Questions referred

Does this case involve a rule that must be notified under Article 8(1), cf. Article 1, first paragraph, (2), (5), and (11) of Directive 98/34/EC ([1]) of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, as amended by Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, assuming the following:

(a) amending legislation is to be introduced amending the Law on certain gaming, lotteries and betting (lov om visse spil, lotterier og væddemål), under which a provision is to be introduced on sentencing inter alia for whoever intentionally or through gross negligence 'offers gaming, lotteries or betting in Denmark without holding a licence pursuant to Paragraph 1', and for whoever intentionally or through gross negligence 'advertises gaming, lotteries or betting not covered by a licence under Paragraph 1', and

(b) the remarks on the draft amending legislation indicate that the purpose of the abovementioned sentencing provisions is to clarify or introduce a prohibition on gaming offered online by gaming companies outside Denmark and directly targeting the Danish market, partly by prohibiting advertising for, inter alia, gaming offered online by gaming companies outside Denmark, inasmuch as the same remarks it is stated that there is no doubt that, under the rules prevailing before the amendments, gaming measures are unlawful if a gaming company outside Denmark makes use of sales channels in which the gaming device is actually physically sold within the borders of Denmark; there is, however, greater doubt as to whether gaming from outside Denmark aimed at gaming participants in Denmark but actually physically situated outside Denmark is also covered by the provision; and it is therefore necessary to have clarified whether those forms of gaming are covered. It is further apparent from the remarks that it is suggested to introduce an advertising ban on gaming, lotteries and betting which are not licensed under that law, and that the amendment complies with the current prohibition in Paragraph 12(3) of the Law on horserace betting (hestevæddeløbsloven) but is a clarification of Paragraph 10(4) of the [now repealed] Law on betting and lotteries (Tips- og lottoloven). The remarks further state that the purpose of the prohibition is to protect gaming providers holding a licence from the Danish authorities against competition from companies that do not hold such a licence and who therefore cannot lawfully offer or broker gaming in Denmark.

([1]) OJ 1998 L 204, p. 37.

Appeal brought on 10 May 2016 by Kühne + Nagel International AG against the judgment delivered on 29 February 2016 in Case T-254/12 *Kühne + Nagel International AG* v *European Commission*

(Case C-261/16 P)

(2016/C 251/19)

Language of the case: German

Parties

Appellants: Kühne + Nagel International AG, Kühne + Nagel Management AG, Kühne + Nagel Ltd, Kühne + Nagel Ltd, Kühne + Nagel Ltd (represented by: U. Denzel, C. von Köckritz and C. Klöppner, lawyers)

Other party to the proceedings: European Commission

Form of order sought

The appellants claim that the Court should:

1. set aside the judgment of the General Court (Ninth Chamber) of 29 February 2016 in Case T-254/12;

2. annul, pursuant to the fourth paragraph of Article 263 TFEU, Article 1(1) and (2), Article 2 and Article 3 of the Commission decision of 28 May 2012 in Case COMP/39462 — Freight forwarding, C(2012) 1959 final, in so far as it concerns the appellants;

3. annul or substantially reduce the fines imposed on the appellants in the aforementioned decision;

4. order the Commission to pay the appellants' costs in respect of the proceedings before the General Court and the Court of Justice.

Pleas in law and main arguments

The appellants put forward five grounds of appeal:

First, the General Court errs in law in assuming that the concerted practices relating to NES and AMS infringe Article 101 TFEU. Article 101 TFEU is not applicable to those concerted practices because they were not capable of affecting inter-State trade.

Secondly, the calculation of the fine imposed on the appellants is marred by an error in law. Concerted practices contrary to the law on cartels were established in relation to individual charges ('fees' or 'surcharges'). In that regard, the General Court ought to have calculated the fine to be imposed only on the basis of the turnovers redeemed with the respective fee. The General Court misjudged that, by including additional turnovers (in particular the freight rate) in the calculation of the fine, the Commission infringed recital 13 of the guidelines on the setting of fines. By implicitly also taking the exercise of its unlimited jurisdiction to review as a basis for that method, the General Court itself thereby incorrectly exercised that power.

Thirdly, the General Court infringed the principle of equal treatment. Unlike the other freight forwarders, K+N does not operate according to the consolidation model but, from an economic point of view, behaves as a classic intermediary in over 90 % of transactions. Due to the quite significant differences in the business model, the General Court ought to have proceeded differently and should not have treated different situations in the same way. In particular, the General Court should have annulled the Commission's calculation of the fine and should have determined, as against the appellants, a fine only on the basis of the turnovers generated with the respective 'fees' or 'surcharges'.

Fourthly, the fine imposed by the General Court is grossly disproportionate. The fine approved by the General Court is clearly excessive and also cannot be justified on grounds of deterrence.

Fifthly, the General Court did not observe the Air Transport Exemption and thus erroneously took, in relation to NES and AMS, the applicability of Article 101 TFEU as a starting point.