Reports of Cases

OPINION OF ADVOCATE GENERAL
COLLINS
delivered on 27 April 2023 [1]

Case C-746/21 P

Altice Group Lux Sàrl, formerly New Altice Europe BV, in liquidation
v

European Commission

(Appeal – Competition – Control of concentrations between undertakings – Regulation (EC) No 139/2004 – Article 4(1) – Prior notification obligation – Article 7(1) – Standstill obligation – Article 14(2) – Decision imposing fines for failure to notify and implementation of a concentration before it has been declared compatible with the internal market – Principle of proportionality – Distortion of the facts)

I. Introduction

1. This appeal concerns 'gun jumping', or the failure to comply with the notification and standstill obligations laid down in Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation). [2] That regulation requires merging parties to notify a concentration that falls under the mandatory filing regime to the European Commission. It also prohibits them from implementing a concentration before the Commission has cleared it. Regulation No 139/2004 gives the Commission a power to impose fines on parties that infringe both of those obligations. The exercise of that power has given rise to the present appeal.

II. Facts, procedure and form of order sought

2. On 9 December 2014, New Altice Europe BV ('Altice') signed a share purchase agreement [3] ('the SPA') with Oi SA ('the seller') whereby Altice would acquire sole control of PT Portugal ('the target') within the meaning of Article 3(1)(b) of Regulation No 139/2004. That agreement included restrictive covenants, notably clause 6(1)(b) intended to govern the management of the target between the date of signing and the date of closing, pursuant to which the seller agreed to refrain from taking certain commercial actions and decisions without prior authorisation from Altice ('the pre-closing covenants'). [4]

1 Original language: English.

2 OJ 2004 L 24, p. 1.

3 Referred to as 'the Transaction Agreement' in the contested decision (defined in point 4 of the present Opinion).

4 See recitals 58 to 66 of the contested decision for further detail.

3. Following pre-notification contacts with the Commission, Altice formally notified the concentration on 25 February 2015. On 20 April 2015, the Commission declared it compatible with the internal market, subject to commitments.

4. On 24 April 2018, the Commission adopted Decision C(2018) 2418 final in Case M.7993 – Altice/PT Portugal ('the contested decision'). It fined Altice EUR 62 250 000 for having implemented a concentration prior to its clearance, thereby infringing Article 7(1) of Regulation No 139/2004, and EUR 62 250 000 for having implemented a concentration prior to its notification, which constituted an infringement of Article 4(1) thereof.[5] The Commission found that the pre-closing covenants gave Altice the ability to exercise decisive influence over the target, that Altice had actually exercised that influence and that it had engaged in a series of information exchanges with the target in that context.[6]

5. Altice sought to annul the contested decision. By judgment of 22 September 2021,[7] the General Court, in the exercise of its unlimited jurisdiction, reduced the fine for the infringement of Article 4(1) of Regulation No 139/2004 to EUR 56 025 000. It dismissed the remainder of the action. Paragraphs 1 to 29 of the judgment under appeal provide details on the background to the action.

6. In its appeal, Altice asks the Court of Justice to:

– annul the judgment under appeal and Articles 1, 2, 3 and 4 of the contested decision or, in the alternative, exercise its unlimited jurisdiction to substantially reduce the fines imposed in Articles 3 and 4 of the contested decision, as amended by the General Court, or, in the further alternative, refer the case back to the General Court;

– order the Commission to pay its costs of the present proceedings and those before the General Court.

7. The Commission asks the Court to:

– dismiss the appeal;

– order Altice to pay the costs.

8. The Council, which addressed the first ground of appeal only, asks the Court to:

– dismiss the first ground of appeal;

– order Altice to pay its costs of the present proceedings.

5 Articles 1 to 4 of the contested decision.

6 Recitals 479 to 491 of the contested decision.

7 Judgment of 22 September 2021, *Altice Europe* v *Commission* (T-425/18, EU:T:2021:607) ('the judgment under appeal').

III. The grounds of appeal

9. The six grounds of appeal fall into three categories. The first and second grounds contest the legality and application of Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 and their application to the facts of the present case. The third, fourth and fifth grounds address the question as to whether Altice had implemented the concentration. The sixth ground contests the level of the fines the Commission imposed.

A. The first and second grounds: legality and application of Article 4(1) and Article 14(2)(a) of Regulation No 139/2004

1. Summary of the arguments

10. In its first ground of appeal, Altice submits that the General Court wrongly rejected its plea, based on Article 277 TFEU, challenging the applicability of Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 by reason of their illegality.

11. Altice submits that Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 do not allow the Commission to impose a second fine on the same person for conduct already penalised under Article 7(1) and Article 14(2)(b) thereof. Article 4(1) and Article 14(2)(a) of Regulation No 139/2004 are disproportionate and redundant, and therefore illegal, because Article 7(1) prohibits all early implementation of a concentration and pursues the same objective as Article 4(1). That anomaly has its origin in the reform of Regulation No 139/2004. Its previous manifestation, Article 4(1) of Regulation No 139/2004, provided for a notification obligation whereas its present version contains a standstill obligation.

12. In its second ground of appeal, Altice submits that, even if its objection under Article 277 TFEU were to fail, the General Court erred in its assessment that the Commission could impose separate fines for infringements of Article 4(1) and of Article 7(1) of Regulation No 139/2004 in the circumstances of the present case. It relies on the same arguments as in its first ground, namely that those provisions pursue the same objectives and therefore infringe the prohibition of double punishment and concurrence of laws. In the alternative, should the Court consider that Article 4(1) and Article 7(1) of Regulation No 139/2004 pursue autonomous objectives, the principle of concurrence of offences stands in the way of imposing two separate fines pursuant thereto. In those circumstances, the General Court ought also to have considered the proportionality of the fines.

13. The Commission and the Council disagree with those arguments.

2. Assessment

14. Article 4(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings,[8] the previous version of Regulation No 139/2004, required the notification of concentrations not more than one week after the conclusion of the agreement, the announcement of the public bid or the acquisition of a controlling interest. That period began to run when the first of those events occurred. Article 7(1) and (2) of Regulation No 4064/89

[8] OJ 1989 L 395, p. 1.

provided that a concentration could not be put into effect either prior to its notification or within the first three weeks thereafter, subject to that prohibition being extended. Article 14(1)(a) of Regulation No 4064/89 gave the Commission a power to impose fines from [European Currency Unit] 1 000 to [European Currency Unit] 50 000 where the parties had omitted to notify a concentration in accordance with Article 4 thereof. Article 14(2)(b) of Regulation No 4064/89 provided that the Commission could impose fines not exceeding 10% of the aggregate turnover of the undertakings concerned for infringements of Article 7(1) or (2) of that regulation.

15. Regulation No 139/2004 includes a notification obligation and a standstill (or non-implementation) obligation, which differ from those in the previous version in the following material respects. Article 4(1) of Regulation No 139/2004, headed 'Prior notification of a concentration and pre-notification referral at the request of the notifying parties', provides that the notification obligation arises once the relevant agreement has been concluded (or the public bid announced) but implementation has not commenced. Article 7 of Regulation No 139/2004 is headed 'Suspension of concentrations': by paragraph 1 of that article a concentration shall not be implemented either before its notification or until it has been declared compatible with the internal market. Pursuant to Article 14(2) of Regulation No 139/2004, the Commission may impose fines not exceeding 10% of aggregate turnover for failure to notify a concentration and for its early implementation. [9]

16. Contrary to what Altice argues, the relevant provisions of Regulation No 139/2004 are similar in material respects to those in the previous version: they differentiate between the obligation to notify and the obligation not to implement and they permit the imposition of fines for an infringement of each of those obligations. The differences between the two versions do not, in my view, allow for inferences to be drawn about the interpretation of Regulation No 139/2004 that are capable of supporting the position for which Altice contends.

17. By Article 4(1) of Regulation No 139/2004 the obligation to notify arises (i) after the agreement has been concluded, and (ii) before the concentration has been implemented. That provision does not impose a standstill obligation per se. Its title and text focus on the obligation to notify, a procedural requirement that crystallises once the two aforementioned conditions have been met. Subject to a three-year limitation period, [10] Article 14(2)(a) of Regulation No 139/2004 allows the Commission to impose fines if it finds that that provision has been infringed. The Commission must assess the facts in order to establish, inter alia, if, when and how implementation occurred, since that is amongst the conditions which determine the existence of an infringement of Article 4(1) of Regulation No 139/2004. The other condition is the conclusion of the relevant agreement.

18. Article 7(1) of Regulation No 139/2004 focuses on the obligation to suspend concentrations. It provides that parties cannot implement concentrations either before notification or until they have been declared compatible with the internal market. Subject to a five-year limitation period, [11] Article 14(2)(b) of Regulation No 139/2004 allows the Commission to impose fines for infringements of that prohibition. The Commission must assess the facts in order to ascertain if, and when, the concentration was implemented. The extent and duration of implementation are

[9] Regulation No 139/2004 provides various derogations from, and exceptions to, the notification and standstill obligations that are irrelevant to the present appeal.

[10] Article 1 of Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1).

[11] Ibid.

relevant factors in determining the level of any fine to be imposed for a failure to respect that obligation.[12] In the context of an infringement of Article 7(1) of Regulation No 139/2004, the conclusion of an agreement is not necessarily determinative since it is not a formal requirement of that provision.[13]

19. The Court has observed that Article 14(2)(a) and (b) of Regulation No 139/2004 provide for the possibility of imposing separate fines when Article 4(1) and Article 7(1) of Regulation No 139/2004 are infringed concomitantly through the implementation of a concentration before its notification.[14] When the Commission suspects that parties have (i) failed to notify a concentration on time, and (ii) implemented it before clearance, there is likely to be an overlap between the factual circumstances that it must investigate under (i) and (ii), namely the nature and timing of the steps the parties took that may amount to implementation.[15]

20. As paragraphs 56, 57, 60, 63 and 64 of the judgment under appeal observed, in my view correctly, by reference to the Court's case-law Article 4(1) and Article 7(1) of Regulation No 139/2004 impose different obligations: the first mandates timely notification whilst the second prohibits early implementation; they therefore have autonomous objectives.[16] They relate to different conduct, albeit that the existence of that conduct can in certain cases, be established by reference to some of the same facts.

21. Given that Article 4(1) and Article 7(1) of Regulation No 139/2004 have autonomous objectives, the former cannot be regarded as redundant in the light of the latter. As paragraphs 54 and 55 of the judgment under appeal point out in reliance upon the Court's case-law,[17] an infringement of Article 7(1) of Regulation No 139/2004 does not always cause an infringement of Article 4(1) of Regulation No 139/2004. Where a notification has been submitted in time, parties to a concentration may take steps to implement that concentration after notification but before clearance, in which case only Article 7(1) of Regulation No 139/2004 may be relevant.

22. The aim of regulating mergers is to ensure that they do not lead to lasting changes to the structure of the market that reduce competition. Regulation No 139/2004 puts in place a system of exclusive control over concentrations with a Community dimension and prohibits those that significantly impede effective competition. Incentivising compliance with both the notification obligation and the standstill obligation by allowing for the imposition of fines when either or both of them are infringed ensures that concentrations do not go undetected and avoids the problems that arise with undoing those that create problems. The importance of compliance with each of those obligations in the context of the compulsory notification and prior clearance

[12] Recital 595 of the contested decision.

[13] Which is not to say that account cannot be taken of the terms of the agreement where they are relevant to the assessment as to whether implementation occurred.

[14] Judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149, paragraph 106).

[15] See, for example, recital 490 of the contested decision, where the Commission relies on evidence adduced in the context of the application of Article 7(1) of Regulation No 139/2004 in order to assess if the obligation in Article 4(1) of Regulation No 139/2004 was infringed.

[16] Judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149, paragraphs 103 and 104). Altice observes that the obligations in Article 4(1) and Article 7(1) of Regulation No 139/2004 have the objective of ensuring the effective control of concentrations. As the Council points out, it is more accurate to describe that as the overarching objective of Regulation No 139/2004. Altice's approach does not assist in the granular assessment as to whether the obligations in Article 4(1) and Article 7(1) pursue autonomous objectives.

[17] Judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149, paragraphs 101, 102 and 109).

regime laid down by Regulation No 139/2004 is therefore clear.[18] Altice has adduced no convincing argument capable of undermining that approach. That conclusion reflects the reasoning in the judgment under appeal and is consonant with the Court's case-law to which that judgment refers in its rejection of Altice's plea of illegality with respect to Article 4(1) and Article 14(2)(a) of Regulation No 139/2004.

23. Finally, I do not accept Altice's submission that the General Court failed to address its arguments and the evidence it adduced relating to the prohibition of double punishment and the concurrence of laws or offences. Altice put those arguments before the General Court ostensibly on the premiss that Article 4(1) and Article 7(1) of Regulation No 139/2004 'protect the same legal interest'.[19] Paragraphs 56 and 57 of the judgment under appeal engaged with that premiss before dismissing those arguments.[20]

24. I would add that in so far as they refer to concepts such as 'the concurrence of laws', 'the false (apparent) concurrence of laws', and the 'principle of consumption', Altice's pleadings are imprecise.[21] According to Altice, those related concepts, and the prohibition of 'double punishment' that they apparently entail, are part of the Member States' common legal traditions and thus constitute general principles of EU law. By way of evidence, Altice laid before the General Court five legal opinions to show how the criminal legal systems of Belgium, Spain, France, Italy and Portugal interpret and apply those concepts. Two themes emerge from these opinions. First, those Member States' criminal legal systems contain a variety of rules applicable in situations where, for example, the 'same conduct' or the 'same facts' lead to infringements of multiple legal provisions; behaviours are connected by a 'logical link' or 'similar intent'; an offence encapsulates behaviour that is addressed by another offence; 'general offences' are subsumed into, or considered subsidiary to, 'specialised offences'; and 'serious offences' absorb 'less serious offences'. Second, the national laws applicable to those situations are based on, or are an expression of, principles of procedural fairness, legality, proportionality of sanctions and *ne bis in idem*,[22] all of which are well established in EU law.[23]

25. As matters currently stand, almost all references to the concepts on which Altice relies are found in judgments relating to the implementation of concentrations. Only a handful of judgments of the European Court of Human Rights mention them in passing in the context of references to national law. Absent precise and common definitions of those concepts, a consensus that they and the consequences that flow from them are part of the Member States' legal traditions and an indication that they fill an identifiable lacuna in EU law, I am unpersuaded that it is either useful or wise to apply or to endorse them in the context of the present case.

26. In the light of the above, I advise the Court to dismiss the first ground of appeal.

[18] See the twenty-first and the twenty-sixth recitals of Regulation 4064/89. See also the judgments of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371 (paragraphs 41 and 42 and the case-law cited) ('the judgment in *Ernst & Young*) and of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149, paragraph 109).

[19] Paragraph 51 of the judgment under appeal.

[20] Paragraphs 51 to 67 of the judgment under appeal, addressing the plea of illegality.

[21] I understand Altice does not contest paragraphs 326 to 330 of the judgment under appeal where it addresses the application of the German law principle of set off (*Anrechnungsprinzip*).

[22] The Court has held that the principle *ne bis in idem* does not apply when the same authority imposes penalties for infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004 in a single decision, as was the case here (judgment of 4 March 2020, *Marine Harvest* v *Commission*, C-10/18 P, EU:C:2020:149, paragraph 78). When asked to comment on that judgment, Altice informed the General Court that it was no longer pursuing its ground of appeal based on the principle *ne bis in idem*.

[23] See, to similar effect, the Commission's Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union (COM/2004/0334 final), section 3.1.1.7.

27. Since Altice advances the same arguments in the context of the second ground of appeal, it follows that it must be dismissed for the same reasons.

28. I will address Altice's arguments on the proportionality of the fines under the rubric of the sixth ground of appeal.

B. The third, fourth and fifth grounds: implementation of the concentration

1. The third ground: concept of implementation

(a) Summary of the arguments

29. This ground relates to the pre-closing covenants. It comprises three branches. First, Altice submits that the judgment under appeal confuses the concepts of concentration in Article 3(2) of Regulation No 139/2004 and implementation in Article 4(1) and Article 7(1) thereof. It contends that implementation could have occurred only upon the transfer of the shares in the target to Altice, which occurred after the Commission had declared the concentration compatible with the internal market. That fact is further demonstrated by the circumstance that, had the Commission prohibited the concentration, or had the parties decided to abandon the deal, there would have been no need for measures pursuant to Article 8(4) of Regulation No 139/2004 to restore the competitive situation that prevailed prior to the signing of the SPA.[24] The judgment under appeal distorts Altice's arguments on that point.[25]

30. Second, the judgment under appeal errs when it considered that the pre-closing covenants constituted partial implementation because the General Court did not refute the submission that those covenants did not constitute a lasting change of control. They lasted less than five months and the SPA set a definite end date for them. The General Court also erred in law when it held that the considerations set out in paragraph 49 of the judgment in *Ernst & Young* were irrelevant.

31. Third, Altice contends that the judgment under appeal wrongly considered that, in order to be ancillary within the meaning of the Commission Notice on restrictions directly related and necessary to concentrations,[26] pre-closing covenants must preserve the value of the target business. The pre-closing covenants here fell within the scope of that notice because they played a legitimate role in ensuring the integrity of the acquired business between signing and closing and laid the groundwork for its integration into Altice.[27]

32. The Commission observes that Altice did not challenge the findings in the judgment under appeal that it had implemented the concentration by actually exercising decisive influence over the target – as opposed to having the ability to do so – before the Commission had declared it compatible with the internal market. Since the findings relating to the actual exercise of decisive influence are sufficient to sustain the operative part of the judgment under appeal, namely to 'dismiss the action as to the remainder', the ground of appeal based on Altice's ability to exercise decisive influence is ineffective and ought to be dismissed on that basis. In any event, it contests all of Altice's arguments in support of the third ground of appeal.

[24] Paragraphs 69 to 89, 96, 132 and 144 of the judgment under appeal.

[25] Paragraph 87 of the judgment under appeal.

[26] OJ 2005 C 56, p. 24.

[27] Paragraphs 102 to 105, 117, 120, 121, 130 and 131 of the judgment under appeal.

(b) Assessment

33. I disagree with the Commission's submission that the third ground of appeal is ineffective in whole or in part. Altice challenged the finding in the contested decision that the pre-closing covenants gave it the possibility to exercise decisive influence. The General Court's reasoning and conclusions on that point were not included for the sake of completeness and are part of the reasoning that led to the dismissal of the action. [28]

34. The case-law of the Court establishes two key points with respect to the first limb of the third ground of appeal. Article 7(1) of Regulation No 139/2004 limits the prohibition of implementation to concentrations as defined in Article 3 thereof. [29] Under the latter provision, a concentration is deemed to arise where a change of control on a lasting basis results from a merger or acquisition, that control being constituted by the possibility, conferred by rights, contracts or any other means, of exercising decisive influence on an undertaking. A concentration within the meaning of Article 7 of Regulation No 139/2004 arises as soon as the merging parties implement operations or transactions that contribute to a lasting change in the control of the target undertaking. [30] Those points apply equally to Article 4(1) of Regulation No 139/2004.

35. Contrary to what Altice argues, there is nothing in the relevant provisions of Regulation No 139/2004, or the Court's interpretation of them, to indicate that the possibility to exercise decisive influence is conferred only by a transfer of shares in the target to the buyer. That state of affairs is, moreover, clear from Article 3(2)(b) of Regulation No 139/2004 and the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. [31] The General Court therefore correctly ruled that a change of control could arise because the SPA gave Altice the possibility to exercise decisive influence over the target from the date it had been signed. [32]

36. Article 8(4) of Regulation No 139/2004 provides that the Commission may require undertakings to dissolve the concentration via the disposal of shares or other restorative measures. As the General Court correctly observed, [33] that provision does not define the concept of a concentration. Contrary to what Altice asserts, it also does not define the concept of implementation. Altice therefore errs when it maintains, on that basis, that implementation occurs only in those circumstances where the Commission can require dissolution measures within the meaning of Article 8(4) of Regulation No 139/2004.

37. Altice's contention that paragraph 87 of the judgment under appeal distorted its argument is also without merit. Altice explains that, in paragraph 47 of its application to the General Court, it had referred to *implementation*, whereas paragraph 87 of the judgment under appeal refers to the Altice's argument that only transactions requiring dissolution measures within the meaning of Article 8(4) of Regulation No 139/2004 establish the existence of a *concentration*. [34] As point 36 of

[28] Judgment of 18 June 2020, *Commission* v *RQ* (C-831/18 P, EU:C:2020:481, paragraphs 52 and 53 and the case-law cited). That the Commission might have reached the same conclusion on the infringement of Regulation No 139/2004 without relying on Altice's ability to exercise decisive influence is a different matter.

[29] The judgment in *Ernst & Young*, paragraphs 43 and 44.

[30] The judgment in *Ernst & Young*, paragraphs 45 to 47 and 52.

[31] OJ 2008 C 95, p. 1, paragraphs 18 to 21 and 61 ('the Jurisdictional Notice').

[32] Paragraphs 77 and 84, last sentence, of the judgment under appeal.

[33] Paragraph 87 of the judgment under appeal.

[34] Emphasis added.

the present Opinion observes, that provision does not define the concepts of concentration or implementation. The General Court's conclusion is, in any event, correct even if one substitutes the word 'implementation' for the word 'concentration'. [35]

38. As for the second limb of the present ground, paragraphs 85 and 94 to 97 of the judgment under appeal assess the duration of the pre-closing covenants. The General Court distinguished between measures that contribute to a change of control, which do not have to be lasting, and the change of control itself, which in order to constitute a concentration must last. That analysis is correct in the light of the Court's case-law. [36] It is therefore immaterial that Altice relied on the pre-closing covenants in order to exercise control over the target for 4 months and 11 days.

39. In the particular circumstances of the present case, moreover, any doubts as to the lasting nature of the change of control are dispelled by the observation that the transfer of shares pursuant to the SPA seamlessly accomplished the change of control over the target that took place when the SPA was signed and Altice actually exercised decisive influence over aspects of target's business pursuant to the pre-closing covenants. Once the shares in the target were transferred to Altice, it no longer needed to rely on the contractual arrangements to control the target business. The facts therefore do not support Altice's contention that the change in control had been temporary.

40. As for Altice's argument based on the application of the criteria set out in paragraph 49 of the judgment in *Ernst & Young*, that paragraph states that the implementation of transactions that do not present a direct functional link with the implementation of a concentration, and are therefore unnecessary to achieve a change of control, do not fall within the scope of Article 7 of Regulation No 139/2004. Altice argues that the pre-closing covenants were unnecessary, had no functional link with the transfer of shares and therefore fell outside the scope of that provision.

41. The Commission correctly points out that the situation envisaged in paragraph 49 of the judgment in *Ernst & Young*, which is described in more detail in paragraphs 47 and 48 thereof, is one where a concentration is achieved 'by successive partial operations' and by 'transactions that are closely connected in that they are linked by a condition or take the form of a series of transactions in securities taking place within a reasonably short period of time'. As paragraphs 98 to 100 of the judgment under appeal observe, that factual situation did not pertain in the present case. The criteria in paragraph 49 of the judgment in *Ernst & Young* to assess if ancillary or preparatory transactions constitute implementation of a concentration by means of a series of transactions are therefore irrelevant.

42. As for the third limb, I disagree with Altice's contention that the judgment under appeal wrongly considered that, in order to be ancillary within the meaning of the Commission Notice on restrictions directly related and necessary to concentrations, pre-closing covenants must preserve the value of the target business. Paragraphs 102 and 103 of the judgment under appeal left open the possibility of using criteria other than the preservation of the value of the undertaking. In paragraph 104, it observes that Altice had not submitted evidence to demonstrate that there was a risk to the target's commercial integrity rather than to its value. Altice's argument therefore rests upon a misreading of the judgment under appeal.

43. In the light of the foregoing, I propose that the Court dismiss the third ground of appeal.

[35] Judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357, paragraphs 30 and 31 and the case-law cited).

[36] The judgment in *Ernst & Young*, paragraph 52.

2. *The fourth ground: concept of veto rights*

(a) Summary of the arguments

44. Altice submits that paragraphs 91 to 169 of the judgment under appeal erred in their review of the pre-closing covenants, which the contested decision characterises as giving Altice 'veto rights' over strategic decisions affecting the target. Altice relies on paragraphs 18 and 54 of the Jurisdictional Notice, which state that control can be acquired on a contractual basis only where the undertaking concerned enjoys 'veto rights over strategic business decisions', namely 'the power to block the adoption of strategic decisions'. According to Altice, the SPA did not give it that power since only the pre-closing covenants required its consent. Withholding that consent could not 'produce a deadlock situation' because the sole remedy for failure to observe the pre-closing covenants was an indemnity for losses. The General Court therefore erred in law when it rejected its challenge to the contested decision.

45. For the same reasons, Altice submits, in the alternative, that the General Court distorted the evidence when it concluded that the pre-closing covenants conferred veto rights upon Altice. That, in turn, means that the assessment in paragraphs 170 to 215 of the judgment under appeal relating to section 4.2.1 of the contested decision, which relies on the conclusion that Altice had a veto right over those strategic decisions, is incorrect. The General Court was therefore wrong to conclude that the pre-closing covenants amounted to implementation within the meaning of Article 4(1) and Article 7(1) of Regulation No 139/2004.

46. The Commission disagrees with those arguments.

(b) Assessment

47. The present ground complains of errors in paragraphs 91 to 215 of the judgment under appeal. Contrary to the Court's procedural requirements,[37] such a broad reference does not enable it to determine which elements of the judgment under appeal Altice contests.[38] At the hearing, Altice identified paragraphs 111, 114, 123 to 125 and 131 of the judgment under appeal as the principal ones it contested.

48. Altice relies on paragraph 18 and 54 of the Jurisdictional Notice to argue that the General Court, when it endorsed the Commission's conclusion that the pre-closing covenants gave Altice veto rights in certain areas, erred in law. In particular, the General Court misinterpreted the concept of veto rights as set out in that notice.

49. The Jurisdictional Notice provides guidance to enable undertakings to establish, in advance of any contact with the Commission, whether and to what extent the EU merger control regime may cover their operations. It is without prejudice to any interpretation that the Court or the General Court may give.[39]

[37] See, for example, judgment of 23 November 2021, *Council* v *Hamas* (C-833/19 P, EU:C:2021:950, paragraph 50 and the case-law cited).

[38] That observation applies equally to the second limb of the sixth ground of appeal.

[39] Judgment of 18 January 2017, *Toshiba* v *Commission* (C-623/15 P, not published, EU:C:2017:21, paragraphs 67 and 71 and the case-law cited).

50. I will first consider paragraph 54 of the Jurisdictional Notice, which introduces the section dealing with the acquisition of sole control. An attentive reading of that section indicates that it analyses two distinct situations. Paragraphs 54 to 60 address the acquisition of *de jure* sole control via voting rights, typically by means of the acquisition of a majority or minority shareholding in the target. Paragraph 61 deals with the acquisition of de facto sole control via the purchase of assets or by contractual means. The references in paragraph 54 to a shareholder's ability to 'veto strategic decisions', 'block the adoption of strategic decisions' and to shareholders who can 'produce a deadlock situation' appear in the context of voting rights associated with shares. They thus do not purport to provide a definition or a description of veto rights determinative for the assessment of the contract-based rights at issue. The General Court therefore correctly held that paragraph 54 of that notice is irrelevant in the context of the assessment of the pre-closing covenants. [40]

51. Paragraph 18 of the Jurisdictional Notice states that in order to confer control on a contractual basis 'the contract must lead to a similar control of the management and the resources of the other undertaking as in the case of the acquisition of shares or assets'. Several examples are given, the last of which refers to 'veto rights' in the context of contracts leading 'to a situation of joint control if both the owner of the assets as well as the undertaking controlling the management enjoy veto rights over strategic business decisions'. Two merger decisions cited in footnote 22 of that notice illustrate that statement. The first concerns the acquisition of a group of hotels. One undertaking, a joint venture, would own the hotels. The other undertaking would manage them pursuant to a management contract. The undertakings were required to approve the management company's operating plans for the hotels. If the parties could not reach agreement, they would submit the dispute to an external arbitrator, thus avoiding the possibility of a situation of deadlock. [41]

52. It is clear from that overview that the term 'veto right' is used in that part of the Jurisdictional Notice to describe a situation where the parties to a transaction agree that the buyer's consent is required for certain business decisions affecting the target. To the extent that the judgment under appeal expressly or impliedly endorsed the use of the term 'veto right' in the contested decision to describe the arrangements that pertained under the pre-closing covenants, it contains no error.

53. Altice's alternative plea, based on similar arguments, that the General Court distorted the evidence, in reality calls into question that court's assessment of the facts, which it is not permitted to do in an appeal. [42] It is, moreover, based on the premiss that the pre-closing covenants did not confer 'veto rights', which I propose that the Court reject for the reasons given in points 50 to 52 of the present Opinion.

54. In the light of the foregoing, I propose that the Court dismiss the fourth ground of appeal.

[40] Paragraphs 123 to 125 of the judgment under appeal.

[41] Case COMP/M.3858 – Lehman Brothers/SCG/Starwood/Le Meridien of 20 July 2005, paragraphs 7 to 10. The second merger decision referred to in footnote 22 of the Jurisdictional Notice (Case IV/M.126 – Accor/Wagon-Lits of 28 April 1992) is insufficiently detailed to allow any useful conclusions to be drawn from it for purposes of the present appeal.

[42] Judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357, paragraphs 30 and 31 and the case-law cited).

3. The fifth ground: information exchanges

(a) Summary of the arguments

55. Altice advances three lines of argument to contest the General Court's findings with respect to information exchanges.

56. Under the first limb of the fifth ground, Altice submits that paragraphs 226, 235 and 236 of the judgment under appeal distort the meaning of recitals 470, 479 and 482 of the contested decision by holding that those recitals did not state that information exchanges between Altice and the target infringed Article 4(1) and Article 7(1) of Regulation No 139/2004. The General Court's interpretation of those recitals is unreasonable because the text of the contested decision plainly confirms that the Commission had concluded that the information exchanges, as such, constituted an exercise of decisive influence.

57. Under the second limb of the fifth ground, Altice submits that the General Court failed to take account of the fact that information exchanges might infringe Article 101 TFEU, which provides for an *ex post* system of enforcement. The conclusion that information exchanges fall under the *ex ante* system of control in Regulation No 139/2004 where they take place in situations that ultimately lead to a concentration, but mutate into infringements of Article 101 TFEU where there is no change of control, is anomalous and inconsistent with the Court's case-law, according to which the scope of Article 7 of Regulation No 139/2004 should not limit that of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU]. [43]

58. The third limb of the fifth ground asserts that the judgment under appeal does not explain how the information exchanges would have been necessary to achieve a change of control on a lasting basis or to present a direct link with the implementation of the concentration when Altice acquired the shares in the target. The General Court therefore failed to observe the requirements of paragraph 49 of the judgment in *Ernst & Young*.

59. The Commission contests those arguments.

(b) Assessment

60. As regards the alleged distortion of evidence, it is for the General Court to establish the facts. Unless there is a substantive inaccuracy in its findings, there is no error of law for the Court of Justice to assess. [44]

61. Recital 470 of the contested decision observes that the 'receipt of such sensitive and granular information … outside any clean team agreements placed Altice in a position as if it already controlled [the target] and was therefore entitled to ask for and receive such information'. Recital 473 of the contested decision, the concluding paragraph of the section that includes recital 470, states: 'the Commission takes the view that Altice requesting and receiving strategic information on the [t]arget's KPIs [key performance indicators] and future pricing strategy *contributes to showing* that Altice exercised decisive influence …'. [45]

[43] OJ 2003 L 1, p. 1.

[44] Judgment of 11 May 2017, *Dyson* v *Commission* (C-44/16 P, EU:C:2017:357, paragraphs 30 and 31 and the case-law cited).

[45] Emphasis added. See also recitals 477 and 478 of the contested decision.

62. Recital 479 of the contested decision is the first paragraph in the section headed 'Conclusion on breach of Article 7(1) of [Regulation No 139/2004]'. It states that provisions of the SPA and Altice's conduct from the signing date, described in section 4.2 of the contested decision, amounted to early implementation of the transaction. Section 4.2, headed 'Altice's influence over the Target', runs from recitals 178 to 478. That section first considers Altice's role in the target's commercial decisions (section 4.2.1, recitals 178 to 377) and then the exchanges of commercially sensitive information between Altice and the target (section 4.2.2, recitals 378 to 478). Recital 482 concludes that all of the conduct described in section 4.2 constituted the actual exercise of decisive influence.

63. It is therefore clear from the text of recitals 470, 479 and 482 of the contested decision that the Commission did not conclude that information exchanges between Altice and the target in themselves infringed Article 4(1) and Article 7(1) of Regulation No 139/2004. The context in which those recitals appear confirms that view. The General Court therefore did not distort the facts when it held that the Commission had not concluded that the information exchanges were sufficient, in themselves, to establish an infringement of Article 4(1) and Article 7(1) of Regulation No 139/2004 [46] and that the Commission had correctly concluded in recital 478 of the contested decision that the information exchanges had contributed to demonstrating that Altice had exercised decisive influence over certain aspects of the target's business. [47]

64. The arguments Altice raises under the second limb of the present ground, which relate to the application of Article 101 TFEU, are fundamentally misconceived. Apart from the challenge based on the alleged distortion of evidence under the first limb of the present ground, that I propose the Court dismiss, Altice has not contested the General Court's finding that the information exchanges contributed to demonstrating that Altice had exercised decisive influence over aspects of the target's business. The information exchanges were inherent to the operation of the consent arrangements in the pre-closing covenants and an integral aspect of Altice's exercise of decisive influence over the target. [48] It would be illogical, if not indeed unlawful, [49] for the Commission to disregard the information exchanges in the context of its assessment of the other conduct under Article 4(1) and Article 7(1) of Regulation No 139/2004 and instead to assess them separately under Article 101 TFEU.

65. The argument regarding the application of the considerations set out in paragraph 49 of the judgment in *Ernst & Young* thus ought to be dismissed for the reasons set out in point 41 of the present Opinion.

66. In the light of the foregoing, I propose that the Court dismiss the fifth ground of appeal.

C. The sixth ground: assessment of fines

67. Altice subdivides this sixth ground into four limbs. They may be categorised under four broad headings: (i) whether the infringements were committed negligently; (ii) the General Court's reasoning; (iii) the assertion that since the infringements are different, especially in terms of their duration, the levels of the fines ought to be different; and (iv) the proportionality of the fines, considered separately and cumulatively.

46 Paragraph 226 of the judgment under appeal.

47 Paragraph 235 of the judgment under appeal.

48 Recitals 49 and 50 of the contested decision.

49 See Article 21(1) of Regulation No 139/2004.

1. The first limb: infringements committed negligently

(a) Summary of the arguments

68. Altice submits that, contrary to the General Court's findings in paragraphs 279 to 296 of the judgment under appeal, the infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004 were not committed negligently. The case-law recognises that the scope of the obligation in Article 7(1) of Regulation No 139/2004 is unclear. Pre-closing covenants in share purchase agreements are a standard practice in mergers and acquisitions. This was also the first time that the Commission had declared that those types of covenants and exchanges of information, in the period between the signing of the SPA and the transfer of shares in the target, constituted implementation. Altice further submits it did not impede the Commission's ability to detect the concentration because it submitted the draft SPA to the Commission with the draft Form CO.

69. The Commission contests those arguments.

(b) Assessment

70. Paragraphs 279 to 296 of the judgment under appeal considered Altice's arguments that the fines were unlawful owing to the absence of any negligence or intent on its part. Following a brief summary of the arguments in paragraph 279 thereof, the General Court recalled that, according to Article 14(2) of Regulation No 139/2004, fines may be imposed for infringements committed intentionally or negligently. It then set out how the case-law had interpreted that provision. Paragraphs 284 to 290 of the judgment under appeal assessed the factors and the evidence upon which the Commission had concluded that Altice was negligent. The General Court rejected Altice's arguments contesting that assessment. The findings in paragraphs 284 to 290 of the judgment under appeal are not at issue in this appeal. Altice contests only the findings in paragraphs 292 and 293, which consider its arguments that the legal provision at issue lacks clarity and the absence of precedents.

71. As paragraphs 282, 292 and 293 of the judgment under appeal observe correctly, it is settled case-law that the condition of negligence is satisfied where the undertaking concerned cannot be unaware of the nature of its conduct, irrespective of its awareness that it is infringing EU rules.[50] The fact that conduct with the same features has not been examined in the past does not mean that an undertaking cannot be held liable for having engaged in such conduct.[51]

72. Altice does not contest that it has significant experience in merger transactions. More importantly, contemporaneous documentary evidence shows that it had been advised of the risk that its conduct constituted 'gun jumping', or, in other words, 'pre-empting a decision of the Competition Authority and acting in a way as if clearance had been given'.[52] There is ample evidence to support the conclusion that the parties to the concentration intended to and, in fact implemented the deal in advance of notification and clearance, ignoring express advice to the

[50] See, to that effect, judgments of 18 June 2013, *Schenker & Co. and Others* (C-681/11, EU:C:2013:404, paragraph 37 and the case-law cited) and of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 156 and the case-law cited).

[51] See, to that effect, judgments of 6 December 2012, *AstraZeneca* v *Commission* (C-457/10 P, EU:C:2012:770, paragraph 164) and of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717, paragraph 43).

[52] Paragraphs 286 to 289 of the judgment under appeal and recital 582 of the contested decision.

effect that it would infringe the applicable rules. The steps taken were more than preparatory and went further than preserving the value of the target. They were not subject to safeguards such as non-disclosure agreements or the use of clean teams. Altice's suggestion that that method of proceeding is normal practice in mergers and acquisitions is worrying and deserves the Commission's attention.

73. The argument that Altice did not impede the Commission's ability to detect the concentration because it submitted the draft SPA together with the draft Form CO is, in my view, irrelevant to the assessment as to whether the infringement was committed negligently. At most, it may be relevant to the assessment of the gravity of the infringement of the notification obligation under Article 4(1) of Regulation No 139/2004. [53]

2. The second limb: reasoning for the imposition of fines

(a) Summary of the arguments

74. Altice submits that the General Court infringed Article 296 TFEU and Article 41(2) of the Charter of Fundamental Rights of the European Union when it concluded that the contested decision contained sufficient reasoning with respect to the level of the fines under Article 7(1) and Article 4(1) of Regulation No 139/2004. The reasoning in paragraphs 297 to 362 of the judgment under appeal, in particular – as clarified at the hearing – paragraphs 314 to 324 thereof, is insufficient and contradictory. The General Court should have explained why, if the Commission was able to impose two separate fines for the infringement of those provisions, it did not have to assess the level of each fine separately.

75. The Commission considers that the Court should declare that argument inadmissible because it does not comply with the requirement that an appeal must indicate precisely the contested elements of the judgment that Altice seeks to have set aside and the legal arguments that it specifically advances to support it. [54]

(b) Assessment

76. The Commission rightly points out that Altice's argument is succinct. It nevertheless contains sufficient detail to allow the Commission to mount a defence to it and for the Court to assess it.

77. It is settled case-law that the statement of reasons that the second paragraph of Article 296 TFEU requires must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning it followed. That statement need not address all relevant facts and points of law since the question as to whether the statement of reasons meets those requirements is assessed with regard to both its text and the context in which it was adopted. [55]

78. Paragraphs 315 to 324 of the judgment under appeal contain the reasons for the General Court's dismissal of Altice's argument that the fines are unlawful due to a lack of reasoning in the contested decision. The General Court first recalls that, under Article 14(2) of Regulation No 139/2004, the Commission may impose fines not exceeding 10% of the aggregate turnover of

[53] That is in line with the approach adopted in paragraphs 364 to 368 of the judgment under appeal.

[54] Judgment of 9 November 2017, *TV2/Danmark* v *Commission* (C-649/15 P, EU:C:2017:835, paragraph 34 and the case-law cited).

[55] Judgment of 10 March 2016, *HeidelbergCement* v *Commission* (C-247/14 P, EU:C:2016:149, paragraph 16 and the case-law cited).

the undertaking concerned and that, under Article 14(3) thereof, the Commission must have regard to the nature, gravity and duration of any infringement when it fixes the amount of the fine. Paragraph 319 of the judgment under appeal states that the Commission explained the nature, gravity and duration of those infringements in recitals 568 to 599 of the contested decision. Paragraphs 320 to 322 of the judgment under appeal summarise the reasoning in the contested decision. Paragraph 323 concludes that that reasoning was sufficient because it enabled Altice to defend itself and the General Court to exercise its power of review.

79. The text of paragraphs 320 to 323 of the judgment under appeal makes it clear that the General Court was of the view that the Commission had assessed the nature, gravity and duration of each of the infringements separately. The Commission considered that both infringements undermined the effectiveness of Regulation No 139/2004; that both were serious and had been committed at the very least negligently, but that their durations were different.

80. The General Court thus considered common elements of the infringements together and assessed diverging elements separately. That approach was an appropriate one for the General Court to take. It does not contradict its conclusion that it was open to the Commission to impose two fines. In the absence of detailed guidelines on the calculation of fines, setting out, for example, the weighting attributed to the three different criteria and the starting points or multiplication factors for one or more of them, the General Court was entitled to endorse the reasoning in the contested decision on this point as sufficient. [56]

81. I would make the following observations by way of response to a submission that the contested decision lacked transparency in calculating the fines it imposed under Article 14 of Regulation No 139/2004. To date, the Commission has imposed such fines in but a handful of cases, which means that it has done so in a limited range of circumstances where undertakings have infringed Article 4(1) and Article 7(1) of Regulation No 139/2004. [57] The harm that results from such infringements is difficult to quantify in purely monetary terms. [58] Were the Commission to adopt a harm-based approach, the unlawful implementation of a problematic merger would, in all likelihood, be punished more severely than that of a non-problematic merger. That approach might conflict with the principle that since all mergers with a Community dimension must be notified to the Commission and be declared compatible with the internal market prior to implementation, all breaches of that rule ought to be punished in the same way. Mergers are exceptional events in the lifetime of an undertaking. They involve considerable financial and reputational risk and they are very costly in terms of acquisition costs, financing, fees and management time. [59] Were it possible to assess the level of fines with precision, undertakings might include the risk associated with non-compliance in the cost-benefit analysis of a merger. What is more, the detection of infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004 is not straightforward. While certain matters, such as publicity and marketing, may come to the Commission's attention by way of information in the public domain,

[56] See, by analogy, judgments of 10 July 2014, *Telefónica and Telefónica de España* v *Commission* (C-295/12 P, EU:C:2014:2062, paragraph 181 and the case-law cited) and of 22 October 2015, *AC-Treuhand* v *Commission* (C-194/14 P, EU:C:2015:717, paragraphs 68 and 69 and the case-law cited)

[57] See, to that effect, Opinion of Advocate General Wahl in *Ernst & Young* (C-633/16, EU:C:2018:23, points 44 and 45). The Commission imposed symbolic fines in Case IV/M.920, Samsung/AST, Commission decision of 18 February 1998, and in Case IV/M.969, A.P. Møller, Commission decision of 10 February 1999. In Case COMP/M.4994, Electrabel/Compagnie Nationale du Rhône of 10 June 2009, and in Case COMP/M.6850, Marine Harvest/Morpol of 30 September 2013, the Commission imposed total fines of EUR 20 million.

[58] Both of those circumstances contrast with the situation with respect to infringements of Article 101 TFEU.

[59] According to information on Altice's website, the target had an enterprise value of EUR 7.4 billion on a cash and debt-free basis. Cash consideration was EUR 5.6 billion. Transaction fees were EUR 122 million.

other early implementation strategies involve changes that outsiders are unlikely to detect.[60] All of these considerations emphasise the importance of deterrence when the Commission comes to fix the level of fines for prohibited behaviour in this field. Deterrence is undoubtedly greater where there is a degree of unforeseeability as to the level of fines the Commission might impose in an individual case. As matters stand at present, provided the Commission's decision making process respects general principles of EU law, notably equal treatment, proportionality and the requirement to state reasons, and that its outcomes are subject to effective judicial review, I do not consider that the maintenance of competitive market structures and full compliance with the EU merger control regime would be furthered by greater transparency in the calculation of fines for infringements of Regulation No 139/2004.[61]

3. The third limb: differences between the infringements reflected in the level of the fines

(a) Summary of the arguments

82. Altice submits that paragraphs 320 to 324 of the judgment under appeal contain an error of law in that they hold that Article 14(3) of Regulation No 139/2004 can lead to the imposition of two separate fines in identical amounts for two allegedly autonomous infringements, in spite of their different nature, gravity and duration. Altice considers that an infringement of Article 4(1) of Regulation No 139/2004 is less serious than an infringement of Article 7(1) thereof, in that the former is instantaneous while the latter is continuous. Paragraph 343 of the judgment under appeal fails to explain why the duration of the two infringements cannot be compared. That finding is, moreover, wrong in law since there is nothing in Regulation No 139/2004 to support it. If a fine of EUR 62 250 000 is proportionate for an infringement that lasted 137 days, the fine for an infringement of Article 4(1) of Regulation No 139/2004, which lasted only one day, should not be higher than EUR 450 000.

83. The Commission contests those arguments.

(b) Assessment

84. Altice's arguments are based on an incorrect interpretation of the judgment under appeal. Paragraphs 320 to 324 thereof assessed the adequacy of the reasoning of the contested decision. That is clear from the heading before paragraph 312 and from the text of that paragraph, which summarises Altice's arguments. It is also clear from paragraph 314, which refers to the second paragraph of Article 296 TFEU, from the case-law interpreting that article, and from the two concluding paragraphs in that section, paragraphs 319 and 323, which hold that the reasoning in the contested decision was sufficient.

85. The paragraphs in the judgment under appeal that Altice contests do not consider the substantive validity of the reasons stated in the contested decision. They therefore cannot be impugned on the basis that they contain an error of law of that nature.

[60] The regime under Article 101 TFEU of granting immunity from, or reduction of, fines for whistleblowers and undertakings that cooperate with the Commission, on which the Commission relies to bring to its attention possible infringement of that provision, would not work in the context of mergers.

[61] For a contrary view, see, for example, Memeti, N., 'Monetary Fines in EU Mergers: In Need for More Regulation', *Market and Competition Law Review*, April 2019, Volume III, No. 1, pp. 209-233.

86. As to the alleged lack of reasoning in paragraph 343 of the judgment under appeal, that paragraph, which appears in the section considering whether the fines were unlawful in the light of the principle of proportionality, states that that comparison is impossible because 'an instantaneous infringement has no duration'. That reasoning, albeit succinct, explains the General Court's decision on that issue and allows it to be challenged on appeal, as Altice has done.

87. In its substantive challenge to that finding, Altice submits that nothing in Regulation No 139/2004, in particular Article 4(1), Article 7(1) or Article 14(2) thereof, supports the General Court's conclusion. I disagree. As point 17 of the present Opinion explains, the requirement in Article 4(1) of Regulation No 139/2004 to notify a concentration is a procedural obligation that crystallises when the two conditions set out in that provision are met. It is therefore correct to say that the infringement of that provision is instantaneous and has no duration, which makes it impossible to compare it to an infringement of Article 7(1) of Regulation No 139/2004, because, as Altice recognises, the latter infringement has a duration. In the light of that conclusion, its argument that the fine for the infringement of Article 4(1) of that regulation should be reduced to EUR 450 000 must fail. [62]

4. The fourth limb: proportionality of the fines, separately and cumulatively

(a) Summary of the arguments

88. Altice contends that the imposition of a fine of EUR 62 250 000 for an infringement of Article 4(1) of Regulation No 139/2004, which is the same infringement punished under the first limb of Article 7(1) of that regulation, is disproportionate. It further submits that each one of the fines is disproportionate since the Commission had previously imposed far lower fines for infringements of Article 4(1) and Article 7(1) of Regulation No 139/2004. Altice finally submits that paragraph 308 of the judgment under appeal incorrectly states that the fact that it had notified the transaction and had offered commitments before signing the SPA 'cannot mitigate the fact that its conduct constituted an infringement'. That statement distorts Altice's assertion that, in carrying out its assessment of the nature and the gravity of each infringement, the Commission ought to have taken account of those circumstances.

89. The Commission contests those arguments.

(b) Assessment

90. The case-law does not support Altice's contention that, where two fines are imposed in a single decision, it is necessary to assess the proportionality of each of them. [63] In the light of the reasoning that I propose the Court adopt in order to reject the first two grounds of appeal, the argument that Altice is being punished twice for the same conduct must therefore fail. [64]

91. Under Article 14(2) of Regulation No 139/2004, maximum fines may not exceed 10% of an undertaking's aggregate turnover. The Commission points out that the fines it imposed on Altice represented 0.5% of its aggregate turnover in the year preceding the adoption of the contested

[62] Judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149, paragraph 115).

[63] Judgment of 3 April 2019, *Powszechny Zakład Ubezpieczeń na Życie* (C-617/17, EU:C:2019:283, paragraphs 38 and 39).

[64] See points 14 to 27 of the present Opinion, in particular point 20, and judgment of 4 March 2020, *Marine Harvest* v *Commission* (C-10/18 P, EU:C:2020:149, paragraph 116).

decision. Altice has not called into question the accuracy or relevance of the Commission taking that consideration into account in its assessment of the proportionality of the fine in the light of the requirement of deterrence. It is clear that previous fines for similar infringements did not have a sufficient deterrent effect on Altice, so its argument that the imposition of considerably higher fines is disproportionate must fail. Nor can the Commission's practice in previous decisions serve as a legal framework for the imposition of fines in competition matters. [65]

92. Altice's argument that the General Court failed to 'ensure the proportionality of the fines' is manifestly unfounded for two reasons. First, paragraphs 332 to 349 of the judgment under appeal assessed Altice's argument that the fines were unlawful in the light of the principle of proportionality. Apart from paragraph 343, Altice does not question any element of that assessment. [66] Second, the General Court, in the exercise of its unlimited jurisdiction, assessed the application for a reduction of the fine within the context of Altice's plea that there had been an infringement of the principle of proportionality. In the exercise of its unlimited jurisdiction, the General Court observed that it was bound 'to examine all submissions on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity and duration of the infringement', 'taking into account all the circumstances of the case' in order to 'decide upon an amount of the fine which is proportionate in the light of the criteria which it considers appropriate and the gravity of the infringement committed by the applicant, and which also has a sufficiently deterrent effect'. [67] It is clear from the foregoing that the General Court had regard to the principle of proportionality in carrying out its review of the fines in the exercise of its unlimited jurisdiction. Altice does not contest any particular element of that analysis. Its allegation that the General Court did not consider each infringement separately is incorrect in fact, since it found that the mitigating circumstance applied to the fine for the infringement of Article 4(1) of Regulation No 139/2004 only.

93. Altice alleges that paragraph 308 of the judgment under appeal distorts its assertion that, in its assessment of the nature and gravity of each infringement, the Commission should have taken into consideration the fact that Altice had notified the transaction and offered commitments before signing the SPA. Since Altice has not provided any other details or legal argument to support that alleged error, it does not comply with the Court's requirements and must be dismissed on that basis. [68]

94. In the light of all of the foregoing, I propose that the Court dismiss the sixth ground of appeal and, therefore, the entire appeal.

IV. Costs

95. Under Article 138(1) and (2) of the Rules of Procedure, read together with Article 184(1) and (2) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

[65] See, by analogy, judgment of 7 June 2007, *Britannia Alloys & Chemicals* v *Commission* (C-76/06 P, EU:C:2007:326, paragraph 60 and the case-law cited).

[66] See point 86 of the present Opinion.

[67] Paragraphs 350, 354, 355 and 363 of the judgment under appeal.

[68] See point 47 of the present Opinion.

96. Since Altice has been unsuccessful and the Commission has applied for the costs, Altice must be ordered to bear its own costs and to pay the Commission's costs relating to the present proceedings.

97. Under Article 140(1) of the Rules of Procedure, read together with Article 184(1) and (2) thereof, Member States and institutions which have intervened in the proceedings are to bear their own costs.

98. The Council should therefore be ordered to bear its own costs in the present appeal.

V. Conclusion

99. For the foregoing reasons I suggest that the Court rule as follows:

– dismiss the appeal;

– order Altice Group Lux Sàrl, formerly New Altice Europe BV, in liquidation, to bear its own costs and those incurred by the European Commission;

– order the Council of the European Union to bear its own costs.