Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

28 June 2016*

(Competition — Agreements, decisions and concerted practices — Portuguese and Spanish telecommunications markets — Non-compete clause with respect to the Iberian market inserted in the contract for the acquisition by Telefónica of Portugal Telecom's share in the Brazilian mobile telephone operator Vivo — Legal safeguard 'to the extent permitted by law' — Obligation to state reasons — Infringement by object — Ancillary restriction — Potential competition — Infringement by effects — Calculation of the amount of the fine — Request for examination of witnesses)

In Case T-208/13,

Portugal Telecom SGPS, SA, established in Lisbon (Portugal), represented by N. Mimoso Ruiz and R. Bordalo Junqueiro, lawyers,

applicant,

v

European Commission, represented initially by C. Giolito, C. Urraca Caviedes and T. Christoforou, and subsequently by Giolito, C. Urraca Caviedes and P. Costa de Oliveira, acting as Agents, and by M. Marques Mendes, lawyer,

defendant,

APPLICATION for, primarily, annulment of Commission Decision C(2013) 306 final of 23 January 2013 relating to a proceeding under Article 101 [TFEU] (Case AT.39.839 — Telefónica/Portugal Telecom) and, in the alternative, reduction of the fine,

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro (Rapporteur), President, S. Gervasoni and L. Madise, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 May 2015,

gives the following

* Language of the case: Portuguese.

Judgment

Background to the dispute

1 The present dispute, which concerns Commission Decision C(2013) 306 final of 23 January 2013 relating to a proceeding under Article 101 [TFEU] (Case AT.39.839 — Telefónica/Portugal Telecom) ('the contested decision'), originated in a clause ('the clause') inserted in Article 9 of the share purchase agreement ('the agreement') signed by Telefónica, SA ('Telefónica') and the applicant, Portugal Telecom SGPS, SA ('PT') on 28 July 2010, whereby Telefónica was to acquire exclusive control of the Brazilian mobile network operator Vivo Participações, SA ('Vivo'). The clause is worded as follows (recital 1 of the contested decision):

'Ninth — Non-compete

To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market for a period starting on [the date of the definitive conclusion of the transaction of 27 September 2010] until [31 December] 2011.'

2 The European Commission considered, in accordance with its preliminary conclusion in the statement of objections of 21 October 2011, that, in the light of the clause and the circumstances (the economic and legal context of the case and the parties' conduct), the clause amounted to a market-sharing agreement with the object of restricting competition in the internal market and thus infringed Article 101 TFEU (recitals 2 and 434 of the contested decision).

A – *Presentation of PT and Telefónica*

3 The Portugal Telecom group was formed in 1994 following the merger of three public companies and privatised in five phases between 1995 and 2000. Following the fifth and final privatisation phase, in 2000, the Portuguese State held 500 class-A shares ('golden shares') which conferred on it certain special rights, including a right of veto over amendments to the company's by-laws and other important decisions. On 12 December 2000, Portugal Telecom, SA adopted the structure of a holding company and the denomination PT (recitals 21, 22 and 23 of the contested decision).

4 PT is the largest telecommunications operator in Portugal and has a strategic presence in other countries, notably in Brazil and in Sub-Saharan Africa. In Brazil, PT's main shareholdings consisted in 50% of the shares in the joint venture controlling Vivo until Vivo was acquired by Telefónica. Following the sale of its stake in Vivo on 28 July 2010, PT entered into a strategic partnership with Oi, one of the main providers of electronic communications in Brazil (recitals 24 and 25 of the contested decision).

5 PT sold its 0.20% stake in Telefónica in 2010 and does not control any Spanish company. It provides telecommunications services to its Portuguese multinational customers active on the Spanish market by using other operators' networks and, in particular, Telefónica's network (recitals 27, 28 and 233 of the contested decision).

6 Telefónica is the Spanish State's former telecommunications monopoly; it was fully privatised in 1997 and is the main telecommunications operator in Spain. It has developed an international presence in several countries in the European Union, Latin America and Africa and is one of the major European telecommunications groups (recitals 12 and 16 of the contested decision).

7 At the time of the adoption of the decision at issue in the present proceedings, Telefónica held 2% of PT's share capital. At the time of the facts forming the subject matter of that decision, Telefónica held a minority stake in Zon Multimedia ('Zon'), a competitor of PT in the electronic communications sector, resulting from the spin-off, in November 2007, of PT Multimedia from its parent company, PT. In addition to its shareholdings in a number of Portuguese companies, Telefónica began to develop a direct presence in Portugal through two of its subsidiaries and the Portuguese branch of one of those subsidiaries (recitals 18 to 20 and 215 of the contested decision).

8 In addition, Telefónica designated, depending on the date, one or two members of PT's board of directors. At the time of the definitive conclusion of the transaction relating to the purchase of Vivo, namely on 27 September 2010 (see paragraph 25 below), two of the members of PT's board of directors had been designated by Telefónica (footnote 67 of the contested decision).

B – *Negotiation and signature of the agreement*

9 Vivo is one of the major mobile telecommunications operators in Brazil. At the time when the agreement was signed (28 July 2010), Vivo was jointly controlled by Telefónica and PT through Brasilcel NV ('Brasilcel'), an investment vehicle company incorporated in the Netherlands (recital 33 of the contested decision).

10 On 6 May 2010, Telefónica launched a hostile takeover offer of EUR 5.7 billion for the 50% shareholding in Brasilcel then owned by PT. That offer contained, inter alia, a provision that 'Telefónica would not require any non-compete or non-solicitation commitment from Portugal Telecom'. That first offer was unanimously rejected by the members of PT's board of directors (recitals 35 and 36 of the contested decision).

11 On 1 June 2010, at 2.53 am, following a meeting between the parties on 31 May 2010, PT sent Telefónica an email with a draft relating to a second offer to purchase its shareholding in Vivo. The clause was introduced for the first time in that draft (recital 38 of the contested decision).

12 The first draft of the clause was worded as follows (recital 39 of the contested decision):

'Non-compete

Each party shall refrain from engaging or investing, directly or indirectly through any Affiliate, in any project in the telecommunication business (including fixed and mobile services, internet access and television services) that can be deemed to be in competition with the other within the Iberian market for a period starting on the date of Acceptance of the Offer until the latest of (i) 31 December 2011 or (ii) the date of consummation of the transfer of the last portion of Alternative B Put Shares'.

13 In an email sent to PT on 1 June 2010 at 12.21 pm, Telefónica suggested an amendment to the clause in the form of the addition of the phrase 'excluding any investment or activity currently held or performed as of the date [of signature of the agreement]', in order to exclude from the scope of the agreement the existing activities of each party in the other party's national market. That amendment was incorporated in the second offer, dated 1 June 2010 (recital 40 of the contested decision).

14 In addition to the first draft of the clause, the second offer provided for an increased price of EUR 6.5 billion, a call option in favour of PT, under which PT could buy back its shares owned by Telefónica, and a commitment by Telefónica to buy PT's shares in Dedic SA, a Brazilian call centre operator. Furthermore, the second offer still included Telefónica's commitment not to require any 'non-compete or non-solicitation commitments by Portugal Telecom' that had already appeared in the first offer (recitals 41 and 42 of the contested decision).

15 On the evening of 1 June 2010, PT's board of directors announced that it considered that Telefónica's second offer did not reflect the real value of Vivo. However, it decided to submit its decision to the general assembly of the company on 30 June 2010 (recital 45 of the contested decision).

16 The second offer was made public by the parties by being posted on their respective websites and being notified to the Spanish and Portuguese Stock Exchange Authorities. In addition, the content of the clause inserted into the second offer was also made public in a brochure distributed by PT's board of directors to its shareholders on 9 June 2010 in connection with the general shareholders' meeting to be held on 30 June 2010 (recitals 128 and 129 of the contested decision).

17 On 29 June 2010, Telefónica presented a third offer of EUR 7.15 billion, containing the same terms and conditions as the second offer (recital 46 of the contested decision).

18 On 30 June 2010, PT's ordinary general assembly approved Telefónica's third offer. However, the Portuguese Government exercised the right attached to its golden shares in PT (see paragraph 3 above) to block the transaction and Telefónica extended the third offer until 16 July 2010 (recitals 47 and 48 of the contested decision).

19 In its judgment of 8 July 2010, *Commission* v *Portugal* (C-171/08, ECR, EU:C:2010:412), the Court of Justice considered that, by maintaining special rights in PT such as those provided for in PT's statutes in favour of the State and other public bodies, conferred in connection with the State's golden shares in PT, the Portuguese Republic had failed to fulfil its obligations under Article 56 EC (recital 50 of the contested decision).

20 On 16 July 2010, PT asked Telefónica to extend its offer until 28 July 2010, but Telefónica refused to do so and the offer lapsed (recital 51 of the contested decision).

21 On 27 July 2010, a new meeting took place between PT and Telefónica and Telefónica proposed to PT that the words 'to the extent permitted by law' should be added at the beginning of the clause and that the duration of the clause should be from 'the date [of the definitive conclusion of the transaction on 27 September 2010] until 31 December 2011' (recitals 52 and 53 of the contested decision).

22 On 28 July 2010, Telefónica and PT entered into the agreement whereby Telefónica acquired exclusive control over Vivo by acquiring 50% of the share capital of Brasilcel for EUR 7.5 billion (recital 54 of the contested decision).

23 The agreement included, in clause 9, the following clause (recital 55 of the contested decision):

'Ninth — Non-compete

To the extent permitted by law, each party shall refrain from engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market for a period starting on [the date of the definitive conclusion of the transaction of 27 September 2010] until [31 December] 2011.'

24 Unlike the second offer (paragraph 14 above), the agreement no longer included the call option in favour of PT, whereby PT could buy back the PT shares owned by Telefónica. On the other hand, the agreement made provision, in particular, for, in the first place, the resignation of the members of PT's board of directors designated by Telefónica (Clause 3.6 of the agreement); in the second place, an industrial partnership programme between the two undertakings (Clause 6 of the agreement), on

condition that they did not compete in Brazil (Clause 7 of the agreement); and, in the third place, the possible acquisition by Telefónica of the Brazilian company Dedic, which specialises in the provision of call centre services (Clause 10 of the agreement) (recitals 56 to 61 of the contested decision).

25 The transaction was definitively concluded on 27 September 2010, by means of a 'deed of transfer of shares' and a 'confirmatory deed' (recital 63 of the contested decision).

26 On the date of signature of the agreement, on 28 July 2010, PT had also announced that it had entered into, on the same date, a memorandum of understanding setting out the principles for the implementation of a strategic partnership with Oi (see paragraph 4 above) and that it expected to acquire 22.38% of the shares of the Oi group in order to have an important role in its management (recital 62 of the contested decision).

27 The Vivo transaction was notified, on 29 July and 18 August 2010, to the Agência National de Telecommunicações (Anatel, the Brazilian telecommunications regulatory authority) and the Conselho Administrativo de Defesa Econômica (CADE, the Brazilian competition authority) and, in an article published in the press on 23 August 2010, Telefónica confirmed that the agreement included a non-compete clause (recitals 103, 130 and 491 of the contested decision).

C – *Events following the conclusion of the agreement*

28 On 26 and 29 October 2010, two telephone conversations took place between Telefónica and PT (recitals 113 and 124 of the contested decision).

29 On 4 February 2011, after the Commission had initiated the proceedings on 19 January 2011 (see paragraph 31 below), Telefónica and PT signed an agreement deleting the clause (recital 125 of the contested decision), worded as follows:

'Recitals:

Whereas [PT] and Telefónica entered into an agreement (the "Agreement") on 28 July 2010 in relation to the sale from [PT] to Telefónica of 50% (fifty) percent of the outstanding share capital of the Dutch company [Brasilcel] ("Brasilcel" or "the Company").

Whereas Section Ninth of the Agreement included a Non-compete clause whereby, to the extent permitted by law, each Party would refrain from engaging in competition with the other in the Iberian market since Closing (as defined in the Agreement) until 31 December 2011.

Whereas Section Ninth of the Agreement was first discussed between the parties in relation to PT's right to call the shares held by Telefónica in PT and eventually kept in the final agreement despite the fact that the said right was dropped, subject therefore to its conformity with law.

Whereas the Parties wish to confirm in writing their understanding that Section Ninth is not enforceable, and has not at any time been enforced, and therefore it has not affected their respective commercial decisions.

Whereas Telefónica and PT were notified on 24 January and 21 January 2011 respectively of the opening by the European Commission of formal proceedings in relation to the aforesaid Section Ninth.

In light of the above, the Parties agree as follows:

First. Amendment of the Agreement and Withdrawal of Rights

The Agreement shall be amended by deleting Section Ninth in its entirety, which will be deemed not to have had content at any time.

The Parties irrevocably and definitively confirm that Section Ninth has not and may not have conferred any rights or imposed any obligations on them or on any third party.

Second. Governing Law

This Agreement, and any question or dispute related to it or to its performance or consequences of any breach of it, shall be governed by and construed in accordance with the laws of Portugal.'

D – *Procedure before the Commission*

30 The clause was detected in September 2010 by the Spanish Competition Authority, which informed the Portuguese Competition Authority and the Commission, and it was decided that the investigation should be entrusted to the Commission (recital 3 of the contested decision).

31 On 19 January 2011, the Commission initiated proceedings against Telefónica and PT pursuant to Article 11(6) of Council Regulation (EC) No 1/2003 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) and Article 2(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18) (recital 5 of the contested decision).

32 In the context of the investigation, in application of Article 18(2) of Regulation No 1/2003, the Commission sent requests for information to the parties on 5 January, 1 April, 25 May, 10 and 24 June 2011 and 5 September 2012 and to certain of their multinational customers on 20 April 2011. In addition, meetings were held with PT on 17 March and 8 September 2011 and on 27 September 2012 and with Telefónica on 21 March and 7 September 2011 and on 27 September 2012 (recital 6 of the contested decision).

33 On 21 October 2011, the Commission adopted a statement of objections; on 4 November 2011, the parties had access to the file; and on 7 November 2011, they received the relevant documents. On 13 January 2012, Telefónica and PT replied to the statement of objections, but did not request an oral hearing (recitals 7, 8 and 9 of the contested decision).

34 On 23 January 2013, the Commission adopted the contested decision.

Contested decision

35 The Commission stated that the case giving rise to the contested decision concerned the clause in the agreement (paragraphs 1, 22 and 23 above) (recital 1 of the contested decision).

36 The Commission explained that it had considered in the statement of objections that, in the light of the clause and the circumstances (the economic and legal context of which the clause formed part and the behaviour of the parties), the clause amounted to a market-sharing agreement with the object of restricting competition in the internal market and constituted an infringement of Article 101 TFEU, and that it confirmed that conclusion in the contested decision (recital 2 of the contested decision).

37 In the first place, the Commission analysed the factual background to the negotiations between the parties that led to the introduction of the clause of the final version of the agreement, the events subsequent to the signature of the agreement (see paragraphs 10 to 29 above) and the parties' arguments relating to that background and those events (recitals 29 to 130 of the contested decision).

38 In the second place, the Commission considered, in the light of the scope of the clause and the relevant markets, that, in view of its wording (paragraphs 1 and 23 above), the clause covered any project regarding electronic communications services, on condition that the other party rendered or might render that service. Consequently, and as is apparent from its wording, the clause referred to fixed and mobile telephone services, internet access and television services and also broadcasting transmission services, which are considered to be communications services although they are not mentioned in the clause. On the other hand, the Commission stated that, in accordance with the wording of the clause, any investment or activity carried out before the date of signature of the agreement, namely 28 July 2010, was excluded from the scope of the clause (recitals 132 to 136 and 185 of the contested decision).

39 In the latter regard, the Commission noted that global telecommunication services and wholesale international carrier services were excluded from the scope of the clause because each of the parties was present in the market for such services within the Iberian peninsular at the time of signature of the agreement (recitals 173, 174, 184 and 185 of the contested decision).

40 As regards the geographic scope of the clause, the Commission interpreted the expression 'Iberian market' as referring to the Spanish and Portuguese markets. Having regard to the parties' commercial activities, which consisted of a presence on most of the electronic communications markets in the country of origin of each of them and little or no presence in the country of origin of the other party (paragraphs 3 to 7 above), the Commission considered that the geographic scope of the clause corresponded to Portugal for Telefónica and to Spain for PT (recitals 137 to 140 of the contested decision).

41 The Commission therefore concluded that the clause applied to all markets for electronic telecommunications services and television services in Spain and Portugal, with the exception of the markets for global telecommunication services and wholesale international carrier services (recital 185 of the contested decision).

42 In the third place, according to the Commission, there is no doubt that the clause constitutes an agreement within the meaning of Article 101(1) TFEU, since it is an agreement in written form, entered into and signed by the parties, the existence of which is undeniable and since, moreover, the clause was included in a public deed executed before a notary, the recitals to which state that a copy of the agreement is annexed to the deed (recital 237 of the contested decision).

43 First, in the light of the case-law on restriction of competition by object, the Commission, after analysing the parties' arguments, considered that the clause constituted a restriction by object having regard to the content of the agreement, the objectives which the clause sought to attain, the legal and economic context of which the clause formed part, the actual conduct and behaviour of the parties and, last, their intention (recitals 238 to 242 and 243 to 356 of the contested decision).

44 The Commission thus concluded, as regards the object of the clause, that, taking into account its scope, the clause prevented PT from entering into any of the Spanish telecommunications markets and prevented Telefónica from expanding its limited presence in the Portuguese telecommunications markets while the clause was in force, so that, instead of competing with each other and behaving as rivals, as normally expected in an open and competitive market, Telefónica and PT had deliberately agreed to exclude or limit competition on their respective markets and the clause thus amounted to a market-sharing agreement (recital 353 of the contested decision).

45 In the latter regard, the Commission stated that the clause was, in addition, liable to delay integration in the electronic communications sector, since the market integration process would be seriously jeopardised if incumbents such as Telefónica and PT could reinforce their already very strong market position by participating in collusive practices with the aim of protecting their home markets and avoiding the entry of other operators to those markets (recitals 354 and 355 of the contested decision).

46 Second, after recalling that, according to the case-law, there was no need to take into account the actual effects of an agreement if it was shown that the agreement constituted a restriction of competition by object, which, according to the Commission, was the case here, the Commission nonetheless stated, in response to the parties' arguments, that, first of all, the clause had been adopted by two competitors and was therefore capable of producing anticompetitive effects; that, next, even if the clause were considered to be incapable of producing any effects, that would not preclude its being regarded as constituting a restriction by object, since, if an agreement had as its object the restriction of competition, it was irrelevant, as regards the existence of the infringement, whether the agreement was or was not in the commercial interest of its participants, the fact that the clause having as its object the restriction of competition might have proved to be incapable of producing any effects in the commercial interest of Telefónica or PT thus being irrelevant; and that, last, the parties had wholly failed to show that they had engaged in new activities in Spain or Portugal that might disprove that the clause had been implemented, which did not in itself show that the clause had been implemented, but was a sign that it might have been implemented (recitals 240 and 357 to 365 of the contested decision).

47 The Commission considered that it must be concluded that, in this case, there was no need to show any negative effects on competition, since the anticompetitive object of the clause had been established and it was thus not necessary to carry out a detailed assessment of each telecommunications market concerned and of the effects of the clause within those markets (recital 366 of the contested decision).

48 Third, the Commission stated that the clause could not be analysed as a restriction ancillary to the Vivo transaction, since it related to the Iberian market whereas the Vivo transaction concerned an operator whose activity was confined to Brazil and the clause could not be considered to be necessary for the implementation of the operation (recitals 367 to 433 of the contested decision).

49 The Commission concluded that the clause imposed a non-compete obligation on the parties and constituted a market-sharing agreement with the object of restricting competition within the internal market and that it thereby infringed Article 101 TFEU, in view of the content of the agreement (and, in particular, the wording of the clause, which left little, if any, doubt as to its nature) and of the economic and legal context of which the agreement formed part (for example, the electronic communications markets, which were liberalised) and the actual conduct and behaviour of the parties (in particular, the fact that the agreement was terminated by the parties only on 4 February 2011, following the initiation of proceedings by the Commission on 19 January 2011 (and not as a result of the telephone conversations of October 2010, contrary to the parties' claims) (recital 434 of the contested decision).

50 Fourth, the Commission stated that the clause did not fulfil the conditions laid down in Article 101(3) TFEU (recitals 436 to 446 of the contested decision) and that it might affect trade between Member States (recitals 447 to 453 of the contested decision).

51 Fifth, as regards the duration of the infringement, the Commission concluded that the infringement covered the period from the date of the definitive conclusion of the transaction, namely 27 September 2010 (see paragraph 25 above), until the date on which the clause had been terminated, namely 4 February 2011 (see paragraph 29 above) (recitals 454 to 465 of the contested decision).

52 Sixth, as regards the calculation of the amount of the fines, the Commission applied, in the contested decision, the provisions of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the Guidelines').

53 In order to determine the basic amount of the fine to be imposed, the Commission took into account the value of sales of the services covered by the clause as defined in section 5 of the contested decision (see paragraphs 38 to 40 above) and, in particular, for each party, only the value of its own sales in its country of origin (recitals 478 to 483 of the contested decision).

54 The Commission also recalled that it normally took into account the sales made by the undertakings during the last full business year of their participation in the infringement, but that, in this instance, the infringement had lasted for less than one year and had taken place between 2010 and 2011. Consequently, the Commission used the undertakings' sales in 2011, which were lower than the sales recorded by the parties in 2010 (recital 484 of the contested decision).

55 As regards the gravity of the infringement, which determines the percentage of the value of sales to be taken into consideration when setting the basic amount of the fine, the Commission observed that the infringement consisted of an agreement not to compete and to share the Spanish and Portuguese electronic communications and television markets and that Telefónica and PT were the incumbent telecommunications operators in their respective countries. In addition, the Commission noted that it took into account the fact that the clause had not been kept secret by the parties (see paragraphs 16 and 27 above). In the light of those factors, the Commission considered that the value of sales to be taken into consideration should be 2% for the two undertakings concerned (recitals 489 to 491 and 493 of the contested decision).

56 So far as the duration of the infringement was concerned, the Commission took account of the fact that it had covered the period from 27 September 2010 (date of the notarised deed and thus of the definitive conclusion of the transaction) until 4 February 2011 (date of the agreement whereby the parties terminated the clause) (recital 492 of the contested decision).

57 The Commission did not take any aggravating circumstance into account and considered that the date of termination of the clause, 4 February 2011, constituted a mitigating circumstance, since the clause was terminated only 16 days after the Commission initiated the proceedings and 30 days after it sent the first request for information to the parties. As, moreover, the clause had not been kept secret, the Commission considered that the basic amount of the fines to be imposed on the parties should be reduced by 20% (recitals 496, 500 and 501 of the contested decision).

58 The final amount of the fines came to EUR 66 894 000 for Telefónica and EUR 12 290 000 for PT (recital 512 of the contested decision). The Commission pointed out that those amounts did not exceed 10% of the total turnover of each of the parties concerned (recitals 510 and 511 of the contested decision).

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

'*Article 1*

[Telefónica] and [PT] have infringed Article 101 [TFEU] by participating in a non-compete agreement, included as clause nine of the Stock Purchase Agreement entered into by them on 28 July 2010.

The duration of the infringement was from 27 September 2010 until 4 February 2011.

Article 2

For the infringement referred to in Article 1, the following fines are imposed:

(a) [Telefónica]: EUR 66 894 000

(b) [PT]: EUR 12 290 000

…'

Procedure and forms of order sought

60 By application lodged at the Court Registry on 9 April 2013, the applicant brought the present action.

61 On a proposal from the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of the General Court of 2 May 1991, it requested the parties to produce certain documents. The parties complied with that request within the prescribed period.

62 The parties presented oral argument and replied to the Court's oral questions at the hearing on 22 May 2015.

63 The applicant claims that the Court should:

— hold that the present action for annulment was properly brought and is admissible under Article 263 TFEU and for the purposes of Article 264 TFEU;

— annul the contested decision;

— in the alternative, reduce the amount of the fine imposed on the applicant in Article 2 of the contested decision;

— order the Commission to pay the costs of the proceedings and the costs incurred by the applicant.

64 The Commission contends that the Court should:

— declare the action inadmissible;

— in the alternative, declare that the action is wholly unfounded in law and uphold the decision in its precise terms and the fine imposed in the same amount;

— order the applicant to pay the costs.

Law

A – *Admissibility*

65 In support of the action, the applicant formally puts forward two pleas for annulment, the first alleging breach of essential procedural requirements, namely failure to state reasons and insufficiency of the evidence, and the second alleging infringement of the Treaty and of the law relating to its application, in that the decision is vitiated by a manifest error as to the facts, the evidence and the sufficiency of the evidence; an error in the interpretation of Article 101 TFEU and, consequently, an infringement of that

provision; breach of the obligation to investigate and to make a determination; breach of the principle *in dubio pro reo*; breach of the principles with which the Commission must comply when imposing fines; and breach of the principle of proportionality.

66 Before setting out the actual pleas in law, the application contains three preliminary parts, entitled 'The facts', 'The subject matter of the action' and 'Essential content of and main defects in the decision'.

67 The Commission maintains that, owing to its lack of clarity and intelligibility and to the way in which the pleas in law are presented, the application must be declared inadmissible pursuant to Article 44 of the Rules of Procedure of 2 May 1991. The Commission claims that it is very difficult to identify what the applicant wishes to put forward by way of pleas for annulment, as the statement of the actual pleas does not begin until paragraph 276 of the application, preceded by more than 250 paragraphs of argument in which the applicant does not specify what in its view constitutes one or more pleas for annulment of the contested decision. Furthermore, in the statement of the pleas for annulment, the applicant does not make clear to what extent that argument is relevant for the purpose of supporting those pleas for annulment.

68 It should be borne in mind that, under Article 21 of the Statute of the Court of Justice of the European Union and Article 44(1)(c) of the Rules of Procedure of 2 May 1991, each application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based. The information given must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case, if necessary without other supporting information (judgment of 30 January 2007, *France Télécom* v *Commission*, T-340/03, ECR, EU:T:2007:22, paragraph 166). Furthermore, the Courts of the European Union have held that it must be accepted that the statement of pleas in the application need not match the terms and the order used in the Rules of Procedure and that the presentation of those pleas, in terms of their substance rather than their legal classification, might be sufficient if the applicant set them out with sufficient clarity (see order of 21 May 1999, *Asia Motor France and Others* v *Commission*, T-154/98, ECR, EU:T:1999:109, paragraph 55 and the case-law cited).

69 Conversely, if that is not the case and if the application does not set out, in particular, precise criticisms of the contested decision, the action must be declared inadmissible (see, to that effect, order of 20 January 2012, *Groupe Partouche* v *Commission*, T-315/10, EU:T:2012:21, paragraph 22 et seq.).

70 Thus, it cannot be acceptable that both the defendant institution and the Court should be reduced to speculating about the reasoning and precise observations, both in law and in fact, that could lie behind the applicant's observations. It is precisely such a situation, which creates legal uncertainty and is anathema to the sound administration of justice, that Article 44(1) of the Rules of Procedure of 2 May 1991 is designed to avoid (see, to that effect, order of 19 May 2008, *TF1* v *Commission*, T-144/04, ECR, EU:T:2008:155, paragraph 57).

71 Last, it should be observed that material in an application for annulment under the headings 'The facts', 'The subject matter of the action' or 'Essential content of and main defects in the decision' is not, prima facie, intended to constitute independent pleas in law capable of resulting in the annulment of the contested decision, but rather to describe the facts and the act which is being challenged. However, it is not possible to preclude, a priori, that this part of the application may contain a statement setting out one or more pleas for annulment. Nonetheless, it is only where it emerges clearly and unambiguously from a passage contained under those headings that, in addition to providing a description, the passage is challenging the validity of the findings made in the contested decision that the passage can be regarded as a plea in law, notwithstanding the structure of the application and its position in the general scheme of that document (see, to that effect, judgments of 14 December 2005, *Honeywell* v *Commission*, T-209/01, ECR, EU:T:2005:455, paragraph 106, and of 1 July 2008, *Commission* v *D*, T-262/06 P, ECR-SC, EU:T:2008:239, paragraph 52).

72 In the present case, it must be stated that the application lacks clarity owing, in particular, to the fact that the applicant sets out, in more than 200 paragraphs, '[The] essential content of and [the] main defects in the decision', before arriving at the actual 'pleas'. As those 'pleas' are developed in a very succinct manner, it appears necessary to identify, in those 200 or so paragraphs, the complaints and arguments supporting the pleas in law.

73 That, moreover, appears to have been the applicant's intention, since it so stated in paragraph 69 of the reply and so confirmed at the hearing. Contrary to the Commission's contention, it is possible to identify, in the part relating to '[The essential content of and the main defects in the decision', the applicant's criticisms of the contested decision and the provisions which it claims to have been infringed. The Commission's assertion that 'the application reveals a total absence of legal conclusions capable of calling the legality of the [contested] decision in question' cannot therefore be upheld. It should be noted, moreover, that the Commission was able to respond to the complaints put forward by the applicant.

74 It follows that the Commission's plea of inadmissibility must be rejected and that the application must be declared admissible.

75 It should be observed, however, that while it is possible to identify, in the 200 or so paragraphs preceding the statement of the actual pleas in the application, the applicant's criticisms of the contested decision and the provisions which it claims to have been infringed, its pleadings are characterised by the lack of correspondence between those criticisms and the pleas relied on and a certain lack of conciseness. In those circumstances, it is appropriate to bear in mind that the requirement that the Court give reasons for its decisions cannot be interpreted as meaning that it is obliged to respond in detail to every single argument advanced by a party, particularly if the argument was not sufficiently clear and precise and was not adequately supported by evidence (judgments of 11 September 2003, *Belgium* v *Commission*, C-197/99 P, ECR, EU:C:2003:444, paragraph 81, and of 11 January 2007, *Technische Glaswerke Ilmenau* v *Commission*, C-404/04 P, EU:C:2007:6, paragraph 90). It is clear from established case-law, moreover, that the obligation to state reasons does not require the Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case and that the reasoning may therefore be implicit on condition that it enables the persons concerned to know why this Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see judgment of 16 July 2009, *Commission* v *Schneider Electric*, C-440/07 P, ECR, EU:C:2009:459, paragraph 135 and the case-law cited).

B – *Substance*

1. *Claims for annulment of the contested decision*

76 In support of its claim for annulment of the contested decision, the applicant puts forward a plea alleging breach of essential procedural requirements and a plea alleging infringement of Article 101 TFEU and of the rules that must be observed in its application.

a) The plea alleging breach of essential procedural requirements

77 The applicant claims, under the head of breach of essential procedural requirements, that the contested decision is vitiated by a failure to state reasons and by insufficiency of evidence; however, as the applicant confirmed at the hearing, the latter complaint should be dealt with when the Court examines the second plea for annulment, alleging infringement of Article 101 TFEU.

78 As regards the alleged failure to state reasons, it should be borne in mind that the obligation laid down in Article 296 TFEU to state adequate reasons is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 67; of 22 March 2001, *France* v *Commission*, C-17/99, ECR, EU:C:2001:178, paragraph 35; and of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, ECR, EU:C:2011:620, paragraph 146).

79 In the present case, first, it should be observed that the applicant addresses the failure to state reasons in the contested decision under the heading 'Failure to state reasons' in the part of its application entitled 'Pleas for annulment'. The complaints set out under that heading will be examined below. Second, it is apparent that, throughout its application, the applicant puts forward criticisms which resemble complaints relating to the reasoning, but which, subject to the complaints examined in paragraphs 165 to 168, 220 to 224 and 254 to 256 below, actually relate to the question whether the contested decision is well founded, and that they should be examined when the substantive questions to which they relate are examined.

80 In the context of its criticisms that strictly relate to the plea alleging breach of the obligation to state reasons, the applicant, after observing that that obligation is laid down in Article 296 TFEU, merely claims that 'the reasoning stated in the contested decision contains omissions, inaccuracies and errors on essential questions, which irreparably affects the conclusions which it reaches', and refers, 'by way of example', to the Commission's conclusions set out in recitals 264 et seq. and 353 et seq. of the contested decision. It is clear from its submissions, however, that in reality the applicant does not criticise the reasoning, but the merits of the considerations set out in those recitals, as, moreover, it confirmed at the hearing, which was recorded in the minutes.

81 It follows that, in that it does not relate to the complaints which in reality challenge the merits of the contested decision, and subject to paragraphs 165 to 168, 220 to 224 and 254 to 256 below, the plea alleging breach of essential procedural requirements must be rejected, without there being any need to examine the applicant's arguments strictly relating to that plea from the viewpoint of the obligation to state reasons.

b) The plea alleging infringement of Article 101 TFEU and of the law relating to the application of that provision

82 In the applicant's submission, having regard to the nature of the clause and to the legal and economic circumstances and context of which it forms part, neither the clause nor the obligation requiring the parties to refrain from competing in the Iberian market must be regarded as a restriction of competition by object.

83 The applicant therefore takes issue with the Commission for having infringed Article 101 TFEU by characterising the clause as a restriction of competition by object. In that context, it claims that the Commission did not adduce proof of the infringement and that it made a manifest error of assessment with respect to the facts, the proof and the sufficiency of the proof, erred in the application of Article 101 TFEU and infringed the Treaty, breached the obligation to investigate and to make a determination and, last, breached the principle *in dubio pro reo*.

84 As the applicant confirmed at the hearing, it develops, in essence, the following legal and factual arguments in support of this plea: the clause had no connection with the Vivo transaction, but was linked to the option that enabled PT to buy back its shares that were held by Telefónica ('the call option'), which was found in the second and third offers but no longer appeared in the final version of the agreement or to the resignation of the members of PT's board of directors appointed by Telefónica, which was provided for in the agreement; the clause contained two separate obligations, a

main 'self-assessment' obligation and a secondary non-compete obligation, the latter obligation becoming binding only if it was found to be legal when the first obligation was exercised; the clause could not constitute a restriction of competition by object, because the Commission did not show that Telefónica and PT were potential competitors and that the clause was therefore capable of restricting competition; and, last, since the clause did not constitute a restriction of competition by object, the Commission ought to have examined its effects.

Preliminary observations

85 It should be borne in mind that, in order to be caught by the prohibition laid down in Article 101(1) TFEU, an agreement, a decision by an association of undertakings or a concerted practice must have 'as [its] object or effect' the prevention, restriction or distortion of competition in the internal market.

86 In that regard, it is apparent from the case-law of the Court of Justice that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects (see judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, ECR, EU:C:2014:2204, paragraph 49 and the case-law cited).

87 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition (see judgment in *CB* v *Commission*, cited in paragraph 86 above, EU:C:2014:2204, paragraph 50 and the case-law cited).

88 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) TFEU, to prove that they have actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (judgment in *CB* v *Commission*, cited in paragraph 86 above, EU:C:2014:2204, paragraph 51).

89 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent (see judgment in *CB* v *Commission*, cited in paragraph 86 above, EU:C:2014:2204, paragraph 52 and the case-law cited).

90 According to the case-law of the Court of Justice, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see judgment in *CB* v *Commission*, cited in paragraph 86 above, EU:C:2014:2204, paragraph 53 and the case-law cited).

91 In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account (see judgment in *CB* v *Commission*, cited in paragraph 86 above, EU:C:2014:2204, paragraph 54 and the case-law cited).

92 It is in the light of those principles that the arguments put forward by the applicant should be examined.

The argument alleging that the clause was linked to the call option or to the resignation of the members of PT's board of directors appointed by Telefónica

93 The applicant claims that the clause had no connection to the Vivo transaction, but that it was linked to the call option, which appeared in the second or third offers — the latter offer consisting solely in an increase in the price, without a new version of the terms of the agreement — and no longer appeared in the final version of the agreement, and to the resignation of the members of PT's board of directors appointed by Telefónica, which was provided for in the agreement.

94 The applicant emphasises that the call option and the clause appeared at the same time in the second offer and claims that the non-compete obligation was typical of an asset acquisition such as the call option, entailing the risk that the acquirer would exploit the sector transferred, with which it is very familiar.

95 Because of the reduction of Telefónica's shareholding in PT's capital to around 2%, announced on 23 June 2010, the fourth offer no longer contained a call option, but required Telefónica to take steps to ensure that its two representatives on PT's board of directors would resign. Owing to the difficulties in the negotiation procedure, certain provisions which came from the previous offers were not discussed again, however, and the clause was therefore retained, with the words 'to the extent permitted by law' being inserted.

96 The applicant stated at the hearing, in answer to a question from the Court, that it did not claim that the clause ought to have been characterised as a restriction ancillary to the departure of the members of PT's board of directors appointed by Telefónica. However, it follows, in essence, from its assertions that it claims to have associated the non-compete commitment with (i) the option to purchase its shares held by Telefónica and (ii) the resignation of the members of its board of directors appointed by Telefónica. In addition, in the applicant's submission, when the call option was deleted from the draft agreement at the time of the fourth offer, the words 'to the extent permitted by law' was inserted, thus changing the non-compete clause into a self-assessment clause. In those circumstances, and since, by that argument, the applicant claims to remove the clause from the application of Article 101 TFEU, the following observations must be made.

97 It follows from the case-law of the Court of Justice that if a given operation or activity is not covered by the prohibition rule laid down in Article 101(1) TFEU, owing to its neutrality or positive effect in terms of competition, a restriction of the commercial autonomy of one or more of the participants in that operation or activity is not covered by that prohibition rule either, if that restriction is objectively necessary to the implementation of that operation or that activity and proportionate to the objectives of one or the other (see judgment of 11 September 2014, *MasterCard and Others* v *Commission*, C-382/12 P, ECR, EU:C:2014:2201, paragraph 89 and the case-law cited).

98 Where it is not possible to dissociate such a restriction from the main operation or activity without jeopardising its existence and aims, it is necessary to examine the compatibility of that restriction with Article 101 TFEU in conjunction with the compatibility of the main operation or activity to which it is ancillary, even though, taken in isolation, such a restriction may appear on the face of it to be covered by the prohibition rule in Article 101(1) TFEU (judgment in *MasterCard and Others* v *Commission*, cited in paragraph 97 above, EU:C:2014:2201, paragraph 90).

99 Accordingly, the concept of 'ancillary restriction' covers any restriction which is directly related and necessary to the implementation of a main operation (judgments of 18 September 2001, *M6 and Others* v *Commission*, T-112/99, ECR, EU:T:2001:215, paragraph 104, and of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T-360/09, ECR, EU:T:2012:332, paragraph 62).

100 A restriction 'directly related' to implementation of a main operation must be understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it (judgments in *M6 and Others* v *Commission*, cited in paragraph 99 above, EU:T:2001:215, paragraph 105, and in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraph 63).

101 The condition that a restriction be necessary implies a two-fold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it (judgments in *M6 and Others* v *Commission*, cited in paragraph 99 above, EU:T:2001:215, paragraph 106, and in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraph 64).

102 As regards the objective necessity of a restriction, it must be observed that inasmuch as the existence of a rule of reason in EU competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro- and anticompetitive effects of an agreement (judgments in *M6 and Others* v *Commission*, cited in paragraph 99 above, EU:T:2001:215, paragraph 107, and in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraph 65).

103 That approach is justified not merely so as to preserve the effectiveness of Article 101(3) TFEU, but also on grounds of consistency. As Article 101(1) TFEU does not require an analysis of the positive and negative effects on competition of a principal restriction, the same finding is necessary with regard to the analysis of accompanying restrictions (judgments in *M6 and Others* v *Commission*, cited in paragraph 99 above, EU:T:2001:215, paragraph 108, and in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraph 66).

104 Consequently, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary for the implementation of that operation. If, without the restriction, the main operation is difficult, or even impossible, to implement, the restriction may be regarded as objectively necessary for its implementation (judgments in *M6 and Others* v *Commission*, cited in paragraph 99 above, EU:T:2001:215, paragraph 109, and in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraph 67).

105 Where a restriction is objectively necessary for the implementation of a main operation, it is still necessary to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement that operation. If the duration or the scope of the restriction exceeds what is necessary in order to implement the operation, it must be assessed separately under Article 101(3) TFEU (judgment in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraph 68).

106 It must be observed that, inasmuch as the assessment of the ancillary nature of a particular agreement in relation to a main operation entails complex economic assessments by the Commission, judicial review of that assessment is limited to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts

have been accurately stated and whether there has been a manifest error of assessment or misuse of powers (judgment in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraph 69).

107 If it is established that a restriction is directly related and necessary to achieving a main operation, the compatibility of that restriction with the competition rules must be examined with that of the main operation. Thus, if the main operation does not fall within the scope of the prohibition laid down in Article 101(1) TFEU, the same holds for the restrictions directly related to and necessary for that operation. If, on the other hand, the main operation is a restriction within the meaning of Article 101(1) TFEU but benefits from an exemption under Article 101(3) TFEU, that exemption also covers those ancillary restrictions (judgment in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraph 70).

108 It should also be noted that, in the judgment of 11 July 1985, *Remia and Others* v *Commission* (42/84, ECR, EU:C:1985:327, paragraphs 17 to 20), the Court of Justice examined a non-compete clause in a contract for the sale of an undertaking. After pointing out that the mere fact of being included in a contract for the sale of an undertaking was not of itself sufficient to remove non-compete clauses from the scope of Article 101(1) TFEU, the Court of Justice stated that, in order to determine whether or not such clauses come within the prohibition laid down in that article, it was necessary to examine what the state of competition would be if those clauses did not exist. The Court of Justice made clear that, if that were the case, should the vendor and purchaser remain competitors after the transfer, the agreement for the transfer of the undertaking could not be given effect, since the vendor, with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers, so that, in such a situation, the non-compete clauses had, in principle, the merit of ensuring that the transfer would be possible and have the effect intended, on the understanding that they must be necessary to the transfer of the undertaking concerned and that their duration and scope must be strictly limited to that purpose.

109 As regards the call option and the departure of the members of PT's board of directors appointed by Telefónica, it should be noted that the applicant asserts, in paragraphs 20 and 76 of the application, that the clause had, in relation to those two factors, an objective comparable to that of the non-compete clauses in agreements for the transfer of undertakings, namely to prevent Telefónica from making use of the information gained through its presence on PT's board of directors in order to compete with PT.

110 As regards the call option, it should be observed that that option no longer appeared in the final version of the agreement and could therefore no longer justify the clause, which, moreover, is the reason why the Commission did not examine whether the clause might be characterised as an ancillary restriction to the call option (see recital 390 of the contested decision). Furthermore, and in any event, it must be stated that the applicant merely (i) asserts that 'the non-compete option was in PT's interest and typical of an acquisition of shares with the characteristics of that resulting from the implementation of the call option, especially an acquisition entailing enhanced control, involving a significant investment and the risk that the seller might exploit the sector transferred, with which it is very familiar'; (ii) emphasises the size of the shareholding to which the call option was to apply (10%); and (iii) claims that 'PT was in the habit of associating clauses of this type to agreements for the purchase and sale of shares, since they [were] limited in time and not harmful to current activities' and that 'PT had an interest in protecting itself in the short term following the exercise of the call option'.

111 However, the applicant does not explain why and how, in the present case, the sale by Telefónica of the shares in PT which it owned might have entailed an actual risk that the seller would continue to operate in the sector concerned with which it was very familiar or from what, specifically, it felt the need to protect itself because of the exercise of the call option.

112 Furthermore, although it asserts that the call option and the non-compete clause appeared at the same time in the second offer, which would suggest that they are connected, the applicant does not show that their introduction was connected. Thus, the applicant merely states that the fact that the clause was connected to the call option is apparent from the exchange of correspondence between Telefónica and PT on 1 June 2010 between 2.53 am and 5 pm, which resulted in an increase of the price of the second offer. That correspondence, produced by the Commission in answer to a question from the Court, consists of an exchange of emails between Telefónica and PT containing the successive revisions of the wording of the agreement with clear amendments. While those versions of the agreement do indeed include the call option and the non-compete clause, it cannot be inferred that the clause is dependent on the call option.

113 In those circumstances, it must be stated that it cannot be maintained that the clause might have been characterised as a restriction ancillary to the call option.

114 As regards, moreover, the departure of the members of PT's board of directors appointed by Telefónica, the applicant asserts that they might have had access to sensitive information, but fails to demonstrate that there was a genuine risk that Telefónica would use the information obtained by the members of PT's board of directors which it had appointed in a way that would be detrimental to PT after those members had left.

115 In addition, it must be stated that the applicant adduces no evidence capable of rebutting the Commission's conclusions set out in recitals 391 to 401 of the contested decision, according to which the clause could not be justified as a restriction ancillary to the departure of the members of PT's board of directors appointed by Telefónica.

116 The Commission thus asserted, in particular, that Portuguese company law and, more particularly, Articles 64, 254 and 398 of the Portuguese Commercial Code imposed a legal obligation on the members of a board of directors not to use the information to which they had had access for purposes other than ensuring the proper functioning of the company (recital 395 of the contested decision). The applicant does not explain why, given such a legal obligation, the clause was necessary in order to protect the information made available to the members of PT's board of directors appointed by Telefónica after they had left the board.

117 Likewise, the Commission noted, as regards the alleged need to protect the confidential information to which the members of PT's board of directors appointed by Telefónica had access, that that information had been made available to those members before the Vivo transaction, that no non-compete commitment had been deemed necessary at that time and that the parties had not shown why Telefónica's departure from PT's board of directors would have triggered a need to adopt a non-compete commitment (recitals 393 and 394 of the contested decision).

118 It follows from the foregoing considerations that the applicant has not shown that the clause had been a restriction ancillary to the departure of the members of PT's board of directors appointed by Telefónica.

119 Nor, it should be noted, has the applicant contradicted the Commission's considerations set out in recitals 402 to 404 of the contested decision, according to which, even on the assumption that a non-compete commitment was necessary for the implementation of the resignation from PT's board of directors of the members appointed by Telefónica, in order to ensure the protection of the confidential information made available to that board, such a commitment ought to have been limited to what was strictly necessary, which is not the case for the clause, which is bilateral in nature and therefore not only prohibits Telefónica from competing with PT but also prohibits PT from competing with Telefónica.

120 Last, and in any event, it should be noted that, as the Commission correctly points out in recitals 386 and 387 of the contested decision, the question whether a restriction may be characterised as ancillary must be examined by reference to the main obligation. In this instance, the main operation by reference to which the non-compete clause should be assessed is neither the call option nor the departure of the members designated by Telefónica from PT's board of directors, but the Vivo transaction. However, the applicant puts forward no evidence to show that the clause would have been necessary in order to permit the implementation of that operation.

121 It follows from the foregoing considerations that the applicant has failed to show that the clause ought to have been characterised as a restriction ancillary to the call option while that option appeared in the agreement, which in the applicant's submission ought to have been taken into account in the assessment of the circumstances of the agreement. The applicant has likewise failed to show that the clause was a restriction ancillary to the departure of the members appointed by Telefónica from PT's board of directors, provided for in the final version of the agreement, and that it ought therefore to have avoided on that basis being caught by the prohibition laid down in Article 101 TFEU.

The argument alleging that the clause contained a self-assessment obligation

122 The applicant claims that the clause contained no non-compete obligation incompatible with Article 101 TFEU: the non-compete obligation in the clause was subject to the condition that it would be assessed and validated by both parties and, if that assessment had taken place and led to the conclusion that the non-compete obligation was not permissible, it would have been deleted without having ever produced any effects. That reading is, in all respects, the most plausible reading of the provision in question.

123 In the applicant's submission, because of the words 'to the extent permitted by law', the clause actually contained two obligations, namely a secondary obligation not to compete and a primary self-assessment obligation, requiring the parties to assess the legality of the non-compete obligation and if the self-assessment exercise provided for in the clause should have the consequence that the non-compete obligation was not lawful, that obligation would automatically become void.

124 During the conference calls on 26 and 29 October 2010, the parties carried out the self-assessment exercise provided for in the clause and reached the conclusion that the restriction of competition was not permissible. They then considered whether it was necessary to delete the clause, but such a solution seemed to them to be incompatible with the existence of the self-assessment obligation then contained in the clause. PT therefore acknowledged that the obligation imposed by the clause was satisfied when the self-assessment exercise was carried out and that the competent authorities should be informed of the result of the exercise. It is in that context that the agreement entered into by the parties on 4 February 2011, which deleted the clause and confirmed that it had never imposed a non-compete obligation on either of the parties, must be understood.

125 Finally, the non-compete obligation was not capable of producing effects before it had been validated and could not therefore be characterised as a restriction by object. In any event, even if that had been the case, it would have become void on 29 October 2010, the date from which it was clear to both the parties that they could not rely on the agreement in order to refrain from competing with each other.

126 In the context of the present action, the applicant disputes certain of the Commission's conclusions in the contested decision, but fails to produce specific evidence or, at least, relevant arguments of such a kind as to call those conclusions in question. The applicant addresses, in essence, the following points in the course of its argument: first, the conclusion in recital 255 of the contested decision that the wording of the clause shows its anticompetitive nature is incorrect: second, the parties were correct to have doubts as to the possibility that the clause might be legal as a restriction ancillary to the call option or to the departure of the members of the board of directors appointed by Telefónica; third,

the conditions of the negotiation of the agreement justified deferring the examination of that possibility; fourth, the conference calls of October 2010 show that the self-assessment exercise provided for in the clause took place; fifth, the agreement to delete the clause, concluded on 4 February 2011, confirms that the self-assessment exercise took place and that the clause never had the slightest effect; sixth, the Commission misinterprets PT's replies to the requests for information of 5 January 2011; and, seventh, and last, the parties in any event had sufficient arguments not to comply with the clause.

127 In the first place, the applicant's assertion that the conclusion in recital 255 of the contested decision is incorrect relates to its argument that, contrary to the Commission's contention, it does not analyse the clause as a mere self-assessment obligation, but maintains that the clause contained two obligations, one preliminary and the other final: the preliminary self-assessment obligation was to ascertain whether the non-compete obligation was possible, whereas the non-compete obligation could not be constituted without the parties having verified that it was possible. The insertion of the words 'to the extent permitted by law' meant that neither of the parties was entitled to require the other to refrain from competing without having first validated the legality of that conduct, since the obligation not to compete depended on compliance with the obligation to assess the legality of that restriction.

128 The non-compete obligation is therefore not to be confused with the self-assessment obligation and the outcome of the assessment, during the conference calls of October 2010, was that the non-compete obligation was not legal. The purpose of the termination agreement was to delete the clause in order to remove doubt and to dispel definitively the idea that there was any non-compete agreement between the parties, and not to put an end to the self-assessment obligation.

129 It should be noted that, as the Commission contends, the alleged difference which the applicant claims to exist between the assertion in recital 76 of the contested decision that 'the parties submit … that, instead of providing for a non-compete obligation, the clause would merely provide for an obligation to self-assess the legality and scope of a non-compete commitment' and the assertion that 'the clause contained a non-compete obligation, the legality of which depended on its being validated by the parties' is wholly irrelevant. The two assertions amount, in essence, to claiming that, because of the expression 'to the extent permitted by law', the non-compete obligation provided for in the clause could not take effect before its legality had been analysed by the parties. Contrary to the applicant's apparent contention, moreover, the allegation that the clause did not contain a self-assessment obligation, but an initial self-assessment obligation and a subsequent non-compete obligation, does not rebut the Commission's arguments in the contested decision.

130 As regards, thus, the Commission's conclusion in recital 255 of the contested decision, the applicant's contention that the clause did not in its view contain only a self-assessment obligation, but also a — secondary — non-compete obligation does not alter the fact that the wording of the clause clearly makes no reference to any self-assessment exercise and cannot therefore support the parties' argument that the clause contained an obligation to carry out such an exercise.

131 In the second place, it must be stated that the applicant's other arguments cannot be accepted either. It is clear upon examining the factors on which the applicant relies in the present action that it has failed to rebut the Commission's analysis, according to which the idea that the clause contained a self-assessment obligation, that that self-assessment was carried out, and that the non-compete obligation never became effective, so that there cannot have been an infringement of Article 101 TFEU, cannot succeed. The applicant merely claims that the non-compete obligation was conditional upon verification that it was possible, but adduces no evidence capable of calling in question the evidence adduced by the Commission in order to show that there was nothing to indicate that the clause contained a self-assessment obligation on which the entry into force of the non-compete obligation was dependent.

132 First, the applicant puts forward evidence which is supposed to demonstrate that the interpretation according to which the clause contained a self-assessment obligation concerning the legality of the non-compete obligation is reinforced by the fact that there was a reasonable doubt as to the possibility that the non-compete obligation could be characterised as a restriction ancillary to the call option or the departure of the members of PT's board of directors appointed by Telefónica. The applicant thus maintains that, in view of the context and the pressure of the negotiation, it seemed reasonable to the applicant to set aside the non-compete obligation until the consequences of the deletion of the call option and the maintenance of the obligation for the members of PT's board of directors appointed by Telefónica to resign had been verified.

133 That argument must be rejected.

134 As regards the call option, it should be borne in mind that it was provided for in the second and third offers (recitals 41 and 46 of the contested decision) and that it no longer appeared in the fourth offer, since Telefónica had in the meantime sold most of its shares in PT, which had initially amounted to around 10% (recital 18 of the contested decision).

135 The applicant thus maintains that, owing to the short period between receipt of the fourth offer and the signing of the agreement, namely 24 hours, the parties did not have time to ascertain whether the clause might still be legal without the call option and therefore altered the clause to a self-assessment clause in order to defer the examination of its legality.

136 However, it follows from what was stated in paragraphs 110 to 113 above that the applicant has not succeeded in showing that the clause might have been characterised as a restriction ancillary to the call option at the time when it appeared in the agreement or that there might be any reasonable doubt in that respect, and any argument based on that notion cannot therefore succeed.

137 As regards, moreover, the departure of the members of PT's board of directors appointed by Telefónica, provided for in the agreement, it was also stated in paragraphs 114 to 118 above that it was not established that the clause was a restriction ancillary to the departure of those board members, so that an alleged doubt in that respect cannot support the argument that the clause would in reality have imposed an obligation to self-assess the legality of such a restriction.

138 In that context, it should also be noted that, as the Commission observed in recital 376(b) of the contested decision, the applicant's argument is contradictory, in so far as the considerations to the effect that the clause might be regarded as a restriction ancillary to the departure of the members of PT's board of directors appointed by Telefónica, and the considerations to the effect that the self-assessment exercise would have made it possible to determine that the clause was not compatible with competition law, are incompatible, since if the clause had been legal as a restriction ancillary to the departure of the members of PT's board of directors appointed by Telefónica the alleged self-assessment exercise could not have reached the conclusion that the clause was illegal.

139 Furthermore, it should be observed that, while emphasising the alleged difficulty of the legal question as to whether the clause might have been characterised as a restriction ancillary to the resignation of the members of PT's board of directors appointed by Telefónica, the applicant, as the Commission correctly observes, never maintained that the alleged assessment of the legality of the clause during the conference calls of October 2010 was long or difficulty, but claimed, on the contrary, that two telephone calls were sufficient for the parties to reach agreement on the issue.

140 It follows from the foregoing that the alleged legal complexity of the questions linked with the possibility that the clause would be characterised as a restriction ancillary to the call option or to the resignation of the members of PT's board of directors appointed by Telefónica cannot be accepted as a factor arguing in favour of the assertion that the phrase 'to the extent permitted by law' introduced an obligation to self-assess the legality of the non-compete obligation in the clause.

141 Second, the applicant maintains that the conditions of the negotiation of the agreement justified adding a self-evaluation obligation prior to the non-compete obligation. When examining the fourth offer, the parties took care not to re-examine the clauses coming from the earlier offers and amended them only if it proved necessary to do so in order to adapt the offer to the essential characteristics of the operation. The words 'to the extent permitted by law' were therefore inserted because the circumstances had changed when the call option was dropped, but it was not possible, given the many constraints of the negotiation, to validate beforehand the legality of the maintenance of the non-compete obligation in the terms initially provided for.

142 The applicant further claims that the agreement was signed less than 24 hours after receipt of the fourth offer. During that time, since the conclusion of the acquisition and Vivo and of Oi was at stake, the clause was the least of PT's concerns, and there is nothing to prove that the parties discussed the final version of the clause and every indication that they did nothing about it.

143 That argument, too, is unconvincing.

144 First of all, as regards the dropping of the call option, it should be borne in mind that it was as early as 23 June 2010 that Telefónica announced that it had reduced its shareholding in PT to almost 2%, so that, as the Commission correctly points out, it was on that date — more than one month before the fourth offer was sent on 27 July and the agreement was signed on 28 July 2010 — that the parties were aware that any alleged link between the call option and the clause had ceased to exist. It follows that the applicant cannot maintain that the parties had only 24 hours within which to assess the consequences of the disappearance of the call option.

145 Next, it should be noted that the applicant does not disprove the evidence put forward by the Commission in order to demonstrate that the parties amended the terms of the agreement up until the outcome of the negotiations, namely the fact that clauses 6 and 7 of the agreement were amended between the submission of the fourth offer and the signature of the agreement and that the clause itself was the subject of discussion and amendments as regards its duration until just before the agreement was signed. It merely asserts that 'there is nothing to prove that the parties discussed the final draft of [the clause] and every indication that they did nothing about it'. In addition, the applicant's assertion in paragraph 34 of the reply that the amendment of the clause consisting in postponing the date on which it entered into force from 'the date of signature of the present [agreement]' to 'the date [of the definitive conclusion of the transaction]' is a purely logical amendment, or indeed an automatic correction, cannot be accepted. The expression 'the date of signature of the present [agreement]' would have meant that the clause took effect at the time of signature of the agreement, and therefore on 28 July 2010, whereas the expression 'the date [of the definitive conclusion of the transaction]' means that the clause took effect at the time of the definitive conclusion of the transaction, on 27 September 2010 (see paragraphs 22 and 25 above).

146 Last, and more generally, the argument which the applicant bases on the alleged difficulty of the negotiating conditions must be rejected. Thus, the Commission is correct to assert in recital 249 of the contested decision and in paragraph 49 of the defence that it is simply not credible that undertakings like Telefónica and PT, which have access and recourse to sophisticated legal advice, 'botched up' the discussion and amendment of the wording of the agreement and, in particular, of the clause. Nor does the applicant rebut that assertion; once again, it merely asserts that 'the likelihood that the parties initially had access and recourse to sophisticated legal advice is, to say the least, uncertain and objectively low'.

147 Third, the applicant claims that the self-assessment exercise allegedly provided for in the clause was carried out during the conference calls on 26 and 29 October 2010. Since, however, the applicant does not again challenge the analysis carried out by the Commission, in particular, in recitals 102 to 124 of the contested decision, following which it concluded that the evidence put forward by the parties did not show that the clause was 'exhausted' from 29 October 2010, that the self-assessment

was provided for in the clause or that that alleged self-assessment had any effect (recital 124 of the contested decision), its claims must once again be rejected. The applicant merely asserts that 'proof of the contacts and proof of what was said [are the] same and [that they are] consistent', that it 'does not seem reasonable to believe that [the conference calls] had any purpose other than to discuss [the clause] and that [they provided confirmation] that the non-compete obligation was lawful', that 'there is no evidence to support such an absurd theory' and that, 'on the contrary, everything indicates that the common reflection could lead to only one conclusion, [namely] that the non-compete obligation was unlawful and ineffective'.

148 Likewise, the applicant does not disprove the Commission's argument that if the clause had genuinely provided for a self-assessment obligation, it would have been logical not only for it to refer to that obligation but also for it to specify a date by which that self-assessment exercise was to be carried out rather than a fixed date on which the clause was to enter into force or, failing that, that the parties should at least carry out that self-assessment exercise as soon as possible after signing the agreement and, in any event, before the entry into force provided for in the agreement, namely the definitive conclusion of the transaction on 27 September 2010 (recitals 250 to 255 and 309 et seq. of the contested decision). In so far as the applicant merely states that 'the parties may deem it necessary to set a deadline, just as they may choose not to do so', that, since the non-compete obligation provided for in the clause was not binding so long as its legality had not been established, PT did not deem it urgent to clarify the issue, as the topic had 'faded into the background', and that, in the circumstances of the case, 'it is understandable that the parties did not display excessive zeal in clarifying the issue', it must be stated that the applicant has failed to explain either the lack of a date for carrying out the self-assessment exercise or the delay before that exercise was allegedly carried out.

149 The affidavit made by Ms M.R.S.S.N., the head of PT's competition directorate at the time of the conclusion of the agreement and also of the agreement terminating the clause, which the Commission produces as Annex B.1 to the defence, does not alter that finding. Admittedly, Ms M.R.S.S.N. asserts in that statement that, during the conference calls between Telefónica and PT in October 2010, the question whether the clause was acceptable under competition law was assessed, that the parties concluded that they could not commit themselves in the terms initially set out and that it also follows from those conference calls that the obligation laid down in the clause might be considered to have been implemented from the time when the parties had examined its legality and concluded that its object was not possible (see also recital 117 of the contested decision). However, as the Commission observes (recitals 120 and 122 of the contested decision), that affidavit does not constitute contemporaneous evidence of what was said in the conversations of October 2010, which would confer higher probative value on it (see, to that effect, judgments of 11 March 1999, *Ensidesa* v *Commission*, T-157/94, ECR, EU:T:1999:54, paragraph 312, and of 16 December 2003, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied and Technische Unie* v *Commission*, T-5/00 and T-6/00, ECR, EU:T:2003:342, paragraph 181). In addition, although testimony provided by a direct witness of the circumstances which he has described must in principle be characterised as evidence with a high probative value (judgment of 3 March 2011, *Siemens* v *Commission*, T-110/07, ECR, EU:T:2011:68, paragraph 75), it is also necessary to take into account the fact that the affidavit at issue in the present case was made by a person who might have a direct interest in the case and who cannot be classified as independent of the applicant (see, to that effect, judgment in *Siemens* v *Commission*, EU:T:2011:68, paragraphs 69 and 70).

150 It follows that, in the light of all of the evidence produced, that affidavit, as the sole item of evidence, is not sufficient to demonstrate that the clause contained a self-assessment obligation, bearing in mind that, as regards the probative value to be placed on the various evidence, the only relevant criterion for assessing evidence freely produced lies in its credibility (see judgment of 8 July 2004, *Mannesmannröhren-Werke* v *Commission*, T-44/00, ECR, EU:T:2004:218, paragraph 84 and the case-law cited; judgments of 8 July 2004, *Dalmine* v *Commission*, T-50/00, ECR, EU:T:2004:220, paragraph 72, and *JFE Engineering and Others* v *Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, ECR, EU:T:2004:221, paragraph 273) and that, according to the rules generally applicable in relation to

evidence, the credibility and, accordingly, the probative value of a document depend on its origin, the circumstances in which it was drawn up, the person to whom it is addressed and its content (judgment of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, ECR, EU:T:2000:77, paragraph 1053).

151 Fourth, the applicant disputes the Commission's assessment (recitals 313 at 323 of the contested decision) concerning the agreement to terminate the clause (see paragraph 29 above). According to the Commission, in essence, the termination agreement does not substantiate the argument that the clause contained a self-assessment obligation that was implemented during the conference calls of October 2010, in particular because no wording in the termination agreement shows a connection between the termination clause and a self-assessment obligation (recital 315 of the contested decision). The recitals to the termination agreement set out the circumstances in which the parties reached the decision to 'delete' the clause, but make no reference to the October telephone conversations (recital 316 of the contested decision), and the wording of the termination agreement contains a non-compete obligation and not a self-assessment obligation (recitals 317 to 322 of the contested decision).

152 The applicant claims that the Commission's interpretation proceeds from the incorrect premiss that the parties maintained that the clause merely contained a self-assessment obligation, whereas PT has always maintained that the clause contained two obligations, an initial self-assessment obligation and a secondary non-compete obligation. When matters are viewed in that light, the termination agreement does not in any way contradict the idea that the clause established a self-assessment obligation.

153 That argument must be rejected. Even if the clause had to be interpreted as containing a self-assessment obligation and a non-compete obligation, it must be stated that the Commission's argument summarised in paragraph 151 above remains valid. Furthermore, the applicant merely contends that the termination agreement 'confirms' the parties' interpretation during the conference calls of October 2010 and that the assertion in that agreement that the clause 'cannot be implemented and has at no time been implemented' appears to be inconsistent only if the clause is confined to a self-assessment obligation, since it would be inconsistent to assert that the obligation cannot be implemented and has never been implemented when the parties specifically maintain that the self-assessment exercise allegedly provided for in the clause was carried out, but not if it is accepted that the clause contained a self-assessment obligation and a non-compete obligation, since, in that case, it would not be inconsistent to assert that the obligation provided for in the clause cannot be implemented and has never been implemented.

154 That argument does not alter the fact that the agreement makes no reference to the conference calls of October 2010, to an alleged interpretation of the clause arrived at during those conference calls, to the fact that it confirms an alleged result of those conferences or, generally, to the fact that the clause contains a self-assessment obligation. Even if the alleged difference which PT sees between the contention that the clause contained a self-assessment obligation and the contention that it contained a self-assessment obligation and a non-compete obligation is accepted, the terms of the termination agreement and, in particular, the assertion that the clause cannot be implemented and has never been implemented continue to be inconsistent in the light of such an interpretation.

155 Fifth, the applicant claims that the Commission is mistaken when it states, in recital 115 of the contested decision, that PT's reply to the request for information dated 5 January 2011 does not mention that the clause should be interpreted as incorporating an obligation to carry out a self-assessment exercise and when it observes, in recital 303 of the contested decision, that, before their replies to the statement of objections, the parties did not allege that the clause provided for a self-assessment obligation.

156 It should be noted that, in paragraphs 30, 31 and 32 of its reply to the request for information, PT asserted that 'the fact is that, although the existence of that provision was made public by [PT] on 9 June 2010 (see annex 10), it faded into the background, since [PT] did not feel bound by it and did not expect that it would be able to require Telefónica to act in any way in accordance with its provisions, at least not before the legality of the provision had been assessed'. The applicant added that 'the subject became a source of concern again only with the news that appeared in the newspapers on 23 and 24 August and 19 [October] 2010', that, 'following the appearance of that news, [the applicant] instructed its lawyers to contact Telefónica's lawyers in order to clarify the matter' and that 'two conference calls took place on 26 and 29 October 2010 and concluded that there was not sufficient justification for the non-compete clause and that it served no purpose and that it would therefore be preferable to terminate it'.

157 Although PT therefore did not expressly state that the main obligation established by the clause was a self-assessment obligation, it nonetheless asserted that it 'did not feel bound [by the clause] and did not expect that it would be able to require Telefónica to act in any way in accordance with its provision, at least not before the legality of the provision had been assessed', which implies that the legality of the clause would be assessed before it entered into force.

158 However, although the Commission's assertion that before their replies to the statement of objections the parties did not allege that the clause would provide for a self-assessment obligation should be nuanced, not only do the statements in question not confirm that the clause would have become void following the alleged self-assessment exercise but, in addition, the fact that PT already gave to understand in its reply to the request for information dated 5 January 2011 that the legality of the clause must be validated before it entered into force does not alter the fact that the applicant has not shown, in the present proceedings before the Court, that the clause contained a self-assessment obligation or that the clause would have become void following the alleged self-assessment carried out in October 2010.

159 Sixth, and last, the applicant maintains that, in any event, the Commission ought to have considered that the clause was ineffective, because the parties had sufficient arguments not to comply with the non-compete obligation. Thus, in the applicant's submission, it is clear on reading the clarifications provided by Telefónica and PT that the parties did not have the same interests with respect to the clause, since Telefónica claimed that it had agreed to the clause in order to enable the Vivo transaction to proceed, while PT's interest was to protect itself because of the call option. Accordingly, the two parties disagreed as to what was permitted by law and therefore had sufficient arguments with each other not to comply with the non-compete obligation.

160 That argument must be rejected without there being any need to examine the reasons which allegedly support the argument that the parties had sufficient arguments not to comply with the non-compete obligation. It is sufficient in that regard to recall that, in accordance with Article 101(2) TFEU, agreements subject to the prohibition in that article are automatically void and that no undertaking can therefore be required to comply with them. Since the invalidity referred to in Article 101(2) TFEU is absolute, an agreement which is null and void by virtue of this provision has no effect as between the contracting parties and cannot be invoked against third parties (see, by analogy, judgment of 25 November 1971, *Béguelin Import*, 22/71, ECR, EU:C:1971:113, paragraph 29). The fact that the parties had 'arguments not to comply with the non-compete obligation' cannot therefore prevent an agreement from being caught by the prohibition in Article 101 TFEU.

161 It follows from all of the foregoing considerations that the argument that the clause contained a self-assessment obligation must be rejected.

The argument alleging infringement of Article 101 TFEU owing to the failure to examine the conditions of potential competition

162 The applicant maintains that the Commission erred by failing to examine the conditions of potential competition in order to ascertain whether, in view of the structure of the relevant markets and the economic and legal context, there were real and genuine possibilities that Telefónica and PT would compete with each other on the relevant markets to which the clause allegedly related. It submits that whether or not a restriction of competition can be characterised as a 'restriction by object' also depends on whether it is capable of having restrictive effects.

163 In that regard, the applicant claims that, owing to the statutory and regulatory obstacles to entry into and expansion in the Portuguese electronic communications market and to the obstacles inherent in the actual structure, characteristics and specificities of the markets in question, the parties could not be characterised as potential competitors.

164 The applicant also takes issue with the Commission for having failed to have regard in the contested decision to the exhaustive analysis which the applicant undertook in its reply to the statement of objections of the electronic communications markets in Portugal and of the obstacles that made competition on those markets impossible, but merely satisfied itself with a general argument that failed to comply with the obligations resulting from the case-law and failed to rebut a large part of the arguments developed by the applicant.

165 In the first place, it follows from the applicant's argument that it does not, strictly speaking, call in question the formal reasoning of the contested decision, but the fact that the Commission, wrongly in the applicant's submission, failed to carry out a study of the structure of the affected markets and the genuine possibilities of competition in those markets.

166 In any event, it is apparent, in the light of recitals 265 to 278 of the contested decision, that the Commission explained the reasons why it had not considered it necessary to carry out a detailed analysis of the structure of the affected markets and that it answered the arguments which the parties set out in their replies to the statement of objections concerning the existence of potential competition between them, as summarised in recitals 268 to 270 of the contested decision. In so far as the applicant's argument may be understood as a general criticism of an alleged lack of reasoning in the contested decision on that point, it cannot thus succeed.

167 More specifically, the applicant claims, in paragraphs 136 and 318 of the application, that the Commission failed to rebut, in the contested decision, the argument, set out in recital 169, maintaining that, if certain retail markets were excluded from the scope of the clause, the corresponding wholesale markets should also be excluded, since actual or potential competition in the retail markets determined competition in the wholesale markets and that, if the former were not covered by the non-compete obligation, then the latter were not either. However, it is clear upon reading recitals 153, 154 and 169 of the contested decision that the Commission considered that the parties should be regarded as potential competitors in all the markets for electronic communication services and television services and that, accordingly, since it did not accept the premiss that certain retail markets should be excluded from the scope of the clause, the argument that the wholesale markets corresponding to those retail markets, and complementary to them, should be excluded from the scope of the clause did not have to be rebutted.

168 Furthermore, the applicant takes issue with the fact that the contested decision contains little or no reflection on the question as to which markets could in fact be the subject of the agreement at issue. In so far as that criticism also relates to the Commission's compliance with its obligation to state reasons, it must be rejected, since, in section 5.3 of the contested decision (recitals 186 to 197), the Commission defined the 'relevant product markets', referring, contrary to the applicant's assertions, not only to the guidance in its Recommendation of 17 December 2007 on relevant product and

service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (OJ 2002 L 344, p. 65), but also to its previous decisions and the case-law (recital 186 of the contested decision). In addition, in section 5.5 of the contested decision (recitals 200 to 233 of the contested decision), the Commission analysed 'the parties' presence in the relevant markets'. Last, it stated that, given the broad scope of the clause, the precise limits of the definition of each of the relevant markets could be left open.

169 In the second place, as regards the complaint alleging incorrect assessment of the 'capacity' of the clause to restrict competition between PT and Telefónica owing to the Commission's position that in this case it was not required to carry out a detailed analysis of the structure of the relevant markets, it is appropriate, as is apparent from the contested decision, to point out three factors on which the Commission relied in order to conclude that no detailed analysis of potential competition was necessary with respect to each specific market for the purposes of assessing whether the agreement constituted a restriction of competition by object (recital 278 of the contested decision).

170 First of all, the Commission observed that entering into a non-compete agreement or envisaging the need to carry out a self-assessment of the lawfulness and scope of an ancillary non-compete commitment — if the interpretation of the clause proposed by the parties were to be followed — constituted recognition by the parties that they were at least potential competitors with respect to some services. In the absence of any potential competition, there would have been no need to conclude any non-compete agreement at all, or to consider carrying out a self-assessment of a non-compete agreement (recital 271 of the contested decision).

171 Next, the Commission observed that the clause was broad in scope, since it applied to all electronic communications services and to television services (recitals 141, 265 and 278 of the contested decision).

172 Last, the Commission stated that those services had been liberalised in accordance with the EU regulatory framework, which permitted and encouraged competition among operators (recital 265 of the contested decision), and that that liberalised context, in which competition was possible and encouraged, should be the point of departure for the assessment of the clause (recital 267 of the contested decision).

173 It should be borne in mind, moreover, that, in order for an agreement to be regarded as having an anticompetitive object, it must have the potential to have a negative impact on competition, that is to say, it must be capable in an individual case of resulting in the prevention, restriction or distortion of competition within the internal market (judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, ECR, EU:C:2013:160, paragraph 38).

174 In addition, it should again be pointed out (see paragraph 90 above) that, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question (see judgment in *CB* v *Commission*, cited in paragraph 86 above, EU:C:2014:2204, paragraph 53 and the case-law cited).

175 However, although, when interpreting the context of an agreement, it is necessary to take into consideration the actual conditions of the functioning and the structure of the market or markets in question, the Commission is not always required to produce a precise definition of the markets

concerned. The definition of the relevant market differs according to whether Article 101 TFEU or Article 102 TFEU is to be applied. For the purposes of Article 102 TFEU, the appropriate definition of the relevant market is a necessary precondition for any judgment concerning allegedly anticompetitive behaviour (judgments of 10 March 1992, *SIV and Others* v *Commission*, T-68/89, T-77/89 and T-78/89, ECR, EU:T:1992:38, paragraph 159, and of 11 December 2003, *Adriatica di Navigazione* v *Commission*, T-61/99, ECR, EU:T:2003:335, paragraph 27), since, before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined. On the other hand, it has consistently been held that, for the purposes of applying Article 101 TFEU, the reason for defining the relevant market is to determine whether the agreement in question is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the internal market (judgments of 21 February 1995, *SPO and Others* v *Commission*, T-29/92, ECR, EU:T:1995:34, paragraph 74, and in *Adriatica di Navigazione* v *Commission*, EU:T:2003:335, paragraph 27; see also judgment of 12 September 2007, *Prym and Prym Consumer* v *Commission*, T-30/05, EU:T:2007:267, paragraph 86 and the case-law cited).

176 Thus, for the purposes of applying Article 101(1) TFEU, a prior definition of the relevant market is not required where the agreement at issue has in itself an anticompetitive object, that is to say, where the Commission was able to conclude correctly, without first defining the market, that the agreement at issue distorted competition and was liable to have an appreciable effect on trade between Member States. That applies, in particular, to the case of the most serious restrictions, expressly prohibited by Article 101(1)(a) to (e) TFEU (Opinion of Advocate General Bot in Joined Cases *Erste Group Bank and Others* v *Commission*, C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P, ECR, EU:C:2009:192, points 168 to 175). If the actual object of an agreement is to restrict competition by 'market sharing', it is not necessary to define the markets in question precisely, provided that actual or potential competition was necessarily restricted (judgment in *Mannesmannröhren-Werke* v *Commission*, cited in paragraph 150 above, EU:T:2004:218, paragraph 132).

177 Accordingly, since in the present case the Commission found that the clause to which the Commission took exception in the contested decision had market sharing as its object, the applicant cannot maintain that a detailed analysis of the markets concerned was necessary in order to determine whether the clause constituted a restriction of competition by object.

178 Undertakings which conclude an agreement whose purpose is to restrict competition cannot, in principle, avoid the application of Article 101(1) TFEU by claiming that their agreement should not have an appreciable effect on competition (judgment in *Mannesmannröhren-Werke* v *Commission*, cited in paragraph 150 above, EU:T:2004:218, paragraph 130). The agreement impugned in the present case consisted of a non-compete clause, defined by the parties as applicable to 'any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market', its existence made sense only if there was competition to be restricted (judgments in *Mannesmannröhren-Werke* v *Commission*, cited in paragraph 150 above, EU:T:2004:218, paragraph 131, and of 21 May 2014, *Toshiba* v *Commission*, T-519/09, EU:T:2014:263, paragraph 231).

179 Therefore, the applicant's argument that the existence of an alleged non-compete agreement cannot constitute proof of the existence of potential competition between the parties is irrelevant.

180 It is clear from the case-law that entering into such an agreement is at least a strong indication that a potential competitive relationship existed (see, to that effect, judgment in *Toshiba* v *Commission*, cited in paragraph 178 above, EU:T:2014:263, paragraph 231). As the Commission correctly points out in recital 271 of the contested decision, entering into a non-compete agreement is a recognition by the parties that they are at least potential competitors regarding some services. In addition, the existence

of the non-compete agreement is only one of the factors on which the Commission relied in order to conclude that potential competition existed between the parties (see paragraphs 169 to 172 above and paragraph 182 below).

181 In that regard, the case-law shows, in particular, that, where the relevant market has been liberalised, as in the present case, the Commission is not required to analyse the structure of the market and the question whether entry to that market would correspond to a viable economic strategy for each of the parties (see, to that effect, judgment in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraphs 89 to 93), but that it is required to examine whether there are insurmountable barriers to entry to the market that would rule out any potential competition (see, to that effect, judgment in *Toshiba* v *Commission*, cited in paragraph 178 above, EU:T:2014:263, paragraph 230).

182 In the present case, the Commission not only found that the market for telecommunications and television services in Spain and Portugal was fully liberalised (see paragraph 172 above), but also observed that, according to the parties themselves, they were present on the markets for the provision of global telecommunication services and wholesale international carrier services, on the whole of the Iberian market (recitals 173, 174 and 272 of the contested decision); that they had not proved that duration of the clause would have been insufficient to acquire an existing telecommunications operator, as a means of becoming the holder of certain networks without the need to deploy them (recital 273 of the contested decision); that the current situation of the Spanish and Portuguese markets could not be invoked to exclude the possibility of investing in the sector, since, in spite of the crisis, investment in the sector had increased or at least remained stable (recital 274 of the contested decision); and, last, that Telefónica itself had acknowledged that the launch of a takeover for a company such as PT was possible, during the negotiations relating to the Vivo transaction, so that the acquisition of a competitor of PT could also have been possible (recitals 37 and 275 to 277 of the contested decision).

183 The applicant does not put forward in the application anything to indicate that, in spite of those factors, a detailed analysis of the markets in question would have been necessary in order to determine whether the clause constituted a restriction of competition by object or in order to establish that no insurmountable obstacle prevented the parties from entering their respective neighbouring markets.

184 It should be noted that, in addition to the argument already dealt with in paragraphs 162 to 181 above, the applicant, in its pleadings, merely disputes the Commission's argument summarised in paragraph 182 above, although its contention does not appear to be capable of calling in question the Commission's conclusion that in this case it was not required to carry out a detailed analysis of potential competition between the parties on the markets to which the clause applied.

185 Likewise, the applicant's additional argument, which consists in suggesting factors that are supposed to show that entry to the markets concerned would not have corresponded to the parties' strategic priorities or would not have been economically advantageous or attractive, cannot be upheld.

186 In fact, without there being any need to examine that argument in detail, it is sufficient to observe that, while the intention of an undertaking to enter a market may be of relevance in order to determine whether it can be considered to be a potential competitor in that market, nonetheless the essential factor on which such a description must be based is whether it has the ability to enter that market (see judgment in *E.ON Ruhrgas and E.ON* v *Commission*, cited in paragraph 99 above, EU:T:2012:332, paragraph 87 and the case-law cited).

187 Last, as regards the argument whereby the applicant claims that there was clearly nothing the agreement to prevent Telefónica from increasing its presence in Zon and that it would have been very unlikely that Telefónica would again develop its own infrastructure on the Portuguese market, since

that would have undermined Zon's activity, it should be noted that, as the Commission asserted in recital 164 of the contested decision, the argument that the clause did not prevent Telefónica from increasing its presence in Zon could not be upheld, since the clause contained literally the prohibition on 'engaging or investing, directly or indirectly through any affiliate, in any project in the telecommunication business', which also includes any increase of Telefónica's shareholding in Zon. Furthermore, the fact that Telefónica already has a minority shareholding in Zon, the increase of which was prohibited by the clause, is not such as to show that Telefónica was not a potential competitor in the Portuguese market, but indicates that, in the absence of the clause, Telefónica could have increased that shareholding or acquired other shares in other operators.

188 It follows from the foregoing considerations that it cannot be asserted that — in spite of the fact that the very existence of the clause is a strong indication of potential competition between the parties, that its object consisted in a market-sharing agreement, that it had a broad scope and that it formed part of a liberalised economic context — the Commission ought to have carried out a detailed analysis of the structure of the markets concerned and of potential competition between the parties on those markets in order to reach the conclusion that the clause constituted a restriction of competition by object. The argument whereby the applicant alleges that there has been an infringement of Article 101 TFEU owing to the failure to examine the conditions of potential competition must therefore be rejected.

The argument alleging lack of effects

189 The applicant maintains that, as the clause contained no restriction of competition by object, the Commission also failed to show either that the clause had produced effects restrictive of competition or that it was capable of producing such effects.

190 In so far as it follows from the examination of the applicant's arguments in paragraphs 93 to 188 above that the applicant has not succeeded in showing that the Commission's conclusion that the clause constitutes a restriction of competition by object is incorrect, its argument summarised in paragraph 189 above relies on the false premiss that the conduct in question cannot be characterised as a restriction of competition by object and must therefore be rejected. It follows from the very wording of Article 101(1) TFEU that agreements between undertakings are prohibited, regardless of their effect, where they have an anticompetitive object. Consequently, it is not necessary to show actual anticompetitive effects where the anticompetitive object of the conduct in question is proved (see judgment of 3 March 2011, *Siemens and VA Tech Transmission & Distribution* v *Commission*, T-122/07 to T-124/07, ECR, EU:T:2011:70, paragraph 75 and the case-law cited).

191 For the purpose of applying Article 101(1) TFEU, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition. That applies in particular in the case of obvious restrictions of competition such as price fixing and market sharing (judgment of 8 December 2011, *KME Germany and Others* v *Commission*, C-389/10 P, ECR, EU:C:2011:816, paragraph 75).

192 Moreover, the Court must reject the applicant's argument that, in asserting that the fact that the parties did not engage in new activities in Spain and Portugal is a non-conclusive sign that the clause may have been implemented (recital 365 of the contested decision), the Commission requires the parties to adduce the 'probatio diabolica' that the failure to engage in new activities was not attributable to the clause. Since the Commission does not rely on that factor in order to demonstrate that the clause constitutes an infringement of Article 101 TFEU, but relies on the fact that the clause is in the nature of an infringement by object, and in so far as, in addition, the Commission stated that the fact that the parties did not engage in new activities on the markets in question is a 'non-conclusive sign' that the clause may have been implemented, the applicant cannot take issue with the Commission for having required the parties to adduce a 'probatio diabolica'.

193 According, the argument alleging that the Commission did not examine the effects of the clause must be rejected.

2. *The claims relating to the amount of the fine*

194 In the alternative, the applicant disputes the amount of the fine imposed on it and maintains that it must be reduced, since even if the clause had been capable of producing effects restrictive of competition, the Commission did not properly evaluate the extent of those effects or their duration when determining the amount of the fine and thus breached the principles applicable to the calculation of fines and the principle of proportionality.

a) Preliminary observations

The principles applicable to the calculation of the fines

195 It should be borne in mind that it is settled case-law that the Commission enjoys a broad discretion as regards the method for calculating fines. That method, which is defined in the Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 23(2) of Regulation No 1/2003 (see, to that effect and by analogy, judgment of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission*, C-322/07 P, C-327/07 P and C-338/07 P, ECR, EU:C:2009:500, paragraph 112 and the case-law cited).

196 The gravity of infringements of EU competition law must be determined by reference to numerous factors such as, in particular, the specific circumstances and context of the case and the deterrent effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (judgments of 19 March 2009, *Archer Daniels Midland* v *Commission*, C-510/06 P, ECR, EU:C:2009:166, paragraph 72, and of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, ECR, EU:C:2009:505, paragraph 54).

197 As stated in paragraph 52 above, the Commission, in the present case, determined the amounts of the fines by applying the method defined in the Guidelines.

198 Although the Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form a rule of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see, by analogy, judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECR, EU:C:2005:408, paragraph 209 and the case-law cited, and of 8 October 2008, *Carbone-Lorraine* v *Commission*, T-73/04, ECR, EU:T:2008:416, paragraph 70).

199 In adopting such rules of conduct and announcing through their publication that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see, by analogy, judgments in *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 198 above, EU:C:2005:408, paragraph 211 and the case-law cited, and in *Carbone-Lorraine* v *Commission*, cited in paragraph 198 above, EU:T:2008:416, paragraph 71).

200 Furthermore, the Guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in setting the amount of the fines and, consequently, ensure legal certainty on the part of the undertakings (see, by analogy, judgment in *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 198 above, EU:C:2005:408, paragraphs 211 and 213).

201 Points 4 and 5 of the Guidelines read as follows:

‘4. The Commission’s power to impose fines on undertakings or associations of undertakings which, intentionally or negligently, infringe Article [101 TFEU] or [102 TFEU] is one of the means conferred on it in order for it to carry out the task of supervision entrusted to it by the Treaty. That task not only includes the duty to investigate and sanction individual infringements, but it also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to steer the conduct of undertakings in the light of those principles. For this purpose, the Commission must ensure that its action has the necessary deterrent effect. Accordingly, when the Commission discovers that Article [101 TFEU] or [102 TFEU] has been infringed, it may be necessary to impose a fine on those who have acted in breach of the law. Fines should have a sufficiently deterrent effect, not only in order to sanction the undertakings concerned (specific deterrence) but also in order to deter other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 81 and 82 of the EC Treaty (general deterrence).

5. In order to achieve these objectives, it is appropriate for the Commission to refer to the value of the sales of goods or services to which the infringement relates as a basis for setting the fine. The duration of the infringement should also play a significant role in the setting of the appropriate amount of the fine. It necessarily has an impact on the potential consequences of the infringement on the market. It is therefore considered important that the fine should also reflect the number of years during which an undertaking participated in the infringement.’

202 The Guidelines define a calculation method of consisting of two steps (point 9 of the Guidelines). They provide, by way of a first calculation step, for the determination by the Commission of a basic amount for each undertaking or association of undertakings concerned and include, in that regard, the following provisions:

‘12. The basic amount will be set by reference to the value of sales and applying the following methodology.

…

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking’s sales of goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.

…

19. The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

20. The assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales.

22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

23. Horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.

24. In order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales (see paragraphs 20 to 23 above) will be multiplied by the number of years of participation in the infringement. Periods of less than six months will be counted as half a year; periods longer than six months but shorter than one year will be counted as a full year.

25. In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.

…'

203 The Guidelines provide, by way of a second calculation step, that the Commission may adjust the basic amount upwards or downwards, on the basis of an overall assessment which takes account of all the relevant circumstances (points 11 and 27 of the Guidelines).

204 In respect of those circumstances, point 29 of the Guidelines states:

'The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

— where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened: this will not apply to secret agreements or practices (in particular, cartels);

— where the undertaking provides evidence that the infringement has been committed as a result of negligence;

— where the undertaking provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market; the mere fact that an undertaking participated in an infringement for a shorter duration than others will not be regarded as a mitigating circumstance since this will already be reflected in the basic amount;

— where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so;

— where the anticompetitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation.'

205 Last, as the Court of Justice recalled in its judgments in *KME Germany and Others* v *Commission*, cited in paragraph 191 above (EU:C:2011:816, paragraph 129), and of 8 December 2011, *KME Germany and Others* v *Commission* (C-272/09 P, ECR, EU:C:2011:810, paragraph 102), the Courts of the European Union must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a

review, the Courts cannot use the Commission's margin of discretion — either as regards the choice of factors taken into account in the application of the criteria mentioned in the Guidelines or as regards the assessment of those factors — as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

206 The review of legality is supplemented by the unlimited jurisdiction which the Courts of the EU were afforded by Article 17 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959 to 1962, p. 87) 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 (judgment in *KME Germany and Others* v *Commission*, cited in paragraph 205 above, EU:C:2011:810, paragraph 103).

Contested decision

207 The Commission considered that, on the basis of the facts described in the contested decision, the infringement had been committed intentionally and had consisted of a clearly unlawful agreement not to compete and to share the Spanish and Portuguese electronic communications markets between the parties. According to the Commission, with respect to this type of obvious infringement, the parties could not claim that they had not acted deliberately (recital 477 of the contested decision).

208 As regards the value of sales that would serve as a reference for the setting of the basic amount, the Commission found that the non-compete clause applied to all electronic communication services and also to television services supplied in Spain and Portugal, with the exception of global telecommunication services and wholesale international carrier services in the Iberian Peninsula, for which the parties competed with each other at the time of signature of the agreement and which were thus excluded from its application. Furthermore, in view of the fact that the clause excluded from its scope any investment and activity already current at the time of the agreement that could be deemed to be in competition with the activities and investments of the other party in the Iberian market, the Commission took into account for each party only the value of its own sales in its country of origin. It therefore did not take into consideration, in particular, the value of sales of each party in the country of origin of the other party, since those amounts corresponded, in principle, to pre-existing activities not covered by the clause. That means that, as regards Telefónica, the value of its sales was set by the Commission by reference to the value of its sales in Spain, while, as regards PT, the value of its sales was determined by reference to the value of its sales in Portugal (recitals 482 and 483 of the contested decision).

209 The Commission then stated that it normally took into account the sales made by the undertakings during the last full business year of their participation in the infringement. Taking into account that the infringement lasted for less than one year and that it took place in 2010 and 2011, the Commission used the undertakings' sales in 2011, which were lower than the sales recorded by the parties in 2010 (recital 484 of the contested decision).

210 As regards the gravity of the infringement, which determines the percentage of the value of sales to be taken into consideration when setting the amount of the fine, the Commission stated that, in this instance, the infringement had consisted of an agreement not to compete and to share the Spanish and Portuguese electronic communications and television markets between the parties and that Telefónica and PT were the incumbent operators in their respective countries (recital 489 of the contested decision).

211 The Commission stated that it took into account that the clause had not been kept secret by the parties from the moment it was introduced for the first time in the offer dated 1 June 2010. As explained in recitals 128 to 130 of the contested decision, the second offer including the first version of the clause was uploaded by the parties on to their respective websites and communicated to the Spanish and Portuguese Stock Exchange Authorities, which also published it on their own websites. In addition, on 9 June 2010 PT distributed to its shareholders a brochure containing an explanation of the transaction and the clause. Furthermore, the agreement including the final version of the clause was part of the filings by Telefónica and PT to Anatel and CADE. Last, in a press article published by the *Jornal de Negócios* on 23 August 2010, Telefónica confirmed that the agreement included a non-compete clause (recital 491 of the contested decision).

212 As regards the duration of the infringement, the Commission took account of the fact that it had lasted from 27 September 2010, the date of the notarised declaration, and therefore, of the definitive conclusion of the transaction, until 4 February 2011, the date of the agreement whereby the parties terminated the clause (recital 492 of the contested decision).

213 On the basis of those factors, the size of the undertakings and the short duration of the restrictive agreement, the Commission considered that, in the specific circumstances of the present case, it was proportionate and sufficient in terms of deterrence to take a low proportion of the value of sales into account in setting the basic amount of the fines. The Commission therefore considered that the percentage of the value of sales to be taken into consideration should be 2% for the two undertakings concerned (recital 493 of the contested decision). The percentage of the value of sales taken for each undertaking was multiplied by the coefficient applied for duration, namely 0.33, corresponding to four months of a full year.

214 The Commission took the amounts as thus calculated as final basic amounts, and thus did not add a fixed amount for deterrence (entry fee) in this case, as provided for in point 25 of the Guidelines (see paragraph 202 above), which, moreover, it confirmed at the hearing.

215 As regards the adjustment of the basic amount, the Commission considered that no aggravating circumstance was to be applied in this case (recital 496 of the contested decision).

216 On the other hand, the Commission pointed out that the parties had decided to terminate the clause on 4 February 2011, thus putting an end to the anticompetitive practice in question. Taking into account the fact that the clause was terminated only 16 days after the Commission had initiated the proceedings and 30 days after it had sent the first request for information to the parties, and as the clause had not been secret, the termination of the clause must be regarded as a mitigating circumstance that should be applied to both parties (recital 500 of the contested decision).

217 In the light of those circumstances, the Commission considered that the basic amount of the fines to be imposed on the parties should be reduced by 20% (recital 501 of the contested decision) and rejected all the arguments put forward by the parties alleging other mitigating circumstances (recitals 502 to 507 of the contested decision).

218 The final amounts of the fines therefore came to EUR 66 894 400 for Telefónica and EUR 12 290 400 for PT.

b) Sales taken into account for the purpose of calculating the fine

219 The applicant takes issue with the Commission's findings with respect to the scope of the clause and claims that, in so far as the exclusion of certain activities from its scope meant that the turnover taken into account for the purposes of setting the fine should be reduced, the amount of the fine imposed on it must be reduced. The applicant maintains that the Commission failed to have regard to

the exhaustive analysis of the electronic communications markets in Portugal carried out by the applicant in its reply to the statement of objections and failed to address or rebut a large part of the applicant's arguments.

The statement of reasons

220 In so far as that argument must be understood as taking issue with the Commission's failure to fulfil its obligation to state reasons, it must be borne in mind that the statement of reasons 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 (see judgment in *Elf Aquitaine* v *Commission*, cited in paragraph 78 above, EU:C:2011:620, paragraph 147 and the case-law cited). It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment in *Commission* v *Sytraval and Brink's France*, cited in paragraph 78 above, EU:C:1998:154, paragraph 63 and the case-law cited).

221 As regards the scope of the obligation to state reasons concerning the calculation of the amount of a fine imposed for infringement of the EU competition rules, it should be noted that Article 23(3) of Regulation No 1/2003 provides that 'in fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement'. In this connection, the Guidelines and the Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17) contain rules that indicate what factors the Commission takes into consideration in measuring the gravity and duration of an (see, to that effect, judgment of 9 July 2003, *Cheil Jedang* v *Commission*, T-220/00, ECR, EU:T:2003:193, paragraph 217 and the case-law cited).

222 That being so, the essential procedural requirement to state reasons is satisfied where the Commission indicates in its decision the factors which it took into account in accordance with the Guidelines and, where appropriate, the Notice on immunity from fines and reduction of fines in cartel cases and which enabled it to determine the gravity of the infringement and its duration for the purpose of calculating the amount of the fine (see, to that effect, judgment in *Cheil Jedang* v *Commission*, cited in paragraph 221 above, EU:T:2003:193, paragraph 218).

223 In the present case, in sections 5 and 6.3.3.2 of the contested decision, and especially in recitals 153, 184, 185 and 278, the Commission stated that the parties must be regarded at least as potential competitors in all markets for electronic communication services and television services in Spain and Portugal, that their arguments that certain activities should be excluded from the scope of the clause could not be accepted and that, since the parties' arguments concerning the existence of potential competition between them must be rejected, and given the broad scope of the clause, there was no need in the present case for a detailed analysis of whether the parties were potential competitors with respect to each specific market for the purposes of analysing whether the agreement should be regarded as constituting a restriction by object. Next, the Commission noted, in recital 482 of the contested decision, under the heading 'The value of sales', that it found that the non-compete clause applied to all types of electronic communication services and television services, with the exception of global telecommunication services and wholesale international carrier services and that all services provided in Spain and Portugal and included in the markets listed in section 5.3, with the exception of the global telecommunication services and wholesale international carrier services, were directly or indirectly related to the infringement.

224 It follows that the Commission sufficiently explained the way in which it determined the value of sales to be taken into account for the purposes of calculating the fine and the reasons why it considered that there was no need to examine each of the services which the applicant had claimed in its reply to the statement of objections should be excluded for the purposes of calculating the fines. In so far as the applicant's argument may be understood as alleging a breach of the obligation to state reasons, it must therefore be rejected.

Substance

225 The applicant claims that the value of certain sales must be excluded from the calculation of the fine, namely sales on the markets in which the parties were not potential competitors, sales corresponding to current activities and sales made outside the Iberian Peninsula.

– Sales corresponding to activities not capable of being subject to competition

226 So far as sales made in markets or with services which, in the applicant's submission, were not subject to potential competition, are concerned, in the first place, it should be noted that, in recital 478 of the contested decision, the Commission referred to point 12 of the Guidelines, which states that the basic amount of the fine is to be set by reference to the value of sales according to the methodology set out in the following points. In that recital, the Commission also explained that the basic amount of the fine to be imposed on the undertakings would be set by reference to the value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the European Union. In recital 482 of the contested decision (see paragraph 208 above), the Commission stated that it found that the non-compete clause applied to every type of electronic communication services and television services, with the exception of global telecommunication services and wholesale international carrier services, and that, thus, all services provided in Spain and Portugal and included in the markets listed in section 5.3, with the exception of global telecommunication services and wholesale international carrier services, were directly or indirectly related to the infringement.

227 At the hearing, the Commission, in answer to the questions put by the Court, explained that, in the light of the very broad scope of the clause, it was not required to analyse potential competition between the parties for each of the services on which the applicant relied for the purposes of determining the value of sales to be taken into consideration when calculating the amount of the fine. The Commission submitted that, in the context of an infringement by object such as that in the present case, where such an exercise was not required for the purposes of establishing the infringement, it was also unnecessary to carry out that exercise for the purposes of determining the amount of the fine.

228 That argument cannot succeed.

229 In fact, the clause applied, according to its terms, to 'any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market'. In addition, for the purposes of calculating the fine, the Commission used the value of sales of activities which in its view came within the scope of the clause and excluded sales corresponding to current activities, which, according to the terms of the clause, were excluded from its scope. Accordingly, sales corresponding to activities that could not be in competition with the other party during the period of application of the clause, which were also excluded from its scope according to its terms, also had to be excluded for the purposes of calculating the fine.

230 It follows that, even though the Commission was not required to evaluate potential competition with respect to each of the services on which the applicant relied for the purposes of establishing the infringement (see paragraphs 169 to 188 above), it ought nonetheless to have considered whether the applicant was correct to maintain that the value of the sales of the services in question should be excluded from the calculation of the fine on the ground that there was no potential competition between the parties with respect to those services.

231 In that regard, it should be borne in mind that, as the Court of Justice has already held, the Commission must assess, in each specific case and having regard both to the context and the objectives pursued by the scheme of penalties created by Regulation No 1/2003, the intended impact on the undertaking in question, taking into account in particular a turnover which reflects the undertaking's real economic situation during the period in which the infringement was committed (judgments of 7 June 2007, *Britannia Alloys & Chemicals* v *Commission*, C-76/06 P, ECR, EU:C:2007:326, paragraph 25; of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, ECR, EU:C:2014:2363, paragraph 53; and of 23 April 2015, *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, ECR, EU:C:2015:258, paragraph 49).

232 It is permissible, for the purpose of fixing the fine, to have regard both to the total turnover of the undertaking, which gives an indication, albeit approximate and imperfect, of the size of the undertaking and of its economic power, and to the proportion of that turnover accounted for by the goods in respect of which the infringement was committed, which therefore gives an indication of the scale of the infringement (judgments of 7 June 1983, *Musique Diffusion française and Others* v *Commission*, 100/80 to 103/80, ECR, EU:C:1983:158, paragraph 121; *Guardian Industries and Guardian Europe* v *Commission*, cited in paragraph 231 above, EU:C:2014:2363, paragraph 54; and *LG Display and LG Display Taiwan* v *Commission*, cited in paragraph 231 above, EU:C:2015:258, paragraph 50).

233 Although Article 23(2) of Regulation No 1/2003 leaves the Commission a margin of discretion, it nonetheless limits the exercise of that discretion by laying down objective criteria to which the Commission must adhere. Thus, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, so that the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Furthermore, the exercise of that discretion is also limited by the rules of conduct which the Commission has imposed on itself, in particular in the Guidelines (judgments in *Guardian Industries and Guardian Europe* v *Commission*, cited in paragraph 231 above, EU:C:2014:2363, paragraph 55, and in *LG Display and LG Display Taiwan* v *Commission*, cited in paragraph 231 above, EU:C:2015:258, paragraph 51).

234 Thus, where, as in the present case, the Commission determines the basic amount of the fine in accordance with the methodology set out in the Guidelines, it must comply with that methodology.

235 In that regard, it should be borne in mind that, according to point 13 of the Guidelines, 'in determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly … relates in the relevant geographic area within the EEA'. Those Guidelines state, in point 6, that 'the combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'.

236 It follows from the case-law, moreover, that the proportion of the turnover accounted for by the goods in respect of which the infringement was committed gives a proper indication of the scale of the infringement on the relevant market, while the turnover in the products which were the subject of a restrictive practice constitutes an objective criterion giving a proper measure of the harm which that practice does to normal competition (see, to that effect, judgments in *Musique Diffusion française and*

Others v *Commission*, cited in paragraph 232 above, EU:C:1983:158, paragraph 121; of 11 March 1999, *British Steel* v *Commission*, T-151/94, ECR, EU:T:1999:52, paragraph 643; and of 8 July 2008, *Saint-Gobain Gyproc Belgium* v *Commission*, T-50/03, EU:T:2008:252, paragraph 84).

237 Point 13 of the Guidelines thus pursues the objective of adopting as the starting point for the setting of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it (judgments of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, EU:C:2013:464, paragraph 76; in *Guardian Industries and Guardian Europe* v *Commission*, cited in paragraph 231 above, EU:C:2014:2363, paragraph 57; and in LG *Display and LG Display Taiwan* v *Commission*, cited in paragraph 231 above, EU:C:2015:258, paragraph 53).

238 Consequently, the concept of value of sales referred to in point 13 of the Guidelines extends to sales made in the market to which the infringement relates in the EEA, without there being any need to determine whether those sales were actually affected by the infringement, as the proportion of turnover deriving from the sale of products in respect of which the infringement was committed is best able to reflect the economic importance of the infringement (see, to that effect, judgments in *Team Relocations and Others* v *Commission*, cited in paragraph 237 above, EU:C:2013:464, paragraphs 75 to 78; in *Guardian Industries and Guardian Europe* v *Commission*, cited in paragraph 231 above, EU:C:2014:2363, paragraphs 57 to 59; of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe* v *Commission*, C-286/13 P, ECR, EU:C:2015:184, paragraphs 148 and 149; and in *LG Display and LG Display Taiwan* v *Commission*, cited in paragraph 231 above, EU:C:2015:258, paragraphs 53 to 58 and 64).

239 Nonetheless, while it would, admittedly, be contrary to the goal pursued by that provision if the concept of value of sales to which it refers were understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by the impugned cartel, that concept cannot be extended to cover the undertaking's sales which do not fall, directly or indirectly, within the scope of that cartel (see, to that effect, judgments in *Team Relocations and Others* v *Commission*, cited in paragraph 237 above, EU:C:2013:464, paragraph 76, and in *Dole Food and Dole Fresh Fruit Europe* v *Commission*, cited in paragraph 238 above, EU:C:2015:184, paragraph 148).

240 In that connection, it should be noted that the Commission cannot, admittedly, be required, when faced with a restriction by object such as that at issue in the present case, to carry out on its own initiative an examination of potential competition for all the markets and services concerned by the scope of the infringement, under pain of derogating from the principles established in the case-law cited in paragraphs 175, 176 and 178 above, and to introduce, by determining the value of sales to be taken into account when calculating the fine, the obligation to examine potential competition when such an exercise is not required in the case of a restriction of competition by object (see paragraph 177 above). In that regard, the Court of Justice has held, in a case governed by the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the [CS] Treaty (OJ 1998 C 9, p. 3), that, in the case of an infringement consisting of market sharing, an interpretation which would result in an obligation being imposed on the Commission in respect of the method of calculating fines to which it is not subject for the purposes of applying Article 101 TFEU where the infringement in question has an anticompetitive object cannot be upheld (judgment in *Prym and Prym Consumer* v *Commission*, cited in paragraph 196 above, EU:C:2009:505, paragraph 64).

241 The solution adopted in the present case does not consist in imposing on the Commission, when determining the amount of the fine, an obligation by which it is not bound for the purposes of applying Article 101 TFEU in the case of an infringement which has an anticompetitive object, but in drawing the inferences from the fact that the value of sales must be directly or indirectly related to the infringement within the meaning of point 13 of the Guidelines and cannot cover the sales which do

not fall, directly or indirectly, within the scope of the infringement (see the case-law cited in paragraph 239 above). It follows that, from the time when the Commission chooses to rely, in order to determine the amount of the fine, on the value of sales directly or indirectly related to the infringement, it must determine that value precisely.

242 In that regard, it should be observed that, in the present case, in the light of the wording of the clause, which refers expressly to 'any project in the telecommunication business (including fixed and mobile services, internet access and television services, but excluding any investment or activity currently held or performed as of the date hereof) that can be deemed to be in competition with the other within the Iberian market', and of the fact that the applicant put forward, in its reply to the statement of objections, factual material in order to demonstrate that the value of the sales of certain services thus relied on should be excluded for the purposes of the calculation of the fine on the ground that there was no competition between the parties, the Commission ought to have examined that material in order to determine the value of the sales of products or services made by the undertaking that were directly or indirectly related to the infringement.

243 Thus, in the present case, in so far as the sales directly or indirectly related to the infringement are sales of services falling within the scope of the clause, namely sales of any project in the telecommunication business, with the exception of current activities, that could be deemed to be in competition with the other party within the Iberian market, the Commission ought, in order to determine the value of those sales, to have determined the services for which the parties were not in potential competition within the Iberian market, by examining the material put forward by them in their replies to the statement of objections in order to demonstrate the absence of potential competition between them with respect to certain services during the period of application of the clause. Only on the basis of such a factual and legal analysis would it have been possible to determine the sales directly or indirectly related to the infringement, the value of which ought to have served as the starting amount for the calculation of the basic amount of the fine.

244 It follows that the argument whereby the applicant maintains that the Commission ought to have determined, on the basis of the material put forward by the applicant concerning the absence of potential competition between Telefónica and PT with respect to certain services, the value of sales directly or indirectly related to the infringement must be upheld and Article 2 of the contested decision must be annulled, solely in so far as it fixes the amount of the fine on the basis of the value of sales taken into account by the Commission.

245 In the second place, it should be borne in mind that the system of judicial review of Commission decisions relating to proceedings under Articles 101 TFEU and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and at the request of applicants, by the Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, ECR, EU:C:2014:2062, paragraph 42). In that regard, it should be observed that, in the present case, the illegality found concerns the value of sales taken into consideration for the purposes of determining the amount of the fine imposed on the applicant and, therefore, the actual basis for the calculation of the fine.

246 In that context, it is appropriate to point out again that the Commission, in recital 482 of the contested decision, did not carry out an analysis of potential competition between the parties for the services to which the applicant refers. Furthermore, in answer to the questions put by the Court at the hearing with a view to obtaining a response from the Commission to the applicant's arguments concerning the alleged absence of potential competition between Telefónica and PT with respect to certain services in Portugal, the Commission merely reiterated its position that it was not required to analyse potential competition between the parties for the purposes of determining the amount of the fine and,

moreover, merely answered all the applicant's arguments by stating that Telefónica was a potential competitor of PT with respect to the services in question, since it would have been able to participate in the calls for tenders or to buy an existing operator.

247 It follows from the foregoing that, in the present case, the Court does not have sufficient material in order to determine the final amount of the fine to be imposed on the applicant.

248 It is true that the unlimited jurisdiction which the Court enjoys under Article 31 of Regulation No 1/2003 empowers it, in addition to merely reviewing the lawfulness of the penalty, to substitute its own assessment for the Commission's. However, in the present case, the Commission did not analyse the material put forward by the applicant in order to demonstrate the absence of potential competition between the parties with respect to certain services when determining the value of sales to be taken into consideration in the calculation of the amount of the fine. If the Court were to determine the value of those sales that would therefore mean that it was led to fill in a gap in the investigation of the file.

249 In fact, the exercise of unlimited jurisdiction cannot go so far as to lead the Court to carry out such an investigation, which would go beyond the substitution of the Court's assessments for the Commission's, since the Court's assessment would be the only and the first assessment of the material that the Commission ought to have taken into account when determining the value of the sales directly or indirectly related to the infringement within the meaning of point 13 of the Guidelines and which it fell to the Commission to analyse.

250 It follows that, in the present case, it is not appropriate to exercise the Court's unlimited jurisdiction and it is therefore for the Commission to draw all the inferences from the illegality found when it implements the present judgment and to make a new finding on the fixing of the amount of the fine. Furthermore, the Court considers that it must examine the other pleas relating to the amount of the fine.

– Sales corresponding to pre-existing activities

251 The applicant claims that, in accordance with the wording of the clause, sales corresponding to pre-existing activities must be excluded for the purposes of calculating the fine.

252 In the first place, it should be borne in mind that it is apparent from recitals 482 and 483 of the contested decision that the value of sales of global telecommunication services and wholesale international carrier services for which the parties were actual competitors at the time of signature of the agreement was not taken into account in the calculation of the fine.

253 In the second place, the applicant maintains that the value of sales of PT's services corresponding to the services provided by Zon, namely fixed-line telephone services, broadband internet and pay-per-view television, must be excluded from the scope of the clause, since, in so far as Telefónica held shares in that company, which was a competitor of PT active in the electronic communications sector (see paragraph 7 above), the services provided by Zon fall within the category 'any investment or activity currently held or performed as of the date [of signature of the agreement' (see paragraph 1 above), which are excluded from the scope of the clause.

254 First, the applicant notes that the contested decision provides little or no clarification with respect to certain criticisms made by its addressees and that, as regards Telefónica's shareholding in Zon and the influence which that enabled it to wield, the Commission merely reiterates its argument that that shareholding did not confer any power of control on Telefónica. In so far as that observation may be taken to allege that the Commission was in breach of its obligation to state reasons, such an allegation should be rejected.

255 It is apparent that the Commission replied to the parties' argument that the services provided by Zon should be excluded from the scope of the clause, pointing out that it did not accept the assertion that Zon's activities must be excluded from the scope of the clause, since, if the parties had wished to show that they were in competition in Portugal, through Telefónica's shareholding in Zon, they ought to have shown that Telefónica controlled Zon's activities, which they did not do, whereas it is apparent from the 2011 annual accounts that Telefónica did not control the Portuguese operator. In doing so, the Commission clearly explained the reason why it considered that Zon's activities should not be excluded from the scope of the clause and the reason why it concluded that Telefónica did not control that company, so that it cannot be found to have committed any breach of the obligation to state reasons.

256 In that regard, the Commission further explained in recitals 156 to 164 of the contested decision that, if the activity carried out by a company in which one of the parties held shares but which it did not control was not relevant to the determination of the scope of the clause, the clause ought to have stated that it was intended to apply to the activities of companies not controlled by the parties. Furthermore, if such activities were relevant to the determination of the scope of the clause, they should also have been relevant to compliance with the provisions of the clause, so that the commencement of a prohibited activity by a company in which one of the parties held a minority share but did not control would constitute a breach of the clause. The Commission continued on that point by asserting that the parties could not claim to have entered into any obligation whatsoever on behalf of the companies in which they held a minority shareholding, but which they did not control, since they would not be in a position to ensure compliance with such an obligation. Consequently, in order for an activity to be capable of being excluded from the scope of the clause, it must be carried out directly by one of the parties, or indirectly by one of the companies controlled by them.

257 Second, as regards the substance, the applicant does not dispute either the argument just set out or the Commission's finding that Telefónica held, during the relevant period, only a minority shareholding (5.46%) in Zon (recital 19 of the contested decision) and therefore did not control that company, so that the services provided by Zon could not be considered to be services provided by Telefónica and, accordingly, as services for which Telefónica and PT were in competition and which should thus be excluded from the scope of the clause. It follows that the applicant has failed to show why, in its view, in spite of the fact that Telefónica held only a minority shareholding in Zon, the services provided by the latter company should be regarded as services provided by Telefónica and, therefore, excluded from the scope of the clause. In those circumstances, its argument must be rejected.

– Sales corresponding to activities outside the Iberian Peninsula

258 The applicant disputes the geographic scope of the clause as determined by the Commission, claiming that, since the agreement refers expressly to the Iberian market and not to Portugal and Spain, it must be concluded that the parties intended to refer to the component territories of the Iberian Peninsula and not to the component territories of the Kingdom of Spain and the Portuguese Republic. Therefore, in the applicant's submission, the territories corresponding to the autonomous regions of the Azores and Madeira, which in 2011 represented a turnover of EUR 36 992 000 and EUR 23 492 000 respectively, must be excluded from the geographic scope of the clause, with the consequence that the value of PT's sales taken into account in calculating the fine and therefore the amount of the fine must be adjusted.

259 That assertion cannot be accepted. Contrary to the applicant's contention, the wording of the clause does not refer literally to 'the Iberian Peninsula', but to 'the Iberian market'. It is apparent that the reference to 'the Iberian market' must be understood not in a strictly geographical sense, as referring solely to the Iberian Peninsula, but as referring to the markets of Spain and Portugal, which include the markets in their territories not situated in the Iberian Peninsula. There is nothing to indicate, nor does the applicant put forward any arguments to show, that the territories of those States situated outside the Iberian Peninsula were excluded from the scope of the clause.

260 In that regard, it should be noted that the applicant merely criticises the Commission's interpretation of the geographic scope of the clause, but puts forward no argument to challenge the Commission's findings with respect to the geographic scope of the clause, set out in recitals 175 to 182 of the contested decision. In those circumstances, its claims cannot succeed.

261 It follows from all of the foregoing considerations that the applicant's arguments relating to the sales taken into account for the purposes of calculating the fine must be upheld in that, in order to determine the value of the applicant's sales to be taken into consideration for the purposes of calculating the amount of the fine, the Commission was required to examine the arguments whereby the applicant sought to show that there was no potential competition between Telefónica and PT with respect to certain services (see paragraphs 226 to 250 above) and rejected as to the remainder.

c) Duration of the infringement

262 The applicant claims that the Commission erred in determining in duration of the infringement, since the non-compete obligation was not capable of producing effects before it was validated and could not therefore be characterised as a restriction by object intended to apply necessarily from the date of its entry into force, namely the date of the definitive conclusion of the transaction on 27 September 2010, and that, in any event, even if the express condition of validation were disregarded, the non-compete agreement expired on 29 October 2010 because of the conclusions to which the conference calls on 26 and 29 October 2010 led.

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

264 In addition, as stated in paragraph 202 above, point 24 of the 2006 Guidelines provides that, in order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales is to be multiplied by the number of years of participation in the infringement and that periods of less than six months are to be counted as half a year, while periods longer than six months but shorter than one year are to be counted as a full year.

265 As regards the duration of the infringement at issue in the present case, the Commission concluded, in recitals 454 to 465 of the contested decision — as stated in paragraph point 51 above — that the duration of the infringement is equal to the duration of the period commencing on the date of definitive conclusion of the transaction, namely 27 September 2010 (see paragraph 25 above), and ending on the date on which the clause was terminated, namely 4 February 2011 (see paragraph 29 above).

266 By the present complaint, the applicant disputes, in essence, the lawfulness of the contested decision in that it finds, as stated in Article 1 of its operative part, that the infringement lasted over a period from the definitive conclusion of the transaction on 27 September 2010 until 4 February 2011. It should therefore be held that, by the present complaint relating to duration, the applicant seeks not only a reduction of the fine but also annulment in part of the contested decision and, in particular, of Article 1 of its operative part, in that the Commission wrongly held in that article that the infringement continued from 27 September 2010 until 4 February 2011.

267 However, it must be stated that the applicant puts forward no additional evidence relating specifically to the duration of the infringement, but merely refers to criticisms already made in the context of its plea alleging infringement of Article 101 TFEU and of the law relating to its application, which have already been examined and rejected in that context (see paragraphs 122 to 161 above). Since the applicant has not succeeded in demonstrating that the non-compete obligation was subject to a

self-assessment obligation or that the October 2010 conference calls had resulted in the termination of the clause, its claim for a reduction of the duration of the infringement taken into account in the calculation of the amount of the fine must be rejected.

d) Respect for the principle of proportionality

268 The applicant maintains that the setting of the amount of the fine imposed on it for the infringement at issue in the present case is vitiated by a breach of the principle of proportionality.

269 The Commission raises a plea of inadmissibility, claiming that this plea for annulment must be declared inadmissible in so far as the applicant, in the three lines of the application devoted to this plea, merely submits that 'all things considered, [the applicant] is convinced that, in the light of all of the circumstances of the case and the criteria that must be followed for the purposes of imposing fines, the Commission did not respect the principle of proportionality'.

270 It should be borne in mind that, as already observed in paragraph 68 et seq. above, each application is required to state the subject matter of the proceedings and a summary of the pleas in law on which the application is based and that that information must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to decide the case, if necessary without other supporting information. In addition, it is necessary, in order to ensure legal certainty and the proper administration of justice, that the basic matters of fact and law relied on appear coherently and intelligibly in the text of the application itself (see order in *TF1* v *Commission*, cited in paragraph 70 above, EU:T:2008:155, paragraph 29 and the case-law cited).

271 It must be stated that the plea alleging breach of the principle of proportionality set out by the applicant in the context of the present action does not satisfy the requirements as thus identified, and the plea of inadmissibility raised by the Commission is therefore well founded and the plea alleging breach of the principle of proportionality must be declared inadmissible.

272 Furthermore, its should be observed in that regard that, in EU competition law, the review of legality is supplemented by the unlimited jurisdiction which the Courts of the EU 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, cancel, reduce or increase the fine or penalty payment imposed (see judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, ECR, EU:C:2011:815, paragraph 63 and the case-law cited).

273 It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are inter partes. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (judgment in *Chalkor* v *Commission*, cited in paragraph 272 above, EU:C:2011:815, paragraph 64).

274 That requirement, which is procedural in nature, does not conflict with the rule that, in the case of infringements of the competition rules, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence to demonstrate that its objections are well founded (judgment in *Chalkor* v *Commission*, cited in paragraph 272 above, EU:C:2011:815, paragraph 65).

275 The failure to review the whole of the contested decision of the Court's own motion does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the Court — which is indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts — should be obliged to undertake of its own motion a new and comprehensive investigation of the file (judgment in *Chalkor* v *Commission*, cited in paragraph 272 above, EU:C:2011:815, paragraph 66).

276 The review provided for by the Treaties thus involves review by the Courts of the European Union of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights of the European Union (judgment in *Chalkor* v *Commission*, cited in paragraph 272 above, EU:C:2011:815, paragraph 67).

277 It follows from that case-law that, in the absence of arguments and evidence put forward by the applicant in support of its plea alleging breach of the principle of proportionality, the Court is not required to examine of its own motion, in the exercise of its unlimited jurisdiction, whether the Commission respected that principle when setting the amount of the fine.

3. *The request for the examination of witnesses*

278 The applicants asks the Court to hear as a witness Ms M.R.S.S.N., the officer in charge of PT's competition directorate at the time of the conclusion of the agreement and at the time of the termination of the clause.

279 The Commission claims that the request must be rejected on the ground that it is unnecessary and otiose, since Ms M.R.S.S.N.'s statement on oath as to the facts of which she is aware is already in the file.

280 It must be pointed out that the Court is the sole judge of whether the information available to it concerning the cases before it needs to be supplemented (see order of 10 June 2010, *Thomson Sales Europe* v *Commission*, C-498/09 P, EU:C:2010:338, paragraph 138 and the case-law cited).

281 As the Court of Justice has already held in a case concerning competition law, even where a request for the examination of witnesses, made in the application, states precisely about what facts and for what reasons the witness or witnesses should be examined, it falls to the General Court to assess the relevance of the application to the subject matter of the dispute and the need to examine the witnesses named (see judgment of 19 December 2013, *Siemens* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, EU:C:2013:866, paragraph 323 and the case-law cited).

282 The Court of Justice has also stated that the General Court's discretion in that regard was in line with the fundamental right to a fair hearing and, in particular, Article 6(3)(d) of the Convention for the Protection of Human Rights and Fundamental Freedoms, singed in Rome on 4 November 1950 (ECHR). It is apparent from the case-law of the Court of Justice that that provision does not confer on the accused an absolute right to obtain the attendance of witnesses before a court and that it is in principle for the court hearing the case to determine whether it is necessary or appropriate to call a witness. Article 6(3) of the ECHR does not require that every witness be called but is aimed at full equality of arms, ensuring that the procedure in issue, considered in its entirety, gave the accused an adequate and proper opportunity to challenge the suspicions concerning him (see judgment in *Siemens* v *Commission*, cited in paragraph 281 above, EU:C:2013:866, paragraphs 324 and 325 and the case-law cited).

283 In that regard, this Court has already held that a request for the examination of witnesses submitted by an applicant undertaking could not be granted where the statements which the applicant sought to obtain by means of such testimony before the Court had already been made before the Commission, where they had been considered not to be supported by documentary evidence and had even been contradicted by certain information in the file (see, to that effect, judgment of 13 July 2011, *ThyssenKrupp Liften Ascenseurs* v *Commission*, T-144/07, T-147/07 to T-150/07 and T-154/07, ECR, EU:T:2011:364, paragraphs 152 and 154).

284 In addition, it should be noted that an application seeking that the Court should supplement the information available to it is inoperative where, even if the Court were to grant that application, the meaning of its decision would not be affected (see, to that effect, order in *Thomson Sales Europe* v *Commission*, cited in paragraph 280 above, EU:C:2010:338, paragraph 141).

285 If the Court is able to rule on the basis of the forms of order sought, the pleas in law and the arguments put forward in the course of both the written and the oral procedure and in the light of the documents produced, the applicant's request for examination of a witness put forward by the applicant must be rejected without the Court being required to provide specific reasons for its finding that it is unnecessary to seek additional evidence (see, to that effect, order of 15 September 2005, *Marlines* v *Commission*, C-112/04 P, EU:C:2005:554, paragraph 39, and judgment of 9 September 2009, *Clearstream* v *Commission*, T-301/04, ECR, EU:T:2009:317, paragraph 218).

286 However, while it is true that a party is not entitled to require the Courts of the European Union to adopt a measure of organisation of procedure or a measure of inquiry, the fact nonetheless remains that the Court cannot draw conclusions from the fact that certain information is not in the file unless it has exhausted the means laid down in its Rules of Procedure for obtaining production of that information from the party concerned (see order of 8 October 2013, *Michail* v *Commission*, T-597/11 P, ECR-FC, EU:T:2013:542, paragraph 40 and the case-law cited).

287 In this instance, since Ms M.R.S.S.N.'s statements concerning the facts of which she was aware is already in the file, there is no need to grant the applicant's request for examination of a witness.

288 In that regard, it should be borne in mind, as already stated in paragraph 283 above, that this Court has held that a request for the examination of witnesses submitted by an applicant undertaking could not be granted where the statements which the applicant sought to obtain by means of such testimony before the Court had already been made before the Commission, where they had been considered not to be supported by documentary evidence and had even been contradicted by certain information in the file.

289 In the present case, it should be borne in mind that the Commission stated, as already noted in paragraphs 149 and 150 above, that it had taken the statement in question into account and that it had evaluated it in accordance with the principles applicable to the appraisal of evidence. The Commission thus took account of the fact that that statement had been produced by a person who might have a direct interest in the case (recital 122 of the contested decision) and in carrying out its appraisal it weighed that evidence against the rest of the evidence available (recitals 121, 124 and 308 of the contested decision). At no time did the Commission cast doubt on the fact that the person making that statement had actually expressed her views in the manner recorded in that statement.

290 In those circumstances, the request that the Court should order the person who made that statement to be examined before the Court must be rejected, as the information contained in the file is sufficient to enable the Court to rule on the October 2010 conference calls (see, to that effect, judgment in *ThyssenKrupp Liften Ascenseurs* v *Commission*, cited in paragraph 283 above, EU:T:2011:364, paragraph 152 and 154; see also, to that effect and by analogy, judgment of 7 October 2004, *Mag Instrument* v *OHIM*, C-136/02 P, ECR, EU:C:2004:592, paragraph 77).

291 That conclusion cannot be called in question by the applicant's assertion that, under the principle of proximity or immediacy, the examination of witnesses by the Court has undeniable added value by comparison with the taking into account of a statement recorded in writing. Since the content of the statement is not called in question and since all that is required is to appraise that item of evidence by reference to all the evidence, the arguments put forward by the applicant at the hearing cannot call in question the finding that the examination of the author of the statement in question before the Court is superfluous.

292 It follows from all of the foregoing considerations that the application for examination of witnesses must be rejected.

293 It follows from all of the foregoing considerations that the applicant's arguments relating to the sales taken into account for the purposes of calculating the fine must be upheld in part in that, in order to determine the value of the applicant's sales to be taken into consideration in the calculation of the amount of the fine, the Commission was required to examine the arguments whereby the applicant sought to show that there was no potential competition between Telefónica and PT concerning certain services. Accordingly, Article 2 of the contested decision must be annulled, solely in that it sets the amount of the fine on the basis of the value of sales taken into consideration by the Commission, and the action must be rejected for the remainder.

Costs

294 Under Article 134(3) of the Rules of Procedure of the General Court, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing his own costs, pay a proportion of the costs of the other party.

295 Since the action has been only partly successful, the Court considers it fair, having regard to the circumstances of the case, to order the applicant to bear three quarters of its own costs and to pay one quarter of the Commission's costs. The Commission will bear three quarters of its own costs and one quarter of the applicant's costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls Article 2 of Commission Decision C(2013) 306 final of 23 January 2013 relating to a proceeding under Article 101 [TFEU] (Case AT.39.839 — Telefónica/Portugal Telecom) in that it sets the amount of the fine imposed on Portugal Telecom SGPS, SA at EUR 12 290 000, in so far as that amount was set on the basis of the value of sales taken into account by the European Commission;**

2. **Dismisses the action as to the remainder;**

3. **Orders Portugal Telecom SGPS to bear three quarters of its own costs and to pay one quarter of the Commission's costs, and the Commission to bear three quarters of its own costs and to pay one quarter of Portugal Telecom SGPS's costs.**

Martins Ribeiro Gervasoni Madise

Delivered in open court in Luxembourg on 28 June 2016.

[Signatures]

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