



Reports of Cases

Judgment of the General Court (Ninth Chamber) of 29 February 2016 —

Kühne + Nagel International and Others v Commission

(Case T-254/12)

(Competition — Agreements, decisions and concerted practices — International air freight forwarding services — Decision finding an infringement of Article 101 TFEU — Surcharges and charging mechanisms affecting the final prices — Whether trade between Member States affected — Errors of assessment — Duration of the infringement — Amount of the fine — Point 13 of the 2006 Guidelines on the method of setting fines — Value of sales — Mitigating circumstances — Proportionality — Rights of the defence)

1. *Competition — Fines — Amount — Determination — Discretion of the Commission — Judicial review — Unlimited jurisdiction of the EU judicature — Scope (Art. 261 TFEU; Council Regulation No 1/2003, Art. 31) (see paras 30-33)*
2. *Agreements, decisions and concerted practices — Definition of the market — Determination of the relevant market — Criteria for assessment — Substitutability of the products or services on the supply side or the demand side — Scope — Contract for international air freight forwarding services as a batch of services (Art. 101(1) TFEU; EEA Agreement, Art. 53(1); Commission Notices 97/C 372/03 and 2004/C 101/07, point 55) (see paras 41-43, 45, 46, 48, 50-52)*
3. *Agreements, decisions and concerted practices — Effect on trade between Member States — Appreciable effect — Criteria for assessment — Potential and significant effect (Art. 101(1) TFEU; EEA Agreement, Art. 53(1); Commission Notice 2004/C 101/07, point 53) (see paras 56-58, 67)*
4. *Competition — Transport — Competition rules — Air transport — Regulation No 17 — Scope — Activities directly concerning the provision of air transport services — Not included — Activities not concerning the air transport market itself, but an upstream or downstream market — Inclusion (Art. 101 TFEU; Council Regulations No 17, No 141, third recital and Art. 1) (see paras 113, 115-117, 121)*
5. *Agreements, decisions and concerted practices — Agreements between undertakings — Concept — Joint intention as to the conduct to be adopted on the market — Included — Pursuance of negotiations on certain aspects of the restriction — No effect (Art. 101(1) TFEU; EEA Agreement, Art. 53(1)) (see paras 138-140)*

6. *Agreements, decisions and concerted practices — Concerted practice — Concept — Coordination and cooperation incompatible with the obligation on each undertaking to determine independently its conduct on the market — Exchange of information between competitors (Art. 101(1) TFEU; EEA Agreement, Art. 53(1)) (see paras 141-143)*
7. *Competition — Administrative procedure — Commission decision finding an infringement — Burden of proving the infringement and its duration on the Commission — Extent of the burden of proof — Degree of precision required of the evidence used by the Commission — Body of evidence — Judicial review — Scope (Art. 101 TFEU; Council Regulation No 1/2003, Art. 2) (see paras 144-149, 152, 154, 191)*
8. *Competition — Administrative procedure — Commission decision finding an infringement — Use as evidence of statements of other undertakings which participated in the infringement — Lawfulness — Declarations against the interests of the person making them — High probative value (Art. 101 TFEU; Council Regulation No 1/2003, Art. 2) (see paras 150, 151)*
9. *Agreements, decisions and concerted practices — Participation in meetings having an anti-competitive object — Circumstances from which, where the undertaking concerned has not distanced itself from the decisions adopted, it may be concluded that it participated in the ensuing cartel (Art. 101(1) TFEU; EEA Agreement, Art. 53(1)) (see paras 165-167)*
10. *Competition — Fines — Amount — Determination — Determination of the base amount — Criteria — Gravity of the infringement — Determination of the fine in proportion to the factors for assessment of the gravity of the infringement — Factors to be taken into consideration (Art. 101 TFEU; Charter of Fundamental Rights, Art. 49(3); Council Regulation No 1/2003, Art. 23(3); Commission Notice 2006/C 210/02, points 6, 13 and 23) (see paras 208-210, 259-261)*
11. *Competition — Fines — Amount — Determination — Determination of the base amount — Criteria — Overall turnover of the undertaking concerned — Turnover corresponding to the goods covered by the infringement — To be taken into consideration (Art. 101 TFEU; Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02, point 6) (see paras 211-214)*
12. *Competition — Fines — Guidelines on the method of setting fines — Legal nature — Indicative rule of conduct implying a self-limitation on the discretion of the Commission — Possibility of the Commission departing therefrom — Conditions (Art. 101 TFEU; Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02, points 13 and 37) (see para. 215)*
13. *Competition — Fines — Amount — Determination — Determination of the base amount — Determination of the value of sales — Sales carried out in direct or indirect relation to the infringement — Limitation to sales actually affected by the cartel — None — Inclusion of costs inherent to the prices of the goods and services sold (Art. 101 TFEU; Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02, point 13) (see paras 228, 247, 257, 258)*

14. *Competition — Fines — Amount — Determination — Determination of the base amount — Determination of the value of sales — Sales carried out in direct or indirect relation to the infringement — Cartel in the international freight forwarding sector — Cartel covering transport services as a block of services — Account taken of the value of sales realised with transport services as a block of services — Lawfulness (Art. 101 TFEU; Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02, point 13) (see paras 262, 263)*
15. *Competition — Fines — Amount — Determination — Adjustment of the basic amount — Mitigating circumstances — Cooperation of the undertaking concerned outside the scope of the Leniency Notice — Criteria for assessment (Art. 101 TFEU; Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02, point 29, fourth indent) (see paras 282, 283, 287, 299)*
16. *Competition — Fines — Amount — Determination — Adjustment of the basic amount — Mitigating circumstances — Existence of a cartel concerning an upstream market — Absence — Participation allegedly under constraint at meetings of undertakings having an anti-competitive purpose — None (Art. 101 TFEU; Council Regulation No 1/2003, Art. 23(2); Commission Notice 2006/C 210/02, point 29) (see paras 292-294, 296)*
17. *Competition — Administrative procedure — Observance of the rights of the defence — Access to the file — Scope — Refusal to communicate a document — Consequences — Need to draw a distinction, in relation to the burden of proof borne by the undertaking concerned, between incriminating and exculpatory documents (Art. 101 TFEU; Council Regulation No 1/2003, Art. 27(2); Commission Regulation No 773/2004, Art. 15) (see paras 308-311)*

Re:

APPLICATION for annulment of Commission Decision C(2012) 1959 final of 28 March 2012 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case COMP/39462 — Freight forwarding), in so far as it concerns the applicants or, in the alternative, for variation of the fines imposed on them in that decision.

Operative part

The Court:

1. Dismisses the action;

2. Orders Kühne + Nagel International AG, Kühne + Nagel Management AG, Kühne + Nagel Ltd (Uxbridge), Kühne + Nagel Ltd (Shanghai) and Kühne + Nagel Ltd (Hong Kong) to pay the costs.