Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

29 February 2016*

(Competition — Agreements, decisions and concerted practices — International air freight forwarding services — Decision finding an infringement of Article 101 TFEU — Price fixing — Surcharges and charging mechanisms affecting the final price — Evidence contained in an application for immunity — Protection of the confidentiality of communications between lawyers and clients — Code of Conduct rules on duty of loyalty and prohibition on double representation — Fiduciary duties — Whether trade between Member States affected — Whether unlawful conduct can be attributed — Choice of companies — Fines — Proportionality — Gravity of the infringement — Mitigating circumstances — Equal treatment — Cooperation — Settlement — 2006 Guidelines on the method of setting fines)

In Case T-265/12,

Schenker Ltd, established in Feltham (United Kingdom), represented by F. Montag, B. Kacholdt and F. Hoseinian, lawyers, and by D. Colgan and T. Morgan, Solicitors,

applicant,

v

European Commission, represented initially by A. Dawes and N. von Lingen, and subsequently by A. Dawes and G. Meessen, acting as Agents, and by B. Kennelly and H. Mussa, Barristers,

defendant,

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

THE GENERAL COURT (Ninth Chamber),

composed of G. Berardis, President, O. Czúcz (Rapporteur) and A. Popescu, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 24 September 2014,

gives the following

* Language of the case: English.

Judgment

Background to the dispute and the contested decision

1 By Decision C(2012) 1959 final of 28 March 2012 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case COMP/39462 — Freight forwarding) ('the contested decision'), the European Commission found that companies active in the sector of international air freight forwarding services had, in periods between 2002 and 2007, participated in various agreements and concerted practices in the sector of international air freight forwarding services, giving rise to four separate infringements of Article 101(1) TFEU and Article 53(1) of the Agreement on the European Economic Area (EEA).

2 The applicant, Schenker Ltd, is owned by Deutsche Bahn AG ('DB'), a joint-stock company governed by German law and wholly owned by the Federal Republic of Germany. DB is the holding company of a group of companies ('the DB group') providing mobility and logistics services worldwide. Under the brand DB Schenker, and in particular via the Schenker group of companies, consisting of a number of entities, including the applicant, the DB group provides, in particular, air freight forwarding services. [*confidential*] [1] The Brink's Company ('Brink's') sold to DB a group of companies run by Bax Global Inc., one of which was Bax Global Ltd (UK). After its business was transferred to the applicant, Bax Global (UK) ceased trading and ceased to exist.

3 This case concerns only one of the four infringements referred to in paragraph 1 above, namely the new export system ('NES') cartel. This case does not concern the currency adjustment factor ('CAF') cartel, the advanced manifest system ('AMS') cartel and the peak season surcharge ('PSS') cartel. In so far as, by the contested decision, the Commission penalised other companies in the DB group for their participation in the CAF, AMS and PSS cartels, those companies have brought a separate action, which forms the subject matter of Case T-267/12.

4 The cartels referred to in paragraph 3 above concern the market in international air freight forwarding services. According to the Commission's description of that sector in recitals 3 to 71 of the contested decision, freight forwarding services may be defined as the organisation of transportation of items, which may also include activities such as customs clearance, warehousing or ground services, on behalf of customers according to their needs. The freight forwarding business has been segmented into domestic and international freight forwarding and into freight forwarding by air, land and sea (recital 3 of the contested decision).

5 The description which the Commission provided of the NES cartel in recitals 92 to 114 of the contested decision may be summarised as follows: the NES is a pre-clearance system for exports from the United Kingdom to countries outside the European Economic Area which was introduced by the United Kingdom authorities in 2002. At a meeting, several freight forwarders agreed to introduce a surcharge for NES declarations, agreed on the levels of the surcharge and on the timing of its application. Following that meeting, those freight forwarders exchanged several emails in order to monitor the implementation of the agreement on the market. The anticompetitive contacts lasted from 1 October 2002 until 10 March 2003.

6 The discussions concerning the AMS cartel and the monitoring of its implementation took place, in particular, in the context of the Freight Forward International Association (known as Freight Forward Europe before 1 January 2004; 'the FFI Association').

1 — Confidential information redacted.

7 It is stated in recital 72 of the contested decision that the Commission began its investigation following the application for immunity submitted by Deutsche Post AG ('DP') under the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; 'the 2006 Leniency Notice'). DP supplemented its application for immunity by oral statements and documentary evidence. By letter of 24 September 2007, the Commission granted conditional immunity to DP with respect to an alleged cartel among the private providers of international air freight forwarding services, aimed at fixing or passing on various fees and surcharges.

8 The Commission carried out unannounced inspections between 10 and 12 October 2007.

9 [*confidential*] DB and its subsidiaries submitted an application for immunity or, failing that, an application for a reduction of the fine pursuant to the leniency programme (recital 76 of the contested decision).

10 On 5 February 2010 the Commission sent a statement of objections to the applicant, to which it replied (recitals 87 and 89 of the contested decision).

11 Between 6 and 9 July 2010, the Commission held a hearing, in which the applicant took part (recital 89 of the contested decision).

12 In the contested decision, having regard to the evidence in its possession, the Commission held that, as the economic successor of Bax Global (UK), the applicant was liable for the participation of Bax Global (UK) in the NES cartel.

13 In Article 1(1)(a) of the contested decision, the Commission found that, in relation to the NES cartel, as an economic successor of Bax Global (UK), the applicant had infringed Article 101 TFEU and Article 53 of the EEA Agreement by participating from 1 October 2002 until 10 March 2003 in a single and continuous infringement in the air freight forwarding services sector which covered the territory of the United Kingdom, and which consisted in fixing prices or other trading conditions. Article 2(1)(a) of the contested decision provides that, for that infringement, a fine amounting to EUR 3 673 000 was imposed on the applicant. The applicant received no reduction of its fine for cooperation with the Commission.

14 It is stated in recital 856 of the contested decision that the fine imposed was calculated on the basis of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

Procedure before the General Court and forms of order sought

15 By application lodged at the Court Registry on 12 June 2012, the applicant brought this action.

16 On the proposal of the Judge-Rapporteur, the Court (Ninth Chamber) decided to open the oral part of the procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of 2 May 1991, sent questions to which the parties were invited to reply. The parties complied with that request within the period prescribed.

17 By letter of 5 September 2014, the applicant lodged observations on the report for the hearing.

18 The parties presented oral argument and replied to questions put by the Court at the hearing on 24 September 2014.

19 The applicant claims that the Court should:

— annul Article 1(1)(a) of the contested decision;

— annul in its entirety or, in the alternative, reduce the fine imposed in Article 2(1)(a) of the contested decision;

— order the Commission to pay the costs.

20 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

21 In support of its action, the applicant relies on seven pleas in law.

22 The first plea in law alleges (i) infringement of Articles 4, 7 and 27(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1), breach of the rights of the defence and of the right to a fair hearing, and (ii) breach of the principle of sound administration. In essence, the applicant claims that the information and evidence contained in DP's application for immunity were inadmissible.

23 By the second plea, the applicant claims that the Commission had no power to adopt a decision concerning the NES cartel, since that cartel was exempt from the application of European Union competition law pursuant to Article 1 of Regulation No 141 of the Council of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition, Series I 1959-1962, p. 291).

24 In the third plea in law, the applicant claims that, in finding that the NES cartel was capable of having an appreciable effect on trade between Member States, the Commission infringed Article 101(1) TFEU, Articles 4 and 7 of Regulation No 1/2003 and the principle of sound administration and failed to have due regard to the Guidelines on the effect on trade concept contained in Articles [101 TFEU] and [102 TFEU] (OJ 2004 C 101, p. 81; 'the 2004 Effects Notice').

25 The fourth plea relates to an infringement of Article 101(1) TFEU, Article 296 TFEU, Article 41 of the Charter of Fundamental Rights of the European Union and Articles 4, 7 and 23(2) of Regulation No 1/2003, and also breach of the principles of personal liability and sound administration, in that only the applicant was held to be liable for the conduct of Bax Global (UK).

26 By the fifth plea in law, first, the applicant claims that, in setting the amount of the fine on the basis of a turnover exceeding the maximum theoretical amount that could have been generated by the NES cartel, the Commission infringed Articles 23(2) and (3) of Regulation No 1/2003 and was in breach of the principle of proportionality, the principle that punishment must fit the offence, the principle *nulla poena sine culpa*, the principle of sound administration, failed to have due regard to the 2006 Guidelines and committed errors of assessment. Second, the applicant argues that the Commission infringed Article 27(1) and (2) of Regulation No 1/2003 and the rights of the defence.

27 By the sixth plea in law, the applicant argues that, in evaluating the applications for immunity and for a reduction in the fine, the Commission infringed Article 23(2) of Regulation No 1/2003 and the principle of equal treatment, failed to have due regard to the 2006 Leniency Notice and committed an error of assessment.

28 The seventh plea in law is to the effect that the Commission infringed Article 23(2) of Regulation No 1/2003 and the principle of equal treatment, and committed an error of assessment in refusing to enter into settlement talks, in accordance with the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation No 1/2003 in cartel cases (OJ 2008 C 167, p. 1; 'the Commission Notice on settlement procedures').

29 In its written pleadings the applicant explains that the first to fourth pleas in law are relied on in support of the application for the annulment of Article 1(1)(a) of the contested decision and are also directed, 'consequently', to the annulment of Article 2(1)(a) of the contested decision. The fifth to seventh pleas in law and, in the alternative, the fourth plea in law are relied on in support of the application for the annulment of Article 2(1)(a) of the contested decision.

30 The applicant also calls on the Court to exercise its unlimited jurisdiction, the fifth, sixth and seventh pleas in law being expressly relied on in that regard. Further, as part of the fourth plea in law, the applicant claims that the amount of the fine should be reduced by the Court in the exercise of its unlimited jurisdiction.

31 In that context, it must be recalled that the review of legality of decisions adopted by the Commission is supplemented by the unlimited jurisdiction which the Courts of the European Union are afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU.

32 That jurisdiction empowers the Courts, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed. Where the findings on which the Commission has relied in order to determine the amount of the fine or periodic penalty payment imposed are vitiated by an illegality, but where the final amounts have to be regarded as appropriate, the unlimited jurisdiction empowers the Courts to maintain the amount of the fine.

33 It is therefore for the Court, in the exercise of its unlimited jurisdiction, to assess, on the date on which it adopts its decision, whether the fine imposed on the applicant was one whose amount properly reflects the gravity and duration of the infringement in question (see, to that effect, judgment of 27 September 2012 in *Shell Petroleum and Others* v *Commission*, T-343/06, ECR, EU:T:2012:478, paragraph 117 and the case-law cited).

34 It must, however, be pointed out that the exercise of unlimited jurisdiction does not amount to a review of the Court's own motion, and borne in mind that proceedings before the Courts of the European Union are *inter partes* (judgment of 8 December 2011 in *KME Germany and Others* v *Commission*, C-389/10 P, ECR, EU:C:2011:816, paragraph 131).

1. *The first plea in law: (i) infringement of Articles 4, 7 and 27(2) of Regulation No 1/2003, breach of the rights of the defence and the right to a fair hearing and (ii) an infringement of the principle of sound administration*

35 This plea in law is aimed at the Commission's conclusion in recital 658 of the contested decision, that it was entitled to use information and evidence contained in DP's application for immunity.

36 The plea can be broken down into two parts. First, the applicant claims that, by using the information and evidence contained in DP's application for immunity, the Commission infringed Articles 4, 7 and 27(2) of Regulation No 1/2003, the rights of the defence and the right to a fair hearing. Second, the applicant claims that the Commission was in breach of the principle of sound administration by not taking due account of the arguments which it put forward during the administrative procedure.

The first part: infringement of Articles 4, 7 and 27(2) of Regulation No 1/2003, the rights of the defence and the right to a fair hearing

37 The applicant argues that, by using the information and evidence contained in DP's application for immunity, the Commission infringed Articles 4, 7 and 27(2) of Regulation No 1/2003, the rights of the defence and the right to a fair hearing, recognised by EU law and enshrined in Article 47 and Article 48(2) of the Charter of Fundamental Rights, and in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950.

38 According to the applicant, in this case, the Commission was not entitled to use the information and evidence contained in DP's application for immunity, should have closed the investigation or, at the least, should have disregarded that information and evidence in the file. First, since the law firm C. acted for DP with respect to drawing up and submitting that application for immunity, that firm was in breach of its obligation of professional secrecy and of the prohibition on double representation or the principle of loyalty to former clients. According to the applicant, that law firm played a dual role. On the one hand, it had been the legal adviser of the FFI Association and its individual members, one such being the applicant. On the other hand, at the same time or, at the least, shortly after that relationship came to an end, when it was still subject to legal obligations resulting from its having acted as legal adviser to the FFI Association and its individual members, that firm assisted DP, at least as from 27 July 2006, in collecting, compiling, analysing and submitting information indicating potential breaches of European Union competition rules to a number of competition authorities, including the Commission. Second, DP was in breach of its fiduciary duties as President and Secretary of the FFI Association. The reason why DP chose to be assisted by the law firm C. in its immunity application was undoubtedly that DP wished to benefit from the particular relationship between that firm and the FFI Association and the privileged information that firm therefore possessed. Since the conduct concerning the AMS cartel, in which members of the FFI Association were involved, and the conduct concerning the NES cartel were closely related, the Commission was also not entitled to use the information and evidence contained in DP's application for immunity with respect to the NES cartel.

39 The Commission disputes those arguments. In particular, the Commission contends that, in so far as, in the reply, the applicant claims that under EU law a lawyer is prohibited from using knowledge and information obtained from his client to the disadvantage of that client, that is a new plea in law, which has to be regarded as being inadmissible.

40 In that regard, it must be recalled that the principle which prevails in EU law is that the evidence may be freely adduced (judgment of 8 July 2004 in *Dalmine* v *Commission*, T-50/00, ECR, EU:T:2004:220, paragraph 72).

41 As a general rule, no provision or general principle of EU law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Articles 101 TFEU and 102 TFEU, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the FEU Treaty (judgment of 8 July 2004 in *JFE Engineering and Others* v *Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, ECR, EU:T:2004:221, paragraph 192).

42 However, the powers available to the Commission during the preliminary phases of investigation and collection of information must be reconciled with compliance with the fundamental rights and general principles of EU law, which apply in all procedures under the European Union competition rules.

43 That case-law and those principles must guide the Court in its examination of the submissions concerning, first, an infringement of the obligation of professional secrecy, second, the prohibition on dual representation and the principle of loyalty and, third, DP's fiduciary duties.

The submission concerning an infringement of the obligation of professional secrecy

44 The applicant argues that, since the law firm C. infringed the obligation of professional secrecy, the information and evidence contained in DP's immunity application are inadmissible and ought not to have been used by the Commission.

45 In that context, it must be recalled that the confidentiality of communications between lawyers and clients is protected at the level of EU law (see, to that effect, judgment of 18 May 1982 in *AM & S Europe* v *Commission*, 155/79, ECR, EU:C:1982:157, paragraphs 18 to 28).

46 Accordingly, as regards investigative measures taken by the Commission which relate to communications between lawyers and clients, it is apparent from settled case-law that the protection of their confidentiality precludes the Commission reading the content of such communications. Further, were the Commission to have read them, the protection of confidentiality would preclude the Commission using such communications as the basis for a decision imposing a fine for an infringement of European Union competition law (see, to that effect, judgment of 17 September 2007 in *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission*, T-125/03 and T-253/03, ECR, EU:T:2007:287, paragraphs 86 to 88 and the case-law cited).

47 The applicant claims that, in this case, the protection of the confidentiality of communications between lawyers and clients also precluded the Commission from using the information and evidence contained in DP's immunity application. Since the purpose of confidentiality of communications between lawyers and clients is to enable clients to be wholly candid in what they confide to their lawyers, without fear of later disclosure of their communications which could be prejudicial to their interests, those communications should be protected not only in relation to investigative measures taken by the Commission, but also in relation to disclosure by a lawyer which is contrary to the obligation of professional secrecy.

48 In that regard, suffice it to state that it is apparent from recital 658 of the contested decision that all the information and evidence which DP submitted in its application for immunity was available to all the members of the FFI Association. Consequently, according to the Commission's findings, the information and evidence contained in DP's immunity application was available to DP, irrespective of whether there was a breach, by the law firm C., of the obligation of professional secrecy.

49 The applicant does not put forward any argument which can call into question that finding. It is clear that, notwithstanding the fact that the undertaking to which the applicant was affiliated was a member of the FFI Association and that it was therefore well placed to monitor whether that finding by the Commission was well founded, there is nothing in DP's application for immunity which the applicant identifies as having been disclosed by the law firm C. in breach of the obligation of professional secrecy, and the applicant does no more than claim that the reason why DP chose to be advised by the law firm C. with respect to the preparation of its immunity application could have been only that it wanted to 'benefit from … privileged circumstances' with respect to the earlier link between that firm and the FFI Association and its members.

50 Consequently, the Court must reject the submission concerning an infringement of the obligation of professional secrecy, and there is no need to rule on the question whether the protection of the confidentiality of communications between lawyers and clients precludes the Commission using documents which have been submitted to it by an undertaking after those documents may have been disclosed to that undertaking by a lawyer in breach of the obligation of professional secrecy.

The submission concerning an infringement of the prohibition on double representation and the principle of loyalty

51 The applicant claims that the evidence contained in DP's immunity application was inadmissible by reason of the fact that, by acting for DP with regard to the preparation and submission of its application for immunity, the law firm C. was in breach of the prohibition on double representation and the principle of loyalty laid down by the Charter of Core Principles of the European Legal Profession and the Code of Conduct for European Lawyers.

52 In that regard, first, it must be observed that there are no provisions of EU law which state that the Commission is not entitled to use information and evidence submitted to it by an undertaking in an application for immunity, where the lawyer who has acted for that undertaking has infringed the prohibition on double representation or the duty of loyalty to his or her former clients.

53 Secondly, having regard to the fact that the fundamental rights and general principles of EU law must also be respected by the Commission during the preliminary phases of investigation and collection of information (see paragraph 42 above), the Court must examine whether, in this case, the Commission could properly use the information and the evidence contained in DP's immunity application.

54 In that context, first, it must be observed that the prohibition on double representation and the duty of loyalty relied on by the applicant are intended not only to ensure the independence and loyalty of lawyers, but also to ensure that lawyers are not placed in a situation where, because of a conflict between the interests of their various clients, they are likely to find themselves in breach of the obligation of professional secrecy.

55 Yet, even on the assumption that (i) the Code of Conduct relied on by the applicant is to be deemed to be the expression of general principles which must be taken into account in the procedure before the Commission and (ii) the conduct of the law firm C. did not comply with that code, it is clear that, in the circumstances of this case, the Commission did not err in concluding that it was entitled to use the information and evidence contained in DP's immunity application.

56 As stated in paragraphs 48 and 49 above, in the circumstances of this case, the Commission was entitled to take the view that the information and evidence contained in that application were produced by DP and were therefore not the fruit of a breach of the obligation of professional secrecy committed by the law firm C. Further, an undertaking is under no obligation to be advised by or represented by a lawyer with respect to the preparation and submission of an immunity application. In the light of those circumstances, even if both assumptions referred to in paragraph 55 above apply, the Commission was entitled to use the information and evidence contained in DP's immunity application. In that context, it must also be observed that any breach, by the law firm C., of the rules of a national code of conduct applicable to it could be punished under national law.

57 Consequently, the Court must reject the submission concerning a breach of the prohibition on double representation and the principle of loyalty, and there is no need to rule on whether those represent the expression of general principles which must be taken into account in the procedure before the Commission and whether the conduct of the law firm C. complied with those principles.

The submission concerning a breach of DP's fiduciary duties

58 The applicant claims that DP's immunity application was inadmissible by reason of the fact that DP was in breach of the fiduciary duties incumbent on it because of its position as President and Secretary of the FFI Association.

59 First, in so far as the subject of that submission by the applicant is intended to be the very decision made by DP to cooperate with the Commission, the submission must be rejected. In that regard, first, it must be recalled that the powers available to the Commission during the preliminary phases of investigation and collection of information are not available to undertakings. That is particularly true with respect to an instrument such as the 2006 Leniency Notice, taking into consideration the fact that the Commission's aim in that notice is to encourage undertakings to reveal the existence of unlawful cartels and to cooperate with its investigation, by reporting the conduct of undertakings which took part in the cartels.

60 Second, in so far as the subject of this submission is solely DP's decision to be advised specifically by the law firm C., the submission must again be rejected. Even on the assumption that, by choosing to be advised by the law firm C., DP was in breach of its fiduciary duties, having regard to the interests at stake in this case, that would not preclude the Commission using the information and evidence contained in its application for immunity (see paragraph 56 above). In that context, it must also be stated that, if the duties relied on by the applicant are not themselves to be regarded as prohibited and legally void pursuant to Article 101(2) TFEU, the breach of the duties relied on by the applicant could, in any event, be punished under national law.

61 Accordingly, the Court must also reject the third submission, concerning an infringement of DP's fiduciary duties.

62 Consequently, the first part of this plea in law must be rejected in its entirety, and there is no need to rule on the objection of inadmissibility made by the Commission.

The second part: infringement of the principle of sound administration

63 The applicant argues that the Commission infringed the principle of sound administration by not taking due account of the arguments which it had put forward during the administrative procedure, concerning breach of the obligation of professional secrecy, the prohibition on double representation, the duty of loyalty and fiduciary duties.

64 The Commission disputes those arguments.

65 First, it must be recalled that, in a procedure seeking to impose a fine on undertakings for an infringement of Article 101 TFEU, the Commission may not confine itself to examining the evidence put forward by the undertakings, but must, as a matter of sound administration, play its part, using the means available to it, in ascertaining the relevant facts and circumstances (see, to that effect, judgment of 13 July 1966 in *Consten and Grundig* v *Commission*, 56/64 and 58/64, ECR, EU:C:1966:41, p. 347).

66 In this case, the Commission took into consideration the arguments concerning a breach of the obligation of professional secrecy. As stated in paragraphs 48 and 49 above, the Commission examined the source of the information and evidence contained in DP's immunity application and found that that information and evidence was available to DP, irrespective of any breach, by the law firm C., of the obligation of professional secrecy. The applicant has not put forward any argument to show that those findings of the Commission were vitiated by error.

67 Further, as regards the arguments concerning the infringements of the prohibition on double representation, the duty of loyalty and DP's fiduciary duties, suffice it to state, with reference to paragraphs 51 to 61 above, that, in the circumstances of this case, such infringements, even if established, would not have been such as to prevent the Commission using the information. Accordingly, nor was the Commission obliged to examine those arguments.

68 In the light of the foregoing, the second part of the first plea in law must also be rejected, and, consequently, the first plea must be rejected in its entirety, and there is no need to answer the question whether the infringements relied on by the applicant, which concerned the AMS cartel, were capable of affecting the lawfulness of the contested decision with respect to the NES cartel.

2. *The second plea in law: infringement of Article 1 of Regulation No 141*

69 This plea in law concerns the conclusion of the Commission, in recitals 644 to 648 of the contested decision, that it was entitled to rely on Regulation No 1/2003 as the basis for penalising the applicant for the participation of Bax Global (UK) in the NES cartel. According to the Commission, that cartel was not exempt from the scope of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [101 TFEU] and [102 TFEU] (OJ, English Special Edition, Series I 1959-1962, p. 87) because of the exemption for transport provided for by Article 1 of Regulation No 141. In that context, the Commission relied on, inter alia, the finding that the participants in the NES cartel coordinated their behaviour in order to remove uncertainty in relation to various elements of price in the freight forwarding sector and it was therefore the rates for freight forwarding services which were affected by that cartel and not the rates for transport services. Even if the freight forwarders had had contractual relationships with the air carriers, those relationships would have been the basis for the provision of air transport services, but not for the provision of freight forwarding services affected by the NES cartel.

70 The applicant considers that those findings of the Commission are misconceived. Pursuant to Article 1 of Regulation No 141, the Commission had no power to adopt a decision on the NES cartel.

71 In that context, it must be recalled that Regulation No 1/2003, as amended following Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and No 1/2003 in connection with air transport between the Community and third countries (OJ 2004 L 68, p. 1), on which the Commission based the contested decision, applies to air transport.

72 However, under the legislation in force before Regulation No 1/2003 became applicable, that is before 1 May 2004, cartels affecting air transport between the Community and third countries were exempt from the scope of Regulation No 17. Under Article 1 of Regulation No 141, Regulation No 17 did not apply to agreements in the transport sector which had as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets. It is true that Article 1 of Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1), as amended by Council Regulation (EEC) No 2410/92 of 23 July 1992 (OJ 1992 L 240, p. 18), provided for the removal of that exemption in the case of air transport between Community airports, but not in the case of air transport between the Community and third countries.

73 In essence, the applicant therefore claims that, since the participation of Bax (Global) UK in the NES cartel occurred before 1 May 2004, that cartel was exempted from the scope of Regulation No 17 by virtue of Article 1 of Regulation No 141. According to the applicant, freight forwarding services and NES filing services are part of the transport process and therefore constitute transport services within

the meaning of that article. In any event, freight forwarding services as a whole, and more specifically services concerning the NES, were directly related to air transport. Consequently, the Commission was not entitled to penalise the applicant under Regulation No 1/2003.

74 The Court must first examine the applicant's arguments concerning the interpretation of Article 1 of Regulation No 141, and then examine its arguments concerning the Commission's conclusion that the NES cartel affected not transport services, but freight forwarding services.

The interpretation of Article 1 of Regulation No 141

75 The applicant maintains that the aim of Article 1 of Regulation No 141 is to exclude a range of activities within the transport sector, namely all the activities which are part of the transport process, since the concept of an industry sector may be wider than that of the market at issue. When assessing the activities which are exempted by that article, account should be taken of the nature of the undertakings' economic activity. In that context, no distinction can be made as regards the various levels of activity of an undertaking. Accordingly, in the case of Bax Global (UK), the Commission should not have distinguished the acquisition of cargo space from carriers, on the one hand, and the provision of that space to shippers, on the other. Further, the applicant argues that Article 1 of Regulation No 141 must be applied to services related to transport, on the ground that that article refers to 'transport conditions' and the preamble of that regulation refers to agreements, decisions and concerted practices directly relating to the provision of transport services.

76 The Commission disputes those arguments.

77 In that regard, first, it must be recalled that, in order to be exempted from the scope of Regulation No 17 pursuant to Article 1 of Regulation No 141, the conduct of an undertaking must have as its object or effect the restriction of competition in a transport market. According to the third recital of Regulation No 141, only conduct directly relating to the provision of transport services is to be exempted by that article.

78 Moreover, it must be recalled that, according to the case-law, the conduct of an undertaking which does not concern air transport itself, but a market situated upstream or downstream of air transport, cannot be regarded as directly relating to the provision of transport services and is therefore not exempted by Article 1 of Regulation No 141 (see, to that effect, judgment of 17 December 2003 in *British Airways* v *Commission*, T-219/99, ECR, EU:T:2003:343, paragraphs 171 and 172).

79 In the light of the foregoing, the interpretation of Article 1 of Regulation No 141 advocated by the applicant cannot be accepted.

80 A reading of Article 1 of Regulation No 141 as meaning that that provision is not confined to exempting cartels concerning air transport services, but exempts a set of activities within the air transport sector, is not compatible with either the wording of that provision, or the third recital of that regulation, or the abovementioned case-law, from which it is apparent that the cartel must directly relate to the provision of air transport services.

81 Next, contrary to what is argued by the applicant, Article 1 of Regulation No 141 does not exempt the activities of an undertaking in their entirety solely because one part of its activities concerns air transport services. Consequently, even if an undertaking seeks to obtain transport services on an upstream market, its activities on a downstream market, which are not directly related to transport services, are not exempted by virtue of that article.

82 Further, the Court must reject the interpretation advocated by the applicant, that Article 1 of Regulation No 141 exempts all services which are directly linked to transport services. As follows from the considerations set out in paragraph 80 above, that provision is confined to exempting cartels directly relating to transport services, but does not exempt cartels relating to services which are directly linked to transport services.

83 Moreover, in so far as, in support of the reading of Article 1 of Regulation No 141 which it proposes, the applicant claims that that provision refers to 'transport … conditions', suffice it to state that that expression does no more than clarify that not only are cartels affecting rates for transport services exempted, but also those fixing trading conditions within the meaning of Article 101(1)(a) TFEU. However, contrary to what is argued by the applicant, it cannot be inferred that services which are not transport services, but which have a direct link with transport services are also exempted from the application of Regulation No 17.

The services affected by the NES cartel

84 The applicant also calls into question the Commission's finding that the NES cartel affected freight forwarding services as a package of services.

85 In that regard, in, inter alia, recitals 3 to 6, 64 to 66, 614, 867 to 872 and 877 to 879 of the contested decision, the Commission stated that, from an economic perspective, the freight forwarders transformed the transport services and other input services into freight forwarding services, which met a specific demand from their customers. That demand was not satisfied by the individual services which are components of freight forwarding services. The freight forwarders offered a package of services to their customers which enabled them easily to dispatch goods, without having to concern themselves with the details of transport organisation. Those services included air transport services, but could also include warehousing services, cargo handling services, logistics or ground transport services and services relating to customs and fiscal matters. If the shippers were obliged to acquire themselves the individual services required to ensure that the goods arrive at their destination, first, they would have to coordinate the various operations at their own risk, and, second, they would not be able to profit from the economies of scale which the freight forwarders are able to achieve by consolidating the goods of their various customers. In contrast, the freight forwarders prefinanced or purchased wholesale and in advance the services of third parties which are required for the provision of freight forwarding services and were in a position, by bringing together by way of consolidation the goods of their own customers in cargoes of the optimal weight and size, to take advantage of economies of scale and to use those capacities more efficiently than one of their customers could have done if he had attempted to purchase air transport services or related services directly from an air carrier, a ground handling company or a warehousing company. For the customers of the freight forwarders, freight forwarding services therefore have a higher value than that of their inputs considered individually.

86 Further, in, inter alia, recitals 129 and 130, 572, 645, 868, 869 and 872 of the contested decision, the Commission found that, even though, by means of the NES cartel, the freight forwarders entered into an agreement only on the NES surcharges, that cartel affected freight forwarding services. First, in that context, the Commission relied on the consideration that the NES surcharge was part of the total price which the customers had to pay for the provision of freight forwarding services. Second, the Commission stated, that the freight forwarders which participated in the NES cartel were not merely suppliers of NES filing services, did not regard third parties which were not freight forwarders and which offered individual NES filing services as actual or potential competitors and did not attempt to involve such suppliers in the NES cartel. Third, the Commission held that it was clear from the evidence in its possession that the decision of a freight forwarder not to pass on risk or cost factors to its customers in the form of a surcharge was likely to confer on it a competitive advantage on the market for freight forwarding services as a package of services. Since freight forwarding is a low margin

market, even a small price increase or surcharge imposition or absence thereof could play a decisive role in whether or not the freight forwarders lose customers, whether or not they maintain their client base or whether or not they gain new business opportunities at the expense of their competitors.

87 The applicant considers that those findings are erroneous.

88 First, the applicant argues that the Commission ignored the fact that the transport services were included in the freight forwarding services and that, from the perspective of the freight forwarders' customers, the transport services were very important, since the organisation of transportation in itself, without the actual transportation, did not meet their needs. The contractual obligation owed by the freight forwarders to their customers went beyond the mere organisation of the transportation of goods from source to destination. From a customer perspective, the product or service at issue is cargo space, irrespective of whether it is offered by a carrier or a freight forwarder.

89 The Commission disputes those arguments.

90 This submission must be rejected.

91 In that regard, it must be observed that, in the contested decision, the Commission did not dispute that, from the perspective of the freight forwarders' customers, transport services constitute an important element of freight forwarding services. The Commission confined itself to finding that, even though freight forwarding services included transport services, the former had to be distinguished from the latter. Further, in so far as the applicant argues that, from the perspective of the freight forwarders' customers, the services which the freight forwarders offer is the provision of cargo capacity, it is clear that that proposition is merely asserted and that the applicant offers no argument to demonstrate that the Commission's findings as set out in paragraph 85 above, that a distinction must be made between freight forwarding services and transport services, are vitiated by error.

92 Second, the applicant claims, first, that the Commission failed to take sufficient account of the fact that it frequently leases entire aircraft, which means that it can determine the destination and schedule of transport services, and that it bears the economic risk attached to using the available cargo capacity. Second, the freight forwarders often themselves supply the transport services, either wholly or in part. Thus, even where the transportation is classified as 'air freight', over short distances they themselves often provide such transportation by land using the fleet of trucks available to them.

93 The Commission disputes those arguments.

94 That submission must also be rejected.

95 In that regard, it is clear that the fact relied on by the applicant, that it leases entire aircraft and bears the economic risk attached to using the available cargo capacity, does not allow the inference that its entire activity concerns transport services. Admittedly, to the extent that the freight forwarders acquire air transport services from the carriers, their activity concerns the air transport market. However, as stated in paragraph 81 above, the fact that the applicant seeks to obtain services on the air transport services market is not sufficient ground for its entire activity to be exempted pursuant to Article 1 of Regulation No 141. Yet, according to the Commission's findings as stated in paragraphs 85 and 86 above, the NES cartel affected not the transport services market, but the freight forwarding services market, on which market the freight forwarders offer freight forwarding services to their customers and which market is downstream of the transport services market. In any event, the applicant does not challenge the Commission's finding in recital 6 of the contested decision that the majority of the freight forwarders do not themselves provide air transportation.

96 Further, the fact that, as part of the provision of freight forwarding services, the applicant itself takes charge of some or all transport services by land does not alter the fact that the services affected by the NES cartel were not transport services, but freight forwarding services in the form of a package of services.

97 Third, the applicant claims that the air carriers negotiate air transport contracts directly with major customers and that the carriers can themselves lease aircraft from suppliers. Accordingly, the freight forwarders are in fact in direct competition with the air carriers.

98 The Commission disputes those arguments.

99 In that regard, it must be observed, that those arguments fail to call into question the Commission's finding that the freight forwarding services have to be distinguished from transport services, because, in the form of a package of services, they meet a specific demand from customers, from whose perspective, economically, the freight forwarding services cannot be replaced by their individual component services. The fact that some major customers of the carriers negotiate air transport contracts directly with the carriers fails to demonstrate that, for the majority of the freight forwarders' customers, for the reasons set out in paragraph 85 above, economically, the individual services which make up the freight forwarding services and the freight forwarding services are not interchangeable.

100 Further, the applicant does not explain how the fact that the carriers lease aircraft for use to provide air transport services could be capable of calling into question the Commission's finding that the services affected by the NES cartel were freight forwarding services which have to be distinguished from transport services.

101 This submission must therefore be rejected.

102 Fourth, the applicant claims that the Commission failed to take into account the fact that the goods could not be transported without the NES declaration. The Commission applied a false criterion for the determination of whether there was a direct relationship between the freight forwarding services (as a whole or solely those concerning the NES), on the one hand, and air transport, on the other. Since the NES declaration is a precondition of a transport activity, a failure to file NES documents would jeopardise the possibility of air transport from the United Kingdom. A relationship with air transport also exists for freight forwarding services as a whole.

103 The Commission disputes those arguments.

104 In that regard, it is clear that, in recital 647 of the contested decision, the Commission recognised that compliance with the NES procedure constituted a legal precondition for transportation from the United Kingdom and that a failure to comply with that procedure might jeopardise the transport by air of some goods. The Commission therefore took into account the importance of NES filing services for the transport services.

105 Furthermore, the Court must observe that the arguments put forward by the applicant, claiming a link between the NES procedure and the transport services, and a link between the transport services and the freight forwarding services, fail to call into question the merits of the Commission's findings. The NES cartel affected freight forwarding services, and Article 1 of Regulation No 141 exempts only cartels directly related to transport services (see paragraph 82 above), but not cartels affecting services linked to transport services. Therefore, the links between the NES procedure and the air transport services from the United Kingdom, and the links between transport services and freight forwarding services, are not capable of calling into question the Commission's conclusion that the NES cartel was not exempted.

106 That submission must therefore be rejected and there is no need to examine whether the Commission's further findings as stated in recital 647 of the contested decision, that, first, the absence of freight forwarding services or failure to comply with the NES procedure would not jeopardise the possibility of air transport services as such and, second, the service relating to the NES procedure could be supplied by service providers other than the air carriers or the freight forwarders, are of relevance.

107 Fifth, the applicant relies on the fact that the rules of the International Air Transport Association (IATA) apply not only to relationships between carriers and freight forwarders, but also to those between the freight forwarders and their customers.

108 The Commission disputes those arguments.

109 In that regard, suffice it to state that the scope of the IATA rules fails to call into question the Commission's finding that there was a specific demand for freight forwarding services as a package of services which, for the reasons set out in paragraph 85 above, economically, cannot be replaced by the individual component services.

110 Consequently, none of the arguments put forward by the applicant demonstrate that the Commission misinterpreted or misapplied Article 1 of Regulation No 141.

111 Accordingly, the Court must reject the second plea in law in its entirety.

3. *The third plea in law: trade between Member States was not appreciably affected*

112 This plea concerns the Commission's findings in Section 5.2.1.3 of the contested decision that the NES cartel was such as to appreciably affect the pattern of trade between the Member States.

113 The applicant considers that those findings are not compatible with Article 101(1) TFEU and Articles 4 and 7 of Regulation No 1/2003 and that the Commission did not comply with either the principle of sound administration or the 2004 Effects Notice.

114 The arguments put forward by the applicant in this plea can be divided into two parts. First, the applicant argues that, contrary to the Commission's findings, the NES cartel did not affect freight forwarding services, but solely NES filing services. Secondly, the applicant claims that the Commission's finding that the NES cartel was such as to appreciably affect trade between Member States was erroneous, since the effects of that cartel were limited to the United Kingdom, and indeed to certain parts of that Member State.

The first part, concerning the services affected by the NES cartel

115 The applicant challenges the Commission's finding in recital 614 of the contested decision that the NES cartel affected freight forwarding services. The applicant considers that that finding is erroneous. The NES cartel solely affected NES filing services. The freight forwarders entered into agreements solely with respect to the amounts of the NES surcharge and the provision of NES filing services was an activity independent of freight forwarding. It was a stand-alone activity relating to the particular legislation in the United Kingdom and therefore a separate services market for the purposes of competition law.

116 First, the applicant argues that the Commission failed to provide sufficient evidence to demonstrate that the NES cartel affected freight forwarding services as a whole. The Commission did no more than record that the NES surcharge was included in the total price paid by customers for the

provision of freight forwarding services. Yet there were independent third party non-freight forwarders who offered NES filing services. Contrary to the Commission's findings, the fact that those third parties were not referred to in the discussions among the freight forwarders was not relevant.

117 The Commission disputes those arguments.

118 This submission must be rejected.

119 In that regard, it must be stated that, contrary to what is argued by the applicant, the Commission did not confine itself to recording that the NES surcharge was included in the total price paid by customers for the provision of freight forwarding services.

120 On the one hand, the Commission's findings on which it based its conclusion that freight forwarding services as a package of services constituted a market which had to be distinguished from the markets for their individual component services, have been set out above in paragraph 85.

121 On the other, as stated above in paragraph 86, the Commission's conclusion that the NES cartel affected freight forwarding services was not based solely on the finding that the NES surcharge was part of the total price which the customers had to pay for the provision of freight forwarding services. As stated by the Commission, first, all the undertakings which participated in the NES cartel were freight forwarders and none of them were mere suppliers of NES filing services; second, those undertakings had not regarded such suppliers as actual or potential competitors; third, those undertakings did not seek to involve those suppliers in the NES cartel; and, fourth, the decision of a freight forwarder not to pass on the risk and cost factors to its customers in the form of a surcharge was likely to confer on it a competitive advantage in the freight forwarding services market.

122 Therefore, the aim of the NES cartel was not to restrict competition with respect to NES filing services as individual services, but competition with respect to freight forwarding services as a package of services.

123 Further, admittedly, the fact that third party non-freight forwarders offer NES filing services and the fact asserted by the applicant that as much as 40% to 50% of customs declarations in Europe are submitted directly by the shipper or through customs agencies, even if that proved to be correct, may demonstrate that there was a demand for individual NES filing services. However, they fail to demonstrate that the cartel at issue affected those individual services.

124 Secondly, the applicant claims that the reasons stated in the contested decision are inconsistent. On the one hand, in recital 441 of the contested decision, in the description of the infringement, the Commission solely referred to the conduct directly linked to the NES surcharge and offered no evidence to demonstrate that the NES cartel related to other subjects, for example transportation prices or other ancillary services. On the other, in recital 872 of the contested decision, the Commission asserted that the NES cartel affected not the NES filing services market, but freight forwarding services.

125 The Commission disputes those arguments.

126 This submission must be rejected.

127 Contrary to what is argued by the applicant, those findings of the Commission are not contradictory. According to the Commission's findings as summarised in paragraphs 85 and 86 above, even though the NES cartel related only to the NES surcharge, its aim was to restrict competition between freight forwarders with respect to freight forwarding services.

128 Third, the applicant claims that the reason why the freight forwarders indicate ancillary services such as NES filing services associated with the freight forwarding services on their bills is purely a matter of administrative convenience, as the Commission itself recognised. Charges for those services can thus be covered by an overall bill.

129 The Commission disputes those arguments.

130 This submission must also be rejected.

131 In that regard, it must be observed that the fact that the freight forwarders charged their customers for NES filing services in no way calls into question the Commission's finding that there is a specific demand for freight forwarding services as a package of services, because of the possibility thereby to save time and money. On the contrary, those findings are supported by the applicant's argument that this allows freight forwarders to send an overall bill to their customers.

132 Further, it is clear that, contrary to what is argued by the applicant, in recital 868 of the contested decision, the Commission did not find that the fact that the freight forwarders charged their customers for NES filing services was a purely administrative matter of no importance. The Commission simply stated in that recital that the fact that, on their bills, the freight forwarders itemised the NES surcharge separately, instead of including it in the final price of the freight forwarding services, was a purely formal issue, devoid of any economic or legal significance.

133 Fourth, the applicant argues that it is apparent from Article 1(1) of the contested decision that the NES cartel affected the supply of NES filing services.

134 The Commission disputes that argument.

135 In that regard, suffice it to state that is plain from the wording of that provision that the NES cartel affected the 'air freight forwarding services sector'.

136 Accordingly, none of the arguments put forward by the applicant is such as to demonstrate that the Commission's finding that the aim of the NES cartel was to restrict competition with respect to freight forwarding services is vitiated by error.

137 Consequently, the first part of this plea must be rejected.

The second part, on whether trade between Member States was affected

138 The applicant also challenges the Commission's conclusion that the NES cartel was capable of appreciably affecting the pattern of trade between the Member States.

139 In Section 5.2.1.3 of the contested decision, in recitals 590 to 599 and 602 to 615, the Commission stated that trade between Member States might have been affected by the NES cartel (i) directly, with respect to the provision of freight forwarding services and (ii) indirectly, with respect to the transported goods.

140 The applicant considers that those findings are vitiated by errors. Neither the effects which the NES cartel might have had on the freight forwarding services, nor the effect which it might have had on the transportation of goods were capable of appreciably affecting trade between Member States. The Commission relied on general arguments, failed to produce sufficient evidence, did not comply with the 2004 Effects Notice and did not carry out an adequate inquiry.

141 In that regard, first, it must be observed that Article 101(1) TFEU and Article 53 of the EEA Agreement concern only agreements which are capable of affecting trade between Member States. As is stated in the case-law, if an agreement is to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (judgment of 13 July 2006 in *Manfredi and Others*, C-295/04 to C-298/04, ECR, EU:C:2006:461, paragraph 42).

142 It must also be recalled that an agreement will fall outside the prohibition in Article 101 TFEU if it has only an insignificant effect on the market (see judgment of 21 January 1999 in *Bagnasco and Others*, C-215/96 and C-216/96, ECR, EU:C:1999:12, paragraph 34 and the case-law cited).

143 The cross-border nature of freight forwarding services is not to be confused with the issue of whether trade between Member States was appreciably affected. If every cross-border transaction were automatically capable of appreciably affecting trade between Member States, the concept of appreciability, which is, however, a condition for the application of Article 101(1) TFEU established by case-law, would be devoid of meaning (judgment of 16 June 2011 in *Ziegler* v *Commission*, T-199/08, ECR, EU:T:2011:285, paragraphs 52 and 53).

144 In the light of the fact that the concept of trade for the purposes of Article 101 TFEU is not limited to traditional exchanges of goods across borders, but also covers exchanges of services, the Court must examine the applicant's arguments seeking to challenge the findings of the Commission based on the effects of the NES cartel on trade with respect to freight forwarding services, and then examine the arguments seeking to challenge the Commission's findings based on the effects of that cartel on the flow of goods. Thereafter, the Court must turn to the argument concerning a breach of the principle of sound administration and a failure to comply with paragraph 77 of the 2004 Effects Notice.

Whether trade with respect to freight forwarding services was affected

145 The applicant challenges the Commission's finding that the NES cartel was capable of having appreciable effects on the freight forwarding services market.

146 In recitals 598, 607, 608, 610, 613 and 614 of the contested decision, the Commission stated that, notwithstanding the fact that the NES cartel related only to the legislation of one Member State, it was capable of affecting trade between Member States, in particular, with respect to freight forwarding services. First, the freight forwarding services affected by the NES cartel were sought not only by customers situated in the United Kingdom, but also by customers located outside the United Kingdom, in other EEA countries, or by local offices of the latter. Second, the freight forwarding services sector is characterised by substantial trade between Member States, both between the countries of the European Union and those of the European Free Trade Association (EFTA). Freight forwarders compete with one another in all, or almost all, the States belonging to the EEA and their customers are established in the EEA. It was evident that the conduct of global undertakings on the UK market could have had repercussions on the competitive structure within the internal market, as the altered margins in the United Kingdom could have affected their business conduct in other Member States. Further, the Commission stated that the effects of the NES cartel on freight forwarding services had been appreciable, since the conditions for the presumption provided for in paragraph 53 of the 2004 Effects Notice were met. First, the NES cartel was by its very nature a cartel capable of affecting trade between Member States for the purposes of that paragraph. Second, the turnover achieved by the parties in the services affected by the NES cartel exceeded EUR 40 million and their market share exceeded the 5% threshold.

147 The applicant considers that those findings are in error. The Commission's findings were entirely speculative. Contrary to the view taken by the Commission, the NES cartel did not affect trade in several Member States and did not have as its main aim the regulation of competition within the EEA. Any effect of the NES surcharge was confined to the United Kingdom, or solely to certain areas in the United Kingdom.

148 More specifically, the applicant calls into question, first, the Commission's findings based on the effects on the freight forwarders' customers and on the conduct of the freight forwarders in other Member States and, second, the Commission's findings as regards whether trade was appreciably affected.

– The effects on the freight forwarders' customers and on the conduct of freight forwarders in other Member States

149 The applicant's first argument is that the Commission's finding in recital 610 of the contested decision, that the altered margins of freight forwarders in the United Kingdom were capable of having repercussions on their conduct in other Member States, is entirely speculative. The Commission provided no evidence to demonstrate that the NES surcharge, which was, in practice, applicable only to goods in the United Kingdom, could have had any effect whatsoever on the business of undertakings operating in other Member States, particularly if the commercial insignificance of the NES surcharge is taken into consideration. In the circumstances of this case, the fact that the undertakings which participated in the agreement were members of groups of differing nationalities is of no relevance.

150 The Commission disputes those arguments.

151 In that regard, it must be observed that Article 101(1) TFEU concerns agreements which are capable of affecting trade between Member States. Accordingly, the Commission is not obliged to demonstrate the actual effects of an agreement, it is sufficient that the Commission establish that those agreements are capable of having such an effect. The Commission may therefore confine itself to demonstrating that there is a sufficient degree of probability that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (judgment of 17 July 1997 in *Ferriere Nord* v *Commission*, C-219/95 P, ECR, EU:C:1997:375, paragraph 20).

152 The Commission did not however err in taking the view that, in the circumstances of this case, it was sufficiently probable that the NES cartel might have had an influence on the conduct of freight forwarders in Member States other than the United Kingdom.

153 In that context, first, it must be recalled that, contrary to what is argued by the applicant, the NES cartel affected freight forwarding services (see paragraphs 115 to 136 above).

154 Second, it must be observed that, according to the findings made by the Commission in the contested decision, which have not been challenged by the applicant, the freight forwarders which participated in the NES cartel also offer their freight forwarding services in Member States other than the United Kingdom and compete with one another in those Member States with respect to those freight forwarding services.

155 Third, in the circumstances of this case, it cannot be ruled out that, in the absence of the NES cartel, the competition between the freight forwarders in relation to the costs arising from the NES might have had an impact on the margins of freight forwarders in the United Kingdom and might have led to gains and losses of market share in that country. Admittedly, in that context, the applicant argues that the NES surcharge was commercially insignificant. Nonetheless, that argument fails to invalidate the Commission's finding that, having regard to the fact that the freight forwarding services market is one characterised by low margins, the commercial importance of the NES surcharge could not be

regarded as insignificant. That finding of the Commission is supported, first, by its finding in recital 907 of the contested decision that the freight forwarders' customers resisted payment of the NES surcharge, and, second, by the evidence mentioned in recital 869 of the contested decision, which reports the fears expressed by some freight forwarders who participated in the NES cartel that competition concerning the costs arising from the NES might have altered margins and entailed a gain or loss of market share. It is clear that the applicant offers no argument capable of invalidating those findings.

156 Fourth, having regard to those circumstances, it appears sufficiently probable that the NES cartel was capable of having repercussions on the conduct of the freight forwarders in other Member States, where they were also competing with one another, and of altering the structure of competition within the European Union in that respect.

157 Consequently, the Court must conclude that nothing of what is argued by the applicant is such as to call into question the Commission's finding based on the effects of the NES cartel on the behaviour of freight forwarders in Member States other than the United Kingdom.

158 The applicant's second argument is that the Commission's finding in recital 607 of the contested decision that the services affected by the NES cartel were sought not only by customers situated in United Kingdom, but also by undertakings situated in other Member States in the EEA, is vitiated by errors. Cross-border trade is not facilitated by the provision of NES filing services, since those services are only of interest in the United Kingdom and do not create any demand outside the United Kingdom. In any event, the Commission failed to provide sufficient evidence on this subject.

159 In that context, it must be recalled that, contrary to what is argued by the applicant, the NES cartel affected not NES filing services, but freight forwarding services (see paragraphs 115 to 136 above).

160 Further, as regards the doubts expressed by the applicant concerning the Commission's findings that customers situated in Member States other than the United Kingdom sought freight forwarding services which might have been affected by the NES cartel, it must be recalled that the Commission may confine itself to demonstrating that there is a sufficient degree of probability that that cartel might have had an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (see paragraph 151 above).

161 Yet, as the applicant itself states, in that regard, the Commission relied on a statement made by [*confidential*], that [*confidential*].

162 Contrary to what is argued by the applicant, the credibility of that statement cannot be called into question by the applicant's assertion that, in the majority of cases where goods situated in another Member State were transported through the United Kingdom, NES filing services were not necessary. Even if that assertion were correct, it is clear that it does not cover the situation in which a customer located in a Member State other than the United Kingdom seeks to obtain freight forwarding services with respect to goods that are already located in the United Kingdom.

163 Consequently, it is clear that nothing of what is argued by the applicant is such as to call into question the Commission's finding based on the effects of the NES cartel on the freight forwarding services sought by customers situated in a Member State other than the United Kingdom.

164 The applicant's third argument is that the nature and scope of the NES cartel demonstrates that it was confined to the United Kingdom and that it was not designed to produce effects on trade between Member States. The NES cartel was implemented by air freight personnel of various undertakings based in the London Heathrow Airport area. The Commission failed to show that the individuals concerned had the necessary authority to bind their entire UK organisations. The Bax Global (UK) participant in that cartel, Mr B., played no role in the fixing of prices. Bax operated a policy which

allowed autonomy, and consequently local branch managers within Bax Global (UK) generally had significant flexibility as to prices, with each branch constituting a separate business. The amount of the NES surcharge charged to a specific customer of Bax Global (UK) was therefore decided by the branch manager concerned following negotiations between the branch in charge of the shipment and that customer.

165 The Commission disputes those arguments.

166 In that regard, it is clear, that the applicant does not challenge the Commission's findings in recitals 94 to 114 of the contested decision that Mr B. was party, as a representative of Bax Global (UK), to a meeting and subsequent contacts in the course of which he came to an agreement with the representatives of other freight forwarders on the introduction of an NES surcharge, on the tariffs for that surcharge, the timetable for its application, and the monitoring of its implementation.

167 In addition, as regards the argument that Mr B. had no pricing authority, suffice it to observe that the applicant does not call into question the Commission's findings in recital 122 of the contested decision, where the Commission recounted in detail and with reference to evidence that Mr B. did have pricing authority within Bax Global (UK), that the existence of the NES cartel was well known within that company and that the members of the Board had been informed by Mr B. of the existence of the NES cartel and had raised no objection to it. In that context, it must also be recalled that formal authorisation of the participation of an undertaking's employee in a cartel is not a prerequisite of that participation being attributable to the undertaking (judgment of 16 November 2011 in *Álvarez* v *Commission*, T-78/06, EU:T:2011:673, paragraph 39).

168 Moreover, in so far as the applicant claims that the scope of the NES cartel was confined to the United Kingdom or even to part of the territory of that Member State, suffice it to observe that, by reason of the findings set out in paragraphs 149 to 163 above, that argument does not call into question the Commission's finding that the NES cartel was such as to have effects in other Member States.

169 Consequently, the Court must hold that nothing of what is argued by the applicant is sufficient to demonstrate that the Commission's findings that the NES cartel was such as to have effects on the behaviour of the freight forwarders in other Member States and on the freight forwarders' customers are vitiated by errors.

– Whether trade was appreciably affected

170 The applicant also challenges the Commission's finding that the NES cartel was such as to affect trade between Member States appreciably.

171 In that regard, in the contested decision, the Commission stated that, in this case, the conditions for the positive presumption provided for in paragraph 53 of the 2004 Effects Notice were met. The Commission stated that the NES cartel was, by its very nature, capable of affecting trade between Member States. Further, in recital 614 of the contested decision, the Commission found that the turnover which the parties concerned achieved on the relevant trade lane was significantly higher than the EUR 40 million required. In recitals 613 and 899 of the contested decision, the Commission considered that not only the relatively strong individual positions of the undertakings concerned on the markets in the United Kingdom and the EEA, but also their overall market share in the United Kingdom and in the EEA argued in favour of trade being affected.

172 The applicant considers that those findings are vitiated by errors. First, the Commission misapplied the presumption provided for in paragraph 53 of the 2004 Effects Notice. Second, in the circumstances of this case, that presumption was rebutted.

173 The Commission disputes those arguments.

174 In that regard, first, it must be observed that paragraph 53 of the 2004 Effects Notice, neither the lawfulness nor relevance of that provision being challenged in this action, is worded as follows:

'The Commission will also hold the view that where an agreement or a practice by its very nature is capable of affecting trade between Member States, for example, because it concerns imports and exports or covers several Member States, there is a rebuttable positive presumption that such effects on trade are appreciable when the turnover of the parties in the products covered by the agreement … exceed 40 million euro. In the case of agreements that by their very nature are capable of affecting trade between Member States, it can also often be presumed that such effects are appreciable when the market share of the parties exceeds the 5% threshold set out in the previous paragraph. However, this presumption does not apply where the agreement covers only part of a Member State (see paragraph 90 below).'

175 Next, the Court must reject the applicant's argument that the NES cartel was not an agreement that by its very nature was capable of affecting trade between Member States. In that context, first, it must be stated that the application of the presumption provided for in paragraph 53 of the 2004 Effects Notice does not necessarily require that the cartel cover several Member States. As is apparent from the use of the words 'for example', that is no more than one example of the agreements that are covered by that paragraph. Second, reference must be made to paragraphs 149 to 168 above, where it was stated that the Commission's finding that, notwithstanding that the NES cartel related to expenses arising out of United Kingdom legislation on the NES, the cartel was capable of affecting the freight forwarding services market in several Member States, is not vitiated by errors.

176 Further, in so far as the applicant calls into question the Commission's analysis that the thresholds laid down in paragraph 53 of the 2004 Effects Notice were exceeded, it is clear that the applicant does no more than argue that the Commission should have used not turnovers achieved in the provision of freight forwarding services, but only turnovers achieved in the provision of NES filing services. In that regard, suffice it to recall that, first, under paragraph 53 of the 2004 Effects Notice, account must be taken of the turnover achieved by the parties in the provision of the services covered by the cartel and, second, by reason of the considerations set out in paragraphs 115 to 137 above, it must be held that the NES cartel affected freight forwarding services.

177 Moreover, in so far as the applicant argues that the Commission failed to take account of the fact that the presumption provided for in paragraph 53 of the 2004 Effects Notice was rebuttable and that, in the circumstances of this case, the presumption was rebutted, suffice it to observe that, in that context, the applicant puts forward no argument that has not already been examined and rejected in paragraphs 115 to 176 above.

178 Consequently, nothing of what is argued by the applicant is such as to call into question the Commission's conclusion that the NES cartel was capable of appreciably affecting trade between Member States with respect to the freight forwarding services.

Whether the flow of goods was affected

179 The applicant also claims that the Commission's findings based on an effect on the flow of goods are vitiated by errors. The NES cartel did not entail any adverse effect on the pattern of trade, either with respect to goods originating in the United Kingdom, or with respect to goods originating in other countries. First, the NES surcharge was charged only on goods originating in the United Kingdom, there being virtually no scope for the charging of the NES surcharge on shipments which did not

have their origin in the United Kingdom. Second, the flow of goods located in the United Kingdom could not conceivably be adversely affected by the NES surcharge. Therefore, the NES cartel was not such as to affect trade between Member States or at least not to do so appreciably.

180 Those arguments must be rejected as being ineffective. Even on the assumption that the NES cartel did not appreciably affect the flow of goods between Member States, that cannot call into question the Commission's conclusion that, by reason of its effects on the freight forwarding services, that cartel was such as to have affected trade between Member States appreciably.

The breach of the principle of sound administration and disregard of paragraph 77 of the 2004 Effects Notice

181 In so far as the applicant argues that the Commission was in breach of the principle of sound administration and infringed paragraph 77 of the 2004 Effects Notice, in accordance with which, when cartels cover the territory of a single Member State, it may be necessary to undertake a more detailed inquiry into the ability of those cartels to affect trade between Member States, in that the Commission did not engage in any further fact-finding, suffice it to observe that it follows from the foregoing that, on the basis of the information available to it, the Commission could properly come to the conclusion that the NES cartel was capable of affecting trade between Member States, and was not obliged to undertake any further inquiry.

182 Accordingly, it must be concluded that nothing of what is argued by the applicant is such as to call into question the merits of the Commission's finding that the NES cartel was capable of appreciably affecting the pattern of trade between Member States.

183 Consequently, the third plea in law must be rejected in its entirety.

4. *The fourth plea in law, concerning the Commission's decision to hold the applicant solely liable*

184 By this plea in law, the applicant challenges the Commission's decision to hold the applicant solely liable for the conduct of Bax Global (UK). The plea has three parts. By the first part, claiming, inter alia, an infringement of Article 101(1) TFEU and the principle of personal responsibility, the applicant argues that there is no legal basis for holding it liable for the conduct of Bax Global (UK). By the second part of the plea, claiming an infringement of Article 41 of the Charter of Fundamental Rights and the principle of sound administration, the applicant criticises the Commission for having failed to investigate whether Brink's, the former parent company of Bax Global (UK), should, together with the applicant or alone, have been held liable for the conduct of Bax Global (UK). By the third part of the plea, claiming an infringement of Article 296 TFEU, the applicant complains that the Commission failed to state in the contested decision sufficient reasons for that purpose.

The first part, claiming, inter alia, an infringement of Article 101(1) TFEU and breach of the principle of personal responsibility

185 This part of the plea concerns the Commission's decision to hold the applicant to be solely liable for the participation of Bax Global (UK) in the NES cartel.

186 In recitals 664 and 754 of the contested decision, the Commission stated that (i) Bax Global (UK) had participated in the NES cartel between 1 October 2002 and 10 March 2003; (ii) before the adoption of the contested decision, all its activities had been transferred to one of its affiliated companies, namely the applicant; (iii) Bax Global (UK) had ceased to exist and therefore could not be an addressee of the contested decision; and (iv) that the applicant was the economic successor of Bax Global (UK) and could consequently be held liable for its conduct.

187 The applicant considers that, by acting in this way, the Commission was in breach of the principle of personal responsibility, Article 101(1) TFEU and Articles 4, 7 and 23(2) of Regulation No 1/2003. In this case, there was no legal basis for holding the applicant liable for the participation of Bax Global (UK) in the NES cartel. Contrary to the Commission's findings, the acquisition and absorption of Bax Global (UK) did not result in a transfer to the applicant of liability for the conduct of the undertaking by which Bax Global (UK) was owned between October 2002 and March 2003 and which had been controlled by Brink's. Since Brink's still existed on the date of adoption of the contested decision, the Commission should have held Brink's liable for the conduct of Bax Global (UK), and not the latter. The transfer of liability to a new legal person is conditional upon such new legal person constituting, together with the original legal person, one and the same undertaking for the purposes of the application of the European Union competition rules, which was not true in this case.

188 The Commission disputes those arguments.

189 In that regard, it must be recalled, first, that where an economic entity infringes the competition rules, it falls to that entity, in accordance with the principle of personal responsibility, to answer for that infringement.

190 However, as the Commission correctly stated in recital 664 of the contested decision, the principle of personal responsibility does not mean that, in some circumstances, the economic successor of a company cannot be held liable for the conduct of that company.

191 Thus, first, it is apparent from the case-law that the economic successor of a legal entity which is responsible for an infringement of European Union competition law may be held liable, where that entity has ceased to exist at the time when the Commission decision is adopted (see, to that effect, judgments of 24 September 2009 in *Erste Group Bank and Others* v *Commission*, C-125/07 P, C-133/07 P and C-137/07 P, ECR, EU:C:2009:576, paragraphs 77 to 83, and 5 December 2013 *SNIA* v *Commission*, C-448/11 P, EU:C:2013:801, paragraph 23).

192 Secondly, where a company responsible for an infringement of competition law transfers the economic activity on the market concerned to another company at a time when those two companies are part of the same undertaking, the company to which the activity was transferred may be held liable by reason of the structural links which existed then between those two companies (see, to that effect, judgments of 7 January 2004 in *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, ECR, EU:C:2004:6, paragraphs 354 to 360, and 31 March 2009 *ArcelorMittal Luxembourg and Others* v *Commission*, T-405/06, ECR, EU:T:2009:90, paragraphs 106 to 119).

193 In the two situations mentioned above, an attribution of liability to the economic successor is justified in the interests of achieving effective implementation of the competition rules. If the Commission did not have such an option, undertakings would find it easy to evade penalties by means of restructuring, transfers or other legal or organisational changes. The objective of punishing conduct which is contrary to the competition rules and preventing its repetition by means of deterrent penalties would thus be compromised.

194 Since the Commission established that, before the adoption of the contested decision, all the activities of Bax Global (UK) had been transferred to the applicant, which at that time was an affiliated company, and that again before the adoption of the contested decision, Bax Global (UK) ceased to exist (see paragraph 186 above), the Commission was entitled to hold the applicant liable for the infringement committed by Bax Global (UK) pursuant to the case-law and principles referred to in paragraphs 191 and 192 above.

195 None of the arguments put forward by the applicant can call into question that conclusion.

196 First, the applicant argues that it is apparent from paragraphs 61 to 64 of the judgment of 30 September 2009 in *Hoechst* v *Commission* (T-161/05, ECR, EU:T:2009:366) that it is solely Brink's, as the former parent company of Bax Global (UK), who should answer for the infringement.

197 In that regard, the Court must observe that since Bax Global (UK) participated in the NES cartel (see paragraph 186 above), it can be held liable for it.

198 Moreover, as regards any liability incurred by Brink's as the parent company of Bax Global (UK), it must be recalled that, contrary to what is argued by the applicant, the Commission's option to hold the applicant liable as the economic successor of Bax Global (UK) is not restricted by any option of also holding its former parent company, Brink's, to be liable (see, to that effect, judgment in *Erste Group Bank and Others* v *Commission*, cited in paragraph 191 above, EU:C:2009:576, paragraph 82).

199 In addition, it must be stated that paragraph 61 of the judgment in *Hoechst* v *Commission*, cited in paragraph 196 above (EU:T:2009:366), in no way precludes those conclusions. Admittedly, in that paragraph, the Court held that it was for the legal person managing the undertaking in question at the time when the infringement was committed to answer for that infringement, even if, at the time when the decision finding the infringement was adopted, another company had assumed responsibility for operating the undertaking. Yet it is apparent from the context that, in that paragraph, the Court did no more than clarify that a parent company which, at the time when an infringement was committed, controlled the subsidiary directly involved in that infringement and was therefore part of the same undertaking, could be held liable for that infringement even where, at the time when the Commission's decision was adopted, those two companies were no longer part of the same undertaking.

200 Accordingly, this submission must be rejected.

201 Second, the applicant argues that it follows from paragraph 109 of the judgment in *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 192 above (EU:T:2009:90) that, in the event of transfer of all or part of the economic activities from one legal entity to another, liability for an infringement committed by the initial operator, within the activities concerned, could be attributed to the new operator only where both entities constituted one and the same economic entity for the purposes of application of the competition rules.

202 In that regard, it must be recalled that the situation concerned in the judgment in *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 192 above (EU:T:2009:90), namely that referred to in paragraph 192 above, is not the only situation where an economic successor can be held to be liable. As stated in paragraphs 190 to 193 above, where a company which has committed an infringement of the competition rules has ceased to exist when the contested decision is adopted, the Commission was entitled to hold its economic successor to be liable, irrespective of whether those two legal entities were part of the same undertaking. In this case, Bax Global (UK) had ceased to exist at the time when the contested decision was adopted. Accordingly, the Commission was entitled to hold the applicant liable as its economic successor.

203 Further, and in any event, as regards the application of the judgment in *ArcelorMittal Luxembourg and Others* v *Commission*, cited in paragraph 192 above (EU:T:2009:90), it must be observed, that, at the time when the activities of Bax Global (UK) were transferred to the applicant, those two companies belonged to the DB Group. Accordingly, because of the structural links which existed between them when the economic activity of Bax Global (UK) was transferred to the applicant, the Commission was entitled to hold the applicant liable for the conduct of Bax Global (UK).

204 Accordingly, that argument must be rejected.

205 Thirdly, the applicant argues that the concepts of 'undertaking' and 'liability' for the purposes of Article 101 TFEU and the question of transfer of liability between various undertakings are legal concepts and the Commission had therefore no discretion in relation to them.

206 As regards that argument, in the first place, it must be observed that it is not apparent from the contested decision that the Commission considered that it had any discretion as regards the concept of an undertaking within the meaning of European Union competition law or as regards a transfer of liability. In recital 754 of the contested decision, the Commission confined itself to applying the case-law and principles referred to in paragraphs 190 to 193 above, according to which, in a situation such as that of the present case, it was entitled to hold liable the economic successor of the company which directly participated in an infringement.

207 As regards recitals 791 and 782 of the contested decision, in which the Commission stated that it was not imposing penalties on former parent companies of subsidiaries which participated in the NES cartel, it is clear that, in that context, the Commission did no more than exercise the discretion available to it to determine the legal entities on which it was to impose a penalty, as the applicant itself acknowledges. On the other hand, in that context, the Commission took no position on whether, in this case, those former parent companies could have been considered to be part of an undertaking which committed an infringement of Article 101 TFEU or on questions of transfer of liability.

208 Since none of the arguments seeking to demonstrate that, in this case, there was no legal basis for imposing a penalty on the applicant is well founded, this part of this plea in law must be rejected.

The second part, concerning a breach of Article 41 of the Charter of Fundamental Rights and the principle of sound administration, and the third part, concerning a breach of the duty to state reasons

209 In these parts of this plea, first, the applicant argues that, by omitting to examine diligently and sufficiently whether it could hold Brink's liable for the conduct of Bax Global (UK) and to what extent it was necessary and fair to take action against the applicant in order to ensure the effective enforcement of the European Union competition rules, the Commission was in breach of Article 41 of the Charter of Fundamental Rights and the principle of sound administration. Secondly, the applicant claims that the Commission did no more than make known that it had chosen not to hold Brink's to be liable, whereas, under Article 296 TFEU, it ought to have stated reasons for the decision not to hold Brink's, the former parent company of Bax Global (UK), liable either solely or jointly and severally. Consequently, the contested decision should be annulled, or, at the least, there should be imposed on the applicant only that proportion of the fine which it would ultimately have had to pay if it had been able to seek recovery from Brink's as being jointly and severally liable.

210 The Commission disputes those arguments.

The breach of Article 41 of the Charter of Fundamental Rights and the principle of sound administration

211 First, it must be recalled that, according to Article 23(2)(a) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 TFEU. That provision refers solely to the possibility of imposing penalties on undertakings, but does not define the legal entities on which a fine can be imposed. The Commission therefore has a discretion concerning the choice of legal entities on which it can impose a penalty for an infringement of European Union competition law (see, to that effect, judgment in *Erste Group Bank and Others* v *Commission*, cited in paragraph 191 above, EU:C:2009:576, paragraph 82).

212 However, in the exercise of that choice, the Commission is not entirely free. The Commission must have regard to, inter alia, the general principles of EU law and the fundamental rights guaranteed at EU level (see, to that effect, Opinion of Advocate General Kokott in *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, ECR, EU:C:2012:11, point 48).

213 Accordingly, where, in the course of its investigation, the Commission decides not to impose a fine on a particular category of legal entities which might have been part of the undertaking which committed the infringement, the Commission must have due regard to, inter alia, the principle of equal treatment.

214 It follows that not only must the criteria which the Commission establishes in order to make a distinction between those legal entities on which it imposes a fine and those on which it decides not to impose a fine not be arbitrary, but they must also be applied consistently.

215 The question whether, in this case, the Commission exceeded the limits of its discretion must be examined in the light of those principles and that case-law.

216 First, as regards the applicant's arguments seeking to challenge the criteria applied by the Commission, it must be observed that, in this case, the Commission decided to hold liable not only the subsidiaries which participated in the NES cartel, but also the parent companies of those subsidiaries which, at the time when the contested decision was adopted, were part of the same undertaking for the purposes of Article 101 TFEU, in so far as participation in that cartel could also be imputed to them. On the other hand, as is apparent from recitals 791 and 782 of the contested decision, the Commission decided not to impose fines on the former parent companies of those subsidiaries, irrespective of whether they could also have been held liable for the NES cartel.

217 Such an approach is within the discretion available to the Commission. As part of that discretion, the Commission can take into consideration the fact that an approach intended to impose penalties on all the legal entities which might be held to be liable for an infringement might add considerably to the work involved in its investigations (see, to that effect, judgment in *Erste Group Bank and Others* v *Commission*, cited in paragraph 191 above, EU:C:2009:576, paragraph 82).

218 It is apparent from the contested decision that, in this case, even excluding the former parent companies of subsidiaries which participated in the AMS, NES, CAF and PSS cartels, the total number of legal entities taking part in the procedure before the Commission was 47. Given the size of that number, the Commission's decision not also to take action against the former parent companies of those subsidiaries cannot be regarded as arbitrary.

219 In that context, it must also be recalled that, in paragraphs 155 to 167 of its judgment of 11 July 2013 in *Team Relocations and Others* v *Commission* (C-444/11 P, EU:C:2013:464), the Court of Justice has previously had the occasion to rule that the Commission did not exceed the limits of its discretion when it decided to impose penalties solely on companies directly involved in the infringement and on their current parent companies which could be held liable for their conduct, and not on their former parent companies.

220 Secondly, as regards how the Commission applied the criteria which it had established, suffice it to state that the applicant offers no argument to demonstrate that those criteria were not applied consistently.

221 Accordingly, the Court must conclude that, by deciding not to impose a penalty on Brink's, the former parent company of Bax Global (UK) which directly participated in the NES cartel, even though Brink's could possibly have been held to be liable, the Commission did not exceed the limits of the discretion available to it under Article 23(2)(a) of Regulation No 1/2003.

222 None of the arguments put forward by the applicant is capable of calling into question that conclusion.

223 First, contrary to what is claimed by the applicant, it cannot be inferred from the judgment of 18 July 2013 in *Dow Chemical and Others* v *Commission* (C-499/11 P, ECR, EU:C:2013:482) that, in this case, the Commission was obliged to examine whether it could hold liable Brink's, as the former parent company of Bax Global (UK). Even if that were to be inferred from paragraph 47 of that judgment, in which the Court of Justice held, in essence, that there was a principle that the Commission should impose a fine on all the legal entities which form part of the undertaking that committed the infringement, that paragraph must be read taking into account its context. In that case, a parent company, which had been held liable by the Commission for the conduct of one of its subsidiaries, claimed that, having regard to the discretion enjoyed by the Commission, the Commission ought to have explained its approach of holding it to be liable. It was in response to that argument that the Court of Justice relied on the principle that, as a company affiliated to the undertaking that infringed Article 101 TFEU, the parent company had to be penalised. However, it cannot be inferred from that judgment that the Commission is prevented from adopting an approach which consists in not taking action against particular categories of legal entities, where such an approach is not arbitrary and enables the Commission to make efficient use of its resources. In paragraph 47 of the judgment in *Dow Chemical and Others* v *Commission* (EU:C:2013:482), the Court of Justice expressly recognised that the Commission could choose not to impose a penalty on a parent company provided that such a decision was based on objective reasons.

224 Secondly, the applicant claims that if both it and Brink's had been held liable, that would have given it economic advantages, since that would have made it easier for the applicant to seek recovery from Brink's with respect to payment of its proportion of the fine.

225 In that regard, suffice it to state that, even on the assumption that the applicant and Brink's could have been held liable jointly and severally for payment of the fine and that such imputation of liability could have conferred an advantage on the applicant, those circumstances would not have been such as to demonstrate that the Commission exceeded the limits of the discretion available to it. The Commission is to ensure respect for European Union competition law in the interests of the European Union and has only limited resources to achieve that objective. Accordingly, even if the result of an approach which consists in not taking action against all the legal entities on which a fine might possibly be imposed may be that the legal entities on which a fine is imposed are placed in a less favourable position, that does not mean that the Commission cannot pursue such an approach where it is based on objective reasons and enables it to make more efficient use of its resources.

226 It follows that, contrary to what is claimed by the applicant, the Commission did not err in this case in deciding not to impose fines on Brink's as the former parent company of Bax Global (UK).

227 Consequently, the second part of the plea, claiming a breach of Article 41 of the Charter of Fundamental Rights and of the principle of sound administration, must be rejected.

The breach of the obligation to state reasons

228 The applicant also claims that the Commission was in breach of its obligation to state reasons under the second paragraph of Article 296 TFEU.

229 First, it must be recalled that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review (judgment of 29 September 2011 in *Elf Aquitaine* v *Commission*, C-521/09 P, ECR, EU:C:2011:620, paragraph 147).

230 Thus, in the context of individual decisions, it is settled case-law that the purpose of the obligation to state the reasons on which an individual decision is based is, in addition to permitting review by the competent courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged (see judgment in *Elf Aquitaine* v *Commission*, cited in paragraph 229 above, EU:C:2011:620, paragraph 148 and the case-law cited).

231 It is also settled case-law that the requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment in *Elf Aquitaine* v *Commission*, cited in paragraph 229 above, EU:C:2011:620, paragraph 150 and the case-law cited).

232 The question whether the reasons stated in the contested decision are sufficient must be examined in the light of that case-law.

233 In that regard, it is clear that, in recital 754 of the contested decision, the Commission stated that it was entitled to hold the applicant liable for the infringement as the economic successor of Bax Global (UK). Further, in recitals 791 and 782 of the contested decision, the Commission stated that it had decided not to impose penalties on the former parent companies. It is obvious from the contested decision that that applied to Brink's as the former parent company of Bax Global (UK). Further, it is sufficiently clear from recital 791 of the contested decision and its context that the Commission's view was that that approach ensured that its investigation was not excessively laborious. On the one hand, it is clear from the contested decision that a total of 47 legal entities took part in the procedure before the Commission and that the result of adopting an approach of also imposing penalties on the former parent companies would have been to further increase that already significant number. On the other, in footnote No 802 to recital 791 of the contested decision, the Commission referred to paragraph 335 of the judgment of 14 December 2006 in *Raiffeisen Zentralbank Österreich and Others* v *Commission* (T-259/02 to T-264/02 and T-271/02, ECR, EU:T:2006:396), where the Court held that the Commission's investigations would be made considerably more laborious by the need to verify, in each case where there were successive controllers of an undertaking, to what extent the latter's acts could be imputed to the former parent company.

234 Accordingly, it must be concluded that the information contained in the contested decision was sufficient both to enable the applicant to understand why the Commission had decided to penalise it and not to penalise Brink's and also to enable the Court to carry out its review.

235 Consequently, the third part of the fourth plea and therefore the fourth plea in its entirety must be rejected, not only as regards the application for annulment of the contested decision, but also as regards the request that the Court should exercise its unlimited jurisdiction.

5. *The fifth plea in law, concerning errors in the calculation of the amount of the fine and an infringement of Article 27(1) and (2) of Regulation No 1/2003 and the rights of the defence*

236 This plea in law may be divided into two parts, the first alleging errors in the calculation of the amount of the fine, and the second infringement of Article 27(1) and (2) of Regulation No 1/2003 and also breach of the rights of the defence.

The first part, concerning errors in the calculation of the fine

237 This part of the plea relates to the part of the contested decision where the Commission calculated the amount of the fines imposed on the applicant.

238 In that context, the Commission relied on the general methodology laid down by the 2006 Guidelines. In particular, it considered that, in order to determine the basic amount of the fine, it was appropriate, first, under point 13 of the 2006 Guidelines, to use the value of the sales made by the applicant in the provision of freight forwarding services to customers in the EEA on the trade lane affected by the NES cartel and, second, to apply a gravity percentage of 15%. The Commission also took the view that the applicant could not rely on any mitigating circumstances.

239 The applicant claims that, in so acting, the Commission imposed on it a fine which goes beyond the scope and gravity of the NES cartel. In that connection, the applicant puts forward four submissions. First, it argues that the Commission did not use the appropriate value of sales. Second, it challenges the gravity percentage applied by the Commission. Third, it claims that the Commission failed to take account of a mitigating circumstance, namely the existence of an unlawful cartel affecting transport services. Fourth, it argues that the Commission infringed the principle of equal treatment.

The submission concerning the value of sales

240 This submission relates to the Commission's findings set out in recitals 857 to 890 of the contested decision, that, pursuant to point 13 of the 2006 Guidelines, in order to calculate the basic amount of the fine, it should use the value of the sales made by the applicant in the provision of freight forwarding services to customers in the EEA on the trade lane affected by the NES cartel.

241 The applicant considers that those findings are vitiated by errors. The Commission disregarded the 2006 Guidelines and infringed Article 23(2) and (3) of Regulation No 1/2003, the principle of proportionality, the principle that the punishment must fit the offence and the principle *nulla poena sine culpa*. According to the applicant, the Commission also committed errors of assessment.

242 In essence, the applicant argues that, by using the value of the sales made by it in the provision of freight forwarding services to customers in the EEA on the trade lane affected by the NES cartel, the Commission imposed on it a fine which goes beyond the scope and gravity of the infringement identified in the contested decision. According to the applicant, the Commission ought not to have used the value of sales made in the provision of freight forwarding services, but should have ensured that the value of sales used reflected the economic harm caused by the NES cartel, instead of relying on objectives of general deterrence, and should have adjusted those values by taking into consideration the existence of an upstream cartel on the transport services market.

243 The Commission disputes those arguments.

244 In that regard, it must be observed that, under Article 49(3) of the Charter of Fundamental Rights, the severity of penalties must not be disproportionate to the infringement and, under Article 23(3) of Regulation No 1/2003, in order to determine the amount of the fine, the Commission must have regard to the gravity and duration of the infringement.

245 As regards the principle of proportionality and the principle that the punishment must fit the offence, those principles require that fines must not be disproportionate to the objectives pursued, that is to say, to compliance with the European Union competition rules, and that the amount of the fine imposed on an undertaking for an infringement in competition matters should be proportionate to the infringement, seen as a whole, having regard, in particular, to its gravity. In particular, the principle of proportionality obliges the Commission to set the fine proportionately to the factors taken into

account for the purposes of assessing the gravity of the infringement and also to apply those factors in a way which is consistent and objectively justified (judgment of 27 September 2006 in *Jungbunzlauer* v *Commission*, T-43/02, ECR, EU:T:2006:270, paragraphs 226 to 228).

246 Further, it must be recalled that, in order to assess the gravity of an infringement of European Union competition law, the Commission must take account of a large number of factors, the nature and importance of which vary according to the type of infringement in question and the particular circumstances of the case. Those factors may, depending on the circumstances, include the volume and value of the goods in respect of which the infringement was committed and the size and economic power of the undertaking and, consequently, the influence which the undertaking was able to exert on the market (judgments of 7 June 1983 in *Musique diffusion française and Others* v *Commission*, 100/80 to 103/80, ECR, EU:C:1983:158, paragraph 121; 3 September 2009 *Prym and Prym Consumer* v *Commission*, C-534/07 P, ECR, EU:C:2009:505, paragraph 96; and *KME Germany and Others* v *Commission*, cited in paragraph 34 above, EU:C:2011:816, paragraphs 58 and 59).

247 As regards, more specifically, the volume and value of the goods which are the subject of the infringement, the Court has previously held that, while it is undeniable that the turnover of an undertaking or of a market is, as a factor for assessing the gravity of an infringement, necessarily vague and imperfect, turnover is, notwithstanding that it is approximate, currently considered, by the EU legislature, the Commission and the Court, as an adequate criterion, in the context of competition law, for assessing the size and economic power of the undertakings concerned (judgment of 6 May 2009 in *KME Germany and Others* v *Commission*, T-127/04, ECR, EU:T:2009:142, paragraph 93).

248 The part of the overall turnover which derives from the sale of the goods or services which are the subject of the infringement best reflects the economic importance of that infringement.

249 Those principles are reflected in the 2006 Guidelines, which lay down a general methodology for the calculation of the amount of fines. It is stated in point 6 of the 2006 Guidelines that 'the combination of the value of sales to which the infringement relates and of the duration of the infringement is regarded as providing an appropriate proxy to reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement'.

250 Thus, the 2006 Guidelines provide that, at a first stage, the Commission is to determine the basic amount of the fine. At that stage, pursuant to point 13 of the 2006 Guidelines, the Commission is to identify the value of the sales of the goods or services, made by the undertaking, to which the infringement directly or indirectly relates, in the relevant geographic area within the EEA in the course of a particular year. Further, the Commission is to apply to that value a gravity factor in the form of a given percentage calculated according to the degree of gravity of the infringement and is to multiply that result by the number of years that the undertaking participated in the infringement. In cases of horizontal price-fixing, market-sharing and output-limitation agreements, the Commission is to include an additional amount. At a second stage, the Commission is to take account of aggravating or mitigating circumstances.

251 In adopting the 2006 Guidelines, the Commission imposed a limit on the exercise of its discretion. The Commission therefore cannot, without giving reasons, depart from the methodology laid down in those guidelines under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (judgment of 28 June 2005 in *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECR, EU:C:2005:408, paragraph 211).

252 Nonetheless, point 37 of the 2006 Guidelines permits the Commission to depart from the general methodology laid down by those guidelines, in order to take account of the particularities of a given case or to achieve an adequate level of deterrence.

253 The applicant's arguments must be examined in the light of those principles and that case-law.

– The sales made to which the NES cartel related

254 The applicant claims that the NES cartel related only to the NES surcharge and, consequently, the Commission ought to have used only the value of sales made in the provision of NES filing services. Moreover, the Commission should not have included in the value of sales the costs of transport services invoiced by the carriers. Freight forwarders organise the transportation of goods, but the carriers invoice them for their services, including charges such as the fuel and security surcharges. The charges and surcharges levied by the carriers, over which the freight forwarders have no control, cannot therefore be regarded as being covered by the NES cartel.

255 The Commission disputes those arguments.

256 In that regard, in the first place, it must be recalled that, under point 13 of the 2006 Guidelines, the Commission is to identify the value of the sales of goods or services to which the infringement directly or indirectly relates. As stated in paragraphs 84 to 101 and 115 to 137 above, the NES cartel affected the freight forwarding services as a package of services. Accordingly, the Commission did not exceed the limits which it imposed on itself in point 13 of the 2006 Guidelines by using the value of sales made by the applicant in the provision of freight forwarding services as a package of services and not solely the value of sales made in the provision of NES filing services.

257 In the second place, the Court must observe that none of the circumstances referred to by the applicant oblige the Commission to depart from the general methodology laid down in point 13 of the 2006 Guidelines, pursuant to point 37 of those guidelines.

258 The applicant argues that Bax Global (UK) acted as a mere intermediary, acting as a 'debt collector' with respect to some expenses.

259 In that regard, the Court must observe that, in, inter alia, recitals 65, 878 and 879 of the contested decision, the Commission acknowledged that the freight forwarders were in a position of intermediaries between the carrier and the shipper and could adopt a great variety of business models.

260 Nonetheless, it is clear that, in the situation where a freight forwarder does not pass on the transport costs to its customers, but where its income is limited to a commission paid by the carrier, no problem arises, since only the amount of the commission is reflected in its turnover.

261 As regards the situation where a freight forwarder passes on to its customers the transport costs which it has itself had to pay or will have to pay to third parties, it must be stated that, as is apparent from the Commission's findings as summarised in paragraph 85 above, from an economic perspective, the role of a freight forwarder is not confined to being a mere intermediary. The freight forwarder transforms the services acquired from third parties and other inputs into integrated freight forwarding services, which enable their customers to save time and money and therefore respond to a specific demand which is not met by the individual services which are components of the freight forwarding services. In the light of the foregoing, in that situation, the Commission is entitled to use the value of the freight forwarders' sales for the purposes of point 13 of the 2006 Guidelines.

262 Further, contrary to what is argued by the applicant, the Commission was not required to deduct the value of transport services.

263 As stated above, those services must be considered to be inputs for the freight forwarding services. Yet there are in all industrial sectors costs inherent in the final product which the manufacturer cannot control but which nevertheless constitute an essential element of its business as a whole. It is not

therefore appropriate to deduct the costs of inputs, which are inherent in the prices of the goods and services sold, from the value of sales, even where the cost of inputs constitutes a significant part of the value of sales (see, to that effect, judgment in *KME Germany and Others* v *Commission*, cited in paragraph 34 above, EU:C:2011:816, paragraphs 58 to 65, and *KME Germany and Others* v *Commission*, cited in paragraph 247 above, EU:T:2009:142, paragraph 91). Admittedly, that case-law concerns a case in which the 2006 Guidelines were not yet applicable. Nonetheless, that case-law can be applied to those guidelines. The considerations underpinning that case-law relate, generally, to the use of turnover in the calculation of the amount of fines, and indicate that there is an objective criterion which is closely connected with the infringement at issue (see, in that regard, Opinion of Advocate General Wathelet in *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, ECR, EU:C:2014:272, point 59).

264 Accordingly, contrary to what is argued by the applicant, the nature of the freight forwarding services and of the NES cartel did not preclude the Commission from using the overall turnover which the applicant achieved in the provision of those services on the trade lane concerned, and not deducting therefrom the costs for transport services or other services, supplied by third parties, but which form part of the package of services that make up those freight forwarding services.

– The application of the NES surcharge

265 The applicant argues that the Commission ought not to have taken into account the freight forwarding services which were not subject to an NES surcharge. In cases where that surcharge was not applied, the turnover generated by the shipment cannot be regarded as having been affected by the conduct relating to the NES.

266 The Commission disputes those arguments.

267 In that regard, it must be recalled that, pursuant to point 13 of the 2006 Guidelines, the Commission is to use the value of sales to which the infringement relates, and the implementation of the infringement is not taken into account. It therefore does not follow from point 13 that only the value of sales resulting from transactions which were actually affected by the unlawful cartels may be taken into consideration in order to calculate the value of sales (see, to that effect, judgment of 16 June 2011 in *Putters International* v *Commission*, T-211/08, ECR, EU:T:2011:289, paragraph 58).

268 Nonetheless, in that context, it must also be recalled that, in accordance with the case-law, the concept of the value of sales referred to in point 13 of the 2006 Guidelines cannot extend to encompassing sales made by the undertaking in question which do not fall, directly or indirectly, within the scope of the alleged cartel (judgment in *Team Relocations and Others* v *Commission*, cited in paragraph 150 above, EU:C:2013:464, paragraphs 73 to 78).

269 Yet it is clear that the applicant does no more than claim that the Commission should not have taken into account the freight forwarding services with respect to which the NES surcharge was not applied, but it does not offer any argument from which it can be established that the freight forwarding services which the Commission took into account, namely the turnover on the trade lane affected by the NES cartel, did not fall within the scope of that cartel.

270 Further, in the circumstances of this case, the Commission was not obliged to depart from the general methodology provided for by point 13 of the 2006 Guidelines, under point 37 of those guidelines. The Courts of the European Union have never imposed on the Commission the obligation to establish in every case the individual sales which were affected by the cartel (judgment in *Putters International* v *Commission*, cited in paragraph 267 above, EU:T:2011:289, paragraph 60). On the contrary, as is apparent from the case-law of the Court of Justice, if the concept of the value of sales were limited to those with respect to which it is established that they were actually affected by a cartel entered into by

a given undertaking, the result would be to minimise artificially the economic importance of that cartel, since the mere fact that a limited amount of direct evidence of sales actually affected by the cartel had been found would lead to the imposition of a fine which bore no actual relation to the scope of the cartel in question. Such a reward for secrecy would also adversely affect the objective of the effective investigation and sanctioning of infringements of Article 101 TFEU and, therefore, cannot be permitted (judgment in *Team Relocations and Others* v *Commission*, cited in paragraph 219 above, EU:C:2013:464, paragraphs 76 and 77).

271 Consequently, the Court must reject the argument concerning the application of the NES surcharge.

– The existence of a cartel affecting air transport services

272 The applicant argues that the Commission was in breach of the principle that the penalty must fit the offence, the principle of proportionality and the principle *nulla poena sine culpa* by failing to take account of the fact that the rates for transport services had been inflated by a cartel affecting those services. Consequently, the Commission penalised the effects of one and the same infringement twice, first in relation to the carriers who had committed the infringement and then in relation to those who happened to be their customers. The applicant also claims that the Commission's finding in recital 884 of the contested decision, that the applicant can bring proceedings against the carriers before the national civil courts, is of no relevance.

273 The Commission disputes those arguments.

274 In that regard, first, it must be observed that the 2006 Guidelines contain no rule which expressly provides that the existence of an upstream cartel is to be taken into account for the calculation of fines.

275 The Court must therefore examine whether the existence of a cartel affecting a market upstream of the market affected by the infringement for which a fine was imposed represents a circumstance that obliges the Commission to depart from the general methodology laid down in point 13 of the 2006 Guidelines.

276 In that context, it must be recalled that the use of the criterion of the value of sales as the starting point for the calculation of fines finds its justification in, inter alia, the fact that the part of the overall turnover that derives from the sale of the goods or services which are the subject matter of the infringement best reflects the economic importance of that infringement (see paragraphs 247 and 248 above) and is an objective criterion which can be easily applied.

277 The fact that the air transport services market was affected by a cartel is not such as to invalidate the Commission's finding that the value of sales made by the applicant on the freight forwarding services market, on the trade lane affected by the NES cartel, are indeed able to reflect the economic importance of their participation in that infringement. First, those sales represent the turnover generated by the applicant in the specific market conditions. Second, there is an objective link between the NES cartel and that turnover which reflects the relative weight of the applicant's participation.

278 Further, it must be observed that if an approach were adopted whereby the existence of an unlawful cartel affecting an upstream market would compel the Commission to adjust the value of sales to which an infringement affecting a downstream market relates, the result would be to introduce an element of uncertainty at the very first stage of the calculation of fines. First, the amount of the deductions to be made would generally be difficult to determine. Second, in order to respect the principle of equal treatment, deductions would have to be made not only in the circumstance where an unlawful cartel might affect an upstream market, but, more generally, in all circumstances where

factors to be considered as contrary to EU law might have a direct or indirect impact on the prices of the goods or services concerned. Third, the result of such an approach would be to create the risk that the basis for the calculation of the amount of a fine would be challenged after the adoption of the contested decision, in circumstances where factors liable to have a direct or indirect impact on the prices of inputs were discovered after that time. The approach advocated by the applicant would therefore be likely to encourage endless, insoluble disputes, including allegations of unequal treatment.

279 As regards the argument concerning an infringement of the principle *nulla poena sine culpa*, suffice it to state that, since the fine imposed on the applicant was calculated on the basis of the sale prices which it itself charged its customers, the Commission did not impose on it a penalty for an infringement committed by a third party, but took into account revenue which the applicant itself generated and for which it has to answer. That argument must therefore also be rejected.

280 In the light of the foregoing, the Court must conclude that the existence of a cartel affecting a market upstream of the market affected by the infringement for which fines were imposed cannot be deemed to be a circumstance that obliges the Commission to depart from the general methodology laid down in point 13 of the 2006 Guidelines.

281 Therefore, the Court must reject the argument relating to the existence of a cartel affecting the transport services market, and there is no need to give a ruling on whether the Commission's observation in recital 884 of the contested decision, that the applicant can bring proceedings before the national civil courts against the carriers, is relevant in this context. Even if that observation were misconceived, that would not call into question the other findings made by the Commission, the merits of which have been examined above.

– Taking account of the economic harm caused

282 The applicant argues that the Commission failed to take sufficient account of the economic harm caused by the NES cartel. According to the 2006 Guidelines, fines are specifically linked to the presumed economic harm extrapolated from the value of sales to which the infringement related. The Commission should therefore ensure that the turnover used reflects the economic harm. At the stage where the turnover relating to the identified infringement is to be determined, a general deterrent effect should not be taken into consideration, since such an effect can be taken into consideration only at a later stage in the calculation of the fine. In this case, the circumstances that the theoretical maximum turnover linked to the NES system represents a negligible part of the amount of the fine imposed and that it represents an even more insignificant part of the turnover used by the Commission demonstrates that the Commission's approach was contrary to the 2006 Guidelines.

283 The Commission disputes those arguments.

284 In that regard, it must be observed, first, that, contrary to what is argued by the applicant, neither point 13 nor any other point of the 2006 Guidelines provides that the value of sales must be adjusted to reflect the economic harm caused by the infringement.

285 Secondly, the circumstances referred to by the applicant did not oblige the Commission to depart from the general methodology laid down in point 13 of the 2006 Guidelines, under point 37 of those guidelines.

286 It is admittedly true that, in the calculation of fines, the value of sales should not be given disproportionate importance (judgment in *KME Germany and Others* v *Commission*, cited in paragraph 34 above, EU:C:2011:816, paragraph 60). However, in that regard, suffice it to state that the value of sales is only one criterion, among many, which is taken into account by the general methodology laid down by the 2006 Guidelines. Even if the circumstances referred to by the

applicant, such as the harm caused or the margin achieved, were of relevance to the calculation of fines, under that methodology, they could be taken into consideration at later stages of that calculation, such as the assessment of the degree of gravity of the infringement, of the existence of mitigating or aggravating circumstances or even of the ability to pay of the undertakings concerned. Therefore, even if, in this case, the Commission were to have been obliged to take into consideration the circumstances referred to by the applicant in the later stages of the determination of the amount of the fine, the Commission would not have been obliged, for that reason, to depart from point 13 of the 2006 Guidelines, under point 37 of those guidelines.

287 As regards the relationship between the amount of the fines and the amount of the surcharges imposed, it must be observed that, admittedly, fines must be set at a sufficiently high level so that undertakings are deterred from participating in a cartel, notwithstanding the advantages they may derive from it. On the other hand, the amount of a fine cannot be regarded as inappropriate solely because it does not reflect the economic harm which has been or which may have been caused by the cartel concerned.

288 In that context, the Court must also reject the applicant's argument that, at the stage of the determination of the value of sales, the Commission relied on a general objective of deterrence, although it was not entitled to take account of such an objective at that stage in the calculation of fines.

289 In that regard, the Court must observe that, by using the value of sales made by the applicant in the provision of freight forwarding services to customers in the EEA on the trade lane affected by the NES cartel, the Commission did no more than apply the general methodology laid down in point 13 of the 2006 Guidelines and therefore did not depart from that methodology by relying on a general objective of deterrence.

290 Further, on the assumption that, by its arguments, the applicant seeks to claim that, in so far as the value of sales do not reflect the economic harm caused in the form of the surcharges levied, the Commission was obliged to adjust those values, in order to ensure that a general objective of deterrence was not taken into account at that early stage of the calculation of fines, the Court must also reject those arguments.

291 In that context, it must be observed that the value of sales is used as a proxy for the economic importance of the infringement, not only because it can best reflect the economic importance of that infringement and the relative weight of each undertaking participating in the infringement, but also because it is an objective criterion which is easy to apply. That latter aspect of the value of sales means that the action of the Commission is more foreseeable for undertakings and enables them to assess the size of the fine they are liable to incur when they decide to take part in an unlawful cartel. Use of the criterion of the value of sales in point 13 of the 2006 Guidelines therefore pursues, inter alia, an objective of general deterrence. Yet, contrary to what is suggested by the applicant, there is nothing to prevent the Commission, in the mission conferred on it by the Treaty to supervise compliance with European Union competition law (judgments in *Musique Diffusion française and Others* v *Commission*, cited in paragraph 246 above, EU:C:1983:158, paragraph 105, and *Dansk Rørindustri and Others* v *Commission*, cited in paragraph 251 above, EU:C:2005:408, paragraph 170), from pursuing an objective of general prevention, when it determines the general methodology for the calculation of fines.

292 Accordingly, the arguments that the Commission took insufficient account of the economic harm caused by the NES cartel must also be rejected.

– The competitiveness factors affected

293 The applicant also argues that, because the Commission used the value of sales made in the provision of freight forwarding services, it imposed penalties on them as if the aim of the NES cartel had been to fix the final price of the freight forwarding services or to cover all competitiveness factors in the freight forwarding sector.

294 The Commission disputes that argument.

295 In that regard, it must be recalled that, as stated in paragraphs 267 to 270 above, the Commission was entitled to use as the starting point for the calculation of the fine the sales falling within the scope of that cartel, irrespective of the gravity of that infringement.

296 Further, it must be borne in mind that, in accordance with the general methodology laid down by the 2006 Guidelines, the nature of the infringement is taken into account at a later stage, in the determination of the degree of gravity, which, pursuant to point 20 of those guidelines, is to be assessed on a case-by-case basis for all types of infringements, taking account of all the relevant circumstances of the case.

297 In the light of the foregoing, it cannot be inferred, from the fact that the Commission used the value of sales made in the provision of the freight forwarding services affected by the NES cartel as the starting point for the calculation of fines imposed on the applicant, that the Commission treated that cartel as a cartel designed to fix the final price of the freight forwarding services or to cover all competitiveness factors.

298 Consequently, that argument must be rejected.

– The errors of assessment

299 In so far as the applicant claims that the Commission committed errors of assessment, it does no more than refer to the arguments which have already been examined and rejected above. Consequently, this argument must also be rejected.

300 Accordingly, the Court must conclude that none of the arguments put forward by the applicant is such as to demonstrate that, by using the value of sales made in the provision of the freight forwarding services affected by the NES cartel, the Commission disregarded the 2006 Guidelines, infringed Article 23(2) and (3) of Regulation No 1/2003, was in breach of the principle of proportionality, the principle that the penalty must fit the offence or the principle *nulla poena sine culpa* or committed errors of assessment.

301 It follows that the Court must reject in its entirety the submission concerning the use, by the Commission, of the value of sales made by the applicant in the provision of freight forwarding services to customers in the EEA on the trade lane affected by the NES cartel.

The submission concerning the degree of gravity

302 In its reply, the applicant challenges the Commission's conclusion in recital 945 of the contested decision that, for the NES cartel, a gravity percentage of 15% was appropriate.

303 In recitals 891 to 947 of the contested decision, the Commission set out the reasons why that gravity percentage was appropriate. In that context, the Commission stated, inter alia, that the object of the NES cartel was to fix, directly or indirectly, prices or other trading conditions. In that regard, the

Commission stated that the undertakings had agreed on the introduction of the NES surcharge, its level and the timing of its introduction. The Commission also took into consideration that the NES cartel had been partially implemented and that its implementation had been monitored.

304 The applicant considers that the 15% gravity percentage adopted by the Commission does not properly reflect the gravity of the NES cartel.

305 The Commission disputes those arguments.

306 In that regard, first, it must be observed that the applicant offers no argument specifically challenging the findings of the Commission pertaining to the degree of gravity as set out in recitals 891 to 947 of the contested decision.

307 Secondly, it is clear that even if the applicant's arguments concerning the use of the value of sales were also taken into consideration as arguments concerning the degree of gravity, those arguments would fail to demonstrate any error in the findings of the Commission with respect thereto.

308 It must be observed that the NES cartel constitutes a horizontal cartel relating to a price element of freight forwarding services and must therefore be regarded as a serious restriction on competition.

309 Moreover, it must be noted that it is stated in point 23 of the 2006 Guidelines that, with respect to horizontal price-fixing agreements, the proportion of sales taken into account by the Commission will generally be set at the higher end of the scale, that is up to 30%.

310 Further, having regard to the nature of the services concerned, the fact that the NES cartel related only to the NES surcharge does not permit the inference that a gravity rate of 15% was not appropriate. As the Commission explained in recital 869 of the contested decision, and as is confirmed by the evidence referred to therein, the concerted action with respect to the passing on of cost factors by means of the imposition of surcharges was capable of having a not insignificant impact on the conduct of the freight forwarders and on the structure of the market (see paragraphs 155 and 156 above).

311 For the same reasons, the Court must reject the argument that the theoretical maximum turnover linked to the NES system represented only an insignificant part of the amount of the fine imposed and an even smaller part of the turnover used by the Commission.

312 Last, as regards the implementation of the cartel, it is clear that the applicant does not challenge the Commission's finding in recital 907 of the contested decision that, first, the level of implementation of the NES cartel was not attributable to the intention of the undertakings to bring that cartel to an end, but rather resulted from circumstances outwith the cartel's operation, such as customer resistance, and, second, none of the parties demonstrated sufficiently that they avoided implementing the NES cartel, by adopting competitive conduct on the market.

313 In the light of the foregoing, the setting of a 15% gravity rate cannot be regarded as inappropriate.

314 Consequently, the Court must also reject the submission concerning the gravity rate of 15% set by the Commission, there being no need to give a ruling on whether that submission is admissible notwithstanding that the applicant, first, claimed that that rate was inappropriate only at the stage of its reply and, second, failed to identify the findings of the Commission concerning the gravity rate which it sought to challenge.

The submission concerning the existence of a mitigating circumstance

315 The applicant claims that the Commission ought to have taken the existence of an upstream cartel and its impact on transportation costs into account as a mitigating circumstance. The Commission should also have undertaken further investigations in that regard and it therefore was in breach of the principle of sound administration.

316 The Commission disputes those arguments.

317 In that regard, it must be recalled that point 29 of the 2006 Guidelines sets out a non-exhaustive list of the mitigating circumstances which may lead, subject to certain conditions, to a reduction in the basic amount of the fine.

318 Where an infringement has been committed by several undertakings, the relative gravity of the participation of each of them must be examined in order to determine whether aggravating or mitigating circumstances exist in relation to them (judgment of 25 October 2011 in *Aragonesas Industrias y Energía* v *Commission*, T-348/08, ECR, EU:T:2011:621, paragraph 277).

319 The Court must however observe that it is not possible to link the existence of a cartel affecting an upstream market to one of the mitigating circumstances expressly mentioned in point 29 of the 2006 Guidelines.

320 In addition, even if the list set out in point 29 of the 2006 Guidelines is not exhaustive, it is clear that the existence of a cartel affecting the transport services market is an external factor which cannot diminish the relative gravity of the participation of the applicant in the NES cartel.

321 Moreover, in so far as the argument put forward by the applicant must be understood as referring to a causal link between the surcharges which the freight forwarders charged to their customers and those imposed by the carriers, suffice it to state that such an argument is incapable of justifying an unlawful cartel between the freight forwarders the object of which was that they should not compete with one another with respect to the costs arising from the NES filing services, but that they should pass on those surcharges to their customers.

322 Accordingly, in this case, the existence of a cartel affecting transport services cannot be considered to be a mitigating circumstance.

323 In that context, it must also be recalled that the Court has previously had occasion to examine and reject a comparable argument (judgment of 14 May 2014 in *Reagens* v *Commission*, T-30/10, EU:T:2014:253, paragraph 289).

324 In the light of the foregoing, the Court must reject the submission that the Commission failed to take account of a mitigating circumstance and was in breach of the principle of sound administration.

The submission concerning an infringement of the principle of equal treatment

325 The applicant argues that the Commission infringed the principle of equal treatment by following in this case a methodology other than that followed in the case COMP/39258 — Airfreight ('the Airfreight case'). In the latter case, the Commission set the amount of the fines imposed on carriers solely on the basis of the turnovers generated by the fuel and security overcharging.

326 In that regard, first, it must be recalled that the principle of equal treatment constitutes a general principle of law which the Commission must respect in a procedure brought under Article 101 TFEU and which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified (judgment of 29 June 2012 in *GDF Suez* v *Commission*, T-370/09, ECR, EU:T:2012:333, paragraph 386).

327 Secondly, as regards whether the Commission treated a comparable situation differently, first, it must be noted that the Commission's practice in previous decisions does not serve as a legal framework for the fines imposed in competition matters and that decisions in other cases can give only an indication for the purpose of determining whether there is discrimination, when the facts of the various cases are not identical (judgment of 21 September 2006 in *JCB Service* v *Commission*, C-167/04 P, ECR, EU:C:2006:594, paragraphs 201 and 205).

328 That is even more true in this case, where the matter at issue, namely the determination of the value of sales used as the starting point for the calculation of fines, is the subject of an express rule in point 13 of the 2006 Guidelines. In such circumstances, the Court must examine the complaint of a breach of the principle of equal treatment in the light of what is stated in point 13, which the Commission adopted in order to improve the consistency of its position from one case to another. Yet it is clear from the foregoing that, first, the Commission complied with the general methodology laid down by point 13 and, second, in the circumstances of this case, was not obliged to depart from that methodology.

329 Accordingly, even if the applicant claims that the Commission followed a different methodology in the Airfreight case were to be correct, that would fail to demonstrate that, in this case, the Commission infringed the principle of equal treatment. If it were correct, that would have one of two consequences: either, unlike the circumstances in this case, there were particularities in the Airfreight case which justified the Commission departing from the general methodology laid down in point 13 of the 2006 Guidelines, or in the Airfreight case the Commission failed to comply with those guidelines. On either of those two possibilities, the applicant would not be entitled to ask to be treated in this case in the same way as the parties in the Airfreight case.

330 Consequently, the submission alleging breach of the principle of equal treatment must also be rejected.

Conclusion

331 Accordingly, in so far as this part of the plea in law seeks the annulment of the fine imposed in Article 2(1)(a) of the contested decision, the Court must reject this part of the plea.

332 This part of the plea must also be rejected in so far as it is submitted in support of the request that the Court should exercise its unlimited jurisdiction.

333 Examination of this part of the plea has not only failed to detect any errors but has also failed to detect the use of any inappropriate factors in the calculation of fines.

334 In particular, having regard to the considerations set out in paragraphs 240 to 264 and 272 to 301 above, it is clear that neither (i) the approach envisaged by the applicant of taking into account solely turnovers achieved in the provision of NES filing services, nor (ii) the approach whereby the costs of transport services are deducted from the value of sales used, nor (iii) the approach whereby that value of sales is adjusted because of the existence of a cartel affecting the transport services market, can be considered to be appropriate, since those approaches fail adequately to reflect the economic importance of the applicant's participation in the NES cartels, which affected freight forwarding services as a package of services.

335 In that context, it must also be observed that, even though it is conceivable that low profit margins may be indicative of an undertaking's reduced ability to pay notwithstanding the size of its turnover, no argument has been put forward in this case to permit the inference that the fines imposed were excessive taking into consideration the applicant's ability to pay.

336 Further, for the reasons stated in paragraphs 265 to 271 above, nor can the approach to the effect that only the sales with respect to which an NES surcharge was in fact charged should be taken into account be considered to be appropriate.

337 Consequently, the first part of the fifth plea in law must be rejected.

The second part of the fifth plea in law: infringement of Article 27 of Regulation No 1/2003 and breach of the rights of the defence

338 This part of the fifth plea concerns the statement of reasons in recitals 887 and 888 of the contested decision, where the Commission set out the reasons why the applicant should not be given access to the file in the Airfreight case. In that context, the Commission stated that the applicant was not involved in the Airfreight case and that, accordingly, it could not have access to the file, either pursuant to the Commission's Notice on the rules for access to the Commission file in cases pursuant to Articles [101 TFEU] and [102 TFEU], Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004 (OJ 2005 C 325, p. 7), or under Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18). Further, the Commission held that, in any event, none of the documents contained in the Airfreight case file was relevant with respect to the liability of the freight forwarders in the present case.

339 The applicant maintains that the Commission infringed Article 27(1) of Regulation No 1/2003 and was in breach of its rights of defence. The Commission ought to have allowed it to examine the relevant information in the Airfreight case, which was closely linked to this case. Without adequate access to the file, the applicant was not in a position fully to exercise its rights of defence.

340 The Commission disputes those arguments.

341 In that regard, first, it must be recalled that, under Article 27(1) of Regulation No 1/2003, before taking decisions as provided for in Articles 7, 8 and 23 and Article 24(2) of that regulation, the Commission is to give the undertakings which are the subject of the proceedings conducted by it the opportunity of being heard on the matters to which the Commission has taken objection. The Commission is to base its decisions only on objections on which the parties concerned have been able to comment.

342 Article 27(2) of Regulation No 1/2003 provides that the rights of defence of the parties concerned are to be fully respected in the proceedings. Those parties are to be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets.

343 Pursuant to Article 15 of Regulation No 773/2004, upon request, the Commission is to grant access to the file to the parties to whom it has addressed a statement of objections and access is to be granted after the notification of the statement of objections.

344 It follows from those provisions that the Commission must give to the undertaking concerned the opportunity to examine all the documents in the investigation file that might be relevant for its defence. Those documents include both incriminating and exculpatory evidence, save where the

business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (judgment of 1 July 2010 in *Knauf Gips* v *Commission*, C-407/08 P, ECR, EU:C:2010:389, paragraph 22).

345 As regards failure to disclose exculpatory documents, it is settled case-law that the undertaking concerned need establish only that the non-disclosure was able to influence, to its detriment, the course of the procedure and the content of the Commission's decision. It is therefore sufficient for the undertaking to show that it would have been able to use those documents for its defence, in the sense that, if it had been able to rely on them during the administrative procedure, it would have been able to invoke evidence which was not consistent with the inferences made at that stage by the Commission and therefore could have had an influence, in any way at all, on the assessments made by the Commission in any decision, at least as regards the gravity and duration of the conduct in which the undertaking was found to have engaged and, accordingly, the level of the fine (judgment in *Knauf Gips* v *Commission*, cited in paragraph 344 above, EU:C:2010:389, paragraph 23).

346 It follows that the applicant must not only establish that it did not have access to the documents contained in the Airfreight case file, but also that it could have used them for its defence. The applicant cannot validly plead a failure to disclose documents that are not relevant.

347 The applicant argues that, on the basis of the relevant parts of the Airfreight case file, it would have been able to provide an estimate of the impact on its turnover of the cartel affecting air freight services. Thus, the applicant would have been able to show that the Commission's decision to take an inflated turnover into account was inappropriate and disproportionate.

348 Yet, as stated in paragraphs 272 to 281 and 315 to 324 above, the existence of a cartel affecting air transport services was not capable of having an impact on the turnovers used by the Commission and could not be taken into account as a mitigating circumstance. Further, as stated in paragraphs 325 to 330 above, the applicant cannot base a complaint of an infringement of the principle of equal treatment on the conduct of the Commission in the Airfreight case.

349 In that context, the Court must also reject the applicant's argument that the Commission's decision to refuse it access to the file without further investigation is inconsistent 'with the holistic position of Union law'. That argument fails to invalidate the conclusion that the content of the Airfreight case file could have had no influence on the assessments made by the Commission in the contested decision. Further, in so far as, in that context, the applicant refers to the judgment of 22 May 2012 in *EnBW Energie Baden-Württemberg* v *Commission* (T-344/08, ECR, EU:T:2012:242), suffice it to state, on the one hand, that that judgment concerned access to the file under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43) and not the provisions mentioned in paragraphs 341 to 343 above, and, on the other, that that judgment was set aside by the Court of Justice (judgment of 27 February 2014 in *Commission* v *EnBW*, C-365/12 P, ECR, EU:C:2014:112).

350 The applicant puts forward no argument capable of calling into question those findings or demonstrating that the content of the Airfreight case file could have influenced some other aspect of the assessments made by the Commission in the contested decision.

351 Consequently, the Court must also reject this part of the plea and, therefore, the fifth plea in law in its entirety, not only with respect to the application for annulment, but also with respect to the request that the Court exercise its unlimited jurisdiction.

6. *The sixth plea in law: infringement of Article 23(2) of Regulation No 1/2003 and breach of the principle of equal treatment, failure to comply with the 2006 Leniency Notice and error of assessment*

352 This plea in law relates to the Commission's decision to grant DP immunity from a fine with respect to the NES cartel.

353 In recitals 1026 to 1103 of the contested decision, in the first place, the Commission granted DP immunity from a fine with respect to the NES, AMS, CAF and PSS cartels. In that regard, the Commission stated that, at the time when it had received DP's immunity application, having regard to the information which DP had submitted to it, it was entitled to grant DP, in the letter of 24 September 2007, conditional immunity with respect to an alleged cartel among the private suppliers of international freight forwarding services aimed at fixing or passing on to their customers various fees and surcharges [*confidential*]. At the end of the administrative procedure, the Commission held that DP had cooperated satisfactorily and that the alleged cartel with respect to which it had granted DP conditional immunity 'fully covered all infringements dealt with in [the contested decision]'. In the second place, the Commission assessed the applications made by other undertakings for immunity and reduction of fines in connection with those cartels.

354 The applicant argues that those findings are vitiated by errors. The Commission treated DP more favourably than the other undertakings which submitted applications for immunity and reduction of fines, since the basis of assessment of their applications differed from that applied to DP's immunity application. Although the Commission found that there were four infringements, the Commission granted general conditional immunity covering the air freight forwarding sector to DP, but failed to examine whether the evidence produced by that undertaking had covered all the conduct at issue. The Commission acted differently with respect to the applications for reduction of fines made by other undertakings, which it assessed with reference to each infringement taken separately. The applicant claims that, if all the applications for immunity and reduction of fines had been assessed by taking account of the freight forwarding sector as a whole, it would have qualified for more favourable treatment.

355 The Commission disputes those arguments.

356 Having regard to the applicant's arguments, which seek to demonstrate that, if the Commission had correctly applied the 2006 Leniency Notice, it would have been treated more favourably, the Court must examine, first, whether the Commission erred in granting immunity to DP with respect to the NES cartel and then examine, secondly, the argument that the Commission used different criteria with respect to the applications for reduction in fines made by other undertakings, including the applicant.

Compliance with the conditions laid down for the granting of immunity

357 In that regard, it must be recalled that it follows from point 8(a) of the 2006 Leniency Notice that the Commission is to grant conditional immunity to an undertaking which discloses its participation in an alleged cartel if that undertaking is the first to submit information and evidence which will enable the Commission to carry out a targeted inspection in connection with that cartel.

358 Point 9 of the 2006 Leniency Notice is worded as follows:

'For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Commission with the information and evidence listed below, to the extent that this, in the Commission's view, would not jeopardise the inspections:

(a) A corporate statement … which includes, in so far as it is known to the applicant at the time of the submission:

— A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application;

— The name and address of the legal entity submitting the immunity application as well as the names and addresses of all the other undertakings that participate(d) in the alleged cartel;

— The names, positions, office locations and, where necessary, home addresses of all individuals who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;

— Information on which other competition authorities, inside or outside the EU, have been approached or are intended to be approached in relation to the alleged cartel; and

(b) Other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.'

359 Pursuant to point 18 of the 2006 Leniency Notice, once the Commission has received the information and evidence submitted by the undertaking and has verified that the conditions set out in point 8(a) were met, the Commission is to grant the undertaking conditional immunity from fines in writing.

360 It follows from point 22 of that notice that if, at the end of the administrative procedure, an undertaking meets the conditions set out in point 12 thereof, one of those conditions being that the undertaking cooperates genuinely, fully, continuously and expeditiously with the Commission, the Commission is to grant it final immunity in the decision bringing the administrative procedure to an end.

361 Further, it must be borne in mind that, by the adoption of the 2006 Leniency Notice, the Commission created legitimate expectations, as indeed the Commission recognised in point 38 of that notice. In view of the legitimate expectation which undertakings intending to cooperate with the Commission are entitled to derive from that notice, the Commission is therefore obliged to adhere to it. Accordingly, were the Commission not to have complied with the rules of conduct laid down by that notice, the Commission would have been in breach of the principle of the protection of legitimate expectations (see, to that effect, judgments of 18 June 2008 in *Hoechst* v *Commission*, T-410/03, ECR, EU:T:2008:211, paragraph 510, and 13 July 2011 *Kone and Others* v *Commission*, T-151/07, ECR, EU:T:2011:365, paragraph 127).

362 As regards the choice of factors taken into account in the application of the criteria set out in the 2006 Leniency Notice and the assessment of those factors, it is for the Court to carry out its review of legality without using the Commission's margin of discretion as a basis for dispensing with the conduct of an in-depth review of the law and of the facts (judgment of 24 October 2013 in *Kone and Others* v *Commission*, C-510/11 P, EU:C:2013:696, paragraphs 24 and 54).

363 The applicant's arguments must be examined in the light of that case-law and those principles.

364 Having regard to the structure of rules in the 2006 Leniency Notice, the Court must examine whether, pursuant to point 8(a) and points 9 and 18 of the 2006 Leniency Notice, the Commission was entitled to grant DP conditional immunity with respect to an alleged cartel of the scale described in paragraph 353 above, and then examine whether, at the end of the administrative procedure, the Commission was entitled to grant DP final immunity with respect to the NES cartel.

365 Pursuant to point 8(a) of the 2006 Leniency Notice, DP had to be the first undertaking to submit information and evidence enabling the Commission to carry out a targeted inspection in connection with an alleged cartel covering the NES cartel.

366 It is apparent from the contested decision that, at the time when DP submitted its application for immunity, the Commission was not in possession of any information on the existence of any infringements in the air freight forwarding sector. Accordingly, the Commission had to assess DP's application for immunity on the basis of the information and evidence submitted by DP. In this case, the Commission considered that DP's information enabled it to carry out targeted inspections with respect to a cartel of the scale described in paragraph 353 above.

367 In that regard, the applicant confines itself to the argument that the Commission granted DP immunity by default with respect to all the conduct at issue and failed to examine whether the evidence submitted by DP covered all the conduct at issue.

368 In that regard, it must be recalled that, at the time when the Commission receives an application for immunity under point 8(a), it does not yet have any knowledge of the cartel concerned. Accordingly, as is stated in footnote No 1 to point 8(a) of the 2006 Leniency Notice, the Commission must carry out an *ex ante* assessment of the application for immunity, based exclusively on the type and quality of information submitted by the undertaking.

369 The 2006 Leniency Notice therefore does not preclude the Commission granting conditional immunity to an undertaking even where the information provided by that undertaking does not yet enable the Commission to form a conception of the nature and scope of the alleged cartel which is detailed and specific.

370 First, although point 9(a) of the 2006 Leniency Notice requires that the undertaking seeking immunity must submit to the Commission a 'detailed description' of, inter alia, the alleged cartel and its geographic scope together with 'specific information' on its content, that obligation applies only in so far as the undertaking has such knowledge at the time of its application. Second, it must be recalled that the collaboration of an undertaking in the detection of a cartel of which the Commission had no prior knowledge has an intrinsic value which can justify immunity from fines. The objective of point 8(a) and point 18 of the 2006 Leniency Notice is to facilitate the detection of infringements which are not known to the Commission, which would remain secret in the absence of evidence disclosed by the undertaking applying for immunity (see, by analogy, judgment in *Kone and Others* v *Commission*, cited in paragraph 362 above, EU:C:2013:696, paragraph 67).

371 Accordingly, contrary to what is argued by the applicant, point 8(a) and points 9 and 18 of the 2006 Leniency Notice do not require that the material submitted by an undertaking should constitute information and evidence pertaining specifically to the infringements which are identified by the Commission at the end of the administrative procedure. It is sufficient if that material enables the Commission to carry out a targeted investigation in relation an alleged infringement which covers the infringement(s) that the Commission finds to exists at the end of that procedure.

372 Next, it must be stated that the applicant offers no argument capable of calling into question the Commission's finding that the information DP submitted to it before 24 September 2007 enabled it to carry out a targeted inspection in connection with an alleged cartel among the private suppliers of international freight forwarding services aimed at fixing or passing on to their customers various fees and surcharges in the territories mentioned in paragraph 353 above.

373 Consequently, the Commission did not err in granting conditional immunity to DP with respect to such an alleged cartel pursuant to point 8(a) and points 9 and 18 of the 2006 Leniency Notice.

374 As regards the Commission's decision to grant final immunity to DP at the end of the administrative procedure, it must be observed that, after having found, in recital 1029 of the contested decision, that the NES, AMS, CAF and PSS cartels constituted separate, single and continuous infringements, the Commission held, in recital 1031 of that decision, that the alleged cartel with respect to which it had granted DP conditional immunity 'fully covered all infringements dealt with in [the contested decision]'.

375 In so doing, the Commission followed the procedure laid down in point 22 of the 2006 Leniency Notice.

376 In the light of the foregoing, it must be concluded that, in this case, the Commission did not infringe the conditions laid down in point 8(a) and points 9, 18 and 22 of the 2006 Leniency Notice.

The argument concerning the use of different criteria

377 The applicant argues that the Commission was in breach of the principle of equal treatment and committed errors of assessment by treating DP's immunity application and the applications of other undertakings on the basis of different criteria.

378 In that regard, first, it must be observed that, as is apparent from recitals 1029 and 1031 of the contested decision, when, at the end of the administrative procedure, the Commission made a final decision on DP's immunity application and decided on the applications for reduction of fines made by other undertakings, it assessed those applications on the same basis, namely in connection with the separate NES, AMS, CAF and PSS cartels that it had found to exist at that stage in the procedure.

379 Next, the Court must examine the applicant's argument that the Commission misapplied the 2006 Leniency Notice by taking into account material which it had in its possession at the time when it received, first, DP's immunity application and, second, the applications made by other undertakings, including that made by the applicant. According to the applicant, the point in time at which the applications for immunity and reduction of fines had been lodged had already been taken into account in the ranking of the applications. Accordingly, that could not be taken into account a second time in order to justify treating DP's application and the applications for reduction made by other undertakings on different bases.

380 First, on the assumption that this submission refers to the fact that the Commission took account of the material in its possession at the time when the various applications were submitted, it must be observed that it is very clear from the rules laid down in the 2006 Leniency Notice that the Commission is obliged to take account of the material in its possession at the time when an application for immunity or for reduction of a fine is lodged. Thus, it is stated in point 10 of that notice that conditional immunity pursuant to point 8(a) is not to be granted if the Commission already has sufficient evidence to adopt a decision ordering an inspection in connection with the alleged cartel. As regards applications for reduction of fines, it follows from point 24 of the 2006

Leniency Notice that, in order to obtain a reduction, an undertaking must submit to the Commission evidence of the alleged infringement which represents significant added value 'with respect to the evidence already in the Commission's possession'.

381 It must further be borne in mind that the aim of the Commission's leniency programme is not to offer to undertakings participating in secret cartels an opportunity to escape the financial consequences of their responsibility, but to facilitate the detection of such practices and then, in the administrative procedure, to reconstruct the relevant facts as far as possible. Accordingly, the benefits which may be obtained by undertakings participating in such practices cannot exceed the level that is necessary to ensure the full effectiveness of the leniency programme and of the administrative procedure carried out by the Commission.

382 Accordingly, contrary to what is argued by the applicant, in this case, the Commission did not err by taking account of the fact that, at the time when DP submitted its application for immunity, the Commission had no prior knowledge of anticompetitive conduct affecting freight forwarding services, whereas, when it received the applications of other undertakings, including that of the DB group, the Commission already had such information. In that context, it must be recalled that, when the other undertakings lodged their applications, the Commission had in its possession not only the information and evidence that DP had submitted to it, but also evidence that the Commission had seized in the course of the unannounced inspections.

383 Second, on the assumption that the applicant's argument refers to the fact that, on the one hand, as regards DP's immunity application, initially, the Commission granted conditional immunity on the basis of the information which it had in its possession at that stage in the procedure and, thereafter, at the end of the administrative procedure, it granted final immunity with respect to the identified cartels on the ground that those cartels were covered by the cartel with respect to which it had granted conditional immunity, whereas, on the other hand, as regards the applications for reduction of fines made by other undertakings, the Commission confined itself to examining the added value of the information and evidence submitted in connection with cartels identified at the end of the administrative procedure, that argument must again be rejected.

384 In that regard, it must be observed that the 2006 Leniency Notice provides for distinct bodies of rules for, on the one hand, applications for immunity and, on the other, applications for reduction of a fine. Only with respect to applications for immunity does the 2006 Leniency Notice provide that the Commission is to adopt a decision granting conditional immunity on the basis of the information it has in its possession when it receives such an application, therefore on the basis of an *ex ante* assessment. In contrast, with respect to applications for reduction of fines, there is no provision for a conditional decision in advance and the Commission is therefore limited to examining, at the end of the administrative procedure, the added value of the information and evidence submitted with respect to cartels which the Commission has found to exist at the end of the procedure.

385 In so far as the applicant's argument seeks to challenge the making of that distinction in the 2006 Leniency Notice, suffice it to state that the preferential treatment afforded to the first undertaking to cooperate properly with the Commission for the purposes of point 8 of that notice is justified by the objectives of, on the one hand, encouraging undertakings to cooperate as early as possible with the Commission in order to qualify for that preferential treatment and, on the other, not conferring on the undertakings which are not the first to cooperate properly with the Commission advantages which exceed the level that is necessary to ensure that the leniency programme and the administrative procedure are fully effective (see paragraph 381 above).

386 In that context, it must also be borne in mind that the distinction between the body of rules laid down, on the one hand, with respect to applications for immunity, and, on the other, applications for reduction of a fine is qualified by the rules laid down in the third paragraph of point 26 of the 2006 Leniency Notice. According to that rule, where an undertaking applying for a reduction of a fine

reveals evidence that is compelling within the meaning of point 25 of the 2006 Leniency Notice, which the Commission uses to establish additional facts increasing the gravity or duration of the infringement, the Commission is not to take into account those facts when setting the amount of the fine imposed on the undertaking which provided that evidence and is to grant to that undertaking, thereby, 'partial immunity'.

387 In the light of the foregoing, the argument that the Commission based its assessments of DP's immunity application and the applications for reduction of a fine made by other undertakings on different criteria must also be rejected.

388 Consequently, it must be concluded that none of the arguments put forward by the applicant is capable of demonstrating that the Commission's assessment of DP's application for immunity from a fine and of the applications for reductions in fines made by other undertakings is vitiated by errors.

389 Consequently, the sixth plea in law must be rejected in its entirety, not only with respect to the application for annulment, but also with respect to the request that the Court exercise its unlimited jurisdiction.

7. *The seventh plea in law, concerning the Commission's decision not to seek settlement*

390 The applicant argues that, by letter of 21 October 2009, the DB group informed the Commission that this case was suitable for settlement and expressed its willingness to enter into discussions with a view to reaching a settlement. The Commission replied, in a letter of 4 November 2009, that, in the light of the particular circumstances of this case and the relatively advanced stage of proceedings, it did not deem it appropriate to commence settlement discussions in this matter, and thereby, according to the applicant, infringed Article 23(2) of Regulation No 1/2003 and committed errors of assessment, and, further, was in breach of the principle of equal treatment.

The first part of the plea: an infringement of Article 23(2) of Regulation No 1/2003 and errors of assessment

391 The applicant's first argument is that, following receipt of its letter of 21 October 2009, the Commission should, first, have ascertained whether the parties concerned were willing to enter into settlement talks in order to be able meaningfully to exercise its discretion and, second, have commenced talks with the applicant in order to deal with the case by settlement. The purpose of a settlement procedure is to optimise the use of the Commission's resources by improving its enforcement score without necessarily increasing its administrative burden. The Commission cannot make an appropriate assessment of the prospects of achieving procedural efficiencies by means of the settlement procedure without having first ascertained whether the parties under investigation are prepared potentially to acknowledge liability under Article 101 TFEU for all or part of the conduct examined by the Commission.

392 The Commission disputes those arguments.

393 In that regard, first, it must be observed that, according to the approach advocated by the applicant, the Commission is incapable of fully assessing whether a settlement procedure is appropriate until it has made contact with the parties concerned and explored their interest in achieving a settlement. According to the applicant, the Commission therefore committed an error of assessment in taking the decision not to pursue settlement before it had made contact with the parties to whom the contested decision was addressed.

394 Such an approach is incompatible with the applicable provisions.

395 Under Article 10a(1) of Regulation No 773/2004, as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ 2008 L 171, p. 3), the Commission may set a time limit within which the parties may indicate in writing that they are prepared to engage in settlement discussions with a view to possibly introducing settlement submissions. It is therefore plain from the wording of that provision that the Commission is not obliged to make contact with the parties, but that it has a discretion in that regard. That reading of Article 10a(1) of Regulation No 773/2004, as amended, is confirmed by recital 4 of Regulation No 622/2008, which states that the Commission has a broad margin of discretion to determine in which cases it may appropriately explore the parties' interest to engage in settlement discussions, as well as to decide to engage in such discussions or discontinue them or finally to settle the case.

396 In that context, it must also be noted that the Commission's practice is consistent with that approach. According to point 6 of the Commission's Notice on the conduct of settlement procedures, where the Commission considers that a particular case may, in principle, be suitable for settlement, it is supposed to explore the possible interest in settlement of all the parties, although the parties to the proceedings do not have a right to that procedure. It is plain from point 6 that only if the Commission were to consider that a case is suitable for settlement would it be supposed to explore the interest of the undertakings concerned. Accordingly, point 6 also provides for the possibility that the Commission may consider that a case is not suitable for settlement without first having made contact with the parties concerned and having explored their interest in achieving a settlement.

397 It follows that, contrary to what is argued by the applicant, the mere fact that the Commission did not explore its interest and the interest of the other undertakings concerned in achieving a settlement is not in itself capable of demonstrating that the contested decision is vitiated by errors. Consequently, that submission must be rejected.

398 The applicant's second argument is that, in the circumstances of this case, the Commission's decision not to choose settlement was vitiated by errors of assessment. In this case, settlement would have resulted in efficiency gains.

399 The Commission disputes those arguments.

400 It must be observed that, contrary to what is suggested by the applicant, the Commission exercised its discretion. In that regard, suffice it to state that, in its letter of 4 November 2009, the Commission replied that it did not deem it appropriate to commence settlement discussions in this matter.

401 Further, as regards the submissions concerning an error of assessment by the Commission, it must initially be borne in mind that, according to the Commission, its decision not to take the option of settlement in this case was based on, inter alia, the consideration that the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved was not sufficiently high, given, in particular, the substantial number of parties.

402 In that context, it must be recalled that the aim of settlement is to make optimum use of the Commission's resources through the imposition of effective and timely punishment. According to recital 4 of Regulation No 622/2008, the Commission must take account of the probability of reaching a common understanding, regarding the scope of the potential objections, with the parties involved within a reasonable time frame. As is stated in that recital, in that context, the Commission may take account of factors such as the number of parties involved, foreseeable conflicting positions on the attribution of liability, and the extent to which the facts may be disputed. It is also stated in that recital that the Commission may take account of concerns other than those relating to possible efficiency gains, such as the possibility of setting a precedent.

403 The Court must examine, in the light of the foregoing considerations, whether the arguments put forward by the applicant are capable of demonstrating that the Commission committed errors of assessment.

404 In that regard, first, the applicant refers to the large number of parties concerned and the possibility that a settlement procedure might have produced efficiency gains.

405 As regards that argument, it must be recalled the efficiency gains arising from a settlement procedure are greater when all the parties concerned accept settlement. In such a situation, the Commission is not required to permit access to the file and to organise a hearing. The Commission may also confine itself to drafting a succinct version of the statement of objections in one language. On the other hand, if one or more parties concerned are not willing to enter into talks on settlement, the efficiency gains are more limited. Accordingly, it is not misconceived to consider that a large number of parties concerned may have a negative effect on the time the Commission may require to reach a common understanding with the parties concerned regarding the scope of the potential objections.

406 In the light of the fact that, in this case, the number of parties participating in the procedure was 47, the Commission did not err in considering that that aspect of the case was not conducive to achieving a settlement.

407 In that context, it must also be observed, first, that a significant number of the undertakings concerned had not cooperated with the Commission on the basis of its 2006 Leniency Notice and that, second, certain aspects of its decision, such as the admissibility of information and evidence submitted by DP, the attribution of liability to economic successors and the determination of the value of sales made which were affected by the cartels, were likely to be disputed by some of the parties to whom the contested decision was addressed. Accordingly, contrary to what is argued by the applicant, it was conceivable that some aspects of the contested decision were likely to be disputed by its addressees.

408 Contrary to what is claimed by the applicant, the large number of parties therefore did not preclude the Commission deciding not to enter into a settlement procedure.

409 Second, the applicant argues that the parties concerned might have been fewer in number if the Commission had decided to initiate separate procedures for each of the AMS, CAF, NES and PSS cartels, instead of grouping them together in one procedure. According to the applicant, the Commission cannot take advantage of a situation for which it is responsible.

410 This argument must also be rejected.

411 In that regard, it must be observed that both the option of settlement and the option of parallel treatment of a number of infringements in one and the same procedure are designed to achieve efficiency gains. Yet since no provision requires that either of those two options be preferred, the Commission's choice to deal with a number of infringements in a single procedure is not restricted by the option of settlement. Accordingly, the Commission cannot be criticised for choosing to deal with the AMS, CAF, NES and PSS cartels together and for assessing whether settlement was appropriate by taking into consideration the procedural situation resulting from that choice.

412 In any event, it is clear that the applicant fails to demonstrate that a decision to deal with the abovementioned infringements in isolation would have led to a different outcome as regards settlement. In that context, it must be observed that, even if each of those infringements is considered in isolation, there was, with respect to each infringement, a not insignificant number of undertakings who had not cooperated under the 2006 Leniency Notice and that, taking that fact into account, the Commission was entitled to take the view that none of the infringements could suitably be dealt with by settlement, and did not thereby commit an error of assessment.

413 Third, the applicant argues that the Commission erred by relying on the advanced stage of proceedings. According to the applicant, that is not a relevant reason for not initiating the settlement procedure. On the contrary, the Commission cannot take a decision concerning a possible settlement procedure before having reached a relatively advanced stage in proceedings, enabling it to have an understanding of the conduct of the undertakings concerned and to have sufficient evidence in its possession to establish the existence of an infringement.

414 The Commission disputes those arguments.

415 That argument must be rejected.

416 That argument must be rejected as being ineffective. In this case, the Commission's finding that the case could not suitably be dealt with by settlement was already justified by reason of the consideration concerning the large number of parties (see paragraphs 404 to 408 above).

417 Further, and in any event, it must be observed that, in this case, the Commission did not err in taking account of the stage reached in the proceedings at the time when it received the letter from the DB group in which the latter expressed its interest in a settlement procedure. As stated above, the fact that undertakings make known their interest in participating in settlement is one of the factors which the Commission may take into account in order to decide whether the case is suitable for settlement, since that factor may affect the probability of reaching a common understanding, regarding the scope of the potential objections, with the parties involved within a reasonable time frame. However, the weight of an expression of interest is variable, and dependent on the stage in the proceedings. In a case where, without committing any error, the Commission envisaged not opting for settlement and had already initiated proceedings which did not involve settlement, the efficiency gains which may arise from settlement may prove to be more limited.

418 In this case, the Commission had envisaged proceedings which did not involve settlement and, when it received the DB group's letter of 21 October 2009, the Commission had already prepared and discussed a draft statement of objections. Accordingly, the Commission's finding that, having regard to the work that had already been done, the DB group's expression of interest had less weight, is not vitiated by any error of assessment.

419 Fourth, the applicant argues that the competition authorities in a number of non-EEA States, such as New Zealand, the United States and South Africa, have considered it appropriate to reach settlements with regard to the same or similar infringements.

420 That argument must also be rejected.

421 In that regard, suffice it to state that the Commission's decision must be assessed on the basis of the applicable EU legislation, and the fact that non-EEA States may have opted to proceed by settlement cannot therefore demonstrate that the Commission committed an error of assessment. In any event, in so far as the applicant refers to examples pertaining to States where a system of plea bargaining is used, it must be observed the settlement procedure provided for in Article 10a(1) of Regulation No 773/2004, as amended, is substantially different from such a system.

422 Accordingly, nothing in what is argued by the applicant is capable of demonstrating that the Commission's assessment that this case was not suitable for settlement is vitiated by errors.

423 The third submission put forward by the applicant, which the Court must answer, is that the Commission has stated other reasons for its decision not to take the option of settlement in the course of the procedure before the Court and that those reasons are inadmissible or at the least, of no relevance.

424 In that context, the Court must refer to the case-law referred to in paragraphs 229 to 231 above. It must also be recalled that the statement of reasons must, in principle, be notified to the person concerned at the same time as the decision adversely affecting him, and a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Courts of the European Union (judgment of 19 July 2012 in *Alliance One International and Standard Commercial Tobacco* v *Commission*, C-628/10 P and C-14/11 P, ECR, EU:C:2012:479, paragraph 74).

425 Further, the Court must observe that this action is directed against the contested decision and that it is therefore the statement of reasons in that decision which must be examined. However, as part of the background to that decision, the content of the Commission's letter of 4 November 2009 may also be taken into account.

426 As regards the sufficiency of the reasons stated in the contested decision, it is clear, first, that, on the one hand, in its letter of 4 November 2009, the Commission referred to the advanced stage of proceedings and the particular circumstances of the case. On the other, it is sufficiently clear from the context and the content of the contested decision that the number of parties concerned was high, that a not insignificant proportion of those undertakings had not cooperated with the Commission, and that some aspects of the Commission's approach were likely to be disputed (see, in particular, the listing of the addressees of the contested decision, Section 2.2 thereof, on the undertakings subject to the proceedings before the Commission, Section 8.5 thereof, on the application of the 2006 Leniency Notice, recitals 644 to 648 thereof, on the competence of the Commission and recitals 857 to 890 thereof, on the determination of the value of sales).

427 Second, the legal context of the contested decision, namely recital 4 of Regulation No 622/2008 and the Commission Notice on the conduct of settlement procedures entails that the Commission considered that those circumstances were relevant to its choice of whether or not to opt for settlement of the case.

428 It follows that the statement of reasons in the contested decision was sufficiently clear to enable the applicant to understand the reasons and the Court to exercise its power of review.

429 Consequently, the first part of the seventh plea in law must be rejected.

The second part of the plea: breach of the principle of equal treatment

430 The applicant argues that the Commission was in breach of the principle of equal treatment. The freight forwarding case is not significantly different from other cases in which the Commission did opt for settlement.

431 Initially, it must be recalled that the principle of equal treatment precludes comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified, but with regard to the comparability of situations, the Commission's practice in previous decisions does not serve as a legal framework for the fines imposed in competition matters and decisions in other cases can give only an indication for the purpose of determining whether there is discrimination, when the facts of the various cases are not identical (see paragraphs 326 and 327 above).

432 Further, and in any event, it must be observed that the circumstances relied on by the applicant are not such as to establish a breach of the principle of equal treatment.

433 In that context, it must be recalled that the comparability of two situations must be assessed in the light, inter alia, of the subject matter and purpose of the legislative acts at issue (see, to that effect, judgment of 16 December 2008 in *Arcelor Atlantique and Lorraine and Others*, C-127/07, ECR, EU:C:2008:728, paragraph 26). Since the objective of the settlement procedure is to enable the Commission to deal with cartels more rapidly and more effectively, the Commission must take into account, inter alia, the probability of reaching a common understanding regarding the scope of the potential objections with the parties involved within a reasonable time frame (see recital 4 of Regulation No 622/2008).

434 First, in so far as the applicant argues that, in other cases, the infringements were more complex, suffice it to state that those factors are not, in themselves, such as to demonstrate that, in this case, the Commission should have taken the view that it would have been easier to reach a common understanding regarding the scope of the potential objections with the parties involved within a reasonable time frame.

435 Second, in so far as the applicant argues, in essence, that each of the NES, AMS, CAF and PSS cartels were, individually, suitable for settlement, suffice it to state that that argument does not refer to the Commission's previous practice, but does no more, in essence, than reproduce the submission that the number of parties concerned could have been lower if the Commission had decided to initiate separate procedures for each of the AMS, CAF, NES and PSS cartels, a submission already rejected in paragraphs 409 to 412 above.

436 Third, in so far as the applicant claims that, in Commission Decision C(2010) 5001 final of 20 July 2010 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case COMP/38.866 — Animal feed phosphates), the Commission adopted a settlement decision which did not extend to all the parties involved in the infringement, suffice it to state that, in that case, after the Commission decided to initiate discussions with the parties concerned with a view to settlement, the Commission decided not to adopt a settlement decision with respect to one undertaking that had decided to abandon the discussions. Yet the applicant does not explain in what way that renders that case comparable to this case, where the number of parties was very high and a not insignificant proportion of the undertakings concerned had not cooperated with the Commission.

437 Accordingly, the Court must reject the part of the plea concerning a breach of the principle of equal treatment, and, consequently, the seventh plea in law in its entirety.

438 Since all the pleas in law must be rejected and examination of those pleas has not revealed anything to justify the Court exercising its unlimited jurisdiction to reduce the fines imposed on the applicant, the Court must dismiss the action in its entirety, not only with respect to the application for annulment, but also with respect to the request that the Court exercise its unlimited jurisdiction.

Costs

439 Under Article 134(1) of the Rules of Procedure of the General Court, 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 applicant has been unsuccessful, it must be ordered to pay the costs incurred by the Commission, as sought by the Commission.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. Dismisses the action;

2. Orders Schenker Ltd to pay the costs.

Berardis Czúcz Popescu

Delivered in open court in Luxembourg on 29 February 2016.

[Signatures]

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