Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

20 January 2016*

(Reference for a preliminary ruling — Competition policy — Article 101 TFEU — Regulation (EC) No 1/2003 — International freight forwarding sector — National competition authorities — Legal status of instruments of the European Competition Network — Model Leniency Programme of that network — Application for immunity submitted to the Commission — Summary application for immunity submitted to national competition authorities — Relationship between those two applications)

In Case C-428/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 1 April 2014, received at the Court on 18 September 2014, in the proceedings

DHL Express (Italy) Srl,

DHL Global Forwarding (Italy) SpA

v

Autorità Garante della Concorrenza e del Mercato,

interveners:

Schenker Italiana SpA,

Agility Logistics Srl,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the First Chamber, acting as President of the Second Chamber, J.L. da Cruz Vilaça (Rapporteur), A. Arabadjiev, C. Lycourgos and J.-C. Bonichot, Judges,

Advocate General: M. Wathelet,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 9 July 2015,

* Language of the case: Italian.

after considering the observations submitted on behalf of:

— DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA, by M. Siragusa and G. Rizza, avvocati,

— Schenker Italiana SpA, by G.L. Zampa, G. Barone et A. Di Giò, avvocati,

— Agility Logistics Srl, by A. Lirosi, M. Padellaro and A. Pera, avvocati,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Fiorentino and P. Gentili, avvocati dello Stato,

— the German Government, by T. Henze and A. Lippstreu, acting as Agents,

— the French Government, by D. Colas and J. Bousin, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the United Kingdom Government, by V. Kaye, acting as Agent, assisted by D. Beard QC, and V. Wakefield, Barrister,

— the European Commission, by L. Malferrari, G. Meeßen and T. Vecchi, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 101 TFEU, Article 4(3) TEU and Article 11 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).

2 The request has been made in proceedings between DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA (together, 'DHL'), on the one hand, and the Autorità Garante della Concorrenza e del Mercato (Authority responsible for competition compliance and enforcement of market rules, 'the AGCM'), on the other, concerning the AGCM's decision to impose fines on DHL for participating in a cartel in the sector of international road freight forwarding to and from Italy, in breach of Article 101 TFEU ('the decision at issue').

The legal framework

EU law

3 Recital 15 of Regulation No 1/2003 reads:

'The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States.'

4 Article 11 of Regulation No 1/2003, headed ‘Cooperation between the Commission and the competition authorities of the Member States’, provides:

‘1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

3. The competition authorities of the Member States shall, when acting under Article [101 TFEU] or Article [102 TFEU], inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption Regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article [101 TFEU] or Article [102 TFEU].

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles [101 TFEU] and [102 TFEU]. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.’

5 Article 35(1) of Regulation No 1/2003 provides:

‘The Member States shall designate the competition authority or authorities responsible for the application of Articles [101 TFEU] and [102 TFEU] in such a way that the provisions of this regulation are effectively complied with. ... The authorities designated may include courts.’

6 Paragraph 1 of the Commission Notice on Cooperation with the Network of Competition Authorities (OJ 2004, C 101, p. 43, ‘the Notice on Cooperation’) states:

‘... Regulation ... No 1/2003 ... creates a system of parallel competences in which the Commission and the Member States’ competition authorities ... can apply Article [101 TFEU] and Article [102 TFEU]. Together the [national competition authorities] and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities

in cases where Articles [101 TFEU] and [102 TFEU] are applied and is the basis for the creation and maintenance of a common competition culture in Europe. The network is called "European Competition Network" (ECN).'

7 In view of this system of parallel competences, in which all the competition authorities have the power to apply Article 101 TFEU, paragraphs 8 to 15 of the Notice on Cooperation set out the criteria for determining which authorities are 'well placed' to deal with a case. Thus, in accordance with paragraph 14 of that notice, 'the Commission is particularly well placed if one or several agreement(s) or practice(s) ... have effects on competition in more than three Member States ...'.

8 According to paragraph 38 of that notice:

'In the absence of a European Union-wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. It is therefore in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply Article [101 TFEU] in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question. In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to file leniency applications with the relevant authorities simultaneously. It is for the applicant to take the steps which it considers appropriate to protect its position with respect to possible proceedings by these authorities.'

9 In the context of the ECN, a Model Leniency Programme was adopted in 2006 ('the ECN Model Leniency Programme'). That programme, which was not published in the *Official Journal of the European Union*, is available only on the Commission's website. It was revised in November 2012, after the events at issue in the main proceedings and, consequently, after the decision of the AGCM which is the subject-matter of the action before referring court.

10 Paragraph 3 of the ECN Model Leniency Programme states:

'The ECN Model [Leniency] Programme sets out a framework for rewarding the cooperation of undertakings which are party to agreements and practices falling within its scope. The ECN members commit to using their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model [Leniency] Programme. The ECN Model [Leniency] Programme does not prevent a CA from adopting a more favourable approach towards applicants within its programme.'

11 According to Paragraph 5 of that programme, concerning 'Type 1A' immunity from fines:

'The [competition authority] will grant an undertaking immunity from any fine which would otherwise have been imposed provided:

(a) The undertaking is the first to submit evidence which in the [competition authority]'s view, at the time it evaluates the application, will enable the [competition authority] to carry out targeted inspections in connection with an alleged cartel.

(b) The [competition authority] did not, at the time of the application, already have sufficient evidence to adopt an inspection decision/seek a court warrant for an inspection or had not already carried out an inspection in connection with the alleged cartel arrangement; and

(c) The conditions attached to leniency are met.'

12 Paragraph 22 of the ECN Model Leniency Programme provides that, '[i]n cases where the Commission is "particularly well placed" to deal with a case in accordance with paragraph 14 of the ... Notice [on Cooperation], the applicant that has or is in the process of filing an application for immunity with the Commission may file summary applications with any [national competition authorities] which the applicant considers might be "well placed" to act under the ... Notice [on Cooperation]. Summary applications should include a short description of the following:

...

— The nature of the alleged cartel conduct;

— ..., and

— Information on its other past or possible future leniency applications in relation to the alleged cartel.'

13 Paragraph 24 of the ECN Model Leniency Programme states:

'Should [a national competition authority] having received a summary application decide to request specific further information, the applicant should provide such information promptly. Should [a national competition authority] decide to act upon the case, it will determine a period of time within which the applicant must make a full submission of all relevant evidence and information required to meet the threshold. If the applicant submits such information within the set period, the information provided will be deemed to have been submitted on the date when the summary application was made.'

14 Explanatory Note 7 to the ECN Mode Leniency Programme states:

'The purpose of the ECN Model [Leniency] Programme is to address the issue of multiple parallel applications and to provide a greater degree of predictability for potential applicants. ... [I]t sets out the features of a uniform type of short form applications (so-called summary applications) designed to alleviate the burden on both undertakings and [competition authorities] associated with multiple filing in large, cross-border cartel cases.'

Italian law

15 On 15 February 2007, the AGCM adopted a Notice on the non-imposition or reduction of penalties under Article 15 of Law No 287/90 (Communicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'articolo 15 della legge 10 ottobre 1990, n. 287), which incorporates the Italian leniency programme ('the national leniency programme').

16 Article 16 of the national leniency programme, entitled 'Summary application', provides as follows:

'In cases where the Commission is best placed to deal with a case and conduct the procedure, an undertaking which has submitted or is preparing to submit to the Commission an application for non-imposition of penalties may submit to the [AGCM] a similar application for leniency, drafted in "summary" form, where it considers that the [AGCM] is also in a position to take action in the matter. Pursuant to [paragraph] 14 of the [Notice on Cooperation], the Commission is best placed where one or more agreements or practices, including networks of agreements or of similar practices, have an impact on competition in more than three Member States.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

17 On 5 June 2007, DHL submitted to the European Commission an application for immunity from fines concerning several infringements of EU competition law in the sector of international freight forwarding. On 24 September 2007, the Commission granted DHL conditional immunity for the entire international forwarding sector, that is to say, as regards maritime, air and road transit. On 20 December 2007, DHL brought to the attention of the Commission certain information concerning the conduct of undertakings in the international road freight forwarding sector in Italy. In June 2008, the Commission decided to pursue only the part of the cartel concerning international air freight forwarding services, leaving the national competition authorities the possibility of pursuing the infringements in relation to the sea and road freight forwarding services.

18 In parallel, on 12 July 2007, DHL submitted to the AGCM a summary application for immunity under the national leniency programme. In that application, DHL provided information concerning unlawful conduct in the international freight forwarding and transport market. According to the AGCM, that application concerned only the international sea and air freight transport sectors, and did not concern the road transport sector. However, according to DHL, that summary application concerned illegal conduct observed throughout the international freight forwarding and transport market. DHL stated that, whilst its application of 12 July 2007 did not give concrete and specific examples of conduct observed in relation to road freight forwarding, that was merely because such conduct had not yet been discovered.

19 On 23 June 2008, DHL submitted an additional summary application for immunity to the AGCM, supplementing the application initially submitted on 12 July 2007, in order to expressly extend that application to the international road freight forwarding sector. In that additional application, DHL stated that 'the present declaration merely constitutes, for all purposes and effects, a supplement to the application submitted on 12 July 2007, in so far as the additional conduct to which it relates does not amount to a separate infringement not covered by the original declaration and is nothing more than a new manifestation of infringements already reported and, as such, the Commission took account of them for the purposes of the leniency granted to the undertaking'.

20 In the meantime, on 5 November 2007, Deutsche Bahn AG submitted to the Commission — on its own behalf and on behalf, in particular, of Schenker Italiana SpA ('Schenker') — a first leniency application concerning sea freight forwarding and, a second application, on 19 November 2007, concerning road freight forwarding. In addition, on 12 December 2007, Schenker submitted a summary application for leniency to the AGCM, providing information on road freight forwarding in Italy.

21 On 20 November 2007, Agility Logistics Srl ('Agility') submitted to the Commission a summary application for reduction of the fine, in relation to infringements on the international freight forwarding and transport market. On 12 May 2008, Agility Logistics International submitted a summary application for leniency to the AGCM, on its own behalf and on behalf of its subsidiary Agility, concerning the Italian cartel in relation to road freight forwarding.

22 On 18 November 2009, the AGCM opened a procedure concerning possible infringements of Article 101 TFEU in the international freight transport sector.

23 In the decision at issue, adopted on 15 June 2011, the AGCM concluded that several undertakings, including DHL, Schenker and Agility had, in breach of Article 101 TFEU, taken part in a cartel in the international road freight forwarding sector affecting operations to and from Italy.

24 In that decision, the AGCM recognised that Schenker was the first company to have applied for immunity from fines in Italy for road freight forwarding. Under the national leniency programme, no fine was imposed on that company. DHL and Agility, however, were ordered to pay fines, which were

subsequently reduced to 49% and 50%, respectively, of the initial amounts. The AGCM also considered that, in its application of 12 July 2007, DHL had requested immunity from fines only for air freight and sea freight forwarding, the application in respect of road freight forwarding having been filed by DHL only on 23 June 2008.

25 DHL brought an action for partial annulment of the decision at issue before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court for Lazio, Italy) on the ground that it should have been accorded the first place in the queue for the national leniency programme and therefore immunity from fines. According to DHL, the principles of EU law require a national authority which receives a summary leniency application to assess it taking into account the main application for immunity which that company submitted to the Commission. Moreover, DHL submitted that the summary applications submitted by Schenker and Agility to the AGCM were inadmissible.

26 The Tribunale amministrativo regionale per il Lazio (Regional Administrative Court for Lazio, Italy) rejected the action brought by DHL on the basis that, as a matter of principle, the different leniency programmes and the applications in relation to those programmes were autonomous and independent.

27 DHL lodged an appeal before the referring court against the judgment at first instance. That company submits that the decision at issue does not respect the principles set out, inter alia, in the Notice on Cooperation and in the ECN Model Leniency Programme. According to DHL, the rules and instruments of the ECN are binding on the AGCM, since it is a national competition authority which forms part of that network.

28 In those circumstances, the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'On a proper construction of Article 101 TFEU, Article 4(3) TEU and Article 11 of Regulation (EC) No 1/2003, does it follow that:

(i) national competition authorities may not, in their own implementation practices, deviate from the instruments defined and adopted by the ECN and, in particular, from the ECN Model Leniency Programme, in a case such as that at issue before the referring court, without running counter to the findings of the Court of Justice of the European Union in paragraphs 21 and 22 of the judgment of 14 June 2011 in *Pfleiderer* (Case C-360/09, EU:C:2011:389)?

(ii) a legal link exists between the main application for immunity that an undertaking has submitted or is about to submit to the Commission and the summary application for immunity submitted by that undertaking to a national competition authority in respect of the same cartel, with the effect that — notwithstanding the provision made under paragraph 38 of the Commission Notice on Cooperation within the Network of Competition Authorities — the national competition authority is obliged, under paragraph 22 of the 2006 ECN Model Leniency Programme (now paragraph 24 according to the numbering of the 2012 ECN Model Leniency Programme) and the related Explanatory Note 45 (now Explanatory Note 49 according to the numbering of the 2012 Model Leniency Programme), to take the following steps:

— to assess the summary application in the light of the main application for immunity, examining whether the summary application accurately reflects the content of the main application; and

— failing which — if the national competition authority believes that the summary application received is narrower in material scope than the main application submitted by the same undertaking, on the basis of which the Commission has granted conditional immunity to that undertaking — to contact the Commission, or that undertaking, in order to ascertain whether,

following the submission of the summary application, that undertaking has identified, through its internal investigations, actual and specific examples of conduct in the sector purportedly covered by the main application for immunity but not by the summary application?

(iii) pursuant to paragraph 3 and paragraphs 22 to 24 of the 2006 ECN Model Leniency Programme and Explanatory Notes 8, 41, 45 and 46 and taking account of the amendment introduced by paragraphs 24 to 26 of the 2012 ECN Model Leniency Programme and Explanatory Notes 44 and 49, a national competition authority which at the material time applied a leniency programme as described in the main proceedings could, with regard to a given secret cartel in respect of which the first undertaking has submitted or was about to submit to the Commission a main application for immunity, legitimately take receipt of:

— only a summary application for immunity from that undertaking; or

— also additional summary applications for immunity from various undertakings that had initially submitted to the Commission 'unacceptable' applications for immunity or applications for a reduction in the fine, in particular where the main applications submitted by the latter undertakings were made after the first undertaking was granted conditional immunity?'

Consideration of the questions referred

The first question:

29 By its first question, the referring court asks, in essence, whether EU law, in particular Article 101 TFEU and Regulation No 1/2003, must be interpreted as meaning that the instruments adopted in the context of the ECN, in particular the ECN Model Leniency Programme, are binding on national competition authorities.

30 It is settled case-law that the cooperation mechanism between the Commission and the national competition authorities which was set up in Chapter IV of Regulation No 1/2003 is intended to ensure the coherent application of the competition rules in the Member States (see, to that effect, judgments in *X*, C-429/07, EU:C:2009:359, paragraph 20, and in *Tele2 Polska*, C-375/09, EU:C:2011:270, paragraph 26).

31 According to recital 15 of Regulation No 1/2003, the Commission and the competition authorities of the Member States should form together a network of public authorities applying the EU competition rules in close cooperation. In that respect, paragraph 1 of the Notice on Cooperation states that that network is a forum for discussion and cooperation in the application and enforcement of EU competition policy.

32 It follows that the ECN, being intended to encourage discussion and cooperation in the implementation of competition policy, does not have the power to adopt legally binding rules.

33 In that respect, the Court has already held that neither the Commission Notice on Cooperation, nor the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17; 'the Leniency Notice') is binding on Member States (see judgment in *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 21).

34 Moreover, the Notice on Cooperation and the Leniency Notice, adopted in the context of the ECN, were published in 2004 and 2006, respectively, in the 'C' series of the *Official Journal of the European Union*, which, by contrast with the 'L' series of the Official Journal, is not intended for the publication

of legally binding measures, but only of information, recommendations and opinions concerning the European Union (judgments in *Polska Telefonia Cyfrowa*, C-410/09, EU:C:2011:294, paragraph 35, and *Expedia*, C-226/11, EU:C:2012:795, paragraph 30).

35 It follows that those notices are not capable of creating obligations on Member States.

36 As regards, in particular, the leniency programme applicable, within the European Union, to undertakings that cooperate with the Commission or with the national competition authorities in order to uncover unlawful cartels, it must be noted that neither the provisions of the FEU Treaty on competition nor Regulation No 1/2003 lay down common rules on leniency (judgment in *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 20). Thus, in the absence of a centralised system, at the EU level, for the receipt and assessment of leniency applications in relation to infringements of Article 101 TFEU, the treatment of such applications sent to a national competition authority is determined by that authority under the national law of the Member State in question.

37 In that respect, it should be pointed out that the Leniency Notice relates only to leniency programmes implemented by the Commission itself (judgment in *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 21).

38 In that context, it must be recalled that the Court has already held that the ECN Model Leniency Programme has no binding effect on the courts and tribunals of the Member States (judgment in *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 22).

39 DHL submits, however, that that case-law concerns only national courts and tribunals and not national competition authorities. According to DHL, the Court's conclusion in *Pfleiderer* (C-360/09, EU:C:2011:389) was solely justified by the fact that the provisions in question did not have direct effect and that, accordingly, national courts could not apply them in civil or administrative disputes.

40 That argument cannot be accepted.

41 First, given that, in accordance with Article 35(1) of Regulation No 1/2003, the Member States may designate courts as national competition authorities, the uniform application of EU law in the Member States would be undermined. The binding effect of the ECN Model Leniency Programme would vary depending on the nature, judicial or administrative, of the national competition authorities of the various Member States.

42 Secondly, the Court has already held that the leniency programme established by the Commission, through its Leniency Notice, is not binding on Member States (judgment in *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 36). That conclusion also applies to the ECN Model Leniency Programme.

43 Furthermore, DHL's argument that the national competition authorities have formally undertaken to respect the principles set out in the Notice on Cooperation does not change the legal status, under EU law, of that notice, nor that of the ENC Model Leniency Programme.

44 In the light of the foregoing, the answer to the first question is that EU law, in particular Article 101 TFEU and Regulation No 1/2003, must be interpreted as meaning that the instruments adopted in the context of the ECN, in particular the ECN Model Leniency Programme, are not binding on national competition authorities.

The second question

45 By its second question, the referring court asks, in the first place, whether EU law, in particular Article 101 TFEU and Regulation No 1/2003, must be interpreted as meaning that there is a legal link between the application for immunity which an undertaking submits or is preparing to submit to the Commission and the summary application submitted to a national competition authority in respect of the same cartel which requires that authority to assess the summary application in the light of the application for immunity, where the summary application accurately reflects the content of the application for immunity submitted to the Commission. In the second place, the referring court asks whether, in the event that the summary application has a more limited material scope than the application for immunity, the national competition authority is required to contact the Commission or the undertaking itself, in order to establish whether that undertaking has found specific examples of unlawful conduct in the sector allegedly covered by the application for immunity, but which is not covered by the summary application.

Admissibility

46 Agility and the French Government argue that the first part of the second question is inadmissible, on the ground, respectively, that it is irrelevant and that it is hypothetical.

47 According to Agility and the French Government, the question that arises in the main proceedings is whether a summary application must be interpreted in the light of the application for immunity submitted to the Commission where those applications do not have the same material scope. By contrast, by the first part of the second question, the referring court asks whether, in the event that the summary application accurately reflects the content of the application for immunity submitted to the Commission, the summary application must be interpreted in the light of that application for immunity.

48 It must be borne in mind in this regard that, according to the Court's settled case-law, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, inter alia, judgments in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 40, and in *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 34).

49 In those circumstances, the Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, judgments in *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 42, and in *Banco Privado Português and Massa Insolvente do Banco Privado Português*, C-667/13, EU:C:2015:151, paragraph 36).

50 That is not the case here.

51 First, it can be seen from the order for reference that, on 5 June 2007, DHL submitted an application for immunity to the Commission concerning several infringements of EU competition law in the international freight forwarding services sector. Secondly, on 12 July 2007, DHL submitted a summary application to the AGCM in relation to unlawful conduct in the market for international road freight forwarding to and from Italy.

52 Since there is disagreement between the AGCM and DHL concerning the material content of the summary application and, consequently, concerning the possible similarities or differences as regards the scope of the applications at issue in the main proceedings, it is not obvious that the response to the first part of the second question would be of no use to the referring court.

53 In those circumstances, the first part of the second question referred must be regarded as admissible.

Substance

54 The leniency system is based on the principle that the competition authorities are to grant immunity from fines to the undertaking that reports its participation in a cartel if it is the first to submit evidence, inter alia, enabling the Commission to find an infringement of Article 101 TFEU.

55 In accordance with paragraph 38 of the Notice on Cooperation, in the absence of a European Union-wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. As noted in paragraph 36 above, the treatment of a leniency application is determined by the law of each Member State.

56 In that respect, paragraph 1 of the ECN Model Leniency Programme states that it is in the interest of undertakings to apply for leniency to all competition authorities which have competence to apply Article 101 of the FEU Treaty in the territory which is affected by the infringement in question and which may be considered well placed to act against that infringement.

57 It should also be pointed out that the national competition authorities are free to adopt leniency programmes and each of those programmes is autonomous, not only in respect of other national programmes, but also in respect of the EU leniency programme.

58 The coexistence and autonomy that thus characterise the relationships between the EU leniency programme and those of the Member States are a reflection of the system of parallel competence between the Commission and national competition authorities established by Regulation No 1/2003.

59 It follows that, in the case of a cartel the anticompetitive effects of which are liable to manifest themselves in several Member States and, consequently, may give rise to the intervention of various national competition authorities, as well as the Commission, it is in the interest of an undertaking which wishes to benefit from the leniency system in respect of its participation in the cartel in question to submit applications for immunity, not only to the Commission, but also to the national authorities potentially competent to apply Article 101 TFEU.

60 The autonomy of leniency programmes must necessarily extend to the various applications for immunity submitted to the Commission and to the national competition authorities, given that they constitute an integral part of those programmes. In that respect, it must be noted that the autonomy of those applications follows directly from the fact that there is, at the EU level, no single system of self-reporting for undertakings that participate in cartels in breach of Article 101 TFEU. That autonomy cannot, moreover, be affected by the fact that the various applications concern the same infringement of competition law.

61 The existence, as alleged, of a legal link between the application for immunity submitted to the Commission and the summary application submitted to the national competition authorities, obliging those authorities to assess the summary application in the light of the application for immunity, would call into question the autonomy of the various applications and, consequently, the rationale behind the system of summary applications. That system is based on the principle that there is not, at the EU level, a single leniency application or a ‘main’ application submitted in parallel to ‘secondary’

applications, but rather applications for immunity submitted to the Commission and summary applications submitted to the national competition authorities, the assessment of which is the exclusive responsibility of the authority to which the application in question is addressed.

62 In any event, no provision of EU law in relation to cartels requires national competition authorities to interpret a summary application in the light of an application for immunity submitted to the Commission, irrespective of whether or not that summary application accurately reflects the content of the application submitted to the Commission.

63 As regards any obligation for the national competition authority to contact the Commission or the undertaking which submitted a summary application to it, where the material scope of that summary application is more limited than that of the application for immunity, it must be noted, as the Advocate General pointed out in point 78 of his Opinion, that such an obligation would be liable to attenuate the duty of cooperation of leniency applicants, which is one of the pillars of any leniency programme.

64 In those circumstances, it is for the undertaking applying to national competition authorities for leniency to ensure that any application which it submits is devoid of ambiguities as to its scope, all the more so since, as noted in paragraph 62 above, there is no obligation on the national competition authorities to assess a summary application in the light of an application for immunity submitted to the Commission.

65 That interpretation, based on the obligation of the undertaking to inform the national competition authorities if it becomes apparent that the actual scope of the cartel is different from that which it had declared to those authorities, or from that which it had submitted to the Commission, is the only interpretation capable of ensuring respect for the autonomy of the various leniency systems.

66 If the mere possibility, for the national competition authorities, to contact undertakings from which they have received summary applications in order to obtain further information were replaced with an obligation to contact those undertakings or the Commission where the material scope of those applications is more limited than that of the applications for immunity submitted to the Commission, it would create a hierarchy among the applications concerned, in breach of the decentralised system laid down by Regulation No 1/2003.

67 The answer to the second question must therefore be as follows:

— EU law, in particular Article 101 TFEU and Regulation No 1/2003, must be interpreted as meaning that there is no legal link between the application for immunity which an undertaking submits or is preparing to submit to the Commission and the summary application submitted to a national competition authority in respect of the same cartel, requiring that authority to assess the summary application in the light of the application for immunity. Whether or not the summary application accurately reflects the content of the application for immunity submitted to the Commission is, in that respect, irrelevant.

— Where the summary application submitted to a national competition authority has a more limited material scope than the application for immunity submitted to the Commission, that national authority is not required to contact the Commission or the undertaking itself, in order to establish whether that undertaking has found specific examples of unlawful conduct in the sector allegedly covered by the application for immunity, but which is not covered by the summary application.

The third question

68 By its third question, the referring court asks, in essence, whether EU law, in particular Article 101 TFEU and Regulation No 1/2003, must be interpreted as meaning that, where a first undertaking has submitted an application for immunity to the Commission, only that undertaking may submit a summary application to a national competition authority or if other undertakings, which had submitted an application for a reduction of the fine to the Commission, are also entitled to do so.

Admissibility

69 The Italian and Austrian Governments submit that the third question referred is inadmissible in that, by that question, the referring court asks the Court to interpret national law, in particular the national leniency programme.

70 According to settled case law, it is not for the Court, in preliminary ruling proceedings, to rule upon the compatibility of provisions of national law with EU law or to interpret national legislation or regulations (see, inter alia, judgments in *Jaeger*, C-151/02, EU:C:2003:437, paragraph 43, and in *Consorci Sanitari del Maresme*, C-203/14, EU:C:2015:664, paragraph 43).

71 However, in the present case, it can be seen from the third question that the referring court essentially seeks guidance from the Court as to the interpretation of EU law, in particular, Article 101 TFEU and Regulation No 1/2003, in the context of the operation of the system of parallel competences between the Commission and the national competition authorities, in order to determine whether, under the national leniency programme, the AGCM 'could lawfully' accept certain applications for immunity.

72 Accordingly, it is necessary to give an answer that will be of use to the referring court by providing the latter with guidance as to the interpretation of EU law, which will enable that court to rule itself on the lawfulness of the decision at issue.

73 It follows that the third question referred must be considered admissible.

Substance

74 The doubt on the part of the referring court that gave rise to the third question referred relates to the fact that the ENC Model Leniency Programme indicated that the system of summary applications for immunity at the national level was open to the undertaking that had applied to the Commission for immunity from fines, whereas it was not clear whether that system was also open to undertakings that had applied to the Commission for a mere reduction of fines.

75 The possibility for an undertaking which was not the first to submit an application for immunity to the Commission and which, accordingly, was not eligible for full immunity, but only a reduction of the fine, to submit a summary application for immunity to the national competition authorities was expressly set out in the ENC Model Leniency Programme only after the amendments made to that programme in 2012.

76 In that respect, the fact that the ENC Model Leniency Programme, in the version existing at the material time, did not expressly refer to the possibility for the undertakings that had submitted an application to the Commission for reduction of fines to lodge a summary application for immunity before the national competition authorities cannot be interpreted as precluding those authorities from accepting, in those circumstances, such a summary application.

77 As noted in paragraph 44 above, the instruments adopted in the context of the ECN, in particular the ECN Model Leniency Programme, are not binding on national competition authorities. Given the non-binding nature of that programme, it follows, first, that Member States are not required to incorporate provisions of the ECN Model Leniency Programme in their leniency systems and, secondly, that they are also not precluded from adopting, at the national level, rules which are not present in that model programme or which diverge from it, in so far as that competence is exercised in compliance with EU law, in particular Article 101 TFEU and Regulation No 1/2003.

78 The Member States' competence to determine their leniency programmes must be exercised in accordance with EU law, including Regulation No 1/2003. In particular, the Member States may not render the implementation of EU law impossible or excessively difficult and, specifically, in the area of competition law, they must ensure that the rules which they establish or apply do not jeopardise the effective application of Articles 101 TFEU and 102 TFEU (judgments in *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 24, and in *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 26).

79 The Court has already held that leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of Articles 101 TFEU and 102 TFEU (judgment in *Pfleiderer*, C-360/09, EU:C:2011:389, paragraph 25).

80 In that respect, it must be pointed out that the effective application of Article 101 TFEU does not preclude a national leniency system which allows the acceptance of a summary leniency application submitted by an undertaking which had not submitted an application for full immunity.

81 On the contrary, that approach is in accordance with the underlying purpose and spirit of the establishment of the system of leniency applications. That system is intended, inter alia, to promote the uncovering of conduct contrary to Article 101 TFEU by encouraging participants in cartels to report them. It is therefore intended to encourage the submission of such applications, not to limit their number.

82 Thus, the Court of Justice has held that the aim of the Leniency Notice is to create a climate of uncertainty within cartels in order to encourage the reporting of them to the Commission (judgment in *LG Display and LG Display Taiwan* v *Commission*, C-227/14 P, EU:C:2015:258, paragraph 87). That uncertainty arises, inter alia, from the fact that only one cartel participant can obtain full immunity and that, at any moment, the Commission may, on its own initiative, identify the existence of that cartel.

83 In that context, it is possible that an undertaking which was not the first to submit an application for immunity to the Commission and which, consequently, is eligible only for a reduction of the fine may, by lodging a summary application for immunity, be the first to inform the national competition authority of the existence of the cartel concerned. In such a situation, in the event that the Commission does not pursue its investigation concerning the same matters as were reported to the national authority, the undertaking concerned could be granted full immunity under the national leniency programme.

84 Consequently, the answer to the third question is that EU law, in particular Article 101 TFEU and Regulation No 1/2003, must be interpreted as not precluding a national competition authority from accepting, in circumstances such as those at issue in the main proceedings, a summary application for immunity from an undertaking which had not submitted an application for full immunity to the Commission, but rather an application for reduction of the fine.

Costs

85 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **EU law, in particular Article 101 TFEU and 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], must be interpreted as meaning that the instruments adopted in the context of the European Competition Network, in particular the Model Leniency Programme of that network, are not binding on national competition authorities.**

2. **EU law, in particular Article 101 TFEU and Regulation No 1/2003, must be interpreted as meaning that there is no legal link between the application for immunity which an undertaking submits or is preparing to submit to the European Commission and the summary application submitted to a national competition authority in respect of the same cartel, requiring that authority to assess the summary application in the light of the application for immunity. Whether or not the summary application accurately reflects the content of the application for immunity submitted to the Commission is, in that respect, irrelevant.**

   Where the summary application submitted to a national competition authority has a more limited material scope than the application for immunity submitted to the Commission, that national authority is not required to contact the Commission or the undertaking itself, in order to establish whether that undertaking has found specific examples of unlawful conduct in the sector allegedly covered by the application for immunity, but which is not covered by the summary application.

3. **EU law, in particular Article 101 TFEU and Regulation No 1/2003, must be interpreted as not precluding a national competition authority from accepting, in circumstances such as those at issue in the main proceedings, a summary application for immunity from an undertaking which had not submitted an application for full immunity to the Commission, but rather an application for reduction of the fine.**

[Signatures]