Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

17 December 2015 *

(Competition — Abuse of dominant position — Polish telecommunications market — Decision establishing an infringement of Article 102 TFEU — Conditions imposed by the incumbent operator for allowing paid access for new operators to the network and to wholesale broadband access services — Legitimate interest in finding that an infringement was committed — Fines — Obligation to state reasons — Gravity of the infringement — Mitigating circumstances — Proportionality — Unlimited jurisdiction — 2006 Guidelines on the method of setting fines)

In Case T-486/11,

**Orange Polska S.A.**, formerly Telekomunikacja Polska S.A., established in Warsaw (Poland), represented initially by M. Modzelewska de Raad, P. Paśnik, S. Hautbourg, lawyers, A. Howard, Barrister, and C. Vajda QC, and subsequently by M. Modzelewska de Raad, P. Paśnik, S. Hautbourg, A. Howard and D. Beard QC,

applicant,

supported by

**Polska Izba Informatyki i Telekomunikacji**, represented initially by P. Rosiak, and subsequently by K. Karasiewicz, lawyers,

intervener,

v

**European Commission**, represented initially by B. Gencarelli, K. Mojzesowicz and G. Koleva, and subsequently by K. Mojzesowicz, G. Koleva et M. Malferrari and finally by G. Koleva, M. Malferrari, É. Gippini Fournier and J. Szczodrowski, acting as Agents,

defendant,

supported by

**European Competitive Telecommunications Association**, represented initially by P. Alexiadis and J. MacKenzie, and subsequently by J. MacKenzie, Solicitors,

intervener,

* Language of the case: English.

APPLICATION for the full or partial annulment of Commission Decision C(2011) 4378 final of 22 June 2011 relating to a proceeding under Article 102 TFEU (Case COMP/39.525 — Telekomunikacja Polska) and for a reduction of the fine imposed by the Commission in Article 2 of that decision,

THE GENERAL COURT (Eighth Chamber),

composed of D. Gratsias, President, M. Kancheva (Rapporteur) and C. Wetter, Judges,

Registrar: L. Grzegorczyk, Administrator,

having regard to the written procedure and further to the hearing on 26 June 2015,

gives the following

## Judgment

### Background to the dispute

1 The applicant, Orange Polska S.A., is a telecommunications company created following the acquisition on 7 November 2013 by Telekomunikacja Polska S.A. ('T.P.') of two companies: Orange Polska sp. z o.o. and Polska Telefonia Komórkowa sp. z o.o. ('PTK'). The applicant is therefore the legal successor of TP, a telecommunications undertaking incorporated in 1991 following the privatisation of the former State monopoly Poczta Polska, Telegraf i Telefon.

2 On 22 June 2011, the European Commission adopted Decision C(2011) 4378 final relating to a proceeding under Article 102 TFEU (Case COMP/39.525 — Telekomunikacja Polska) ('the contested decision'), addressed to TP.

1. *The technological, legislative and factual context of the contested decision*

3 The contested decision concerns the provision of wholesale broadband internet access services by means of unbundled access to the local loop in Poland from 2005 to 2009.

4 The local loop is the physical twisted metallic pair circuit connecting the network termination point at the subscriber's premises to the main distribution frame or equivalent facility in the fixed public telephone network.

5 Unbundled access to the local loop allows new entrants, usually called 'alternative operators' ('AOs') — as opposed to the incumbent operators of the telecommunications networks — to use the pre-existing telecommunications infrastructure belonging to those incumbent operators in order to offer various services to end-users, in competition with the incumbent operators. Unbundled access to the local loop has developed and been regulated in the context of the liberalisation of the telecommunications sector. The main reason for that development was the fact that it was not economically viable for AOs to duplicate a telecommunications infrastructure that was comparable in terms of technological performance and geographical coverage to that of the incumbent operators.

6 Local loop unbundling in the European Union has been implemented in accordance with the 'investment ladder' concept. According to that concept, in order to access the incumbent operator's network, AOs first choose the least expensive technological solutions, such as the wholesale rental of lines belonging to the incumbent operator. Then, once their client-base has been established, AOs move on to solutions which require more investment in the construction of sections of their own

networks which are connected to the incumbent operator's network. Although the latter solutions are more expensive, they provide AOs with more autonomy from the incumbent operator and make it possible to offer subscribers more complex and varied services.

7 The different telecommunications services that can be provided to end-users through the local loop include high bit-rate data transmission services for fixed internet access and for multimedia applications based on digital subscriber line (DSL) technology.

8 Fixed broadband internet access can also be provided by means of other technologies using other infrastructures, for example, new loops with high-capacity optical fibre, cable television infrastructure (cable modem technology) or LAN Ethernet networks, the territorial scope of which may be extended by the use of WLAN technologies which allow data transmission by radio waves (Wireless-Fidelity or Wi-Fi). The size of those infrastructures is, however, generally limited and their development involves significant investment.

9 The use of pre-existing infrastructure covering very extensive geographical areas therefore explains the popularity of DSL technology as opposed to the alternative technologies. In Poland, from 2005 to 2010, the share of DSL technology in the market for technologies allowing fixed broadband internet access always remained higher than 50%, even though it decreased (from 62% to above 50%).

10 AOs wishing to offer broadband internet access based on DSL technology to end-users may purchase wholesale broadband access products from the incumbent network operator. On the Polish market, during the period covered by the contested decision, two wholesale broadband access products existed, namely unbundled access to the local loop itself (Local Loop Unbundling, or 'LLU access') and broadband access (Bitstream access, or 'BSA').

11 There are two key differences, apart from the technical arrangements, between LLU and BSA access. First, LLU access requires AOs to construct sections of their own network in order to obtain physical access to the incumbent operator's network infrastructures. It therefore involves greater investment by AOs. Secondly, it gives AOs greater control over the parameters of the services provided to retail customers, as well as the possibility of offering them both internet access services and voice communication services. BSA, although less expensive, entails more technological constraints for AOs.

12 Access to the incumbent operator's network, whether by LLU or BSA, is a process involving several stages. It is possible to distinguish three main stages of access to the network. At the first stage, AOs negotiate agreements with the incumbent operator regarding the conditions of access to its network. At the second stage, AOs connect to the incumbent operator's network. At the third stage, AOs request activation of the subscriber lines. Each of those stages of access is divided into several sub-stages which depend inter alia on the technological solutions used for LLU and BSA access. During those three stages, AOs may request the incumbent operator to provide general information regarding its network.

13 Local loop unbundling is governed at EU level inter alia by Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop (OJ 2000 L 336, p. 4) and Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 118, p. 33). The provisions of those instruments were implemented in Poland even before its accession to the European Union, by successive amendments to the ustawa Prawo telekomunikacyjne (Law on telecommunications).

14 In essence, that regulatory framework requires the operator identified by the national regulatory authority as the operator with significant market power, which is generally the incumbent operator, to grant AOs unbundled access to its local loop and to related services under transparent, fair and non-discriminatory conditions that are at least as favourable as the conditions determined in a

reference offer. The reference offer is adopted as part of an administrative procedure before the national regulatory authority. The operator with significant market power is required to prepare a draft reference offer and to submit it for approval by that authority. Next, the draft reference offer is subject to consultations with market players. The national regulatory authority has the power to impose changes to the draft reference offer and, at the end of the consultation, it adopts a decision implementing the final reference offer.

15 Quite apart from its role in the procedure to identify the operator with significant market power and to adopt the reference offer, the national regulatory authority has other competences. In particular, it acts on its own initiative, or at the request of an interested operator, to ensure non-discrimination, fair competition and economic efficiency in the market and issues binding decisions to resolve disputes between the operator with significant market power and AOs.

16 In Poland, the national regulatory authority, namely the President of the Urząd Regulacji Telekomunikacji i Poczty (Office of Telecommunications and Post Regulation), replaced as of 16 January 2006 by the President of the Urząd Komunikacji Elektronicznej (Office for Electronic Communications) (the national regulatory authority being referred to hereinafter as 'UKE'), found that TP had significant power in the wholesale market for broadband access. TP was therefore required to ensure that AOs have transparent and non-discriminatory access to its broadband network and to submit reference offers applicable to LLU and BSA access services. Those offers, after having been the subject of consultations with interested parties, were implemented by decisions of the national regulatory authority. The first reference offer relating to LLU access was adopted on 28 February 2005 and the first reference offer relating to BSA access services ('the BSA reference offer') was adopted on 10 May 2006. Those offers have since been amended on several occasions by successive decisions of UKE.

17 From 2005 onwards, the national regulatory authority acted on several occasions to remedy TP's failures to comply with its regulatory obligations, including by imposing fines upon it. In 2009 UKE initiated a process that was intended to lead to a functional separation of TP. In order to avoid that functional separation, on 22 October 2009 TP signed a memorandum of understanding with UKE ('the agreement with UKE'), in accordance with which it voluntarily undertook, first, to comply with its regulatory obligations, to conclude agreements on conditions of access with AOs in a manner consistent with the relevant reference offers and to comply with the principle of non-discrimination with respect to AOs. In addition, it undertook to introduce a forecasting system for AO orders, to open up access to its applications in order to allow AOs to obtain necessary general information, and to terminate the judicial proceedings that it had brought against UKE's decisions implementing reference offers or amending agreements on the conditions of access concluded between TP and AOs. Finally, TP undertook to invest in the modernisation of its broadband network in order to allow at least 1 200 000 new broadband lines to be created.

2. *The administrative procedure*

18 From 23 to 26 September 2008, in cooperation with the Polish competition authority, the Commission carried out inspections at TP's premises of located in Warsaw (Poland), in accordance with Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1).

19 On 17 April 2009, the Commission decided to initiate, against TP, proceedings within the meaning of Article 2 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18).

20 On 26 February 2010, the Commission adopted a statement of objections, to which TP replied on 2 June 2010. A hearing was organised on 10 September 2010 at the request of TP.

21 On 28 January 2011, the Commission sent TP a letter drawing TP's attention to a number of items of evidence relating to the objections raised by the Commission, stating that it might use those objections in any final decision ('the letter of facts'). TP replied to that letter by letter of 7 March 2011.

3. *The contested decision*

22 On 22 June 2011 the Commission adopted the contested decision, which was notified to TP on 24 June 2011. A summary of the decision was published in the *Official Journal of the European Union* of 9 November 2011 (OJ 2011 C 324, p. 7).

23 In the contested decision, the Commission identified three relevant product markets, namely:

— the market for wholesale broadband access (the wholesale BSA market),

— the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location (the wholesale LLU market), and

— the retail mass market, which is the downstream market of standard broadband products offered at a fixed location by telecommunications operators to their own end-users, whether provided through DSL, cable modem, LAN/WLAN or any other technology, excluding mobile broadband services (recitals 581 to 625 of the contested decision).

24 According to the contested decision, the relevant geographic market covered the entire territory of Poland (recital 626 of the contested decision).

25 The Commission found that TP was the only wholesale supplier of BSA and LLU broadband access in Poland. With regard to the retail market, the Commission found that TP held a dominant position since, in terms of revenue, its market share was within the range of 46% to 57% and, in terms of number of lines, its market share was of the order of 40% to 58% (recitals 669, 672 and 904 of the contested decision).

26 The Commission took the view that TP had abused its dominant position in the Polish wholesale BSA market and the Polish wholesale LLU market by refusing to give access to its network and to supply BSA and LLU wholesale products (recital 803 and Article 1 of the contested decision). The aim of that abuse, which occurred in the wholesale market, was to protect TP's position in the retail market (recitals 710 and 865 of the contested decision).

27 The Commission took the view that TP had developed a strategy, the existence of which was confirmed by various internal documents of TP, to limit competition at all stages of the procedure for accessing its network (recitals 707 to 711 of the contested decision).

28 The Commission stated that, in order to achieving that strategy, TP engaged in complex behaviour, consisting of the following five elements:

— proposing unreasonable terms to AOs in the agreements concerning access to BSA and LLU products, that is, the exclusion or amendment of contractual clauses and the extension of deadlines to the detriment of AOs (recitals 165 to 295 and 714 to 721 of the contested decision);

— delaying the process of negotiating agreements concerning access to BSA and LLU products (recitals 296 to 374 and 722 to 747 of the contested decision);

— limiting access to its network (recitals 375 to 443 and 748 to 762 of the contested decision);

— limiting access to subscriber lines (recitals 444 to 510 and 763 to 782 of the contested decision);

— refusing to provide reliable and accurate general information indispensable for AOs to take decisions regarding access (recitals 511 to 565 and 783 to 792 of the contested decision).

29 The Commission stated that TP's aforementioned practices had had a cumulative effect on the AOs, which encountered obstacles at each stage of the procedure for accessing TP's wholesale products. The Commission indicated that although, taken individually, each of the obstacles raised by TP might not seem to be very harmful, taken as a whole, they formed a pattern of abusive conduct, the objective of which was to deny AOs access to the wholesale broadband access market (recital 713 of the contested decision).

30 The Commission concluded that the abuse committed by TP constituted a single and continuous infringement of Article 102 TFEU. It considered that that infringement had started on 3 August 2005, the date on which the first negotiations between TP and an AO regarding access to TP's network on the basis of the reference offer for LLU access had started, and that it had lasted until at least 22 October 2009, the date on which, after the Commission had initiated proceedings, the agreement with UKE was signed (Article 1 and recital 909 of the contested decision) ('the period of the infringement').

31 The Commission penalised TP for that infringement of Article 102 TFEU by imposing on it a fine calculated in accordance with the rules set out in the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2, 'the 2006 Guidelines').

32 The Commission first determined the basic amount of the fine by calculating 10% of the average value of sales made by TP on the relevant markets and multiplying the number obtained by a factor of 4.2, corresponding to the duration of the infringement determined at four years and two months. The basic amount obtained on the basis of that calculation was EUR 136 000 000 (recitals 898 to 912 of the contested decision).

33 Next, the Commission decided not to adjust the basic amount of the fine on the basis of aggravating or mitigating circumstances. In particular, it refused to take into account, by way of mitigating circumstances, the arguments put forward by TP in its letter of 7 March 2011 replying to the letter of facts (recitals 914 to 916 of the contested decision).

34 Finally, the Commission acknowledged that TP's conduct, at issue in the contested decision, had also been the subject of decisions of UKE fining TP for breach of its regulatory obligations. In order to take account of those fines, the Commission deducted their amount from the basic amount of the fine and set the final amount of the fine at EUR 127 554 194.

## Procedure and forms of order sought by the parties

35 By application lodged at the Court Registry on 2 September 2011, the applicant brought the present action.

36 By document lodged at the Court Registry on 23 December 2011, Netia S.A. sought leave to intervene in support of the form of order sought by the Commission.

37 By document lodged at the Court Registry on 28 December 2011, Polska Izba Informatyki i Telekomunikacji ('PIIT') sought leave to intervene in support of the form of order sought by the applicant.

38 The Commission lodged its defence on 13 January 2012.

39 By letter of 10 February 2012, the applicant requested confidential treatment vis-à-vis Netia and PIIT of certain information in the application and its annexes.

40 By letter of 9 March 2012, the applicant requested confidential treatment vis-à-vis Netia and PIIT of certain information in the annexes to the defence.

41 By letter of 4 April 2012, the applicant requested confidential treatment vis-à-vis Netia and PIIT of certain information in the reply.

42 By order of 29 June 2012, the President of the First Chamber of the Court granted Netia leave to intervene.

43 On 21 September 2012 Netia lodged its statement in intervention.

44 By order of 7 November 2012, the President of the First Chamber of the Court granted PIIT leave to intervene.

45 By letter of 17 December 2012, the applicant requested confidential treatment vis-à-vis Netia and PIIT of certain information in the annexes to the rejoinder. By another letter of the same date, the applicant requested confidential treatment vis-à-vis PIIT of certain information in the annexes to the statement in intervention of Netia.

46 By document lodged at the Registry on 24 January 2013, the European Competitive Telecommunications Association ('ECTA') sought leave to intervene in support of the form of order sought by the Commission.

47 On 1 February 2013, PIIT lodged its statement in intervention. The applicant did not request the confidential treatment of information contained in that statement.

48 By letter of 15 February 2013, the applicant raised objections to the intervention of ECTA.

49 By letter of 17 March 2013, the Commission submitted its observations on the statement in intervention of PIIT.

50 By letter of 19 March 2013, the applicant submitted its observations on Netia's statement in intervention. The Commission did not submit observations on that statement in intervention.

51 By letter of 14 April 2013, the applicant submitted its observations on the statement in intervention of PIIT.

52 By letter of 29 May 2013, the applicant requested confidential treatment vis-à-vis Netia and PIIT of certain information in the annexes to its observations on Netia's statement in intervention.

53 None of the requests for confidential treatment lodged by the applicant has been contested.

54 By order of the President of the First Chamber of the Court of 3 September 2013, ECTA was granted leave to intervene in the present case in support of the form of order sought by the Commission, that intervention being limited to the submission of observations during the oral procedure, pursuant to Article 116(6) of the Rules of Procedure of 2 May 1991.

55 After a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Eighth Chamber, to which the present case was, consequently, assigned.

56 By letter of 5 November 2014, Netia withdrew its intervention.

57 By letter of 17 December 2014, the Commission submitted its observations on the withdrawal of Netia's intervention.

58 By order of 26 February 2015, the President of the Eighth Chamber of the Court removed the intervention of Netia from the Court's register and ordered Netia to bear its own costs.

59 On hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the parties to respond to certain written questions. The parties complied with that request within the time allowed.

60 The parties presented oral argument and answered questions put to them by the Court at the hearing on 26 June 2015.

61 The applicant, supported by PIIT, claims that the Court should:

— principally, annul the contested decision in full;

— in the alternative, annul Article 2 of the contested decision in full;

— in the further alternative, reduce the amount of the fine set out in Article 2 of the contested decision;

— order the Commission to pay the costs.

62 The Commission, supported by ECTA, contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

## Law

### 1. *The scope of the dispute*

63 By its first and second heads of claim, the applicant requests, principally, the annulment of the contested decision in full and, in the alternative, the annulment of Article 2 of the decision. By its third head of claim, the applicant requests that the Court, in the further alternative, adjust the amount of the fine. It is therefore necessary to examine in turn the claim for annulment and the claim for adjustment of the fine.

64 It is important, however, to note at the outset that, in support of its claim for adjustment, the applicant relies on two pleas in law, the first of which alleges an error of law and of assessment with respect to the calculation of the basic amount of the fine, and the second of which alleges errors of law and of assessment as well as a failure to take account of mitigating circumstances. It is clear that those pleas ask the Court to penalise non-compliance with a legal rule and are thus such, if well founded, as to lead to the partial annulment of the contested decision. They thus fall within the Court's review of legality and not, as such, within its unlimited jurisdiction.

65 It must be recalled that the unlimited jurisdiction conferred, pursuant to Article 261 TFEU, on the Court by Article 31 of Regulation No 1/2003 empowers the Court — in addition to carrying out a mere review of legality of the penalty, which enables the Court only to dismiss the action for annulment or to annul the contested measure — to substitute its own appraisal for the Commission's and, consequently, to vary the contested measure, even without annulling it, taking into account all the factual circumstances, by amending, in particular, the fine imposed where the question of the amount of the fine is before it (see, to that effect, judgments of 8 February 2007 in *Groupe Danone* v *Commission*, C-3/06 P, ECR, EU:C:2007:88, paragraphs 61 and 62; of 3 September 2009 in *Prym and Prym Consumer* v *Commission*, C-534/07 P, ECR, EU:C:2009:505, paragraph 86; and of 5 October 2011 in *Romana Tabacchi* v *Commission*, T-11/06, ECR, EU:T:2011:560, paragraph 265).

66 It is also apparent from the case-law that an action in which the Court is asked to exercise its unlimited jurisdiction with respect to a decision imposing a penalty, a jurisdiction conferred by Article 261 TFEU, but exercised pursuant to Article 263 TFEU, necessarily comprises or includes a request for the annulment, in full or in part, of that decision (see, to that effect, order of 9 November 2004 in *FNICGV* v *Commission*, T-252/03, ECR, EU:T:2004:326, paragraph 25).

67 It is therefore only after the Court has finished reviewing the legality of the decision referred to it, in the light of the pleas in law submitted to it and of grounds which, where applicable, it has raised of its own motion, that, in the event that it does not annul the decision in full, it is to exercise its unlimited jurisdiction in order, first, to draw the appropriate conclusions from its findings with respect to the lawfulness of that decision and, secondly, to establish, according to the information which has been brought to its attention (see, to that effect, judgments of 8 December 2011 in *KME Germany and Others* v *Commission*, C-389/10 P, ECR, EU:C:2011:816, paragraph 131, and 10 July 2014 in *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, ECR, EU:C:2014:2062, paragraph 213), whether it is appropriate, on the date on which it adopts its decision (judgments of 11 July 2014, *Esso and Others* v *Commission*, T-540/08, ECR, EU:T:2014:630, paragraph 133; *Sasol and Others* v *Commission*, T-541/08, ECR, EU:T:2014:628, paragraph 438; and *RWE and RWE Dea* v *Commission*, T-543/08, ECR, EU:T:2014:627, paragraph 257), to substitute its own assessment for that of the Commission, so that the amount of the fine is appropriate.

68 Consequently, the pleas put forward by the applicant in support of its claim for adjustment will be examined in the light of its claim for annulment, since, in actual fact, they raise questions of pure legality. If those pleas were to prove well founded, bearing in mind that they are not such as to lead to the annulment in full of the contested decision (see paragraph 64 above), account would be taken of them by way of the Court's unlimited jurisdiction. Similarly, if it followed from the examination of those pleas that a particular complaint, relating, for example, to considerations of fairness (see, to that effect, judgment of 17 December 1959 in *Macchiorlatti Dalmas* v *High Authority*, 1/59, ECR, EU:C:1959:29, p. 425), could support that claim for adjustment, that complaint would naturally be examined in that way.

2. *The claim for annulment*

*The claim for the annulment of the contested decision in full*

69 In support of this head of claim, the applicant puts forward a single plea in law, alleging an error of law and a failure to state reasons concerning the existence of a legitimate interest in finding that an infringement was committed in the past.

70 In support of that single plea in law — which it is nevertheless appropriate to break down into two separate complaints, since a distinction should be made between the question of the obligation to state reasons, which requires that the contested decision contain the key factual and legal elements in order to show clearly and unequivocally the reasoning of the institution which adopted the measure, and the merits of the reasons given by that institution (judgments of 2 April 1998 in *Commission* v *Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 67, and 16 October 2014 in *Eurallumina* v *Commission*, T-308/11, EU:T:2014:894, paragraph 33) — the applicant argues that it is apparent from Article 7 of Regulation No 1/2003 that, where the Commission takes a decision finding that an infringement was committed in the past, it must establish a legitimate interest in pursuing its investigation and provide an appropriate explanation in its decision. The duty to establish and state reasons for the existence of a legitimate interest is independent of whether, in its decision, the Commission imposes a fine.

71 According to the applicant, that interpretation of Article 7 of Regulation No 1/2003 complies with the case-law of the Court of Justice, in particular the judgments of 2 March 1983 in *GVL* v *Commission* (7/82, ECR, EU:C:1983:52) and of 6 October 2005 in *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* (T-22/02 and T-23/02, ECR, EU:T:2005:349). It is also justified by the need to ensure respect for the procedural safeguards provided for by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), signed in Rome on 4 November 1950, and Article 47 of the Charter of Fundamental Rights of the European Union.

72 The applicant recalls that, according to the contested decision, the infringement that TP is alleged to have committed ended on 22 October 2009, and thus before the adoption of the contested decision on 22 June 2011. Since the Commission did not demonstrate, in the contested decision, its legitimate interest in pursuing the investigation and establishing the existence of that infringement, the decision is vitiated by an error of law and a failure to state reasons and should therefore be annulled in full.

73 The Commission disputes the applicant's arguments and contends that this plea should be rejected.

74 In that regard, first, with respect to the complaint alleging failure to state reasons for a legitimate interest in establishing an infringement committed in the past, it should be recalled that, according to Article 7(1) of Regulation No 1/2003:

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

75 That provision must be read in the light of the statement of reasons for the Proposal for a Council Regulation on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] and amending Regulations (EEC) No 1017/68, (EEC) No 2988/74, (EEC) No 4056/86 and (EEC) No 3975/87 ('Regulation implementing Articles [101 TFEU] and [102 TFEU]') (OJ 2000 C 365 E, p. 284). The statement of reasons relating to Article 7 explains that in that provision 'the

Commission is empowered to adopt a decision finding an infringement not only when it orders the termination of an infringement or imposes a fine, but also where the infringement has already come to an end and no fine is imposed. In conformity with the case-law of the Court of Justice, however, the power of the Commission to adopt an infringement decision in such circumstances is limited to cases where it has a legitimate interest in doing so. This may be the case where there is a danger that the addressee might re-offend, or where the case raises new issues clarification of which is in the public interest'.

76 It follows from the above that the Commission must establish the existence of a legitimate interest in finding an infringement where both the infringement has ceased and the Commission does not impose a fine.

77 That conclusion is consistent with the case-law of the Court cited by the applicant in its pleadings and with more recent case-law which, in essence, acknowledges the existence of a link between, on the one hand, the obligation imposed on the Commission to demonstrate a legitimate interest in finding an infringement and, on the other, the time-limit on its power to impose fines. The Court has held that the time-limit on the Commission's power to impose fines could not affect its implicit power to find that an infringement had been committed. However, the exercise of that implicit power to adopt a decision establishing an infringement after expiry of the limitation period is conditional on the Commission showing a legitimate interest in making such a finding (judgments of 16 November 2006 in *Peróxidos Orgánicos* v *Commission*, T-120/04, ECR, EU:T:2006:350, paragraph 18, and of 6 February 2014 in *Elf Aquitaine* v *Commission*, T-40/10, EU:T:2014:61, paragraphs 282 and 284 to 287).

78 It follows that the interpretation of Article 7(1) of Regulation No 1/2003 put forward by the applicant, to the effect that the Commission must show a legitimate interest in finding an infringement which occurred in the past, notwithstanding the fact that it is punishing that infringement by a fine, is incorrect. Since that institution is not subject, in that respect, to the obligation to state reasons, the first complaint of the plea in law must be dismissed.

79 Next, inasmuch as, in the present case, it is undisputed that the Commission's power to impose fines was not time-barred and that the Commission decided to impose a fine on TP, the applicant claims incorrectly that the Commission erred in law in that it failed to show, in the contested decision, the existence of a legitimate interest in finding an infringement which occurred in the past. The second complaint of the first plea in law must therefore also be rejected.

80 Consequently, this plea must be dismissed as unfounded, as must, accordingly, the head of claim seeking the annulment in full of the contested decision.

*The claim seeking partial annulment of the contested decision*

81 In support of its claim for the partial annulment of the contested decision, the applicant raises two pleas in law. The two pleas incorrectly put forward in support of the claim for adjustment should be added thereto, except with respect to the elements of those pleas which specifically concern unlimited jurisdiction.

The first plea in law

82 The first plea is based on Article 6 of the ECHR and Article 47 of the Charter of Fundamental Rights. According to the applicant, it is apparent from those two articles read together that a fine may be imposed only by an 'independent and impartial tribunal established by law' which fulfils all the procedural safeguards provided for in Article 6 ECHR. Not only is the Commission not a court, but it combines prosecution and decision-making functions. The fines it imposes, which are indeed

manifestly of a 'criminal' nature within the meaning of Article 6 of the ECHR, are therefore not imposed by a body which is truly independent of the administration and thus infringe the principle of impartiality enshrined in the above provisions.

83 The applicant declined to answer the question put by the Court by way of measures of organisation of procedure with respect to the appropriate conclusions to be drawn, in relation to that plea, from the judgments of 8 December 2011 in *Chalkor* v *Commission* (C-386/10 P, ECR, EU:C:2011:815, paragraphs 62, 63 and 81) and 18 July 2013 in *Schindler Holding and Others* v *Commission* (C-501/11 P, ECR, EU:C:2013:522, paragraphs 33 to 38), of which formal notice was taken at the hearing. The applicant nevertheless asked the Court to exercise its unlimited jurisdiction, in accordance with the principles established in the case-law cited above, and, accordingly, to take account of both Article 6 ECHR and Article 47 of the Charter of Fundamental Rights, as when examining the arguments put forward in support of the head of claim seeking adjustment of the amount of the fine.

84 It must therefore be held, in respect of the claim for annulment, that the applicant withdrew its first plea and, consequently, that it is no longer necessary for the Court to adjudicate on that plea.

The second plea in law

85 The second plea alleges breach of the applicant's rights of defence. By this plea, the applicant submits that Article 2 of the contested decision infringes its right to be heard and its rights of defence, enshrined in Articles 41 and 48 of the Charter of Fundamental Rights and Article 27 of Regulation No 1/2003 and in Articles 10 and 15 of Regulation No 773/2004.

86 According to the applicant, the case-law of the Court of Justice and of the General Court relating to the required content of the statement of objections is superseded by the provisions of the Charter of Fundamental Rights listed in the previous paragraph. Thus, since the entry into force of the Lisbon Treaty, the Commission is under an obligation to provide in the statement of objections both the factual and legal elements required to prove the infringement and the factual and legal elements which are relevant for the calculation of the amount of the fine. As regards the calculation of the amount of the fine, the Commission is under an obligation to present in the statement of objections not only the key elements required for the determination of the basic amount of the fine, but also the elements of which it takes account for adjustments to the basic amount, namely the facts capable of constituting aggravating and mitigating circumstances. Similarly, the final amount of the fine likely to be imposed on the undertaking in question should, according to the applicant, be set out in the statement of objections. The possibility for the applicant to contest the final amount of the fine before the Court is not sufficient to ensure that the rights flowing from Articles 41 and 48 of the Charter of Fundamental Rights are protected.

87 In the present case, the Commission is alleged to have infringed the provisions listed in paragraph 85 above, by failing to indicate in the statement of objections and in the letter of facts sent to the applicant, the elements that it was going to consider by way of mitigating circumstances. In particular, and despite the arguments submitted by the applicant in that regard during the administrative procedure, the Commission failed to conduct an analysis, in those documents, of the impact of the agreement between the applicant and UKE on the gravity of the infringement or on the level of the fine.

88 The Commission disputes the applicant's arguments and contends that this plea should be rejected.

89 As a preliminary point, it should be noted that, in the contested decision, the Commission did not make any adjustments to the amount of the fine. In recitals 913 to 916 of the contested decision, the Commission rejected the arguments submitted by the applicant during the administrative procedure relating to the existence of mitigating circumstances.

90 In that regard, it should be observed that, according to settled case-law, provided that the Commission indicates expressly in the statement of objections that it will consider whether it is appropriate to impose fines on the undertakings concerned and that it also sets out the principal elements of fact and of law that may give rise to a fine, such as the gravity and the duration of the alleged infringement and the fact that it has been committed intentionally or negligently, it respects the undertakings' right to be heard. In doing so, it provides them with the necessary elements to defend themselves not only against a finding of infringement but also against the fact of being fined (see judgment of 25 October 2005 in *Groupe Danone* v *Commission*, T-38/02, ECR, EU:T:2005:367, paragraph 50 and the case-law cited).

91 Settled case-law further states that so far as the setting of the amount of the fines is concerned, the rights of defence of the undertakings in question are guaranteed before the Commission by virtue of the fact that they have the opportunity to make submissions on the duration, the gravity and the foreseeability of the anti-competitive nature of the infringement. Moreover, undertakings have an additional guarantee, as regards the setting of the amount of the fine, in that the Court has unlimited jurisdiction and may in particular cancel or reduce the fine pursuant to Article 31 of Regulation No 1/2003. The Court has therefore concluded that the Commission was entitled to confine itself to indicating, without further details, in the statement of objections that it would take account of the individual role played by each undertaking in the agreements in question and that the amount of the fine would reflect any aggravating or mitigating circumstances, since the Guidelines on the method of setting fines detail the circumstances which may be regarded as such (see judgment of 27 September 2012 in *Koninklijke Wegenbouw Stevin* v *Commission*, T-357/06, ECR, EU:T:2012:488, paragraph 217 and the case-law cited).

92 The arguments raised by the applicant in this plea should be examined in the light of the principles recalled in paragraphs 90 and 91 above.

93 Before carrying out that examination, it should also be stated, first, that the rules set out in the judgment in *Koninklijke Wegenbouw Stevin* v *Commission* (cited in paragraph 91 above, EU:T:2012:488) apply to both aggravating and mitigating circumstances. The rule laid down by the Court requires the Commission to state, in the statement of objections, that it will take account of the factors that may affect the final amount of the fine, and that includes both aggravating circumstances and mitigating circumstances.

94 Secondly, it should be noted that, contrary to what the applicant submits, the principles set out in paragraphs 90 and 91 above were not affected by the entry into force of the Lisbon Treaty or by the statements put forward by the Commission in its notice on best practices for the conduct of proceedings concerning Articles 101 [TFEU] and 102 TFEU (OJ 2011 C 308, p. 6).

95 It is clear from the case-law of the Court of Justice, elaborated in the context of the application of Article 47 of the Charter of Fundamental Rights, that the entry into force of the Lisbon Treaty, incorporating the Charter of Fundamental Rights into European Union primary law, has not substantially changed the content of the right to a fair trial, as it derives inter alia from Article 6 ECHR and as recognised at EU level as a general principle of EU law (see, to that effect, judgment of 3 May 2012 in *Legris Industries* v *Commission*, C-289/11 P, EU:C:2012:270, paragraph 36 and the case-law cited). Those considerations may be extended to the right to be heard and, more broadly, to the rights of the defence as a whole, relied on by the applicant, to the extent that those rights help to ensure that a fair trial is held.

96 Moreover, with respect to the notice on best practices, referred to in paragraph 94 above, it is clear that, given the fact that it was published on 20 October 2011, that is to say, several months after the adoption of the contested decision, it is not applicable in this case, pursuant to point 6 of that notice (see, by analogy, judgment of 17 May 2011 in *Elf Aquitaine* v *Commission*, T-299/08, ECR, EU:T:2011:217, paragraph 148).

97 With respect to the application of the rules arising from the case-law referred to in paragraphs 90 and 91 above, in the present case, it should be noted, first, that in paragraph 522 of the statement of objections, the Commission stated its intention to impose a fine on TP in respect of an abuse characterised as a refusal to provide services. In the following paragraphs of that document, the Commission indicated that it was of the opinion that the abuse by TP had been committed intentionally or negligently and that TP was aware that its conduct could affect competition in the internal market. Secondly, the Commission stated in paragraph 524 of the statement of objections that, in determining the amount of the fine, it would take account of all the relevant circumstances of the case, in particular the gravity and duration of the infringement, and that it would apply the rules set out in the 2006 Guidelines. With respect to the gravity of the infringement, the Commission stated, in paragraph 528 of the statement of objections, that it would take account of its nature, its actual impact on the market where it was measurable, and the extent of the affected geographic market. With respect to the duration of the infringement, the Commission stated, in paragraph 529 of the statement of objections, that the infringement had started at the latest on 3 August 2005 and that it had not yet ended. Thirdly, the Commission stated, in paragraph 525 of the statement of objections, that the amount of the fine could be affected by a possible taking into account of the aggravating or mitigating circumstances listed in points 28 and 29 of those guidelines.

98 Furthermore, it is clear from the letter of facts, which is composed of a series of written exchanges between the Commission and TP and which was sent to TP after the hearing, that the Commission provided guidance with respect to the value of sales, as defined in point 13 of the 2006 Guidelines, that it was going to use to calculate the basic amount of the fine.

99 The items listed in paragraphs 97 and 98 above support the conclusion that, in the present case, the Commission observed the principles set out in paragraphs 90 and 91 above. The arguments put forward by the applicant do not call that conclusion into question.

100 First, it follows from the case-law cited in paragraphs 90 and 91 above that, contrary to what the applicant maintains, the Commission was not required to state the total amount of the fine in the statement of objections.

101 Secondly, the Court rejects the applicant's argument that the Commission should have analysed, in the part of the statement of objections relating to penalties, the impact of the agreement with UKE on the gravity of the infringement or on the amount of the fine.

102 It is apparent from the file that the discussion relating to the taking into account of the agreement with UKE in the calculation of the fine was initiated by TP at an advanced stage of the administrative procedure, after the statement of objections had been sent. Thus, at first, in paragraphs 912 to 1009 of the response to the statement of objections, TP put forward the argument that, given the commitments made under the agreement with UKE, the Commission should acknowledge that the signing of that agreement marked the end of the infringement. The Commission shared that point of view in the letter of facts (paragraph 27). Secondly, in paragraphs 483 and 484 of the letter of 7 March 2011, sent in response to the letter of facts, TP put forward an argument that the agreement with UKE could be taken into account as a mitigating circumstance. TP reiterated that argument in a letter dated 6 June 2011, which it sent on its own initiative and in which it opined on the expediency of imposing a fine in this case.

103 Moreover, the Commission answered all those arguments, submitted after the statement of objections had been sent, in recitals 913 to 916 of the contested decision. Without prejudging the merits of the Commission's response, which is the subject of the plea alleging failure to take into account mitigating circumstances, it must be held that the fact that the Commission took a position in the contested decision on those arguments submitted after the statement of objections had been sent does not constitute a breach of TP's right to be heard or of its rights of the defence.

104 In the light of the foregoing considerations, the present plea must be rejected as unfounded.

The third plea in law

105 The third plea in law, alleging an error of law and of assessment with respect to the calculation of the basic amount of the fine, relates first and foremost to a failure to observe points 20 to 22 of the 2006 Guidelines.

106 Whilst stating that it does not dispute the existence of the infringement which it is alleged to have committed, the applicant is essentially requesting the Court to review the amount of the fine set out in the contested decision in the light of the principle of proportionality and taking account of the fact that the gravity of the infringement did not warrant the Commission using, in the calculation of the basic amount of the fine, 10% of the value of sales, within the meaning of point 13 of the 2006 Guidelines. The applicant's arguments concerning the disproportionate and therefore inappropriate and inequitable nature of that amount will be considered in the context of the claim for adjustment.

107 The present plea consists of two parts, by which the applicant alleges that the Commission, first, did not take due account of the fact that the infringement involved practices with different durations and intensities and, secondly, incorrectly assessed the impact of TP's conduct on the relevant market.

108 Before examining those two parts, it should be noted, first, that pursuant to Article 49(3) of the Charter of Fundamental Rights, the severity of penalties must not be disproportionate to the offence.

109 In the procedures initiated by the Commission in order to penalise infringements of competition rules, the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement and to apply those factors in a way which is consistent and objectively justified (judgments in *Telefónica and Telefónica de España* v *Commission*, cited in paragraph 67 above, EU:C:2014:2062, paragraph 196, and of 5 October 2011 in *Transcatab* v *Commission*, T-39/06, ECR, EU:T:2011:562, paragraph 189).

110 Next, it should be observed that according to Article 23(3) of Regulation No 1/2003, in order to determine the amount of a fine, it is necessary to take into account the duration of the infringement as well as its gravity.

111 As regards the gravity of an infringement, there is no binding or exhaustive list of criteria which must be taken into account in the assessment thereof. Nevertheless, it follows from the case-law that the factors capable of affecting the assessment of the gravity of infringements include, not only the particular circumstances of the case, but also its context and the dissuasive effect of fines, the conduct of the undertaking concerned, the role it played in the establishment of the practice in question, the profit which it was able to derive from that practice, its size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the European Union (judgment of 14 October 2010 in *Deutsche Telekom* v *Commission*, C-280/08 P, ECR, EU:C:2010:603, paragraphs 273 and 274; see also, judgment of 8 December 2011 in *KME Germany and Others* v *Commission*, C-272/09 P, ECR, EU:C:2011:810, paragraph 96 and the case-law cited).

112 The amount of the fine must also reflect objective factors such as the content and duration of the anti-competitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order, as well as the market share of the undertakings responsible and also any repeated infringements (see judgment in *KME Germany and Others* v *Commission*, paragraph 111 above, EU:C:2011:810, paragraph 97 and the case-law cited).

113 According to the 2006 Guidelines, on which the Commission based its calculation of the fine in this case, the gravity of the infringement is taken into account by the Commission in the first stage of the calculation of the fine, that is to say when determining its basic amount. Pursuant to point 19 of the 2006 Guidelines, the basic amount of the fine is related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement. According to point 20 of the 2006 Guidelines, the Commission is required to assess the gravity of the infringement on a case-by-case basis for each type of infringement, taking account of all the relevant circumstances of the case. According to points 21 and 22 of those guidelines, the Commission, as a general rule, sets the proportion of the value of sales taken into account at a level of up to 30%, and, in order to decide whether the proportion of the value of sales to be considered must be at the lower end or at the higher end of that scale, it takes account of factors such as the nature of the infringement, the combined market share of the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

114 Finally, as regards the role of the Court in the review of the amount of the fine, it should be recalled that the Court must review the legality of the contested decision on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out that review, the Court cannot use the Commission's margin of discretion — either as regards the choice of factors taken into account in the application of the criteria mentioned in the guidelines or as regards the assessment of those factors — as a basis for dispensing with an in-depth review of the law and of the facts (judgment in *KME Germany and Others* v *Commission*, paragraph 111 above, EU:C:2011:810, paragraph 102).

115 The review provided for by the treaties, the limits of which are defined by the case-law referred to in paragraphs 65 to 67 and 114 above, which entails a review by the Court of both the law and the facts, and a power to assess the evidence, to annul the contested decision and to alter the amount of a fine, is, contrary to the applicant's initial assertions, consistent with the requirements of the principle of principle of effective judicial protection set out in Article 47 of the Charter of Fundamental Rights (see, to that effect, judgment in *Schindler Holding and Others* v *Commission*, paragraph 83 above, EU:C:2013:522, paragraph 38 and the case-law cited).

116 The arguments put forward by the applicant in the present plea in law must be assessed in the light of these principles.

– The first part, alleging the failure to have regard to the fact that the duration of the various constituent elements of the infringement and the intensity of that infringement varied over time

117 The applicant argues that the Commission erred in law by refusing to take account of the fact that the duration of the various constituent elements of TP's infringement and its intensity had changed over time, on the grounds that abusive conduct could be observed throughout the infringement. The Commission thus overlooked a relevant parameter for establishing a fine proportionate to the gravity of the infringement, namely the fact that none of the conduct identified as forming part of the constituent elements of the infringement lasted for four years and two months.

118 The applicant supports those assertions by many arguments by which it seeks, essentially, to determine the exact duration of certain aspects of TP's conduct which, taken together, constitute the abuse of a dominant position committed by TP. It maintains that, given the cumulative effect of the errors by

the Commission in the calculation of the duration of that conduct, that abuse does not appear to be so serious as to justify the Commission establishing at a level of 10% the proportion of the value of sales constituting the starting point for the calculation of the basic amount of the fine. The applicant thus requests the Court to reduce the amount of the fine imposed on TP.

119 The applicant's arguments focus on four of the five elements constituting the abuse of a dominant position by TP (see paragraph 28 above).

120 First, regarding the proposal to AOs of unreasonable terms in the agreements on access to TP's network in BSA and LLU modes, the applicant submits that the Commission erred in law in finding that that aspect of the abuse had lasted from 3 August 2005 to 22 October 2009. In particular, with regard to the standard form contracts for BSA access, the applicant claims that version No 1 of TP's standard form contract, which entered into force on 22 December 2008, was consistent with the relevant reference offer regarding BSA access. Moreover, with respect to LLU access, version No 1 of TP's standard form contract, which entered into force on 17 February 2009, is consistent with the relevant LLU reference offer. Accordingly, it cannot be claimed that TP imposed disadvantageous stipulations on AOs in those contracts after 22 December 2008 with respect to BSA access, and 17 February 2009 with respect to LLU access. Moreover, several clauses of TP's standard form contracts which were disadvantageous for AOs were applied for even shorter periods.

121 Secondly, as regards the restriction on physical access to TP's network, the applicant argues, first, that the practice of rejecting AOs' access orders on procedural and technical grounds tapered down over the period starting in 2007 and ending in 2009. Next, the claim that TP overestimated the investments which AOs needed to make is excessive and affects only a single isolated case. Furthermore, as regards the refusal of access to TP's premises through installation ducts, the events at issue occurred in 2007. Finally, as regards the practice of delaying the implementation of orders placed by AOs for the construction or modification of the service access nodes ('SANs'), the applicant submits that the examples given by the Commission in the contested decision are not convincing, that those delays were caused by factors independent of TP and that the Commission does not give any examples of such conduct having occurred after July 2008.

122 Thirdly, with respect to the restriction of access to subscriber lines, the applicant submits that the practice lasted for less time than the entire period of the infringement established by the Commission. The refusal to provide BSA services on lines leased wholesale (as part of the wholesale line rental ((('WLR')) service, in which the AO provided fixed telephony services) ended in October 2007 and thus lasted only approximately one year, the delays in the repair of faulty lines ended in early 2008 and did not exceed a period of one year, the delays in the implementation of the orders for BSA access lasted only until the fourth quarter of 2007 and the delays in the implementation of the orders for LLU access ended in the first quarter of 2008.

123 Fourthly, regarding the refusal to provide AOs with reliable and accurate general information which they needed to make appropriate decisions in order to gain access to broadband products, the applicant submits that, already with effect from 2006, it implemented a number of initiatives seeking to improve the accuracy of its information and to give priority to the locations that the AOs intended to use. Regarding BSA access, the applicant improved access to its IT interface, in particular from March 2007 onwards, and undertook other initiatives, during 2007, to improve, technologically, access to general information. Regarding LLU access, it provided access to general information by sending, at the request of AOs, DVD support media. Regarding the problem of data transmission in an IT format which was difficult to use ('.pdf' files), this occurred in isolated cases.

124 In that regard, given the complexity of the infringement TP is alleged to have committed and the very detailed nature of the applicant's arguments, it is appropriate, before commencing their review, to describe the infringement as it is presented in the contested decision.

125 In the contested decision, the Commission found that TP had developed a strategy aimed at limiting competition at all stages of the procedure for AOs to access its network, namely during the negotiation of agreements on conditions for access to that network, at the stage of the connection of those AOs to that network and, finally, at the stage of the activation of the subscriber lines. That aim of that strategy, which was implemented in the market for wholesale BSA and LLU broadband access, was to protect TP's market share on the downstream market, namely the retail market in which telecom operators provide services to their own end-users (recitals 710 to 712 of the contested decision).

126 In order to demonstrate the existence of that strategy, the Commission relied, inter alia, on documents taken during inspections at TP's headquarters and on UKE's observations on TP's reply to the statement of objections. It is apparent from those documents, examined in recitals 148 to 155 and 554 to 556 of the contested decision, that the members of TP's board of directors developed a project aimed at preventing AOs from gaining access to TP's network, making it as difficult as possible to acquire information about the network's structure and thus retaining, for as long as possible, TP's retail clientele. It is apparent, moreover, from those documents that the implementation of that strategy involved, on the one hand, conduct directed against AOs and, on the other, conduct directed against the national regulatory authority, such as the deliberate refusal to cooperate with that authority, the considerable delay in the submission of the BSA reference offer, despite the legal obligation to do so (see paragraph 14 above) or the bringing of an action before the administrative courts against all decisions of the authority implementing the reference offers.

127 The contested decision provides a detailed description of the conduct adopted by TP in order to implement its strategy. Overall, that conduct was classified by the Commission into five groups constituting the five elements of the abuse of a dominant position, namely, first, the proposal to AOs of unreasonable terms in the agreements for access to the BSA and LLU products; secondly, delays in the process of negotiating agreements on access to BSA and LLU products; thirdly, restricting physical access to TP's network; fourthly, limiting access to subscriber lines; and fifthly, refusing to provide accurate and reliable information indispensable to AOs to take decisions relating to access (see paragraph 28 above).

128 First, regarding the proposal to AOs of unreasonable terms in the agreements for access to BSA and LLU products, in recitals 165 to 295 of the contested decision, the Commission stated that, according to the applicable rules, TP was required to enter into an agreement for access to its network with those AOs that requested BSA or LLU access on terms that were no less favourable for the AOs than the minimum requirements laid down in the BSA and LLU reference offers (see paragraphs 11 and 12 above). Notwithstanding that obligation, TP offered standard-form contracts whose terms did not meet the minimum requirements of the relevant reference offers. In that respect, with regard to contracts relating to BSA access, the Commission identified 18 types of contractual clauses affected by TP's practices which it classified into three categories: first of all, clauses which were favourable to AOs which were contained in the reference offer but deleted from the contracts offered by TP; next, clauses contained in the reference offer and amended to the detriment of AOs in the contracts offered by TP; and, finally, clauses in the reference offer relating to the fixing of certain time periods, amended to the detriment of AOs in the contracts offered by TP. With respect to contracts relating to LLU access, the Commission identified 10 types of contractual clauses affected by TP's practices which it classified into two categories: first, clauses which were favourable to AOs contained in the reference offer but deleted from the contracts offered by TP, and secondly, clauses contained in the reference offer but amended to the detriment of AOs in the contracts offered by TP. In recitals 714 to 721 of the contested decision, the Commission emphasized that the evidence gathered during the administrative procedure confirmed the repeated and significant nature of the non-compliance with the clauses set out in TP's reference offers. It stated that, although the reference offers adopted by UKE in 2006 for LLU access and in 2008 for BSA access contained standard form contracts that could be used by TP, TP had agreed to use them only after the signature of the agreement with UKE on 22 October 2009.

129 Secondly, with respect to the delaying of the negotiation of the agreements on access to BSA and LLU products, by relying on testimonies of AOs active in the Polish market and UKE's observations collected during the administrative procedure, the Commission identified various delaying tactics implemented by TP in order to avoid concluding contracts with AOs within a reasonable time. First of all, the Commission found that in 70% of cases, TP had not complied with the legal deadline requiring it to conclude the contract for access to its network with AOs within 90 calendar days and that, in many cases, those delays had reached periods exceeding one or even two years. The Commission then found that, on repeated occasions, TP had not complied with the statutory period of three days to send the contract proposal, exceeding it, in many cases, by dozens or even hundreds of days (recitals 300 to 314 of the contested decision). In addition, the Commission identified other delaying tactics, such as the fact that TP was regularly represented at the negotiations by personnel unauthorised to enter into contractual commitments (recitals 315 to 322 of the contested decision) or the fact that it delayed without justification the signing of the contracts (recitals 323 to 329 of the contested decision). Finally, the Commission found that those delaying tactics had led many AOs to involve the regulator in the negotiation process or simply to abandon their plans to connect to TP's network (recitals 300 and 305 of the contested decision).

130 Thirdly, as regards the restriction of physical access to TP's network, in recitals 375 to 399 of the contested decision, the Commission stated inter alia that, once the contract for access was signed, AOs submitted requests to TP for access to SANs for BSA access and an order for collocation or for correspondence cables for LLU access. The Commission explained that the AOs' orders had been subject to procedural and technical verifications, following which TP notified AOs of the technical conditions and an estimate of connection costs. Once those conditions were accepted, the AO was in a position, on that basis, to prepare a technical proposal for resubmission to TP (recital 375 of the contested decision).

131 The Commission gives examples of TP's anticompetitive practices implemented at that stage of connecting to its network, relying, in large part, on the testimony of AOs active in the Polish market, the minutes of checks carried out by UKE and the decisions of that authority. In that regard, the Commission stated, first, that TP had rejected, on procedural or technical grounds, many access orders. Those rejections concern 31% of BSA applications for the years 2006 to 2009 and 44% of LLU access requests during the period from 2006 to 2008, the situation having improved in 2009. Regarding LLU access, the Commission also noted cases where, despite a positive technical verification, AOs had not connected to TP's network, as a result, in particular, of the overestimation by TP of the connection-related costs (recitals 378 to 392 and 749 to 754 of the contested decision). Next, the Commission noted significant delays in the implementation of AOs' requests, both with respect to the construction or modification of SANs and to the implementation of the orders for LLU access. According to the testimonies relied on by the Commission, those delays, ranging from three to thirteen months even in the case of very simple works, made it impossible for AOs to conduct normal investment planning (recitals 393 to 396 and 755 to 758 of the contested decision). Finally, the Commission noted that PTK, the subsidiary of TP which was active in the relevant markets, did not experience the same access problems to the network of its parent company as other AOs. This confirms, according to the Commission, the ability to ensure faster access to that network (recitals 397 to 399 and 759 to 761 of the contested decision).

132 Fourthly, regarding the restriction of access to subscriber lines, in recitals 444 to 510 of the contested decision, the Commission stated that, once connected to a SAN (BSA access) or after having obtained access to a collocation space or having installed a correspondence cable (LLU access), AOs could, in principle, acquire their own customers. In order to do so, they were to send TP an order for the activation of the subscriber's line, a request which was the subject of a procedural and technical check by TP (recital 444 of the contested decision).

133 The Commission has identified, on the basis of the testimony of the AOs, the documents seized during the inspections and the records of the checks carried out by UKE, three types of practices implemented by TP which restricted AOs' access to subscribers. First, it found that TP rejected a large number of orders for the activation of lines on procedural and technical grounds. Although, during certain periods, the situation improved, those rejections related, generally, to between 30 and 50% of orders from different AOs, with the exception of PTK, the subsidiary of TP (recitals 448 to 467 of the contested decision). Next, the Commission noted the problem of limited availability of subscriber lines as a result, on the one hand, of TP's refusal to provide BSA access services on WLR lines and, on the other, of delays in the repair of faulty lines. Lastly, the Commission identified delays in the execution of AOs' orders (recitals 468 to 473 of the contested decision). The Commission observed that these obstacles had been particularly troublesome for AOs, since they affected the direct relationships between AOs and end-users, in particular where the AOs were entering into those relationships, and may thus have had the effect of harming the AOs' image in their customers' eyes. According to the Commission, the blocking of BSA access on WLR lines affected AOs all the more since it prevented them from offering their existing clients who used fixed telephony services additional internet access services (recital 470 of the contested decision).

134 Fifthly, as regards the refusal to provide accurate and reliable general information which was essential for AOs to be able to make decisions regarding access, the Commission indicated, first of all, that TP was required to provide that information to AOs under the applicable regulations. The Commission stated that that general information related to many technical aspects of TP's network and also noted that, according to the AOs, the possession of reliable and comprehensive general information was an essential requirement for initiating and continuing the supply of BSA and LLU services to end-users. Next, the Commission recalled that the refusal to provide information relating to the structure of TP's network was a key element of TP's strategy to restrict competition at all stages of the procedure for AOs to access its network (see paragraph 126 above). Finally, the Commission noted that the problems of access to reliable and accurate general information were manifest at every step of the procedure for access to TP's network. In that regard, it noted, in particular, that during the first phase of the infringement period, TP did not provide a definition of the general information in the contracts concluded with AOs, and, at a later stage, it used in its contracts a definition that did not match that of the reference offer (recitals 511 to 516 and footnote No 828 of the contested decision).

135 The Commission described in detail the manner in which TP prevented AOs from gaining access to the general information relating to its network. In that respect, on the basis of numerous accounts of AOs and documents seized during inspections, the Commission stated, first of all, that the quality of the data transmitted by TP to AOs concerning its network was low. Those data were often incorrect or incomplete and did not fulfil the requirements of the reference offers and contracts concluded between TP and the AOs (recitals 517 to 528 of the contested decision). Next, the Commission found cases in which TP had sent the general information to AOs in a format which made them unusable (recitals 529 and 530 of the contested decision). The Commission, furthermore, noted that TP had not complied with its obligation, under the relevant reference offers, to provide AOs with an IT interface allowing access to databases containing general information and providing other features relating to communication between AOs and TP. That interface became operational only from April 2010 (recitals 531 to 534 of the contested decision). Lastly, the Commission noted that there were technological solutions making it possible to ensure access to more accurate and reliable general information and that PTK, TP's subsidiary, had benefited from such access (recitals 535 to 541 of the contested decision).

136 In recital 713 of the contested decision, the Commission stated that TP's practices, described in paragraphs 128 to 135 above, had had a cumulative effect on the AOs, which encountered obstacles at each stage of the procedure for accessing TP's wholesale products. The Commission indicated that although, taken individually, each of the obstacles raised by TP might not seem to be very harmful, taken as a whole, they formed a pattern of abusive conduct, the objective of which was to deny AOs

access to the wholesale broadband access market. In conclusion, the Commission characterised the applicant's abuse of a dominant position as a single and continuous infringement (Article 1 of the contested decision).

137 The question of the variable duration and intensity of TP's conduct is addressed in recitals 903 and 907, which are in the part of the contested decision relating to the setting of the amount of the fine.

138 Thus, in recital 903 of the contested decision, the Commission responded to the argument put forward by TP during the administrative procedure that it was appropriate, when assessing the nature of the infringement, to take account of the fact that certain practices it was alleged to have committed lasted for a shorter duration than the total duration of the infringement. That argument was based on a comparison of the infringement that TP was alleged to have committed with the infringement that was the subject of Commission Decision C(2009) 3726 final of 13 May 2009 relating to a proceeding under Article 82 [EC] and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel) and specifically with the Commission's observations that, in determining the gravity of the infringement committed by Intel, account was to be taken of the fact that that undertaking's abusive practices were concentrated in the period from 2002 to 2005 and that, after 2005 until the end of the infringement in December 2007, no more than two individual abuses had been noted (see recital 1785 of the Intel decision). In responding to that argument in recital 903 of the contested decision, the Commission stated that '[i]n that context, it need[ed] to be noted, however, that even though the intensity of conduct of TP varie[d] in the period of infringement, abusive conduct [was] noticeable throughout the period of abuse'.

139 In recital 907 of the contested decision, the Commission stated that, when considering the gravity of the infringement, it had taken into account the fact that the elements of TP's abusive conduct had not all been met at the same time. The Commission explained that that circumstance was a logical consequence of the fact that the procedure for obtaining access to the incumbent operator's wholesale internet broadband access products was spread out in time over several separate and successive stages. The Commission summarised those steps in footnote No 1258 of the contested decision as being, first of all, the stage of the negotiation of terms and agreements for access to the network; next, the stage of obtaining physical access to the network; and, lastly, the stage of activating subscriber lines and of obtaining general information. The Commission further stated that AOs could not, for example, have faced problems of physical access to TP's network before the signature of the contract relating to the conditions for physical access to that network. Similarly, the problems faced by AOs at the stage of obtaining physical access to TP's network or the stage of activating subscriber lines only began after protracted negotiations for the agreement of those contracts on conditions of access. In addition, both before and after the signing of those contracts, the development of business strategies by the AOs was compromised by the poor quality and incomplete nature of the general information about TP's network, which TP was required to communicate.

140 At the hearing, in answer to a question from the Court, the applicant clarified the scope of its arguments. It indicated, regarding the argument presented in paragraph 117 above, that the content of recital 907 of the contested decision only reflects the fact that the Commission took account of the sequential nature of the infringement. However, it argued, that recital does not make it possible to conclude that the Commission fully took account of the variability in the intensity and duration of TP's conduct at each stage of the procedure for obtaining access to TP's network. That is why, in the arguments summarised in paragraphs 120 to 123 above, the applicant complains of errors allegedly made by the Commission in the calculation of the duration and intensity of that conduct. TP submits that the examination of those detailed arguments makes it possible to assess correctly the gravity of TP's infringement.

141 In that respect, it is apparent from recital 907 of the contested decision, read together with footnote No 1258, that, in assessing the gravity of TP's alleged abuse of a dominant position, the Commission did take account of the duration and variable intensity of various aspects of TP's conduct which, taken together, form the constituent elements of that abuse. The Commission explicitly noted that the elements of TP's abusive conduct had not all occurred simultaneously.

142 That conclusion is supported by an examination of the contested decision as a whole. Indeed, in that decision, the Commission noted on several occasions specific improvements in TP's conduct and specified the periods, which were shorter than the duration of the period of the infringement, during which specific aspects of TP's conduct were implemented (see, in particular, recitals 383, 409, 437, 450, 462, 508, 510 and 515 of the contested decision).

143 Moreover, contrary to what the applicant submits in the application, recital 903 of the contested decision may not be interpreted as meaning that the Commission refused to take into account the fact that the duration of the different constituent elements of TP's infringement and the intensity of that infringement varied over time. In that recital, the Commission merely noted that there was a significant difference between the circumstances of the infringement TP is alleged to have committed and the circumstances of the infringement Intel was alleged to have committed, namely the fact that, despite its variability, TP's unlawful conduct was ongoing in nature and was spread over the entire period of the infringement, while the infringement attributed to Intel was highly concentrated for a certain period, which was substantially shorter than the period of the infringement.

144 In view of the above, it cannot be argued that, in assessing the gravity of TP's infringement, the Commission refused to take into account that the duration of the various constituent elements of TP's infringement and the intensity of that infringement varied over time.

145 Moreover, the review of the merits of the applicant's detailed arguments, conducted below, does not make it possible to conclude that the Commission made an error of law or of assessment in deciding on the gravity of TP's infringement.

146 In that regard, as a preliminary point, it should be noted that by these arguments the applicant neither disputes the existence of the infringement as such nor its length as established in the contested decision, namely the period between 3 August 2005 and 22 October 2009. Nor does it call into question the classification of the abuse of a dominant position attributed to TP as a single and continuous infringement, or the existence of a strategy aimed at restricting competition at all stages of the procedure for access to its network.

147 Moreover, it is appropriate to reject as founded on a manifestly erroneous reading of the contested decision the arguments by which the applicant claims that the Commission erred in law in stating that the various constituent elements of the infringement attributed to TP lasted as long as the period of the infringement. Those arguments are contradicted by the Commission's observations set out in the recitals of the contested decision mentioned in paragraphs 138, 139 and 142 above.

148 First, regarding the offer of unreasonable terms to AOs in the agreements relating to BSA and LLU access to TP's network, it should be noted that the arguments presented in the applicant's pleadings relate to over 30 contractual clauses that were amended or deleted from TP's contracts relating to BSA and LLU access. The applicant thus submits a precise calculation of the periods during which those clauses were affected by amendments or deleted. However, given the complexity of contracts relating to access to wholesale broadband access products, the gravity and the negative impact of TP's offer of unreasonable terms in its contracts must be assessed globally, and not on the basis of each of these terms individually.

149 Next, it is clear that, by its arguments, the applicant in fact acknowledges that TP offered AOs contracts which were not consistent with numerous provisions of the BSA and LLU reference offers, starting, respectively, from May and June 2006, until, respectively, late 2008 and February 2009. The fact that that practice started after the beginning of the period of the infringement, and ceased before its end, does not reduce the gravity of TP's offending conduct. Although the applicant claims that the failure to observe the terms of the BSA reference offer began only in May 2006, it does not dispute the fact that the adoption of that reference offer was delayed for several months because of its refusal, in breach of its statutory obligations, to present UKE with a draft reference offer (see paragraphs 14 and 126 above). Regarding the end of that element of the infringement, the Commission observes pertinently that the fact that TP stopped proposing unreasonable clauses in its contracts does not mean that it removed those clauses from existing contracts. Unreasonable clauses could therefore continue to apply to the detriment of AOs.

150 Finally, that element of the infringement may not be examined without having regard to circumstances not disputed by the applicant, namely the fact that, during the initial stage of the period of the infringement, at the stage of the negotiation of contracts with AOs, TP implemented practices aimed at discouraging them from gaining access to its network, in particular various tactics aimed at delaying contract negotiations and a strategy seeking to make it as difficult as possible for AOs to obtain general information on its network. That finding supports the Commission's conclusion that the bargaining space left to AOs was very narrow, with AOs thus having to accept the conditions proposed by TP, even though they were contrary to the provisions of the relevant reference offers, or to initiate proceedings before UKE in order to force TP to meet its regulatory obligations, or to decide not to enter the market (recitals 305, 314 and 716 of the contested decision).

151 Secondly, with regard to the restriction of physical access to TP's network, it should be noted, first of all, that neither the fact that some of the practices implemented by TP were shorter in duration than the infringement, nor the fact that those practices were being tapered down throughout that period, shows that the infringement was less serious and that the fine imposed on TP disproportionate. As the Commission points out, TP's various practices adopted at successive stages of the procedure for access to its network processes were complementary. Furthermore, with respect to the rejection of AOs' orders for technical or procedural reasons, the Commission expressly acknowledged, in particular in recitals 383 and 409 of the contested decision, an improvement of the situation and the arguments raised by the applicant do not permit the finding that the Commission did not take account of that improvement in determining the amount of the fine. Next, contrary to what the applicant maintains, the problem of overestimating the costs of investments for LLU access did not relate to a single isolated case. That problem was reported by two AOs and noted by UKE in the minutes of a check carried out in 2008. The Commission also notes in that regard that, since, at that time (in 2008), few operators made use of LLU access, the three examples cited are of significant importance and should not be considered exaggerated. Lastly, contrary to what the applicant claims, the evidence gathered by the Commission, in particular the minutes of a check carried out by UKE in October 2007 and the statements of AOs, confirm to the requisite legal standard that TP delayed the implementation of orders for the construction or modification of SANs.

152 Thirdly, with respect to the limited access to subscriber lines, the applicant does not dispute the Commission's observations relating to the rejections of orders on procedural and technical grounds. It merely notes that the problems of availability of WLR lines for BSA access ended in October 2007 and that the problems related to delays in the implementation of orders for BSA and LLU access occurred only in 2007 and early 2008. However, that does not affect the Commission's conclusion that TP implemented practices designed to limit the access of AOs to subscriber lines, practices which were particularly troublesome for AOs in so far as they affect their direct relationships with end-users. Furthermore, the Commission expressly acknowledged, in particular in recitals 508 and 510 of the contested decision, the fact that the elements of the infringement referred to by the applicant were limited in time and there is nothing to suggest that it did not take that into account in determining the amount of the fine.

153 Fourthly, as regards the applicant's arguments concerning the refusal to provide AOs with accurate and reliable general information, they do not prove that the Commission exaggerated the gravity of the infringement in determining the fine imposed on TP.

154 First of all, the applicant does not dispute the assertions in the contested decision that it was technically possible to ensure access to more accurate and reliable general information and that PTK, a subsidiary of TP, had been able to benefit from that access. The applicant does not deny that the quality of the general information was worst during the first phase of the period of the infringement, that is to say during 2005 and 2006. It is precisely at that time that, together with the delaying tactics used by TP during negotiations with AOs, that practice was the most harmful to AOs, since it prevented them from planning and implementing their business strategies. Next, despite the improvement in the quality of the general information, which was, moreover, acknowledged by the Commission (recital 528 of the contested decision), the contested decision refers to cases, evidenced by the statements of AOs, in which inaccurate or contradictory general information was communicated, and thus still in 2008 and 2009. Similarly, despite the initiatives implemented by TP, the problems of availability of the IT interface allowing access to the databases containing the general information persisted until 2010. Lastly, contrary to what the applicant maintains, the Commission did not exaggerate the extent of the problems with the format of the files containing the data. On the one hand, it stated that those problems had emerged 'in some instances' (recital 529 of the contested decision). On the other, those problems, assessed in the context of the general poor quality of the information provided by TP, are an illustration of TP's general attitude towards AOs.

155 Moreover, the Commission acknowledged in the contested decision that TP had implemented initiatives that made it possible to improve the quality of that information, in particular in 2009. There is nothing to suggest that the Commission did not take account of that improvement in determining the amount of the fine.

156 In the light of the foregoing, the Court finds that the answer given by the Commission, in recitals 903 and 907 of the contested decision, to TP's arguments relating to the duration and varying intensity of certain practices which it implemented in breach of the regulatory framework and which were grouped by the Commission into five elements constituting an abuse of a dominant position — arguments that the applicant repeats in essence as part of the present part — is devoid of any error of law or assessment. Contrary to what the applicant maintains, the manner in which the Commission took account of the duration and variable intensity of the anti-competitive conduct attributed to it may not be regarded as infringing the principle of proportionality.

157 It follows that the first part of the present plea must be rejected.

– The second part, alleging errors vitiating the Commission's conclusions on the impact of the infringement on the relevant markets

158 By the second part, the applicant, supported by PIIT, submits, first, that the assessment of the nature and gravity of the infringement is based inter alia on the conclusion that TP's conduct had an actual impact on the relevant markets. According to the case-law, in particular the judgment of 8 September 2010 in *Deltafina* v *Commission*, (T-29/05, ECR, EU:T:2010:355, paragraph 248), in such circumstances the Commission must provide specific, credible and adequate evidence for assessing the actual influence which the infringement could have had on the relevant market. In the contested decision, rather than examining the actual effects of TP's conduct, the Commission merely examined the likely effects of that conduct.

159 Secondly, the applicant and PIIT argue that the assessment of the likely effects of TP's conduct on the relevant markets is incorrect. The Commission's findings are exaggerated and disregard important factors in assessing the impact of the applicant's conduct.

160 The Commission disputes having based its assessment of the gravity of the infringement on the finding that TP's practices had a tangible negative impact on the markets concerned. It further disputes the arguments of the applicant and PIIT, according to which it erred in its assessment of the likely effects of the infringement. It therefore argues that the second part of the present plea must therefore be rejected.

161 In that regard, first, it should be noted that the applicant's arguments are based on a premiss that the rule laid down by the judgment in *Deltafina* v *Commission*, cited in paragraph 158 above (EU:T:2010:355, paragraph 248), in the context of the application of the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CA] (OJ 1998, C 9, p. 3, 'the 1998 Guidelines') can be applied to the 2006 Guidelines.

162 It should be recalled that, according to point 1.A of the 1998 Guidelines, the Commission, in assessing the gravity of the infringement, had to take into consideration, inter alia, 'its actual impact on the market, where this can be measured'. In the judgment in *Deltafina* v *Commission*, cited in paragraph 158 above (EU:T:2010:355, paragraph 248), but also in the judgment in *Prym and Prym Consumer* v *Commission*, cited in paragraph 65 above (EU:C:2009:505, paragraphs 81 and 82), the EU judicature held that the actual impact of the infringement on the market is, in principle, only an optional element of the assessment of the gravity of the infringement, which may allow the Commission, where it is present, to increase the starting amount of the fine beyond the minimum amount. However, according to the Court of Justice, where the Commission considers it appropriate for the purposes of calculating the fine to take that optional element into account, it cannot just put forward a mere presumption but must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market.

163 The 2006 Guidelines, applied by the Commission in order to calculate the amount of the fine imposed in this case, no longer provide for the taking account of the 'actual impact on the market, where this can be measured' during the assessment of the gravity of a particular infringement. According to point 22 of the 2006 Guidelines, in order to decide whether the proportion of the value of sales determined by reference to the gravity should be at the lower end or at the higher end of the scale of up to 30%, the Commission is to have regard to a number of factors, such as the nature of the infringement, the combined market share of all the parties involved, the geographic scope of the infringement and whether or not the infringement has been implemented. It is apparent therefrom that, as a general rule, the Commission is not obliged to take into consideration the actual impact of the infringement on the market when determining the proportion of the value of sales established by reference to gravity. However, since the list of factors in point 22 of the guidelines is not exhaustive, the Commission may, if it considers it appropriate to do so, take account of the actual impact of the infringement on the market in order to increase that proportion. In such a case, it is appropriate to consider that the case-law cited in the preceding paragraph also applies in respect of the 2006 Guidelines, so that the Commission must provide specific, credible and adequate evidence making it possible to assess the actual impact that the infringement could have had on competition in that market.

164 Secondly, it should be noted that the present part of the first plea contains two sets of argument, the first alleging failure to state reasons. By those arguments, the applicant and PIIT submit that the Commission based its assessment of the gravity of the infringement on the actual negative effects that the infringement by TP had on competition and consumers. They claim that, in the contested decision, the Commission merely examined the likely effects of that infringement and therefore did not provide an adequate statement of reasons, having regard to the judgment in *Deltafina* v *Commission*, cited in paragraph 158 above (EU:T:2010:355, paragraph 248), with respect to the existence of its actual effects. By the arguments grouped together in the second set, the applicant and PIIT seek to demonstrate errors allegedly committed by the Commission in assessing the likely effects of the infringement.

165 First, as regards the arguments in the first set, it should be recalled that the statement of reasons required under Article 296 TFEU for measures of institutions of the European Union must be assessed by reference to the circumstances of the 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 persons to whom it is of direct and individual concern, may have in obtaining explanations (judgment of 25 June 2014 in *Nexans and Nexans France* v *Commission*, C-37/13 P, ECR, EU:C:2014:2030, paragraphs 31 and 32).

166 In the present case, it should be noted that the Commission's assessment of the gravity of the infringement in recitals 899 to 908 of the contested decision is divided into four parts, the first three relating to the nature of the infringement, market share and the geographical scope of the infringement, the fourth being a summary. In recital 906 of the contested decision within that summary, the Commission stated that, in determining the proportion of the value of sales which was to be retained for the purposes of setting the basic amount of the fine, it had taken into account, in particular, the nature of the infringement, its geographical scope, market share, and the fact that the infringement had been implemented.

167 The passage that the applicant disputes is in recital 902 of the contested decision, which is contained in the part on the assessment of the nature of the infringement. In that part, the Commission stated, first of all, that an abuse of a dominant position in the form of a refusal to provide a service, by TP, had been condemned on numerous occasions both by itself and by the Courts of the European Union (recital 899 of the contested decision). It stated that the product markets in question were of considerable economic importance and that they played an important role in building the information society, as broadband connections are a factor which conditions the supply of various digital services to end consumers (recital 900). The Commission also took into account the fact that TP was the only owner of a nationwide telecommunications network and that, accordingly, AOs wishing to provide services based on DSL technology were totally dependent on it (recital 901).

168 In recital 902, the Commission noted the following:

'Also, as described in section VIII.1, conduct of TP may be deemed abusive and aiming at eliminating competition from the retail market or at least delaying their entry and growth on this market. Also, as indicated in [recital] (892), TP was aware of the fact that its conduct infringes the law. That has a negative impact on the competition and consumers who are faced with high prices, poorer choice and limited number of innovative products.'

169 The reasons given by the Commission in recitals 899 to 906 of the contested decision leave no room for doubt as to the factors on which the Commission based its assessment of the gravity of the infringement and which are: the nature of the infringement, its geographical scope, the relevant market share held by TP and the implementation of the infringement by TP. Contrary to what the applicant and PIIT argue, the Commission did not state in recital 902 of the contested decision, and neither can it be inferred in any way from that recital, read in the light of the statement of reasons as a whole relating to the gravity of the infringement, that it had taken into account the actual effects of the infringement on the market and on consumers in determining, on the basis of that gravity, the proportion of the value of sales which had to be taken into account for the purposes of fixing the basic amount of the fine. In particular, the sentence referred to by the applicant can only be read as referring, in a general and abstract manner, to the nature of the infringement and to the fact that, to the extent that it was deliberate and was intended to eliminate competition on the retail market or to delay the evolution of that market, it had the capacity to adversely affect competition and consumers.

170 In that regard, it should be added that the findings made in the first and second sentences of the recital in question, concerning the elimination of competition in the retail market and the intentional nature of the infringement, are illustrated by the reference, first, to section VIII.1 of the contested decision, in which the Commission describes TP's strategy of seeking to restrict competition at all stages of the

procedure for AOs to access its network and, secondly, to recital 892 of the contested decision, in which it provided reasons for its finding that the infringement had been committed intentionally. By contrast, the last sentence of recital 902 contains no reference to section X.4.4 of the contested decision, in which the Commission presented its comments on the likely effects of the infringement.

171 It follows that the Commission did not take account, in assessing the gravity of the infringement, of the actual effects of TP's infringement on the relevant markets, nor the likely effects of that infringement, which it examined in section X.4.4 of the contested decision. In accordance with the case-law cited in paragraph 162 above, since the Commission did not take into account the actual effects of the infringement in assessing its gravity, it did not have to show the existence of those effects.

172 The applicant's argument, alleging failure to state reasons regarding the demonstration of the actual effects of the infringement for the purposes of assessing its gravity, must therefore be rejected as unfounded.

173 Secondly, the arguments grouped together in the second set, in which the applicant and PIIT seek to demonstrate errors made by the Commission in assessing the likely effects of the infringement, must be regarded as ineffective. Since the Commission did not take account of the likely effects of the infringement in assessing its gravity, which it used to determine the proportion of the value of sales taken for the purposes of setting the basic amount of the fine, any errors in the assessment of the likely effects of the infringement cannot have any influence on that basic amount.

174 Accordingly, the arguments by which the applicant and PIIT seek to demonstrate that the Commission made errors in assessing the likely effects of the infringement must be rejected as ineffective.

175 It follows that the second part of the present plea must be rejected.

176 Furthermore, in order to assess the basic amount of the fine in the light of the principle of proportionality, it should be noted, first, that, according to the case-law of the Court of Justice, the amount of the fine depends not only on the duration, number of incidents and intensity of the anti-competitive conduct, but also on the nature of the infringement, the extent of the market affected and the damage to the economic public order, as well as the relative weight and the market share of the undertakings responsible (see, to that effect, judgment in *KME Germany and Others* v *Commission*, cited in paragraph 111 above, EU:C:2011:810, paragraphs 96 and 97 and the case-law cited). Secondly, the amount of the fine must also take account of elements such as the deterrent effect of the fine, the undertaking's conduct and the risk that the infringement poses to the objectives of the Union. Thirdly, the amount of the fine imposed on an undertaking in respect of an infringement relating to competition must be proportionate to the infringement, seen as a whole (see, to that effect, judgment in *Transcatab* v *Commission*, paragraph 109 above, EU:T:2011:562, paragraph 189).

177 Moreover, according to settled case-law, an undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine, undistorted competition on the internal market. When the existence of a dominant position has its origins in a former legal monopoly, that fact has to be taken into account (judgment of 27 March 2012 in *Post Danmark*, C-209/10, ECR, EU:C:2012:172, paragraph 23).

178 In view of the abovementioned case-law, the Court considers that, in the present case, in assessing the proportionality of the fine and, more specifically, the proportionality of the basic amount of the fine, it is essential to take account, first, of the fact that the applicant had a dominant position which owed its origin to the former legal monopoly over both the wholesale market for LLU and BSA broadband access, where it was the sole supplier, and on the retail market.

179 Secondly, as stated in paragraphs 125 to 136 and 146 to 157 above, and although the duration of some of the anticompetitive conduct by TP was shorter than the period of the infringement, TP's infringement, whose existence is not contested as such, consisted of multiple, flagrant, persistent and intentional breaches of the regulatory framework which required it, as operator with significant market power, to grant AOs unbundled access to its local loop and to related services under transparent, fair and non-discriminatory terms.

180 Thirdly, it is undisputed that TP was aware of the illegality of its conduct, both in regulatory terms, since proceedings were brought and it was found to be in breach by the decisions of the national regulatory authority, confirmed by the final decisions of the national courts, and in terms of competition law, where its practices were designed to prevent or delay the entry of new entrants into the product markets concerned.

181 Fourthly, it is clear that the product markets affected by TP's abusive practices, which are considerable in size, since they extend over the whole territory of one of the largest Member States of the European Union, are markets of great importance both from an economic point of view and from a social point of view, in that access to broadband internet constitutes the key element of the development of the information society.

182 It is apparent from recitals 899 to 902, 904 and 905 of the contested decision that the Commission took account of those elements in the assessment of the gravity of the infringement. In those recitals, the Commission stated, first, that an abuse of a dominant position in the shape of a refusal to provide a service, of which TP was accused, had been repeatedly condemned both by the Commission and by the Courts of the European Union. It stated that the product markets in question were of considerable economic importance and that they played a key role in building the information society. The Commission also took account of the fact that TP was the sole owner of the national telecommunications network and that, accordingly, AOs who wished to provide services based on DSL technology were totally dependent on TP. It was furthermore noted that the aim of TP's conduct was to eliminate competition in the retail market, or, at least, to delay the entry of newcomers or the evolution of that market, that that conduct was intentional and that it had had a negative impact on competition and consumers (recitals 899 to 902 of the contested decision). Lastly, the Commission took into account the fact that, throughout the period of the infringement, TP had a dominant position not only on the wholesale market, over which it held a monopoly, but also on retail markets, where its market share ranged between 57% and 46% in terms of revenues. The Commission noted in that regard that the difference between TP's market share and that of the AO holding the highest market share after that of TP was considerable. As regards the geographical extent of the market concerned, the Commission indicated that TP's infringement extended over the entire territory of Poland (recitals 904 and 905 of the contested decision).

183 Those elements, which are not disputed by the applicant, are sufficient to consider that the abuse of a dominant position attributed to TP was a serious infringement.

184 Furthermore, it should be recalled that, in the context of the application of the 1998 Guidelines, which made a distinction between very serious, serious and less serious infringements, the Court confirmed the Commission's assessment that the implementation of a practice of margin squeezing by an incumbent national telecommunications operator should be classified as a very serious infringement and a flagrant abuse of a dominant position (judgment of 29 March 2012 in *Telefónica and Telefónica de España* v *Commission*, T-336/07, ECR, EU:T:2012:172, paragraphs 382 to 387). It should be added that the Court confirmed the classification of the infringement at issue as 'very serious' for the entire period of the infringement concerned, even though the Commission acknowledged that the gravity of that infringement was not uniform throughout that period (judgment in *Telefónica and Telefónica de España* v *Commission*, EU:T:2012:172, paragraphs 417 to 419).

185 Although the breach of Article 102 TFEU consisting in the use of a margin squeeze is an infringement of a different nature than TP's infringement, which is a refusal to provide services, that infringement may also be considered a flagrant abuse of particular gravity. In *Telefónica and Telefónica de España* v *Commission*, paragraph 184 above (EU:T:2012:172), the classification of the infringement as very serious was founded, in essence, on three elements, namely the fact that the applicant could not ignore the illegality of its conduct, the intentional nature of that conduct, and the fact that the incumbent operator had a virtual monopoly on the wholesale market for broadband access and a very strong dominant position in the retail markets. All those elements are present in this case, since neither the intentional and unlawful conduct of TP nor the size of its relevant market share is disputed.

186 In view of the foregoing, the Court considers that, in the light of the particular gravity of TP's infringement, the Commission did not breach the principle of proportionality by setting at 10% the proportion of the value of sales retained for the purposes of determining the basic amount of the fine imposed on it pursuant to points 19 to 22 of the 2006 Guidelines.

187 Consequently, the first plea in law of the application must be rejected as unfounded.

The fourth plea in law

188 The fourth plea alleges a failure to take mitigating circumstances into consideration. The applicant, supported by PIIT, submits, in that regard, that the Commission made errors of law and of assessment by refusing to take account, by way of mitigating circumstances, of three factors relied on by TP during the administrative procedure, namely, first, 'considerable' investments undertaken since the date of the agreement with UKE in order to modernise Polish fixed-line infrastructure for AOs and end-users; secondly, the voluntary cessation of the infringement by TP; and, thirdly, the commitments TP offered to make.

189 Furthermore, in the event that the Court does not consider that the variations in the duration and intensity of its conduct, which it put forward in the context of the first part of the third plea, warrant a reduction in the basic amount of the fine, the applicant asks the Court to take account of them as mitigating circumstances.

190 The Commission disputes the applicant's arguments and contends that this plea should be rejected.

191 It is necessary to examine the arguments put forward by the applicant and PIIT in the light of the principles set out in paragraphs 110 to 114 above.

– The investments made by TP since the date of the agreement with UKE

192 With respect to the investments in facilities, the applicant claims that, under the agreement with UKE, it committed to making two types of investments, namely, on the one hand, investments designed to improve AOs' access to BSA and LLU services, and, on the other hand, investments for the modernisation of the Polish fixed line infrastructure.

193 According to the applicant, the latter of those investments, estimated at EUR 761.4 million between October 2009 and the end of 2011, of which close to EUR 168.3 million were spent at the end of 2010, should be taken into account as a mitigating circumstance. The applicant submits, in that regard, that those investments are a voluntary measure which goes beyond the measures required to bring to an end the infringement established by the Commission and that they benefited both Polish consumers and AOs. Thus, those investments should be classified as compensation for TP's infringement, similar to that which was recognised by the Court, as a mitigating circumstance, in its judgment of 30 April 2009 in *Nintendo and Nintendo of Europe* v *Commission* (T-13/03, ECR,

EU:T:2009:131). Those investments are also comparable to the payments made by private schools in the United Kingdom to an education trust fund in the case decided by the decision of the competition authority of the United Kingdom of 20 November 2006 (Case CA 98/05/2006 — Independent Schools).

194 At the hearing, both the applicant and PIIT emphasised that over 12% of the investments in the modernisation of TP's network concerned parts of Poland where there was no infrastructure allowing for fixed access to the internet. Investments in those regions, also known as 'white spots' or 'digital exclusion zones', are not cost-effective for AOs, in particular because of the economic and legal barriers characterising them. In that regard, PIIT referred to the documents confirming the beneficial effects of TP's investments for AOs and end-users, annexed to the applicant's pleadings and to its statement in intervention.

195 Furthermore, the applicant argues that the Commission erred in law by refusing to consider those investments as a mitigating circumstance on the ground that they do not change the nature of the infringement. Such a refusal implies that only circumstances which change the nature of the infringement may be described as mitigating circumstances. However, the 2006 Guidelines recognise as possible mitigating circumstances elements which make no difference to the nature of the infringement, such as cooperation with the Commission. The applicant submits that the refusal to take account of those investments also infringes the principle of proportionality.

196 In that regard, it should be noted that the investments on which the applicant relies relate to a requirement set out in section 2(1)(k) of the agreement with UKE signed, on the one hand, by the President of UKE and, on the other, by the chairman of the board of TP. According to that section of the agreement, TP undertook to provide the infrastructure for fixed access to broadband internet allowing for the creation of at least 1 200 000 million new connections, in accordance with the terms set out in the annexes to that agreement.

197 According to the wording of recitals 6 to 9 of the preamble to the agreement:

'6. The President of [UKE] believes that TP has not been performing its regulatory obligations imposed on it by means of [its] decisions, in particular the non-discrimination obligation with regard to access to TP's infrastructure.

7. TP was fined several dozen times for, among other things, failure to timely meet the conditions for ensuring telecommunication access; failure to perform the offer defining framework terms of agreements on local loop unbundling and related facilities (RUO offer [reference unbundling offer]); violation of the decision introducing the Bitstream Access [broadband access service] offer; failure to submit instruction of maintenance of regulatory accounting and a description of calculation of costs on the market of call origination in the TP network; failure to perform the "TP Framework Offer of Telecommunication Access Concerning Connection of Networks (RIO offer [reference interconnection offer])" and failure to disclose contents of telecommunication access agreements;

8. In the opinion of the President of DEC, the imposed regulatory obligations related to telecommunication access have not ensured effective competition on relevant markets on which TP holds significant power and the President of [UKE] believes that the absence of effective competition is of durable nature; therefore, the President of [UKE] has begun works designed to impose the obligation of functional separation as a regulatory remedy onto TP;

9. TP has entered into negotiations with telecommunication market actors designed to establish rules of co-operation with [AOs] providing for elimination of anti-competitive and discriminatory conduct of TP on relevant markets on which TP holds significant power, in order to avoid the imposition of the obligation of functional separation.'

198 Furthermore, pursuant to section 2(2) of the agreement with UKE, according to the President of UKE, the implementation by TP of all the commitments made under that agreement, in particular, the commitment made in section 2(1)(k) to create 1 200 000 new connections, could lead to the elimination of the biggest problems he had identified in the telecommunications market as regards access to the telecommunications network, and which are listed in recital 8 of the preamble to the agreement, reproduced in paragraph 197 above.

199 Given those factors, it must be stated, first, that the investments made by TP cannot be considered to be compensatory measures comparable to those which were accepted by the Commission in the case which is the subject of the judgment in *Nintendo and Nintendo of Europe* v *Commission*, paragraph 193 above (EU:T:2009:131).

200 Contrary to the compensation referred to in the case which gave rise to the judgment in *Nintendo and Nintendo of Europe* v *Commission*, paragraph 193 above (EU:T:2009:131), the purpose of which was to compensate third parties identified in the statement of objections as having suffered financial harm as a result of the unlawful conduct of the undertakings involved, the creation of new lines and the investments involved therein were not intended to compensate AOs for any damage they might have suffered, but to eliminate from the relevant markets, on which TP was present as an operator with significant market power, what the President of UKE described as 'the absence of effective competition [of a] durable nature'. Moreover, inasmuch as TP's investments were intended to create new connections, end-users and AOs who suffered from the effects of TP's anti-competitive practices were not able to benefit from those investments.

201 Nor may the investments carried out by TP be considered as compensatory measures comparable to the payments made by private schools in the UK in case CA 98/05/2006 — Independent Schools. It is apparent from the decision of the competition authority of the United Kingdom that the private schools which were penalised for having exchanged information on registration fees entered into a type of settlement with the competition authority, pursuant to which the fine imposed on them was relatively modest. In exchange, the offending schools undertook to contribute to an educational trust fund created specifically for pupils who attended those schools during the academic years for which information on registration fees had been exchanged. The contributions of the relevant schools to the trust fund can be compared to the payments made in the case giving rise to the judgment in *Nintendo and Nintendo of Europe* v *Commission*, paragraph 193 above (EU:T:2009:131). However, they are not of the same nature as the investments made by TP, which were not designed to compensate AOs and end-users who suffered from the effects of TP's practices.

202 Secondly, although the commitments defined in the agreement with UKE were accepted by TP of its own accord, it is clear that they were motivated by TP's desire to avoid a severe regulatory penalty, namely functional separation, which was contemplated by the competent regulatory authority in order to bring an end to the continuous and repeated infringements of the regulatory framework by TP. In that regard, it should be added that it is clear both from the contested decision and from the wording of the agreement with UKE, reproduced in paragraph 197 above, that functional separation was contemplated by UKE since other measures adopted with a view to compelling TP to comply with the regulatory framework, in particular a number of decisions by which UKE imposed fines upon it, proved to be ineffective (see recital 153 of the contested decision). The desire to address the threat of functional separation thus attenuates the voluntary nature of the commitments made in the agreement on which the applicant relies.

203 Thirdly, investments, even where they are costly and made in unattractive areas from a commercial point of view, are a normal part of business life and are carried out with a view to a return. Thus, the creation of 1 200 000 new connections entailed for TP, above all, the possibility of gaining 1 200 000 new customers in areas where the AOs, which do not have the same size and resources as those of an

incumbent operator, could not invest. Accordingly, although the investments in the modernisation and development of the Polish fixed line infrastructure owned by TP indirectly benefited end-users as well as AOs, it must be stated that those investments benefited, first and foremost, TP itself.

204 Fourthly, as regards PIIT's arguments based on the documents annexed to its statement in intervention and the applicant's pleadings, their implausibility should be noted immediately. The arguments put forward by PIIT in its intervention, which it developed at the hearing, are contradicted by the content of the documents it annexed to its statement in intervention. In particular, UKE's decision of 28 April 2011, appended as Annex 1 to its statement in intervention, which was not disputed by TP before the Polish national courts, relies first of all on the negative effects that TP's conduct has had on the development of the market for broadband internet access in Poland, especially during the period of the infringement. UKE points out that the regulatory measures implemented did not yield the desired results as regards the termination of the incumbent operator's discriminatory conduct and as regards the respect for equal treatment of all operators.

205 Admittedly, some documents relied on by PIIT confirm that both the AOs and UKE acknowledged the benefits for AOs and end-users of the agreement with UKE, including of the investments it planned. However, those beneficial effects are not such as to justify a reduction in the basic amount of the fine by way of mitigating circumstances.

206 The aforementioned beneficial effects may be attributed to the agreement as such and not to the investments in particular. Thus, first of all, in the document setting out the regulatory strategy until 2015, dated November 2012 (Annex 18 to the statement in intervention), UKE acknowledged the beneficial effects for the market of the implementation of all the commitments made by TP in the agreement. Similarly, in its presentation of 20 November 2011 on the effects of the agreement it concluded with TP (Annex 23 to the statement in intervention), UKE referred to the beneficial effects, for the AOs and end-users, of the whole agreement. Furthermore, noting that the agreement benefited the AOs and end-users, in particular, by an extension of the telecommunications infrastructure, by an improvement in the access to that infrastructure, by increased competition in the relevant market and lower prices, UKE noted that it had also brought benefits to TP itself, in particular by enabling it to avoid functional separation and potential litigation relating to the infringement of the principle of non-discrimination. Finally, in its generic report of May 2010 (Annex 3 to the statement in intervention), Netia, which is TP's biggest competitor on the retail market, acknowledged that the provisions of the agreement on the principle of non-discrimination should enable it to accelerate the activation of new subscriber lines through TP's network. Regarding TP's investments in infrastructure, Netia merely indicates that they will increase the size of the market on which it operates.

207 The improvement of the situation in the relevant market resulting from the change in TP's conduct that followed the signature of the agreement with UKE was also taken into account by the Commission. The Commission decided to choose the date of the signature of the agreement as the date of the end of the infringement.

208 In the light of those considerations, the Commission cannot be criticized for not having granted TP the benefit of mitigating circumstances in respect of the investments it made in order to modernise Polish fixed line infrastructure. In that regard, it is irrelevant whether only elements that change the nature of the infringement or also elements that do not may be classified as mitigating circumstances.

209 It follows that the refusal to grant the applicant the benefit of mitigating circumstances in respect of the investments undertaken pursuant to the agreement with UKE cannot be considered a breach of point 29 of the 2006 Guidelines, nor an infringement of the principle of proportionality.

– The voluntary termination of the infringement

210 The applicant, supported by PIIT, submits that, pursuant to the agreement with UKE, it voluntarily terminated the infringement and maintains that it is contrary to the principle of proportionality and to point 29 of the 2006 Guidelines not to take account of that termination as a mitigating circumstances on the ground that it did not terminate the infringement immediately after the Commission's intervention. It notes in that regard that, from December 2008, that is to say already two months after the Commission's inspections at its premises, organised from 23 to 26 September 2008 and until the signing of the agreement with UKE on 22 October 2009, TP was actively engaged in remedying the elements of the abuse noted by the Commission.

211 In accordance with the first indent of point 29 of the 2006 Guidelines, the basic amount may be reduced where the Commission finds that there are mitigating circumstances, such as the fact that the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened.

212 That provision reproduces, in essence, point 3 of the 1998 Guidelines. With respect to that point, the Court held that its purpose was to encourage undertakings to terminate their anti-competitive conduct as soon as the Commission launches an investigation into it (judgment of 13 July 2011 in *Schindler Holding and Others* v *Commission*, T-138/07, ECR, EU:T:2011:362, paragraph 274).

213 Moreover, according to the case-law, the termination of the infringement as soon as the Commission intervenes can logically constitute a mitigating circumstance only if there are reasons to suppose that the undertakings concerned were encouraged to cease their anti-competitive conduct by the interventions in question (judgment of 26 September 2013 in *Alliance One International* v *Commission*, C-679/11 P, EU:C:2013:606, paragraph 80). In other words, for the termination of the infringement to be recognised as a mitigating circumstance, there must be a causal link between the interventions of the Commission and the termination of the infringement concerned.

214 In the present case, it must be stated, first of all, that TP did not terminate the unlawful conduct immediately after the Commission's first intervention, namely after the inspections at its premises in Warsaw, conducted by the Commission, assisted by the Polish competition authority, from 23 to 26 September 2008. Although TP began to comply, gradually, with its regulatory obligations from the end of 2008, it is apparent from recitals 574 and 577 of the contested decision, and it is not disputed by the applicant, that AOs continued to experience difficulties with access to wholesale BSA and LLU broadband access products, as a result of TP's impugned conduct, and thus well after the signature of the agreement with UKE, which took place on 22 October 2009.

215 Next, as is clear from recitals 78 and 567 to 571 of the contested decision and point 197 above, and is not disputed by the applicant, the main reason for the signature of the agreement with UKE was to avoid the functional separation proposed by UKE because of TP's persistent disregard for the regulatory requirements relating to access to its network. In view of that element, the causal link, required by the case-law, between the Commission's inspections and the cessation of TP's infringement cannot be considered established.

216 Finally, although, as was noted in paragraph 214 above, after the signature of the agreement with UKE, AOs continued to experience difficulties with access to wholesale products for BSA and LLU broadband access, the Commission acknowledged the importance of that agreement and the fact that it had marked a turning point in TP's conduct, by choosing the date of its signature as the date on which the infringement had terminated. Thus, the conclusion of that agreement had a significant impact on the calculation of the fine, in that it stopped the multiplier rate applied according to the duration of the infringement.

217 In those circumstances, the refusal to grant TP the benefit of the mitigating circumstance provided for in the first indent of point 29 of the 2006 Guidelines cannot be regarded either as a breach of that provision or as an infringement of the principle of proportionality.

– The commitments proposed by TP

218 The applicant states that TP offered to make some commitments, but that offer was rejected by the Commission. It argues that that proposal, though rejected, should be considered as falling under the concept of effective cooperation within the meaning of point 29 of the 2006 Guidelines. The Commission's refusal to take account of that offer of commitments in the calculation of the fine is, furthermore, contrary to the principle of proportionality.

219 In accordance with the fourth indent of point 29 of the 2006 Guidelines, the basic amount may be reduced where the Commission finds that there are mitigating circumstances, such as where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so.

220 In that regard, it has been consistently held that a reduction in the amount of the fine on grounds of cooperation during the administrative procedure is based on the consideration that such cooperation makes it easier for the Commission to establish an infringement (see judgment of 19 May 2010 in *Boliden and Others* v *Commission*, T-19/05, ECR, EU:T:2010:203, paragraph 104 and the case-law cited).

221 While taking account of the case-law cited in paragraph 114 above, it should be recalled that the Commission retains a certain discretion in conducting an overall assessment of the importance of any reduction in the amount of fines by way of mitigating circumstances (judgment of 16 June 2011 in *FMC Foret* v *Commission*, T-191/06, ECR, EU:T:2011:277, paragraph 333). It must be afforded that discretion in particular when it comes to assessing the usefulness of the cooperation of the undertaking concerned in the proceedings, and the level to which that cooperation facilitates its task in establishing an infringement.

222 In the present case, the applicant argues that before the adoption of the statement of objections, TP had asked the Commission to discuss an offer of commitments in which it proposed inter alia to make the agreement with UKE legally binding, to provide its wholesale BSA and LLU broadband access services as part of a separate and dedicated business operation, to establish a code of good practice and to establish a monitoring system of its obligations entrusted to an independent agent.

223 However, on the one hand, the Court considers that the commitments proposed by TP were not such as to make it easier for the Commission to establish an infringement. Those commitments related to a promise by TP to improve its conduct and thus referred more to the termination of an infringement whose existence was no longer in doubt.

224 Moreover, the Court is of the opinion that the fourth indent of point 29 of the 2006 Guidelines may not reasonably be interpreted as meaning that the mere fact that an undertaking offers to make commitments during an administrative procedure is sufficient in order to establish effective cooperation with the Commission which goes beyond obligations to cooperate and, thus, to secure that undertaking a reduction in the amount of the fine. If that were the case, any undertaking finding itself in the applicant's situation could merely offer to make commitments, regardless of their quality and regardless of whether they facilitate the Commission's task of establishing the infringement, in order to receive a reduction in the amount of the fine. Such an interpretation is contrary to the ratio legis of point 29 of the 2006 Guidelines, which is to encourage undertakings to enter into a close and meaningful cooperation with the Commission.

225 In the light of the foregoing, the refusal to grant PT the benefit of the mitigating circumstance provided for in the fourth indent of point 29 of the 2006 Guidelines may not be regarded either as a breach of that provision or as an infringement of the principle of proportionality.

3. *The claim for adjustment*

226 It should, first of all, be noted that since no irregularity or illegality vitiates the contested decision, the claim for adjustment cannot be accepted in so far as it asks the Court to draw the inference, with respect to the amount of the fine, from those illegalities or irregularities.

227 Next, it is appropriate to ascertain, in the light of all the evidence in the file, especially that put forward by the applicant, whether the Court should substitute, under its unlimited jurisdiction, a different amount for the fine than that adopted by the Commission, on the grounds that the latter amount is not appropriate.

228 It is apparent from that examination that, contrary to what the applicant maintains, the manner in which the Commission took account, in the contested decision, of the variations in the duration and intensity of its conduct was appropriate to the circumstances of the case, consistent with the requirements of fairness and devoid of any error or disproportionality.

229 Moreover, in accordance with the case-law cited in paragraph 67 above, it should be noted that there were no elements unknown to the Commission at the date of the adoption of the contested decision and subsequently brought to the attention of the Court that might justify an adjustment of the amount of the fine.

230 In those circumstances, the claim for adjustment submitted by the applicant must be rejected as must, consequently, the application in its entirety.

**Costs**

231 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

232 As the Commission did not request that PIIT be ordered to pay the costs incurred in connection with its intervention, PIIT shall bear only its own costs.

233 ECTA shall bear its own costs, in accordance with Article 138(3) of the Rules of Procedure.

ON THOSE GROUNDS THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Orange Polska S.A. to bear its own costs and to pay those of the European Commission;**

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

Gratsias Kancheva Wetter

Delivered in open court in Luxembourg on 17 December 2015.

[Signatures]

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