Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

10 July 2014*

(Article 102 TFEU — Abuse of dominant position — Spanish markets for access to broadband internet — Margin squeeze — Article 263 TFEU — Review of legality — Article 261 TFEU — Unlimited jurisdiction — Article 47 of the Charter — Principle of effective judicial protection — Review exercising powers of unlimited jurisdiction — Amount of the fine — Principle of proportionality — Principle of non-discrimination)

In Case C-295/12 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 13 June 2012,

**Telefónica SA**, established in Madrid (Spain),

**Telefónica de España SAU**, established in Madrid,

represented by F. González Díaz and B. Holles, abogados,

appellants,

the other parties to the proceedings being:

**European Commission**, represented by F. Castillo de la Torre, É. Gippini Fournier and C. Urraca Caviedes, acting as Agents,

defendant at first instance,

**France Telecom España, SA**, established in Pozuelo de Alarcón (Spain), represented by H. Brokelmann and M. Ganino, abogados,

**Asociación de Usuarios de Servicios Bancarios (Ausbanc Consumo)**, established in Madrid, represented by L. Pineda Salido and I. Cámara Rubio, abogados,

**European Competitive Telecommunications Association**, established in Wokingham (United Kingdom), represented by A. Salerno and B. Cortese, avvocati,

interveners at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas, D. Šváby and C. Vajda (Rapporteur), Judges,

* Language of the case: Spanish.

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 16 May 2013,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2013,

gives the following

## Judgment

1 By their appeal, Telefónica SA and Telefónica de España SAU ('the appellants') seek to have set aside the judgment of the General Court of the European Union in Case T-336/07 *Telefónica and Telefónica de España* v *Commission* EU:T:2012:172 ('the judgment under appeal'), by which that court dismissed their application for annulment of Commission Decision C(2007) 3196 final of 4 July 2007 relating to a proceeding pursuant to Article 82 [EC] (Case COMP/38.784 — Wanadoo España vs. Telefónica) ('the contested decision') and their application put forward in the alternative for the revocation or reduction of the fine imposed on them by that decision.

## Legal context

*Regulation No 17*

2 The infringement spanned the period from September 2001 to December 2006. On 1 May 2004, Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-62, p. 87), was abolished and replaced by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1).

3 Consequently, Regulation No 17 was applicable to the facts of the case until 1 May 2004, the date on which Regulation No 1/2003 became applicable. It should, however, be noted that the relevant provisions of Regulation No 1/2003 are, for all essential purposes, identical to those of Regulation No 17.

4 Article 15(2) of Regulation No 17 provided as follows:

'The Commission may by decision impose on undertakings or associations of undertakings fines of from 1 000 to 1 000 000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently:

(a) they infringe Article [81](1) [EC] or Article [82 EC]; or

…

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

5 Article 17 of Regulation No 17 provided as follows:

‘The Court of Justice shall have unlimited jurisdiction within the meaning of Article [229 EC] to review decisions whereby the Commission has fixed a fine or periodic penalty payments; it may cancel, reduce or increase the fine or periodic penalty payment imposed.’

*Regulation No 1/2003*

6 Article 23(2) of Regulation No 1/2003, which replaced Article 15(2) of Regulation No 17, provides as follows:

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

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

…

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

…’

7 Article 31 of Regulation No 1/2003, which replaced Article 17 of Regulation No 17, provides as follows:

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

*The 1998 Guidelines*

8 The Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [ECSC] (OJ 1998 C 9, p. 3) (‘the 1998 Guidelines’) provides in Section 1.A thereof, relating to the assessment of the gravity of the infringement, as follows:

‘A. Gravity In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market. Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.

— minor infringements:

…

Likely fines: [EUR] 1 000 to [EUR] 1 million.

— serious infringements:

…

Likely fines: [EUR] 1 million to [EUR] 20 million.

— very serious infringements:

These will generally be horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market, such as the partitioning of national markets and clear-cut abuse of a dominant position by undertakings holding a virtual monopoly …

Likely fines: above [EUR] 20 million.'

**Background to the dispute and the contested decision**

9 The General Court summarised the background to the dispute at paragraphs 3 to 29 of the judgment under appeal as follows:

'3 On 11 July 2003, Wanadoo España SL (now France Telecom España SA) ("France Telecom") submitted a complaint to the Commission of the European Communities, complaining that the margin between the wholesale prices which the subsidiaries of Telefónica charged their competitors for the wholesale supply of broadband access in Spain and the retail prices which they charged end users was not enough to allow competitors of Telefónica to compete with it (recital 26 to the contested decision).

…

6 On 4 July 2007, the Commission adopted the contested decision which is the subject-matter of this action.

7 In the first place, the Commission identified in the contested decision three relevant product markets, namely one retail broadband market and two wholesale broadband markets (recitals 145 to 208).

8 The retail market at issue covers, according to the contested decision, all undifferentiated broadband products, whether supplied by ADSL (Asymetric Digital Subscriber Line) or by any other technology, marketed on the "general public market" to residential and non residential users. On the other hand, it does not cover customised broadband access services aimed principally at "large client accounts" (recital 153 of the contested decision).

9 As regards the wholesale markets, the Commission stated that three main wholesale offers were available, namely a reference offer for local loop unbundling, marketed solely by Telefónica, a regional wholesale offer (GigADSL; "the regional wholesale product"), also marketed solely by Telefónica, and several national wholesale offers marketed by Telefónica (ADSL-IP and ADSL-IP Total; "the national wholesale product") and by other operators on the basis of local loop unbundling and/or the regional wholesale product (recital 75 to the contested decision).

…

14 The Commission concluded that the wholesale markets at issue for the purposes of the contested decision covered the regional wholesale product and the national wholesale product, excluding wholesale services by cable and technologies other than ADSL (recitals 6 and 208 of the contested decision).

15 The relevant geographic wholesale and retail markets are, according to the contested decision, nationwide (Spain) (recital 209 of the contested decision).

16 In the second place, the Commission found that Telefónica had a dominant position on the two wholesale markets at issue (recitals 223 to 242 of the contested decision). Thus, during the period under consideration, Telefónica had a monopoly in the supply of the regional wholesale product and more than 84% of the national wholesale product (recitals 223 and 235 of the contested decision). According to the contested decision (recitals 243 to 277), Telefónica also had a dominant position on the retail market.

17 In the third place, the Commission examined whether Telefónica had abused its dominant position in the relevant markets (recitals 278 to 694 of the contested decision). In that regard, the Commission considered that Telefónica had infringed Article [102 TFEU] by imposing unfair prices on its competitors in the form of a margin squeeze between the prices for retail broadband access on the Spanish "mass market" and the prices on the regional and national wholesale broadband access markets, throughout the period from September 2001 until December 2006 (recital 694 to the contested decision).

…

24 In the fourth place, the Commission found that in the present case trade between Member States was affected, since Telefónica's pricing policy related to the access services of a dominant operator, extending to the entire Spanish territory, which constitutes a substantial part of the internal market (recitals 695 to 697 to the contested decision).

25 For the purpose of calculating the amount of the fine, the Commission applied, in the contested decision, the method set out in the [1998 Guidelines].

26 First, the Commission assessed the gravity and the impact of the infringement and also the size of the relevant geographic market. First of all, as regards the gravity of the infringement, the Commission considered that it was dealing with a clear-cut abuse on the part of an undertaking holding what was virtually a monopoly position, that must be qualified as "very serious" under the 1998 Guidelines (recitals 739 to 743 to the contested decision). At recitals 744 to 750 to the contested decision, the Commission distinguished the present case from Commission Decision 2003/707/EC of 21 May 2003 relating to a proceeding under Article [102 TFEU] (Case COMP/C 1/37.451, 37.578, 37.579 — Deutsche Telekom AG) (OJ 2003 L 263, p. 9; "the Deutsche Telekom decision"), in which the abuse on the part of Deutsche Telekom, which also concerned a margin squeeze, had not been qualified as "very serious" within the meaning of the 1998 Guidelines. Next, so far as the impact of the infringement found was concerned, the Commission took account of the fact that the relevant markets were of considerable economic importance, that they played a crucial role in the creation of the information society and that the impact of Telefónica's abuse on the retail market had been significant (recitals 751 and 753 to the contested decision). Last, as regards the size of the relevant geographic market, the Commission observed, in particular, that the Spanish broadband market was the fifth largest national broadband market in the European Union (EU) and that, while margin squeeze cases were necessarily limited to a single Member State, it prevented operators from other Member States from entering a fast-growing market (recitals 754 and 755 to the contested decision).

27 According to the contested decision, the starting amount of the fine, EUR 90 000 000, takes account of the fact that the gravity of the abusive practice became clear over the period under consideration and, more particularly, after the adoption of the Deutsche Telekom decision (recitals 756 and 757). A multiplier of 1.25 was applied to that amount to take account of Telefónica's significant economic capacity and to ensure that the fine was sufficiently deterrent, and the starting amount of the fine was thus increased to EUR 112 500 000 (recital 758).

28 Second, as the infringement had lasted from September 2001 until December 2006, that is to say, for five years and four months, the Commission increased the starting amount of the fine by 50%. The basic amount of the fine was thus increased to EUR 168 750 000 (recitals 759 to 761 to the contested decision).

29 Third, on the basis of all the evidence available, the Commission considered that the existence of certain attenuating circumstances could be recognised in this case, since the infringement had at least been committed as a result of negligence. A reduction of 10% of the amount of the fine was thus granted to Telefónica, which reduced the amount of the fine to EUR 151 875 000 (recitals 765 and 766 to the contested decision).'

## The procedure before the General Court and the judgment under appeal

10 By application lodged at the Registry of the General Court on 1 October 2007, the appellants brought an action for annulment of the contested decision or, in the alternative, the revocation or reduction of the fine imposed by the Commission.

11 In support of their principal claims, the appellants put forward six pleas in law, alleging, respectively, breach of the rights of the defence, errors of fact and of law in the definition of the relevant wholesale markets, errors of fact and of law in the establishment of their dominant position on the relevant markets, errors of law in the application of Article [102 TFEU] as regards their abusive conduct, errors of fact and/or errors of assessment of the facts and errors of law with respect to their abusive conduct and its anti-competitive impact and, lastly, an ultra vires application of Article [102 TFEU] and breach of the principles of subsidiarity, proportionality, legal certainty, sincere cooperation and sound administration.

12 In support of the claims put forward in the alternative, the appellants relied on two pleas in law. The first plea alleged errors of fact and of law, infringement of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003 and breach of the principles of legal certainty and legitimate expectations. The second plea, which was formulated further in the alternative, alleged errors of fact and of law and breach of the principles of proportionality and equal treatment, the principle that the penalty must be specific to the offender and the offence and breach of the obligation to state reasons regarding the determination of the amount of the fine.

13 By orders of 31 July 2008 and 28 February 2011, respectively, the Asociación de usuarios de servicios bancarios (Ausbanc Consumo) and France Telecom on the one hand, and the European Competitive Telecommunications Association ('the ECTA') on the other, were granted leave to intervene in support of the form of order sought by the Commission.

14 The General Court rejected each of the appellants' pleas and dismissed the action in its entirety.

## Forms of order sought by the parties before the Court of Justice

15 The appellants claim that the Court should:

— primarily:

  — set aside the judgment under appeal in its entirety or in part;

  — on the basis of the information available to it, annul the contested decision in its entirety or in part;

— revoke or reduce the fine, pursuant to Article 261 TFEU;

— revoke or reduce the fine as a result of the unjustifiable duration of the proceedings before the General Court; and

— order the Commission and the parties intervening in support of the Commission to pay the costs of both the appeal proceedings and the proceedings before the General Court.

— In the alternative, if the above is not possible at this stage of the proceedings:

— set aside the judgment under appeal and refer the case back to the General Court for it to be reheard in the light of the issues of law settled by the Court of Justice;

— revoke or reduce the fine pursuant to Article 261 TFEU;

— order the Commission and the parties intervening in support of the Commission to pay the costs of both the appeal proceedings and the proceedings before the General Court.

— In any event, grant access, pursuant to Article 15 TFEU, to the transcript or recording of the hearing which took place before the General Court on 23 May 2011, and hold a hearing.

16 The Commission contends that the Court should:

— dismiss the appeal as inadmissible in its entirety or in part or dismiss it as unfounded;

— in the alternative, if the appeal must be upheld, dismiss in any event the action for annulment of the contested decision; and

— order the appellants to pay the costs.

17 Ausbanc Consumo contends that the Court should:

— dismiss the appeal and uphold the judgment under appeal in its entirety;

— order the appellants to pay the costs;

— in any event, grant access, pursuant to Article 15 TFEU, to the transcript or recording of the hearing which took place before the General Court on 23 May 2011.

18 France Telecom contends that the Court should:

— dismiss the appeal in its entirety;

— order the appellants to pay the costs of both the appeal proceedings and the proceedings before the General Court; and

— hold a hearing.

19 The ECTA claims that the Court should:

— dismiss the appeal;

— also dismiss the appellants' claims put forward in the alternative seeking the revocation of the fine or a reduction in the amount of the fine; and

— order the appellants to pay the costs.

## The appeal

20 The appellants rely on 10 grounds of appeal in support of their claim that the judgment under appeal should be set aside.

21 As a preliminary issue, it is necessary to examine the plea of inadmissibility raised by the Commission in respect of the appeal in its entirety and the requests submitted by the appellants and Ausbanc Consumo for access to the transcript or recording of the hearing before the General Court.

### *The plea of inadmissibility raised by the Commission in respect of the appeal in its entirety*

22 The Commission claims that the appeal is inadmissible in reliance on the following arguments.

23 First, the Commission contends that the appeal is extremely long and repetitive and frequently sets out a number of pleas on every page, so that it appears to contain several hundred pleas, which amounts to a record in the history of proceedings before the EU courts.

24 Second, the appeal is almost systematically directed at obtaining a fresh assessment of the facts, under the guise of claims that the General Court applied the 'wrong legal test'.

25 Third, the grounds of appeal are too often presented as simple statements, devoid of any reasoning.

26 Fourth, the Commission contends that, on the one hand, the appellants often criticise the contested decision rather than the judgment under appeal and, on the other, when such criticism concerns the judgment under appeal, the appellants almost never identify the specific passages or paragraphs of the judgment which are purported to contain errors of law.

27 Fifth, the Commission maintains that it was extremely difficult, if not impossible, for it to exercise its rights of defence in an appeal that was formulated in such a confused and unintelligible manner and therefore requests the Court to dismiss the appeal in its entirety as inadmissible.

28 In the alternative, the Commission is of the view that, on the rare occasions when, by their appeal, the appellants raises a legal issue, their arguments are clearly at odds with the Court's case-law. It therefore requests the Court to declare that the appeal is clearly unfounded by way of reasoned order.

29 According to settled case-law, it is apparent from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 112(1)(c) of the Rules of Procedure of the Court of Justice in force at the time when the present appeal was brought that an appeal must indicate precisely the contested elements of the judgment under appeal and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or the ground of appeal in question will be dismissed as inadmissible (see, inter alia, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* EU:C:2005:408, paragraph 426, and Case C-280/08 P *Deutsche Telekom* v *Commission* EU:C:2010:603, paragraph 24).

30 Accordingly, a ground of appeal supported by an argument that is not sufficiently clear and precise to enable the Court to exercise its powers of judicial review, in particular because essential elements on which the ground of appeal is based are not indicated sufficiently coherently and intelligibly in the text of the appeal, which is worded in a vague and ambiguous manner in that regard, does not satisfy those requirements and must be dismissed as inadmissible (see, to that effect, Case C-194/99 P *Thyssen*

*Stahl* v *Commission* EU:C:2003:527, paragraphs 105 and 106, and Case C-520/09 P *Arkema* v *Commission* EU:C:2011:619, paragraph 61 and the case-law cited). The Court has also held that an appeal lacking any coherent structure which simply makes general statements and contains no specific indications as to the points of the order under appeal which may be vitiated by an error of law must be dismissed as clearly inadmissible (see the order in Case C-107/07 P *Weber* v *Commission* EU:C:2007:741, paragraphs 26 to 28).

31 As regards the appeal brought in the present case, it should be noted, as observed by the Commission, that it contains a great many grounds and arguments that must be regarded as inadmissible. However, the present appeal cannot be regarded as inadmissible in its entirety. Some of the grounds of appeal identify with the requisite degree of precision the contested elements of the judgment under appeal and set out with sufficient clarity the legal arguments relied on. As a consequence, notwithstanding the shortcomings identified below, the plea of inadmissibility raised by the Commission in respect of the appeal in its entirety must be rejected.

*The requests for access to the transcript or the recording of the hearing before the General Court*

32 The appellants and Ausbanc Consumo have requested access, pursuant to Article 15 TFEU, to the transcript or the recording of the hearing which took place before the General Court on 23 May 2011.

33 Article 169(1) of the Rules of Procedure of the Court of Justice provides that an appeal is to seek to have set aside, in whole or in part, the decision of the General Court as set out in the operative part of that decision.

34 The requests for access submitted by the appellants and Ausbanc Consumo do not seek to have set aside, in whole or in part, the judgment under appeal. Moreover, those parties do not explain for what purpose they seek access to the transcript or the recording of the hearing held before the General Court on 23 May 2011 or the extent to which any access which may be granted to those documents may be of assistance for the purpose of their claims seeking, respectively, the setting aside of the judgment under appeal and the dismissal of the appeal.

35 The requests for access submitted by the appellants and Ausbanc Consumo must therefore be rejected as inadmissible.

*The argument alleging that the General Court failed to have regard to its obligation to carry out a review exercising its powers of unlimited jurisdiction*

36 By the fifth part of their fifth ground of appeal, the appellants submit that the General Court failed to have regard to its obligation to carry out a review exercising its powers of unlimited jurisdiction for the purpose of Article 6 of the European Convention on Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), in so far as concerns its assessment of the alleged abuse of a dominant position and its effects on competition.

37 Furthermore, the appellants reiterate on numerous occasions the argument that the General Court failed to have regard to its obligation to carry out a review exercising its powers of unlimited jurisdiction with regard to the establishment of the infringement, in particular in their second and third grounds of appeal.

38 Since those arguments are identical or overlap to a large degree, it is appropriate to examine them together before going on to consider the other grounds of appeal.

39 First of all, it is appropriate to bear in mind the essential characteristics of the remedies provided by EU law in order to ensure effective judicial protection for undertakings which are the addressees of Commission decisions imposing fines for infringement of the competition rules.

40 The principle of effective judicial protection is a general principle of EU law to which expression is now given by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and which corresponds, in EU law, to Article 6(1) of the ECHR (see Case C-386/10 P *Chalkor* v *Commission* EU:C:2011:815, paragraph 51; Case C-199/11 *Otis and Others* EU:C:2012:684, paragraph 47; and Case C-501/11 P *Schinlder Holding and Others* v *Commission* EU:C:2013:522, paragraph 36).

41 Whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of EU law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law (see *Schindler Holding and Others* v *Commission* EU:C:2013:522, paragraph 32).

42 According to established case-law, EU law provides for a system of judicial review of Commission decisions relating to proceedings under Article 102 TFEU which affords all the safeguards required by Article 47 of the Charter (see, to that effect, *Chalkor* v *Commission* EU:C:2011:815, paragraph 67, and *Otis and Others* EU:C:2012:684, paragraphs 56 and 63). That system of judicial review consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU, by the Court's unlimited jurisdiction with regard to the penalties provided for in regulations.

43 As regards review of the legality of Commission decisions in competition matters, the first and second paragraphs of Article 263 TFEU provide that the Court of Justice is to review the legality of acts of the Commission intended to produce legal effects vis-à-vis third parties and, to that end, it has jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of power. Under Article 256 TFEU, the General Court has jurisdiction to review at first instance the legality of Commission decisions in competition matters, as provided for in Article 263 TFEU.

44 That review of legality is supplemented, in accordance with Article 261 TFEU, by the Court of Justice's unlimited jurisdiction with regard to the fines and periodic penalty payments imposed by the Commission for infringement of the competition rules. Article 17 of Regulation No 17, replaced by Article 31 of Regulation No 1/2003, provides that the Court of Justice is to have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment, which means that it may cancel, reduce or increase the fine or periodic penalty payment imposed.

45 It follows from the foregoing that the scope of judicial review extends to all Commission decisions relating to a proceeding under Article 102 TFEU, whereas the scope of the unlimited jurisdiction conferred by Article 31 of Regulation No 1/2003 is confined to the parts of such decisions imposing a fine or a periodic penalty payment.

46 Since the fifth part of the fifth ground of appeal concerns parts of the contested decision relating to the establishment of the infringement, the appellants' argument alleging that the General Court failed to have regard to the obligation to carry out a review exercising its powers of unlimited jurisdiction for the purpose of Article 47 of the Charter must be understood as referring to the review of legality carried out by the General Court in the present case, as provided for in Article 263 TFEU.

47 In essence, the appellants contend that the General Court failed to have regard to its obligation to carry out a review exercising its powers of unlimited jurisdiction for the purpose of Article 47 of the Charter in its assessment of the abuse and its effects on competition. In particular, the appellants take issue with the General Court for rejecting their arguments after concluding that there was no manifest error on the part of the Commission, at paragraphs 211, 220, 223, 244, 251 and 263 of the judgment under appeal. The appellants make three complaints in that regard.

48 By their first complaint, the appellants maintain that the General Court's review was limited to a manifest error of assessment of factors which did not give rise to complex economic assessments.

49 By their second complaint, the appellants contend that the General Court was incorrect to confine itself to reviewing the manifest error of assessment, thus avoiding examining whether the evidence adduced by the Commission substantiated the conclusions it drew from its assessment of the complex economic situation, in accordance with the judgment in Case C-12/03 P *Tetra Laval* EU:C:2005:87, paragraph 39.

50 By their third complaint, the appellants claim that the General Court is required, even when dealing with complex economic questions, to exercise its powers of unlimited jurisdiction for the purpose of Article 6 of the ECHR, as interpreted by the European Court of Human Rights in. *A. Menarini Diagnostics S.r.l v. Italy*, no 43509/08 of 27 September 2011, in which the manifest error of assessment test has no place.

51 According to the case-law of the European Court of Human Rights, the obligation to comply with Article 6 of the ECHR does not preclude, in an administrative procedure, a 'penalty' being imposed in the first instance by an administrative authority. For this to be possible, however, decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) of the ECHR must be subject to subsequent review by a judicial body endowed with unlimited jurisdiction (judgments of the European Court of Human Rights, *Segame SA v. France*, no 4837/06, § 55, ECHR 2012, and *A. Menarini Diagnostics v. Italy*, § 59)

52 It is also apparent from the case-law of the European Court of Human Rights that the characteristics of a judicial body endowed with unlimited jurisdiction include the power to quash in all respects, on questions of fact and law, the decision at issue. Such a body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it (see, inter alia, the judgment of the European Court of Human Rights, *A. Menarinin Diagnostics v. Italy*, § 59; and *Schindler Holding and Others* v *Commission* EU:C:2013:522, paragraph 35).

53 It is established case-law that the review of legality provided for in Article 263 TFEU involves review by the European Union judicature, in respect of both the law and the facts, of the arguments relied on by applicants against the contested decision, which means that it has the power to assess the evidence, annul the decision and to alter the amount of the fine (see, to that effect, *Schindler Holding and Others* v *Commission* EU:C:2013:522, paragraph 38 and the case-law cited).

54 Accordingly, the Court of Justice has already stated that, whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the EU judicature must refrain from reviewing the Commission's interpretation of information of an economic nature. The EU judicature must, among other things, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but must also determine whether that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (*Commission* v *Tetra Laval* EU:C:2005:87, paragraph 39; *Chalkor* v *Commission* EU:C:2011:815, paragraph 54; and *Otis and Others* EU:C:2012:684, paragraph 59).

55 Moreover, failure to review the whole of the contested decision of the court's own motion does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the General Court — which is indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts — should be obliged to undertake of its own motion a new and comprehensive investigation of the file (*Chalkor* v *Commission* EU:C:2011:815, paragraph 66, and *Kone and Others* v *Commission* EU:C:2013:696, paragraph 32).

56 Accordingly, the EU judicature must carry out its review of legality on the basis of the evidence adduced by the applicant in support of the pleas in law put forward and it cannot use the Commission's margin of discretion as regards the assessment of that evidence as a basis for dispensing with the conduct of an in-depth review of the law and of the facts (see, to that effect, *Chalkor* v *Commission* EU:C:2011:815, paragraph 62, and *Schindler Holding and Others* v *Commission* EU:C:2013:522, paragraph 37).

57 Given those characteristics, the review of legality provided for by Article 263 TFEU satisfies the requirements of the principle of effective judicial protection enshrined in Article 6(1) of the ECHR, which corresponds in EU law to Article 47 of the Charter (see, to that effect, *Chalkor* v *Commission* EU:C:2011:815, paragraph 67; *Otis and Others* EU:C:2012:684, paragraph 56; and *Schindler and Others* v *Commission* EU:C:2013:522, paragraph 38).

58 In the present case, the appellants simply claim, by means of general assertions alleging that the General Court erred in law in its examination of the evidence adduced by the Commission, and do not specifically identify the nature of any such error, inter alia by reference to the requirements set out at paragraph 54 above. Accordingly, they do not maintain that the General Court failed to establish whether the evidence put forward is factually accurate, reliable and consistent or that the evidence reviewed by that court does not contain all the relevant data that must be taken into consideration in appraising a complex situation. Moreover, they fail to explain how the General Court erred in law in the conclusions set out at paragraphs 211, 220, 223, 244, 251 and 263 of the judgment under appeal and in the reasons given for those conclusions.

59 In any event, it should be noted that, in carrying out the review of legality provided for in Article 263 TFEU, the General Court did not merely ascertain whether there were any manifest errors of assessment but carried out an in-depth review, as regards questions of both fact and law, of the contested decision in the light of the pleas in law put forward by the appellants, thus satisfying the requirements of an unrestricted review for the purpose of Article 47 of the Charter (see, to that effect, *Chalkor* v *Commission* EU:C:2011:815, paragraph 82, and Case C-272/09 P *KME and Others* v *Commission* EU:C:2011:810, paragraph 109).

60 Therefore, the appellants' argument that the General Court failed to have regard to its obligation to carry out a review exercising its powers of unlimited jurisdiction in so far as concerns the establishment of the infringement must be rejected, as must the fifth part of the fifth ground of appeal, as unfounded.

*The first and ninth grounds of appeal, alleging breach of the rights of the defence*

61 By their first ground of appeal, the appellants claim that the General Court infringed their rights of defence. This ground of appeal is divided into four parts.

62 The appellants' ninth ground of appeal alleges that the duration of the proceedings before the General Court was excessive. As it reproduces in almost identical terms part of the arguments put forward in the first part of the first ground of appeal, it is appropriate to examine them together.

The first part of the first ground of appeal and the ninth ground of appeal, alleging that the duration of the proceedings was disproportionate

63 By the first part of their first ground of appeal and their ninth ground of appeal, the appellants contend that the duration of the proceedings before the General Court was disproportionate, which infringes their fundamental right to effective judicial protection within a reasonable period of time, enshrined in Article 47 of the Charter and Article 6 of the ECHR.

64 While the appellants seek to have the judgment under appeal set aside or, in the alternative, to have the judgment set aside in so far as it confirms the fine imposed or to obtain a reduction in the amount of the fine, it should be noted that, in the absence of any evidence that the excessive duration of the proceedings before the General Court had an effect on the outcome of the dispute, failure on the part of the General Court to adjudicate within a reasonable time cannot lead to the judgment under appeal being set aside. Indeed, where failure to adjudicate within a reasonable time has no effect on the outcome of the dispute, the setting aside of the judgment under appeal would not provide a remedy for any infringement by the General Court of the principle of effective judicial protection (Case C-40/12 P *Gascogne Sack Deutschland* v *Commission* EU:C:2013:768, paragraphs 81 and 82; Case C-50/12 P *Kendrion* v *Commission* EU:C:2013:771, paragraphs 82 and 83; and Case C-58/12 P *Groupe Gascog*ne v *Commission* EU:C:2013:770, paragraphs 81 and 82).

65 In the present case, the appellants have not provided any evidence to the Court from which it may be inferred that failure by the General Court to adjudicate within a reasonable time could have affected the outcome of the dispute before it. In particular, their argument that the duration of the proceedings prevented them from lodging an appeal before judgment was delivered in Case C-52/09 *TeliaSonera Sverige* (EU:C:2011:83) gives no ground for concluding that the outcome of the dispute before the General Court could have been different.

66 In so far as the appellants claim, in the alternative, that the Court should reduce the amount of the fine imposed on them, it should be recalled that the sanction for a breach, by a court of the European Union, of its obligation under the second paragraph of Article 47 of the Charter to adjudicate on the cases before it within a reasonable time must be an action for damages brought before the General Court, since such an action constitutes an effective remedy. Accordingly, a claim for compensation for the damage caused by the failure on the part of the General Court to adjudicate within a reasonable time may not be made directly to the Court of Justice in the context of an appeal, but must be brought before the General Court itself (*Gascogne Sack Deutschland* v *Commission* EU:C:2013:768, paragraphs 86 to 90; *Kendrion* v *Commission* EU:C:2013:771, paragraphs 91 to 95; and *Groupe Gascogne* v *Commission* EU:C:2013:770, paragraphs 80 to 84).

67 Where a claim for damages is brought before the General Court, which has jurisdiction under Article 256(1) TFEU, it must determine such a claim sitting in a different composition from that which heard the dispute giving rise to the procedure whose duration is criticised (*Groupe Gascogne* v *Commission* EU:C:2013:770, paragraph 90).

68 In the present case, the appeal does not contain the necessary information on the conduct of the proceedings at first instance to enable the Court to determine whether the duration of those proceedings was unreasonable.

69 It follows from the foregoing considerations that the first part of the first ground of appeal and the ninth ground of appeal must be rejected.

The second part of the first ground of appeal, alleging errors of law in the finding that certain arguments set out in the annexes are inadmissible

70 By the second part of their first ground of appeal, the appellants claim that the General Court erred in law, first, in finding, at paragraphs 62 and 63 of the judgment under appeal, that the annexes to the originating application and the reply were to be taken into consideration only in so far as they supported or supplemented pleas or arguments expressly set out in the body of their written pleadings and, second, in dismissing as inadmissible, at paragraphs 231, 250 and 262 of that judgment, in accordance with the principle referred to above, certain arguments set out in those annexes relating to the calculation of the terminal value, average customer lifetime and the double counting of certain cost items.

71 It should be noted that in those paragraphs the General Court applied the rule of procedure, set out at paragraphs 58 of the judgment under appeal and laid down in Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure of the General Court, to the effect that the essential matters of law and fact relied on in an action must be stated, at least in summary form, coherently and intelligibly in the application itself, as observed by the Advocate General at point 26 of his Opinion.

72 With regard to the appellants' argument that the General Court could not require them to include in their application all the economic calculations on which their arguments were based, it is clear that the appellants do not identify with the requisite degree of precision the error of law allegedly committed by the General Court. Accordingly, that argument must be rejected as inadmissible in accordance with the case-law cited at paragraphs 29 and 30 above.

73 As a consequence, the second part of the first ground of appeal must be rejected as partly unfounded and partly inadmissible.

The third part of the first ground of appeal, alleging errors of law in the finding rejecting as inadmissible the arguments relating to the claim that national and regional access infrastructure was not essential

74 By the third part of their first ground of appeal, the appellants maintain that, at paragraph 182 of the judgment under appeal, the General Court distorted the facts and infringed their rights of defence by finding that they had not relied on the non-essential nature of wholesale products when assessing the effects of their conduct.

75 That argument is ineffective, as pointed out by the Advocate General at point 27 of his Opinion, since the appellants' reliance on the non-essential nature of wholesale products formed part of a broader argument in which the General Court was invited to apply the criteria established by the Court of Justice in *Bronner* (Case C-7/97 EU:C:1998:569) in connection with a refusal to supply amounting to abuse. As is apparent from paragraphs 180 and 181 of the judgment under appeal, the abusive conduct of which the appellants stand accused, which took the form of a margin squeeze, constitutes an independent form of abuse distinct from that of refusal to supply, so that the criteria established in *Bronner* (EU:C:1998:569) were not applicable in the present case (Case C-52/09 *TeliaSonera Sverige* EU:C:2011:83, paragraphs 55 to 58).

76 Consequently, the third part of the first ground of appeal must be rejected as ineffective.

The fourth part of the first ground of appeal, alleging breach of the rights of defence and the presumption of innocence

77 By the fourth part of the first ground appeal, the appellants contend that the General Court infringed the rights of defence and the presumption of innocence by finding, in relation to certain arguments in the contested decision which were not referred to by the Commission in the statement of objections, that it was for the appellants to show that the result at which the Commission arrived in its decision would have been different if those arguments had been disallowed.

78 It is clear that the appellants' arguments in that regard do not contain any precise indication as to the passages of the judgment under appeal which may be vitiated by an error of law.

79 As a consequence, in the light of the settled case-law cited at paragraphs 29 and 30 above, the fourth part of the first ground of appeal must be rejected as inadmissible.

80 In the light of the foregoing, the first ground of appeal must be rejected as in part inadmissible, in part ineffective and in part unfounded, and the ninth ground of appeal as unfounded.

*The second ground of appeal, alleging errors of law in the definition of the relevant wholesale markets*

81 By their second ground of appeal, the appellants argue that the General Court erred in law in the definition of the relevant wholesale markets. The Commission, the ECTA, France Telecom and Ausbanc Consumo submit that the second ground of appeal is inadmissible.

82 First of all, it is clear that the arguments introducing the second ground of appeal do not identify with the requisite degree of precision any error of law committed by the General Court and consist of general, unsubstantiated assertions essentially alleging infringement of the presumption of innocence and the rules governing the burden of proof and must therefore be rejected as inadmissible in the light of the case-law cited at paragraphs 29 and 30 above.

83 Secondly, the appellants contend that the General Court erred in law at paragraph 117 of the judgment under appeal, which sets out a series of findings of fact concerning the considerable investment entailed in the use of local loop unbundling.

84 It should be recalled that, in accordance with Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice, appeals against decisions of the General Court are limited to points of law. It is settled case-law that the General Court has exclusive jurisdiction to find and appraise the relevant facts and, in principle, to examine the evidence it accepts in support of those facts. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (Case C-535/06 P *Moser Baer India* v *Council* EU:C:2009:498, paragraph 32 and case-law cited, and Case C-89/11 P *E.ON Energie* v *Commission* EU:C:2012:738, paragraph 64).

85 In the light of that case-law, the appellants' arguments relating to the investment necessary for the use of local loop unbundling must be rejected as inadmissible.

86 Thirdly, the appellants dispute the series of factual assessments set out at paragraph 115 et seq. of the judgment under appeal, at the end of which the General Court concluded, at paragraph 134, that the Commission was correct to take the view that local loop unbundling was not part of the relevant market in the present case. In particular, the appellants take issue with the finding that an operator must have a critical mass in order to make the major investment necessary for the use of local loop unbundling.

87 Fourthly, the appellants contend that the General Court made an error of assessment by endorsing, at paragraph 123 of the judgment under appeal, the Commission's reasoning that the necessary substitutability for the purposes of the definition of the relevant market must materialise in the short term. According to the appellants, the General Court overlooked the fact that the SSNIP (small but significant and non-transitory increase in price) test must be applied in a specific temporal context.

88 Fifthly, the appellants take issue with the judgment under appeal in so far as the General Court found that there could be no question of asymmetric substitution between the wholesale products in question.

89 Since those arguments seek to challenge factual assessments made by the General Court, they must be rejected as inadmissible in the light of the case-law cited at paragraph 84 above.

90 In the light of the foregoing, as observed by the Advocate General at point 12 of his Opinion, the plea of inadmissibility raised by the Commission, the ECTA, France Telecom and Ausbanc Consumo must be upheld and the second ground of appeal rejected in its entirety as inadmissible.

*The third ground of appeal, alleging errors of law in the assessment of the dominant position*

91 By their third ground of appeal, the appellants submit that the General Court erred in law as regards the establishment, at paragraph 146 et seq. of the judgment under appeal, of the purported dominant position of Telefónica and its subsidiaries on the relevant markets. In particular, the appellants take issue with the General Court for concluding that they enjoyed a dominant position on the basis of their large market shares on the relevant markets, namely 100% of the regional wholesale market and 84% of the national wholesale market, without taking account of the actual pressure they were under from their competitors.

92 It is sufficient to note in that regard that the General Court examined the appellants' claims seeking to demonstrate that there was pressure from competitors on the relevant markets at paragraphs 156, 157 and 160 to 167 of the judgment under appeal and found that none of those claims was capable of calling into question the fact that they held a dominant position on those markets.

93 In so far as, by their arguments, the appellants are seeking to call into question findings of fact made by the General Court, it is necessary to reject them as inadmissible, in the light of the case-law cited at paragraph 84 above.

94 Consequently, the third ground of appeal must be rejected as inadmissible.

*The fourth ground of appeal, alleging infringement of the right to property and the principles of proportionality and legal certainty and the principle that penalties must be clearly defined by law, and failure to have regard to the case-law established in Bronner*

95 By their fourth ground of appeal, the appellants claim that the General Court was incorrect to conclude that they had infringed Article 102 TFEU when the factors indicative of a refusal to supply amounting to abuse identified by the Court in *Bronner* (EU:C:1998:569) were not present, in particular the essential nature of the inputs. The General Court thereby infringed the appellants' right to property, the principles of proportionality and legal certainty and the principle that penalties must be clearly defined by law.

96 As is apparent from paragraph 75 above, the General Court stated at paragraphs 180 and 181 of the judgment under appeal that the criteria established by the Court in *Bronner* (EU:C:1998:569) related to a refusal to supply amounting to abuse. However, the abusive conduct of which the appellants stand charged, which takes the form of a margin squeeze, constitutes an independent form of abuse distinct

from that of refusal to supply (*TeliaSonera Sverige* EU:C:2011:83, paragraph 56), to which the criteria established in *Bronner* (EU:C:1998:569) are not applicable, in particular, the essential nature of the inputs.

97 The appellants also claim that the General Court's decision not to apply the criteria established in Bronner (EU:C:1998:569) gives rise to an infringement of their right to property and the principles of proportionality and legal certainty and the principle that penalties must be clearly defined by law.

98 Irrespective of whether those claims are well founded, it is clear, as observed by the Commission, that they were not put forward by the appellants before the General Court.

99 It has consistently been held that a plea raised for the first time in an appeal before this Court must be rejected as inadmissible. In an appeal, the Court's jurisdiction is confined to examining the assessment by the General Court of the pleas argued before it. To allow a party to put forward in an appeal before the Court of Justice a plea in law which it has not raised before the General Court would amount to allowing that party to bring before the Court, whose jurisdiction in appeals is limited, a wider case than that heard by the General Court (*Dansk Rørindustri and Others* v *Commission* EU:C:2005:408, paragraph 165 and the case-law cited).

100 As a consequence, as observed by the Advocate General at point 16 of his Opinion, those claims must be rejected as inadmissible.

101 In the light of the foregoing, the fourth ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

*The fifth ground of appeal, alleging errors of law in the assessment of the abuse and its effects on competition*

102 By their fifth ground of appeal, the appellants claim that the General Court erred in law in its assessment of the abuse and its effects on competition. This ground consists of six parts.

103 The fifth part of the fifth ground of appeal has already been examined and rejected as unfounded at paragraph 60 above.

The first part of the fifth ground of appeal, alleging errors of law in the application of the margin squeeze test

104 In support of the first part of their fifth ground of appeal, alleging errors of law in the application of the margin squeeze test, the appellants simply summarise the two margin squeeze tests applied by the Commission, their criticism of those tests as set out in the originating application and the General Court's response.

105 As the appellants fail to identify in that regard any error of law committed by the General Court or the passages in the judgment under appeal that may be vitiated by such an error of law, the first part of the fifth ground of appeal must be rejected in the light of the case-law cited at paragraphs 29 and 30 above.

The second part of the fifth ground of appeal, alleging errors of law in the choice of wholesale inputs

106 By the second part of their fifth ground of appeal, alleging errors of law in the choice of wholesale inputs, the appellants contend that, at paragraphs 200 to 211 of the judgment under appeal, the General Court was incorrect to consider whether there was a margin squeeze for each wholesale

product considered separately, without taking account of the fact that the alternative operators used an optimal combination of wholesale products, including unbundling of the local loop, which enabled them to reduce their costs.

107 As pointed out by the Commission, the appellants are seeking by those arguments to call into question the General Court's findings of fact concerning the definition of the relevant markets and the finding that it had not been established that the alternative operators used such an optimal combination, in particular at paragraphs 202 and 210 of the judgment under appeal. The appellants also allege distortion of the facts, without, however, identifying the evidence in the file which, it is claimed, was distorted by the General Court. As a consequence, it is necessary, in the light of the case-law cited at paragraph 84 above and as observed by the Advocate General at point 18 of his Opinion, to reject this argument as inadmissible.

108 Moreover, contrary to what is claimed by the appellants, the General Court did not err by reversing the burden of proof at paragraph 210 of the judgment under appeal but simply stated that the evidence on which the Commission based its decision, which was not disputed by the appellants, tends to show that the alternative operators did not use such an optimal combination during the infringement period.

109 In the light of the foregoing, the second part of the fifth ground of appeal must be rejected as partly unfounded and partly inadmissible.

The third and fourth parts of the fifth ground of appeal, alleging errors of laws in the examination of the DCF method and the 'period-by-period' method used by the Commission

110 By the third part of their fifth ground of appeal, the appellants claim that the General Court made a number of errors of law in its examination, at paragraphs 212 to 232 of the judgment under appeal, of the DCF method applied by the Commission in the contested decision.

111 By the fourth part of their fifth ground of appeal, the appellants submit that the General Court made a number of errors in law in its examination, at paragraphs 233 to 264 of the judgment under appeal, of the 'period-by-period' method applied by the Commission in the contested decision.

112 It is apparent from paragraph 213 of the judgment under appeal that, in calculating the margin squeeze, the Commission calculated the appellants' profitability by using those two methods, that is, the 'period-by-period' method, as well as the DCF method proposed by the appellants, in order, inter alia, 'to ensure that the method proposed by the appellants did not disprove the finding of a margin squeeze resulting from the "period-by-period" analysis'.

113 The Court notes that, under the guise of general, unsubstantiated assertions alleging infringement of the presumption of innocence and the requirement of effective judicial protection, the appellants are in fact seeking a fresh examination of the two methods applied by the Commission to calculate their profitability.

114 It is apparent from the case-law cited at paragraph 84 above that the General Court has exclusive jurisdiction to find and appraise the relevant facts and, in principle, to examine the evidence it accepts in support of those facts.

115 As a consequence, as proposed by the Advocate General at point 18 of his Opinion, the third and fourth parts of the fifth ground of appeal must be rejected as inadmissible.

The sixth part of the fifth ground of appeal, alleging errors of law in the examination of the effects of the appellants' conduct on the retail market

116 By the sixth part of their fifth ground of appeal, the appellants contend that the General Court committed a number of errors of law in the examination of the effects of their conduct on the retail market.

117 The appellants maintain, in their first complaint, that the General Court erred in its failure to take account of the non-essential nature of inputs in its examination of the effect of their conduct on the retail market, thus failing to have due regard for the principles established by the Court in *TeliaSonera Sverige* (EU:C:2011:83).

118 That complaint must be rejected as unfounded as it is based on a misinterpretation of paragraph 69 of the judgment in *TeliaSonera Sverige* (EU:C:2011:83), in which the Court simply stated that, when assessing the effects of the margin squeeze, the question whether the wholesale product is indispensable may be relevant, with the result that the General Court was not obliged to take account of it.

119 Accordingly, the General Court duly exercised its power to assess the facts at paragraphs 275 and 276 of the judgment under appeal in finding that the Commission had established in the contested decision the likely effects of the appellants' conduct on the relevant markets, independently of the issue of whether inputs were essential.

120 By their second complaint, the appellants claim that the General Court should have considered whether the margin between the wholesale price of inputs and the retail price was positive or negative.

121 As argued by the Commission, the second complaint must be rejected as inadmissible in the light of the case-law cited at paragraph 99 above, since the appellants did not raise it before the General Court.

122 Furthermore, the complaint in question fails to identify the passages of the judgment under appeal which may be vitiated by an error of law, so that it must also be rejected as inadmissible in the light of the case-law cited at paragraphs 29 and 30 above.

123 By their third complaint, the appellants contend that, at paragraph 283 of the judgment under appeal, the General Court was incorrect to reject as ineffective their claim that there was no evidence of any specific effects of the margin squeeze on the market.

124 That third complaint must be rejected as unfounded since, first, in order to establish that a practice such as margin squeeze is abusive, that practice must have an anti-competitive effect on the market, although the effect does not necessarily have to be concrete, it being sufficient to demonstrate that there is a potential anti-competitive effect which may exclude competitors who are at least as efficient as the dominant undertaking (see *TeliaSonera Sverige* EU:C:2011:83, paragraph 64) and, second, the General Court found at paragraph 282 of the judgment under appeal, in its assessment of the facts, that the Commission had demonstrated that there were such potential effects.

125 In the light of the foregoing, the sixth part of the fifth ground of appeal must be rejected as must, therefore, the fifth ground of appeal in its entirety, as inadmissible, in part, and unfounded, in part.

*The sixth ground of appeal, alleging that the Commission acted ultra vires and infringement of the principles of subsidiarity, proportionality, legal certainty, sincere cooperation and sound administration*

126 By their sixth ground of appeal, the appellants submit that the General Court failed to have regard to the fact that the Commission is precluded from acting ultra vires, and to the principles of subsidiarity, proportionality, legal certainty, sincere cooperation and sound administration.

127 The first part of the sixth ground of appeal alleges that the General Court erred in law at paragraphs 289 to 294 of the judgment under appeal in its examination of the breach by the Commission of the prohibition on exceeding its powers.

128 In the first place, the appellants maintain that the General Court endorsed a misinterpretation of the case-law established in *Bronner* (EU:C:1998:569) by taking the view that the Commission had the power to regulate ex post the price conditions to which the use of non-essential infrastructure is subject. That argument is unfounded, since it amounts to a claim that Article 102 TFEU is applicable in the present context only if the requirements established in *Bronner* (EU:C:1998:569) are satisfied. It should be recalled in that regard that Article 102 TFEU is of general application and cannot be restricted, inter alia, as the General Court was correct to point out at paragraph 293 of the judgment under appeal, by the existence of a regulatory framework adopted by the EU legislature for ex ante regulation of the telecommunications markets.

129 In the second place, the appellants make various unsubstantiated assertions concerning the General Court's alleged distortion of the facts, the Commission's use of 'regulatory' concepts, and claims that the Commission does not have the power to regulate ex post prices for the use of non-essential infrastructure. Since those assertions do not identify with the requisite degree of precision any error of law committed by the General Court, they must be rejected as inadmissible in accordance with the case-law cited at paragraphs 29 and 30 above.

130 By the second part of their sixth ground of appeal, the appellants contend that the General Court committed a number of errors of law when examining, at paragraphs 296 to 308 of the judgment under appeal, the Commission's alleged infringement of the principles of subsidiarity, proportionality and legal certainty.

131 It is clear that the appellants' first complaint, which alleges infringement of the principle of proportionality, must be rejected as inadmissible in the light of the case-law cited at paragraphs 29 and 30 above, since the appellants fail to identify the passages of the judgment under appeal which may be vitiated by an error of law.

132 The second complaint relates to the claim that, at paragraph 306 of the judgment under appeal, the General Court disregarded the principle of legal certainty by accepting that conduct which complied with the regulatory framework may constitute a breach of Article 102 TFEU.

133 That complaint must be rejected as unfounded since, as the Commission, the ECTA and France Telecom correctly observe, the fact that an undertaking's conduct complies with a regulatory framework does not mean that such conduct complies with Article 102 TFEU.

134 By their third complaint, alleging breach of the principle of subsidiarity, the appellants contend that, at paragraphs 299 to 304 of the judgment under appeal, the General Court clearly distorted their claims and disregarded the fact that the objectives pursued by competition law and by the regulatory framework are the same. Since those objectives are the same, the General Court should have ascertained whether the Commission's intervention on the ground of infringement of competition law is compatible with the objectives pursued by the Comisión del Mercado de las Telecomunicaciones (Spanish Commission for the Telecommunications Markets, 'the CMT') under the regulatory framework.

135 That third complaint must be rejected as, in part, inadmissible, in so far as it alleges distortion of the appellants' arguments, since the appellants fail to identify the arguments which they claim the General Court distorted and, in part, unfounded, in so far as it alleges breach of the principle of subsidiarity, since the Commission's implementation of Article 102 TFEU is not subject to any prior consideration of action taken by national authorities.

136 By the third part of their sixth ground of appeal, the appellants claim that the General Court erred in law in finding, at paragraphs 309 to 315 of the judgment under appeal, that the Commission had not infringed the principles of sincere cooperation and sound administration.

137 The appellants also argue that, at paragraphs 313 and 314 of the judgment under appeal, the General Court distorted their claims, in so far as they took issue with the Commission not for failing to consult the CMT on the statement of objections, but for failing to act on the basis of all the relevant facts and failing to cooperate with the CMT.

138 That third complaint must be rejected as inadmissible, since, as observed by the Advocate General at point 41 of his Opinion, the appellants fail to identify the evidence which they claim was distorted and the General Court's alleged errors of analysis.

139 In the light of the foregoing, the sixth ground of appeal must be rejected as partly inadmissible and partly unfounded.

*The seventh ground of appeal, alleging errors of law in the application of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003*

140 By their seventh ground of appeal, the appellants contend that the General Court erred in law in its application of Article 15(2) of Regulation No 17 and Article 23(2) of Regulation No 1/2003. That plea falls into two parts.

The first part of the seventh ground of appeal, alleging breach of the principle of legal certainty and the principle that penalties must be clearly defined by law

141 By the first part of their seventh ground of appeal, the appellants argue, in essence, that the General Court failed to have regard to the principle of legal certainty and the principle that penalties must be clearly defined by law enshrined in Article 7 of the ECHR and Article 49 of the Charter by finding that the Commission was entitled to impose a fine on them on account of the practice of margin squeezing. The appellants put forward four complaints in that regard.

142 In their first complaint, under the heading 'existence of clear and foreseeable precedents', the appellants simply summarise the content of paragraphs 357 to 368 of the judgment under appeal, without identifying any error of law committed by the General Court. As a consequence, it is necessary, in the light of the established case-law cited at paragraphs 29 and 30 above, to reject that complaint as inadmissible.

143 In the second complaint, the appellants merely state that the General Court failed to have regard to the principle that penalties must be clearly defined by law and the principle of legal certainty by declaring, at paragraph 357 of the judgment under appeal, that the Commission exercises its discretion in the specific context of each case when assessing whether it is appropriate to impose a fine.

144 In so far as it relates to infringement of Articles 6 and 7 of the ECHR, the second complaint must be rejected as inadmissible in accordance with the case-law cited at paragraph 99 above, since the appellants did not raise that argument before the General Court.

145 In so far as the appellants rely on the principle that penalties must be clearly defined by law and the principle of legal certainty, the second complaint must also be rejected as inadmissible since the appellants do not substantiate their arguments by explaining how those principles deny the Commission a margin of discretion when deciding to impose a fine for infringement of the competition rules.

146 In the third complaint, the appellants express the view that, at paragraphs 360 and 361 of the judgment under appeal, the General Court erred in law by finding that Commission Decision 85/518/EEC of 18 July 1988 relating to a proceeding under Article [101 TFEU] (Case No IV/30.178 — Napier Brown — British Sugar) and the Deutsche Telekom decision constitute clear precedents which clarify the conditions under which Article 102 TFEU is applicable to the practice of margin squeezing. In essence, the appellants are arguing that those decisions do not constitute clear and foreseeable precedents, with the result that they could not reasonably have foreseen the interpretation of Article 102 TFUE adopted by the Commission in the contested decision.

147 It should be recalled that the principle that penalties must be clearly defined by law and the principle of legal certainty cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability but may preclude the retroactive application of a new interpretation of a rule establishing an offence (*Dansk Rørindustri and Others* v *Commission* EU:C:2005:408, paragraph 217).

148 That is particularly true of a judicial interpretation which produces a result that was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time (*see Dansk Rørindustri and Others* v *Commission* EU:C:2005:408, paragraph 218 and the case-law cited).

149 In the present case, it is clear that the Commission's interpretation in the contested decision to the effect that a practice of squeezing margins is contrary to Article 102 TFEU was reasonably foreseeable at the time when the offence was committed. It follows that such an interpretation was foreseeable as a result of Decision 88/518 (Napier Brown) and the Deutsche Telekom decision, as well as the foreseeable negative effects which the practice of squeezing margins would have on competition, as the General Court was correct to point out at paragraphs 358 to 362 of the judgment under appeal.

150 Moreover, in so far as the third complaint is based on *Bronner* (EU:C:1998:569), it should be recalled that the abusive conduct of which the appellants stand charged, which took the form of a margin squeeze, constitutes an independent form of abuse distinct from that of a refusal to supply, to which the criteria established in *Bronner* (EU:C:1998:569) are not applicable, as already stated at paragraph 75 above.

151 The third complaint must therefore be rejected as unfounded.

152 By their fourth complaint, the appellants maintain that the General Court was incorrect to conclude that the methodology used by the Commission to ascertain whether there was a margin squeeze was reasonably based on clear and foreseeable precedents. In particular, the appellants criticise the General Court's line of reasoning at paragraphs 363 to 369 of the judgment under appeal, at the end of which the General Court concluded that the methodology used by the Commission to determine whether there was a margin squeeze was foreseeable.

153 It is clear that the appellants are seeking, in essence, to call into question the findings of fact as to whether the methodology used by the Commission to determine whether there was a margin squeeze was foreseeable, so that the fourth complaint must be rejected as inadmissible, in accordance with the case-law cited at paragraph 84 above.

154 In the light of the foregoing, the first part of the seventh ground of appeal must be rejected as partly inadmissible and partly unfounded.

The second part of the seventh ground of appeal, alleging errors of law in the classification of the appellants' conduct as an infringement committed intentionally or as a result of serious negligence

155 By the second part of their seventh ground of appeal, the appellants contend that the General Court committed a number of errors of law in classifying their conduct as an infringement committed intentionally or as a result of serious negligence for the purpose of Article 23(2) of Regulation No 1/2003.

156 With regard to whether the offences were committed intentionally or as a result of serious negligence and are therefore liable to be penalised by the imposition of a fine in accordance with the first subparagraph of Article 15(2) of Regulation No 17 or Article 23(2) of Regulation No 1/2003, it is the Court's settled case-law that that condition is satisfied where the undertaking concerned cannot be unaware of the anti-competitive nature of its conduct, whether or not it is aware that it is infringing the competition rules of the Treaty (*Deutsche Telekom* v *Commission* EU:C:2010:603, paragraph 124 and the case-law cited).

157 The appellants put forward two complaints in support of the second part of the seventh ground of appeal.

158 By their first complaint, the appellants contend that they were not in a position to foresee the anti-competitive nature of their conduct because the definition of the relevant market applied by the Commission and the anti-competitive nature of their pricing policy were not foreseeable.

159 The Court finds in that regard that the appellants are seeking, in essence, to call into question the findings of fact as to whether the definition of the relevant market was foreseeable, with the result that the first complaint must be rejected as inadmissible in accordance with the case-law cited at paragraph 84 above.

160 With regard to the anti-competitive nature of their pricing policy, the appellants contend that, given the monitoring of and intervention in their activities by the national regulatory authorities, they could not have foreseen the action taken by the Commission on the basis of Article 102 TFEU.

161 It is clear that the action taken by the Commission on the basis of Article 102 TFEU is not subject, as stated at paragraph 135 above, to prior consideration of any intervention on the part of the national regulatory authorities and is therefore, in principle, independent of such intervention. Accordingly, the appellants cannot properly rely on a claim that the action taken by the Commission was not foreseeable because of steps taken by the national regulatory authorities, with the result that that argument, which forms part of the first complaint, must be rejected as unfounded.

162 The appellants also take issue with paragraph 341 of the judgment under appeal, in which the General Court stated that the checks carried out by the national regulatory authorities were based on ex ante estimates, not the appellants' actual historic costs, so that the appellants were not prevented, as a result of that monitoring, from foreseeing that their pricing policy was anti-competitive.

163 As the appellants do not establish in what way that finding of fact by the General Court distorted the facts, their arguments in that regard must be rejected as inadmissible, in accordance with the case-law cited at paragraph 84 above.

164 By their second complaint, the appellants criticise the General Court's rejection of their argument that the CMT's actions could have given rise to a legitimate expectation that their pricing practices were compatible with Article 102 TFEU.

165 As observed by France Telecom, since the assertions made by the appellants in the second complaint seek to challenge factual assessments made by the General Court at paragraphs 349 to 351 of the judgment under appeal, they must be rejected as inadmissible in accordance with the case-law cited at paragraph 84 above.

166 Therefore, the second part of the seventh ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

167 In the light of the foregoing, the seventh ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

*The eighth ground of appeal, alleging errors of law in the calculation of the amount of the fine*

168 By their eighth ground of appeal, which is in three parts, the appellants submit that the General Court erred in law in the calculation of the amount of the fine.

The first part of the eighth ground of appeal, alleging errors of law in the classification of the appellants' conduct

169 By the first part of their eighth ground of appeal, the appellants contend that the General Court erred in law by classifying their conduct as a 'very serious infringement'; they put forward four complaints in that regard.

170 By their first complaint, the appellants submit that the General Court erred in law in its classification of the nature of the infringement in the light of the 1998 Guidelines.

171 In their first complaint, the appellants specifically identify only paragraph 386 of the judgment under appeal, in which the General Court rejected the argument that the classification of an infringement as 'serious' used by the Commission in the Deutsche Telekom decision should have been applied to the appellants' conduct, at the very least until the publication on 14 October 2003 of that decision in the *Official Journal of the European Union*, by referring to the fact that the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters.

172 The appellants contend that the General Court erred in law in that paragraph, since abuse may be classified as 'clear-cut' and, as a consequence, a 'very serious infringement', only by reference to earlier decisions, which is apparent from both the 1998 Guidelines and the contested decision.

173 That argument must be rejected as unfounded, since paragraph 386 of the judgment under appeal, as correctly observed by the Commission, must be read in conjunction with paragraph 383, which refers to paragraphs 353 to 368 of the judgment, in which the General Court found that there were precedents justifying the classification of the appellants' conduct as clear-cut abuse.

174 As a consequence, the first complaint must be rejected as unfounded, in so far as it relates to paragraph 386 of the judgment under appeal, and as inadmissible as to the remainder, in accordance with the case-law cited at paragraphs 29 and 30 above, since the appellants fail to identify the passages of the judgment under appeal which they claim to be vitiated by an error of law.

175 By their second complaint, the appellants take issue with the General Court's findings of fact concerning the actual exclusionary effects on the retail market and the harm suffered by consumers.

176 As submitted by France Telecom and the Commission, since the second complaint seeks to challenge findings of fact made by the General Court, it must be rejected as inadmissible in accordance with the case-law cited at paragraph 84 above.

177 By their third complaint, the appellants contend that the General Court erred in law at paragraph 413 of the judgment under appeal by finding that their conduct may be classified as 'very serious', even though the relevant geographic market was restricted to Spain. The appellants allege, in that regard, infringement of the principle of non-discrimination, since the classification applied in the Commission Decision of 16 July 2003 relating to a proceeding under Article [102 TFEU] (Case COMP/38.223 — Wanadoo Interactive) ('the Wanadoo decision') and the Deutsche Telekom decision was that of a 'serious' infringement in relation to geographic markets larger in size than the market in question, namely the German and French markets, respectively.

178 As the Commission was correct to observe, the General Court did not err in law in finding, at paragraph 413 of the judgment under appeal, that the fact that the relevant geographic market is restricted to Spain does not mean that the infringement cannot be classified as 'very serious'. The mere fact that, in the Deutsche Telekom and Wanadoo decisions, the Commission classified the infringements in question as 'serious', even though the relevant geographic markets were larger than that in question in the present case, does not affect that assessment, as the classification of an infringement as 'serious' or 'very serious' does not depend only on the size of the relevant geographic market but also, as correctly observed by the General Court at paragraph 413 of the judgment under appeal, other criteria characterising the infringement.

179 Accordingly, the third complaint must be rejected as unfounded.

180 By their fourth complaint, the appellants maintain that the General Court erred in law by finding that the Commission was not required to alter the classification of the infringement before and after the publication of the Deutsche Telekom decision or, at the very least, to explain how it had taken into account the varying degrees of seriousness of the infringement during the period under consideration in determining the starting amount of the fine.

181 The General Court did not err in law in pointing out, at paragraph 416 of the judgment under appeal, that in the determination of the amount of the fine in a case of infringement of the competition rules, the Commission fulfils its obligation to state reasons when it indicates in its decision the factors which enabled it to determine the gravity of the infringement and its duration, and it is not required to indicate the figures relating to the method of calculating the fines (see Case C-280/98 P *Weig* v *Commission* EU:C:2000:627, paragraphs 43 to 46; Case C-291/98 P *Sarrió* v *Commission* EU:C:2000:631, paragraphs 73 to 76; and Joined Cases, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* EU:C:2002:582, paragraphs 463 to 464).

182 Moreover, the General Court did not err in law in rejecting, at paragraph 420 of the judgment under appeal, the appellants' complaint alleging that the Commission failed to fulfil its obligation to state reasons by not taking into account the varying degree of seriousness of the infringement and by failing to distinguish two separate infringement periods. Indeed, the Commission fulfilled its obligation to state reasons since it set out, at paragraphs 739 to 750 of the contested decision, the reasons why it classified the infringement committed by the appellants as very serious throughout the infringement period, even though their conduct did not display the same degree of seriousness throughout that period, and at the same time explained the differences between the Deutsche Telekom case, in which the infringement was classified as serious, and the present case.

183 Admittedly, it would have been preferable for the Commission to have included in the contested decision reasons which went beyond those requirements, inter alia by setting out the figures on the basis of which it took account of the varying degree of seriousness of the infringement when

determining the starting amount of the fine. However, the availability of that possibility is not such as to alter the scope of the requirements attaching to the duty to state reasons in so far as concerns the contested decision (see, to that effect, *Weig* v *Commission* EU:C:2000:627, paragraph 47; *Sarrió* v *Commission* EU:C:2000:631, paragraph 77; and Case C-199/99 *P Corus UK* v *Commission* EU:C:2003:531, paragraph 149).

184 In the light of the foregoing, the first part of the eighth ground of appeal must be rejected as, in part, inadmissible and, in part, unfounded.

The second part of the eighth ground of appeal, alleging breach of the principles of proportionality and equal treatment, the principle that the penalty must be specific to the offender and the offence and of the obligation to review the reasoning of the contested decision

185 The second part of the eighth ground of appeal, which contains four complaints, alleges breach of the principles of proportionality and equal treatment, the principle that the penalty must be specific to the offender and the offence and of the obligation to review the reasoning of the contested decision.

186 By the third complaint, which it is appropriate to examine first, the appellants contend that the General Court failed to have regard to the principle that the penalty must be specific to the offender and the offence by failing to verify whether the fine had been calculated taking into account the appellants' individual situation.

187 It is clear that the third complaint fails to identify with the requisite degree of precision any error of law committed by the General Court or the passages of the judgment under appeal which may be vitiated by such an error of law, with the result that it must be rejected as inadmissible in accordance with the case-law cited at paragraphs 29 and 30 above.

188 By their first complaint, the appellants submit that the General Court failed to have regard to the principle of non-discrimination by overlooking the fact that the circumstances of the Deutsche Telekom and Wanadoo decisions were similar to those described in the contested decision and gave rise to fines 10 times lower.

189 As the General Court observed at paragraph 425 of the judgment under appeal, the Court has consistently held that the Commission's practice in previous decisions does not itself 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 there is discrimination (Case C-549/10 P *Tomra Systems and Others* v *Commission* EU:C:2012:221, paragraph 104 and the case-law cited).

190 Accordingly, the fact that the Commission has, in the past, imposed fines set at a specific level for certain categories of infringements cannot prevent it from setting new fines at a higher level, if raising of penalties is deemed necessary in order to ensure the implementation of EU competition policy, that policy continuing to be defined solely by Regulation No 1/2003 (*Tomra Systems and Others* v *Commission* EU:C:2012:221, paragraph 105 and the case-law cited).

191 The General Court was therefore entitled, at paragraph 427 of the judgment under appeal, to reject the argument based on the comparison between the fine imposed on the appellants and the fines imposed by the Commission in other competition decisions and to conclude that no breach of the principle of equal treatment could be established in the present case.

192 By their second complaint, the appellants submit that the General Court disregarded the principle of proportionality by failing to establish that the starting amount of the fine, set at EUR 90 million, was disproportionate. The appellants point out in that regard, first, that that starting amount is the second

highest imposed for abuse of a dominant position and, second, that the final amount of the fine was, respectively, 12.5 and 11.25 times higher than the fines imposed on Deutsch Telekom and Wanadoo for similar abusive conduct.

193 Furthermore, by their fourth complaint, the appellants claim that the General Court failed to fulfil its obligation to review the reasoning of the contested decision by finding that the Commission was not required to explain in particular detail the reasons for its decision to impose in the present case a fine considerably higher than those imposed in the Wandadoo and Deutsche Telekom decisions, bearing in mind the similarity of the three cases.

194 With regard to reviewing compliance with the obligation to state reasons, it should be noted that while the Commission admittedly explained, at paragraphs 739 to 750 of the contested decision, the differences between the Deutsche Telekom case and the present case, it gave little detail as to the reasons justifying the imposition in the present case of a fine considerably higher than those imposed in the Wanadoo and Deutsch Telekom decisions. The Commission could have, inter alia, specified the methodology used to determine the starting amount, in the manner envisaged by the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2), which were not applicable at the material time.

195 However, the General Court did not err in law in finding, at paragraph 434 of the judgment under appeal, that the Commission had fulfilled its obligation to state reasons, since it indicated in the contested decision the facts which enabled it to determine the gravity of the infringement and its duration. In those circumstances, the General Court was again entitled to take the view that the Commission was not required, in accordance with the case law cited at paragraphs 181 and 183 above, to indicate the figures relating to the method of calculating the fine.

196 As regards the proportionality of the fine imposed on the appellants, the General Court was entitled to state, at paragraph 429 of the judgment under appeal, that 'the principle of proportionality requires the Commission to set the fine proportionately to the factors taken into account for the purpose of assessing the gravity of the infringement'.

197 The appellants also contend in the fourth complaint that the General Court failed to have regard to Article 6 of the ECHR by failing to carry out a review exercising its powers of unlimited jurisdiction, which it is required to do in relation to the proportionality of the starting amount of the fine.

198 As stated at paragraph 44 above, the review of legality provided for in Article 263 TFEU is supplemented, in accordance with Article 261 TFEU, by the Court's unlimited jurisdiction with regard to fines and periodic penalty payments imposed by the Commission for infringement of the competition rules. Article 17 of Regulation No 17, replaced by Article 31 of Regulation No 1/2003, provides that the Court of Justice is to have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment, which means that it may cancel, reduce or increase the fine or periodic penalty payment imposed.

199 Article 23(3) of Regulation No 1/2003, which replaced the second subparagraph of Article 15(2) of Regulation No 17, provides that the amount of the fine must be determined by reference to the gravity and duration of the infringement.

200 It follows from the foregoing considerations that, in order to satisfy the requirements of conducting a review exercising its powers of unlimited jurisdiction for the purpose of Article 47 of the Charter with regard to the fine, the EU judicature is bound, in the exercise of the powers conferred by Articles 261 TFEU and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement.

201 It should be noted in that regard that, at paragraph 431 of the judgment under appeal, the General Court pointed out that the methodology set out in Section 1.A of the 1998 Guidelines reflects a global approach, whereby the starting amount of the fine, determined by reference to the gravity of the infringement, is calculated by reference to the nature of the infringement, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

202 Applying those criteria and referring to paragraphs 371 to 421 of the judgment under appeal, the General Court found, at paragraph 432 of the judgment, that the starting amount of the fine of EUR 90 million was not disproportionate in the light of the fact that, first, the appellants' conduct constituted clear-cut abuse for which there are precedents and which undermines the objective of the attainment of an internal market for telecommunications networks and services, and, second, that abuse had a significant impact on the Spanish retail market.

203 While it is true that the General Court omitted to point out that the Commission failed to specify in the contested decision the methodology which it used to determine the starting amount of the fine, in the manner advocated by the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, which were not applicable at the material time, such an omission is nevertheless not sufficient for it to be concluded that the General Court erred in its review of whether that amount was proportionate, which it carried out on the basis of the criteria set out at paragraph 432 of the judgment under appeal.

204 It follows from the foregoing that, in its examination of the appellants' arguments seeking to show that the starting amount of the fine was disproportionate, the General Court did in fact exercise the powers conferred by Articles 261 TFEU and 263 TFEU in a manner consistent with the requirements of exercising its power of unlimited jurisdiction for the purpose of Article 47 of the Charter, by examining all the complaints raised by the appellants, based on issues of fact and law, seeking to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement. In examining those complaints, the General Court none the less came to the conclusion that none of the appellants' arguments justified a reduction of the starting amount.

205 In so far as, by the fourth complaint, the appellants criticise the General Court's assessment at paragraph 432 of the judgment under appeal of whether the starting amount of the fine was proportionate in the light of the relevant facts, it should be borne in mind that it is not for the Court of Justice, when ruling on points of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of EU law. Accordingly, only inasmuch as the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, would it have to find that the General Court erred in law, on account of the inappropriateness of the amount of a fine (see, to that effect, *E.ON Energie* v *Commission* EU:C:2012:738, paragraphs 125 and 126; Case C-70/12 P *Quinn Barlo and Others* v *Commission* EU:C:2013:351, paragraph 57; and Case C-586/12 P *Koninklijke Wegenbouw Stevin* v *Commission* EU:C:2013:863, paragraph 33 and the case-law cited).

206 In the present case, it is clear that the appellants have failed to show in what way the starting amount of EUR 90 million imposed by the Commission in the contested decision was excessive, to the point of being disproportionate, within the meaning of the case-law cited in the preceding paragraph.

207 It follows from the foregoing considerations that the second part of the eighth ground of appeal must be rejected as being, in part, unfounded and, in part, inadmissible.

The third part of the eighth ground of appeal, alleging errors of law in the examination of the increase in the starting amount of the fine for the purpose of deterrence, the classification of the appellants' conduct as an 'infringement of long duration', and the reduction of the fine to take account of extenuating circumstances

208 By the third part of the eighth ground of appeal, the appellants contend that the General Court erred in law in its examination of the increase in the starting amount of the fine for the purpose of deterrence, the classification of their conduct as an 'infringement of long duration', and the reduction of the fine to take account of extenuating circumstances.

209 As regards the first complaint, alleging errors of law in the examination of the increase in the starting amount of the fine for the purpose of deterrence, the appellants rely on the following arguments.

210 First, the appellants claim that the General Court failed to have regard to the principles of non-discrimination and proportionality by endorsing the increase in the starting amount of the fine for the purpose of deterrence, even though their economic power was comparable to that of the undertakings involved in the Wandaoo and Deutsche Telekom decisions, in which the Commission did not impose such an increase.

211 In the light of the case-law cited at paragraphs 189 and 190 above, the General Court was correct to reject, at paragraph 441 of the judgment under appeal, that argument based on the Commission's practice in previous decisions, since that cannot itself serve as a legal framework for the imposition of fines in competition matters.

212 Second, the appellants contend that the General Court accepted the Commission's reasoning by means of general references to recitals in the contested decision, without examining whether a multiplier of 25% was appropriate, in spite of the obligation it is under to exercise its powers of unlimited jurisdiction.

213 It should be noted in that regard that the exercise of powers of unlimited jurisdiction provided for in Articles 261 TFEU and Article 31 of Regulation No 1/2003 does not amount to a review of the Court's own motion and that proceedings before the Courts of the European Union are inter partes. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against such a decision and to adduce evidence in support of those pleas (*Chalkor* v *Commission* EU:C:2011:815, paragraph 64, and Case C-389/10 P *KME Germany and Others* v *Commission* EU:C:2011;816, paragraph 131).

214 It is clear that the General Court examined, at paragraphs 438 to 441 of the judgment under appeal, the manner in which the Commission gave its reasons for the increase in the starting amount of the fine and found that the increase was based, to the requisite legal standard, on information in the contested decision concerning the appellants' economic power. In so doing, the General Court exercised the powers conferred by Articles 261 TFEU and 263 TFEU in a manner consistent with the requirements of exercising its powers of unlimited jurisdiction, by examining all the complaints raised by the appellants, based on issues of fact and law, in that connection.

215 It follows from the above that the first complaint must be rejected as unfounded.

216 The appellants' second complaint, alleging errors of law in the examination of the classification of the appellants' conduct as an 'infringement of long duration'

217 As regards the starting date of the infringement, the appellants claim that the General Court erred in that it failed to make a distinction between the period preceding the Deutsche Telekom decision and that following that decision and to assess the seriousness of the infringement by reference to each period, thus failing to have regard to the principle of non-discrimination and its obligation to carry out a review exercising its powers of unlimited jurisdiction.

218 That argument must, clearly, be rejected as ineffective, since the appellants merely claim that the General Court should have made a distinction between two infringement periods on the basis of the alleged varying degree of intensity of the infringement, without explaining in what way the duration of the infringement might have been reduced as a result.

219 The appellants also argue that the General Court distorted their claims, without, however, identifying with the requisite degree of precision the elements which, they claim, were distorted or the errors of analysis committed by the General Court. As a consequence, that argument must be rejected as inadmissible in the light of the case-law cited at paragraph 84 above.

220 As regards the date on which the infringement ended, the General Court found, according to the appellants, that the Commission had proved that the infringement continued only up to the end of the first half of 2006. As a consequence, the appellants maintain that the General Court reversed the burden of proof by finding that they had not proved that there was no margin squeeze during the second half of 2006, when it was in fact incumbent on the Commission to establish the existence of the infringement.

221 It is apparent from paragraph 451 of the judgment under appeal that the General Court found, on the basis of evidence in the file that was not disputed by the appellants, that both Telefónica de España SAU's wholesale prices and its retail prices remained unchanged between September 2001 and 21 December 2006, the date on which the infringement ceased, without the appellants ever claiming that there should be any change in the costs taken into consideration by the Commission. The General Court did not thereby reverse the burden of proof but carried out a correct assessment of the evidence submitted to it, as noted by the Advocate General at point 171 of his Opinion.

222 As a consequence, the second complaint must be rejected as in part inadmissible, in part ineffective and in part unfounded.

223 The third complaint alleges errors of law in the examination of the reduction of the fine to take account of extenuating circumstances.

224 In the first place, the appellants maintain that the General Court applied an 'incorrect legal test' by considering their negligence to be extremely serious when determining whether the 10% reduction given by the Commission in reflection of their legitimate expectations was appropriate.

225 It is clear that, at paragraph 459 of the judgment under appeal, the General Court made assessments of fact as to the appellants' degree of negligence. That argument must therefore be rejected as inadmissible in the light of the case-law cited at paragraph 84 above.

226 In the second place, the appellants take issue with paragraph 461 of the judgment under appeal, by which the General Court referred, in its examination of the allegedly novel nature of the case, to its reasoning relating to the existence of clear and foreseeable precedents. In that regard, the appellants contend that the General Court applied a manifestly incorrect test, namely that of legal certainty, and disregarded the fact that one of the extenuating circumstances identified by the 1998 Guidelines is the existence of reasonable doubt on the part of the undertaking concerned as to whether its conduct constitutes an infringement. According to the appellants, such a reasonable doubt existed at least until October 2003, the date on which the Deutsche Telekom decision was published, and continued until the judgment was delivered in *TeliaSonera Sverige* (EU:C:2011:83).

227 It must be noted in that regard that whether the appellants had reasonable doubts is a question of fact, falling solely within the jurisdiction of the General Court, so that the fourth complaint must be rejected as inadmissible in accordance with the case-law cited at paragraph 84 above.

228 It follows that the third part of the eighth ground of appeal must be rejected as in part inadmissible, in part ineffective, and in part unfounded.

229 In the light of the foregoing, the eighth ground of appeal must be rejected as in part inadmissible, in part ineffective, and in part unfounded.

*The tenth ground of appeal, alleging that the General Court failed to have regard to the obligation to carry out a review in the exercise of its powers of unlimited jurisdiction for the purpose of Article 6 of the ECHR with regard to the determination of the fine*

230 By their tenth ground of appeal, the appellants claim that the General Court failed to have regard to the obligation to carry out a review in the exercise of its powers of unlimited jurisdiction for the purpose of Article 6 of the ECHR with regard to the determination of the fine, since it failed to exercise the powers of unlimited jurisdiction conferred by Article 261 TFEU and Article 31 of Regulation No 1/2003.

231 It is clear that, in the tenth ground of appeal, the appellants fail to identify with the requisite degree of precision the contested elements of the judgment under appeal and merely state, in a general manner and without substantiating their claims, that the General Court should have examined all the evidence and all the relevant facts in order to determine whether the fine was appropriate. It should, however, be noted that the arguments put forward in support of the tenth ground of appeal, relating to the alleged failure to have regard to the obligation to carry out a review in the exercise of the General Court's powers of unlimited jurisdiction, have already been examined in connection with other grounds of appeal, in so far as the appellants have identified with the requisite degree of precision the contested elements of the judgment under appeal.

232 As a consequence, the tenth ground of appeal must be rejected as inadmissible in accordance with the case-law cited at paragraphs 29 and 30 above.

233 It follows from all of the foregoing considerations that the appeal must be rejected in its entirety.

**Costs**

234 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.

235 Under Article 140(3) of the Rules of Procedure, the Court may order an intervener to bear its own costs.

236 As the appellants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

237 The interveners, France Telecom, Ausbanc Consumo and the ECTA must bear their own costs.

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

1. **Dismisses the appeal;**

2. **Orders Telefónica SA and Telefónica de España SAU to pay the costs;**

3. **Orders France Telecom España, SA, Asociación de Usuarios de Servicios Bancarios (Ausbanc Consumo) and the European Competitive Telecommunications Association to bear their own costs.**

[Signatures]