JUDGMENT OF THE COURT (Sixth Chamber)

1 February 2018 (*)

(Appeal — Competition — Agreements, decisions and concerted practices — Article 101 TFEU — Price fixing — International air freight forwarding services — Pricing agreement affecting the final price of the services)

In Case C−263/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 12 May 2016,

Schenker Ltd, established in Feltham (United Kingdom), represented by F. Montag and M. Eisenbarth, Rechtsanwälte, and F. Hoseinian, advokat,

appellant,

the other party to the proceedings being:

European Commission, represented by A. Dawes, H. Leupold and G. Meessen, acting as Agents,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Chamber, J.−C. Bonichot and E. Regan, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, Schenker Ltd ('Schenker (UK)') asks the Court to set aside the judgment of the General Court of the European Union of 29 February 2016, *Schenker* v *Commission* (T−265/12, 'the judgment under appeal', EU:T:2016:111), by which the General Court dismissed its action seeking annulment of Commission Decision C(2012) 1959 final of 28 March 2012 relating to a proceeding under Article 101 [TFEU] and Article 53 of the EEA Agreement (Case COMP/39462 — Freight forwarding) ('the decision at issue'), in so far as that decision concerns it, and a reduction of the fine imposed on it in that decision.

Facts

2 It is apparent from the decision at issue and the background to the dispute set out in paragraphs 1 to 14 of the judgment under appeal that Schenker (UK), which is a subsidiary of Deutsche Bahn AG, provides international air freight forwarding services.

3 Those services consist in organising a transport operation by aggregating a number of services covering the whole or part of the transport operation, from both a logistical point of view (packaging, transportation, warehousing, handling, consolidation) and an administrative one (customs and fiscal formalities, insurance). Freight forwarders thus provide their customers with a combination of several services as a single package.

4 By the decision at issue, the European Commission identified four pricing mechanisms in respect of which the air freight forwarders acted in concert in breach of Article 101 TFEU. The following mechanisms are involved:

– the New Export System (NES), a pre-clearance system for exports from the United Kingdom to countries outside the European Economic Area (EEA);

– the Advanced Manifest System (AMS), a customs procedure under which information concerning goods imported into the United States must be notified to the authorities of that country before they arrive;

– the Currency Adjustment Factor (CAF), a factor intended to manage the risks resulting from the appreciation of the renminbi-yuan (CNY) against the United States dollar (USD);

– the Peak Season Surcharge (PSS), a temporary rate adjustment factor imposed as a reaction to increased demand in certain high-season periods from or to Hong Kong (China) and southern China.

5 Schenker (UK) was found liable only for participation in the NES cartel.

6 Paragraph 5 of the judgment under appeal is worded as follows:

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

7 Under Article 1(1)(a) and Article 2(1)(a) of the decision at issue, Schenker (UK), as an economic successor of Bax Global (UK), was ordered to pay a fine of EUR 3 673 000 for its participation from 1 October 2002 until 10 March 2003 in the NES cartel. Schenker (UK) received no reduction of its fine for cooperation with the Commission.

The proceedings before the General Court and the judgment under appeal

8 By application lodged at the Registry of the General Court on 12 June 2012, Schenker (UK) brought an action for partial annulment of the decision at issue and reduction of the fine imposed upon it by that decision.

9 By the judgment under appeal, the General Court dismissed the action.

Forms of order sought

10 By its appeal, Schenker (UK) claims that the Court should:

– set aside the judgment under appeal;

– annul Article 1(1)(a) of the decision at issue or alternatively refer the case back to the General Court;

– annul or, in the alternative, reduce the fine set out in Article 2(1)(a) of the decision at issue or alternatively refer the case back to the General Court;

– order the Commission to pay the costs.

11 The Commission contends that the Court should dismiss the appeal and order Schenker (UK) to pay the costs.

The appeal

12 Schenker (UK) puts forward six grounds in support of its appeal.

The first ground of appeal, alleging breach of the 'principle of prohibition of double representation'

Arguments of the parties

13 By its first ground of appeal, concerning paragraphs 52, 55 and 56 of the judgment under appeal, Schenker (UK) submits that the General Court erred in law by dismissing a breach of a 'principle of prohibition of double representation'. Under that principle, the General Court should have declared the evidence submitted by Deutsche Post AG inadmissible since its lawyers had a conflict of interest in respect of one of their other clients, the Freight Forward International Association representing the interests of freight forwarders.

14 The Commission contests those arguments.

Findings of the Court

15 The question whether a lawyer has complied with his obligations under national law and rules governing conduct in agreeing to represent a client in a case liable to give rise to a conflict of interest in respect of another client does not fall within the scope of the competence conferred on the Commission for the purposes of applying Articles 101 and 102 TFEU.

16 The General Court did not, accordingly, err in law in holding, in paragraph 52 of the judgment under appeal, that 'there are no provisions of EU law which state that the Commission is not entitled to use information and evidence submitted to it by an undertaking in an application for immunity, where the lawyer who has acted for that undertaking has infringed the prohibition on double representation or the duty of loyalty to his or her former clients'.

17 This ground is sufficient to justify rejection of the submission concerning a breach of the prohibition on double representation and of the principle of loyalty. Accordingly, the appraisal set out in paragraphs 53 to 57 of the judgment under appeal is superfluous. The complaints of Schenker (UK) in its regard are therefore ineffective.

18 Consequently, the first ground of appeal must be rejected as in part unfounded and in part ineffective.

The second ground of appeal, alleging infringement of Regulation No 141

Arguments of the parties

19 By its second ground of appeal, concerning paragraphs 78 to 83 of the judgment under appeal, Schenker (UK) contends that the General Court wrongly held that the NES cartel did not fall within conduct excluded from the scope of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [101 and 102 TFEU] (OJ, English Special Edition 1959-1962, p. 87), by virtue of the exemption laid down in Article 1 of Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291), on the ground that that exemption applied only to air carriers.

20 Schenker (UK) submits that that interpretation of Article 1 of Regulation No 141 is incorrect. All services directly related to transport services fall within the exemption laid down by that article. The exemption is not limited to air carriers alone, but covers a set of activities in the field of transport that are ancillary to the transport service in the strict sense.

21 The Commission contests the line of argument put forward by Schenker (UK) relating to the interpretation of Article 1 of Regulation No 141.

Findings of the Court

22 Under Article 1 of Regulation No 141, 'Regulation No 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article [102 TFEU], within the transport market'.

23 It is apparent from a literal interpretation of the term 'transport sector' that it may cover, in everyday language, apart from transport services in themselves, a set of activities inherently linked to a physical act of moving persons or goods from one place to another by a means of transport (see Opinion 2/15 (Free Trade Agreement with Singapore) of 16 May 2017, EU:C:2017:376, paragraph 61, and, to that effect, judgment of 15 October 2015, *Grupo Itevelesa and Others*, C−168/14, EU:C:2015:685, paragraphs 41, 45 and 46).

24 However, the terms 'transport' and 'transport market', found in Article 1 of Regulation No 141, are narrower in scope than the term 'transport sector'.

25 It thus follows from the wording of that article that Regulation No 17 does not apply to restrictions of competition which directly affect the transport services market.

26 This interpretation of Article 1 of Regulation No 141 is confirmed by the regulation's third recital, which states that 'the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices directly relating to the provision of transport services'.

27 In the light of those factors, a cartel relating to the fixing of the rates and conditions of the services provided by freight forwarders, whose activity consists in supplying, in one package, a number of services that are distinct from the transport operation in itself, is not excluded from the scope of Regulation No 17 by Article 1 of Regulation No 141 (see, to that effect, judgment of 24 October 2002, *Aéroports de Paris* v *Commission*, C−82/01 P, EU:C:2002:617, paragraph 18).

28 Accordingly, the General Court was correct in holding, in paragraph 80 of the judgment under appeal, that 'a reading of Article 1 of Regulation No 141 as meaning that that provision is not confined to exempting cartels concerning air transport services, but exempts a set of activities within the air transport sector, is not compatible with either the wording of that provision, or the third recital of that regulation, or the abovementioned case-law, from which it is apparent that the cartel must directly relate to the provision of air transport services'.

29 In the light of the foregoing, the second ground of appeal must be rejected as unfounded.

The third ground of appeal, alleging that the General Court erred in law in the application of Article 101 TFEU

Arguments of the parties

30 By its third ground of appeal, concerning paragraphs 122, 127, 154 to 156 and 159 of the judgment under appeal, Schenker (UK) submits that the General Court erred in law in rejecting the line of argument by which it contended that Article 101 TFEU was inapplicable to the NES cartel as that cartel did not appreciably affect trade between Member States.

31 According to Schenker (UK), by holding, in paragraphs 122 and 127 of the judgment under appeal, that the objective of the conduct relating to the NES was to restrict competition with respect to freight forwarding services as a package of services, the General Court also distorted the decision at issue.

32 The General Court took inflated turnover as a basis in order to calculate the amount of the fine and to be able to hold that the thresholds referred to in paragraph 53 of the Commission notice entitled 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty' (OJ 2004 C 101, p. 81) were reached.

33 The General Court assumed, in paragraphs 154 to 156 and 159 of the judgment under appeal, that the condition laid down in Article 101 TFEU relating to trade between Member States being affected is met as soon as undertakings involved in a local infringement carry out activities in other Member States. Such reasoning renders that condition devoid of any purpose. The infringement established is limited to the preparation of NES declarations in respect of services provided from the United Kingdom to countries outside the EEA. The fact that Schenker (UK) and its competitors provide non-NES services in other Member States is irrelevant for the purpose of determining whether trade between Member States is, consequently, affected, particularly as the Commission did not establish that there was a single infringement in the freight forwarding services sector, encompassing the NES, the AMS, the CAF and the PSS.

34 The Commissiondisputes those contentions.

Findings of the Court

35 First of all, the General Court did not err in law in observing, in paragraph 151 of the judgment under appeal, that the condition relating to the agreement concerned being capable of affecting trade between Member States, within the meaning of Article 101 TFEU, is satisfied where the Commission demonstrates that there is a sufficient degree of probability that that agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States (judgment of 17 July 1997, *Ferriere Nord* v *Commission*, C−219/95 P, EU:C:1997:375, paragraph 20).

36 Next, the line of argument put forward by Schenker (UK) is based on the premiss that the General Court distorted the decision at issue in bringing freight forwarding services taken as a whole within the sphere of the infringement for which it was found liable.

37 That premiss is incorrect. It is not in dispute that the relevant product market is the market for international air freight forwarding services and not that for its various components on whose pricing Schenker (UK) and the other undertakings covered by the decision at issue agreed. By the decision at issue, the Commission found four distinct infringements, corresponding to the four agreements in question relating to the four items intended to be incorporated in the price of international air freight forwarding services, that is to say, the NES, the AMS, the CAF and the PSS. Whilst those agreements each have their own particular characteristics, be it their substantive or geographical content, the period for which they were in effect or the undertakings which participated in them, they all concern the market for international

air freight forwarding services as a package of services. In the light of the definition of the relevant market, the General Court was not required to examine whether the NES surcharge could affect trade between Member States in NES-related services considered independently of freight forwarding services taken as a whole.

38 After recalling in paragraphs 153 and 154 of the judgment under appeal that the NES cartel affected international air freight forwarding services, which are offered not only in the United Kingdom but also in other Member States, the General Court held without erring in law, in paragraph 156 of that judgment, that 'it appears sufficiently probable that the NES cartel was capable of having repercussions on the conduct of the freight forwarders in other Member States, where they were also competing with one another, and of altering the structure of competition within the European Union in that respect'.

39 Finally, the line of argument put forward by Schenker (UK) is based on an incorrect reading of paragraphs 154 to 156 of the judgment under appeal. Contrary to what it asserts, the General Court did not 'establish an assumption' that trade between Member States must be regarded as affected as soon as undertakings involved in an infringement in one Member State carry out activities in other Member States. The General Court stated, in paragraph 154 of that judgment, that the participants in the agreement relating to the NES offered their freight forwarding services in Member States other than the United Kingdom. It is apparent from that finding that, in accordance with the definition of the relevant market, the freight forwarding services at issue are purchased and sold across the European Union and form part of a market which, by nature, is a cross-border one.

40 It follows from these factors that the General Court did not assume that trade between Member States was affected as soon as the participants in the cartel in question carried out activities in a number of Member States.

41 As regards the assessment of whether the cartel at issue appreciably affected trade between Member States, Schenker (UK) merely refers to its fifth ground of appeal, by which it contests the General Court's reasoning rejecting the line of argument set out at first instance concerning the calculation of the fine. The line of argument set out by the appellant relates more specifically to the value of the sales taken into account to calculate the basic amount of the fine. For the reasons stated in response to the fifth ground of appeal, in paragraphs 58 to 62 of the present judgment, that line of argument is not well founded.

42 It follows from those factors that the third ground of appeal must be rejected as unfounded.

The fourth ground of appeal, relating to attribution of the infringement between companies of the same group

Arguments of the parties

43 In the fourth ground of appeal, Schenker (UK) explains that Deutsche Bahn purchased Bax Global Ltd (UK) from The Brink's Company ('Brink's') in January 2006, approximately three years after the infringement period in respect of the NES cartel ended. On the date of the decision at issue, Bax Global (UK) no longer existed. The Commission held Schenker (UK)liable for the conduct of Bax Global (UK) as its economic successor while refusing to hold Brink's, as the former parent company of Bax Global (UK), jointly and severally liable with Schenker (UK) for the infringement.

44 In this connection, Schenker (UK) contends that the General Court distorted the decision at issue in holding, in paragraphs 217, 218, 225 and 233 of the judgment under appeal, first, that the Commission enjoys discretion when deciding whether to pursue a parent company jointly and severally liable for its subsidiary, secondly, that the Commission had objective reasons for not pursuing Brink's and, thirdly, that the Commission stated sufficient reasons in the decision at issue.

45 Schenker (UK) also criticises the General Court for having, in paragraph 218 of the judgment under appeal, substituted new reasoning for that of the decision at issue. Indeed, during the proceedings at first

instance the Commission never relied on the fact that 47 entities were already involved in the proceedings before the Commission. In any event, such an argument cannot constitute an objective reason for ceasing to pursue former parent companies.

46 The Commission contests those arguments.

Findings of the Court

47 In so far as Schenker (UK) claims that the General Court erred in law by distorting the decision at issue, it should be noted that it rejected the arguments by which Schenker (UK) contested the Commission's determination of the entities liable, essentially on the ground that, first, the Commission did not exceed the limits of its discretion when it decided not to hold the former parent companies jointly and severally liable and, secondly, the reasons stated in the decision at issue were sufficient in that regard.

48 In the first place, as regards the Commission's decision not to hold the former parent companies liable for their subsidiaries' participation in the infringements at issue, it should be pointed out, as the General Court correctly held in paragraphs 211 to 213 of the judgment under appeal, that, whilst the Commission has a discretion concerning the choice of legal entities on which it can impose a penalty for an infringement of EU competition law (judgments of 24 September 2009, *Erste Group Bank and Others* v *Commission*, C−125/07 P, C−133/07 P and C−137/07 P, EU:C:2009:576, paragraph 82, and of 11 July 2013, *Team Relocations and Others* v *Commission*, C−444/11 P, not published, EU:C:2013:464, paragraph 159), it must nevertheless, when making that choice, have due regard to the fundamental rights guaranteed by the European Union, in particular the principle of equal treatment.

49 In addition, the Court has already held that, in the light of the discretion which the Commission enjoys, the fact that it holds a parent company liable for the conduct of its subsidiary which participated directly in the infringement does not imply in any way that it is also under the obligation to hold the earlier parent company of that subsidiary liable or jointly liable (judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C−444/11 P, not published, EU:C:2013:464, paragraph 160).

50 In the light of those factors, the General Court did not err in law in holding, in paragraphs 216 to 219 of the judgment under appeal, that the Commission could decide, in the exercise of the discretion which it enjoys, to hold liable the parent companies of the subsidiaries that participated in the NES cartel which, at the time when the decision at issue was adopted, were part of the same undertaking for the purposes of Article 101 TFEU, in so far as participation in that cartel could also be imputed to them, without however pursuing the former parent companies of those subsidiaries. In this respect, it should be pointed out that, as the General Court observes in paragraph 217 of the judgment under appeal, it is open to the Commission to take account of the fact that the expansion of its proceedings might add considerably to the work involved (see, to that effect, judgment of 24 September 2009, *Erste Group Bank and Others* v *Commission*, C−125/07 P, C−133/07 P and C−137/07 P, EU:C:2009:576, paragraph 82). Thus, the General Court cannot be criticised for having held, in paragraph 218 of the judgment under appeal, that the Commission, having taken into account the significant number of entities already taking part in the procedure, could decide to exclude the former parent companies without exceeding the limits of its discretion.

51 In the second place, it should be recalled, as the General Court does in paragraphs 229 to 231 of the judgment under appeal, that, by virtue of settled case-law, the statement of reasons required under Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on all the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons for a measure meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also

to its context and to all the legal rules governing the matter in question (see, inter alia, judgment of 16 February 2017, *H&R ChemPharm* v *Commission*, C−95/15 P, not published, EU:C:2017:125, paragraph 18 and the case-law cited).

52 After noting, in paragraph 233 of the judgment under appeal, the various matters relied upon by the Commission in the decision at issue to justify its decision not to pursue the former parent companies, the General Court correctly held, in paragraph 234 of that judgment, that the Commission had, in the light of the principles recalled in the preceding paragraph of the present judgment, set out sufficient reasons for its decision.

53 Consequently, the fourth ground of appeal must be rejected as unfounded.

The fifth ground of appeal, relating to the value of sales to be taken into account for calculating the basic amount of the fine

Arguments of the parties

54 The fifth ground of appeal concerns paragraphs 256, 286, 287, 291, 295, 308, 310 and 311 of the judgment under appeal.

55 By this ground of appeal, Schenker (UK) contests the General Court's determination, in paragraph 256 of the judgment under appeal, that the Commission did not err in law in taking the view that 'the NES cartel affected the freight forwarding services as a package of services'. The appellant submits that the General Court founded its reasoning on matters which did not follow from the decision at issue. In adopting as its main finding that that conduct was intended to restrict competition with respect to freight forwarding services as a package of services, the General Court distorted the content of the decision at issue, exceeded the powers given to it under Article 264 TFEU and ruled *ultra petita*. In paragraph 295 of that judgment, the General Court did not state specifically or persuasively why it considered that the Commission was entitled to use turnover that exceeded the scope of the infringement as the starting point for calculating the fine.

56 Schenker (UK) also contests the appraisals on the basis of which the General Court rejected its submissions that the fine was not proportionate. In paragraphs 286, 287 and 291 of the judgment under appeal, the General Court gave precedence to the fine's deterrent effect over its proportionality. Nor did the General Court rule on the line of argument put forward by Schenker (UK) that the disproportionateness of the fine is clear in the light of the fact that the value of the sales that were affected by the infringement represents only 0.4% of the value adopted by the Commission for calculating the fine. The General Court should have taken that disproportion into consideration when it assessed the gravity of the infringement in paragraphs 308, 310 and 311 of the judgment under appeal.

57 The Commission contests those arguments.

Findings of the Court

58 The arguments of Schenker (UK) are based on the premiss that the General Court brought freight forwarding services taken as a whole within the sphere of the infringement found in the decision at issue for which it was declared liable, although that infringement relates solely to the NES.

59 It must be stated that that premiss is incorrect. As has already been held in paragraphs 36 and 37 of the present judgment when examining the third ground of appeal, Schenker (UK) confuses the infringement in question with the definition of the relevant market affected by that infringement.

60 Point 13 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') provides that, 'in determining the basic amount of the fine to be imposed, the Commission will take the value of the … sales of goods or services

to which the infringement directly or indirectly relates'. Having regard to the objective pursued by point 13 of the 2006 Guidelines, which consists in adopting as the starting point for the calculation of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it, the concept of the 'value of sales' must be understood as referring to sales on the market concerned by the infringement (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C−444/11 P, not published, EU:C:2013:464, paragraphs 76, 77 and 81).

61 Consequently, in order to determine the basic amount of the fine to be imposed in the present instance, pursuant to point 13 of the 2006 Guidelines, it was appropriate to take account of the value of the sales on the market for international air freight forwarding services, since the sales falling within the sphere of the infringements at issue were made on that market. The Commission was thus entitled to use the sales on the relevant market as the starting point for calculating the fines.

62 Therefore, the General Court did not err in law in holding, in paragraph 256 of the judgment under appeal, that 'the NES cartel affected the freight forwarding services as a package of services. Accordingly, the Commission did not exceed the limits which it imposed on itself in point 13 of the 2006 Guidelines by using the value of sales made by [Schenker UK] in the provision of freight forwarding services as a package of services and not solely the value of sales made in the provision of NES filing services', an assessment that was repeated, in essence, in paragraph 295 of the judgment under appeal.

63 As regards the complaints by which Schenker (UK) contests the assessment of the proportionality of the amount of the fine in the light of the relevant facts which was carried out by the General Court in paragraphs 286, 287 and 291 of the judgment under appeal, it should be recalled that, in order to satisfy the requirements of Article 47 of the Charter of Fundamental Rights of the European Union when conducting a review in the exercise of its unlimited jurisdiction with regard to a fine, the EU judicature is bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C−295/12 P, EU:C:2014:2062, paragraph 200).

64 On the legal and factual grounds set out in paragraphs 284 to 292 of the judgment under appeal, the General Court rejected the arguments that the Commission took insufficient account of the economic harm caused by the NES cartel. Contrary to the contentions set out by Schenker (UK) in its appeal, the General Court did not fail to rule on the line of argument put forward by it at first instance.

65 Indeed, the General Court held, in paragraph 284 of the judgment under appeal, that no provision 'of the 2006 Guidelines provides that the value of sales must be adjusted to reflect the economic harm caused by the infringement' and, in paragraph 287, that 'the amount of a fine cannot be regarded as inappropriate solely because it does not reflect the economic harm which has been or which may have been caused by the cartel concerned'.

66 The General Court, furthermore, properly rejected, in paragraphs 290 and 291 of the judgment under appeal, the line of argument intended to demonstrate that, in so far as the values of sales do not reflect the economic harm caused in the form of the surcharges levied, the Commission is obliged to adjust those values in order that an objective of general deterrence is not already taken into account at that stage of the calculation of fines, on the ground that 'use of the criterion of the value of sales in point 13 of the 2006 Guidelines … pursues, inter alia, an objective of general deterrence'.

67 In the light of those factors, the General Court did not err in law in rejecting, in paragraph 292 of the judgment under appeal, the arguments to the effect that the Commission took insufficient account of the economic harm caused by the NES cartel.

68 Finally, the Court must, for the same reasons, reject the complaints set out by Schenker (UK) contesting the General Court's assessments in paragraphs 308, 310 and 311 of the judgment under appeal, in respect

of the taking into consideration, at the stage of examination of the gravity percentage adopted, of the disproportion between the turnover achieved by the NES cartel and the turnover on the international air freight forwarding market.

69 The fifth ground of appeal must therefore be rejected in its entirety as unfounded.

The sixth ground of appeal, relating to the assessment of cooperation

Arguments of the parties

70 By its sixth ground of appeal, Schenker (UK) submits that the General Court erred in law by not holding that the Commission infringed the principle of equal treatment by treating it differently from Deutsche Post. Whilst Deutsche Post had its fine reduced on account of its cooperation in the light of the investigation taken as a whole, the Commission assessed the cooperation of all the other undertakings in the light of each of the infringements taken individually. If the Commission had followed the same approach for all the undertakings, a smaller fine would have been imposed on Schenker (UK).

71 The General Court distorted the terms of the decision at issue when it held, in paragraph 378 of the judgment under appeal, that the Commission assessed the applications for immunity submitted by Deutsche Post and the other undertakings on the same basis, namely in connection with the four separate cartels. Schenker (UK) refers in that regard torecitals 1029 and 1031 of the decision at issue, which rebut that determination.

72 Schenker (UK) submits that the ground set out in paragraphs 380 to 385 of the judgment under appeal that any difference in treatment between the applications for immunity of Schenker (UK) and Deutsche Post can be explained by the fact that Deutsche Post cooperated at an earlier stage of the investigation is muddled and illogical. That circumstance does not enable it to be explained why the Commission assessed the consequences of an undertaking's cooperation in the light of the infringements taken as a whole in one case and under an analysis conducted infringement by infringement in the other case.

73 The Commission counters by stating that the criticisms of Schenker (UK) concerning paragraph 378 of the judgment under appeal are ineffective and that the grounds set out in paragraphs 380 to 385 are free from any error of law.

Findings of the Court

74 In so far as the appellant complains that the General Court did not find an infringement of the principle of equal treatment, it should be pointed out that the Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17) lays down two separate regimes for rewarding undertakings for their cooperation in the Commission investigation where, although they have been or are party to a cartel, they have contributed to action taken against it. In return for their cooperation, those undertakings may obtain either immunity from fines, where they have enabled the Commission to become aware of infringements, or a reduction in the amount of the fines, where they have provided, by their cooperation in the course of the investigation, evidence which represents significant added value.

75 It is not in dispute that Deutsche Post submitted an application for immunity. By contrast, it was not until after the investigation was initiated that Schenker (UK) and the other companies in the Deutsche Bahn group cooperated in the investigation, when the Commission already possessed evidence, in particular the evidence seized when inspections were carried out. In the light of those factors, the General Court could legitimately hold, in essence, in paragraphs 380 to 387 of the judgment under appeal, that Deutsche Post, on the one hand, and Schenker (UK), on the other, were not in the same situation and that the Commission was consequently required to apply separate rules to them.

76 Nor did the General Court distort recital 1029 of the decision at issue when it observed, in paragraph 378 of the judgment under appeal, that the Commission had made a final decision on the undertakings'

applications for immunity on the same basis, namely, infringement by infringement. Contrary to what Schenker (UK) contends, that finding is not rebutted by recital 1031 of the decision at issue, which merely points out the circumstances in which Deutsche Post obtained conditional immunity after the submission of its application for immunity, that is to say, on a date when the nature and extent of the infringements were not yet precisely known.

77 In the light of those factors, the sixth ground of appeal must be rejected as unfounded.

78 It follows from all the foregoing considerations that the appeal must be dismissed in its entirety.

Costs

79 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

80 Since the Commission has applied for costs and Schenker (UK) has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Sixth Chamber) hereby:

1. Dismisses the appeal;

2. Orders Schenker Ltd to bear its own costs and to pay those incurred by the European Commission.

Fernlund Bonichot Regan

Delivered in open court in Luxembourg on 1 February 2018.

A. Calot Escobar C.G. Fernlund

Registrar President of the Sixth Chamber

* Language of the case: English.