Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

22 September 2021 *

(Competition – Concentrations – Telecommunications sector – Decision imposing fines for putting into effect a concentration before it has been notified and authorised – Article 4(1), Article 7(1) and Article 14 of Regulation (EC) No 139/2004 – Legal certainty – Legitimate expectations – Principle of legality – Presumption of innocence – Proportionality – Gravity of the infringements – Implementation of the infringements – Exchange of information – Amount of fines – Unlimited jurisdiction)

In Case T-425/18,

Altice Europe NV, established in Amsterdam (Netherlands), represented by R. Allendesalazar Corcho and H. Brokelmann, lawyers,

applicant,

v

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

defendant,

supported by

Council of the European Union, represented by S. Petrova and O. Segnana, acting as Agents,

intervener,

APPLICATION based on Article 263 TFEU seeking, primarily, annulment of Commission Decision C(2018) 2418 final of 24 April 2018 imposing fines for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Regulation (EC) No 139/2004 (Case M.7993 – Altice/PT Portugal), and, in the alternative, annulment or reduction of the fines imposed on the applicant,

THE GENERAL COURT (Sixth Chamber),

composed of A. Marcoulli, President, S. Frimodt Nielsen and R. Norkus (Rapporteur), Judges,

Registrar: E. Artemiou, Administrator,

* Language of the case: English.

having regard to the written part of the procedure and further to the hearing on 24 September 2020,

gives the following

Judgment

I. Background to the dispute

1 The applicant, Altice Europe NV, is a multinational cable and telecommunications company based in the Netherlands.

2 PT Portugal SGPS SA ('PT Portugal') is a telecommunications and multimedia operator with activities extending across the entire telecommunications sector in Portugal.

A. Acquisition of PT Portugal by the applicant

3 On 9 December 2014, the applicant entered into a share purchase agreement with the Brazilian telecommunications operator Oi SA ('the SPA') whereby it would, through its subsidiary Altice Portugal SA, acquire sole control of PT Portugal within the meaning of Article 3(1)(b) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

4 The completion of that acquisition was subject, inter alia, to obtaining authorisation from the European Commission under Regulation No 139/2004.

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

B. Pre-notification stage

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

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

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

9 On 3 February 2015, the applicant submitted a draft notification form, including a copy of the SPA in its annexes.

C. The notification and decision authorising the concentration subject to compliance with certain commitments

10 On 25 February 2015, the transaction was formally notified to the Commission.

11 On 20 April 2015, the Commission adopted a decision pursuant to Article 6(1)(b) of Regulation No 139/2004, read in conjunction with Article 6(2) of that regulation, by which it declared the operation compatible with the internal market subject to compliance with the commitments annexed to that decision, including the divestiture by the applicant of its subsidiaries Cabovisão and ONI.

D. Contested decision and procedure which led to its adoption

12 On 13 April 2015, the Commission sent the applicant a request for information relating to exchanges between the applicant and PT Portugal at a meeting of their respective executives, of which it had become aware through the press, prior to the adoption of the Commission's clearance decision.

13 On 17 April 2015, the applicant submitted its observations to the Commission.

14 On 12 May 2015, the Commission sent the applicant a second request for information, specifically regarding the type of information exchanged, to which the applicant replied on 12 June 2015. Following the Commission's decision of 8 July 2015, taken pursuant to Article 11(3) of Regulation No 139/2004, requesting the applicant to produce missing documents, the applicant provided those documents on 30 July 2015.

15 On 4 December 2015, the Commission sent the applicant a third request for information, to which the applicant replied on 18 December 2015.

16 By letter of 11 March 2016, the Commission informed the applicant that, following the examination of the documents provided by the applicant in response to the requests for information, it had opened an investigation to determine whether the applicant had infringed the standstill obligation laid down in Article 7(1) of Regulation No 139/2004 and the notification obligation laid down in Article 4(1) of that regulation.

17 By decision of 15 March 2016, taken pursuant to Article 11(3) of Regulation No 139/2004, the Commission requested the applicant to provide various documents. The applicant provided those documents on 6 April 2016.

18 On 20 July 2016, the Commission sent the applicant a fourth request for information, to which the applicant replied on 23 August, and subsequently, on 24 August 2016, a fifth request for information, to which the applicant replied on 15 September 2016.

19 The Commission's services and the applicant met on 12 May 2017.

20 On 17 May 2017, pursuant to Article 18 of Regulation No 139/2004, the Commission sent the applicant a statement of objections concluding, on a preliminary basis, that it had infringed Article 4(1) and Article 7(1) of Regulation No 139/2004.

21 On 18 August 2017, the applicant submitted written observations on the statement of objections.

22 On 21 September 2017, a hearing was held in the course of which the applicant was able to present its arguments.

23 On 20 October 2017, Oi replied to the Commission's request for information of 6 October 2017.

24 By letter of 16 November 2017, the Commission informed the applicant that there was additional evidence in its file in support of the preliminary findings of the statement of objections.

25 On 24 April 2018, the Commission adopted Decision C(2018) 2418 final imposing a fine [on the applicant] for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004 (Case M.7993 – Altice/PT Portugal) ('the contested decision').

26 The Commission concluded that it was apparent from various documents in the file that the applicant had had the possibility of exercising decisive influence or had exercised control over PT Portugal prior to the adoption of the clearance decision and, in some instances, prior to notification, in breach of Article 7(1) and Article 4(1) of Regulation No 139/2004 respectively (recital 55).

27 Section 4 of the contested decision explains why the Commission concluded that the applicant had implemented the SPA prior to the Commission's clearance of the concentration, contrary to Article 7(1) of Regulation No 139/2004. In particular, section 4.1 states that certain clauses of the SPA ('the preparatory clauses') gave the applicant a right to veto decisions regarding PT Portugal's commercial policy. Section 4.2 describes the instances of the applicant being involved in the day-to-day running of PT Portugal. Section 4.3 sets out the Commission's conclusions as to why the terms of the SPA, as described in section 4.1, and the parties' conduct, as described in section 4.2, constitute implementation of the SPA before the Commission declared the transaction compatible with the internal market (recital 56).

28 Section 5 of the contested decision explains why the Commission concluded that the applicant had implemented the transaction prior to notification of the concentration, contrary to Article 4(1) of Regulation No 139/2004 (recital 57).

29 The first four articles of the operative part of the contested decision are worded as follows:

'Article 1

Altice N.V. has, at least negligently, implemented a concentration prior to its clearance in breach of Article 7(1) of Regulation (EC) No 139/2004 in the context of Case No. M.7499 – Altice / PT Portugal.

Article 2

Altice N.V. has, at least negligently, implemented a concentration prior to its notification in breach of Article 4(1) of Regulation (EC) No 139/2004 in the context of Case No. M.7499 – Altice / PT Portugal.

Article 3

A fine of EUR 62 250 000 is hereby imposed on Altice N.V. pursuant to Article 14(2) of Regulation (EC) No 139/2004 for the breach referred to in Article 1 of this decision.

Article 4

A fine of EUR 62 250 000 is hereby imposed on Altice N.V. pursuant to Article 14(2) of Regulation (EC) No 139/2004 for the breach referred to in Article 2 of this decision.'

II. Procedure and forms of order sought

30 By application lodged at the Registry of the General Court on 5 July 2018, the applicant brought the present action.

31 By document lodged at the Court Registry on 7 November 2018, the Council of the European Union sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

32 By decision of 6 December 2018, the President of the Seventh Chamber of the Court granted leave to intervene. The Council lodged its statement in intervention on 22 February 2019 and the parties lodged their observations on that statement within the prescribed time limits.

33 The Commission lodged the defence on 30 November 2018.

34 The main parties submitted the reply and the rejoinder on 25 February and 10 May 2019 respectively.

35 By letter of 29 May 2019, the applicant submitted a request for a hearing under Article 106(2) of the Rules of Procedure of the General Court.

36 Following changes in the composition of the Chambers of the Court, the present case was allocated to the Sixth Chamber.

37 By a measure of organisation of procedure adopted on 10 March 2020 pursuant to Article 89 of the Rules of Procedure, the Court requested the parties to express their view on the possible implications, for the present case, of the judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149). The parties replied to the Court's questions within the prescribed time limits.

38 By order of the Court of 11 November 2020 reopening the oral part of the procedure, the applicant was permitted to lodge a letter in reply to a question put at the hearing, to which it had not been in a position to reply at that time. In addition, by letter from the Court Registry of 12 November 2020, the Commission was requested to submit a document mentioned in the contested decision and to provide any helpful explanations.

39 The Commission complied with that request and the parties submitted their observations within the prescribed time limits.

40 The applicant claims that the Court should:

– annul the contested decision;

– in the alternative, annul or substantially reduce the fines imposed on it pursuant to Articles 3 and 4 of the contested decision;

– order the Commission and the Council to pay the costs.

41 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

42 The Council contends that the Court should reject in its entirety the plea of illegality raised in respect of Article 4(1) and Article 14(2)(a) of Regulation No 139/2004.

III. Law

43 As a preliminary point, it should be recalled that, under Article 3(1) of Regulation No 139/2004 'a concentration shall be deemed to arise where a change of control on a lasting basis results from: … (b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings'.

44 Article 3(2) of Regulation No 139/2004 provides that 'control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking'.

45 It should also be recalled that under the first subparagraph of Article 4(1) of Regulation No 139/2004, 'concentrations with a Community dimension defined in this Regulation shall be notified to the Commission prior to their implementation and following the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest'.

46 In addition, under Article 7(1) of that regulation, 'a concentration with a Community dimension … shall not be implemented either before its notification or until it has been declared compatible with the [internal] market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6)'.

47 However, Article 7(3) of Regulation No 139/2004 provides as follows:

'The Commission may, on request, grant a derogation from the obligations imposed in paragraphs 1 or 2. The request to grant a derogation must be reasoned. … [The] derogation may be applied for and granted at any time, be it before notification or after the transaction.'

48 Furthermore, under Article 14(2), 'the Commission may by decision impose fines not exceeding 10% of the aggregate turnover of the undertakings concerned … where, either intentionally or negligently, they: (a) fail to notify a concentration in accordance with [Article] 4 …; (b) implement a concentration in breach of Article 7'. Under Article 14(3), 'in fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement'.

49 In support of the action, the applicant puts forward five pleas in law, alleging, first, infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004, the principles of legality and the presumption of innocence, second, errors of fact and law with regard to the alleged acquisition of sole control of PT Portugal, third, errors of fact and law as regards the alleged infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004, fourth, infringement of the principle *ne bis in idem*, the principles of proportionality and the prohibition of double punishment, and a plea of illegality in respect of Article 4(1) and Article 14(2) of Regulation No 139/2004 and, fifth, that the fines are illegal and infringe the principle of proportionality. Furthermore, in the context of the fifth part of the fifth plea, the applicant requests the Court, in the exercise of its unlimited jurisdiction, to reduce substantially the amount of the fines imposed on it, either on account of the arguments put forward in the context of the fifth part of the fifth plea or on account of the arguments put forward in the context of the third plea.

50 First, the Court considers that it is appropriate to deal with the first to third pleas together and then to address the fourth and fifth pleas. Second, the Court considers that it is appropriate to deal first with the plea of illegality raised in the context of the fourth plea.

A. The principal claims seeking annulment of the contested decision

1. The plea of illegality of Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 raised in the context of the fourth plea

51 The applicant claims that those provisions, by permitting the Commission to impose a second fine on the same person for the same conduct as already penalised by another legal provision protecting the same legal interest (Article 7(1), in conjunction with Article 14(2)(b) of Regulation No 139/2004), infringe the principle *ne bis in idem* enshrined in Article 50 of the Charter of Fundamental Rights of the European Union ('the Charter') and in Article 4(1) of Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), the principle of proportionality enshrined in Article 49(3) of the Charter and the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States governing concurrence of laws. The applicant states that the Court acknowledged, in the judgment of 26 October 2017, *Marine Harvest* v *Commission* (T-704/14, EU:T:2017:753), that the current legal framework was 'unusual' and that it could, in the case giving rise to that judgment, have been the subject of a plea of illegality. That anomaly originated in the adoption of Regulation No 139/2004, which no longer provides that concentrations must be notified no later than one week after the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest, as was laid down in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1). That regulation contained two different obligations (a formal obligation to notify within one week, established in Article 4(1), and a substantive obligation not to implement the concentration prior to its notification and clearance, established in Article 7(1)), both of which were penalised with fines on very different scales. An undertaking which notified a concentration more than one week after concluding the agreement, but which waited for the Commission's approval before putting it into effect, infringed only Article 4(1) of Regulation No 4064/89 but not Article 7(1). The problem was aggravated with the introduction of Article 14(2)(a) of Regulation No 139/2004, according to which failure to notify a concentration in accordance with Article 4(1) can now be sanctioned with a fine of up to 10% of the turnover of the undertaking. Therefore, Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 are redundant. Consequently, Articles 2 and 4 of the contested decision ought to be annulled.

52 The Commission and the Council contest the applicants' arguments.

53 As a preliminary point, it should be noted that, following the judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149), the applicant, when questioned by the Court, stated that it was withdrawing the complaint alleging infringement of the principle *ne bis in idem*.

54 As regards the applicant's general conclusion that Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 are 'redundant' in the light of Article 7(1) and Article 14(2)(b) of Regulation No 139/2004, it should be recalled that while an infringement of Article 4(1) of Regulation No 139/2004 automatically results in an infringement of Article 7(1) of that regulation, the converse is not true, however (see judgments of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraphs 294 and 295, and of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraph 101).

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

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

57 In addition, one on the one hand, Article 4(1) of Regulation No 139/2004 lays down an obligation to act, consisting in the obligation to notify the concentration prior to its implementation and, on the other hand, Article 7(1) of that regulation lays down an obligation not to act, namely not to implement that concentration before its notification or authorisation (see judgments of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 302, and of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraph 104).

58 Furthermore, an infringement of Article 4(1) of Regulation No 139/2004 is an instantaneous infringement, whereas an infringement of Article 7(1) of that regulation is a continuous infringement which is triggered when the infringement of Article 4(1) of that regulation is committed (see, to that effect, judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 352; see judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraphs 113 and 115).

59 The applicant therefore errs in maintaining that Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 are 'redundant' in the light of Article 7(1) and Article 14(2)(b) of that regulation.

60 As regards, more specifically, the applicant's argument that Article 4(1) and Article 14(2)(a) of Regulation No 139/2004, by permitting the Commission to impose a second fine on the same person in respect of the same facts as those already penalised by another legal provision protecting the same legal interest as that protected by Article 7(1) and Article 14(2)(b) of that regulation, infringe the principle of proportionality and the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States governing concurrence of laws, it has just been stated that those provisions pursue autonomous objectives,

namely, first, requiring undertakings to notify the concentration in question prior to its implementation and, second, preventing them from implementing that concentration before the Commission declares it to be compatible with the internal market.

61 In that regard, it follows from the applicant's line of argument that it must be understood that the terminology it is using, namely the expression 'legal interest', has the same meaning as the term 'objective' used by the Court of Justice in the judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149).

62 Therefore, the applicant errs in claiming that, because those provisions pursue the same 'legal interest', they infringe the principle of proportionality enshrined in Article 49(3) of the Charter or the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States governing concurrence of laws.

63 In addition, to deprive the Commission of the possibility of establishing a distinction, by means of the fines which it imposes, between a situation in which the undertaking complies with the notification obligation but infringes the standstill obligation, and a situation in which that undertaking infringes both those obligations, would not enable the objective of Regulation No 139/2004 to be attained, that objective being to ensure effective control of concentrations with a Community dimension, in so far as infringement of the notification obligation could never be the subject of a specific penalty (judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraphs 108 and 109).

64 It follows that to declare Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 unlawful, as the applicant suggests, would prevent infringements of the notification obligation from being subject to a specific penalty and would be contrary to the objective of that regulation.

65 Lastly, it should be recalled that the Court has already stated, in paragraph 343 of the judgment of 26 October 2017, *Marine Harvest* v *Commission* (T-704/14, EU:T:2017:753), cited by the applicant, that the imposition of two penalties for the same conduct, by the same authority in a single decision, cannot be considered, as such, to be contrary to the principle of proportionality.

66 It follows from the foregoing that, even if, as the applicant submits, the Court was entitled to find that the legal framework in question was unusual (see, to that effect, judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 306), first, that legal framework seeks to enable two autonomous objectives to be attained in the context of the 'one-stop shop' system (see paragraphs 56 and 64 above) and, second, the applicant's arguments have not served to demonstrate that Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 are unlawful. In addition, it must be stated that the applicant has not put forward any argument in support of the alleged unlawfulness of Article 7(1) of that regulation.

67 It is therefore necessary to reject the plea of illegality in respect of Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 and, in so far as it was raised, the plea in respect of Article 7(1) and Article 14(2)(b) of that regulation.

2. The first three pleas, concerning the existence of an infringement under Article 4(1) and Article 7(1) of Regulation No 139/2004

68 The applicant submits, in the first part of the first plea, that the contested decision infringed Article 4(1) and Article 7(1) of Regulation No 139/2004, in the first part of the third plea, that the pre-closing covenants contained in the transaction agreement were ancillary in nature and did not amount to early implementation of the concentration, in the second part of the third plea, that it did not actually exercise any decisive influence over PT Portugal prior to the transaction closing, in the third part of the third plea, that the contested decision contains an error of fact and of law as regards the transmission of information, in the second part of the first plea, that the contested decision infringes the general principles of legality and the presumption of innocence and, in the second plea, that the contested decision contains errors of fact and of law in that the Commission concluded that the applicant had acquired sole control of PT Portugal.

(a) The first part of the first plea: infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004

69 According to the applicant, the excessively wide interpretation of the concept of 'implementation' of the concentration in the contested decision, as regards both the measures qualified as conferring on the applicant the 'possibility of exercising decisive influence' as a consequence of the legal consultation and veto rights allegedly conferred by the preparatory clauses laid down in Article 6.1(b) of the SPA and the alleged exchanges of commercially sensitive information, goes beyond the scope and meaning of that concept attributed by Article 4(1) and Article 7(1) of Regulation No 139/2004 and by the case-law of the Court of Justice.

70 More specifically, in the first place, as regards the alleged 'possibility of exercising decisive influence' on the basis of the preparatory clauses, the applicant maintains, first, that Article 7(1) and Article 4(1) of Regulation No 139/2004 do not prohibit agreements which give the 'possibility of exercising decisive influence' on another undertaking, but only prohibit the 'implementation' of control on a lasting basis. The acquisition of control (Article 3(l)(b) of Regulation No 139/2004) and therefore also the 'possibility of exercising decisive influence' on a lasting basis (Article 3(2) of Regulation No 139/2004) must be 'implemented' in order to infringe Article 4(1) and Article 7(1) of Regulation No 139/2004. In its judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), the Court of Justice drew a distinction between (i) transactions which are preparatory to or ancillary to the concentration and the purpose of which is to prepare for the implementation of the concentration or to manage the interim period between signing and closing and (ii) transactions which result in an actual implementation of the concentration in that they contributed to the change of control on a lasting basis. In the present case, the change of control agreed in the SPA stems solely from the transfer of the shares in PT Portugal to the applicant. It is undisputed that that transfer did not take place before the concentration was authorised by the Commission.

71 Second, the applicant maintains that Article 4(1) and Article 7(1) of Regulation No 139/2004 refer to the concept, in English, of 'implementation', which must be understood as 'full consummation' of the concentration. In that regard, the applicant refers to paragraph 90 of the order of 18 March 2008, *Aer Lingus Group* v *Commission* (T-411/07 R, EU:T:2008:80), according to which, prima facie, the definition of 'implementation' envisaged under Article 8(4) and (5) of Regulation No 139/2004 encompasses full consummation of the concentration, and to paragraph 98 of that order, according to which the same interpretation of the term 'implementation' must apply, *mutatis mutandis*, to Article 7 of Regulation No 139/2004.

72 Third, the applicant maintains that until a concentration has actually been implemented there can be no harm to the effectiveness of the system of *ex ante* control of the effects of concentrations.

73 In the second place, as regards the assertions relating to exchanges of commercially sensitive information, that information in no way contributes to a lasting change of control, nor is it necessary to achieve that. In addition, that information does not give rise to a possibility of exercising decisive influence. In that regard, the applicant submits that in the Commission Consolidated Jurisdictional Notice under Regulation No 139/2004 (OJ 2008 C 95, p. 1; 'the Consolidated Jurisdictional Notice'), the Commission describes a period of one year as relatively short and even states that a start-up period of up to three years may not constitute a lasting change of control (point 34 of the Consolidated Jurisdictional Notice). Consultations which took place during a transitory and limited period of four months between the signing of the SPA and the clearance decision can by no means contribute to a 'lasting change of control'.

74 In the third place, the applicant maintains that, in the present case, there was no 'implementation' of a concentration as provided for in Article 4(1) and Article 7(1) of Regulation No 139/2004 given that, in a hypothetical scenario where the notified concentration is prohibited, there would be no need for 'dissolution' within the meaning of Article 8(4) of Regulation No 139/2004.

75 The Commission disputes the applicant's arguments.

76 In the first place, as regards, first, the applicant's argument, on the one hand, that Article 4(1) and Article 7(1) of Regulation No 139/2004 do not prohibit agreements which give the 'possibility of exercising decisive influence' on another undertaking and, on the other hand, referring to the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), which drew a distinction between transactions which are preparatory or ancillary to the concentration and transactions which contribute to a lasting change of control, it should be recalled that, pursuant to Article 3 of Regulation No 139/2004, a concentration is deemed to arise where a change of control on a lasting basis results from the merger of two or more previously independent undertakings or parts of undertakings, or the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings of direct or indirect control of the whole or parts of one or more other undertakings, that control being constituted by the possibility, conferred by rights, contracts or any other means, of exercising decisive influence on an undertaking (judgments of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 45, and of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraph 49).

77 It is therefore necessary, in the present case, to analyse whether the SPA led to a change of control on a lasting basis of PT Portugal solely by means of the transfer of its shares to the applicant, as the applicant maintains, or whether the SPA resulted in such a change because of the possibility which it gave to the applicant to exercise decisive influence over PT Portugal before the transaction was cleared by the Commission.

78 That analysis will be carried out subsequently, in the context of the second sub-part of the first part of the third plea.

79 Second, as regards the applicant's argument that the concept of 'réalisation', used in the French-language version of Article 4(1) and Article 7(1) of Regulation No 139/2004, corresponds, in the English-language version of those articles, to the concept of 'implementation', which ought to be understood as meaning 'full consummation' of the concentration, in accordance with paragraphs 90 and 98 of the order of 18 March 2008, *Aer Lingus Group* v *Commission*

(T-411/07 R, EU:T:2008:80), it should be noted that, while according to that order the way in which the expression 'implemented' is set out in various official languages indicates that, prima facie, the definition of 'implementation' envisaged under Article 8(4) and (5) of Regulation No 139/2004 encompasses the full consummation of the concentration (order of 18 March 2008, *Aer Lingus Group* v *Commission*, T-411/07 R, EU:T:2008:80, paragraph 90), the applicant's assertion that the Court stated in paragraph 98 of that order that the same interpretation of the term 'implementation' must apply *mutatis mutandis* to Article 7 of Regulation No 139/2004 is incorrect.

80 As the Commission points out, it is apparent from paragraph 98 of the order of 18 March 2008, *Aer Lingus Group* v *Commission* (T-411/07 R, EU:T:2008:80), that the Court stated that that interpretation of the term 'implementation' must apply, *mutatis mutandis*, to the 'applicant's arguments' relating to Article 7 of Regulation No 139/2004, and not to Article 7 of Regulation No 139/2004 itself.

81 The Court therefore limited that interpretation to the appellant's arguments, namely, in the instant case, the derogation from the standstill obligation laid down in Article 7(2) of Regulation No 139/2004, and did not intend to give a general interpretation of the term 'implementation' as 'full consummation'.

82 In addition, it should be noted that, in paragraph 83 of the judgment of 6 July 2010, *Aer Lingus Group* v *Commission* (T-411/07, EU:T:2010:281), the Court clearly stated that, in the context of the derogation from the standstill obligation laid down in Article 7(2) of Regulation No 139/2004, the acquisition of a holding which does not, as such, confer control for the purposes of Article 3 of Regulation No 139/2004 may fall within the scope of Article 7 of that regulation.

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

84 Third, as regards the applicant's argument that while the concentration has not actually been implemented, the effectiveness of the system of *ex ante* control of the effects of concentrations could not be harmed, it must be recalled that any transaction or group of transactions which brings about 'a change of control on a lasting basis' by conferring the 'possibility of exercising decisive influence on the undertaking concerned' is a concentration which is deemed to have arisen for the purposes of Regulation No 139/2004. Such concentrations have the following characteristics in common: where before the operation there were two distinct undertakings for a given economic activity, there will only be one after it. Unlike in the case of a merger in which one of the two undertakings concerned ceases to exist, the Commission thus has to determine whether the result of the implementation of the concentration is to confer on one of the undertakings the power to control the other, that is to say a power which it did not previously hold. That power to control is the possibility of exercising decisive influence on an undertaking,

in particular where the undertaking with that power is able to impose choices on the other in relation to its strategic decisions (judgment of 6 July 2010, *Aer Lingus Group* v *Commission*, T-411/07, EU:T:2010:281, paragraph 63).

85 In the second place, as regards the information exchanges, in response to the applicant's argument that conduct which is of limited duration cannot contribute to a change of control on a lasting basis, it must be noted, in accordance with the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371, paragraph 52), that it is the change of control that must be lasting in order for there to be a concentration, and not the operations which are capable of contributing, in fact or in law, to such a change of control.

86 As to whether, in the present case, those information exchanges contributed to a change of control on a lasting basis or provided a possibility of exercising decisive influence, that question is the subject of the third part of the third plea below.

87 In the third place, as regards the applicant's argument that only transactions requiring 'dissolution' measures within the meaning of Article 8(4) of Regulation No 139/2004 establish the existence of a concentration, suffice it to state, first, that the applicant does not substantiate that assertion and, second, that that provision does not seek to define the concept of concentration, but to state the Commission's powers when it finds that an infringement has occurred. The applicant therefore errs in maintaining that the existence of a concentration is established only where it is possible for the Commission to dissolve the transaction in question.

88 In addition, the Court has already stated that while the acquisition of control is necessary for the Commission to be able to exercise its power to dissolve the concentration, it is not necessary for a transaction to fall within the scope of Article 7 of Regulation No 139/2004 (see, to that effect, judgment of 6 July 2010, *Aer Lingus Group* v *Commission*, T-411/07, EU:T:2010:281, paragraphs 66 and 83).

89 The first part of the first plea must therefore be rejected in its entirety.

(b) The first part of the third plea: the pre-closing covenants contained in the transaction agreement were ancillary in nature and did not amount to early implementation of the concentration

90 The present part comprises four sub-parts. The first concerns an alleged error of law in so far as the contested decision considers that the pre-closing covenants were not ancillary to or preparatory to the concentration, the second concerns the fact that the pre-closing covenants contained in the transaction agreement did not give the applicant the right to veto certain decisions of PT Portugal, the third concerns an alleged breach of the principle of legal certainty by the finding that an infringement existed and the fourth concerns an infringement of the principle of legal certainty due to the imposition of fines.

(1) The first sub-part: alleged error of law in so far as the contested decision considers that the pre-closing covenants were not ancillary to or preparatory to the concentration

91 In the first place, the applicant submits that Article 8.2(b) of the SPA stipulates that if the necessary conditions are not met at the latest 18 months following signing, the SPA would lapse and all its provisions would terminate and have no further effect. The pre-closing covenants

considered to constitute the alleged infringement lasted for only 4 months and 11 days (recital 595 of the contested decision). Consequently, even if those arrangements had contributed to a change of control (*quod non*), they could not have contributed to a 'lasting change of control' of the target, given that, according to point 28 of the Consolidated Jurisdictional Notice, Regulation No 139/2004 does not deal with 'transactions resulting only in a temporary change of control'.

92 In the second place, the applicant submits that, even though the contested decision acknowledges, in accordance with the Commission Notice on restrictions directly related and necessary to concentrations (OJ 2005 C 56, p. 24; 'the Notice on Ancillary Restraints'), that 'pre-closing covenants dictating how a target business operates between signing and closing can be justified in order to prevent material changes to … the target' (recital 117 of the contested decision), the contested decision applies a sole and extremely restrictive criterion by considering that such agreements were 'only justified if strictly limited to that which is necessary to ensure that the value of the target is maintained' (recital 71 of the contested decision). Neither Regulation No 139/2004 nor the Notice on Ancillary Restraints requires that the sole purpose of directly related and necessary pre-closing covenants should be to preserve the value of the target's business, as worldwide established practice recognises that those covenants play a key role in ensuring the integrity of the commercial activities of the acquired business between signing and closing. In addition, the applicant adds that, in the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), which constitutes the sole precedent in which the possibility of applying the prohibition contained in Article 7(1) of Regulation No 139/2004 to pre-closing agreements was analysed, the Court of Justice rejected the application of that prohibition to the pre-closing agreement, taking the view that it was ancillary or preparatory to the concentration, without even mentioning the criterion regarding the preservation of the value of the target's business.

93 The Commission disputes the applicant's arguments.

94 In the first place, as regards the argument concerning the duration of the pre-closing covenants deemed to constitute the alleged infringement, it should be noted that point 28 of the Consolidated Jurisdictional Notice, cited by the applicant, provides as follows:

'Article 3(1) of [Regulation No 139/2004] defines the concept of a concentration in such a manner as to cover operations only if they bring about a lasting change in the control of the undertakings concerned and … in the structure of the market. [Regulation No 139/2004] therefore does not deal with transactions resulting only in a temporary change of control. However, a change of control on a lasting basis is not excluded by the fact that the underlying agreements are entered into for a definite period of time, provided those agreements are renewable. A concentration may arise even in cases in which agreements envisage a definite end-date, if the period envisaged is sufficiently long to lead to a lasting change in the control of the undertakings concerned.'

95 Clearly, the terms of the Consolidated Jurisdictional Notice relied on by the applicant concern the definition of a concentration and, in particular, the duration of the agreements underlying a concentration. In that regard, it follows that a concentration arises where the change of control of the undertaking is lasting, including where the period covered by the underlying agreement is a definite period. By contrast, contrary the applicant's suggestion, those words do not concern the duration of the pre-closing covenants.

96 Moreover, as has been pointed out in paragraph 85 above, it is the change of control which must be lasting in order for there to be a concentration, and not measures, such as pre-closing covenants, which are capable of contributing, in fact or in law, to such a change of control, by conferring the possibility of exercising decisive influence on the target.

97 Thus, as the Commission points out, the applicant's argument is based on confusion between the definition of a concentration, which presupposes a lasting change of control, and a measure contributing to such a change.

98 In the second place, as regards the question of the scope of the alleged infringement and, more specifically, the criterion or criteria for determining whether the preparatory clauses constituted an infringement of Article 4(1) and of Article 7(1) of Regulation No 139/2004, first, as regards the applicant's reference to the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), it must be noted that, in that judgment, the Court of Justice, which was dealing with a request for a preliminary ruling concerning the interpretation of the standstill obligation laid down in Article 7(1) of Regulation No 139/2004, found that even though the measure in question was subject to a conditional link with the concentration in question and was likely to be of an ancillary and preparatory nature, the fact remained that, despite the effects it was likely to have on the market, it did not contribute, as such, to the change of control of the target undertaking (judgment of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 60).

99 Thus, the Court of Justice did not exclude all ancillary and preparatory measures, as such, from the scope of Article 7(1) of Regulation No 139/2004 and did not consider it useful to have recourse to any criteria to establish the probable and preparatory nature of the measure in question, since it did not consider it necessary to determine whether that measure constituted an ancillary restriction.

100 The applicant's reference to the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), to attempt to demonstrate that there are criteria justifying pre-closing covenants, such as those in the present case, other than the preservation of the target, is therefore irrelevant.

101 Second, according to the applicant, another criterion which can be taken into account is that of the integrity, in the sense of the 'commercial integrity' of the target. Pre-closing covenants ought to be able to impose obligations on the seller to consult the buyer on certain actions that are capable of affecting the integrity of the business, regardless of whether they end up preserving, increasing or decreasing its value. Preserving that integrity goes beyond the criterion of preserving the value of the target company. Accordingly, the legality of pre-closing covenants cannot depend on monetary thresholds triggering the obligation for the seller and the buyer to consult, as argued by the Commission in recitals 94 to 98 of the contested decision.

102 In that regard, it must be noted that, according to point 13 of the Notice on Ancillary Restraints, 'agreements necessary to the implementation of a concentration are typically aimed at protecting the value transferred'.

103 The Notice on Ancillary Restraints does not therefore exclude the possibility of using criteria other than the criterion of the sole and strict preservation of the value of the undertaking transferred.

104 However, since the applicant does not submit, in the context of the present plea, any evidence intended to demonstrate that there was, in the present case, a risk of the target's commercial integrity being so undermined, that argument is ineffective. It is only when the examination of the pre-closing agreements and the instances of implementation takes place that, where necessary, the possible impact of that argument on the lawfulness of the contested decision will be examined.

105 The first sub-part of the first part of the third plea must therefore be rejected.

(2) Second sub-part: alleging that the pre-closing covenants contained in the transaction agreement did not give the applicant a right to veto certain decisions of PT Portugal

106 The applicant submits that Article 6.1(b) of the SPA granted it only limited consultation rights, which did not give it 'the power to block the adoption of strategic decisions' within the meaning of point 54 of the Consolidated Jurisdictional Notice. Those consultation rights cannot therefore be regarded as veto rights. The applicant submits that the decision to consult it on the matters listed in Article 6.1(b) of the SPA in each case belonged exclusively to Oi, that it was required, under that provision, to give its consent to the decisions on which it was consulted unless it was able to justify its refusal and that the only consequence provided in the SPA in case of Oi infringing certain covenants was the right to obtain indemnification for the loss suffered.

107 The Commission disputes the applicant's arguments.

108 In recital 112 of the contested decision, the Commission states that it is both common and appropriate for clauses aimed at protecting the value of an acquired business between the signing of a purchase agreement and closing to be included in sale and purchase agreements. Such an agreement between the seller and the buyer determining the conduct of the target however can only be reasonably justified if it is strictly limited to that which is necessary to ensure that the value of the target is maintained and does not afford the purchaser the possibility to exercise decisive influence over the target, for example by affecting the ordinary course of its business operations or its commercial policy. However, according to the Commission, certain provisions of Article 6.1(b) of the SPA were not limited strictly to ensuring the maintenance of the target's value, but permitted the applicant to exercise decisive influence over PT Portugal.

109 In that regard, it must be noted that Article 6.1(b) of the SPA provides as follows:

'Furthermore, until [c]losing, the [s]eller shall procure that, except with the written consent of the [b]uyer (not to be unreasonably withheld or delayed …), no [g]roup [c]ompany[, namely PT Portugal and its subsidiaries,] shall … take any of the actions below, it being agreed that, upon expiry of a one month period after the [e]xecution [d]ate, the monetary thresholds referred to below shall be automatically modified so that (i) any reference to a [EUR] 5[million] threshold shall be replaced by a [EUR] 1[million] threshold …:

…

(ii) enter into any transaction or commitment or assume or incur liability (including any contingent liability) the value of which exceeds [EUR 5 million] in the aggregate; or

(iii) take any commitment in excess of [EUR 5 million] and exceeding three months or which may not be terminated with a notice period of three months or less; or

…

(vii) enter into, terminate or modify any agreement qualifying as a [m]aterial [c]ontract; or

…

(ix) except as provided for in the [b]udget, acquire or agree to acquire any assets the aggregate value of which exceed [EUR 5 million]; or

…

(xviii) recruit any new director or officer; or

…

(xx) terminate or amend the terms of any contract with any director or officer except if there is a just cause for such termination; or

…

(xxvi) modify its pricing policies or standard offer prices as applicable to its products and services to its customers (other than as reflected in the [b]udget) or amend any existing standard terms and conditions with customers, excluding any day to day action with specific aimed at preventing [customer] churn; or

(xxvii) enter into, amend or terminate any [m]aterial [c]ontracts other than for cause or in the ordinary course of business …

…’

110 First, as regards Article 6.1(b)(xviii) and (xx) of the SPA, which relates to appointment, dismissal or changes to the contracts of officers and directors, as the Commission acknowledges in the contested decision (recital 75), having a right to oversee the personnel of a target may be justified in order to preserve the value of the business between signing of the transaction agreement and closing, for example, for certain key employees who are integral to the value of the business, or in order to prevent changes to the cost base of the business.

111 However, the Commission submits, in the contested decision (recital 76), that having a veto right over the appointment, dismissal and changes to the terms of employment of any officer or director appears to go beyond what is necessary for preserving the target’s value and enables the acquirer to influence the target’s commercial policy. The wording of Article 6.1(b)(xviii) and (xx) of the SPA is, according to the Commission, extremely broad and covers an undefined class of personnel not all of whom are likely to be relevant to the value of the target.

112 In that regard, even though the applicant does not call into question the Commission’s assertion that an undefined class of personnel is covered, that assertion appears to be incorrect. Annex A.48 to the application lists the PT Portugal ‘board directors’, namely eight persons. Similarly, Annex A.49 lists the ‘administrators’, namely two persons.

113 The wording of Article 6.1(b)(xviii) and (xx) of the SPA was not therefore 'extremely broad', but related only to the management of PT Portugal.

114 In any event, that finding cannot call into question the accuracy of the argument put forward by the Commission in the contested decision that Article 6.1(b)(xviii) and (xx) of the SPA afforded the applicant the possibility to co-determine the structure of the senior management of PT Portugal. As the Commission points out in the contested decision, an analogy may be made with point 67 of the Consolidated Jurisdictional Notice, which relates to the concept of veto rights and which provides that 'veto rights which confer joint control typically include decisions on issues such as … the appointment of senior management'. Similarly, point 69 of the Consolidated Jurisdictional Notice states that 'the power to co-determine the structure of the senior management, such as the members of the board, usually confers on the holder the power to exercise decisive influence on the commercial policy of an undertaking'.

115 Second, as regards Article 6.1(b)(xxvi) of the SPA, on pricing policies, its wording is extremely broad, obliging PT Portugal to obtain written consent from the applicant to a very wide range of decisions on prices and client contracts. In particular, as the Commission observes, the absence of a definition of pricing policies and of standard offer prices proposed by PT Portugal results in an obligation to obtain the applicant's written consent to any change in prices. In addition, the obligation to obtain the applicant's written consent to changes to any standard terms and conditions with customers gave it the possibility to object to any change in PT Portugal's customer contracts.

116 Third, as regards Article 6.1(b)(ii), (iii), (vii), (ix) and (xxvii) of the SPA which gave the applicant the opportunity to enter into, terminate or modify certain types of contracts which PT Portugal could enter prior to the closing of the acquisition, in the Commission's view, in the light of the commercial matters covered by those clauses and the low level of the monetary thresholds which applied to some of those provisions, those clauses go beyond what is necessary to prevent any material changes to PT Portugal's business and, consequently, to preserve the value of the applicant's investment (recital 117 of the contested decision).

117 In that regard, it must be pointed out that the limitations in Article 6.1(b)(ii), (iii), (vii), (ix) and (xxvii) of the SPA are so numerous and broad and the monetary thresholds so low that it must be held that they do indeed go beyond what is necessary to preserve the value of the applicant's investment.

118 In addition, in recital 102 of the contested decision, the Commission also states, without being contradicted by the applicant, that in its reply of 20 October 2017 to the request for information of 6 October 2017 (see paragraph 23 above), Oi confirmed that it interpreted the SPA as meaning that it was obliged to seek the applicant's consent to all material contracts, whether or not they were in the ordinary course of business.

119 In that regard, it must be noted that, in that reply of 20 October 2017, Oi explained that the monetary thresholds and the conditions of Article 6.1 of the SPA had been established after several rounds of negotiations between Oi and the applicant, who had exchanged several draft SPAs, and that the monetary thresholds proposed by it were originally much higher.

120 In addition, in that reply of 20 October 2017, Oi explained that, although, because of an error on the part of both parties, Article 6.1(b)(vii) and Article 6.1(b)(xxvii) of the SPA became overlapped, Oi preferred to consider that Article 6.1(b)(vii) of the SPA, which contained more restrictive conditions than those in Article 6.1(b)(xxvii) of the SPA, prevailed, in order not to run the risk of a claim by the applicant.

121 Accordingly, the Commission was correct to conclude, in recital 108 of the contested decision, that the obligation on Oi to obtain the applicant's written consent to enter into, terminate or modify a wide range of contracts conferred upon the applicant the opportunity to determine PT Portugal's commercial policy, an opportunity which went beyond what was necessary to protect the value of PT Portugal.

122 The applicant's arguments cannot call that finding into question.

123 First, as regards the applicant's reference to point 54 of the Consolidated Jurisdictional Notice, it must be noted that, according to that provision, there is 'sole control' where one undertaking alone can exercise decisive influence on another undertaking. That is the case, in particular, where the undertaking exercising sole control has the power to determine the strategic commercial decisions of the other undertaking.

124 The issue in the present case is not whether Article 6.1(b) of the SPA conferred on the applicant 'sole' control of PT Portugal, since the Commission does not claim that the applicant acquired such control, but whether that provision resulted in a change of control, at least in part, of PT Portugal.

125 The applicant's reference to point 54 of the Consolidated Jurisdictional Notice is therefore irrelevant.

126 Second, contrary to the applicant's claim, the fact of Oi failing to comply with its obligation not to take any action mentioned in Article 6.1(b) of the SPA without the written consent of the acquirer would result, for the applicant, in the right to obtain compensation confirms that it does indeed constitute a veto right, and not a mere consultation right.

127 That finding cannot be called into question by the applicant's argument that it was required to give its consent to the decisions on which it was consulted unless it was able to justify its refusal. Such an argument concerns the reasons why the applicant might legitimately refuse its consent, and not the existence or nature of a veto right as such.

128 In that regard, as is apparent from recital 316 of the contested decision, citing a letter from the applicant to Oi of 2 April 2015, it can be observed that, on occasion, the applicant clearly refused to give its consent to Oi.

129 The applicant therefore errs in arguing that Article 6.1(b) of the SPA represented only a consultation right and not a veto right.

130 It is therefore clear that the applicant has failed to adduce any evidence capable of demonstrating that the power to block appointments, dismissals or amendments to the contract of any officer or director (Article 6.1(b)(xviii) and (xx) of the SPA), the power to block decisions on PT Portugal's pricing policies and the standard offer prices to customers (Article 6.1(b)(xxvi) of the SPA) and the

power to enter into, terminate or modify certain types of contract (Article 6.1(b)(ii), (iii), (vii), (ix) and (xxvii) of the SPA) were necessary to ensure the value of the undertaking transferred was preserved or to avoid its commercial integrity being compromised.

131 Accordingly, the Commission was correct in concluding, in recitals 55 and 177 of the contested decision, that the veto rights provided for in Article 6.1(b) of the SPA went beyond what was necessary to preserve the value of the target's business until the closing of the transaction, by granting the applicant the possibility to exercise control over the target. In addition, there is nothing in the file to indicate that those veto rights could prevent the commercial integrity of the target from being compromised.

132 It should also be noted that the preparatory clauses, in the absence of any indication to the contrary, applied immediately. The applicant therefore had the possibility of exercising that decisive influence as from the date of signing the SPA on 9 December 2014, that is to say, on a date prior to the notification of the concentration which took place on 25 February 2015.

133 The second sub-part of the first part of the third plea must therefore be rejected.

(3) The third sub-part: alleged breach of the principle of legal certainty by the finding that an infringement existed

134 According to the applicant, the contested decision infringes the principle of legal certainty in that the pre-closing covenants contained in the transaction agreement reflect the Commission's practice and worldwide established practice in mergers and acquisitions.

135 The Commission disputes the applicant's arguments.

136 As a preliminary point, as the Commission observes, the applicant's arguments based on a comparison between, first, the clauses laid down in Article 6.1(b) of the SPA and, second, the Commission's past decisions and an alleged worldwide established practice on mergers and acquisitions, appear to be more akin to the principle of the protection of legitimate expectations than the principle of legal certainty.

137 In any event, the principle of the protection of legitimate expectations, which is a fundamental principle of EU law, is the corollary of the principle of legal certainty, which requires that legal rules be clear and precise and aims to ensure that situations and legal relationships governed by EU law remain foreseeable (judgment of 5 September 2014, *Éditions Odile Jacob* v *Commission*, T-471/11, EU:T:2014:739, paragraph 90).

138 If the applicant's argument is to be understood as alleging a failure to observe the principle of the protection of legitimate expectations, it must be recalled with regard to the Commission's previous decision-making practice that, in accordance with settled case-law, the right to rely on that principle extends to any person with regard to whom an institution of the European Union has given rise to justified hopes. Three conditions must be satisfied in order for a claim to entitlement to the protection of legitimate expectations to be well founded. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the EU authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are

addressed. Third, the assurances given must comply with the applicable rules (see judgment of 5 September 2014, *Éditions Odile Jacob* v *Commission*, T-471/11, EU:T:2014:739, paragraph 91 and the case-law cited).

139 In the present case, the Commission has not provided the applicant with the slightest indication capable of being interpreted as an opportunity to undertake partial implementation of the concentration.

140 In addition, the decision-making practice of the Commission is capable of being varied depending on the change in circumstances or developments in its assessments (see judgment of 23 May 2019, *KPN* v *Commission*, T-370/17, EU:T:2019:354, paragraph 80 and the case-law cited).

141 Accordingly, the Court has already held that the fact that, in past decisions, the Commission did not hold undertakings liable for equivalent conduct could not give rise to a legitimate expectation that the Commission would refrain in future from pursuing and penalising such conduct where that reorientation of the Commission's decision-making practice was based on a correct interpretation of the full implication of the relevant legal provision (see, to that effect, judgment of 8 September 2010, *Deltafina* v *Commission*, T-29/05, EU:T:2010:355, paragraph 428).

142 Moreover, it may be noted that, as is apparent from recital 611 of the contested decision, in its decision-making practice predating the contested decision, the Commission has already had the opportunity to penalise an undertaking for having implemented a concentration before it was notified and cleared (see decision C(2009) 4416 final of 10 June 2009 imposing a fine for implementing a concentration in breach of Article 7(1) of Regulation (EEC) No 4064/89 (Case COMP/M.4994 Electrabel/Compagnie National du Rhône) and decision C(2014) 5089 final of 23 July 2014 imposing fines for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004 (Case COMP/M.7184 – Marine Harvest/Morpol)).

143 The applicant cannot therefore claim that the Commission's previous decision-making practice gave rise to a legitimate expectation on its part.

144 As regards the applicant's argument that its conduct is consistent with the worldwide practice in mergers and acquisitions, suffice it to observe that, in any event, the applicant provides no example in which authorisation was given for contractual clauses conferring veto rights going beyond what is necessary to preserve the value of the target until the closing of the transaction, thus giving the possibility of exercising control over the target.

145 The applicant's argument, understood as the principle of the protection of legitimate expectations not having been observed in the contested decision is therefore unfounded and must be rejected.

146 If the applicant's argument were to be understood as alleging failure to observe the principle of legal certainty, in that the notification and standstill obligations laid down in Article 4(1) and Article 7(1) of Regulation No 139/2004 were not clear, the applicant's argument would then appear to concur with the argument which it put forward in the context of the first plea in which it maintains that extending the concept of 'implementation' to arrangements which are ancillary to a concentration would lead to an excessively broad extension of the concept of 'implementation'. According to the applicant, that extension is incompatible with the principle of legality guaranteed by Article 49(1) of the Charter and Article 7 of the ECHR. The applicant points out that Article 49(1) of the Charter and Article 7 of the ECHR embody the principle that only the law can define a crime (*nullum crimen sine lege*) and prescribe a penalty (*nulla poena sine lege*).

147 In that regard, it should be recalled that the principle that offences and punishments are to be strictly defined by law (*nullum crimen, nulla poena sine lege*) cannot be interpreted as prohibiting the gradual clarification of the rules by judicial interpretation (judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 217). According to the case-law of the European Court of Human Rights, however clearly a legal provision is drafted, there is inevitably a need for interpretation by the courts and it will always be necessary to elucidate points of doubt and to adapt the wording to changing circumstances (judgment of 8 July 2008, *AC-Treuhand* v *Commission*, T-99/04, EU:T:2008:256, paragraph 141).

148 Nevertheless, although the principle of *nullum crimen, nulla poena sine lege* in principle enables the rules governing criminal liability to be gradually clarified through interpretation by the courts, it may preclude retroactive application of a new interpretation of a rule establishing an offence. That is particularly true if the result of that interpretation was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation attributed to the provision in the case-law at the material time. Furthermore, the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it applies, and does not preclude the person concerned from taking appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in the case of persons engaged in a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can thus be expected to take special care in assessing the risks that such an activity entails (judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 217 to 219, and of 8 July 2008, *AC-Treuhand* v *Commission*, T-99/04, EU:T:2008:256, paragraph 142).

149 It is apparent from the above considerations that the interpretation of the full implications of Article 4(1) and Article 7(1) of Regulation No 139/2004 must have been sufficiently foreseeable at the time of the perpetration of the alleged misconduct, in the light of the wording of that provision, as interpreted by the case-law (see, by analogy, judgment of 8 July 2008, *AC-Treuhand* v *Commission*, T-99/04, EU:T:2008:256, paragraph 143).

150 In that regard, it must be noted that the judgments of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), and of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149), cited in paragraph 76 above, were delivered after the SPA was signed.

151 However, it must borne in mind that it is clear from the wording of Article 4(1) and Article 7(1) of Regulation No 139/2004 that a concentration with a Community dimension must be notified prior to its implementation and that it is not to be implemented without prior notification and clearance (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 246). None of those provisions contains broad notions or vague criteria (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 379).

152 In addition, first, as has just been stated in paragraph 142 above, the Commission had already had, prior to the date of signing the SPA, the opportunity to penalise an undertaking for having implemented a concentration before it was notified and declared compatible.

153 Second, the Court had already had, prior to the date of signing the SPA, the opportunity to state that a concentration was not to be implemented before it had been cleared by the Commission. The Court had already stated, admittedly prima facie, that it was legitimate for the Commission, taking into account the strict time limits within which the Commission was to review a notified concentration and the combinations of factors which might give rise to control in any given case, to ask the parties not to take any action which might lead to a change of control (order of 18 March 2008, *Aer Lingus Group* v *Commission*, T-411/07 R, EU:T:2008:80, paragraph 94).

154 Lastly, it follows from the foregoing analysis that the applicant could have understood that the preparatory clauses laid down in Article 6.1(b) of the SPA constituted implementation of the concentration, in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004.

155 In any event, if the applicant had had any doubt as to whether those clauses were compatible with Article 4(1) and Article 7(1) of Regulation No 139/2004, it was for the applicant to consult the Commission. Indeed, if it is in any doubt as to its obligations under Regulation No 139/2004, the appropriate course of conduct for an undertaking is to contact the Commission (see, to that effect, judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 256 and the case-law cited).

156 The third sub-part of the first part of the third plea must therefore be rejected.

(4) The fourth sub-part: alleged infringement of the principle of legal certainty due to the imposition of fines

157 According to the applicant, the contested decision infringes the principle of legal certainty by penalising it in relation to a contract which was in line with the standard market practice in mergers and acquisitions and the Commission's practice under Regulation No 139/2004. In addition, the applicant states that it submitted the SPA to the Commission as an annex to the draft notification on 3 February 2015 (see paragraph 9 above) and once again as an annex to the notification on 25 February 2015 (see paragraph 10 above). Although it was aware of the content of the SPA even before the transaction was notified to it, the Commission did not express any concern or make any comments on the pre-closing covenants set out in Article 6.1(b) of the SPA, contrary to the Commission's actions in the case which gave rise to Decision C(2007) 3104 of 27 June 2007 declaring a concentration incompatible with the common market and the functioning of the EEA Agreement (Case COMP/M.4439 – Ryanair/Aer Lingus), where the Commission required Ryanair not to exercise its voting rights attached to the shares of Aer Lingus.

158 The Commission disputes the applicant's arguments.

159 It must be observed that the fourth sub-part constitutes, in essence, a repetition of the arguments put forward by the applicant in the third sub-part.

160 As recalled in paragraph 48 above, Article 14(2)(a) and (b) of Regulation No 139/2004 clearly establishes that the Commission is empowered to impose a penalty on an undertaking where it infringes Article 4(1) and Article 7(1) of Regulation No 139/2004.

161 It has also been recalled that it is not the first time that undertakings have had penalties imposed on them under Article 14(2)(a) and (b) of Regulation No 139/2004 for having infringed Article 4(1) and Article 7(1) of Regulation No 139/2004 (see paragraph 142 above).

162 In addition, it must be stated that, as is apparent from the case-law of the Court, and more particularly from the order of 18 March 2008, *Aer Lingus Group* v *Commission* (T-411/07 R, EU:T:2008:80, paragraph 94), the examination of a notified concentration, in the light of the combination of various factors which may have to be taken into account, requires a certain amount of time. In the present case, it is important to note that, while it is true that the applicant submitted the SPA to the Commission as an annex to an email relating to the draft notification on 3 February 2015, that email included numerous annexes, totalling 200 pages (the SPA comprising 71 pages). Since a certain amount of time is required to examine those documents, the Commission's failure to react swiftly cannot be interpreted as implicit clearance of the concentration. Moreover, in one of the emails exchanged prior to the email of 3 February 2015, following the applicant's request to the Commission that the Commission expressly state that it had no objection to the project, the Commission had warned the applicant by return email that, at that stage of the procedure, it did not intend to comment.

163 In addition, and in any event, as has been stated in paragraph 132 above, the applicant infringed Article 4(1) and Article 7(1) of Regulation No 139/2004 as from 9 December 2014.

164 The infringement in respect of those provisions had therefore already been committed when the pre-notification contacts between the applicant and the Commission commenced on 18 December 2014, even though the Commission had been informed of the proposed concentration on 31 October 2014.

165 In that regard, as regards the applicant's argument that, in the case which gave rise to Decision C(2007) 3104 (Case COMP/M.4439) – Ryanair/Aer Lingus), the Commission required Ryanair not to exercise its voting rights, suffice it to state that when the Commission requested Ryanair not to exercise its voting rights, it merely asked Ryanair to avoid putting itself in a situation where it would be implementing a concentration (see, to that effect, judgment of 6 July 2010, *Aer Lingus Group* v *Commission*, T-411/07, EU:T:2010:281, paragraph 83). In that case, there was no infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 before the concentration was notified.

166 It may also be noted that, as the Commission points out, it is only the notifying party who is required under Article 4(1) and Article 7(1) of Regulation No 139/2004 to make certain that the necessary steps are taken to ensure that the concentration is not implemented prior to notification and clearance.

167 While Article 8(5)(a) of Regulation No 139/2004 provides that 'the Commission may take interim measures appropriate to restore or maintain conditions of effective competition where a concentration … has been implemented in contravention of Article 7, and a decision as to the compatibility of the concentration with the [internal] market has not yet been taken', it does not impose any obligation on the Commission.

168 The applicant's argument alleging infringement of the principle of legal certainty in that fines were imposed on it must therefore be rejected.

169 The fourth sub-part of the first part of the third plea must therefore be rejected.

(c) The second part of the third plea: the applicant did not actually exercise any decisive influence over PT Portugal prior to the transaction closing

170 In recitals 178 to 371 of the contested decision, the Commission set out seven instances demonstrating that the applicant had exercised decisive influence on PT Portugal and had implemented the merger before it was cleared.

171 In that regard, according to the applicant, the findings in the contested decision are based on an incorrect assessment of the evidence in the file. In the first place, Oi retained sole control of PT Portugal until the closing of the transaction. In the second place, the applicant was consulted only on a small minority of the subjects dealt with by PT Portugal's board of directors between the signing of the agreement and the clearance of the concentration. In the third place, consulting the applicant in the seven instances referred to in section 4.2.1 of the contested decision does not constitute evidence of early implementation of the concentration. First, the applicant argues that none of the seven instances contributed to a change of control on a lasting basis by PT Portugal, since the seven instances referred to by the Commission related to matters which had no functional link with the implementation of the concentration and did not even constitute acts preparatory to the transaction for the purposes of the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371). Second, the sole purpose of those seven instances was to maintain the status quo of the target during the period prior to the closing of the transaction and to avoid any disruption likely to affect PT Portugal's value or integrity. In addition, in most cases, the applicant simply agreed with the course of action proposed by PT Portugal or merely requested supplementary information so as to be in a position to understand exactly what that course of action entailed.

172 The Commission disputes the applicant's arguments.

173 In the first place, as regards the applicant's argument that Oi retained sole control over PT Portugal until the closing of the transaction, it should be recalled that the relevant criterion for determining whether Article 4(1) and Article 7(1) of Regulation No 139/2004 have been infringed is not that of 'sole control', but that of a change of control on a lasting basis of the target resulting in particular from the acquisition of control of the target, control being constituted by the possibility, conferred inter alia by a contract, of exercising decisive influence over it (see paragraph 76 above).

174 In addition, the argument that Oi retained sole control of PT Portugal until the closing of the transaction has no basis in fact, as is apparent both from the SPA's preparatory clauses which afforded the applicant the possibility of exercising decisive influence as from its signing (see paragraph 132 above) and from the finding that decisive influence was actually exercised on certain aspects of PT Portugal's business before the closing of the transaction (see first and fourth instances, paragraphs 181 and 199 below, respectively).

175 The applicant's first argument must therefore be rejected.

176 In the second place, as regards the applicant's argument that it was consulted only on very few questions, in particular on three decisions linked to the renewal or conclusion of contracts for the distribution of television content, but not on eight other decisions concerning such content, it must be stated that the fact that the applicant was consulted only on a certain number of matters cannot call into question the fact that those consultations and the exercise of decisive influence on the target undertaking were potential infringements.

177 The applicant's second argument must therefore be rejected.

178 In the third place, as regards the applicant's argument that the fact that it was consulted in the seven instances referred to in section 4.2.1 of the contested decision does not constitute evidence of early implementation of the concentration, first, as regards the applicant's claim that the seven instances referred to by the Commission related to matters which had no functional link with the implementation of the concentration and did not even constitute acts preparatory to the transaction for the purposes of the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), it must be stated that, in the case which gave rise to that judgment, the Court of Justice had to determine whether the termination of an agreement constituted early implementation of a concentration.

179 In the present case, the Commission did not state, in the contested decision, that the applicant's conduct had a functional link with the implementation of the concentration or constituted a preparatory act, but rather stated that, by its conduct, it had actually exercised control over many aspects of PT Portugal's business before the clearance decision was adopted.

180 Second, as a preliminary point, as regards the applicant's claim that 'in most cases', it simply agreed with the course of action proposed by PT Portugal or merely requested supplementary information, it must be stated that the applicant thereby acknowledges that, on some occasions, it did not give its approval to PT Portugal's choices.

181 Next, more specifically, as regards the first of the seven instances, concerning a campaign to promote post-paid mobile services, it is apparent from the contested decision that the aim of that campaign was to speed up customer migration from pre-paid contracts to post-paid contracts and, in so doing, to consolidate PT Portugal's customer base, to increase the average revenue per subscriber and to reduce the rate of customer churn. Before the proposal concerning the post-paid promotion campaign was approved by PT Portugal's board of directors, the latter requested, by telephone conference dated 20 January 2015, the applicant's consent to be able to launch the campaign. Immediately after that conference call, the applicant gave written instructions to PT Portugal concerning the targets to be achieved and the duration of the campaign. In addition, PT Portugal regularly sent the applicant information on its progress. According to the contested decision, price campaigns were regularly organised on the retail mobile communications market. Therefore, the post-paid promotion campaign was not in any way extraordinary and fell within PT Portugal's ordinary course of business. In addition, the campaign's objective of maintaining the revenue per subscriber and reducing the rate of customer churn is a common feature of the promotional activities of telecommunications operators (recitals 181 to 219 of the contested decision).

182 The applicant claims that its intervention was justified, since the campaign represented a repositioning by PT Portugal towards standalone offers rather than 'multiplay', which could harm the undertaking's integrity and, therefore, was outside the scope of ordinary price promotions. In addition, the applicant asserts that it did not seek to alter the scope, detailed arrangements or content of the campaign and that, in any event, its intervention had no effect on PT Portugal's business in so far as it did not prevent it from carrying out the campaign initially planned.

183 In that regard, it must be observed that there is nothing to suggest that the campaign could have had a negative impact on the integrity of PT Portugal's business. As the Commission points out in the contested decision, the aim of maintaining revenue per subscriber and reducing the rate of customer churn is a normal objective for a telecommunications operator.

184 In any event, as is apparent from recitals 203 and 204 of the contested decision, the cost of the campaign was below the threshold which, under Article 6.1(b) of the SPA, triggered the obligation for Oi to obtain the applicant's written consent (a threshold of only EUR 1 million upon expiry of a period of one month after the execution date, see paragraph 109 above).

185 In addition, even if, as the applicant claims, it did not prevent PT Portugal from conducting the campaign initially planned, it is apparent from the facts, as set out in paragraph 181 above, that the applicant does not dispute that it played an essential role in the approval, detailed arrangements and monitoring of the campaign for the promotion of post-paid mobile services.

186 The fact that the applicant, as it itself states in the application, confirmed its agreement to the campaign launch demonstrated that it did actually exercise control over the campaign, since it decided whether the campaign could be launched.

187 The applicant thereby put in place limits to be observed and objectives to be achieved. The applicant was also consulted on the characteristics and objectives of the post-paid promotion campaign, and gave written instructions to PT Portugal's management concerning the campaign's objectives and duration. It also received detailed information, not only on PT Portugal's future pricing intentions (recital 205 of the contested decision), but also on the results of the post-paid promotion campaign while it was being implemented, in particular as regards the number of customers who had migrated to post-paid contracts and the increases in turnover per subscriber depending on each type of offer (recital 218 of the contested decision).

188 The second of the seven instances concerns the renewal of the distribution agreement for the Porto Canal sports channel, which had reinforced its grid with additional sports content from Porto Football Club. That instance was the subject of numerous discussions between the applicant and PT Portugal as from 18 February 2015. Around that date, the applicant and PT Portugal had a telephone conversation during which the applicant was informed of the progress of the renewal discussions. During that conversation, the applicant asked PT Portugal to provide it with all the relevant documents and to fix a date for a telephone conference. During the same conversation, the applicant informed PT Portugal, its competitor, that its subsidiary Cabovisão had ceased distributing Porto Canal. On 20 February 2015, PT Portugal sent the applicant an email containing detailed confidential information concerning the distribution agreement, such as information on the terms of the existing agreement, the performance of the channels concerned, the renegotiation process and the proposal sent to Porto Canal. That email also included two possible scenarios for the future distribution fee structure. In the same email, PT Portugal requested a conference call with the applicant, which took place on 23 February 2015. On 25 February 2015, PT Portugal sent the applicant detailed figures on the number of hours that subscribers spent watching Porto Canal. By letter of 2 April 2015, the applicant initially refused to give PT Portugal its consent to the renewal of the contract, before changing its mind a few days later and agreeing to the negotiations proceeding. It thus follows from the facts as set out in the contested decision, which are not disputed by the applicant, that the applicant gave instructions to PT Portugal on how the negotiations were to proceed and that PT Portugal applied those instructions (recitals 220 to 250 of the contested decision).

189 According to the applicant, its intervention in the negotiations with the sports channel was justified on account of the political sensitivity of negotiations with a sports club. In addition, its intervention was, in its view, intended to avoid any material change in PT Portugal's commercial strategy in the television segment. Furthermore, negotiations with the Porto Canal channel were carried out at a slow pace (the contract was concluded on 23 July 2015, nearly three months after approval). Moreover, PT Portugal continued to distribute the channel after the expiry date of the previous contract, that is to say after 31 March 2015. Lastly, the applicant argues that the exchanges between the applicant and PT Portugal concerning the renegotiation of the Porto Canal channel contract could not have affected Cabovisão, which had ceased distributing that channel several months earlier (in September 2013).

190 In that context, as regards the arguments that the applicant's intervention was, first, justified on account of the political sensitivity of the contract and, second, was intended to avoid a material change in PT Portugal's commercial strategy, it must be observed that the renegotiation of contracts for the distribution of television content forms part of the ordinary business of an undertaking active in the provision of television services. In addition, it is stated in recital 235 of the contested decision, without being disputed by the applicant, that the value of the contract was very small compared to the purchase price for the acquisition of PT Portugal and PT Portugal's turnover. The applicant's intervention cannot therefore reasonably be regarded as necessary to preserve the value of the target in the period between the date of signing and the date of closing the transaction. Lastly, the applicant adduces no evidence to demonstrate that the contract was of political importance or was an indicator of a material change in strategy which would have justified its intervention.

191 As regards the argument that the negotiations with the Porto Canal channel were conducted at a slow pace, the fast or slow pace of negotiations cannot call into question the fact that the applicant did actually intervene in a commercial decision of PT Portugal prior to the adoption of the clearance decision.

192 As regards the argument that PT Portugal continued distributing the Porto Canal channel pursuant to the terms of the previous agreement, as stated in recital 249 of the contested decision, that fact is irrelevant in the context of the applicant's unjustified intervention in PT Portugal's commercial decisions and strategies during the period between the signing and conclusion of the agreement. Moreover, that argument appears rather to conflict with the argument that it was essential for it to intervene in PT Portugal in the context of its negotiations with the Porto Canal channel.

193 As regards the argument that the exchanges between the applicant and PT Portugal could not have had any effect on Cabovisão, that fact is also irrelevant in the context of the applicant's unjustified intervention in PT Portugal's commercial decisions and strategies during the period between the signing and conclusion of the agreement.

194 The third of the seven instances concerns the selection of radio access network suppliers, in respect of which PT Portugal asked the applicant, on 17 March 2015, whether it would permit the applicant to continue the selection process, even though it was understood that the choice would be made only after the transaction had been closed. The applicant then instructed PT Portugal to put the selection process on hold and to provide it with information on that matter, following which PT Portugal altered its selection strategy (recitals 251 to 280 of the contested decision).

195 According to the applicant, PT Portugal consulted it, in order to ensure that that selection was prepared and carried out under the best possible conditions so as to avoid any disruption in the functioning of PT Portugal's radio access network equipment, which constitutes both an indispensable input and the backbone of the mobile network of any telecommunications operator.

196 In that regard, it appears that the selection process was not intended to resolve a risk of disruption in the functioning of PT Portugal's radio access network equipment. It is clear from recitals 253 and 273 of the contested decision, which the applicant does not dispute, that PT Portugal, which had several radio access network suppliers per site, wished to rationalise the number of suppliers so as to reduce operational expenditure and simplify the network.

197 In addition, while, as has just been pointed out, PT Portugal requested the applicant's consent not for the final selection of the equipment supplier, but for the purposes of continuing the selection process, the applicant provided no explanation to justify why continuing a selection process could have had a substantial impact on PT Portugal's business such as to justify its intervention. It may also be noted that, in recital 274 of the contested decision, the Commission stated that it could not be ruled out that the issue whether to continue the selection process was not even caught by the provisions of Article 6.1(b) of the SPA. In that regard, the Commission observed, in recital 275 of the contested decision, that PT Portugal had explicitly stated that its intention was not to ask for capital expenditure.

198 That third instance thus appears to illustrate the fact that the applicant not only implemented the preparatory clauses of Article 6.1(b) of the SPA, but that it could even have gone beyond those clauses.

199 The fourth of the seven instances concerns a video on demand contract. On 10 February 2015, PT Portugal contacted the applicant in order to establish whether concluding an agreement on television content would be in line with its commercial strategy and requested the applicant's consent to conclude that agreement. PT Portugal also sent the applicant information on the negotiations relating to that contract. In addition, PT Portugal asked the applicant whether it was signing similar contracts and to give it instructions as to whether to sign that contract. On 11 February 2015, the applicant informed PT Portugal that the applicant was signing similar agreements on more favourable commercial terms and requested PT Portugal not to conclude that agreement before discussing it and to reduce the duration of the contract to one year (recitals 281 to 304 of the contested decision).

200 According to the applicant, its intervention was justified given the novelty of the contract, which represented a material change in strategy. The applicant acknowledges that it provided information to PT Portugal, but states that PT Portugal did not take it into account and signed the agreement on 4 March 2015, that is to say, before the transaction closed.

201 In that regard, the Commission stated, in recital 300 of the contested decision, that the content of the contract was not outside the ordinary course of business, since PT Portugal already offered on-demand video services under contracts with more than 60 content providers. In addition, the Commission observed, in recitals 298 to 301 of the contested decision, that there was no indication that the contract was of such importance for PT Portugal's business that the applicant's intervention was necessary to protect the value of its investment. Lastly, the Commission found that while PT Portugal had actually entered into the contract before the

transaction closed, the duration of the contract had been reduced to one year rather than two as initially foreseen by PT Portugal, in accordance with the applicant's instructions. The applicant does not dispute any of those three matters.

202 The fifth of the seven instances concerns the inclusion of a new television channel. At the beginning of April 2015, PT Portugal requested instructions from the applicant, which refused to approve that inclusion. On the date of the clearance decision, the applicant had still not given its consent (recitals 305 to 326 of the contested decision).

203 The applicant submits that, since that channel was not aimed at human beings but at dogs, its intervention was justified in the light of the novelty of the contract and the negative effects which that content might have on PT Portugal's image. The evidence in the file shows not only that it did not interfere with PT Portugal's decision-making but also that there is no indication that it was even interested in doing so. It merely asked for clarification of the revenue sharing model for that channel, which was new and which it had never heard of previously, and it left PT Portugal to decide on its own whether or not to conclude that contract. Ultimately, the channel was launched, notwithstanding the absence of a response from the applicant, one month after the transaction was cleared.

204 In that regard, even if, as the Commission points out in the contested decision, at the time of the negotiations PT Portugal was already offering channels on hunting, fishing and bull-fighting (recital 324 of the contested decision), a channel aimed at dogs does indeed appear to constitute an unusual proposal.

205 Therefore, even though the Commission states, in recital 317 of the contested decision, that the annual value of that contract was well below the monetary threshold set in Article 6.1(b) of the SPA, it cannot be ruled out that that content could have had negative effects on PT Portugal's image and that the applicant's intervention was therefore necessary to preserve PT Portugal's image or even the value that might result from such an image. Furthermore, it must be borne in mind that, as has been noted in paragraph 103 above, under the Notice on Ancillary Restraints, a restriction may be justified by criteria other than the criterion of the sole and strict preservation of the value of the target undertaking.

206 The sixth of the seven instances concerns the action to be taken in relation to shares in a national telecommunications network. On 9 March 2015, the applicant was informed by Oi, first, that an operator intended to purchase those shares and, second, that Oi did not intend to sell its shares or to exercise its pre-emption rights. In the contested decision, the Commission does not dispute that that exchange could be justified by the need to preserve the business acquired by the applicant, which included participation in that network, but observes that the applicant, after requesting and obtaining further information, expressly stated that it wished PT Portugal to buy as many shares from other shareholders as possible and to establish contacts in order to purchase further shares, thus exceeding the limits of what could be regarded as appropriate and necessary to preserve the value of PT Portugal (recitals 327 to 352 of the contested decision).

207 According to the applicant, the information was sent to it as a courtesy. The applicant argues that it merely asked whether other shareholders were prepared to sell their shares to PT Portugal and its suggestion to acquire additional shares was not followed.

208 In that regard, it is common ground that the applicant asked PT Portugal to contact the operator in question and that PT Portugal took the steps necessary for that purpose.

209 Therefore, the Commission was correct in finding that the applicant, by asking PT Portugal to contact the operator in question, had overstepped the boundaries of what could be considered necessary to preserve the value of PT Portugal between the date of signing and the date of closing of the transaction (recital 344 of the contested decision). In so doing, the applicant acted as if it had already formally acquired control of PT Portugal.

210 The applicant's argument that ultimately no shares were acquired from the operator in question cannot call that finding into question.

211 Indeed, while that transaction was unsuccessful, that was not due to PT Portugal, but was rather due to the applicant, which ultimately declined to meet the operator in question (recital 346 of the contested decision).

212 The seventh instance mentioned in the contested decision concerns a call for tenders for the provision of outsourcing services and solutions. In order to perform that contract, PT Portugal was required to make certain investments. On 6 April 2015, Oi sent the applicant a formal request in accordance with Article 6.1(b) of the SPA seeking its approval for the investments to be made. The applicant then asked for additional information and asked what the payback period for the investment would be. In the contested decision, the Commission concluded that it was unlikely that the contract would have had a substantial impact on the value of PT Portugal's business, given the value of that contract compared to the value of PT Portugal's business and its purchase price, and that, in any event, the information which PT Portugal had sent to the applicant was much more detailed and extensive than what would have been necessary to achieve the objective of maintaining the value of the target undertaking, such as exchanging detailed information on expected revenues (recitals 353 to 371 of the contested decision).

213 According to the applicant, its intervention was justified in the light of the low profitability and the nature of the contract. Moreover, it merely requested additional information and did not dictate to PT Portugal how it was to behave. In addition, the applicant maintains that its intervention could not have affected PT Portugal's business since the investment was made without waiting for its approval.

214 In that regard, it must be observed that the contract formed part of PT Portugal's day-to-day business, since it concerned the renewal of an existing contract and a level of revenue comparable to that of the pre-existing contract. In addition, it is not disputed that the value of the contract did not reach the thresholds set by the SPA. Lastly, the fact that the investment was made without waiting for the applicant's approval does not alter the fact that PT Portugal supplied confidential information regarding the 'expected customer revenues' with the applicant, which, at the time, was a competitor on the Portuguese telecommunications market.

215 It follows from the foregoing that, even if the fifth instance did not demonstrate that the transaction was implemented prior to the date on which the concentration was cleared, in any event, the Commission was correct in finding in recital 55 of the contested decision (see paragraph 26 above) that, given the findings relating to the other six instances, it was apparent from various documents in the file that the applicant had actually exercised decisive influence over PT Portugal prior to the adoption of the clearance decision and, in some instances, prior to notification, in breach of Article 4(1) and Article 7(1) of Regulation No 139/2004.

216 In that regard, it is important to point out that, since the applicant claims that its intervention was justified on account of the unusual nature of those operations, it should, as the Commission stated in recital 116 of the contested decision, have requested a derogation from the standstill obligation in respect of those operations, on the basis of Article 7(3) of Regulation No 139/2004.

217 As the Commission points out, it has granted derogations from the standstill obligation under Article 7(3) of Regulation No 139/2004 on a number of occasions, authorising certain actions which are considered to constitute partial implementation of a concentration, but which do not constitute an actual change of control (derogation granted in order to restore the viability of the target undertaking (Commission decision of 2 July 2008, Case COMP/M.5267 – Sun Capital/SCS Group); derogation granted to enable certain steps to be undertaken, such as signature of administrative contracts (Commission decision of 14 September 2004, Case COMP/M.3275 – Shell España/Cepsa/SIS JV); derogation granted to enable certain implementing measures, such as signature of contracts and incorporation of a joint venture (Commission decision of 28 November 2006, Case COMP/M.4472 – William Hill/Codere/JV)).

218 The applicant's third argument and the second part of the third plea in its entirety must therefore be rejected.

(d) The third part of the third plea: error of law and of fact in finding that the transmission of information contributed to the finding that decisive influence was exercised

219 The applicant submits that the mere existence of information exchanges, which are inevitable and even necessary in the context of a concentration, is insufficient to establish an infringement of Article 4(1) or Article 7(1) of Regulation No 139/2004. It is therefore for the Commission to demonstrate that the transmission to the applicant of information on PT Portugal resulted in transferring control of PT Portugal to it within the meaning of the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371). In that regard, unduly extending the scope of Article 7(1) of Regulation No 139/2004 to acts which do not contribute to the implementation of a concentration would, according to that judgment, result in a corresponding reduction in the scope of Regulation No 139/2004. Accordingly, by presuming that the information provided to the applicant was used to exercise decisive influence over PT Portugal, the decision infringes the principle of the presumption of innocence guaranteed in Article 48 of the Charter.

220 The Commission disputes the applicant's arguments.

221 In recitals 378 to 478 of the contested decision, the Commission described information exchanges between the applicant and PT Portugal which contributed to demonstrating that the applicant had exercised decisive influence over PT Portugal and had implemented the concentration prior to its clearance.

222 In addition, it should be noted that it is apparent from the contested decision, first, that three meetings were held, on 3 February, 20 March and 25 to 27 March 2015, between the applicant's directors and those of PT Portugal, on the applicant's initiative, which were intended, according to the applicant's internal emails of 27 January 2015 concerning the first meeting, to 'start coordinating any key decisions that require [the applicant's] consent as per the contract [and] any initiatives [PT Portugal] would like to run by [the applicant]' (recitals 380 and 381 of the contested decision).

223 At those meetings, PT Portugal provided the applicant with detailed and precise information on matters such as its key initiatives in terms of its strategy and commercial objectives, its cost-related strategies, its key supplier relationships, recent financial data on its revenues, its profit margin, its capital expenditure and its budget planning, key performance indicators, its network expansion plans and detailed information on PT Portugal's wholesale business (recitals 384 to 410 of the contested decision).

224 Second, in the context of bilateral exchanges, which began on 20 February 2015, PT Portugal also provided the applicant with precise and detailed information on its future pricing strategy for customer 3Play/4Play offers (recitals 449 to 454 of the contested decision) and, at the applicant's request, from 11 March 2015, provided information on key performance indicators each week (recitals 455 to 468 of the contested decision).

225 As regards the applicant's allegation that the Commission concluded, in the contested decision, that the mere existence of information exchanges, which are however inevitable and even necessary in the context of a concentration, was sufficient to establish an infringement of Article 4(1) or Article 7(1) of Regulation No 139/2004, that allegation is incorrect in two respects.

226 First, the Commission did not conclude that those information exchanges were sufficient to 'establish' an infringement of Article 4(1) or Article 7(1) of Regulation No 139/2004.

227 In recital 478 of the contested decision, the Commission concluded that those exchanges had 'contribute[d]' to demonstrating that the applicant had exercised decisive influence over certain aspects of PT Portugal, as, moreover, the applicant itself observed in the title of the third part of the plea.

228 Second, what was involved was not a question of 'mere information exchanges'.

229 The Commission expressly stated in recital 437 of the contested decision that exchanges of business-related information between a potential acquirer and a vendor could be considered as, if properly conducted, a normal part of the acquisition process, if the nature and purpose of such exchanges are directly related to the potential acquirer's need to assess the value of the business.

230 However, in the present case, the exchanges of information continued after the signing of the SPA. Moreover, it follows from what has just been stated above that the parties exchanged certain information regarding PT Portugal which was highly sensitive both commercially and competitively, even though Cabovisão and ONI, subsidiaries of the applicant (see paragraph 8 above), were in direct competition with PT Portugal at that time.

231 Accordingly, the applicant had access to information to which it should not have had access and PT Portugal replied to the applicant's requests, since providing access to that information was not justified by the aim of maintaining the value of the target undertaking.

232 In addition, the applicant was aware of that situation.

233 An internal document of the applicant from April 2015, which is cited in recital 582 of the contested decision, states as follows:

'Certain exchanges of information are obviously strictly forbidden [under the rules on early implementation of a concentration]: exchanges of information on clients, on network specificities, exchange of information in the framework of invitations to tender, exchanges on commercial conditions, on prices or rebates eventually granted, on purchase conditions, on on-going negotiations in particular, on agreements with third parties. Any exchange on financial issues is to be banned insofar as it does not concern elements available to the public (standard price list …). No consultation is possible in the context of offers to clients or agreements with third parties.'

234 Similarly, footnotes 214 and 219 of the contested decision cite a very clear internal email from the applicant in which the head of the B2B department conveyed to the director of operations his unease regarding email exchanges with PT Portugal during the pre-closing period, which he considered to be premature.

235 The Commission was therefore correct in concluding, in recital 478 of the contested decision, that the information exchanges had contributed to demonstrating that the applicant had exercised decisive influence over certain aspects of PT Portugal's business.

236 Therefore, first, contrary to the applicant's assertions, it was not for the Commission to demonstrate that transmitting information relating to PT Portugal to the applicant had, in itself, resulted in control of PT Portugal being transferred to it, within the meaning of the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371).

237 Second, the Commission did not unduly extend the scope of Article 7(1) of Regulation No 139/2004 to acts which did not contribute to the implementation of the concentration.

238 Accordingly, the applicant's reference to the judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371) – paragraph 58 of which stated that extending the scope of Article 7 of Regulation No 139/2004 to transactions not contributing to the implementation of a concentration would amount not only to extending the scope of the regulation in breach of Article 1 of that regulation, but also to a corresponding reduction in the scope of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1), which would then no longer be applicable to such operations, even if they may give rise to coordination between undertakings, for the purposes of Article 101 TFEU – is irrelevant.

239 In addition, as the Commission points out, Article 4(1) and Article 7(1) of Regulation No 139/2004 seek to prevent, by means of an *ex ante* control mechanism, the situation, as in the present case, in which an acquirer is able to, or even does, interfere unjustifiably with the running of the target's business before the Commission has had the opportunity to review the concentration, rather than the situation provided for in Article 101 TFEU and Regulation No 1/2003, which presuppose an *ex post* mechanism.

240 Lastly, it must be emphasised that, since the first meeting took place on 3 February 2015, the information exchanges contributed to demonstrating that the applicant had exercised decisive influence over certain aspects of PT Portugal's business in breach of both Article 7(1) and Article 4(1) of Regulation No 139/2004.

241 As regards the applicant's claim that the decision infringes the principle of the presumption of innocence on the ground that the Commission presumes that the information exchanges constituted a lasting change in control, as has just been stated, the Commission did not presume, in the contested decision, that those exchanges constituted a lasting change in control, but, after having stated that certain exchanges could be regarded as part of a normal acquisition process, it assessed the implications of the information exchanges which had occurred between the applicant and PT Portugal prior to the conclusion of the transaction and found that those exchanges contributed to demonstrating that the applicant had exercised decisive influence over PT Portugal.

242 The third part of the third plea must therefore be rejected.

(e) The second part of the first plea: infringement of the general principles of legality and the presumption of innocence

243 The applicant submits that extending the concept of 'implementation' to arrangements which are ancillary to a concentration and which give the acquirer the possibility to be consulted on certain specific matters, but do not contribute to any actual change of control on a lasting basis, results in punishing situations where no reprehensible behaviour effectively took place and which are by no means contemplated in Article 4(1) and Article 7(1) of Regulation No 139/2004. Such an excessively broad extension of the concept of 'implementation' is incompatible with the principle of legality guaranteed by Article 49(1) of the Charter and Article 7 ECHR. Similarly, the decision also infringes the fundamental right to the presumption of innocence guaranteed in Article 48(1) of the Charter and Article 6(2) ECHR.

244 The Commission disputes the applicant's arguments.

245 As regards an alleged infringement of the general principle of legality in that the arrangements, that is to say, the clauses provided for in Article 6.1(b) of the SPA, did not contribute to a lasting change in the actual control of the target undertaking, as has been pointed out in paragraph 108 et seq. above, some of the preparatory clauses contributed to the change of control on a lasting basis due to the possibility that they afforded the applicant to co-determine the structure of PT Portugal's senior management and to enter into, terminate or modify certain types of its contracts, as well as the obligation for PT Portugal to obtain the applicant's written consent to a very wide range of decisions on pricing and client contracts.

246 The contested decision did not therefore extend the concept of 'implementation'.

247 The applicant's argument alleging infringement of the general principle of legality must therefore be rejected.

248 As regards the alleged infringement of the principle of the presumption of innocence, it should be borne in mind that that principle implies that every person accused is presumed to be innocent until his or her guilt has been established according to law. It thus precludes any formal finding and even any allusion to the liability of an accused person for a particular infringement in a final decision unless that person has enjoyed all the usual guarantees accorded for the exercise of the rights of defence in the normal course of proceedings resulting in a decision on the merits of the case (see judgment of 10 November 2017, *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 257 and the case-law cited).

249 In the present case, it is apparent from paragraphs 12 to 24 above, relating to the administrative procedure, that the applicant enjoyed procedural rights enabling it to exercise its rights of defence. Moreover, the applicant does not claim that its rights of defence were infringed during the administrative procedure.

250 In addition, it must be borne in mind that the Commission must prove the infringements which it has found and adduce evidence capable of demonstrating to the requisite legal standard the existence of the fact constituting an infringement (see judgment of 13 September 2013, *Total Raffinage Marketing* v *Commission*, T-566/08, EU:T:2013:423, paragraph 35 and the case-law cited). Any doubt on the part of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed (see judgment of 13 September 2013, *Total Raffinage Marketing* v *Commission*, T-566/08, EU:T:2013:423, paragraph 37 and the case-law cited).

251 It follows from the foregoing that the Commission has satisfied the burden of proof by demonstrating that not only the possibility for the applicant to exercise decisive influence (see paragraph 132 above), but also the actual exercise of that decisive influence over certain aspects of PT Portugal's business (see paragraph 215 above) and additionally the existence of information exchanges which contributed to the implementation of the transaction (see paragraph 235 above) constituted an infringement of Article 4(1) and of Article 7(1) of Regulation No 139/2004.

252 The Court therefore also rejects the applicant's argument alleging infringement of the principle of the presumption of innocence and the second part of the first plea in its entirety.

(f) The second plea: errors of fact and of law in that the Commission concluded that the applicant had acquired sole control of PT Portugal

253 The applicant submits that the contested decision wrongly penalised it for having acquired, prior to the notification of the concentration and the Commission's clearance decision, 'sole control of PT Portugal within the meaning of Article 3(1)(b) of [Regulation No 139/2004] by way of purchase of shares' (recital 3 of the contested decision), given that ownership of the shares in PT Portugal transferred to the applicant on 2 June 2015 (recital 11 of the contested decision), that is, after the concentration was notified (25 February 2015) and after the clearance decision (20 April 2015). The applicant submits that, until that date, PT Portugal remained a fully owned subsidiary of Oi, as owner of the shares representing 100% of the share capital of that company. Oi retained sole control of PT Portugal until 2 June 2015, holding all the shares and voting rights in its subsidiary, and it was only as from that date that the applicant acquired sole control of PT Portugal. In addition, no reference was made in the contested decision to there having been a 'partial implementation' of a concentration in the present case.

254 The Commission disputes the applicant's arguments.

255 The Commission states that, contrary to the applicant's assertion, it did not find in the contested decision that the applicant had acquired 'sole control' of PT Portugal prior to notification and clearance of the concentration.

256 In addition, as has been recalled in paragraph 173 above, the relevant criterion for determining whether Article 4(1) and Article 7(1) of Regulation No 139/2004 have been infringed is not that of 'sole control', but the criterion of a change of control on a lasting basis of the target resulting

in particular from the acquisition of control of the target, control being constituted by the possibility, conferred inter alia by a contract, of exercising decisive influence over it (see paragraph 76 above).

257 In the present case, as has been stated previously, it is apparent not only from the SPA preparatory clauses which afforded the applicant the possibility of exercising decisive influence (see paragraph 131 above), but also from the finding that decisive influence over certain aspects of PT Portugal's business had actually been exercised (see paragraph 215 above) and additionally from the existence of information exchanges which contributed to the implementation of the concentration (see paragraph 235 above) that the Commission was correct in finding that the applicant had infringed Article 4(1) and Article 7(1) of Regulation No 139/2004.

258 The second plea must therefore be rejected.

259 It follows from all of the foregoing that the Court must reject the first three pleas.

3. The fourth plea: the Commission infringed the principle ne bis in idem *and the principles of proportionality and of the prohibition of double punishment*

260 The fourth plea comprises three parts. The applicant submits, in the first part, that, by the contested decision, the Commission imposed two fines on it for the same conduct, in the second part, that the contested decision infringes the principle *ne bis in idem* and, in the third part, that the contested decision infringes the principle of proportionality and the principle of the prohibition of a double punishment rooted in the general principles common to the legal systems of the Member States.

261 In its reply to the Court's request of 10 March 2020 to express its views on the possible implications of the judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149) (see paragraph 37 above), the applicant stated that it was withdrawing the second part based on infringement of the principle *ne bis in idem*.

(a) The first part: the Commission imposed two fines on the applicant penalising the same conduct pursuant to two provisions which protect the same legal interest

262 The applicant observes that recital 564 of the contested decision states that the facts which gave rise to the alleged infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004 were the same. The Commission's statement in recital 39 of the contested decision that Article 4(1) and Article 7(1) enshrine distinct legal principles and thereby play distinct and complementary roles is, therefore, contradictory and, in any event, unfounded. The formalistic distinction which the contested decision draws between a positive obligation to act, namely to notify before implementation (recitals 40 and 486), and a negative obligation not to act, namely not to implement before notification (and obtaining clearance) (recitals 41 and 487), cannot, according to the applicant, hide the fact that the infringement established in Article 4(1) of Regulation No 139/2004 is not the failure to notify the concentration, but the implementation of the concentration before its notification. In addition, an undertaking could not infringe Article 4(1) of Regulation No 139/2004 without at the same time infringing Article 7(1) of that regulation. The fact that both provisions impose the same obligation (or that they prohibit the same conduct) is also confirmed by the fact that Article 7(3) of Regulation No 139/2004 provides that the parties may request a derogation from the obligations laid down in Article 7(1) of that

regulation 'at any time, be it before notification or after the transaction', and by the absence in that regulation of an equivalent provision allowing the parties to request a derogation from the obligation imposed in Article 4(1) of that regulation.

263 The Commission disputes the applicant's arguments.

264 In that regard, as is apparent from the principles recalled in paragraph 54 et seq. above in the context of the plea of illegality raised by the applicant, suffice it to note that Article 4(1)(b) and Article 7(1)(b) of the regulation pursue autonomous objectives in the context of the 'one-stop shop' system referred to in recital 8 of that regulation and that Article 4(1)(b) lays down an obligation to do something, which is instantaneous, whereas Article 7(1)(b) lays down an obligation not to do something, which is continuous.

265 The applicant therefore errs in arguing that Article 4(1)(b) and Article 7(1)(b) of Regulation No 139/2004 'protect the same legal interest', 'impose the same obligation' or 'prohibit the same conduct'.

266 The first part of the fourth plea must therefore be rejected.

(b) Third part: infringement of the principle of proportionality enshrined in Article 49(3) of the Charter and of the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States

267 The applicant submits that the imposition of two penalties on the same person for the same conduct in the context of one and the same procedure infringes the principle of proportionality enshrined in Article 49(3) of the Charter and the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States governing concurrence of laws. There is, between Article 4(1) of Regulation No 139/2004 and Article 7(1) of that regulation, an apparent or false concurrence (or concurrence of laws), since those two provisions protect the same legal interest and trigger the imposition of two fines on the same offender for the same conduct. The applicant adds that that is all the more so in the present case because it informed the Commission, on its own initiative, of the concentration well before the SPA was signed and then sent a case-team allocation request relating to its file three days after such signature.

268 The Commission disputes the applicant's arguments.

269 In that regard, it has just been stated (paragraph 264 above) that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue autonomous objectives in the context of the 'one-stop shop' system referred to in recital 8 of that regulation.

270 The fact that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue autonomous objectives accordingly constitutes a differentiating factor which justifies the imposition of two separate fines.

271 The applicant therefore errs in claiming that Article 4(1) and Article 7(1) of Regulation No 139/2004 protect the 'same legal interest', in relation to which cumulating punishments is disproportionate, infringes the principle of proportionality enshrined in Article 49(3) of the Charter, and is contrary to the principle of the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States.

272 Moreover, the Court of Justice held in Case C-10/18 P that the General Court was justified in holding that the Commission was entitled to impose two separate fines under Article 4(1) and Article 7(1) of Regulation No 139/2004 respectively (judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraph 111).

273 In addition, first, as regards the principle of proportionality, it has already been stated (see paragraph 65 above) that the imposition of two penalties for the same conduct, by the same authority in a single decision cannot be considered, as such, to be contrary to the principle of proportionality (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 343).

274 Second, as to the principle of the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States, the Court of Justice has already rejected a similar argument. It held that the General Court was correct in holding that, as regards Article 4(1) and Article 7(1) of Regulation No 139/2004, in the absence of a provision which is 'primarily applicable', the applicant's argument that the General Court infringed the principle of concurrent offences, as laid down in international law and the legal order of the Member States, could not be upheld (see, to that effect, judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraphs 117 and 118).

275 For the same reason, the argument based on the prohibition of double punishment rooted in the general principles common to the legal systems of the Member States cannot be upheld.

276 Therefore, the fact that, in the present case, the applicant contacted the Commission on 31 October 2014 to inform it of its plan to acquire sole control of PT Portugal (see paragraph 6 above), that is to say prior to the date of signing the SPA, 9 December 2014 (see paragraph 3 above), then made a case-team allocation request relating to its file on 12 December 2014 (see paragraph 7 above) cannot call into question the Commission's ability to impose two separate fines in respect of Article 4(1) and Article 7(1) of Regulation No 139/2004 respectively.

277 The third part of the fourth plea and, therefore, the fourth plea in its entirety, must be rejected. Accordingly, the principal heads of claim seeking annulment of the contested decision must be rejected.

B. The heads of claim raised in the alternative, concerning the amount of the fines

278 In support of those heads of claims which are raised in the alternative, the applicant puts forward the fifth plea, alleging that the fines are unlawful and infringe the principle of proportionality. That plea in law comprises five parts. The first part alleges that the fines are unlawful owing to the absence of negligence or intent, the second part alleges that fines are inappropriate where the objectives of the control of concentrations are not thwarted, the third part alleges that the fines are unlawful on the ground that the statement of reasons for the setting of the amount of those fines lacks adequate reasoning, the fourth part alleges that the second fine imposed in respect of the same facts must be annulled or reduced and the fifth part alleges that the amount of the fines is disproportionate, by virtue of which the applicant requests the Court to reduce the fine in the exercise of its unlimited jurisdiction.

1. First part: the fines are unlawful owing to the absence of negligence or intent

279 The applicant disputes the assertion that an infringement 'was committed at the very least negligently' (section 7.2.1 of the contested decision), when this is the first time that pre-closing provisions contained in a share purchase agreement, or consultations and information exchanges, could constitute an infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004. More specifically, in the first place, the applicant argues that the Commission cannot rely on an internal document of the applicant dating from April 2015 to demonstrate that it was aware of the fact that it was important not to engage in gun-jumping. In particular, the applicant states that the contested decision quotes three excerpts from that document which describe 'gun jumping', warn about the possibility of heavy fines, and refer in particular to the prohibition on engaging in certain exchanges of information. First, it argues that the document post-dates the first infringement (obligation to notify) and coincides with the end of the second infringement (standstill obligation) and, second, the document was drawn up in the context of a different project. In the second place, the Commission cannot maintain, in the contested decision, that the applicant included the provisions at issue in the SPA in order to safeguard its own financial interests, since an intentional infringer would never have included the clauses at issue in an agreement relating to a concentration, knowing that such an agreement would necessarily be submitted to the Commission in the context of the notification of the concentration. In the third place, the lack of precedents made it impossible, or in any event more complicated, for the applicant to know that its behaviour could constitute an infringement.

280 The Commission disputes the applicant's arguments.

281 It must be recalled that, according to Article 14(2) of Regulation No 139/2004, the Commission may impose fines in respect of infringements which have been committed 'either intentionally or negligently' (see paragraph 48 above).

282 As regards the question whether an infringement has been committed intentionally or negligently, it is apparent from the case-law that that condition is satisfied where the undertaking concerned cannot be unaware of the anticompetitive nature of its conduct, whether or not it is aware that it is infringing the competition rules (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 237).

283 The fact that the undertaking concerned has characterised wrongly in law its conduct upon which the finding of the infringement is based cannot have the effect of exempting it from imposition of a fine in so far as it could not be unaware of the anticompetitive nature of that conduct. An undertaking may not escape the imposition of a fine where the infringement of the competition rules has resulted from that undertaking erring as to the lawfulness of its conduct on account of the terms of legal advice given by a lawyer (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 238).

284 It is in the light of those considerations that the Court must consider whether the Commission was correct in concluding in the contested decision that the applicant was negligent in implementing the transaction contrary to Article 4(1) and Article 7(1) of Regulation No 139/2004.

285 In that regard, given that the Commission concluded that the applicant had infringed those provisions solely under the test of negligence, in so far as the applicant's arguments seek to demonstrate that the Commission erred in finding that the applicant had acted intentionally, those arguments are ineffective, in that they do not reflect the reality of the findings of the contested decision.

286 In recitals 578 to 586 of the contested decision, the Commission based its conclusion that the applicant had been negligent, inter alia, on the factors set out below:

– The applicant is a large European company with significant previous experience in merger transactions and prior to the transaction had already been involved in merger control proceedings at national level.

– An internal document of the applicant dating from April 2015 states that 'certain exchanges of information are obviously strictly forbidden [under the rules on early implementation of a concentration]' (an excerpt of which is reproduced in paragraph 233 above).

– The applicant carefully negotiated the terms of the SPA with Oi and, according to the applicant itself, it included the contested provisions in the SPA specifically in order to safeguard its own financial interests. The Commission considers that a diligent acquirer would have assessed the risks of infringing Article 4(1) and Article 7(1) of Regulation No 139/2004, especially since, as explained in section 4.1 of the contested decision, the preparatory clauses go well beyond what would be necessary to maintain the value of the target.

– As explained in section 7.4.1 of the contested decision, the Commission considers that the applicant knew or should have known that the behaviour described in sections 4 and 5 of that decision would constitute an infringement of the notification requirement or of the standstill obligation.

287 As regards the applicant's first argument that the April 2015 document post-dates the first infringement and coincides with the end of the second infringement and that it was drawn up in the context of another project, first, as the Commission points out, the fact that that document was drafted after the infringement of Article 4(1) of Regulation No 139/2004 took place, when the infringement of Article 7(1) of that regulation had commenced, cannot make diligent behaviour out of the contested behaviour and demonstrates that the applicant was well aware of the risk that its conduct was not compatible with Regulation No 139/2004.

288 Second, the assertion that that document was drawn up in the context of another project is incorrect. Recital 582 of the contested decision refers, in footnote 306, to footnote 8 of the contested decision. It is apparent from that footnote that the April 2015 document, entitled 'Framework note on information exchanges and preventing the risk of gun jumping', was attached to the confidentiality declaration requested by the applicant, by which the employees of PT Portugal undertook not to disclose the information exchanges relating to the preparation of the transaction at issue.

289 It may also be observed that another document confirms that the applicant was well aware of the risk of its conduct being incompatible with Regulation No 139/2004, as is apparent from the internal email of 2 April 2015, reproduced in footnotes 214 and 219 of the contested decision, which expressed unease that certain emails exchanged with PT Portugal appeared to be 'premature' during the period prior to clearance of the concentration (see paragraph 234 above).

290 As regards the applicant's second argument that it could not have deliberately inserted the provisions at issue into the SPA in order to safeguard its own financial interests, it must be recalled that infringements committed negligently are not, from the point of view of their effects on competition, less serious than those committed intentionally (see, by analogy, judgment of 12 December 2012, *Electrabel* v *Commission*, T-332/09, EU:T:2012:672, paragraph 237).

291 Moreover, in any event, as has just been pointed out, that argument is ineffective since, although the Commission, in the contested decision, did not rule out the possibility that the applicant had acted intentionally, it ultimately concluded that it had acted at least negligently when it infringed Article 4(1) and Article 7(1) of Regulation No 139/2004.

292 As regards the applicant's third argument that, in the absence of precedents, it could not know that its conduct could constitute an infringement, suffice it to state that the mere fact that, at the time when an infringement is committed, the Courts of the European Union have not yet had the opportunity to rule specifically on particular conduct does not preclude, as such, the possibility that an undertaking may have to expect its conduct to be declared incompatible with the EU competition rules (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 389).

293 Moreover, as the Commission observes, the fact that conduct with the same features has not been examined in past decisions does not exonerate an undertaking (see, to that effect, judgment of 1 July 2010, *AstraZeneca* v *Commission*, T-321/05, EU:T:2010:266, paragraph 901).

294 In any event, as has already been stated, if the applicant had the slightest doubt as to whether the preparatory clauses (paragraph 155 above), or even its conduct, was compatible with Article 4(1) and Article 7(1) of Regulation No 139/2004, it was for the applicant to consult the Commission.

295 The Commission was therefore correct in concluding in recital 586 of the contested decision that the applicant had acted at the very least negligently when it infringed Article 4(1) and Article 7(1) of Regulation No 139/2004.

296 The first part of the fifth plea must therefore be rejected.

2. Second part: the fines are inappropriate where the objectives of the control of concentrations are not thwarted

297 According to the applicant, a distinction as to the gravity of the infringement must be drawn between, on the one hand, the – alleged – infringements, consisting of the early implementation of a concentration of which the Commission was fully aware and, on the other hand, infringements which consist either of an absolute failure to notify the concentration or in its implementation before the Commission is made aware of the transaction. In that regard, the applicant submits that the Commission acknowledged in its press release that the infringements found in the contested decision had had no impact on its decision to authorise the concentration. The objectives of the control of concentrations under EU law were thus not compromised in the present case, and it was therefore inappropriate to impose fines.

298 The Commission disputes the applicant's arguments.

299 It should be recalled that the purpose of Article 4(1) and Article 7(1) of Regulation No 139/2004 is to ensure the effectiveness of the system of *ex ante* control of the effects of concentrations with a Community dimension. It should also be noted that the objective of the EU rules on the control of concentrations is the prevention of irreparable and permanent damage to competition. The system for the control of concentrations is intended to enable the Commission to exercise 'effective control of all concentrations in terms of their effect on the structure of competition' (recital 6 of Regulation No 139/2004) (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 498).

300 In the case of concentrations which raise serious doubts as to their compatibility with the internal market, the possible risks to competition associated with early implementation are not the same as in the case of concentrations which do not raise competition concerns (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 499).

301 The fact that a concentration raises serious doubts as to its compatibility with the internal market therefore makes the early implementation of that concentration more serious than the early implementation of a concentration which does not raise competition concerns, unless, notwithstanding the fact that it raises such serious doubts, the possibility that its implementation in the form initially envisaged and not cleared by the Commission may have had damaging effects on competition can be ruled out in a particular case (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 500).

302 In the present case, the concentration as initially notified on 25 February 2015 raised serious doubts as to its compatibility with the internal market.

303 Those serious doubts as to its compatibility with the internal market were due, in particular, to the overlap between PT Portugal and the business of the applicant's subsidiaries Cabovisão and ONI, which at that time were in direct competition with PT Portugal.

304 It thus follows from recitals 8 and 10 of the contested decision that the applicant's acquisition of PT Portugal was cleared only after the applicant submitted commitments, in accordance with Article 6(2) of Regulation No 139/2004, in order to remove the serious doubts raised by the concentration. Those commitments concerned a number of horizontally affected markets in Portugal, in particular the provision of fixed voice telephony services, internet services and several paid services in the telecommunications sector.

305 The applicant does not put forward any argument capable of calling into question the Commission's assessment that the concentration gave rise to serious doubts as to its compatibility with the internal market.

306 In addition, on the date on which the SPA was notified, the preparatory clauses had already been in force since its signature (9 December 2014), the first of the seven instances (of consultation) had already taken place (20 January 2015) and the first meeting between the applicant and PT Portugal had already taken place (3 February 2015).

307 In addition, since the applicant and PT Portugal are competitors in a number of markets (see paragraphs 188, 214 and 230 above), through their behaviour they risked restricting competition between them and causing lasting damage to competition.

308 Therefore, the fact that the applicant may have notified the concentration or offered commitments has no bearing on the infringement committed. Even though the applicant offered commitments from the outset, that did not permit it to implement the transaction, and that cannot mitigate the fact that its conduct constituted an infringement.

309 The applicant's argument that the objectives of the control of concentrations under EU law were not compromised or thwarted must therefore be rejected.

310 In addition, that conclusion cannot be called into question by the fact that the contested decision, in the words of the press release of 24 April 2018 (IP/18/3522), 'has no effect on the Commission's April 2015 decision to authorise the merger under [Regulation No 139/2004]'. As stated in that press release, the 'assessment of the Commission at that time was independent of the facts reproached by the Commission to [the applicant] in [the contested] decision'.

311 The second part of the fifth plea must therefore be rejected.

3. The third part: the fines are unlawful on the ground that the statement of reasons for setting the amount of those fines lacks adequate reasoning

312 The applicant maintains that the contested decision goes appreciably further than the previous decisions, both as to the practice which it declares to be contrary to Article 4(1) and Article 7(1) of Regulation No 139/2004 and as to the amount of the fines imposed, which is six times higher than the highest fines imposed by previous decisions. The Commission provides, in the contested decision, only a very general enunciation of the factors which it apparently took into account (nature, gravity and duration of the infringement) and does not enable the applicant to understand even the approximate weighting of each of those factors. Moreover, the contested decision provides no reasons justifying why the fines are identical despite their differing duration.

313 The Commission disputes the applicant's arguments.

314 It is settled case-law that the statement of reasons required by the second paragraph of Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measures in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 446 and the case-law cited).

315 As regards the fines imposed pursuant to Article 14 of Regulation No 139/2004, as was pointed out in paragraph 48 above, under Article 14(2) of Regulation No 139/2004, the Commission may impose fines not exceeding 10% of the aggregate turnover of the undertaking concerned within the meaning of Article 5 of that regulation in respect of an infringement of the notification obligation laid down in Article 4 of Regulation No 139/2004 and in respect of the implementation of a concentration in breach of Article 7 of that regulation. Under Article 14(3) of that regulation, 'in fixing the amount of the fine, regard shall be had to the nature, gravity and duration of the infringement'.

316 Furthermore, it must be noted that the Commission has not adopted guidelines setting out the method of calculation that it must follow when setting the amount of a fine under Article 14 of Regulation No 139/2004 (see judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 449 and the case-law cited).

317 First, in the absence of such guidelines, the Commission is not required to express in figures, in absolute terms or as a percentage, the basic amount of the fine and any aggravating or mitigating circumstances (see judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 455 and the case-law cited).

318 Second, the framework of the Commission's analysis must be that of Article 14(3) of Regulation No 139/2004. However, it is required to reveal clearly and unequivocally in the contested decision the elements which it took into account in setting the amount of the fine (see judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 450 and the case-law cited).

319 In the present case, it must be stated that, in recitals 568 to 599 of the contested decision, the Commission explained the nature, gravity and duration of the infringements.

320 More specifically, as regards the nature of the infringements, the Commission stated, in recitals 568 to 577 of the contested decision, that those were serious infringements because, first, they were capable of undermining the effectiveness of Regulation No 139/2004, second, the infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004 had been committed independently of the positive outcome of the merger review procedure carried out by the Commission and, third, the legislature had determined that infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004 could be as serious as infringements of Articles 101 and 102 TFEU by having set the same maximum fine thresholds in each.

321 As regards the gravity of the infringements, the Commission, in recitals 578 to 594 of the contested decision, considered that account had to be taken, first, of the fact that the infringements had been committed at the very least negligently and, second, of the anticompetitive risks associated with early implementation of a transaction which raised serious doubts as to its compatibility with the internal market.

322 As regards the duration of the infringements, the Commission explained in recitals 595 to 599 of the contested decision that the two infringements should be treated separately: first, the infringement of Article 4(1) of Regulation No 139/2004 as an instantaneous infringement committed on the date of signing the SPA (9 December 2014) and, second, the infringement of Article 7(1) of Regulation No 139/2004 which commenced on 9 December 2014 and lasted until the date of the clearance decision (20 April 2015).

323 It must therefore be observed that the Commission considered the factors listed in Article 14(3) of Regulation No 139/2004, namely the nature, gravity and duration of the infringement. In that context, it disclosed in a clear and unequivocal fashion the matters which it took into account in setting the amount of the fines, thus enabling the applicant to defend itself and the Court to exercise its power of review.

324 As regards the fact that the Commission did not explain, in the contested decision, why the amount of the fines was identical despite their difference in duration, as the Commission pointed out at the hearing, logically, the duration of a continuous infringement cannot be compared with an instantaneous infringement, since the latter has no duration.

325 The third part of the fifth plea must therefore be rejected.

4. The fourth part: the need to cancel or reduce the second fine imposed in respect of the same facts

326 The applicant submits that the second fine imposed in the contested decision should be annulled or significantly reduced by virtue of the principle of German law, 'set off' (*Anrechnungsprinzip*), according to which any fine imposed in respect of the same facts should be set off when calculating the second fine. In addition, the applicant argues that the Commission infringed the principle of proportionality since it failed to take account of the fine imposed in respect of one of the two infringements when calculating the fine for the other infringement.

327 The Commission disputes the applicant's arguments.

328 In that regard, it is sufficient to recall that the set off principle does not apply to a situation in which several penalties are imposed in a single decision, even if those penalties are imposed for the same actions (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 344).

329 It follows that the applicant's argument alleging infringement of the principle of proportionality on account of the failure to take account of one of the fines in setting the amount of the other fine cannot be accepted.

330 The fourth part of the fifth plea must therefore be rejected.

5. Fifth part: the fines are disproportionate

331 In the fifth part of the plea, the applicant claims that the fines imposed by Articles 3 and 4 of the contested decision are contrary to the principle of proportionality. Failing that, the applicant requests the Court, in the exercise of its unlimited jurisdiction, to reduce substantially the fines imposed by those articles.

(a) Whether the fines are unlawful in the light of the principle of proportionality

332 As a preliminary point, it should be noted that the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. It follows that fines must not be disproportionate to the aims pursued, that is to say, to compliance with the competition rules, and that the amount of the fine imposed on an undertaking for an infringement of competition law must be proportionate to the infringement, viewed as a whole,

account being taken, in particular, of the gravity of the infringement (see judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 580 and the case-law cited).

333 The applicant submits, first, that the amount of the fines is disproportionate in the light of the size of the undertaking and of the fine imposed by the Commission in the case which gave rise to the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672). Second, it submits that the amount of the fines is disproportionate in the light of the duration of the infringement, both because of the fact that the instantaneous infringement of Article 4(1) of Regulation No 139/2004 is manifestly disproportionate in that it is of the same amount as the fine imposed for the infringement of Article 7(1) of that regulation, which lasted 4 months and 11 days, and in the light of the duration of the infringement if it is compared with the fines imposed in previous cases, such as those which gave rise to the judgments of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672), and of 26 October 2017, *Marine Harvest* v *Commission* (T-704/14, EU:T:2017:753). Third, the applicant submits that the fines imposed are disproportionate in so far as the Commission failed to take account, as a mitigating circumstance, of the absolute novelty of the contested decision, owing to the 'absence of any specific precedent concerning a transaction agreement' (recital 612 of the contested decision).

334 The Commission disputes the applicant's arguments.

335 First, as regards the applicant's argument that the amount of the fines is disproportionate in the light of the size of the undertaking and the fine imposed by the Commission in its decision C(2009) 4416 final of 10 June 2009, imposing a fine for the implementation of a concentration in breach of Article 7(1) of Council Regulation (EEC) No 4064/89 (Case COMP/M.4994 – Electrabel/Compagnie nationale du Rhône), the fact that in the past the Commission has applied fines of a particular level for certain types of infringements does not mean that it is precluded from raising that level within the limits indicated in the relevant legislation if that is necessary to ensure the implementation of EU competition policy. Indeed, the proper application of the EU competition rules requires that the Commission be able at any time to adjust the level of fines to the needs of that policy (see judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 603 and the case-law cited).

336 In addition, since the applicant's argument must be understood as a request that the Court finds that the contested decision infringes the principle of equal treatment, it should be recalled that, according to settled case-law, the Commission's previous decision-making practice does not serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether that principle might not have been observed since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (see, to that effect, judgments of 21 September 2006, *JCB Service* v *Commission*, C-167/04 P, EU:C:2006:594, paragraphs 201 and 205; of 7 June 2007, *Britannia Alloys & Chemicals* v *Commission*, C-76/06 P, EU:C:2007:326, paragraph 60; and of 16 June 2011, *Caffaro* v *Commission*, T-192/06, EU:T:2011:278, paragraph 46).

337 However, observance of the principle of equal treatment, which prevents comparable situations from being treated differently and different situations from being treated in the same way unless such difference in treatment is objectively justified, is incumbent on the Commission when it imposes a fine on an undertaking for infringement of the competition rules, as it is on any institution in carrying out all its activities. However, previous decisions by the Commission

imposing fines can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case (see judgment of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T-360/09, EU:T:2012:332, paragraphs 261 and 262 and the case-law cited).

338 First of all, it is clear that the applicant has adduced no evidence to demonstrate that the circumstances of the case which gave rise to Decision C(2009) 4416 final (Case COMP/M.4994 – Electrabel/Compagnie nationale du Rhône) and the circumstances of the present case are comparable, nor does it even argue that they are.

339 In addition, it may be observed that the applicant's assertion that 'in the *Electrabel* case, … the General Court found that a fine of [EUR] 20 million, imposed on an undertaking with a consolidated turnover of [EUR] 47.5 billion, respected the principle of proportionality, as it corresponded to 0.04% of the group's turnover', is incorrect, given that, in that case, it was not the 'group' which had been ordered to pay a fine, but the Electrabel company. As is apparent from paragraph 282 of the judgment of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672), the fine imposed on the applicant corresponded to 0.13% of its turnover. Comparing the amount of the fine with only the 'group' turnover rather than comparing it with the turnover of the undertaking ordered to pay the fine is therefore misleading, especially since, in the case which gave rise to Commission decision C(2009) 4416 final (Case COMP/M.4994 – Electrabel/Compagnie nationale du Rhône), the fine was imposed solely in respect of an infringement of Article 7(1) of Regulation No 4064/89.

340 Moreover, in the present case, as the Commission points out, without being challenged by the applicant, the total amount of the fine imposed for the two infringements represents approximately 0.5% of the applicant's turnover for 2017.

341 As the Commission stated in the contested decision in the case which gave rise to the judgment of 26 October 2017, *Marine Harvest* v *Commission* (T-704/14, EU:T:2017:753), the total amount of the two fines imposed in respect of Article 4(1) and Article 7(1) of Regulation No 139/2004 corresponded to approximately 1% of the turnover of the undertaking concerned.

342 Therefore, in any event, the applicant's argument which involves comparing the fines imposed on it with those imposed in the case which gave rise to Commission decision C(2009) 4416 final (Case COMP/M.4994 – Electrabel/Compagnie nationale du Rhône), in relation to turnover achieved, does not assist its case and must therefore be rejected.

343 Second, as regards, on the one hand, the applicant's argument that the amount of the fines is disproportionate in the light of the duration of the infringements, because the fines imposed for infringement of Article 4(1) and Article 7(1) are identical, as has previously been stated in relation to the argument concerning the lack of adequate reasoning (see paragraph 324 above), the duration of a continuous infringement cannot be compared with an instantaneous infringement, since an instantaneous infringement has no duration.

344 As regards, on the other hand, the applicant's argument that the amount of the fines is disproportionate in the light of the duration of the infringements compared with the fines imposed in previous cases such as those which gave rise to the judgments of 12 December 2012, *Electrabel* v *Commission* (T-332/09, EU:T:2012:672), and of 26 October 2017, *Marine Harvest* v

Commission (T-704/14, EU:T:2017:753), it is clear that the applicant has adduced no evidence to demonstrate that the circumstances of those cases and of the present case are comparable in that regard, nor does it even argue that they are.

345 Therefore, the argument relating to the duration of the infringement must also be rejected.

346 Third, as regards the applicant's argument that the contested decision is absolutely novel, that argument is incorrect, since, as has already been pointed out, the Commission has already had the opportunity to penalise an undertaking for having implemented a concentration before it was notified and cleared (see paragraph 142 above).

347 In addition, in any event, it has also already been pointed out (see paragraph 292 above) that the mere fact that, at the time when an infringement is committed, the Courts of the European Union have not yet had the opportunity to rule specifically on particular conduct does not preclude, as such, the possibility that an undertaking may have to expect its conduct to be declared incompatible with the EU competition rules (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 389).

348 In that regard, it must be noted that there is no obligation for the Commission to take into consideration as a mitigating circumstance the fact that conduct with exactly the same characteristics as that at issue has not yet given rise to the imposition of a fine (judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 640).

349 The argument that the contested decision is absolutely novel must therefore also be rejected.

(b) The application for a reduction in the fines

350 First, the applicant asks the Court, in order to observe the principle of proportionality guaranteed in Article 49(3) of the Charter, in the exercise of its unlimited jurisdiction, to reduce the fines imposed by Articles 3 and 4 of the contested decision, whether it takes the view that either the pre-closing covenants in the SPA relating to the transaction which are the subject of section 4.1 of the contested decision, or the instances referred to in section 4.2.1 of the contested decision, or the transmission of information referred to in section 4.2.2 of the contested decision do not amount to an implementation of the concentration.

351 Second, the applicant maintains that such a reduction could also be made by taking into consideration as a mitigating circumstance the factors put forward in the fifth part of the fifth plea, namely the size of the undertaking penalised, the duration, nature and gravity of the infringements and the absence of precedents.

352 As a preliminary point, it should be recalled that it is 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 the 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, second, to establish, according to the information which has been brought to its attention whether it is appropriate, on the date on which it adopts its decision, to substitute its own assessment for that of the Commission, so that the amount of the fine is appropriate (see judgments of 17 December 2015, *Orange Polska* v *Commission*, T-486/11, EU:T:2015:1002,

paragraph 67 and the case-law cited, and of 12 July 2019, *Hitachi-LG Data Storage and Hitachi-LG Data Storage Korea* v *Commission*, T-1/16, EU:T:2019:514, paragraph 56 and the case-law cited).

353 Under Article 16 of Regulation No 139/2004, the Court of Justice of the European Union is to have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed. That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed (see judgment of 26 October 2017, *Marine Harvest* v *Commission*, T-704/14, EU:T:2017:753, paragraph 581 and the case-law cited).

354 In that regard, while the exercise of that jurisdiction does not amount to a review *ex officio*, and the proceedings are *inter partes*, the EU Courts are bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all submissions on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity and the duration of the infringement (see judgment of 16 July 2020, *Nexans France and Nexans* v *Commission*, C-606/18 P, EU:C:2020:571, paragraph 97 and the case-law cited).

355 In addition, in the exercise of its unlimited jurisdiction, it is for the Court to determine the amount of the fine, taking into account all the circumstances of the case (see, to that effect, judgment of 26 September 2013, *Alliance One International* v *Commission*, C-679/11 P, not published, EU:C:2013:606, paragraph 104 and the case-law cited).

356 Finally, as part of its duty to state reasons, the Court is required to set out in detail the factors which it takes into account in setting the amount of the fine (see, to that effect, judgment of 14 September 2016, *Trafilerie Meridionali* v *Commission*, C-519/15 P, EU:C:2016:682, paragraph 52).

357 First, as regards the applicant's request that the Court, in the exercise of its unlimited jurisdiction, reduce the amount of the fines if it takes the view that either the pre-closing covenants in the SPA relating to the transaction which is the subject of section 4.1 of the contested decision, or the instances referred to in section 4.2.1 of the contested decision, or the transmission of the information referred to in section 4.2.2 of the contested decision, do not amount to implementation of the concentration, it follows from the foregoing that the Commission was correct in finding, in the contested decision, that the preparatory clauses had afforded the applicant the possibility to exercise decisive influence on PT Portugal contrary to Article 4(1) and Article 7(1) of Regulation No 139/2004 (see paragraph 108 et seq. above), that the contested provisions had been implemented on a number of occasions contrary to Article 4(1) and Article 7(1) of Regulation No 139/2004 (see paragraph 173 et seq. above) and that the information exchanges had contributed to demonstrating that the applicant had exercised decisive influence on certain aspects of PT Portugal's business (see paragraph 221 et seq. above) contrary to those provisions. Therefore, examination of the arguments put forward by the applicant in that regard does not demonstrate that the fines imposed by the Commission are inappropriate and ought to be reduced.

358 Even assuming the fifth instance does not demonstrate that the transaction was implemented (see paragraph 205 above) contrary to Article 7(1) of Regulation No 139/2004, such a matter cannot call into question that finding.

359 The other instances sufficiently demonstrate such implementation of the transaction so that the possibility that the fifth instance is non-infringing cannot call into question the appropriateness of the fine imposed for the infringement of Article 7(1) of Regulation No 139/2004.

360 Second, as regards the applicant's request that the Court take account of the size of the undertaking penalised, the duration, the nature and the gravity of the infringements and the lack of precedents as a mitigating circumstance, it follows from the examination of the fifth part of the fifth plea that the arguments concerning the size of the undertaking penalised, the duration of the infringement and the alleged absence of precedents must be rejected (see paragraphs 335 to 349 above).

361 As regards the nature of the infringements, the applicant has not put forward any arguments to that effect.

362 As regards the gravity of the infringements, it should be recalled, as a preliminary point, that it is settled case-law that the setting of a fine by the Court is not an arithmetically precise exercise (judgments of 5 October 2011, *Romana Tabacchi* v *Commission*, T-11/06, EU:T:2011:560, paragraph 266, and of 15 July 2015, *SLM and Ori Martin* v Commission, T-389/10 and T-419/10, EU:T:2015:513, paragraph 436).

363 Nevertheless, it is for the Court to decide upon an amount of the fine which is proportionate in the light of the criteria which it considers appropriate and the gravity of the infringement committed by the applicant, and which also has a sufficiently deterrent effect.

364 In that regard, it should be noted that, in the context of the fourth plea in law (see paragraph 267 above), the applicant has stated that it had informed the Commission, on its own initiative, of the concentration on 31 October 2014 (paragraph 6 above), that is to say well before the SPA was signed on 9 December 2013 (see paragraph 3 above), then sent a case-team allocation request relating to its file on 12 December 2014 (paragraph 7 above).

365 Therefore, while such an argument was rejected in the context of the fourth plea, in so far as it ought, according to the applicant, to have resulted in the Commission not having imposed two separate fines on it, the Court considers that those circumstances must be taken into account in assessing the gravity of the infringement of the notification obligation laid down in Article 4(1) of Regulation No 134/2009.

366 It should be noted that, even though the SPA was signed on 9 December 2014 (paragraph 3 above), the first and fourth instances of implementation commenced on 20 January (paragraph 181 above) and 10 February 2015 (paragraph 199 above) respectively and the first information exchange meeting was held on 3 February 2015 (paragraph 240 above), that is to say, on dates prior to the notification of the SPA on 25 February 2015 (paragraph 10 above), the Commission had already been informed of the proposed concentration, since it had been made aware of that proposal by the applicant on 31 October 2014 and a meeting was held on 5 December 2014 between the Commission and the applicant.

367 Lastly, it must be noted that although a period of two and a half months elapsed between the date on which the SPA was signed and the date on which the proposed concentration was notified, during that period, as the applicant points out, three days after the SPA was signed the applicant

sent the Commission a case-team allocation request relating to its file (paragraph 7 above) and, on 3 February 2015, submitted to the Commission a draft notification form, including a copy of the SPA in its annexes (paragraph 9 above).

368 Therefore, in the light of those circumstances, in the exercise of its unlimited jurisdiction, the Court considers that the amount of the fine imposed in respect of the infringement of Article 4(1) of Regulation No 139/2004 should be reduced by 10%.

369 The amount of the fine imposed on the applicant in relation to the infringement of Article 4(1) of Regulation No 139/2004 must therefore be set at EUR 56 025 000 and the remainder of the action must be dismissed.

IV. Costs

370 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. That being said, pursuant to Article 134(3) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

371 In the present case, although the principal heads of claim submitted by the applicant have been rejected, the Court, in the exercise of its unlimited jurisdiction, has decided, in accordance with the request made by the applicant, to reduce the fine imposed under Article 4(1) of Regulation No 139/2004. The applicant must therefore be ordered to bear its own costs and to pay four fifths of those incurred by the Commission.

372 In accordance with Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. Therefore, the Council must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Sets the amount of the fine imposed on Altice Europe NV by Article 4 of European Commission Decision C(2018) 2418 final of 24 April 2018 imposing a fine for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Regulation (EC) No 139/2004 (Case M.7993 – Altice/PT Portugal) for infringement of Article 4(1) of that regulation at EUR 56 025 000;**

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

3. **Orders Altice Europe to bear its own costs and to pay four fifths of the costs of the Commission;**

4. **Orders the Council of the European Union to bear its own costs.**

Marcoulli Frimodt Nielsen Norkus

Delivered in open court in Luxembourg on 22 September 2021.

E. Coulon M. van der Woude
Registrar President

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