footnote 791 to the contested decision, the Commission stated that Telefónica was the largest telecommunications incumbent in Europe in terms of market capitalisation and that its resources and profits were significant. It also stated that, according to the United States Securities and Exchange Commission filing for the fiscal year 2006, Telefónica possessed a cash and short-term investment reserve of EUR 5 472 million on 31 December 2006 and that its profits came to EUR 6 579 million in the fiscal year 2006 on revenues of EUR 52 901 million. It follows that the reasons for the increase of the fine for the purpose of deterrence are stated to the requisite legal standard.

440 Second, the Court must reject the arguments that the Commission ought to have ascertained whether the starting amount of the fine of EUR 90 million was in itself already sufficiently deterrent, even without an increase, and that the need to increase a fine for deterrence should be determined after the calculation of the final amount. It should be observed in that regard that the applicants do not challenge the legality of the 1998 Guidelines, under which consideration of the deterrent effect of a fine is one of the factors taken into account when the starting amount of the fine is being set. It must be concluded that the Commission was entitled to consider that the significant economic power of Telefónica, which, at the time of the adoption of the contested decision, was the largest historical

telecommunications operator in terms of market capitalisation (recital 758 and footnote 791 to the contested decision), justified the imposition of a factor for deterrence, a fortiori since the applicants do not dispute that the starting amount of the fine represents, in this case, only 0.17% of Telefónica's turnover.

441 Third, the applicants rely on the Commission's previous practice in taking decisions in order to show that it breached the principles of proportionality and equal treatment by increasing the starting amount of the fine for the purpose of deterrence. Thus, Telefónica's financial capacity does not justify its being treated differently from Wanadoo Interactive and Deutsche Telekom, to which the Commission did not apply an increase for deterrence. Such an argument must be rejected, however, since, as stated at paragraph 386 above, the Commission's practice in previous decisions cannot serve as a legal framework for the imposition of fines in competition matters. The mere assertion that the Commission increased the starting amount of the fine imposed on Telefónica for the purpose of deterrence in the present case, while no increase for deterrence was applied in the Wanadoo Interactive and Deutsche Telekom decisions, cannot therefore substantiate a breach of the principles of equal treatment and proportionality. The applicants' complaint must therefore be rejected.

442 Fourth, as regards the argument alleging breach of the principle that the penalty must be specific to the offender and the offence, it is sufficient to refer to the considerations set out at paragraph 433 above.

443 It follows from all the foregoing considerations that the applicants' arguments that the Commission made a number of errors in increasing the starting amount of the fine imposed on Telefónica for the purpose of deterrence are unfounded and, accordingly, the third part of the second plea must be rejected.

Fourth part of the second plea, alleging errors of law and manifest errors of assessment in the qualification of the infringement as being of 'long duration'

444 In the context of the present part of the plea, the applicants claim that the Commission made errors of law and manifest errors of assessment of the facts in determining the starting point and the final date of the infringement.

445 It must be borne in mind that, according to Article 23(3) of Regulation No 1/2003, the duration of the infringement is one of the factors to be taken into consideration when determining the amount of the fine to be imposed on undertakings which have infringed the competition rules.

446 As regards the factor relating to the duration of the infringement, the 1998 Guidelines draw a distinction between infringements of short duration (in general, less than one year), for which the starting amount of the fine determined for gravity should not be increased, infringements of medium duration (in general, one to five years), for which that amount may be increased by up to 50%, and infringements of long duration (in general, more than five years), for which the amount may be increased by up to 10% per year (first to third indents of the first paragraph of Section 1.B).

447 In the first place, the applicants dispute the determination, at recital 759 to the contested decision, of the starting date of the infringement.

448 First, for the reasons stated at paragraphs 356 to 369 above, the applicants' argument that Telefónica was not in a position, before October 2003, to be aware that its conduct might constitute an infringement of Article 82 EC must be rejected.

449 Second, it should be borne in mind that the arguments put forward by the applicants in relation to the failure to take the variable intensity of the infringement into account when setting the starting amount of the fine were rejected at paragraph 419 above.

450 Third, the applicants' arguments that the variation in the gravity of the infringement justifies a further reduction by reference to the duration of the infringement confuse the criteria of the gravity and duration of the infringement provided for in Article 23(3) of Regulation No 1/2003 and in the 1998 Guidelines. By their arguments, they challenge the increase in the starting amount of the fine at a rate of 10% per year by referring to matters connected with the assessment of the gravity of the infringement, and which, moreover, they have not demonstrated (see paragraph 419 above). Since the increase for duration involves the application of a certain percentage to the starting amount of the fine which is determined according to the gravity of the infringement as a whole, and thus already reflects the varying levels of intensity of the infringement, there is no need to take into account, for the increase of that amount on the basis of the duration of the infringement, a variation in the intensity of the infringement during the period concerned (Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 159). For the same reasons, the Court rejects the argument based on the fact that between 26 July 2001 and 21 December 2006 the CMT controlled Telefónica's margins, and also the argument relating to the emerging nature of the Spanish market and Telefónica's significant investments on that market.

451 In the second place, as regards the determination of the date on which the infringement ceased, it should be observed that the applicants' sole argument relies on the fact that, in order to establish the margin squeeze, the Commission relies only on data covering the period 2001 to June 2006. However, the applicants do not dispute the Commission's assertion at recital 124 to the contested decision that the level of the prices of the national and regional wholesale products was not affected between the CMT's decision of 1 June 2006, when the CMT amended the regulation of prices applicable to the regional and national wholesale products, requiring Telefónica to be cost-oriented (recital 123 to the contested decision), and 21 December 2006, when the CMT adopted provisional measures providing for substantial decreases of the prices of those products, the price of the regional wholesale product having been reduced by between 22 and 54% and the price of the national wholesale product (ADSL-IP) by between 24 and 61%. Furthermore, they do not dispute the finding at recital 62 to the contested decision that at the time of adoption of the contested decision TESAU's retail prices had not varied since September 2001. Nor do they claim that there was any change in the costs, which were taken into consideration by the Commission in the present case. The infringement may therefore be considered to have ceased on 21 December 2006 (see also recital 747 to the contested decision).

452 In those circumstances, as the applicants cannot rely on the duration of the infringement at issue to seek a reduction of at least 20% of the amount of the fine imposed on Telefónica, the fourth part of the second plea must be rejected.

Fifth part of the second plea, alleging errors of law and errors of fact when the attenuating circumstances were taken into account

453 As a preliminary point, it should be borne in mind that it follows from the 1998 Guidelines that the basic amount of the fine may be reduced where the infringement is committed as a result of negligence or unintentionally (fifth indent of the first paragraph of Section 3).

454 It should also be observed that, in accordance with the case-law, the sufficiency of any reduction of the fine on the ground of attenuating circumstances must be determined on the basis of an overall assessment which takes all the relevant circumstances into account (Case T-44/00 *Mannesmannröhren-Werke* v *Commission* [2004] ECR II-2223, paragraph 274).

455 The adoption of the 1998 Guidelines has not rendered irrelevant the case-law under which the Commission enjoys a discretion as to whether or not to take account of certain matters when setting the amount of the fines which it intends to impose, by reference in particular to the circumstances of the case. Thus, in the absence of any binding indication in the 1998 Guidelines regarding the attenuating circumstances that may be taken into account, the Commission has retained a degree of latitude in making an overall assessment of the extent to which a reduction of fines may be made in respect of attenuating circumstances (*Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 319 above, paragraph 473).

456 In the present case, at recital 765 to the contested decision, the Commission considered, with respect to the CMT's regulatory intervention in relation to the prices of the regional wholesale product, that Telefónica had acted negligently since, even on the favourable view that it might have believed at the outset that the CMT's model was based on realistic estimates, it must, or ought to, have quickly realised that the actual costs did not correspond to the estimates used by the CMT in its *ex ante* analysis (see also recitals 727 to 730 to the contested decision). For that reason, the Commission granted Telefónica a reduction of 10% for attenuating circumstances (recital 766 to the contested decision).

457 In the first place, the applicants maintain that the Commission did not take sufficient account of the fact that the infringement was committed in part through negligence.

458 First, in that regard, the applicants' argument that the Commission made an error of assessment in taking the view that Telefónica's negligence concerned only the regional wholesale product must be rejected. As is clear from paragraphs 110 to 143 above, the Commission was correct to conclude that the national and regional wholesale products did not belong to the same market. Furthermore, since the prices of the national wholesale product were never regulated during the infringement period, the Commission was correct to consider that the attenuating circumstance relating to Telefónica's negligence concerned only the regional wholesale product. The fact that there was sectoral regulation which enabled the CMT to intervene with respect to Telefónica's national wholesale product is irrelevant, since, as is clear from the case-law, while it is not excluded that, in certain circumstances, a national legal framework or conduct on the part of national authorities may constitute attenuating circumstances, the approval or tolerance of the infringement by the national authorities cannot be taken into account as attenuating circumstances where the undertakings concerned have the necessary means to obtain precise and accurate information (Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraphs 228 and 230).

459 Second, for the reasons stated at paragraphs 343 to 352 above, the Court must reject the applicants' argument that the Commission erred in considering that Telefónica's negligence was extremely serious, regard being had to its legitimate expectation in the CMT's action and the complexity of the case.

460 Third, although the applicants maintain that the reduction of 10% for attenuating circumstances granted to the undertaking concerned in the Deutsche Telekom decision is insufficient in the present case owing, first, to the higher basic amount set for Telefónica and, second, to the different sectoral regulation in Spain, such an argument cannot be accepted. First of all, as stated at paragraph 386 above, the Commission's practice in previous decisions cannot serve as a legal framework for the imposition of fines in competition matters. Next, the Court of Justice has already held that the mere fact that the Commission, in its previous practice when taking decisions, granted a certain rate of reduction for specific conduct does not mean that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (*Dansk Rørindustri and Others* v *Commission*, paragraph 59 above, paragraph 192). Thus, it must be considered in the present case that the mere fact that the Commission, in its Deutsche Telekom decision, granted a certain rate of reduction for a specific circumstance does not mean that it is

required to grant the same reduction, or even a proportionately greater reduction, when assessing the attenuating circumstances in the present case. Accordingly, the arguments which the applicants base on the rate of reduction granted in the Deutsche Telekom decision, for the purposes of showing that Telefónica ought to have received a greater reduction for attenuating circumstances, are irrelevant. Last, and in any event, it must be borne in mind that the basic amount of the fine is determined, in accordance with the 1998 Guidelines, by reference to the gravity and duration of the infringement. The Commission cannot therefore be required to take the rate of reduction granted in the Deutsche Telekom decision into consideration when determining the rate of reduction of the amount of the fine granted to an undertaking for an attenuating circumstance.

461 In the second place, as regards what the applicants allege to be the novel nature of the present case, it is sufficient to refer to paragraphs 356 to 368 above.

462 It follows from the above considerations that the fifth part of the second plea must be rejected, as must the second plea in its entirety.

463 It follows that the alternative claims must be rejected and the application dismissed in its entirety.

Costs

464 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.

465 Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission, France Telecom, Ausbanc and ECTA, in accordance with the forms of order sought by them.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Telefónica, SA, and Telefónica de España, SA, to bear their own costs and to pay the costs incurred by the European Commission, France Telecom España, SA, the Asociación de Usuarios de Servicios Bancarios (Ausbanc Consumo) and the European Competitive Telecommunications Association, in accordance with the forms of order sought by them.**

Truchot Martins Ribeiro Kanninen

Delivered in open court in Luxembourg on 29 March 2012.

[Signatures]

Table of contents