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-264/16 P,

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

Deutsche Bahn AG, established in Berlin (Germany),

Schenker AG, established in Essen (Germany),

Schenker China Ltd, established in Shanghai (China),

Schenker International (H.K.) Ltd, established in Hong Kong (China),

represented by F. Montag and M. Eisenbarth, Rechtsanwälte, and F. Hoseinian, advokat,

appellants,

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 their appeal, Deutsche Bahn AG, Schenker AG, Schenker China Ltd and Schenker International (H.K.) Ltd (together, ‘DB and Others’) ask the Court to set aside the judgment of the General Court of the European Union of 29 February 2016, *Deutsche Bahn and Others* v *Commission* (T-267/12, not published, ‘the judgment under appeal’, EU:T:2016:110), by which the General Court dismissed their 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 them, and a reduction of the fines imposed on them 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 16 of the judgment under appeal that DB and Others provide 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 DB and Others were found liable only for their participation in respect of the AMS, CAF and PSS.

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

‘The Commission’s findings in relation to the AMS, CAF and PSS cartels may be summarised as follows:

– the AMS cartel [concerned a situation whereby] a number of international freight forwarders agreed from at least 19 March 2003 until 19 August 2004 to fix a surcharge at a level that would enable them to cover at least the costs associated with the AMS; the discussions between the undertakings participating in the cartel and the monitoring of its implementation took place, in particular, within the framework of the Freight Forward International Association (named Freight Forward Europe before 1 January 2004 …);

– the CAF cartel … was aimed at finding an agreement on a common tariff strategy in order to deal with the risk of a fall in profits owing to the appreciation of the Chinese currency, the renminbi, against the United States dollar, following the decision of the People’s Bank of China in 2005 that it would no longer peg the renminbi to the United States dollar; a number of international freight forwarders decided to convert all contracts with their customers into renminbi and, if this was not possible, to introduce a surcharge (CAF) and to set its level; the discussions took place in China between 27 July 2005 and 13 March 2006;

– the PSS cartel … concerned an agreement between a number of international freight forwarders between August 2005 and May 2007 relating to the application of a temporary rate adjustment factor; that factor was imposed as a reaction to increased demand in the air freight forwarding sector at certain times, such as the Christmas period, which led to a shortage of transportation

capacity and an increase in transport rates; it was designed to protect the freight forwarders' margins.'

7 Under Article 1(2)(g) and Article 2(2)(g) of the decision at issue, a fine of EUR 23 091 000 was imposed on Schenker and Deutsche Bahn jointly and severally for their participation from 25 March 2003 until 19 August 2004 in the AMS cartel. Schenker and Deutsche Bahn received for their cooperation a 25% reduction of the fine imposed upon them.

8 Under Article 1(3)(a) and Article 2(3)(a) of the decision at issue, a fine of EUR 2 444 000 was imposed on Schenker China, as an economic successor of Bax Global (China) Co. Ltd, for its participation in the CAF cartel from 27 July 2005 until 13 March 2006. Schenker China received for its cooperation a 20% reduction of the fine imposed upon it.

9 Under Article 1(3)(b) and Article 2(3)(b) of the decision at issue, a fine of EUR 3 071 000 was imposed on Schenker China and Deutsche Bahn jointly and severally for their participation from 29 July 2005 until 13 March 2006 in the CAF cartel. Schenker China and Deutsche Bahn received for their cooperation a 20% reduction of the fine imposed upon them.

10 Under Article 1(4)(h) and Article 2(4)(h) of the decision at issue, a fine of EUR 2 656 000 was imposed on Schenker International (H.K.) and Deutsche Bahn jointly and severally for their participation in the PSS cartel from 3 September 2005 until 23 June 2006. Schenker International (H.K.) and Deutsche Bahn received for their cooperation a 50% reduction of the fine imposed upon them and the period from 4 February until 23 June 2006 was disregarded for the purposes of the fine.

The proceedings before the General Court and the judgment under appeal

11 By application lodged at the Registry of the General Court on 12 June 2012, DB and Others brought an action for partial annulment of the decision at issue and reduction of the fines imposed upon them by that decision.

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

Forms of order sought

13 By their appeal, DB and Others claim that the Court should:

– set aside the judgment under appeal;

– annul Article 1(2)(g), Article 1(3)(a) and (b) and Article 1(4)(h) of the decision at issue or alternatively refer the case back to the General Court;

– annul or, in the alternative, reduce the fines set out in Article 2(2)(g), Article 2(3)(a) and (b) and Article 2(4)(h) of the decision at issue or alternatively refer the case back to the General Court;

– order the Commission to pay the costs.

14 The Commission contends that the Court should dismiss the appeal and order DB and Others to pay the costs.

The appeal

15 DB and Others put forward five grounds in support of their appeal.

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

Arguments of the parties

16 By their first ground of appeal, concerning paragraphs 55, 58 and 59 of the judgment under appeal, DB and Others submit 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.

17 The Commission contends that this ground of appeal is ineffective and, in any event, unfounded.

Findings of the Court

18 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.

19 The General Court did not, accordingly, err in law in holding, in paragraph 55 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’.

20 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 56 to 60 of the judgment under appeal is superfluous. The complaints of DB and Others in its regard are therefore ineffective.

21 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

22 By their second ground of appeal, concerning paragraphs 81 to 86 of the judgment under appeal, DB and Others contend that the General Court wrongly held that the AMS 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.

23 DB and Others submit 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.

24 The Commission contests the line of argument put forward by DB and Others relating to the interpretation of Article 1 of Regulation No 141.

Findings of the Court

25 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’.

26 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).

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

28 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.

29 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'.

30 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).

31 Accordingly, the General Court was correct in holding, in paragraph 83 of the judgment under appeal, that 'to read Article 1 of Regulation No 141 as meaning that that provision is not confined to exempting cartels concerning air transport services, but that it 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'.

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

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

Arguments of the parties

33 In the third ground of appeal, DB and Others explain that Deutsche Bahn purchased Bax Global (China) from The Brink's Company ('Brink's') in January 2006, approximately two months before the end of the infringement period. On the date of the decision at issue, Bax Global (China) no longer existed. The Commission held Schenker China liable for the conduct of Bax Global (China) as its economic successor while refusing to hold Brink's, as the former parent company of Bax Global (China), jointly and severally liable with Schenker China for the infringement.

34 In this connection, DB and Others contend that the General Court distorted the decision at issue in holding, in paragraphs 148, 149, 156 and 164 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.

35 DB and Others also criticise the General Court for having, in paragraph 149 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.

36 The Commission contests those arguments.

Findings of the Court

37 In so far as DB and Others claim that the General Court erred in law by distorting the decision at issue, it should be noted that it rejected the arguments by which they 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.

38 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 142 to 144 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.

39 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).

40 In the light of those factors, the General Court did not err in law in holding, in paragraphs 147 to 150 of the judgment under appeal, that the Commission could decide, in the exercise of the discretion which it enjoys, to hold liable also the parent companies of the subsidiaries that participated in the CAF 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 148 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 149 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.

41 In the second place, it should be recalled, as the General Court does in paragraphs 160 to 162 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).

42 After noting, in paragraph 164 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 165 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.

43 Consequently, the third ground of appeal must be rejected as unfounded.

The fourth 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

44 By their fourth ground of appeal, DB and Others contest the General Court's determination, in paragraphs 192, 198 and 199 of the judgment under appeal, that the Commission did not err in law in taking the view that the aim of the conduct relating to the AMS, the CAF and the PSS was to restrict competition with respect to freight forwarding services as a package of services. The appellants submit 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 243 of the judgment under appeal, 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.

45 DB and Others also contest the appraisals on the basis of which the General Court rejected their submissions that the fines were not proportionate. In paragraphs 235, 239 and 245 of the judgment under appeal, the General Court gave precedence to a fine's deterrent effect over its proportionality. Nor did the General Court rule on the line of argument put forward by DB and Others that the disproportionateness of the fines is clear in the light of the fact that the value of the sales that were affected by the infringements represents only 0.1% (AMS), 3.7% (CAF) and 0.2% (PSS) 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 256, 258 and 259 of the judgment under appeal.

46 The Commission contests those arguments.

Findings of the Court

47 The arguments of DB and Others are based on the premiss that the General Court brought freight forwarding services taken as a whole within the sphere of the infringements found in the decision at issue for which they were declared liable, although those infringements relate solely to the AMS, the CAF and the PSS.

48 That premiss is, however, incorrect in that it confuses the infringements in question with the definition of the relevant market affected by those infringements.

49 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 DB and Others 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.

50 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'. Whilst that concept of the 'value of sales' cannot be extended to encompass sales which do not fall within the infringement, it nonetheless

cannot be limited to the value solely of sales in respect of which it is established that they were actually affected by that infringement (judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraphs 76 and 77). 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).

51 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.

52 Accordingly, the General Court did not err in law in holding, in paragraph 245 of the judgment under appeal, that 'it cannot be inferred from the fact that the Commission used the values of sales made in the provision of the freight forwarding services affected by the AMS, CAF and PSS cartels as the starting point for the calculation of fines imposed on [DB and Others] that the Commission treated those cartels as cartels designed to fix the final price of the freight forwarding services or to cover all competitiveness factors'.

53 The General Court was also correct in holding in paragraph 192 of that judgment, on the basis of the uncontested matters set out in paragraphs 87 to 104 thereof, that 'the Commission was entitled to hold, without committing an error in law, that the aim of [the AMS] cartel was not to restrict competition with respect to AMS filing services as individual services, but competition with respect to freight forwarding services as a package of services'.

54 The same is true in respect of the ground set out in paragraph 198 of the judgment under appeal, relating to the CAF cartel.

55 Nor did the General Court err in law by holding in paragraph 200 of the judgment under appeal — after stating in paragraph 199 that 'the PSS surcharge did not relate to any particular service, but was designed solely to pass on cost or risk factors to the freight forwarders' customers' — that 'the Commission did not exceed the self-imposed limits in point 13 of the 2006 Guidelines by using the values of sales made by [DB and Others] in the provision of freight forwarding services as a package of services and not solely the values of sales made with the AMS, CAF and PSS surcharges'.

56 As regards the complaints by which DB and Others contest the review of the proportionality of the amount of the fines in the light of the relevant facts which was carried out by the General Court in paragraphs 234, 235, 239, 258 and 259 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).

57 On the legal and factual grounds set out in paragraphs 232 to 240 of the judgment under appeal, the General Court rejected the arguments that the Commission took insufficient account of the economic harm caused by the AMS, CAF and PSS cartels in particular because the turnovers linked to the AMS, the CAF and the PSS represent only an insignificant part of the turnovers used by the Commission. Contrary to the contentions set out by DB and Others in their appeal, the General Court did not fail to rule on that part of the line of argument put forward by them at first instance.

58 Indeed, the General Court held, in paragraph 232 of the judgment under appeal, that no provision ‘of the 2006 Guidelines provides that the value of sales must be limited to reflect the economic harm caused by the infringement’ and, in paragraph 235, 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 potentially have been caused by the cartel concerned’.

59 The General Court, furthermore, properly rejected, in paragraphs 238 and 239 of the judgment under appeal, the line of argument of DB and Others 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’.

60 In the light of those factors, the General Court did not err in law in rejecting, in paragraph 240 of the judgment under appeal, the arguments to the effect that the Commission took insufficient account of the economic harm caused by the AMS, CAF and PSS cartels.

61 Finally, the Court must, for the same reasons, reject the complaints set out by DB and Others contesting the General Court’s assessments in paragraphs 256, 258 and 259 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 AMS, CAF and PSS cartels and the turnover on the international air freight forwarding market.

62 The fourth ground of appeal must therefore be rejected in its entirety as unfounded.

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

The first part of the fifth ground of appeal

– *Arguments of the parties*

63 By the first part of their fifth ground of appeal, DB and Others submit that the General Court erred in law by not holding that the Commission infringed the principle of equal treatment by treating them 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 DB and Others in the light of each of the infringements. If the Commission had followed the same approach, smaller fines would have been imposed on DB and Others.

64 The General Court distorted the terms of the decision at issue when it held, in paragraph 352 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. DB and Others refer in that regard torecitals 1029 and 1031 of the decision at issue, which rebut that determination.

65 DB and Others submit that the ground set out in paragraphs 354 to 359 of the judgment under appeal that any difference in treatment between the applications for immunity of DB and Others 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.

66 The Commission contests those arguments.

– *Findings of the Court*

67 In so far as the appellants complain 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.

68 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 DB and Others 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 354 to 361 of the judgment under appeal, that Deutsche Post, on the one hand, and DB and Others, on the other, were not in the same situation and that the Commission was consequently required to apply separate rules to them.

69 Nor did the General Court distort recital 1029 of the decision at issue when it observed, in paragraph 352 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 DB and Others contend, 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.

70 In the light of those factors, the first part of the fifth ground of appeal must be rejected as unfounded.

The second part of the fifth ground of appeal

– *Arguments of the parties*

71 By the second part of their fifth ground of appeal, DB and Others submit that the General Court infringed Article 47 of the Charter of Fundamental Rights. When exercising its unlimited jurisdiction, the General Court relied on new reasoning and documents upon which Deutsche Bahn did not have the opportunity to comment.

72 DB and Others point out that the General Court held in paragraphs 388 to 391 of the judgment under appeal that the refusal to grant Deutsche Bahn and Schenker International (H.K.) partial immunity from 7 December 2005 was contrary to point 26 of the Commission Notice on immunity from fines and reduction of fines in cartel cases. They criticise the General Court for not having given due effect to that finding, by refusing entitlement to such partial immunity on the grounds set out in paragraphs 392 to 411 of the judgment under appeal. The General Court relied on reasoning and documents other than those upon which the decision at issue is based.

73 Since DB and Others consider that they are unable to challenge that evidence on appeal, they submit that it was incumbent upon the General Court to invite them to comment on the new matters upon which it relied. The General Court cannot base its assessment on considerations which they could not reasonably foresee (judgment of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 82).

74 The Commission contests those arguments.

– *Findings of the Court*

75 According to paragraph 393 of the judgment under appeal, DB and Others had access during the administrative procedure to all the evidence upon which the General Court relied. Also, according to paragraph 19 of that judgment, the documents produced by the Commission in response to a request from the General Court were disclosed to DB and Others, which were invited to submit observations in their regard, and these are matters which DB and Others do not call into question. Accordingly, there is no ground for complaining that the General Court infringed the rule that the parties should be heard or prejudiced the rights of the defence.

76 Therefore, the second part of the fifth ground of appeal is unfounded and the fifth ground of appeal must be rejected.

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

Costs

78 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.

79 Since the Commission has applied for costs and DB and Others have 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 Deutsche Bahn AG, Schenker AG, Schenker China Ltd and Schenker International (H.K.) Ltd to bear their 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

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* Language of the case: English.