Reports of Cases

JUDGMENT OF THE GENERAL COURT (Tenth Chamber, Extended Composition)

9 February 2022*

(Competition – Abuse of dominant position – Rail freight transport services market – Decision rejecting a complaint – Article 7 of Regulation (EC) No 773/2004 – Reasonable time – EU interest in pursuing examination of a complaint – Determination of the authority best placed to examine a complaint – Criteria – Manifest error of assessment – Systemic or generalised deficiencies concerning respect for the rule of law – Risk of infringement of a complainant's rights if a complaint is rejected – Obligation to state reasons)

In Case T-791/19,

Sped-Pro S.A., established in Warsaw (Poland), represented by M. Kozak, lawyer,

applicant,

v

European Commission, represented by J. Szczodrowski, L. Wildpanner and P. van Nuffel, acting as Agents,

defendant,

supported by,

Republic of Poland, represented by B. Majczyna, acting as Agent,

intervener,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2019) 6099 final of 12 August 2019 (Case AT.40459 – Rail freight forwarding in Poland – PKP Cargo), rejecting the complaint lodged by the applicant concerning alleged infringements of Article 102 TFEU on the rail freight transport services market in Poland,

THE GENERAL COURT (Tenth Chamber, Extended Composition),

composed of M. van der Woude, President, A. Kornezov (Rapporteur), E. Buttigieg, G. Hesse and D. Petrlík, Judges,

Registrar: M. Zwozdziak-Carbonne, Administrator,

* Language of the case: Polish.

having regard to the written part of the procedure and further to the hearing on 17 September 2021,

gives the following

Judgment

Background to the dispute

1 The applicant, Sped-Pro S.A., is a company established in Warsaw (Poland), active in the forwarding services sector. In the course of those activities, it has used rail freight transport services supplied by PKP Cargo S.A., a company controlled by the Polish State.

2 On 4 November 2016, the applicant lodged a complaint with the European Commission against PKP Cargo ('the complaint'), under Article 7(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1). In the complaint, the applicant alleged, inter alia, that PKP Cargo had abused its dominant position within the meaning of Article 102 TFEU on the market for rail freight transport services in Poland, in that it had, in essence, refused to conclude a multi-annual cooperation contract with the applicant, on market conditions. The applicant submitted an additional complaint on 24 August 2017.

3 By letter of 13 September 2017 ('the guidance letter'), the Commission informed the applicant of its intention to reject the complaint, in accordance with Article 7(1) of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101] and [102 TFEU] (OJ 2004 L 123, p. 18).

4 The applicant submitted observations and supplementary information on 19 October, 19 December and 21 December 2017, and on 8 January, 29 June and 4 October 2018. In addition, two meetings took place between the applicant and the Commission on 5 December 2017 and 26 April 2018.

5 By Decision C(2019) 6099 final of 12 August 2019 (Case AT.40459 – Rail freight forwarding in Poland – PKP Cargo) ('the contested decision'), the Commission rejected the complaint, in accordance with Article 7(2) of Regulation No 773/2004, on the ground, in essence, that the Prezes Urzędu Ochrony Konkurencji i Konsumentów (President of the Office for the protection of competition and consumers, Poland; 'the Polish competition authority') was best placed to examine it.

Procedure and forms of order sought

6 By application lodged at the Court Registry on 15 November 2019, the applicant brought the present action.

7 On 30 January 2020, the Commission lodged the defence at the Court Registry.

8 The reply and the rejoinder were lodged at the Court Registry on 7 April and 26 June 2020 respectively.

9 By decision of 25 May 2020, the President of the Tenth Chamber of the General Court granted the Republic of Poland leave to intervene in support of the form of order sought by the Commission. The Republic of Poland lodged a statement in intervention on 30 August 2020 and the applicant submitted observations on that statement on 29 September 2020. However, on 8 October 2020, the President of the Tenth Chamber of the General Court decided not to include those observations in the case file, on the ground that they had been lodged after the expiry of the time limit.

10 On a proposal from the Tenth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure of the General Court, to refer the case to a Chamber sitting in extended composition.

11 As a member of the Tenth Chamber (Extended Composition) was unable to sit, on 20 July 2021, the President of the General Court designated himself, pursuant to Article 17(2) of the Rules of Procedure, to complete the Chamber in the present case. In accordance with Article 10(5) of those Rules, he also presided over the Chamber in the present case.

12 The parties presented oral argument and answered oral questions put to them by the Court at the hearing on 17 September 2021.

13 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

14 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

15 The Republic of Poland supports the form of order sought by the Commission.

Law

16 The applicant raises three pleas in law. The first is divided into two parts, alleging, in essence, respectively, (i) infringement of the applicant's right to have its affairs handled within a reasonable time, and (ii) a failure to state the reasons for the contested decision. The second plea in law alleges infringement of the principle of the rule of law in Poland. The third plea in law concerns the EU interest in pursuing the examination of the complaint.

17 It is appropriate to examine, first of all, the first part of the first plea in law, then the third plea in law and, lastly and in conjunction, the second plea in law and the second part of the first plea in law.

The first part of the first plea in law, alleging infringement of the applicant's right to have its affairs handled within a reasonable time

18 The applicant claims that the Commission infringed the principle of reasonable time, in that it adopted the contested decision nearly three years after the complaint was lodged and nearly two years after notification of the guidance letter to the applicant. In doing so, the Commission infringed Article 7(1) and (2) of Regulation No 1/2003 and Article 7(1) of Regulation No 773/2004, read in conjunction with Article 41(1) of the Charter of Fundamental Rights of the European Union ('the Charter').

19 The Commission disputes the applicant's arguments.

20 In the first place, it should be noted that compliance with the reasonable time requirement in the conduct of administrative procedures relating to competition policy constitutes a general principle of EU law, the observance of which is ensured by the EU judicature (see judgment of 19 December 2012, *Heineken Nederland and Heineken* v *Commission*, C-452/11 P, not published, EU:C:2012:829, paragraph 97 and the case-law cited).

21 The principle that an administrative procedure must be conducted within a reasonable time has been reaffirmed by Article 41(1) of the Charter, under which every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the European Union (see judgment of 15 July 2015, *HIT Groep* v *Commission*, T-436/10, EU:T:2015:514, paragraph 239 and the case-law cited).

22 In accordance with Article 7(1) of Regulation No 773/2004, where the Commission considers that, on the basis of information in its possession, there are insufficient grounds for acting on a complaint, it is to inform the complainant of its reasons and set a time limit within which the complainant may make known its views in writing. Under Article 7(2) of that regulation, if the complainant makes known its views within the time limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission is to reject the complaint by decision.

23 Therefore, a complainant has the right to receive a decision rejecting its complaint and the Commission is under an obligation to decide on that complaint within a reasonable time (see, to that effect, judgment of 11 July 2013, *BVGD* v *Commission*, T-104/07 and T-339/08, not published, EU:T:2013:366, paragraph 127).

24 It is true that, in the judgment of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission* (C-466/19 P, EU:C:2021:76), the Court of Justice indicated, in paragraph 32, that infringement of the reasonable-time principle was capable of justifying the annulment only of a decision making a finding of infringement following an administrative procedure based on Article 101 or 102 TFEU, where it had been proved that that infringement had adversely affected the rights of defence of the undertakings concerned. However, that affirmation by the Court of Justice must be read in the light of the circumstances of the case that gave rise to that judgment. In that regard, it is important to emphasise that the decision at issue in that case was a decision requesting information adopted in accordance with Article 18(3) of Regulation No 1/2003, as an investigative tool in an ongoing administrative procedure. That is the context in which the Court of Justice found, in essence, in paragraph 33 of that judgment, that the argument alleging that the duration of that administrative procedure was excessive was relevant not in the context of an

action concerning such a decision, but in the context of an action concerning the Commission's decision to terminate that administrative procedure by finding an infringement of Article 101 or 102 TFEU.

25 Although it is true that the Commission's decision to reject a complaint is not a 'decision making a finding of infringement', it does nevertheless terminate the administrative procedure before the Commission, unlike the decision at issue in the case cited in paragraph 24 above. Accordingly, to deny the Commission's obligation to respect the reasonable time principle in its consideration of complaints put before it, in breach of Article 52(1) of the Charter, would amount to negating the complainant's right to have its affairs handled within a reasonable time, as required by Article 41(1) of the Charter.

26 In the second place, the Court finds that, in the present case, approximately two years and nine months elapsed between the lodging of the complaint and the adoption of the contested decision.

27 Although the Commission seeks to justify that length of time by the complexity of the factual and legal issues contained in the complaint and by the fact that the applicant had submitted an additional complaint as well as other observations and supplementary information, it remains the case that, in the contested decision, which contains only 31 paragraphs in fewer than 7 pages in total, the Commission limited itself to asserting, in essence, that the Polish competition authority was best placed to examine the complaint. However, as the applicant claims, such a finding did not require a complex factual or legal evaluation of the anticompetitive practices reported in the complaint.

28 Furthermore, it should be noted that the Commission failed to meet its commitment to inform the complainant, within an indicative time period of four months from receipt of the complaint, of its proposed course of action in response to the complaint, in accordance with paragraphs 61 and 62, read in conjunction with paragraphs 55 and 56, of the Commission Notice on the handling of complaints by the Commission under Articles [101] and [102 TFEU] (OJ 2004 C 101, p. 65). Although it is an indicative time period, as is apparent from paragraph 61 of that Commission notice, it remains the case that around ten months elapsed between the lodging of the complaint and the notification of the guidance letter to the applicant, which far exceeds that indicative period.

29 In any case, and without the need to make a final decision on the question of whether the Commission infringed its obligation to handle the complaint within a reasonable time, it is apparent from the case-law that infringement of the reasonable time principle may only be capable of justifying the annulment of a decision by the Commission where it could have had an impact on the outcome of the procedure. That is particularly the case where that infringement is capable of adversely affecting the rights of defence of the undertaking concerned (see, to that effect, judgment of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, C-105/04 P, EU:C:2006:592, paragraphs 42 to 52).

30 That case-law applies *mutatis mutandis* to decisions to reject a complaint under Article 7(2) of Regulation No 773/2004, although it must be pointed out that the complainant is not a defendant in such a procedure. It follows that, in the case of an action against such a decision, an infringement of that principle may lead to the annulment of that decision only where the applicant demonstrates that exceeding that reasonable time period had an impact on the possibility of defending its position during that procedure. That would be the case particularly if

exceeding the reasonable time had prevented it from gathering or submitting before the Commission factual or legal elements relating to the anticompetitive practices complained of or to the EU interest in pursuing the case.

31 However, the applicant has not provided any evidence capable of demonstrating that that condition is met in the present case.

32 First, the applicant merely states, in essence, that the duration of the administrative procedure was 'crucial', given that the limitation period for bringing an action for damages had not been suspended or interrupted by the lodging of the complaint or by the adoption of the contested decision, in accordance with Article 10(4) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1).

33 However, the possibility for the applicant to assert its rights under Article 102 TFEU by bringing before national courts an action for damages or any other action in direct application of that provision, in compliance with the principles of equivalence and effectiveness (see, to that effect, judgments of 19 June 1990, *Factortame and Others*, C-213/89, EU:C:1990:257, paragraph 19 and the case-law cited, and of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraph 27 and the case-law cited) was in no way dependent on the outcome of the procedure before the Commission relating to its complaint, or in particular on the lack of initiation of a formal procedure by it. Accordingly, any exceeding of the reasonable time limit by the Commission had no effect on the applicant's right to bring such an action before the national courts, before the expiry of the limitation period and without awaiting the Commission's decision on the complaint.

34 Secondly, the applicant claims, in essence, that certain measures adopted by the Republic of Poland during the administrative procedure called into question respect for the rule of law in that Member State. However, the applicant has not submitted any evidence capable of demonstrating that the deterioration of the rule of law in Poland prevented it from gathering or submitting before the Commission any factual or legal elements relating to the anticompetitive practices complained of or to the EU interest in pursuing the case.

35 It follows that the first part of the first plea in law must be rejected as unfounded.

The third plea in law, concerning the EU interest in pursuing the examination of the complaint

36 The applicant claims that the Commission infringed Article 102 TFEU, read in conjunction with the second sentence of Article 17(1) TEU, Article 7(2) of Regulation No 773/2004 and Article 7(1) and (2) of Regulation No 1/2003. In particular, it claims that, in the contested decision, the Commission committed manifest errors of assessment of the EU interest in pursuing the examination of the complaint, the consequence of which was to deprive Article 102 TFEU of its effectiveness.

37 The Commission disputes the applicant's arguments.

38 As a preliminary point, it should be noted that, according to settled case-law, the Commission, entrusted by Article 105(1) TFEU with the task of ensuring the application of Articles 101 and 102 TFEU, is responsible for defining and implementing the competition policy of the European Union and for that purpose has a discretion as to how it deals with complaints. In order to perform that task effectively, it is entitled to give differing degrees of priority to the complaints brought before it. In doing so, the Commission may not only decide on the order in which the complaints are to be examined, but also reject a complaint on the ground that there is an insufficient EU interest in further investigation of the case (see, to that effect, judgment of 16 May 2017, *Agria Polska and Others* v *Commission*, T-480/15, EU:T:2017:339, paragraphs 34 and 35 and the case-law cited).

39 However, the discretion enjoyed by the Commission in that regard is not unlimited. The Commission is required to consider attentively all the matters of fact and of law which the complainant brings to its attention (see judgment of 17 December 2014, *Si.mobil* v *Commission*, T-201/11, EU:T:2014:1096, paragraph 82 and the case-law cited).

40 Furthermore, it follows from the case-law that, when the Commission adopts rules of conduct and by publishing them announces that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations (see, to that effect, judgment of 16 February 2017, *H&R ChemPharm* v *Commission*, C-95/15 P, not published, EU:C:2017:125, paragraph 57). In the present case, the Commission restricted itself in the exercise of its discretionary power in the handling of complaints by the adoption of its Notice on cooperation within the Network of Competition Authorities (OJ 2004 C 101, p. 43), which contains guidance seeking to clarify, inter alia, the conditions under which either the Commission or a single national competition authority, or several national competition authorities, is or are best placed to examine a complaint.

41 Judicial review of decisions rejecting complaints must not lead to the Court substituting its own assessment of the EU interest for that of the Commission and must focus on whether or not the contested decision is based on materially incorrect facts or is vitiated by an error of law, a manifest error of appraisal or misuse of powers (see judgment of 11 January 2017, *Topps Europe* v *Commission*, T-699/14, not published, EU:T:2017:2, paragraph 66 and the case-law cited).

42 In the contested decision, the Commission rejected the complaint on the ground, in essence, that the Polish competition authority was best placed to examine it because, first, the alleged infringement was limited, essentially, to the Polish market and, secondly, that authority had acquired detailed knowledge of the rail freight transport services market in Poland and the practices of PKP Cargo, as a result of several investigations it had conducted and decisions adopted in that sector since 2004.

43 The applicant submits, first, that the Commission's assessment was vitiated by manifest errors of assessment as regards the definition of the market affected by the anticompetitive practices complained of and, secondly, that the Commission should also have taken account of other factors capable of demonstrating the EU interest in pursuing the examination of the complaint.

44 In the first place, as regards the definition of the market affected by the anticompetitive practices complained of, it should be noted, first, that the applicant claims that PKP Cargo's allegedly abusive practices produced effects beyond the national market, therefore the Commission was best placed to examine them.

45 In that regard, it should be noted that, where the effects of the infringements alleged in a complaint are essentially confined to the territory of one Member State and where proceedings in respect of those infringements have been brought by the complainant before the courts and competent administrative authorities of that Member State, the Commission is entitled to reject the complaint for lack of EU interest, provided however that the rights of the complainant can be adequately safeguarded by the national courts, which presupposes that the latter are in a position to gather the factual information necessary in order to determine whether the practices at issue constitute an infringement of Articles 101 and 102 TFEU (see judgment of 3 July 2007, *Au Lys de France* v *Commission*, T-458/04, not published, EU:T:2007:195, paragraph 83 and the case-law cited, and order of 19 March 2012, *Associazione 'Giùlemanidallajuve'* v *Commission*, T-273/09, EU:T:2012:129, paragraph 68 and the case-law cited).

46 Paragraph 10 of the Commission Notice on cooperation within the Network of Competition Authorities states that a single national competition authority is usually well placed to deal with agreements or practices that substantially affect competition mainly within its territory, whereas, according to paragraph 14 thereof, the Commission is particularly well placed to handle a case, notably where one or several agreements or practices, including networks of similar agreements or practices, have effects on competition in more than three Member States (cross-border markets covering more than three Member States or several national markets).

47 In the present case, it is apparent from the contested decision that the allegedly abusive practices complained of were attributable to an undertaking established in Poland, namely PKP Cargo, and were prejudicial to another undertaking also established in Poland, namely the applicant. Furthermore, in its complaint, the applicant asserted that, even if the effects of those practices were felt in several Member States, PKP Cargo held a dominant position 'on the Polish market' and that, in principle, the abuse of a dominant position alleged against PKP Cargo had taken place 'on the Polish market'. Furthermore, the market shares held by PKP Cargo, as set out in the complaint, concerned only the Polish market, as the applicant has not alleged, let alone demonstrated, that PKP Cargo held a dominant position in other geographical markets. Likewise, in its letter of 4 October 2018, the applicant reiterated to the Commission its request to open an investigation against PKP Cargo in order to examine its alleged abuse of a dominant position 'on the rail freight market in Poland'.

48 The fact, alleged by the applicant, that the rail freight transport services market in Poland was open to competition with undertakings established in other Member States is not capable of calling into question the Commission's analysis. Even if the allegedly abusive practices of PKP Cargo could have affected other geographical markets, none of the information in the file indicated, either explicitly or implicitly, that PKP Cargo held a dominant position in such markets. Moreover, nor does the mere fact that PKP Cargo operated and had subsidiaries in several Member States mean that that undertaking or one of its subsidiaries held a dominant position in other geographical markets.

49 Secondly, the fact, put forward by the applicant, that the alleged infringement was capable of affecting trade between Member States, within the meaning of Article 102 TFEU, is irrelevant. The effect on trade between Member States is a condition for the application of Article 102 TFEU, and not for the determination of the authority best placed to examine a complaint.

50 Thirdly, the applicant's argument that, in paragraph 25(iv) of the contested decision, the Commission erred in finding that the relevant market for the services was the 'rail market', whereas it was the 'rail freight transport market', cannot succeed either. The aforementioned paragraph must be read in the light of paragraphs 3, 21 and 26 of the same decision, from which it is apparent that the relevant market was the market for rail freight transport services. Thus, the reference to the 'rail market' in paragraph 25(iv) of the contested decision constitutes, at most, an inaccuracy that has no impact on the legality of that decision.

51 In those circumstances, the Commission could legitimately consider that the allegedly abusive practices of PKP Cargo concerned mainly the rail freight transport services market in Poland.

52 In the second place, it should be noted that the applicant does not dispute the Commission's assertion that the Polish competition authority had acquired detailed knowledge of the rail freight transport services market in Poland and the practices of PKP Cargo, as a result of several investigations it had conducted and decisions adopted in that sector since 2004.

53 Therefore, the Commission did not commit any manifest error of assessment in considering that the practices complained of concerned mainly the rail freight transport services market in Poland, that the Polish competition authority had acquired detailed knowledge of the sector, and that, on the basis of those factors, that authority was best placed to examine the complaint.

54 In the third place, the applicant submits that the Commission should also have taken account of other factors for the purposes of assessing the EU interest in pursuing the case.

55 First, it refers to case-law according to which, when the Commission examines the EU interest in pursuing the case, it must (i) assess how serious the alleged interferences with competition are and how persistent their consequences are, taking into account the duration and significance of the infringements complained of and their effect on the competition situation in the European Union (judgment of 23 April 2009, *AEPI* v *Commission*, C-425/07 P, EU:C:2009:253, paragraph 53) and (ii) balance the significance of the alleged infringement as regards the functioning of the internal market, the probability of establishing the existence of the infringement and the scope of the investigation required (judgment of 18 September 1992, *Automec* v *Commission*, T-24/90, EU:T:1992:97, paragraph 86). The applicant claims, in essence, that the Commission failed to examine and to balance all of those criteria, which, in its view, was legally incorrect and contrary to the Commission's obligation to state reasons.

56 It is true, as the applicant observes, that in the contested decision, the Commission limited its assessment of the EU interest to the criteria mentioned in paragraph 42 above, without explicitly examining the seriousness or the significance of the alleged infringement, the persistence of its consequences, the probability of establishing the existence of the infringement and the scope of the investigation required.

57 However, according to settled case-law, in view of the fact that assessment of the EU interest raised by a complaint depends on the circumstances of each case, the number of criteria of assessment the Commission may refer to should not be limited, nor conversely should it be

required to have recourse exclusively to certain criteria. Given that, in a field such as competition law, the factual and legal circumstances may differ considerably from case to case, it is permissible to apply criteria which have not hitherto been considered or to give priority to a single criterion for assessing that EU interest (see judgments of 19 September 2013, *EFIM* v *Commission*, C-56/12 P, not published, EU:C:2013:575, paragraph 85 and the case-law cited, and of 20 September 2018, *Agria Polska and Others* v *Commission*, C-373/17 P, EU:C:2018:756, paragraph 61 and the case-law cited).

58 The Court of Justice has already had the opportunity to state that the lessons learned from that case-law cannot be called into question by the case-law cited in paragraph 55 above (see, to that effect, judgments of 17 May 2001, *IECC* v *Commission*, C-449/98 P, EU:C:2001:275, paragraphs 44, 46 and 47, and of 20 September 2018, *Agria Polska and Others* v *Commission*, C-373/17 P, EU:C:2018:756, paragraph 62 and the case-law cited).

59 It may be that, regardless of the seriousness or significance of the alleged infringement, the persistence of its consequences, the probability of being able to establish its existence or even the scope of the investigation measures necessary, the EU interest does not require the Commission to investigate a complaint if a national competition authority finds itself, particularly because of its proximity to the relevant evidence, the scope of the markets affected by the practices complained of or even because of knowledge acquired in the past as regards those markets and those practices, better placed than the Commission to investigate that alleged infringement.

60 Therefore, contrary to what the applicant claims, the Commission was not obliged to examine and to weigh up all of the criteria referred to in the case-law cited in paragraph 55 above.

61 Secondly, the applicant claims, in essence, that the complaint raised a new question of law, not yet decided in EU competition law, namely whether the refusal to give access to an essential facility, on non-discriminatory terms, because of an unpaid debt, the existence of which was, nevertheless, disputed by the undertaking requesting access to that facility, constituted an abuse of a dominant position within the meaning of Article 102 TFEU.

62 In that regard, it should be noted that, according to paragraph 15 of the Commission Notice on cooperation within the Network of Competition Authorities, the Commission is particularly well placed to deal with a case if the EU interest requires the adoption of a Commission decision to develop EU competition policy when a new competition issue arises or in order to ensure effective enforcement of the rules.

63 However, even if the question raised in paragraph 61 above were to constitute a new competition issue of significance for the development of EU competition policy, within the meaning of paragraph 15 of the Commission Notice on cooperation within the Network of Competition Authorities, that would not mean that the Commission was automatically obliged to examine the complaint. The ‘new’ issue raised by the applicant is, in essence, whether the allegedly abusive practices of PKP Cargo could have been regarded as objectively justified. Such an examination would not only involve establishing whether PKP Cargo held a dominant position on the relevant market, but also the reality, which is disputed, of the debt in question, as well as the possible exclusionary effects of those practices. However, the applicant has not demonstrated that the Commission was best placed to carry out such an examination, notwithstanding the fact that those practices concerned mainly the Polish market and that the Polish competition authority already had detailed knowledge of the sector.

64 Therefore, the applicant has not demonstrated that, in the present case, the criterion relating to the existence of a new competition issue of significance for the development of EU competition policy should have taken precedence over the criteria referred to in paragraph 42 above.

65 In the fourth place, it is appropriate to reject the applicant's argument that, in the contested decision, the Commission should have established whether PKP Cargo applied a discriminatory discount system and whether the latter held a claim over the applicant that was capable of justifying its refusal to conclude a contract with the applicant. The Commission did not reject the complaint on the ground that the evidence made available to it did not allow a finding that the practices complained of were contrary to Article 102 TFEU, but on the ground that the Polish competition authority was best placed to examine them. Therefore, the Commission was not required to take a position on those issues.

66 In the fifth place, the fact, complained of by the applicant, that the Polish competition authority had, by letters of 21 August and of 7 October 2019, refused to follow up on the complaint, is irrelevant, since that refusal occurred only after the adoption of the contested decision (see, to that effect, judgment of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission*, C-466/19 P, EU:C:2021:76, paragraph 82).

67 In the sixth place, the fact, not in dispute, that, in accordance with Polish law, decisions by the Polish competition authority rejecting a complaint cannot be the subject of judicial proceedings is not such as to impose an obligation on the Commission to examine the complaint. It is for the Member States, under the second subparagraph of Article 19(1) TEU, to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law, and it is not for the Commission to make up for any shortcomings in judicial protection at national level by opening an investigation. Moreover, and in any event, it was open to the applicant to bring actions before the national courts for compensation of the damage allegedly caused by the conduct the subject of the complaint, in order to obtain compliance with Article 102 TFEU (see, to that effect, judgment of 20 September 2018, *Agria Polska and Others* v *Commission*, C-373/17 P, EU:C:2018:756, paragraphs 83 and 87).

68 Lastly, in so far as the applicant also alleges an infringement of the second sentence of Article 17(1) TEU, it is sufficient to note that it did not raise any stand-alone argument alleging infringement of that provision.

69 It follows that the third plea in law must be rejected as unfounded.

70 It is appropriate, next, to examine the arguments put forward by the applicant in the second plea in law and in the second part of the first plea in law, relating to systemic and generalised deficiencies in the rule of law in Poland and seeking to demonstrate that there was a real risk of its rights as complainant not being adequately safeguarded at national level.

The second plea in law and the second part of the first plea in law, concerning respect for the principle of the rule of law in Poland

71 In its second plea in law, the applicant submits that the Commission infringed its right to effective judicial protection, guaranteed by Article 2 TEU, read in conjunction with the second paragraph of Article 19(1) TEU and Article 47 of the Charter. In that regard, it claims that the Commission

was best placed to examine the complaint, in view of the systemic or generalised deficiencies in the rule of law in Poland and, in particular, the lack of independence of the Polish competition authority and the national courts with jurisdiction in that area.

72 In particular, the applicant puts forward several elements capable, in its view, of demonstrating that, first, the Polish competition authority was subordinate to the executive and that, secondly, the national courts called to review the legality of its decisions, namely the Sąd Ochrony Konkurencji i Konsumentów – XVII Wydział Sądu Okręgowego w Warszawie (Competition and Consumer Protection Court, Division No 17 of the Regional Court, Warsaw, Poland) and the Izba Kontroli Nadzwyczajnej i Spraw Publicznych (Extraordinary Review and Public Affairs Chamber) of the Sąd Najwyższy (Supreme Court, Poland), did not have all the guarantees of independence, as was apparent, notably, from the case-law of the Court of Justice. Moreover, the applicant puts forward several specific indicia relating to the circumstances of the case, the nature of the alleged infringement and its factual context, capable, in its view, of demonstrating that there were substantial grounds for believing that it would run a real risk of its rights being infringed, if its case were to be examined by the national courts. In the second part of the first plea in law, the applicant claims that the Commission failed to take those elements into consideration and failed to state to the requisite legal standard the reasons for the contested decision in that regard.

73 The Commission and the Republic of Poland dispute the applicant's arguments.

74 In the contested decision, the Commission verified whether systemic or generalised deficiencies in the rule of law in Poland prevented it from rejecting the complaint on the ground that the Polish competition authority was best placed to examine it, by applying by analogy the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

75 However, the Republic of Poland disputes the application of that case-law by analogy to the present case, on the ground, inter alia, that it relates to cooperation between national courts in criminal matters, and, more particularly, to the execution of a European arrest warrant, and not to decisions rejecting a complaint in matters of competition law. Furthermore, that Member State states that the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), concerned the principle of effective judicial protection laid down in Article 19(1) TEU, as well as the risk of infringement of the fundamental right to a fair trial before an independent tribunal, as enshrined in the second paragraph of Article 47 of the Charter, whereas those provisions do not apply to administrative bodies such as the Polish competition authority.

76 It is, therefore, appropriate to examine, in the first place, whether the Commission was right to apply by analogy the lessons learned from the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), to the present case.

77 In that regard, it should be noted that, in that judgment, the Court of Justice considered that, where a person in respect of whom a European arrest warrant has been issued, pleads, in order to oppose his or her surrender to the issuing judicial authority, that there are systemic deficiencies, or, at all events, generalised deficiencies which, according to him or her, are liable to affect the independence of the judiciary in the issuing Member State and thus to compromise the essence of his or her fundamental right to a fair trial, the executing judicial authority is required to assess whether there is a real risk that the person concerned will suffer a breach of that fundamental

right, when it is called upon to decide on his or her surrender to the authorities of that State (see judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 60 and the case-law cited).

78 To that end, according to the Court of Justice, the executing judicial authority must conduct a two-stage analysis.

79 As a first step, it must assess, on the basis of material that is objective, reliable, specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached (see judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 61 and the case-law cited).

80 If the executing judicial authority finds that the conditions for that first stage of analysis have been met, it must, as a second step, assess specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that, following his or her surrender to the issuing Member State, the requested person will run that risk (see judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 68 and the case-law cited).

81 The Court of Justice has also stated that, in certain well-defined cases, the executing judicial authority would be required to refuse automatically to execute any European arrest warrant issued by that Member State, without having to carry out any specific assessment of whether the individual concerned runs a real risk that the essence of his or her fundamental right to a fair trial will be affected (judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraph 72).

82 On the question of whether the case-law referred to in paragraph 81 above could be applied to the present case, it should be recalled that the legality of the contested decision must be assessed on the basis of the factual and legal elements existing on the date that decision was adopted, namely 12 August 2019 (see the case-law cited in paragraph 66 above). Thus, even if events occurring after that date were to make it possible to dispense with the second stage of the analysis in application of that case-law, it is important to note that, at the time the contested decision was adopted, the conditions for its application were not met.

83 That being said, it should be recognised, with the Republic of Poland, that it is true that there are obvious differences between the circumstances that gave rise to the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), and those at the root of the present case. However, several points of principle justify the application by analogy of the lessons learned from that judgment for the purposes of determining the competition authority best placed to examine a complaint regarding an infringement of Articles 101 and 102 TFEU.

84 First, it should be noted that the fundamental premiss that each Member State shares with all the other Member States, and recognises that those Member States share with it, the common values referred to in Article 2 TEU, entails and justifies the existence of mutual trust between the Member States and, in particular, their courts, that those values upon which the European Union

is founded, including the rule of law, will be recognised, and therefore that the EU law that implements those values will be respected (judgment of 24 June 2019, *Commission* v *Poland (Independence of the Supreme Court)*, C-619/18, EU:C:2019:531, paragraphs 42 and 43).

85 That fundamental premiss also applies in relations between the Commission, the national competition authorities and the national courts in the application of Articles 101 and 102 TFEU. Both the rules concerning the area of freedom, security and justice, at issue in the case that gave rise to the judgment cited in paragraph 76 above (see judgments of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 35 and 36, and of 25 July 2018, *Generalstaatsanwaltschaft (Detention conditions in Hungary)*, C-220/18 PPU, EU:C:2018:589, paragraph 104), and those relating to the European competition network and to the cooperation between the Commission and the national courts for the application of Articles 101 and 102 TFEU, at issue in the present case (see in particular recitals 15, 21 and 28, Article 11(1) and Article 15 of Regulation No 1/2003, as well as the end of paragraph 2 of the Commission Notice on cooperation within the Network of Competition Authorities), establish a system of close cooperation between the competent authorities based on the principles of mutual recognition, mutual trust and sincere cooperation.

86 Under Articles 4 and 5 of Regulation No 1/2003, the Commission and the competition authorities of Member States have parallel powers for the application of Articles 101 and 102 TFEU, while the scheme of Regulation No 1/2003 is based on close cooperation between them (judgment of 16 October 2013, *Vivendi* v *Commission*, T-432/10, not published, EU:T:2013:538, paragraph 26). In addition, according to Article 35(1) of the same regulation, the competition authorities of the Member States must ensure the effective application of Articles 101 and 102 TFEU in the general interest, it being specified that the authorities designated by the Member States may include courts (see, to that effect, judgment of 7 December 2010, *VEBIC*, C-439/08, EU:C:2010:739, paragraphs 56 and 62). Moreover, in accordance with Article 4 of Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (OJ 2019 L 11, p. 3), those authorities must be guaranteed independence and impartiality. Although it is true that the transposition period of that directive had not yet expired when the contested decision was adopted, it remains the case that Member States must refrain, during that period, from taking any measures liable seriously to compromise the result prescribed by it (see judgments of 18 December 1997, *Inter-Environnement Wallonie*, C-129/96, EU:C:1997:628, paragraph 45, and of 2 June 2016, *Pizzo*, C-27/15, EU:C:2016:404, paragraph 32).

87 In addition, Article 101(1) and Article 102 TFEU produce direct effects in relations between individuals and confer rights on the individuals concerned which the national courts must safeguard. The power to apply those provisions is vested concurrently in the Commission and the national courts. That conferral of competence is characterised by the duty of sincere cooperation between the Commission and the national courts (judgment of 18 September 1992, *Automec* v *Commission*, T-24/90, EU:T:1992:97, paragraph 90). That is confirmed by paragraph 15 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles [101] and [102 TFEU] (OJ 2004 C 101, p. 54), which provides that the Commission and the national courts are subject to mutual duties of loyal cooperation.

88 It follows that, as with the area of freedom, security and justice, for the purposes of application of Articles 101 and 102 TFEU, cooperation between the Commission, the competition authorities of the Member States and the national courts is based on the principles of mutual recognition, mutual trust and loyal cooperation, which oblige each of those authorities and courts to consider, except in exceptional circumstances, that all the other authorities and courts respect EU law and, in particular, the fundamental rights recognised by that law.

89 Secondly, it is apparent from the case-law cited in paragraph 45 above that, when the effects of the infringements alleged in a complaint are, essentially, felt only in the territory of a single Member State and when disputes relating to those infringements have been brought by the complainant before the competent courts or administrative authorities in that Member State, the Commission is entitled to reject the complaint for lack of EU interest, provided, however, that the complainant's rights are adequately safeguarded by the national courts.

90 Therefore, the case-law already obliges the Commission, before rejecting a complaint for lack of EU interest, to ensure that the national authorities are in a position adequately to safeguard the rights of the complainant. That case-law, in so far as it refers, broadly speaking, to 'national authorities', covers both the national competition authorities and the national courts with jurisdiction in that area. If, in the Member State concerned, there existed systemic or generalised deficiencies of such a kind as to compromise the independence of those authorities, as well as substantial grounds for believing that, if the Commission rejected the complaint and the complaint was brought before those authorities, the complainant would run a real risk of infringement of its rights, then those national authorities would not be in a position adequately to safeguard the complainant's rights, within the meaning of the case-law referred to in paragraph 45 above.

91 Thirdly, the fundamental right to a fair trial before an independent tribunal guaranteed by the second paragraph of Article 47 of the Charter is also of particular importance for the effective application of Articles 101 and 102 TFEU. The national courts are called on (i) to review the legality of decisions by the national competition authorities and (ii) to apply directly Articles 101 and 102 TFEU. The Court of Justice has already noted in that regard that it was incumbent upon Member States, under the second paragraph of Article 19(1) TEU, to provide the remedies necessary to ensure respect for individuals' right to effective judicial protection in the fields covered by EU law, including the field of competition law (see, to that effect, the case-law cited in paragraph 67 above).

92 It follows from all the foregoing that compliance with the requirements of the rule of law is a relevant factor that the Commission must take into account, for the purposes of determining which competition authority is best placed to examine a complaint and that, to that end, the Commission could, in the present case, apply by analogy the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586).

93 In the second place, it is apparent from the contested decision that the Commission limited itself to indicating, in essence, that the conditions for the second stage of the analysis identified in the judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)* (C-216/18 PPU, EU:C:2018:586), were not met in the present case, while avoiding taking a position on whether the conditions for the first stage of the analysis identified in that judgment were met.

94 In so far as those two stages of analysis are cumulative, the Commission cannot be criticised for having limited itself, in the interests of procedural economy, to examination of that second stage.

95 Accordingly, the arguments put forward by the applicant seeking to demonstrate, in general terms, the existence of systemic or generalised deficiencies in Poland of a kind such as to compromise the independence of the Polish competition authority and the national courts with jurisdiction in that area are ineffective.

96 In the third place, it is appropriate to examine the reasons given in the contested decision as to why the Commission considered that the conditions for the second stage of the analysis were not met in the present case.

97 In that regard, it follows from the case-law that, in the second stage of analysis, it is first for the person concerned, in the present case the applicant, to provide evidence of there being substantial grounds for believing that it ran a real risk of its rights being infringed if its case were to be examined by the national authorities. It is then for the Commission, in the light of specific concerns expressed by the applicant and of any information provided by it, to assess, specifically and precisely, whether in the circumstances of the present case, such grounds existed, having regard to the personal situation of that party, the nature of the alleged infringement and the factual context (see, to that effect, by analogy, judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paragraphs 60, 68 and 75).

98 In the present case, the applicant submitted, during the administrative procedure, a body of specific evidence and information capable, in its view, of demonstrating, as a whole, substantial grounds for believing that it ran a real risk of infringement of its rights if its case were to be examined by the national authorities. According to the applicant, the Commission failed to take that evidence and information into consideration and to state the reasons for the contested decision to the requisite legal standard in that regard.

99 In particular, first, the applicant drew the Commission's attention to the fact that PKP Cargo was an undertaking controlled by the State and that, because of the close links PKP Cargo had with the government, the Polish competition authority could be lenient, or even biased with regard to that undertaking. According to the applicant, the president of the Polish competition authority depends entirely on executive power, as he or she is appointed and removed by the prime minister, without the law specifying the duration of his or her mandate and the grounds for its revocation. The fact that the prime minister has revoked the president's authority several times since 2014 is indicative of that dependence. PKP S.A., the parent company of PKP Cargo, is a member of the Polish National Foundation, an association which, still according to the applicant, was created and financed by the largest public companies in Poland, and which has the objective, via media campaigns, of defending and promoting the reform of the judicial system in Poland.

100 Secondly, the applicant referred several times to the fact that, in April 2007, the Public Prosecutor General of the time, Mr Z. Ziobro, had opposed the Polish competition authority's decision of 17 June 2004 in the case DOK 50/04, by which that authority found an abuse of dominant position by PKP Cargo and penalised the latter on that basis. According to the applicant, that circumstance demonstrates 'the political will to protect one of the Treasury's main companies' and was capable of calling into question the independence of the Polish competition authority, as the latter 'had a much weaker position' than that of the Public Prosecutor General.

101 Thirdly, according to the applicant, the Polish competition authority's lenient policy towards PKP Cargo is demonstrated (i) by the fact that the penalties imposed on it in the past were weak, non-dissuasive and ineffective, as evidenced by the fact that, despite them, PKP Cargo persists in its anticompetitive practices, and (ii) by the fact that that authority has refused to take any action against PKP Cargo since 2015, although the applicant has brought matters before that authority several times in that regard. That latter situation is indicative of a change in the policy of that authority with regard to PKP Cargo since 2015, which is explained by its lack of independence.

102 Fourthly, the applicant stated, in essence, that the national courts competent in the area of competition law were not in a position to mitigate the deficiencies of the Polish competition authority due to their lack of independence.

103 In the contested decision, the Commission confined itself, in paragraph 25(v), to asserting that the arguments presented by the applicant concerning the second stage of the analysis, referred to in paragraph 80 above, contained 'exclusively a non-substantiated allegation' and that the fact that the president of the Polish competition authority is appointed by the prime minister did not prejudice the independence of its decisions with regard to PKP Cargo. No other passage in the contested decision reveals any substantial assessment of the body of evidence put forward by the applicant to that end, or indeed reasons why the Commission considered that all that evidence was 'exclusively' 'non-substantiated'.

104 Thus, it is not apparent from the contested decision that the Commission examined specifically and precisely the various pieces of evidence submitted by the applicant during the administrative procedure. However, in accordance with the case-law referred to in paragraph 97 above, the Commission should have assessed, specifically and precisely, in the light of the specific concerns expressed by the applicant and any information provided by it, whether, in the circumstances of the case, there were substantial grounds for believing that the applicant ran a real risk of its rights being infringed, if its case were to be examined by the national authorities.

105 The summary statement of reasons in the contested decision on that point does not allow either the applicant to know the reasons why the Commission dismissed the specific evidence put forward by the applicant concerning the second stage of the analysis referred to in paragraph 80 above, or the Court to exercise effective control over the legality of that decision and to assess whether there were substantial grounds for believing that the applicant ran a real risk of its rights being infringed (see, to that effect, judgment of 14 September 2017, *Contact Software* v *Commission*, T-751/15, not published, EU:T:2017:602, paragraphs 39 and 40 and the case-law cited).

106 Accordingly, the second plea in law and the second part of the first plea in law of the action must be upheld and, consequently, the contested decision must be annulled, without there being any need to examine the other arguments put forward by the applicant in support of the second part of the first plea in law.

Costs

107 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant, in accordance with the form of order sought by the applicant.

108 The Republic of Poland must bear its own costs, pursuant to Article 138(1) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Tenth Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision C(2019) 6099 final of 12 August 2019 (Case AT.40459 – Rail freight forwarding in Poland – PKP Cargo);**

2. **Orders the Commission to bear its own costs and to pay those incurred by Sped-Pro S.A.;**

3. **Orders the Republic of Poland to bear its own costs.**

van der Woude Kornezov Buttigieg

Hesse Petrlík

Delivered in open court in Luxembourg on 9 February 2022.

[Signatures]