Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

11 July 2013 *

(Appeal — Competition — Agreements, decisions and concerted practices — Article 81 EC and Article 53 of the EEA Agreement — International removal services market in Belgium — Guidelines on the effect on trade between Member States — Legal status — Requirement to define the relevant market — Scope — Right to fair legal process — Principle of good administration — Objective impartiality on the part of the Commission — Guidelines on the method of setting fines (2006) — Proportion of the value of sales — Obligation to state reasons — Fine reduced on grounds of inability to pay or the special circumstances of the case — Equal treatment)

In Case C-439/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 August 2011,

Ziegler SA, established in Brussels (Belgium), represented by J.-F. Bellis, M. Favart and A. Bailleux, avocats,

applicant,

the other party to the proceedings being:

European Commission, represented by A. Bouquet and N. von Lingen, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas (Rapporteur), A. Ó Caoimh, C. Toader and C.G. Fernlund, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 24 October 2012,

after hearing the Opinion of the Advocate General at the sitting on 13 December 2012,

gives the following

* Language of the case: French.

Judgment

1 By its appeal, Ziegler SA ('Ziegler') seeks to have set aside the judgment of the General Court of the European Union in Case T-199/08 *Ziegler* v *Commission* [2011] ECR II-3507 ('the judgment under appeal'), by which that Court dismissed Ziegler's action seeking annulment of Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 – International Removal Services) ('the contested decision') or, in the alternative, annulment of the fine imposed on it by that decision or, in the further alternative, a reduction of that fine.

I – Legal context

2 The Guidelines on the effect on trade concept contained in Articles [81 EC] and [82 EC] (OJ 2004 C 101, p. 81) ('the Guidelines on the effect on trade') state, inter alia, at points 3, 45, 50 and 52 to 55 thereof as follows:

'3. The present guidelines … spell out a rule indicating when agreements are in general unlikely to be capable of appreciably affecting trade between Member States … The aim is to set out the methodology for the application of the effect on trade concept and to provide guidance on its application in frequently occurring situations. …

…

45. The assessment of appreciability depends on the circumstances of each individual case, in particular the nature of the agreement and practice, the nature of the products covered and the market position of the undertakings concerned. … The stronger the market position of the undertakings concerned, the more likely it is that an agreement or practice capable of affecting trade between Member States can be held to do so appreciably …

…

50. … the Commission considers it appropriate to set out general principles indicating when trade is normally not capable of being appreciably affected …. When applying Article 81 [EC], the Commission will consider this standard as a negative rebuttable presumption applying to all agreements within the meaning of Article 81(1) [EC] …

…

52. The Commission holds the view that in principle agreements are not capable of appreciably affecting trade between Member States when the following cumulative conditions are met:

(a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5%, and

(b) in the case of horizontal agreements, the aggregate annual Community turnover of the undertakings concerned … in the products covered by the agreement does not exceed 40 million euro. …

…

53. The Commission will also hold the view that where an agreement by its very nature is capable of affecting trade between Member States, for example, because it concerns imports and exports or covers several Member States, there is a rebuttable positive presumption that such effects on

trade are appreciable when the turnover of the parties in the products covered by the agreement calculated as indicated in paragraphs 52 and 54 exceeds 40 million euro. In the case of agreements that by their very nature are capable of affecting trade between Member States it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5% threshold …. However, this presumption does not apply where the agreement covers only part of a Member State …

54. With regard to the threshold of 40 million euro … the turnover is calculated on the basis of total Community sales excluding tax during the previous financial year by the undertakings concerned, of the products covered by the agreement …. Sales between entities that form part of the same undertaking are excluded …

55. In order to apply the market share threshold, it is necessary to determine the relevant market (41). This consists of the relevant product market and the relevant geographic market. The market shares are to be calculated on the basis of sales value data or, where appropriate, purchase value data. If value data are not available, estimates based on other reliable market information, including volume data, may be used.'

3 Footnote 41 to point 55 of the Guidelines on the effect on trade states that, when defining the relevant market, reference should be made to the Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5) ('the Notice on the definition of the market').

4 The Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2) ('the Guidelines on the method of setting fines') provide, under the heading 'Basic amount of the fine', as follows:

'…

A. Calculation of the value of sales

13. In determining the basic amount of the fine to be imposed, the Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly … relates in the relevant geographic area within the [European Economic Area (EEA)]. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement (hereafter "value of sales").

…

B. Determination of the basic amount of the fine

19. The basic amount of the fine will be related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement.

…

21. As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales.

22. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

23. Horizontal price-fixing, market-sharing and output-limitation agreements [7], which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.

…

25. In addition, 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 … in order to deter undertakings from even entering into horizontal price-fixing … agreements. … 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.

…'

5 Footnote 2 to point 23 of the Guidelines on the method of setting fines states that such agreements include concerted practices and decisions by associations of undertakings within the meaning of Article 81 EC.

6 Under the heading 'Adjustments to the basic amount', the Guidelines on the method of setting fines provide as follows:

'F. Ability to pay

35. In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'

7 Under the heading 'Final considerations', point 37 of the Guidelines on the method of setting fines provides as follows:

'Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.'

II – Background to the dispute and the contested decision

8 The facts giving rise to the dispute and the contested decision, as set out in paragraphs 1 to 21 of the judgment under appeal, may be summarised as follows.

9 In the contested decision, the Commission found that the addressees of that decision – one of which was Ziegler (whose consolidated turnover in the financial year ending 31 December 2006 was EUR 244 420 326) – had participated in a cartel in the international removal services sector in Belgium by fixing prices, sharing customers and manipulating the procedure for the submission of tenders and thereby committed a single and continuous infringement of Article 81 EC, or must be held liable for such an infringement, for part or the whole of the period from October 1984 to September 2003.

10 The services concerned by the infringement include removals of goods from or to Belgium, both for natural persons and for undertakings or public institutions. In view of the fact that the international removal companies in question are all located in Belgium and that the activities of the cartel took place there, Belgium was considered to be the geographic centre of the cartel. The combined turnover of the cartel members for those international removal services was estimated by the Commission at EUR 41 million for 2002. Since the size of the sector was estimated at approximately EUR 83 million, the combined market share held by the undertakings involved was therefore considered to account for approximately 50% of the sector concerned.

11 The Commission stated in the contested decision that one of the aims of the cartel was to establish and maintain high prices and to share the market, and the cartel itself took various forms: agreements on prices, agreements on sharing the market by means of a system of false quotes known as 'cover quotes', and agreements on a system of financial compensation, known as 'commissions', for rejected offers or for not quoting at all.

12 In the contested decision, the Commission found that, between 1984 and the early 1990s, the cartel had operated, inter alia, on the basis of written price-fixing agreements, the 'commission' and 'cover quote' practices being introduced at the same time. According to that decision, as was stated in the judgment under appeal, the 'commissions' practice was to be treated as the indirect fixing of prices for international removal services in Belgium, since the cartel members issued invoices to each other for commissions on rejected offers or offers not made, referring to fictitious services, and the amount represented by those commissions was, moreover, invoiced to the customers.

13 As regards 'cover quotes', the Commission stated in the contested decision that, through the submission of such quotes, the removal company which wanted the contract ensured that the customer paying for the removal received several quotes. To that end, that company indicated to its competitors the total price that they were to quote for the planned removal, which was higher than the price quoted by the company itself. Thus the system in operation was one of fictitious quotes submitted by companies which did not intend to carry out the removal. The Commission took the view that that practice constituted a manipulation of the tendering procedure to ensure that the price quoted for a removal was higher than it would have been in a competitive environment.

14 The Commission found in the contested decision that those arrangements were in place until 2003 and that those complex activities had the same object: price-fixing and market-sharing and, thereby, the distortion of competition.

15 In the light of those factors, the Commission adopted the contested decision, Article 1 of which is worded as follows:

'By directly and indirectly fixing prices for international removal services in Belgium, sharing part of the market, and manipulating the procedure for the submission of tenders, the following undertakings have infringed Article 81(1) [EC] and Article 53(1) of the [Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3)] in the periods indicated:

…

(j) [Ziegler], from 4 October 1984 to 8 September 2003.'

16 Consequently, under Article 2(l) of the contested decision, the Commission imposed a fine of EUR 9.2 million on Ziegler, calculated in accordance with the methodology set out in the Guidelines on the method of setting fines.

17 On 24 July 2009, the Commission adopted Decision C(2009) 5810 final amending the contested decision by reducing by approximately EUR 600 000 the value of the sales of another addressee of the contested decision. As that value had been taken as the basis of the calculation of the fine imposed on that addressee, the Commission reduced the amount of that fine.

III – The proceedings before the General Court and the judgment under appeal

18 By application lodged at the Registry of the General Court on 3 June 2008, Ziegler brought an action for annulment of the contested decision or, in the alternative, annulment of the fine imposed on it or, in the further alternative, a substantial reduction of that fine. Ziegler also requested the General Court to order that the full administrative file be lodged at the Court Registry, pending judgment.

19 In parallel with that action, Ziegler filed an application for interim measures, seeking, inter alia, a stay of execution of Article 2 of the contested decision, in so far as it imposed a fine on it. That application was refused by order of the President of the General Court of 15 January 2009 in Case T-199/08 R *Ziegler* v *Commission*, the appeal lodged against that decision subsequently being dismissed by order of the President of the Court of Justice of 30 April 2010 in Case C-113/09 P(R) *Ziegler* v *Commission*.

20 Ziegler relied on nine pleas in law in support of its action, namely five principal pleas, seeking annulment of the contested decision, and four pleas in the alternative, seeking the annulment or reduction of the fine.

21 By the judgment under appeal, the General Court granted in part Ziegler's request that it order that the administrative file be lodged at the Court Registry. However, it dismissed all the pleas relied on by Ziegler and, as a consequence, rejected the action in its entirety, ordering Ziegler to pay the costs. The Court's decision was based, inter alia, on the following considerations.

22 In its analysis of the first plea seeking annulment of the contested decision, alleging manifest errors of assessment and errors of law in the assessment of the conditions necessary for the application of Article 81(1) EC, the General Court first of all dismissed, at paragraphs 41 to 46 of the judgment under appeal, the Commission's arguments that it was not necessary to define the relevant market in the case of obvious restrictions of competition. The General Court stated that the Commission is under an obligation to define the market in particular where it is impossible, without such a definition, to determine whether the agreement at issue is liable to affect trade between Member States and that, in the present case, Ziegler was entitled to call into question the Commission's assessment of that condition for the application of Article 81 EC.

23 Next, at paragraphs 56 to 63 of the judgment under appeal, the General Court found that the Commission had failed to prove that the EUR 40 million threshold set out at point 53 of the Guidelines on the effect on trade had been reached. According to the General Court, it was necessary, when estimating the size of the market for the purposes of ascertaining whether there was an appreciable effect on trade between Member States, for the turnover achieved as a subcontractor to be deducted from the turnover achieved from the services in question. That court found that once the turnover achieved as a subcontractor was deducted, the EUR 40 million threshold was no longer reached.

24 Lastly, after finding, at paragraph 48 of the judgment under appeal, that the argument put forward by Ziegler by way of response, concerning the 5% market share threshold set out at point 53 of the Guidelines on the effect on trade, simply supplemented the plea calling into question the evidence of any appreciable effect on trade between Member States and was therefore admissible, the General Court went on to analyse that argument at paragraphs 64 to 74 of the judgment under appeal. It stated in that regard, inter alia, that the Commission had failed to comply with the obligation to define the relevant market, as it was required to by point 55 of those guidelines. However, it took the

view that, in the circumstances of the case, the Commission had established to the requisite legal standard that the 5% market share threshold had been exceeded, since it had provided a sufficiently detailed description of the relevant sector for it to be possible to ascertain whether that threshold had been reached. It therefore held, at paragraph 72 of the judgment under appeal, that, 'exceptionally', the Commission was entitled to base its decision on that threshold without expressly determining the market within the meaning of point 55 of those guidelines.

25 In its analysis of the first part of the third plea seeking annulment of the contested decision, alleging breach of the obligation to state reasons with regard to the calculation of the basic amount of the fine, the General Court stated, inter alia, at paragraphs 88 to 94 of the judgment under appeal, that it was desirable for the Commission to augment its reasoning as to the calculation of fines, that the Guidelines on the method of setting fines adopted in 2006 had brought about a fundamental change in the method of setting fines and that, in those circumstances, it was no longer possible for the Commission, in principle, to state reasons only for the classification of an infringement as 'very serious' and to omit to justify the choice of the proportion of the value of sales taken into account. It pointed out that, in the present case, the Commission had set that percentage at 17%, the only reasons given for that choice being the 'very serious' nature of the infringement. In that regard, that court stated, at paragraph 93 of the judgment under appeal, that '[t]hat reasoning can be sufficient only where the Commission applies a percentage very close to the lower end of the scale laid down for the most serious restrictions' and that 'had the Commission wished to apply a higher percentage, it would have had to provide more detailed reasons'. The General Court added, at paragraph 94 of that judgment, that those considerations were also valid as regards the additional amount applied as a deterrent.

26 With regard to the fourth plea seeking annulment of the contested decision, alleging infringement of the right to fair legal process and the general principle of good administration, the General Court stated, at paragraphs 103 to 107 of the judgment under appeal, that Ziegler had not called into question the Commission's competence, in the present case, to adopt a decision in relation to a proceeding under Article 81 EC. It also stated that the lack of objectivity allegedly shown by the Commission did not constitute an infringement of the rights of the defence capable of leading to annulment of the contested decision but must be placed in the context of the review of the assessment of the evidence or of the statement of reasons for the decision. It therefore held that the plea in question was ineffective as a plea for annulment. Nevertheless, the General Court pointed out, for the sake of completeness, that that plea was also unfounded. Indeed, in its view, the matters raised by Ziegler were not of such a kind as to demonstrate that the alleged bias of the Commission or of one of its officials was reflected in the contested decision or that the Commission was biased in investigating the case or how the conduct which certain Commission officials were accused of, even if proved, could have infringed the right to fair legal process.

27 In its analysis of the last plea, seeking annulment of or a reduction in the fine on account of exceptional circumstances, the General Court examined the arguments by which Ziegler pleaded, in essence, its inability to pay the fine and unequal treatment vis-à-vis another undertaking to which the contested decision was addressed. It pointed out, inter alia, at paragraphs 165 to 169 of the judgment under appeal, that point 35 of the Guidelines on the method of setting fines imposed two cumulative conditions for its application and that the Commission's assessment – that the fact that the fine imposed on Ziegler accounted for only 3.76% of its worldwide turnover in 2006 suggested that the fine is unlikely to irretrievably jeopardise its economic viability – was abstract and took no account of the company's specific circumstances. It therefore found that that assessment could not form a basis on which Ziegler's application for a reduction could be rejected. However, since Ziegler did not challenge the Commission's finding in the contested decision that the second condition, relating to the presence of a specific social and economic context, was not met, the General Court considered that the Commission was justified in rejecting Ziegler's arguments seeking a reduction of the fine on account of its economic and financial difficulties.

28 As regards the purported infringement of the principle of equal treatment in relation to another undertaking at which the contested decision was addressed, the General Court pointed out, at paragraphs 170 and 171 of the judgment under appeal, that the Commission had also refused the request made by that other company pursuant to point 35 of the Guidelines on the method of setting fines, on account of the lack of a specific social and economic context. It also considered that while the Commission had in fact granted that company a reduction in the fine in accordance with point 37 of those guidelines, it was apparent from the contested decision that that undertaking's position and that of Ziegler were not comparable and it was sufficient to note in that connection that the fine imposed on Ziegler was considerably below the 10% threshold of its total turnover, whereas, before it was reduced, the fine imposed on the other undertaking far exceeded that threshold.

IV – Forms of order sought by the parties

29 By its appeal, Ziegler claims that the Court should:

— declare the present appeal admissible and well founded;

— set aside the judgment under appeal and give final judgment itself on the dispute;

— grant the form of order sought at first instance and, accordingly annul the contested decision or, in the alternative, annul the fine imposed on the appellant in that decision or, in the further alternative, substantially reduce that fine; and

— order the Commission to pay the costs both at first instance and on appeal.

30 In its reply, Ziegler also claims that the Commission's request seeking the substitution of certain grounds should be rejected as inadmissible or, at the very least, unfounded.

31 The Commission contends that the Court should:

— dismiss the appeal and substitute certain grounds of the judgment of the General Court;

— in the alternative, dismiss the action for annulment; and

— order Ziegler to pay the costs.

V – The appeal

32 Ziegler relies on four grounds of appeal.

A – *The first ground of appeal, alleging errors of law in the assessment of the evidence of an appreciable effect on trade between Member States*

33 Ziegler divides its first ground of appeal into three parts, the first concerning the obligation to define the relevant market and the second and third concerning, in essence, the 5% market share threshold set out at point 53 of the Guidelines on the method of setting fines. However, the Commission has requested that the Court first of all grant leave for the substitution of certain grounds, which, in its view, will lead to the rejection of the first ground of appeal.

1. The Commission's request for new grounds to be substituted

a) Arguments of the parties

34 First, the Commission submits that the purpose of the Guidelines on the effect on trade is not to render the standard of the requirement of proof of an appreciable effect on trade between Member States more stringent than that established by case-law. Whereas it has a certain discretion concerning the calculation of fines, the Commission has no leeway to come to the view that a cartel which has an appreciable effect on trade between Member States might not be caught by the prohibition laid down in Article 81 EC. Therefore, the thresholds set out at points 52 and 53 of the Guidelines on the effect on trade are merely indicative. Similarly, no obligation to define the market may be inferred from point 55 of those guidelines in cases, such as those involving cartels, in which, as is clear from case-law, such a definition is unnecessary. The grounds set out at paragraphs 64 to 74 of the judgment under appeal are therefore incorrect and should be replaced.

35 Second, the Commission is of the view that the General Court erred in law by confusing the term 'turnover' within the meaning of points 52 and 53 of the Guidelines on the effect on trade with the term 'value of sales' used in point 13 of the Guidelines on the method of setting fines, and by taking the view that turnover within the meaning of points 52 and 53 could not include the turnover achieved as sub-contractors. Subcontracting is in fact a relevant economic activity for the purpose of determining whether trade between Member States may be regarded as being appreciably affected, even though it should not be taken into account in calculating the fine. The Commission therefore requests that new grounds be substituted for the grounds set out at paragraphs 56 to 63 of the judgment under appeal, in which the General Court concluded, incorrectly, that it had not been proven that the EUR 40 million threshold was exceeded.

36 Third, the Commission requests that new grounds be substituted for the grounds set out at paragraphs 40 to 50 of the judgment under appeal, in particular those set out at paragraph 48. It contends that the General Court was incorrect to conclude that Ziegler's argument relating to the 5% market share threshold was admissible. It is not possible to infer that argument from the application initiating the proceedings, and it should therefore have been regarded not as supplementing a plea already raised but as a new limb of a plea and, as such, inadmissible.

37 Ziegler maintains that the requests for substitution of grounds are inadmissible, since they have no effect on the operative part of the judgment under appeal and are imprecise. They are, in any event, unfounded.

38 In first place, by establishing, in the Guidelines on the effect on trade, thresholds which are not to be found in case-law, the Commission must have intended to limit the scope of its discretion as regards the application of the condition requiring there to be an appreciable effect on trade between Member States. It cannot therefore depart from those guidelines without providing adequate reasons. Moreover, where it chooses to apply them, as in the present case, the Commission is bound to adhere to them.

39 In second place, no support is to be found for the distinction which the Commission claims exists between the terms 'value of sales' and 'turnover' in the wording or the spirit of the provisions concerned or, *a fortiori*, in the case-law.

40 In third place, Ziegler maintains that the argument presented before the General Court concerning the 5% market share threshold was admissible because it supplemented a plea claiming that there was no appreciable effect on trade between Member States.

b) Findings of the Court

41 With regard to the admissibility of the requests at issue, disputed by Ziegler, it should be noted, first, that they cannot be dismissed as inadmissible on the ground that they are imprecise. For each of the requests submitted, the Commission has identified precisely the passages of the judgment under appeal which it considers to be incorrect in law, the grounds on which it considers them to be so and the grounds which, in its view, the General Court should have established if it was not to err in law, namely those which the Commission raised before it in its defence.

42 Second, according to the Court's settled case-law, for a request for substitution of grounds to be admissible, the appellant must have an interest in bringing proceedings, in so far as the request must be capable, if successful, of procuring an advantage to the party making it. That may be the case where the request for substitution of grounds amounts to a defence to one of the applicant's pleas (see, to that effect, Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission* [2009] ECR I-9291, paragraph 23, and the judgment of 21 December 2011 in Case C-329/09 P *Iride* v *Commission*, paragraphs 48 to 51).

43 In the present case, with regard to the first request, concerning the grounds relating to the concept of an 'appreciable effect on trade between Member States' and the obligation to define the relevant market, it should be noted that if the General Court erred in law in holding that, in view of the binding nature of the Guidelines on the effect on trade, the Commission was required to define the relevant market, the first part of the first ground of appeal relied on by Ziegler would be ineffective. Indeed, Ziegler would therefore no longer be in a position to claim that the General Court incorrectly exempted the Commission from its obligation to define the market. As a consequence, the Commission has an interest in making that request, which is therefore admissible.

44 As regards the second request, concerning the grounds relating to whether or not the EUR 40 million threshold was exceeded, if it were established that the General Court, in breach of the law, had confused the term 'value of sales' used in the Guidelines on the method of setting fines with the term 'turnover' within the meaning of the Guidelines on the effect on trade and as a result inferred, incorrectly, that that threshold had not been reached, it would have to be found that it had been established that that threshold was exceeded. In that case, the second and third parts of Ziegler's first ground of appeal, relating solely to the assessment of the 5% market share threshold, would be ineffective. It follows that the Commission also has an interest in making that request, which is therefore also admissible.

45 With regard to the third request, concerning the grounds relating to the admissibility of Ziegler's argument on the 5% market share threshold, it is sufficient to observe, without there being any need to rule on its admissibility, that it must in any event be rejected as unfounded (see, by analogy, Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26).

46 The first subparagraph of Article 48(2) of the Rules of Procedure of the General Court provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. However, a plea or an argument which may be regarded as amplifying a plea put forward previously, whether directly or by implication, in the original application and which is closely connected therewith must be declared admissible (see, to that effect, the order in Case C-430/00 P *Dürbeck* v *Commission* [2001] ECR I-8547, paragraph 17).

47 In the present case, it is apparent from the file on the case before the General Court that, in the second part of the first plea in law in the original application, Ziegler, first, challenged, at paragraph 44 of that application, '[t]he turnover of the companies in question and the size of the market in euros as determined by the Commission in its estimate of the market shares of those companies and of other companies active on the international removal services market'. Next, it stated, at paragraph 45 of that application, that '[t]he method adopted by the Commission to calculate the market shares and the size

of the market is vitiated by a manifest error of assessment and the estimate of the market shares of the companies in question at paragraph 89 of the [contested] decision is factually incorrect'. Lastly, Ziegler maintained, at paragraph 58, that the 'inconsistencies and inaccuracies identified [in the original application] concerning the calculation of the market shares and the size of the market in euros have a consequential effect on the assessment of the impact of the agreements at issue on the pattern of trade between [the] Member States' and referred in that connection to recital 373 to the contested decision, which refers, inter alia, to exceeding the 5% market share threshold.

48 In the light of the foregoing, the General Court was entitled to find, at paragraph 48 of the judgment under appeal, that 'the reference to the 5% threshold in the reply only supplements an existing plea and is not a new one' and, therefore, that Ziegler's arguments concerning its claim that the threshold had not been exceeded were admissible.

49 The Commission's third request must, therefore, be dismissed from the outset, while the merits of the first two requests will be examined, if necessary, in the analysis of Ziegler's first ground of appeal.

2. The merits of the first ground of appeal

a) The first part of the first ground of appeal, concerning the obligation to define the market

i) Arguments of the parties

50 According to Ziegler, the General Court erred in law in considering, at paragraph 72 of the judgment under appeal, that, 'exceptionally', the Commission was entitled to conclude that the undertakings concerned held a market share in excess of 5%, without determining the relevant market.

51 As its principal argument, Ziegler contends that it was not possible for the General Court, without erring in law, to exempt the Commission from the obligation to define the relevant market laid down in point 55 of the Guidelines on the effect on trade, which refer to the Notice on the definition of the market. As those guidelines limit the Commission's discretion, any failure to adhere to them constitutes infringement of the principles of equal treatment and the protection of legitimate expectations. In the present case, it is precisely because the Commission failed to prove that the condition requiring an appreciable effect on trade between Member States had been met and simply relied on presumptions set out in those guidelines that it was necessary for it to define the relevant market.

52 Ziegler submits, as an alternative argument, that the grounds given by the General Court to justify exempting the Commission from the obligation to define the market are vitiated by contradictions and substantive errors. The contradiction resides in the fact that the General Court exempted the Commission from that obligation on the ground – set out at paragraphs 70 and 71 of the judgment under appeal – that that obligation had, in fact, been fulfilled. There was, at the very least, a failure to provide reasons in that regard, since the General Court did not justify its decision to afford the Commission the benefit of a lower standard of proof.

53 With regard to the substantive errors, Ziegler claims that, first, a description of the sector in question cannot be confused with the legal concept of the market used in competition law. Second and in any event, the application of demand and supply-side substitutability criteria should have led to a finding that there was one single market for all international removal services with a geographical coverage extending far beyond Belgian territory. The General Court was not therefore entitled in law to conclude that the international removal services market, with Belgium as either the starting place or the destination, had been correctly identified by the Commission.

54 In addition to requesting the substitution of new grounds, the Commission points out, first, that Ziegler did not dispute in the course of the administrative procedure that the condition requiring an appreciable effect on trade between Member States was met in the present case.

55 Next, according to the Commission, it is necessary to distinguish between the definition of the potentially relevant market for the purpose of determining whether the 5% market share threshold has been exceeded on the one hand, and, on the other, the comprehensive definition of the relevant market which is carried out where the strength of an individual player in the market is evaluated. Only in the latter case is an analysis going beyond a simple description of the sector concerned necessary. Moreover, according to case-law, where the infringement is manifest, there is no need to define the market. Therefore, in order to comply with point 55 of the Guidelines on the effect on trade, it is sufficient, in the case of cartels, to give a description of the sector enabling the market share of the cartel members to be established.

56 Lastly, the Commission recognises that the reasoning of the General Court is somewhat contradictory. However, that simply demonstrates that the General Court was incorrect to consider that it had failed to comply with its obligation to define the relevant market. The Commission refers in that regard to its arguments concerning the substitution of grounds.

ii) Findings of the Court

57 First, in so far as, by claiming that Ziegler did not dispute during the administrative procedure that the condition requiring an appreciable effect on trade between Member States had been met, the Commission seeks to challenge the admissibility of the present ground of appeal, it should be recalled, as regards in particular the application of Article 81 EC, that there is no requirement under the law of the European Union that the addressee of the statement of objections must challenge the various matters of fact or law set out in the statement during the administrative procedure, if it is not to be barred from doing so later at the stage of judicial proceedings. In the absence of a specific legal basis, such a restriction is contrary to the fundamental principles of the rule of law and of respect for the rights of the defence (Case C-407/08 P *Knauf Gips* v *Commission* [2010] ECR I-6375, paragraphs 89 and 91).

58 Consequently, it cannot be argued that Ziegler was not entitled to dispute before the General Court or, now, before this Court, the claim that the condition for the application of Article 81 EC, relating to an appreciable effect on trade between Member States, was met.

59 Ziegler maintains, as a principle argument, that the General Court erred in law in exempting the Commission from the obligation to define the relevant market as it was required to by point 55 of the Guidelines on the effect on trade, whereas the Commission argues, on the contrary, that the General Court was incorrect in finding that those guidelines are binding on the Commission. It should be noted in that regard, first, that, according to the settled case-law of the Court of Justice, the Commission may adopt a policy as to how it will exercise its discretion in the form of measures such as guidelines, in so far as those measures contain rules indicating the approach which the institution is to take and do not depart from the rules of the FEU Treaty (see, to that effect, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 34 and 36, and Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 62).

60 Thus, while measures designed to produce external effects, such as guidelines directed at economic operators, cannot be regarded as rules of law which the administration is required in all cases to comply with, they nevertheless lay down rules of conduct indicating the approach to be adopted from which the administration cannot depart, in an individual case, without giving reasons which are compatible with the principle of equal treatment. By adopting such rules and announcing by publishing them that it will apply them to the cases to which they relate, the institution in question

imposes a limit on the exercise of its own discretion and cannot depart from those rules, without being found, in some circumstances, in breach of general principles of law, such as the principles of equal treatment or of the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct of general application may produce legal effects (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 209 to 211).

61 That applies to the Guidelines on the effect on trade. It is apparent from point 3 of those guidelines that, while they are intended to give guidance to the courts and authorities of the Member States in their application of the effect on trade concept contained in Articles 81 EC and 82 EC, their aim is also to 'set out the methodology for the application of the effect on trade concept and to provide guidance on its application in frequently occurring situations'. Moreover, the wording of point 50, 52 and 53 in particular of those guidelines clearly indicates that the Commission intends to apply them, especially for the purpose of determining whether an agreement has an appreciable effect on trade between Member States.

62 It is common ground, as is apparent from paragraph 49 of the judgment under appeal, that the Commission chose to apply those guidelines in the present case in order to determine whether the condition for the application of Article 81 EC, relating to an appreciable effect on trade between Member States, was met. In those circumstances, the General Court did not err in law, at paragraphs 66 to 68 of the judgment under appeal, in finding in essence that the Commission was required, in the circumstances of the present case, to comply with those guidelines.

63 Furthermore, even though it is unnecessary, in certain circumstances, to define the relevant market in order to establish whether there is an appreciable effect on trade between Member States for the purpose of Article 81 EC, namely where it is possible, even in the absence of such a definition, to establish that the cartel in question is capable of affecting trade between Member States and has the object or effect of preventing, restricting or distorting competition within the common market (see, to that effect, the order of 16 February 2006 in Case C-111/04 P *Adriatica di Navigazione* v *Commission*, paragraph 31), it is not possible, by definition, to verify whether a market share threshold has been exceeded in the absence of any definition whatsoever of that market. Point 55 of the Guidelines on the effect on trade states, logically, that '[i]n order to apply the market share threshold, it is necessary to determine the relevant market', and a footnote to that point refers to the Notice on the definition of the relevant market.

64 In those circumstances, it must again be held that the General Court did not err in law in finding, in essence, at paragraphs 66 to 68 of the judgment under appeal, that the Commission was required, under those guidelines, to define the relevant market. The Commission's first request for the substitution of new grounds must therefore be rejected.

65 None the less, the principal argument put forward by Ziegler cannot succeed.

66 It is true that the General Court stated, at paragraphs 68 of the judgment under appeal, that '[i]t is common ground that the Commission has failed to comply with the obligation [to define the relevant market] laid down in point 55 of the … Guidelines [on the effect on trade]' and considered, at paragraph 72 of that judgment, that 'exceptionally, the Commission was entitled to base its decision on the second alternative condition of point 53 of the … Guidelines without expressly determining the market within the meaning of point 55 of those Guidelines'.

67 However, it is apparent from reading paragraphs 65 to 73 of the judgment under appeal as a whole that the General Court did not exempt the Commission from the obligation to define the relevant market where it bases its decision on the 5% threshold of the relevant Community market. On the contrary, it found, at paragraph 70 of that judgment, that the Commission had appropriately identified

the services concerned in so far as it 'provided a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope', enabling 'the Court to verify the Commission's basic assertions and in so far as, on that basis, it is clear that the combined market share far exceeds the 5% threshold'.

68 The General Court stated, at paragraph 65 of the judgment under appeal, that '[t]he Commission was fully entitled to find that the cartel had as its object the restriction of competition in the sector of international removals to and from Belgium. The removals in question were characterised by the fact that Belgium was either the starting place or the destination and that the cartel's activity took place in Belgium. In addition, in estimating the size of the market, the Commission took into account the turnovers of the foreign companies on that market. Consequently, the Commission was justified in finding that international removal services in Belgium were the relevant services'. The General Court also observed, at paragraph 71 of that judgment, that the international removal services market in Belgium was 'correctly identified by the Commission as the relevant market'.

69 The General Court thereby simply concluded, as observed by the Advocate General at point 46 of her Opinion, that such a description constituted a definition of the market within the meaning of point 55 of the Guidelines on the effect on trade and that, on that basis, it was possible to determine whether the 5% threshold in question had been exceeded.

70 It is therefore clear that Ziegler's principal argument, which seeks to challenge the merits of the exemption from the obligation to define the relevant market granted to the Commission, is based on a selective – even incorrect – reading of the judgment under appeal and must, as a consequence, be rejected, in the same way as the argument put forward in the alternative, to the effect that the General Court had recourse to contradictory grounds in order to justify that exemption, or indeed failed to comply with its obligation to state reasons in that regard, since that argument is also based on the same selective reading.

71 Second, as regards Ziegler's claim that, in adopting that approach, the General Court, at the very least, made an incorrect assessment of the legal requirements which the definition of the relevant market should have satisfied in the present case, it should be noted that, in the context of the application of Article 81 EC, the sole purpose of the definition of the relevant market is to determine whether the agreement in question is capable of affecting trade between Member States and has the object or effect of preventing, restricting or distorting competition within the common market (order in *Adriatica di Navigazione* v *Commission*, paragraph 31) and that, in order to assess whether a cartel has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 35 and the case-law cited, and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erest Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 37).

72 Accordingly, as regards the assessment of the condition that there should be an appreciable effect on trade between Member States, the requirements to be met by the definition of the relevant market vary depending on the individual circumstances of each particular case.

73 In those circumstances, contrary to what is claimed by Ziegler, the General Court did not err in law as regards the legal requirements to be met by the definition of the relevant market in the present case by finding, at paragraph 70 of the judgment under appeal, that the 'sufficiently detailed description of the relevant sector, including supply, demand and geographic scope' was sufficient to constitute a definition of the relevant market for the purpose of determining whether the 5% market share threshold laid down in point 53 of those guidelines was exceeded in the present case.

74 Third, in so far as Ziegler claims that the General Court gave its approval, wrongly, to the Commission's definition of the market in the contested decision, it must be borne in mind that it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of

Justice of the European Union that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts and the legal conclusions which the General Court has drawn from them (see, inter alia, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 23, and Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraph 71 and the case-law cited).

75 Thus, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (*Baustahlgewebe* v *Commission*, paragraph 24 and the case-law cited, and *General Química and Others* v *Commission*, paragraph 72 and the case-law cited).

76 By the argument set out at paragraph 74 above, Ziegler is in fact seeking a fresh assessment of the facts, without in any way claiming that the General Court distorted the facts. That argument is, therefore, inadmissible.

77 In the light of the foregoing, it follows that the first part of the first ground of appeal must be rejected as being in part unfounded and in part inadmissible.

b) The second part of the first ground of appeal: whether or not the 5% market share threshold was exceeded

i) Arguments of the parties

78 Ziegler submits that, even if the international removal market in Belgium were accepted as the relevant market, the General Court failed to comply with its obligation to state reasons by finding, at paragraph 71 of the judgment under appeal, that the 5% market share threshold set out at point 53 of the Guidelines on the effect on trade had unquestionably been reached in the present case and that, for that threshold not to have been reached, the size of the market would have to be at least EUR 435 million, which cannot be the case, since, according to the General Court, the starting point would have to be a market much larger than that identified by the Commission.

79 First, no reasons are given for that assertion, which is based on a finding of the General Court which has not been the subject of an exchange of arguments between the parties, in breach of the general principle of respect for the rights of the defence, the principle that the subject-matter of an action is delimited by the parties and the rules relating to the burden of proof. Second, even if that assertion is based on the estimate of the size of the market concerned in the contested decision, that figure cannot be accepted because the General Court found, at paragraph 59 of the judgment under appeal, that the estimate of the size of the market at EUR 83 million was incorrect and that the market had not been defined. The General Court therefore used contradictory reasoning. Ziegler adds that, in its view, the size of the international removal market in Belgium in 2002 may have been EUR 880 million.

80 In addition to its request that new grounds be substituted, the Commission states, first of all, that the quantification of the hypothetical size of market necessary for it to be possible for the market share held by the cartel members to fall below the 5% threshold was debated at the hearing and that it provided calculation factors in its response of 22 March 2010 to the written questions put by the General Court. Next, the evaluation of the size of the relevant market at EUR 880 million was proposed for the first time before the Court of Justice and is fanciful. The Commission also observes

that Ziegler complains that the size of the market was over-estimated in the context of the examination of the EUR 40 million threshold but claims that it is under-estimated for the purpose of examining the 5% market share threshold. Finally, in any event, the 5% threshold was clearly established. Ziegler does not contest the General Court's mathematical reasoning, in particular at paragraph 70 of the judgment under appeal. Furthermore, the explanation given by that court is more than adequate for the purpose of understanding its reasoning. The obligation to state reasons is therefore also fulfilled.

ii) Findings of the Court

81 According to settled case-law, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review (see, inter alia, Case C-259/96 P *Council* v *de Nil and Impens* [1998] I-2915, paragraphs 32 and 33, and *General Química and Others* v *Commission*, paragraph 59).

82 However, the obligation to state reasons does not require the General Court to provide an account which responds exhaustively and one by one all to the arguments put forward by the parties to the case. The reasoning may therefore be implicit on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review (see, inter alia, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/002 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 372).

83 In the present case, at paragraph 71 of the judgment under appeal, the only paragraph dealing with the part of the ground of appeal under consideration, the General Court stated as follows:

'… first, … the Commission was justified in finding that international removal services in Belgium were the relevant services … . Second, on that basis, the Commission estimated the size of the market at EUR 83 million and the combined market share of the participants in the cartel at approximately 50%. Those figures must be adjusted in order to take into account the corrections resulting from Decision C (2009) 5810 [final of 24 July 2009] … and from the exclusion of the sales achieved as a subcontractor …, which, according to the Commission, results in a combined turnover of over EUR 20 million and a combined market share of approximately 30%. That market share is still, however, well above 5%. Third, in answer to the Court's questions, [Ziegler] itself stated, at the hearing, that, for the 5% threshold not to be reached, the size of the market would have to be at least EUR 435 million. The only way the market concerned could attain such a size would be to start from a much larger market than that of international removal services in Belgium, which was, however, correctly identified by the Commission as the relevant market.'

84 It therefore follows, first, that paragraph 71 of the judgment under appeal makes it abundantly clear that the figures referred to by the General Court and the conclusion it drew from them were indeed the subject of an exchange of arguments between the parties. Accordingly, the argument alleging breach of the principle of audi alteram partem and the consequential breach of the general principle of respect for the rights of the defence, the principle that the subject-matter of an action is delimited by the parties and the rules relating to the burden of proof must be rejected.

85 Second, it is apparent from the file on the case before the General Court that the conclusion reached by that court at paragraph 71 of the judgment under appeal is not based on the estimate of the size of the market given in the contested decision – which, according to paragraph 59 of the judgment under appeal, is incorrect – but on the adjusted figures communicated by the Commission in its response of 22 March 2010 to the questions put by the General Court. As is apparent from the file on the case before the General Court, the Commission stated in that response that it was possible for it 'to estimate the overall size of the international market for removals to or from Belgium, excluding

removals which were subcontracted, at EUR 67.5 million at the most' and that, even in such a smaller market, the cartel members 'would still have, at the very least, a combined market share of almost 30%'. It follows that the contradictory reasoning alleged has not been established.

86 It should also be noted in that regard that, as observed by the Advocate General at point 73 of her Opinion, the simple fact that some of the figures in the contested decision may have been found to be incorrect cannot lead to the conclusion that all the figures communicated by the Commission were vitiated by errors. In any event, the assessment of the accuracy of figures put forward by the Commission, in this case in its response to questions put by the General Court, is a question of fact, which, save where the facts or evidence are distorted, which is not alleged in the present case, is not subject to review by the Court of Justice on appeal, in accordance with the case-law cited at paragraphs 74 and 75 above.

87 Third, contrary to what is maintained by Ziegler, the reasoning of the General Court at paragraph 71 of the judgment under appeal, in support of its conclusion that the 5% market share threshold was exceeded, fulfills the requirements set out at paragraphs 81 and 82 above. It is self-evident that the combined market share of the cartel members can be proportionately lower only if the market to which the cartel relates is larger. Since, first, the General Court found that the international removal services market in Belgium had been correctly identified by the Commission and, second, the size of that market, as accepted by that court, cannot, in the absence of any allegation of distortion, validly be challenged at the appeal stage, no particular reasoning was called for in support of that finding, other than that based on the observation that only if a much larger market had been established than the international removal services market in Belgium – correctly identified by the Commission – would it be possible to conclude that that threshold had not been reached.

88 It should also be noted in that regard that, by claiming that the size of the international removal market in Belgium in 2002 could have been EUR 880 million, Ziegler is once again seeking to call into question the General Court's assessment of the facts, without in any way pleading distortion of the clear sense of the evidence. As is apparent from the case-law cited at paragraphs 74 and 75 above, such an argument is, in any event, inadmissible at the appeal stage.

89 In the light of the foregoing, the second part of the first ground of appeal must be rejected as being in part unfounded and in part inadmissible, without there being any need to rule on the Commission's second request for the substitution of new grounds.

c) The third part of the first ground of appeal, whereby exceeding the 5% market share threshold is not sufficient to establish a risk of an appreciable effect on trade between Member States

i) Arguments of the parties

90 Ziegler submits, as an alternative argument, that, in any event, the General Court erred in law at paragraph 73 of the judgment under appeal by concluding that the infringement at issue was capable of having an appreciable effect on trade between Member States by sole virtue of the fact that the cartel members held more than 5% of the market concerned. Ziegler refers, inter alia, to point 45 of the Guidelines on the effect on trade and argues, first, that a precondition for the application of the presumption in question is that agreements must be in place which, by their very nature, are capable of affecting trade between Member States. The General Court did not, however, give any ruling on that condition, which is not, moreover, fulfilled in the present case. Second and in any event, the positive presumption referred to in point 53 of those guidelines is not, according to the actual wording of that point, generally and automatically applicable. The Commission is therefore required to examine the circumstances of the individual case and justify the application of that presumption.

91 The Commission observes that other factors in addition to the exceeding of the 5% market share threshold – which is, in any event, obvious here – reinforce the conclusion that it has been demonstrated that there is an appreciable effect on trade between Member States. It states in that regard that Ziegler fails to take account of the cross-border nature of the services affected and of the fact that the cartel covered the whole of Belgium.

ii) Findings of the Court

92 According to the Court's case-law, if an agreement, decision or concerted practice is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that it might hinder the attainment of a single market between Member States. Moreover, the effect must not be insignificant (*Asnef-Equifax and Administración del Estado*, paragraph 34 and the case-law cited, and *Erste Group Bank and Others* v *Commission*, paragraph 36).

93 An effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. In order to assess whether a cartel has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (*Asnef-Equifax and Administración del Estado*, paragraph 35 and the case-law cited, and *Erste Group Bank and Others* v *Commission*, paragraph 37).

94 Thus, the Court has already held that a cartel extending over the whole of the territory of a Member State has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the FEU Treaty is designed to bring about and is therefore capable of affecting trade between Member States within the meaning of Article 81(1) EC (see, to that effect, Case C-35/99 *Arduino* [2002] ECR I-1529, paragraph 33; *Asnef-Equifax and Administración del Estado*, paragraph 37 and the case-law cited; and *Erste Group Bank and Others* v *Commission*, paragraph 38) and that, where the services concerned have a cross-border dimension, that is a relevant factor in determining whether trade between Member States is affected within the meaning of that provision (see, by analogy, Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801, paragraphs 18 and 21).

95 The question whether there may be an appreciable effect on trade between Member States must therefore be assessed taking into account all the relevant factors of the individual case. Accordingly, the possibility cannot be ruled out that, in a particular case, one of those factors alone, such as the fact that the thresholds laid down by the Commission at point 53 of the Guidelines on the effect on trade has been clearly exceeded, may, in itself, provide a sufficient indication that there is an appreciable effect on trade between Member States within the meaning of Article 81(1) EC (see, by analogy, Case 19/77 *Miller International Schallplatten* v *Commission* [1978] ECR 131, paragraph 9, and Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraphs 82, 83 and 86).

96 Moreover, it should be recalled that point 53 of the Guidelines on the effect on trade states that '[i]n the case of agreements that by their very nature are capable of affecting trade between Member States it can … often be presumed that such effects are appreciable when the market share of the parties exceeds the 5% threshold'.

97 In the present case, it is true that, at paragraph 73 of the judgment under appeal, the General Court simply stated that 'in the context of the positive presumption laid down in point 53 of the … Guidelines [on the effect on trade], it is sufficient if only one of the two alternative conditions is met in order to prove that the effect on trade between Member States is appreciable'.

98 However, the General Court also observed, at paragraphs 53 of the judgment under appeal, that 'the positive presumption, laid down in point 53 [of the Guidelines on the effect on trade] applies only to agreements or practices that by their very nature are capable of affecting trade between Member States'. Furthermore, it stated, at paragraphs 52, 65 and 71 of that judgment, that the cross-border nature of the services concerned by the cartel in question was not disputed and that the Commission had correctly identified the cartel's geographical market as covering Belgium, that is the whole territory of a Member State.

99 It is therefore apparent from reading the judgment under appeal as a whole that, in reaching the conclusion that the condition requiring an appreciable effect on trade between Member States was fulfilled in the present case, the General Court did not simply rely on the exceeding of the 5% market share threshold – in itself very important – but also considered the geographic scope of the cartel and the cross-border nature of the services affected. Thus, it took account of all the relevant factors of the individual case, in accordance with the case-law cited at paragraphs 92 to 95 above.

100 Moreover, although the General Court did not give an express ruling on the precondition for the application of point 53 of the Guidelines on the effect on trade, relating to the nature of the agreement in question, it is apparent from the factors set out at paragraph 98 above that, in its view, that condition was clearly fulfilled in the present case, having regard to the characteristics of the cartel in issue. The infringement alleged of point 53 has not therefore been established. Furthermore, in the light of the case-law cited at paragraphs 81 and 82 above, there are no grounds for the claim that the General Court failed to comply with its obligation to state reasons with regard to the application of that presumption in the present case.

101 In those circumstances, the third part of the first ground of appeal relied on by Ziegler must be rejected and, as a consequence, that ground in its entirety, without there being any need to rule on the merits of the Commission's second request for the substitution of new grounds.

B – *The second ground of appeal, alleging infringement of Article 296 TFEU, Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and of the general principle of equal treatment with regard to the assessment of the reasons given concerning the amount of the fine*

1. Arguments of the parties

102 Ziegler claims, in essence that the General Court infringed European Union law by finding, at paragraphs 88 to 94 of the judgment under appeal, that the Commission had not failed to comply with its obligation to provide an adequate statement of reasons by relying solely on the 'very serious' nature of the infringement in establishing the proportion of the value of sales to be used to determine the basic amount of the fine and the additional amount applied as a deterrent.

103 As its principal argument, Ziegler contends, first, that by granting such an exemption from the obligation to state reasons, the General Court acted in breach of Article 296 TFEU. Points 20 and 22 of the Guidelines on the method of setting fines provide that the Commission must take account of a number of factors in deciding the proportion of the value of sales to be taken into consideration, even where it considers the infringement to constitute one of the most serious restrictions of competition. The statement of reasons provided by the General Court at paragraph 93 of the judgment under appeal is therefore insufficient and fundamentally misinterprets point 23 of those guidelines.

104 Second, the judgment under appeal disregards the fundamental right to fair legal process enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 ('the ECHR'), in so far as that right entails an obligation 'to provide a

relevant and adequate statement of reasons'. The Commission is under such an obligation when it institutes proceedings and takes decisions concerning infringements of competition law since, in the light of the case-law of the European Court of Human Rights, it cannot be disputed that the Commission is a tribunal within the meaning of Article 6 of the ECHR. It follows from that case-law that the right to fair legal process precludes the General Court from granting an exemption from the obligation to state reasons concerning the penalties to be imposed for the most serious infringements of competition law.

105 Ziegler adds that even if the Commission was not regarded as a tribunal subject to such requirements to provide a statement of reasons, the General Court, in releasing the Commission from its obligation to state reasons where it finds that a proportion of the value of sales is close to the lower end of the scale laid down for the most serious restrictions, thereby failed to exercise its power of unlimited jurisdiction and disregarded its right to fair legal process. Case-law, in particular that of the European Court of Human Rights, would suggest that a simple review as to whether an administrative body has exceeded the bounds of its discretion does not constitute the exercise of unlimited jurisdiction for the purpose of Article 6 of the ECHR. Similarly, since the mere possibility of exercising the power of unlimited jurisdiction is not sufficient for the purposes of ensuring fair legal process, that power must in fact be exercised in the present case.

106 Ziegler maintains, as an alternative argument, that even if such an exemption from the obligation to state reasons were acceptable in principle, the extent of the exemption granted by the General Court renders it incompatible with the fundamental provisions referred to above as well as the general principle of equal treatment and no adequate reasons are given for the exemption. First, the claim that, as stated at paragraph 93 of the judgment under appeal, such an exemption may be granted only when a 'percentage very close to' the lower end of the scale laid down for the most serious restrictions of competition is applied – without any definition being given of that notion – would lead to different situations being treated in the same manner, in breach of the principle of equal treatment. Second, by finding that the exemption granted also covers the additional amount applied as a deterrent, without further explanation, the General Court failed to have regard to its obligation to state reasons. Indeed, as point 25 of the Guidelines on the method of setting fines states that the additional amount is to be applied to the most serious infringements, the nature of the infringement is not sufficient in itself for the purpose of determining the proportion of the value of sales to be taken into account.

107 The Commission's request that new grounds be substituted concerning the scope of the obligation to state reasons imposed by the Guidelines on the method of setting fines adopted in 2006 is, in Ziegler's view, inadmissible and, in any event, unfounded. The case-law prior to the adoption of those guidelines in 2006 is no longer relevant. The guidelines have rendered the Commission's duty to state reasons more onerous. Similarly, the recognition of the penal nature of fines imposed by the Commission in competition matters and the entry into force of the Charter have made the requirements attaching to the Commission's statements of reasons for its decision more stringent.

108 First, the Commission observes, with regard to the reasons given for setting the proportion of the value of sales at 17%, that Ziegler did not put forward any argument before the General Court relating to its fundamental right to fair legal process. It requests the Court to substitute new grounds for the grounds set out at paragraphs 90 to 92 of the judgment under appeal. In particular, the statement at paragraph 92 of that judgment that the Guidelines on the method of setting fines adopted in 2006 rendered the Commission's obligation to state reasons more onerous is incorrect. The Commission also claims that the tension between paragraphs 92 and 93 of the judgment under appeal identified by Ziegler would be removed if its request for the substitution of new grounds were granted, which would lead to the rejection of the second ground of appeal.

109 That ground of appeal is, in any event, unfounded. As its principal argument, the Commission submits, first, with regard to the obligation to state reasons, that the General Court correctly concluded, in the light of the contested decision, that the Commission had complied with that obligation. Second, the

argument alleging that the Commission is a tribunal within the meaning of Article 6 of the ECHR, bound by a special obligation to state reasons, and that the inadequate reasoning of the judgment under appeal denies Ziegler its right to challenge the contested decision before an independent tribunal exercising its power of unlimited jurisdiction is inadmissible, since it was put forward for the first time at the appeal stage and it would not have been impossible to pursue that argument before the General Court. That argument is, in any event, unfounded. In particular, the case-law of the European Court of Human Rights is not capable of undermining the existing case-law of the Court of Justice to the effect that the Commission cannot be regarded as a tribunal within the meaning of Article 6 of the ECHR.

110 As regards, in the alternative, the assessment of the reasons given for the amount of the fine, the Commission refers, with regard to the proportion of the value of sales used to determine the basic amount of the fine, to its arguments set out above concerning the grounds put forward in the contested decision. As far as concerns the proportion of the value of sales used to determine the additional amount applied as a deterrent, the Commission is of the view that it cannot be disputed that the proportion equivalent to 17% applied in the present case is at the lower end of the 15% – 25% scale or that the serious nature of the infringement could result in that proportion being applied twice, since two assessments are carried out concerning the serious nature of the infringement in itself.

2. Findings of the Court

a) The Commission's request that new grounds be substituted

111 It should be noted that, even on the assumption that the General Court erred in holding, at paragraphs 90 to 92 of the judgment under appeal, that the adoption in 2006 of the Guidelines on the method of setting fines, replacing those adopted in 1998, rendered the Commission's obligation to state reasons more onerous when imposing sanctions for infringements of European Union competition law, that would have no bearing on analysis of the merits of Ziegler's second ground of appeal. Indeed, at paragraphs 93 to 96 of the judgment under appeal, the General Court stated that the imposition of a higher standard of reasoning was unnecessary in the case before it. Thus, the General Court did not draw any factual or legal conclusion for the present case from the matters referred to at paragraphs 90 to 92 of the judgment under appeal.

112 The Commission's request must therefore be regarded as being directed against grounds included in the judgment under appeal purely for the sake of completeness and, consequently, as it is ineffective, it must in any event be rejected (see, to that effect, the order in Case C-317/95 P *SPO and Others* v *Commission* [1996] ECR I-1611, paragraph 47 and the case-law cited, and the judgment in Case C-182/99 P *Salzgitter* v *Commission* [2003] ECR I-10761, paragraphs 54 and 55).

b) The merits of the second ground of appeal

i) Principal argument

113 First, it should be noted that while, as its principal argument in the second ground of appeal, Ziegler claims, inter alia, infringement of Article 296 TFEU, it is Article 253 EC which is applicable in the present case, since the contested decision was adopted before the entry into force of the Treaty of Lisbon. That is irrelevant, however, since Article 253 EC does not lay down different legal requirements applicable to the statement of reasons for the European Union measures at issue in the present case from those applicable under the second paragraph of Article 296 TFEU. That claim must therefore be construed as alleging, inter alia, infringement of Article 253 EC.

114 It should be borne in mind that the obligation laid down in Article 253 EC to state adequate reasons is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 146 and the case-law cited).

115 In that vein, first, the statement of reasons required under Article 253 EC must be appropriate for the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (*Elf Aquitaine* v *Commission*, paragraphs 147 and 148 and the case-law cited).

116 Second, the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (*Elf Aquitaine* v *Commission*, paragraph 150 and the case-law cited).

117 Moreover, as regards the choice of the proportion of the value of sales used to determine the basic amount of the fine, point 21 of the Guidelines on the method of setting fines states that '[a]s a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales'. Point 22 of those guidelines provides that '[i]n order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented'. Point 23 of those guidelines states that 'the proportion of the value of sales taken into account for [horizontal price-fixing, market-sharing and output-limitation agreements] will generally be set at the higher end of the scale'.

118 As regards the determination of the additional amount applied as a deterrent, point 25 of the Guidelines on the method of calculating fines states that '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 … in order to deter undertakings from even entering into horizontal price-fixing … agreements. … 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'.

119 In the present case, with regard to the proportion of the value of sales used to determine the basic amount of the fine, the General Court, after finding, at paragraph 89 of the judgment under appeal – which is not disputed by Ziegler – that 'the Commission gave sufficient reasons for classifying the infringement as "very serious"', and recalling, at paragraph 87 of the judgment under appeal, the scope

of the obligation to state reasons laid down in Article 253 EC, and, at paragraph 91 of that judgment, the essential content of points 19, 21 and 23 of the Guidelines on the method of calculating fines, stated as follows at paragraph 93 of the judgment:

'… in recital 543 of the [contested decision], the Commission set the percentage at a level scarcely above the mid-point of the scale, namely at 17%, basing its choice solely on the "very serious nature" of the infringement. However, the Commission has failed to explain in a more detailed manner how the classification of the infringement as "very serious" has led it to set the percentage at 17% and not at a percentage considerably more "at the higher end of the scale". That reasoning can be sufficient only where the Commission applies a percentage very close to the lower end of the scale laid down for the most serious restrictions, that being, moreover, highly favourable to the applicant. In that case, supplementary reasons going beyond the reasoning inherent in the guidelines are not necessary. By contrast, had the Commission wished to apply a higher percentage, it would have had to provide more detailed reasons.'

120 In so far as concerns the proportion of sales used to determine the additional amount applied as a deterrent, the General Court found, at paragraph 94 of the judgment under appeal, that '[i]n view of the fact that … recital 556 of the [contested decision] refers to recital 542 and that the lower limit of the scale is the same, the considerations above apply equally to the complaints relating to the statement of reasons for the setting of that amount'.

121 It is apparent from those considerations, first, that the General Court concluded, in accordance with the case-law cited at paragraph 115 above, that the reasons given by the Commission in the contested decision concerning the proportion of value of the sales used to determine the basic amount of the fine are clear, unequivocal and consistent with the method referred to at points 21 and 23 of the Guidelines on the method of calculating fines. It should be recalled that the Commission stated at those points that, as a general rule, it will set a proportion equivalent to up to 30% of the value of sales but, for infringements such as horizontal price-fixing and market sharing agreements – the categorisation of the cartel at issue in the contested decision, which Ziegler has not contested – the proportion applied will generally be 'at the higher end of the scale'.

122 Second, as 17% is considerably below the upper limit of the scale referred to by the Commission in those guidelines for the most serious restrictions of competition, the General Court observed, correctly, that that percentage was highly favourable to Ziegler. Thus, in accordance with the case-law cited at paragraph 116 above, the General Court was justified in considering that Ziegler had no interest in receiving a particular explanation as to the choice of that percentage and that the Commission was not therefore required to give more specific reasons in the contested decision concerning that point.

123 Third, it is not apparent from the judgment under appeal – and nor has it been claimed by Ziegler – that the contested decision was adopted in a particular context or concerned a cartel with particular characteristics which called for more specific reasons to be given by the Commission for its choice of the proportion of the value of sales used in determining the basic amount of the fine than the reasons actually put forward or that the failure to provide such reasons should have been censured by the General Court.

124 Fourth, with regard in particular to the percentage figure used to determine the additional amount applied as a deterrent, it is clear that, first, the cartel in question falls squarely within the category of infringements referred to at point 25 of the Guidelines on the method of calculating fines, which are also referred to at point 23, and, second, 17% is also at the lower end of the 15% – 25% scale mentioned at point 25. The General Court was therefore entitled to refer, at paragraph 94 of the judgment under appeal, to its analysis of the reasons given for the percentage figure used to

determine the basic amount of the fine. Accordingly, the considerations set out at paragraphs 121 to 123 above are equally valid as regards the General Court's analysis of the reasons given by the Commission in the contested decision concerning that percentage figure.

125 In those circumstances, Ziegler's claim that the General Court infringed Article 253 EC by omitting to censure inadequate reasoning in the contested decision regarding the choice of the proportion of the value of sales used in determining the basic amount of the fine and the amount of the additional fine applied as a deterrent, or even by exempting the Commission from any obligation to state reasons in that regard, must be rejected as unfounded.

126 Furthermore, with regard to the alleged infringement of the fundamental right to fair legal process enshrined in Article 47 of the Charter and Article 6 of the ECHR, it should be noted, first, that the protection afforded in European Union law by Article 47 of the Charter is the same as that afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47 (see, to that effect, Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraph 51).

127 As Ziegler maintains that, in the present case, that provision of the Charter was infringed by both the Commission and the General Court, it must be recalled, first, that according to settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court would be to allow it to bring before the Court, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the Court's jurisdiction is therefore confined to reviewing the findings of law on the pleas argued before the General Court (Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 60 and the case-law cited, and Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacc*o v *Commission* and *Commission* v *Alliance One International and Others* [2012] ECR, paragraph 111).

128 In the proceedings at first instance, Ziegler did not put forward any argument to establish that, in adopting the contested decision, the Commission infringed its fundamental right to fair legal process. That complaint is therefore inadmissible.

129 Second, since Ziegler contends by that complaint that the General Court itself infringed that fundamental right, it should be pointed out that Ziegler is claiming that that infringement derives from the fact that the General Court exempted the Commission, in breach of European Union law, from the obligation to state reasons which the Commission is under when establishing the proportion of the value of sales to be used to determine the basic amount of the fine and the additional amount applied as a deterrent.

130 However, it is clear that that complaint is based on a false premiss, as is apparent from paragraph 125 above, since the General Court did not in any way exempt the Commission from the obligation it is under to state reasons. That complaint must therefore be dismissed since, in that respect, it is unfounded.

131 The principal argument of the second ground of appeal must therefore be dismissed in its entirety.

ii) The argument put forward in the alternative

132 First, the principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter. According to settled case-law, that principle requires that comparable situations must not be treated differently, and different situations must not be treated in the same way, unless such treatment is objectively justified (Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECR I-8301, paragraphs 54 and 55 and the case-law cited).

133 It is also the Court's settled case-law that, when the amount of the fine is determined, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in an agreement or a concerted practice contrary to Article 81(1) EC (*Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, paragraph 58 and the case-law cited).

134 However, the Court has repeatedly held that the Commission's practice in previous decisions does not itself serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination (Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 205, and *Erste Group Bank and Others* v *Commission*, paragraph 233).

135 However, in the present case Ziegler does not claim that the General Court failed to censure an infringement of the principle of equal treatment on the basis that the Commission, in determining the basic amount of the fine to be imposed on it as well as the additional amount applied as a deterrent, chose to use a proportion equivalent to 17% of the value of sales, whereas it used a proportion equivalent to 15% for another undertaking involved in the same cartel, whose conduct was comparable to its own. On the contrary, Ziegler claims that the General Court infringed that principle by implying, at paragraph 93 of the judgment under appeal, that cases in which the fine is calculated on the basis of a proportion equivalent to 17% of the value of sales and cases in which the calculation is made on the basis of a proportion equivalent to 15% of that value may be treated as comparable.

136 It is clear, first, that no such implication may be inferred from paragraph 93 of the judgment under appeal. Second, in any event, in the light of the case-law cited at paragraph 134 above, the theoretical comparison with any possible future Commission practice cannot have the slightest possible relevance with regard to any claim alleging discrimination.

137 It follows that the complaint alleging infringement of the principle of equal treatment must be rejected.

138 Second, with regard to the General Court's purported infringement of its obligation to state reasons by permitting the Commission, at paragraph 94 of the judgment under appeal, to fix the proportion of the value of sales to be taken into account in determining the additional amount applied as a deterrent at 17% on the sole ground that the infringement was 'very serious', when point 25 of the Guidelines on the method of setting fines implies that the nature of the infringement alone cannot be a sufficient factor in determining the percentage to be applied, it should be recalled, first, that it has already been held, at paragraphs 124 and 125 above, that the General Court did not infringe Article 253 EC at paragraph 94 of the judgment under appeal as alleged by Ziegler in the principal argument relied on in the second ground of appeal.

139 Second, contrary to Ziegler's contentions, the General Court was not required to provide additional reasons for its decision by reference to point 25 of the Guidelines on the method of setting fines. As regards the determination of the percentage to be used within the range set out in point 25, it is true that that point states that '[f]or 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 [of those guidelines]'. However, the nature of the infringement concerned is indeed given as one such factor.

140 Moreover, as observed by the Advocate General at point 129 of her Opinion, it is apparent from the wording of point 22, in conjunction with point 25, that it is a simple general statement from which it cannot be inferred: (i) that the Commission must necessarily rely on all those factors in every single case and provide a detailed statement of reasons justifying the proportion applied with regard to each of those factors; or (ii) that the General Court must therefore necessarily find that the Commission's statement of reasons is insufficient if it has failed to provide reasons for its decision with regard to each and every one of the factors referred to at point 22.

141 In those circumstances and in the light of the case-law cited at paragraphs 81 and 82 above, it is apparent that the General Court gave sufficient reasons for its conclusion at paragraph 94 of the judgment under appeal.

142 Moreover, the fact that Ziegler considers the General Court's substantive position to be incorrect cannot vitiate the judgment under appeal on the ground of failure to state reasons. In accordance with the case-law cited at paragraph 114 above, a distinction must be made between the obligation to state reasons and the question whether the reasoning is well founded.

143 The complaint alleging an inadequate statement of reasons in the judgment under appeal must therefore be rejected as unfounded, as must, consequently, the argument put forward in the alternative in the second ground of appeal in its entirety.

144 Since none of the complaints raised by Ziegler in support of the second ground of appeal may therefore be upheld, that ground of appeal must be rejected in its entirety.

C – *The third ground of appeal, alleging infringement of the obligation to state reasons, the fundamental right to fair legal process and the principle of good administration as regards the rejection of the complaint alleging a lack of objective impartiality on the part of the Commission*

1. Arguments of the parties

145 Ziegler submits, first, that paragraphs 103 to 107 of the judgment under appeal are vitiated by failure to provide a proper statement of reasons in that the General Court failed to give reasons for rejecting the complaint that the Commission lacked objective impartiality. The reasoning employed by the General Court at paragraphs 104 and 106 of the judgment under appeal concerns subjective impartiality and is therefore based on a confusion between those two concepts. Objective impartiality predates the contested decision and relates to factors which are external to the decision without necessarily having to be reflected in it. In order to ascertain whether the Commission has been objectively impartial, it is necessary to ask whether, independently of its conduct, certain verifiable facts give rise to doubts as to that institution's impartiality.

146 Ziegler maintains, second, that the contested decision is vitiated on the ground that it lacks objective impartiality and that it follows that, in rejecting that plea, the General Court disregarded its right to fair legal process, enshrined in Article 47 of the Charter and Article 6 of the ECHR, and its right to good administration, enshrined in Article 41 of the Charter. On the one hand, those provisions impose a duty of objective impartiality on the Commission, even if it is not regarded as a tribunal within the meaning of Article 47 of the Charter and Article 6 of the ECHR. At the very least, the Commission is bound by that duty by virtue of the right to good administration enshrined in Article 41 of the Charter. On the other hand, according to Ziegler, the requirement of objective impartiality is not met in the present case. The Commission is concerned by the infringement attributed to Ziegler due to both the fact that it was one of its victims and the fact that Commission officials were involved, in so far as they requested 'cover quotes'. According to the European Court of Human Rights, the victims of an infringement cannot act as judges of the infringement.

147 According to the Commission, the third ground of appeal is unfounded. As regards the statement of reasons in the judgment under appeal, the case-law of the European Court of Human Rights on subjective impartiality is, in its view, irrelevant because the Commission cannot be treated as a court. Moreover, the fact that the Commission, or another EU institution, is one of the victims of a cartel cannot, in itself, call into question the fact that it conducts its investigations with total impartiality. In the present case, none of Ziegler's rights of defence was affected. The General Court was entitled, in

those circumstances, to take account of the fact that Ziegler was not able to put forward any specific indication in support of its assertions. Therefore, the General Court correctly stated the reasons for which it rejected that line of argument.

148 As regards the fundamental right to fair legal process and the principle of good administration, the Commission repeats that it cannot be regarded as a tribunal within the meaning of Article 47 of the Charter and Article 6 of the ECHR. It also acknowledges that it is obviously bound by a duty of impartiality, in particular during the administrative investigation, in accordance with the principle of good administration, and considers that it complied with the duty of impartiality in the present case.

2. Findings of the Court

149 First, as regards the purported failure to state adequate grounds in the judgment under appeal, it should be noted that, according to the established case-law cited at paragraphs 81 and 82 above, the obligation upon the General Court to state reasons does not require it to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case. The General Court's reasoning may therefore be implicit on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review. Furthermore, according to the equally established case-law cited at paragraph 114 above, the obligation to state adequate reasons must be distinguished from the question whether the reasoning is well founded.

150 In the present case, the General Court stated at paragraph 104 of the judgment under appeal that 'the lack of objectivity allegedly shown by the Commission does not constitute an infringement of the rights of the defence capable of leading to annulment of the contested decision but must be placed in the context of the review of the assessment of the evidence or of the statement of reasons for the decision'. It concluded at paragraph 105 of that judgment that that plea was ineffective as a plea for annulment.

151 Nevertheless, at paragraph 106 of the judgment under appeal, the General Court stated, for the sake of completeness, that that plea was 'also unfounded', on the ground, first, that '[t]he matters raised by [Ziegler] are not of such a kind as to demonstrate that the alleged bias of the Commission or of one of its officials was reflected in the [contested decision]' – the General Court then going on to consider the fact that those matters were not conclusive – and, second, that the arguments put forward by Ziegler, including at the hearing, '[could not] substantiate its assertion that the Commission was biased in investigating the case'. In that connection, it considered in particular that '[Ziegler had failed] to show how the conduct which certain officials are accused of even if proved, could have infringed the right to a fair procedure'.

152 Hence, while the General Court did not, in those paragraphs, make an express distinction between objective and subjective impartiality, it nevertheless clearly indicated the reason for which it took the view that the plea put forward by Ziegler could not succeed and thereby addressed, to the requisite legal standard, the arguments raised by that company and enabled the Court of Justice to exercise its power of review in a manner consistent with the case-law cited at paragraph 149 above. The issue whether, in so far as it applies the same requirements to objective impartiality as to subjective impartiality, the reasoning employed by the General Court is correct is a substantive question which cannot, irrespective of whether it is justified, vitiate the judgment under appeal on the ground of failure to state adequate reasons, in accordance with the case-law cited at paragraph 114 above.

153 It follows from the foregoing that the first part of the third ground of appeal must be rejected as unfounded.

154 As regards, second, the purported infringement of the fundamental right to fair legal process and the principle of good administration, it should be noted that, while the Commission may not be classified as a 'tribunal' within the meaning of Article 6 of the ECHR (see, to that effect, Joined Cases 209/78 to 215/78 and 218/78 *Landewyck and Others* v *Commission* [1980] ECR I-3125, paragraph 81, and *Musique Diffusion française and Others* v *Commission*, paragraph 7), it is nevertheless required during the administrative procedure to respect the fundamental rights of the European Union, which include the right to good administration enshrined in Article 41 of the Charter. In particular, it is that provision, not Article 47 of the Charter, which governs the administrative procedure relating to restrictive practices before the Commission (see, to that effect, Case C-109/10 P *Solvay* v *Commission* [2011] ECR I-10329, paragraph 53, and Case C-110/10 P *Solvay* v *Commission* [2011] ECR I-10439, paragraph 48).

155 Article 41 of the Charter provides that every person has the right, inter alia, to have his or her affairs handled impartially by the institutions of the European Union. That requirement of impartiality encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned (see, by analogy, Joined Cases C 341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 54, and Case C-308/07 P *Gorostiaga Atxalandabaso* v *Parliament* [2009] ECR I-1059, paragraph 46).

156 This part of the third ground of appeal is concerned solely with the concept of objective impartiality. Ziegler maintains, in essence, that it was not possible for the General Court to find, without erring in law, that, in the circumstances of the present case, the Commission did not lack objective impartiality, given that the Commission considered itself to be a victim of the restrictive practice in question and Commission officials requested 'cover quotes'.

157 First, the simple fact that the Commission investigates a cartel which is detrimental to the European Union's financial interests and imposes penalties on its members does not mean that the Commission lacks objective impartiality. Otherwise, the mere possibility that the Commission, or indeed any other EU institution, might be the victim of anti-competitive conduct, as referred to in Article 81 EC, would have the effect, as observed by the Advocate General at point 149 of her Opinion, of depriving it of its competence to investigate such conduct, which cannot be accepted. It should be noted in particular that under Article 85 EC – now Article 105 TFEU – the tasks entrusted to the Commission by the Treaties include precisely that of ensuring the application of the principles laid down in Articles 81 EC and 82 EC.

158 Second, the fact that the Commission's departments responsible for bringing proceedings for infringements of EU competition law and those responsible for the administration of removals of officials and agents of that institution belong to the same organisational structure cannot, of itself, call into question that institution's objective impartiality, since those departments necessarily form part of the structure, to which they belong (see, by analogy, Case C-199/11 *Otis and Others* [2012] ECR, paragraph 64).

159 Third, the Court has already held that Commission decisions may be subject to review by the European Union judicature and that European Union law lays down a system enabling the courts to review Commission decisions, including decisions relating to procedures under Article 81 EC, which provides all the guarantees required by Article 47 of the Charter (*Otis and Others*, paragraph 56). The Commission cannot, therefore, in any event be regarded as both the victim of an infringement and the judge responsible for imposing penalties for the infringement.

160 In the light of the foregoing, the General Court was justified in taking the view that the Commission had not failed in its duty of impartiality. It did not, therefore, err in law in rejecting Ziegler's plea alleging infringement of the right to fair legal process and the general principle of good administration.

161 Moreover, in accordance with the case-law cited at paragraph 75 above, it is for the General Court alone to assess the value which should be attached to the evidence produced to it, save where the clear sense of the evidence has been distorted. Thus, in so far as, by the second part of the third ground of appeal Ziegler seeks to call into question the General Court's assessment of the evidence which it adduced in support of the plea raised before it and does not claim that the clear sense of that evidence was distorted, that argument must be rejected as inadmissible.

162 It follows that the second part of the third ground of appeal relied on by Ziegler is in part unfounded and in part inadmissible and must therefore be rejected, as must, therefore, the third ground of appeal in its entirety.

D – *The fourth ground of appeal, alleging infringement of the principle of equal treatment as regards the assessment of the reduced fines*

1. Arguments of the parties

163 Ziegler submits that, having found at paragraph 167 of the judgment under appeal that the Commission had made an error concerning its ability to pay, the General Court could not go on to conclude, without infringing the principle of equal treatment, that the Commission was entitled to grant to another undertaking which had participated in the cartel a 70% reduction of the fine initially imposed, on the basis of point 37 of the Guidelines on the method of setting fines, when it did not contemplate a reduction of the amount of the fine imposed on Ziegler on the same basis. Claiming that, like that other undertaking, it was in the position of being unable to pay – a position noted by the General Court – Ziegler contends that it was entitled to have its particular circumstances analysed by reference to point 37.

164 The justification given by the General Court for that different treatment at paragraph 171 of the judgment under appeal, relating to the 10% threshold of total turnover, was not raised by the Commission. Moreover, that justification runs counter to that court's reasoning that an assessment based on turnover alone does not take account of the undertaking's specific circumstances and is not therefore relevant, when considered in isolation, for the purposes of deciding whether to grant a reduction of the fine. In the light of the above, the judgment under appeal should be set aside and Article 2 of the contested decision annulled. At the very least, the fine imposed on Ziegler should be substantially reduced.

165 In response, the Commission contends that the fourth ground of appeal should be rejected. First, due regard was had to the principle of equal treatment in the application of point 35 of the Guidelines on the method of setting fines. It points out, inter alia, in that connection, that all the requests for the application of point 35 were refused, on account of the lack of a specific social and economic context. Second, point 37 of those guidelines refers to a wholly exceptional situation. The circumstances of the other undertaking in question were entirely special, for reasons which cannot be disclosed to Ziegler but which the General Court was aware of. The fact that the General Court explicitly referred to the difference in the amount of the fines solely in terms of percentage of total turnover can be explained by the highly confidential nature of the information in question, which cannot be disclosed to Ziegler. That percentage is also relevant in determining whether or not a fine could threaten an undertaking's survival and, in any event, the difference in percentages supports the inference that the situations of that other undertaking and Ziegler are not comparable, especially as Ziegler did not seek to rely on point 37.

2. Findings of the Court

166 In accordance with the case-law cited at paragraph 132 above, the principle of equal treatment requires, inter alia, that comparable situations must not be treated differently, unless such treatment is objectively justified.

167 Thus, breach of the principle of equal treatment as a result of different treatment presumes that the situations concerned are comparable, having regard to all the elements which characterise them. The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject-matter and purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraphs 25 and 26 and the case-law cited).

168 In the present case, after pointing out at paragraph 165 of the judgment under appeal that, in order to benefit from the reduction provided for in point 35 of the Guidelines on the method of setting fines, a request must be submitted and two cumulative conditions be met, namely, an insuperable difficulty in paying the fine and the existence of a specific social and economic context, the General Court in fact held, at paragraphs 167 of that judgment, that '[a] simple calculation of the fine as a percentage of the company's worldwide turnover cannot of itself lead to the conclusion that the fine is not liable to irretrievably jeopardise the applicant's economic viability. If that were the case, it would be possible to set out specific thresholds for the application of point 35 of the … Guidelines [on the method of setting fines]'.

169 The General Court went on to find, in the same paragraph, that there were no grounds to support the Commission's conclusion in the contested decision that the first condition for the application of point 35, namely an insuperable difficulty in paying the fine, was not met.

170 However, first of all, while the General Court thus reached the conclusion that the Commission had not given sufficient reasons for its view that the fine which it intended to impose on Ziegler would not irretrievably jeopardise its economic viability, it did not, on the other hand, find that Ziegler was in fact in the position of being unable to pay. The General Court simply stated that the Commission had not established that that was not the case. It is therefore clear that Ziegler's argument is based, at least in part, on a false premiss and that, as a consequence, the claim alleging contradictory reasoning has not been made out.

171 Second, it is true that point 35 of the Guidelines on the method of setting fines states that '[i]n exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context'. However, point 37 of those guidelines provides that '[a]lthough these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21'. It follows that, unlike point 35 of those guidelines, point 37 may be applied independently of the ability of the undertaking concerned to pay.

172 Therefore, even if the General Court had recognised that Ziegler had a reduced ability to pay for the purpose of point 35 of those guidelines, that fact alone would not have had the effect of rendering its situation comparable to that of the other undertaking in question for the purpose of point 37.

173 It should, nevertheless, be noted that the wording of point 37 does not preclude the possibility that an undertaking's inability to pay may be relevant for the purpose of determining whether that provision is applicable. However, first, in order for both points 35 and 37 of the Guidelines on the method of

setting fines to be effective, the conditions for their respective application must be different. Accordingly, an inability or reduced ability to pay within the meaning of point 35 cannot be deemed sufficient, in itself to give rise to the possible application of point 37 of those guidelines.

174 Second, since an inability or reduced ability to pay may be relevant in connection with point 37, the General Court was justified, for the purpose of determining whether the Commission had treated Ziegler and the other undertaking concerned equally, in comparing their situations at paragraph 171 of the judgment under appeal by reference to the relative amount of the fine envisaged for each of them in terms of their respective turnovers and in concluding, in the light of the considerable difference found between those relative amounts, that there had been no breach of the principle of equal treatment.

175 It follows from the foregoing that the fourth ground of appeal must be rejected in its entirety, including the claim seeking a reduction of the amount of the fine.

176 Since none of the grounds of appeal can be upheld, the appeal must be dismissed in its entirety.

VI – Costs

177 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where an appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which applies to appeal proceedings pursuant to Articles 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Ziegler has been unsuccessful in its submissions and the Commission has applied for costs against that company, Ziegler must be ordered to pay the costs.

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

1. Dismisses the appeal;

2. Orders Ziegler SA to pay the costs.

[Signatures]