Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 26 September 2013[1]

Case C-295/12 P

Telefónica SA
Telefónica de España SAU
v

European Commission

(Competition — Abuse of dominant position — Margin squeeze — Wholesale prices charged by Telefónica SA for broadband access in Spain — Fine — Commission under an obligation to state reasons — Method of calculation — Principle of non-discrimination — Principle of proportionality — Unlimited jurisdiction of the General Court)

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1 — Original language: French.

1. The present case concerns an appeal brought by Telefónica SA ('Telefónica') and Telefónica de España SAU ('Telefónica de España') against the judgment of the General Court [2] in which the latter dismissed their action for annulment of the Commission Decision C(2007) 3196 final [3] and their application put forward, in the alternative, for revocation or reduction of the amount of the fine.

2 — Judgment in Case T-336/07 *Telefónica and Telefónica de España* v *Commission* [2012] ECR, 'the judgment under appeal'.

3 — Commission Decision of 4 July 2007 relating to a proceeding pursuant to Article [102 TFEU] (Case COMP/38.784 — *Wanadoo España* v *Telefónica*, 'the contested decision'.

I – **Background to the dispute**

2. In paragraphs 3 to 29 of the judgment under appeal, the General Court summarised the background to the dispute as follows:

‘3 On 11 July 2003, Wanadoo España SL (now France Télécom España SA) (“France Telecom”) submitted a complaint to the Commission …, complaining 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 …

…

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 …

…

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

16 In the second place, the Commission found that Telefónica had a dominant position on the two wholesale markets at issue … 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 … According to the contested decision …, 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 … 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 …

…

25 For the purpose of calculating the amount of the fine, the Commission applied in the contested decision the method set out in its Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 [4] and Article 65(5) of the [ECSC] Treaty (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” within the meaning of the 1998 Guidelines … At recitals 744 to 750 to the contested decision, the

4 — Council Regulation of 6 February 1962, First Regulation implementing Articles [101 TFEU] and [102 TFEU] (OJ, English Special Edition: 1959-62, p. 87).

Commission distinguished the present case from the … [Deutsche Telekom[5]] decision in which the abuse on the part of Deutsche Telekom, which also concerned a margin squeeze,[6] 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 … 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 necessarily limited to a single Member State, it prevented operators from other Member States from entering a fast-growing market …

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 … 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 …

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 …

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 …'

II – **The action before the General Court and the judgment under appeal**

3. In their action before the General Court, Telefónica SA and Telefónica de España put forward six pleas in law in support of their principal claims seeking annulment of the contested decision, alleging, respectively, breach of the rights of defence, errors of fact and of law in the definition of the relevant wholesale markets, errors of fact and of law in establishing their dominant position on the relevant markets, errors of law in the application of Article 102 TFEU in so far as concerns their abusive conduct, errors of fact or errors of assessment of the facts and errors of law with respect to their abusive conduct and its anti-competitive impact, and, lastly, *ultra vires* application of Article 102 TFEU and breach of the principles of subsidiarity, proportionality, legal certainty, sincere cooperation and sound administration.

4. In the alternative, the appellants put forward two pleas in law seeking revolution of the fine or a reduction of its amount, alleging: (i) errors of fact and of law and infringement of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003,[7] and of the principles of legal certainty and legitimate expectations, and (ii) 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 determining of the amount of the fine. The General Court rejected each of those pleas and dismissed the action in its entirety.

5 — Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article [102 TFEU] (Case COMP/C1/37.451, 37.578, 37.579 — Deutsche Telekom AG) (OJ 2003 L 263, p. 9, the 'Deutsche Telekom decision'. See, in this connection, Case C-280/08 P *Deutsche Telekom* v *Commission* [2010] ECR I-9555, and the Opinion of Advocate General Mazák in that case.

6 — In this Opinion, I shall use only the term 'margin squeeze'.

7 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), applicable from 1 May 2004.

III – **The procedure before the Court of Justice**

5. In addition to the appellants and the Commission, three intervening parties at first instance, namely the Asociación de usuarios de servicios bancarios (Ausbanc Consumo, 'Ausbanc'), France Telecom (original complainant in this case) and the European Competitive Telecommunications Association ('ECTA'), took part in the written procedure before the Court. At the hearing which was held on 16 May 2013 — and related solely to the seventh, eighth and tenth grounds of appeal (concerning alleged errors of law in calculating the amount of the fine and the requirement for the General Court to exercise its powers of unlimited jurisdiction) — all those parties submitted observations.

IV – **The appeal**

A – *Request for access to the verbatim transcript or the recording of the hearing before the General Court*

6. The appellants and Ausbanc have requested the Court to grant them access, pursuant to Article 15 TFEU, to the verbatim transcript or the recording of the hearing held before the General Court on 23 May 2011. I am of the view that these requests should be refused since the verbatim transcript or the recording of the hearing held before the General Court are not part of the case-file provided to the Court under Article 5(1) of the Instructions to the Registrar of the General Court.

B – *Objection of inadmissibility raised by the Commission against the appeal as a whole*

7. It is clear that: (i) the appeal, which is formulated in a confused and poorly structured manner, is extremely long — the French translation of the appeal amounts to no fewer than 133 pages in single spacing and contains 492 paragraphs [8] — and repetitive, with several hundred grounds of appeal, sub-sections, complaints, arguments and elements of arguments (which the Commission claims to be a record in the history of proceedings before the EU judicature); (ii) the appeal is almost systematically directed at obtaining a re-examination of the facts, under cover of claims that the General Court applied an 'incorrect legal test'; (iii) the grounds of appeal are often presented as pure assertions devoid of any reasoning; and (iv) the appellants on the one hand often criticise the contested decision rather than the judgment under appeal and, on the other hand, when they do actually criticise the judgment under appeal they hardly ever identify the specific passages or paragraphs in that judgment which allegedly contain errors of law.

8. Those observations, added to the difficulty, if not impossibility, for the Commission to exercise its rights of defence, form the basis of the Commission's objection of inadmissibility regarding the appeal as a whole. Whilst I can sympathise with that objection of inadmissibility to a certain extent — and indeed many parts of the appeal do appear to me to be manifestly inadmissible — it is none the less true that the appeal as such cannot be declared inadmissible in its entirety, since some of the grounds of appeal or arguments (even though it is like looking for a needle in a haystack) satisfy the requirements of admissibility. Those needles also raise questions of principle, some of them unusual, regarding inter alia the obligation upon the General Court to genuinely exercise its powers of unlimited jurisdiction.

9. It therefore seems to me that the Commission's objection of inadmissibility concerning the appeal as a whole must be dismissed.

8 — In other words, an application before the Court of Justice (which should contain only legal arguments) longer than the application in proper form before the General Court! Moreover, there are some virtually unintelligible paragraphs, such as paragraph 298, which contains a sentence of 121 words.

C – *The appeal*

1. Grounds of appeal which are inadmissible in their entirety: second, third, fourth and fifth grounds of appeal.

10. These grounds of appeal — based on alleged errors of law, respectively, in defining the relevant markets, assessing the dominant position, the abuse of that position and its effect on competition — seem to me to be inadmissible in that they essentially dispute the factual assessments contained in the judgment of the General Court. Furthermore, these grounds of appeal rarely indicate the contested passages or sections of the judgment under appeal to which they refer, whereas this is a requirement according to the Court's consistent case-law, as codified and confirmed by Articles 169(2) and 178(3) of the Court's Rules of Procedure.

a) Second ground of appeal

11. The appellants allege (paragraph 37 of the appeal) that the General Court was incorrect to refuse to consider its principle claim that the local loop unbundling, the national wholesale product and the regional wholesale product formed part of the same wholesale market or its alternative claim, that the national and regional wholesale products formed part of the same wholesale market.

12. I consider that the objection of inadmissibility raised by the Commission, ECTA, France Telecom and Ausbanc against the whole of the second ground of appeal should be upheld. First, the complaints put forward in support of this ground of appeal are obscure and formulated in a virtually unintelligible manner. Second, this ground of appeal seeks in actual fact to dispute the factual assessments of the General Court. Third, the appellants raise several new issues that were not debated at first instance, such as the claim that the Commission failed to apply the 'SSNIP test',[9] that the definition of markets is incompatible with the Notice on the definition of relevant market,[10] that the market definition requires an empirical analysis based on a market test and/or an econometric study and, lastly, that the SSNIP test should be applied within a specific timeframe.

b) Third ground of appeal

13. In paragraph 93 of the appeal the appellants criticise the reasoning of the General Court regarding their dominant position on the national and regional wholesale markets.

14. Here again I consider that the objection of inadmissibility raised by ECTA, France Telecom and Ausbanc must be upheld in that the third ground of appeal is based on new claims seeking to dispute the factual assessments made by the General Court which led it to conclude that a dominant position existed. By taking issue with paragraphs 149, 150, 162 and 163 of the judgment under appeal — to the extent that the General Court's finding that they held a dominant position was allegedly based solely on the large market shares held by the appellants and that that court erred by failing to consider the competitive pressures which the appellants were under on a 'contestable' market — the appellants are disputing the facts as assessed by the General Court in paragraph 157 of the judgment under appeal which led it to find that the wholesale market in question was not a 'contestable market'.[11] Those arguments must therefore be dismissed as inadmissible.

9 — 'SSNIP' meaning 'small but significant and non-transitory increase in price'.

10 — Commission Notice on the definition of relevant market for the purposes of [European Union] competition law (OJ 1997 C 372, p. 5).

11 — In other words a market on which the customers and competitors of Telefónica could reproduce its network and were thus in a position to exert effective competitive pressure irrespective of their market share.

c) Fourth ground of appeal

15. The appellants claim in essence (paragraph 120 of the appeal) that the General Court erred by finding that they had infringed Article 102 TFEU, whereas the elements constituting a refusal to deal amounting to abuse were not present, and that, in so doing, it infringed their right to property, the principles of proportionality and legal certainty and the principle that penalties must be clearly defined by law.

16. Here again, I consider that the objection of inadmissibility in respect of the whole of the fourth ground of appeal — raised by the Commission, ECTA, France Telecom and Ausbanc — must be upheld in so far as the arguments on which that ground is based: (i) were not debated at first instance (for example, the argument relating to an alleged infringement of the right to property, which seems to be the key issue in this ground of appeal, or the arguments relating to the principles of proportionality and legal certainty); (ii) either seek to dispute factual assessments made by the General Court and, in actual fact, are asking the Court of Justice to re-examine the facts; (iii) or are not presented clearly (such as the challenge to the case-law in *TeliaSonera Sverige*,[12] which is unsubstantiated) or fail to indicate sufficiently precisely which points of the judgment under appeal are being disputed.

d) Fifth ground of appeal

17. In this ground of appeal (paragraph 149 of the appeal), the appellants, after summarising the two margin squeeze tests applied by the Commission, do no more, in essence, than repeat the complaints made in this connection in their application at first instance before the General Court and dispute the responses given by the latter in paragraphs 199 to 265 of the judgment under appeal.

18. In actual fact, and frequently without indicating precisely to which passages of the judgment under appeal they are referring, the appellants are seeking a fresh assessment of the facts and evidence already examined by the General Court, something that is clearly inadmissible at the appeal stage, unless the clear sense of the evidence is distorted, which the appellants fail to establish.

19. I will give a few examples below.

— The appellants maintain that alternative operators were using an optimal combination of wholesale products. In making this claim, they are challenging a finding of fact made by the General Court in paragraphs 130, 195 and 280 of the judgment under appeal to the effect that a combination of wholesale products had not been established.

— In paragraph 162 of the appeal the appellants would appear to be criticising paragraph 207 of the judgment under appeal, in so far as the General Court distorted the facts by finding that the actual use of the local loop began only in late 2004. The appellants maintain, on the one hand, that the General Court ought to have examined two separate periods, before and after that date, and, on the other hand, that competitors actually used the local loop prior to 2004. This argument does not identify any specific evidence in the case file which has been distorted by the General Court. In any event, it is apparent from the case file that the appellants did not claim at first instance that a new period commenced in 2004.

— In paragraph 167 of the appeal, the appellants would appear to be criticising paragraph 217 of the judgment under appeal, in so far as it is claimed that the General Court erred by assuming that the extension of the reference period would entail unacceptable distortion, thereby disregarding the corrective mechanisms proposed by the appellants and hence failing to have regard to the presumption of innocence. It is sufficient to point out in this regard that the General Court merely

12 — Case C-52/09 [2011] ECR I-527.

summed up an argument raised by the appellants, without giving its own assessment. In any event, the argument relating to the presumption of innocence has been raised by the appellants for the first time in the appeal.

— The appellants also claim (paragraphs 178 et seq. of the appeal) that the General Court made several errors of law when examining (in paragraphs 233 to 264 of the judgment under appeal) the 'period-by-period' method adopted by the Commission in the contested decision. These arguments appear to me to be inadmissible in that the appellants failed to challenge the principle of recourse to the 'period-by-period' method before the General Court but merely challenged its implementation by the Commission.

— The appellants also claim (paragraph 181 of the appeal) that the General Court made a number of errors of law in connection with its examination, in paragraphs 234 to 244 of the judgment under appeal, of the costs of marketing staff. They claim that the General Court applied the 'equally efficient competitor' test incorrectly by failing to take into account the possibility that an equally efficient competitor might subcontract its marketing services. This argument is inadmissible in that it extends the scope of the appeal beyond the issues raised at first instance by introducing new claims and invites the Court to conduct a re-examination of the facts.

— In paragraph 183 of the appeal, the appellants would appear to be criticising paragraph 244 of the judgment under appeal, in so far as the General Court erred by disregarding the cost estimates given in the appellants' scorecards, failing to exercise its powers of unlimited jurisdiction, adopting the method of long-run average incremental costs (LRAIC) and using the fully allocated current costs in its accounts to assess marginal marketing costs. These arguments must also be rejected in that they invite the Court to review factual assessments contained in paragraphs 237 to 244 of the judgment under appeal.

— The appellants' arguments concerning the examination of the average customer lifetime and relating to paragraphs 245 to 251 of the judgment under appeal are inadmissible in that they are based on new claims.

— By apparently criticising (in paragraph 188 of the appeal) paragraphs 256 and 257 of the judgment under appeal, in which the General Court allegedly erred by rejecting the weighted average cost of capital (WACC) that they were proposing, and paragraphs 259 to 264 of the judgment under appeal, in which the General Court erred in law when examining the alleged 'double counting' of a number of cost items, the appellants are calling into question the General Court's assessment of the evidence (which based its conclusions on a global examination of the evidence in the case file and on the debate between the parties).

— The appellants also claim (paragraph 218 of the appeal) that the General Court ought to have found that the margin between the wholesale and retail price of inputs was positive in this case, which should to have led it to require a demonstration of the actual effects or a particularly high degree of proof as to the likely effects of the applicants' conduct. This argument — which appears for the first time in the appeal — is inadmissible.

20. The appellants then put forward three arguments (paragraphs 220, 227 and 231 of the appeal) which would appear to relate to paragraphs 274 to 276 of the judgment under appeal, alleging that the General Court was incorrect to find that the likely effects of the appellants' conduct had been established, whereas: (a) the Commission ought to have examined whether the profitability of alternative operators as efficient as the appellants had actually been lowered as a result of the latter's pricing practices; (b) the Commission ought to have analysed the relationship between the wholesale and retail prices on the market in order to determine whether the margin squeeze had actually limited the ability of alternative operators to set retail prices, and (c) the Commission ought to have examined the relationship between wholesale prices, the cash flows of operators and their level of

investment in order to determine whether the margin squeeze had actually limited the investment potential of alternative operators. In my view, these three arguments are inadmissible since they were not raised at first instance and seek to open a debate in the appeal on the 'actual effects' of the appellants' conduct. The application at first instance merely raised the issue of 'likely effects' in paragraphs 191 to 199, taking issue with the contested decision for having assumed that such effects were the inevitable consequence of the outcome of the margin squeeze test. Moreover, those arguments also seek to dispute the General Court's assessment of the facts in paragraphs 275 and 276 of the judgment under appeal.

21. It follows from the foregoing that the second, third, fourth and fifth grounds of appeal should be declared inadmissible.

2. Grounds of appeal which should be dismissed in that they are partially inadmissible and partially unfounded: first, sixth, seventh and ninth grounds of appeal

a) First and ninth grounds of appeal

22. These two grounds of appeal overlap to the extent that, in setting out their ninth ground of appeal, the appellants reproduce in exactly the same terms some of the arguments set forth in their first ground of appeal. It is therefore appropriate to examine these two grounds of appeal together. First, the appellants' arguments (paragraph 12 of the appeal) concern the disproportionate duration of the proceedings before the General Court, extending from 1 October 2007 to 29 March 2012, which infringes their fundamental right to effective judicial protection within a reasonable time enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the 'ECHR'). The appellants contend, as their principal claim (paragraph 14 of the appeal), that the disproportionate duration of the proceedings justifies the setting aside of the judgment under appeal in view of its effect on the outcome of the dispute, since it prevented them from entering an appeal or altering their written submissions prior to the Court's ruling in *TeliaSonera Sverige*. Irrespective of the fact that I do not share the appellants' view regarding that cause and effect relationship, I would point out that in any event they expressly made known their views on the interpretation to be given to the *TeliaSonera Sverige* judgment at the hearing before the General Court, which took place several months after that judgment was handed down.

23. Next, the appellants claim, in the alternative (paragraph 15 of the appeal), that they should in any event be granted a reduction in the amount of the fine in accordance with the case-law established in *Baustahlgewebe* v *Commission*.[13]

24. In common with the Commission, ECTA, France Telecom and Ausbanc, I consider that the duration of the proceedings before the General Court, which lasted for a little under 4 years and 6 months, is not unreasonable in this case[14] having regard, inter alia, to the following circumstances: (i) the technical complexity of the case file (in the words of the Court,[15] 'the complexity of the case may be deemed to justify a duration which is prima facie too long'); (ii) two actions were brought against the contested decision, one by the appellants and the other by the Kingdom of Spain, which were

13 — Case C-185/95 P [1998] ECR I-8417, paragraph 141.

14 — I note that questions of principle relating to the problem of the duration of proceedings before the General Court will again be the subject of a decision by the Grand Chamber of this Court in Case C-50/12 *Kendrion* v *Commission* (Advocate General Sharpston having delivered her Opinion on 30 May 2013), questions relating, inter alia, to the scope of the Court's judgment in *Baustahlgewebe* v *Commission* (in which the Court reduced the fine in the light of the excessive duration of the proceedings before the General Court) in the light of the judgment in Case C-385/07 P *Der GrünePunkt-Duales System Deutchland* v *Commission* [2009] ECR I-6155 (in which no fine was imposed and the Court indicated to the applicant that it could bring an action for damages before the General Court).

15 — Joined Cases C-403/04 P and C-405/04 P *Sumitomo Metal Industries and Nippon Steel* v *Commission*, [2007] ECR I-729, paragraphs 116 and 117 and the case-law cited.

examined in parallel by the General Court, causing the proceedings to be lengthier; (iii) the appellants lodged at first instance an excessively lengthy and highly unusual application, which considerably exceeded the maximum number of pages recommended in the Practice Directions to parties before the General Court; that application had to be regularised, which lengthened the written procedure, and, even so, the version of the application in proper form, which extended to almost 140 pages, plus numerous voluminous annexes, was still inordinately long and well in excess of the length advocated in the Practice Directions; subsequently, the appellants submitted a 112-page reply, accompanied by 25 annexes, in which they also made new claims; (iv) several parties applied for leave to intervene during the course of the proceedings, so that the written procedure continued until early 2009; and (v) the appellants finally submitted numerous requests for confidentiality vis-à-vis the intervening parties, which were for the most part rejected, but which also further prolonged the proceedings by requiring the General Court to produce expurgated versions of various documents.

25. Second, in paragraph 19 of the appeal, the appellants criticise paragraphs 62 and 63 of the judgment under appeal, in which the General Court decided that the annexes to the application and the reply would be taken into consideration only in so far as they supported or supplemented pleas in law or arguments expressly set out in the body of their written pleadings, as well as paragraphs 231, 250 and 262 of the judgment under appeal, in which the Court dismissed as inadmissible, in accordance with the principle referred to above, certain arguments supported by annexes relating to the calculation of the terminal value, average customer lifetime and the double counting of a number of cost items.

26. Taken as a whole, these arguments appear to me to be manifestly inadmissible, since they fail to indicate precisely in what way the alleged irregularity of the proceedings harmed the appellants' interests or rights of defence. Moreover, first, the argument that the General Court ought to have dismissed the objection of inadmissibility as the Commission raised it only in its rejoinder and not in its defence is without foundation, given that the formal regularity of pleadings is a matter of public policy which a court can raise of its own motion, whatever the approach adopted by the defendant, who may, by the same token, raise it at any time in the procedure. Second, the argument whereby the appellants criticise paragraph 62 of the judgment under appeal — on the basis that the General Court cannot require them to include in their application all the economic calculations on which their arguments were based — is also unfounded. In line with case-law, the General Court merely required, in paragraph 58 of the judgment under appeal, that the 'essential matters' of fact and of law should be stated 'at least in summary form, coherently and intelligibly in the application itself'.

27. Third, in paragraph 24 of the appeal, the appellants criticise paragraph 182 of the judgment under appeal, in so far as they claim that the General Court distorted the facts and infringed their rights of defence by holding that they had not relied on the non-essential nature of wholesale products when assessing the effects of their conduct. They maintain, as their principal argument that they relied on the non-essential nature of such products in their application at first instance (paragraphs 106 and 108), in their reply (paragraph 216) and at the hearing, both in the plea regarding the applicability of Article 102 TFEU in general and in relation to the assessment of the effects of their conduct. According to the appellants, the arguments relating to the non-essential nature of wholesale products constitute an amplification of a plea seeking annulment already set out in the application. Like the Commission and France Telecom, I find that argument ineffective. It is sufficient to observe that the General Court's line of reasoning, in particular in paragraphs 268 to 272, 274 to 281 and 389 to 410 of the judgment under appeal, is not based on whether or not the input at issue is indispensable.

28. In the alternative, the appellants contend (paragraph 28 of the appeal) that in any event Article 48(2) of the Rules of Procedure of the General Court confers on them a right to introduce a new plea in law based on matters of law or of fact which come to light in the course of the proceedings, namely, in the present, case the judgment in *TeliaSonera Sverige*, since the Court clarified in that judgment the criteria applicable to an assessment of the effects of a margin squeeze. According to consistent case-law, which may be applied *mutatis mutandis* to a preliminary ruling, a

judgment which dismisses an action does not justify the introduction of new pleas in law.[16]

29. Fourth, the appellants take the view (paragraph 33 of the appeal) that the General Court infringed their rights of defence and presumption of innocence. They maintain, as their principal argument, that the General Court infringed the presumption of innocence by deciding that the evidence on which the Commission relied in the contested decision, but which was not referred to in the statement of objections, should be disregarded only if the appellants could show that the outcome of the contested decision would have been affected. According to the appellants, the evidential test used by the General Court is at odds with the case-law of the European Court of Human Rights ('ECtHR').

30. In my opinion, this argument must be declared inadmissible since, first, it fails to indicate in a sufficiently precise manner the passages of the judgment under appeal which allegedly contain the error in law and, second, paragraphs 86 to 109 of the judgment under appeal, which examine this issue in detail, make findings of fact from which no appeal lies. I would add that paragraph 78 of the judgment under appeal appears to be merely an obiter dictum in relation to reasoning based on other key considerations set out in paragraph 79 et seq., which are not contested by the appellants. Lastly, that argument is lacking in any foundation, since the criterion applied by the General Court in the judgment under appeal derives from the consistent case-law of the Court of Justice,[17] which is perfectly in line with that of the ECtHR. Failure to disclose a document constitutes a breach of rights of defence only where the Commission has relied on that document in support of its complaint and that complaint can only be substantiated by that document.[18] Where several items of evidence specifically support a claim or a complaint, the absence of one of those items is not sufficient to disallow the claim or complaint if it is corroborated by other items. Furthermore, the Commission did not rely on any new evidence in order to establish the liability of the appellants, as evidenced by paragraphs 103 and 107 of the judgment under appeal.

31. In the alternative, the appellants maintain (paragraph 36 of the appeal) that they have demonstrated that the outcome of the contested decision could have been different if the new evidence had been disallowed. They claim that, by disregarding those arguments, the General Court distorted the facts, committed a manifest error of assessment and erred in law in so far as concerns of the criteria for assessing the evidence and, in addition, infringed the obligation to provide reasons. This complaint appears to me to be inadmissible in so far as it relies on terse, general and unfounded assertions, since the General Court did in fact examine, in paragraphs 88 to 109 of the judgment under appeal, the claim that some of the evidence was new and the effects of the alleged lack of access to that evidence. Furthermore, I share France Telecom's view that the evidence to which the appellants refer was included in the decision only for the purpose of rebutting the arguments relied upon by the latter in their response to the statement of objections, and that the General Court considered that the Commission had not relied on the documents in question in order to support its objection relating to the existence of an infringement (see paragraph 103 of the judgment under appeal).

32. In the light of the foregoing considerations, the first and ninth grounds of appeal are partly inadmissible and partly unfounded and should therefore be rejected.

16 — A judgment of the Court confirming the validity of an act of the EU institutions cannot be regarded as a fact justifying the raising of a fresh issue, since it merely confirms a legal situation which was known to the applicants when the action was commenced (see Case 11/81 *Dürbeck* v *Commission* [1982] ECR 1251, paragraph 17).

17 — See 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, paragraphs 71 to 73 and the case-law cited, 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 104.

18 — The Commission explained in its statements before the General Court (paragraph 15 of the defence) that Telefónica's allegations were manifestly irrelevant, since all the matters on which Telefónica claimed it had been unable to express its opinion were unnecessarily elaborate statements of reason.

b) The sixth ground of appeal

33. In the first part of this ground of appeal, the appellants claim (paragraph 242 of the appeal) that the General Court made several errors of law when examining, in paragraphs 287 to 295 of the judgment under appeal, the alleged infringement of the prohibition of *ultra vires* action on the part of the Commission. In the first place, they claim that the General Court endorsed a misinterpretation of the case-law established in *Bronner*[19] by taking the view that the Commission has the power to regulate *ex post* the tariffs to which the use of non-essential infrastructure is subject. As France Telecom and ECTA correctly observed, that line of argument is manifestly unfounded, since it is tantamount to claiming that Article 102 TFEU should not apply where the conditions laid down in *Bronner* are not satisfied.

34. Second, the appellants would appear to take issue (paragraph 249 of the appeal) with paragraph 289 of the judgment under appeal, on the basis that the General Court distorted their claims, since they did not claim that competition law did not apply to 'instrumental' markets but rather that it did not apply to an obligation to provide access imposed by the national regulator. It is clear that the appellants have failed to identify the parts of their pleadings that were distorted or the errors of assessment which led the General Court to distort them. Furthermore, the appellants did in fact claim at first instance that competition law could not apply to 'instrumental' markets (paragraph 241 of the reply). In any event, that objection is irrelevant since the appellants do not dispute the fact that the General Court's response was correct in law.

35. Third, in paragraph 251 of their appeal the appellants would appear to criticise paragraph 290 of the judgment under appeal, in so far as the General Court did not call into question the use of the 'ladder of investments' concept which, by virtue of its 'regulatory' nature, led the Commission to disregard the possibility of using a combination of products. This complaint seems to me to be clearly inadmissible since it does not relate to any error of law and does not call into question any of the observations made by the General Court in paragraph 290 of the judgment under appeal.

36. Fourth, in paragraph 253 of the appeal the appellants would appear to take issue with paragraph 293 of the judgment under appeal on the basis that the General Court distorted their claims, since they did not dispute the application of Article 102 to the telecommunications market but criticised its use by the Commission for regulatory purposes. This argument is inadmissible because the appellants have failed to identify the parts of their pleadings that were distorted or the errors of assessment which led the General Court to distort them. In any event, I consider that the Court did not distort the appellants' claims that there was no abuse of a dominant position because telecommunications law pursues different aims from those of competition law.

37. Fifth, in paragraph 254 of the appeal the appellants would appear to take issue with paragraph 294 of the judgment under appeal in so far as the General Court distorted the facts by finding that only the measures adopted in 2006 were notified to the Commission whereas, first, the Kingdom of Spain had incorporated the new regulatory framework in 2003 by means of the Framework Telecommunications Law No 32/2003 of 3 November 2003 and, second, the Commission monitored the situation by means of the implementation reports which it has been publishing since 1997. As the Commission, ECTA, and France Telecom correctly stated, the General Court did not distort any fact because no measure was notified to the Commission prior to 2006, a fact which the appellants do not dispute. The fact that the Spanish authorities had already acted in accordance with EU law before 2006 is, in principle, irrelevant, since the appellants' argument amounted to a contention that the Commission ought to

19 — Case C-7/97 [1998] ECR I-7791.

have used its powers under the new regulatory framework (paragraph 291 of the judgment under appeal) but the General Court held (paragraph 294 of the judgment under appeal) that they could not be used prior to the notification of the measures in 2006 (paragraph 294 of the judgment under appeal).

38. In the second part of this ground of appeal the appellants claim (paragraph 255 of the appeal) that the General Court made a number of errors of law in the course of its analysis in paragraphs 296 to 308 of the judgment under appeal. First, in paragraph 259 of the appeal, they would appear to criticise paragraph 306 of the judgment under appeal, claiming that the General Court infringed the principle of proportionality by failing to examine whether the contested decision was appropriate and necessary in view of the legitimate objectives also pursued by the national regulatory authority, the Comisión del Mercado de las Telecommunicaciones (Spanish Commission for the Telecommunications Markets) ('the CMT'). They also claim an infringement of the rights of the defence on the ground that the General Court required them to demonstrate that the Commission's action was contrary to the principle of proportionality, whereas it was for the Commission to demonstrate that its action complied with that principle. I share the view of the Commission and ECTA that this argument is inadmissible because it was not relied upon before the General Court.

39. Second, in paragraph 261 of the appeal, the appellants would appear to criticise paragraph 306 of the judgment under appeal, claiming that the General Court infringed the principle of legal certainty by accepting that conduct that complied with the regulatory framework may constitute an infringement of Article 102 TFEU. That argument is also inadmissible in that the appellants merely argued before the General Court infringement of the principle of legal certainty deriving from the fact that the Commission had not examined the action taken by the CMT.

40. Third, in paragraph 264 of the appeal the appellants criticise paragraphs 299 to 304 of the judgment under appeal, claiming that the General Court manifestly distorted their claims concerning the principle of subsidiarity and disregarded the fact that the objectives pursued by competition law and by the regulatory framework for telecommunications were the same. That argument appears to me to be inadmissible because the appellants have not identified the claims which the General Court allegedly distorted.

41. In the third part of this ground of appeal, the appellants criticise (paragraph 267 of the appeal) the General Court's analysis of the alleged infringement by the Commission of the principles of sincere cooperation and sound administration. More specifically, they refer to paragraphs 313 and 314 of the judgment under appeal, maintaining that the General Court distorted their claims in that they criticised the Commission not for failing to consult the CMT regarding the statement of objections, but rather for failing to act on the basis of all the factual evidence needed to form an opinion and for failing to cooperate in an appropriate manner with the CMT regarding the bases and reasons for its action and its impact on the attainment of the regulatory objectives. In so doing, the General Court erred by failing to assess whether, in accordance with its duty of cooperation and sound administration, the Commission had examined the reasons and discussed with the CMT the purpose of its action and its method of calculating the margin squeeze (the test applied by the CMT). That argument seems to me to be manifestly inadmissible in that the appellants have not identified the evidence that was distorted or the errors of assessment made. Furthermore, the argument is quite clearly without foundation since the General Court found, and the appellants have not disputed, first, that the CMT had actually been involved in the administrative procedure and, second, that the relevant provisions of Regulation No 1/2003 did not lay down any obligation requiring the Commission to consult the national regulatory authorities.

42. It appears to me, in the light of all the above considerations, that the sixth ground of appeal is either inadmissible or unfounded and should therefore be rejected.

c) Seventh ground of appeal

i) First part of the seventh ground of appeal

43. The appellants contend (paragraph 274 of the appeal) that, when examining the characterisation of the infringement as 'clear-cut abuse' in paragraphs 353 to 369 of the judgment under appeal, the General Court infringed the principle of legal certainty and the principle that penalties must be specific to the offender and the offence, enshrined in Article 7 ECHR and Article 49 of the Charter. They contend that, in accordance with *Dansk Rørindustri and Others* v *Commission*,[20] such principles may preclude the retroactive application of a new judicial interpretation of a rule establishing an offence, the result of which was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time.

44. In their first complaint (paragraph 281 of the appeal), entitled 'Existence of clear and foreseeable precedents', the appellants merely summarise paragraphs 357 to 368 of the judgment under appeal. In their second complaint (paragraph 284 of the appeal), they criticise paragraph 357 of the judgment under appeal in so far as the General Court deferred to the Commission's discretion as to the need to impose a fine, thereby infringing its obligation to exercise its powers of unlimited jurisdiction laid down in Article 6 ECHR and Article 229 EC (now Article 261 TFEU), as well as the principle that penalties must be strictly defined by law and the principle of legal certainty established in Article 7 ECHR. In their third complaint (paragraph 286 of the appeal), the appellants would appear to criticise paragraphs 356 to 362 of the judgment under appeal, claiming that the General Court was wrong to conclude that the application of Article 102 TFEU to their conduct was based on clear and foreseeable precedents. In their fourth complaint (paragraph 302 of the appeal), the appellants would appear to criticise paragraphs 363 to 369 of the judgment under appeal, claiming that the General Court erred by concluding that the methodology used by the Commission to determine the existence of a margin squeeze was reasonably based on clear and foreseeable precedents.

45. The whole of the first part of the seventh ground of appeal seems to me to be inadmissible in so far as the appellants did not raise the issue of the existence or otherwise of clear precedents at first instance for the purpose of disputing the principle of whether a fine should be imposed, but raised it merely in connection with the amount of the fine and the existence of 'clear-cut abuse'.

ii) Second part of the seventh ground of appeal

46. In paragraph 310 of their appeal, the appellants claim that the General Court made several errors of law when examining, in paragraphs 319 to 352 of the judgment under appeal, whether their conduct should be characterised as an 'infringement committed intentionally or as a result of serious negligence' for the purposes of Article 23(2) of Regulation No 1/2003.

– First complaint

47. The first argument: the appellants would appear to criticise paragraphs 322 to 326 of the judgment under appeal, claiming that the General Court erred in its assessment that they were able to foresee the market definition adopted by the Commission in the contested decision. It is sufficient to note, along with the Commission, that the General Court applied the classic market definition criteria based on

20 — Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P [2005] ECR I-5425.

substitutability, which cannot be regarded as 'unforeseeable'. Furthermore, the allegedly unforeseeability of the distinction between the regional and national wholesale markets is irrelevant since those markets were both affected by a dominant position and a margin squeeze applied by the appellants.

48. More specifically, in paragraph 317 of the appeal the appellants would appear to take issue with paragraph 323 of the judgment under appeal, claiming that the General Court disregarded the case-law of the ECtHR concerning foreseeability, by stating that the appellants ought to have taken appropriate legal advice, without checking whether they had actually done so and assuming that that legal advice would have chimed with the approach taken by the Commission. It is clear that case-law has never attached any importance whatever to whether or not an undertaking has sought legal advice; if it did so, that would imply that undertakings go unpunished if they do not seek legal advice.

49. Next, in paragraph 319 of the appeal the appellants would appear to criticise paragraph 326 of the judgment under appeal, claiming that the General Court failed to apply the relevant legal criterion relating to the foreseeability of the market definition and, as a result, the criterion regarding the foreseeability of the consequences of their conduct, by failing to take account of the context and of certain circumstances referred to by the appellants, such as the fact that the available precedents defined a single market, the fact that certain operators used a combination of inputs, the fact that the national and/or regional wholesale markets did not exist in other Member States, the fact that Directive 2002/21/EC[21] defined a single market covering national and regional infrastructure, or the fact that the CMT itself had confirmed that position in its decision of 6 April 2006. These claims seem to me to be inadmissible because, although the various circumstances set out above are alluded to in the appeal, they were not mentioned at first instance for the purpose of rebutting the argument that the consequences of the appellants' conduct were foreseeable (either in paragraphs 297 to 301 of the application or in paragraphs 271 to 275 of the reply at first instance).

50. Last, in paragraph 323 of the appeal, the appellants would appear to criticise paragraph 326 of the judgment under appeal, claiming that the General Court erred in its finding that they could not have been unaware of the fact that they held a dominant position on the relevant markets. That finding was based on the mistaken premiss that the appellants should reasonably have foreseen the market definition adopted by the Commission. Moreover, the appellants claim that the General Court applied an incorrect legal test by examining the merits rather than applying the foreseeability test. These claims are inadmissible since, at first instance, the appellants did not express any doubts as to the fact that their market shares could reasonably point to a dominant position, either in paragraphs 297 to 301 of the application or in paragraphs 272 to 275 of the reply.

51. The second argument: the appellants would appear to criticise paragraphs 338 to 341 of the judgment under appeal, claiming that the General Court erred in its finding that they could foresee that their pricing policy might constitute anti-competitive conduct.

52. First, in paragraph 330 of the appeal, they would appear to take issue with paragraphs 339 and 340 of the judgment under appeal, claiming that the General Court applied an incorrect legal test by conducting a substantive analysis in order to determine whether the Commission was entitled to act *ex post*, instead of examining the issue of foreseeability in order to determine whether such intervention could reasonably have been foreseen, even though the appellants were required to provide access and were subject to rigorous monitoring by the CMT. To my mind, it is absolutely clear and hence 'foreseeable' that the existence of regulations or of a degree of monitoring by the national sectoral authorities does not provide protection against the application of the Treaties (as noted in paragraph 340 of the judgment under appeal). Moreover, according to the judgment in *Deutsche Telekom* v *Commission*, (paragraphs 119, 124 and 127), sector-specific regulations may be relevant for

21 — Directive of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (OJ 2002 L 108, p. 33).

the purpose of determining whether an undertaking was aware of the unlawful nature of its conduct but not for establishing whether that conduct was intentional or negligent, since that requirement is satisfied where the undertaking could not have been unaware of the anti-competitive nature of its conduct, irrespective of whether it is aware that it is infringing the competition rules of the Treaty.

53. Next, the appellants would appear to criticise the first part of paragraph 341 of the judgment under appeal, relating to the regional wholesale product, in so far as the General Court allegedly distorted the facts by claiming that the appellants had not denied that the CMT had not examined the existence of a margin squeeze on the basis of the appellants' real historic costs but had done so on the basis of *ex ante* estimates. The appellants thus claim that they maintained in their application at first instance (paragraph 320) that the CMT had not wanted to use the appellants' real costs figures, preferring to instruct the consultancy firm ARCOME to draw up a model based on the cost of a 'reasonably efficient' hypothetical competitor, not on those of an 'equally efficient' competitor. The General Court therefore erred by disregarding the fact that the appellants were entitled to assume that the CMT analysis should have been more accurate than an analysis based on their own costs. Moreover, the General Court manifestly distorted the facts by failing to consider that the prices in question had been subject to an *ex post* review. I note that the appellants are not disputing the factual finding that the CMT did not examine a possible margin squeeze on the basis of real historic data. Furthermore, the claims that the CMT applied the 'reasonably efficient' competitor test are not only unsubstantiated, but also clearly inadmissible, since the appellants never raised them at first instance, even though recital 733 of the contested decision indicated that the CMT used the 'equally efficient' operator test. Next, those claims are in any event irrelevant and ineffective, given that, as indicated in paragraph 302 of the judgment under appeal, 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, so that the appellants could not expect the CMT review, which was based on *ex ante* estimates, to protect them from the *ex post* application of competition law, which is based on real, historic data. Lastly, the General Court did not fail to take into consideration the alleged *ex post* review; it simply found that the review did not alter its conclusion (paragraphs 303, 340, 347 and 348 of the judgment under appeal).

54. Finally, in paragraph 334 of the appeal, the appellants would appear to criticise the second part of paragraph 341 of the judgment under appeal, relating to the national wholesale product. They claim that the General Court distorted the facts by disregarding, on the one hand, their claims that their national infrastructures were part of a wider market including the local loop and, at the very least, regional access, which was subject to access rules applied *ex ante* by the CMT, and, on the other hand, their claim that they were subject to an *ex post* review by the CMT. It is sufficient to note in this connection that whether or not the CMT carried out a review is a question of fact and that the conclusions of the General Court are clear in this regard. In any event, the appellants' arguments are ineffective since the mere fact that the possibility of an *ex post* review exists cannot preclude the application of competition law.

– Second complaint

55. By this complaint (paragraph 338 of the appeal), the appellants would appear to criticise paragraphs 343 to 352 of the judgment under appeal, in so far as the General Court was incorrect in its finding that the lack of intervention by the Commission and the action taken by the CMT did not entitle them to a legitimate expectation that their pricing policies complied with Article 102 TFEU. These arguments appear to me to be inadmissible, given that they are merely criticisms of the assessment of the facts for which the General Court alone has jurisdiction.

56. I consider, in the light of the above, that the seventh ground of appeal must be rejected in its entirety because it is in part inadmissible and in part unfounded.

3. Eighth ground of appeal (calculation of the amount of the fine) and tenth ground of appeal (failure to have regard to the obligation to conduct a full review in connection with penalties)

57. I will examine first, with a view to suggesting that they be rejected, the second and third arguments of the first complaint and the second complaint of the first part of the eighth ground of appeal. I will then examine the first and fourth arguments of the first complaint and the other complaints in the eighth ground of appeal, in addition to the tenth ground of appeal, which, in one way or another, all concern the question whether the General Court exercised its powers of unlimited jurisdiction as regards the fixing of the amount of the fine.

i) First part of the eighth ground of appeal (second and third arguments of the first and second complaints)

58. By the second argument of the first complaint, in paragraph 371 of the appeal, the appellants would appear to criticise paragraph 384 of the judgment under appeal, alleging that the General Court was wrong to consider that they had a virtual monopoly, thereby disregarding certain essential market characteristics, such as the possibility of replicating wholesale products, the 'contestable' nature of the market, the strict regulation to which they were subject and the indirect pressure of competition. Since the only purpose of this argument is to call into question the findings of the facts made by the General Court, it is inadmissible.

59. Next, by the third argument of the first complaint, in paragraph 374 of the appeal, the appellants would appear to criticise paragraph 385 of the judgment under appeal, alleging that the General Court was wrong to consider that the method of calculating the margin squeeze was based on the Commission's practice in previous decisions, when that method included a number of new elements such as, inter alia, the presence of a non-essential input or a developing market.

60. The appellants repeat the claim that the penalty was not foreseeable because in their case the input ('Telefónica's local access network') was non-essential [22] and they refer repeatedly to *Bronner*, [23] to the fact that the precedents related solely to 'essential inputs' and to *Industrie des poudres sphériques* v *Commission*, [24] (in order to claim that it is difficult to give a clear answer to the question whether the price was to be regarded as excessive or predatory). In so far as concerns terms of *Bronner*, I consider that, in that case, the question whether or not the applicant was bound by an obligation to supply the product did not arise because that obligation already existed. Furthermore, it is clearly incorrect to state that all the precedents referred to essential inputs. For example, Telefónica omits to mention the National Carbonising decision relating to abuse consisting in what would nowadays be called a 'margin squeeze'. [25] In the *Napier Brown* case, [26] the Commission decided that a dominant position existed in the form of a margin squeeze, even though upstream product alternatives were available. In other words, the Commission did not require the input to be indispensable in that case. [27] Nor does the Commission Notice on the application of the competition rules to access agreements in the telecommunications sector, [28] which was already tackling this problem in 1998, require the existence of an essential input or excessive or predatory pricing. The question put to the General Court was in fact whether there were precedents that required the input to be essential rather than non-essential.

22 — Paragraphs 276, 289, 293, 295, 330, 336, 366, 371, 374 and 482 of the appeal.

23 — Paragraphs 276, 288, 289, 295 and 298 of the appeal.

24 — See paragraphs 295 and 482 of the appeal and Case T-5/97 *Industrie des poudres sphériques* v *Commission* [2000] ECR II-3755.

25 — Decision in which the Commission adopted interim measures and explained the conditions that must be satisfied in order for such conduct to be regarded as abuse (Commission Decision 76/1185/ECSC of 29 October 1975 adopting interim measures concerning the National Coal Board, National Smokeless Fuels Limited and the National Carbonizing Company Limited (OJ 1976 L 35, p. 6).

26 — See Commission Decision 88/518/EEC of 18 July 1988 relating to a proceeding under Article [102 TFEU] (Case No IV/30.178 Napier Brown — British Sugar) (OJ 1988 L 284, p. 41, recital 66).

27 — It may be noted, in accordance with *TeliaSonera Sverige* (paragraph 69), that it is when assessing the effects of the margin squeeze that the question whether the wholesale product is indispensable may be relevant. See also the Opinion of Advocate General Mazák in that case.

28 — OJ 1988 C 265, p. 2, points 117 to 119.

61. Furthermore, the argument put forward by the appellants at first instance (paragraph 341 of the appeal) to the effect that the 'non-essential' nature of the input was not evident in their case is ineffective since the Commission did not find that the input in question was 'essential', that characteristic not being a necessary element of the reasoning it applies in determining whether there is abuse. Regarding the judgment in *Industrie des poudres sphériques* v *Commission*, it suffices to point out that the appellants merely insist that their reading of the judgment is the correct one, without actually engaging in any discussion of the shared interpretation of it given by the Commission and the General Court.

62. As regards the appellants' argument concerning other new elements used by the Commission which the General Court disregarded, it is sufficient to note that it is inadmissible because, at first instance, it was raised only with a view to reducing the fine, not to contest the fact that the Commission was entitled to impose it. Furthermore, with specific regard to the argument relating to developing markets, the *Wanadoo Interactive*[29] and *Deutsche Telekom* decisions also concerned fast-growing markets and so it was clear that that fact was not sufficient in itself to preclude the existence of abuse.

63. Lastly, by their second complaint, the appellants would appear to criticise paragraphs 377 to 407 of the judgment under appeal, in so far as they claim that the General Court made a number of errors of law when assessing the actual effects of the abuse at issue and more specifically (or so it would appear): (i) paragraphs 394 to 398 of the judgment under appeal, in so far as the General Court erred in law when assessing the increase in their share of the retail market (paragraph 380 of the appeal); (ii) paragraph 399 of the judgment under appeal, in so far as the General Court distorted the facts because the Commission itself had recognised in the contested decision that two operators had obtained a market share of more than 1% (Wanadoo España and Ya.com) (paragraph 385 of the appeal); (iii) paragraph 401 of the judgment under appeal, in so far as the General Court was incorrect in its finding that the higher growth rate achieved by the appellants on the wholesale market was an indicator of actual exclusionary effects vis-à-vis their competitors (paragraph 390 of the appeal); (iv) paragraph 407 of the judgment under appeal, in so far as the General Court was incorrect to conclude that the Commission was perfectly entitled to take the view that the high level of the retail price in Spain was credible evidence of the actual impact of their conduct on the Spanish market, when the Commission had failed to establish a causal link between the abuse at issue and the high level of retail prices (paragraph 393 of the appeal); and (v) paragraph 409 of the judgment under appeal, in so far as the General Court was wrong to conclude that the Commission was entitled to consider that the low broadband penetration rate in Spain was credible evidence of the actual impact of their conduct on the Spanish market, disregarding other factors invoked by the appellants which explained that low rate (paragraph 399 of the appeal).

64. I consider that the objection of inadmissibility raised against this second complaint in its entirety by the Commission and France Telecom must be upheld. This complaint is based on claims not made at first instance and calls on the Court to re-examine the facts. In any event, the General Court has applied the correct test, namely the presence of 'specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition' (paragraph 390 of the judgment under appeal), and the appellants merely question whether that evidence was adequate, without claiming any distortion.

29 — Commission Decision of 16 July 2003 relating to a proceeding under Article [102 TFEU] (Case COMP/38.233 — Wanadoo Interactive, 'the Wanadoo Interactive decision'). See, in this connection, Case C-202/07 P *France Telecom* v *Commission* [2009] ECR I-2369 and the Opinion of Advocate General Mazák in that case. However, as the latter pointed out in his Opinion (point 57) in *TeliaSonera Sverige*, 'while dynamic or fast-growing markets are not exempted from the application of Article 102 TFEU the fact remains that, wherever justified, the Commission … should intervene in such markets with particular caution, modifying if necessary [its] standard approach as was done successfully in *Wanadoo* [*Interactive*]'.

ii) First and fourth arguments of the first complaint, third and fourth complaints of the first part and the remainder of the eighth and the tenth grounds of appeal

65. I shall set out the arguments of the parties before providing an overview in order to pinpoint the essential issue being put before the Court in this appeal.

– Arguments of the parties

66. By the first argument of the first complaint (paragraph 362 of the appeal) the appellants would appear to criticise paragraphs 382 to 387 of the judgment under appeal, in so far as the General Court erred in law in classifying the nature of the infringement in the light of the 1998 Guidelines on the method of setting fines. It took the view, inter alia, that a finding that there was no infringement of the principle of legal certainty implied of necessity that the abuse should be 'clear-cut'. According to the appellants, their reasoning regarding the principle of legal certainty was directed at showing that they were not able to foresee that their conduct was unlawful, whereas their reasoning relating to clear-cut abuse was directed at establishing that no clear-cut abuse existed within the meaning of the 1998 Guidelines. The appellants add that they were reasonably entitled to believe that their conduct was not abusive.

67. The Commission maintains, in essence, that the General Court addressed the issue of whether 'clear-cut' abuse existed by giving a very detailed reply, in paragraphs 353 to 369 of the judgment under appeal, to each of the arguments raised at first instance, and concluded that the precedents were sufficiently clear.

68. By the fourth argument of the first complaint, the appellants (paragraph 375 of the appeal) criticise, inter alia, paragraph 386 of the judgment under appeal, in so far as the General Court was wrong to refuse to classify the infringement as 'serious', rather than 'very serious', in respect of the period prior to the publication of the Deutsche Telekom decision.

69. The Commission contends that the judgment under appeal should be taken as a whole and that the General Court concluded that the infringement was 'very serious' independently of the Deutsche Telekom decision.

70. In a third complaint (paragraph 409 of the appeal), the appellants would appear to take issue with paragraphs 412 and 413 of the judgment under appeal, in so far as the General Court infringed the principle of non-discrimination by finding that the Commission's practice in previous decisions could not serve as a legal framework for the imposition of fines in competition matters, even where there exist very similar precedents such as, in terms of the issues raised, the Wanadoo Interactive and Deutsche Telekom decisions.

71. The Commission contends that this complaint does not disclose any error of law, given that no rule of law prevents an infringement whose scope is limited to a single Member State from being classified as 'very serious'. It also refers to paragraph 413 of the judgment under appeal, where the General Court drew attention to significant differences vis-à-vis the earlier cases, which were never disputed by the appellants.

72. By their fourth complaint, the appellants (paragraph 414 of the appeal) would appear to criticise paragraphs 415 to 420 of the judgment under appeal, in so far as the General Court failed to take account of the variable degree of the gravity of the infringement during the infringement period.

73. In essence, the Commission maintains that it accepted, in recitals 750 and 760 of the contested decision, that the infringement had been 'less serious' during certain periods, which demonstrates that the variable degree of gravity of the infringement was taken into account when setting the amount of the fine. The Commission also states that breaking the infringement down into two periods is inappropriate since the General Court regarded the infringement as very serious during both periods.

74. In the second part of their eighth ground of appeal, the appellants claim infringement of the principles of proportionality and equal treatment and the principle that penalties must be specific to the offender and the offence. In their first complaint (paragraph 424 of the appeal) the appellants would appear to criticise paragraphs 424 to 427 of the judgment under appeal, in so far as the General Court decided, contrary to the principle of non-discrimination, that the Commission's practice in previous decisions did not serve as a legal framework for the imposition of fines in competition matters.

75. The Commission points out that it demonstrated at first instance the differences between the present case and the cases cited by the appellants and adds that it is empowered to increase the level of fines, particularly where the previous level did not have a deterrent effect. Thus, the fact that the basic amount was much higher than that imposed in the Wanadoo Interactive and Deutsche Telekom decisions is irrelevant for the purpose of assessing the legality of the basic amount in the present case.

76. By their second complaint (paragraph 428 of the appeal), the appellants would appear to take issue with paragraphs 428 to 432 of the judgment under appeal, claiming that the General Court, without exercising its powers of unlimited jurisdiction order to verify whether the penalty was proportionate, and hence acting in breach of the principle of proportionality, merely took refuge in the Commission's margin of discretion in setting the amount of fines.

77. The Commission points out, in essence, that the General Court not only referred to the Commission's margin of discretion but actually verified, in paragraph 432 of the judgment under appeal, whether the fine was disproportionate.

78. By their third complaint, the appellants (paragraph 432 of the appeal) would appear to criticise paragraph 433 of the judgment under appeal, in so far as the General Court failed to exercise its powers of unlimited jurisdiction in order to ascertain whether the principle that the fine should have a deterrent effect had taken undue precedence over the principle that the penalty must be specific to the offender and the offence.

79. The Commission claims that it fails to see the error of law claimed by the appellants. It states, first, that there is no legal principle which states that the 'individual effect' should take precedence over the 'general deterrent effect' and, second, that the contested decision explained in great detail why the fine was tailored to the particular circumstances of the case.

80. Lastly, by their fourth complaint, the appellants (paragraph 435 of the appeal) would appear to criticise paragraphs 434 and 435 of the judgment under appeal, in so far as the General Court breached its obligation to state reasons by finding that the Commission was not required to explain in particular detail the reasons for its decision to impose a considerably higher fine than those imposed in the Wanadoo Interactive and Deutsche Telekom cases.

81. The Commission contends, in essence, that, to the extent that the appellants complain that the General Court checked that the information 'figured' in the contested decision, the fourth complaint does not reveal any error of law in that, as far as stating reasons is concerned, it is necessary to ascertain whether the Commission provided adequate grounds, not whether it produced evidence to substantiate its grounds.

82. In the third part of their eighth ground of appeal, the appellants claim (paragraphs 439 and 440 of the appeal) that the General Court erred in law when examining, in paragraphs 437 to 443 of the judgment under appeal, the increase in the basic amount of the fine for the purpose of deference.

83. The Commission and France Telecom point out, first, that paragraphs 437 to 443 of the judgment under appeal clearly rebut the arguments put forward by the appellants. Next, the Commission states that the EU judicature has confirmed the legality of the practice of increasing the fine imposed on large undertakings, as in *Showa Denko* v *Commission* and *Lafarge* v *Commission*.[30] Lastly, the Commission adds that the 25% increase is well below the increase traditionally applied by the Commission.

84. In the fourth part of their eighth ground of appeal, which is formally incorporated in the third part in the appeal, the appellants claim in essence (paragraph 445 of the appeal) that the General Court erred in law when, in paragraphs 444 to 452 of the judgment under appeal, it classified their conduct as an infringement 'of long duration'.

85. As regards the end of the infringement, the Commission states that the file supplied by the appellants contains no information regarding any price adjustments between June and December 2006.

86. In the fifth part of their eighth ground of appeal, which is formally incorporated in the third part in the appeal, the appellants claim in essence (paragraph 453 of the appeal) that the General Court erred in law when examining (in paragraphs 453 to 461 of the judgment under appeal) the reduction of the fine in the light of attenuating circumstances.

87. With regard to negligence, the Commission claims that the General Court assessed that aspect carefully in paragraph 458 of the judgment under appeal, which should be read in the light of the judgment as a whole. As to novelty, the Commission considers that the General Court was entitled, in paragraph 461 of the judgment under appeal, to refer to paragraphs 356 to 368 of that judgment since it had already assessed the seriousness of the infringement in those paragraphs and, where there is an attenuating circumstance, that also forms part of its assessment of the seriousness.

88. In their tenth ground of appeal, the appellants claim (paragraph 474 of the appeal) that the General Court infringed Article 229 EC (now Article 261 TFEU) by failing to regard its duty to exercise its powers of unlimited jurisdiction in regard to penalties.

89. The Commission contends that each of the claims made in the tenth ground of appeal has been rebutted in detail in its replies to the other grounds.

– Analysis

90. As can be gathered from reading the arguments of the parties, the first complaint (in its first and fourth arguments) and the third and fourth complaints of the first part of the eighth ground of appeal, the first, second, third and fourth complaints of the second part of the eighth ground of appeal, in addition to its third, fourth and fifth parts, and, lastly, the tenth ground of appeal, overlap to a large extent. All the appellants' arguments relating to calculation of the fine concern, in essence, the exercise by the General Court of its powers of unlimited jurisdiction, its observance of the principles of proportionality and non-discrimination and the principle that the penalty must be specific to the offender and the offence. I shall therefore examine now the question whether, in the judgment under appeal, the General Court actually exercised its powers of unlimited jurisdiction as it is required to do or whether it simply took refuge in invoking the Commission's margin of discretion.

30 — Case C-289/04 P [2006] ECR I-5859 and Case C-413/08 P [2010] ECR I-5361, respectively.

α) Part one: Rights and obligations of the Commission

91. Although, within an individual Commission decision and for the purpose of observing the principles of non-discrimination and proportionality, case-law requires that the same method of calculation be used for all members of a cartel,[31] it is none the less true that the Court has repeatedly held that 'the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination.'[32]

92. Thus, 'the fact that the Commission has, in the past, imposed fines set at a specific level for certain categories of infringements cannot prevent it from setting fines at a higher level, if raising of penalties is deemed necessary in order to ensure the implementation of European Union competition policy, that policy continuing to be defined solely by Council Regulation (EC) No 1/2003'.[33] The General Court added[34] that '[t]he Commission cannot be compelled to set fines which display perfect coherence with those imposed in other cases'.

93. The Court has stated that 'the implementation of that policy requires that the Commission may adjust the level of fines to the needs of that policy',[35] particularly where the levels previously applied failed to have a dissuasive effect.

94. The Court has also held that 'the gravity of infringements has to be determined by reference to numerous factors, such as the particular circumstances of the case, its context and the dissuasive effect of fines, and no binding or exhaustive list of the criteria which must be applied has been drawn up'.[36]

95. It is also appropriate to refer to the case-law of the General Court, which has been called upon to adjudicate on these issues. The latter observed, correctly, in *Archer Daniels Midland* v *Commission*, that '[a]s regards … comparisons with other Commission decisions imposing fines, it follows that those decisions can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the *facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case*'[37] (my emphasis).

96. In *Tréfilunion* v *Commission* ('the Welded steel mesh cartel'),[38] the General Court correctly pointed out that '*although it is desirable for undertakings — in order to be able to define their position in full knowledge of the facts — to be able to determine in detail, in accordance with any system which the Commission might consider appropriate, the method of calculation of the fine imposed upon them, without being obliged, in order to do so, to bring court proceedings against the Commission decision —*

31 — See, inter alia, Case C-291/98 P *Sarrió* v *Commission ('the Cartonboard cartel')* [2000] ECR I-9991, paragraphs 91 to 101.

32 — Case C-549/10 P *Tomra Systems and Others* v *Commission* [2012] ECR, paragraph 104. See also Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 205, and 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, paragraph 233.

33 — See *Tomra Systems and Others*, paragraph 105, and, to the same effect, *Dansk Rørindustri and Others*, paragraph 227.

34 — See Case T-155/06 *Tomra Systems and Others* v *Commission* [2010] ECR II-4361, paragraph 314.

35 — See *Tomra Systems and Others* v *Commission*, paragraph 106 and, in the same vein, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission, 'the Pioneer case'* [1983] ECR 1825, paragraph 109.

36 — See *Tomra Systems and Others* v *Commission*, paragraph 107, and, in the same vein, Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33.

37 — See Case T-59/02 [2006] ECR II-3627, paragraph 316 and the case-law cited. That case-law was confirmed in Case T-360/09 *E.ON Ruhrgas and E.ON* v *Commission* [2012] ECR, paragraph 262. I would point out that the judgment in *Archer Daniels Midland* v *Commission* was set aside by the Court for reasons which have nothing to do with this point (Case C-511/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-5843).

38 — Case T-148/89 [1995] ECR II-1063, paragraph 142.

which would be contrary to the principle of good administration — in the present case, having regard to the case-law cited, the information contained in the Decision and the lack of cooperation on the part of the applicant …, the complaint concerning an inadequate statement of reasons cannot be upheld' (my emphasis).

97. Furthermore, as the General Court has rightly observed in its decisions 'whenever the Commission decides to impose fines in accordance with competition law, it is bound to comply with general principles of law, including the principles of equal treatment and proportionality, as interpreted by the Courts of the European Union'. [39]

98. To sum up the considerations set out above, I note that the Commission's obligation to state reasons, the importance of which has been confirmed once again in the recent decisions in *Chalkor* v *Commission and KME Germany and Others* v *Commission* ('the market for copper industrial plumbing tubes cartel') and in those of the ECtHR, [40] is the key issue for the purpose of determining compliance with the principles of non-discrimination and proportionality, where a comparison is made between the contested decision and earlier Commission decisions in so far as they impose a fine.

99. First, in *Sarrió* v *Comission*, [41] the Court held (in paragraph 73) that 'in the light of the case-law referred to in paragraphs 341 and 342 of the contested judgment [[42]], the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration. If those factors are not stated, the decision is vitiated by failure to state adequate reasons'.

100. Next, in paragraph 76 of that judgment, the Court added that '[a]dmittedly, the Commission cannot, by a mechanical recourse to arithmetical formulae alone, divest itself of its own power of assessment. However, it may in its decision give reasons going beyond the requirements set out in paragraph 73 of this judgment, inter alia by indicating the figures which, especially in regard to the desired deterrent effect, influenced the exercise of its discretion when setting the fines imposed on a number of undertakings which participated, in different degrees, in the infringement' (my emphasis).

101. Lastly, the Court held, in paragraph 77 of that judgment that, 'it may indeed be desirable for the Commission to make use of that possibility in order to enable undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them. More generally, such a course of action may serve to render the administrative act more transparent and *facilitate the exercise by the Court of First Instance of its unlimited jurisdiction, which enables it to review not only the legality of the contested decision but also the appropriateness of the fine imposed*. However, … the availability of that possibility is not such as to alter the scope of the requirements resulting from the duty to state reasons' (my emphasis).

39 — See, inter alia, *Archer Daniels Midland* v *Commission*, paragraph 315; Case T-138/07 *Schindler Holding and Others* v *Commission* [2011] ECR II-4819, paragraph 105; and Case T-352/09 *Novácke chemické závody* v *Commission* [2012] ECR, paragraph 44.

40 — Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-13125; Case C-272/09 *KME and Others* v *Commission* [2011] ECR I-12789; and Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085 (all three referred to as '*Chalkor and KME*'); and also *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011.

41 — I would add that this line of reasoning has been confirmed inter alia in Case C-199/99 P *Corus UK* v *Commission* [2003] ECR I-11177, paragraphs 149 and 150, and 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, paragraphs 463 and 464.

42 — Namely, the order in Case C-137/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 54, and the judgment in Case T-49/95 *Van Megem Sports* v *Commission* [1996] ECR II-1799, paragraph 51.

102. Although it is clear from this case-law that making known its method of calculating a fine is merely a 'desirable' option for the Commission, not *stricto sensu* forming part of its obligation to state reasons, which merely requires it to indicate the factors which enabled it to determine the gravity of the infringement and its duration, [43] it is questionable whether that implies that the Commission may keep silent as to the method of calculating the fine and fail to explain in detail the reasons for the increase in the fine imposed, which is drastic in terms of previous highly comparable precedents, especially in the light of the decisions in *Chalkor, KME* and *Menarini*, in so far as those decisions clarified the scope of General Court's duty to exercise its powers of unlimited jurisdiction.

103. I would point out that, in paragraph 60 of its judgment in *Chalkor* v *Commission* the Court stated, first, that '[the] Guidelines which, as the Court has held, form rules of practice from which the administration may not depart in an individual case without giving reasons compatible with the principle of equal treatment [44], *merely describe the method used by the Commission to examine infringements and the criteria that the Commission requires to be taken into account in setting the amount of a fine*'.

104. In this context, according to paragraph 61 of *Chalkor* v *Commission* (and according to paragraph 128 of *KME Germany and Others* v *Commission*), '*the obligation to state reasons for acts of the Union … is a particularly important obligation*. It is for the Commission to state the reasons for its decision and, in particular, to explain the weighting and assessment of the factors taken into account … The Courts must establish of their own motion that there is a statement of reasons' (my emphasis).

105. I would also point out that, according to the Court's case-law, [45] 'although a decision of the Commission which fits into a well-established line of decisions may be reasoned in a summary manner (for example by a reference to those decisions), the Commission must, if a decision goes appreciably further than the previous decisions, provide a fuller account of its reasoning' (my emphasis). Without those additional details, the exercise of unlimited jurisdiction would be much more difficult.

106. Lastly, I would observe that the Commission's reasoning appears much more transparent and detailed when it 'proposes' a fine or a periodic penalty payment (in the twofold infringement procedure under Article 260(2) TFEU) than when it 'decides' itself to impose a fine (in competition law proceedings). [46]

43 — It is worth noting, in this regard, that the 2006 Guidelines represent a step forward in that they indicate, inter alia, that the basic amount is to be set by reference to the value of sales. See the Commission Notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003' (OJ 2006 C 210, p. 2, points 12 to 26).

44 — Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91.

45 — See Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 155, which cites, inter alia, Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, paragraph 31, and Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraph 44. See also Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 15; Case C-228/99 *Silos* [2001] ECR I-8401, paragraph 28; and also, in the same vein, Case C-244/95 *Moskof* [1997] ECR I-6441, paragraph 54.

46 — Although the Commission has no problem with communicating its method of calculating penalties in two-fold infringement proceedings — whilst none the less retaining a margin of discretion in fixing the weighting applicable to each criterion — it is hard to justify its lack of transparency when calculating fines in connection with cartels (which would enable the General Court to exercise fully its powers of unlimited jurisdiction). See also De Bronett, G.-K., *Ein Vergleich zwischen Kartellgeldbußen gegen Unternehmen und „Pauschalbeträgen" gegen Mitgliedstaaten wegen Verstoß gegen EU-Recht*, ZWeR 2013, 38. Furthermore, the very existence of Commission Guidelines indicates that its margin of discretion is far from unlimited. In that regard, the approach followed in the United States seems to me to be the best, in that the sentencing guidelines make it possible to foresee the level of fines (and the duration of the prison sentence) with a fairly high degree of accuracy (see the Sentencing Reform Act 1984 and the US Sentencing Commission Guidelines Manual at www.ussu.gov, and also Whish, R., and Bailey, D., *Competition Law*, Oxford, 7th ed., 2012, p. 276.

β) Part two: Unlimited jurisdiction of the General Court

αα) The theory of unlimited jurisdiction

107. Since the Treaty of Rome, signed on 25 March 1957,[47] the Court of Justice has enjoyed special jurisdiction with regard to penalties, namely unlimited jurisdiction. This enables it, particularly in the field of competition law, not only to cancel or confirm a fine or its amount but also to increase or reduce it.

108. As the Court held in paragraph 130 of *KME Germany and Others* v *Commission*, '[t]he review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union were afforded by Article 17 of Regulation No 17 and which is now recognised by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, *in addition to carrying out a mere review of the lawfulness of the penalty*, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed [[48]]' (my emphasis).

109. While the texts of the Treaty and the regulations which confer this jurisdiction have not changed,[49] the general principles of EU law, the entry into force of the Charter (which now has the same legal status as the treaties, pursuant to the first subparagraph of Article 6(1) TEU) and the case-law of both the ECtHR and the Court of Justice have confirmed that, with regard in particular to fines imposed by the Commission in competition matters, the unlimited jurisdiction enjoyed by the Court[50] requires it to make its own assessment in that regard.

110. It follows inter alia from the judgment of the ECtHR in *Menarini* that the exercise of 'unlimited jurisdiction' entails the power to quash in all respects, on questions of fact and law, the decision adopted and the jurisdiction to examine all questions of fact and law relevant to the dispute before the General Court.

111. Judge Pinto de Albuquerque, in his dissenting opinion in that case, rightly pointed out that, '[*i*]*n terms of principles, the imposition of public law penalties falls outside the traditional functions of the administration and must fall within the jurisdiction of a court*. If the verification of the factual circumstances relating to the imposition of a public-law penalty could be reserved to an administrative body, without a strict *ex post* review by the courts, those principles [the separation of powers and the principle that penalties must be clearly defined by law] would be completely undermined' (my emphasis).

112. Similarly, as the judgments in *Chalkor* and *KME* clearly indicated, the exercise of unlimited jurisdiction by the General Court entails a review of both the law and the facts and the power to assess the evidence, to annul the contested decision and to alter the amount of fines.[51]

47 — Article 172 of the Treaty provides that, '[r]egulations made by the Council pursuant to the provisions of this Treaty may give the Court of Justice unlimited jurisdiction in regard to the penalties provided for in such regulations'. According to Article 17 of Regulation No 17, '[t]he Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed'.

48 — See also paragraph 63 of *Chalkor* v *Commission*, and, in the same vein, *Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 692.

49 — Article 261 TFEU provides that: '[r]egulations adopted jointly by the European Parliament and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations'. Article 31 of Regulation No 1/2003 provides that: '[t]he Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed'.

50 — Now the General Court in the context of actions brought against decisions of the Commission imposing a fine.

51 — See *Chalkor* v *Commission*, paragraph 65.

113. As Advocate General Kokott pointed out,[52] the question whether the General Court has exercised its powers of unlimited jurisdiction is 'a genuine point of law … It concerns the scope of the legal requirements for an examination by the General Court of a plea of discrimination and in particular the intensity of review which the General Court should assume in that respect towards the Commission. This concerns an issue which is time and again the subject of discussion and currently — not least in light of the [Charter]. … Article 47 of the Charter … guarantees the fundamental right to effective legal protection, which is also recognised as a general principle of EU law [[53]] … This fundamental right entitles a person, inter alia, to have decisions of administrative authorities reviewed by an independent court under a fair procedure' (my emphasis).

114. Furthermore, under Article 49(3) of the Charter, relating to the principle that penalties must be clearly defined by law and the principle that the penalty must be proportionate to the offence, the EU judicature is required to guarantee the effectiveness of the principle that '[t]he severity of penalties must not be disproportionate to the criminal offence'.

115. In addition, the ECtHR has also held that review of an administrative penalty means that a court should verify and examine in detail the *suitability* of a penalty in relation to the offence committed, by taking the relevant parameters into account, including the proportionality of the penalty itself, and that it should where necessary replace the latter (see *Menarini*, paragraphs 64 to 66).

116. Likewise, in EU law, the principle of proportionality, which is one of the general principles of EU law (and enshrined in the Charter), requires that measures adopted by EU institutions should not exceed the limits of what is appropriate and necessary in order to attain the legitimate objectives pursued by the legislation in question, and, 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.[54]

117. In procedures implementing competition rules, application of the principle of proportionality requires that the fine imposed on a company should not be disproportionate in relation to the objectives pursued by the Commission and that the amount of the fine should be proportionate to the infringement, account being duly taken, inter alia of the seriousness of the latter. To that end, the General Court must examine all the relevant facts, such as the conduct of the undertaking and the role it played in establishing the anti-competitive practice, its size, the value of the goods in question or the profit that it made as a result of the infringement committed, as well as the objective of deterrence pursued and the risks posed by offences of that kind to the objectives of the EU.

118. In other words, the General Court must exercise its unlimited jurisdiction *fully* when assessing the proportionality of the amount of the fine.[55]

52 — See her Opinion in Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others* (judgment of 19 July 2012), point 95 et seq.

53 — See Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 30 and 31; Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 49; and *KME and Others* v *Commission*, paragraph 92. See also; the Order in Case C-457/09 *Charty* [2011] ECR I-819, paragraph 25.

54 — See, inter alia, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13; Joined Cases C-133/93, C-300/93 and C-362/93 *Crespoltoni and Others* [1994] ECR I-4863, paragraph 41; and Case C-189/01 *Jippes* v *Commission* [2001] ECR I-5689, paragraph 81.

55 — I agree here with points 103 to 131 of Advocate General Bot's Opinion in Case C-89/11 P *E.ON Energie* v *Commission* [2012] ECR, where he refers, inter alia, to the case-law of the ECtHR (*Schmautzer v. Austria* 23 October 1995, Series A no. 328-A; *Valico S.R.L. v. Italy* (dec), no. 70074/01, ECHR 2006-III; and *Menarini*). It is true that, while he proposed, in his Opinion, that the Court should set aside the judgment of the General Court in so far as the latter failed to exercise its powers of unlimited jurisdiction when considering the proportionality of the fine imposed on E.ON Energie and refer the case back to the General Court for a decision on the proportionality of that fine, the Court, for its part, dismissed the appeal. Nevertheless, it can be seen, from reading the judgment of the Court of Justice, that the Court does not disagree with Advocate General Bot as regards the principles but it shows that — in the case in point — the General Court had exercised its powers of unlimited jurisdiction and had found, without committing any error of law, that the fine was proportionate. Aware that the Commission could have imposed on E.ON Energie a fine of 10% of its annual turnover if it had established the existence of anti-competitive practices, the General Court considered that the fine of EUR 38 million imposed for breaking a seal, which represented 0.14% of E.ON Energie's annual turnover, could not be regarded as excessive in the light of the need to ensure that that penalty had a deterrent effect.

119. Furthermore, the principle of non-discrimination requires 'that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified'. [56]

120. This means two things. First, that the Commission's statement of reasons must make it possible for the General Court to assess whether the fine is proportionate and non-discriminatory. As the Court has held, 'the statement of reasons required under Article 253 EC [now Article 296 TFEU] must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the *competent Court of the European Union to exercise its jurisdiction to review legality*' [57] (my emphasis), which in the present case is unlimited jurisdiction.

121. Next, this means that the assessment of the General Court must be sufficiently independent of that of the Commission, in so far as the former may not merely fall in with the amount set by the Commission — in a relatively abstract manner, as would appear to be the case here in regard to the basic amount — nor feel bound by the method of calculation used by the Commission or the considerations which it took into account when setting the amount of that fine. [58]

122. As the General Court rightly observed in *Volkswagen* v *Commission* [59] (in which this Court dismissed the appeal), 'the Court must carry out, in the exercise of its jurisdiction in the matter, its own assessment of the circumstances of the case in order to determine the amount of the fine' (my emphasis). In that judgment — in the light of all the circumstances and considerations and in the exercise of its unlimited jurisdiction — the General Court considered that it was appropriate to reduce the amount of the fine from ECU 102 000 000 to EUR 90 000 000.

123. As Advocate General Mengozzi has rightly pointed out, [60] 'the circumstances in which the Courts [of the European Union] may exercise unlimited jurisdiction cannot be defined by the Commission guidelines, which are an organisational instrument internal to that institution' and merely constitute 'soft law', [61] whereas, in the words of Advocate General Bot, [62] the General Court in practice 'restricts itself too often to examining whether the Commission has correctly applied the methodology which it laid down [itself] in its guidelines [whereas] the setting of the amount of the fine does not normally entail complex economic assessments, which should be reserved to the Commission and subject to a limited judicial review'.

124. An argument which is often raised against the approach advocated in this Opinion is that the General Court should not or cannot 'interfere' in the setting of a fine, and hence in competition policy, which is the sole responsibility of the Commission. I do not share that reasoning since the General Court adjudicates only in individual cases. The Commission therefore retains all its powers to define and to apply its general policy in other cases.

56 — Case C-227/04 P *Lindorfer* v *Council* [2007] ECR I-6767, paragraph 63.

57 — See *Elf Aquitaine*, paragraph 147.

58 — See, to that effect, Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189.

59 — Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 347 and the case-law cited. The judgment of the Court of Justice is cited in the previous footnote.

60 — See Mengozzi, P., '*La compétence de pleine juridiction du juge communautaire*', Liber Amicorum en l'honneur de Bo Vesterdorf, Bruylant, Brussels, 2007, pp. 219 to 236.

61 — In that connection, see also Nehl, H.P., '*Kontrolle kartellrechtlicher Sanktionsentscheidungen der Kommission durch die Unionsgerichte*', in Immenga, U. and Körber, T., (eds.), *Die Kommission zwischen Gestaltungsmacht und Rechtsbindung*, Nomos, 2012, pp. 139 and 140 ('[d]ie mit dieser Neuorientierung einhergehende Rückbesinnung des Gerichtshofs auf das "hard law" anstelle des "soft law" zum Zweck der gerictlichen Kontrolle der Ausübung des Ermessens der Kommission bei der Geldbussenbemessung ist sehr zu begrüssen').

62 — See his article '*La protection des droits et des garanties fondamentales en droit de la concurrence*' in *De Rome à Lisbonne: mélanges en l'honneur de Paolo Mengozzi*, Bruylant, 2013, pp. 175 to 192.

125. In my view, the foregoing considerations and more particularly paragraph 62 of *Chalkor* v *Commission* and paragraph 129 of *KME Germany and Others* v *Commission*, suggest that, when conducting its review of legality, the General Court may not fall back on the Commission's margin of discretion, or a simple manifest error of assessment which the latter may have made regarding the choice of factors taken into account when applying the criteria mentioned in the 1998 Guidelines or its evaluation of those factors, as a basis for dispensing with the conduct of *an in-depth review of questions of law and of fact or for failing to require the Commission to explain the changes in its policy regarding fines in a specific case*.

126. In any event, according to the Court's case-law — even though the General Court may, at the outside, and where appropriate, refer to the '"discretion", "substantial margin of discretion" or "wide discretion" of the Commission [which I believe it should no longer do], such references [*cannot] prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it*' [63] (my emphasis).

127. In paragraph 78 of *Chalkor* v *Commission*, the Court stated that 'the General Court did not confine itself to that review of conformity with the Guidelines, but itself reviewed, in paragraph 145 of the judgment under appeal, the adequacy of the penalty'.

128. The Court also pointed out in *SCA Holding* v *Commission* [64] that 'the Court of First Instance *is competent to assess*, in the context of the unlimited jurisdiction accorded to it by Article 172 of the EC Treaty [now Article 261 TFEU] and Article 17 of Regulation No 17 [Article 31 of Regulation No 1/2003] *the appropriateness of the amounts* of fines. *That assessment may justify the production and taking into account of additional information which is not as such required, by virtue of the duty to state reasons* under Article 190 of the Treaty [now Article 296 TFEU], *to be set out in the decision*' (my emphasis).

129. The General Court must therefore assess *of its own motion* whether the fine is appropriate and proportionate and it is required to ascertain *of its own motion* whether all the relevant factors for the purpose of calculating the fine have actually been taken into account by the Commission, it being understood that, in order to do so, the General Court must also be able to review the facts and circumstances relied upon before it by the applicants. [65]

130. The General Court has already adopted this line of reasoning in some cases.

63 — See *KME Germany and Others* v *Commission*, paragraph 136. Even with regard to the review of legality and complex economic assessments, paragraph 94 of *KME and Others* v *Commission* states that '[a]s regards the review of legality, the Court of Justice has held that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, *that does not mean that the Courts of the European Union must refrain from reviewing the Commission's interpretation of information of an economic nature*. Not only must those Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent *but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it …*' (my emphasis). Similarly, the EFTA Court held in Case E-15/10 *Posten Norge* [2012], paragraphs 100 and 101, that 'it must be recalled that Article 6(1) ECHR requires that subsequent control of a criminal sanction imposed by an administrative body must be undertaken by a judicial body that has full jurisdiction. Thus, the Court must be able to quash in all respects, on questions of fact and of law, the challenged decision (see, for comparison, European Court of Human Rights *Janosevic v. Sweden*, no. 34619/97, § 81, ECHR 2002-VII, and [*Menarini*] § 59). Therefore, when imposing fines for infringement of the competition rules, [EFTA Surveillance Authority (ESA)] cannot be regarded to have *any margin of discretion in the assessment of complex economic matters* which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review … Furthermore … in a case which is covered by the guarantees of the criminal head of Article 6 ECHR, the question whether the evidence is capable of substantiating the conclusions drawn from it by the competition authority must be answered having regard to the presumption of innocence. Thus, although the Court may not replace ESA's assessment by its own and, accordingly, it does not affect the legality of ESA's assessment if the Court merely disagrees with the weighing of individual factors in a complex assessment of economic evidence, *the Court must none the less be convinced that the conclusions drawn by ESA are supported by the facts*' (my emphasis).

64 — Case C-297/98 P [2000] ECR I-10101, paragraph 55.

65 — This reading of the *Chalkor and KME* case-law and of the case-law in *Menarini*, is also supported inter alia, by Wesseling, R., and Van der Woude, M., *The lawfulness and acceptability of enforcement of European cartel law*, World Competition 35, No 4 (2012), pp. 573 to 598.

131. In *Romana Tabacchi*[66] (which has not been the subject of an appeal before the Court of Justice), it stated quite correctly that '[t]he unlimited jurisdiction conferred on the [General] Court, in application of Article 229 EC [now Article 261 TFEU] by Article 31 of Regulation No 1/2003 empowers the [General] Court, in addition to carrying out a mere review of the lawfulness of the penalty, which enables [that] Court only to dismiss the action for annulment or to annul the contested measure, to substitute its own appraisal for the Commission's and, consequently, to vary the contested measure, even without annulling it, by taking into account all the factual circumstances, by amending, in particular, the fine imposed where the question of the amount of the fine is before it. … by its nature, the fixing of a fine by the [General] Court is not an arithmetically precise exercise. Furthermore, *the [General] Court is not bound by the Commission's calculations or by its Guidelines* when it adjudicates in the exercise of its unlimited jurisdiction … *but must make its own appraisal, taking account of all the circumstances of the case*'(my emphasis).

132. In paragraphs 283 to 285 of that judgment, the General Court concluded that '[i]n the light of those circumstances, the Court considers that a fine in the amount of EUR 2.05 million, as imposed by the Commission on 20 October 2005, is such as to entail, as such, the liquidation of the applicant and, consequently, its disappearance from the market, which appears, moreover, to be likely to have significant repercussions, to which the applicant refers in its fifth plea. … In the light of the foregoing considerations, and taking account in particular of the cumulative effect of the illegalities previously found and also of the applicant's weak financial capacity, the Court considers that an equitable assessment of all the circumstances of the case will be made if it sets the final amount of the fine imposed on the applicant at EUR 1 million. In effect, a fine in such an amount makes it possible to penalise the applicant's unlawful conduct effectively, in a manner which is not negligible and which remains sufficiently deterrent. Any fine above that amount would be disproportionate to the infringement found against the applicant appraised as a whole … In the present case, a fine of EUR 1 million constitutes a fair penalty for the applicant's conduct' (my emphasis).[67]

133. In *Groupe Danone* v *Commission* ('the Belgian beer market cartel'), the Court of Justice dismissed a ground of appeal alleging infringement by the General Court of the *ne ultra petita* rule, on the basis that it altered the method used in applying the weighting to reflect attenuating circumstances when it had not been requested to do so, for the simple reason that, since the General Court had been asked to examine the amount of the fine, it was empowered, under Article 229 EC (now Article 261 TFEU) and under Regulation No 17, now replaced by Regulation No 1/2003, to cancel, reduce or increase the amount of the fine imposed by the Commission.[68]

134. As Advocate General Mengozzi has correctly pointed out,[69] that assessment is easily understood if the function of unlimited jurisdiction is perceived as an additional guarantee for undertakings, providing for an extremely thorough review by an independent and impartial judicial body of the amount of the fine imposed on them. This description of the General Court's unlimited jurisdiction as an 'additional guarantee' has already been confirmed by the Court of Justice when defining the scope of the rights of defence of undertakings in relation to the Commission with regard to the imposition of fines.[70]

66 — Case T-11/06 *Romana Tabacchi* v *Commission* [2011] ECR I-6681, paragraphs 265 and 266. See also, to that effect, *Vinyl Maatschappij and Others* v *Commission*, paragraph 692; *Groupe Danone* v *Commission*, paragraph 61; and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 86.

67 — See also Case T-59/99 *Ventouris* v *Commission* [2003] ECR II-5257, and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181.

68 — See *Groupe Danone* v *Commission*, paragraphs 56 and 61 to 63.

69 — See his Opinion in the case which gave rise to the judgment in Case C-286/11 P *Commission* v *Tomkins* [2013] ECR, point 40. See also Mengozzi, P., '*La compétence de pleine juridiction du juge communautaire*', op. cit., p. 227.

70 — See *Dansk Rørindustri and Others* v *Commission*, paragraph 445. See also, inter alia, Case T-83/91 *Tetrapak* v *Commission* [1994] ECR II-755, paragraph 235, and Case T-23/99 *LR AF 1988* v *Commission* [2002] ECR II-1705, paragraph 200.

135. I also agree with Advocate General Mengozzi when he states in his Opinion in *Commission* v *Tomkins* that this description can only mean that, provided the amount of the fine is contested before the General Court, it is possible for undertakings, being fully aware of the precise amount set by the Commission, to raise any objections, with regard to both the legality and the appropriateness of the calculation of that amount by the Commission, with the result that they may influence, by any plea in defence, beyond the constraints inherent in the review of legality, the view of the Court as regards the appropriate amount of the fine.[71] As he quite rightly added, in order for that function as an additional guarantee to be effective, the General Court must be authorised[72] to take into account *all* of the factual circumstances, including, for example, circumstances after the decision which is contested before it,[73] something which the constraints inherent in the review of legality would not, in principle, permit.[74]

136. I would also mention the judgment of the General Court in *Siemens Österreich and Others* v *Commission* ('the Gas insulated switchgear cartel'),[75] in which, on the basis of the principle that penalties must be specific to the offender and to the offence concerned, it stated '[that] contrary to what the Commission claims … it is not free to determine the sums to be paid jointly and severally. It follows from the principle that penalties must be specific to the offender and to the offence concerned, … that each company must be able to discern from the decision imposing a fine on it to be paid jointly and severally with one or more other companies the amount which it is required to bear in relation to the other joint and several debtors, once payment has been made to the Commission. To that end, the Commission must, inter alia, specify the periods during which the companies concerned were jointly liable for the unlawful conduct of the undertakings which participated in the cartel and, where necessary, the degree of liability of those companies for that conduct … Therefore, in the present case, the Commission had to take account of the findings which it made, in recital 468 of the [contested] decision, regarding the periods of joint responsibility of the various companies belonging to the undertaking VA Tech in order to determine the amounts to be paid jointly and severally by those companies. In so far as possible, those amounts must reflect the weighting of the individual shares of the joint liability of those companies, as identified in that recital'.

137. The General Court went on to analyse the Commission decision in detail and criticised both the selection of companies liable for payment of the fine and the calculation of the amounts for which they were respectively liable.

138. In paragraph 166 of its judgment, without making any reference to the Commission's margin of discretion, the General Court concluded that 'in holding Reyrolle, SEHV and Magrini jointly and severally liable for payment of a fine which clearly exceeds their joint liability, in not holding Siemens Österreich and KEG jointly and severally liable for payment of part of the fine imposed on SEHV and Magrini, and in not holding Reyrolle solely liable for a part of the fine imposed on it, the Commission infringed the principle that penalties must be specific to the offender and to the offence'.

71 — Advocate General Mengozzi rightly points out (in footnote 20 of his Opinion) that the Court has held on several occasions that review by the General Court of fines imposed by the Commission is designed to assess the appropriateness of the amount of the fine in the light of the circumstances of the dispute before it. See, in that connection, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 42 and 48, and Case C-283/98 P *Mo och Domsjö* v *Commission* [2000] ECR I-9855, paragraphs 42 and 48.

72 — According to the Court's case-law cited in footnote 66 to this Opinion.

73 — See, in this connection, Joined Cases 6/73 and 7/73 *Istituto Chemoterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 233, paragraphs 51 and 52; *Baustahlgewebe* v *Commission*, paragraph 141; *Tokai Carbon and Others* v *Commission*, paragraph 274; and Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 227.

74 — Advocate General Mengozzi adds that that also explains why, for example, in Case 8/83 *Officine Bertoli* v *Commission* [1984] ECR 1649, paragraph 29, the Court held that, although the submission relied upon by the applicant in support of its application for a reduction of the amount of the fine imposed upon it could not be upheld, certain circumstances peculiar to that case did justify a reduction on equitable grounds.

75 — Joined Cases T-122/07 to T-124/07 [2011] ECR I-793, paragraphs 153 and 154. An appeal against that judgment is currently pending before the Court (Joined Cases C-231/11 P to C-233/11 P *Commission* v *Siemens Österreich and Others*). Advocate General Mengozzi's Opinion was delivered on 19 September 2013.

139. Another example can be found in the judgment of the Court of First Instance (now the General Court) in *Brasserie nationale and Others* v *Commission*,[76] in which the latter held '[t]hat the Court of First Instance is … under a duty to verify whether the amount of the fine imposed is proportionate in relation to the gravity and duration of the infringement, and to weigh the gravity of the infringement and the circumstances invoked by the applicant'.

140. In *Parker Pen* v *Commission*,[77] a judgment handed down before the Guidelines existed, the Court of First Instance concluded, following an analysis of the fine at issue, 'that the fine of ECU 700 000 imposed on Parker [was] inappropriate, having regard in particular to the low turnover to which the infringement relate[d], and that it [was] justified in the exercise of its unlimited jurisdiction to reduce to ECU 400 000 the amount of the fine imposed on Parker'.

141. In *Ventouris* v *Commission* ('the Greek ferries cartel'), which was not the subject of an appeal, the Court of First Instance concluded, this time after the introduction of the Guidelines, that the fine at issue should be reduced on grounds of equity and proportionality. Given that, in a single decision, the Commission had imposed penalties in respect of two separate offences, those two grounds of equity and proportionality required that an undertaking which had been involved in only one infringement should be penalised less severely than those which had been involved in two infringements. According to that Court, by calculating the fines starting from a single basic amount for all the undertakings, adapted according to their relative size, without making any distinction according to whether the company concerned had participated in one of the infringements or both, the Commission subjected the undertaking which had been held liable for participation in only one infringement to a fine that was disproportionate to the significance of the offence committed.[78]

142. On the other hand (following the judgments in *Chalkor, KME* and *Menarini*) the General Court concluded in *Dow Chemical* v *Commission* ('the Chloroprene rubber cartel')[79] that 'in the present case, it is not incumbent upon the Court, at this stage, in the absence of any finding that the contested decision is unlawful — as was the case in *BASF and UCB* v *Commission* … — [80] to recalculate the amount of the fine imposed on the applicant; the Court is merely required to review the legality of the Commission's application of the 2006 Guidelines to their situation' (my emphasis), an approach which can be found in the judgment under appeal.

143. I am of the view that a genuine review of the fine by the General Court in the exercise of its powers of unlimited jurisdiction is especially necessary since the amount of the fines imposed by the Commission is continually increasing. Without aiming to be exhaustive, I shall cite a few examples: in *Microsoft* (which was invoked by the Commission at the hearing) Microsoft was ordered to pay a fine of EUR 497 million in 2004, to which a periodic penalty payment of EUR 280.5 million was added in 2006, a penalty payment of EUR 899 million in 2008 and a fine of EUR 561 million in 2013.[81] Intel, for its part, received a fine of EUR 1.06 billion.[82] In 2008, St Gobain received a fine of EUR 896 million (with fines of EUR 1.38 billion being imposed for the 'Car glass' cartel),[83] that of

76 — Joined Cases T-49/02 to T-51/02 [2005] ECR II-3033, paragraph 170.

77 — Case T-77/92 [1994] ECR II-549, paragraphs 94 and 95.

78 — See also Case T-211/08 *Putters International* v *Commission* [2011] ECR II-3729; Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441; *Tokai Carbon and Others* v *Commission*; and Case T-235/07 *Bavaria* v *Commission* [2011] ECR II-3229, all cases in which the General Court substituted its own appraisal for that of the Commission or examined the appropriateness of the fine.

79 — Judgment of 2 February 2012 in Case T-77/08, paragraph 148. An appeal is currently pending against that judgment before the Court of Justice; see Case C-179/12 P).

80 — Joined Cases T-101/05 and T-111/05 [2007] ECR II-4949.

81 — Respectively, Commission Decision C(2004) 900 of 24 March 2004, relating to a proceeding under to Article [102 TFEU] (Case COMP/C-3/37.792 — Microsoft); Commission Decision C(2005) 4420 final of 12 July 2006; Commission Decision C(2008) 764 final, of 27 February 2008, fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by the 'Microsoft' decision; and Commission Decision C(2013) 1210 final of 6 March 2013.

82 — Commission Decision C(2009) 3726 final of 13 May 2009 in Case COMP/C-3/37.990 — Intel.

83 — Commission Decision C(2008) 6815 final of 12 November 2008 in Case COMP/39.125 — Automobile glass.

Siemens in 2007 was over EUR 396 million (with fines of EUR 750 million in total being imposed for the 'Gas insulated switchgear' cartel).[84] In the case of the escalator manufacturers' cartel, the fines totalled almost EUR 1 billion.[85] Finally, in 2012, the Commission imposed a fine of EUR 1.47 billion on two cartels between manufacturers of cathode ray tubes for televisions and computer monitors.[86]

144. As regards the importance attached in this Opinion to the General Court's review of the method of calculating fines, I would recall the statement made by Advocate General Tizzano in *Dansk Rørindustri and Others* v *Commission*,[87] in which he notes that his examination in that case 'shows that the calculation method used by the Commission is not without risk as far as the fairness of the system is concerned … It does not seem to me to be fully consistent with the requirements of individualisation and progressiveness of the 'penalty' … that, as in the present cases, *some of the calculation operations are essentially formal and abstract in character and therefore do not have concrete repercussions on the final amount of the fine*. Nor can the fact be ignored that, for the same reasons, the objective of greater transparency pursued by the Guidelines is liable to be less than fully attained … In addition, that intensification [of the Commission's policy with regard to fines, which is more rigorous and has led to an increase in the level of fines], deriving as it does from a calculation method based on flat-rate amounts, is liable for the most part to hit small and medium-sized undertakings … In short, a new situation is emerging, which is more problematical than was the case when the method followed by the Commission did not, in principle, lead to the limit of 10% of total turnover being exceeded in the calculation process, so that the amount of the fine could be made to reflect all the circumstances of the case more easily and immediately … The question must then be asked whether the abovementioned consequences of the new trend in the fines policy might not make it appropriate to steer a slightly different course *so as to make certain that it is possible in every case to guarantee results that are in conformity with the general requirements of reasonableness and fairness*' (my emphasis).

145. Those incisive comments on the part of Advocate General Tizzano in that case indicate clearly that it is not just desirable or lawful but absolutely *necessary* for the General Court to exercise fully[88] and independently its power to review the fines imposed by the Commission.[89]

ββ) Application of the theory concerning the power of unlimited jurisdiction to the present case

146. In order to assess the review of the fine carried out by the General Court and the grounds of appeal alleging infringement of the principles of proportionality and non-discrimination and the principle that penalties must be specific to the offender and the offence and of the Commission's obligation to state reasons for the amount of the fine, it is necessary to return to the contested decision.

84 — Commission Decision C(2006) 6762 final of 24 January 2007 in Case COMP/F/38.899 — Gas insulated switchgear.

85 — Commission Decision C(2007) 512 final of 21 February 2007 in Case COMP/E-1/38.823 — Elevators and escalators.

86 — Commission Decision C(2012) 8839 final of 5 December 2012 in Case COMP/39.437 — TV and computer monitor tubes.

87 — See, points 129 to 133 of the Opinion.

88 — '[T]he purpose of attaching the Court of First Instance to the Court of Justice and of introducing two levels of jurisdiction was, first, to improve the judicial protection of individual interests, in particular in proceedings necessitating close examination of complex facts, and, second, to maintain the quality and effectiveness of judicial review in the [EU] legal order' (*Baustahlgewebe* v *Commission*, paragraph 41).

89 — By way of an example of the full exercise of unlimited jurisdiction, I would refer to the United Kingdom Competition Appeal Tribunal (CAT), since it makes *its own* assessment of the amount of the fine on the basis of *a very comprehensive approach, taking the case as a whole* (see, for example judgments No 1114/1/1/09 *Kier Group plc* v *OFT* [2011] CAT 3, and No 1099/1/2/08 *National Grid plc* v *Gas and Electricity Markets Authority* [2009] CAT 14.

147. In recital 756 of the contested decision, the Commission indicated that an abusive practice may be classified as a very serious infringement, even though it was not necessarily of a uniform degree of seriousness throughout the period of the infringement. In recital 757, the Commission merely stated that the basic amount of the fine to be imposed on the appellants to reflect the seriousness of the infringement should — 'in the light of the specific circumstances of this case' — be set at EUR 90 million.

148. The appellants maintained, before the General Court, that the Commission had infringed the principle that the penalty must be specific to the offender and the offence, the principles of proportionality and equal treatment and its obligation to state reasons by setting the basic amount of the fine at EUR 90 million. In the first place, the basic amount of the fine imposed on Telefónica to reflect the seriousness of the infringement was the second highest basic amount ever imposed for abuse of a dominant position. Furthermore, that amount was nine and ten times higher, respectively, than the basic amount imposed in 2003 on Deutsche Telekom and on Wanadoo Interactive in respect of abuse of a dominant position in the same sector, whereas: (i) those two decisions, in the same way as that imposing the fine on Telefónica, were adopted on the basis of the 1998 Guidelines and the same methods of calculation were therefore used; (ii) the conduct at issue in these three cases partially overlapped in temporal terms and was similar in nature; and (iii) the three cases concerned the internet access markets in France, Germany and Spain, which are very similar in terms of size, economic importance and stage of growth. The clear disproportion between the basic amount imposed on Telefónica and the amounts imposed on Wanadoo Interactive and Deutsche Telekom was further aggravated by the fact that, in the case of Telefónica, the basic amount was increased by 25% by way of deterrence, an increase which was not applied to Wanadoo Interactive or Deutsche Telekom, notwithstanding the size of those undertakings. Bearing in mind the intended deterrent effect, the amount of the fine imposed on Telefónica to reflect the seriousness of the infringement (EUR 112.5 million) is ultimately 12.5 times and 11.25 times higher, respectively, than the fines imposed on Wanadoo Interactive and Deutsche Telekom in respect of similar, if not even more serious, abuse of a dominant position.

149. Furthermore, according to the appellants, the excessive nature of the basic amount of the fine imposed on Telefónica, amounting to EUR 90 million, is even more apparent when compared with the fine imposed on Deutsche Post AG (DPAG) in 2001.[90] In that case, the Commission set a basic amount of just EUR 12 million, even though it acknowledged inter alia: (i) that the infringement should be classified as 'serious'; (ii) that the loyalty rebates granted by undertakings in a dominant position 'have already been condemned by the Community Courts' on a number of occasions; and (iii) that '[Deutsche Post AG's] rebate and pricing policy has had a powerful negative impact on competition', enabling [Deutsche Post AG] to maintain a stable market share of more than 85% on the German market for mail-order parcel services.

150. What is the General Court's view?

151. First, regarding the principle of non-discrimination, in paragraphs 424 to 427 of the judgment under appeal (four paragraphs only), the General Court dismisses the appellants' arguments on the simple basis that the Commission's practice in earlier decisions cannot serve as a legal framework for the imposition of fines in competition matters but only as an indication.

90 — Commission Decision 2001/354/EC of 20 March 2001 relating to a proceeding under [Article 102 TFEU] (Case COMP/35.141 — Deutsche Post AG) (OJ 2001 L 125, p. 27).

152. Second, as regards the principle of proportionality, in paragraphs 428 to 432 of the judgment under appeal (five paragraphs in all), the General Court dismissed the appellants' arguments essentially on the basis that the Commission has a 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. In fact, on this question the General Court repeats the Commission's explanations regarding the classification of the infringement as 'very serious' and in only one paragraph (432) does 'conduct its analysis', concluding that the starting amount of EUR 90 million is not disproportionate.

153. Third, regarding the principle that penalties must be specific to the offender and the offence, in only one paragraph (433) of the judgment under appeal, does the General Court refer to the case-law to the effect that, 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. 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 rule. The General Court concluded that it was clear from the contested decision that, in the present case, the fine was calculated by reference to Telefónica's specific situation. Accordingly, the appellants could not claim that the general deterrent effect of the fine was 'the first and last objective of the fine'.

154. Last, regarding the alleged infringement of the obligation to state reasons and provide effective judicial protection, in paragraphs 434 and 435 of the judgment under appeal (two paragraphs only) the General Court rejects the appellants' arguments and merely asserts that the Commission did not disregard the *minimum* requirements in the matter, in so far as indicated the facts which enabled it to determine the gravity of the infringement and its duration. Furthermore, the General Court adds once again that, since the Commission's practice in previous decisions cannot serve as a legal framework for the imposition of fines in competition matters, the Commission is not required to state the reasons why the basic amount of the fine imposed on the appellants was significantly higher than the amount of the fines imposed in its decisions in Wanadoo Interactive and Deutsche Telekom.

155. On reading these 12 paragraphs (out of a total of 465!),[91] paragraphs which contain practically *no* genuine analysis on the part of the General Court, I come to the view that, in regard to the principles of non-discrimination and proportionality and the principle that the penalty must be specific to the offender and the offence and the obligation the Commission is under to state reasons concerning the amount of the fine, the General Court has clearly failed to exercise its powers of unlimited jurisdiction in the manner required.

156. As regards of the alleged infringement of the principle of non-discrimination, the General Court merely refers to the indicative nature of the amount of the fines imposed by the Commission in previous decisions, but fails to point out that, as regards the present case, certain previous Commission decisions contained particularly helpful indications. That is all the more important since the Commission did not disclose its method of calculating the basic amount of EUR 90 million (which in the view of the Court would have been desirable, and, in my view, necessary here) or provide adequate reasons to justify the difference between that amount and the amount imposed in other decisions with very similar characteristics such as Deutsche Telekom and Wanadoo Interactive.

157. The General Court even neglected its own case-law on the subject since it had observed in paragraph 316 of *Archer Daniels Midland* v *Commission* (and, moreover, confirmed its view in *E.ON Ruhrgas and E.ON* v *Commission*, paragraph 262, following the judgment under appeal) that '[a]s regards … comparisons with other Commission decisions imposing fines, it follows that those decisions can be relevant from the point of view of observance of the principle of equal treatment

91 — It is true that 'brevity is the soul of wit' (Shakespeare in *Hamlet*, 1602), but unlimited jurisdiction requires more than wit!

only where it is demonstrated that the facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case' (my emphasis). It is clear that, although, in principle, the Commission's practice in previous decisions cannot serve as a legal framework for the imposition of fines in competition matters, that reasoning encounters its limit in the principle of non-discrimination, according to which comparable situations may not be treated differently. [92]

158. Moreover, the principle of 'equal punishment for the same conduct' is set out in the 1998 Guidelines [93] and it applies in particular where the circumstances which led to the imposition of a fine, such as the relevant markets, the type of infringement, the products, undertakings or duration of the infringement are in fact similar, as appears to be the case here, unless — on the basis of additional information provided by the Commission at the request of the General Court or otherwise — the contrary is shown to be the case.

159. Here, the General Court ought at the very least to have required the Commission to explain very clearly why it imposed a starting amount of EUR 90 million in this case (and how it arrived at that amount), bearing in mind that (i) it is the second highest fine after that imposed on Microsoft (Decision C(2004) 900) and the starting amount in this case is over 40% higher than the third highest starting amount (Astra Zeneca), [94] even though, in the latter two cases, the relevant geographic market extended beyond the territory of a single Member State, (ii) the amount in question is 4.5 times greater than the minimum amount indicated in the Guidelines for calculating fines in the case of 'very serious' infringements, and (iii) that amount is ten and nine times greater, respectively, than the 'basic amount' imposed on Deutsche Telekom and Wanadoo Interactive, in respect of similar practices, markets, products and undertakings.

160. With regard to the gravity of the infringement ('serious' or 'very serious'), the appellants maintained before the General Court that: (i) the abuse of a dominant position committed on a geographic market confined to the territory of a single Member State had been classified hitherto as serious, and (ii) the factors relied on the Commission to justify the reference to the geographic aspect (the size of the Spanish market and the fact that access to the market for foreign operators was difficult) were also present in the Deutsche Telekom and Wanadoo Interactive decisions, in which the infringement was not, however, classified as 'very serious', contrary to the view taken by the Commission in the documents in the case, even during the period prior to the publication of the Deutsche Telekom decision. Here again, the General Court confines itself to stating that the Commission's practice in previous decisions cannot serve as a legal framework for the imposition of fines in competition matters. However, if the Commission took the size of the market as the basis for classifying the infringement as 'very serious', should the General Court not have taken into account the fact that, in relation to larger markets (France and Germany), the Commission had not deemed that a sufficient ground for qualifying the infringement as 'very serious'?

161. Furthermore, although the criterion enabling an infringement to be defined as 'very serious' within the meaning of the 1998 Guidelines is the 'clear-cut' nature of the abuse at issue, it is impossible to arrive at such a conclusion without referring at the very least to the Commission's practice in earlier decisions. The 1998 Guidelines themselves in fact refer to the Commission's practice in earlier decisions for the purpose of clarifying the definition of a 'very serious' infringement. [95] Moreover, the contested decision justifies the classification of the infringements as

92 — Concerning the setting of the amount of the fine, see inter alia Case T-13/03 *Nintendo* v *Commission* [2009] ECR II-975, paragraph 170.

93 — See the 1998 Guidelines, Section 1 A, last paragraph.

94 — Commission Decision C(2005) 1757 final of 15 June 2005 relating to a proceeding under [Article 102 TFEU] and Article 54 of the EEA Agreement (Case COMP/A.37.507/F3 — AstraZeneca).

95 — See Guidelines, Section 1. A.

clear-cut abuse by reference to the Commission's practice in earlier decisions.[96] The General Court is therefore confusing the case-law suggesting that the amount of the fines imposed in earlier decisions is of an indicative nature and an interpretation of the 1998 Guidelines for the purpose of establishing whether an infringement is minor, serious or very serious. The Guidelines use the criterion of 'clear-cut abuse' for the purpose of penalising conduct which is manifestly unlawful, something which can only be established, in relation to abusive practices, by reference to precedents.

162. Moreover, I concur with the fourth complaint in the first part of the appellants' eighth ground of appeal (paragraph 414 of the appeal), in which they criticise paragraphs 415 to 420 of the judgment under appeal, in so far as the General Court failed to take the varying degree of the gravity of the infringement during the infringement period into account. In that connection, criticism may be levelled at the findings of the General Court in paragraphs 418 and 419 of the judgment under appeal to the effect that the Commission was entitled to take the view that the infringement should be classified as 'very serious' throughout the period concerned, and that, in spite of the fact that it classified the infringement as 'very serious' throughout that period, the Commission did in fact take the varying degree of intensity of the infringement into account when setting the starting amount of the fine. The General Court therefore failed to have regard to its obligation to exercise its powers of unlimited jurisdiction by failing to verify whether the starting amount of the fine had *actually* taken into account the varying degree of intensity of the infringement, with particular regard to the period preceding publication of the Deutsche Telekom decision.

163. The General Court is particularly brief in relation to the alleged infringement of the principle of proportionality and the principle that the penalty must be specific to the offender and the offence, referring solely to very general considerations: the Commission's margin of discretion (paragraph 430 of the judgment under appeal), the global approach of the 1998 Guidelines (paragraph 431) and the requirement for the Commission to set the fine proportionately to the factors taken into account when assessing the seriousness of the infringement and to apply those factors in a manner which is consistent and objectively justified; however, at no point does the General Court verify whether the application of those factors was actually consistent and objectively justified in the present case. It concludes in paragraph 432 of the judgment under appeal that '[s]ince 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'.

164. Even though the case-law of the General Court itself[97] requires that a fine be calculated by taking into account the specific situation of the undertaking concerned, which entails *verifying whether the facts of the case* indicate that the principle that the fines should have a deterrent effect took undue precedence over the principle that the penalty must be specific to the offender and the offence, the General Court merely states, in paragraph 433 of the judgment under appeal, that 'in the present case the fine was calculated by reference to Telefónica's specific situation'.

165. The General Court arrives at this conclusion without attributing any importance to several factors to which it should have given its attention, in particular: (i) the fact that the Deutsche Telekom, Wanadoo Interactive and Telefónica decisions were adopted on the basis of the 1998 Guidelines, that is by applying the same calculation rules; (ii) the conduct examined in the three cases partially

96 — 'As established in section A.1 above, Telefónica's infringement is not novel but, to the contrary, is a clear cut abuse for which there are precedents. In particular, after the Deutsche Telekom decision (published in October 2003) the conditions of application of Article 82 EC to an economic activity subject to sector specific ex ante regulation were to a large extent clarified and known to Telefónica' (recital 740 to the contested decision).

97 — Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 528.

overlapped in temporal terms and is (very) similar in nature:[98] predatory pricing practices in the case of Wanadoo Interactive and margin squeezing in Deutsche Telekom and Telefónica; (iii) the three cases concern the internet access markets in France, Germany and Spain, which are very similar in terms of size and economic importance, (iv) the undertakings penalised in the three cases are the historic telecommunications operators (or a subsidiary of one of them in the case of Wanadoo Interactive) with very comparable turnover;[99] and (v) certain factors might even indicate, at least in theory, that the basic amount should be lower than that imposed in Deutsche Telekom, where: (a) wholesale prices were higher than retail prices, which enabled Deutsche Telekom to be aware that a margin squeeze existed without having to take account of costs; (b) the German regulator found that there were negative margins; (c) the products concerned comprised essential infrastructure; and (d) according to the appellants, Spanish regulation was stricter than German regulation during period at issue[100] (although the latter point is disputed by the Commission).

166. The Commission maintained before the Court that 'the conclusion drawn by the General Court in paragraph 432 was based *on a detailed examination of the "elements in the file"* and the claims made by the parties' and that the General Court actually verified whether the fine was disproportionate. In response to a question put by the Court during the hearing concerning these 'elements in the file', the Commission representative merely stated that he thought 'that the elements in the file should be taken to refer to the documents, evidence and analysis of the legal issues made by the [parties]' and explained, in essence, that the basic amount of EUR 90 million was a midway point (a 'kind of median') between the starting point set in the 1998 Guidelines, namely EUR 20 million, and the basic amount of EUR 185 million imposed in *Microsoft*. It is difficult to extract from this argument a convincing explanation for the huge increase in the basic amount as compared with similar cases, more especially since it is the second highest basic amount after that imposed in Microsoft. Furthermore, even though these matters were discussed at the hearing before the General Court (as submitted by the Commission), it is none the less true that this is not apparent from the judgment under appeal.

167. As regards the increase in the basic amount of the fine for the purpose of deterrence (paragraphs 437 to 443 of the judgment under appeal) (which should have led the General Court to question the justification, on the same grounds of deterrence, for the significant increase in the basis amount), the General Court, in paragraph 439, merely endorsed the Commission's reasoning by general references to the recitals of the contested decision, without examining whether the 1.25 multiplier was appropriate and, again, without genuinely exercising its powers of unlimited jurisdiction. The General Court also failed to examine, in this part, the comparison with the Wanadoo Interactive and Deutsche Telekom decisions, in which the fine had not been increased for reasons of deterrence, thereby failing to apply the case-law to the effect that the Commission must provide a fuller account of its reasoning where 'a decision goes appreciably further than previous decisions' (see footnote 45 to this Opinion).

98 — As Advocate General Mazák pointed out in his Opinion (footnote 41) in *TeliaSonera Sverige*, '[s]ome academic commentators have suggested that *Deutsche Telekom* v *Commission* … should have more properly been analysed as a predatory pricing case, while *France Telecom* v *Commission* ([Wanadoo Interactive]) should have been a margin squeeze case (at the oral hearing the Commission did not disagree with the latter point; however, it pointed out that it decided to treat France Telecom as a predatory pricing case because the downstream unit (Wanadoo [Interactive]) was not 100% owned by France Telecom)'.

99 — According to the appellants, in 2006, the last year of the alleged infringement, the turnover of the Telefónica Group was EUR 52 901 million, that of the France Telecom Group was EUR 46 630 million in 2002 and that of Deutsche Telekom was EUR 55 838 million in 2003.

100 — Telefónica stated in paragraph 284 of its reply that Spanish regulation was stricter than German regulation during the period at issue, in view, inter alia, of the fact that (i) the 'retail minus' model used by the CMT was intended to prevent the margin squeeze phenomenon, unlike the maximum price system applied in Germany during the infringement period, which allowed set-offs to be applied between different products belonging to the same 'basket', and the fact that (ii) until November 2003, the CMT fixed retail prices (whereas the German authority set maximum retail prices, not fixed prices) and, subsequently, had to approve *ex ante* all Telefónica's retail price initiatives for new services and promotions and, in order to do so, it checked whether there was a sufficient margin between wholesale and retail prices.

168. In addition, in paragraph 441 of the judgment under appeal, the General Court failed to make a proper analysis of a possible infringement of the principle of non-discrimination, in that the applicants' turnover was in fact comparable to that of Wanadoo Interactive and Deutsche Telekom, [101] in respect of which the Commission had decided that it was not appropriate to impose an increase for the purpose of deterrence. Here the General Court once again takes refuge in the case-law that practice in previous decisions cannot serve as a legal framework for fines.

169. The General Court appears to me to make the same error when examining, in paragraphs 444 to 452 of the judgment under appeal, the classification of the appellants' conduct as an infringement of 'long duration'. In paragraphs 448 to 450 of the judgment under appeal, the General Court failed to make a distinction between the two infringement periods (which was necessary, in my view), one preceding and the other following the Deutsche Telekom decision, nor did it assess the gravity of the infringement in regard to each period. The General Court refers to paragraphs 356 to 369 and to paragraph 419 of the judgment under appeal and merely states that the 'starting amount of the fine … already reflects the varying levels of intensity of the infringement'. As I have already indicated, it is not at all clear whether (or how) the starting amount actually reflects those varying levels of intensity. In any event, the General Court fails to examine this aspect. The General Court does not dispute the fact that, in the Deutsche Telekom decision, the Commission considered that the variation in the gravity of the infringement during the period concerned meant that it was necessary to (i) reclassify as 'serious' the infringement initially regarded as 'very serious', and (ii) to reduce the increased fine, on account of its duration. The Commission took the view that Deutsche Telekom's limited margin for manoeuvre in adjusting its prices from 2002 justified the classification of the infringement as 'minor' from that date and that it was therefore unnecessary to increase the fine after that date. [102]

170. Finally, in paragraph 461 of the judgment under appeal, the General Court refers, in its assessment of the alleged novel nature of the case, to its reasoning regarding the existence of clear and foreseeable precedents. In that regard, the General Court applied a clearly incorrect test, namely that of legal certainty, and disregarded the fact that one of the attenuating circumstances established by the 1998 Guidelines is the existence of reasonable doubt on the part of the undertaking concerned as to whether its conduct constitutes an infringement. I believe that a reasonable doubt could have existed, at least until October 2003, the date of publication of the Deutsche Telekom decision, in so far as it is possible that the appellants might not have been able to perceive the limits of any legitimate expectation that a dominant operator might have in the action taken by the CMT. It is the General Court itself which acknowledges, in paragraph 361 of the judgment under appeal, that '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'.

171. The only argument of the appellants in this part of the appeal which does not appear to me to be well founded concerns the date on which the infringement ceased. In paragraph 449 of the appeal, the appellants criticise paragraph 451 of the judgment under appeal, contending that the General Court appears to have accepted that the Commission had proved the existence of the infringement only up to the end of the first half of 2006. As a result, the appellants argue that the General Court reversed the burden of proof by finding that the appellants had not proved that there was no margin squeeze during the second half of 2006, whereas it was for the Commission to establish the existence of the infringement. The General Court did not err in law in this regard, since there is no evidence in the file submitted by the appellants to indicate that any price adjustments were made between June and December 2006. Thus, there was no reversal of the burden of proof, but rather a decision based on

101 — The General Court merely refers to Telefónica's financial capacity. As indicated in footnote 99 to this Opinion, the figures for turnover were highly comparable. In terms of market capitalisation, Deutsche Telekom and Telefónica were also in a comparable situation, according to the sources quoted by the Commission in the contested decision (see Telefónica's Annual Report at page 22, cited in footnote 791 to the contested decision; Telefónica's market capitalisation and that of Deutsche Telekom were USD 74 113 million and USD 70 034 million, respectively, in 2005, and USD 104 722 million and USD 80 371 million in 2006).

102 — Deutsche Telekom, paragraphs 206 to 207 and 211.

the information contained in the file. The Commission provided evidence in its decision that the national and regional wholesale products were not subject to any adjustment until 21 December 2006 and that retail prices had remained unchanged since September 2001. Moreover, the appellants did not claim that there was any change in the costs which were taken into consideration by the Commission (paragraph 451 of the judgment under appeal).

172. It follows from the foregoing considerations that the eighth and tenth grounds of appeal must, for the most part, be upheld in so far as the General Court failed to exercise its powers of unlimited jurisdiction and thus erred in law when examining the alleged infringement 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.

173. I am not stating that there was an infringement of those principles but rather that the General Court failed to verify correctly, in the exercise of its powers of unlimited jurisdiction, whether or not the Commission decision concerning the fine complied with those principles.

174. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, the latter may, where the decision of the General Court is set aside, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment. In the present case, the state of the proceedings is not such as to enable the Court to give judgment.

V – **Conclusion**

175. In the light of the foregoing considerations, I propose that the Court should:

(1) set aside the judgment of the General Court of 29 March 2012 in Case T-336/07 *Telefónica and Telefónica de España* v *Commission* in so far as the General Court failed to exercise its powers of unlimited jurisdiction when examining the fine imposed by the European Commission on Telefónica SA and Telefónica de España SAU;

(2) refer the case back to the General Court of the European Union;

(3) order that the costs be reserved.