Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

9 November 2023 *

(Appeal – Competition – Control of concentrations between undertakings – Regulation (EC) No 139/2004 – Plea of illegality – Article 4(1) – Prior notification obligation for concentrations – Article 7(1) – Concentration standstill obligation – Scope – Concept of the 'implementation' of a concentration – Article 14(2) – Decision imposing fines for implementing a concentration before its notification and clearance – Obligation to state reasons – Principle of proportionality – Unlimited jurisdiction)

In Case C-746/21 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 2 December 2021,

Altice Group Lux Sàrl, previously New Altice Europe BV, in liquidation, represented by R. Allendesalazar Corcho and H. Brokelmann, abogados,

appellant,

the other parties to the proceedings being:

European Commission, represented initially by M. Domecq, M. Farley and F. Jimeno Fernández, and subsequently by M. Domecq and M. Farley, acting as Agents,

defendant at first instance,

Council of the European Union, represented by A.-L. Meyer and O. Segnana, acting as Agents,

intervener at first instance,

THE COURT (Third Chamber),

composed of K. Jürimäe (Rapporteur), President of the Chamber, N. Piçarra, M. Safjan, N. Jääskinen and M. Gavalec, Judges,

Advocate General: A.M. Collins,

Registrar: R. Stefanova-Kamisheva, Administrator,

having regard to the written procedure and further to the hearing on 1 February 2023,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 27 April 2023,

gives the following

Judgment

1 By its appeal, Altice Group Lux Sàrl, previously New Altice Europe BV, in liquidation ('Altice'), seeks to have set aside the judgment of the General Court of the European Union of 22 September 2021, *Altice Europe* v *Commission* (T-425/18, 'the judgment under appeal', EU:T:2021:607), by which the General Court fixed the amount of the fine imposed on that company by Article 4 of Commission Decision C(2018) 2418 final of 24 April 2018 imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Council Regulation (EC) No 139/2004 (Case M.7993 – Altice/PT Portugal) ('the decision at issue'), at EUR 56 025 000 and dismissed its action as to the remainder.

Legal context

Regulation (EC) No 139/2004

2 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) was repealed, with effect from 1 May 2004, by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ('the EC Merger Regulation') (OJ 2004 L 24, p. 1). In view of the period during which the conduct that is the subject of the decision at issue took place, it is the latter regulation that applies *ratione temporis*.

3 Recitals 5, 6, 8, 20 and 34 of Regulation No 139/2004 state:

> '(5) However, it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it.
>
> (6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. [Regulation No 4064/89] has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 of the Treaty, this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.
>
> …

(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. …

…

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. … It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

…

(34) To ensure effective control, undertakings should be obliged to give prior notification of concentrations with a Community dimension following the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. … The implementation of concentrations should be suspended until a final decision of the Commission has been taken. However, it should be possible to derogate from this suspension at the request of the undertakings concerned, where appropriate. …'

4 Article 1 of that regulation, headed 'Scope', provides in paragraph 1:

'Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.'

5 Article 3 of that regulation, headed 'Definition of concentration', provides, in paragraphs 1 and 2:

'1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.'

6 Article 4 of that regulation, entitled 'Prior notification of concentrations and pre-notification referral at the request of the notifying parties', provides in the first subparagraph of paragraph 1 thereof:

'Concentrations with a Community dimension defined in this Regulation shall be notified to the [European] Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest.'

7 Article 7 of Regulation No 139/2004, entitled 'Suspension of concentrations', provides in paragraphs 1 and 3:

'1. A concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6).

…

3. The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. In deciding on the request, the Commission shall take into account inter alia the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration. Such a derogation may be made subject to conditions and obligations in order to ensure conditions of effective competition. A derogation may be applied for and granted at any time, be it before notification or after the transaction.'

8 Article 8 of that regulation, headed 'Powers of decision of the Commission', provides, in paragraph 4:

'Where the Commission finds that a concentration:

(a) has already been implemented and that concentration has been declared incompatible with the common market, or

(b) has been implemented in contravention of a condition attached to a decision taken under paragraph 2, which has found that, in the absence of the condition, the concentration would fulfil the criterion laid down in Article 2(3) or, in the cases referred to in Article 2(4), would not fulfil the criteria laid down in Article [101(3) TFEU],

the Commission may:

– require the undertakings concerned to dissolve the concentration, in particular through the dissolution of the merger or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the implementation of the concentration; in circumstances where restoration of the situation prevailing before the implementation of the concentration is not possible through dissolution of the concentration, the Commission may take any other measure appropriate to achieve such restoration as far as possible,

– order any other appropriate measure to ensure that the undertakings concerned dissolve the concentration or take other restorative measures as required in its decision.

In cases falling within point (a) of the first subparagraph, the measures referred to in that subparagraph may be imposed either in a decision pursuant to paragraph 3 or by separate decision.'

9 Under Article 14(2) and (3) of that regulation:

'2. The Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertaking concerned within the meaning of Article 5 on the persons referred to in Article 3(1)b or the undertakings concerned where, either intentionally or negligently, they:

(a) fail to notify a concentration in accordance with Articles 4 or 22(3) prior to its implementation, unless they are expressly authorised to do so by Article 7(2) or by a decision taken pursuant to Article 7(3);

(b) implement a concentration in breach of Article 7;

…

3. In fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement.'

10 Article 16 of that regulation, entitled 'Review by the Court of Justice', provides:

'The Court of Justice shall have unlimited jurisdiction within the meaning of Article [261 TFEU] to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.'

The Consolidated Jurisdictional Notice

11 Points 18 and 54 of the Commission Consolidated Jurisdictional Notice under Council Regulation No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1; 'the Consolidated Jurisdictional Notice') read as follows:

'(18) Control can also be acquired on a contractual basis. In order to confer control, the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of acquisition of shares or assets. In addition to transferring control over the management and the resources, such contracts must be characterised by a very long duration (ordinarily without a possibility of early termination for the party granting the contractual rights). … Such contracts may also lead to a situation of joint control if both the owner of the assets as well as the undertaking controlling the management enjoy veto rights over strategic business decisions. …

…

(54) Sole control is acquired if one undertaking alone can exercise decisive influence on an undertaking. Two general situations in which an undertaking has sole control can be distinguished. First, the solely controlling undertaking enjoys the power to determine the strategic commercial decisions of the other undertaking. This power is typically achieved by the acquisition of a majority of voting rights in a company. Second, a situation also conferring sole control exists where only one shareholder is able to veto strategic decisions in an undertaking, but this shareholder does not have the power, on his own, to impose such decisions (the so-called negative sole control). In these circumstances, a single shareholder possesses the same level of influence as that usually enjoyed by an individual shareholder which jointly controls a company, i.e. the power to block the adoption of strategic decisions. In contrast to the situation in a jointly controlled company, there are no other shareholders enjoying the same level of influence and the shareholder enjoying negative sole control does not necessarily have to cooperate with specific other shareholders in determining the strategic behaviour of the controlled undertaking. Since this shareholder can produce a deadlock situation, the shareholder acquires decisive influence within the meaning of Article 3(2) and therefore control within the meaning of the Merger Regulation …'

Background to the dispute and the decision at issue

12 The background to the dispute is set out in paragraphs 1 to 29 of the judgment under appeal. For the purposes of the present appeal, it can be summarised as follows.

The acquisition by Altice of PT Portugal

13 On 9 December 2014, Altice, a multinational cable and telecommunications company based in the Netherlands, entered into a share purchase agreement ('the SPA') with the Brazilian telecommunications operator Oi SA. That agreement provided that Altice would, through its subsidiary Altice Portugal SA, acquire sole control, within the meaning of Article 3(1)(b) of Regulation No 139/2004, of PT Portugal SGPS SA ('PT Portugal'), a telecommunications and multimedia operator with activities extending across the entire telecommunications sector in Portugal.

14 The completion of that acquisition was subject, inter alia, to obtaining authorisation from the Commission under that regulation.

15 On 2 June 2015, Altice publicly announced that the transaction had been completed and that ownership of the shares in PT Portugal had been transferred to it.

The pre-notification stage

16 On 31 October 2014, Altice contacted the Commission to inform it of its plan to acquire sole control of PT Portugal. On 5 December 2014, a meeting took place between Altice and the Commission's services.

17 On 12 December 2014, Altice sent the Commission a case-team allocation request relating to its file and, on 18 December 2014, pre-notification contacts commenced.

18 On 26 January 2015, Altice submitted to the Commission a draft commitments package relating to the divestiture of its subsidiaries in Portugal, Cabovisão and ONI.

19 On 3 February 2015, Altice submitted to the Commission a draft notification form and included a copy of the SPA amongst its annexes.

The notification and the decision authorising the concentration subject to conditions

20 On 25 February 2015, the operation was formally notified to the Commission.

21 On 20 April 2015, the Commission adopted a decision ('the clearance decision') by which it declared the operation compatible with the internal market subject to compliance with the commitments annexed to that decision, including the divestiture by Altice of its subsidiaries in Portugal, Cabovisão and ONI.

Decision at issue and procedure leading to its adoption

22 On 13 April 2015, the Commission sent Altice a request for information relating to exchanges that it had had with PT Portugal at a meeting of their respective executives prior to the adoption of the Commission's clearance decision, of which that institution had become aware through the press. On 17 April 2015, Altice submitted its observations to the Commission.

23 Following several requests for information, to which Altice responded, the Commission, by letter of 11 March 2016, informed Altice that it had opened an investigation to determine whether Altice had infringed the standstill obligation laid down in Article 4(1) and Article 7(1) of Regulation No 139/2004.

24 Following requests for the production of documents and additional information, to which Altice responded, and a meeting between it and the Commission's services, on 17 May 2017 that institution sent it a statement of objections concluding, on a preliminary basis, that it had infringed those provisions. Altice submitted written observations in response to that statement of objections on 18 August 2017.

25 On 24 April 2018, the Commission adopted the decision at issue.

26 By that decision, the Commission found that Altice had had the possibility of exercising decisive influence or had exercised control over PT Portugal prior to the adoption of the clearance decision and, in some instances, prior to notification, in breach of Article 7(1) and Article 4(1) of Regulation No 139/2004 respectively.

27 Section 4 of the decision at issue sets out the reasons on the basis of which the Commission concluded that Altice had implemented the SPA prior to the Commission's clearance of the concentration, contrary to Article 7(1) of Regulation No 139/2004. In particular, Section 4.1 states that certain clauses of the SPA gave Altice a right to veto decisions regarding PT Portugal's commercial policy ('the pre-closing covenants'). Section 4.2 describes the instances of Altice being involved in the day-to-day running of PT Portugal. In that respect, the Commission found, first, that Altice had in fact exercised a decisive influence over PT Portugal's business in seven instances and, second, that sensitive information had been exchanged between PT Portugal and Altice, which contributed to demonstrating that Altice exercised a decisive influence over PT Portugal.

Section 4.3 sets out the Commission's conclusions as to why the terms of the SPA, as described in Section 4.1, and the parties' conduct, as described in Section 4.2, constitute implementation of the SPA before the Commission declared the transaction compatible with the internal market.

28 Section 5 of the decision at issue sets out the reasons that led the Commission to conclude that Altice had implemented the SPA prior to the Commission's clearance of the concentration, contrary to Article 4(1) of Regulation No 139/2004. The pre-closing covenants, some of the seven instances of the effective exercise of decisive influence and some exchanges of information occurred before that notification.

29 On the basis of all of those grounds, the Commission, in Articles 1 and 2 of the decision at issue, found that Altice had, at least negligently, implemented a concentration prior to its clearance, in breach of Article 7(1) of Regulation No 139/2004, and prior to its notification, in breach of Article 4(1) of that regulation.

30 Pursuant to Article 14(2) of Regulation No 139/2004, the Commission, in Articles 3 and 4 of that decision, imposed on Altice two fines, each in the sum of EUR 62 250 000, in respect of the two infringements that it had found.

The procedure before the General Court and the judgment under appeal

31 By application lodged at the Registry of the General Court on 5 July 2018, Altice brought an action seeking, principally, the annulment of the decision at issue or, in the alternative, the annulment or reduction of the amount of the fines imposed on it by that decision.

32 By decision of 6 December 2018, the President of the Seventh Chamber of the General Court granted the Council of the European Union leave to intervene in support of the form of order sought by the Commission, in accordance with its request.

33 In support of its claim for the annulment of the decision at issue, Altice raised a plea of illegality and four pleas in law that the General Court examined in three stages. First of all, in paragraphs 54 to 67 of the judgment under appeal, the General Court rejected the plea of illegality in respect of Article 4(1) and Article 14(2) of Regulation No 139/2004. Next, in paragraphs 68 to 259 of that judgment, the General Court dismissed Altice's first three pleas in law, relating to an infringement of Article 4(1) and Article 7(1) of that regulation. Finally, in paragraphs 260 to 277 of that judgment, the General Court dismissed the fourth plea in law and, in particular, the arguments based on a breach of the principle of proportionality and 'the principle of the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States'. Consequently, in paragraph 277 of the judgment under appeal, it rejected the claim for annulment of the decision at issue.

34 In support of its heads of claim relating to the amount of the fines, Altice put forward a fifth plea, alleging that the fines are unlawful and infringe the principle of proportionality, which was subdivided into five parts. The General Court dismissed the first four parts, in particular the third part, alleging that the fines are unlawful on the ground that the statement of reasons for the setting of the amount of those fines lacks adequate reasoning. In the context of the fifth part, it considered, in the exercise of its unlimited jurisdiction, that the amount of the fine imposed on Altice in respect of the infringement of Article 4(1) of Regulation No 139/2004 should be reduced by 10%, and that the fine should be set at EUR 56 025 000. The General Court found that

Altice had, of its own initiative, informed the Commission of the concentration well before the SPA was signed and sent a request to the Commission for a case-team to be allocated to deal with its file.

Procedure before the Court and forms of order sought

35 By its appeal, Altice claims that the Court should:

– set aside the judgment under appeal;

– annul Articles 1 to 4 of the decision at issue;

– in the alternative, reduce the fines imposed by Articles 3 and 4 of the decision at issue, as amended by the General Court;

– in the further alternative, refer the case back to the General Court; and

– order the Commission to pay its costs in the appeal and in the proceedings before the General Court.

36 The Commission contends that the Court should:

– dismiss the appeal; and

– order Altice to pay the costs.

37 The Council contends that the Court should:

– dismiss the first ground of appeal; and

– order Altice to pay its costs in the appeal proceedings.

The appeal

38 Altice puts forward six grounds in support of its appeal.

The first ground of appeal

39 By its first ground of appeal, Altice submits that the General Court erred in law in its assessment of the plea of illegality regarding Article 4(1) and Article 14(2)(b) of Regulation No 139/2004. This ground is comprised of three parts.

The first part of the first ground of appeal

– *Arguments of the parties*

40 By the first part of the first ground, Altice submits that, in paragraphs 54 to 58, 60 to 64, 66, 264, 265 and 271 of the judgment under appeal, the General Court erred in law in finding that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue 'autonomous objectives' and impose two distinct obligations, namely the notification obligation and the standstill obligation, each of which may be the subject of specific penalties.

41 In the first place, Altice emphasises that, since the adoption of Regulation No 139/2004, the notification obligation cannot be distinguished from the standstill obligation, cannot be separately infringed and cannot be the subject of a specific penalty. Whilst a breach of Article 4(1) of that regulation arises when a concentration is implemented before notification, that implementation would specifically be covered by Article 7(1) of that regulation.

42 Therefore, contrary to the General Court's ruling in paragraphs 56, 60 to 62 and 271 of the judgment under appeal, those provisions do not pursue 'autonomous objectives', rather they have a single objective and thus a single legal interest. That objective seeks to ensure the effectiveness of the system of *ex ante* control of concentrations that have a Community dimension. To that end, those provisions both prohibit the implementation of a concentration before its notification. The General Court failed, in paragraph 60 of the judgment under appeal, to take account of the fact that Article 7(1) of Regulation No 139/2004 prohibits not only the implementation of a concentration prior to its authorisation by the Commission, but also its implementation prior to its notification to the Commission.

43 The distinctions made by the General Court, in paragraphs 54, 55, 57 and 58 of the judgment under appeal are ineffective in that regard since they cannot overturn the position, submitted by Altice, that those two provisions apply to the same conduct and pursue the same objective in that they prohibit the implementation of a concentration prior to notification. The duration of the infringements is relevant only for the assessment of the proportionality of the fines.

44 Furthermore, in paragraphs 56, 66 and 264 of the judgment under appeal, the General Court was wrong to rely, in support of its finding that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursued 'autonomous objectives', on the 'one-stop shop' system referred to in recital 8 of that regulation. That recital merely defines the Commission's jurisdiction to review concentrations with a Community dimension.

45 In the second place, Altice submits that the system laid down by Regulation No 139/2004 is merely a relic of the past. It observes that Regulation No 4064/89 did include two separate and autonomous obligations, namely a procedural obligation to notify a concentration within one week of concluding an agreement, and a substantive obligation to suspend implementation of the concentration. The infringement of each of those obligations could be penalised by fines based on different scales.

46 In adopting Regulation No 139/2004, the EU legislature removed, from Article 4(1) thereof, the time limit prescribed for notification of a concentration and required a notification prior to the implementation of a concentration. In parallel, it increased the amount of the fine that could be imposed, pursuant to Article 14(2)(a) of that regulation, where there was a breach of the

notification obligation. In so doing, it transformed that obligation into a substantive obligation not to implement a concentration prior to its notification. The legal framework resulting from that omission by the legislature to remove or amend those provisions is an 'anomaly'.

47 In the third place, on the basis of a systematic interpretation Altice adds that Article 7(3) of Regulation No 139/2004 provides for a derogation from Article 7(1) thereof and that there is no equivalent provision allowing a derogation from Article 4(1) of that regulation. That is the case because that derogation equally involves a derogation from the notification obligation referred to in the latter provision. Furthermore, Article 14(2)(a) of that regulation expressly provides that no fine can be imposed for the infringement of Article 4(1) of that regulation if a derogation has been granted pursuant to Article 7(3).

48 The Commission and the Council consider that this part of the first ground must be rejected as unfounded.

– *Findings of the Court of Justice*

49 By the first part of the first ground of appeal, Altice alleges, in essence, that the General Court erred in law in finding that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue autonomous objectives whereas, according to it, they protect a single legal interest and are redundant.

50 It should be observed that there is a link between Article 4(1) of Regulation No 139/2004, which lays down the obligation to notify a concentration prior to its implementation, and Article 7(1) of that regulation, which lays down the obligation not to implement that concentration before it has been notified and authorised. A breach of Article 4(1) of that regulation automatically entails a breach of Article 7(1) of the same regulation such that it is impossible to envisage a breach of the first provision that is independent from a breach of the second provision (see, to that effect, judgments of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraphs 101 and 106).

51 However, in a situation where an undertaking notifies a concentration prior to its implementation, in accordance with Article 4(1) of Regulation No 139/2004, it remains possible for that undertaking to infringe Article 7(1) of that regulation if it implements that concentration before the Commission declares it compatible with the internal market (judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraph 102).

52 It follows that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue autonomous objectives in the context of the 'one-stop shop' system referred to in recital 8 of that regulation (judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraph 103).

53 On the one hand, Article 4(1) of that regulation lays down an obligation to act, namely the obligation to notify the concentration prior to its implementation and, on the other hand, Article 7(1) of that regulation lays down an obligation not to act, namely not to implement that concentration before its notification or authorisation. Whereas the infringement of the first of those obligations is an instantaneous infringement, infringement of the second is a continuous infringement (see, to that effect, judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraphs 104 and 115).

54 Furthermore, Regulation No 139/2004 provides in Article 14(2)(a) and (b) for separate fines for the infringement of each of those obligations where those infringements are committed concomitantly, through the implementation of a concentration before it has been notified to the Commission (see, to that effect, judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraphs 105 and 106). That option is justified by the objective of that regulation, which, as is apparent from recital 34 thereof, is to ensure effective control of concentrations with a Community dimension by obliging undertakings to give prior notification of concentrations and by providing for the implementation of such concentrations to be suspended until a final decision has been taken (see, to that effect, judgments of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 42, and of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraphs 108 and 109).

55 In the light of that objective, the Court has already rejected an interpretation according to which, if a concentration is implemented before its notification, the Commission may penalise only the infringement of Article 7(1) of Regulation No 139/2004. The Court found that, by depriving the Commission of the possibility of establishing a distinction, by means of the fines which it imposes, between the situation in which the undertaking complies with the notification obligation but infringes the standstill obligation and the situation in which that undertaking infringes both those obligations, such an interpretation would not enable that objective to be attained, in so far as infringement of the notification obligation could never be the subject of a specific penalty (see, to that effect, judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraphs 107 to 109).

56 In the light of those observations, in the first place, it must be held that, in paragraphs 54 to 58 and 63 of the judgment under appeal, the General Court recalled specifically the case-law cited in paragraphs 50 to 54 of the present judgment. It correctly concluded from that that, notwithstanding some overlap, of which it had duly taken account, Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue autonomous objectives and lay down separate obligations, the infringements of each of which are different in nature.

57 Thus, while both objectives fall within the aim of Regulation No 139/2004, which, as has been observed in essence in paragraph 54 of the present judgment, consists of ensuring the effectiveness of the system of *ex ante* control of the effects of concentrations, it remains the case that they take different forms.

58 Therefore, the General Court was fully entitled to reject, in paragraphs 59 and 62 of the judgment under appeal, Altice's argument pleading the unlawfulness of Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 on the ground, according to Altice, that Article 4(1) and Article 7(1) are redundant, and pursue a single legal interest.

59 It is also apparent from the case-law cited in paragraphs 50 to 53 of the present judgment that the conclusion that those provisions pursue autonomous objectives is drawn, contrary to Altice's submission, from the respective normative content and objectives of those two provisions and the general scheme of Regulation No 139/2004, and not from recital 8 thereof.

60 In the second place, it is not possible to draw any other conclusion by comparing the provisions of Regulation No 4064/89 with those of Regulation No 139/2004: it is only the latter regulation that applies, *ratione temporis*, to the present case.

61 In the third place, without it being necessary to determine whether, as Altice alleges, Article 7(3) of Regulation No 139/2004 permits, in addition to the grant of a derogation from the standstill obligation, the grant of a derogation from the notification obligation, the argument based on that provision cannot succeed. That argument merely reflects the connections between those two obligations which have been duly taken into account in the case-law recalled in paragraphs 50 and 55 of the present judgment.

62 It follows from the foregoing considerations that the first part of the first ground of appeal must be rejected as unfounded.

Second part of the first ground of appeal

– *Arguments of the parties*

63 By the second part of the first ground of appeal, Altice submits that the General Court erred in law in finding that the cumulative imposition of two fines pursuant to Article 14(2) of Regulation No 139/2004 did not infringe the principle of proportionality.

64 According to it, contrary to the General Court's ruling in paragraphs 65 and 273 of the judgment under appeal, the possibility of cumulatively imposing two fines for the same conduct committed by the same person for the infringement of two obligations protecting the same objective is, of itself, manifestly contrary to the principle of proportionality, since that cumulative imposition of penalties is unnecessary and excessive.

65 The objective of the effectiveness of the system of *ex ante* control of concentrations would be fully achieved by a less onerous measure consisting of the imposition, on the basis of Article 14(2)(b) of Regulation No 139/2004, of a single fine penalising, simultaneously, the infringement of the notification obligation and the infringement of the standstill obligation, both of which are covered by Article 7(1) of that regulation. Taking into account the nature, gravity and duration of the infringement, the Commission would be able to vary the fine imposed for an infringement of that provision, depending on whether an undertaking infringed both obligations or only the second of them.

66 The Commission and the Council consider that this part of the first ground of appeal must be rejected as unfounded.

– *Findings of the Court*

67 In paragraph 65 of the judgment under appeal, which is challenged by Altice in the second part of the first ground of appeal, the General Court held that the imposition of two penalties for the same conduct, by the same authority in a single decision, cannot be considered, as such, to be contrary to the principle of proportionality. The General Court reiterated that finding in paragraph 273 of that judgment, which Altice also challenges.

68 In the first place, it must be observed that this part is based on the premiss that the obligations laid down in Article 4(1) and Article 7(1) of Regulation No 139/2004 seek to protect a single objective. However, that premiss has been found to be unsound in the analysis carried out in respect of the first part of this ground of appeal. Therefore, Altice's submission must be rejected.

69 In the second place, it should be recalled that the principle of proportionality, which is one of the general principles of EU law, requires that acts of the EU institutions be appropriate for attaining the legitimate objectives pursued by the legislation at issue and do not exceed the limits of what is necessary in order to achieve those objectives. Where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, judgment of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraph 340 and the case-law cited).

70 In the present case, under Article 14(2) of Regulation No 139/2004 the Commission has the power by decision to impose, pursuant to points (a) and (b) respectively, fines for the infringement by undertakings of Article 4(1) and Article 7(1) of that regulation, the amount of each of those fines not to exceed 10% of the aggregate turnover of those undertakings. In accordance with Article 14(3) of that regulation, account is to be taken, when setting the amount of each fine, of the nature, gravity and duration of the infringement.

71 As follows from paragraphs 54 and 55 of the present judgment, that option of imposing, by the same decision, two fines owing to the infringement, by the same conduct, of both of the autonomous obligations is appropriate for ensuring the effectiveness of the control of concentrations that have a community dimension and also necessary for that purpose. In addition, in setting the amount of each of those fines below the limit of 10% of the aggregate turnover of the undertakings concerned, having regard to the nature, gravity and duration of each infringement, the Commission must ensure compliance with the principle of proportionality in the use it makes of the provisions of Regulation No 139/2004.

72 Accordingly, the General Court did not err in law in holding, in paragraphs 65 and 273 of the judgment under appeal, that the imposition of two penalties for the same conduct, by the same authority in a single decision, cannot be considered, as such, to be contrary to the principle of proportionality. It is for that authority to satisfy itself that the fines taken together are proportionate to the nature of the infringement (see, by analogy, judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie*, C-617/17, EU:C:2019:283, paragraph 38).

73 It follows that the second part of the first ground of appeal must be rejected as unfounded.

The third part of the first ground of appeal

– *Arguments of the parties*

74 By the third part of the first ground of appeal, Altice submits that the General Court erred in law in finding that the imposition of two cumulative fines pursuant to Article 14(2) of Regulation No 139/2004 is not contrary to the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States governing the concurrence of laws.

75 First, Altice submits that the General Court wrongly failed to consider its argument based on that general principle of EU law when examining the plea of illegality.

76 Secondly, the General Court erred in law in paragraph 274 of the judgment under appeal. Contrary to the General Court's statement in that paragraph, the Court of Justice did not reject, in paragraphs 117 and 118 of the judgment of 4 March 2020, *Marine Harvest* v *Commission*

(C-10/18 P, EU:C:2020:149), an argument based on that principle, since, in the absence of a plea of illegality before it, it did not rule on whether Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 complied with the principle prohibiting double punishment.

77 Moreover, it is irrelevant whether the legislature has or has not defined one of the infringements as being more serious than the other, or one provision as being primarily applicable. Developed to deal with the lack of such a categorisation by the legislature, the principles applicable to concurrent criminal offences would preclude the imposition of two fines on the same offender, for the same conduct, to protect the same legal interest.

78 In that respect the General Court also failed to take account of the six legal opinions produced by Altice.

79 Thirdly, in accordance with the 'principle of the concurrence of laws' and the 'principle of consumption', the infringement of Article 7(1) of Regulation No 139/2004 includes within it the infringement of Article 4(1) of that regulation in the present case. The first provision is broader and encompasses the obligation imposed by the second in its entirety. In order to avoid the imposition of an excessive fine, it is therefore necessary to apply solely Article 7(1) of the regulation. The five-year limitation period would then apply.

80 The Commission and the Council dispute Altice's arguments and consider that the present part of this ground of appeal is unfounded.

– *Findings of the Court*

81 First, to the extent that Altice criticises the General Court for not ruling, in the context of the plea of illegality that it had raised, on the arguments based on the 'general principles common to the legal systems of the Member States governing the concurrence of laws', it must be observed that the General Court rejected those arguments in paragraphs 60 to 62 of the judgment under appeal, explaining that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue autonomous objectives.

82 It is clear from the application at first instance that that aspect of the plea of illegality raised by Altice was intrinsically linked to its allegation that the provisions protect a single legal interest.

83 Therefore, the General Court cannot be criticised for not having ruled explicitly and in detail on all of the arguments advanced by Altice on that aspect.

84 Secondly, in paragraph 274 of the judgment under appeal, the General Court considered that the Court of Justice had already rejected, in paragraphs 117 and 118 of the judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149), an argument analogous to that made by Altice on 'the principle of the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States'.

85 That consideration is not vitiated by any error of law.

86 In that judgment, in particular in paragraphs 117 and 118 thereof, the Court held that, even if that principle were relevant, in the absence, in Regulation No 139/2004, of a provision that is 'primarily applicable' and taking into account the autonomous objectives pursued by Article 4(1) and Article 7(1) of the regulation, that principle does not prevent the imposition of two fines as a

result of an infringement, by the same conduct, of those provisions. The General Court could therefore, without erring in law, base its assessment of Altice's argument on that judgment, even though, in the case that gave rise to that judgment, a plea of illegality had not been raised before the Court of Justice.

87 Accordingly, it was also unnecessary for the General Court to take into account explicitly the various opinions and experts' reports produced by Altice.

88 Thirdly, Altice's argument, as summarised in paragraph 79 of the present judgment, must be rejected since it is based on the premiss that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue a single objective and are redundant. That premiss has been held to be unsound in the analysis carried out in respect of the first part of this ground of appeal.

89 It follows from the foregoing considerations that the third part of the first ground of appeal and, therefore, this ground in its entirety must be dismissed.

The second ground of appeal

Arguments of the parties

90 By the second ground of appeal, Altice challenges paragraphs 260 to 278 and 328 of the judgment under appeal.

91 In the first place, Altice submits that the General Court erred in law and failed correctly to apply the principle of proportionality in finding that that principle did not apply 'as such' to the imposition of the two fines for the infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 and in failing to satisfy itself that the two fines imposed were proportionate to the infringements committed.

92 First, to the extent that in paragraphs 264, 265 and 270 of the judgment under appeal, the General Court referred to the autonomous objectives of those two provisions of Regulation No 139/2004, Altice refers to the first ground of appeal.

93 Secondly, as regards the principle of proportionality, Altice recalls that, where the principle *ne bis in idem* does not preclude a competition authority from imposing two fines on an undertaking in a single decision for the same facts, that authority must nevertheless ensure that the fines, considered together, are proportionate to the nature of the infringement. The General Court failed to carry out that assessment. Furthermore, when reducing the amount of the fine imposed pursuant to the infringement of Article 4(1) of Regulation No 139/2004, it did not do so in order to ensure the proportionality of the two fines imposed.

94 According to Altice, the imposition of a second fine for the same conduct to protect the same legal interest is, by definition, unnecessary and excessive.

95 In the second place, Altice considers that the General Court also infringed the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States governing the concurrence of laws in rejecting the argument that the imposition of two fines infringed this general principle of EU law.

96 In that regard, Altice refers to the argument that it advanced in the context of the first ground of appeal. It adds that, should Article 4(1) and Article 7(1) of Regulation No 139/2004 be considered to protect different legal interests, that would be a situation of ideal concurrence of offences. It would therefore be necessary to apply the set-off principle, which applies for the reasons set out in the context of the third part of the first ground of appeal, and, therefore, to take account of the amount of the first penalty imposed when determining the amount of the second. Accordingly, the General Court committed an error of law in paragraph 328 of the judgment under appeal by rejecting, on the basis of a misreading of the judgment of 26 October 2017, *Marine Harvest* v *Commission* (T-704/14, EU:T:2017:753, paragraph 344), the applicability of that principle.

97 The Commission contends that this ground of appeal is unfounded.

Findings of the Court

98 At the outset, it must be observed that the second ground of appeal is based, to a great extent, on references to the arguments already advanced by Altice in support of the first ground of appeal. To the extent that those arguments have already been rejected in the context of the analysis of the first ground, the second ground of appeal cannot succeed.

99 As to the remainder, first, the allegation based on an infringement of the principle of proportionality is insufficiently substantiated, with the result that it must be rejected as inadmissible.

100 Secondly, Altice alleges that the set-off principle applies, for the reasons set out in the third part of the first ground of appeal, should it be found that there is a 'concurrence of offences'. That is a hypothesis that Article 4(1) and Article 7(1) of Regulation No 139/2004 protect separate legal interests. It must be observed that, whereas the third part is based on the premiss that those provisions protect the same legal interest and the present case corresponds to a situation of a concurrence of laws, Altice has failed to explain how those reasons may be transposed to those circumstances.

101 As regards the reference made by Altice, in that context, to paragraph 344 of the judgment of 26 October 2017, *Marine Harvest* v *Commission* (T-704/14, EU:T:2017:753), cited in paragraph 328 of the judgment under appeal, its argument rests on an incorrect reading of paragraph 344. In that paragraph, the General Court clearly rejected the applicability of the set-off principle to a situation in which several penalties are imposed in a single decision, even if those penalties are imposed for the same facts. That argument is, therefore, unfounded.

102 It follows that the second ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

The third to fifth grounds of appeal

103 By the third to the fifth grounds of appeal, Altice challenges the General Court's assessments in respect of the Commission's finding that Altice had implemented the concentration, within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004, prior to its being notified to and cleared by the Commission.

104 The Commission contends that those three grounds are ineffective and, in any event, unfounded.

Whether the third to fifth grounds of appeal are effective

– *Arguments of the parties*

105 The Commission submits that, in the decision at issue, the finding that Altice had implemented the concentration, within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004, prior to its being notified to and cleared by the Commission, was based on three factors. Those factors were, first, the presence of the pre-closing covenants, secondly, Altice's actual exercise of control over PT Portugal's business and, thirdly, the exchanges of information which contributed to demonstrating that Altice exercised a decisive influence over PT Portugal.

106 The Commission submits that, by its third to fifth grounds of appeal, Altice disputes only the assessments made by the General Court on the first and third of those factors. As regards the second factor, Altice merely alleges that the conclusions drawn by the Commission in Section 4.2.1 of the decision at issue were based on the premiss that Altice had a right of veto over the strategic decisions of PT Portugal in question, the existence of which Altice disputes. According to the Commission, that latter allegation is without foundation since neither that decision nor the judgment under appeal makes the finding as to the effective exercise of decisive influence by Altice over aspects of PT Portugal's commercial strategy subject to the SPA conferring on it such a right of veto. Thus, Altice does not in fact dispute the General Court's findings as to the substance concerning the conduct described in that Section 4.2.1 and examined in paragraphs 170 to 218 of the judgment under appeal.

107 Therefore, the Commission submits that, since those findings are in themselves of such a nature as to substantiate the finding of the implementation by Altice of the concentration, the third to fifth grounds of appeal are ineffective.

108 In its reply, Altice disputes all of those arguments.

– *Findings of the Court*

109 As the Commission correctly points out and as stated in paragraphs 27 and 28 of the present judgment, in the decision at issue the Commission relied on three factors when finding that Altice had implemented the concentration, within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004, prior to its notification to and clearance by that institution. First, the pre-closing covenants gave Altice the possibility of exercising decisive influence over PT Portugal's business. Secondly, seven instances illustrate an actual exercise of influence by Altice over PT Portugal's business. Thirdly, the exchanges of information contributed to demonstrating that Altice exercised a decisive influence over PT Portugal.

110 The General Court examined the merits of those findings in the context of the first three pleas raised by Altice, relating to whether there was an infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004. It is in that context that it ruled, inter alia, on the concept of 'implementation' of a concentration, within the meaning of those provisions (paragraphs 76 to 89 of the judgment under appeal), on the pre-closing covenants (paragraphs 94 to 105, 108 to 133 and 136 to 155 of that judgment), on the seven alleged instances of actual exercise of decisive influence over PT Portugal (paragraphs 173 to 218 of that judgment) and also on the exchanges of information (paragraphs 221 to 242 of that judgment).

111 By the third to fifth grounds of appeal, Altice disputes, in essence, the assessments of the General Court relating to the concept of 'implementation' of a concentration, within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004, the pre-closing covenants and the exchanges of information.

112 It is true that, as the Commission submits, Altice has not raised, in support of its appeal, a ground seeking specifically to challenge the General Court's assessments of the seven alleged instances of actual exercise of decisive influence.

113 It remains the case however that, by the third part of the third ground of appeal, Altice puts at issue the relevance of the criterion that the General Court applied for the purpose of assessing not only the pre-closing covenants, at issue in the third ground of appeal, but also the seven alleged instances of the actual exercise of decisive influence on PT Portugal. It referred in that way to that criterion in the latter context, inter alia, in paragraphs 190 and 201 of the judgment under appeal.

114 Likewise, as is clear from paragraph 91 of the notice of appeal, the fourth ground of appeal, relating to the interpretation of the concept of 'veto right' by the General Court, seeks, ultimately, to challenge in particular the premiss on which the General Court relied for the purpose of reviewing the Commission's assessments of the seven alleged instances of the actual exercise of decisive influence.

115 Therefore, contrary to the Commission's submission, the third to fifth grounds of appeal cannot be dismissed as ineffective.

116 It is necessary, therefore, to examine whether those grounds are well founded.

The third ground of appeal

– *Arguments of the parties*

117 By its third ground of appeal, Altice submits in essence that the General Court erred in law in concluding that the pre-closing covenants amounted to an 'implementation' of a concentration within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004. This ground is comprised of three parts.

118 By the first part of this ground, Altice challenges paragraphs 69 to 89, 96, 132 and 144 of the judgment under appeal, in which the General Court concluded that the mere signing of the SPA granted Altice the 'possibility of exercising decisive influence' over PT Portugal and that that signing amounted to the implementation of the concentration. In so doing, the General Court confused the concept of 'concentration' in Article 3 of Regulation No 139/2004 with the concept of 'implementation' in Article 4(1) and Article 7(1) of that regulation and conferred an excessive scope on the latter.

119 First, the 'possibility to exercise a decisive influence' corresponds to the definition of 'control' set out in Article 3(2) of Regulation No 139/2004, and thus to the concept of 'concentration' within the meaning of Article 3 of that regulation. However, the 'concentration' means less than the

'implementation' of a concentration, since Article 3 does not concern 'implementation'. Implementation therefore necessarily means more than the possibility of exercising decisive influence.

120 Similarly, the wording of Article 4(1) and Article 7(1) of that regulation implies that there is a difference between an agreement giving rise to a 'concentration', which must be notified, and its later 'implementation'. In the present case the signing of the SPA was already a 'concentration' that needed to be notified, but not yet an 'implemented' concentration. The implementation arose at the time of the transfer of all PT Portugal's shares to Altice.

121 Teleologically, none of the practices examined by the General Court in the judgment under appeal jeopardised the control of concentrations having regard to the facts of the case, namely the prior notification of the concentration, the offer of remedies and the transfer of shares only after clearance.

122 Secondly, Altice alleges that the General Court adopted an interpretation of the concept of 'implementation' that was too broad by including within it the mere signing of pre-closing covenants. According to it, the concentration cannot be regarded as having been implemented on the basis of those covenants and the instances examined by the General Court, since the Commission did not have the power to order, pursuant to Article 8(4) of Regulation No 139/2004, the dissolution of the concentration or the disposal of all the shares or assets acquired, so as to restore the situation prevailing prior to the signing of the SPA. The shares and assets of PT Portugal remained under the exclusive control of Oi until the conclusion of the operation after it was cleared by the Commission. The General Court therefore erred in law in rejecting, in paragraphs 69 to 88 of the judgment under appeal, Altice's arguments to that effect.

123 In addition, in paragraph 87 of the judgment under appeal, the General Court distorted an argument made by Altice in paragraph 47 of its application at first instance by confusing, in essence, the concept of 'concentration' used by the General Court, and that of 'implementation' used by Altice. Consequently, paragraph 88 of that judgment is not capable of effectively refuting Altice's allegation.

124 By the second part of the third ground of appeal, Altice submits that the General Court erred in law in the interpretation and application, in paragraphs 95 to 97 and 113 et seq. of the judgment under appeal, of the concepts of 'partial implementation' and of contribution to a 'lasting change of control' in the light of the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371).

125 The General Court deduced from paragraph 46 of that judgment that Article 7 of Regulation No 139/2004 applies to 'partial implementations' of a concentration where the parties 'implement operations contributing to a lasting change in the control of the target undertaking'. However, Altice considers that, in the light of paragraph 49 of that judgment and the Consolidated Jurisdictional Notice, operations that are unnecessary to achieve a change of control do not fall under that article as they do not present a direct functional link with the implementation of the concentration.

126 Moreover, it follows from paragraphs 43 to 45 and 52 of that judgment that Article 7(1) of Regulation No 139/2004 applies only to operations that contributed to a lasting change in the control of the undertaking. In that context, in paragraph 95 of the judgment under appeal, the General Court erred in law in finding that the requirement of a lasting change in control did not concern the duration of the pre-closing covenants.

127 The General Court thus committed an error of law in concluding that those covenants, in themselves, contributed to a lasting change of control since they were unnecessary for the achievement of that change by the transfer of PT Portugal's shares, they did not contribute to that change, and they were short-lived.

128 By the third part of the third ground of appeal, Altice alleges that the General Court erred in law in finding, in paragraphs 102 to 105, 117, 120, 121, 130 and 131 of the judgment under appeal, that in order to be regarded as ancillary restraints that are not covered by the prohibition laid down in Article 7(1) of Regulation No 139/2004 the pre-closing covenants should necessarily preserve the value of the target business.

129 Altice submits that, in the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), the Court of Justice held that the prohibition in Article 7(1) of Regulation No 139/2004 did not apply to a pre-closing transaction that was ancillary or preparatory to the concentration. The Court did not refer, in that context, to a criterion linked to the preservation of the value of the target undertaking, which also cannot be found either in that regulation or in the Commission Notice on restrictions directly related and necessary to concentrations (OJ 2005 C 56, p. 24).

130 Moreover, it is established worldwide that, in practice, pre-closing covenants play a key role in ensuring the integrity of the business to be acquired between the date of signing the agreement and the date of closing. It is common for the seller to be obliged to consult the buyer regarding certain actions relating to the management of the business transferred, where they are taken in the pre-closing period, in order to ensure that the buyer does not claim in respect of losses suffered as a result of those actions.

131 The Commission contends that the third ground of appeal is unfounded.

– *Findings of the Court*

132 By its third ground of appeal, the three parts of which shall be examined together, Altice contests, in essence, the General Court's interpretation of the concept of 'implementation' of a concentration, within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004, and its application in the present case to the pre-closing covenants.

133 At the outset, it should be noted that, while this ground is formally directed against various paragraphs of the judgment under appeal, some of those paragraphs merely summarise Altice's arguments. The interpretation by the General Court of the concept of 'implementation' is found, for the main part, in a combined reading of paragraphs 76, 77, 83 to 85, 87, 95, 96, 102 to 104, 117, 121, 130, 131 and 144 of the judgment under appeal. It is therefore appropriate for the Court of Justice's assessment to concentrate on those paragraphs, which are contested by Altice.

134 In the first instance, Altice criticises the General Court for having confused the concepts of 'concentration' and 'implementation' of a concentration and for having conferred too broad a scope on the latter.

135 In that regard, it should be recalled that Article 4(1) of Regulation No 139/2004 lays down an obligation to notify the Commission of concentrations with a Community dimension prior to their implementation. As to Article 7(1) of that regulation, that article merely provides that a concentration is not to be implemented either before its notification or until it has been declared compatible with the common market.

136 Neither of those provisions defines what is meant by the 'implementation' of a concentration.

137 That being so, taking into account, first, the objectives pursued by Regulation No 139/2004, which seeks in particular to ensure the effectiveness of the system of *ex ante* control of concentrations, secondly, the concept of 'concentration' within the meaning of Article 3 of that regulation, and thirdly, the general scheme of that regulation, the Court has already held that the implementation of a concentration, within the meaning of Article 7 of the regulation, arises as soon as the parties to a concentration implement operations contributing to a lasting change in the control of the target undertaking. In that respect, control is constituted by the possibility, conferred by rights, contracts or any other means, of exercising decisive influence on an undertaking (see, to that effect, judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraphs 41 to 46, 52, 53, 59 and 61).

138 Thus, the Court has held that any partial implementation of a concentration falls within the scope of Article 7 of Regulation No 139/2004. If the parties to a concentration were prohibited from implementing a concentration by means of a single transaction, but it were open to them to achieve the same result by successive partial operations, that would reduce the effectiveness of the prohibition in Article 7 of Regulation No 139/2004 and would thus put at risk the prior nature of the control required by that regulation and the pursuit of its objectives (judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 47).

139 That interpretation must also be given, for the same reasons and taking into account the connection between Article 4(1) and Article 7(1) of Regulation No 139/2004 as observed in paragraph 50 of the present judgment, to the concept of 'implementation' contained in Article 4(1) of that regulation.

140 In paragraphs 76, 77, 83 and 84 of the judgment under appeal, the General Court specifically applied that case-law after recalling the main guidance flowing from it. In accordance with that case-law, it was fully entitled to consider, in essence in paragraphs 77 and 84 of that judgment, that a concentration could be implemented as soon as a transaction conferred on the acquirer the possibility of exercising a decisive influence over the target undertaking and, in paragraph 83 of that judgment, that any partial implementation of a concentration falls within the scope of Article 7 of Regulation No 139/2004.

141 Altice's argument that the General Court confused the concepts of 'concentration' and 'implementation', by conferring too broad a scope on the latter, must therefore be rejected.

142 Against that background, Altice is also incorrect in relying on Article 8(4) of Regulation No 139/2004 in order to deduce that the implementation of a concentration is limited to situations that may lead the Commission to order, in the event that the transaction is not cleared, that the concentration be dissolved, First, as the General Court correctly found, without distorting Altice's written submissions, in paragraph 87 of the judgment under appeal, that provision merely sets out the Commission's powers when it finds that an infringement has occurred. It does not contain, however, any definition of the concepts of 'concentration' and 'implementation'. Second, the reading suggested by Altice would restrict the scope of the obligations set out in Article 4(1) and Article 7(1) of Regulation No 139/2004 at the risk of undermining the effectiveness of the *ex ante* control of concentrations.

143 In the second instance, Altice criticises the General Court's findings regarding the concept of 'partial implementation' of a concentration.

144 As regards, in the first place, the concept of 'a lasting change of control', the General Court stated, in paragraphs 85, 95 and 96 of the judgment under appeal, that conduct of even limited duration may contribute to a lasting change of control as it is that change, rather than the measures capable of contributing to it, which must be of lasting duration for there to be a concentration.

145 Contrary to Altice's submission, that finding is not vitiated by any error of law. First, it is unambiguously stated in Article 3(1) of Regulation No 139/2004, which must be taken into account for the purpose of determining the scope of the concept of the 'implementation' of a concentration, within the meaning of Articles 4 and 7 of that regulation, that for a concentration to arise there must be a 'change of control on a lasting basis'. Second, as follows from paragraphs 137 and 138 of the present judgment, any measure that contributes to the lasting change in the control of the target undertaking must be regarded as an implementation at least in part of the concentration, which falls within Article 4(1) and Article 7(1) of Regulation No 139/2004. In other words, it is the change of control that must be of lasting duration, rather than the transaction contributing to its implementation, with the result that the latter may be of a temporary nature.

146 As regards, in the second place, the assessment of the question whether measures which are unnecessary to achieve a change of control and are ancillary to that change may contribute to the implementation of a concentration, it must be observed that, in paragraphs 98 and 99 of the judgment under appeal, which are not challenged under this ground of appeal, the General Court held, in the light of the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371, paragraph 60), that ancillary and preparatory measures are not, as such, excluded from the scope of Article 7(1) of Regulation No 139/2004. In that respect, in paragraph 99 of the judgment under appeal, the General Court observed that the Court of Justice did not lay down any criteria to establish the probable ancillary and preparatory nature of the measure in question. Furthermore, it added, in paragraphs 102 and 103 of that judgment, that the Commission notice referred to in paragraph 129 of the present judgment refers, non-exhaustively, to a criterion relating to protecting the value of the target undertaking and does not therefore exclude the possibility of other criteria being taken into account. It nevertheless observed, in paragraph 104 of that judgment, that Altice had not submitted any evidence to demonstrate that there had been, in the present case, a risk of PT Portugal's commercial integrity being undermined, whilst referring to the assessment of Altice's subsequent pleas.

147 Finally, in the assessment, in paragraphs 109 to 132 of the judgment under appeal, of whether, as the Commission stated in the decision at issue, the pre-closing covenants contributed to the implementation of the concentration, the General Court applied, notably in paragraphs 117, 121, 130 and 131 of that judgment, the same criterion as that institution in determining whether those covenants sought exclusively to preserve the value of the target undertaking or whether they went beyond what was necessary for that purpose.

148 Altice's arguments are not capable of establishing that, in so doing, the General Court made errors of law.

149 First, Altice's argument that only measures necessary for the lasting change of control fall within the concept of 'implementation', within the meaning of those provisions, is based on an incorrect reading of the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371).

150 In that regard, as is clear from paragraphs 138 and 139 of the present judgment, any partial implementation of a concentration falls within the scope of application of Articles 4 and 7 of Regulation No 139/2004 in order to ensure the prior nature of the control of concentrations.

151 Moreover, in the case that gave rise to the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), the Court of Justice was required to determine whether the termination, by one of the parties to a concentration, of a cooperation agreement with a third party to that transaction contributed to the implementation of a concentration.

152 It is in that context that, in paragraph 48 of the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), the Court recalled that recital 20 of Regulation No 139/2004 states that it is appropriate to treat as a 'single concentration' transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time. In paragraph 49 of that judgment, the Court added that, however, where such transactions, despite having been carried out in the context of a concentration, are not necessary to achieve a change of control of an undertaking concerned by that concentration, they do not fall within the scope of Article 7 of Regulation No 139/2004. Although they may be ancillary or preparatory to the concentration, those transactions do not present a direct functional link with its implementation, so that their implementation is not, in principle, likely to undermine the efficiency of the control of concentrations.

153 It follows that it is within the context of assessing whether there was a single concentration that the Court referred to the notion of a 'direct functional link' and to the ancillary or preparatory nature of a transaction. By contrast, it is not possible to conclude from the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), that only a transaction that is necessary for the lasting change of control may contribute to the implementation of a concentration. Such an interpretation would be liable, moreover, to reduce unduly the scope of Article 4(1) and of Article 7(1) of Regulation No 139/2004 and, consequently, reduce the effectiveness of the prior control of concentrations.

154 As regards, secondly, the arguments relating to ancillary restraints, it must be held that, contrary to the submission that Altice appears to make, and as is clear from paragraphs 102 and 103 of the judgment under appeal, which appears in paragraph 146 of the present judgment, the General Court did not uphold the criterion of the preservation of the value of the target undertaking as being the single criterion for assessing the ancillary nature of a restraint.

155 Furthermore, to the extent that Altice bases its argument on a worldwide practice, that argument is based on purely unsubstantiated statements. Therefore, it cannot be upheld.

156 In the light of the foregoing considerations, the third ground of appeal must be dismissed in its entirety as being unfounded.

The fourth ground of appeal

– *Arguments of the parties*

157 By its fourth ground of appeal, Altice challenges paragraphs 91 to 169 of the judgment under appeal on the ground, principally, that the General Court erred in law in the interpretation of the concept of 'veto right' and, in the alternative, that it distorted the SPA by interpreting it as conferring 'veto rights'. This ground is comprised of two parts.

158 By the first part of the fourth ground, Altice alleges that the General Court erred in law in the interpretation of the concept of 'veto right', in breach of Article 3(2) of Regulation No 139/2004, read in combination with Article 4(1) and Article 7(1) of that regulation and the Consolidated Jurisdictional Notice.

159 In the light of Article 3(2) of Regulation No 139/2004, it submits that, prior to acquiring control by owning a majority of the shares of the target undertaking, the future acquirer may acquire control on a contractual basis through 'veto rights'. Those veto rights necessarily imply, as is clear from points 18 and 54 of the Consolidated Jurisdictional Notice, the power to block the adoption of strategic commercial decisions against the will of another party. The concepts of 'veto rights' and 'power to block' must thus be interpreted strictly in order to ensure that the regulation applies only to agreements that confer the possibility of exercising 'decisive' influence.

160 In paragraphs 103 to 133 of the judgment under appeal, the General Court extended the concept of 'veto rights' to situations which do not confer the power to block strategic decisions. In so doing, it erred in law.

161 Pursuant to Articles 6.1 and 7.1 of the SPA, Altice did not have the power to veto decisions to be taken by PT Portugal as it lacked the power to block the adoption by it of strategic decisions and to produce a deadlock situation. Any strategic decision adopted by PT Portugal or Oi in breach of the pre-closing covenants would be valid and would only give rise to indemnification. In that context, contrary to the General Court's finding in paragraph 126 of the judgment under appeal, the right to indemnification for any losses does not constitute a veto right.

162 By the second part of the fourth ground, raised in the alternative, Altice submits that in paragraphs 109 to 132 of the judgment under appeal, the General Court distorted the SPA by finding that its pre-closing covenants conferred veto rights upon Altice. That interpretation clearly contradicts the wording not only of Article 6 but also of Article 7 of the SPA, paragraph 1(c) of which clearly states that indemnification 'shall be the sole remedy available to the Buyer as against the Seller except in case of fraud by the Seller'.

163 Altice submits, in particular in its reply, that it follows that the fact that PT Portugal consulted it in seven instances on certain matters governed by Article 6 of the SPA cannot constitute an 'implementation', within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004, contrary to the Commission's assessments that were upheld by the General Court in paragraphs 170 to 215 of the judgment under appeal.

164 The Commission responds that the argument set out in the preceding paragraph of the present judgment is an extension of the scope of the appeal that is inadmissible as it is brought out of time, and that the present ground of appeal is, in its entirety, unfounded.

– *Findings of the Court*

165 As a preliminary matter, it should be stated that, while the present ground of appeal, concerning the concept of 'veto right' used by the General Court, is formally directed against numerous paragraphs of the judgment under appeal, some of those merely set out a summary of Altice's arguments, whilst others are not specifically challenged under this ground. The interpretation by the General Court of the concept of 'veto right' and its application in the present case is set out, for the main part, in a combined reading of paragraphs 109 to 133 of the judgment under appeal. It is therefore appropriate for the Court of Justice's assessment to concentrate on those paragraphs, which are contested by Altice.

166 In those paragraphs, the General Court essentially held, contrary to Altice's submissions, that the pre-closing covenants conferred on it the possibility of exercising decisive influence over PT Portugal. According to the General Court, Article 6.1(b) of the SPA, set out in paragraph 109 of that judgment, gave Altice, from the date the SPA was signed, the possibility of exercising decisive influence over PT Portugal by obliging Oi to obtain Altice's written consent to enter into, terminate or modify a wide range of contracts and thus giving it the opportunity of determining PT Portugal's commercial policy and of blocking a range of decisions, without it being established that it was necessary to protect the value of PT Portugal. The General Court held that Altice therefore had the right to veto certain decisions of PT Portugal, which was confirmed by the fact that if Oi failed to comply with that obligation, that would result in Altice having the right to obtain compensation.

167 In that regard, it should be recalled that, as is apparent from paragraphs 137 to 139 of the present judgment, the implementation of a concentration, within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004, arises as soon as the parties to a concentration implement operations contributing to a lasting change in the control of the target undertaking. Any partial implementation of a concentration falls within the scope of application of those provisions.

168 In that context, pursuant to Article 3(2)(b) of that regulation, control results from rights, contracts or any other means which confer the possibility of exercising decisive influence on an undertaking and, in particular, rights or contracts which confer a decisive influence on the composition, voting or decisions of the organs of an undertaking.

169 In the present case, Altice does not dispute the fact that, pursuant to a stipulation in Article 6.1 of the SPA, cited in paragraph 109 of the judgment under appeal, numerous decisions concerning not only the business operations and commercial policy of PT Portugal but also its management structure could be taken only with Altice's written agreement. Nor does Altice challenge the fact that, in accordance with Article 7.1 of the SPA, Oi was required to indemnify Altice for any losses suffered as a result of a breach of that stipulation.

170 First, it thus appears that the SPA laid down a contractual obligation for Oi to seek Altice's written agreement on those decisions and also attached to that obligation a contractual penalty, namely a right to an indemnity. In those circumstances, and to the extent that the General Court held that that possibility went beyond what was necessary to protect the value of PT Portugal, the General Court did not err in law in holding that the SPA gave Altice the possibility of exercising decisive influence on PT Portugal's business.

171 In that regard, Altice's argument that only the possibility of preventing the adoption by the target business of valid decisions could reflect the existence of a right of veto and thus demonstrate the exercise of decisive influence on that undertaking cannot succeed. To the extent that that argument is based on points 18 and 54 of the Consolidated Jurisdictional Notice, it must be observed that those points deal with 'joint control' and the acquisition of 'sole control' and are therefore irrelevant for the purposes of the present case. Furthermore, there is no basis on which to conclude that such a condition is required by Article 3(2)(b) of Regulation No 139/2004.

172 Secondly, as regards the allegation, raised in the alternative, of the distortion of the SPA, it must be observed that, by that allegation, Altice in fact challenges the legal classification of the contractual stipulations referred to in paragraph 169 of the present judgment, by repeating its position that there is no 'veto right' where certain decisions are merely subject to obtaining prior consent on pain of an indemnity. However, that argument cannot succeed for the same reasons as those set out in paragraphs 170 and 171 of the present judgment.

173 Thirdly, Altice's submission, summarised in paragraph 163 of the present judgment, since it is merely the extension of arguments already examined and rejected in paragraphs 167 to 171 above, must be rejected for the same reasons as those set out in those paragraphs, without it being necessary to examine its admissibility, which the Commission called into question.

174 It follows that the fourth ground of appeal must be dismissed in its entirety as unfounded.

The fifth ground of appeal

– *Arguments of the parties*

175 By its fifth ground of appeal, Altice disputes the General Court's conclusion that the exchanges of information amounted to an 'implementation' of a concentration within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004. This ground is comprised of two parts.

176 By the first part of the fifth ground, Altice submits that, in paragraphs 227 and 235 of the judgment under appeal, the General Court distorted the decision at issue. In those paragraphs, the General Court stated that, in that decision, the Commission had found that those exchanges of information had merely 'contribute[d] to demonstrating that [Altice] had exercised decisive influence over certain aspects of PT Portugal'. That decision clearly stated, notably in recitals 470, 479 and 482 and in Section 4.2.2 thereof, that those exchanges of information constituted in themselves an implementation of the concentration.

177 By the second part of the fifth ground, Altice submits that, in paragraph 239 of the judgment under appeal, the General Court failed correctly to apply Article 1 of Regulation No 139/2004, 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), and Article 101 TFEU, in finding that the exchanges of information had been made in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004.

178 In essence, Altice criticises the General Court for having extended the scope of application of those provisions to the point of including exchanges of information capable of falling within the scope of Article 101 TFEU and of Regulation No 1/2003. In so doing, it failed correctly to apply the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371, paragraphs 57 and 59).

By making a distinction between exchanges of information in the context of a concentration and those subsequent to a concentration, the General Court reaches an irrational result, in the sense that those exchanges are covered by Article 4(1) and Article 7(1) of Regulation No 139/2004 if they occur in situations leading to a concentration, but they mutate into an infringement of Article 101 TFEU if, ultimately, there is no change of control.

179 Furthermore, the General Court failed to give reasons explaining how the exchanges of information would have been 'necessary to achieve a change of control' on a lasting basis or would 'present a direct link with the implementation' of the concentration, which only occurred when Altice acquired the shares of PT Portugal. Therefore, they do not fall within Article 7(1) of Regulation No 139/2004.

180 The Commission contends that this ground of appeal is unfounded.

– *Findings of the Court*

181 In the first place, the arguments alleging a distortion of the decision at issue are based on an incorrect and incomplete reading of that decision.

182 It is true that the Commission used ambiguous wording in the decision at issue, notably in recital 470, which sets out a one-off assessment, and in recitals 479 and 482, which summarises the findings made. However, those passages must be placed in the overall context of that decision. It is clear, without there being any ambiguity, from recitals 448, 473, 477 and 478 of that decision that the Commission took the exchanges of information into account only as evidence that contributed to establishing that Altice had exercised a decisive influence over PT Portugal.

183 Therefore, the General Court did not distort the decision at issue when, in paragraphs 227 and 235 of the judgment under appeal, it found that, in that decision, the Commission had found that those exchanges had 'contributed' to demonstrating that Altice had exercised such influence.

184 In the second place, as regards the arguments in relation to the respective scope of application of control of concentrations and control of competition law, as is clear from Article 21(1) of Regulation No 139/2004, the latter is solely applicable to concentrations as defined in Article 3 of that regulation, in respect of which Regulation No 1/2003 does not, as a rule, apply. By contrast, Regulation No 1/2003 continues to apply to the actions of undertakings which, without constituting a concentration within the meaning of Regulation No 139/2004, are nevertheless capable of leading to coordination between undertakings in breach of Article 101 TFEU and which, for that reason, are subject to the control of the Commission or of the national competition authorities (judgments of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraphs 32 and 33, and of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraphs 56 and 57).

185 Consequently, since, as the Commission and the General Court have observed, it is established that the exchanges of information contributed to the implementation of the concentration, the General Court was fully entitled to find, in paragraph 239 of the judgment under appeal, that they fell within the scope of application of Regulation No 139/2004.

186 In the third place, the arguments that the exchanges of information were unnecessary for the purpose of the change of control or the lack of a direct link between them and that change must be rejected for the same reasons as those that resulted in the dismissal of the third ground of appeal.

187 In the light of the foregoing considerations, the fifth ground of appeal must be dismissed in its entirety as being unfounded.

The sixth ground of appeal

188 By the sixth ground of appeal, Altice disputes, in essence, the General Court's assessments of the fines that were imposed by the decision at issue. This ground of appeal is comprised of four parts, the second and third of which partially overlap and must therefore be examined together.

The first part of the sixth ground of appeal

– *Arguments of the parties*

189 By the first part of the sixth ground of appeal, Altice alleges that paragraphs 155 and 279 to 296 of the judgment under appeal are vitiated by an error of law in that they find, wrongly, that Altice had acted at least negligently when it infringed Article 4(1) and Article 7(1) of Regulation No 139/2004.

190 Altice is of the view that in the case-law relating to that concept of 'negligence' there is a clear correlation between the degree of foreseeability of a prohibition provision and the liability of the offender.

191 First, it is the first time that, by the decision at issue, the Commission has found that, despite the lack of any transfer of a target undertaking's shares, a concentration had been implemented as a result of pre-closing covenants, which are however a normal practice amongst undertakings, and as a result of the exchanges of information during the period between the signing of the SPA and the implementation of the transaction.

192 Secondly, as the Court accepted in paragraphs 38 and 39 of the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), there is a lack of clarity as to the precise scope of the prohibition on the 'implementation' of a concentration, within the meaning of Article 7 of Regulation No 139/2004. Furthermore, before that judgment, the General Court interpreted it as meaning the 'full consummation of the concentration'.

193 Thirdly, Altice informed the Commission of the transaction even before signing the SPA and offered commitments in order to remedy any potential concerns raised by the transaction.

194 The Commission disputes the merits of all those arguments.

– *Findings of the Court*

195 According to Article 14(2) of Regulation No 139/2004, the Commission may impose fines for infringements which have been committed 'either intentionally or negligently'.

196 That condition is satisfied where the undertaking concerned cannot be unaware of the anticompetitive nature of its conduct, whether or not it is aware that it is infringing EU competition law (see, by analogy, judgments of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 37 and the case-law cited, and of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 156).

197 First, contrary to Altice's submissions and as the General Court correctly held in paragraphs 292 and 293 of the judgment under appeal, the fact that, at the time when an infringement is committed, the Commission and the EU Courts have not yet had the opportunity to rule specifically on particular conduct does not preclude, in itself, the possibility that an undertaking may have to expect its conduct to be declared incompatible with the EU competition rules. That fact is therefore not such as to exempt the undertaking concerned from its liability (see, by analogy, judgments of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraph 164, and of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 43).

198 In the same way, secondly, Altice cannot successfully rely on the alleged lack of clarity of the provisions of Article 4(1) and Article 7(1) of Regulation No 139/2004. Where there is any doubt as the interpretation of provisions of that nature, a diligent undertaking may be required to consult the Commission in order for it to be satisfied of the legality of its conduct, as the General Court held in paragraphs 155 and 294 of the judgment under appeal. That is all the more so in the present case in which the factual assessments made by the General Court in paragraph 287 of the judgment under appeal, which are not subject to review by the Court of Justice and which moreover are not disputed, indicate that Altice was well aware of the risk that its conduct was incompatible with Regulation No 139/2004.

199 Thirdly, the argument in relation to information given prior to the signing of the SPA and the offer of commitments seeks, in reality, to invite the Court to make a fresh assessment of the factual issue, namely whether Altice acted negligently. That argument is therefore inadmissible at the appeal stage.

200 It follows from the foregoing that the first part of the sixth ground of appeal must be rejected in its entirety.

The second and third parts of the sixth ground of appeal

– *Arguments of the parties*

201 By the second part of the sixth ground of appeal, Altice submits that paragraphs 297 to 362 of the judgment under appeal are vitiated by an error of law and infringe Article 296 TFEU and Article 41(2) of the Charter of Fundamental Rights of the European Union in that the General Court concluded that the decision at issue was adequately reasoned when imposing two distinct and cumulative fines of EUR 62 250 000 each for the infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004 respectively.

202 It is wrong in law and contradictory to consider, on the one hand, that the Commission may impose two separate fines on the ground that they are allegedly two separate infringements, while accepting, on the other hand, that the Commission assesses the two fines together as the penalised conduct is the same. It follows that there was a failure to state reasons in setting the amount of each of the fines imposed, which the General Court ought to have found.

203 Paragraphs 317 and 324 of the judgment under appeal do not explain why the imposition of two identical fines for two purportedly separate infringements is proportionate as a result of applying the criteria set out in Article 14(3) of Regulation No 139/2004.

204 By the third part of the sixth ground of appeal, Altice submits that the General Court erred in law in holding, in paragraphs 320 to 324 of the judgment under appeal, that Article 14(3) of Regulation No 139/2004 may lead to the imposition of two separate fines of the same amount for two infringements which are allegedly autonomous and different in nature, gravity and duration.

205 Even assuming, *quod non*, that Article 4(1) and Article 7(1) of Regulation No 139/2004 impose two separate obligations, it would be necessary to find that the nature and gravity of an infringement of the first of those provisions are less serious than those of an infringement of the second. The first provision lays down a single procedural obligation, the breach of which constitutes an instantaneous infringement, while the second is broader and contains two obligations, including the substantive standstill obligation, the breach of which is continuous. That difference is also reflected in the limitation periods applicable to both infringements.

206 As regards the duration of the infringements, namely instantaneous (one day) and continuous (four months and 11 days, namely 137 days), the General Court stated, in paragraphs 324 and 343 of the judgment under appeal, that no comparison could be made between them. However, that conclusion is not sufficiently reasoned and is also vitiated by an error of law, since there is no provision of Regulation No 139/2004 to substantiate it.

207 In the light of the difference in duration, Altice submits that, even if a fine of EUR 62 250 000 were proportionate to the infringement of Article 7(1) of Regulation No 139/2004, which it disputes, a fine proportionate to the infringement of Article 4(1) of that regulation, which lasted only one day, should not amount to more than EUR 450 000.

208 The Commission contends that the second part is inadmissible since Altice does not set out its arguments in sufficient detail.

209 In any event, that part is also unfounded. First, in paragraphs 317 and 324 of the judgment under appeal, the General Court explained in clear and unequivocal terms how the Commission took account of the nature, gravity and duration of each of the two infringements, in accordance with Article 14(3) of Regulation No 139/2004. Second, in the case that gave rise to the judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149, paragraphs 98 to 111), the Commission had already imposed two separate fines for infringements of Article 4(1) and Article 7(1) of that regulation respectively and assessed the fines together. Neither the General Court nor the Court of Justice has opposed the joint assessment of the fines. In any event, in the present case, while many of the reasons given in the decision at issue are common to both fines, others distinguish between the two fines.

210 The Commission contends that the third part is unfounded.

211 First, the Court of Justice has already accepted, in the judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149), that Regulation No 139/2004 does not, in itself, preclude the imposition of identical fines for infringements of both Article 4(1) and Article 7(1) of that regulation.

212 Secondly, those provisions are also fundamental pillars of the EU system of *ex ante* control of concentrations. Infringements of those provisions must be regarded as being, by their very nature, of equal gravity given that they could give rise to fines subject to the same ceiling, in accordance with Article 14(2)(a) and (b) of Regulation No 139/2004, without the legislature having classified one of them as more serious than the other.

213 Thirdly, the Commission submits that, in paragraphs 322 and 324 to 343 of the judgment under appeal, the General Court provides, to the requisite legal standard, the reasons for its finding that the duration of the two infringements, one instantaneous and of no duration and the other continuous, is not comparable.

214 Fourthly, Altice's calculation of a fine of EUR 450 000 for the infringement of Article 4(1) of Regulation No 139/2004 is based on the incorrect premiss that the duration of that infringement is one day. Since that infringement is of no duration and is as serious in nature as an infringement of Article 7(1) of that regulation, a fine of such an amount does not sufficiently reflect the nature and gravity of the infringement and does not have a sufficient deterrent effect.

– *Findings of the Court*

215 As regards the admissibility of the second part of the sixth ground of appeal, it should be noted that, although the arguments raised in support of that part of this ground are concise, they are nevertheless clear from Altice's written pleadings and clearly made it possible for the Commission to respond to the substance of those arguments. The Commission's plea of inadmissibility must therefore be rejected.

216 As to the substance, it should be noted that, by the second and third parts of the sixth ground of appeal, Altice essentially challenges paragraphs 314 to 325 of the judgment under appeal. Its arguments relate, first, to the General Court's findings in relation to the Commission's obligation to state reasons when it imposes, in a single decision, two fines for the infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 respectively and, second, to the possibility for the Commission to set the level of the two fines at the same amount. Since those two questions are separate, they must be addressed sequentially.

217 As regards, in the first place, the obligation to state reasons, referred to in the second and third parts, it should be recalled that, according to the case-law of the Court of Justice, the statement of reasons required by Article 296 TFEU for measures adopted by EU institutions 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 the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on all the circumstances of each case, in particular, the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. 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 (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 63, and of 10 March 2016, *HeidelbergCement* v *Commission*, C-247/14 P, EU:C:2016:149, paragraph 16).

218 As regards, in particular, the statement of reasons for a decision imposing a fine for infringement of Article 4(1) or Article 7(1) of Regulation No 139/2004, it must be pointed out, as has already been recalled in paragraph 70 of the present judgment, that Article 14(3) of that regulation provides that, in fixing the amount of the fine, the Commission must have regard to the nature, gravity and duration of the infringement.

219 Furthermore, in the absence of guidelines setting out the method of calculation applicable to the setting of fines under Article 14 of Regulation No 139/2004, it must be held that the Commission fulfils its obligation to state reasons by showing clearly and unequivocally the factors taken into account, without being required to set out in detail the figures relating to the calculation of the fine (see, to that effect, judgment of 22 October 2015, *AC-Treuhand* v *Commission*, C-194/14 P, EU:C:2015:717, paragraph 68 and the case-law cited).

220 In the light of those considerations, it appears that, contrary to Altice's submissions, there is nothing, in principle, to prevent the Commission from assessing in parallel the fines that it imposes for infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 respectively, in the sense that it gives a ruling, at the same time, on the nature, gravity and duration of the two infringements. That being so, the Commission must, in that context, set out with sufficient clarity the reasons justifying the fines imposed for the infringement of each of those provisions, having regard to the nature, gravity and duration of the infringements found.

221 In the present case, it is true that, as the General Court found in paragraphs 319 to 323 of the judgment under appeal, the Commission set out in detail, in recitals 568 to 599 of the decision at issue, its assessments relating to the nature, gravity and duration of the two infringements committed by Altice and, thus, the factors taken into account for the purposes of determining the amount of the fines. It was in the light of all the circumstances thus recalled, as is apparent from recital 621 of that decision, that the Commission set the two fines at EUR 62 250 000 each.

222 However, it is also apparent from the grounds of the decision at issue that, although the Commission considered that the two infringements were identical in nature and gravity, it also observed that they were different in terms of duration, one being an instantaneous infringement and the other a continuous infringement. It must be stated that the Commission has in no way explained why, in spite of that difference, the two infringements called for fines of the same amount. In other words, it did not explain why that difference, although significant, was not such as to justify a differentiation in the amount of the two fines.

223 In those circumstances, the General Court could not confine itself to rejecting, in paragraph 324 of the judgment under appeal, the argument alleging an inadequate statement of reasons, in the contested decision, for the identical nature of the fines despite the difference in duration of the two infringements concerned, on the sole ground that, 'logically, the duration of a continuous infringement cannot be compared with an instantaneous infringement, since the latter has no duration', before rejecting, in paragraph 325 of that judgment, the argument alleging infringement of the obligation to state reasons.

224 The General Court therefore erred in law in rejecting the complaint alleging an infringement of the obligation to state reasons.

225 As regards the Commission's argument in response to the fact that, in the case that gave rise to the judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149, paragraphs 98 to 111), the Court of Justice upheld reasoning similar to that of the decision at issue, it suffices to note that, in that case, the appellant had not raised any ground of appeal seeking to challenge the General Court's assessments relating to the calculation of the fines, with the result that neither that calculation nor the grounds on which it was based fell within the scope of the appeal before the Court of Justice. In particular, as is apparent from paragraph 85 of that judgment, a ground of appeal relating to the proportionality of the fines was not validly raised before the Court of Justice.

226 As regards, in the second place, the arguments challenging the very possibility for the Commission to impose two fines of the same amount for infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004, it must be observed that, in paragraphs 320 to 324 of the judgment under appeal, the General Court did not specifically rule on that issue. That argument concerns the merits of the decision at issue, whereas paragraphs 320 to 324 concern the statement of reasons for that decision, in particular the reasons that led to the determination of the amount of the fines imposed.

227 In any event, that argument is unfounded since the amount of those fines is to be assessed in the light of the circumstances of each individual case, having regard to the criteria of gravity, nature and duration of the infringements referred to in Article 14(3) of Regulation No 139/2004. It cannot therefore be claimed generally that fines imposed, by the same decision, for infringements of Article 4(1) and Article 7(1) of that regulation at the same time can never be of the same amount.

228 It is also necessary, however, that in the specific circumstances of a particular case, the imposition of two fines of the same amount for such infringements be justified on the grounds set out by the Commission.

229 It must be observed that, before the General Court, Altice specifically submitted that the Commission could not impose fines of the same amount for infringements of a different duration. In that regard, the sole fact, even if true, that an instantaneous infringement and a continuous infringement cannot be compared as regards their duration is not capable of responding to that line of argument. In the light of Altice's arguments, the General Court was required to ascertain whether, given the instantaneous nature of the infringement of the obligation to notify, the fine imposed was proportionate. The General Court failed however to carry out that assessment by confining itself, in paragraph 343 of the judgment under appeal, to referring to the fact that the two infringements were not comparable.

230 In the light of the foregoing considerations, the second and third parts of the sixth ground of appeal must be upheld.

The fourth part of the sixth ground of appeal

231 By the fourth part of the sixth ground of appeal, Altice submits that the General Court failed to ensure that the two fines imposed on it in a single decision for the same facts were proportionate, contrary to the case-law arising from paragraph 39 of the judgment of 3 April 2019, *Powszechny*

Zakład Ubezpieczeń na Życie (C-617/17, EU:C:2019:283). In its view, those two fines, even after the reduction of the fine imposed for the infringement of Article 4(1) of Regulation No 139/2004 by the General Court in the exercise of its unlimited jurisdiction, are so excessive as to be disproportionate.

232 In that regard, since it has been held in paragraph 230 of the present judgment that the General Court erred in law in its review of the fine imposed by the Commission for infringement of Article 4(1) of Regulation No 139/2004, errors which could have had an impact on the exercise, by that court, of its unlimited jurisdiction, there is no longer any need to adjudicate on this part of the ground of appeal.

233 In the light of all the foregoing considerations, the second and third parts of the sixth ground of appeal must be upheld and that ground must be rejected as to the remainder.

234 Consequently, the judgment under appeal must be set aside, in so far as it dismissed, in point 2 of the operative part, the action for annulment of Article 4 of the decision at issue and set, in point 1 of the operative part, a new amount of the fine imposed by that provision.

The action before the General Court

235 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, in the event that the Court of Justice sets aside the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

236 That is the position in the present case, since the Court of Justice has all the information necessary in order to rule on the action.

237 As a preliminary point, as regards the scope of the Court's review, it must be pointed out that, as is apparent from paragraph 234 of the present judgment, the judgment under appeal is set aside only in so far as it dismissed, in point 2 of its operative part, the action for annulment of Article 4 of the decision at issue and set, in point 1 of the operative part, a new amount of the fine imposed by that provision. Accordingly, it is for the Court to examine the dispute only in so far as it relates to the application for annulment of Article 4 of the decision at issue and to the application for reduction of the amount of the fine imposed on account of the infringement of Article 4(1) of Regulation No 139/2004 (see, by analogy, judgment of 18 March 2021, *Pometon* v *Commission*, C-440/19 P, EU:C:2021:214, paragraph 157).

238 As regards, in the first place, the application for annulment of Article 4 of the decision at issue, it follows from the reasons set out in paragraphs 221 and 222 of the present judgment that the statement of reasons for that decision is inadequate as regards the amount of the fine imposed under Article 4(1) of Regulation No 139/2004.

239 The application for annulment of Article 4 of the decision at issue must therefore be upheld.

240 In those circumstances, it is necessary, in the second place, to rule, in the exercise of the unlimited jurisdiction conferred on the Court of Justice by Article 261 TFEU and Article 16 of Regulation No 139/2004, on the amount of the fine to be imposed on Altice for the infringement found in Article 2 of the decision at issue, namely the infringement of Article 4(1) of Regulation

No 139/2004 (see, by analogy, judgments of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 73 and the case-law cited, and of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 87).

241 In that regard, it must be noted that the Court, when itself giving final judgment in the matter, in accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, is empowered, in the exercise of its unlimited jurisdiction, to substitute its own appraisal for that of the Commission and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed (judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 88 and the case-law cited).

242 As is apparent from paragraph 70 of the present judgment, in accordance with Article 14(2)(a) and (3) of Regulation No 139/2004, infringement of Article 4(1) of that regulation may give rise to a fine the amount of which must be determined, subject to the ceiling of 10% of the undertaking's aggregate turnover, having regard to the nature, gravity and duration of the infringement.

243 In the present case, first, the Court adopts the Commission's findings, set out in recital 577 of the decision at issue, that Altice's infringement of Article 4(1) of Regulation No 139/2004 is serious in nature.

244 Secondly, as regards the gravity of that infringement, it is established, in the light of paragraphs 195 to 200 of the present judgment, that the infringement was committed, at the very least, negligently. Furthermore, it is common ground, in the light of the assessments in recitals 587 to 593 of the decision at issue, that the Court must also endorse the finding that the transaction at issue raised serious doubts as to its compatibility with the internal market. However, account must be taken of the fact, emphasised by the General Court in paragraphs 364 to 367 of the judgment under appeal, that Altice, of its own initiative, informed the Commission of the concentration well before the SPA was signed and sent the Commission a request for the allocation of a case-handling team three days after that signature.

245 Thirdly, as regards the duration of the infringement of Article 4(1) of Regulation No 139/2004, it must be borne in mind that it was an instantaneous infringement (judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraph 115), which is not disputed in the present case.

246 In those circumstances, a fair assessment of all the circumstances of the case will be made by setting the amount of the fine imposed on Altice for the infringement of Article 4(1) of Regulation No 139/2004, found in Article 2 of the decision at issue, at EUR 52 912 500. That amount appears to be proportionate in the light of the nature, gravity and duration of the infringement, while remaining sufficiently dissuasive.

247 Contrary to Altice's arguments, even if combined with the fine imposed for the infringement of Article 7(1) of Regulation No 139/2004, that amount remains proportionate. In the light of the findings made by the General Court in paragraph 340 of the judgment under appeal, which have not been put at issue before the Court of Justice, and in the absence of any reliance by Altice on updated data, it must be observed that the two fines taken together remain below 0.5% of Altice's turnover for 2017.

248 In the light of all the foregoing considerations, the amount of the fine imposed on Altice in respect of the infringement found in Article 2 of the decision at issue is set at EUR 52 912 500.

Costs

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

250 Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 138(3) of the Rules of Procedure, applicable to appeal proceedings by virtue of Article 184(1) thereof, provides, in addition, that, 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 its own costs, pay a proportion of the costs of the other party.

251 In the present case, since only one of the six grounds of appeal and one of the five pleas in the action for annulment have been successful, and that only in part, it is appropriate to decide that Altice shall bear, in addition to its own costs, five sixths of the costs incurred by the Commission in respect of those two sets of proceedings.

252 Under Article 184(4) of the Rules of Procedure, where the appeal has not been brought by an intervener at first instance, the latter may not be ordered to pay costs in the appeal proceedings unless it participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court may decide that it is to bear its own costs. Since the Council, intervener at first instance, participated in the written part of the procedure before the Court, it must be ordered to bear its own costs relating both to the appeal proceedings and to the proceedings at first instance.

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

1. **Sets aside point 1 of the operative part of the judgment of the General Court of the European Union of 22 September 2021, *Altice Europe* v *Commission* (T-425/18, EU:T:2021:607);**

2. **Sets aside point 2 of the operative part of the judgment of the General Court of the European Union of 22 September 2021, *Altice Europe* v *Commission* (T-425/18, EU:T:2021:607) to the extent that it rejects the application for the annulment of Article 4 of Commission Decision C(2018) 2418 final of 24 April 2018 imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Council Regulation (EC) No 139/2004 (Case M.7993 – Altice/PT Portugal);**

3. **Dismisses the appeal as to the remainder;**

4. **Annuls Article 4 of Commission Decision C(2018) 2418 final;**

5. **Fixes the amount of the fine imposed on Altice Group Lux Sàrl in respect of the infringement found in Article 2 of Decision C(2018) 2418 final at EUR 52 912 500;**

6. Orders Altice Group Lux Sàrl to bear, in addition to its own costs, five sixths of the costs incurred by the European Commission in the proceedings at first instance and on appeal;

7. Orders the European Commission to pay one sixth of its own costs incurred in the proceedings at first instance and on appeal;

8. Orders the Council of the European Union to bear its own costs incurred in the proceedings at first instance and on appeal.

Jürimäe Piçarra Safjan

Jääskinen Gavalec

Delivered in open court in Luxembourg on 9 November 2023.

A. Calot Escobar
Registrar

K. Jürimäe
President of the Chamber