Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

25 July 2018 *

(Appeal — Competition — Article 102 TFEU — Abuse of dominant position — Polish wholesale market for fixed broadband internet access — Refusal to give access to the network and to supply wholesale products — Regulation (EC) No 1/2003 — Article 7(1) — Article 23(2)(a) — Legitimate interest in finding an infringement which has come to an end — Calculation of the fine — 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 — Gravity — Mitigating circumstances — Investments made by the infringing undertaking — Review of legality — Review exercising powers of unlimited jurisdiction — Substitution of grounds)

In Case C-123/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 February 2016,

Orange Polska SA, established in Warsaw (Poland), represented by S. Hautbourg, avocat, P. Paśnik and M. Modzelewska de Raad, adwokaci, A. Howard, Barrister, and D. Beard QC,

appellant,

the other parties to the proceedings being:

European Commission, represented by J. Szczodrowski, L. Malferrari and E. Gippini Fournier, acting as Agents,

defendant at first instance,

Polska Izba Informatyki i Telekomunikacji, established in Warsaw, represented by P. Litwiński, adwokat,

European Competitive Telecommunications Association AISBL (ECTA), formerly the European Competitive Telecommunications Association, established in Brussels (Belgium), represented by G.I. Moir and J. MacKenzie, Solicitors,

interveners at first instance,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Rosas, C. Toader, A. Prechal and E. Jarašiūnas (Rapporteur), Judges,

Advocate General: M. Wathelet,

* Language of the case: English.

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 22 November 2017,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2018,

gives the following

Judgment

1 By its appeal, Orange Polska SA ('Orange') asks the Court, principally, to set aside the judgment of the General Court of the European Union of 17 December 2015, *Orange Polska* v *Commission* (T-486/11, 'the judgment under appeal', EU:T:2015:1002), by which the General Court dismissed Orange's action seeking, principally, annulment of Commission Decision C(2011) 4378 final of 22 June 2011 relating to a proceeding under Article 102 TFEU (Case COMP/39.525 — Telekomunikacja Polska) ('the decision at issue'), and to annul that decision.

Legal context

Regulation (EC) No 1/2003

2 Recital 11 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 and 102 TFEU] (OJ 2003 L 1, p. 1) states:

'For it to ensure that the provisions of the Treaty are applied, the [European] Commission should be able to address decisions to undertakings or associations of undertakings for the purpose of bringing to an end infringements of Articles [101 and 102 TFEU]. Provided there is a legitimate interest in doing so, the Commission should also be able to adopt decisions which find that an infringement has been committed in the past even if it does not impose a fine. …'

3 Article 4 of that regulation, in Chapter II, entitled 'Powers', states that 'for the purpose of applying Articles [101 and 102 TFEU], the Commission shall have the powers provided for by this Regulation'.

4 In Chapter III of that regulation, concerning 'Commission decisions', Article 7, entitled 'Finding and termination of infringement', provides in paragraph 1:

'Where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [101 or 102 TFEU], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. For this purpose, it may impose on them any behavioural or structural remedies … If the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.'

5 Article 16(1) of that regulation, in Chapter IV, concerning cooperation, states, in particular, that 'when national courts rule on … practices under Article [101 or 102 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission'.

6 Chapter VI of Regulation No 1/2003 deals with penalties. In that chapter, Article 23, entitled 'Fines', provides:

'…

2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article [101 or 102 TFEU] …

…'

7 Chapter VII of that regulation, entitled 'Limitation periods', contains Article 25, concerning 'Limitation periods for the imposition of penalties'. Article 25(1) and (2) provides:

'1. The powers conferred on the Commission by Articles 23 and 24 shall be subject to the following limitation periods:

(a) three years in the case of infringements of provisions concerning requests for information or the conduct of inspections;

(b) five years in the case of all other infringements.

2. Time shall begin to run on the day on which the infringement is committed. However, in the case of continuing or repeated infringements, time shall begin to run on the day on which the infringement ceases.'

8 Article 31 of Regulation No 1/2003, which is one of the general provisions of that regulation, states:

'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

Directive 2014/104/EU

9 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) provides, in Article 10:

'1. Member States shall, in accordance with this Article, lay down rules applicable to limitation periods for bringing actions for damages. …

…

4. Member States shall ensure that a limitation period is suspended or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.'

10 Article 18(3) of that directive states:

'A competition authority may consider compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor.'

Guidelines on the method of setting fines

11 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 2006 Guidelines'), in the section relating to the determination of the basic amount of the fine, state:

'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.

…'

12 Point 29 of those guidelines, concerning mitigating circumstances, indicates that 'the basic amount may be reduced where the Commission finds that mitigating circumstances exist' and sets out an illustrative list.

Background to the dispute and the decision at issue

13 The background to the dispute and the decision at issue, as set out in paragraphs 1 to 34 of the judgment under appeal, may be summarised as follows.

14 Orange is the legal successor of Telekomunikacja Polska SA (hereinafter also referred to as 'Orange'), a telecommunications company established in Poland in 1991 following the privatisation of the former State monopoly.

15 Following an inspection carried out between 23 and 26 September 2008, the Commission, on 26 February 2010, adopted a statement of objections, to which Orange replied on 2 June 2010.

16 In the decision at issue, the Commission identified three relevant product markets: the market for wholesale broadband access, also known as 'the wholesale BSA [bit-stream access] market'; the market for wholesale physical network infrastructure access at a fixed location, also known as 'the wholesale LLU [local-loop unbundling] market'; and the retail mass market, namely the market of standard broadband products offered at a fixed location by telecommunications operators to their own end-users. The relevant geographic market was defined as the entire territory of Poland.

17 Furthermore, the Commission stated, first, that, at the material time, the operator identified by the national regulatory authority (NRA) as being an operator with significant market power on the market for the provision of fixed public telephone networks, in this case Orange, was obliged to grant new entrants, known as 'alternative operators', unbundled access to its local loop and to related services under transparent, fair and non-discriminatory conditions at least as favourable as the conditions determined in a reference offer, proposed by the operator identified by the NRA and adopted

following a procedure before the NRA. It also explained that, from 2005 onwards, the Polish NRA acted on several occasions to remedy Orange's failures to comply with its regulatory obligations, including by imposing fines upon it.

18 Second, the Commission stated that, on 22 October 2009, Orange signed an agreement with the President of the Urząd Komunikacji Elektronicznej (UKE) (President of the Office for Electronic Communications), the Polish NRA at that time, in accordance with which Orange voluntarily undertook, in particular, to comply with its regulatory agreements, to conclude agreements with alternative operators on access in a manner consistent with the relevant reference offers and to invest in the modernisation of its broadband network ('the agreement with the UKE').

19 As regards the infringement in question, the Commission found that Orange had a dominant position in the product markets identified in paragraph 16 above.

20 The Commission took the view that Orange had abused its dominant position in the two wholesale markets, with the aim of protecting its position in that retail market, by developing a strategy aimed at limiting competition at all stages of the procedure for access to its network. That strategy consisted in proposing unreasonable terms to alternative operators in the agreements for broadband internet access and unbundled access to the local loop, delaying the process of negotiating agreements concerning access to those products, limiting access to its network and to subscriber lines, and refusing to provide information indispensable for alternative operators to take decisions regarding access.

21 In Article 1 of the decision at issue, the Commission concluded that Orange, by refusing to grant alternative operators access to its wholesale broadband products, had committed a single and continuous infringement of Article 102 TFEU, starting on 3 August 2005, the date of the first negotiations between Orange and an alternative operator regarding access to Orange's network on the basis of the reference offer for unbundled access to the local loop, and lasting until at least 22 October 2009, the date on which the agreement with the UKE was signed.

22 The Commission penalised Orange by imposing on it, in Article 2 of the decision at issue, a fine of EUR 127 554 194, calculated in accordance with the 2006 Guidelines. In that calculation, it determined the basic amount of that fine by calculating 10% of the average value of sales made by Orange on the relevant markets and multiplying the number obtained by a factor of 4.16, to reflect the duration of the infringement. Although it decided not to adjust that amount on the basis of aggravating or mitigating circumstances, it did however deduct from that amount the fines which had been imposed by the UKE on Orange for breach of its regulatory obligations.

The procedure before the General Court and the judgment under appeal

23 By application lodged at the Registry of the General Court on 2 September 2011, Orange brought an action seeking, principally, the annulment of the decision at issue or, in the alternative, the annulment or reduction of the fine imposed on it by that decision.

24 By order of 7 November 2012, the President of the First Chamber of the General Court upheld the request lodged by the Polska Izba Informatyki i Telekomunikacji (PIIT) (Polish Chamber of Information Technology and Telecommunications) for leave to intervene in support of the form of order sought by Orange.

25 By order of 3 September 2013, the President of the First Chamber of the General Court granted the request lodged by the European Competitive Telecommunications Association (ECTA), which has since become a non-profit international association, for leave to intervene in support of the form of order sought by the Commission.

26 In support of its action, Orange put forward five pleas in law. The first plea was put forward in support of its claim for annulment of the decision at issue in its entirety, the second and third pleas supported its claim for annulment of Article 2 of the decision at issue, and the fourth and fifth pleas supported the claim seeking adjustment of the fine imposed by Article 2 of the decision at issue. Taking the view that the latter two pleas sought to impugn an error of law and were such, if well founded, as to lead to the partial annulment of the decision at issue, the General Court re-categorised them as falling within the Court's review of legality and not its unlimited jurisdiction. Having rejected, in its review of the legality of the decision at issue, all five pleas as unfounded and having found, furthermore, that there was no other element justifying an adjustment of the amount of the fine, the General Court dismissed the action in its entirety.

Forms of order sought and the procedure before the Court

27 Orange claims that the Court should:

– set aside the judgment under appeal;

– annul the decision at issue in its entirety; or

– in the alternative, annul Article 2 of the decision at issue in its entirety; or

– in the further alternative, reduce the fine imposed by the decision at issue to the extent which the Court considers appropriate; or

– in the further alternative, remit the decision relating to the fine to the Commission; and

– order the Commission to pay the costs.

28 The Commission contends that the Court should dismiss the appeal and order Orange to pay the costs.

29 The PIIT claims that the Could should:

– set aside the judgment under appeal;

– annul Article 2 of the decision at issue; or

– in the alternative, reduce the fine imposed by the decision at issue to the extent which the Court considers appropriate; or

– in the further alternative, remit the decision relating to the fine to the Commission; and

– order the Commission to pay the costs, including the costs incurred by the PIIT.

30 The ECTA contends, in essence, that the Court should dismiss the appeal and order Orange to pay the costs of the Commission and of the ECTA.

31 By decision of the President of the Court of Justice of 2 March 2017, the proceedings in the present case were suspended, pursuant to Article 55(1)(b) of the Rules of Procedure of the Court of Justice, pending delivery of the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632).

The appeal

32 In support of its appeal, Orange puts forward three grounds of appeal.

The first ground of appeal, alleging an error of law as regards the Commission's obligation to demonstrate the existence of a legitimate interest in adopting a decision finding that an infringement was committed in the past

Arguments of the parties

33 Orange points out that the infringement in question ended more than 6 months before the notification of the statement of objections and 18 months before the decision at issue was adopted. The infringement in question was therefore committed in the past and the Commission was therefore required to justify a legitimate interest in finding an infringement, in accordance with Article 7(1) of Regulation No 1/2003, which, however, it failed to do.

34 In that regard, in paragraph 76 of the judgment under appeal, the General Court found that, under that provision, the Commission is obliged to establish the existence of a legitimate interest in adopting a decision finding an infringement where both the infringement has ceased and the Commission does not impose a fine. However, in paragraph 77 of that judgment, the General Court limited the scope of that obligation solely to cases where the Commission's power to impose fines is time-barred. In doing so, it erred in law in its interpretation and application of that provision.

35 First of all, that interpretation cannot be inferred from the wording of Article 7(1) of Regulation No 1/2003, which is unequivocal. Both recital 11 of Regulation No 1/2003 and the preparatory work for that regulation, together with the Commission's administrative practice, confirm that the Commission's obligation to demonstrate a legitimate interest in finding an infringement committed in the past exists regardless of whether or not a fine is imposed. Furthermore, only Article 7(1) of Regulation No 1/2003 gives the Commission the power to find an infringement of Article 101 or 102 TFEU.

36 Next, there is no basis for making the requirements of Article 7 of Regulation No 1/2003 contingent upon the Commission's power to impose fines. Article 23(2) of that regulation refers to infringements which must already have been found and that provision has no bearing on the circumstances in which an infringement may be found under Article 7 of that regulation. That interpretation is supported by the fact that the Commission's power to find an infringement is not subject to any limitation period and is conferred on the Commission by a part of Regulation No 1/2003 which is separate from the part of that regulation which grants the Commission the power to impose fines. It is also not clear from the case-law that the impossibility of imposing a fine is a precondition for the requirement to demonstrate a legitimate interest.

37 Lastly, Orange states that, first, pursuant to Article 16 of Regulation No 1/2003, the finding by the Commission of a past infringement establishes, in the context of actions for damages, proof of the liability of the undertaking concerned. Second, such a finding, even where no fine is imposed, may harm that undertaking due to its suspensive effect on the limitation periods applicable to actions for damages, laid down in Article 10(4) of Directive 2014/104. Those elements justify the Commission being required, in all decisions finding a past infringement which has been voluntarily terminated by an undertaking, to set out the reasons establishing its legitimate interest in pursuing such an infringement.

38 Moreover, the first ground of appeal, since it refers to paragraphs 74 to 80 of the judgment under appeal, and not solely to paragraph 77 thereof, is not ineffective, as the Commission incorrectly argues.

39 The Commission submits that the first ground of appeal is unfounded. That ground is, in any event, ineffective, in that it refers to only paragraph 77 of the judgment under appeal, while the reasoning put forward in paragraph 76 of that judgment is sufficient to justify the findings in paragraphs 78 and 79 thereof. The argument put forward by Orange in response, that the first ground in reality refers to paragraphs 74 to 80 of the judgment under appeal or, at the very least, to paragraphs 74 to 76 and 80 of that judgment, is inadmissible, pursuant to Article 169(2) of the Rules of Procedure, since those paragraphs have not been identified in the appeal.

40 The ECTA submits that the first ground of appeal is unfounded since the Commission's power to impose a fine, irrespective of whether the infringement has ceased or not, stems from Article 23(2) of Regulation No 1/2003. That provision, other than requiring proof of intention or negligence, does not subject that power to any other condition. Consequently, Orange is wrong to rely on Article 7(1) of that regulation.

Findings of the Court

41 As a preliminary point, inasmuch as the Commission challenges the relevance of the first ground of appeal on the basis that it is directed only at paragraph 77 of the judgment under appeal, it must be stated that only paragraphs 76 and 77 of the judgment under appeal are explicitly referred to in the appeal and that only paragraph 77 does indeed seem to be expressly criticised.

42 However, it is clear from the arguments set out by Orange in its appeal that it challenges the General Court's interpretation of Article 7(1) of Regulation No 1/2003 to the effect that that provision did not require the Commission to establish, in the decision at issue, the existence of a legitimate interest in finding the infringement in question, even though that infringement had already ended when that decision was adopted, since the Commission's power to impose a fine was not time-barred. It is obvious that that interpretation follows only from a combined reading of paragraphs 76 and 77, with the result that the appeal clearly covers those two paragraphs.

43 In addition, those paragraphs are the essential grounds on which the General Court based its findings in paragraphs 78 to 80 of the judgment under appeal, since paragraphs 74 and 75 of that judgment, the only other paragraphs in that judgment which set out the General Court's reasoning relating to the first plea raised before it, merely recall the wording, respectively, of Article 7(1) of Regulation No 1/2003 and of an extract from the explanatory memorandum to the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 [COM(2000) 582 final] ('Regulation implementing Articles 81 and 82 [EC]') (OJ 2000 C 365 E, p. 284) ('the proposal which led to the adoption of Regulation No 1/2003'). There was therefore no need, for the purposes of the first ground of appeal, to expressly refer to paragraphs 74 and 75, since the accuracy of the statements made in them is not in dispute.

44 Accordingly, the challenge concerning paragraphs 76 and 77 of the judgment under appeal necessarily covers the findings in paragraphs 78 to 80 of that judgment. Consequently, the first ground cannot be dismissed at the outset as being ineffective on the ground that it refers only to paragraph 77 of that judgment.

45 Furthermore, inasmuch as the Commission challenges the admissibility of the argument put forward by Orange in its reply, on the ground that Orange was out of time in submitting that the first ground of appeal covers all of the General Court's reasoning rejecting the first plea raised before it, it should be noted that, as was found in paragraphs 42 to 44 above, the appeal clearly identifies the points in the grounds of that judgment which are contested in the context of the first ground of appeal. That plea of inadmissibility therefore lacks any basis in fact and as a result must be dismissed.

46 As regards the merits of that plea, it should be recalled that the first sentence of Article 7(1) of Regulation No 1/2003 provides that, where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 101 or 102 TFEU, it may by decision require the undertakings and associations of undertakings concerned to bring that infringement to an end. The same provision states, furthermore, in its last sentence, that, if the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past.

47 As is apparent from the explanatory memorandum to the proposal which led to the adoption of Regulation No 1/2003, the relevant section of which was cited by the General Court in paragraph 75 of the judgment under appeal, the last sentence of Article 7(1) of that regulation, which corresponds to that in that proposal, reflects the guidance given in the judgment of 2 March 1983, *GVL* v *Commission* (7/82, EU:C:1983:52).

48 In that judgment, the Court ruled on the scope of the provisions of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 and 82 EC] (OJ, English Special Edition 1959-1962, p. 87), in particular Article 3(1) of that regulation — the wording of which was reproduced, in essence, in the first sentence of Article 7(1) of Regulation No 1/2003 — which stated only that 'where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article [81 or 82 EC], it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end'. As is apparent from paragraph 18 of that judgment, the applicant in the case giving rise to that judgment, in which the Commission had not imposed a fine, argued in particular that Article 3 of that regulation did not give the Commission the power to adopt a decision solely intended to find that an infringement had occurred in the past.

49 In that regard, the Court noted that the provisions of Regulation No 17 had to be interpreted within the framework of the rules on competition contained in the EEC Treaty and that the purpose of that regulation was to ensure compliance with the rules on competition by undertakings and, to that end, to enable the Commission to require undertakings to bring to an end any infringement which it establishes and to impose fines and periodic penalty payments in respect of an infringement. The Court held that the power to take decisions of such a type necessarily implies a power to make a finding that the infringement in question exists (see, to that effect, judgment of 2 March 1983, *GVL* v *Commission*, 7/82, EU:C:1983:52, paragraphs 18, 22 and 23).

50 The Court therefore found that in reality the relevant question in the case before it was not whether the Commission had the power to declare, by means of a decision, that the rules on competition had been infringed, but whether the Commission had, in that case, a legitimate interest in adopting a decision finding an infringement which had already been ended by the undertaking concerned, even though no fine had been imposed (judgment of 2 March 1983, *GVL* v *Commission*, 7/82, EU:C:1983:52, paragraph 24). It found that, in the case in question, the Commission had sufficiently established such an interest in the decision which was at issue (see, to that effect, judgment of 2 March 1983, *GVL* v *Commission*, 7/82, EU:C:1983:52, paragraphs 25 to 28).

51 In the light of the foregoing, the General Court did not err in law in inferring, in paragraph 76 of the judgment under appeal, on the one hand, from the wording of Article 7(1) of Regulation No 1/2003 and, on the other hand, from the proposal which led to the adoption of Regulation No 1/2003, that 'the Commission must establish the existence of a legitimate interest in finding an infringement where both the infringement has ceased and the Commission does not impose a fine'.

52 Subsequently, in paragraph 77 of the judgment under appeal, the General Court held that its finding set out in paragraph 76 was 'consistent with the case-law of the [General] Court … which, in essence, acknowledges the existence of a link between, on the one hand, the obligation imposed on the Commission to demonstrate a legitimate interest in finding an infringement and, on the other, the time limit on its power to impose fines', noting in that regard that it had previously 'held that the time limit on the Commission's power to impose fines could not affect its implicit power to find that

an infringement had been committed', but that 'the exercise of that implicit power to adopt a decision establishing an infringement after expiry of the limitation period is conditional on the Commission showing a legitimate interest in making such a finding', and referring in that regard to two of its previous judgments.

53 The General Court concluded from this, in paragraph 78 of the judgment under appeal, first, that 'the interpretation of Article 7(1) of Regulation No 1/2003 put forward by [Orange], to the effect that the Commission must show a legitimate interest in finding an infringement which occurred in the past, notwithstanding the fact that it is punishing that infringement by a fine, is incorrect' and, consequently, rejected the first argument put before it alleging infringement by the Commission of the obligation to state reasons incumbent upon it as regards the existence of such a legitimate interest.

54 Second, it concluded from this, in paragraph 79 of the judgment under appeal, that 'inasmuch as, in the present case, it is undisputed that the Commission's power to impose fines was not time-barred and that the Commission decided to impose a fine on [Orange], [Orange] claims incorrectly that the Commission erred in law in that it failed to show, in the [decision at issue], the existence of a legitimate interest in finding an infringement which occurred in the past'. Consequently, it also rejected the second argument put before it in the context of the first plea in law raised before it and, in paragraph 80 of that judgment, dismissed that first plea in its entirety as well as Orange's head of claim seeking the complete annulment of the decision at issue.

55 By its first ground of appeal, Orange essentially submits that, in paragraph 77 of the judgment under appeal, the General Court introduced an — erroneous — restriction on its finding in paragraph 76 of that judgment, in that it is apparent from paragraph 77 that it is only where the two conditions set out in paragraph 76 are both satisfied that the Commission is required to establish the existence of a legitimate interest in finding an infringement, whereas such an interpretation cannot be inferred from the wording of Article 7(1) of Regulation No 1/2003. Furthermore, the findings set out by the General Court in paragraph 77 of the judgment under appeal are not sufficient grounds on which to base the rejection of the claim by which that undertaking argued that it is apparent from Article 7(1) of Regulation No 1/2003 that, when the Commission adopts a decision finding the existence of an infringement committed in the past, it must establish the existence of a legitimate interest to do so, regardless of whether or not the Commission imposes a fine in its decision.

56 That criticism of the judgment under appeal must be rejected. The General Court, by way of the considerations set out in paragraph 77 of that judgment, did not limit the scope of the conclusion that it had reached in paragraph 76 thereof, given that it is already clear from paragraph 76 alone that the applicability of the last sentence of Article 7(1) of Regulation No 1/2003 presupposes that the two cumulative conditions set out in that paragraph are satisfied; it merely explained and clarified that that conclusion was also in accordance with its own case-law relating to the Commission's obligation to establish the existence of a legitimate interest in finding an infringement where the limitation period for imposing a fine has elapsed.

57 Those considerations, inasmuch as they refer, in essence, to the Commission's implied power to find an infringement, stemming from its explicit power to impose fines, were furthermore sufficient to reject the plea put forward before the General Court. Pursuant to Article 23(2)(a) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 or 102 TFEU. As recalled in paragraph 49 above, the Court of Justice has already held that the Commission's power to impose fines where there is an infringement and to take decisions to that effect necessarily implies a power to make a finding that the infringement in question exists (see, to that effect, judgment of 2 March 1983, *GVL* v *Commission*, 7/82, EU:C:1983:52, paragraph 23). The Court of Justice has also already held that the Commission's power to impose penalties under Article 15 of Regulation No 17, to

which, in essence, Article 23 of Regulation No 1/2003 corresponds, is in no way affected by the fact that the conduct constituting the infringement has ceased (judgment of 15 July 1970, *ACF Chemiefarma* v *Commission*, 41/69, EU:C:1970:71, paragraph 175).

58 It follows from the foregoing that the Commission's use of its power to impose a fine confers on it an implicit power to find the infringement, without its being required to justify a legitimate interest for making that finding, including where it relates to an infringement committed in the past.

59 It may also be noted that, according to the first sentence of Article 7(1) of Regulation No 1/2003, where the Commission finds that there is an infringement of Article 101 or 102 TFEU, it may by decision require the undertakings and associations of undertakings concerned to bring such infringement to an end. The Commission's use of its power to order the infringement to be brought to an end in accordance with that provision, a power which the Commission moreover exercised in Article 3 of the decision at issue in so far as that cessation had not already taken place, and which Orange does not contest, therefore necessarily implies a power to make a finding of that infringement and, accordingly, also does not require the Commission to establish a legitimate interest in doing so (see, to that effect, judgment of 2 March 1983, *GVL* v *Commission*, 7/82, EU:C:1983:52, paragraphs 22 to 24).

60 Therefore, given that, in the present case, the Commission imposed a fine on Orange for having committed an infringement of Article 102 TFEU, that it is agreed between the parties that that power was not time-limited and that the Commission ordered, in Article 3 of the decision at issue, that the infringement be brought to an end unless that had already taken place, the Commission was justified — as the General Court held, in essence, in paragraphs 79 and 80 of the judgment under appeal, both under Article 7(1) and under Article 23(2) of Regulation No 1/2003, those two provisions being cited by the decision at issue — in finding the infringement in question, and did not specifically have to justify, in that decision, the existence of a legitimate interest in finding that infringement.

61 Consequently, Orange's argument, as set out in paragraphs 34 to 36 of the present judgment, cannot succeed.

62 Lastly, in so far as, by its argument set out in paragraph 37 above, Orange submits that, given the effects of a Commission decision finding an infringement of Article 101 or 102 TFEU, it is necessary, in any event, to require that institution to justify, in such a decision, the existence of a legitimate interest in making that finding, it should be noted that such general statements are not sufficient to demonstrate that the General Court's findings in paragraphs 76 to 80 of the judgment under appeal were incorrect.

63 In the light of all the foregoing considerations, the first ground of appeal must be rejected in its entirety.

The second ground of appeal, alleging errors of law and of assessment in the Commission's examination of the impact of the infringement for the purpose of calculating the fine

Arguments of the parties

64 Orange argues that the General Court distorted the decision at issue in finding that, when assessing the gravity of the infringement for the purpose of calculating the basic amount of the fine, the Commission took account of neither the actual effects nor the likely effects of the infringement and in declining, as a result, to examine its argument that the Commission had failed to adduce specific, adequate and credible evidence of actual and/or likely effects.

65 Therefore, the General Court's first error was that distortion. First, it is in fact clear from the last sentence of recital 902 of the decision at issue that the Commission relied on the actual effects of the infringement in calculating the fine, which it confirmed before the General Court by acknowledging that the wording of that recital, in so far as it concerns the actual effects of the infringement, constitutes a 'clerical mistake'. However, in paragraph 169 of the judgment under appeal, the General Court stated that that recital could only be read as referring, in a general and abstract manner, to the nature of the infringement, misunderstanding the clear meaning of the terms used in that recital, which specifically refers to the effects on competition that had occurred as a result of Orange's actual behaviour on the market, which is confirmed by the use of a verb conjugated in the past tense. In paragraph 182 of the judgment under appeal, the General Court moreover referred to actual past events, and made reference in particular to recital 902.

66 Second, and in any event, the General Court distorted the decision at issue by taking the view that the Commission had not taken account of the likely effects of the infringement. In recital 902 of the decision at issue, the Commission at the very least took account of such effects in calculating the fine, which it also admitted in its pleadings before the General Court. The General Court nevertheless incorrectly found that the fact of taking account of the nature of the infringement did not involve taking its likely effects into consideration. However, the likely effects, just like the actual effects, of the conduct in question are essential indicators of the nature of the infringement and, consequently, of its gravity, which cannot be assessed in the abstract. Hence, the General Court was required to examine whether the finding of those likely effects was justified.

67 Since the General Court did not correctly examine the decision at issue, its analysis of the proportionality of the fine was distorted. A fine cannot be regarded as proportionate if the factors which determined its amount, described in the decision at issue, were not correctly examined.

68 The General Court's second error is an error in law and an infringement of the principle of effective judicial protection on the ground that it failed to assess whether the effects of the infringement taken into account for the purposes of calculating the fine had been correctly established by the Commission. According to Orange, first, since the Commission had, contrary to what the General Court found by distorting the decision at issue, relied on the actual effects of the infringement in order to calculate the fine, the General Court should have established whether the decision at issue contained specific, credible and adequate evidence of those effects instead of rejecting, in paragraphs 171 to 173 of the judgment under appeal, the argument put forward by that undertaking in that regard as being, in essence, ineffective.

69 Second, and in any event, the General Court wrongly failed to exercise its power to review the evidence of the likely effects of the infringement that were taken into account in calculating the fine. In that regard, Orange submitted to the General Court arguments showing that the Commission's approach as regards the existence of a causal link between its conduct and the alleged likely effects on the markets was incorrect. Those arguments, concerning the penetration of broadband services in Poland, the Commission's use of flawed assumptions and methodologies, the impact of mobile telephones on the penetration of broadband services in Poland, the delayed introduction of a reference offer by the Polish NRA, and the pace of broadband service development, were thus not taken into account by the General Court.

70 Furthermore, Orange argues that it is apparent from the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), that, if, in a decision finding abuse of a dominant position, the Commission carries out an analysis of the capacity of the conduct in question to foreclose, or its potential to distort competition or harm consumers, the General Court is required to examine all of the applicant's arguments and evidence seeking to call into question the merits of that analysis. That guidance as to the assessment of the potential of a given conduct to restrict competition must be

applied by analogy to the assessment of the nature and gravity of an infringement for the purposes of calculating the fine, since the nature and gravity of an infringement largely depends on the capacity of that conduct to foreclose.

71 The Commission submits that the second ground of appeal must be dismissed in its entirety. It is inadmissible, inasmuch as Orange seeks to obtain from the Court a new assessment of the facts, nor does it meet the criteria established by the case-law relating to distortion, and it is, in any event, both unfounded and ineffective. The judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), has no bearing on the present case.

72 The PIIT argues, like Orange, that it is apparent from the decision at issue that the Commission relied on the actual effects of that undertaking's conduct and that that institution, at the very least, did in fact carry out an analysis of the likely effects. Furthermore, the considerations relating to the effects, set out in the decision at issue, more specifically regarding the existence of significant foreclosure effects and substantial harm for Polish consumers of broadband services, as regards the competitive pressure of broadband services providers and as regards the analysis of the Polish broadband market, are incorrect or vitiated by contradictions, as is clear from the evidence submitted to the General Court. Those errors distorted the Commission's analysis of the gravity of the infringement.

73 The ECTA, like the Commission, submits that the General Court, in finding that the actual or likely effects of the infringement were not taken into account for the purposes of setting the basic amount of the fine imposed on Orange, did not distort the decision at issue. Accordingly, it is unnecessary to examine whether the General Court wrongly failed to assess whether the decision at issue contained specific, credible and adequate evidence of the existence of such effects. The judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632), does not contain anything relevant to the analysis of the second ground of appeal.

Findings of the Court

74 It should be recalled that, by the first part of the second ground of appeal, Orange seeks to establish the premiss on which the second part of that ground is based, namely that it is on the basis of a distortion of the last sentence of recital 902 of the decision at issue, made in paragraph 169 of the judgment under appeal, that the General Court was able to find that the Commission had not taken into account, in its assessment of the gravity of the infringement in question for the purposes of calculating the fine, either the actual or the likely effects of that infringement.

75 According to the settled case-law of the Court, a distortion must be obvious from the documents in the Court's file, without any need for a new assessment of the facts and evidence (judgments of 6 April 2006, *General Motors* v *Commission*, C-551/03 P, EU:C:2006:229, paragraph 54, and of 19 April 2012, *Tomra Systems and Others* v *Commission*, C-549/10 P, EU:C:2012:221, paragraph 27).

76 In the present case, the General Court stated, in paragraph 169 of the judgment under appeal, that 'the reasons given by the Commission in recitals 899 to 906 of the [decision at issue] leave no room for doubt as to the factors on which the Commission based its assessment of the gravity of the infringement and which are: the nature of the infringement, its geographical scope, the relevant market share held by [Orange] and the implementation of the infringement by [Orange]'; that 'contrary to what [Orange] and [the] PIIT argue, the Commission did not state in recital 902 of the [decision at issue], and neither can it be inferred in any way from that recital, read in the light of the statement of reasons as a whole relating to the gravity of the infringement, that it had taken into account the actual effects of the infringement on the market and on consumers in determining, on the basis of that gravity, the proportion of the value of sales which had to be taken into account for the purposes of fixing the basic amount of the fine'; and that, 'in particular, the sentence referred to by [Orange] can only be read as referring, in a general and abstract manner, to the nature of the

infringement and to the fact that, to the extent that it was deliberate and was intended to eliminate competition on the retail market or to delay the evolution of that market, it had the capacity to adversely affect competition and consumers'.

77 In that regard, the General Court furthermore noted, in paragraph 170 of the judgment under appeal, that, in contrast to the statements made in the first and second sentences of recital 902, the final sentence of that recital 'contains no reference to [the part] of the [decision at issue], in which the Commission presented its comments on the likely effects of the infringement'. It deduced from this, in paragraph 171 of that judgment, that 'the Commission did not take account, in assessing the gravity of the infringement, of the actual effects of [Orange's] infringement on the relevant markets, nor the likely effects of that infringement'.

78 The General Court based that reading of the decision at issue on the findings which it made in paragraphs 166 to 168 of the judgment under appeal relating to the content of the other relevant recitals of that decision. Thus, in paragraph 166 of the judgment under appeal, the General Court first of all noted 'that the Commission's assessment of the gravity of the infringement in recitals 899 to 908 of the [decision at issue] is divided into four parts, the first three relating to the nature of the infringement, market share and the geographical scope of the infringement, the fourth being a summary', and that, in that summary, in recital 906 of that decision, 'the Commission stated that, in determining the proportion of the value of sales which was to be retained for the purposes of setting the basic amount of the fine, it had taken into account, in particular, the nature of the infringement, its geographical scope, market share, and the fact that the infringement had been implemented'.

79 Next, in paragraph 167 of the judgment under appeal, the General Court noted that 'the passage that [Orange] disputes is in recital 902 of the [decision at issue], which is contained in the part on the assessment of the nature of the infringement'; that, in that part of that decision, 'the Commission stated … that an abuse of a dominant position in the form of a refusal to provide a service, by [Orange], had been condemned on numerous occasions both by [the Commission] and by the Courts of the European Union', referring, in that regard, to recital 899 of that decision; that '[the Commission] stated that the product markets in question were of considerable economic importance and that they played an important role in building the information society, as broadband connections are a factor which conditions the supply of various digital services to end consumers', referring, in that regard, to recital 900 of that decision; and that 'the Commission also took into account the fact that [Orange] was the only owner of a nationwide telecommunications network and that, accordingly, [alternative operators] wishing to provide services based on DSL technology were totally dependent on it', referring, in that regard, to recital 901 of the same decision.

80 Lastly, in paragraph 168 of the judgment under appeal, the General Court observed that 'in recital 902 [of the decision at issue], the Commission noted the following: "Also, as described in section VIII.1, conduct of [Orange] may be deemed abusive and aiming at eliminating competition from the retail market or at least delaying their entry and growth on this market. Also, as indicated in [recital] 892 [of the decision at issue], [Orange] was aware of the fact that its conduct infringes the law. That has a negative impact on the competition and consumers who are faced with high prices, poorer choice and limited number of innovative products"'.

81 It is therefore on the basis of a reading of all of the recitals of the decision at issue which dealt with the nature of the infringement that the General Court based its finding, in paragraph 169 of the judgment under appeal — which is disputed by Orange in the context of the first part of the second ground of appeal on the basis that the General Court distorted the decision at issue — that the last sentence of recital 902 of the decision at issue 'can only be read as referring, in a general and abstract manner, to the nature of the infringement and to the fact that, to the extent that it was deliberate and was intended to eliminate competition on the retail market or to delay the evolution of that market, it had

the capacity to adversely affect competition and consumers' and, then, its conclusion, set out in paragraph 171 of that judgment, that the decision at issue did not refer to either the actual effects of the infringement on the relevant markets or the likely effects of that infringement.

82 First, the General Court's quotation from recital 902 of the decision at issue set out in paragraph 168 of the judgment under appeal is correct. Secondly, Orange does not claim that the General Court distorted recitals 899 to 901 or recital 906 of that decision. Thirdly, the elements set out in those recitals could undoubtedly provide a basis for its reading of the last sentence of that recital set out in paragraph 169, that being even more so because it was also not disputed, as is apparent from paragraphs 124 to 136 and 146 of the judgment under appeal, that the infringement in question had been implemented by Orange; that, in accordance with point 22 of the 2006 Guidelines, the implementation of that infringement was, like the nature of that infringement, the market share of the parties in question and its geographical scope, a relevant element for the purposes of assessing gravity; and, as the General Court noted in paragraph 166 of the judgment under appeal, the Commission had specifically indicated, in recital 906 of the decision at issue, that, in the present case, it had taken into account, in determining the gravity of the infringement in question, the fact that the infringement had been implemented, which Orange does not indeed dispute.

83 Accordingly, the General Court did not distort the decision at issue in finding, following a reading of all of the relevant recitals of that decision, in essence, in paragraph 169 of the judgment under appeal, that the last sentence of recital 902 of that decision was only a general reference to the nature of the infringement committed in the present case by Orange, which consisted of conduct whose abusive nature had already been well established and which had been deliberately implemented by Orange in full knowledge that it was illegal.

84 In that regard, Orange cannot derive any useful argument from the fact that the second part of that sentence is written in the past tense, which allegedly shows that the Commission is referring to the effects which were actually produced. It is sufficient to note in that connection that only the Polish language version of the decision at issue is the authentic language version and that that version is written in the present tense.

85 Orange also cannot derive any useful argument from the fact that the Commission, in its pleadings submitted before the General Court, recognised that that sentence referred to the actual or likely effects of an infringement, while asserting that it was a clerical error. Even assuming that those pleadings had the content which Orange attributes to them, it is sufficient to note, first, that it is apparent from the very wording of Article 263 TFEU that the review of legality under that provision cannot concern the content of the pleadings lodged by the defendant before a Court of the European Union responsible for carrying out that review and, second, that an appeal relates only to the judgment under appeal (judgment of 2 October 2003, *Ensidesa* v *Commission*, C-198/99 P, EU:C:2003:530, paragraph 32 and the case-law cited).

86 Nor may paragraph 182 of the judgment under appeal be invoked in support of Orange's position. In that paragraph, the General Court noted that 'it is apparent from recitals 899 to 902, 904 and 905 of the [decision at issue] that the Commission took account of those elements in the assessment of the gravity of the infringement', those 'elements' being identified in paragraphs 178 to 181 of the judgment under appeal as being the fact that '[Orange] had a dominant position which owed its origin to the former legal monopoly over both the wholesale market for LLU and BSA broadband access, where it was the sole supplier, and on the retail market'; the fact that '[Orange's] infringement, whose existence is not contested as such, consisted of multiple, flagrant, persistent and intentional breaches of the regulatory framework'; the fact that 'it [was] undisputed that [Orange] was aware of the illegality of its conduct, both in regulatory terms … and in terms of competition law, where its practices were designed to prevent or delay the entry of new entrants into the product markets concerned'; and the fact that 'the product markets affected by [Orange's] abusive practices, which … extend over the

whole territory of one of the largest Member States of the European Union, are markets of great importance both from an economic point of view and from a social point of view, in that access to broadband internet constitutes the key element of the development of the information society'.

87 The General Court furthermore recalled, again in paragraph 182 of the judgment under appeal, the content of recitals 899 to 902 of the decision at issue, to which it had already referred in paragraphs 167 and 168 of that judgment, in almost identical terms to those used in those paragraphs, as well as the content of recitals 904 and 905 of the decision at issue relating to Orange's dominant position and the size of the relevant geographic market, the latter two findings not being challenged by Orange in the present appeal.

88 Therefore, contrary to what Orange argues on the basis of an erroneous reading of paragraph 182 of the judgment under appeal, it is not at all apparent from that paragraph that the General Court gave a different scope to the last sentence of recital 902 of the decision at issue in that paragraph than the scope which it had already given to that recital in paragraph 169 of that judgment.

89 It follows from the foregoing that the General Court did not distort the decision at issue when it found, in paragraph 171 of the judgment under appeal, that the Commission had not taken into account, in the assessment of the gravity of the infringement for the purposes of the calculation of the fine, the actual effects of the infringement committed by Orange on the relevant markets, or the likely effects of that infringement. Consequently, the General Court was correct in finding in that paragraph that, since the Commission had not taken into account the actual effects of the infringement in the assessment of the gravity of that infringement, it did not have to show the existence of those effects and, subsequently, in paragraph 172, in rejecting as unfounded Orange's argument alleging a failure to state reasons in the decision at issue with regard to the demonstration of the actual effects of the infringement. The General Court was also correct to reject as ineffective, in paragraphs 173 and 174 of the judgment under appeal, Orange and the PIIT's arguments seeking to show the mistakes made by the Commission in the assessment of the likely effects of the infringement, since the Commission had also not taken account of those effects in the assessment of the gravity of that infringement.

90 Consequently, the first part of the second ground of appeal, which seeks to establish that the General Court distorted the last sentence of recital 902 of the decision at issue, must be dismissed in its entirety as unfounded.

91 Regarding the second part of that ground of appeal, it must be stated that it is based entirely on the premiss that the distortion alleged in the context of the first part of that ground is established. However, as was found in paragraphs 76 to 90 above, that is not the case. That second part, being based on an erroneous premiss, must therefore also be dismissed in its entirety as unfounded, as must, assuming that it is admissible, the PIIT's argument set out in paragraph 72 above.

92 In the light of the foregoing considerations, the second ground of appeal must be dismissed in its entirety.

The third ground of appeal, alleging errors of law and of assessment relating to the failure to take investments made by Orange into account as mitigating circumstances

Arguments of the parties

93 Orange argues that, in dismissing its argument that the Commission ought to have regarded the investments it made following the agreement with the UKE in order to improve the fixed broadband network in Poland ('the investments in question') as mitigating circumstances, the General Court distorted evidence and made several errors in law and/or manifest errors of assessment, each one of which ought to have led to a reduction of the fine imposed.

94 First, in paragraph 195 of the judgment under appeal, the General Court recognised that elements which make no difference to the nature of the infringement can be regarded as mitigating circumstances and, in paragraph 208 of that judgment, it recognised that it was not necessary, in order to determine whether certain circumstances might be regarded as mitigating circumstances for the purposes of point 29 of the 2006 Guidelines, to know whether those circumstances had changed the nature of the infringement. It thus rejected the reasoning given by the Commission in recital 915 of the decision at issue. However, in paragraphs 192 to 209 of that judgment, the General Court departed from the reasoning adopted in that decision for not treating those investments as mitigating circumstances and substituted its own reasoning, even though it had indicated that it was confining itself to reviewing the legality of the decision at issue and did not intend to exercise its unlimited jurisdiction. In so doing, it infringed the rule that, in the context of the review of legality referred to in Article 263 TFEU, it may not substitute its own reasoning for that of the author of the contested act.

95 Second, the General Court erred in law and/or committed a manifest error of assessment in determining that the investments in question could not be regarded as compensatory measures. On the one hand, contrary to what was held in paragraphs 199 to 201 of the judgment under appeal, it can be inferred from the judgment of 30 April 2009, *Nintendo and Nintendo of Europe* v *Commission* (T-13/03, EU:T:2009:131), and from the decisions of national competition authorities, that the concept of compensation may include benefits in kind rather than money, even if they are indirect. Article 18(3) of Directive 2014/104 confirms this and even encourages such measures to be taken into account in the calculation of fines. On the other hand, it was impossible in the present case to quantify and allocate direct compensation accurately or effectively. Thus, if Orange had not unilaterally made the investments in question, the importance and benefits of which were recognised by the UKE and the alternative operators, few people would have obtained any redress. In that regard, in paragraphs 204 to 206 of the judgment under appeal, the General Court wrongly regarded the beneficial effects referred to therein as deriving from the agreement with the UKE and not from those investments.

96 Third, the General Court erred in law and distorted the evidence in the case file in finding, in paragraph 202 of the judgment under appeal, that the investments in question were motivated by Orange's desire to avoid the functional separation envisaged by the UKE. No argument concerning the reasons that led Orange to conclude the agreement with the UKE appears in the pleadings or in the decision at issue and the General Court could not, in the context of the review of the legality of the decision at issue, substitute its own reasoning for that of the Commission without effecting an unlawful substitution of grounds and a breach of the principle of fairness and of the rights of the defence. Furthermore, as the Commission itself acknowledged in paragraph 140 of the decision at issue and as is clear from the documents produced before the General Court, those investments were indeed voluntary.

97 Fourth, the General Court was wrong to find, in paragraph 203 of the judgment under appeal, that the investments in question were merely 'a normal part of business life'. That statement contradicts the finding made in paragraph 202 of that judgment, since the same investments could not

simultaneously be due to the threat of regulatory intervention and also an incident of normal business life. Paragraph 204 of that judgment also distorts the evidence because, in focusing upon events which had taken place during the infringement period, it gave the impression that, since regulatory measures had not had the intended results, no benefits flowed from subsequent investments. In any event, those investments were not made with a view to a return, some of them not being economically viable, but in order to remedy the harm suffered by those adversely affected by the conduct found to constitute an infringement.

98 Moreover, the category of mitigating circumstances is not closed. In addition, the lack of judicial precedent is no bar to recognition of a mitigating circumstance. In the present case, exceptional circumstances justified the recognition of the investments in question as mitigating circumstances, in particular given the point at which they were made and their scale.

99 The third ground of appeal does not ask the Court of Justice to re-examine the plea put forward at first instance, but calls into question the General Court's analysis, which provided a basis *ex post* for the Commission's refusal by substituting, for the reasoning of the decision at issue, new reasons which had not been included in that decision and were furthermore incorrect.

100 The Commission argues that that ground is ineffective, since the reasoning of the General Court which is being challenged is included in the judgment under appeal only for the sake of completeness, as a response to the arguments submitted before it. All the evidence examined by the General Court and all the reasons given for not regarding the investments in question as a mitigating circumstance came from the pleadings that were submitted to it and from the decision at issue. Furthermore, in deciding not to amend the fine, the General Court exercised its unlimited jurisdiction, as Orange requested it to do.

101 In any event, that ground is inadmissible, since Orange asks the Court of Justice to carry out a re-examination of the facts, or unfounded, since Orange has failed to demonstrate that, under the relevant legal framework, the General Court was required to regard the investments in question as a compensatory measure.

102 The PIIT submits, like Orange, that the investments in question are by their nature compensatory, as is clear from the facts set out in the observations it submitted to the General Court. Consequently, the General Court erred in law in failing to take them into account as mitigating circumstances. In addition, it erred in its assessment of the evidence submitted by the PIIT and distorted the content of that evidence, in particular in stating, in paragraph 204 of the judgment under appeal, that the arguments put forward by the PIIT in its intervention were contradicted by the documents annexed to that statement. It was also wrong to find, in paragraph 206 of the judgment under appeal, that any beneficial effects for alternative operators and end-users had to be attributed solely to the agreement with the UKE and not to those investments.

103 The ECTA argues, as the Commission does, that the third ground of appeal must be dismissed. It adds that the General Court did not substitute grounds.

Findings of the Court

104 In the first place, in so far as, by the third ground, Orange submits that the General Court erred in law by substituting its own reasoning for that of the Commission in the decision at issue in rejecting the classification of the investments in question as a mitigating circumstance, within the meaning of point 29 of the 2006 Guidelines, thus infringing the limits imposed upon it as regards its review of legality, it should be recalled that the system of judicial review of Commission decisions relating to proceedings under Articles 101 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 General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 71 and the case-law cited).

105 The scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings under Articles 101 and 102 TFEU, which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the applicant at first instance and taking into account all the elements submitted by the latter. However, in the context of that review, the EU Courts may in no circumstances substitute their own reasoning for that of the author of the contested act (see, to that effect, judgments of 10 April 2014, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 56, and of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraphs 72 and 73 and the case-law cited).

106 By contrast, when they exercise their unlimited jurisdiction laid down in Article 261 TFEU and Article 31 of Regulation No 1/2003, the EU Courts are empowered, in addition to merely reviewing the legality of the penalty, to substitute their own assessment in relation to the determination of the amount of that penalty for that of the Commission, the author of the act in which that amount was initially fixed. Consequently, the EU Courts may vary the contested act, even without annulling it, in order to cancel, reduce or increase the amount of the fine imposed, that jurisdiction being exercised by taking into account all the factual circumstances (see, to that effect, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 692; of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 61; and of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 86).

107 In the present case, it is appropriate to dismiss at the outset any argument that Orange attempts to derive from paragraph 195 of the judgment under appeal, given that, as is apparent from the wording of that paragraph, it merely sets out the argument which Orange submitted before the General Court, namely that the Commission had erred in law in refusing to regard the investments in question as a mitigating circumstance on the basis that they did not change the nature of the infringement.

108 Nevertheless, it should be noted that, in paragraph 208 of that judgment, the General Court indeed found, as Orange notes, that it was irrelevant whether only elements that change the nature of the infringement, or also elements that do not, may be classified as mitigating circumstances, while finding, in paragraphs 208 and 209 of the same judgment, that the refusal to grant Orange the benefit of mitigating circumstances in respect of the investments undertaken pursuant to the agreement with the UKE could not be considered a breach of point 29 of the 2006 Guidelines, nor an infringement of the principle of proportionality. It relied, in that regard, upon the findings which it set out in paragraphs 196 to 207 of that judgment.

109 In those paragraphs, the General Court quoted certain sections of the agreement with the UKE and inferred from them that the investments made by Orange could not be regarded as compensatory measures comparable to those which had been accepted by the Commission in the case giving rise to the judgment of the General Court of 30 April 2009, *Nintendo and Nintendo of Europe* v *Commission*, (T-13/03, EU:T:2009:131), or to those which had been favourably assessed by the competition authority of the United Kingdom. The General Court also noted that the commitments defined in the agreement with the UKE were motivated by Orange's desire to avoid functional separation and it found that those investments were a normal part of business life, given that they benefited, above all, Orange itself. The General Court furthermore rejected the PIIT's arguments, noting that the documents it submitted established that some of the beneficial effects for the alternative operators and end-users stemming from the agreement with the UKE and from the investments it planned had to be attributed to that agreement in itself and not to the investments in question in particular, and it noted that the

Commission had indeed taken account of the improvement of the situation on the relevant market resulting from the change in Orange's conduct that followed the signature of that agreement, given that the Commission had taken the date of that signature as the date on which the infringement had ended.

110 Nevertheless, it must be stated that the criticisms raised by Orange before the General Court, set out in paragraphs 192 to 194 of the judgment under appeal and which the General Court rejected in paragraphs 196 to 207 thereof, did not refer to any of the arguments in the decision at issue relating to the Commission's refusal to take account of mitigating circumstances, but sought to have the General Court exercise its unlimited jurisdiction and reduce the fine imposed by the Commission in accordance with the case-law set out in paragraph 106 above, so that the compensatory measure which the investments in question allegedly constituted could be taken into account, as is explicitly clear from paragraphs 63 and 64 of the judgment under appeal as well as from the application at first instance.

111 Therefore, although the General Court was wrong, as is apparent, in essence, from paragraphs 63 to 68 and from the structure of the judgment under appeal, to make those findings in the context of its review of the legality of the decision at issue, it must be stated that, by the grounds set out in paragraphs 196 to 207 of the judgment under appeal, the General Court in fact responded to the argument put before it by Orange, summarised in paragraphs 192 to 194 of the judgment under appeal, with a view to obtaining an adjustment of the fine imposed in Article 2 of the decision at issue.

112 Since Orange expressly presented that argument in order to obtain such an adjustment and the findings in question do indeed relate only to the assessment of the fine imposed by the Commission, in accordance with the limits placed on the General Court when exercising its unlimited jurisdiction (see, to that effect, judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraphs 76 and 77), the General Court was, in the present case, entitled to put forward the reasoning set out in paragraphs 196 to 207 of the judgment under appeal on the basis of its unlimited jurisdiction.

113 Therefore, in accordance with the case-law recalled in paragraph 106 above, the General Court was, on that basis, entitled to substitute its own reasoning for that of the Commission.

114 Consequently, the third ground of appeal, inasmuch as, by that ground, Orange claims that the General Court exceeded the limits of its power to review legality, must be dismissed, since the error identified in paragraph 111 above is not such as to lead to the judgment under appeal being set aside (see, by analogy, judgment of 12 November 1996, *Ojha* v *Commission*, C-294/95 P, EU:C:1996:434, paragraph 52).

115 In the second place, inasmuch as, by the arguments set out in paragraphs 95 to 98 and 102 above, Orange and the PIIT challenge the merits of the General Court's findings in paragraphs 196 to 207 of the judgment under appeal, it should be recalled that it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law, and that it is only inasmuch as the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, that it would have to find that the General Court erred in law, on account of the inappropriateness of the amount of a fine (judgments of 22 November 2012, *E.ON Energie* v *Commission*, C-89/11 P, EU:C:2012:738, paragraphs 125 and 126 and the case-law cited, and of 27 April 2017, *FSL and Others* v *Commission*, C-469/15 P, EU:C:2017:308, paragraphs 77 and 78 and the case-law cited). In the present case, it must however be stated that this is not so. That argument must therefore be rejected as inadmissible.

116 It follows from the foregoing that the third ground of appeal must be dismissed in its entirety.

117 Moreover, inasmuch as, by their heads of claim, Orange and the PIIT ask the Court, in the alternative, to reduce the fine imposed by the decision at issue to the extent which the Court considers appropriate, it is sufficient to note that those claims are necessarily based on the same grounds as their main claims and must, consequently, also be rejected for the reasons set out in the present judgment (see, by analogy, judgment of 1 June 1978, *Mulcahy* v *Commission*, 110/77, EU:C:1978:118, paragraph 30).

118 Finally, inasmuch as, by their heads of claim in the further alternative, Orange and the PIIT ask the Court to remit the decision relating to the fine to the Commission and to order the Commission to adopt a new decision relating to the fine, it is sufficient to note that, in the context of an appeal, the Court has no power to issue directions to the institutions (see, to that effect, judgments of 8 July 1999, *DSM* v *Commission*, C-5/93 P, EU:C:1999:364, paragraphs 34 to 37, and of 22 January 2004, *Mattila* v *Council and Commission*, C-353/01 P, EU:C:2004:42, paragraphs 15 and 16), with the result that those heads of claim must be rejected as inadmissible.

119 In the light of all the foregoing considerations, the appeal must be dismissed in its entirety as being in part inadmissible, in part ineffective and in part unfounded.

Costs

120 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court of Justice itself gives final judgment in the case, the Court is to make a decision as to costs.

121 Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

122 Since Orange has been unsuccessful in its grounds of appeal and the Commission has applied for costs, Orange must be ordered to bear its own costs and to pay those incurred by the Commission.

123 Under Article 184(4) of the Rules of Procedure, where the appeal has not been brought by an intervener at first instance, he may not be ordered to pay costs in the appeal proceedings unless he participated in the written or oral part of the proceedings before the Court. Where an intervener at first instance takes part in the proceedings, the Court may decide that he shall bear his own costs.

124 Since the PIIT participated in the written part of the proceedings and the ECTA participated in the written and oral parts of the proceedings before the Court, it must be held, in the circumstances of the case, that each of the parties intervening at first instance shall bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Orange Polska SA to bear its own costs and to pay those incurred by the European Commission;**

3. **Orders Polska Izba Informatyki i Telekomunikacji and the European Competitive Telecommunications Association AISBL (ECTA) to bear their own costs.**

Ilešič Rosas Toader

Prechal Jarašiūnas

Delivered in open court in Luxembourg on 25 July 2018.

A. Calot Escobar
Registrar

M. Ilešič
President of the Second Chamber