JUDGMENT OF THE GENERAL COURT (First Chamber, Extended Composition)

18 November 2020 (*)

(Competition – Abuse of a dominant position – Rail freight market – Decision finding an infringement of Article 102 TFEU – Access by third-party undertakings to infrastructure managed by Lithuania's national railway company – Removal of a section of railway track – Concept of 'abuse' – Actual or likely exclusion of a competitor – Calculation of the amount of the fine – 2006 Guidelines on the method for setting fines – Remedies – Proportionality – Unlimited jurisdiction)

In Case T−814/17,

Lietuvos geležinkeliai AB, established in Vilnius (Lithuania), represented by W. Deselaers, K. Apel and P. Kirst, lawyers,

applicant,

v

European Commission, represented by A. Cleenewerck de Crayencour, A. Dawes, H. Leupold and G. Meessen, acting as Agents,

defendant,

supported by

Orlen Lietuva AB, established in Mažeikiai (Lithuania), represented by C. Thomas and C. Conte, lawyers,

intervener,

APPLICATION pursuant to Article 263 TFEU seeking, primarily, the annulment of Commission Decision C(2017) 6544 final of 2 October 2017 relating to proceedings under Article 102 TFEU (Case AT.39813 – Baltic Rail) and, in the alternative, the reduction of the fine imposed on the applicant,

THE GENERAL COURT (First Chamber, Extended Composition),

composed of S. Papasavvas, President, H. Kanninen, N. Półtorak (Rapporteur), O. Porchia and M. Stancu, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 5 February 2020,

gives the following

Judgment

I. Background to the dispute

A. Factual context

1 Lietuvos geležinkeliai AB (‘the applicant’ or ‘LG’) is the Lithuanian national railway company, with its headquarters in Vilnius, Lithuania. LG is a public undertaking, whose sole shareholder is the Lithuanian State. As a vertically integrated undertaking, LG both manages railway infrastructure, which remains the property of the Lithuanian State, and provides rail transport services, for freight and for passengers, in Lithuania.

2 Orlen Lietuva AB (‘the intervener’ or ‘Orlen’) is an undertaking established in Juodeikiai, in the Mažeikiai district (Lithuania), which specialises in refining crude oil and distributing refined oil products. Orlen is a wholly owned subsidiary of the Polish undertaking PKA Orlen S.A.

3 Orlen’s activities include operating several facilities in Lithuania, including a large refinery (‘the Refinery’) located in Bugeniai, in the Mažeikiai district in the north-west of Lithuania, close to the border with Latvia. That refinery is the sole installation of its type in the three Baltic States. At the end of the 2000s, 90% of the output of refined oil products from that refinery were transported by rail, thereby making Orlen one of the applicant’s most significant customers.

4 At that time, Orlen produced approximately 8 million tonnes of refined oil products annually at the Refinery. Three quarters of that output was destined for export, mainly by sea to countries in Western Europe. Accordingly, 4.5 to 5.5 million tonnes of refined oil products were transported through Lithuania by train to the seaport of Klaipėda (Lithuania).

5 The remainder of the exported output, approximately 1 to 1.5 million tonnes, was transported also by train to or through Latvia and was destined mainly for consumption on the internal Estonian and Latvian markets. Around 60% of that output transported by train to or through Latvia used the ‘Bugeniai-Mažeikiai-Rengė’ railway line, a route which goes from the Refinery, itself located close to the Mažeikiai rail junction, to the town of Rengė, in Latvia, 34 km of which were located in Lithuanian territory (‘the Short Route to Latvia’). The remainder of that output transported by train to or through Latvia used the ‘Bugeniai-Kužiai-Joniškis-Meitene’ railway line, a longer route, 152 km of which were located in Lithuanian territory (‘the Long Route to Latvia’).

6 In order to transport its products on the Short Route to Latvia, Orlen used the applicant’s services for the Lithuanian part of the route, namely from the Refinery to the Latvian border. LG then concluded a subcontract with Latvijas dzelzceļš, the Latvian national railway company (‘LDZ’) for transport over that Lithuanian part of the route. Since it did not have the necessary regulatory authorisation to carry out its activities independently in the territory of Lithuania, LDZ operated as a subcontractor of the applicant. After crossing the border, LDZ continued to transport Orlen’s products on Latvian territory under various contractual arrangements.

7 Until September 2008, commercial relations between Orlen and the applicant concerning the applicant’s transport services on the Lithuanian rail network, including transport on the Short Route to Latvia, were governed by an agreement signed in 1999 (‘the 1999 Agreement’).

8 As well as setting out the rates applied by the applicant for transport services, the 1999 Agreement included, in particular, a specific commitment by the applicant to transport Orlen’s cargo on the Short Route to Latvia. Article 6.1 of that agreement entitled Orlen to ‘use the Bugeniai-Rengė route (approximately 34 km) to carry loads anywhere in Latvia, Estonia or [the Commonwealth of Independent States]’ for the duration of the agreement, namely until 2024.

9 In early 2008, a commercial dispute arose between the applicant and Orlen regarding the rates paid by Orlen to the applicant for the transport of its oil products.

10 Because of the commercial dispute with the applicant concerning the rates, Orlen explored the possibility of contracting directly with LDZ for rail transport services for its freight on the Short Route to Latvia, and switching its seaborne export business from Klaipėda, in Lithuania, to the seaports of Riga and Ventspils in Latvia.

11 Accordingly, on 4 April 2008, Orlen wrote to the Latvian Ministry of Transport and Communications to inform it of its plans to switch its seaborne export business to the Latvian seaport of Ventspils using LDZ's rail transport services and suggested organising a meeting to discuss those plans with the Ministry. Orlen also requested information on the rates which it could expect for LDZ's rail transport services. In its reply of 7 May 2008, the Ministry informed Orlen that it would not interfere with LDZ's commercial decisions but that it nevertheless was very interested in developing freight transportation in Latvia.

12 On 12 June 2008, a meeting was held between the applicant and Orlen, at which the plans to switch Orlen's export business were discussed. In addition, since Orlen had made a unilateral decision in the spring of 2008 to apply a lower rate than that requested by the applicant and to withhold the payment of the difference, on 17 July 2008, the applicant initiated arbitration proceedings against Orlen.

13 On 28 July 2008, LG informed Orlen that the 1999 Agreement would be terminated as from 1 September 2008. Orlen noted during the administrative procedure before the Commission of the European Communities that the termination of the 1999 Agreement from 1 September 2008 had been announced by LG three days after it had formally requested a quotation from LDZ to replace the applicant's services for transporting, from the Refinery using the Short Route to Latvia, approximately 4.5 to 5 million tonnes of refined oil products to the seaports located in the territory of Latvia. Orlen also suggested that the applicant could have been informed of the request for a quotation directly by LDZ.

14 On 2 September 2008, following the identification of a defect in the rail track of several dozens of metres in length ('the Deformation'), LG, mainly on the basis of safety grounds, suspended traffic on a 19 km long section of the Short Route to Latvia between Mažeikiai and the border with Latvia ('the Track').

15 On 3 September 2008, the applicant set up an Inspection Commission composed of senior employees in its local subsidiary to investigate the reasons for the Deformation. The Inspection Commission submitted two reports, namely the investigation report of 5 September 2008 and the technical report of 5 September 2008 (together, 'the Reports of 5 September 2008').

16 According to the investigation report of 5 September 2008, the Deformation was caused by the physical deterioration of a number of elements of the Track structure. The investigation report of 5 September 2008 also confirmed that traffic should remain suspended 'until all the restoration and repair works are complete[d]'.

17 The findings contained in the investigation report of 5 September 2008 were confirmed by the technical report of 5 September 2008, which, as the first report had done, referred solely to the site of the Deformation and identified the cause of that deformation as various problems with the structure of the Track. The technical report of 5 September 2008 concluded that the traffic accident which occurred as a deformation on the Track should be qualified as a buckling which happened due to physically worn-out elements of the upper track construction.

18 LDZ made an offer to Orlen for the transport of its oil products on 29 September 2008, following a meeting held on 22 September 2008. According to Orlen, that offer was 'concrete and attractive'.

19 From 3 October 2008, LG undertook the complete removal of the Track. By the end of October 2008, the Track had been removed in its entirety.

20 On 17 October 2008, Orlen sent a letter to LDZ confirming its intention to transport approximately 4.5 million tonnes of oil products from the Refinery to the Latvian seaports. A subsequent meeting was held on 20 February 2009 and further discussions took place during the spring of 2009.

21 In January 2009, a new general transport agreement was concluded between the applicant and Orlen for a 15-year period, namely until 1 January 2024 ('the 2009 Agreement'). That agreement replaced an interim agreement which had been signed on 1 October 2008.

22 The 2009 Agreement used as its basis the applicant's standard pricing policy in relation to rates, which attributed a basic rate to each route in Lithuania. In addition, the 2009 Agreement applied a system of discounts to those rates [*confidential*]. (1)

23 [*confidential*]

24 Negotiations between Orlen and LDZ continued until the end of June 2009, when LDZ made an application for a licence to operate on the Lithuanian part of the Short Route to Latvia.

25 On 10 November 2009, an arbitration court found that the unilateral termination of the 1999 Agreement by the applicant was unlawful and that that agreement had to be regarded as having been in force until 1 October 2008, the date on which Orlen and the applicant concluded an interim transport agreement.

26 According to Orlen, discussions with LDZ were interrupted in mid-2010, when it finally concluded that the applicant did not intend to repair the Track in the short term. At that point, LDZ withdrew its application for a licence to operate on the Lithuanian part of the Short Route to Latvia.

B. Administrative procedure

27 On 14 July 2010, Orlen lodged a formal complaint with the Commission pursuant to Article 7 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

28 In its complaint, Orlen, in essence, stated that, following a commercial dispute with LG, the latter had removed the Track, with the result that the Short Route to Latvia was unavailable and that it was obliged to use the only route available, that is to say, the Long Route to Latvia, in order to transport by train the part of its output intended for transport to or through Latvia.

29 More specifically, Orlen explained that the commercial dispute at issue concerned the rates charged by LG for rail freight transport and that, because of that disagreement, it had begun to examine the possibility of using solely LDZ's service to transport its refined oil products on the Short Route to Latvia and to switch, using that route, its seaborne export business from the seaport of Klaipėda to the seaports of Riga and Ventspils, a fact of which LG was aware. Orlen thus argued that the applicant's actions, namely the suspension of traffic and the subsequent removal of the Track, were not objectively justified and that their sole purpose was to prevent it from switching its seaborne exports to Latvian seaports using the rail transport services of LDZ.

30 Between 8 and 10 March 2011, the Commission, assisted by the national competition authorities in the Republic of Lithuania and the Republic of Latvia, carried out inspections under Article 20 of Regulation No 1/2003 at the premises of the applicant in Vilnius and at the premises of LDZ in Riga. In the course of those inspections, the Commission, inter alia, seized documents which, in its view, demonstrated that the applicant was aware of the potential competition from LDZ and of the risk that Orlen might switch its seaborne exports to the Latvian seaports.

31 On 6 March 2013, the Commission decided to initiate proceedings against LG pursuant to Article 2 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18).

32 On 5 January 2015, the Commission sent a statement of objections to the applicant. In that statement of objections, the Commission came to the preliminary conclusion that the applicant might have infringed Article 102 TFEU.

33 On 25 March 2015, Orlen submitted observations on a non-confidential version of the statement of objections.

34 On 8 April 2015, the applicant replied to the statement of objections and submitted comments on Orlen's observations. An oral hearing was subsequently held on 27 May 2015.

35 On 23 October 2015, the Commission sent a letter of facts to the applicant, to which the applicant responded on 2 December 2015. On 29 February 2016, the applicant made a further submission to the Commission.

36 On 2 October 2017, the Commission adopted Decision C(2017) 6544 final relating to proceedings under Article 102 TFEU (Case AT.39813 – Baltic Rail) ('the contested decision'), a summary of which was published in the *Official Journal of the European Union* (OJ 2017 C 383, p. 7).

C. The contested decision

37 In the contested decision, the Commission, in essence, concluded that the applicant had abused its dominant position as the railway infrastructure manager in Lithuania by removing the Track, thus preventing LDZ from entering the Lithuanian market. The Commission imposed a fine on the applicant and ordered it to bring the infringement to an end.

1. Definition of the relevant markets and the applicant's dominant position on those markets

38 In the contested decision, the Commission identified two relevant markets, namely:

– the upstream market for the management of railway infrastructure;

– the downstream market for the provision of rail transport services for oil products.

39 The relevant geographic market for the management of railway infrastructure is regarded as the Lithuanian national market. The Commission took the view, on the basis of the 'point of origin – point of destination' approach, known as the 'O & D approach', that the relevant geographic market was the market for the transport of rail freight from the Refinery to the three seaports of Klaipėda, Riga and Ventspils.

40 The Commission found that, under national legislation, the applicant held a legal monopoly on the upstream market for the management of railway infrastructure in Lithuania. In that regard, Article 5(1) of the Lietuvos Respublikos geležinkelių transporto kodekso patvirtinimo, įsigaliojimo ir taikymo įstatymas (Railway Transport Code of the Republic of Lithuania) of 22 April 2004 (Žin., 2004, No IX-2152; 'the Railway Transport Code') provided that public railway infrastructure was the property of the Lithuanian State and its management was entrusted to the applicant.

41 The Commission also found that LG was, with the exception of very small quantities transported by LDZ, the only undertaking active on the downstream market for the provision of rail transport services for oil products, which thereby conferred on it a dominant position on that market.

2. Abusive conduct

42 In the contested decision, the Commission found that the applicant had abused its dominant position as railway infrastructure manager in Lithuania by removing the Track, this being capable of having the anticompetitive effect of foreclosing competition on the market for the provision of rail transport services for oil products between the Refinery and neighbouring seaports, by raising barriers to market entry without objective justification. In particular, the Commission found in recitals 182 to 201 of the contested decision that, by removing the Track in its entirety, LG had had recourse to methods other than those which condition normal competition. In that regard, the Commission stated, first, that LG was aware of Orlen's plans to switch to the Latvian seaports using LDZ's services, second, that LG had removed the Track in great haste, without securing the necessary funds and without taking any of the normal preparatory steps for its reconstruction, third, that the removal of the Track was contrary to standard practice in the sector,

fourth, that LG was aware of the risk of losing all of Orlen's business if the Track were rebuilt and, fifth, that LG had taken steps to convince the Lithuanian Government not to rebuild the Track.

43 The Commission observed that the Track allowed for the shortest and cheapest route from the Refinery to a Latvian seaport to be used. In the Commission's view, because of its proximity to Latvia and to LDZ's logistical base, that route also represented a very favourable option for LDZ to enter the Lithuanian market.

44 As regards the anticompetitive effects of the applicant's conduct, the Commission took the view, following analysis set out in recitals 202 to 324 of the contested decision, that the removal of the Track had been capable of preventing LDZ from entering the market or, at the very least, had made its market entry much more difficult, even though, in the Commission's view, before the Track was removed, LDZ had a credible opportunity to transport Orlen's oil products for seaborne export from the Refinery to the Latvian seaports via the Short Route to Latvia. The removal of the Track meant that all rail transport from the Refinery to a Latvian seaport had to take a much longer route on Lithuanian territory. In particular, the Commission took the view that, after the removal of the Track, the only option for LDZ to compete with the applicant would have been to attempt to operate on the route to Klaipėda or on the Long Route to Latvia. LDZ would therefore have been required to carry out its activities far from its logistical base in Latvia and would have been reliant on its competitor LG for infrastructure management services. Accordingly, the Commission took the view that, from an *ex ante* perspective, LDZ was exposed to significant commercial risks, which it was less likely to take.

45 The Commission also took the view, in recitals 325 to 357 of the contested decision, that the applicant had provided no objective justification for removing the Track, since the explanations put forward were inconsistent, at times contradictory and were unconvincing.

3. Fine and order

46 In applying the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines'), the Commission, having regard to the gravity and duration of the infringement, imposed a fine of EUR 27 873 000 on the applicant.

47 The Commission also found that several behavioural or structural remedies could have either restored the competitive situation that existed before the removal of the Track or eliminated the disadvantages faced by potential competitors on the alternative routes to the seaports. To that end, it ordered LG to bring the infringement to an end and to submit to it, within three months of notification of the contested decision, a proposal for measures to that effect.

4. Operative part of the contested decision

48 The operative part of the contested decision reads as follows:

'*Article 1*

[LG] has infringed Article 102 [TFEU] by removing the rail track between Mažeikiai in Lithuania and the Latvian border. The infringement started on 3 October 2008 and is on-going at the date of adoption of this Decision.

Article 2

For the infringement referred to in Article 1, a fine of EUR 27 873 000 is imposed on [LG].

…

Article 3

[LG] shall bring to an end the infringement referred to in Article 1 and submit to the Commission within three months a proposal for measures to that effect. That submission shall be sufficiently detailed in order to enable the Commission to make a preliminary assessment as to whether the proposed measures will ensure effective compliance with the Decision.

[LG] shall refrain from repeating any act or conduct having the same or similar object or effect to the act described in Article 1.

…'

II. Procedure and forms of order sought

49 By application lodged at the Court Registry on 14 December 2017, the applicant brought the present action.

50 By document lodged at the Court Registry on 5 April 2018, Orlen sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

51 At the request of the Commission, the time limit for lodging an application for confidential treatment was extended and set at 4 June 2018.

52 By letters lodged at the Court Registry on 1 and 4 June 2018, the Commission and the applicant respectively submitted an application for confidential treatment vis-à-vis the intervener of certain information contained in the application and in the defence as well as in some of the annexes to them. Common non-confidential versions of the application and the defence were lodged by the applicant and the Commission.

53 By a letter of 15 June 2018, the applicant submitted an application for confidential treatment vis-à-vis the intervener of certain information contained in the reply and in the annex thereto.

54 By order of the President of the Third Chamber of the General Court of 13 July 2018, Orlen was granted leave to intervene in support of the form of order sought by the Commission. The decision on the substance of the applications for confidential treatment was reserved and non-confidential versions of the various procedural documents prepared by the main parties were provided to Orlen.

55 By letter of 31 July 2018, the Commission submitted an application for confidential treatment vis-à-vis the intervener of certain information contained in the reply. On the same day, a common non-confidential version of the reply was lodged by the applicant and the Commission.

56 By letter of 5 August 2018, the intervener disputed the confidential nature of certain redacted passages in the non-confidential versions of certain of the procedural documents, namely Annexes A.14 and A.26.

57 By letter of 30 August 2018, the applicant submitted an application for confidential treatment vis-à-vis the intervener of certain information contained in the rejoinder. A common non-confidential version of the rejoinder was lodged at the Court Registry by the main parties.

58 On 15 September 2018, the intervener lodged its statement in intervention.

59 By letter of 22 September 2018, the intervener stated that it had no objections against the applications for confidential treatment lodged by the main parties with regard to certain passages of the reply and the rejoinder.

60 On 24 September 2018, within the context of the measures of organisation of procedure provided for in Article 89(3) of the Rules of Procedure of the General Court, the General Court (Third Chamber) put

questions in writing to the applicant and the intervener. Those questions were answered within the time limit set.

61 On 13 December 2018, within the context of the measures of organisation of procedure provided for in Article 89(3) of its Rules of Procedure, the General Court (Third Chamber) put questions in writing to the applicant and the intervener.

62 On 21 December 2018, further to those questions, the intervener withdrew its objections regarding Annex A.26, whilst on 7 January 2019 the applicant withdrew the application for confidential treatment of Annex A.14. There are therefore no outstanding objections with regard to the application for confidential treatment made by the applicant.

63 Following a change in the composition of the Chambers of the General Court pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the First Chamber, to which the present case was accordingly allocated.

64 Acting on a proposal from the First Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

65 On 28 November 2019, following a proposal from the Judge-Rapporteur, the General Court (First Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure under Article 89 of the Rules of Procedure, put questions in writing to the parties and requested the production of a document. The parties complied with those requests within the prescribed period.

66 The parties presented oral argument and replied to the Court's oral questions at the hearing on 5 February 2020.

67 The applicant claims that the Court should:

– annul the contested decision;

– in the alternative, reduce the amount of the fine imposed on it under Article 2 of the contested decision;

– order the Commission to pay the costs.

68 The Commission and the intervener contend that the Court should:

– dismiss the action in its entirety;

– order the applicant to pay the costs.

III. Law

A. The principal claims, seeking annulment of the contested decision

69 The applicant relies on five pleas in law in support of its principal claims by which it seeks the annulment of the contested decision. In essence, the first plea alleges manifest errors of assessment and of law in the application of Article 102 TFEU as regards the abusive nature of the applicant's conduct, the second plea alleges errors of assessment and of law in the application of Article 102 TFEU as regards the assessment of the practice in question, the third plea alleges infringement of Article 296 TFEU and Article 2 of Regulation No 1/2003 on the grounds of insufficient evidence and a failure to state reasons, the fourth plea, only as regards the first part of that plea, alleges errors in establishing the amount of the fine, and the fifth plea alleges errors relating to the imposition of a remedy.

1. First plea in law: errors of assessment and of law in the application of Article 102 TFEU as regards the abusive nature of the applicant's conduct

70 In support of its first plea, the applicant disputes, in essence, the legal test applied by the Commission in the contested decision to categorise its conduct as an abuse of a dominant position within the meaning of Article 102 TFEU. According to the applicant, the Commission should have appraised the present case in the light of the established case-law on refusal of access to essential facilities, which sets a significantly higher threshold for finding that a practice is abusive than that applied in the contested decision.

71 First of all, according to the applicant, it is not the removal of the Track which has anticompetitive effects. In fact, it is the suspension of traffic, which occurred a month earlier, which had those effects. In the applicant's opinion, even if the Track had not been removed on 3 October 2008 and regardless of the fact that it had been left unrepaired following the traffic suspension on 2 September 2008, LDZ could not, in any event, have used it. Consequently, in the applicant's view, the legal issue comes down to the question of whether, in the circumstances of the present case, Article 102 TFEU imposed on it a duty to repair the Track. In the absence of such a duty, the question of whether or not there are objective justifications for the removal of the Track does not arise.

72 Next, the applicant submits, in essence, that the duty to repair or invest in a facility to which a competitor may request access could be imposed on it under Article 102 TFEU only if the Track is an essential facility, that is to say, if it is indispensable to enable LDZ to operate on the relevant downstream market, and that its non-repair by the applicant would eliminate all competition on the downstream market. However, according to the applicant, those two conditions are not met in the present case. In particular, access to the Track is not indispensable for LDZ to compete with it on the relevant market.

73 More generally, the applicant claims that the fact that an alternative may be less advantageous from the point of view of one competitor does not make a facility 'essential' or 'indispensable'. In its view, it would be an undue restriction on the applicant's freedom to conduct business and its property rights if it were required under Article 102 TFEU to invest substantially in a non-essential (and completely dilapidated and non-functioning) facility solely in order to allow a single competitor to enter the market, by making available to that competitor a more attractive route to serve one single customer and for a small portion of that customer's output.

74 Finally, the applicant observes that the legal test based on the case-law concerning essential facilities was what the Commission itself intended to apply before the statement of objections was issued. It points out that, at a meeting with the applicant on 25 March 2013, the Commission's services in fact explained that the theory of harm was based on the premiss that the removal of the Track constituted a refusal to supply essential infrastructure services to LDZ.

75 The Commission and the intervener dispute those arguments.

76 In that regard, it must be recalled that Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits (see judgment of 6 September 2017, *Intel* v *Commission*, C−413/14 P, EU:C:2017:632, paragraph 136 and the case-law cited).

77 According to settled case−law, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market (see judgment of 6 September 2017, *Intel* v *Commission*, C−413/14 P, EU:C:2017:632, paragraph 135 and the case-law cited).

78 It has been held, in this regard, that the concept of abuse of a dominant position prohibited by Article 102 TFEU is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in goods or

services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition (see judgments of 19 April 2012, *Tomra Systems and Others* v *Commission*, C−549/10 P, EU:C:2012:221, paragraph 17 and the case-law cited, and of 9 September 2009, *Clearstream* v *Commission*, T−301/04, EU:T:2009:317, paragraph 140 and the case-law cited).

79 Article 102 TFEU covers not only those practices which directly cause harm to consumers but also practices which cause consumers harm through their impact on competition (see, to that effect, judgments of 27 March 2012, *Post Danmark*, C−209/10, EU:C:2012:172, paragraph 20 and the case-law cited; see also, to that effect, judgment of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T−336/07, EU:T:2012:172, paragraph 171).

80 It is not necessarily a question of the actual effect of the abusive conduct complained of. For the purposes of establishing an infringement of Article 102 TFEU, it is necessary to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or, in other words, that the conduct is capable of having that effect (judgment of 19 April 2012, *Tomra Systems and Others* v *Commission*, C−549/10 P, EU:C:2012:221, paragraph 68; see, also, judgments of 9 September 2009, *Clearstream* v *Commission*, T−301/04, EU:T:2009:317, paragraph 144 and the case-law cited, and of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T−336/07, EU:T:2012:172, paragraph 268 and the case-law cited). Furthermore, the fact that the abusive conduct of an undertaking in a dominant position has adverse effects on markets other than the dominated markets does not preclude the application of Article 102 TFEU (see, to that effect, judgment of 14 November 1996, *Tetra Pak* v *Commission*, C−333/94 P, EU:C:1996:436, paragraph 25).

81 The arguments advanced by the applicant in support of its first plea must be examined in the light of those principles.

82 In the present case, it should be pointed out that the arguments put forward by the applicant in the first plea relate solely to the legal test applied by the Commission to categorise its conduct as an abuse of a dominant position.

83 In recitals 177 and 178 of the contested decision, the Commission found that, by removing the Track without objective justification, the applicant had abused its dominant position on the Lithuanian market for the management of railway infrastructure. In particular, the Commission took the view that, in the legal and factual circumstances in question, the removal of the Track was not a practice which was consistent with those which condition normal competition. In the Commission's view, that has led to potential anticompetitive effects on the market for the provision of rail transport services for oil products between the Refinery and the seaports of Klaipėda, Riga and Ventspils, through the creation of barriers to market entry.

84 It follows that, in the present case, the conduct objected to in the contested decision consists of the removal of the Track as such, irrespective of the suspension of traffic on that track on 2 September 2008 and the non-repair thereof.

85 In that regard, first of all, to the extent that, by its arguments, the applicant disputes the fact that the removal of the Track as such can be categorised as potentially abusive conduct, it must be recalled that the list of abusive practices set out in Article 102 TFEU is not exhaustive, with the result that the list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position which are prohibited by EU law (see judgment of 17 February 2011, *TeliaSonera Sverige*, C−52/09, EU:C:2011:83, paragraph 26 and the case-law cited). Therefore, as a general rule, any conduct by an undertaking in a dominant position which is capable of restricting competition on a market may be categorised as abusive. It follows that it cannot be ruled out that the removal of the Track could, of itself, irrespective of the suspension of traffic and the non-repair of the Track, be categorised as potentially abusive conduct.

86 Consequently, it is necessary to ascertain whether, in the present case, the Commission applied, in the contested decision, the appropriate legal test for finding that the practice in question, namely the removal of the Track, constituted an abuse of a dominant position within the meaning of Article 102 TFEU.

87 As a preliminary point, it must be noted that the case-law on essential facilities relates, in essence, to circumstances in which a refusal to supply by an undertaking in a dominant position, by virtue, in particular, of the exercise of a property right, may constitute an abuse of a dominant position. That case-law therefore relates in particular to situations in which the free exercise of an exclusive right, being a right which rewards investment or innovation, may be limited in the interest of undistorted competition on the internal market (see judgment of 1 July 2010, *AstraZeneca* v *Commission*, T−321/05, EU:T:2010:266, paragraph 679 and the case-law cited).

88 In particular, that limitation, which ultimately results in a duty to supply being imposed, is permitted provided that the three exceptional circumstances, detailed by the Court of Justice in particular in the judgment of 26 November 1998, *Bronner* (C−7/97, EU:C:1998:569), are met.

89 In the case which gave rise to the judgment of 26 November 1998, *Bronner* (C−7/97, EU:C:1998:569), the Court of Justice held that, in order for the refusal by an undertaking in a dominant position to grant access to a service to constitute an abuse within the meaning of Article 102 TFEU, that refusal must be likely to eliminate all competition on the market on the part of the person requesting the service, such refusal must be incapable of being objectively justified, and the service in itself must be indispensable to carrying on that person's business (judgment of 26 November 1998, *Bronner*, C−7/97, EU:C:1998:569, paragraph 41; see, also, judgment of 9 September 2009, *Clearstream* v *Commission*, T−301/04, EU:T:2009:317, paragraph 147 and the case-law cited).

90 The purpose of the exceptional circumstances set out in the judgment of 26 November 1998, *Bronner* (C−7/97, EU:C:1998:569), is to ensure that a duty imposed on an undertaking in a dominant position to provide access to its infrastructure does not ultimately impede competition by reducing that undertaking's initial incentive to build such infrastructure. Indeed, the incentive for a dominant undertaking to invest in facilities would be reduced if its competitors were, upon request, able to share the benefits (see, to that effect, Opinion of Advocate-General Jacobs in *Bronner*, C−7/97, EU:C:1998:264, point 57).

91 However, such a requirement to protect the incentive of the undertaking in a dominant position to invest in the creation of essential facilities is not present where the applicable regulatory framework already imposes a duty to supply on the undertaking in a dominant position or where the dominant position which the undertaking has acquired on the market derives from a former State monopoly.

92 The case-law has accordingly acknowledged that the exceptional circumstances described in the judgment of 26 November 1998, *Bronner* (C−7/97, EU:C:1998:569), had been laid down and applied in the context of cases dealing with the question whether Article 102 TFEU could be such as to require the undertaking in a dominant position to supply to other undertakings access to a product or service, in the absence of any regulatory obligation to that end (judgment of 13 December 2018, *Slovak Telekom* v *Commission*, T−851/14, under appeal, EU:T:2018:929, paragraph 118). Where there is a legal duty to supply, the necessary balancing of the economic incentives, the protection of which justifies the application of the exceptional circumstances developed in the judgment of 26 November 1998, *Bronner* (C−7/97, EU:C:1998:569), has already been carried out by the legislature at the point when such a duty was imposed.

93 Case-law has also acknowledged that the existence of a dominant position having its origins in a legal monopoly must be taken into consideration in the context of the application of Article 102 TFEU (see, to that effect, judgment of 27 March 2012, *Post Danmark*, C−209/10, EU:C:2012:172, paragraph 23 and the case-law cited). This is especially true when, in a situation where there is a legal monopoly, the undertaking has not invested in the construction of the infrastructure, which was built and developed with public funds.

94 In the present case, it must be noted in the first place that the applicant holds a dominant position on the market for the management of railway infrastructure which derives from a statutory monopoly. Also, the applicant has not invested in the Lithuanian railway network, which belongs to the Lithuanian State and was built and developed using public funds.

95 In the second place, it must be recalled that the applicant does not enjoy unfettered exercise of an exclusive property right, which rewards investment or innovation. In its capacity as Lithuania's railway infrastructure manager, it is responsible under both EU and national law for granting access to public railway infrastructure and ensuring the good technical condition of that infrastructure, as well as ensuring safe and uninterrupted rail traffic and, in the event of disturbance to rail traffic, taking all necessary measures to restore the normal situation.

96 It must be noted that Article 10 of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25) granted railway undertakings established in the European Union access to railway infrastructure on equitable conditions for the purpose of operating such services in all Member States. In addition, Article 5 of Directive 2001/14/EC of the European Parliament and of the Council of 26 February 2001 on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (OJ 2001 L 75, p. 29) granted railway undertakings the right of access, on a non-discriminatory basis, to the minimum access package and track access to service facilities that are described in Annex II to that directive. Similarly, as was stated in recital 131 of the contested decision, at the national level, the Rules for Allocation of Public Railway Infrastructure Capacities set the categories of infrastructure services that mirror the list of services in Annex II to Directive 2001/14. In particular, paragraph 57 of those rules states that the 'minimum access package' and access to railway infrastructure must be provided on a non-discriminatory basis.

97 In addition, as is clear from recital 122 of the contested decision, Article 29(1) of Directive 2001/14 provided that 'in the event of disturbance to train movements caused by technical failure or accident the infrastructure manager [had to] take all necessary steps to restore the normal situation'. Similarly, under Article 8(1)(4) of the Lietuvos Respublikos geležinkelių transporto sektoriaus reformos įstatymas (Law on the Reform of the Rail Transport Sector of the Republic of Lithuania) of 27 April 2004 (Žin., 2004, No 61-2182), which was in force until 8 October 2011, the applicant was required to ensure the good technical condition of the public railway infrastructure and safe and uninterrupted rail traffic. Furthermore, paragraph 69 of the Rules for Allocation of Public Railway Infrastructure Capacities, adopted by Decision No 611 of the Government of the Republic of Lithuania of 19 May 2004, as amended by Decision No 167 of 15 February 2006, provides that, in the event of disturbance of railway traffic caused by a railway traffic accident, the infrastructure manager is to take all necessary measures to restore the normal situation.

98 In the light of the foregoing, it must be held that, contrary to what the applicant claims, in the light of the relevant regulatory framework, the conduct in question, namely the removal of the entirety of the Track, cannot be analysed in the light of the case-law established in relation to refusal to provide access to essential facilities, but must be analysed as conduct capable of hindering market entry by making access to the market more difficult and thus leading to an anticompetitive foreclosure effect. It follows that the question whether Article 102 TFEU imposed a duty on the applicant to repair the Track is irrelevant for the purposes of the present case.

99 It follows that the Commission did not err in not assessing whether the conduct at issue met the conditions regarding the indispensability of the service to which access had been refused and the elimination of all competition laid down in paragraph 41 of the judgment of 26 November 1998, *Bronner* (C-7/97, EU:C:1998:569). It was sufficient, subject to any objective justification, to show that the conduct in question was such as to restrict competition and, in particular, to constitute an impediment to market entry (see, to that effect, judgment of 6 December 2012, *AstraZeneca* v *Commission*, C-457/10 P, EU:C:2012:770, paragraphs 149 and 153).

100 The applicant, in response to the Commission's arguments, seeks to challenge that finding, arguing that it was not obliged under Article 102 TFEU to invest its resources in new infrastructure since the Track was

completely dilapidated and could no longer be used. In particular, according to the applicant, no provision of national law imposed on it an absolute duty to invest its very limited resources in a new infrastructure replacing a completely dilapidated track where alternative routes on the network were available.

101 In that regard, it must be stated that that argument is based on the premiss that the Commission, instead of examining the removal of the Track as an abuse, should have examined whether the failure to repair such facilities could be categorised as an abuse in the light of the case-law concerning essential facilities. However, it is clear from the analysis in paragraphs 98 and 99 above that that premiss is incorrect.

102 As to the argument that the Commission itself had in mind the legal test based on the case-law concerning access to essential facilities prior to the statement of objections, since, at a meeting with the applicant on 25 March 2013, the Commission services explained that the theory of harm in the present case was based on the premiss that the removal of the Track constituted a refusal to provide LDZ with access to essential infrastructure services, it is sufficient to point out that the fact that the minutes of a meeting with the representatives of the Commission services prior to the statement of objections which were drafted solely by the applicant's legal adviser and not approved by the Commission, indicate that the 'theory of harm' previously applied by it may have been a refusal to supply essential services to LDZ, cannot dictate the Commission's assessment in the contested decision. Furthermore, it is patently clear from the minutes in question that the opinions expressed at the meeting were purely preliminary views and that other theories of harm could also be considered by the Commission. In particular, it is evident from the second paragraph of the 'Theory of harm' section of those minutes that, in the Commission's view, the removal of the Track could also be regarded as a restriction of competition by object, since it could have prevented competition in the provision of rail transport services.

103 In view of the foregoing, it must be concluded that the Commission was not required to assess the compatibility of the applicant's conduct with Article 102 TFEU in the light of the established case-law in relation to refusal to provide access to essential facilities.

104 The first plea must therefore be rejected as unfounded.

2. Second plea in law: errors of assessment and of law in the application of Article 102 TFEU to the assessment of the practice in question

105 By its second plea, the applicant claims, in essence, an infringement of Article 102 TFEU and manifest errors of assessment as regards the assessment of the practice in question, since, in its view, in the legal and factual circumstances of the present case, the removal of the Track, which was a non-essential and dilapidated infrastructure, did not constitute an abuse of a dominant position. In particular, according to the applicant, even if the removal of such a facility could, under very exceptional circumstances, have constituted an abuse even though the conditions laid down in the case-law and referred to in the first plea are not met, the Commission has not shown to the requisite legal standard that such very exceptional circumstances existed in the present case in relation to the Track.

106 The applicant divides the second plea into four parts.

107 As a preliminary point, it must be recalled that the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings applying Articles 101 and 102 TFEU which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the applicant and taking account of all the elements submitted by the applicant (see judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C−603/13 P, EU:C:2016:38, paragraph 72 and the case-law cited).

(a) The first part of the second plea: errors in the 'doubts' expressed by the Commission regarding the reality of the Track defects

108 By the first part of the second plea, the applicant complains that the Commission committed an error of law compounded by an error of assessment in that the doubts expressed by the Commission regarding the existence and significance of the Track defects for traffic safety have no basis. In particular, the applicant criticises the Commission on the ground that it stated that the removal was 'not justified' and that the technical explanations given by the applicant in relation to the Track and its defects were 'unconvincing'. It also claims that the 'doubts' expressed by the Commission regarding the existence and significance of the defects in the Track were in reality driven by the fact that the Commission suspected that safety concerns were used as a pretext to cover up its conduct.

109 In support of that first part, the applicant puts forward four complaints.

(1) The first complaint of the first part: there were doubts regarding the occurrence of the Deformation of the Track

110 By its first complaint, the applicant submits that the doubts expressed by the Commission concerning the occurrence of the Deformation are wholly without basis. The applicant maintains that the doubts expressed by the Commission regarding the existence of the Deformation are driven by suspicions linked to the fact that it claimed safety problems as justification for its conduct. In that regard, it argues that the Deformation was in fact promptly reported by several of its employees who were involved in or responsible for supervision of the Track and that all their reports were consistent in their description of the Deformation. Therefore, in the applicant's view, there is absolutely no reason to suspect that they could all have 'colluded' to 'invent' a Deformation which did not exist.

111 The Commission and the intervener dispute that complaint.

112 In the present case, it is sufficient to note that, as the applicant itself acknowledges, the Commission stated in recital 181 of the contested decision that, despite its doubts regarding the existence of the Deformation, it had based its analysis on the assumption that the Deformation had occurred as reported by the applicant. In particular, the Commission was of the view that there was insufficient evidence to disregard the applicant's claims regarding the occurrence and extent of the Deformation, which it confirmed once again at the hearing, in response to a question from the Court. In addition, the Commission, like the applicant, recognised that the Deformation had been recorded in various written documents submitted by the applicant. It is also clear from recital 179 of the contested decision that the Commission examined the circumstances surrounding the appearance of the Deformation not in order to attempt to demonstrate that the applicant had acted in bad faith by purely and simply inventing the Deformation, but solely because the intervener had claimed that the Deformation could not have occurred in the manner described by the applicant, a claim which the applicant strenuously disputed.

113 Consequently, it is necessary to reject the applicant's argument alleging that doubts were expressed by the Commission regarding the Deformation of the Track.

(2) The second complaint of the first part: errors in the assessment of the claim that the removal of the Track was due solely to the Deformation

114 By its second complaint, the applicant disputes the assertion in recital 329 of the contested decision that it initially claimed, in its response to the first request for information of 6 January 2012, that the removal of the entire Track was due solely to the occurrence of the Deformation. In that regard, it maintains that it referred in its response to the detailed description of the procedure which led to the closure and the removal of the Track. Therefore, according to the applicant, both in its response to the first request for information and in its observations on the statement of objections, it put forward the same arguments, namely that, while the Deformation had led it to assess the Track as a whole, it was in fact the general condition of the Track, and not the occurrence of the Deformation alone, which had justified its removal.

115 The Commission and the intervener dispute that complaint.

116 In the present case, it should be noted that, as observed in recital 329 of the contested decision, in its response to the first request for information, the applicant stated that 'the closure and subsequent removal of the Lithuanian [part of the] track were the result of the incident which occurred on the track on 2 September 2008'. However, immediately after that sentence, the applicant referred to '[the] detailed description of the procedure which led to the closure and removal of the track'.

117 However, even if the claim in the contested decision – that the applicant had initially maintained that the removal of the Track was the result of the Deformation having appeared – were not correctly reflected, as the applicant asserts, that is irrelevant, since the Commission, in the contested decision, did not base its analysis on that claim but rather on the applicant's arguments put forward in response to the statement of objections. The contested claim was used only to rule out the possibility that the Deformation alone could have justified the removal of the entire Track.

118 It follows that the applicant's complaint must be rejected.

(3) The third complaint of the first part: errors in the assessment of the differences between the Reports of 5 September 2008 and the letters of 4 and 5 September 2008

119 By its third complaint, the applicant submits that the allegedly unexplained discrepancies pointed out by the Commission in recital 334 of the contested decision between, first, the Reports of 5 September 2008 and, second, the two letters from the local director of a branch of the applicant ('the local director') of 4 and 5 September 2008, according to which the reports stated, on the one hand, that a local repair of the Deformation site was sufficient while, on the other hand, the letters from the local director referred to the need for more comprehensive work on the Track, are due to the fact that the mandate of the four members of the inspection commission was restricted to analysing the Deformation and that they examined solely the site of the Deformation, and not the entire Track. By contrast, the local director, to whom the members of the inspection commission reported, was not restricted by any mandate. He was the most senior employee, since he was in charge of infrastructure and ensuring safe traffic in his region, and his key responsibility was to assess what the incident meant for the safety of the entire Track. On the basis of his experience of the Track and the fact that all the steps taken previously, including the minor repairs and the speed reductions to 25 km/h, had not prevented an incident as serious as the Deformation, which could have had a potentially devastating impact on the environment (oil pollution), and which could also have occurred on any other segment of the Track, he was led to conclude that a renovation (that is to say, a reconstruction) of the entire Track was needed in order to resume safe traffic. Furthermore, the applicant states that it was well aware of the speed limit on the Track, with the result that the Commission could not draw any conclusion from the fact that the local director had not explicitly referred in his letters of 4 and 5 September 2008 to the failure of the speed-limit reduction to prevent the Deformation.

120 The Commission and the intervener dispute that complaint.

121 In that regard, it must be recalled that on 3 September 2008 the applicant set up an inspection commission composed of senior employees of its local branch to investigate the reasons for the Deformation. The inspection commission visited and inspected only the site of the Deformation. Therefore, its conclusions were related to the condition of the Track with reference only to that location. The inspection commission submitted two reports, namely the investigation report of 5 September 2008 and the technical report of 5 September 2008.

122 According to the investigation report of 5 September 2008, the Deformation was caused by the physical deterioration of a number of elements of the Track structure. That investigation report also confirmed that traffic should remain suspended 'until all the restoration and repair works are complete[d]'.

123 The findings contained in the investigation report of 5 September 2008 were confirmed by the technical report of 5 September 2008, which, as the first report had done, referred solely to the site of the Deformation and identified the cause of the Deformation as various problems with the structure of the Track. The technical report of 5 September 2008 concluded that the traffic accident which had occurred as

a deformation on the Track should be qualified as a buckling which was attributable to physically worn-out elements of the upper Track construction.

124 On 4 September 2008, one day before the inspection commission submitted the Reports of 5 September 2008, the local director sent a letter to LG's Railways Infrastructure Directorate. In that letter, the local director noted the same findings as in the 5 September 2009 reports, but concluded that 'partial track repair will not solve the problem' and requested permission and financing to implement a project to repair the entire Track.

125 The local director repeated his conclusions in a second letter of 5 September 2008, in which he estimated the cost of the works at 38 million litai (LTL), corresponding to approximately EUR 11.2 million.

126 Accordingly, first, it is not clear from the content of the local director's letters of 4 and 5 September 2008 that, as the applicant submits, his mandate was not limited to the site of the Deformation, which meant that he found it necessary to assess the condition of the entire Track, whereas the inspection commission of 3 September 2008 had limited its review to the site of the Deformation. Indeed, the author of the letter of 4 September 2008 did no more than point out that a deformation at the 18th kilometre of the Track had been reported during a regular inspection, then listed the results of the inspection concerning the cause of the deformation and concluded by stating that 'partial track repair will not solve the problem'. He also concluded by requesting the necessary permission and financing to implement a project to repair the entire Track. Similarly, the letter of 5 September 2008 is a short letter in which the local director reported the date and time of the Deformation and stated that, in order to restore traffic on the Track, work on the entire Track was necessary. He also estimated the cost of the works at LTL 38 million and requested the recipient's assistance in allocating funding for the execution of those works.

127 Second, as the Commission states, the members of the inspection commission of 3 September 2008, who prepared the Reports of 5 September 2008 and who recommended a local repair of the Deformation, were senior employees belonging to the same LG branch as the local director and who, like the latter, must have been familiar with the history of the Track.

128 Third, as stated in recital 332 of the contested decision, it is clear from a comparison of the Reports of 5 September 2008 with the letter of 4 September 2008 from the local director, as summarised in Table 2 in recital 46 of the contested decision, that those three documents describe the same problems with the structure of the Track. Therefore, it is difficult to see why the Reports of 5 September 2008 recommended local repairs at the site of the Deformation, whereas the letters of 4 and 5 September 2008 called for full repairs on the entire Track.

129 Fourth, the applicant is not justified in claiming that the local director had concluded that the Track had to be completely removed and reconstructed on the basis of (i) his experience with the Track and (ii) the fact that the measures taken previously, in particular speed reductions, had not prevented the Deformation from occurring. The letters from the local director of 4 and 5 September 2008 do not mention an alleged failure of previous measures, such as the speed limit. In particular, the letter from the local director of 4 September 2008 did no more than state, without further clarification, that 'partial track repair will not solve the problem'. Furthermore, the fact that the issue of limiting the speed on the Track was well known within LG, even if it were established, is not capable of remedying the lack of reference to the failure of the previous measures nor, in any event, of justifying the inconsistencies between the Reports of 5 September 2008 and the letters from the local director.

130 It follows that the justifications put forward by the applicant to explain the discrepancies between the Reports of 5 September 2008 and the letters from the local director of 4 and 5 September 2008 are not sufficient to invalidate the finding made by the Commission in the contested decision that there were inconsistencies.

131 Consequently, the applicant's complaint must be rejected.

(4) The fourth complaint of the first part: the Commission was incorrect in rejecting the arguments concerning systemic problems in the Track bed

132 By its fourth complaint, the applicant submits that the arguments which it put forward relating to the systemic problems with the Track bed are not, as the Commission found in the contested decision, inconsistent or unconvincing. In its opinion, those problems can be explained by the specific circumstance that it was late (11 September 2008) before a specific expert in track beds and ballast was able to analyse the Track. The extraordinary commission set up on 10 September 2018, which examined the Track, found, inter alia, a high level of ballast deterioration, four 'gullies' which indicate 'roadbed defects' and a bed width which did not correspond to technical regulations. On the basis of those findings, the extraordinary commission concluded that, in that case, the Deformation had to have been caused by systemic problems in the fastening system and the Track bed. According to the applicant, that conclusion did not require an excavation of the ballast. Indeed, in its view, those perfectly visible defects of, inter alia, the state and form of the ballast, and which provided strong indications of the poor state of the bed in general, were sufficient in themselves to allow the experts to come to their conclusions.

133 According to the applicant, the Track was generally in a very poor condition and the occurrence of the Deformation made it clear to the extraordinary commission that the ad hoc measures adopted previously (minor repairs to the Track structure and speed reductions) had not been sufficient to address the serious safety problems which had arisen. On the basis of the clear technical findings of the expert in track beds and ballast and those of the extraordinary commission as a whole, there was therefore, in the applicant's view, no alternative other than the reconstruction of the entire Track in order to prevent further dangerous incidents or even accidents from occurring. Thus, according to the applicant, that new detailed overall assessment of the track as a whole formed the basis of the decision to remove the Track.

134 The Commission and the intervener dispute that complaint.

135 In the present case, it should be recalled that, in recital 336 of the contested decision, the Commission observed that, in its correspondence with the Minister for Transport and Communications and in its observations submitted during the administrative procedure, the applicant had stated several times that the main reason for the removal of the entire Track was to be found in a systemic problem in the bed of that track, namely a deterioration of the ballast which caused the bed of the Track to narrow, the repair of which required removal of the Track structure. However, in recital 337 of the contested decision, the Commission pointed out that the condition of the Track had been known since at least a previous report of 3 September 2004 and yet no systemic problems in the Track bed had been reported at that time or until the extraordinary inspection report of 12 September 2008, even though the Track had been subject to regular checks between those two dates.

136 Furthermore, in recital 338 of the contested decision, the Commission stated that, in its response to the statement of objections, the applicant had stated that, unlike the inspection commission which had prepared the Reports of 5 September 2008 and which had not noted any problems with the Track bed, the extraordinary inspection commission set up on 10 September 2008 included specialists in track beds and ballast who had taken the view that 'in order to perform an analysis of the bed, ballast has to be excavated. The bad condition of the bed cannot be seen visually'.

137 However, it is clear from recital 339 of the contested decision that, when the Commission subsequently sought clarification of that new explanation, the applicant stated that the extraordinary inspection commission had not excavated any ballast from the Track.

138 In addition, it is clear from recital 340 of the contested decision that, in its response to the letter of facts, the applicant again revised its explanations, arguing that the main objective of the extraordinary inspection commission had been to carry out a visual evaluation of the Track in order to detect visible defects. According to the applicant, it was only after those visual defects had been detected that special research could have been performed. In the same recital, the contested decision notes, however, that none of those defects had been mentioned in the extraordinary inspection report of 12 September 2008 and that the

decision to dismantle the Track had been taken before the inspection commission had conducted any special research which supposedly would have included excavation of the ballast.

139 Accordingly, in the first place, it must be observed that the inspection report of the extraordinary commission of 12 September 2008 contained two different sections, one of which concerned the main characteristics of the Track and the other concerned the defects found along the Track as a result of the Deformation. That inspection report did not mention the level of ballast deterioration among the defects found along the Track, but that factor was mentioned in the section dedicated to the main characteristics of the Track, along with other factors such as, inter alia, the type of rail, the type of sleepers, and the intensity of traffic. It follows that the deterioration of the ballast as mentioned in the extraordinary commission's inspection report of 12 September 2008, namely as part of the consistent and objective characteristics of the Track, is not relevant in terms of explaining the need to remove the entire Track.

140 In addition, the only defect concerning the Track bed mentioned in the report in question consisted of four 'gullies' showing 'bed defects' and a bed width that did not correspond to technical regulations. However, as the Commission points out, the applicant does not explain how the appearance of four gullies along the Track would have necessitated the removal of the entire Track.

141 In the second place, as regards the argument that it was not necessary to excavate the ballast in order for the extraordinary commission to be able to conclude that there were problems with the bed, it must be stated that such an argument, even if it were established, contradicts the argument put forward by the applicant in its response to the statement of objections that the poor condition of the bed was not visible and that examination of it would have required excavation of the ballast. That contradiction confirms the applicant's difficulties in providing a coherent justification for removing the Track.

142 In the third and final place, it should be observed that the arguments put forward by the applicant in support of the fourth complaint are not sufficient to explain the other inconsistencies pointed out by the Commission in the contested decision, in particular in recital 340 thereof.

143 In view of all of the foregoing, it must be held that the Commission did not commit an error of assessment in concluding that the applicant's arguments relating to the systemic problems in the Track bed were inconsistent or unconvincing.

144 That conclusion cannot be called into question by the applicant's argument that the very poor general condition of the Track, combined with the new detailed assessment of the Track as a whole conducted by the extraordinary commission following the discovery of the Deformation, had led it to take the view that reconstruction of the entire Track was necessary to reinstate traffic safely. Indeed, such an argument is not relevant in order to challenge the doubts raised by the Commission concerning the systemic problems in the Track bed, on the basis of the documents submitted by the applicant. In any event, since that argument is repeated in the context of the second part of the second plea, it will be analysed in that context.

145 Consequently, the applicant's complaint must be rejected.

146 In the light of all of the foregoing, it must be held that none of the complaints put forward by the applicant in support of the first part of the second plea is capable of calling into question the conclusion reached by the Commission in the contested decision that the explanations put forward concerning the existence and significance of the Track defects for the safety of traffic were inconsistent with each other, contradictory and unconvincing.

147 Therefore, the first part of the second plea must be rejected.

(b) The second part of the second plea: errors of assessment in that the Commission took the view that the removal of the Track was 'highly unusual'

148 After recalling that, on the basis of the technical conclusions reached following the extraordinary commission's inspection, it had two options, namely, on the one hand, targeted initial repairs followed by a full reconstruction of the entire Track within five years ('Option 1') or, on the other hand, an immediate and full reconstruction of the Track ('Option 2'), the applicant maintains that, in the particular circumstances of the present case, immediate implementation of Option 2 was not 'highly unusual', with the result that that situation could not be regarded as a matter constituting an abuse.

149 In that regard, first, the applicant submits that it was the Track which was 'highly unusual' since, at the relevant time, it was almost 140 years old and no major restoration had been carried out since 1972. The applicant continues that a number of defects had been detected along the length of the Track but that only minor repairs have been carried out, coupled with reductions of train speeds to 25 km/h. Far from being in line with industry practice in Europe, such measures are, according to the applicant, an expression of the very particular and difficult financial situation faced by the applicant and its sole shareholder, the Lithuanian State.

150 Second, following the appearance of the Deformation and the detailed assessment of the state of the entire Track by the extraordinary commission, the applicant maintains that it had become clear that another cheap patchy repair would not resolve the Track safety issues. For that reason, on 19 September 2008, the applicant decided that reconstructing the Track (whether under Option 1 or 2) was the only way to ensure safe traffic.

151 Third, the applicant claims that, of the two options for it to choose between, Option 2 was the only relevant and economically reasonable solution. In its view, initial repairs would not actually have solved the various problems, since, even if Option 1 were implemented, reconstruction of the entire Track would have been needed within five years. In addition, Option 1 would have been, in short, more expensive than Option 2. Furthermore, Option 1 would have required substantial duplication of work, unlike Option 2, under which the works would be carried out only once. Moreover, all materials used in the initial repairs would have had to be replaced once more in the subsequent reconstruction.

152 Fourth, the applicant maintains that, since Option 2 was the only relevant and economically reasonable solution, there was no reason for it to wait to implement it. Indeed, according to the applicant, LDZ itself explained that a track is normally removed where there is no reason to believe that it will be reused. LDZ also confirmed that removal is a standard practice which is required if the existing rails must be replaced with other rails or if renovation works are needed, for example renovation of the bed and ballast, which cannot technically be performed until the rails are removed. In addition, the applicant claims that it had decided to reuse some of the Track material to repair other tracks. According to the applicant, those materials would have been damaged over the winter if it had not removed them quickly in October 2008 in order to store them safely. Finally, the applicant alleges that, by rapidly removing the Track and simultaneously requesting funds for its reconstruction, it had demonstrated sufficiently to Orlen, which was putting it under persistent pressure, its determination to reconstruct the Track in accordance with its contractual obligations.

153 Fifth, the applicant claims that, at the point when the Track was removed, namely on 3 October 2008, it had a reasonable expectation that it would obtain the funds needed to reconstruct the Track because the impact of the financial crisis following the collapse of Lehman Brothers bank in September 2008 was not yet being felt by it. In particular, according to the applicant, at the material time, it could not foresee the situation developing so adversely, which forced it to stop, as of the end of 2008, the implementation of its major renovation projects, one of which related to the Track. In addition, the applicant points out that, at the material time, (i) EU funds for major investments in railway infrastructure for the period from 2007 to 2013 were still available and (ii) it legitimately expected to qualify for those funds in order to finance the Track reconstruction. The claim in the contested decision that, in the letter of 2 October 2008 to the Ministry of Transport and Communications, it had not made a genuine effort to obtain funding for the renovation of the Track is, in the applicant's view, therefore unfounded.

154 In its observations on the statement in intervention, the applicant explains that it did not have sufficient funds to carry out all the important renovation works on its network and had to prioritise how to use its very limited resources most effectively. At the point in time at which the Track was removed, EU funds were available and it was just a question of prioritisation whether or not to use parts of those funds for the Track. However, the incident completely changed the priority analysis. Furthermore, according to the applicant, given its net profits in 2008, at the material time, even its own funds would have been sufficient and were available to finance in full the reconstruction of the Track in the event that EU (and/or State) funds were not secured.

155 The Commission and the intervener dispute those arguments.

156 It must be stated that, by its arguments, the applicant is challenging the Commission's assessment in recitals 184 to 198 of the contested decision that, in essence, first, the removal of the Track was done in great haste without taking any of the normal preparatory steps for its reconstruction (recitals 184 to 193 of the contested decision) and, second, that removal was contrary to standard practice in the rail sector (recitals 194 to 198 of the contested decision).

157 In that regard, first, it should be recalled that, in recital 184 of the contested decision, the Commission took the view that the applicant had removed the Track in great haste, without securing the necessary funds or taking the normal preparatory steps for its reconstruction. It is clear from recital 185 of the contested decision that, in response to the Commission's request for information, the applicant explained that 'the Lithuanian leg of [the Track] was removed … in order to perform reconstruction works and reopen it for railway traffic as soon as possible, because this track was important for one of the major clients of LG, namely [Orlen]'. The applicant also explains that it 'was acting under persistent pressure from [Orlen] to speed up the reconstruction on this track and therefore made best efforts to perform the necessary works as soon as possible'.

158 Second, in recital 186 of the contested decision, the Commission noted that the applicant had considered at the time that it did not have sufficient funds to renovate the Track and that it was obvious that a lengthy administrative procedure would have to be completed before funds could be secured for a project of that magnitude. According to the arrangements set by the Lithuanian State at the time, major infrastructure works were to be financed with EU funds, while the applicant's limited resources were to be used only for the routine maintenance of the infrastructure. A request for EU funding had to be supported by preparatory steps, including a feasibility study, which in this case took two years to accomplish. The final decision on whether to allocate EU structural funds to a project had to be taken by the Ministry of Transport and Communications. There was therefore no guarantee that funds would be secured, with the result that there was no urgency in removing the Track. Finally, in recital 187 of the contested decision, the Commission also observed that the removal of the entire Track would not have significantly saved time when actual reconstruction works could have started after the conclusion of all preliminary administrative steps.

159 Furthermore, it is clear from recital 188 of the contested decision that the Commission asked the applicant to explain how the dismantling of the Track in October 2008 could have accelerated its reconstruction considering that a lengthy and uncertain procedure of applying for the necessary funds was still to be followed. It is clear from that same recital that, in its response, the applicant repeated, in essence, its claim that the removal of the Track was a necessary step in its reconstruction and was meant to reduce the time needed for the remaining work. It added that the procedure was not lengthy, but rather simple, and that 'when making the request for financing, [it] acted in reasonable expectation that the necessary funds were actually granted for this project' and that 'this expectation was also supported by the fact that LG was asked to present a feasibility study for this project'. According to recital 189 of the contested decision, in its response to the statement of objections, the applicant repeated its argument that it had removed the Track with the sole intention of repairing it as soon as possible. It argued that removal of the Track was not an extraordinary measure, but rather a necessary measure before the short route could be fully repaired and traffic could resume.

160 Third, in recital 190 of the contested decision, the Commission noted that the applicant had made its request for funding on 2 October 2008 in a short letter to the Minister for Transport and Communications, requesting LTL 620 million (approximately EUR 179.71 million) for the renovation of eight different tracks, including the Track, without any specific representations being made with respect to the Track. In addition, the Commission pointed out that the normal approval procedure was expected to be protracted and that its result could not be guaranteed. Nevertheless, the applicant started removing the Track as of the following day, 3 October 2008, without even waiting for the response of the Minister for Transport and Communications. It is clear from recital 191 of the contested decision that, in its response of 28 October 2008, the Ministry of Transport and Communications pointed out that, since those projects had not been approved in the past, no provision for their financing had been made. In addition, the Ministry of Transport and Communications reminded the applicant that EU funds were still available and invited it to identify projects for financing. However, since the success of the funding request depended on the results of a feasibility study and the decision of the Ministry of Transport and Communications, the applicant could not, in the Commission's view, reasonably expect that the EU funds, if granted, would be allocated within a short period of time.

161 Fourth, in recital 192 of the contested decision, the Commission took the view that the applicant's subsequent actions also demonstrated that it was not seeking to rebuild the Track. In that regard, it pointed out, in particular, that the applicant had prepared notes to the Lithuanian Government arguing against the reconstruction of the Track and that it had recommended adding the renovation of the Track to the priority funding list only because the government had instructed it to do so.

162 Furthermore, in recital 194 et seq. of the contested decision, the Commission detailed the reasons why it took the view that removing the Track was 'highly unusual' and contrary to 'standard practice' in the rail sector. First, the Commission noted that, although there were several railway tracks in Lithuania on which traffic was suspended, the applicant had not been able to provide any example of a track that was removed before the renovation works could start.

163 Second, the Commission recalled that it had sent requests for information to the railway infrastructure managers in the two other Baltic countries, the Republic of Estonia and the Republic of Latvia. The Estonian railway infrastructure manager was able to provide only one example of the dismantling of a long section of track. In that case, the track had been removed because the route itself had been closed, abandoned and replaced by another route. The Estonian railway infrastructure manager also indicated that works requiring the dismantling of tracks were not performed on the entire track simultaneously, but in intervals that interrupted traffic for a period of up to 12 hours. Major repair works, including the removal of a track, would not commence until the administrative procedure to approve them had been concluded. LDZ, the Latvian railway infrastructure management company, stated that a track was, as a general rule, removed only after it had not been used for many years and only if there was no reason to believe that it would be used again. In the two examples provided by LDZ, the tracks had been removed after 10 and 13 years of closure. In addition, in Latvia the removal of a track for repair work would be carried out on a step-by-step basis. Such work would not commence until the administrative procedure had been concluded and funding secured.

164 In the present case, as regards, in the first place, the question of the removal of the Track in great haste without any of the preparatory steps for its reconstruction having been adopted, first, the Court observes that it is clear from the analysis of the first part of the second plea that the applicant has not established that, after the Deformation appeared and after the detailed assessment of the condition of the entire Track, it was in a state which would justify its immediate and complete removal. By contrast, it must be observed that the extraordinary commission's inspection report of 12 September 2008, which examined the entirety of the Track, did not find defects along the entire length of the Track but only, as the Commission noted on the basis of the information provided by the applicant, along 1.6 km of the Track. In addition, in a letter sent on 18 September 2008 by LG's Railway Infrastructure Directorate to its Strategic Planning Council and drawn up on the basis of the extraordinary commission's inspection report of 12 September 2008, it was stated that only 1.6 km of track had to be reconstructed immediately. However, as was correctly stated

in recital 348 of the contested decision, problems with 1.6 km of the 19 km of the Track cannot justify the Track's complete and immediate removal. It is true that that letter of 18 September 2008 also stated that the rail fastenings had to be replaced along the 19 km of the Track, that the Track bed had to be repaired, that the communication cables had to be replaced along the entire length of the Track and that, in order to guarantee traffic safety, the Track would have to be fully repaired within five years. However, it did not state that such repairs would have to involve the complete and immediate removal of the Track.

165 Second, it must be stated that the applicant has not sufficiently substantiated the claim that the defects which caused the 2 September 2008 incident had been observed at numerous other locations along the length of the Track. That claim is based on the 'Wacetob report', prepared by the Warsaw Centre for the Advancement of Science and Organisation in Construction (Poland), which the Commission considers, in recitals 349 to 356 of the contested decision, without being contradicted by the applicant, to be devoid of probative value and not capable of supporting the applicant's arguments. In addition, the finding that another 'cheap patchy repair' would not solve the Track's safety problems, contained in the letter from the local director dated 4 September 2008, was, as stated in paragraphs 126 to 130 above, correctly not considered to be consistent with the Reports of 5 September 2008, according to which, in essence, a local repair would have enabled traffic to be restored safely.

166 It must therefore be held that the argument based, in essence, on the need to remove the Track because of concerns about the safety of rail traffic does not support the conclusion that the Commission committed an error of assessment.

167 That conclusion is not called into question by the argument that Option 2 was the only relevant and economically reasonable option, with the result that the applicant had no reason to wait to implement its decision.

168 Even if, as the applicant contends, Option 2 were the only relevant and economically reasonable option, it did not necessarily involve the removal of the Track in great haste. In that regard, it should be observed that, as the Commission points out in recital 187 of the contested decision, the immediate removal of the Track would not have saved any time when reconstruction work could have begun only after conclusion of all the preliminary administrative steps, including in particular obtaining the necessary funding. Therefore, since it did not yet have the necessary funds to begin reconstruction work on the Track, the applicant had no reason to remove the Track in great haste. It cannot therefore claim that there was no reason to wait to put into effect its decision to implement Option 2 or even to remove the Track.

169 Third, the pressure which it is claimed Orlen put on the applicant also cannot justify the removal of the Track in great haste. In that regard, it must be stated that that argument is contradicted by the fact that the applicant chose not to inform Orlen in advance of its plan to remove the Track. Such forbearance is not justified in the light of the nature of the work involved, especially since Orlen was the only customer using the Track. Furthermore, that finding cannot be called into question by the applicant's observations on the statement in intervention, which seek to argue that there was no secrecy surrounding its directorate's actions in 2008. Indeed, as is apparent from recital 55 of the contested decision, on 5 September 2008, Orlen was informed through the railway stations of the mere 'temporary closure' of the Track. It was not informed that the Track was being removed. It is clear, in particular from the explanations provided by the parties at the hearing, that the telegram communicating the 'temporary suspension of traffic' on the Track until the completion of reconstruction and repair work was issued by the applicant's Railway Infrastructure Directorate to inform the stations and LDZ that traffic was suspended, but that that document was never addressed to Orlen.

170 Fourth, the same is true of the alleged need to recover appropriate materials from the Track to prevent damage over the winter, which cannot additionally justify the removal of the Track in great haste. In that respect, it is sufficient to note, as the Commission does, that that argument is not substantiated.

171 Fifth, the argument that, at the time when the Track was removed, the applicant reasonably expected to obtain the necessary funds for the reconstruction of the Track must be rejected for a variety of reasons.

172 First of all, it should be observed that the applicant itself, in its observations submitted in response to the statement in intervention, acknowledges that it did not have sufficient funds to carry out all the important renovation works on its network.

173 Next, in response to a request for information from the Commission as to whether the applicant had planned to carry out any major renovation works on the Track before 2 September 2008, the applicant pointed out that the Track was not one of the priority railway lines and that, in general, the Lithuanian State did not allocate sufficient funds from the public budget for the modernisation of railway infrastructure. In addition, it added that the EU structural funds and its own funds were not sufficient to ensure modernisation of the priority national railway lines. It follows that the applicant was aware of the fact that, once the Track was removed, it would not have its own funds available to rebuild the Track and would find it difficult to obtain the funds necessary for its reconstruction from the State or the European Union.

174 In particular, as regards State funds, it is common ground that, as noted in recital 190 of the contested decision, the applicant made its request for funding on 2 October 2008 in a short letter to the Minister for Transport and Communications, asking for LTL 620 million (approximately EUR 179.71 million) for the renovation of eight different tracks, including the Track. No specific representation was made with respect to the Track. In addition, as was also noted in recital 190 of the contested decision, the normal approval procedure was expected to be protracted and its result could not be guaranteed. Notwithstanding those considerations, the applicant began to remove the Track as of the following day, 3 October 2008, without even waiting for the response of the Minister for Transport and Communications, which it received on 28 October 2008 and which stated that, since those projects had not been approved in the past, no provision for their financing had been made.

175 In that regard, it must be stated that, while it is true that the Minister for Transport and Communications reminded the applicant that EU funds for major investments in railway infrastructure for the period from 2007 to 2013 continued to be available and while the Minister invited it to identify projects for financing, the fact remains that the Commission made no error of assessment in taking the view, in recital 191 of the contested decision, that the applicant could not reasonably expect to receive those funds without commencing in good time the preliminary administrative procedure necessary to obtain them. As the Commission points out in recitals 63 and 64 of the contested decision, the applicant initiated preparation of a feasibility study concerning the renovation and development of eight railway tracks, but it took eight months following approval by its Technical Board to obtain approval from its Director-General, on 29 July 2009, and a further three months to publish the call for tenders.

176 Finally, it is of no use for the applicant to argue that the financial crisis which followed the collapse of Lehman Brothers bank in September 2008 led to a deterioration in its financial situation with immediate consequences for its ability to undertake major renovation works, such as the reconstruction of the Track. In that regard, it must be stated that it is clear from its arguments concerning the dilapidated state of the Track that the applicant was in a precarious economic situation even before the financial crisis of September 2008. Indeed, the applicant itself claims that it is exactly because of its difficult financial situation that no major repair works had been carried out on the Track since 1972 and that, despite a number of defects having been detected along the length of the Track prior to September 2008, only minor repairs had been carried out, coupled with speed reductions to 25 km/h. Furthermore, even if the 2008 financial crisis might have affected the applicant's ability to undertake major renovation works, such as the reconstruction of the Track, it must be observed, as the Commission does, that access to EU funds was not affected by the financial crisis. The applicant could have obtained such funds if it had initiated, in good time, the administrative procedure necessary for that purpose.

177 It follows that the Commission committed no error of assessment in taking the view that the Track had been removed in great haste and without having first secured the necessary funds.

178 As regards, in the second place, the issue of whether removal of the Track was unusual in the light of practice in the rail sector, first, the Court observes that, as the Commission noted in recital 186 of the contested decision, even though there were several rail tracks in Lithuania on which traffic was suspended,

the applicant was unable to provide an example of a track which was removed before renovation works began. In addition, as the Commission points out, the applicant has never removed the Bugeniai-Skuodas-Klaipėda track, although it has been closed since 1995, and, moreover, despite the lack of traffic demand on that track.

179 Second, it should be noted that the Commission sent requests for information to the railway infrastructure managers in the two other Baltic States, the Republic of Estonia and the Republic of Latvia. The Estonian railway infrastructure manager was able to provide only one example of the removal of a long section of track. In that case, the track had been removed because the route itself was closed, abandoned and replaced by another route. The Estonian railway infrastructure manager also indicated that works requiring the dismantling of tracks were not performed on the entire track simultaneously, but in intervals that interrupted traffic for a period of up to 12 hours. Major repair works, including the removal of a track, would not otherwise commence until the administrative procedure to approve them has been concluded.

180 LDZ, the Latvian railway infrastructure management company, replied that a track was, as a general rule, removed only after it had not been used for many years and if there was no reason to believe that it would be used again. In the two examples provided by LDZ, the tracks were removed after 10 and 13 years of closure. As in Estonia, the removal of a track for repair work is carried out on a step-by-step basis in Latvia. According to LDZ, such work does not commence until the administrative procedure has been concluded and funding has been secured.

181 It follows from all of the foregoing that the Commission did not commit an error of assessment in finding, in the contested decision, that the removal of the Track in question in the present case was 'highly unusual'.

182 Therefore, the second part of the second plea must be rejected.

(c) The third part of the second plea: errors in the Commission's assessment of LG's intentions at the time when the Track was removed

183 By the third part of the second plea, the applicant claims that the contested decision is vitiated by an error of law and an error of assessment since, at the time when the Track was removed, contrary to the Commission's view in the contested decision, it intended to reconstruct it.

184 In particular, the applicant submits that, by asserting that it had not at any time sought to rebuild the Track, the Commission presumed that the removal of the Track was part of an anticompetitive strategy adopted on 19 September or 3 October 2008 to prevent competition on the part of LDZ. The applicant claims that the presumption that it acted in bad faith is based on three points taken into account by the Commission, namely, first, the fact that it had requested that the project for the reconstruction of the Track be moved to the reserve list for EU funds, second, the fact that it had prepared three notes for the Lithuanian Government arguing against reconstruction of the Track and, third, the fact that it had recommended adding the renovation of the Track to the priority list only because it was instructed to do so by the government.

(1) The first complaint of the third part: error of law regarding the applicant's anticompetitive intent being taken into account

185 In support of this first complaint, the applicant maintains, in essence, that the contested decision is vitiated by an error of law in that the Commission highlighted the abusive nature of the practice in question on the basis of, inter alia, its anticompetitive intent, whereas, according to the case-law, the concept of abuse is an objective concept relating to the conduct of a dominant undertaking which is such as to influence the structure of a market and which has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition, irrespective of the subjective intent of that undertaking.

186 In addition, the applicant claims that the Commission ought to have specifically demonstrated that, at the material time, namely on 3 October 2008, the applicant had acted in bad faith, for the purpose of preventing LDZ from competing with it, and that it did not intend to reconstruct the Track. According to the applicant, its intentions after the material time are irrelevant to an assessment of the practice in question.

187 The Commission and the intervener dispute that complaint.

188 In this regard, it must be recalled that it is clear from the case-law that the concept of abuse of a dominant position prohibited by Article 102 TFEU is an objective concept relating to the conduct of a dominant undertaking which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to methods different from those governing normal competition in goods or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition (see judgments of 19 April 2012, *Tomra Systems and Others* v *Commission*, C−549/10 P, EU:C:2012:221, paragraph 17 and the case-law cited, and of 9 September 2009, *Clearstream* v *Commission*, T−301/04, EU:T:2009:317, paragraph 140 and the case-law cited).

189 It follows from the objective nature of the concept of abuse that the conduct objected to must be assessed on the basis of objective factors and that proof of the deliberate nature of the conduct and of the bad faith of the undertaking in a dominant position is not required for the purposes of identifying an abuse of a dominant position (see, to that effect, judgment of 1 July 2010, *AstraZeneca* v *Commission*, T−321/05, EU:T:2010:266, paragraph 356).

190 However, the Commission, as part of its examination of the conduct of a dominant undertaking and for the purposes of identifying any abuse of a dominant position, is obliged to consider all of the relevant facts surrounding that conduct (judgment of 19 April 2012, *Tomra Systems and Others* v *Commission*, C−549/10 P, EU:C:2012:221, paragraph 18).

191 It must be observed in this regard that, where the Commission undertakes an assessment of the conduct of an undertaking in a dominant position, that assessment being an essential prerequisite of a finding that there is an abuse of such a position, the Commission is necessarily required to assess the business strategy pursued by that undertaking. For that purpose, it is clearly legitimate for the Commission to refer to subjective factors, such as the motives underlying the business strategy in question (judgment of 19 April 2012, *Tomra Systems and Others* v *Commission*, C−549/10 P, EU:C:2012:221, paragraph 19).

192 Accordingly, contrary to the applicant's assertions, the existence of any anticompetitive intent may constitute one of a number of facts which may be taken into account in order to determine that a dominant position has been abused (see, to that effect, judgment of 19 April 2012, *Tomra Systems and Others* v *Commission*, C−549/10 P, EU:C:2012:221, paragraph 20).

193 In the present case, it should be observed that, in the contested decision, the Commission identified an abuse of a dominant position on the part of the applicant by taking account of various factual circumstances surrounding the removal of the Track and by analysing the potential effects on competition which such removal might have caused.

194 In particular, the Commission took the view in recitals 182 to 201 of the contested decision that LG had had recourse to methods different from those which condition normal competition in that, in essence, first, LG was aware of Orlen's plan to switch to the Latvian seaports using LDZ's services; second, LG had removed the Track in great haste, without securing the necessary funds and without taking any of the normal preparatory measures for its reconstruction; third, the removal of the Track was contrary to standard practice in the sector; and, fourth, LG had taken steps to convince the Lithuanian Government not to reconstruct the Track.

195 In particular, as regards the finding that LG had removed the Track in great haste, without securing the necessary funds and without taking any of the normal preparatory measures for its reconstruction, it has already been established, in paragraphs 157 to 161 above, that the Commission had drawn a distinction between, on the one hand, in recitals 184 to 191 of the contested decision, the applicant's conduct before the Track began to be removed, that is to say, until 2 October 2008, and, on the other hand, in recital 192 of the contested decision, and merely confirming findings already made, the applicant's conduct after 2 October 2008.

196 Once all those different factual circumstances surrounding the removal of the Track had been established, the Commission took the view, in recitals 202 to 324 of the contested decision, that that removal, assessed in its context, had been liable to impede competition on the market for the provision of rail transport services for oil products. Consequently, it can only be held that the Commission did not in any way rely on LG's intent, anticompetitive strategy or bad faith to justify its finding that competition law had been infringed.

197 As regards the finding in recital 192 of the contested decision that, following the removal of the Track, the applicant did not seek to rebuild it, it is apparent from the logic of that decision that that finding is intended solely to support the conclusion in recital 193 of that decision, based on a range of other factors, that the applicant had removed the Track in great haste and without having first obtained the necessary funds. In other words, that finding is an objective factual circumstance concerning, among other things, the practice objected to, and is not a subjective assessment of the applicant's objectives. There is therefore no ground for inferring that the Commission relied on a factor related to the applicant's anticompetitive intent. Accordingly, the applicant's criticism that its intent after the material time was irrelevant to an assessment of the practice in question must also be rejected.

198 It follows that the first complaint of the third part must be rejected.

(2) The second complaint of the third part: material inaccuracies in the facts taken into account in assessing the applicant's bad faith

199 As regards the alleged material inaccuracies in the facts which the Commission took into account in concluding, on the basis of information post-dating 2 October 2008, that, at the material time, the applicant had acted in bad faith and with no genuine intention to reconstruct the Track, in the first place, the applicant submits that the allegation of bad faith is highly implausible, given that, as the Commission acknowledged in recital 90 of the contested decision, it was an arbitration decision of 17 December 2010 delivered following proceedings initiated by Orlen in the context of the commercial dispute between Orlen and the applicant which prompted it not to pursue further the reconstruction of the Track. Prior to that arbitration decision, and in particular at the material time, that is to say, 3 October 2008, the applicant maintains that it was pursuing the reconstruction project, since it was of the view that it was contractually obliged to reconstruct the Track.

200 In the second place, the applicant maintains, in essence, that the three factual elements post-dating 2 October 2008 upon which the Commission based the presumption of bad faith are flawed, speculative and manifestly wrong. There is, however, ample evidence in the file, such evidence not having been considered in the context of the contested decision, demonstrating that, at the material time, it intended to reconstruct the Track, including the documents produced as Annexes A.10, A.30 and A.31. In the applicant's view, its subsequent actions also provide strong evidence that, at the material time, it genuinely intended to reconstruct the Track until it was prompted by the 17 December 2010 arbitration decision to reconsider its position. Therefore, in the applicant's view, there is no factual basis to support the Commission's speculation that the applicant acted in bad faith, namely that it had no genuine intention to reconstruct the Track at the time of its removal on 3 October 2008.

201 The Commission and the intervener dispute that complaint.

202 It should be noted at the outset that, by the second complaint of the third part of the second plea, the applicant, in essence, is challenging the assessments made by the Commission in recital 192 of the contested decision, the content of which was set out in paragraph 161 above. In support of its second complaint, the applicant puts forward, in essence, two lines of argument.

(i) The first argument: the alleged influence of the 17 December 2010 arbitration decision over the decision not to reconstruct the Track

203 By its first argument, the applicant submits that the allegation of bad faith, which, in its view, is clear from recital 192 to the contested decision, is highly implausible, given that it was the 17 December 2010 arbitration decision which prompted it not to pursue further the reconstruction of the Track. The applicant states that, prior to that arbitration decision, and in particular at the material time, it was pursuing the reconstruction project because it believed that it was bound by a contractual obligation to reconstruct the Track.

204 First of all, it must be stated that, as follows from paragraphs 196 and 197 above, the Commission did not base its statement in recital 192 of the contested decision on an allegation of bad faith on the part of the applicant regarding its intention to rebuild the Track, but merely relied on to the factual circumstance that, following the removal, the applicant had not sought to reconstruct the Track. In addition, it must be stated that the Commission's finding that, following the removal of the Track, the applicant did not in fact seek to reconstruct it only supports the conclusion, made in recital 193 of the contested decision on the basis of a number of other factors set out in recitals 184 to 191 of that decision, that the applicant removed the Track in great haste and without having first obtained the necessary funds.

205 Next, it is clear from the contested decision that, even before the 17 December 2010 arbitration decision was adopted, the applicant had repeatedly informed the Lithuanian Government of the disadvantages of reconstructing the Track (recitals 92 to 95 and 103 of the contested decision).

206 Finally, the applicant cannot claim that, before the 17 December 2010 arbitration award was adopted and, in particular, at the material time, it was pursuing the project to reconstruct the Track. Indeed, for a period of more than two years between the removal of the Track and the arbitration decision, the applicant did not undertake any repair works, even though it claimed in a number of documents that the reconstruction could have been completed in around two years.

207 In the light of the foregoing, the applicant's first argument must be rejected.

(ii) The second argument: alleged errors of assessment concerning the three factors mentioned in recital 192 of the contested decision

208 By its second argument, the applicant complains, in essence, that the Commission committed errors of assessment in relation to the three factors mentioned in recital 192 of the contested decision. In particular, the applicant disputes, first, the validity of the three factors and, second, whether it was possible to take account of the three factors as evidence capable of demonstrating that it had no intention to reconstruct the Track at the time when it was removed.

209 In that regard, it is sufficient to point out that, as observed in paragraphs 196 and 197 above, the Commission did not rely in the contested decision on LG's anticompetitive intent or strategy to justify its conclusion that competition law had been infringed.

210 It follows that the second argument of the second complaint of the third part of the second plea must be rejected as ineffective.

211 It follows that the second complaint of the third part, and consequently, the third part of the second plea, must be rejected.

(d) The fourth part of the second plea: errors of assessment and errors of law in the analysis of the potential effects on competition of the practice in question

212 By the fourth part, the applicant seeks to call into question the finding, made in recitals 202 and 203 of the contested decision, that, in essence, the removal of the Track deprived LDZ of the shortest and most direct route from the Refinery to the Latvian seaports of Riga and Ventspils and that that conduct was capable of having anticompetitive effects. It also disputes the three considerations upon which, in its view, that finding is based: namely, first, that, before the removal of the Track, LDZ had a credible opportunity to offer rail transport services for Orlen's oil products from the Refinery to a nearby seaport, and thus to exert competitive pressure on the applicant; second, that, after the removal of the Track, LDZ no longer had that opportunity; and, third, that that situation led to a foreclosure of the market for the provision of rail transport services for oil products from the Refinery to the seaports of Klaipėda, Riga and Ventspils. In the applicant's view, there is no legal or factual basis to support such findings.

213 In particular, the applicant maintains that the Commission's reasoning contains, on the one hand, manifest errors of law (first complaint) and, on the other hand, manifest errors of assessment (second complaint).

(1) First complaint: errors of law

214 In support of the first complaint, claiming errors of law, the applicant puts forward, in essence, two arguments. By the first argument, it maintains that the removal of the Track on 3 October 2008 could not have anticompetitive effects. By the second argument, the applicant claims that the non-repair of the Track did not prevent LDZ from being an efficient competitor or from transporting the cargo destined for Latvia, which was previously transported via the short route and accordingly affected by the removal of the Track, by the long route ('the affected cargo').

(i) The first argument: the removal of the Track had no anticompetitive effects

215 The applicant maintains that the removal of the Track on 3 October 2008 could not have anticompetitive effects since the Track had been unavailable for traffic since the suspension of traffic on 2 September 2008. In the applicant's view, the removal of the Track as such did not deprive LDZ of the shortest and most direct route from the Refinery to the Latvian seaports of Riga and Ventspils, since it was the suspension of traffic, one month earlier, which did so. Even before the Track was removed, neither LDZ nor the applicant had had any opportunity to offer transport services using the Track since 2 September 2008. In the applicant's view, the reason why the Track could no longer be used is therefore unimportant.

216 In addition, according to the applicant, there is no evidence that the situation for LDZ would have been any different if, on 18 September 2008, the applicant had chosen Option 1, that is to say, a staggered reconstruction including initial repairs, instead of Option 2. It continues that the contested decision merely speculates that in such a counterfactual scenario (namely that the Track was not removed on 3 October 2008), LG might have considered undertaking initial repairs at a later stage. However, the applicant takes the view that that scenario is highly unlikely. First of all, given that, as a result of the financial crisis, it did not obtain any funds for an investment of LTL 40 million for the 2009-2010 period, there is no basis for the assumption that it would have received the substantial funds needed for the initial repairs (LTL 21.3 million). It would have had to go through the same process for the initial repairs as for the immediate reconstruction itself, including requesting funds from the State or the European Union. Next, Option 1, including the initial repairs, was much less efficient than Option 2 and it would have been highly irrational for the applicant nevertheless to pursue Option 1 at a later point in time. Finally, it is likely that the 17 December 2010 arbitration decision would equally have prompted it no longer to pursue the initial repairs. Consequently, according to the applicant, there is no basis for the Commission's speculation that, without the removal of the Track, 'a limited repair option might have been considered', that is to say, initial repairs as part of the staggered reconstruction at a later point in time. Therefore, it submits that in the counterfactual scenario where the Track was not removed, the competitive situation would probably not have been any different from the status quo.

217 Furthermore, the applicant observes that, as an infrastructure manager, it has a special responsibility in particular for the safe design, maintenance and operation of its rail network. According to it, the duty to minimise disruption on the rail network is therefore subject to the overriding duty of any infrastructure manager to prevent accidents and ensure safe traffic.

218 The Commission and the intervener dispute that argument.

219 As a preliminary point, it should be recalled that, in the contested decision, the Commission examined the applicant's conduct consisting of removing the Track in great haste without securing the necessary funds and without taking the normal preparatory steps for its reconstruction (recitals 182 to 201 of the contested decision). It categorised that conduct as abuse consisting of recourse to methods different from those which condition normal competition, which are capable of giving rise to anticompetitive effects of foreclosing competition on the market for the provision of rail transport services for oil products between the Refinery and neighbouring seaports by raising market entry barriers without there being an objective justification.

220 The Commission therefore did in fact categorise the removal of the Track, as such, as abusive conduct and took the view that that removal, irrespective of the suspension of traffic on the Track on 2 September 2008, might have had anticompetitive effects on the relevant market. In particular, the Commission considered that the removal of the Track was capable of preventing LDZ, acting as an efficient competitor, from offering services on the relevant downstream market and from exerting competitive pressure on the applicant.

221 In the present case, first, it should be noted that, as the Commission points out, the applicable regulatory framework imposed on railway infrastructure managers, such as the applicant, an obligation to minimise disruption and improve the performance of the rail network. In the event of disturbance to rail traffic, the railway infrastructure manager was under an obligation to take all necessary steps to restore the normal situation.

222 While, as the applicant maintains, as the infrastructure manager, that, under the applicable regulatory framework, it had a special responsibility for, in particular, the safe design, maintenance and operation of its rail network (recital 17 of Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety of the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14 (Railway Safety Directive) (OJ 2004 L 164, p. 44) and Article 24 of the Railway Transport Code), it is quite clear that the infrastructure manager is not, under that regulatory framework, obliged solely to guarantee safe traffic, but is also obliged to minimise disturbance on the rail network and to restore the normal situation following a disturbance to train movements. The infrastructure manager must take into account both obligations. It must therefore be held that, in the present case, the removal of the entire Track could not be justified solely on safety grounds, since safety had already been duly ensured by the suspension of traffic on 2 September 2008.

223 Second, as the applicant had a dominant position on the relevant market, it had a special responsibility not to allow its conduct to impair genuine, undistorted competition on that market. Therefore, when deciding on the solution to the Track Deformation, the applicant should have taken into account its responsibility under Article 102 TFEU and avoided eliminating all prospect of the Track being returned to service in the short term by means of a staggered reconstruction, by complying with its duty to minimise disturbance on the rail network by restoring the normal situation following a disturbance.

224 It follows that, irrespective of the previous suspension of traffic, the applicant, by removing the entire Track, in the factual and legal circumstances taken into account in the contested decision, failed to have regard for its special responsibility under Article 102 TFEU.

225 Third, it must be held that, although the 2 September 2008 suspension of traffic on the Track had admittedly already deprived LDZ of the opportunity to use the short route onto Lithuanian territory, as the applicant submits, it cannot be disputed that, as the Commission points out, the removal of the Track aggravated the situation prevailing after the suspension of traffic. Indeed, the removal of the Track

transformed the suspension of traffic, which was temporary in nature, into a permanent situation in which it was absolutely impossible to use the Track. The change from a temporary to a permanent situation is capable of having an effect on the competitive situation, in that potential competitors will behave differently depending on whether they believe that a return to 'normal' may occur in the short term, in the medium term or never. In that regard, it should indeed be noted that it was when Orlen finally concluded that the applicant did not intend to repair the Track in the short term that LDZ withdrew its application for a licence to operate on the Lithuanian part of the Short Route to Latvia (see paragraph 26 above). In addition, the removal of the Track made it de facto impossible to proceed with Option 1, since the first stage of that option, namely local repairs to parts of the Track which did not allow safe train traffic, could no longer be envisaged. In addition, the removal of the Track in great haste and without first obtaining the necessary funds for its reconstruction increased the risk, which materialised in the present case, that safe rail traffic would not be restored on the short route until more than 10 years later.

226 That removal could involve market foreclosure effects consisting of making access to that market more difficult, since access would be subject to less advantageous conditions. It must therefore be held that the removal of the Track was capable of giving rise to anticompetitive effects on the relevant market.

227 In view of the foregoing, the applicant is incorrect in claiming that the competitive situation in the counterfactual scenario would not have been any different from that in the status quo. Indeed, that situation could have been different, since the removal of the Track, in great haste and without securing the funds necessary for its reconstruction, aggravated the situation existing at the time of the suspension of traffic, by transforming that suspension, which was temporary in nature, into a situation in which it was absolutely impossible to use the Track. It also made the repair of the Track more difficult, as it made Option 1 impossible and did not allow Option 2 to be implemented in full.

228 That conclusion cannot be called into question by the other arguments submitted by the applicant.

229 First, as regards the argument that, since the applicant did not, due to the financial crisis, obtain funds for an investment of LTL 40 million for reconstruction for the 2009-2010 period, there is no basis for the assumption that it would have received the substantial funds needed for the initial repairs, which amount to LTL 21.3 million, and even less so since, for the initial repairs, it would have had to follow the same procedure as that followed for the immediate reconstruction itself, including requesting funds from the State or the European Union, it must be stated that, by that argument, the applicant is, in essence, seeking to justify the implementation of Option 2. However, the Commission does not criticise the applicant for having chosen Option 2 instead of Option 1, but criticises rather the manner in which Option 2 was implemented, in particular the fact that the applicant undertook the Track removal works without any preparation for reconstruction, which made it impossible to carry out Option 1. Since removal of the Track limited the options available and prevented traffic from being restored on the Short Route to Latvia, the applicant could not comply with its obligations as a monopoly undertaking made responsible by the State for managing the rail network. Consequently, the question whether the applicant might have received the substantial funds for the initial repairs is not such as to call into question the Commission's analysis.

230 In any event, by that argument, the applicant confirms that it was aware of the appropriate steps which it should have taken following the 2 September 2008 suspension of traffic on the Track. In that regard, the Commission stated in recital 49 of the contested decision that the applicant had spent EUR 107 000 to remove the Track in great haste, without requesting the funds necessary for its reconstruction and without initiating the administrative procedure to obtain them. In the present case, the applicant was not only late in requesting State funds (see paragraph 173 above), but it also failed to complete the administrative procedure necessary to obtain EU funds (see paragraph 175 above).

231 Second, the argument that Option 1 was much less efficient than Option 2 and that it would have been highly irrational for the applicant to nevertheless implement Option 1 at a later point in time cannot succeed, since the Commission did not criticise the applicant for having chosen Option 2 instead of Option 1, but rather for having removed the Track in great haste and without first securing the funds necessary for its reconstruction.

232 Third, as regards the argument that it is likely that the 17 December 2010 arbitration decision would probably also have prompted the applicant no longer to pursue the initial repairs, were Option 1 to be implemented, it should be recalled, as stated by the Commission in recital 89 of the contested decision, that that arbitration decision was limited in scope regarding the subject matter analysed and the period taken into consideration. The arbitration decision in question covered solely the interpretation of a clause of a commercial agreement concluded in 1999 between the applicant and Orlen, and analysed the facts which had occurred up to 30 September 2008. Accordingly, that arbitration decision did not consider the removal of the Track in October 2008. In addition, it should be recalled that the applicant was obliged, under the applicable regulatory framework, to take all necessary measures to restore the normal situation on the Track after a disturbance. Therefore, the applicant cannot rely on the 17 December 2010 arbitration decision to argue that it was open to it to decide not to request the funds necessary to carry out the works to reconstruct the Track and restore traffic on it.

233 Consequently, it must be held that the Commission made no error of law in taking the view in the contested decision that the removal of the Track as such, irrespective of the earlier suspension of traffic on it, was capable of having anticompetitive effects on the market.

234 It follows that the first argument of the first complaint of the fourth part must be rejected.

(ii) The second argument: the non-repair of the Track did not prevent LDZ from being an efficient competitor

235 The applicant maintains that the non-repair of the Track did not prevent LDZ from being an efficient competitor or from transporting the affected cargo via the Long Route to Latvia. First, it argues that, following the suspension of traffic on 2 September 2008, the Track could have been reused only following major renovation works, regardless of whether Option 1 or Option 2 was implemented. Therefore, according to the applicant, the only material legal question is whether the non-repair of the Track was capable of preventing LDZ, acting as an efficient competitor, from offering services on the relevant market and from exerting competitive pressure on that market. The applicant submits that that question was not, however, considered in the contested decision, which refers only to the removal as anticompetitive conduct whilst, as such, that removal had no effect on competition. Second, the applicant argues that the Commission has not demonstrated that the non-repair would probably have had an exclusionary effect, but rather that it solely referred, incorrectly, to a much lower legal test, that is to say, whether it was capable of restricting competition. Third, the contested decision also fails to consider whether, following the suspension of traffic, LDZ could have competed with LG for the affected cargo on the same route, that is to say, the Long Route to Latvia.

236 The Commission and the intervener dispute that argument.

237 In the present case, as regards the claim that the removal of the Track had no effect on competition, to the extent that it is the non-repair, following the suspension of traffic, which would have such an effect, it must be noted at the outset that the contested decision does not examine whether the non-repair of the Track might have prevented LDZ from offering services on the relevant market and from exerting competitive pressure on the applicant. However, inasmuch as the Commission was able to demonstrate that the removal of the Track as such could be categorised as a potential abuse, such examination was not required.

238 Therefore, contrary to the applicant's assertion, inasmuch as the Commission was able to demonstrate that the removal of the Track was capable of having potential effects on competition, it was not required to examine whether the non-repair of the Track could also have such effects. In any event, it must be stated that the non-repair of the Track was taken into consideration by the Commission in its analysis of the anticompetitive effects of removing the Track. The Commission examined the effect of removing the Track on the issue of whether the Track could be repaired and therefore whether the applicant could comply with the duty to restore the normal situation following the Deformation, a duty incumbent on it as manager of the Lithuanian railway infrastructure and an undertaking in a dominant position on the market.

239 As to whether the Commission did not establish to the requisite legal standard that the non-repair of the Track was capable of having anticompetitive effects by simply applying a legal test which was less strict than the test of whether there was an exclusionary effect, regardless of whether the terms ‘capable’ and ‘likely’ are, as the Commission maintains, interchangeable, it must be observed that the Commission in the present case did consider the likely effects of removing the Track (the contested decision, recitals 317 to 324 and 363).

240 As regards the claim that the Commission should have examined whether the non-repair of the Track following the suspension of traffic could prevent LDZ from competing with the applicant on the Long Route to Latvia for the affected cargo, that is to say, for the volumes which were shipped by the short route until 2 September 2008, it must be observed, as the Commission did, that that argument is based on the assumption that only the volumes transported by the Short Route to Latvia up to 2 September 2008 would have been affected by the removal of the Track.

241 In recital 158 of the contested decision the Commission defined the relevant market, on the basis of the O & D approach, as being the market for Orlen’s oil products exported by sea, that is to say, the market for the rail transport of oil products from the Refinery to the seaports of Klaipėda, Riga and Ventspils. Consequently, the cargo potentially affected by the removal of the Track was not limited to the relatively small volumes of oil products which had been transported on the Track prior to the suspension of traffic in September 2008, but represented a very significant part of the output of Orlen’s refinery which was destined for export by sea to international markets.

242 Since the applicant did not dispute the definition of the relevant market proposed by the contested decision, the Commission cannot be accused of any error in not having examined whether the non-repair of the Track after the suspension of traffic might have prevented LDZ from competing with the applicant on the Long Route to Latvia uniquely for the cargo affected.

243 In the light of all of the foregoing, it must be held that the Commission cannot be accused of any error in having failed to examine whether the non-repair of the Track could have had anticompetitive effects on the market in question.

244 Therefore, the second argument in the first complaint of the fourth part must be rejected and, consequently, the first complaint must be rejected in its entirety.

(2) The second complaint: errors of assessment regarding LDZ’s ability to compete with LG on the Long Route to Latvia

245 By its second complaint, the applicant alleges, in essence, that the Commission erred in its assessment that LDZ had a credible opportunity to compete with it via the Short Route to Latvia, but not by the long route.

246 In support of its second complaint, the applicant puts forward, in essence, two sets of arguments. By the first set of arguments, the applicant seeks to dispute the analysis in the contested decision regarding the existence of barriers to market entry and, in particular, the finding that, on the long routes to the Latvian seaports, LDZ would have been dependent on it to a greater extent (recitals 290 to 308 of the contested decision). By a second set of arguments, the applicant seeks to challenge the finding in the contested decision that the long routes to the Latvian seaports would not have been cost-efficient in comparison with the route to Klaipėda (recitals 309 to 316 of the contested decision).

(i) The arguments seeking to dispute the existence of barriers to market entry

247 By the first set of arguments, the applicant disputes the existence of alleged barriers to market entry and, in particular, the claim that LDZ would have been dependent to a greater extent (recital 300 of the contested decision) on the vertically integrated incumbent (recital 293 of the contested decision), that is to say, the applicant itself, not only for a distance of 34 km on Lithuanian territory (short route) but also for a longer distance of 152 km (long route). The applicant also disputes the finding in the contested decision that, from

an *ex ante* perspective, that situation represented a significantly higher risk for LDZ than operating on the short routes to the Latvian seaports (recital 301 of the contested decision). More specifically, the applicant seeks to challenge the finding in the contested decision that the request made by LDZ for capacity allocation on the Long Route to Latvia would have concerned much longer and significantly busier routes in Lithuania and would therefore have been more complex, thereby increasing friction with the railway infrastructure manager, that is to say, the applicant (recital 297 of the contested decision).

248 In that regard, the applicant submits, first, that the decisions relating to the allocation of infrastructure capacity in Lithuania are not adopted by it but by the Lithuanian State Railways Inspectorate ('VGI'), under the supervision of the Ministry of Transport and Communications. Decisions must be taken by VGI in a non-discriminatory manner and within a strict deadline of four months. Second, the applicant submits that LDZ obtained all the necessary regulatory authorisations within 28 days following its application to operate independently on the first part of the long route in Lithuania, that is to say, from the Latvian border to Radviliškis (Lithuania). There are, it argues, no indications that it would have been difficult, or more complex, for LDZ also to obtain the necessary authorisations for the second section of the long route. Third, the applicant states that the Commission acknowledged in the contested decision that there were no risks of over-capacity on the long route, and thus no room for friction with the applicant. Fourth, the applicant submits that, as the only railway infrastructure manager in Lithuania, it was subject to a duty not to discriminate also in relation to additional railway services. It argues that there is no basis for speculation that it would not have complied with its legal obligations. Fifth, in its view, it would be highly implausible that the approval process as well as the provision of additional services would have been simple with regard to 34 km (short route) or 60 km (first section of the long route) on Lithuanian territory, but very difficult for an additional 92 km (second section of the long route).

249 In addition, the applicant disputes that LDZ could have been more dependent on it to obtain information on access conditions and charges in relation to the long route than for such information in relation to the short route. According to the applicant, all relevant information is published in the Lithuanian Official Journal and on VGI's website, and VGI is required to ensure non-discriminatory access to infrastructure and to set the charges. Even though the 2008-2009 network statement does not specify the actual amount of the charges for additional rail services, the applicant submits that all infrastructure charges were published and publicly known. The formulas applied to calculate the charges are also included in that information. Once VGI had calculated those charges, they were published before a particular train time schedule commenced, which made it easy for any applicant to calculate the actual charges. In addition, even if there were still some uncertainty as to the exact amount of the charges for additional services, in the applicant's view, it is not plausible that that alleged lack of transparency does not constitute a barrier to entry on the short route and the first leg of the long route in Lithuania (in respect of which LDZ had obtained all required authorisations), but does constitute a substantial barrier to entry in relation to the second section of the long route.

250 The Commission and the intervener dispute that set of arguments.

251 In this regard, it must be stated that, in the contested decision, the Commission took the view, in essence, that the removal of the entire 19 km of the Track, having made the shortest and most direct route from the Refinery to the Latvian border inaccessible to competitors, was conduct consisting in recourse to methods different from those which condition normal competition and capable of giving rise to potential anticompetitive effects on the downstream market for the provision of rail transport services for oil products to the seaports of Klaipėda, Riga and Ventspils (recitals 2, 177 and 202 of the contested decision).

252 First of all, the Commission took the view that, before the Track was removed, LDZ had a credible opportunity to transport Orlen's oil products destined for seaborne export from the Refinery to the Latvian seaports via the Short Route to Latvia. The Commission also found that the applicant was seriously concerned about the possibility that Orlen might switch to LDZ's rail transport services. In addition, the Commission observed that Orlen and LDZ had spent two years exploring that possibility, and that the chair of Orlen's board of directors had stated that those negotiations had had the effect of bringing pressure to bear on LG and that LDZ had applied for a licence to operate on the Lithuanian part of the Short Route to

Latvia but not on the long routes to the Latvian seaports. Nevertheless, the Commission subsequently conducted an analysis of transport capacity and costs. Indeed, in order to confirm that assessment, the Commission noted that (i) on the basis of technical and capacity considerations, Orlen's oil products could be transported to the Latvian seaports, (ii) the Latvian seaports were a credible alternative to the port of Klaipėda for the handling of oil products, (iii) for Orlen, rail transport costs were the main criterion in choosing a route, (iv) rail transport costs depended on the distance of the route and the Member State where it was located and (iv) LDZ could have submitted a competitive offer on the short route to the Latvian seaports.

253 Next, the Commission found that, following the removal of the Track, LDZ no longer benefited from the opportunity to offer competitive rail transport services for Orlen's oil products from the Refinery to the neighbouring seaports, and could therefore no longer exert competitive pressure on LG because of the existence of high barriers to entry to the rail sector and the competitive disadvantages inherent in that sector faced by rail operators competing with the market incumbent who was also responsible for infrastructure management.

254 According to the Commission, the only opportunity for LDZ to offer competitive rail transport services for Orlen's oil products would have been to try to operate on the route to Klaipėda or on the long routes to the Latvian seaports. However, the Commission noted that the 228 km long route to Klaipėda was entirely within the territory of Lithuania and that a significant part (152 km) of the long routes to the Latvian seaports was within the territory of Lithuania. The Commission therefore found that the applicant had a competitive advantage on its own network and that LDZ's competitive position on the route to Klaipėda and on the long routes to the Latvian seaports was weaker than on the short routes to those seaports.

255 The Commission also detailed the barriers to market entry and the competitive disadvantages that a potential competitor, such as LDZ, could face on the applicant's network. The Commission focused on the most significant barriers to entry, namely access to railway infrastructure and to additional rail services (recitals 293 to 304 of the contested decision) and the lack of information and transparency regarding the conditions for market entry (recitals 305 to 308 of the contested decision). It added that, even if LDZ had been able to offer rail transport services for Orlen's oil products on the long routes to the Latvian seaports without facing barriers to entry, those routes would have been less profitable in comparison with the route to Klaipėda, with the result that those long routes to the Latvian seaports were not a competitive alternative to the route to Klaipėda.

256 Finally, the Commission concluded that the result of this was foreclosure of the market for the provision of rail transport services for oil products from the Refinery to the seaports of Klaipėda, Riga and Ventspils.

257 In the first place, in the present case, it should be noted at the outset that, by its arguments, the applicant seeks only to challenge the additional assessments made by the Commission in recital 208 et seq. of the contested decision, but does not call into question the main findings set out in recitals 205 to 207 of the contested decision, according to which, in essence, before the Track was removed, LDZ had a credible opportunity to transport Orlen's oil products destined for seaborne export from the Refinery to the Latvian seaports via the Short Route to Latvia. As regards the decisions concerning the allocation of railway infrastructure capacity, it should be noted, as the Commission has done, that the contested decision does not dispute the fact that those decisions are taken by VGI. In that connection, in recital 296 of the contested decision, the Commission acknowledged that, as regards the allocation of capacity in Lithuania, applications for access to railway infrastructure were submitted to VGI, which verified their completeness. However, the Commission went on to explain, without being contradicted by the applicant on this point, that it was the applicant which carried out the technical evaluation of the applications and prepared a draft railway timetable for VGI. Therefore, as the Commission states, LDZ's application for capacity allocation was, in fact, dependent on the evaluation made by the applicant. Furthermore, the application for capacity allocation differed from the request to obtain regulatory authorisations such as the safety certificate necessary to operate in Lithuania. Therefore, as the Commission correctly states, it is irrelevant whether, as the applicant claims, it took 28 days for LDZ to obtain all the necessary regulatory authorisations following its application to operate independently on a part of the Lithuanian section of the long routes to

the Latvian seaports. Indeed, the assessment of the barriers to entry in the contested decision is based not on the difficulty in obtaining regulatory approvals but on the difficulty in obtaining capacity allocation.

258 In the second place, as regards the argument relating to the alleged capacity constraints on the long routes to the Latvian seaports, it must be noted, as the Commission has done, that the contested decision did not claim that there were such constraints on those routes. The contested decision did, however, state that applications for capacity would have been more complex. Those applications depended on the applicant's evaluation of a longer route in Lithuania which is busier than the Lithuanian section of the Short Route to Latvia (recital 297 of the contested decision). The risk of conflicts in train paths was higher on the long routes to the Latvian seaports, given that those routes were already in use, whereas the Lithuanian part of the short route was used exclusively to transport Orlen's oil products (recital 298 of the contested decision).

259 In the third place, as regards the argument that the applicant was subject to a duty not to discriminate also in relation to additional rail services, it must be observed that the contested decision, in recitals 293 to 300 and 303, stated that the transposition of the principle of non-discrimination established under Directive 2001/14 in Lithuanian law left the applicant some leeway to impose unfavourable terms for access to the railway infrastructure and the provision of additional rail services. In particular, in recitals 293 and 294 of the contested decision, the Commission made it clear that the provision of additional rail services was not necessarily regulated or was regulated in a way which left some leeway regarding prices and the quality of the service provided. That was stated to be the case for certain maintenance services (for rolling stock), access to certain facilities (such as marshalling yards or parking and cleaning facilities for rolling stock) or back-up services (in particular in the event of a train breaking down and disrupting traffic). Therefore, if a new operator, such as LDZ, used the services of the incumbent, in the present case the applicant, the latter could largely dictate the terms upon which those services were provided, leading to uncertainty as to their quality and cost. It must be observed that none of those findings is contradicted by the applicant, which does no more than assert that there was no basis for speculation that it would not have complied with its obligations.

260 In the fourth place, as regards the arguments challenging the finding in the contested decision that LDZ would have been more dependent on the applicant for obtaining information on access conditions and charges for the long route than for the short route, it should be pointed out, as the Commission does, that the contested decision acknowledges that the formulas used to calculate the infrastructure charges have been made public. However, the Commission also took the view that, on a longer route in Lithuania, LDZ would have been all the more exposed to the lack of information and transparency regarding access conditions and charges for additional rail services. In particular, in recital 308 of the contested decision, the Commission made clear that the applicant's Network Statement of 2008-2009 defined only the formula for calculating the charges for access to Lithuanian railway infrastructure. In fact, that document did not specify the actual charges for additional rail services, but mentioned only that those additional services were charged in accordance with the regulations in force. That claim does not appear to be disputed by the applicant, which in its pleadings asserts that, even if some uncertainty remained as to the actual amount of the charges for the additional services, it was not plausible that that alleged lack of transparency did not constitute a barrier to entry on the short route and on the first section of the long route in Lithuania, but that it did constitute a substantial barrier to entry in relation to the second section of the long route. Furthermore, by arguing that, although the Network Statement of 2008-2009 did not specify the actual amount of charges for additional rail services, all infrastructure charges were published and publicly known, the applicant is implicitly confirming that the document did not specify the actual charges for additional rail services. In that regard, it must be stated that that document was provided to the Court in response to a measure of organisation of procedure adopted in the present case (see paragraph 65 above) and that it does not in fact specify the amount of the actual charges for additional rail services. In addition, it must be noted, as the Commission has done, that the contested decision did not conclude that there was a lack of transparency solely with regard to the Long Route to Latvia, but rather that the lack of transparency in the prices charged for additional rail services increased the risk for LDZ on both the long route and on the route to Klaipėda, whereas that was not the case on the short route, since on that route LDZ was not

dependent on the applicant's additional services or at least was dependent on them to a lesser extent (recital 307 of the contested decision).

261 Therefore, contrary to the applicant's assertion, the Commission did not commit an error of assessment in finding that the lack of transparency regarding the actual amount of the charges for the additional services constituted a barrier to entry on the long route as well as on the route to Klaipėda.

262 In the fifth and final place, as regards the argument put forward by the applicant in its reply that the undated handwritten note referred to by the Commission in its defence did not address the question of whether operating on the long route involved a higher risk for LDZ (recital 283 of the contested decision), it must be made clear at the outset that, although the document in question is referred to in recitals 97 to 99 and in point (3) of recital 316 of the contested decision, the applicant disputed it solely in its reply. Furthermore, while the document did not explicitly concern LDZ, but a Latvian operator and potential competitor of LG, it examines the potential threats to the interests of the Klaipėda seaport and lists, under the heading 'Defence from Latvia', various barriers to entry which the applicant would have been able to put in place against any competitor from Latvia, including LDZ. Therefore, contrary to the applicant's claims, the document in question was able to be analysed in the contested decision as an item of evidence that operating on the long route represented a significantly higher risk for LDZ.

263 It follows from all of the foregoing that none of the arguments put forward by the applicant is capable of calling into question the findings in the contested decision concerning barriers to market entry and, in particular, the conclusion that LDZ would have been more dependent on the applicant as a vertically integrated incumbent operator.

264 It follows that the first set of arguments of the second complaint of the fourth part must be rejected.

(ii) The arguments disputing that the long routes to the Latvian seaports were not competitive in comparison with the route to Klaipėda

265 By a second series of arguments, the applicant disputes the claim in the contested decision that the long routes to the Latvian seaports would not have been cost-efficient in comparison with the route to Klaipėda (recitals 288 and 310 of the contested decision), such that LDZ could have exerted competitive pressure on the applicant solely on the short routes to those ports, that is to say, if the Track had been repaired.

266 In the first place, according to the applicant, that claim is implausible for a variety of reasons.

267 First, following the traffic suspension and by letter of 29 September 2008, LDZ made an offer to Orlen to provide it with rail transport services to Riga via both the Short Route and the Long Route to Latvia. LDZ itself therefore apparently assumed that it was also able to compete effectively on the long route in relation to Orlen's products transported by LG to Klaipėda. Second, in an internal document from 2009, LG concluded that the differences between the short route and the long route were not essential in terms of distance and prices. In its opinion, it is therefore implausible that LDZ could have competed with LG solely on the short route, but not on the long route. Third, it maintains that there are no significant cost differences between the three routes, which also appears natural given that they all belong to the same geographic market. The fact that LDZ could have exerted pressure on the applicant in relation to Orlen's products transported to Klaipėda solely via the short route (were the Track to have been reconstructed or repaired) is, in its view, therefore highly implausible.

268 Second, according to the applicant, the Commission's cost comparison also contains numerous errors.

269 According to the applicant, the language used by the Commission in itself demonstrates that the cost comparison was not based on a sound and reliable analysis. Thus, the Commission acknowledges that 'it cannot accurately quantify the impact of these structural differences on transport costs' and that 'the cost allocation methodologies used by LG and LDZ may have been different and that may have influenced their [cost] estimations'. It also states that it is unclear 'whether or not' the Latvian ports had a significant

competitive advantage compared with Klaipėda in terms of total sea transport costs and states that the short route to Riga 'appears to be the most attractive'. Second, it asserts that when the Commission compared the applicant's and LDZ's cost breakdowns, LDZ's single largest cost component on the Latvian section of the long route to Riga was the category 'other', whereas the applicant's 'other' costs accounted for a much lower percentage of its total costs on the Lithuanian section of the long route to Riga or Ventspils. In addition, the applicant claims that the Commission has not taken into account the fact that the applicant and LDZ used completely different cost allocation methodologies, rendering any cost comparison arbitrary. By way of example, it argues that, based on the data used by the Commission, the applicant's cost per tonne-kilometre (tkm) was rather static and did not alter according to distance, whereas LDZ's cost estimates decreased on longer routes, due to the costs of loading and unloading freight being estimated as fixed costs, to which the actual transport costs in proportion to the length of the route and to the volume of freight were then added.

270 In addition, according to the applicant, even if the data in Figure 5 of the contested decision, entitled 'Costs per tonne for the transportation of [Orlen's] oil products (Long Routes and Route to Klaipėda)', were based on comparable cost allocation methodologies, they would not support the claim that LDZ could not have credibly competed on the long route in relation to the Orlen products transported to Klaipėda. Furthermore, the applicant points out that the Commission, in the contested decision, acknowledged that the costs in Figure 5 for the long routes were probably overestimated. Nevertheless, the costs on those routes appear to be largely comparable to the costs on the route to Klaipėda, such that LDZ would have been able to exert competitive pressure, particularly taking into account the general cost advantages which, according to the Commission, it had over the applicant with respect to, for example, energy prices and labour costs as well as sea transport costs. In the applicant's view, all of those elements are confirmed by the fact that LDZ made an offer to Orlen in September 2008 to transport its products from Klaipėda to the Latvian seaports on the long route. In addition, it claims that the cost data used in Figure 5 are substantially below the prices actually paid per tonne by Orlen for rail transport services on the route to Klaipėda in 2008 and 2009.

271 The Commission and the intervener dispute that set of arguments.

272 In the present case, first, with regard to the letter of 29 September 2008, by which LDZ made an offer to Orlen for rail transport services to Riga via both the short route and by the long route to the Latvian seaports, it should be noted that, in that letter, LDZ proposed draft pricing for the year 2008 for the transport of oil products via the territory of Latvia to the port of Riga. In particular, it is clear from the contents of that letter that the draft pricing proposed by LDZ concerned solely the Latvian sections of the long and short routes to Riga. Indeed, the letter mentioned the routes Maitene – Mangali (Riga) and Rengė – Mangali (Riga). Therefore, the applicant cannot draw a conclusion solely on the basis of the letter in question as to whether LDZ's offer was competitive, since that offer did not take account of the prices which it charged on the Lithuanian sections of the two routes. Furthermore, the applicant has provided no evidence to support its argument made in the reply that, when it submitted the offer to Orlen, it was clear that LDZ was perfectly familiar with the competitive situation and the relevant prices and costs. Moreover, the mere existence of an offer does not imply that it is actually competitive or, in any event, as competitive as it could have been if the Track had not been removed. Therefore, the applicant cannot draw any conclusions from that letter as regards LDZ's ability to place it under effective competitive pressure on the long route.

273 Second, as regards the internal document from 2009 in which the applicant concluded that the differences between the short and long routes were not essential in terms of distance and price, it should be pointed out that the document in question is the document referenced as ES 9/VJ6. The conclusion to which the applicant refers is found on the third and final page of that document, in which it compared transporting Orlen's products to Jelgava (Latvia) via Šiauliai (Lithuania) with direct transport via Rengė. Therefore, that conclusion does not compare the costs of the entire routes to the Latvian seaports and does not relate to the transport of Orlen's oil products for export by sea. In addition, the fact that, for the applicant, the

differences between the short and long routes to the Latvian seaports are not essential in terms of distance and price does not necessarily follow for LDZ.

274 Consequently, neither the offer referred to in paragraph 272 above nor the internal document referred to in paragraph 273 above can call into question the Commission's finding that the long routes to the Latvian seaports would have been less profitable in comparison with the route to Klaipėda.

275 Third, as regards the argument that there are no significant cost differences between the long routes to the Latvian seaports, the short routes to the Latvian seaports and the route to Klaipėda, it must be stated that, while it is true that, unlike the route to Klaipėda, the long route to Riga included a significant part (86 km) in Latvia, where, according to the contested decision, rail transport costs, in particular energy and labour costs, were lower than in Lithuania (recital 253 of the contested decision), it is also true that the long route to Riga included a section, namely 152 km, in Lithuania. Therefore, since the Commission calculated the costs relating to the routes to the Latvian seaports by adding the applicant's costs and LDZ's costs on their respective sections of the route, in order to assess the difference in costs between the routes, the costs relating to the Latvian part of the long route to Riga must be added to the costs relating to the Lithuanian part of that route. Furthermore, the same applies to the cost calculation for the long route to Ventspils. In addition, the applicant does not dispute the costs set out by the Commission in Figure 5 in recital 311 of the contested decision. That table illustrates that, contrary to the applicant's assertion, in 2008 and in 2009, the costs of transporting Orlen's oil products per tonne were between [*confidential*] and [*confidential*]% higher on the long route to Riga than on the route to Klaipėda and between [*confidential*] and [*confidential*]% higher on the long route to Ventspils than on the route to Klaipėda. Therefore, contrary to the applicant's assertion, there is no sufficiently conclusive evidence demonstrating that LDZ could have, as an efficient competitor, offered services on the relevant market in competition with the applicant on the long route and thus placed the applicant under competitive pressure.

276 Fourth, as regards the arguments challenging the Commission's cost comparison, the following matters must be noted.

277 First, as regards the considerations concerning the language used by the Commission in its cost comparison analysis, it must be stated that it cannot be deduced from selected terms used that the cost comparison is not based on a sound and reliable analysis. Furthermore, it must be pointed out, as the Commission does, that the reference to it being impossible to quantify accurately the impact of those structural differences on transport costs (recital 253 of the contested decision) forms part of an analysis of the factors affecting the cost of rail transport and in no way alters the conclusion reached by the analysis concerning the profitability of the short route to Riga (recitals 254 and 255 of the contested decision). The reference to the fact that the cost allocation methodologies used by the applicant and LDZ might have been different, which might have influenced their cost estimates (recitals 271 to 273 of the contested decision), is clarified by the contested decision, which explains why that factor is irrelevant and does not affect the comparison of the costs of the applicant and those of LDZ. In addition, one of the phrases in the contested decision disputed by the applicant has been taken out of context. The full sentence in the decision was in fact as follows: 'The ports of Riga and Ventspils therefore could have been a credible alternative to the port of Klaipėda at the very least, whether or not they can also be said to have had a significant competitive advantage in terms of total sea transport costs' (recital 240 of the contested decision). Finally, as regards the statement, in a different section of the contested decision, that, based on analysis of the factors affecting the cost of rail transport, the short route to Riga appears to be the most attractive, that claim is then supported by a more detailed comparison of route costs in recitals 255 to 266 of the contested decision, which demonstrates that the short route to Riga is indeed the most attractive.

278 Second, as regards the applicant's argument that the contested decision does not compare 'apples with apples', the Commission is correct to point out that the contested decision responds at length to the applicant's arguments concerning the cost analysis and, in particular, to the objections as to whether it is possible to compare them. Indeed, it is clear from recital 269 of the contested decision that the applicant had already claimed in its response to the statement of objections that its costs and those of LDZ were not comparable. The Commission made a detailed rebuttal of the applicant's arguments in recitals 270 to 284

of the contested decision. In particular, it explained, in recitals 272 and 273 of that decision, that it took into account the fact that the cost calculation methodologies of the applicant and of LDZ may have been different and that this may have influenced their estimations of a cost component, such as administrative expenses. However, it also stated that such a methodological difference would have produced only a limited difference in costs. Similarly, in recital 274 of the contested decision, the Commission explained why it had taken the view that the cost estimates of the applicant and of LDZ covered the same services and included the same cost components, at least for the year 2009. As is clear from footnote 406 to the contested decision, since the applicant did not provide a cost breakdown for the year 2008, the Commission analysed the data relating to the applicant's costs for the year 2009.

279 The applicant cannot therefore rely on the argument that the cost assessment methodology is incorrect in order to challenge the cost comparison made by the Commission in the contested decision and to claim that that comparison is arbitrary.

280 That conclusion cannot be challenged by the applicant's other arguments.

281 First, as regards the argument that, even if the data in Figure 5 of the contested decision were based on comparable cost allocation methodologies, they would not support the claim that LDZ could not have been a credible competitor on the long routes to Latvian seaports, it should be noted that the applicant has provided no evidence to demonstrate that the [*confidential*]% difference between the costs on the long route to Riga in 2008 [*confidential*] and the costs on the route to Klaipėda [*confidential*] should have been completely eliminated in view of the fact that the costs noted by the Commission in Figure 5 of the contested decision for the long routes were 'probably over-estimated'. Furthermore, to the extent that the applicant's argument is claiming that the difference of [*confidential*]% between the costs on the long route to Riga in 2008 [*confidential*] and the costs on the route to Klaipėda [*confidential*] was not significant, it should be pointed out, as the Commission does, that the contested decision also demonstrated that, even following a conservative approach, the costs of the long route to Ventspils were [*confidential*]% higher in 2008 and [*confidential*]% higher in 2009 than the costs of the route to Klaipėda. A difference of [*confidential*]% or [*confidential*]% is significant and difficult to challenge on the basis of overestimation.

282 Second, as regards the argument that the cost data used in Figure 5 [*confidential*] are significantly lower than the prices that Orlen actually paid per tonne for rail transport services on the route to Klaipėda in 2008 [*confidential*] and in 2009 [*confidential*], with the result that, according to the Commission's logic in recitals 281 to 284 of the contested decision, LDZ could have exerted competitive pressure on the applicant if it had chosen to do so, it must be stated that, contrary to the applicant's assertion, the costs calculated by the Commission for the long route to Riga are only very slightly lower than the prices which Orlen actually paid for rail transport services on the route to Klaipėda. A profit margin, however small, must be added to the costs, not to the prices, which further reduces the difference with the prices that Orlen actually paid for rail transport services on the route to Klaipėda.

283 In view of all of the foregoing, it must be held that the Commission cannot be accused of any error of assessment in having concluded that the long routes to the Latvian seaports would not have been competitive in comparison with the route to Klaipėda.

284 Consequently, the second complaint of the fourth part and, therefore, the fourth part of the second plea as a whole must be rejected.

285 It follows from all of the foregoing that the second plea must be rejected as unfounded.

3. Third plea in law: infringement of Article 296 TFEU and of Article 2 of Regulation No 1/2003 due to insufficient evidence and a failure to state reasons

286 By the third plea, the applicant claims, in essence, that the Commission infringed Article 296 TFEU by failing to state reasons and infringed Article 2 of Regulation No 1/2003 by failing to provide sufficient evidence to support its finding in the contested decision of an infringement of Article 102 TFEU.

287 The Commission and the intervener dispute those arguments.

288 The third plea consists, in essence, of two parts, the first claiming infringement of Article 296 TFEU on the basis of a failure to state reasons and the second seeking to rely on an infringement of Article 2 of Regulation No 1/2003.

(a) The first part of the third plea: infringement of Article 296 TFEU on the basis of a failure to state reasons

289 In support of the first part, the applicant puts forward, in substance, two complaints which must be examined together. The first claims that the Commission failed to state why it departed from the established case-law on refusals to supply essential facilities and the second claims that the Commission failed to provide sufficient reasons demonstrating that there were, in the present case, exceptional circumstances relating to the Track which justified the finding of abuse.

290 It must be noted at the outset that the arguments put forward by the applicant in support of the two complaints in the first part do not concern whether the contested decision fails to state reasons or states inadequate reasons. Those arguments are conflated, in actual fact, with the criticism of the substance of the contested decision. The duty to state adequate reasons in decisions is an essential procedural requirement which must be distinguished from the question of whether the reasoning is well founded, which is concerned with the substantive legality of the measure at issue. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C−413/06 P, EU:C:2008:392, paragraph 181 and the case-law cited). It must be observed, furthermore, that such arguments have already been put forward, examined and rejected in the context of the first and second pleas in law.

291 It follows that the first part of the third plea must be rejected.

(b) The second part of the third plea: infringement of Article 2 of Regulation No 1/2003

292 As a preliminary point, it should be noted, as the Commission does, that, apart from a brief reference to Article 2 of Regulation No 1/2003 in paragraph 143 of the application, the applicant does not substantiate its allegation by indicating the parts of the contested decision which, in its view, are insufficiently substantiated. However, the applicant clarified its argument in paragraphs 28 and 29 of its observations on the statement in intervention. In particular, in paragraph 29 of those observations, it claims that the Commission did not rely on direct or documentary, precise and conclusive evidence to prove the infringement to the requisite legal standard. In any event, the applicant maintains that it has, in accordance with the case-law, put forward arguments which cast the facts established by the Commission in a different light and thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement had occurred.

293 In that respect, it must be stated that it is clear from Article 2 of Regulation No 1/2003 and from settled case-law that, in the field of competition law, where there is a dispute as to the existence of an infringement, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (see judgment of 12 April 2013, *GEMA* v *Commission*, T−410/08, not published, EU:T:2013:171, paragraph 68 and the case-law cited).

294 Although the Commission must show precise and consistent evidence to support the firm conviction that the alleged infringement was committed, it is important to point out that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement, as has been held in the case-law concerning the implementation of Article 101 TFEU.

That principle also applies in cases concerning the implementation of Article 102 TFEU (see, to that effect, judgment of 1 July 2010, *AstraZeneca* v *Commission*, T−321/05, EU:T:2010:266, paragraph 477 and the case-law cited).

295 As regards the probative value of the evidence accepted by the Commission, a distinction must be drawn between two situations.

296 First, where the Commission finds that there has been an infringement of the competition rules on the basis of the supposition that the facts established cannot be explained otherwise than by the existence of anticompetitive conduct, the EU Courts will find it necessary to annul the decision in question where those undertakings put forward arguments which cast the facts established by the Commission in a different light and which thus allow another plausible explanation of the facts to be substituted for the one adopted by the Commission in concluding that an infringement has occurred. In such a case, it cannot be considered that the Commission has adduced proof of an infringement of competition law (see, to that effect, judgments of 28 March 1984, *Compagnie Royale Asturienne des Mines and Rheinzink* v *Commission*, 29/83 and 30/83, EU:C:1984:130, paragraph 16, and of 31 March 1993, *Ahlström Osakeyhtiö and Others* v *Commission*, C−89/85, C−104/85, C−114/85, C−116/85, C−117/85 and C−125/85 to C−129/85, EU:C:1993:120, paragraphs 126 and 127).

297 Second, when the Commission relies on evidence which is, in principle, sufficient to demonstrate the existence of the infringement, it is not sufficient for the undertaking concerned to raise the possibility that a circumstance has arisen which might affect the probative value of that evidence in order for the Commission to bear the burden of proving that that circumstance was not capable of affecting the probative value of that evidence. On the contrary, except in cases where such proof could not be provided by the undertaking concerned on account of the conduct of the Commission itself, it is for the undertaking concerned to prove to the requisite legal standard, first, the existence of the circumstance relied on by it and, second, that that circumstance calls into question the probative value of the evidence relied on by the Commission (see judgment of 15 December 2010, *E.ON Energie* v *Commission*, T−141/08, EU:T:2010:516, paragraph 56 and the case-law cited).

298 In the present case, it is clear from the analysis of the second plea in law in the action that the Commission did not find an abuse of a dominant position on the basis of the supposition that the facts established could not be explained otherwise than by the existence of anticompetitive conduct. Rather, it relied on evidence which, as a rule, was sufficient to demonstrate the existence of the contested infringement. Furthermore, the arguments which the applicant puts forward in order to cast a different light on the facts established by the Commission do not allow any other plausible explanation to be substituted for the one adopted by the Commission in concluding that an infringement had occurred.

299 Therefore, having regard to the case-law referred to in paragraphs 292 to 297 above, it must be held that the Commission has not infringed Article 2 of Regulation No 1/2003.

300 It follows that the second part of the third plea must be rejected and, consequently, that the third plea must be rejected in its entirety.

4. Fifth plea in law: infringement of Article 7 of Regulation No 1/2003, in that the decision ordered a disproportionate remedy

301 By its fifth plea, the applicant claims that the contested decision infringes Article 7 of Regulation No 1/2003 in that it imposed on it a disproportionate remedy.

302 In particular, first, it submits that, under Article 7 of Regulation No 1/2003, it could be required only to restore the competitive situation that existed before the Track was removed and that, prior to that removal, it had already been impossible to use the Track since the suspension of traffic on 2 September 2008. It argues that the investment required in a new non-essential facility would go beyond the restoration of the status quo ante and would be unprecedented and disproportionate.

303 Second, the applicant claims that, since, prior to the suspension of traffic, the Track was used by only one customer for a small part of its output and that customer now uses an alternative route, it is unclear whether that customer would use the new Track.

304 Third, the applicant states that the reconstruction in question would require a huge investment that would force it to allocate its resources to favour one single customer whose demand is limited, to the detriment of other routes.

305 Fourth, the applicant claims that the requirement to reconstruct the Track would be disproportionate if it were not permitted to require the only two potential beneficiaries of the new facility to pay a fair and reasonable share of the reconstruction costs.

306 Fifth, the applicant submits, in response to the Commission's defence, that, unlike in the 'Microsoft case' on which the Commission relies, in the present case it is investment in a completely new facility which is at stake and not the sharing of an existing facility.

307 Furthermore, it should be noted that the applicant, on 9 March 2018, issued a press release stating that it had agreed an action plan with the Commission under which the Track would be restored by the end of 2019. According to press reports, an agreement for the reopening of traffic on the Track was, in addition, signed by the applicant and Orlen on 14 August 2018. At the hearing, the applicant and the intervener confirmed that the work to reconstruct the Track had been completed in December 2019 and that, following tests that were in progress on the day of the hearing, the Track was expected to be reopened to traffic by the end of February 2020.

308 The Commission and the intervener dispute the applicant's arguments.

309 As a preliminary point, it must be recalled that Article 7(1) of Regulation No 1/2003 provides, inter alia, that where the Commission, acting on a complaint or on its own initiative, finds that there is an infringement of Article 101 TFEU or of Article 102 TFEU, it may by decision require the undertakings and associations of undertakings concerned to bring that infringement to an end. Article 7(1) further provides that, if the Commission has a legitimate interest in doing so, it may also find that an infringement has been committed in the past (judgment of 9 September 2015, *Philips* v *Commission*, T−92/13, not published, EU:T:2015:605, paragraph 132).

310 The principle of proportionality, which is among the general principles of EU law, requires that measures adopted by the EU institutions should not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T−111/08, EU:T:2012:260, paragraph 323 and the case-law cited).

311 In that regard, the Court has already held that Article 7 of Regulation No 1/2003 expressly indicated the extent to which the principle of proportionality applies in situations covered by that article. In accordance with Article 7(1) of Regulation No 1/2003, the Commission may impose on the undertakings concerned any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end (judgment of 29 June 2010, *Commission* v *Alrosa*, C−441/07 P, EU:C:2010:377, paragraph 39).

312 In addition, it has been made clear that, while the Commission undoubtedly had the power to find that an infringement exists and to order the parties concerned to bring it to an end, it was not for the Commission to impose on the parties its choice from among all the various potential courses of action which were in conformity with the Treaty (judgment of 18 September 1992, *Automec* v *Commission*, T−24/90, EU:T:1992:97, paragraph 52), nor to decide on the precise arrangements for implementing the various courses of action (see, to that effect, order of 20 November 2008, *SIAE* v *Commission*, T−433/08 R, not published, EU:T:2008:520, paragraph 37).

313 In the present case, the contested decision, in addition to imposing a fine of EUR 27 873 000 pursuant to Article 23(2) of Regulation No 1/2003, required the applicant, pursuant to Article 7 of that regulation, to bring the infringement to an end and to submit to the Commission within three months a proposal for measures to that effect (recital 395 and Article 3 of the contested decision). In particular, in recital 394 of the contested decision, the Commission stated that several structural or behavioural remedies could bring the infringement to an end by restoring the competitive situation which existed before the Track was removed, either by reconstructing it or by eliminating the disadvantages facing competitors on the alternative routes to the seaports of Klaipėda, Riga and Ventspils described in section 7.4.2 of the contested decision.

314 Therefore, the contested decision did order the applicant to bring the infringement to an end and, in taking the view that several structural or behavioural remedies could be relevant to that end, proposed, as the applicant acknowledges, two options, namely reconstructing the Track or eliminating the disadvantages facing competitors on the alternative routes to the seaports of Klaipėda, Riga and Ventspils. It follows that, in accordance with the case-law referred to in paragraphs 311 and 312 above, the contested decision provided for various remedies capable of bringing the infringement to an end without imposing a choice between them. Indeed, by inviting the applicant to submit proposed remedies, the Commission left it free to decide how to bring the infringement to an end. In particular, the Commission left the applicant free to choose how to eliminate the disadvantages facing competitors on alternative routes to the seaports of Klaipėda, Riga and Ventspils, were it not to opt for reconstruction of the Track.

315 In the first place, the applicant submits that the second option, namely eliminating the disadvantages facing competitors on alternative routes to the seaports of Klaipėda, Riga and Ventspils, was not a viable remedy. It argues that the elimination of those disadvantages and, in particular, LDZ's dependence on it as a vertically integrated incumbent would involve an unbundling of ownership with a view to divesting the functions of railway infrastructure manager to another entity and maintaining only the activities carried out as a provider of rail transport services. Such ownership unbundling would, according to the applicant, require new legislation to be adopted by the Lithuanian parliament, over which LG has no influence. In addition, it could not survive economically in such a scenario because it would have to compete with railway freight providers from the countries of the Commonwealth of Independent States (CIS). Therefore, the only viable option was to reconstruct the Track. In its reply, it adds that legislative action would also be necessary to discharge it from its responsibility under Article 24(6) of the Railway Transport Code to provide a technical evaluation to VGI.

316 In that regard, it should be pointed out, first, that, as was observed in paragraph 314 above, in accordance with the case-law referred to in paragraph 312 above, the Commission neither imposed nor determined specific arrangements to eliminate the disadvantages facing competitors on the alternative routes to the seaports at Klaipėda, Riga and Ventspils, were the applicant not to opt to reconstruct the Track. In particular, the Commission did not require the ownership of the company to be unbundled nor new legislation to be adopted.

317 In any event, it must be stated, as the Commission does, that the applicant's argument that elimination of the disadvantages faced by competitors on the other routes to the seaports of Klaipėda, Riga and Ventspils would necessarily require a full ownership unbundling is not substantiated. The fact that during the administrative procedure the Commission required such ownership unbundling as a condition for a commitment decision based on Article 9 of Regulation No 1/2003, even if it were established, does not prove that such unbundling was the only method of eliminating the disadvantages faced by competitors on the other routes to the seaports at Klaipėda, Riga and Ventspils, and in particular LDZ's dependence on the applicant. The same applies with regard to the failure, due to pressure from various stakeholders, of the Commission's initial proposal in the framework of the fourth railway package to introduce a strict separation between the infrastructure manager and the railway operator. While the European Parliament document entitled 'The Fourth Railway Package' and dated March 2016, to which the applicant refers, states that the final version of the Fourth Railway Package proposal makes no provision for 'mandatory unbundling', it adds that vertically integrated undertakings are accepted, provided that the infrastructure

manager is fully independent and has effective decision-making rights. It follows that the document referred to by the applicant itself confirms that there is an alternative to full ownership unbundling.

318 It is clear that, in the light of the analysis of anticompetitive effects carried out by the Commission in the contested decision, the elimination of the disadvantages facing competitors on the alternative routes to the seaports of Klaipėda, Riga and Ventspils, described in section 7.4.2 of the contested decision, constituted an appropriate remedy to terminate the contested infringement. That remedy, as one of the possible options to bring the infringement to an end (recital 394 of the contested decision), was therefore a proportionate measure to terminate the contested infringement.

319 In the second place, the applicant submits that reconstruction of the Track is a disproportionate and unprecedented remedy.

320 In that regards, it must be stated, as the Commission does, that the Track reconstruction remedy, as one of the possible options to ensure the effectiveness of the contested decision (recital 394) is the direct consequence of the finding that the applicant's illegal act, namely the removal of that Track, and is confined to bringing the infringement at issue to an end (see, to that effect, judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T−111/08, EU:T:2012:260, paragraph 325).

321 That finding cannot be invalidated by the applicant's other arguments.

322 First, as regards the argument that, prior to its removal, the Track was in very poor condition and, since the suspension of traffic on 2 September 2008, could no longer be used, and that the Commission did not consider whether the applicant was required, under Article 102 TFEU, to undertake repair works, it is clear that that argument is based on an erroneous premiss. That premiss is that the Commission should have categorised as abuse the failure to repair the Track after the suspension of traffic on it and should have analysed the present case in the light of the case-law on access to essential facilities. Therefore, in the light of the observations set out in the context of the analysis of the first plea, that argument cannot succeed.

323 Second, as regards the argument that the contested decision appears to require the applicant to invest in new infrastructure which is accessible only to assist a competitor, which would go far beyond a mere restoration of the status quo ante and would be not only unprecedented but also disproportionate, it must be stated that, contrary to the applicant's assertion, the contested decision did not require it to invest its resources in new infrastructure which is accessible only to assist a competitor. On the contrary, it is clear from the contested decision that the applicant was obliged, under the regulations in force, to ensure good traffic conditions on the Track and that the State should have ensured funding for that. In particular, it is apparent from the national legislation that the applicant was required to take all necessary measures to repair the Track, including applying to the Lithuanian Government to obtain (i) a decision in favour of carrying out the works to repair or reconstruct the Track and (ii) the public funds necessary for their implementation. Therefore, contrary to the applicant's assertion, by requesting the reconstruction of the Track, the contested decision does not go beyond a mere restoration of the status quo ante.

324 Furthermore, the Commission decisions referred to by the applicant to prove the unprecedented nature of the remedy in question cannot call that finding into question, since those decisions, unlike the present case, concern refusals to provide access to an essential facility. Moreover, it is irrelevant that, prior to the suspension of traffic on 2 September 2008, the Track was used by only one customer and solely for an allegedly small portion of its output. Similarly, it is irrelevant that there is an alternative route which that customer used immediately following the suspension of traffic.

325 In addition, the applicant cannot, in order to challenge the disproportionate nature of the remedy imposed, rely on the argument that reconstructing the Track would require a huge investment (approximately LTL 40 million in 2008) and would force it to allocate its very limited resources to favour one single customer. In fact, if the applicant finds that it has to reconstruct the Track without having the necessary resources available, that is simply the consequence of its conduct, namely its decision to remove the Track

in great haste and without seeking the agreement of the State or securing the funds necessary for its reconstruction.

326 Third, as regards the applicant's argument that it would be disproportionate to require it to reconstruct the Track if it were not permitted to require the only two potential beneficiaries of the new facility, namely Orlen and LDZ, to contribute to the reconstruction costs, the following must be noted.

327 In the first place, as is clear from recitals 73 and 74 of the contested decision, on 22 October 2009, Orlen contacted the applicant by letter stating that it was willing to cover the Track reconstruction costs and to discuss the possibilities of recovering its investment. Orlen never received a formal response to its offer and was only informed verbally at a meeting with the chair of the applicant's board of directors (who was at the time also the Vice Minister for Transport and Communications) of the applicant's refusal. In particular, the applicant pointed out that, pursuant to the law governing the activities of railway infrastructure management, the creation, upgrading and development of public railway infrastructure could not be financed by private investment. In addition, in its 2009 strategic business plan for the period from 2010 to 2012, the applicant provided two further explanations for rejecting Orlen's offer. It stated, first, that, in order to be able to take out a loan, it would have had to initiate an open tendering procedure in which it could not be guaranteed that Orlen would be successful and, second, that it had reached its borrowing limit and could not have borrowed more without the consent of its creditors. Therefore, the applicant cannot rely on the allegedly disproportionate nature of the remedy imposed on the ground that it was not permitted to require Orlen and LDZ to contribute to the reconstruction costs.

328 In the second place, the applicant could not expect the Commission to permit it to request Orlen and LDZ to contribute to the reconstruction costs since such permission would have allowed it to transform the benefits of the abuse into remuneration (see, to that effect, judgment of 27 June 2012, *Microsoft* v *Commission*, T−167/08, EU:T:2012:323, paragraphs 141 and 142). In that regard, the comparison made by the applicant with the cases which gave rise to the judgment of 6 April 1995, *RTE and ITP* v *Commission* (C−241/91 P and C−242/91 P, EU:C:1995:98), is not relevant. Indeed, the abuse found in the cases which gave rise to that judgment concerned a refusal to grant access to raw information contained in television programme listings. However, such access is normally subject to the payment of a fee in return.

329 It follows that, by requiring the applicant to bring the infringement to an end, either by restoring the competitive situation which existed before the Track was removed by reconstructing it or by eliminating the disadvantages facing competitors on the alternative routes to the seaports at Klaipėda, Riga and Ventspils, the Commission did not infringe Article 7 of Regulation No 1/2003.

330 Therefore, the fifth plea must be rejected in its entirety.

5. Fourth plea in law: infringement of Article 23(3) of Regulation No 1/2003, in that the contested decision is vitiated by errors of law and of assessment concerning the setting of the amount of the fine

331 In support of its fourth plea, the applicant criticises the Commission on the ground that it made various errors of law and of assessment in imposing a fine on it.

332 This plea is, in essence, divided into two parts. By the first part, the applicant maintains that, in imposing a fine on it, the Commission made an error of law and of assessment. By the second part, put forward in the alternative and seeking a reduction in the amount of the fine, the applicant claims that the Commission made an error of law and of assessment by setting a disproportionately high fine. That second part, with the exception of an argument in the second complaint concerning the allegedly excessive length of the proceedings and seeking the annulment of the contested decision, will therefore be examined below, in the section of the present judgment dealing with the submissions, raised in the alternative, seeking a reduction in the amount of the fine.

333 In support of the first part of the fourth plea, the applicant submits that the Commission committed errors of law and of assessment in imposing a fine on it. In that regard, after recalling that, under Article 23 of

Regulation No 1/2003, the Commission may, but is not obliged to, impose a fine on an undertaking which has infringed Article 102 TFEU, the applicant maintains that imposing a fine is disproportionate where a case is novel, which is so in the present case. In particular, it submits that the Commission and the Court of Justice of the European Union have confirmed that fines were not appropriate in cases which present novel theories of harm. In addition, in the applicant's view, the Commission confirmed that a fine was not appropriate in taking the view that the case could be the subject of a commitments decision.

334 First, the applicant maintains that the case is novel and unprecedented to the extent that it has been assumed that there was a duty on a dominant undertaking to invest in a facility even though access to that facility is neither essential nor indispensable to allow an undertaking to compete with it. In addition, the applicant states that it could not have foreseen that doubts as to the seriousness of the Track defects and its intentions could be regarded as sufficient circumstances to establish an abuse.

335 Second, the applicant disputes the finding that it acted at least negligently. On the contrary, it maintains that the decision to remove the Track was taken in good faith, with the intention of reconstructing it at a later stage. In its view, the novelty of the theory upon which the contested decision is based rules out there having been an intention to commit an infringement or to act negligently in that regard.

336 By the second complaint of the second part of the fourth plea, the applicant maintains that the Commission committed errors of law and of assessment in relation to the duration of the alleged infringement by finding that the infringement commenced at least from the beginning of the works removing the Track in October 2008 and was still ongoing at the date of the adoption of the contested decision. In the first place, according to the applicant, the infringement at issue could not have commenced until it had decided no longer to pursue actively the reconstruction project, that is to say, after the 17 December 2010 arbitration decision. In the second place, the applicant takes the view that the length of the administrative procedure before the Commission was excessive, which, on the one hand, unduly increased the duration of the alleged infringement, and, on the other, adversely affected the applicant's rights of defence since some of the applicant's employees involved in the relevant decision-making process had left the undertaking during that period, which hindered the preparation of its defence. Consequently, the applicant takes the view that the amount of the fine must be substantially reduced.

337 The Commission disputes the applicant's line of argument.

(a) The first complaint of the first part: the legal theory on which the contested decision is based is novel

338 By its first complaint, the applicant seeks, in essence, to argue that the conduct complained of in the contested decision constitutes a novel category of abuse and that it was unaware that it was unlawful.

339 In that regard, in the first place, it must be stated, first, that the applicant's argument concerning the alleged novelty of the contested abusive conduct is based on an erroneous interpretation of the contested decision. Contrary to the applicant's assertion and as already stated, the contested decision did not impose on it a duty to invest in infrastructure which is neither essential nor indispensable to enable a competitor to compete with it. Nor did it require the applicant, as an undertaking in a dominant position, to subsidise a competitor solely to reduce its risks of market entry. As has already been noted on several occasions, the Commission was correct in finding in the contested decision that, by removing the Track in great haste, without securing the necessary funds and without taking the normal preparatory steps for its reconstruction (recitals 182 to 201 of the contested decision), the applicant had engaged in abusive conduct consisting of recourse to methods different from those which condition normal competition. It also found that that conduct was capable of causing potential anticompetitive effects of foreclosing competition on the market for the provision of rail transport services for oil products between the Refinery and neighbouring seaports, by raising barriers to market entry without any objective justification. In that regard, it must be stated that the abusive nature of conduct such as that of the applicant, seeking to keep competitors away from the market, has already been found to be unlawful by the EU Courts (see, to that effect, judgment of

6 December 2012, *AstraZeneca* v *Commission*, C−457/10 P, EU:C:2012:770, paragraph 164). Consequently, the abusive nature of such conduct cannot be categorised as novel.

340 In the second place, it should be observed that the fact that the conduct contested by the Commission could be categorised as novel does not preclude the imposition of a fine. The Court has already found that, while there were cases in which the Commission did not impose any fine or imposed a symbolic fine in the absence of precedents, in other cases the Commission had imposed high fines even in situations in which there was no precedent in relation to conduct with the same features (see, to that effect, judgment of 26 October 2017, *Marine Harvest* v *Commission*, T−704/14, EU:T:2017:753, paragraph 392). Furthermore, it must be clarified that the decision mentioned by the applicant in support of its argument, namely Commission Decision C(2014) 2892 final of 29 April 2014 relating to proceedings under Article 102 [TFEU] and Article 54 of the EEA Agreement (case AT.39985 – Motorola – Enforcement of GPRS standard essential patents, paragraph 561) does not appear to be relevant. That decision is not based solely on the fact that the conduct in question had never previously been categorised as abusive by the EU Courts, but also on the fact that national courts had come to different conclusions on that question.

341 In addition, it is clear from the case-law that the fact that an abuse is without precedent cannot call into question the gravity of an infringement or lead to a reduction in the amount of the fine. In particular, even in the area of calculation of fines, the Court has already found that the fact that conduct with the same features has not yet been examined in past decisions does not exonerate an undertaking (see, to that effect, judgments of 9 November 1983, *Nederlandsche Banden-Industrie-Michelin* v *Commission*, 322/81, EU:C:1983:313, paragraph 107, and of 1 July 2010, *AstraZeneca* v *Commission*, T−321/05, EU:T:2010:266, paragraphs 901 to 903).

342 In light of the foregoing, the first complaint of the first part must be rejected.

(b) The second complaint of the first part: the applicant did not act negligently

343 As regards the second complaint, which claims that the applicant did not act at least negligently, it must be recalled that, in recital 371 of the contested decision, the Commission found that, on the basis of the facts described in the contested decision and the assessment contained in it, the infringement had been committed either with the intention of foreclosing competition or at least negligently since the applicant had disregarded the fact that, by removing the Track, it would foreclose competition on the market for the provision of rail transport services for oil products between the Refinery and the seaports of Klaipėda, Riga and Ventspils.

344 The applicant disputes that conclusion, arguing, in essence, that, when it implemented its decision to choose Option 2 by removing the Track, which it considered to be the necessary first step of that choice, it acted in good faith and with the intention of reconstructing the Track at a later stage.

345 In that regard, it must be recalled that, according to settled case-law, the condition that the infringement was committed intentionally or negligently is satisfied where the undertaking concerned could not have been unaware that its conduct was anticompetitive, whether or not it was aware that it was infringing the competition rules of the Treaty. An undertaking is aware of the anticompetitive nature of its conduct where it is aware of the essential facts justifying both the finding of a dominant position on the relevant market and the finding by the Commission of an abuse of that position (judgment of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T−336/07, EU:T:2012:172, paragraphs 319 and 320; see, also, judgment of 13 July 2018, *Stührk Delikatessen Import* v *Commission*, T−58/14, not published, EU:T:2018:474, paragraph 226 and the case-law cited).

346 Furthermore, it is clear from the case-law that a prudent economic operator is in no doubt that, although the possession of large market shares is not necessarily and in every case the only factor establishing the existence of a dominant position, it has, however, a considerable significance which must of necessity be taken into consideration in relation to his or her possible conduct on the market (judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 133). Accordingly, LG, the

incumbent rail operator and manager of the only existing infrastructure in Lithuania for the provision of rail freight transport services, could not be unaware of the fact that it held a dominant position on the relevant markets.

347 In addition, it must be stated that the applicant's intent or alleged good faith are not relevant for the purpose of overcoming the finding that the infringement in question was committed intentionally or negligently and that it is, therefore, capable of being punished by a fine within the meaning of Article 23(2) of Regulation No 1/2003 (see, to that effect, judgment of 6 April 1995, *Boël* v *Commission*, T−142/89, EU:T:1995:63, paragraph 116 and the case-law cited). As a diligent economic operator, LG ought to have been familiar with the principles of competition law and, where necessary, taken appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences that a given act may entail, such as, in the present case, the removal of the Track. That is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on that account be expected to take special care in assessing the risks that such an activity entails (see, to that effect, judgment of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T−336/07, EU:T:2012:172, paragraph 323 and the case-law cited).

348 Consequently, the Court considers that the applicant could not have been unaware that the practice in question could give rise to serious restrictions on competition, having regard in particular to its monopoly position, whether legal or de facto, on the relevant markets, with the result that the Commission was entitled to find that the infringement in question had been committed at least negligently and therefore justified punishment by way of a fine.

349 Moreover, the applicant cannot rely on the alleged novelty of the theory on which the contested decision is based to rule out the possibility that there was intent to commit an infringement or negligence in that regard. It is clear that such an argument is seeking solely to demonstrate that the applicant was unaware of the unlawful nature of the conduct complained of in the contested decision under Article 102 TFEU. It must, therefore, be rejected in accordance with the case-law referred to in paragraph 341 above. In any event, for the reasons set out in paragraph 339 above, in the present case, the applicant could not have been unaware of the anticompetitive nature of its conduct.

350 It follows that the Commission made no errors of law or error of assessment in finding that the applicant had acted at least negligently (recital 371 of the contested decision).

351 That conclusion cannot, furthermore, be called into question by the fact that, in the course of the administrative procedure, the Commission took the view that the case could be the subject of a commitments decision. As the Commission points out, the fact that, in the context of the administrative procedure, it might have considered accepting a commitments proposal from the applicant as a means of avoiding a fine does not mean that the Commission was of the view that it was not appropriate to set such a fine, but merely that it did not rule out the possibility of not finding an infringement and of not imposing a fine. That circumstance therefore did not prevent the Commission from ultimately concluding that it was necessary to find that there was an infringement and to impose a fine.

352 In the light of all of the foregoing, the second complaint and consequently the first part of the fourth plea must be rejected.

(c) The second complaint of the second part, in so far as it concerns the allegedly excessive length of the procedure

353 As regards the argument concerning the alleged excessive length of the administrative procedure, it should be noted that the applicant submits, first, that it affected its rights of defence and, second, that it should lead to the amount of the fine imposed on it in the contested decision being reduced.

354 As a preliminary point, it must be recalled that, in accordance with settled case-law, compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy

constitutes a general principle of EU law the observance of which the EU Courts ensure (see judgment of 19 December 2012, *Heineken Nederland and Heineken* v *Commission*, C−452/11 P, not published, EU:C:2012:829, paragraph 97 and the case-law cited).

355 The principle that an administrative procedure must be conducted within a reasonable time has been reaffirmed by Article 41(1) of the Charter of Fundamental Rights of the European Union, under which 'every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union' (see judgment of 5 June 2012, *Imperial Chemical Industries* v *Commission*, T−214/06, EU:T:2012:275, paragraph 284 and the case-law cited).

356 Furthermore, it is clear from the case-law that, where the breach of the reasonable-time principle has had a possible effect on the outcome of the procedure, that breach may entail annulment of the decision being contested (see, to that effect, judgment of 21 September 2006, *Technische Unie* v *Commission*, C−113/04 P, EU:C:2006:593, paragraph 48 and the case-law cited).

357 It must be pointed out that, as regards the application of the competition rules, the fact that a reasonable time has been exceeded can constitute a ground for annulment of decisions finding infringements only where it has been proved that the breach of the reasonable-time principle had adversely affected the rights of defence of the undertakings concerned. Save in that specific case, failure to comply with the obligation to adopt a decision within a reasonable time cannot affect the validity of the administrative procedure under Regulation No 1/2003 (judgment of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, C−105/04 P, EU:C:2006:592, paragraph 42).

358 It follows that, even if it were to be found that the overall duration of the administrative procedure was excessive and that the reasonable-time principle had been infringed, such a finding would not, in itself, suffice, in the light of the case-law cited in paragraphs 356 and 357 above, to conclude that the contested decision should be annulled.

359 Furthermore, it should be recalled that it has been held that the excessive duration of the first phase of the administrative procedure might have an effect on the future ability of the undertakings concerned to defend themselves, in particular by reducing the effectiveness of the rights of defence where they were relied on in the second phase of the procedure, because of the passage of time and the resulting difficulty in collecting exculpatory material. It is necessary, however, in such a case for the undertakings concerned to demonstrate in a sufficiently precise manner that they experienced difficulties in defending themselves against the Commission's claims, specifying the documents or testimonies that they could no longer obtain and the reasons why that was capable of compromising their defence (see, to that effect, judgments of 21 September 2006, *Technische Unie* v *Commission*, C−113/04 P, EU:C:2006:593, paragraphs 54 and 60 to 71, and of 29 March 2011, *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, C−201/09 P and C−216/09 P, EU:C:2011:190, paragraph 118).

360 In the present case, although the applicant makes an argument alleging difficulties in collecting certain exculpatory evidence because of the departure of some of its employees, it failed to support that claim with specific evidence. Although it is true that it does specify the date on which the employees in question left the undertaking, it fails to state the reasons why it would have been crucial to obtain information from those persons in order to exercise its rights of the defence and, above all, the circumstances explaining why it was no longer possible to obtain information from them (see, to that effect, judgment of 16 June 2011, *Bavaria* v *Commission*, T−235/07, EU:T:2011:283, paragraph 331).

361 In those circumstances, it must be held that the applicant has not demonstrated that its rights of defence have been adversely affected as a result of the excessive length of the administrative procedure.

362 In the light of all of the foregoing, the second complaint of the second part of the fourth plea must be rejected in so far as it concerns the allegedly excessive length of the administrative procedure.

363 It follows from all of the foregoing that the main forms of order seeking annulment of the contested decision must be rejected in their entirety.

B. The forms of order, raised in the alternative, concerning the amount of the fine

364 By its second head of claim, the applicant requests the Court, in the alternative, to reduce the amount of the fine imposed on it by virtue of Article 2 of the contested decision, on the basis that that fine was set at a disproportionate amount. It challenges, in essence, first, the percentage of the value of sales used by the Commission as the gravity factor, second, the duration of the infringement and, third, the decision to include an additional amount for deterrence in the basic amount. By its forms of order, the applicant disputes the amount of the fine on the ground of infringement of the principle of proportionality and requests the Court to reduce the amount of the fine imposed on it.

1. The complaints concerning the proportionality of the amount of the fine

(a) The first complaint: the [confidential]% gravity percentage applied by the Commission is allegedly disproportionate

365 In support of the first complaint, the applicant maintains that the [*confidential*]% gravity factor applied by the Commission is disproportionate and no reason is given regarding the nature or gravity of the conduct. In the first place, the applicant relies on the novelty of the conduct in question. In the second place, it argues that, since traffic on the Track had already been impossible since the suspension of traffic on 2 September 2008, the removal of the Track had no foreclosure effect or other negative effect on the further consolidation of the Single European rail market, relied on by the Commission in the contested decision. In the third place, it argues that there is no certainty regarding the likelihood that, if the Track had not been removed, the necessary repair works would in fact have been undertaken. In the fourth place, its view is that the gravity factor applied is disproportionate in the light of the Commission's practice in comparable cases applying Article 102 TFEU.

366 In that regard, it must be recalled that, in recitals 377 to 380 of the contested decision, in order to establish the degree of gravity of the infringement in question, the Commission took into account the following four elements:

– first, the nature of the infringement, in particular the fact that the conduct consisting of the removal of a public railway track between two Member States harmed consolidation of the single market, in particular the single European rail market;

– second, the situation on the applicant's relevant markets, namely the fact that the applicant was the only service provider in Lithuania, both on the upstream market for the management of railway infrastructure and on the downstream market for the provision of rail transport services for oil products;

– third, the geographic scope of the infringement, which covered rail links between the Refinery and the seaports of Klaipėda, Riga and Ventspils in two Member States, namely Lithuania and Latvia;

– fourth, the arrangements for the effective implementation of the infringement, namely that the abusive conduct of removing the Track had commenced on 3 October 2008.

367 In recital 381 of the contested decision, after weighing the limited geographic scope of the infringement against the very large market shares held by the applicant and the negative impact of the infringement in question on the consolidation of the single market, the Commission found that the proportion of the value of sales to be taken into account in terms of gravity factor was [*confidential*]%, which led it to apply an amount of EUR [*confidential*].

368 In the present case, in the first place, in so far as the applicant refers to the arguments put forward in support of the first part of the fourth plea concerning the allegedly novel and unprecedented nature of the case, in order to dispute the allegedly disproportionate nature of the [*confidential*]% gravity factor adopted by the Commission, it is sufficient to point out that the abusive nature of conduct such as the applicant's conduct, which was intended to keep competitors away from the market, has, as has already been stated in paragraph 339 above, been censured on a number of occasions by the EU Courts (see, to that effect, judgment of 6 December 2012, *AstraZeneca* v *Commission*, C−457/10 P, EU:C:2012:770, paragraph 164). Consequently, such conduct cannot be categorised as novel and the applicant cannot validly claim that it constitutes a novel category of abuse, which it was unaware was unlawful. The applicant's arguments in that regard cannot therefore provide any basis for the view that the [*confidential*]% gravity factor is disproportionate.

369 In the second place, as regards the argument that the removal of the Track had no foreclosure effect or other negative effect on the further consolidation of the single European rail area, it must be stated that, as was held in paragraph 233 above, the Commission was correct in taking the view in the contested decision that the removal of the Track as such, irrespective of the prior suspension of traffic on it, was capable of having anticompetitive effects on the market. It is evident in particular from the analysis of the second plea that, as the Commission found in the contested decision, the removal of the Track led to foreclosure of the market for the provision of rail transport services for oil products from the Refinery to the seaports of Klaipėda, Riga and Ventspils. In those circumstances, the applicant cannot validly plead that there are no exclusionary or negative effects for the purposes of demonstrating that the [*confidential*]% gravity factor is disproportionate.

370 In addition, the applicant is incorrect in submitting that the removal of the Track had no foreclosure effect or other negative effect on the further consolidation of the single European rail area. As the Commission stated in recital 361 of the contested decision, the removal, without objective justification, of a 19 km section of railway track linking two Member States (in the circumstances of the present case, the Republic of Lithuania and the Republic of Latvia), which is capable of preventing a significant customer from using the services of another rail operator, affects trade between Member States and constitutes conduct which appears to be contrary to the objectives underlying the consolidation of the single market for rail services and, in particular, the EU rail freight market. The consolidation of such a market would be hindered if a rail operator, enjoying a dominant position on the market, could protect itself from competition by removing, without any objective justification, public railway infrastructure linking two Member States.

371 The Commission therefore made no error in finding, in recital 381 of the contested decision, that, in view of the nature of the infringement and, in particular, of the fact that the removal of a public railway track between two Member States harmed consolidation of the single European rail market, and in view of the limited geographic scope of the infringement, that the proportion of the value of sales to be taken into account under the gravity factor in the present case could be [*confidential*]%.

372 In the third place, as regards the argument that the [*confidential*]% gravity factor was also disproportionate in the light of the Commission's practice in comparable cases applying Article 102 TFEU and that it infringed the principle of equality of treatment, it should be recalled that, in accordance with settled case-law, the Commission's practice in previous decisions cannot 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 may be an infringement of the principle of equality of treatment, since the circumstances of those cases, such as the markets, goods, undertakings and periods concerned, are not likely to be the same (see, to that effect, judgments of 21 September 2006, *JCB Service* v *Commission*, C−167/04 P, EU:C:2006:594, paragraphs 201 and 205; of 7 June 2007, *Britannia Alloys & Chemicals* v *Commission*, C−76/06 P, EU:C:2007:326, paragraph 60; and of 16 June 2011, *Caffaro* v *Commission*, T−192/06, EU:T:2011:278, paragraph 46).

373 Nevertheless, observance of the principle of equal treatment, which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference

in treatment is objectively justified, is incumbent on the Commission when it imposes a fine on an undertaking for infringement of the competition rules, as it is on any institution in carrying out all its activities. However, previous decisions by the Commission imposing fines can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the circumstances of the cases in those other decisions, such as the markets, goods, countries, undertakings and periods concerned, are comparable to those of the present case (see judgment of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T−360/09, EU:T:2012:332, paragraphs 261 and 262 and the case-law cited).

374 In the present case, however, the applicant has failed to demonstrate that the circumstances of the cases in the previous decisions on which it relies are comparable to those of the present case. The applicant relies on the Commission decision of 20 September 2016 relating to a proceeding under Article 102 TFEU and Article 54 of the EEA Agreement (Case AT.39759 – ARA Foreclosure). In that regard, however, it is clear that that decision concerned abusive conduct which is not comparable, contrary to the applicant's assertion, to the conduct which is the subject matter of the present case. That previous case concerned a refusal to provide access to an essential facility, whereas, in the present case, it has been determined in the analysis of the first plea that the removal of the Track, with the aim of keeping competitors far from the market on less advantageous conditions, cannot be analysed as a refusal to provide access to an essential facility. Similarly, as regards the Commission decision of 13 May 2009 relating to a proceeding under Article [102 TFEU] and Article 54 of the EEA Agreement (Case COMP/C−3/37.990 – Intel), by pointing out that the conduct criticised in that decision concerned conditional rebates, the applicant itself is demonstrating that the facts of that case are not comparable to those of the present case. Consequently, those decisions are not relevant with regard to compliance with the principle of equal treatment.

375 In the light of all of the foregoing, it must be held that the Commission did not infringe the principle of proportionality by setting the proportion of the value of sales used as a gravity factor for the purpose of determining the basic amount of the fine imposed on the applicant at [*confidential*]%.

(b) The second complaint, in so far as it concerns the excessive duration of the infringement on account of the starting date of the infringement being set incorrectly

376 As regards the arguments challenging the duration of the infringement on account of the starting date chosen by the Commission, it should be recalled that, in the contested decision, after finding that the infringement had commenced on 3 October 2008 and was still ongoing at the date of adoption of the contested decision, the Commission set the multiplier to be applied to the proportion of the value of sales at nine.

377 Accordingly, it is sufficient to state that the applicant's argument that it took the decision not to reconstruct the Track only after the 17 December 2010 arbitration decision has already been rejected in the context of the analysis of the second plea in the action. The applicant cannot therefore rely on that arbitration decision to argue that it was no longer required to reconstruct the Track.

378 It follows that, in the contested decision, the Commission was correct in finding that the infringement commenced on 3 October 2008, when the applicant began to remove the Track, and that it was the removal of the Track, irrespective of the suspension of traffic, that was liable to have anticompetitive effects. The Commission therefore made no error in setting at nine the multiplier to be applied to the proportion of the value of sales used to account for the duration of the infringement.

379 As regards the applicant's request for a substantial reduction in the fine imposed on it on account of the excessive length of the administrative procedure, it is sufficient to point out, in order to reject it, that the Court of Justice has already held that, although an infringement by the Commission of the reasonable-time principle could justify the annulment of a decision taken by it following an administrative procedure based on Article 101 or 102 TFEU inasmuch as it also entailed an infringement of the rights of defence of the undertaking concerned, such an infringement of the reasonable-time principle, if established, could not

lead to a reduction of the fine imposed (see judgment of 26 January 2017, *Villeroy & Boch* v *Commission*, C−644/13 P, EU:C:2017:59, paragraph 79 and the case-law cited).

380 It has also been held that a claim for damages brought against the European Union pursuant to Article 268 TFEU and the second paragraph of Article 340 TFEU constituted an effective remedy of general application for asserting and penalising such a breach, since such a claim could cover all the situations in which a reasonable period of time has been exceeded in proceedings (see, to that effect, judgment of 26 November 2013, *Groupe Gascogne* v *Commission*, C−58/12 P, EU:C:2013:770, paragraph 82).

(c) The third complaint: the additional amount of [confidential]% applied by the Commission is disproportionate

381 By its third complaint, the applicant claims that the application of an additional deterrence amount of [*confidential*]% is disproportionate. First of all, since the case is novel according to the applicant, it could not have foreseen that a new and much lower legal standard would be applied. Next, it maintains that the Commission has not imposed an additional amount in relation to a standalone infringement under Article 102 TFEU in any other case and has not provided any reasons for having departed from its previous practice. In addition, the amount of the fine is, in the applicant's view, already a deterrent, given the size of the undertaking, its method of financing and its profits. Finally, the applicant claims that any deterrence factor should be decreased for the reasons set out with respect to the gravity factor.

382 As a preliminary point, it should be recalled that, in recital 383 of the contested decision, the Commission pointed out that, in accordance with paragraph 25 of the 2006 Guidelines, irrespective of the duration of the participation of the undertaking concerned in the infringement, it could include in the basic amount of the fine an additional amount of up to 25% of the value of the sales for purposes of deterrence. The Commission also recalled in the same recital that, for the purpose of determining the value of sales to be considered in a given case, the Commission had regard to a number of factors, in particular to those referred to in paragraph 22 of the 2006 Guidelines. In recital 384 of the contested decision, the Commission therefore imposed, in view of the nature of the infringement (see recital 377 of the contested decision), an additional amount of [*confidential*]% of the value of sales, that is to say, EUR [*confidential*].

383 As regards the first argument, it must be noted that it is no different from the argument put forward in support of the first complaint in the second part of the fourth plea to dispute the gravity of the infringement. Since that argument has been rejected in the context of the analysis of the first complaint of the second part of the fourth plea, it must also be rejected in so far as it seeks to dispute the proportionality of the additional amount of [*confidential*]%.

384 As regards the second argument, which alleges that the Commission has not imposed an additional amount in relation to a standalone infringement under Article 102 TFEU in any other case and has not provided any reasons for having departed from its previous practice, it must be recalled that, at the date of adoption of the contested decision, the Commission had already applied an additional amount in relation to a standalone infringement under Article 102 TFEU in at least one decision adopted previously, namely Decision C(2017) 4444 final of 27 June 2017 relating to proceedings under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 – Google Search (Shopping)). In addition, it must be recalled, first, that, according to settled case-law and subject to compliance with the principle of equal treatment, the Commission's previous decision-making practice does not itself serve as a legal framework for the fines imposed in competition matters and, second, that the Commission has, within the framework of Regulation No 1/2003, a margin of discretion when fixing the amount of fines, in order that it may direct the conduct of undertakings towards compliance with the competition rules and that it may at any time adjust the level of fines to the needs of that policy (judgment of 16 June 2011, *Bavaria* v *Commission*, T−235/07, EU:T:2011:283, paragraph 288; see, also, judgment of 16 June 2011, *Heineken Nederland and Heineken* v *Commission*, T−240/07, EU:T:2011:284, paragraph 345 and the case-law cited). It follows that that practice by the Commission was not new and

that, in any event, the Commission was not required to state, in the contested decision, reasons for having, where appropriate, departed from its previous practice.

385 In addition, point 25 of the 2006 Guidelines provides that an additional amount may be imposed in relation to infringements which do not relate to cartels. That point states:

'Irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales as defined in Section A above in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred in point 22.'

386 In the present case, the Commission, in accordance with point 22 of the 2006 Guidelines, justified the application of the additional amount in view of the nature of the infringement and, in particular, the fact that the infringement, consisting of the removal of a public railway track between two Member States, harmed consolidation of the Single Market, and in particular the single European rail market (recitals 377 and 384 of the contested decision).

387 As regards the third argument raised by the applicant, to the effect that the fine is of an unprecedented magnitude for a small railway company which makes no or minimal profit, it must be recalled that the applicant is the Lithuanian national railway company, that it has a statutory monopoly in Lithuania for the management of railway infrastructure and a de facto monopoly on the rail freight market in Lithuania and that in 2016 its total turnover was, as is clear from recital 5 of the contested decision, EUR 409.5 million. In the light of those factors, the applicant cannot be categorised as a small railway company. In any event, the Commission is not required to reduce the fines where the undertakings concerned are small or medium-sized undertakings. The size of the undertaking is taken into consideration by virtue of the upper limit laid down in Article 23(2) of Regulation No 1/2003 and in the 2006 Guidelines. Apart from those considerations regarding size, there is no reason to treat small or medium-sized undertakings differently from other undertakings. The fact that the undertakings concerned are small or medium-sized undertakings does not exempt them from their duty to comply with the competition rules (judgment of 28 April 2010, *Amann & Söhne and Cousin Filterie* v *Commission*, T−446/05, EU:T:2010:165, paragraph 200).

388 Finally, in so far as, by its fourth argument, the applicant is seeking a reduction in the additional amount included in the basic amount because of the allegedly excessive length of the administrative procedure, it is clear that that argument must be rejected for the same reasons as those set out in paragraphs 379 and 380 above.

2. The determination of the final amount of the fine imposed on the applicant in the context of unlimited jurisdiction

389 As a preliminary point, it must be recalled that it is only after the EU Courts have finished reviewing the legality of the decision referred to them, in the light of the pleas in law submitted to them and of the grounds which, where applicable, they had raised of their own motion, that, in the event that they do not annul the decision in full, they are to exercise their unlimited jurisdiction in order, first, to draw the appropriate conclusions from their findings with respect to the lawfulness of that decision and, second, to establish, on the basis of the information which has been brought to their attention, whether it is appropriate, on the date on which they adopt their decision, to substitute their own assessment for that of the Commission, in order that the amount of the fine should be appropriate (see judgments of 17 December 2015, *Orange Polska* v *Commission*, T−486/11, EU:T:2015:1002, paragraph 67 and the case-law cited, and of 12 July 2019, *Hitachi-LG Data Storage and Hitachi-LG Data Storage Korea* v *Commission*, T−1/16, EU:T:2019:514, paragraph 56 and the case-law cited).

390 It must also be recalled that, when they exercise their unlimited jurisdiction, the EU Courts are empowered, in addition to the mere review of the legality of the penalty, to substitute, in relation to the determination of the amount of that penalty, their own assessment for that of the Commission, which adopted the measures in which that amount was initially fixed, to the exclusion, however, of any alteration of the constituent elements of the infringement lawfully determined by the Commission in the decision under examination by the Court (see, to that effect, judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C−603/13 P, EU:C:2016:38, paragraphs 75 to 77).

391 Accordingly, the EU Courts are authorised to vary the contested measure, even without annulling it, in order to cancel, reduce or increase the amount of the fine imposed and the exercise of that jurisdiction removes the final transfer to the latter of the power to impose penalties (see, to that effect, judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, 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, EU:C:2002:582, paragraphs 692 and 693; and of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C−534/07 P, EU:C:2009:505, paragraph 86; and order of 7 July 2016, *Westfälische Drahtindustrie and Pampus Industriebeteiligungen* v *Commission*, C−523/15 P, EU:C:2016:541, paragraphs 32 to 34).

392 The assessment by the Court of the appropriateness of the amounts of the fines in the light of the criteria set out in Article 23(3) of Regulation No 1/2003 may justify the production and taking-into-account of additional information which is not mentioned in the Commission decision imposing the fine (see, to that effect, judgments of 16 November 2000, *Stora Kopparbergs Bergslags* v *Commission*, C−286/98 P, EU:C:2000:630, paragraph 57, and of 12 July 2011, *Fuji Electric* v *Commission*, T−132/07, EU:T:2011:344, paragraph 209).

393 It is therefore for the Court, in the exercise of its unlimited jurisdiction, to determine the amount of the fine, having regard to all the circumstances of the case (see, to that effect, judgments of 26 September 2013, *Alliance One International* v *Commission*, C−679/11 P, not published, EU:C:2013:606, paragraph 104, and of 16 June 2011, *Putters International* v *Commission*, T−211/08, EU:T:2011:289, paragraph 75).

394 That exercise involves, in accordance with Article 23(3) of Regulation No 1/2003, taking into consideration the gravity of the infringement committed by the applicant as well as its duration, in compliance with, inter alia, the principles of proportionality, the individualisation of penalties and equal treatment, without the Court, however, being bound by the indicative rules defined by the Commission in the 2006 Guidelines (see, to that effect, judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C−603/13 P, EU:C:2016:38, paragraph 90 and the case-law cited).

395 It follows that, subject to the ceiling of 10% of the total turnover of the undertaking concerned in the preceding business year, the Court's discretion is limited only by the criteria relating to the gravity and duration of the infringement laid down in Article 23(3) of Regulation No 1/2003, which confers a broad discretion on the competent authority, provided that the principles referred to in paragraph 394 above are observed.

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

397 In the present case, first, concerning the application of the legal criterion of the gravity of the infringement, it is settled case-law that the fixing of a fine by the Court is not an arithmetically precise exercise (judgments of 5 October 2011, *Romana Tabacchi* v *Commission*, T−11/06, EU:T:2011:560, paragraph 266, and of 15 July 2015, *SLM and Ori Martin* v *Commission*, T−389/10 and T−419/10, EU:T:2015:513, paragraph 436).

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

399 The Court considers it appropriate to take account, in the exercise of its unlimited jurisdiction, of the nature of the infringement, of LG's position on the relevant markets and of the geographic extent of that infringement.

400 First of all, as regards the nature of the infringement, it must be stated that it is clear from the evidence in the file that the complete removal of the 19 km long section of the short route on which traffic had initially been suspended and which allowed the shortest and cheapest route to be used to connect the applicant's refinery to a Latvian seaport is liable to have had an anticompetitive effect of foreclosing competition on the market for the provision of rail transport services for oil products between the Refinery and the neighbouring seaports by raising barriers to market entry without objective justification.

401 Next, as regards LG's position on the relevant markets, it must be noted that LG held a monopoly on the upstream market for the management of railway infrastructure in Lithuania and was the only undertaking active on the downstream market for the provision of rail transport services for oil products by rail, which therefore conferred on it a monopoly on that market. By reason of the fact that it had that monopoly, LG had a special responsibility not to allow its conduct to impair genuine, undistorted competition on the market.

402 Finally, as regards the geographic extent of the infringement, it should be noted that, although the infringement had an impact on part of the territory of two Member States, it does, however, continue to be relatively limited. The removal of the Track concerned solely a section of a track which provided one of the various possible rail links between Latvia and Lithuania.

403 Second, as regards the duration of the infringement, it should be noted that it began on 3 October 2008 and continued until the date of adoption of the contested decision.

404 The Court therefore considers that setting the amount of the fine at EUR 20 068 650 constitutes a fair assessment of the gravity of the infringement and its duration.

405 Furthermore, the Court finds that the amount of the fine is appropriate, having regard to the need to impose on the applicant a fine which has a deterrent effect.

406 The amount of the fine imposed on the applicant is therefore set at EUR 20 068 650.

Costs

407 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

408 In the present case, the applicant and the Commission must be ordered to bear their own costs.

409 In addition, under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in paragraphs 1 and 2 of that article to bear its own costs. In the present case, Orlen must be ordered to bear its own costs.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. **Sets the amount of the fine imposed on Lietuvos geležinkeliai AB by Article 2 of European Commission Decision C(2017) 6544 final of 2 October 2017 relating to proceedings under Article 102 TFEU (Case AT.39813 – Baltic Rail) at EUR 20 068 650;**

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

3. **Orders Lietuvos geležinkeliai and the Commission to bear their own costs;**

4. **Orders Orlen Lietuva AB to bear its own costs.**

Papasavvas Kanninen Półtorak

Porchia Stancu

Delivered in open court in Luxembourg on 18 November 2020.

E. Coulon M. van der Woude

Registrar President

Table of Contents

(a) The first part of the second plea: errors in the ‘doubts’ expressed by the Commission regarding the reality of the Track defects

(1) The first complaint of the first part: there were doubts regarding the occurrence of the Deformation of the Track

(2) The second complaint of the first part: errors in the assessment of the claim that the removal of the Track was due solely to the Deformation

(3) The third complaint of the first part: errors in the assessment of the differences between the Reports of 5 September 2008 and the letters of 4 and 5 September 2008

(4) The fourth complaint of the first part: the Commission was incorrect in rejecting the arguments concerning systemic problems in the Track bed

(b) The second part of the second plea: errors of assessment in that the Commission took the view that the removal of the Track was ‘highly unusual’

(c) The third part of the second plea: errors in the Commission’s assessment of LG’s intentions at the time when the Track was removed

(1) The first complaint of the third part: error of law regarding the applicant’s anticompetitive intent being taken into account

(2) The second complaint of the third part: material inaccuracies in the facts taken into account in assessing the applicant’s bad faith

(i) The first argument: the alleged influence of the 17 December 2010 arbitration decision over the decision not to reconstruct the Track

(ii) The second argument: alleged errors of assessment concerning the three factors mentioned in recital 192 of the contested decision

(d) The fourth part of the second plea: errors of assessment and errors of law in the analysis of the potential effects on competition of the practice in question

(1) First complaint: errors of law

(i) The first argument: the removal of the Track had no anticompetitive effects

(ii) The second argument: the non-repair of the Track did not prevent LDZ from being an efficient competitor

(2) The second complaint: errors of assessment regarding LDZ’s ability to compete with LG on the Long Route to Latvia

(i) The arguments seeking to dispute the existence of barriers to market entry

(ii) The arguments disputing that the long routes to the Latvian seaports were not competitive in comparison with the route to Klaipėda

3. Third plea in law: infringement of Article 296 TFEU and of Article 2 of Regulation No 1/2003 due to insufficient evidence and a failure to state reasons

(a) The first part of the third plea: infringement of Article 296 TFEU on the basis of a failure to state reasons

(b) The second part of the third plea: infringement of Article 2 of Regulation No 1/2003

4. Fifth plea in law: infringement of Article 7 of Regulation No 1/2003, in that the decision ordered a disproportionate remedy

5. Fourth plea in law: infringement of Article 23(3) of Regulation No 1/2003, in that the contested decision is vitiated by errors of law and of assessment concerning the setting of the amount of the fine

(a) The first complaint of the first part: the legal theory on which the contested decision is based is novel

(b) The second complaint of the first part: the applicant did not act negligently

(c) The second complaint of the second part, in so far as it concerns the allegedly excessive length of the procedure

B. The forms of order, raised in the alternative, concerning the amount of the fine

1. The complaints concerning the proportionality of the amount of the fine

(a) The first complaint: the [confidential]% gravity percentage applied by the Commission is allegedly disproportionate

(b) The second complaint, in so far as it concerns the excessive duration of the infringement on account of the starting date of the infringement being set incorrectly

(c) The third complaint: the additional amount of [confidential]% applied by the Commission is disproportionate

2. The determination of the final amount of the fine imposed on the applicant in the context of unlimited jurisdiction

Costs

* Language of the case: English.

1 Confidential information omitted.