Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 12 February 2015 [1]

Case C-583/13 P

Deutsche Bahn AG
DB Mobility Logistics AG
DB Energie GmbH
DB Netz AG
DB Schenker Rail GmbH
DB Schenker Rail Deutschland AG
Deutsche Umschlaggesellschaft Schiene-Straße mbH (DUSS)
v

European Commission

(Appeal — Articles 20(4) and 28 of Council Regulation (EC) No 1/2003 — Commission's powers of inspection — Fundamental right to the inviolability of private premises — Fundamental right to effective judicial review — Dow Benelux case-law — Burden of proof — Consequences of illegal searches made by the Commission)

1. Legal protection against unjustified searches of private homes by enforcement authorities is generally considered to be one of the principles marking the divide between societies based on the rule of law and other, more repressive, forms of government.

2. However, it is universally recognised that even in communities ruled by law, such as the European Union, public authorities must be given effective investigative powers in order to pursue suspected infringements.

3. Legislation therefore needs to strike a balance between, on the one hand, the right to privacy and, on the other, effective law enforcement.

4. The present proceedings concern the question whether the right balance has been struck, within the context of EU competition law, between the need for effective investigative tools and the right to protection against unjustified searches. More precisely, the Court is called upon to address the following two questions: (i) is the current EU system of inspections under Regulation (EC) No 1/2003 [2] compatible with Articles 7 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter')? and (ii) what are the consequences, within that system, of an illegal search by the Commission?

1 — Original language: English.

2 — Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).

I – Legal framework

5. Article 20 of Regulation No 1/2003 ('The Commission's powers of inspection') states:

'1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

…

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. …

…

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles [101 and 102 of the FEU Treaty], as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.'

6. Additionally, Article 28(1) of Regulation No 1/2003 provides:

'Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.'

II – Background to the proceedings

7. In 2011 the Commission adopted three decisions, each ordering an inspection of the premises of Deutsche Bahn AG and several of its subsidiaries (DB Mobility Logistics, DB Netz AG, DB Energie GmbH, DB Schenker Rail GmbH, DB Schenker Rail Deutschland AG, and Deutsche Umschlagegesellschaft Schiene-Straße mbH) (collectively referred to as 'Deutsche Bahn' or 'the appellants'). Deutsche Bahn is an undertaking pursuing activities in the national and international freight and passenger transport sector, in the logistics sector and in the sector for the provision of ancillary rail transport services.

8. The first inspection decision [3] was notified to Deutsche Bahn on 29 March 2011 when inspectors of the Commission requested access to Deutsche Bahn premises in Berlin, Frankfurt am Main and Mainz (Germany). The decision concerned the potentially unjustified preferential treatment accorded by DB Energie to other Deutsche Bahn subsidiaries in the form of a rebate system for the supply of electric traction energy ('the first suspected infringement').

9. In the course of the inspections, the Commission's inspectors found documents at the premises of Deutsche Bahn which the Commission considered might indicate the existence of further anti-competitive conduct ('the DUSS documents') and accordingly another inspection decision was notified to Deutsche Bahn on 31 March 2011 ('the second inspection decision') while the first inspection was still being carried out. The second inspection decision concerned suspected competition infringements by the Deutsche Umschlagegesellschaft Schiene-Straße ('DUSS') through the strategic use of infrastructure managed by Deutsche Bahn ('the second suspected infringement'). [4]

10. The first and second inspections ended on 31 March and 1 April 2011 respectively.

11. Subsequently, an additional inspection decision ('the third inspection decision') [5] was adopted, and notified to Deutsche Bahn on 26 July 2011. The scope of the third inspection also covered suspected competition infringements by DUSS. The third inspection took place between 26 and 29 July 2011.

III – Procedure before the General Court and the judgment under appeal

12. In the aftermath of the inspections, Deutsche Bahn brought actions against the Commission before the General Court for annulment of the three inspection decisions ('the contested decisions') on the grounds that they infringed Deutsche Bahn's right to privacy, its right to effective judicial protection, the rights of the defence and the principle of proportionality.

13. By judgment of 6 September 2013 in Joined Cases T-289/11, T-290/11 and T-521/11 *Deutsche Bahn and Others* v *Commission* ('the judgment under appeal'), [6] the General Court dismissed those actions in their entirety and ordered Deutsche Bahn to bear the costs.

IV – Procedure before the Court and forms of order sought

14. By their appeal, lodged with the Court on 18 November 2013, the appellants claim that the Court should:

— set aside the judgment under appeal;

3 — Decision C(2011) 1774 of 14 March 2011.
4 — Decision C(2011) 2365 of 30 March 2011.
5 — Decision C(2011) 5230 of 14 July 2011.
6 — EU:T:2013:404.

— annul the contested decisions;

— order the Commission to pay the costs.

15. The Commission, for its part, contends that the Court should:

— dismiss the appeal;

— order the appellants to pay the costs.

16. Written observations in support of the Commission's position have been submitted by the Spanish Government and the EFTA Surveillance Authority ('ESA'), both of whom also presented oral argument at the hearing held on 4 December 2014, as did the appellants and the Commission.

V – Assessment of the grounds of appeal

17. The appellants put forward four grounds of appeal which I will examine in turn. Before doing so, I will briefly illustrate some key aspects of the system provided for in Regulation No 1/2003 with regard to inspections by the Commission.

A – *Introduction*

18. The legality of a Commission inspection of the premises of an undertaking is dependent on the content of the Commission decision ordering the undertaking to submit to the inspection. Pursuant to Article 20(4) of Regulation No 1/2003, the decision is to 'specify the subject matter and purpose of the inspection'. In its case-law, the Court has held that, accordingly, the Commission is in principle obliged to indicate as precisely as possible the evidence sought and the matters to which the investigation must relate, although it is not required to define precisely the relevant market, or to set out the exact legal nature of the presumed infringements, or to indicate the period during which those infringements were committed. [7] That obligation to state specific reasons has consistently been described by the Court as 'a fundamental requirement not only to show that the intervention envisaged within the undertakings concerned was proportional, but also to put those undertakings in a position to understand the scope of their duty to cooperate, while at the same time preserving their rights of defence'. [8]

19. By contrast with its obligations in relation to non-business premises (Article 21 of Regulation No 1/2003), the Commission need not, in the case of a company subjected to an inspection under Article 20 of that regulation, harbour any specific suspicions of wrongdoing on the part of that company: it need merely suspect that the company might hold relevant information.

20. Subject to the requirements described above, the Commission decision is not, in itself, subject to *ex ante* judicial review. Only when coercive measures are envisaged, and the applicable national law requires *a priori* judicial authorisation for that purpose, is there an incidental judicial review of the inspection decision. However, given the limitations placed by Article 20(8) of Regulation No 1/2003 on such judicial control, it seems unlikely that a national court would refuse to grant the coercive measures requested in a given case. Even if that were to happen, a refusal by the undertaking concerned to submit to the inspection order could in any case be penalised under Articles 23 and 24 of Regulation No 1/2003. [9]

7 — See, among others, judgment in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:2030, paragraph 36 and the case-law cited.

8 — Ibid., paragraph 34 and the case-law cited.

9 — If the undertaking is found to have infringed the EU competition rules, even a delay in cooperating with the Commission would bring about an increase in the fine: see, for example, judgment in *Koninklijke Wegenbouw Stevin* v *Commission*, T-357/06, EU:T:2012:488, paragraphs 220 to 240.

21. Pursuant to Article 28 of Regulation No 1/2003, any document or information collected in the course of an inspection must, save for the exceptions provided for in the same regulation, be used only for the purpose for which it was acquired. As the Court has held, that requirement is intended to protect the rights of defence of the undertakings concerned. These rights would be seriously compromised if the Commission could rely on evidence against undertakings which was obtained during an investigation but not related to the subject-matter or purpose of that particular investigation. [10]

22. However, as the Court held in *Dow Benelux*, the above provision does not bar the Commission from initiating an inquiry in order to verify or supplement information which it happened to find by chance during another investigation, if such information indicates the possible existence of another infringement of the EU competition rules. To bar the Commission from doing so would constitute an unnecessary hindrance to its investigative powers, since the undertaking responsible for the potential breach is free to exercise its rights of defence fully in the context of the new investigation. [11] There is no bar, therefore, to the use of information found fortuitously, provided that a new investigation is opened, and conducted in accordance with Regulation No 1/2003.

23. Lastly, the Court has also held that an undertaking that has undergone an inspection ordered by the Commission can contest before the EU Courts the decision ordering the inspection. If the decision is annulled, the Commission may not, for the purposes of proceeding in respect of a suspected infringement of the EU competition rules, use any documents or other evidence which it obtained in the course of that investigation, and if it does, the decision on the infringement might, in so far as it is based on such evidence, be annulled by the EU Courts. [12]

24. It is against that background that I will now assess the four grounds of appeal.

B – *The first ground of appeal*

25. By the first ground of appeal, the appellants submit that the General Court misinterpreted and misapplied the fundamental right to the inviolability of private premises, as protected by Article 7 of the Charter and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR').

26. In paragraphs 42 to 102 of the judgment under appeal, the General Court stated, with reference to the consistent case-law of the European Court of Human Rights ('the ECtHR' or 'the Strasbourg Court'), that an acceptable level of protection against interferences with rights under Article 8 of the ECHR entails a legal framework and strict limits. The General Court went on to explain that there are five categories of safeguard: (i) the statement of reasons on which inspection decisions are based; (ii) the limits imposed on the Commission during the conduct of inspections; (iii) the impossibility for the Commission to carry out an inspection by force; (iv) the intervention of national authorities; and (v) the existence of *ex post facto* remedies. After reviewing the facts and the rules laid down in Regulation No 1/2003, the General Court came to the conclusion that all five categories of safeguard were assured in the cases under consideration. That being so, that court rejected the plea put forward at first instance alleging infringement of the right to the inviolability of private premises by reason of the lack of prior judicial authorisation of the Commission's inspections.

10 — See judgment in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 48 and the case-law cited.

11 — See judgment in *Dow Benelux* v *Commission*, 85/87, EU:C:1989:379 ('*Dow Benelux*'), paragraphs 17 to 19. See also, judgment in *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582 ('*PVC*'), paragraph 301.

12 — See judgment in *Roquette Frères*, EU:C:2002:603, paragraph 49 and the case-law cited.

27. In essence, the appellants contend that the General Court incorrectly interpreted the case-law of the ECtHR on Article 8 of the ECHR, under which, in a situation such as that material to the contested decisions, the Commission is under an obligation to obtain prior judicial authorisation from the General Court or from a national court. On the one hand, the General Court — in the appellants' view — erroneously interpreted the ECtHR rulings in *Colas Est*,[13] *Liotard Frères*,[14] and *Canal Plus*[15] to the extent that it found that the lack of a prior judicial authorisation was only one of the elements taken into account by the ECtHR when it concluded that Article 8 of the ECHR had been infringed. The appellants argue that the General Court should instead have considered the need for prior judicial authorisation to be a key factor underpinning the ECtHR's findings. Moreover, in their view, the General Court misinterpreted the *Harju*[16] and *Heino*[17] judgments, in stating that the absence of a prior warrant could be 'counterbalanced' by full *ex post* judicial review. In those two cases, in fact, the actions by the public authorities were motivated by reasons of urgency. In so far as the Commission did not, in the present cases, seek prior judicial authorisation, despite the fact that there was no urgency, the General Court should have found that it had acted in breach of the principle of proportionality.

28. The Commission, supported by ESA and the Spanish Government, retorts that the General Court had correctly assessed the compatibility of the contested decisions with the fundamental right to the inviolability of private premises and had not misinterpreted the case-law of the ECHR in that connection.

29. The first ground of appeal raises, in substance, the issue of whether the current EU system of inspections under Article 20(4) of Regulation No 1/2003 is compatible with respect for the fundamental right to the inviolability of private premises, as enshrined in Article 7 of the Charter and Article 8 of the ECHR. In particular, the Court is required to determine whether *ex ante* judicial authorisation should be requested by the Commission as a general rule, at least when there is no reason for that institution to act urgently.

30. In common with the Commission, the Spanish Government and ESA, I believe that the General Court did not misinterpret or misapply the judgments of the ECtHR referred to by the appellants. Indeed, as the case-law of the Strasbourg Court currently stands, it cannot be claimed that, as the appellants assert, the protection of the rights enshrined in Article 8 of the ECHR requires an antitrust authority always to obtain judicial authorisation before carrying out on-site inspections of business premises. Nor can it be claimed that, for reasons of proportionality, such an authorisation can be forgone only where there are grounds to justify urgent action on the part of the public authorities.

31. At the outset, it should be recalled that, in extending the guarantees enshrined in Article 8(1) of the ECHR to legal persons, such as undertakings, the Strasbourg Court has been cautious in holding the latter not to be entirely comparable to natural persons,[18] and not to treat business premises in the same way as private homes. Indeed, beginning with *Niemietz*,[19] the ECtHR has consistently stated that public authorities may well be entitled to interfere more extensively with the rights protected by Article 8 where professional and business premises are involved.

13 — *Société Colas Est and Others v. France*, no. 37971/97, ECHR 2002-III.

14 — *Société Métallurgique Liotard Frères v. France*, no. 29598/08, ECHR 2011.

15 — *Société Canal Plus and Others v. France*, no. 29408/08, ECHR 2010.

16 — *Harju v. Finland*, no. 56716/09, ECHR 2011.

17 — *Heino v. Finland*, no. 56720/09, ECHR 2011.

18 — See, for example, *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, § 159 and the case-law cited, ECHR 2013.

19 — *Niemietz v. Germany*, 16 December 1992, § 31, Series A no. 251-B. See also *Société Colas Est and Others v. France*, cited above in footnote 13.

32. Second, and more importantly, unlike the appellants, I do not see how the aforementioned judgments of the ECtHR in *Colas Est*, *Liotard Frères* and *Canal Plus* could be interpreted as requiring an antitrust authority to seek such prior judicial authorisation as a general rule, failing which it would be in breach of Article 8 of the ECHR. Nor am I persuaded that the *Harju* and *Heino* case-law is irrelevant to the present proceedings.

33. To begin with, it must be pointed out that, whereas the *Colas Est* ruling deals specifically with an infringement of Article 8 of the ECHR, the Strasbourg Court focused its attention in *Liotard Frères* and *Canal Plus* exclusively on the alleged infringement of Article 6(1) of the ECHR. Therefore, the General Court cannot reasonably be criticised by the appellants for having referred only to *Colas Est* when discussing the plea alleging infringement of Article 7 of the Charter.

34. In any event, it seems to me that the General Court made a detailed analysis of all those rulings and correctly came to the conclusion that the lack of a prior warrant was only one of the factors taken into account by the ECtHR in those cases when deciding on the infringements of the ECHR alleged by the parties.[20] Indeed, it was always on the basis of an overall assessment of all the pertinent legal and factual circumstances of the individual case that the Strasbourg Court came to make such a determination. More specifically, that court examined, among other factors, the extent of the powers vested in the competent public authority, the circumstances in which the interference with the fundamental right occurred, and whether the legal system concerned provided different safeguards, as well as, more importantly, the possibility of effective *ex post* judicial review.

35. Two recent judgments of the ECtHR, which concerned precisely alleged infringements of Article 8 of the ECHR, seem to confirm this reading of the aforementioned case-law.

36. In *Bernh Larsen*, the ECtHR was required to rule on whether Article 8 of the ECHR precluded a demand by the Norwegian tax authorities, issued to three companies in the context of a tax audit, to make available for inspection at the tax office a backup copy of a computer server. The Strasbourg Court noted that, although not comparable to seizures in criminal proceedings or enforceable on pain of criminal penalties, such a demand was legally binding for the three companies, which could have found themselves faced with administrative sanctions if they had failed to comply. It accordingly found that the demand interfered with those companies' rights to respect for domiciles and correspondence. Yet, despite the fact that no judicial body had authorised the demand beforehand, the ECtHR concluded that such interference was justified. Among other factors, that court took note of the fact that the national legislation attached important limitations to the powers of the authorities in question and provided for effective and adequate safeguards against abuse.[21]

37. Moreover, in its recent judgment in *Delta Pekárny*, the ECtHR examined whether an inspection carried out by the Czech national competition authority at a company's premises in 2003 had given rise to an infringement of Article 8 of the ECHR. The Strasbourg Court found that, for the company concerned, the contested inspection had infringed the right to the inviolability of premises. The reason, however, was that the decision authorising the inspection was not open to effective judicial review, whether *ex ante* or *ex post*. In particular, the only opportunity for the applicants to raise questions regarding the legality of the inspection was in proceedings that addressed the substantive findings made by the competition authority. In that context, issues such as the necessity, the duration and the scope of the inspection as well as its proportionate character had not been open to judicial review.[22]

20 — See, in particular, paragraphs 64 to 73, and 108 to 110 of the judgment under appeal.

21 — *Bernh Larsen Holding AS and Others v. Norway*, cited above in footnote 18.

22 — *Delta Pekárny* AS *v. the Czech Republic*, no. 97/11, §§ 82 to 94, ECHR 2014.

38. Importantly, in *Delta Pekárny*, the ECtHR explicitly stated that the lack of a prior judicial warrant may be compensated by effective *ex post* judicial review, dealing with all issues of law and fact. In that context, the ECtHR made express reference to, inter alia, its judgment in *Harju*, the pertinence of which — for the purposes of the present case — has been contested by the appellants, as was mentioned above.[23] Likewise, in *Bernh Larsen*, that court came to the conclusion that no infringement of Article 8 of the ECHR had occurred, without even assessing whether any reason of urgency justified the actions taken by the public authorities.

39. On that basis, I must conclude that the General Court did not err in law in its interpretation of the ECtHR case-law referred to by the appellants. Nor did that court err in law in its application of that case-law to the case before it.

40. Indeed, under the EU system, an adequate level of protection of the fundamental right to the inviolability of premises is ensured by the *ex post* judicial review that can be carried out by the EU Courts. In my view, there is no doubt that the jurisdiction of the EU Courts covers all aspects of law and fact which may be relevant in order to verify the lawfulness of the inspection decisions,[24] in line with the *Chalkor* and *KME Germany* case-law.[25] Moreover, as was mentioned in point 23 above, the annulment of an inspection decision bars the Commission from making use of documents found in the course of that inspection.

41. It thus seems to me that the appellants have not established any infringement of Article 8 of the ECHR. Furthermore, the appellants do not argue that Article 7 of the Charter might impose a higher standard of protection than that provided for under the ECHR.[26] In any event, I see no element in EU primary or secondary law that would point towards that conclusion. In fact, Article 7 of the Charter has been worded very similarly to Article 8(1) of the ECHR. Moreover, Regulation No 1/2003 specifically requires prior judicial authorisation only for inspections carried out pursuant to Article 21 of that regulation, thereby implicitly excluding the need for such authorisation in relation to inspections based on Article 20(4) of the regulation.

42. For these reasons, I am of the view that the General Court did not err in law in rejecting the appellants' pleas alleging infringement of their right to the inviolability of business premises. Consequently, I propose that the Court reject the first ground of appeal.

C – *The second ground of appeal*

43. By their second ground of appeal, the appellants contend that the General Court misinterpreted and misapplied the fundamental right to effective judicial protection, provided for in Article 47 of the Charter.

44. Both the Commission and the interveners dispute those arguments.

23 — Ibid., §§ 83, 87, and 92 to 93.

24 — Cf. Opinion of Advocate General Kokott in *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:223, point 85.

25 — See judgments in *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, and *KME and Others* v *Commission*, C-272/09 P, EU:C:2011:810.

26 — See Article 52(3) *in fine* of the Charter: '… This provision shall not prevent Union law providing more extensive protection [than that provided in the ECHR]'.

45. The second ground of appeal seems to me, to a large extent, a reiteration of the arguments put forward in relation to the first ground of appeal. The appellants merely contend that the absence of prior judicial authorisation for an inspection deprives undertakings of adequate judicial protection, in breach of the right recognised in Article 47 of the Charter and Article 6(1) of the ECHR. Here, too, the appellants make reference to the abovementioned judgments of the ECtHR in *Colas Est*, *Canal Plus* and *Liotard Frères*. [27]

46. It accordingly suffices to restate what has been explained already: it is open to undertakings that have undergone an inspection to challenge before the EU Courts the lawfulness of the inspection decision issued by the Commission. Such judicial proceedings can be initiated immediately after the company has been notified of the Commission decision (typically upon the start of the inspection), there being no need to wait until the Commission has adopted the final decision on the suspected infringement of the EU competition rules.

47. Furthermore, there is no doubt that the EU Courts have the power to review all aspects of law and fact of inspection decisions, including whether the Commission used its discretionary powers in an appropriate fashion, and to annul them, in whole or in part, on all issues. [28]

48. These aspects mark a significant difference between the EU system under consideration in the present proceedings, and the national system examined by the ECtHR in *Canal Plus* and *Liotard Frères*. In those cases, when finding an infringement of Article 6(1) of the ECHR, the Strasbourg Court's decision turned on two crucial points: (i) the companies could only challenge the inspection decision in the context of an appeal *on a point of law* ('cassation'), which did not allow them to contest the elements of fact underlying the decision, [29] and (ii) the inspection decision could only be challenged jointly with the final decision of the antitrust authority, with the consequence that challenge of the inspection decision would be uncertain and in any event delayed for several years. [30]

49. These points were clearly explained by the General Court in paragraphs 109 to 112 of the judgment under appeal.

50. Again, I do not see — nor have the appellants in any way tried to explain to the Court — why, on this point, Article 47 of the Charter would impose higher standards for the European Union than those entailed for the Strasbourg Court under Article 6(1) of the ECHR.

51. The mere fact that judicial review occurs *ex post* does not seem to me to constitute an infringement of the right to effective judicial protection, for the reasons explained above.

52. I therefore conclude that inspection decisions may be subject to a form of judicial review that meets the standards of effectiveness required by Article 47 of the Charter. Consequently, the General Court in no way erred in law in its interpretation and application of that principle. The second ground of appeal should, accordingly, also be dismissed.

27 — Referred to *supra*, footnotes 13 to 15. In this context, I wish to point out that the appellants have not clearly explained why the judgment in *Colas Est* would be relevant in the present context, since, as was mentioned above, it concerned only an infringement of the right to respect for private and family life (Article 8 of the ECHR).

28 — See case-law cited supra, point 40. For ECtHR case-law, see especially judgment in *Menarini Diagnostics Srl v. Italy*, no. 43509/08, §§ 57 to 67 and the case-law cited, ECHR 2011.

29 — See *Société Canal Plus and Others v. France*, cited above in footnote 15, § 37, and *Société Métallurgique Liotard Frères v. France*, cited above in footnote 14, §§ 18 and 19.

30 — See *Société Canal Plus and Others v. France*, cited above in footnote 15, § 40.

D – *The third ground of appeal*

53. By their third ground of appeal, the appellants argue that the General Court erred in designating the DUSS documents discovered during the first inspection as 'found by chance' within the meaning of the judgment in *Dow Benelux*. [31] The Commission has, in fact, acknowledged that the Commission staff conducting the inspection had been informed beforehand that there was a complaint alleging another infringement of the competition rules by the appellants. The appellants argued that that constituted an irregularity which had affected the exercise of their rights of defence.

54. The Commission objects, in the first place, as to the admissibility of this ground of appeal, in so far as the appellants contest a finding of fact made by the General Court. In any event, the Commission considers that the arguments put forward by the appellants are unfounded.

1. Admissibility

55. It seems to me that the preliminary objection alleging the inadmissibility of this plea should be rejected. In essence, the focus of the appellant's criticism of the General Court is not that the DUSS documents were found by chance, but rather that they cannot be regarded as such within the meaning of *Dow Benelux*. In the present case, the appeal thus concerns the legal characterisation of the facts by the General Court and the legal conclusions which it has drawn from them.

2. Substance

56. From the outset, I should once again recall that, pursuant to Article 28 of Regulation No 1/2003, any document or information collected in the context of an inspection must, save for the exceptions provided for in that regulation, be used only for the purpose for which it was acquired. However, it follows from *Dow Benelux* that, by way of derogation from the principle enshrined in Article 28, documents and information that are found but not covered by the subject-matter of the inspection can be used to launch a new investigation.

57. In its judgment, the General Court has come to the conclusion, in the light of the arguments and evidence presented by the parties, that the DUSS documents were not the object of a targeted search since they were accidentally found in areas of the business premises which the Commission was searching with a view to gathering information relating to the subject-matter of the first inspection. On that basis, and mainly by reference to the *Dow Benelux* case-law, the General Court rejected the appellants' arguments relating to an alleged irregularity in the first inspection. [32]

58. The fact that the DUSS documents were found while searching for other types of document is a finding of fact which cannot, in principle, be reviewed in the context of an appeal before the Court. However, the crucial question is the following: is that enough for it to be held that the appellants' rights of defence and right to privacy were duly respected in the context of the first inspection? In other words, did the General Court correctly apply Article 28 of Regulation No 1/2003 and the *Dow Benelux* case-law?

59. I do not believe this to be the case.

60. To my mind, in order to understand why it must be said that the General Court incorrectly applied the Court's case-law, it is necessary to look into the *raison d'être* of the rules enshrined in Regulation No 1/2003, as interpreted by the Court.

31 — EU:C:1989:379.

32 — See paragraphs 115 to 165 of the judgment under appeal.

61. It cannot be disputed that the Commission has been granted wide investigative powers under Regulation No 1/2003 which severely interfere with certain fundamental rights of companies and individuals. These powers are, as mentioned above, exercised on the basis of no (or little) *ex ante* judicial control. In addition, it should be pointed out that the internal checks and balances typically provided for when the Commission is to adopt decisions and other legally binding acts [33] do not apply to their full extent for decisions under Articles 20 and 21 of Regulation No 1/2003. Indeed, the power to adopt decisions pursuant to those provisions has been entrusted [34] to the Commissioner responsible for competition policy, who, in turn, has sub-delegated that power to the Director-General of the Commission's Directorate-General for Competition ('DG Competition'). [35] This means that inspection decisions are virtually decided by the staff of DG Competition alone, with other Commission services playing little or no role in the decision-making.

62. It is generally accepted, however, that the Commission should be entitled to enjoy such extensive powers, and to an appropriate margin of discretion in exercising them, as competition infringements constitute serious contraventions of the economic laws on which the European Union is founded. Likewise, it is reasonable that the adoption of inspection decisions is delegated to the Commissioner responsible for competition policy, so as to permit the rapid execution of inspections, while minimising any risk of leaks. [36]

63. At the same time, however, precisely because those powers are so extensive, the discretion so ample, and the decision-making subject to so few (judicial or administrative) prior controls, it is for the EU Courts to ensure that the rights of the undertakings and citizens involved in an investigation are fully respected. [37] In other words, the Commission is rightly entitled to interfere, at times severely, with the fundamental rights of undertakings and citizens in the course of antitrust investigations. It cannot, however, go beyond the reach of the law, as this would encroach upon the inviolability, as guaranteed under EU law, of the essence of those fundamental rights. [38]

64. Article 28 of Regulation No 1/2003 should be read against that background. One of the intentions underlying that provision is to prevent the Commission from going on 'fishing expeditions', using as a pretext an ongoing investigation into a possible breach of the competition rules. The Commission cannot search for evidence relating to potential breaches of the EU competition rules other than those relating to the subject-matter of the investigation.

65. On the other hand, the *ratio decidendi* of the *Dow Benelux* case-law is, to my mind, that the Commission cannot be required to turn a blind eye in the event that it should find, purely by coincidence, documentary evidence which appears to point to another possible infringement of the EU competition rules. Indeed, if the Commission does not turn a blind eye, it is not abusing or circumventing any procedural rule. For example, such a situation can be compared, *mutatis mutandis*, to that of an enforcement authority which, while making an on-the-spot inspection because of a suspected tax evasion, finds information which suggests a possible case of money laundering. There is no valid reason why that authority should disregard information genuinely found by accident. The same holds true for the Commission in the context of investigations carried out under Regulation No 1/2003.

33 — These checks and balances include, in particular, a deliberation by the full College of Commissioners, after an inter-service consultation.

34 — On the basis of Article 13 of the Rules of Procedure of the Commission (C(2000) 3614) (OJ 2000 L 308, p. 26), as modified most recently by Commission Decision of 9 November 2011 amending its Rules of Procedure (2011/737/EU, Euratom) (OJ 2011 L 296, p. 58).

35 — See, principally, Commission Decisions PV(2004) 1655, SEC(2004) 520/2, and PV(2006) 1763, SEC(2006) 1368.

36 — On the lawfulness of such delegation, see judgments in *AKZO Chemie and AKZO Chemie UK* v *Commission*, 5/85, EU:C:1986:328, paragraphs 28 to 40, and *Dow Chemical Ibérica and Others* v *Commission*, 97/87 to 99/87, EU:C:1989:380, paragraph 58.

37 — Cf. Opinion of Advocate General Ruiz-Jarabo Colomer in *Aalborg Portland and Others* v *Commission*, C-204/00 P, EU:C:2003:85, point 26. See also, to that effect, judgment in *Hoechst* v *Commission*, C-227/92 P, EU:C:1999:360, paragraphs 14 and 15 and the case-law cited.

38 — See, in particular, Article 52(1) of the Charter.

66. With that in mind, the crux of the present case is as follows: has the Commission circumvented the rule laid down in Article 20(4) of Regulation No 1/2003?

67. The General Court ascertained in the judgment under appeal that, immediately before the inspection took place, all the Commission staff had been specifically informed that another complaint against the appellants had been received, and they had been apprised of the subject-matter of that complaint. In fact, the Commission has openly acknowledged that fact, both during the first instance proceedings and in the course of the present appeal. Nevertheless, the General Court did not take issue with that conduct, which it apparently considered irrelevant within the context of the aforementioned *Dow Benelux* case-law. The General Court merely stated that 'it ha[d] to be considered that there were valid reasons for providing the officials with general background information on the case', without explaining, however, what those reasons actually were. [39]

68. In its written observations, the Commission defends the reasoning of the General Court, contending that it was helpful, for the Commission staff, to be aware of the context in which the inspection was to be carried out.

69. In principle, I agree with the Commission that, before an inspection takes place, it is crucial that the Commission staff be briefed on the relevant context of the investigation. To that end, it seems to me reasonable and helpful to provide the staff concerned with all the information that could contribute to the efficacy of the search for evidence on the subject-matter of the inspection. This includes, for example, information useful for understanding the nature and scope of the possible infringement (products involved, geographical market affected, other companies involved, name of the persons implicated on behalf of the company investigated, and so on) as well as information relating to the logistics of the inspection (offices to search, relevant type of documents, keywords or other type of specific information to look for). Not only can that type of information make the search more effective, thereby ensuring that it achieves its objective, but also it will limit the interference with the rights of the undertakings subject to the inspection, to the extent that it can make the search more focused and less time-consuming.

70. That said, it is by no means clear to me what the Commission is referring to when it speaks, in the present case, of the 'context' of the inspection. Nor do I see why the second suspected infringement should be considered, in the words of the General Court, as 'background information' on the first suspected infringement.

71. Questioned at the hearing, the Commission was at pains to explain to the Court why information on the second suspected infringement was relevant in the context of a search for information relating to the first suspected infringement. The Commission argued that the two cases might be connected in two regards: first because a complainant was common to the two investigations; second, because the Commission was unable, at that time, to rule out the possibility that both lines of conduct investigated could be the expression of a general strategy engaged in by Deutsche Bahn in order to provide its competitors with discriminatory access to the infrastructures held by its subsidiaries.

72. The weakness and vagueness of the Commission's arguments on this point show that, in reality, the two cases do not have anything in common, apart from the fact that they both concern subsidiaries of Deutsche Bahn, although not the same subsidiary. The fact that one company was among the complainants in both cases does not seem to be of any relevance, to the extent that the lines of conduct criticised are quite different and occur on distinct markets.

39 — Paragraph 162 of the judgment under appeal.

73. As concerns the allegation that the Commission could not rule out the possibility that the two lines of conduct constituted the expression of a single strategy, nothing in the files seems to support such a statement. In fact, the description of the events presented by the Commission itself suggests the contrary. The Commission has conceded that its staff had been informed of the subject-matter of the second complaint before the first inspection took place, but added that, on that occasion, its staff had also been reminded that the purpose of that inspection was the subject-matter of the first complaint, and not of the second. Obviously, had the Commission suspected that both lines of conduct were the expression of a single plan, that word of caution would not only have been unnecessary, but even counterproductive. The suspected infringement would, in fact, have been of a much more significant nature and magnitude. It would have thus been logical for the Commission to search actively for possible links between the two cases.

74. Moreover, at the hearing, the Commission explained that, initially, it had decided not to investigate the second complaint since it seemed to concern conduct with a very limited impact. Yet, it is difficult to reconcile this statement with the Commission's argument that, at the time, it could not rule out the possibility that Deutsche Bahn was deploying a far-reaching strategy in order to provide its competitors with discriminatory access to its infrastructures.

75. In any event, it is clear to me that, had the Commission really suspected such a wide-ranging strategy on the part of Deutsche Bahn, it should have made a reference to that effect in the first inspection decision. Even after the DUSS documents had been discovered during the first inspection, no reference to such a suspected strategy was made in either the second or the third inspection decision. This seems, on the one hand, squarely to contradict the Commission's arguments and, on the other hand, to cast further doubt on the lawfulness of the challenged decisions.

76. Lastly, in the course of answering another question at the hearing, the Commission conceded that the search for information on the first suspected infringement was not necessarily made more effective by the fact that its staff had been briefed beforehand on the subject-matter of the second suspected infringement.

77. Given the evident lack of any clear relationship between the two suspected infringements, and the acknowledgment by the Commission that the information given to its staff regarding the second suspected infringement was not truly useful for the search for information on the first one, the inevitable conclusion, it seems to me, is that there must have been another reason behind the briefing of the Commission staff. The only plausible explanation, to my mind, is that information on the DUSS suspected infringement was given to the Commission staff so that they could 'keep their eyes peeled' for evidence related to the second complaint.

78. Indeed, it is by no means certain that the Commission staff — without that prior information — would have been able to understand the meaning of the DUSS documents. All the more so, since the suspected infringement in that case did not consist in a typical and easily identifiable infringement of Article 101 TFEU (such as may be the case with documents which relate to hard core cartels), but in conduct whose possible anti-competitive effects can only be appreciated with the aid of an analysis of a certain complexity. [40]

79. Essentially, this must lead to the conclusion that, deliberately or through negligence, the Commission circumvented the rules laid down in Regulation No 1/2003 to govern inspections, using an inspection to look for documents which concerned another, *unrelated*, matter.

40 — See, to that effect, in particular paragraphs 15 and 22 of the judgment under appeal.

80. In this context, it is almost unnecessary to point out that when, as in the case under consideration, the Commission has been informed of another, different and distinct, alleged infringement of the competition rules by some companies which are already under investigation, it is free to investigate both lines of conduct at the same time. In particular, there is nothing to prevent the Commission, if the relevant conditions are met, from adopting two inspection decisions addressed to the same company, each in the framework of a different investigation, to be carried out at the same time. Yet, if it intends to do this, the Commission should do so openly, following the procedures laid down in Regulation No 1/2003, so that all the safeguards and guarantees provided for the benefit of the undertakings subject to inspection are duly respected.

81. In the present case, the Commission had, initially, deliberately decided not to adopt two distinct decisions at the same time, and to investigate formally only one alleged infringement. And yet the Commission told its staff, explicitly or implicitly, to pay attention specifically to information that related to a second and different suspected infringement.

82. This is clearly not the type of conduct which the Court meant to allow under its *Dow Benelux* case-law. There is, in my view, no difference between a case in which the Commission launches an inspection without a valid decision and one in which the Commission proceeds on the basis of a valid decision, but searches for information relating to another investigation, not covered by that decision.

83. In conclusion, the circumvention of the provisions laid down in Article 20(4) of Regulation No 1/2003 did not give rise only to a breach of the appellants' rights of defence but also, more importantly, to a manifest breach of the right to the inviolability of private premises. For this reason, the third ground of appeal must be upheld and the judgment of the General Court set aside to the extent that it rejected the appellants' plea at first instance alleging the irregularity of the first inspection.

E – *The fourth ground of appeal*

84. By the fourth ground of appeal, the appellants allege that the General Court erred in law in placing on the appellants the burden of proving that the DUSS documents had not been 'found by chance'. The appellants claim that the General Court should instead have directed the Commission to prove that the conditions of the *Dow Benelux* case-law were met.

85. The Commission takes the view that the present ground of appeal is inadmissible and unfounded. Regarding its admissibility, the Commission contends that the appellants are, in essence, asking the Court to review the General Court's assessment of the evidence put forward by the appellants at first instance with a view to establishing that the DUSS documents were not found by chance. The General Court found that that evidence did not support the arguments put forward by the appellants and that evaluation cannot form the object of an appeal.

86. As regards the substance of the ground of appeal under consideration, the Commission contends that it was by no means impossible for the appellants to provide evidence in support of their allegation that, during the first inspection, the Commission had also searched for documents concerning the second alleged infringement. Indeed, the appellants had submitted at first instance a body of documentary evidence which supposedly proved the Commission's illegal conduct but which the General Court — correctly, in the Commission's view — did not find persuasive.

87. Evidently, the present ground of appeal also concerns the dismissal, by the General Court, of the appellants' plea concerning the Commission's use of the DUSS documents found during the first inspection as a basis for the adoption of the second and third inspection decisions. Consequently, if the Court agrees with my assessment of the third ground of appeal, there will be no need also to examine the fourth ground of appeal. Accordingly, I will only briefly examine that ground of appeal for reasons of completeness, or in the event that the Court considers the third ground of appeal to be inadmissible or unfounded.

1. Admissibility

88. At the outset, I am not persuaded by the Commission's arguments that this plea is inadmissible. It seems to me that the appellants do not criticise the evaluation, made by the General Court, of the evidence produced in support of their allegation, but rather the fact that the burden of proving the true intention of the Commission had been placed upon them in the first place. It is therefore the allocation of the burden of proof which constitutes the problem raised by the appellants: clearly, this is an issue of law and, as such, open to review by the Court on appeal.

2. Substance

89. In substance, this ground of appeal raises the issue as to whether, in proceedings before the EU Courts, it is for the undertakings to prove that documents found in the context of an inspection, but unrelated to the stated purpose of that inspection, have been unlawfully used by the Commission in another context, or *vice versa*.

90. From the outset, it seems useful to stress once again that the powers enjoyed by the Commission staff in the course of an inspection under Article 20(1) of Regulation No 1/2003 are framed by the inspection decision which identifies the subject-matter of the inspection. Yet, during an inspection, the Commission must be able to examine all the documents related to the business which it may reasonably believe to be a source of information relevant to the investigation. This means that, inevitably, the Commission staff peruse a large number of documents which may fall outside the subject-matter of the inspection in order to verify whether or not they are relevant. Nevertheless the Commission staff are allowed to take copies only of those documents deemed to be relevant to the investigation. [41]

91. Thus, so long as the Commission takes copies only of documents covered by the inspection decision, its conduct cannot but be presumed valid. In such cases, it would be for the undertaking under inspection to prove before the Court the invalidity of the inspection decision (by directly challenging that decision before the EU Courts) or the unlawfulness of the manner in which the inspection was carried out (usually, in the context of an action for the annulment of the final decision adopted by the Commission on the suspected infringement). [42]

92. On the other hand, any use of information which falls outside the scope of the inspection decision is, in principle, barred. As was clarified in *Dow Benelux*, however, documents found by chance during an inspection and not related to it can still be used to start a new investigation.

41 — See, to that effect, Opinion of Advocate General Kokott in *Nexans and Nexans France* v *Commission*, EU:C:2014:223, point 62 and the case-law cited.

42 — See judgments in *Dow Benelux*, EU:C:1989:379, paragraph 49, and *Nexans France and Nexans* v *Commission*, T-135/09, EU:T:2012:596, paragraph 115 et seq. and the case-law cited.

93. So, if the Commission makes use of documents or information found during an inspection and not covered by the inspection decision, it will be for the Commission — in the case of legal disputes — to invoke an exception to the abovementioned general principle, such as the exception deriving from the judgment in *Dow Benelux*, and to demonstrate to the Court that the conditions for the application of that exception are fulfilled. [43]

94. In normal circumstances, unless there are factors which indicate the opposite, the evidentiary burden upon the Commission is very easily discharged. Indeed, there is generally no reason why the Commission should be interested in reviewing and collecting information that is extraneous to the ongoing investigation. It can thus be considered that, usually, a brief explanation as to how the extraneous information was found should suffice to make a *prima facie* case that the Commission did not err in law during its search. It would then fall on the undertaking concerned to convince the EU Courts that the documents in question were actually targeted from the very beginning. In other words, I am of the view that, save where there is factual evidence to the contrary, the Court can assume that the Commission's conduct comes within the scope of the rule established in *Dow Benelux*.

95. However, in the present case the situation is different. It is common ground between the parties that: (i) the DUSS documents discovered by the Commission during the first inspection do not relate to the subject-matter of that inspection; (ii) those documents were used as a basis for the adoption of two decisions ordering two subsequent inspections which concerned a different possible infringement; and (iii) the Commission staff was briefed on the subject-matter of the second complaint immediately before the first inspection took place.

96. In those circumstances, I agree with the appellants that, in principle, it was for the Commission, which invoked the *Dow Benelux* exception, to show that the conditions for the application of that exception were fulfilled.

97. None the less, that issue is quite irrelevant in the present case. Indeed, in my opinion, the General Court erred at an earlier stage of its reasoning in the judgment under appeal. As was explained above, the *Dow Benelux* exception applies only to discoveries which are truly fortuitous: that is to say, information found while conducting a search, in good faith, for information which relates to the subject-matter of the inspection. Contrariwise, that exception cannot apply to cases in which discoveries of documents are the fruit of an illegal search. In the case under consideration, as has already been explained above, the first inspection constituted an illegal search to the extent that the Commission staff was expressly or implicitly solicited to look out for documents falling outside the scope of the inspection as delimited in the first inspection decision. The first inspection was, in other words, unlawful to the extent that it concerned a search for the DUSS documents.

98. Thus, the General Court's error does not relate to the question whether it was for the Commission to prove that the *Dow Benelux* criteria were met or whether it was for the appellants to disprove it. The error made was more radical. In the circumstances of the present case, the question of the allocation of the burden of proof does not even arise. Had the General Court drawn the correct inferences from the fact that the Commission had conducted an illegal search in relation to the DUSS documents, no additional evidence would have been required from the appellants to prove that there had been a breach of their rights of defence and right to privacy. Likewise, no evidence from the Commission could have proved that the documents had been found by chance, hence lawfully.

99. For this reason, I believe that the fourth ground of appeal is also well founded.

43 — See, by analogy, judgments in *Commission* v *France*, C-24/00, EU:C:2004:70, paragraph 53, and *Commission* v *Italy*, 199/85, EU:C:1987:115, paragraph 14.

VI – Consequences of the assessment

100. Under the first paragraph of Article 61 of the Statute of the Court of Justice, the Court is to set aside the judgment of the General Court if the appeal is well founded. Where the proceedings so permit, it may itself give final judgment in the matter. It may also refer the case back to the General Court.

101. I have concluded that the third and fourth grounds of appeal should be upheld. As a consequence, the judgment under appeal should be set aside to the extent that, in paragraphs 115 to 165, it rejected the appellants' plea at first instance regarding the infringement of their rights of defence during the first inspection.

102. In the light of the facts available and the exchange of views before the General Court and before this Court, I consider it possible for the Court to give final judgment on this matter.

103. In their application before the General Court, the appellants had requested, inter alia, the annulment of the Commission's second and third inspection decisions as being based on information unlawfully obtained during the first inspection.

104. For the reasons explained above, I came to the conclusion that the appellants' rights of defence and their right to the inviolability of private premises were breached because of an infringement of the rules set out in Regulation No 1/2003. In these circumstances, the crucial question is therefore the following: is the breach of the appellants' rights of defence and their right to the inviolability of private premises a sufficient basis for the annulment of the second and third inspection decisions?

105. For the reasons explained below, the answer to that question must, in my view, be in the affirmative.

106. In the first place, as has already been mentioned, the Court has clarified that, in the event that an inspection decision is annulled by the EU Courts, the Commission is prevented from using, for the purposes of proceeding in respect of an infringement of the EU competition rules, any documents or evidence which it might have obtained in the course of that investigation. Otherwise, the decision might, in so far as it was based on such evidence, be annulled by the EU judicature. [44]

107. The principle devolving from that case-law is of paramount importance since it ensures that the system provided for in Regulation No 1/2003 is consistent with the abovementioned case-law of the ECtHR on Article 8 of the ECHR. The Strasbourg Court has, in fact, consistently held that an interference with the right to inviolability of private premises is justifiable, inter alia, where legislation provides for 'safeguards against abuses' on the part of the public authorities. These safeguards may consist, inter alia, in rules which provide for the restitution or destruction of documents seized or copied illegally, or prohibitions on the use, to another end, of the information collected. [45]

44 — See judgment in *Roquette Frères*, EU:C:2002:603, paragraph 49 and the case-law cited.

45 — See *Bernh Larsen Holding AS and Others v. Norway*, cited above in footnote 18, §§ 171 and 172; *Klass and Others v. Germany*, 6 September 1978, § 47 and 52, Series A no. 28; *Z v. Finland*, 25 February 1997, § 103, *Reports of Judgments and Decisions* 1997-I; and *Delta Pekárny AS v. the Czech Republic*, cited above in footnote 22, § 92.

108. In the second place, I observe that Article 28 of Regulation No 1/2003 is formulated in very broad terms. In particular, the verb employed ('to use') has a comprehensive meaning. The rule codified in that provision is, arguably, a general bar on any use of information gathered during an inspection in the context of different investigations, unless a specific exception applies. This is, after all, logical since that principle is of the greatest significance, intended to protect not only the professional secrecy of the undertakings concerned but also, and more importantly, the rights of defence of those undertakings. [46]

109. I thus deduce that the Commission is not only precluded from referring to that information as evidence of an infringement but, more generally, it cannot use that information as the basis for any other decision which is unfavourable or prejudicial to the undertaking concerned (or to any other undertaking, for that matter). I see no reason why that prohibition should not also cover decisions ordering undertakings to submit to an inspection under Article 20(4) of Regulation No 1/2003.

110. In the third place, I observe that, in paragraphs 130 to 134 of the judgment under appeal, the General Court found that the information gathered in the course of the first inspection was 'capable of affecting the legality of the second and third inspection decisions'. The fact that the Commission had previously received a complaint on an alleged infringement committed by DUSS was — correctly in my view — dismissed by the General Court as irrelevant, to the extent that the triggering event for the second and third inspections was the information found during the first inspection. The text of the second and third inspection decisions, in fact, made reference (expressly in the third decision and implicitly in the second decision) to the information found during the first inspection. The Commission has not contested the General Court's findings on this point.

111. Furthermore, I note that, in its submissions before the General Court, the Commission acknowledged that the documents found during the first inspection added important information to that already existing in the Commission's files. In particular, the Commission explicitly stated that the DUSS documents appeared to indicate a possible infringement whose nature and scope appeared more significant than that which formed the subject-matter of the complaint previously received. The limited nature of the information held on the second suspected infringement before the first inspection took place has also been stressed by the Commission at the hearing.

112. The possibility cannot be discounted, therefore, that the information that the Commission had at its disposal before the DUSS documents were found was not sufficient to permit an inspection under Article 20(4) of Regulation No 1/2003. In any event, even if the Commission had had sufficient evidence to order an *ad hoc* inspection regarding the second suspected infringement, I do not see how that would be enough to remedy the consequences flowing from a manifest breach of Article 20(4) of Regulation No 1/2003.

113. In the fourth place, it is irrelevant that some of the DUSS documents were photocopied only after the second decision had been notified to the appellants. To the extent that the Commission found those documents during the first inspection and put them aside for future copying, it cannot be claimed that those documents were obtained afresh on the basis of a new decision.

114. Those documents were discovered during an inspection which was unlawful as concerns the search for information relating to the second suspected infringement. As such, this procedural error cannot be 'cured' by the adoption of a new inspection decision (or, arguably, by issuing a request for information pursuant to Article 18 of Regulation No 1/2003).

46 — See judgment in *Dow Benelux*, EU:C:1989:379, paragraph 18.

115. The contrary view would basically deprive the prohibition set out in Article 28 of Regulation No 1/2003 of any effectiveness. The Commission would, in practice, be able to disregard the procedural rules laid down in the regulation, including that in Article 20(4) thereof, and circumvent the prohibition under Article 28, since any document found illegally could very easily be 'regularised'. Quite apart from raising issues of compatibility with the aforementioned case-law of the ECtHR, that cannot reasonably be read into Regulation No 1/2003.

116. It is true that, in *PVC*, the Court held that, simply because the Commission once obtains documents in a given matter does not confer such absolute protection that those documents cannot be requested under statutory powers in another matter and used as evidence. As a consequence, the Court found that since the Commission had obtained the documents contested in that case anew on the basis of authorisations or decisions, and had used them for the purpose indicated in those authorisations or decisions, it had duly observed the rights of defence afforded to the undertakings in question. [47]

117. However, the facts of that case are markedly different from those of the case under consideration. Indeed, in *PVC*, none of the parties had argued that, during its first inspection, the Commission had indulged in any wrongdoing — unlike in the present case. Moreover, a new copy of the documents in question had been voluntarily provided by the undertakings concerned, following a request by the Commission. [48] Contrariwise, in the present proceedings, the Commission has relied on the copy of the very documents that it had obtained unlawfully in the course of the first inspection.

118. The approach adopted by the General Court in *PVC* is, to my mind, reasonable. [49] Once again, the underlying aim of Article 28 is to avoid circumvention of the rules by the Commission, in order to protect the rights of the undertakings subject to an investigation. It would be an over-extension of the reach of Article 28 to consider that the acquisition of a document in the context of an investigation may bar any future use of such a document in another context — even if no procedural rule is circumvented and the rights of defence of the undertakings concerned are duly respected. To give an example, there would be no reason to prohibit use of an incriminating document, found by the Commission in the course of an inspection or obtained following a request for information relating to another infringement, in a subsequent investigation — provided that a copy of the same document is subsequently found or obtained, in the context of that new investigation, in compliance with the rules laid down in Regulation No 1/2003.

119. That is not, however, the situation in the case before us.

120. In the fifth and final place, it is for me equally irrelevant that — as the Commission stresses in its observations — the appellants' representatives who were 'shadowing' the Commission staff during the inspection did not raise any objection at the time, [50] or ask to record a formal complaint in the report prepared by the Commission staff at the end of the inspection.

121. First, no rule in Regulation No 1/2003 or in the Rules of Procedure of the Court of Justice requires undertakings to raise immediately any possible issue at that stage, failing which the issue cannot be examined by the EU Courts. The mere silence of the undertaking at that moment cannot be said to imply acceptance of potentially unlawful conduct on the part of the Commission. Second, it

47 — See judgment in *PVC*, EU:C:2002:582, paragraphs 294 to 307.

48 — See, in particular, paragraphs 470 and 471 of the judgment at first instance: judgment in *PVC*, T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80.

49 — Ibid., paragraph 477.

50 — Moreover, the Commission's assertions in this respect do not seem to be correct as documents attached to the proceedings indicate that several of the appellants' lawyers initially did object to the search for DUSS-related documents.

may be difficult for the undertaking's representatives to discern immediately a possible breach of the procedural rules by the Commission. The Commission staff is neither required nor supposed to give any specific explanation or justification of, for example, the type of documents or material sought, or the reasons behind the search of a specific office.

122. In the light of the foregoing, I conclude that, since documents obtained in breach of the rules laid down in Regulation No 1/2003 were used by the Commission as a basis for the adoption of the second and third inspection decisions, those decisions must be annulled.

VII – Costs

123. If the Court agrees with my assessment of the appeal, then, in accordance with Articles 137, 138, 140 and 184 of the Rules of Procedure, the appellants — having been successful in only two of the four grounds of appeal put forward — should be ordered to bear half of their own costs and to pay half of the costs incurred by the Commission in connection with this appeal. The Commission, for its part, should pay half of the costs incurred by the appellants and bear half of its own costs relating to this appeal.

124. With regard to the costs at first instance, the appellants have, on the one hand, been successful as concerns the annulment of the second and third inspection decisions. On the other hand, the validity of the first inspection decision has been upheld. Therefore, the Commission should pay the costs relating to Cases T-290/11 and T-521/11, while the appellants should pay the costs relating to Case T-289/11.

125. ESA and the Spanish Government, as interveners, should bear their own costs.

VIII – Conclusion

126. In the light of the above considerations, I accordingly conclude that the Court should:

— set aside the judgment in Joined Cases T-289/11, T-290/11 and T-521/11 *Deutsche Bahn and Others* v *Commission* of 6 September 2013, to the extent that the General Court rejected the plea alleging infringement of the appellants' rights of defence in view of the irregularities affecting the conduct of the first inspection;

— annul Commission Decisions C(2011) 2365 of 30 March 2011 and C(2011) 5230 of 14 July 2011;

— dismiss the appeals for the remainder;

— order the appellants to bear half of their own costs and to pay half of the Commission's costs relating to this appeal and the Commission to bear half of its own costs and to pay half of the appellants' costs relating to this appeal;

— order the Commission to pay the costs relating to Cases T-290/11 and T-521/11, and the appellants to pay the costs relating to Case T-289/11;

— order the Spanish Government and the EFTA Surveillance Authority to bear their own costs.