Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

6 September 2013 *

(Competition — Administrative proceedings — Decision ordering an inspection — Powers of inspection of the Commission — Rights of defence — Proportionality — Obligation to state reasons)

In Joined Cases T-289/11, T-290/11 and T-521/11,

Deutsche Bahn AG, established in Berlin (Germany),

DB Mobility Logistics AG, established in Berlin,

DB Energie GmbH, established in Frankfurt am Main (Germany),

DB Netz AG, established in Frankfurt am Main,

DB Schenker Rail GmbH, established in Mainz (Germany),

DB Schenker Rail Deutschland AG, established in Mainz,

Deutsche Umschlaggesellschaft Schiene-Straße mbH (DUSS), established in Bodenheim (Germany),

represented by W. Deselaers, O. Mross and J. Brückner, lawyers,

applicants,

v

European Commission, represented by L. Malferrari, N. von Lingen and R. Sauer, acting as Agents,

defendant,

supported by

Kingdom of Spain, represented initially, in Cases T-289/11 and T-290/11, by M. Muñoz Pérez, and subsequently, in Cases T-289/11, T-290/11 and T-521/11, by S. Centeno Huerta, abogados del Estado,

by

Council of the European Union, represented by M. Simm and F. Florindo Gijón, acting as Agents,

and by

* Language of the case: German.

EFTA Surveillance Authority, represented by X.A. Lewis, M. Schneider and M. Moustakali, acting as Agents,

interveners,

APPLICATION for annulment of Commission Decisions C(2011) 1774 of 14 March 2011, C(2011) 2365 of 30 March 2011 and C(2011) 5230 of 14 July 2011, ordering, in accordance with Article 20(4) of Council Regulation (EC) No 1/2003, inspections of Deutsche Bahn AG and all of its subsidiaries (Cases COMP/39.678 and COMP/39.731),

THE GENERAL COURT (Fourth Chamber),

composed of I. Pelikánová, President, K. Jürimäe and M. van der Woude (Rapporteur), Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 9 April 2013,

gives the following

Judgment

Background to the dispute

1 Deutsche Bahn AG, DB Mobility Logistics AG, DB Netz AG, DB Energie GmbH, Deutsche Umschlaggesellschaft Schiene-Straße mbH (DUSS), DB Schenker Rail GmbH and DB Schenker Rail Deutschland AG, the applicants, and all legal persons directly or indirectly controlled by Deutsche Bahn, constitute an international undertaking that pursues activities in the national and international freight and passenger transport sector, in the logistics sector and in the sector for the provision of ancillary rail transport services. The subsidiaries involved in the present cases are wholly owned directly or indirectly by Deutsche Bahn.

First inspection

First inspection decision

2 By Decision C(2011) 1774 of 14 March 2011 (Cases COMP/39.678 and COMP/39.731) (‘the first inspection decision’), the European Commission ordered Deutsche Bahn and all legal persons directly or indirectly controlled by it to submit to an inspection, pursuant to Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1).

3 Article 1 of the first inspection decision is worded as follows:

‘Deutsche Bahn AG, … and all legal persons directly or indirectly controlled by it, including DB Mobility Logistics AG, DB Energie GmbH, DB Schenker Rail GmbH and DB Schenker Rail Deutschland AG, are required to submit to an inspection regarding their conduct — which may infringe Article 102 TFEU and Article 54 of the EEA Agreement — in the rail transport sector and the sector for the provision of ancillary services, in the Member States where the concerned subsidiaries of the DB group pursue freight and passenger rail transport activities, particularly in Germany. The conduct at issue involves potentially unjustified preferential treatment by DB Energie

GmbH towards other DB group subsidiaries, notably in the form of a rebate system concerning the supply of electric traction energy, allowing the DB group to obstruct competition in the downstream rail transport markets.

The inspection may take place at any of the premises of the Deutsche Bahn AG group (in particular, at the premises of Deutsche Bahn AG in Potsdamer Platz 2, 10785 Berlin, Germany, [of] DB Mobility Logistics AG in Potsdamer Platz 2, 10785 Berlin, Germany, [of] DB Energie GmbH in Pfarrer-Perabo-Platz 2, 60326 Frankfurt am Main, Germany, of DB Schenker Rail GmbH in Rheinstrasse 2, 55116 Mainz, Germany, [of] DB Schenker Rail Deutschland AG in Rheinstrasse 2, 55116 Mainz, Germany).

Deutsche Bahn AG, and all legal persons directly or indirectly controlled by it, including DB Mobility Logistics AG, DB Energie GmbH, DB Schenker Rail GmbH and DB Schenker Rail Deutschland AG, shall allow the officials and other accompanying persons authorised by the Commission to conduct an inspection, as well as the officials of the competition authority of the Member State concerned and the officials authorised or appointed by that authority who assist the abovementioned officials and persons, to enter any premises, land and means of transport during normal office hours. At the request of the abovementioned officials and persons, the entities referred to in the preceding sentence shall furnish the former with the books and all other records related to the business, irrespective of the medium on which they are stored, for the purposes of the inspection, and shall allow them to examine those books and other records in situ and to take or obtain copies of or extracts from them, in any form. They shall allow them to seal any business premises and books or records for the period of, and to the extent necessary for, the inspection. At the request of the abovementioned officers or persons, they shall immediately provide explanations in situ on facts relating to the subject-matter and purpose of the inspection, and shall authorise all representatives or staff members to provide such explanations. They shall accept that the explanations so provided may be recorded, in any form.'

4 In Article 2 of the first inspection decision, the Commission points out that the inspection can begin on 29 March 2011. In Article 3 of that decision, it states that the inspection decision will be notified to Deutsche Bahn and to all legal persons directly or indirectly controlled by it, immediately prior to the inspection.

5 The reasons given for the first inspection decision are as follows:

'The Commission is in possession of information suggesting that DB Energie is able to give preferential treatment to the concerned subsidiaries of the DB group with a presence in the passenger and freight rail transport markets in the Member States where those subsidiaries operate, particularly in Germany, by means of a rebate system concerning the supply of electric traction energy. That preferential treatment may, in particular, arise from the structure of the rebates offered by DB Energie and may not be objectively justified. The Commission has evidence indicating that DB Energie may have applied similar rebate systems for the supply of electric traction energy in the past, at least since 2002. Furthermore, it cannot be ruled out that DB Energie may have applied those rebate systems or similar systems before that date. It is presumed that this method of doing business gives the concerned subsidiaries of the DB group an advantage over their competitors in the downstream rail transport markets, in the Member States where those subsidiaries pursue activities in the passenger and freight rail transport sector, particularly in Germany, and that the DB group can therefore obstruct competition in those markets. The conduct described above, if proved, constitutes an infringement of Article 102 TFEU and Article 54 of the EEA Agreement.

It is necessary for the Commission to carry out inspections under Article 20 of Regulation No 1/2003 in order to examine all of the relevant facts relating to the alleged concerted practices and to the overall context, and to establish the precise extent to which all of the legal persons concerned were involved.

The decisions on the fixing of prices within the DB group are probably taken at different levels in the undertaking. Furthermore, it is likely that relevant evidence may also be recovered from the DB group subsidiaries that in all probability benefited from the potentially unjustified advantageous prices, obstructing competition in the rail transport markets. Therefore, there is reason to believe that evidence may be found at each of the places listed in Article 1 of this decision.

According to information held by the Commission, the pricing system that DB Energie previously applied in the German passenger and freight rail transport markets has already been the subject of proceedings in Germany, proceedings in which the regulatory and competition authorities appeared as parties. Consequently, the legal persons concerned know that regulatory and competition authorities monitor their charging system. In addition, the Commission has found, in the past, that the practices of the DB group concerning the fixing of prices infringed Article 102 TFEU, a finding that was confirmed by the courts of the European Union. As a result, the legal persons concerned might try to conceal, destroy or deny evidence relating to those practices, with a view to preventing the detection of possible unlawful practices involving the fixing of prices.

In order to ensure that the inspections are effective, they must be conducted without informing the legal persons who are alleged to have participated in the infringement beforehand and be carried out simultaneously at several locations.

To that end, a decision taken under Article 20(4) of Regulation No 1/2003 ordering an inspection of legal persons is necessary.'

Conduct of the first inspection

6 On the morning of 29 March 2011, 32 Commission officials arrived at the premises of the applicants in Berlin (Germany), Frankfurt am Main (Germany) and Mainz (Germany), and notified them of the first inspection decision taken under Article 20(4) of Regulation No 1/2003.

7 The applicants contacted their lawyers, who were present at the inspection from day one. The applicants did not raise any objections to the inspection or complain about the failure to produce judicial authorisation. Nor did they oppose the inspection under Article 20(6) of Regulation No 1/2003 after notification. Accordingly, at no time did the Commission seek assistance from the Member State's authorities under Article 20(6) of that regulation.

8 After serving the first inspection decision, representatives of the undertaking signed the record of service. They supplied the inspectors with the organisation charts and telephone directories of the undertaking, answered questions on the identity of certain employees, accompanied the inspectors in the offices of the persons thereby identified and did not raise any objections to the search of those offices. The files present in the offices were examined, some in their entirety. The inspectors also searched electronic documents, such as e-mails, using specific keywords.

9 Between the morning of 29 March 2011 and approximately 2 pm on 31 March 2011, the Commission's inspectors found documents at the premises of DB Schenker Rail Deutschland in Mainz, which the Commission considered might indicate the existence of further anti-competitive conduct. The aim of that anti-competitive conduct was allegedly to discriminate against competitors in the rail transport field, by means of the infrastructure managed by the applicants and some related services. If a document was unequivocally linked to those fresh suspicions, it was set apart.

10 The Commission considered it necessary to carry out an investigation into DUSS, which led to the adoption of a second inspection decision.

11 The first inspection came to an end at the premises of Deutsche Bahn and DB Mobility Logistics in Berlin on 31 March 2011.

Second inspection

Second inspection decision

12 By Decision C(2011) 2365 of 30 March 2011 (Cases COMP/39.678 and COMP/39.731) ('the second inspection decision'), the Commission ordered Deutsche Bahn and all legal persons directly or indirectly controlled by it to submit to an inspection, pursuant to Article 20(4) of Regulation No 1/2003.

13 Article 1 of the second inspection decision is worded as follows:

'Deutsche Bahn AG, … and all legal persons directly or indirectly controlled by it, including DB Mobility Logistics AG, DB Netz AG, Deutsche Umschlagegesellsschaft Schiene-Straße (DUSS) mbH, DB Schenker Rail GmbH and DB Schenker Rail Deutschland AG, are required to submit to an inspection regarding their conduct — which may infringe Article 102 TFEU and Article 54 of the EEA Agreement — in the rail transport sector and the sector for the provision of ancillary services, in the Member States where the concerned subsidiaries of the DB group pursue rail transport activities, particularly in Germany. The conduct at issue involves potentially unjustified discrimination by Deutsche Umschlagegesellschaft Schiene-Straße (DUSS) mbH towards competitors of the DB group, allowing the latter to obstruct competition in the downstream rail transport markets. The inspection may take place at any premises of the Deutsche Bahn AG group …'

14 In Article 2 of the second inspection decision, the Commission points out that the inspection can begin on 30 March 2011. In Article 3 of that decision, it states that the inspection decision will be notified to Deutsche Bahn and to all legal persons directly or indirectly controlled by it, immediately prior to the inspection.

15 The reasons given for the second inspection decision are as follows:

'Based on information already in its possession, the Commission has evidence indicating that DUSS may have placed competitors operating in Germany in the rail transport markets at a disadvantage, by making it difficult for them to access DB's terminals or by discriminating against them, thereby enabling DUSS to abuse its dominant market position. That may result, in particular, from the fact that DUSS grants inappropriate access to the terminals, provides less efficient services or refuses access to terminals. The Commission has information suggesting that those practices have been in place since 2007. It is presumed that this method of doing business gives the concerned subsidiaries of the DB group an advantage over their competitors in the downstream rail transport markets, in the Member States where those subsidiaries pursue activities in the rail transport sector, particularly in Germany, thereby enabling the DB group to obstruct competition in those markets. …

During the inspections that took place on 29 March 2011 at the premises of the DB group in order to investigate possible unlawful pricing practices, the Commission was informed that evidence regarding those practices was in the possession of legal persons of the DB group. As a result, the legal persons concerned might try to conceal, destroy or deny such evidence and other information relating to those practices, with a view to preventing the detection of possible unlawful practices.

Furthermore, during the abovementioned inspections, the Commission received information on the existence of evidence concerning potentially anti-competitive conduct involving the strategic use of the infrastructure managed by DB group companies and of the provision of rail services. The alleged

conduct involves, in particular, access to maintenance and repair facilities and the provision of related services. The apparent aim of such conduct is to prevent or hinder the activities pursued by competitors of the DB group in the rail transport sector.

…'

Conduct of the second inspection

16 During the first inspection, the Commission notified the applicants, at approximately 2 pm on 31 March 2011, of the second inspection decision dated 30 March 2011.

17 The applicants, assisted by their lawyers, did not raise any objections to the second inspection decision or complain about the failure to produce judicial authorisation. Nor did they oppose the inspection under Article 20(6) of Regulation No 1/2003 after notification. Therefore, at no time did the Commission seek assistance from the Member State's authorities under Article 20(6) of that regulation.

18 The second inspection came to an end at the premises of DB Schenker Rail Deutschland in Mainz on 1 April 2011.

Third inspection

Third inspection decision

19 By Decision C(2011) 5230 of 14 July 2011 (Cases COMP/39.678 and COMP/39.731) ('the third inspection decision'), the Commission ordered Deutsche Bahn and all legal persons directly or indirectly controlled by it to submit to an inspection, pursuant to Article 20(4) of Regulation No 1/2003.

20 Article 1 of the third inspection decision is worded as follows:

'Deutsche Bahn AG, … and all legal persons directly or indirectly controlled by it, including Deutsche Umschlaggesellschaft Schiene Strasse (DUSS) mbh, DB Netz AG, DB Schenker Rail GmbH and DB Schenker Rail Deutschland AG, are required to submit to an inspection regarding their conduct — which may infringe Article 102 TFEU and Article 54 of the EEA Agreement — in the area of rail transport and related services in the Member States where the relevant subsidiaries of the DB group pursue rail transport activities, particularly in Germany. The practices involve possible unjustified discrimination by Deutsche Umschlagegesellschaft Schiene Strasse GmbH (DUSS) mbH towards competitors of the DB group, allowing the DB group to obstruct competition in the downstream rail transport markets and thereby place those competitors at a competitive disadvantage.

The inspection may be conducted at any premises of the Deutsche Bahn AG group …'

21 In Article 2 of the third inspection decision, the Commission points out that the inspection can begin on 26 July 2011. In Article 3 of that decision, it states that the inspection decision will be notified to Deutsche Bahn and to all legal persons directly or indirectly controlled by it, immediately prior to the inspection.

22 The reasons given for the third inspection decision are as follows:

'The Commission is investigating a potentially anti-competitive system involving the strategic use of infrastructure managed by companies of the DB group. The alleged system includes practices concerning access to terminals and the formation of prices regarding terminals and related services. The aim of those practices could be to prevent, complicate or increase the costs of the activities of the DB group's competitors in the area of rail transport, for which access to the infrastructure in question is essential. In the course of its investigations, the Commission conducted inspections at the premises of the companies DB AG, DB Mobility Logistics AG, DB Schenker Rail GmbH, DB Schenker Rail DE and DB Energie GmbH between 29 March and 1 April 2011.

Based on information already in its possession, including — but not limited to — information obtained during those inspections, the Commission gathered evidence showing that DUSS could place competitors with a presence in the rail transport markets in Germany at a disadvantage by preventing, complicating or increasing the costs of access to the terminals, in particular by granting inappropriate or more expensive access to them, by offering less efficient or more expensive related services, or by refusing access to terminals or related services. Such practices may not be objectively justified. The Commission has evidence to suggest that some of those practices have been in place since at least 2007. It is also aware of the existence of a document mentioning a possible 'concealed discount' given by DUSS to DB Schenker Rail DE. According to that document, the concealed discount was in place in 2010. The Commission does not have information on when the discount came into operation.

It is presumed that, as a result of those practices, the subsidiaries of the DB group in question, notably DB Schenker Rail DE, gained a competitive advantage over their competitors in the downstream rail transport markets in the Member States where those subsidiaries have a presence in the rail transport market, particularly in Germany, and that this allowed the DB group to obstruct competition in those markets.'

Conduct of the third inspection

23 At approximately 9.30 am on 26 July 2011, Commission officials arrived at the premises of DUSS and notified the applicants of the third inspection decision taken under Article 20(4) of Regulation No 1/2003.

24 The applicants, assisted by their lawyers, did not raise any objections to the third inspection decision or complain about the failure to produce judicial authorisation. Nor did they oppose the inspection under Article 20(6) of Regulation No 1/2003 after notification. Therefore, at no time did the Commission seek assistance from the Member State's authorities under Article 20(6) of that regulation.

25 The third inspection came to an end on 29 July 2011.

Procedure and forms of order sought by the parties

26 By applications lodged at the Registry of the General Court on 10 June and 5 October 2011, the applicants brought the present actions.

27 By orders of 12 January, 31 January and 12 March 2012, the Council of the European Union, the EFTA Surveillance Authority and the Kingdom of Spain were granted leave to intervene in Cases T-289/11, T-290/11 and T-521/11 in support of the form of order sought by the Commission, and the EFTA Surveillance Authority was granted leave to use English in the written and oral procedures.

28 On hearing the report of the Judge-Rapporteur, the General Court (Fourth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for under Article 64 of its Rules of Procedure, put questions to the parties in writing and twice requested them to lodge certain documents. The parties complied with those requests within the prescribed periods.

29 Cases T-289/11, T-290/11 and T-521/11 were joined for the purposes of the oral procedure and the judgment, by order of the President of the Fourth Chamber of the General Court of 22 January 2013.

30 At the hearing on 9 April 2013, the parties presented oral arguments and answered the questions put by the General Court.

31 The applicants claim that the Court should:

— annul the first, second and third inspection decisions of the Commission;

— in the alternative, uphold the plea of illegality in respect of Article 20(4) to (8) of Regulation No 1/2003;

— annul all measures taken under the inspections conducted on the basis of the first, second and third inspection decisions;

— in particular, order the Commission to return all the copies of documents made during the inspections, on pain of the annulment of future Commission decisions by the General Court;

— order the Commission to pay the costs.

32 The Commission, supported by the Kingdom of Spain, contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

33 The Council contends that the Court should:

— dismiss the applications in so far as they are based on the plea of illegality in respect of Article 20(4) to (8) of Regulation No 1/2003;

— make an appropriate order as to costs.

34 The EFTA Surveillance Authority contends that the Court should:

— dismiss the applications.

Law

35 In support of their actions for annulment, the applicants put forward, in essence, five pleas in law.

36 The first two pleas in law allege (a) infringement of the fundamental right of the applicants to the inviolability of their private premises (Article 7 of the Charter of Fundamental Rights of the European Union (OJ 2010 C 83, p. 389) and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR') by reason of the lack of prior judicial authorisation, and, (b) infringement of the fundamental right of the applicants to an

effective legal remedy (Article 47 of the Charter of Fundamental Rights and Article 6 of the ECHR) by reason of the lack of prior judicial authorisation and the lack of comprehensive judicial review of the inspection decisions, both from a factual and legal point of view, within a reasonable time.

37 At the reply stage, following a written question from the Court, the applicants raised, in the alternative, in support of the first plea in law, a plea of illegality in respect of Article 20(4) to 8 of Regulation No 1/2003, in the event that the Court were to find that the regulation in question does not require prior judicial authorisation to be obtained.

38 The third plea in law alleges infringement of defence rights in that the second and third inspections were based on information that had been unlawfully obtained during the first inspection. According to the applicants, the Commission deliberately sought out information concerning DUSS during the first inspection, even though that inspection only covered the supply of electric traction energy (‘ETE’).

39 The fourth plea in law alleges infringement of defence rights by reason of a disproportionately wide subject-matter of the inspections in Article 1 of each of the three inspection decisions, particularly as regards the nature of the conduct in issue, the geographic extent of the market and the duration of the alleged infringements.

40 The fifth plea in law, part of which is the same in all three cases, alleges infringement of the principle of proportionality. In essence, the applicants submit that the Commission went beyond what was appropriate and necessary in order to achieve the desired goal.

41 The Commission considers that the five pleas in law, put forward in support of the first head of claim, are inadmissible and/or, in any event, unfounded. It considers that the second, third and fourth heads of claim are inadmissible.

The first plea in law, alleging infringement of the right to the inviolability of private premises by reason of the lack of prior judicial authorisation

42 By their first plea in law, the applicants submit that since the three inspection decisions were taken without prior judicial authorisation, they did not observe the safeguards laid down by the principle of the inviolability of private premises, as enshrined in Article 7 of the Charter of Fundamental Rights and Article 8 of the ECHR.

43 In the alternative, if the Court were to find that Regulation No 1/2003 does not require prior judicial authorisation and that it was therefore impossible for the Commission to apply for such a warrant, the applicants raise a plea of illegality (submitted at the reply stage) in respect of Article 20(4) to (8) of Regulation No 1/2003.

44 The Commission challenges both the substance and admissibility of the first plea in law and the plea of illegality.

Admissibility

45 The Commission raises two separate pleas of inadmissibility.

46 In the first place, the Commission, supported by the Kingdom of Spain, considers that the first plea in law, put forward in support of the first head of claim seeking to have the three inspection decisions annulled, is essentially irrelevant and therefore inadmissible, in the light of settled case-law (Joined Cases 97/87 to 99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165, paragraphs 40 and 41, and Case T-339/04 *France Télécom* v *Commission* [2007] ECR II-521,

paragraph 54). According to that case-law, even if the applicants' plea in law was well founded, it could only have a bearing on the legality of the way in which the inspection was carried out and not on the inspection decision itself.

47 First, it should be noted that in its pleadings, the Commission incorrectly establishes a link between the irrelevant nature of a plea in law or claim and its admissibility. Classifying a plea in law or claim as irrelevant is to consider it incapable of influencing the outcome of the proceedings, without it being necessary to examine whether such plea in law or claim is well founded. On the contrary, an inadmissible plea in law or claim, even if capable of influencing the outcome of the proceedings, was not raised in circumstances allowing the court to determine whether it was well founded. Consequently, contrary to the Commission's assertions, the nature of an argument as irrelevant is not, on any view, capable of rendering it inadmissible.

48 Second, the reasoning of the Commission concluding that the applicants' arguments are irrelevant is based on a misinterpretation of the first plea in law.

49 In *Dow Cheminal Ibérica and Others* v *Commission*, paragraph 46 above (paragraphs 40 and 41) and *France Télécom* v *Commission*, paragraph 46 above (paragraph 54), cited by the Commission in support of its reasoning, the European Union Courts recalled that the legality of an act must be assessed, in accordance with settled case-law, by reference to the law and the facts at the time when the act was adopted and that, accordingly, the way in which a decision ordering an inspection is applied has no bearing on the legality of the decision ordering the inspection.

50 By contrast, by their first plea in law, the applicants ask the Court to identify a new formal requirement that would affect the legality of the inspection decisions. Since — according to the wording used by the applicants — an inspection decision should necessarily be 'linked' or 'tied' to securing a warrant, the first plea in law must be interpreted as meaning that only inspection decisions requiring a prior judicial warrant may be legally adopted by the Commission.

51 In those circumstances, the arguments of the Commission must be rejected since the applicants' plea in law is neither irrelevant nor inadmissible.

52 In the second place, as regards the plea of illegality put forward at the reply stage, the Commission, supported by the EFTA Surveillance Authority, considers this plea to be out of time, in terms of Article 48(2) of the Rules of Procedure.

53 The Council submits that the plea of illegality is only admissible in so far as it relates to Article 20(4) of Regulation No 1/2003, being the legal basis for the inspection decisions. Since Article 20(5) of that regulation has no connection with the facts and given that the applicants did not formally oppose the inspection, the plea of illegality in respect of Article 20(5) to (8) of the regulation is therefore inadmissible.

54 The applicants deny that the plea of illegality was put forward out of time, as it simply clarifies the main claim.

55 In that regard, it should be noted that, by their first plea in law, the applicants implicitly challenge the legality of Regulation No 1/2003 under which the decision was adopted. They claim that, by failing to make express provision obliging the Commission to obtain a judicial warrant, from the General Court or from a national court, Regulation No 1/2003 does not meet the requirements of the Charter of Fundamental Rights and of the ECHR, as interpreted by the European Court of Human Rights ('ECtHR'). Consequently, in contrast to the contentions of the Commission and the EFTA Surveillance Authority, the plea of illegality expressly raised in the reply must be regarded as amounting to the

expansion, in paragraph 17 of the reply, of a plea in law raised by implication, but clearly, in the application (see, to that effect, Case T-176/01 *Ferriere Nord* v *Commission* [2004] ECR II-3931, paragraph 136 and the case-law cited).

56 However, as the Council correctly points out, a plea of illegality raised indirectly under Article 277 TFEU, when challenging the legality of a decision in the main proceedings, is only admissible if there is a link between the contested measure and the provision forming the subject-matter of the plea. Since the purpose of Article 277 TFEU is not to enable a party to contest the applicability of any measure of general application in support of any action whatsoever, the scope of a plea of illegality must be limited to what is necessary for the outcome of the proceedings. It follows that the general measure claimed to be illegal must be applicable, directly or indirectly, to the issue with which the action is concerned and there must be a direct legal connection between the contested individual decision and the general measure in question (see, to that effect, Joined Cases T-6/92 and T-52/92 *Reinarz* v *Commission* [1993] ECR II-1047, paragraph 57 and the case-law cited).

57 In the present case, the first, second and third inspection decisions were adopted under Article 20(4) of Regulation No 1/2003 alone. Article 20(5) of that regulation has no connection with these proceedings and the lack of opposition from the applicants has rendered use of the mechanism set forth in Article 20(6) to (8) of Regulation No 1/2003 redundant.

58 In those circumstances, the plea of illegality is only admissible in so far as it concerns Article 20(4) of Regulation No 1/2003.

Substance

59 In the first place, the applicants rely on the development of the case-law of the ECtHR, particularly in *Société Colas Est and Others v. France* (no. 37971/97, ECHR 2002-III), *Société Canal Plus and Others v. France* (no. 29408/08, 21 December 2010) and *Société Métallurgique Liotard Frères v. France* (no. 29598/08, 5 May 2011), to argue that an inspection decision which is not linked or tied to a prior judicial order granting authorisation infringes their rights under Article 7 of the Charter of Fundamental Rights. They claim that, according to the ECtHR, inspections without prior judicial authorisation are disproportionate in the light of the objectives pursued.

60 In the applicants' view, prior judicial authorisation is required in most Member States, including Germany. Furthermore, they point out that such authorisation is necessary in respect of the premises referred to in Article 21(3) of Regulation No 1/2003. At present, the Commission is claimed to be the only judge of its acts when inspecting undertakings' premises.

61 In the second place, the applicants contend that the requirement to produce prior judicial authorisation cannot be confined to cases where the undertaking opposes the inspection, within the meaning of Article 20(6) of Regulation No 1/2003. They submit that: (a) the infringement of fundamental rights occurred when the Commission officials entered the undertaking; (b) the undertaking had neither the time nor the resources, upon the arrival of the Commission officials, to determine whether the inspection was proportionate; (c) the Commission is empowered to take direct coercive measures, such as sealing documents or imposing fines; and (d) the possibility of opposing the inspection or the inappropriate conduct of the Commission officials is theoretical, in the light of the risk of being fined under Article 23(1)(c) of Regulation No 1/2003 in such circumstances, as demonstrated by, first, the proceedings that the Commission unlawfully opened against Sanofi Aventis (Commission document bearing the reference MEMO/08/357 of 2 June 2008), in order to impose a penalty on the undertaking concerned for seeking to oppose an inspection, and, second, the first inspection during which the Commission officials allegedly threatened to close the IT system of the applicants if they were not given the e-mail account passwords of some of the applicants' employees.

62 At the reply stage, the applicants submitted that, first, the case-law of the ECtHR shows that only a situation of imminent danger, in criminal matters, could justify the absence of prior judicial authorisation and, second, Regulation No 1/2003 would be illegal if it did not permit a warrant to be secured beforehand.

63 The Commission challenges all of the applicants' arguments.

64 As a preliminary point, it should be noted that, in order to assess the substance of the first plea in law, it is necessary to examine, in essence, whether the system established by Regulation No 1/2003 is consistent with fundamental rights. Consequently, in the course of its examination of the substance of the first plea in law, the Court considers it appropriate to assess the substance of the plea of illegality, in so far as it concerns Article 20(4) of Regulation No 1/2003.

65 It must be noted that the exercise of the powers of inspection conferred on the Commission by Article 20(4) of Regulation No 1/2003 vis-à-vis an undertaking constitutes a clear interference with the latter's right to respect for its privacy, private premises and correspondence. That is not disputed by the Commission or by the interveners in these proceedings. The question at issue in this instance is therefore whether the lack of a prior judicial warrant automatically renders the administrative interference illegal and, as the case may be, whether the system established by Regulation No 1/2003 offers sufficient safeguards in the absence of prior judicial authorisation.

66 In its recent decisions (*Harju v. Finland*, no. 56716/09, §§ 40 and 44, 15 February 2011, and *Heino v. Finland*, no. 56715/09, §§ 40 and 44, 15 February 2011), the ECtHR drew attention to the importance of conducting a particularly rigorous review in cases where inspections can take place without prior judicial authorisation. It also clearly laid down the principle that the absence of prior judicial authorisation may be counterbalanced by a comprehensive post-inspection review.

67 Therefore, the inevitable conclusion to be drawn from the recent case-law of the ECtHR is that the lack of a prior judicial warrant is not capable, in itself, of rendering an interference within the meaning of Article 8 ECHR illegal.

68 The arguments of the applicants seeking to limit the scope of the ECtHR's judgments in *Heino v. Finland* and *Harju v. Finland*, paragraph 66 above, do not call that conclusion into question.

69 According to the applicants, those judgments show that only a situation of imminent danger, with a view to preventing the commission of a crime, could justify the absence of prior judicial authorisation.

70 It should be noted, as the Commission did, that, first, paragraph 31 of the ECtHR's judgment in *Harju v. Finland*, paragraph 66 above, on which the applicants rely to illustrate the importance of the existence of imminent danger, is found in the section of the judgment summarising the defendant's submissions and not in the section containing the ECtHR's assessment. Second, in contrast to the applicants' contentions, it is clear that the assessment of the ECtHR is not in any way based on the existence of imminent danger. Indeed, the existence of imminent danger is no longer a decisive factor in the judgments of the ECtHR, *Mastepan v. Russia* (no. 3708/03, 14 January 2012) and *Varga v. Romania* (no. 73957/01, 1 April 2008). Finally, as the Commission correctly points out, the fact that the ECtHR's judgments in *Harju v. Finland* and *Heino v. Finland*, paragraph 66 above, fall within the area of criminal law increases their relevance to these proceedings.

71 The arguments of the applicants seeking to prove that the approach adopted in the ECtHR's judgment in *Société Colas Est and Others v. France*, paragraph 59 above, applies in its entirety to the present case cannot succeed either.

72 It is evident from that judgment, notably paragraph 49 thereof, that the absence of a prior warrant is only one of the factors borne in mind by the ECtHR when deciding whether Article 8 of the ECHR has been infringed. In particular, the ECtHR took into account the extent of the powers held by the competent authority, the circumstances of the interference and the fact that the system in place at the material time provided for only a limited number of safeguards. This differs from the situation under EU law (see paragraphs 74 to 99 below).

73 Even if the lack of a prior judicial warrant is not capable, in itself, of rendering an interference illegal — in contrast to the assertions of the applicants — it is necessary to examine whether the system established by Regulation No 1/2003, particularly Article 20(4) thereof, and the way in which that article was applied by the adoption of the three inspection decisions, offered appropriate and sufficient safeguards so as to restrict sufficiently the powers of the Commission. The ECtHR has consistently pointed out that an acceptable level of protection against interferences with rights under Article 8 of the ECHR entails a legal framework and strict limits (*Harju v. Finland*, paragraph 66 above, paragraph 39; *Heino v. Finland*, paragraph 66 above, paragraph 40; *Varga v. Romania*, paragraph 70 above, paragraph 70; and *Société Canal Plus and Others v. France*, paragraph 59 above, paragraph 54).

74 In that connection, it should be noted that there are five categories of safeguards. These relate to, first, the statement of reasons on which inspection decisions are based, second, the limits imposed on the Commission during the conduct of inspections, third, the impossibility for the Commission to carry out an inspection by force, fourth, the intervention of national authorities and, fifth, the existence of *ex post facto* remedies.

75 In the first place, it has been held that the purpose of the statement of reasons on which an inspection decision is based is to show that the operation carried out on the premises of the undertakings concerned is justified (see *France Télécom* v *Commission*, paragraph 46 above, paragraph 57 and the case-law cited). That decision also has to comply with the requirements set forth in Article 20(4) of Regulation No 1/2003. The decision must therefore specify the subject-matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 of that regulation, as well as the right to have the decision reviewed by the Court of Justice. According to the case-law, the statement of reasons must also state the suppositions and presumptions that the Commission wishes to investigate (judgment of 12 July 2007 in Case T-266/03 *CB* v *Commission*, not published in the ECR, paragraphs 36 and 37).

76 None the less, the Commission must not set out the exact legal nature of the alleged infringements, communicate to the undertaking all the information at its disposal, or indicate the period during which the suspected infringement was committed (*France Télécom* v *Commission*, paragraph 46 above, paragraph 58).

77 However, in order to ensure that the undertaking is able to exercise its right of opposition, the inspection decision must contain, apart from the formal particulars listed in Article 20(4) of Regulation No 1/2003, a description of the features of the suspected infringement, by indicating the market thought to be affected and the nature of the suspected competition restrictions, as well as the sectors covered by the alleged infringement, the supposed degree of involvement of the undertaking concerned, the evidence sought and the matters to which the investigation must relate (see *France Télécom* v *Commission*, paragraph 46 above, paragraph 59 and the case-law cited).

78 The review of the statement of reasons on which a decision is based allows the courts to ensure that the principle of protection against arbitrary and disproportionate interventions and the rights of defence are respected (*France Télécom* v *Commission*, paragraph 46 above, paragraph 57), while bearing in mind the need for the Commission to retain a certain leeway, without which the provisions of Regulation No 1/2003 would be rendered redundant (order of 17 November 2005 in Case C-121/04 P *Minoan lines* v *Commission*, not published in the ECR, paragraph 36).

79 In the second place, limits are imposed on the Commission during the conduct of an inspection.

80 First, documents of a non-business nature, that is to say documents not relating to the activities of the undertaking on the market, are excluded from the scope of the Commission's investigatory powers (Case 155/79 *AM & S* v *Commission* [1982] ECR 1575, paragraph 16, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 45).

81 Second, undertakings subject to an inspection ordered pursuant to an inspection decision are entitled to receive legal assistance or even to preserve the confidentiality of lawyer-client correspondence, although the latter safeguard does not apply to information exchanged between the undertaking concerned and a lawyer bound to it by a relationship of employment (Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECR I-8301, paragraphs 40 to 44).

82 Third, although Regulation No 1/2003 imposes an obligation of active cooperation on an undertaking subject to inspection, the Commission may not compel the undertaking concerned to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove (Case 374/87 *Orkem* v *Commission* [1989] ECR 3283, paragraph 35). This principle, developed in the context of the implementation of Article 11 of Council Regulation No 17 of 6 February 1962, the first regulation implementing Articles [81 EC] and [82 EC] (OJ English Special Edition, Series I, 1959-1962, p. 87), also applies to questions that the inspectors may ask in the course of an inspection carried out under Article 20(4) of Regulation No 1/2003.

83 Fourth, mention must be made of the existence of the explanatory notes notified to undertakings together with inspection decisions. These explanatory notes describe the methodology that the Commission has bound itself to apply when conducting an inspection. They usefully define the content of the principle of respect for defence rights and the principle of good administration, as they are perceived by the Commission.

84 The explanatory notes explain how certain stages of the inspection should be conducted. They include information on the obligation to state the names of the officials authorised by the Commission or by the appropriate national competition authority (paragraph 1), the obligation to notify the decision authorising the inspection (paragraph 3), an exhaustive list of rights and powers held by officials (paragraph 4), the right to consult a lawyer (paragraph 6), the conditions under which oral explanations supplied by employees of the undertaking may be recorded (paragraphs 7 and 8), the procedure for consulting, searching and copying certain electronic documents (paragraphs 10 and 11), the ways of handling the deferred consultation of certain documents stored in an electronic medium (paragraphs 11 and 12), the possibility of obtaining a signed inventory of the information copied (paragraph 12) and the conditions for the confidential handling of certain information or business secrets following the inspection (paragraphs 13 and 14). That information is also useful for undertakings, as their representatives have to assess the extent of their duty of cooperation.

85 In the third place, the Commission does not have excessive coercive measures at its disposal which would invalidate the possibility, in practice, of opposing the inspection under Article 20(6) of Regulation No 1/2003, in contrast to the applicants' assertions.

86 First, it has been held that, during an inspection, Commission officials have, inter alia, the power to have shown to them the documents they request, to enter such premises as they choose, and to have shown to them the contents of any piece of furniture which they indicate. On the other hand, they may not obtain access to premises or furniture by force or oblige the staff of the undertaking to give them such access, or carry out searches without the permission of the management of the undertaking (Joined Cases 46/87 and 227/88 *Hoechst* v *Commission* [1989] 2859, paragraph 31).

87 Second, the body of rules governing the statement of reasons on which inspection decisions are based (see paragraphs 75 to 78 above) and the conduct of inspections (see paragraphs 79 to 84 above), enable undertakings to exercise effectively their right to oppose — under Article 20(6) of Regulation No 1/2003 — when the inspectors arrive, when the inspection decision is notified, or at any other time during the inspection.

88 It should be noted that the representatives of the undertakings under inspection are able to record any alleged irregularities which occur during the inspection or any objections they may have in a report, without formally opposing the inspection within the meaning of Article 20(6) of Regulation No 1/2003, and to use all means at their disposal to preserve tangible evidence of such irregularities.

89 Third, it must be recalled that upon arriving at the premises of the undertaking, the Commission must allow the undertaking a reasonable, but brief, period of time to examine the inspection decision, with the assistance of its lawyers. As regards the applicants' argument that the infringement of its fundamental rights occurred when the officials of the Commission entered the undertaking, the Court shares the opinion of the Commission that under no circumstances did the inspection begin before notification of the decision and that the mere act of entering the undertaking for the purpose of that notification does not constitute an infringement of fundamental rights. During the inspection, the Commission must also allow the undertaking a brief period of time to consult its lawyers before taking copies, affixing seals or requesting oral explanations.

90 Fourth, against that background, it should be remembered that the Commission can only apply the penalty mechanism provided for in Article 23 of Regulation No 1/2003 in cases of clear obstruction or abusive exercise of the right to oppose. The Commission cannot therefore use this penalty mechanism as a threat in order to obtain concessions from undertakings which go beyond the strict confines of their duty to cooperate. In that regard, it is to be noted that all decisions taken under Article 23 of Regulation No 1/2003 may be reviewed by the Courts of the European Union.

91 In the fourth place, as regards the safeguards offered by the opposition procedure provided for in Article 20(6) of Regulation No 1/2003, the Commission is under the obligation to seek assistance from the national authorities of the Member State where the inspection is to be carried out. That procedure triggers the application of the review mechanisms specific to the Member State concerned, mechanisms which may be of a judicial nature.

92 If the assistance of the competent national authority has been requested, the Member State concerned must ensure that the Commission's action is effective and must respect the various general principles of EU law, in particular the protection of natural and legal persons against arbitrary and disproportionate interventions by public authorities in the private sphere (*Hoechst* v *Commission* paragraph 86 above, paragraph 33, and *Roquette Frères*, paragraph 80 above, paragraph 35).

93 The competent national body, whether judicial or non-judicial, must consider whether the coercive measures envisaged are arbitrary or excessive having regard to the subject-matter of the investigation. The Commission must make sure that the national body in question has all that it needs to perform that supervisory task and to ensure that, in the implementation of the coercive measures, the national rules are respected (*Hoechst* v *Commission*, paragraph 86 above, paragraphs 34 and 35, and *Roquette Frères*, paragraph 80 above, paragraphs 36 and 37).

94 It should be added, as the Commission correctly pointed out, that the national court with jurisdiction to authorise the coercive measures may refer a question for a preliminary ruling to the Court of Justice. Furthermore, Articles 95 and 105 of the Rules of Procedure of the Court of Justice enable national courts to refer an anonymous question for a preliminary ruling pursuant to an expedited procedure. Finally, national courts may, in certain circumstances, decide to stay warrant proceedings until such time as the Court of Justice has answered the question referred for a preliminary ruling (see, to that effect, Case C-465/93 *Atlanta Fruchthandelsgesellschaft and Others* [1995] ECR I-3761, paragraph 23).

95 In the fifth place, the limits on the interference constituted by an inspection are also founded on the *ex post facto* review, by the European Union Courts, of the legality of the decision ordering the inspection.

96 In this connection, the last sentence of Article 20(8) of Regulation No 1/2003 provides:

'The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.'

97 As is apparent from paragraph 66 above, the existence of an *ex post facto* comprehensive judicial review is particularly important, as it is capable of counterbalancing the absence of a prior judicial warrant. In circumstances such as those of this case, the European Union Courts perform a comprehensive review of inspection decisions covering matters of both fact and law, (also see, to that effect, paragraph 112 below).

98 In addition, as the Commission correctly points out, the applicants can obtain a stay of the implementation of an inspection decision by lodging an application for interim relief under Article 278 TFEU at the same time as an action for annulment, possibly coupled with a request in terms of Article 105(2) of the Rules of Procedure.

99 Finally, the second paragraph of Article 340 TFEU provides a basis for legal action for non-contractual liability of the European Union.

100 The Court considers that all five categories of safeguards mentioned above were guaranteed in the present case. In particular, the three inspection decisions include the information provided for in Article 20(4) of Regulation No 1/2003. The Commission took care to state the names of the recipients of the decisions, the reasons which led it to suspect the existence of unlawful practices, the type of suspected practices thought to be anti-competitive, the affected market for goods and services, the geographical market where the alleged practices applied, the relationship between those practices and the conduct of the undertaking in receipt of the decisions, the officials authorised to carry out the inspection, the means at their disposal and the obligations incumbent on the competent staff of the undertaking, the date and places of the inspection, the penalties risked in the event of obstruction, and the possibility of and prerequisites for raising legal action. It follows from the consideration of the fourth plea in law that such information was properly included in the three inspection decisions (see paragraph 184 below).

101 As regards the conduct of the first inspection and the applicants' contention that a Commission official threatened to close their IT system if they did not release the e-mail account passwords of certain staff members, it must be stated — besides the fact that the Commission objected to that contention — that the applicants' lawyers did not formally record the alleged incident, with the result that no evidence is available to prove that it occurred. Furthermore, the applicants did not dispute the Commission's account set out in its defence, according to which, despite its directions, the applicants blocked access to computers and e-mail accounts for a particularly long period, until day two of the inspection, without the Commission calling on the national authorities to implement coercive measures. As regards the Sanofi Aventis case, it is evident from the material in the case file, particularly the Commission document bearing the reference MEMO/08/357 of 2 June 2008, that the Commission intended to penalise not the fact that the undertaking opposed an inspection, in general terms, but the fact that it opposed, in this specific case, the copying of documents by the Commission. The proceedings were also closed.

102 In the light of the considerations set out in paragraphs 65 to 101 above, the first plea in law and the plea of illegality, in so far as it concerns Article 20(4) of Regulation No 1/2003, must be rejected as unfounded.

The second plea in law, alleging infringement of the right to an effective legal remedy

103 The applicants mainly rely on the judgments of the ECtHR in *Société Métallurgique Liotard Frères v. France* and *Société Canal Plus and Others v. France*, paragraph 59 above, to demonstrate that they should have access to remedies covering matters of both fact and law, in accordance with Article 47 of the Charter of Fundamental Rights and Article 6(1) of the ECHR, prior to the interference constituted by the inspection.

104 The applicants claim, in particular, that neither the procedure provided for in Article 20(8) of Regulation No 1/2003, which empowers national judicial authorities to assess whether the coercive measures required to implement the Commission's inspection decisions are non-arbitrary and proportionate in the event of opposition, nor the review by the European Union Courts, satisfies the conditions developed by the ECtHR in its case-law.

105 In reply to a written question from the Court, the applicants explained that, in their view, Article 6(1) of the ECHR required the Commission to obtain a prior judicial warrant, in the course of which the national courts would review the necessity and proportionality, as regards matters of both fact and law, of the inspection. They also considered that Article 6(1) of the ECHR required a comprehensive judicial review of the inspection decision to be carried out within a reasonable time after the inspection had begun.

106 The Commission submits that the applicants' plea in law is irrelevant and therefore inadmissible and also disputes their interpretation of the ECtHR's judgment in *Société Métallurgique Liotard Frères v. France*, paragraph 59 above. It takes the view that a genuine judicial review carried out *ex post facto* is sufficient and that the General Court is in a position to conduct such a review.

107 As a preliminary point, it has already been noted in paragraph 47 above in relation to admissibility that the nature of an argument as irrelevant is not, on any view, capable of rendering it inadmissible.

108 In respect of the need to obtain a prior judicial warrant, the applicants use this plea in law, like the first (see, to that effect, paragraphs 49 to 51 above), to ask the Court to identify a new formal requirement that would affect the legality of the inspection decisions. This plea in law must be interpreted as meaning that the adoption of an inspection decision has to be conditional on the Commission obtaining a prior judicial warrant following a comprehensive review, covering matters of both fact and law, as provided for in Article 6(1) of the ECHR. In so far as it concerns the need to obtain a prior judicial warrant, the second plea in law cannot be considered to be irrelevant.

109 As regards the arguments of the applicants in this respect, it should be noted, in the first place, that they have misinterpreted the ECtHR's judgments in *Société Métallurgique Liotard Frères v. France* and *Société Canal Plus and Others v. France*, paragraph 59 above.

110 Indeed, as the Commission has noted, it is apparent from these judgments that the key issue is the intensity of the review and not the point in time when it was carried out. That review must cover all matters of fact and law and provide an appropriate remedy if an activity found to be unlawful has already taken place (*Société Canal Plus and Others v. France*, paragraph 59 above, paragraph 36).

111 In the second place, an inspection decision may be challenged under Article 263 TFEU. Consequently, in contrast to the applicants' contentions, the lack of a comprehensive review conducted *ex ante* by a national authority charged with issuing a warrant is, on any view, irrelevant. Article 20(4) of Regulation No 1/2003 provides for such a review by the European Union Courts and requires it to be mentioned in the decision ordering the inspection at the undertaking's premises. The Commission met this procedural requirement when it adopted the first, second and third inspection decisions and the applicants knew that they were able to bring an action enabling them to challenge the need for the inspection, as these cases show.

112 In the third place, it cannot seriously be argued that the General Court is not in a position to conduct a review of the facts and operates solely as a 'court of cassation', as the applicants contend. Indeed, the European Union Courts, ruling on an action for annulment brought under Article 263 TFEU against an inspection decision, conducts both a legal and factual review and has the power to evaluate the evidence and annul the contested decision. It has been held that, when carrying out their review of inspection decisions, the European Union Courts may find it necessary to satisfy themselves that there exist reasonable grounds for suspecting an infringement of the competition rules by the undertakings concerned (see *Roquette Frères*, paragraph 80 above, paragraphs 54 and 55 and the case-law cited). It also follows from these considerations that the applicants' second argument (see paragraph 105 above) — according to which the supposed absence of a comprehensive judicial review of the inspection decisions after the inspections had begun infringed Article 6(1) of the ECHR — must be rejected.

113 In the fourth place, it should be noted, as the Commission correctly points out, that the annulment of the inspection decision, or even the finding of an irregularity in the course of measures implemented by authorised officials, precludes the institution from using the information gathered during the contested activities for the purpose of infringement proceedings (*Roquette Frères*, paragraph 80 above, paragraph 49).

114 Accordingly, the second plea in law must be rejected in its entirety as unfounded.

The third plea in law, alleging infringement of the applicants' defence rights in view of the irregularities affecting the conduct of the first inspection

115 The applicants essentially submit that the second and third inspections were based on information that had been unlawfully obtained during the first inspection. According to the applicants, the Commission deliberately sought out information concerning DUSS during the first inspection, even though that inspection only covered the supply of ETE. The Commission therefore infringed the applicants' defence rights.

116 The applicants contend, first, that the Commission automatically searched the office of Mr M., head of 'Legal Knowledge' at Schenker Rail Deutschland in Mainz, which included an automatic examination of documents that clearly had nothing to do with ETE. That was the office where the Commission found, inter alia, certain e-mails concerning DUSS — clearly unrelated to the subject-matter of the first inspection — which were examined and flagged by the officials V.G. and T.B., despite the protests of the lawyer M. The official V.G. then examined a number of other documents concerning DUSS in the same office.

117 Second, during their electronic search, the Commission officials used certain keywords relating exclusively to DUSS, namely 'NBS', '[S.]', '[T.]' and '[G.]'. In respect of the keyword '[T.]', the applicants point out that the only customer of DB Energie for ETE and, therefore, the only competitor of the DB group is the undertaking TXL, a subsidiary of the undertaking T., which was subject to a separate search. As for the keyword 'NBS', the applicants dispute that the Commission officials were unaware of its meaning, especially given the presence of Mr. N., an official of the Bundesnetzagentu ('the BNetzA') and an expert in the field, who was inevitably familiar with this abbreviation, which is widely used in the sector. In addition, it is unlikely that the Commission officials carried out a thorough search without enquiring about the meaning of the keyword beforehand.

118 Third, a Commission official inspected the records of DB Schenker Rail Deutschland in Mainz and photocopied a document entitled 'European strategy for the Stinnes Intermodal terminals of 17 January 2006', which clearly had nothing to do with the subject-matter of the inspection either.

119 Fourth, during the inspection, the Commission officials themselves admitted that there was a problem linked to the fact that the first inspection decision did not mention the conduct of DUSS.

120 Fifth, the applicants claim that, according to the material in the case file, the Commission asked the undertaking T. to confirm whether its complaint of 16 March 2011 was still valid a few days before the first inspection began. This shows that the Commission intended to search for information on DUSS during the first inspection. Indeed, the 32 Commission officials were notified of the existence of the complaint involving DUSS immediately prior to the inspection. Furthermore, the Commission's intention is also demonstrated by the fact that the undertaking T. clearly mentioned the reference number used by the Commission in the ETE inspection decision of 14 March 2011 ('COMP 39.678') in the subject line of its letter of 16 March 2011 concerning the DUSS case.

121 Sixth, the applicants applied for the examination of Messrs M. and P., in accordance with Article 68(1) of the Rules of Procedure.

122 The Commission submits that the applicants' arguments are irrelevant and, therefore, inadmissible, as it was in possession of sufficient information before the first inspection to justify the second and third inspections. As regards the third inspection decision specifically, the Commission states that it acted solely on the basis of the information in its possession prior to the first inspection and the information gathered during the second inspection. It also rejects all of the applicants' arguments as unfounded.

123 First of all, in respect of the Commission's arguments on admissibility, suffice it to recall that the nature of an argument as irrelevant is not capable of rendering it inadmissible (see paragraph 47 above).

124 Second, it should be noted that the Court of Justice has held that information obtained during investigations must not be used for purposes other than those indicated in the inspection decision. That requirement is intended to protect both professional secrecy and the defence rights of undertakings. Those rights would be seriously endangered if the Commission could rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof (see, as regards Regulation No 17, Case 85/87 *Dow Benelux* v *Commission* [1989] ECR 3137, paragraph 18).

125 Nevertheless, it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty (see, as regards Regulation No 17, *Dow Benelux* v *Commission*, paragraph 124 above, paragraph 19).

126 Since the Commission obtained those documents anew on the basis of authorisations or decisions and used them for the purpose indicated in those authorisations or decisions, it observed the rights of defence afforded to undertakings under Article 20 of Regulation No 1/2003 (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 476).

127 The fact that the Commission once obtains documents in a given matter does not confer such absolute protection that those documents cannot be requested under statutory powers in another matter and used as evidence. Were it otherwise, undertakings would have an incentive, when a first matter is investigated, to give all the documents providing evidence of another infringement, thereby forearming themselves against any prosecution in that respect. Such a solution would go beyond what is required to safeguard professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the competition rules in the common market (*Limburgse Vinyl Maatschappij* v *Commission*, paragraph 126 above, paragraph 477).

128 It should also be noted that the Commission's powers of investigation would serve no useful purpose if it could do no more than ask for documents which it could identify precisely in advance. On the contrary, such a right implies the power to search for various items of information which are not already known or fully identified (*Hoechst* v *Commission*, paragraph 86 above, paragraph 27, and Case T-59/99 *Ventouris* v *Commission* [2003] ECR II-5257, paragraph 122).

129 It is in the light of those principles that the arguments submitted by the applicants should be examined.

130 Before conducting that examination, two preliminary observations must be made. The first observation concerns the Commission's argument to the effect that the third plea in law of the applicants is irrelevant, as it was in possession of sufficient information before the first inspection to justify the second and third inspections. In this connection, it should be noted that the material in the case file shows that the Commission also acted on the basis of the information gathered during the first inspection.

131 Whilst the third inspection decision is clear in that regard (recital 7), the second inspection decision does not clearly specify the origin of the information on which that decision was based (recital 6).

132 In its defence, the Commission claimed that, before the first inspection, it suspected that DUSS had engaged in anti-competitive conduct. In the context of measures of organisation of procedure, the Court asked the Commission to substantiate the existence of those suspicions. In response, the Commission informed the Court about a complaint from the undertaking T. to the effect that DUSS had refused it access to the Munich-Riem terminal under satisfactory conditions.

133 The Commission was therefore in possession of information, before the first inspection, that was likely to fuel the existence of serious suspicions concerning DUSS's involvement in possible anti-competitive conduct.

134 None the less, in contrast to the Commission's claims, this is not capable of rendering the plea in law of the applicants irrelevant. Indeed, the fact that the second inspection decision was adopted whilst the first inspection was underway demonstrates the importance of the information gathered during that inspection in triggering the second inspection. Since the third inspection was unambiguously based, in part, on information gathered during the first two inspections, as is apparent from recital 7 of the third inspection decision, it can be concluded that the conditions under which the information concerning DUSS was gathered during the first inspection are capable of affecting the legality of the second and third inspection decisions. Accordingly, the argument put forward by the Commission that the applicants' third plea in law is irrelevant must be rejected.

135 The second preliminary observation concerns the evidential value of the applicants' aide-mémoires. As the Commission correctly points out, those aide-mémoires were written at least one month after the end of the first inspection, except for the aide-mémoire of the lawyer U.P. of 4 April 2011. The most extensively referred to aide-mémoire, that of the lawyer M., was written two months after the events. In addition, the assertions of the applicants' representatives are based to a large extent on hypotheses as to the intentions of the investigators, hypotheses which are not substantiated by facts.

136 It should also be pointed out that those facts are the only items of evidence put forward by the applicants. At no time did the applicants' representatives lodge a formal opposition as provided for in Article 20(6) of Regulation No 1/2003 or record any dissatisfaction on their part in a verifiable report in the course of these proceedings. It was for the applicants' representatives to make a formal record of all of their complaints at the time the alleged abuses took place and to use all means at their disposal to preserve tangible evidence (see paragraph 88 above). The applicants' contention that, during the first inspection, some officials orally confirmed that the searches concerning DUSS were illegal — which the Commission denies — is not based on any contemporaneous written report, or on any other document

drawn up by the applicants when the disputed events took place. The absence of such formal evidence inevitably makes it more difficult to prove that a targeted search took place which fell outside the subject-matter of the inspection decision. It should also be observed that Messrs M. and P. authored some of the aide-mémoires at issue, as a result of which the documents before the Court already contain their account of the circumstances under which the first inspection was carried out. That being so, it is not necessary for them to be heard, as the applicants request.

137 The arguments of the applicants should be examined in turn: first, the exhaustive search of Mr M.'s office; second, certain disputed documents and keywords; and third, the conduct of the Commission before the first inspection began.

Exhaustive search of Mr M.'s office

138 The applicants contend that the Commission automatically searched the office of Mr M., which included an automatic examination of documents that clearly had nothing to do with ETE. That was the office where the Commission found, inter alia, two e-mails concerning DUSS — clearly unrelated to the subject-matter of the inspection — which were examined and flagged by the officials V.G. and T.B., despite the protests of the lawyer M. V.G. then examined a number of other documents concerning DUSS in the same office.

139 It should be noted from the outset that the Commission is able to conduct exhaustive searches of certain offices or filing cabinets even if it is not clear that information concerning the subject-matter of the investigation is present therein, provided that there are reasons to suggest it. As the Commission rightly points out, were it to confine itself to entering premises or examining filing cabinets with a clear link to the subject-matter of the investigation, there is a risk that it would not be able to locate important items of evidence. Those items of evidence might be hidden or incorrectly filed.

140 Furthermore, the link to the subject-matter of the investigation is not necessarily easy to identify at the outset and it may be the case that such identification is only possible after a thorough examination. As the Commission points out, since its officials do not have complete technical knowledge of all the sectors covered by the investigation, it is not always possible for them to ascertain the relevance of a document immediately, so that they have no option but to carry out a relatively wide search.

141 In the present case, there were good reasons warranting an in-depth search of the office of Mr M. As is apparent from the material in the case file, Mr M. was the director of management, regulation and purchasing at DB Schenker Rail Deutschland and was responsible for purchasing services. As such, he negotiated ETE supply contracts with DB Energie. DB Schenker Rail Deutschland belongs to DB Schenker Rail which itself is, as freight transport subsidiary of the DB Group, one of DB Energie's largest customers. That information, which the applicants did not dispute, therefore warranted an in-depth search of Mr M.'s office.

142 It must be made clear that the first inspection took place at three locations and the incidents described by the applicants in paragraphs 116 to 118 above only occurred at one of them (Mainz). Indeed, those incidents really only concerned a single office and three officials out of a total of 32 officials authorised by the Commission. Furthermore, the number of documents at issue — namely eleven — is clearly very small in the light of the total number of documents involved; around 1 000 documents were copied and a far higher number of documents were examined. Finally, the Commission only copied four documents concerning DUSS.

143 In those circumstances, the arguments of the applicants relating to the automatic search of Mr M.'s office must be rejected as unfounded.

Disputed documents and keywords

144 The applicants submit that, during the first inspection, the Commission examined and photocopied documents that clearly had nothing to do with the subject-matter of the inspection. They also claim that, during the electronic search, the Commission officials used some keywords relating exclusively to DUSS and not to ETE.

145 It must be reiterated that, although the aide-mémoires show that the applicants' representatives stated that, in their opinion, some of the documents examined by the Commission were not related to the subject-matter of the first inspection, at no time did they raise any opposition or formally record a complaint.

146 With respect to the eleven documents at issue, these comprise, first of all, two initial e-mails found at the office of Mr M. in the afternoon of 29 March 2011. After being examined in detail, those e-mails were flagged by the officials V.G. and T.B. On the morning of 30 March 2011, seven additional documents were discovered at the offices of Mr M., including five e-mails. On the morning of 31 March 2011, a Commission official found a document entitled 'European strategy for the Stinnes Intermodal terminals of 17 January 2006' in the files of DB Schenker Rail Deutschland in Mainz. Finally, at the reply stage, the applicants mentioned a further e-mail from Mr M., dated 2 November 2006, on the subject of a 'pilot project concerning the Munich-Riem unloading station'.

147 As is apparent from the pleadings of the parties, the Commission copied four of those eleven documents, namely, an e-mail from Mr L. to Mr F. dated 6 November 2006 on the subject of 'shunting services at the Munich-Riem terminal', an e-mail from Mr S. to Mr M. dated 15 September 2006 on the subject of 'movements at the Munich-Riem unloading station', the e-mail from Mr M. dated 2 November 2006 on the subject of the 'pilot project concerning the Munich-Riem unloading station', and the document entitled 'European strategy for the Stinnes Intermodal terminals of 17 January 2006'.

148 A distinction must therefore be drawn between the four documents that were copied and the seven that were not.

149 As regards the document entitled 'European strategy for the Stinnes Intermodal terminals of 17 January 2006', which was found in the files located in Mainz, the Commission official states that he found that document at approximately 12.30 pm on 31 March 2011. He reportedly removed the original from the filing cabinet in order to discuss its content with colleagues. After taking a copy thereof, he then returned the original to the filing cabinet where it had been found. This was not contested by the applicants. The aide-mémoire of the lawyer D. shows that '[Mr M.] entered the filing room […; h]e was obviously overwhelmed by the volume of documents stored there in various boxes and cabinets, so he simply selected some boxes at random'. According to the applicants' representative, he 'randomly' chose some documents, which is not consistent with the contention that an illegal targeted search was carried out. Several other statements from the aide-mémoires, such as those listed by the Commission in its defence, also tend to confirm the random nature of the officials' search.

150 As regards the three other documents found in Mr M.'s office, these concern the Munich-Riem terminal and DUSS, and indeed relate to matters raised in the complaint of undertaking T.

151 First, it has been established that the Commission had good reasons for carrying out an in-depth search of that office (see paragraph 141 above). Second, the title and content of a document are not necessarily decisive for the purpose of determining whether the document was actually found by chance, as the Commission correctly pointed out. Third and last, there is nothing in the aide-mémoires to show that, in the course of that in-depth search, the Commission agents conducted a targeted search for these three documents.

152 As to the seven other documents, it should be noted that, unlike the four copied documents, they do not contain any references to DUSS or the Munich-Riem terminal. These documents mainly concern the non-discriminatory formation of trains.

153 In those circumstances, having examined the eleven documents at issue, there is no evidence to suggest that an illegal targeted search was carried out.

154 Second, with respect to the keywords used by the Commission officials between the afternoon of 29 March 2011 and approximately 2 pm on 31 March 2011 when the second inspection decision was notified, the applicants provide four examples thereof: 'NBS', '[S.]', '[T.]' and '[G.]'.

155 The aide-mémoires show that during the three days and at the three locations, the Commission officials used numerous keywords. Following a request from the Court, the Commission forwarded the list of keywords sent to the inspectors at the start of the first inspection. The list contained around 90 keywords. The disputed keywords therefore account for a very small percentage of all keywords used. It should also be pointed out that the list of keywords used during an inspection may change in step with the knowledge acquired during that inspection.

156 As regards the keyword 'NBS', it is true that it was only used for the purpose of the first inspection, on 31 March at approximately 11.30 am. According to the Commission, its officials were unaware of the meaning of that acronym and only used it, in the course of a quick search, to ascertain the existence of a link with ETE. First, it should be noted that 'NBS' means 'Nutzungsbedingungen für Serviceeinrichtungen', namely 'conditions for the use of service infrastructure'. Since the supply of ETE is a necessary precondition for access to the electrified network, the existence of a link with the conditions for the use of service infrastructure cannot be ruled out automatically. Second, the aide-mémoire of the lawyer D. shows that she took the view that the keyword in question did not lead to the conclusion that there was no link with ETE prices. Accordingly, she did not object to the search. Third and last, in any event, and in contrast to the applicants' assertions, there is no inconsistency in using an unknown keyword to determine whether or not, based on the results, it is linked to a specific issue.

157 As regards the keyword '[S.]', it is not disputed that it refers to Mr. S., a manager at DUSS. Mr. S worked at DB Schenker Rail before the end of May 2009, namely at one of the DB group's subsidiaries that potentially benefited from the conduct of DB Energie. It is therefore possible that the investigators' search only covered the earlier period of his activities, as the Commission claims.

158 As regards the keyword '[T.]', the explanation given by the Commission is persuasive. According to the Commission, since the undertaking T. was a competitor of Deutsche Bahn and, therefore, a DB Energie customer that had potentially suffered discrimination, it was reasonable that information would be sought about it during the first inspection. The applicants' assertion that the only customer of DB Energie for ETE and, therefore, the only competitor of the DB group was the undertaking TXL, a subsidiary of the undertaking T. which was subject to a separate search, does nothing to cast doubt on that conclusion. Indeed, according to the Commission, the undertaking T. had also lodged a complaint concerning ETE. Furthermore, it is quite possible that the employees of the DB group sometimes used the name of the parent company rather than the subsidiary when referring to the latter, which legitimises the use of the keyword '[T.]' by the Commission's investigators.

159 As regards the keyword '[G.]', this refers to G.S., the head of track infrastructure and facilities at DB Schenker Rail Deutschland. The investigators found an e-mail from his inbox in the office of Mr. M. in the afternoon of 29 March 2011. According to the aide-mémoire of the lawyer M., the e-mail related to pricing measures for train formation facilities. According to the aide-mémoire of the lawyer S., the Commission officials used this keyword in the afternoon of 30 March 2011 as they were unable to find the e-mail they had located the day before, which was confirmed by the Commission. According to the Commission, its officials, who had not been able to examine the e-mail in detail on

29 March 2011, wanted to ascertain whether that e-mail, which concerned a pricing system, was linked to the pricing systems for ETE and to learn more about the areas of activity of G.S. The choice of that keyword was therefore justified.

160 In those circumstances, the arguments of the applicants relating to the disputed documents and keywords must be rejected as unfounded.

The conduct of the Commission before the start of the first inspection

161 The applicants state that, according to the material in the case file, the Commission asked the undertaking T. to confirm whether its complaint of 16 March 2011 was still valid a few days before the first inspection began. This shows that the Commission intended to search for information on DUSS during the first inspection. Indeed, the 32 Commission officials were notified of the existence of the complaint involving DUSS immediately prior to the inspection. Furthermore, the Commission's intention is also demonstrated by the fact that the undertaking T. clearly mentioned the reference number used by the Commission in the ETE inspection decision of 14 March 2011 ('COMP 39.678') in the subject line of its letter of 16 March 2011 concerning the DUSS case.

162 First, with respect to the points made by the applicants regarding the fact that the Commission told its officials about the existence of suspicions concerning DUSS before the first inspection decision, it has to be considered that there were valid reasons for providing the officials with general background information on the case.

163 Second, with respect to the relations between the undertaking T. and the Commission in the months leading up to the inspection, the latter clarified, in response to a written question from the Court, that the undertaking T. had, by its letter of 26 January 2011, and thus of its own volition, requested a meeting to enquire about the status of the proceedings, following its complaint of May 2009. At a meeting on 23 February 2011, the Commission stated that it would treat the complaint concerning ETE as a priority. The representative of the undertaking T. then informed the Commission that, if necessary, it would send the Commission information about DUSS, which it did in a further letter dated 16 March 2011. In those circumstances, it is clear that the exchanges between the undertaking T. and the Commission in the months leading up to the first inspection do not prove the existence of an illegal targeted search.

164 The arguments of the applicants relating to the conduct of the Commission before the start of the first inspection must therefore be rejected as unfounded.

165 In the light of the observations made in paragraphs 123 to 164 above, the third plea in law must be dismissed as unfounded.

The fourth plea in law, concerning the description of the subject-matter of the inspections in the first, second and third inspection decisions

166 The applicants essentially submit that the first, second and third inspection decisions infringe their defence rights by reason of their disproportionately wide subject-matter — in the light of the information that the Commission claimed to have in its possession — as regards, first, the conduct concerned, which encompasses almost all possible conduct engaged in by DB Energie and DUSS, secondly, the geographic extent of the market, which covers all of the Member States where subsidiaries of the DB group operate and, thirdly, the duration of the alleged infringement, in so far as neither the first, second nor third decision specifies any limit in that respect.

167 The Commission rejects all of the applicants' arguments as unfounded.

168 In that regard, it is noteworthy that Article 20(4) of Regulation No 1/2003 defines the essential material that must be included in a decision ordering an inspection, requiring the Commission to specify the subject-matter and purpose of the inspection, the date on which it is to begin, the penalties provided for in Articles 23 and 24 of that regulation and the right to have the decision reviewed by the European Union Courts.

169 The purpose of the statement of reasons for decisions ordering an inspection is thus to show that the operation carried out on the premises of the undertakings concerned is justified, but also to enable those undertakings to assess the scope of their duty to cooperate while at the same time safeguarding their rights of defence (see, as regards Regulation No 17, *Hoechst* v *Commission*, paragraph 86 above, paragraph 29, and *Roquette Frères*, paragraph 80 above, paragraph 47).

170 The requirement for the Commission to specify the subject-matter and purpose of the inspection therefore constitutes a basic guarantee of the rights of defence of the undertakings concerned and, consequently, the scope of the duty to give reasons for decisions ordering inspections cannot be limited by reference to considerations relating to the effectiveness of the investigation. In that connection, whilst it is indeed the case that the Commission is not required to communicate to the addressee of such a decision all the information at its disposal concerning the presumed infringements, to delimit precisely the relevant market, to set out the exact legal nature of the infringements, or to indicate the period during which those infringements were committed, it is obliged to state, as precisely as possible, the presumptions that it wishes to investigate, namely what it is looking for and the matters to which the inspection must relate (see, as regards Regulation No 17, *Dow Benelux* v *Commission*, paragraph 124 above, paragraph 10; *Hoechst* v *Commission*, paragraph 86 above, paragraph 41; and *Roquette Frères*, paragraph 80 above, paragraph 48).

171 To that end, the Commission is also required to state in a decision ordering an inspection the essential features of the suspected infringement by indicating the market thought to be affected, the nature of the suspected restrictions of competition and the supposed degree of involvement in the infringement of the undertaking concerned, as well as the powers conferred on the European Union investigators (see, as regards Regulation No 17, Case 136/79 *National Panasonic* v *Commission* [1980] ECR 2033, paragraph 26, and *Roquette Frères*, paragraph 80 above, paragraphs 81, 83 and 99).

172 In order to establish that the inspection is justified, the Commission is required to show, in a properly substantiated manner, in the decision ordering the inspection that it is in possession of information and evidence providing reasonable grounds for suspecting the infringement of which the undertaking subject to the inspection is suspected (see, as regards Regulation No 17, *Roquette Frères*, paragraph 80 above, paragraphs 55, 61 and 99).

First inspection decision

173 According to the applicants, the subject-matter of the first inspection decision described in Article 1 thereof must be regarded as disproportionately wide, in so far as the conduct referred to involves, in general terms, 'potentially unjustified preferential treatment by DB Energie GmbH towards other DB group subsidiaries, notably in the form of a rebate system' concerning the supply of ETE in Germany.

174 Article 1 of the first inspection decision defines the subject-matter of the inspection as relating to discriminatory conduct, without excluding the possibility of such conduct taking a form that differs from a rebate system. It is clear from the case-law cited in paragraph 171 above that the Commission is only required to state the essential features of the suspected infringement, in particular the nature of the suspected restrictions of competition. Since the Commission stated that the suspected restriction of competition constitutes discriminatory conduct primarily taking the form of a discriminatory pricing practice, it must be considered to have met that requirement.

175 In addition, the wording of a decision must be read by reference to the reasons put forward. It appears that although the conduct concerned is not confined exclusively to the rebate system put in place after 2002, the pricing system for ETE (16.7 Hz) is the near exclusive subject-matter of the inspection. It also follows from recital 6 of the first inspection decision that the information in the possession of the Commission only concerns pricing practices.

176 Consequently, whilst it cannot be ruled out that a significant proportion of DB Energie's conduct may be caught by the inspection, the fact remains that, first, it does not cover 'potentially almost all' possible conduct engaged in by DB Energie, in contrast to the applicants' contentions, and, second, the presumptions that the Commission wishes to investigate are clearly specified, pursuant to the case-law cited in paragraphs 170 and 171 above. In any event, the possibility of an inspection covering an undertaking's conduct in its entirety should not be dismissed from the outset, particularly if the undertaking in question pursues a limited number of activities. The arguments of the applicants regarding the conduct concerned by the first inspection decision must therefore be rejected as unfounded.

177 As to the geographical aspect, it is to be noted, first and foremost, that according to the case-law, the Commission is not required to delimit precisely the relevant market (see paragraph 170 above). Second, a discriminatory rebate system, albeit confined to Germany, could confer an undue competitive advantage on the other subsidiaries of the DB group in all of the downstream markets where they operate. As the Commission pointed out (without being challenged by the applicants), some of the DB group's subsidiaries have their principal place of business outside Germany and the rail freight transport market is an international business where the DB group competes against foreign operators. The Commission was therefore under no obligation to restrict the subject-matter of the first inspection to Germany.

178 As regards the temporal aspect, it follows from the case-law that the Commission is not required to indicate the period during which the suspected infringements were committed (see paragraph 170 above). Furthermore, as the Commission points out, the sixth recital of the first inspection decision shows that the conduct concerned potentially pre-dates 2002. Thus, in contrast to the applicants' contentions, it was not appropriate to restrict the subject-matter of the inspection to the period after 2002.

179 Accordingly, the arguments of the applicants relating to the allegedly disproportionate width of the subject-matter of the first inspection decision must be rejected as unfounded.

Second and third inspection decisions

180 As to the second and third inspection decisions, it should be noted, in the first place, that the wording and reasons put forward — as regards the conduct at issue and the geographic and temporal aspects — are essentially the same in both decisions. The applicants' arguments that the subject-matter of these two decisions is disproportionately wide can therefore be examined together.

181 In the second place, the descriptions of the conduct concerned in the second and third inspection decisions are sufficiently precise, having regard to the requirements of the case-law cited in paragraphs 170 and 171 above. Article 1 and recital 6 of the second inspection decision and Article 1 and recitals 6 to 8 of the third inspection decision show that the conduct concerned relates to various discriminatory practices by DUSS towards competitors, particularly the grant of inappropriate access to terminals, the provision of less efficient services and the refusal of access to terminals. It is also noted that the downstream market concerned is the rail transport market. Finally, it should be observed, as the Commission did, that the fifth recital — in Cases T-290/11 and T-521/11, respectively — shows

that the applicants were aware of the conduct to which the inspection related. The description of the essential features of the suspected infringement in the second and third decisions was therefore sufficient.

182 In the third place, as regards the geographic aspect, the Commission was under no obligation to restrict the subject-matter of the second and third inspections to Germany, but was able to extend it to cover all Member States. Indeed, the infringement forming the subject-matter of these inspections was capable of producing downstream effects on the international freight and passenger rail transport market. As the Commission points out, even if only the use by DUSS of infrastructure equipment in Germany was taken into account, the effects could extend to other Member States. In particular, it is apparent from the undertaking T.'s complaint — which was disclosed to the Court in the context of measures of organisation of procedure — that the use of terminals in Germany may affect competitors wishing to provide transport services to or from other Member States. It should also be pointed out, as the Commission did, that the inspection decisions are addressed to the DB group as a whole, not to DUSS alone, that is to say to certain organisations whose principal place of business is located outside Germany and who pursue international activities.

183 In the fourth place, as regards the temporal aspect, it should be reiterated that the Commission was not required, under the case-law, to state the period during which the infringements were committed (see paragraph 170 above). Besides, the Commission correctly points out that the fact that it was in possession of information indicating that the conduct concerned had been ongoing since at least 2007 is no bar to that conduct having occurred before. The Commission also maintains that it had evidence concerning a concealed discount given by DUSS to DB Schenker Rail Deutschland, with no known date of entry into operation. Accordingly, it was not appropriate for the Commission to restrict the temporal aspect of the second and third inspection decisions.

184 In the light of the foregoing, the fourth plea in law should be rejected as unfounded.

The fifth plea in law, alleging infringement of the principle of proportionality

185 The applicants essentially submit that the first, second and third inspection decisions are disproportionate. They claim that the Commission went beyond what was appropriate and necessary in order to achieve the desired goal.

186 In respect of the first inspection decision, the applicants note that, first, the rebate system in question had been applied in a transparent manner since 2003. The ETE supply contract entered into by each customer, which sets out the charging system as well as the structure of the rebate system, was available on the internet. There was therefore no reason to suspect that secret procedures existed which would warrant an inspection. Second, the rebate system had been reviewed on several occasions by national authorities and courts and found to be consistent with the 'law on cartels'. The Commission, who was informed about those proceedings, could have acquired all the relevant information by cooperating — in the manner provided for in Article 12(1) of Regulation No 1/2003 — with the Bundeskartellamt ('the BKartA'). Third, the reliance placed in the first inspection decision on an earlier decision dating back fifteen years (see paragraph 221 below) to justify the need for the inspection, a decision in which the applicants had not concealed any evidence, is not relevant and gives rise to a 'presumption of bad faith' which is incompatible with the presumption of innocence guaranteed by Article 6(2) of the ECHR. Fourth, it would be inappropriate for an inspection to be carried out having regard to the information sought. Fifth, the first inspection decision does not explain why the Commission, who became aware of the existence of the rebate system in 2006, waited more than five years to carry out the inspection. Sixth, internal documents, such as subjective assessments of staff members, are irrelevant when determining whether conduct penalised under Article 102 TFEU is objectively justified.

187 Having regard to all the circumstances, there was no reason to suspect that, in the present case, the applicants would be tempted to conceal evidence and a request for information under Article 18 of Regulation No 1/2003, such as that dated 4 August 2011, would have been sufficient in the light of the principle of proportionality.

188 At the reply stage, the applicants submitted that a review of the need for, and the proportionality of, the inspection decision could not be carried out without ascertaining the nature of the evidence held by the Commission. They therefore suggested that the Court should ask the Commission to produce that evidence.

189 During the hearing, the applicants argued that the documents concerning the second inspection, which were provisionally seized during the first inspection, could not be set aside and stored in a sealed office for copying at a later stage.

190 As regards the second and third inspection decisions, the applicants claim, first, that the Commission lacked competence since access to rail infrastructure is exhaustively governed by national sectoral rules. In any event, an inspection by the Commission cannot be considered necessary, in the light of the extensive powers of the German sectoral regulator, the BNetzA. Second, the Commission should have come to an agreement with the BNetzA in order to secure information and avoid parallel proceedings. Third, the Commission could have obtained the necessary information by means of a request for information under Article 18 of Regulation No 1/2003, particularly as regards the third inspection decision. Where successive inspections are concerned, they must be justified by particularly serious reasons.

191 The Commission submits that all of the applicants' arguments must be rejected as unfounded.

192 It should be borne in mind that the principle of proportionality, which is among the general principles of EU law, requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the desired objective. However, when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (see, to that effect, Case C-331/88 *Fedesa and Others* [1990] ECR I-4023, paragraph 13, and Case C-180/00 *Netherlands* v *Commission* [2005] ECR I-6603, paragraph 103).

193 In the case of a decision ordering an inspection, observance of the principle of proportionality presupposes that the intended measures do not constitute, in relation to the aims pursued by the inspection in question, a disproportionate and intolerable interference (see, as regards Regulation No 17, *Roquette Frères*, paragraph 80 above, paragraph 76). However, the choice to be made by the Commission between an inspection by straightforward authorisation and an inspection ordered by a decision does not depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case. Therefore, where an inspection decision is solely intended to enable the Commission to gather the information needed to assess whether the Treaty has been infringed, such a decision is not contrary to the principle of proportionality (see, as regards Regulation No 17, *National Panasonic* v *Commission*, paragraph 171 above, paragraphs 28 to 30, and *Roquette Frères*, paragraph 80 above, paragraph 77).

194 It is in principle for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules and even if it already has some indicia, or indeed proof, of the existence of an infringement, the Commission may legitimately take the view that it is necessary to order further investigations enabling it to better define the scope of the infringement or to determine its duration (see, as regards Regulation No 17, *Orkem* v *Commission*, paragraph 81 above, paragraph 15, and *Roquette Frères*, paragraph 80 above, paragraph 78).

195 It is in the light of those principles that the arguments submitted by the applicants should be assessed.

196 As a preliminary point, the grounds of challenge put forward by the applicants at the reply stage and during the hearing must be rejected as out of time, in accordance with Article 48(2) of the Rules of Procedure. Those grounds concern the fact that, first, a review of the need for, and the proportionality of, the first inspection decision cannot be carried out without ascertaining the nature of the evidence held by the Commission and, second, the documents concerning the second inspection, which were set aside during the first inspection, could not be stored in a sealed office.

197 It must be pointed out that Article 48(2) of the Rules of Procedure 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. As the Commission correctly pointed out, the grounds of challenge put forward by the applicants cannot be regarded as expanding upon pleas raised previously, directly or by implication, in the application initiating proceedings, nor can they be considered to be closely linked to those pleas. Consequently, those grounds of challenge must be held to be inadmissible.

198 For those reasons, it is not appropriate to grant the applicants' request concerning the production of evidence held by the Commission before the first inspection.

199 As regards the other grounds of challenge, in the first place, the applicants raise a number of arguments by which they seek to prove that the Commission had no power to inspect their premises because of the existence of sectoral rules governing the transport sector at national level. The applicants also claim that the inspections were not proportionate as the Commission could have obtained all the necessary information through the national authorities — authorities that had, in the past, delivered a number of decisions and judgments concerning the same practices.

200 In that connection, it must be remembered, first, that according to settled case-law, in order to fulfil the role assigned to it by the Treaty, the Commission cannot be bound by a decision given by a national court in application of Articles 101(1) and 102 TFEU. The Commission is therefore entitled to adopt at any time individual decisions under Articles 101 and 102 TFEU, even where an agreement or practice has already been the subject of a decision by a national court and the decision contemplated by the Commission conflicts with that national court's decision (see *France Télécom* v *Commission*, paragraph 46 above, paragraph 79, and Case T-271/03 *Deutsche Telekom* v *Commission* [2008] ECR II-1747, paragraph 120 and the case-law cited).

201 In paragraph 263 of *Deutsche Telekom* v *Commission*, paragraph 200 above, the Court of First Instance also confirmed that the existence of sectoral rules was irrelevant when deciding whether a Commission decision on a competition matter was proportionate. This principle holds true for both final decisions and inspection decisions.

202 Finally, in *France Télécom* v *Commission*, paragraph 46 above (paragraphs 79, 80 and 86), and *CB* v *Commission*, paragraph 75 above (paragraph 48), the Court of First Instance recalled that prior meetings between the Commission and the applicants, or the fact that a national authority may be dealing with a matter, did not affect the powers of investigation conferred on the Commission under Regulation No 1/2003.

203 Second, it should be pointed out, as the Commission did, that there is no reason to presume that the national authorities examined all the relevant issues and gathered all the facts in the course of the administrative and judicial proceedings referred to by the applicants. Indeed, the material in the case file shows that nothing more than discussions took place between the applicants and the national authorities on the subject of the ETE supply system, which the applicants do not dispute. Consequently, no formal investigation procedure was ever opened by the BKartA and the BNetzA in that regard.

204 Third, it must be noted that the Commission put forward a number of facts that the applicants did not deny. According to the Commission, the judgment of the Oberlandesgericht Frankfurt-am-Main (Higher Regional Court of Frankfurt am Main, Germany) dismissing the claim that the rebate system infringed national competition rules — a judgement relied on by the applicants — only concerns national competition law, not EU law. In addition, the reason why that judgment became final is that the complainants in that case and the applicants reached an out-of-court settlement at the appeal stage. Moreover, in the course of that appeal, the BKartA expressly argued that the rebate system concerned was anti-competitive, which casts doubt on the applicants' assertion that the national authorities validated that system. Furthermore, the Commission points out that the judgment was delivered in 2006 and related to events dating back to 2003, while its own investigation also covers recent years. Finally, the judgment of the Oberlandesgericht Frankfurt-am-Main was contradicted by a judgment from the same court handed down immediately thereafter, which probably explains the out-of-court settlement in the first case.

205 Therefore, having regard to paragraphs 199 to 204 above, all of the arguments seeking to demonstrate that the Commission lacked competence or to show that the inspections were disproportionate because of the existence of earlier national decisions must be rejected as unfounded.

206 In the second place, as regards the applicants' argument that a request for information under Article 18 of Regulation No 1/2003 would have been sufficient in the light of the principle of proportionality, the three inspections ordered do not appear to be disproportionate in view of their context.

207 First, pursuant to the case-law cited in paragraphs 193 and 194 above, the choice made by the Commission between an inspection ordered by a decision and another less onerous investigation measure depends on the need for an appropriate inquiry, having regard to the special features of the case. It is for the Commission to decide whether a particular item of information is necessary to enable it to bring to light an infringement of the competition rules. It is also noteworthy that the Commission's powers of investigation would serve no useful purpose if it could do no more than ask for documents which it could identify precisely in advance. On the contrary, such a right implies the power to search for various items of information which are not already known or fully identified (*Hoechst* v *Commission*, paragraph 86 above, paragraph 27, and *Ventouris* v *Commission*, paragraph 128 above, paragraph 122). Consequently, the Commission necessarily enjoys a degree of latitude as to the choice of investigation measure.

208 Second, as regards the first inspection decision, it must be considered, as the Commission does, that since the information sought included evidence signalling a possible intention to drive out competitors, by giving unjustified preferential treatment to companies of the same group by means of a rebate system for the supply of ETE, the Commission was able to carry out that inspection, for the purpose of ensuring an appropriate inquiry. It is difficult to see how such information could, where relevant, come into the Commission's possession other than by means of an inspection. As the Commission rightly points out, a request for information under Article 18 of Regulation No 1/2003 is no guarantee that undertakings will forward incriminating documents to it, such as e-mails.

209 It should also be noted that the information allegedly available to the public, namely the ETE supply contract, was not sufficient to be able to determine precisely the existence and extent of a suspected infringement of Article 102 TFEU. Thus, as the Commission pointed out, from the information available on the internet it was not possible to ascertain, in particular, the identity of the undertakings that actually benefited from the rebates and the sums involved. Nor was it possible to deduce the business strategy of the undertaking and its impact. It is important to substantiate the existence of an active anti-competitive strategy, as the existence of such a strategy enables various facts to be clarified, which can then be classified as unlawful, and may also constitute an aggravating circumstance, as the

Commission observes. The applicants confirm this state of affairs where they explain in their reply that the information sought did not exist as such, as it had to be synthesised from existing, but unavailable, documents.

210 The applicants' argument that the need for information to be assembled calls for a request for information rather than an inspection must also be rejected. Since the information sought was not available, there was still a risk of evidence being destroyed. In addition, as the applicants point out, the fact that the Commission may have taken a different approach in previous cases in order to gain an understanding of the business strategy of the undertakings concerned does not, per se, restrict its power to conduct an inspection in these cases. In any event, the applicants have not identified the previous cases to which they refer or provided any specific information enabling a comparison to be drawn between the circumstances of those cases and the circumstances of the cases under consideration in this judgment.

211 In respect of the argument that internal documents, such as subjective assessments of staff members, are irrelevant when determining whether conduct is objectively justified under Article 102 TFEU, it must be noted that the main purpose of the inspection at the outset was not to take witness statements from staff members. In any event, it may be necessary, depending on the circumstances of the case, to gather witness statements from staff members in order to collect assessments on the facts relating to the undertaking's business activities or strategy.

212 Finally, in respect of the argument that a request for information under Article 18 of Regulation No 1/2003 would have sufficed, since the Commission lodged such a request on 4 August 2011 (that is to say, since the Commission was able to obtain information from the applicants in the course of the procedure by means other than an inspection), it must be considered, as the Commission rightly points out, that the fact that the Commission lodged a request for information after the second and third inspections is not relevant when determining whether those inspections were justified, in the light of the principle of proportionality, for the purpose of deciding whether Article 102 TFEU has been infringed.

213 Third, as regards the second and third inspection decisions, the applicants did not put forward any new arguments, over and above those put forward regarding the first inspection, in support of their ground of challenge that a request for information under Article 18 of Regulation No 1/2003 would have sufficed. At the most, they submitted that, in respect of the third inspection decision, successive inspections have to be justified by particularly serious reasons.

214 In any event, it must be stated that at least some of the information sought in the context of the second and third inspection decisions potentially signalled an intention to commit an infringement and was possibly located at the applicants' premises. Those decisions show that the information in question relates to various discriminatory practices by DUSS towards competitors, particularly the grant of inappropriate access to terminals, the provision of less efficient services and the refusal of access to terminals. It is difficult to imagine that such information would, in this instance, be disclosed voluntarily to the Commission in the context of a request for information under Article 18 of Regulation No 1/2003, particularly having regard to the risks faced by the undertaking in the event of a finding that Article 102 TFEU has been infringed.

215 In addition, the reasons set out in paragraphs 209 and 211 above, regarding the importance of substantiating the existence of an active anti-competitive strategy at the undertaking and of subjective assessments of staff members, are equally valid as far as the second and third inspection decisions are concerned. Furthermore, in contrast to the applicants' assertions, the Commission had the power to conduct an inspection and was not required to coordinate with the national authorities (see paragraphs 199 to 205 above).

216 Finally, as regards the argument that successive inspections must be justified by particularly serious reasons, it is true that, in the case of successive inspections, the Commission is in possession of certain information — gathered during previous inspections — before carrying out those inspections. However, contrary to the applicants' assertions, that does not mean that the Commission is required to obtain the additional information it considers necessary through a request for information under Article 18 of Regulation No 1/2003 or that only particularly serious reasons can justify a further inspection. It is clear from the case-law cited in paragraphs 193 and 194 above that the choice to be made by the Commission between an inspection ordered by a decision and another investigation measure does not necessarily depend on matters such as the particular seriousness of the situation, extreme urgency or the need for absolute discretion, but rather on the need for an appropriate inquiry, having regard to the special features of the case. Thus, the Commission may legitimately take the view that it is necessary to order further inspections to enable it to establish the existence of the suspected infringement, even if it already has some indicia, or indeed proof, which it gathered during previous inspections, of the existence of an infringement.

217 In the light of the considerations set out in paragraphs 206 to 216 above, all of the applicants' arguments to the effect that a request for information under Article 18 of Regulation No 1/2003 would have been sufficient in this case and that, therefore, the inspection decisions were disproportionate, must be rejected.

218 In the third place, the applicants' arguments as to the lack of evidence that there was a real risk of proof being destroyed or concealed in the event of a request for information under Article 18 of Regulation No 1/2003, cannot succeed.

219 First, no such restriction exists in Regulation No 1/2003 or the case-law. Second, contrary to the applicants' assertions, this was not the only reason underlying the decision of the Commission to carry out the inspections, the main reason being to search for evidence indicating, in particular, the existence of a strategy to drive out competitors, evidence that was possibly in the possession of the applicants. Third, for the reasons indicated in paragraphs 208 to 214 above, the argument alleging that there was no evidence of a risk of destruction must be rejected in the light of the circumstances of the case. Fourth, the existence of the judgment from the Oberlandesgericht Frankfurt-am-Main (see paragraph 204 above) does not support the applicants' conclusion that there was no risk of data being destroyed.

220 In the fourth place, as regards the argument alleging an infringement of the presumption of innocence, it should be recalled that the principle of the presumption of innocence, particularly under Article 6(2) of the ECHR, is one of the fundamental rights that, according to the case-law of the Court, are protected in the European Union's legal order.

221 In this instance, the tenth recital of the first inspection decision shows that the Commission indeed referred to the order in Case C-436/97 P *Deutsche Bahn* v *Commission* [1999] ECR I-2387 and the judgment in Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689 — in which the applicants were found to have infringed Article 102 TFEU by reason of their charging practices, in conjunction with other factors — in order to substantiate the risk that the undertakings concerned might attempt to conceal or destroy evidence. The Commission's explanation that the sole purpose of referring to those cases was to draw attention to the fact that the applicants were necessarily aware of the possible consequences of a finding that an infringement had been committed and, therefore, might be prompted to destroy evidence in the event of a request for information under Article 18 of Regulation No 1/2003, is plausible. Furthermore, that factor may be relevant when choosing between different investigation measures. Finally, it should be noted that the first, second and third inspection decisions are decisions ordering an inspection and, therefore, do not contain any penalties or findings of culpability. In those circumstances, the ground of challenge alleging an infringement of the presumption of innocence must be rejected as unfounded.

222 In the fifth place, in respect of the applicants' assertion that they did not understand why the Commission waited more than five years to carry out the inspection when it had been aware of the rebate system since 2006, it need only be noted that, even if the Commission had been in possession of information permitting it to carry out inspections since 2006 — as the applicants argue — that circumstance would have no bearing on the proportionality of those inspections. Furthermore, it is for the Commission to assess the desirability of opening an investigation and the rules on limitation are in place to protect undertakings.

223 In view of all of the above, the Commission does not seem, in this case, to have acted disproportionately in view of the aim pursued and, therefore, to have infringed the principle of proportionality, and the use of inspections ordered under Article 20(4) of Regulation No 1/2003 was appropriate having regard to the specific features of the case.

224 In those circumstances, the fifth plea in law must be rejected as partly inadmissible and partly unfounded.

The third and fourth heads of claim

225 By their third and fourth heads of claim, the applicants ask the Court to annul all measures taken on the basis of the inspections in question in this case and to order the Commission to return all the copies of documents made during those inspections.

226 In respect of the third head of claim, it must be stated that it is not possible, at this stage, to determine the purpose of the applicants' request with a sufficient degree of precision. In particular, it is not possible to determine whether the request covers challengeable acts as provided for in Article 263 TFEU. The third head of claim must therefore be dismissed as inadmissible since it cannot be regarded as sufficiently precise, in accordance with Article 21 of the Statute of the Court and Article 44(1)(c) of the Rules of Procedure.

227 In respect of the fourth head of claim, it should be observed, as the Commission contends, that by asking the Court to rule on the consequences of annulling the inspection decisions, the applicants are seeking to secure a declaration on the effects of a possible judgment ordering annulment, which would also constitute a direction to the Commission as regards how that judgment is to be complied with. However, since the Court has no jurisdiction, in the context of a review of legality on the basis of Article 263 TFEU, to issue declaratory judgments (see, to that effect, the order in Case C-224/03 *Italy* v *Commission* [2003] ECR I-14751, paragraphs 20 to 22) or directions, even where they concern the manner in which its judgments are to be complied with (order in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24), the applicants' fourth head of claim must be declared inadmissible (Case T-145/06 *Omya* v *Commission* [2009] ECR II-145, paragraph 23).

228 It follows from the foregoing that the present applications must be dismissed in their entirety.

Costs

229 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants in Cases T-289/11, T-290/11 and T-521/11 have been unsuccessful, they must be ordered to pay the costs of each of those cases, in accordance with the form of order sought by the Commission.

230 The Council, the EFTA Surveillance Authority and the Kingdom of Spain are ordered to bear their own costs, in accordance with the first and second subparagraphs of Article 87(4) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Dismisses the applications;**

2. **Orders Deutsche Bahn AG, DB Mobility Logistics AG, DB Energie GmbH, DB Netz AG, DB Schenker Rail GmbH, DB Schenker Rail Deutschland AG and Deutsche Umschlaggesellsschaft Schiene-Straße mbH (DUSS) to bear the costs incurred by the European Commission as well as their own costs;**

3. **Orders the Council of the European Union, the EFTA Surveillance Authority and the Kingdom of Spain to bear their own costs.**

Pelikánová Jürimäe Van der Woude

Delivered in open court in Luxembourg on 6 September 2013.

[Signatures]

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