ОБЩ СЪД НА ЕВРОПЕЙСКИЯ СЪЮЗ
TRIBUNAL GENERAL DE LA UNIÓN EUROPEA
TRIBUNÁL EVROPSKÉ UNIE
DEN EUROPÆISKE UNIONS RET
GERICHT DER EUROPÄISCHEN UNION
EUROOPA LIIDU ÜLDKOHUS
ΓΕΝΙΚΟ ΔΙΚΑΣΤΗΡΙΟ ΤΗΣ ΕΥΡΩΠΑΪΚΗΣ ΕΝΩΣΗΣ
GENERAL COURT OF THE EUROPEAN UNION
TRIBUNAL DE L'UNION EUROPÉENNE
CÚIRT GHINEARÁLTA AN AONTAIS EORPAIGH
OPĆI SUD EUROPSKE UNIJE
TRIBUNALE DELL'UNIONE EUROPEA
EIROPAS SAVIENĪBAS VISPĀRĒJĀ TIESA
EUROPOS SĄJUNGOS BENDRASIS TEISMAS
AZ EURÓPAI UNIÓ TÖRVÉNYSZÉKE
IL-QORTI ĠENERALI TAL-UNJONI EWROPEA
GERECHT VAN DE EUROPESE UNIE
SĄD UNII EUROPEJSKIEJ
TRIBUNAL GERAL DA UNIÃO EUROPEIA
TRIBUNALUL UNIUNII EUROPENE
VŠEOBECNÝ SÚD EURÓPSKEJ ÚNIE
SPLOŠNO SODIŠČE EVROPSKE UNIJE
EUROOPAN UNIONIN YLEINEN TUOMIOISTUIN
EUROPEISKA UNIONENS TRIBUNAL

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

30 March 2022 * [1]

(Competition – Agreements, decisions and concerted practices – Market for airfreight – Decision finding an infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport – Coordination of elements of the price of air freight services (fuel surcharge, security surcharge, payment of commission on surcharges) – Exchange of information – Territorial jurisdiction of the Commission – Obligation to state reasons – Article 266 TFEU – State coercion – Single and continuous infringement – Amount of the fine – Value of sales – Duration of participation in the infringement – Mitigating circumstances – Encouragement of anticompetitive conduct by public authorities – Unlimited jurisdiction)

In Case T-341/17,

British Airways plc, established in Harmondsworth (United Kingdom), represented by J. Turner, R. O'Donoghue QC, and A. Lyle-Smythe, Solicitor,

applicant,

v

European Commission, represented by N. Khan and A. Dawes, acting as Agents, and A. Bates, Barrister,

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between

* Language of the case: English.

[1] This judgment is published in extract form.

the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) in so far as it relates to the applicant and, in the alternative, for cancellation of the fine imposed on the applicant or for a reduction in the amount thereof,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of H. Kanninen (Rapporteur), President, J. Schwarcz, C. Iliopoulos, D. Spielmann and I. Reine, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 13 September 2019,

gives the following

Judgment

I. Background to the dispute

1 The applicant, British Airways plc, is an air transport company operating in the market for airfreight ('freight').

2 In the freight sector, airlines provide for the carriage of cargo by air ('the carriers'). As a general rule, the carriers supply freight services to freight forwarders, who arrange the transport of that cargo on behalf of shippers. In return, those freight forwarders pay those carriers a price consisting, on the one hand, of rates calculated on a per-kilogram basis and negotiated either on a long-term basis (typically one season, namely six months) or on an ad hoc basis, and, on the other hand, of various surcharges, which are intended to cover certain costs.

3 There are four different types of carrier: (i) those which exclusively operate dedicated freighter airplanes, (ii) those with cargo capacity on passenger flights, (iii) those with both dedicated freighter airplanes and with cargo capacity on passenger flights (combination airlines) and (iv) integrators with dedicated freighter airplanes providing both integrated express delivery services and general cargo services.

4 No carrier is able to serve all major cargo destinations in the world with sufficient frequency, and therefore agreements among carriers enabling them to increase their network coverage or improve their schedules have become common, including in the context of broader commercial alliances between carriers. At the material time, those alliances included, inter alia, the WOW alliance, which comprised Deutsche Lufthansa AG ('Lufthansa'), SAS Cargo Group A/S ('SAS Cargo'), Singapore Airlines Cargo Pte Ltd ('SAC') and Japan Airlines International Co. Ltd ('Japan Airlines').

A. The administrative procedure

5 On 7 December 2005, the Commission of the European Communities received an application for immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice') lodged by Lufthansa and its subsidiaries, Lufthansa Cargo AG and Swiss International Air Lines AG ('Swiss'). The application alleged that extensive anticompetitive contacts were being maintained between a number of carriers with regard, in particular, to:

– the fuel surcharge ('FSC'), which had been introduced to tackle rising fuel costs;

– the security surcharge ('SSC'), which had been introduced to address the costs of certain security measures imposed following the terrorist attacks of 11 September 2001.

6 On 14 and 15 February 2006, the Commission carried out unannounced inspections at the premises of a number of carriers pursuant to Article 20 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).

7 Following the inspections, a number of carriers, including the applicant, submitted an application under the 2002 Leniency Notice.

8 On 19 December 2007, after sending a number of requests for information, the Commission addressed a statement of objections to 27 carriers, including the applicant ('the Statement of Objections'). It stated that those carriers had infringed Article 101 TFEU, Article 53 of the Agreement on the European Economic Area (EEA) and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport ('the EC-Switzerland Air Transport Agreement') by participating in a cartel relating, in particular, to the FSC, the SSC and a refusal to pay commission on surcharges ('the refusal to pay commission').

9 The addressees submitted written observations in reply to the Statement of Objections.

10 An oral hearing was held from 30 June to 4 July 2008.

B. The Decision of 9 November 2010

11 On 9 November 2010, the Commission adopted Decision C(2010) 7694 final relating to a proceeding under Article 101 [TFEU], Article 53 of the EEA Agreement and Article 8 of the [EC-Switzerland Air Transport Agreement] (Case COMP/39258 – Airfreight) ('the Decision of 9 November 2010'). That decision is addressed to 21 carriers ('the carriers incriminated in the Decision of 9 November 2010'), namely:

– Air Canada;

– Air France-KLM (‘AF-KLM’);

– Société Air France (‘AF’);

– Koninklijke Luchtvaart Maatschappij NV (‘KLM’);

– the applicant;

– Cargolux Airlines International SA (‘Cargolux’);

– Cathay Pacific Airways Ltd (‘CPA’);

– Japan Airlines Corp.;

– Japan Airlines;

– LAN Airlines SA;

– Lan Cargo SA;

– Lufthansa Cargo;

– Lufthansa;

– Swiss;

– Martinair Holland NV (‘Martinair’);

– Qantas Airways Ltd (‘Qantas’);

– SAS AB;

– SAS Cargo;

– Scandinavian Airlines System Denmark-Norway-Sweden (‘SAS Consortium’);

– SAC;

– Singapore Airlines Ltd (‘SIA’).

12 The objections raised provisionally against the other addressees of the Statement of Objections were withdrawn.

13 The grounds of the Decision of 9 November 2010 described a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement, covering the EEA territory and Switzerland, by which the carriers incriminated in the Decision of

9 November 2010 had coordinated their behaviour as regards the pricing of freight services.

14 The operative part of the Decision of 9 November 2010, in so far as it related to the applicant, read as follows:

'*Article 1*

The following undertakings infringed Article 101 of the TFEU and Article 53 of the EEA Agreement by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for [freight] services on routes between airports within the EEA, for the following periods:

…

d) [the applicant] from 22 January 2001 until 14 February 2006;

…

Article 2

The following undertakings infringed Article 101 of the TFEU by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for [freight] services on routes between airports within the European Union and airports outside the EEA, for the following periods:

…

e) [the applicant] from 1 May 2004 until 14 February 2006;

…

Article 3

The following undertakings infringed Article 53 of the EEA Agreement by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for [freight] services on routes between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and third countries, for the following periods:

…

e) [the applicant] from 19 May 2005 until 14 February 2006;

…

Article 4

The following undertakings infringed Article 8 of the [EC-Switzerland Air Transport Agreement] by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for [freight] services on routes between airports within the European Union and airports in Switzerland, for the following periods:

…

d) [the applicant] from 1 June 2002 until 14 February 2006;

…

Article 5

For the infringements referred to in Articles 1 to 4 [of the Decision of 9 November 2010], the following fines are imposed:

…

e) [the applicant]: EUR 104 040 000;

…

Article 6

The undertakings listed in Articles 1 to 4 shall immediately bring to an end the infringements referred to in those Articles, in so far as they have not already done so.

They shall refrain from repeating any act or conduct described in Articles 1 to 4, and from any act or conduct having the same or similar object or effect.'

C. The action challenging the Decision of 9 November 2010 before the General Court

15 By application lodged at the General Court Registry on 24 January 2011, the applicant brought an action for annulment in part of the Decision of 9 November 2010 in so far as it concerned it and, in the alternative, for cancellation of the fine imposed on it or for a reduction in the amount thereof. The other carriers incriminated in the Decision of 9 November 2010, with the exception of Qantas, also brought actions against that decision before the General Court.

16 By judgments of 16 December 2015, *Air Canada* v *Commission* (T-9/11, not published, EU:T:2015:994), *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-28/11, not published, EU:T:2015:995), *Japan Airlines* v *Commission* (T-36/11, not published, EU:T:2015:992), *Cathay Pacific Airways* v *Commission* (T-38/11,

not published, EU:T:2015:985), *Cargolux Airlines* v *Commission* (T-39/11, not published, EU:T:2015:991), *Latam Airlines Group and Lan Cargo* v *Commission* (T-40/11, not published, EU:T:2015:986), *Singapore Airlines and Singapore Airlines Cargo Pte* v *Commission* (T-43/11, not published, EU:T:2015:989), *Deutsche Lufthansa and Others* v *Commission* (T-46/11, not published, EU:T:2015:987), *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), *Air France-KLM* v *Commission* (T-62/11, not published, EU:T:2015:996), *Air France* v *Commission* (T-63/11, not published, EU:T:2015:993), and *Martinair Holland* v *Commission* (T-67/11, EU:T:2015:984), the Court annulled the Decision of 9 November 2010, in whole or in part, in so far as it concerned Air Canada, KLM, Japan Airlines and Japan Airlines Corp., CPA, Cargolux, Latam Airlines Group SA (formerly Lan Airlines) and Lan Cargo, SAC and SIA, Lufthansa, Lufthansa Cargo and Swiss, the applicant, SAS Cargo, SAS Consortium and SAS, AF-KLM, AF and Martinair, respectively. The Court held that that decision was vitiated by a defective statement of reasons.

17 In that regard, the General Court held, in the first place, that the Decision of 9 November 2010 was vitiated by contradictions between the grounds and the operative part thereof. The grounds of the decision described a single and continuous infringement relating to all routes covered by the cartel, in which all the carriers incriminated in the Decision of 9 November 2010 had participated. By contrast, the operative part of that decision identified either four separate single and continuous infringements, or just one single and continuous infringement, liability for which was attributed to the carriers which, as regards the routes mentioned in Articles 1 to 4 of the decision, participated directly in the unlawful conduct referred to in each of those articles or were aware of the collusion on those routes and accepted the risk. Neither of those two readings of the operative part of the decision in question was consistent with the grounds for the decision.

18 The General Court also rejected as incompatible with the grounds of the Decision of 9 November 2010 the alternative reading of its operative part proposed by the Commission, which was that the failure to mention some of the carriers incriminated in the Decision of 9 November 2010 in Articles 1, 3 and 4 of that decision could be explained by the fact that those carriers did not operate the routes referred to in those articles, and that those articles need not be interpreted as referring to separate single and continuous infringements.

19 In the second place, the General Court held that the grounds of the Decision of 9 November 2010 contained significant internal inconsistencies.

20 In the third place, after noting that neither of the two possible readings of the operative part of the Decision of 9 November 2010 was consistent with the grounds thereof, the General Court considered whether, in the context of at least one of those two possible interpretations, the internal contradictions of that decision were likely to undermine the applicant's rights of defence and prevent the

General Court from conducting its review. As regards the first reading, namely that there were four separate single and continuous infringements, first of all, the Court held that the applicant had not been in a position to understand to what extent the evidence set out in the grounds and relating to the existence of a single and continuous infringement was liable to establish the existence of the four separate infringements found in the operative part, or to contest the sufficiency of that evidence. Second, it held that the applicant had not been able to understand the line of reasoning that had led the Commission to find it liable for an infringement, including in respect of routes which it did not operate within the parameters defined by each article of the Decision of 9 November 2010.

D. Contested decision

21 On 20 May 2016, following the annulment ordered by the General Court, the Commission sent a letter to the carriers incriminated in the Decision of 9 November 2010 which had brought an action against that decision before the Court to inform them that its Directorate-General (DG) for Competition intended to propose to it the adoption of a new decision in which it would find that they had participated in a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement on all of the routes referred to in that decision.

22 The addressees of the Commission's letter referred to in paragraph 21 above were invited to make known their views on the intended decision of the Commission's DG for Competition within one month. All addressees, including the applicant, availed themselves of that possibility.

23 On 17 March 2017, the Commission adopted Decision C(2017) 1742 final relating to a proceeding under Article 101 [TFEU], Article 53 of the EEA Agreement and Article 8 of the [EC-Switzerland Air Transport Agreement] (Case AT.39258 – Airfreight) ('the contested decision'). That decision is addressed to 19 carriers ('the incriminated carriers'), namely:

– Air Canada;

– AF-KLM;

– AF;

– KLM;

– the applicant;

– Cargolux;

– CPA;

– Japan Airlines;

– Latam Airlines Group;

– Lan Cargo;

– Lufthansa Cargo;

– Lufthansa;

– Swiss;

– Martinair;

– SAS;

– SAS Cargo;

– SAS Consortium;

– SAC;

– SIA.

24 In the contested decision, no objections are maintained against the other addressees of the Statement of Objections.

25 The grounds of the contested decision describe a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement, by which the incriminated carriers coordinated their behaviour as regards the pricing of freight services worldwide through the FSC, the SSC and the payment of commission on surcharges.

26 In the first place, in Section 4.1 of the contested decision, the Commission described the 'basic principles and structure of the cartel'. In recitals 107 and 108 of that decision, the Commission stated that the investigations had uncovered a worldwide cartel based on a network of bilateral and multilateral contacts over a long period of time among competitors regarding the conduct which they had decided on, intended to adopt, or contemplated adopting with regard to various elements of the price of freight services, namely the FSC, the SSC and the refusal to pay commission. It stated that the common objective of that network of contacts was to coordinate competitors' pricing behaviour or to reduce uncertainty with regard to their pricing policies ('the cartel at issue').

27 According to recital 109 of the contested decision, the objective of the coordinated application of the FSC was to ensure that carriers throughout the world impose a flat-rate surcharge per kilo for all relevant shipments. A complex network of mainly bilateral contacts among carriers was established to coordinate and monitor the application of the FSC, the precise date of application often, according to the Commission, being decided at local level usually with the

principal local carrier taking the lead and others following. That coordinated approach was extended to the SSC and to the refusal to pay commission, with the result that the latter became net revenue for the carriers and created an additional incentive for them to continue with the coordination relating to surcharges.

28 According to recital 110 of the contested decision, senior management in the head offices of a number of carriers were either directly involved in competitor contacts or regularly informed about them. In the case of the surcharges, responsible head-office employees were in contact with each other when a change to the surcharge level was imminent. The refusal to pay commission was also confirmed on a number of occasions during contacts at head-office level. There were frequent contacts also at local level, partly to better implement the instructions received from the head offices and to adapt them to the local market conditions, partly to coordinate and implement local initiatives. In this latter case the head offices generally authorised or were informed of the proposed action.

29 According to recital 111 of the contested decision, carriers contacted each other bilaterally, in small groups and in some instances in large multilateral forums. Local associations of carrier representatives were used, in particular in Hong Kong and Switzerland, to discuss yield-improvement measures and coordinate surcharges. Meetings of alliances, such as the WOW alliance, were also used for such purposes.

30 In the second place, in Sections 4.3, 4.4 and 4.5 of the contested decision, the Commission described the contacts concerning, respectively, the FSC, the SSC and the refusal to pay commission (‘the contacts at issue’).

31 Thus, first, in recitals 118 to 120 of the contested decision, the Commission summarised the contacts relating to the FSC as follows:

> ‘(118) A network of bilateral contacts built up from late 1999/early 2000 onwards involving a number of airlines that allowed information sharing concerning the actions of the participants throughout the network. Carriers contacted each other regularly to discuss any question that came up concerning the FSC, including changes to the mechanism, changes [to] the FSC level, consequent application of the mechanism, [and] instances when some airlines did not follow the system.
>
> (119) Concerning the implementation of FSC at local level, a system was often applied whereby leading airlines on particular routes or in certain countries would announce the change first, and they would be followed by others …
>
> (120) Anti-competitive coordination concerning the FSC took place mainly in four contexts: concerning the introduction of FSC in early 2000, the reintroduction of a fuel surcharge mechanism after the revocation of the planned [International Air Transport Association (IATA)] mechanism, the introduction of new trigger points (raising the maximum level of FSC) and

most frequently at the point where the fuel indices were approaching the level at which an increase or decrease in the FSC would be triggered.'

32 Second, in recital 579 of the contested decision, the Commission summarised the contacts relating to the SSC as follows:

'A number of [incriminated carriers] discussed, among [other] issues, their plans whether or not to introduce [an] SSC … Moreover, the amount of the surcharge and the timing of the introduction were also discussed. [The incriminated carriers] furthermore shared with each other ideas concerning the justification to be given to their customers. Ad hoc contacts concerning the implementation of the SSC continued throughout the years 2002-2006. The illicit coordination took place both at head office and local level.'

33 Third, in recital 676 of the contested decision, the Commission stated that the incriminated carriers had 'continued to refuse [to pay] commission on the surcharges and [had] confirmed their relevant intentions to each other in the framework of numerous contacts'.

34 In the third place, in Section 4.6 of the contested decision, the Commission carried out the assessment of the contacts at issue. The assessment of those relied on against the applicant is set out in recitals 739 to 743 of that decision.

35 In the fourth place, in Section 5 of the contested decision, the Commission applied Article 101 TFEU to the facts of the case, while stating, in footnote No 1289 to that decision, that the considerations adopted also applied to Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement. Thus, first, in recital 846 of that decision, the Commission found that the incriminated carriers had coordinated their conduct or influenced price setting, 'ultimately amounting to price fixing with regard to' the FSC, the SSC and the payment of commission on surcharges. In recital 861 of that decision, the Commission described the 'overall scheme to coordinate the pricing behaviour for [freight] services', the investigation of which had revealed the existence of a 'complex infringement consisting of various actions which [could] be either classified as an agreement or concerted practice, within which the competitors knowingly substituted practical cooperation between them for the risks of competition'.

36 Second, in recital 869 of the contested decision, the Commission found that the 'conduct in question [constituted] a single and continuous infringement of Article 101 of the TFEU'. It thus found that the arrangements at issue pursued a single anticompetitive aim of distorting competition in the freight sector within the EEA, including when coordination took place at local level and experienced local variations (recitals 872 to 876), concerned a 'single product/service', namely 'the provision of [freight] services and the pricing thereof' (recital 877), concerned the same undertakings (recital 878), were of a single nature (recital 879) and related to three elements, namely the FSC, the SSC and the

refusal to pay commission, which were ‘frequently discussed side by side in the same competitor contact’ (recital 880).

37 In recital 881 of the contested decision, the Commission added that ‘the majority of the parties’, including the applicant, were involved in all three elements of the single infringement.

38 Third, in recital 884 of the contested decision, the Commission concluded that the infringement at issue was continuous.

39 Fourth, in recital 903 of the contested decision, the Commission found that the conduct at issue had the object of restricting competition ‘at least in the [European Union], the EEA and Switzerland’. In recital 917 of that decision, the Commission added, in essence, that there was, therefore, no need to take into account the ‘actual effects’ of that conduct.

40 Fifth, in recitals 972 to 1021 of the contested decision, the Commission examined the legislation of seven third countries, which several of the incriminated carriers maintained had required them to collude on surcharges, thereby impeding the application of the relevant competition rules. It considered that those carriers had failed to prove that they had acted under duress from those third countries.

41 Sixth, in recitals 1024 to 1035 of the contested decision, the Commission found that the single and continuous infringement was likely to have an appreciable effect on trade between Member States, between contracting parties to the EEA Agreement and between contracting parties to the EC-Switzerland Air Transport Agreement.

42 Seventh, the Commission examined the limits of its territorial and temporal jurisdiction to find and penalise an infringement of the competition rules in the present case. First, in recitals 822 to 832 of the contested decision, under the heading ‘Jurisdiction of the Commission’, the Commission stated, in essence, that it would not apply, first of all, Article 101 TFEU to agreements and practices before 1 May 2004 concerning routes between airports within the European Union and airports outside the EEA (‘EU-third country routes’), next, Article 53 of the EEA Agreement to agreements and practices before 19 May 2005 concerning EU-third country routes and routes between airports in countries that are contracting parties to the EEA Agreement but are not EU Member States and airports in third countries (‘non-EU EEA-third country routes’ and, together with EU-third country routes, ‘EEA-third country routes’) and, lastly, Article 8 of the EC-Switzerland Air Transport Agreement to agreements and practices before 1 June 2002 concerning routes between airports within the European Union and Swiss airports (‘EU-Switzerland routes’). It also stated that the contested decision did ‘not purport to find an infringement of Article 8 of the [EC-Switzerland Air Transport Agreement] concerning freight services on routes between Switzerland and third countries’.

43 Second, in recitals 1036 to 1046 of the contested decision, under the heading 'The applicability of Article 101 of the TFEU and Article 53 of the EEA Agreement to inbound routes', the Commission rejected the arguments put forward by the various incriminated carriers that it exceeded the limits of its territorial jurisdiction under the rules of public international law by finding and penalising an infringement of those two provisions on routes from third countries to the EEA ('inbound routes' and, as regards the freight services offered on those routes, 'inbound freight services'). In particular, in recital 1042 of that decision, it recalled the criteria which it considered to be applicable:

'With respect to the extra-territorial application of Article 101 of the TFEU and Article 53 of the EEA Agreement these provisions are applicable to arrangements that are either implemented within the [European Union] (implementation theory) or that have immediate, substantial and foreseeable effects within the [European Union] (effects theory).'

44 In recitals 1043 to 1046 of the contested decision, the Commission applied the criteria in question to the facts of the present case:

'(1043) In the case of [inbound freight services], Article 101 of the TFEU and Article 53 of the EEA Agreement are applicable because the service itself that is the subject of the price fixing infringement is to be performed and is indeed performed, in part, within the territory of the EEA. Moreover, many contacts by which the addressees coordinated surcharges and the [refusal to pay] commission took place in the EEA or involved participants in the EEA.

(1044) … the example given in the [Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1)] is not relevant here. [That notice] relates to the geographic allocation of turnover of undertakings for the purpose of establishing whether the turnover thresholds of Article 1 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [(OJ 2004 L 24, p. 1)] are met.

(1045) In addition, anticompetitive practices in third countries with regard to … freight transportation to the EU/EEA are liable to have immediate, substantial and foreseeable effects within the EU/EEA, as the increased costs of air transport to the EEA, and consequently higher prices of imported goods, are by their very nature liable to have effects on consumers in the EEA. In this case the anticompetitive practices eliminating competition between carriers offering [inbound freight services] were liable to have such effects also on the provision of [freight] services by other carriers within the EEA, between the different hub airports used by carriers from third countries in the EEA and airports of destination of those shipments in the EEA to which the carrier from the third country does not fly.

(1046) Finally, it has to be underlined that the Commission has found a world-wide cartel. The cartel was implemented globally and the cartel arrangements concerning inbound routes formed an integral part of the single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement. The cartel arrangements were in many cases organised centrally and the local personnel were merely implementing them. The uniform application of the surcharges on a world wide scale was a key element of the cartel.'

45 In the fifth place, in recital 1146 of the contested decision, the Commission found that the cartel at issue had started on 7 December 1999 and lasted until 14 February 2006. In the same recital, it stated that that cartel had infringed:

– Article 101 TFEU, from 7 December 1999 to 14 February 2006, as regards air transport between airports within the European Union;

– Article 101 TFEU, from 1 May 2004 to 14 February 2006, as regards air transport on EU-third country routes;

– Article 53 of the EEA Agreement, from 7 December 1999 to 14 February 2006, as regards air transport between airports within the EEA ('intra-EEA routes');

– Article 53 of the EEA Agreement, from 19 May 2005 to 14 February 2006, as regards air transport on non-EU EEA-third country routes;

– Article 8 of the EC-Switzerland Air Transport Agreement, from 1 June 2002 to 14 February 2006, as regards air transport on EU-Switzerland routes.

46 In so far as the applicant is concerned, the Commission found that the duration of the infringement was from 22 January 2001 to 14 February 2006.

47 In the sixth place, in Section 8 of the contested decision, the Commission examined the remedies to be taken and the fines to be imposed.

48 As regards, in particular, its determination of the amount of the fines, the Commission stated that it took into account the gravity and duration of the single and continuous infringement as well as possible aggravating and mitigating circumstances. To that end, it applied 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').

49 In recitals 1184 and 1185 of the contested decision, the Commission stated that the basic amount of the fine consisted of a proportion of up to 30% of the value of the undertaking's sales, depending on the gravity of the infringement, multiplied by the number of years of the undertaking's participation in the infringement, plus an additional amount of between 15 and 25% of the value of sales ('the additional amount').

50 In recital 1197 of the contested decision, the Commission determined the value of sales by adding together, for 2005 – that being the last full year of the single and continuous infringement – turnover from flights in both directions on intra-EEA routes, on EU-third country routes, on EU-Switzerland routes and on non-EU EEA-third country routes. It also took into account the accession of new Member States to the European Union in 2004.

51 In recitals 1198 to 1212 of the contested decision, taking into account the nature of the infringement (horizontal price-fixing agreements), the combined market share of the incriminated carriers (34% worldwide and at least as high on intra-EEA and EEA-third country routes), the geographic scope of the cartel at issue (worldwide) and the fact that the cartel had actually been implemented, the Commission set the gravity factor at 16%.

52 In recitals 1214 to 1217 of the contested decision, the Commission determined the duration of the applicant's participation in the single and continuous infringement as follows, according to the routes concerned:

– in so far as concerned intra-EEA routes, from 22 January 2001 to 14 February 2006, equating to five years and giving rise to a multiplier of 5;

– in so far as concerned EU-third country routes, from 1 May 2004 to 14 February 2006, equating to one year and nine months and giving rise to a multiplier of $1^{9}/_{12}$;

– in so far as concerned EU-Switzerland routes, from 1 June 2002 to 14 February 2006, equating to three years and eight months and giving rise to a multiplier of $3^{8}/_{12}$;

– in so far as concerned non-EU EEA-third country routes, from 19 May 2005 to 14 February 2006, equating to eight months and giving rise to a multiplier of $^{8}/_{12}$.

53 In recital 1219 of the contested decision, the Commission found that, given the specific circumstances of the case and taking into account the criteria mentioned in paragraph 51 above, the additional amount should be set at 16% of the value of sales.

54 Consequently, in recitals 1240 to 1242 of the contested decision, the basic amount to be imposed on the applicant was assessed at EUR 260 000 000 and, after a reduction of 50% on the basis of point 37 of the 2006 Guidelines ('the general 50% reduction') to reflect the fact that part of the services relating to inbound routes and routes from the EEA to third countries ('outbound routes') was performed outside the territory covered by the EEA Agreement and that part of the harm was therefore likely to occur outside that territory, the basic amount of the applicant's fine was fixed at EUR 136 000 000.

55 In recitals 1264 and 1265 of the contested decision, in accordance with point 29 of the 2006 Guidelines, the Commission granted the incriminated carriers an additional reduction in the basic amount of the fine of 15% ('the general 15% reduction') on the ground that certain regulatory schemes had encouraged the cartel at issue.

56 Consequently, in recital 1293 of the contested decision, the Commission set the basic amount of the applicant's fine, after adjustment, at EUR 115 600 000.

57 In recitals 1363 to 1381 of the contested decision, the Commission took into account the applicant's contribution in the context of its leniency application and applied a reduction of 10% to the amount of the fine, with the result that, as stated in recital 1404 of the contested decision, the amount of the fine imposed on the applicant was set at EUR 104 040 000.

58 The operative part of the contested decision, in so far as it concerns the present dispute, reads as follows:

'*Article 1*

By coordinating their pricing behaviour in the provision of [freight] services on a global basis with respect to the [FSC], the [SSC] and the payment of commission payable on surcharges, the following undertakings have committed the following single and continuous infringement of Article 101 [TFEU], Article 53 of [the EEA Agreement] and Article 8 of [the EC-Switzerland Air Transport Agreement] as regards the following routes and for the following periods.

(1) The following undertakings have infringed Article 101 of the TFEU and Article 53 of [the] EEA Agreement as regards [intra-EEA] routes, for the following periods:

…

(e) [the applicant] from 22 January 2001 until 14 February 2006 excluding the period from 2 October 2001 to 14 February 2006 in relation to the [FSC] and the [SSC];

…

(2) The following undertakings infringed Article 101 of the TFEU as regards [EU-third country] routes, for the following periods:

…

(e) [the applicant] from 1 May 2004 until 14 February 2006 excluding freight services performed other than from Hong Kong (China), Japan, India, Thailand, Singapore, South Korea and Brazil in relation to the [FSC] and the [SSC];

…

(3) The following undertakings infringed Article 53 of the EEA Agreement as regards [non-EU EEA-third country] routes, for the following periods:

…

(e) [the applicant] from 19 May 2005 until 14 February 2006 excluding freight services performed other than from Hong Kong (China), Japan, India, Thailand, Singapore, South Korea and Brazil in relation to the [FSC] and the [SSC];

…

(4) The following undertakings infringed Article 8 of the [EC-Switzerland Air Transport Agreement] as regards [EU-Switzerland] routes, for the following periods:

…

(e) [the applicant] from 1 June 2002 until 14 February 2006 except in relation to the [FSC] and the [SSC];

…

Article 2

[The Decision of 9 November 2010] is amended as follows:

In Article 5, points (j), (k) and (l) are repealed.

Article 3

For the single and continuous infringement referred to in Article 1 (and as regards [the applicant] … also for the aspects of Articles 1 to 4 of [the Decision of 9 November 2010] that have become final), the following fines are imposed:

…

(e) [the applicant]: EUR 104 040 000;

…

Article 4

The undertakings listed in Article 1 shall immediately bring to an end the single and continuous infringement referred to in that article in so far as they have not already done so.

They shall also refrain from repeating any act or conduct having the same or similar object or effect.

Article 5

This Decision is addressed to

…

[the applicant]

…’

II. Procedure and forms of order sought

59 By application lodged at the General Court Registry on 31 May 2017, the applicant brought the present action.

60 The Commission lodged its defence at the Court Registry on 29 September 2017.

61 The applicant lodged its reply at the Court Registry on 31 January 2018.

62 The Commission lodged its rejoinder at the Court Registry on 12 March 2018.

63 On 24 April 2019, on a proposal from the Fourth Chamber, the General Court decided, pursuant to Article 28 of its Rules of Procedure, to assign the present case to a chamber sitting in extended composition.

64 On 16 August 2019, in the context of the measures of organisation of procedure laid down in Article 89 of the Rules of Procedure, the General Court put written questions to the parties. The parties replied within the prescribed period.

65 At the hearing on 13 September 2019, the parties presented oral argument and answered the questions put by the General Court.

66 By order of 31 July 2020, the General Court (Fourth Chamber, Extended Composition), considering that it lacked sufficient information and that it was necessary to invite the parties to submit their observations concerning an argument which had not been debated between them, ordered the reopening of the oral part of the procedure pursuant to Article 113 of the Rules of Procedure.

67 The parties replied within the prescribed period to a series of questions put by the General Court on 4 August 2020, and then submitted observations on their respective replies.

68 By decision of 6 November 2020, the General Court again closed the oral part of the procedure.

69 By order of 28 January 2021, the General Court (Fourth Chamber, Extended Composition), again considering that it lacked sufficient information and that it was necessary to invite the parties to submit their observations on an argument which had not been debated between them, ordered the reopening of the oral part of the procedure pursuant to Article 113 of the Rules of Procedure.

70 The Commission replied within the prescribed period to a series of questions put by the General Court on 29 January and 16 March 2021. Then, at the request of the General Court, the applicant submitted observations on those replies.

71 By decision of 25 May 2021, the General Court again closed the oral part of the procedure.

72 The applicant claims that the Court should:

– annul the contested decision in whole or in part in so far as it concerns it;

– further or alternatively, cancel or reduce the fine imposed on it in the contested decision;

– order the Commission to pay the costs.

73 The Commission contends, in essence, that the Court should:

– dismiss the action;

– modify the amount of the fine imposed on the applicant by withdrawing from it the benefit of the general 15% reduction should the Court conclude that turnover from the sale of inbound freight services cannot be included in the value of sales;

– order the applicant to pay the costs.

III. Law

74 In its action, the applicant puts forward both a claim for annulment of the contested decision and a claim for cancellation of the fine imposed on it or for a reduction of its amount. The Commission, for its part, put forward a claim seeking, in essence, modification of the amount of the fine imposed on the applicant should the General Court conclude that turnover from the sale of inbound freight services cannot be included in the value of sales.

A. The claim for annulment

75 The applicant puts forward nine pleas in law in support of its claim for annulment. Those pleas allege:

– first, an error or an inadequate statement of reasons in that the contested decision is based on a legal assessment that is incompatible with the Decision of 9 November 2010, which it, however, treats as final;

– second, infringement of Article 266 TFEU;

– third, an error of law or infringement of an essential procedural requirement in connection with an inadequate statement of reasons for the amount of the fine or a lack of jurisdiction on the part of the Commission to impose a fine on the applicant that does not relate exclusively to the findings of infringement made in the contested decision;

– fourth, lack of jurisdiction on the part of the Commission to apply Article 101 TFEU and Article 53 EEA to restrictions of competition in respect of inbound freight services;

– fifth, an error in the application of Article 101 TFEU and Article 53 EEA to the coordination of surcharges for freight services to and from Hong Kong, Japan, India, Thailand, Singapore, South Korea and Brazil; an inadequate statement of reasons concerning the coordination of surcharges for freight services to and from India, Thailand, Singapore, South Korea and Brazil; and failure to state the reasons for and inadequacy of the general 15% reduction;

– sixth, an error in the assessment of the applicant's participation in the component of the single and continuous infringement relating to the refusal to pay commission;

– seventh, errors in the determination of the value of sales;

– eighth, errors made in the calculation of the reduction granted to the applicant under the leniency programme; and

– ninth, an error of assessment and breach of the principle of equal treatment in so far as concerns the starting date of the infringement.

76 The General Court considers it appropriate to examine, first of all the fourth plea; then, the plea raised by the General Court of its own motion, alleging lack of jurisdiction on the part of the Commission in the light of the EC-Switzerland Air Transport Agreement to find and penalise an infringement on routes between airports in countries that are contracting parties to the EEA Agreement but are not EU Member States and airports in Switzerland ('non-EU EEA-Switzerland routes'); and, lastly, the first to third and fifth to ninth pleas in law in turn.

1. The fourth plea, alleging lack of jurisdiction on the part of the Commission to apply Article 101 TFEU and Article 53 of the EEA Agreement to inbound freight services

77 The present plea, by which the applicant claims that the Commission lacked jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement to inbound freight services and failed to observe the principles of international comity and of public international law, consists, in essence, of three parts. The first part alleges incorrect interpretation of Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries (OJ 2004 L 68, p. 1), the second alleges misapplication of the implementation test, and the third alleges misapplication of the qualified effects test.

(a) The first part of the plea, alleging incorrect interpretation of Regulation No 411/2004

78 The applicant submits that the Commission was wrong to rely on Regulation No 411/2004 in order to claim that it had jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes. In its view, the recitals in that regulation cannot confer on the Commission jurisdiction that does not exist under Article 101 TFEU. In any event, it is not apparent from those recitals that Article 101 TFEU applies automatically to all cases of collusion on EU-third country routes. Those recitals simply state that anticompetitive practices on those routes may affect trade between Member States.

79 The Commission replies that Regulation No 411/2004 does not constitute an independent basis for its conclusion that coordination in relation to flights on inbound routes was caught by the prohibitions laid down in Article 101 TFEU and Article 53 of the EEA Agreement. It does not claim that recitals 2 and 3 of that regulation confer on it jurisdiction that would not otherwise exist. It was nevertheless justified in observing that those recitals implicitly recognised the potential for coordination in relation to EU-third country routes to give rise to economic harms in the European Union or the EEA.

80 As a preliminary point, it should be recalled that Article 103(1) TFEU confers on the Council of the European Union the power to adopt the appropriate regulations or directives to give effect to the principles set out in Articles 101 and 102 TFEU.

81 In the absence of such legislation, Articles 104 and 105 TFEU continue to apply and impose, in essence, the obligation to apply Articles 101 and 102 TFEU on the authorities of the Member States, and limit the Commission's powers in this area to investigating, on application by a Member State or on its own initiative, and in conjunction with the competent authorities of the Member States which lend their assistance to it, cases of suspected infringement of the principles laid down in

those provisions and, where appropriate, proposing appropriate measures to bring them to an end (judgment of 30 April 1986, *Asjes and Others*, 209/84 to 213/84, EU:C:1986:188, paragraphs 52 to 54 and 58).

82 On 6 February 1962, the Council adopted, on the basis of Article [103 TFEU], Regulation No 17, First Regulation implementing Articles [101] and [102 TFEU] (OJ, English Special Edition 1959-1962, p. 87).

83 However, Regulation No 141 of the Council of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291) removed the whole of the transport sector from the application of Regulation No 17 (judgment of 11 March 1997, *Commission* v *UIC*, C-264/95 P, EU:C:1997:143, paragraph 44). In those circumstances, in the absence of legislation such as that provided for in Article 103(1) TFEU, Articles 104 and 105 TFEU initially continued to apply to air transport (judgment of 30 April 1986, *Asjes and Others*, 209/84 to 213/84, EU:C:1986:188, paragraphs 51 and 52).

84 The consequence thereof was a division of powers between the Member States and the Commission for the application of Articles 101 and 102 TFEU as described in paragraph 81 above.

85 It was only in 1987 that the Council adopted a regulation on air transport pursuant to Article 103(1) TFEU. This was Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1), which gave the Commission the power to apply Articles 101 and 102 TFEU to international air transport between EU airports, to the exclusion of international air transport between the airports of a Member State and those of a third country (judgment of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro*, 66/86, EU:C:1989:140, paragraph 11). The latter remained subject to Articles 104 and 105 TFEU (see, to that effect, judgment of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, EU:T:2000:290, paragraph 55).

86 The entry into force, in 1994, of Protocol 21 to the EEA Agreement on the implementation of competition rules applicable to undertakings (OJ 1994 L 1, p. 181) extended those rules to the implementation of the competition rules laid down in the EEA Agreement, thus precluding the Commission from applying Articles 53 and 54 of the EEA Agreement to international air transport between airports of States party to the EEA which are not members of the European Union and those of third countries.

87 Regulation No 1/2003 and Decision of the EEA Joint Committee No 130/2004 of 24 September 2004 amending Annex XIV (Competition), Protocol 21 (on the implementation of the competition rules applicable to undertakings) and Protocol 23 (concerning the cooperation between the surveillance authorities) to the EEA Agreement (OJ 2005 L 64, p. 57), which subsequently incorporated that regulation

into the EEA Agreement, initially left that scheme intact. Article 32(c) of Regulation No 1/2003 provided that the latter '[did not] apply to air transport between [European Union] airports and third countries'.

88 Regulation No 411/2004, Article 1 of which repealed Regulation No 3975/87 and Article 3 of which repealed Article 32(c) of Regulation No 1/2003, gave the Commission the power to apply Articles 101 and 102 TFEU to EU-third country routes as from 1 May 2004.

89 Decision of the EEA Joint Committee No 40/2005 of 11 March 2005 amending Annex XIII (Transport) and Protocol 21 (on the implementation of competition rules applicable to undertakings) to the EEA Agreement (OJ 2005 L 198, p. 38) incorporated Regulation No 411/2004 into the EEA Agreement, giving the Commission the power to apply Articles 53 and 54 of the EEA Agreement to non-EU EEA-third country routes from 19 May 2005.

90 In the present case, the question is whether the scope of Regulation No 411/2004 and Decision of the EEA Joint Committee No 40/2005 extends to inbound freight services.

91 In that connection, it should first be noted that, since Regulation No 411/2004 repealed Regulation No 3975/87 and removed Article 32(c) of Regulation No 1/2003, there is no longer an express legal basis that would be such as to justify inbound freight services continuing to be excluded from the scheme established by Regulation No 1/2003 and thus continuing to be subject to the rules laid down in Articles 104 and 105 TFEU.

92 Next, there is nothing in the wording or general scheme of Regulation No 411/2004 to suggest that the legislature intended to maintain the exclusion of inbound freight services from the scope of Regulation No 1/2003. On the contrary, both the title and recitals 1 to 3, 6 and 7 of Regulation No 411/2004 expressly refer to 'air transport between the [European Union] and third countries', without any distinction according to whether (i) they are from or to the European Union or (ii) they concern freight or the carriage of passengers.

93 The purpose of Regulation No 411/2004 also argues in favour of including inbound freight services within the scope of that regulation. It is clear from recital 3 of that regulation that the extension of the scope of Regulation No 1/2003 to air transport between the European Union and third countries is based on a twofold finding. First, 'anti-competitive practices in air transport between the [European Union] and third countries may affect trade between Member States'. Second, 'mechanisms enshrined in [the latter regulation] are equally appropriate for applying the competition rules to air transport between the [European Union] and third countries'. The applicant has neither demonstrated nor even alleged that inbound freight services are, by their very nature, incapable of affecting trade between Member States or are not appropriate for implementing the mechanisms provided for by that regulation.

94 Lastly, the preparatory work for Regulation No 411/2004 confirms that the EU legislature did not intend to draw a distinction either between inbound and outbound routes or between freight and passenger transport. It is thus clear from point 10 of the explanatory memorandum to the proposal for the Council regulation repealing Regulation No 3975/87 and amending Regulation (EEC) No 3976/87 and Regulation No 1/2003, in connection with air transport between the [European Union] and third countries (COM(2003) 91 final – CNS 2003/0038), that 'the extension of the competition enforcement rules to include also international air transport to and from the [European Union] would afford [carriers] the clear benefit of a common EU-wide enforcement system as to the legality of their agreement under the [EU] competition rules'. In the same point, reference is made to the desire to ensure 'the airline industry's need for a level playing field for all air transport activities'.

95 It follows that inbound freight services fall within the scope of Regulation No 411/2004 and Decision of the EEA Joint Committee No 40/2005. The Commission did not therefore err in finding, in recital 1041 of the contested decision, that Article 101 TFEU was applicable to air transport between the European Union and third countries 'in both directions', the same considerations applying to Article 53 of the EEA Agreement as regards non-EU EEA-third country routes.

96 Accordingly, the first part of the present plea must be rejected.

(b) The second and third parts, alleging, respectively, an error in the application of the implementation test and an error in the application of the qualified effects test

97 It should be observed that, as the parties agree in essence, as regards conduct adopted outside the territory of the EEA, the mere existence of directives or regulations referred to in Article 103(1) TFEU is not sufficient to establish the Commission's jurisdiction under public international law to find and penalise an infringement of Article 101 TFEU or of Article 53 of the EEA Agreement.

98 The Commission must also be able to establish that jurisdiction on the basis of the implementation test or the qualified effects test (see, to that effect, judgments of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 40 to 47, and of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, T-441/14, EU:T:2018:453, paragraphs 95 to 97).

99 Those tests are alternative and not cumulative (judgment of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, T-441/14, EU:T:2018:453, paragraph 98; see also, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 62 to 64).

100 In recitals 1043 to 1046 of the contested decision, the Commission, as the applicant acknowledges, relied on both the implementation test and the qualified

effects test in order to establish its jurisdiction under public international law to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes.

101 Since the applicant alleges an error in the application of each of those two tests, the General Court considers it appropriate to examine, first of all, whether the Commission was entitled to avail itself of the qualified effects test. In accordance with the case-law cited in paragraph 99 above, it is only in the negative that it will be necessary to ascertain whether the Commission was entitled to rely on the implementation test.

102 The applicant submits, in essence, that the Commission erred in the application of the qualified effects test. It claims that the Commission falls a long way short of establishing the necessary legal and factual basis for the purpose of demonstrating that the effects – the existence of which it assumes – are immediate, substantial and foreseeable. The Commission does not separately analyse those three cumulative criteria but simply asserts that they are fulfilled. In order to do so, it merely relies on the hypothetical existence of (unspecified) effects on transport costs.

103 The applicant puts forward four arguments in support of its case. First, the Commission fails to address the question whether the effects on which it relies are substantial. Second, the assumed knock-on effects on EU consumers of the prices of the goods shipped (or of the goods incorporating the goods shipped) depend on the conditions of competition and require evidence rather than assumptions. Third, the Commission specifically disputes that it must address the issue of effects in the contested decision. It is apparent from recital 1190 of the contested decision that it is based purely on a restriction of competition 'by object'. Fourth, the Commission's reasoning depends on the demonstration of qualified effects on a market other than the cartelised market. Such effects cannot be assumed. They should be forensically analysed in the light of each of the applicable criteria and quantified in terms of materiality.

104 The applicant adds that the alleged existence of a global cartel is not capable of conferring on the Commission jurisdiction under Article 101 TFEU and Article 53 of the EEA Agreement with regard to all the elements of that cartel.

105 The Commission disputes the applicant's arguments.

106 It must be noted that, contrary to what the applicant submits, the Commission relied in essence in the contested decision on three separate grounds in order to find that the qualified effects test was satisfied in the present case.

107 The first two grounds are set out in recital 1045 of the contested decision. As the Commission confirmed in reply to the written and oral questions put by the General Court, those grounds concern the effects of coordination in relation to inbound freight services taken in isolation. The first ground is that the 'increased costs of air transport to the EEA, and consequently the higher prices of imported

goods [were], by their very nature, liable to have effects on consumers in the EEA'. The second ground concerns the effects of coordination in relation to inbound freight services 'also on the provision of [freight] services by other carriers within the EEA, between the different hub airports used by carriers from third countries in the EEA and airports of destination of those shipments in the EEA to which the carrier from the third country does not fly'.

108 The third ground is set out in recital 1046 of the contested decision and concerns, as is apparent from the Commission's answers to the written and oral questions put by the General Court, the effects of the single and continuous infringement taken as a whole.

109 The General Court considers it appropriate to examine both the effects of coordination in relation to inbound freight services taken in isolation and those of the single and continuous infringement taken as a whole, starting with the former.

(1) The effects of coordination in relation to inbound freight services taken in isolation

110 It is appropriate to examine, first of all, the merits of the first ground on which the Commission's conclusion that the qualified effects test is satisfied in the present case ('the effect at issue') is based.

111 In that connection, it should be recalled that, as is apparent from recital 1042 of the contested decision, the qualified effects test allows the application of the EU and EEA competition rules to be justified under public international law when it is foreseeable that the conduct at issue will have an immediate and substantial effect in the internal market or within the EEA (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 49; see also, to that effect, judgment of 25 March 1999, *Gencor* v *Commission*, T-102/96, EU:T:1999:65, paragraph 90).

112 In the present case, the applicant disputes the relevance of the effect at issue (see paragraphs 115 to 125 below), its foreseeability (see paragraphs 127 to 143 below), its substantiality (see paragraphs 144 to 155 below) and its immediacy (see paragraphs 156 to 161 below).

(i) The relevance of the effect at issue

113 It is apparent from the case-law that the fact that an undertaking participating in an agreement or a concerted practice is situated in a third country does not prevent the application of Article 101 TFEU and Article 53 of the EEA Agreement, if that agreement or practice is operative, respectively, in the internal market or within the EEA (see, to that effect, judgment of 25 November 1971, *Béguelin Import*, 22/71, EU:C:1971:113, paragraph 11).

114 The purpose of applying the qualified effects test is precisely to prevent conduct which, while not adopted on the territory of the EEA, has anticompetitive effects liable to have an impact in the internal market or within the EEA (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 45).

115 That test does not require it to be established that the conduct at issue in fact had any effect in the internal market or within the EEA. On the contrary, according to the case-law, it is sufficient to take account of the probable effects of that conduct on competition (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 51).

116 It is for the Commission to ensure the protection of competition in the internal market or within the EEA against threats to its effective functioning.

117 Where conduct has been found by the Commission, as in the present case, to reveal a degree of harmfulness to competition in the internal market or within the EEA such that it could be classified as a restriction of competition 'by object' within the meaning of Article 101 TFEU and Article 53 of the EEA Agreement, the application of the qualified effects test also cannot require the demonstration of the actual effects which presupposes the classification of conduct as a restriction of competition 'by effect' within the meaning of those provisions.

118 In that connection, it should be recalled that the qualified effects test is enshrined in the wording of Article 101 TFEU and Article 53 of the EEA Agreement, which are intended to prevent agreements and practices which limit competition in the internal market and within the EEA, respectively. Those provisions prohibit agreements and practices of undertakings which have as their object or effect the prevention, restriction or distortion of competition 'within the internal market' and 'within the territory covered by [the EEA Agreement]', respectively (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 42).

119 It is settled case-law that the anticompetitive object and effect are not cumulative conditions, but alternative conditions for assessing whether conduct falls within the prohibitions laid down in Article 101 TFEU and Article 53 of the EEA Agreement (see, to that effect, judgment of 4 June 2009, *T-Mobile Netherlands and Others*, C-8/08, EU:C:2009:343, paragraph 28 and the case-law cited).

120 It follows therefrom that, as the Commission observed in recital 917 of the contested decision, there is no need to take account of the actual effects of the conduct at issue once its anticompetitive object has been established (see, to that effect, judgments of 13 July 1966, *Consten and Grundig* v *Commission*, 56/64 and 58/64, EU:C:1966:41, p. 342, and of 6 October 2009, *GlaxoSmithKline Services and Others* v *Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55). With stronger reason, in such a situation, it is not for the Commission to quantify those effects.

121 In those circumstances, interpreting the qualified effects test, as the applicant appears to advocate, as requiring proof and quantification of the actual effects of the conduct at issue even where there is a restriction of competition 'by object', would amount to making the Commission's jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement subject to a condition which has no basis in the wording of those provisions.

122 The applicant cannot therefore validly claim that the Commission erred in finding that the qualified effects test was satisfied, even though it stated, in recitals 917, 1190 and 1277 of the contested decision, that it was not required to make an assessment of the anticompetitive effects of the conduct at issue in the light of the anticompetitive object of that conduct. Nor can the applicant deduce from those recitals that the Commission did not carry out any analysis of the effects produced by that conduct in the internal market or within the EEA for the purposes of applying that test.

123 In recital 1045 of the contested decision, the Commission considered, in essence, that the single and continuous infringement, in so far as it related to inbound routes, was liable to increase the amount of the surcharges and, consequently, the total price of inbound freight services and that freight forwarders had passed on that additional cost to shippers based in the EEA, who had had to pay a higher price for the goods they had purchased than would have been charged in the absence of that infringement.

124 Furthermore, if the applicant were to argue that the Commission could not rely on the effects of the conduct at issue on a market other than the cartelised market, it is sufficient to note that there is nothing in the wording, scheme or purpose of Article 101 TFEU to suggest that the effects taken into account for the purposes of applying the qualified effects test must occur on the same market as that concerned by the infringement at issue rather than on a downstream market, as in the present case (see, to that effect, judgment of 9 September 2015, *Toshiba* v *Commission*, T-104/13, EU:T:2015:610, paragraphs 159 and 161).

125 The view cannot therefore be taken that it was following an inadequate analysis that the Commission concluded that the effect at issue satisfied the requirements of foreseeability, substantiality and immediacy.

126 In accordance with the case-law cited in paragraph 111 above, the question is therefore whether that effect has the required foreseeability, substantiality and immediacy.

(ii) The foreseeability of the effect at issue

127 The requirement of foreseeability seeks to ensure legal certainty by guaranteeing that the undertakings concerned may not be penalised on account of effects which might indeed result from their conduct but which they could not reasonably expect

to occur (see, to that effect, Opinion of Advocate General Kokott in *Otis Gesellschaft and Others*, C-435/18, EU:C:2019:651, point 83).

128 The occurrence of effects which the members of the cartel at issue ought reasonably to take into consideration on the basis of practical experience thus satisfy the requirement of foreseeability, unlike effects which result from an entirely extraordinary train of events and, therefore, ensue via an atypical causal chain (see, to that effect, Opinion of Advocate General Kokott in *Kone and Others*, C-557/12, EU:C:2014:45, point 42).

129 It is apparent from recitals 846, 909, 1199 and 1208 of the contested decision that what is at issue in the present case is collusive horizontal-pricing behaviour, experience of which shows that it leads inter alia to price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers (see, to that effect, judgment of 11 September 2014, *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51).

130 It is also apparent from recitals 846, 909, 1199 and 1208 of the contested decision that the conduct related to the FSC, the SSC and the refusal to pay commission.

131 In the present case, it was therefore foreseeable for the incriminated carriers that the horizontal fixing of the FSC and the SSC would lead to an increase in the level of the FSC and the SSC. As is apparent from recitals 874, 879 and 899 of the contested decision, the refusal to pay commission was liable to reinforce such an increase. It amounted to a concerted refusal to grant freight forwarders discounts on surcharges, by which the incriminated carriers 'ensured that pricing uncertainty, which could have arisen from competition on commission payments [in the context of negotiations with freight forwarders], remained suppressed' (recital 874 of that decision) and thus aimed to eliminate competition in respect of surcharges (recital 879 of that decision).

132 It is apparent from recital 17 of the contested decision that the price of freight services is made up of rates and surcharges, including the FSC and the SSC. Unless it were considered that an increase in the FSC and the SSC would, as a result of a sufficiently probable 'waterbed effect', be offset by a corresponding reduction in rates and other surcharges, such an increase was, in principle, liable to lead to an increase in the total price of inbound freight services. However, the applicant has failed to establish that a 'waterbed effect' was sufficiently probable as to render the effect at issue unforeseeable.

133 In the present case, it is true that the applicant infers from a chart annexed to its reply to the Statement of Objections that there was a substantial negative correlation between the level of its surcharges and the level of its rates on inbound routes between 2001 and 2006. However, first, it should be noted that that chart concerns freight services on outbound routes and not inbound routes. Second, it must be borne in mind that correlation is not causation. The applicant does not put forward any evidence to demonstrate that the conditions were conducive to the

materialisation of a ‘waterbed effect’. In particular, the applicant does not demonstrate that the rates were sufficiently flexible to offset in good time, by a corresponding reduction, any supra-competitive increase in surcharges.

134 In those circumstances, the members of the cartel at issue could reasonably have foreseen that the effect of the single and continuous infringement, in so far as it concerned inbound freight services, would be an increase in the price of freight services on inbound routes.

135 The question is therefore whether it was foreseeable for the incriminated carriers that freight forwarders would pass on such additional costs to their own customers, namely shippers.

136 In that regard, it is apparent from recitals 14 and 70 of the contested decision that the price of freight services constitutes an input for freight forwarders. It is a variable cost, the increase in which, in principle, has the effect of increasing the marginal cost in relation to which the freight forwarders determine their own prices.

137 The applicant does not put forward any evidence demonstrating that the circumstances of the present case were not conducive to passing on the additional costs resulting from the single and continuous infringement on inbound routes to shippers downstream.

138 In those circumstances, it was reasonably foreseeable for the incriminated carriers that freight forwarders would pass on such additional costs to shippers through an increase in the price of freight-forwarding services.

139 As is apparent from recitals 70 and 1031 of the contested decision, the cost of goods the integrated transportation of which is generally organised by freight forwarders on behalf of shippers incorporates the price of freight-forwarding services, and in particular the cost of freight services which are a constituent element thereof.

140 In the light of the foregoing, it was therefore foreseeable for the incriminated carriers that the single and continuous infringement would, in so far as it related to inbound routes, have the effect of increasing the price of imported goods.

141 It was equally foreseeable for the incriminated carriers that, as is apparent from recital 1045 of the contested decision, that effect would occur in the EEA. Inbound freight services are intended precisely to enable the transport of goods from third countries to the EEA.

142 Since the effect at issue had revealed the normal course of events and economic rationale, it was not, contrary to what the applicant submits, in any way necessary for the effect at issue to materialise on the market on which the incriminated carriers operate in order to foresee it.

143 It must therefore be concluded that the Commission has established to the requisite standard that the effect at issue had the required foreseeability.

(iii) The substantiality of the effect at issue

144 It should be noted at the outset that the applicant is not entitled to claim that the Commission failed to address the question whether the effects on which it relies are substantial. In recital 1045 of the contested decision, the Commission expressly concluded that those effects were substantial.

145 As regards the merits of that conclusion, it should be borne in mind that the assessment of whether effects produced by the conduct at issue are substantial must be carried out in the light of all the relevant circumstances of the case. Those circumstances include, inter alia, the duration, nature and scope of the infringement. Other circumstances, such as the size of the undertakings which participated in that conduct, may also be relevant (see, to that effect, judgments of 9 September 2015, *Toshiba* v *Commission*, T-104/13, EU:T:2015:610, paragraph 159, and of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, T-441/14, EU:T:2018:453, paragraph 112).

146 Where the effect under consideration relates to an increase in the price of a finished product or service derived from or containing the cartelised service, the proportion of the price of the finished product or service represented by the cartelised service may also be taken into account.

147 In the present case, in the light of all the relevant circumstances, it must be held that the effect at issue, relating to the increase in the price of goods imported into the EEA, is substantial.

148 In the first place, it is apparent from recital 1146 of the contested decision that the duration of the single and continuous infringement amounts to 21 months in so far as it concerned EU-third country routes, and eight months in so far as it concerned the non-EU EEA-third country routes. It is apparent from recitals 1215 and 1217 of that decision that this is also the duration of all the incriminated carriers' participation, with the exception of Lufthansa Cargo and Swiss.

149 In the second place, as regards the scope of the infringement, it is apparent from recital 889 of the contested decision that the FSC and the SSC were 'measures of general application that [were] not route specific' and 'were intended to be applied on all routes, on a worldwide basis, including routes to … the EEA'.

150 In the third place, as regards the nature of the infringement, it is apparent from recital 1030 of the contested decision that the object of the single and continuous infringement was to restrict competition between the incriminated carriers, inter alia on EEA-third country routes. In recital 1208 of that decision, the Commission concluded that the 'fixing of various elements of the price, including particular surcharges, constitute[d] one of the most harmful restrictions of competition' and

therefore found that the single and continuous infringement merited the application of a gravity factor 'at the higher end of the scale' provided for in the 2006 Guidelines.

151 For the sake of completeness, as regards the proportion of the price of the cartelised service in the product or service which is derived from it or contains it, it should be noted that during the infringement period the surcharges represented a significant proportion of the total price of freight services.

152 It is thus apparent from a letter of 8 July 2005 from the Hong Kong Association of Freight Forwarding & Logistics to the Chairman of the Cargo Sub-Committee ('the CSC') of the Board of Airline Representatives ('the BAR') in Hong Kong that the surcharges represent a 'very significant part' of the total price of the air waybills which the freight forwarders had to pay. Similarly, in the reply and in the annexes thereto, it is stated that the surcharges represented, during the last business year prior to February 2006, more than 24% of the freight revenue achieved by the applicant. On inbound routes, that proportion was almost 19.9%.

153 As is apparent from recital 1031 of the contested decision, the price of freight services was itself a 'significant cost element of the goods transported that has an impact on their sale'.

154 Again for the sake of completeness, as regards the size of the undertakings that participated in the conduct at issue, it is apparent from recital 1209 of the contested decision that the combined market share of the incriminated carriers on the 'worldwide market' was 34% in 2005 and was 'at least as high' for freight services provided on EEA-third country routes, which included both outbound routes and inbound routes. Moreover, during the infringement period, the applicant itself achieved a significant turnover on the inbound routes of around EUR 330 000 000 between 1 April 2004 and 31 March 2005.

155 It must therefore be concluded that the Commission has established to the requisite standard that the effect at issue had the required substantiality.

(iv) The immediacy of the effect at issue

156 The requirement of immediacy of the effects produced by the conduct at issue relates to the causal link between the conduct at issue and the effect under consideration. The purpose of that requirement is to ensure that the Commission cannot, in order to justify its jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement, rely on all the possible effects, however remote, for which that conduct might have been the cause in the sense of a *conditio sine qua non* (see, to that effect, Opinion of Advocate General Kokott in *Kone and Others*, C-557/12, EU:C:2014:45, points 33 and 34).

157 The direct causal link must not, however, be regarded as being the same as a single causal link, which would mean always finding as a matter of course that the

chain of causality is broken where the action of a third party was a contributory cause of the effects at issue (see, to that effect, Opinion of Advocate General Kokott in *Kone and Others*, C-557/12, EU:C:2014:45, points 36 and 37).

158 In the present case, the intervention of freight forwarders in respect of which it was foreseeable that, with complete independence, they would pass on to shippers the additional costs that they had had to pay is indeed capable of having contributed to the occurrence of the effect at issue. However, that intervention was not, in itself, such as to break the causal chain between the conduct at issue and that effect and thus deprive it of its immediacy.

159 On the contrary, where it is not wrongful, but objectively results from the cartel at issue, in accordance with the normal functioning of the market, such an intervention does not break the causal chain (see, to that effect, judgment of 14 December 2005, *CD Cartondruck* v *Council and Commission*, T-320/00, not published, EU:T:2005:452, paragraphs 172 to 182), but continues it (see, to that effect, Opinion of Advocate General Kokott in *Kone and Others*, C-557/12, EU:C:2014:45, point 37).

160 In the present case, the applicant has not established, or even alleged, that the foreseeable passing on of the additional costs to shippers located in the EEA is wrongful or extraneous to the normal functioning of the market.

161 It follows that the effect at issue has the required immediacy.

162 It follows from the foregoing that the effect at issue is foreseeable, substantial and immediate and that the first ground on which the Commission relied in order to conclude that the qualified effects test was satisfied is well founded. It must therefore be held that the Commission could, without making an error, find that the test was satisfied as regards the coordination in relation to inbound freight services taken in isolation, without there being any need to examine the merits of the second ground relied on in recital 1045 of the contested decision.

(2) The effects of the single and continuous infringement taken as a whole

163 It should be noted at the outset that there is nothing to prevent an assessment of whether the Commission has the necessary jurisdiction to apply, in each case, EU competition law in the light of the conduct of the undertaking or undertakings in question, viewed as a whole (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 50).

164 That is the case not only as regards Article 102 TFEU, but also as regards Article 101 TFEU. According to the case-law, Article 101 TFEU may be applied to practices and agreements that serve the same anticompetitive objective, provided that it is foreseeable that, taken together, they will have immediate and substantial effects in the internal market. Undertakings cannot be allowed to avoid the application of the EU competition rules by combining a number of types of

conduct that pursue the same objective, each of which, taken on its own, is not capable of producing an immediate and substantial effect in that market, but which, taken together, are capable of producing such an effect (judgment of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, T-441/14, EU:T:2018:453, paragraph 106).

165 The Commission may thus base its jurisdiction to apply Article 101 TFEU to a single and continuous infringement as found in the decision at issue on the foreseeable, immediate and substantial effects of that infringement in the internal market. Contrary to what the applicant submits, this is the case even where that effect does not seek to exclude from the internal market one or more competitors of the undertaking concerned (see, to that effect, judgment of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, T-441/14, EU:T:2018:453, paragraph 105).

166 Those considerations apply, *mutatis mutandis*, to Article 53 of the EEA Agreement.

167 In recital 869 of the contested decision, the Commission characterised the conduct at issue as a single and continuous infringement, including in so far as it concerned inbound freight services. The applicant disputes neither that characterisation in general nor the finding of the existence of a single anticompetitive aim seeking to distort competition within the EEA, on which finding that characterisation is based.

168 In recital 1046 of the contested decision, the Commission, as is apparent from its answers to the written and oral questions put by the General Court, examined the effects of that infringement taken as a whole. It thus found, inter alia, that its investigation had revealed a ‘cartel [that] was implemented globally’, whose ‘arrangements concerning inbound routes formed an integral part of the single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement’. It added that the ‘uniform application of the surcharges on a world wide scale was a key element of the cartel [at issue]’. As the Commission stated in reply to the written and oral questions put by the General Court, the uniform application of the surcharges forms part of an overall strategy designed to neutralise the risk that the freight forwarders could circumvent the effects of that cartel by opting for indirect routes which would not be subject to coordinated surcharges in order to transport goods from the point of origin to the point of destination. The reason for this is, as is apparent from recital 72 of the contested decision, that ‘there is not the same time sensitivity associated with [freight] transport as there is with passenger transport’, so that freight ‘may be routed with a higher number of stopovers’ and that indirect routes can, therefore, be substituted for direct routes.

169 In those circumstances, contrary to what the applicant submits, the Commission correctly contends that prohibiting it from applying the qualified effects test to the conduct at issue taken as a whole might lead to an artificial fragmentation of

comprehensive anticompetitive conduct, capable of affecting the market structure within the EEA, into a collection of separate forms of conduct which might escape, in whole or in part, the European Union's jurisdiction (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 57).

170 None of the applicant's arguments is capable of calling that assessment into question. First, contrary to what the applicant argued at the hearing, that assessment in no way assumes that the cartel at issue operated in an effective manner worldwide, covering all routes worldwide, with the Commission having acknowledged moreover, in recital 889 and footnote No 1323 to the contested decision, that the surcharges were measures which 'were intended to be applied on all routes', but could be subject to local variations. As is apparent from paragraph 168 above, the assessment in question requires only that there be a strategy for the uniform application of surcharges.

171 Second, contrary to what the applicant also argued at the hearing, it cannot be maintained that the Commission failed to prove that the incriminated carriers actually thought that the cartel was to operate as described in paragraph 168 above. Since the prohibition on participating in anti-competitive practices and agreements and the penalties which offenders may incur are well known, it is normal for collusive activities to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Since the documents which the Commission discovers are therefore often only fragmentary and sparse, it may be necessary for it to infer the existence of an overall strategy from a number of coincidences and indicia (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 39 and the case-law cited). In the present case, the Commission was entitled to infer the existence of the strategy described in paragraphs 167 and 168 above from the worldwide nature of the cartel at issue (recitals 74, 107, 112, 832, 887 and 1300 of the contested decision), from the general applicability of surcharges and of the refusal to pay commission (recital 889 and footnote No 1323 to that decision), from their implementation in the context of a system of multiple central and local levels (recitals 107, 1046 and 1300 of that decision) and from the evidence relied on in support of those findings.

172 It must therefore be held that the Commission was entitled, in recital 1046 of the contested decision, to examine the effects of the single and continuous infringement taken as a whole.

173 As regards agreements and practices which, first, had the object of restricting competition at least in the European Union, the EEA and Switzerland (recital 903 of that decision), second, brought together carriers with significant market shares (recital 1209 of that decision) and, third, a significant part of which related to intra-EEA routes for a period of more than six years (recital 1146 of that decision), there can be little doubt that it was foreseeable that, taken as a whole,

the single and continuous infringement would produce immediate and substantial effects in the internal market or within the EEA.

174 It follows that the Commission was also entitled to find, in recital 1046 of the contested decision, that the qualified effects test was satisfied as regards the single and continuous infringement taken as a whole.

175 Since the Commission has thus established to the requisite legal standard that it was foreseeable that the conduct at issue would produce a substantial and immediate effect in the EEA, the present complaint must be rejected, as, consequently, must the present plea in its entirety, without it being necessary to examine the second part thereof, alleging errors in the application of the implementation test.

2. The plea, raised of the General Court's own motion, alleging lack of jurisdiction on the part of the Commission under the EC-Switzerland Air Transport Agreement to find and penalise an infringement of Article 53 of the EEA Agreement on non-EU EEA-Switzerland routes

176 As a preliminary point, it should be recalled that it is for the Courts of the European Union to examine of their own motion the plea, which is a matter of public policy, alleging a lack of jurisdiction on the part of the author of the contested measure (see, to that effect, judgment of 13 July 2000, *Salzgitter* v *Commission*, C-210/98 P, EU:C:2000:397, paragraph 56).

177 According to settled case-law, the Courts of the European Union cannot, as a general rule, base their decisions on a plea raised of their own motion – even one involving a matter of public policy – without first having invited the parties to submit their observations in that regard (see judgment of 17 December 2009, *Review M* v *EMEA*, C-197/09 RX-II, EU:C:2009:804, paragraph 57 and the case-law cited).

178 In the present case, the General Court takes the view that it has a duty to examine of its own motion whether the Commission exceeded its own jurisdiction on the basis of the EC-Switzerland Air Transport Agreement as regards non-EU EEA-Switzerland routes by finding, in Article 1(3) of the contested decision, that there had been an infringement of Article 53 of the EEA Agreement on non-EU EEA-third country routes, and invited the parties to submit their observations in that regard in the context of measures of organisation of procedure.

179 The applicant claims that the reference to 'third countries' in Article 1(3) of the contested decision includes the Swiss Confederation. The applicant argued that the latter is a third country within the meaning of the EEA Agreement, the infringement of which is established in that article. The applicant concludes that the Commission found, in that article, an infringement of Article 53 of the EEA Agreement on non-EU EEA-Switzerland routes and thus infringed Article 11(2) of the EC-Switzerland Air Transport Agreement.

180 The Commission replies that the reference in Article 1(3) of the contested decision to 'routes between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and airports in third countries' cannot be interpreted as including non-EU EEA-Switzerland routes. In its view, the concept of 'third country' within the meaning of that article excludes the Swiss Confederation.

181 The Commission adds that, if it were to be held that it found the applicant liable for an infringement of Article 53 of the EEA Agreement on non-EU EEA-Switzerland routes in Article 1(3) of the contested decision, it would have exceeded the limits which Article 11(2) of the EC-Switzerland Air Transport Agreement imposes on its jurisdiction.

182 It is necessary to determine whether, as the applicant maintains, the Commission found an infringement of Article 53 of the EEA Agreement on non-EU EEA-Switzerland routes in Article 1(3) of the contested decision and, if so, whether it thus exceeded the limits of its jurisdiction under the EC-Switzerland Air Transport Agreement.

183 In that regard, it should be recalled that the principle of effective judicial protection is a general principle of EU law now enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'). That principle, which corresponds, in EU law, to Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, requires that the operative part of a decision by which the Commission finds infringements of the competition rules must be particularly clear and precise and that the undertakings held liable and penalised must be in a position to understand and to contest the imputation of that liability and the imposition of those penalties, as set out in the wording of that operative part (see judgment of 16 December 2015, *Martinair Holland* v *Commission*, T-67/11, EU:T:2015:984, paragraph 31 and the case-law cited).

184 It is in the operative part of its decisions that the Commission must indicate the nature and extent of the infringements which it penalises. As regards in particular the scope and nature of the infringements penalised, it is thus in principle the operative part, and not the statement of reasons, which is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in a decision (see judgment of 16 December 2015, *Martinair Holland* v *Commission*, T-67/11, EU:T:2015:984, paragraph 32 and the case-law cited).

185 In Article 1(3) of the contested decision, the Commission found that the applicant had 'infringed Article 53 of the EEA Agreement as regards routes between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and airports in third countries' from 19 May 2005 to 14 February 2006, 'excluding freight services performed other than from Hong Kong (China), Japan, India, Thailand, Singapore, South Korea and Brazil in relation to the [FSC]

and the [SSC]'. The Commission neither expressly included non-EU EEA-Switzerland routes amongst those routes, nor expressly excluded them.

186 It is therefore necessary to ascertain whether the Swiss Confederation is amongst the 'third countries' referred to in Article 1(3) of the contested decision.

187 In that regard, it should be noted that Article 1(3) of the contested decision distinguishes between 'countries that are Contracting Parties of the EEA Agreement but not Member States' and third countries. It is true that, as the applicant observes, the Swiss Confederation is not party to the EEA Agreement and therefore is included amongst the third countries to that agreement.

188 It should, however, be recalled that, given the requirements of unity and consistency in the EU legal order, the same words used in the same act must be assumed to have the same meaning.

189 In Article 1(2) of the contested decision, the Commission found an infringement of Article 101 TFEU as regards 'routes between airports within the European Union and airports outside the EEA'. That concept does not include airports in Switzerland, even though the Swiss Confederation is not party to the EEA Agreement and its airports must therefore formally be regarded as being 'outside the EEA' or, in other words, in a third country to that agreement. Those airports are the subject of Article 1(4) of the contested decision, which finds an infringement of Article 8 of the EC-Switzerland Air Transport Agreement, as regards 'routes between airports within the European Union and airports in Switzerland'.

190 In accordance with the principle recalled in paragraph 188 above, it must therefore be assumed that the phrase 'airports in third countries' employed in Article 1(3) of the contested decision has the same meaning as the phrase 'airports outside the EEA' used in Article 1(2) thereof and, therefore, excludes airports in the Swiss Confederation.

191 In the absence of the slightest indication in the operative part of the contested decision that the Commission intended to give a different meaning to the concept of 'third countries' referred to in Article 1(3) of the contested decision, it must be held that the concept of 'third countries' referred to in Article 1(3) thereof excludes the Swiss Confederation.

192 It therefore cannot be held that the Commission found the applicant liable for an infringement of Article 53 of the EEA Agreement as regards non-EU EEA-Switzerland routes in Article 1(3) of the contested decision.

193 Since the operative part of the contested decision leaves no room for doubt, it is therefore solely for the sake of completeness that the General Court adds that the grounds of that decision do not contradict that conclusion.

194 In recital 1146 of the contested decision, the Commission stated that the 'anti-competitive arrangements' which it had described infringed Article 101 TFEU from 1 May 2004 to 14 February 2006 'as regards air transport between airports within the [European Union] and airports outside the EEA'. In the relevant footnote (No 1514), the Commission stated the following: 'For the purpose of this Decision, "airports outside the EEA" include airports in countries other than in [the Swiss Confederation] and in Contracting Parties to the EEA Agreement'.

195 It is true that, where it described the scope of the infringement of Article 53 of the EEA Agreement in recital 1146 of the contested decision, the Commission did not refer to the concept of 'airports outside the EEA' but rather to 'airports in third countries'. It cannot, however, be inferred therefrom that the Commission intended to give a different meaning to the concept of 'airports outside the EEA' for the purposes of applying Article 101 TFEU and to that of 'airports in third countries' for the purposes of applying Article 53 of the EEA Agreement. On the contrary, the Commission used those two phrases interchangeably in the contested decision. Thus, in recital 824 of the contested decision, the Commission stated that it '[would] not apply Article 101 of the TFEU to anti-competitive agreements and practices concerning air transport between EU airports and airports in third countries that took place before 1 May 2004'. Similarly, in recital 1222 of that decision, as regards the end of SAS Consortium's participation in the single and continuous infringement, the Commission referred to its jurisdiction on the basis of those provisions 'on routes between the [European Union] and third countries as well as routes between Iceland, Norway and Liechtenstein and countries outside the EEA'.

196 The grounds of the contested decision therefore confirm that the concepts of 'airports in third countries' and 'airports outside the EEA' have the same meaning. In accordance with the definition set out in footnote No 1514, it must therefore be held that both concepts exclude airports in Switzerland.

197 Contrary to the applicant's arguments, recitals 1194 and 1241 of the contested decision do not advocate another outcome. Admittedly, the Commission referred, in recital 1194 of that decision, to 'EEA-third country routes, except routes between the [European Union] and Switzerland'. Similarly, in recital 1241 of that decision, in the context of the 'determination of the value of sales on third country routes', the Commission reduced by 50% the basic amount for 'EEA-third country routes, except routes between the [European Union] and Switzerland where [it] is acting under the [EC-Switzerland Air Transport Agreement]'. It could be considered, as the applicant observes in essence, that if the Commission took care to insert in those recitals the words 'except routes between the [European Union] and Switzerland', it is because it took the view that the Swiss Confederation fell within the scope of the concept of 'third country' in so far as the EEA-third country routes were concerned.

198 The Commission acknowledged, furthermore, that it was possible that it had 'inadvertently' included in the value of sales the turnover which some of the

incriminated carriers generated on non-EU EEA-Switzerland routes during the period concerned. According to the Commission, the reason for that is that, in its request for information of 26 January 2009 concerning certain turnover figures, it did not inform the carriers concerned that turnover on non-EU EEA-Switzerland routes should be excluded from the value of sales on non-EU EEA-third country routes.

199 It must nevertheless be found, as the Commission did, that those elements relate exclusively to the revenues to be taken into account for the purposes of calculating the basic amount of the fine, not of determining the geographical boundaries of the single and continuous infringement at issue here.

200 The present plea must therefore be rejected.

3. The first plea, alleging an error or an inadequate statement of reasons, in so far as the contested decision is based on a legal assessment that is incompatible with the Decision of 9 November 2010, which it treats as final

201 The applicant argues that the contested decision is vitiated by an error or, in the alternative, by an inadequate statement of reasons, in so far as the infringement described in the reasoning of the contested decision and found in the operative part of that decision is incompatible with the infringement found in the Decision of 9 November 2010 – an infringement which is treated as final in the contested decision – in particular in the light of the number and identities of the co-perpetrators. It follows that neither national courts concerned with a consequential action in damages, nor the incriminated carriers are able to draw the consequences of the contested decision for damage claims.

202 The Commission disputes the applicant's arguments.

203 As a preliminary point, it should be noted that the applicant claims, principally, that there is an error which it presents as an error of law. However, the arguments underlying that claim relate entirely to the existence of alleged inconsistencies or contradictions arising from the Commission's decision to combine the findings made in the Decision of 9 November 2010 and in the contested decision. It must therefore be stated that the applicant's arguments in fact allege contradictory reasoning, as is apparent, moreover, from its assertion, made in support of its submission as to the existence of an alleged error of law, that 'the result of the Commission maintaining in place two contradictory infringement Decisions against the same party is to cause confusion in the [EU] legal order', running counter to the requirement that 'the national courts applying EU law … must be able to rely on clear definitive findings of the Commission'. It follows that the present plea must be regarded as alleging solely an infringement of the obligation to state reasons.

204 In that regard, it must be borne in mind that the statement of the reasons for a measure must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying that measure (see, to that effect, judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 151).

205 According to the case-law, a contradiction in the statement of the reasons for a decision will, however, be such as to affect its validity only if the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for the decision and, as a result, the operative part of the decision is, wholly or in part, devoid of any legal justification (judgments of 24 January 1995, *Tremblay and Others* v *Commission*, T-5/93, EU:T:1995:12, paragraph 42, and of 30 March 2000, *Kish Glass* v *Commission*, T-65/96, EU:T:2000:93, paragraph 85).

206 In the present case, as is apparent from recitals 9, 11, 1091 and 1092 of the contested decision, the findings of infringement made against the applicant in the operative part are limited to the aspects of the Decision of 9 November 2010 which were annulled by the General Court in its judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988). The other aspects of that decision, in so far as they had not been disputed by the applicant, became final.

207 Thus, the Commission duly explained in the contested decision why it took account of the operative part of the Decision of 9 November 2010 in so far as it concerned the applicant and why it, as a consequence, limited the scope of the new findings of infringement made against it.

208 It is true that, as the applicant notes, the approach adopted by the Commission leads to the co-existence of findings of infringements made against it which differ, in particular, because their co-perpetrators are not strictly the same. Thus, the components of the single and continuous infringement relating to intra-EEA routes, non-EU EEA-third country routes and EU-Switzerland routes are attributed in the contested decision to a number of carriers to which that conduct was not attributed in the Decision of 9 November 2010.

209 However, this does not result in inconsistency that would prevent a proper understanding of the contested decision. The situation in question is merely the result of the scheme of legal remedies, in the context of which the General Court reviewing the legality of an act cannot, without running the risk of ruling *ultra petita*, grant an annulment which goes beyond that sought by the applicant, and of the fact that the applicant sought only a partial annulment of the Decision of 9 November 2010.

210 In so far as the applicant submits that, notwithstanding the fact that the Decision of 9 November 2010 was only annulled in part in so far as it concerns it, the Commission was required to give due effect to the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), by

withdrawing that decision, it must be held that its argument is indissociable from that put forward in support of its second plea. That argument will therefore be examined in conjunction with that plea.

211 In the light of the foregoing, the present plea must be rejected.

4. The second plea, alleging infringement of Article 266 TFEU

212 The applicant maintains that the Commission infringed its duty under Article 266 TFEU to draw the necessary inferences from an earlier judicial decision, and that, consequently, the contested decision, or at least Article 3(e) of the operative part thereof, should be annulled.

213 The applicant complains, inter alia, that the Commission relies on the findings of the Decision of 9 November 2010 in order to impose a fine on it, even though the General Court stated in the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), that those findings were fundamentally flawed.

214 The Commission disputes the applicant's arguments.

215 Pursuant to Article 266 TFEU, the institution whose act has been declared void is required to take the necessary measures to comply with the judgment annulling its act. That obligation involves only taking the necessary measures to comply with the judgment annulling its act (judgment of 29 November 2007, *Italy* v *Commission*, C-417/06 P, not published, EU:C:2007:733, paragraph 52).

216 According to settled case-law, in order to comply with a judgment annulling a measure and to implement it fully, the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part (judgments of 26 April 1988, *Asteris and Others* v *Commission*, 97/86, 99/86, 193/86 and 215/86, EU:C:1988:199, paragraph 27, and of 6 March 2003, *Interporc* v *Commission*, C-41/00 P, EU:C:2003:125, paragraph 29).

217 In that regard, it should be borne in mind that, as is already apparent from paragraph 184 above, the only purpose of considering the grounds of the judgment which set out the precise reasons for the illegality found by the EU judicature is to determine the exact meaning of the ruling made in the operative part of the judgment (judgment of 14 September 1999, *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 55).

218 Consequently, the authority of a ground of a judgment annulling a measure cannot apply to the situation of persons who were not parties to the proceedings and with regard to whom the judgment cannot therefore have decided anything whatever (judgment of 14 September 1999, *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 55). The same applies to those

parts of an act, concerning a person, which have not been challenged before the courts of the EU judicature and which cannot therefore be annulled by the latter, and which therefore become final as regards that person (see, to that effect, judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861, paragraph 85).

219 In the present case, the General Court held, in paragraphs 88 and 89 of its judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), that the applicant's action against the Decision of 9 November 2010 sought only the partial annulment thereof and that, on pain of ruling *ultra petita*, the scope of the annulment which it pronounced could not go further than that sought by the applicant. Consequently, the General Court decided to annul the contested decision within the limits of the form of order sought by the applicant. The Court of Justice dismissed the appeal brought against the judgment in question, thus upholding, in essence, the finding and the conclusions drawn in that regard by the General Court (judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861).

220 Thus, while it is true that the grounds of the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), resulted in a finding of an illegality vitiating the Decision of 9 November 2010 in its entirety, in so far as it concerned the applicant (see paragraph 16 above), the scope of the operative part thereof was nevertheless duly circumscribed in accordance with the limits of the dispute set by the applicant in the form of order sought (see, to that effect, judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861, paragraphs 91 and 92).

221 In accordance with the case-law referred to in paragraph 218 above, the authority that attached to the grounds and that the Commission was required, where appropriate, to take into account when giving effect to the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), did not apply to those parts of the Decision of 9 November 2010 which had not been challenged before the General Court and, therefore, were not capable of being covered by the operative part of that judgment.

222 It follows that the Commission was entitled to rely in the contested decision, without infringing Article 266 TFEU, on the findings of infringement of the Decision of 9 November 2010 which were not called into question by the operative part of the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), and which therefore became final.

223 Accordingly, the present plea must be rejected.

5. The third plea, alleging an error of law and/or infringement of an essential procedural requirement in connection with an inadequate statement of reasons for the amount of the fine and/or a lack of jurisdiction on the part of the Commission to impose a fine that does not relate exclusively to the findings of infringement made in the contested decision

224 The applicant submits that the Commission has made an error, infringed an essential procedural requirement and exceeded the limits of its jurisdiction by imposing on it a fine of the same amount as that imposed by the Decision of 9 November 2010. The Commission relied on the fact that the new fine relates not only to the limited aspects of the single and continuous infringement in which the applicant took part (identified in Article 1 of the contested decision), but is also based on the aspects set out in the Decision of 9 November 2010 'that have become final' (Article 3 of the contested decision).

225 First, that applicant submits that, on the date of adoption of the contested decision, no findings in the Decision of 9 November 2010 had 'become final' in respect of it in that an appeal against the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), was still pending.

226 Second, the General Court annulled the fine imposed on the applicant in the Decision of 9 November 2010 because it took the view that there were fundamental contradictions within that decision. That meant that all of the findings of the Decision of 9 November 2010 should have been annulled had the General Court not considered itself bound by the *ultra petita* principle. Therefore, in the applicant's view, the fact that the General Court did not annul Articles 1 to 4 of the Decision of 9 November 2010 in their entirety in respect of the applicant does not mean that the Commission could rely on those provisions in order subsequently to impose the same fine without providing an additional statement of reasons to justify the findings in those provisions.

227 Third, the applicant maintains that the Commission's approach prevented it from understanding the basis for the amount of the fine in the contested decision given the uncertainty surrounding the scope of the infringement attributed to it.

228 Fourth, the Commission was not competent to impose a fine in the contested decision which did not relate exclusively to the findings of infringement made in that decision.

229 The Commission disputes the applicant's arguments.

230 It should be noted that the present plea consists of four complaints, which it is appropriate to examine in turn.

231 First, as regards the alleged error made by the Commission in that it regarded as final, at the time it adopted the contested decision, the findings in the Decision of 9 November 2010 on which it relies in order to impose a fine on the applicant, it

must be noted that, even if it was proved, that error would have no effect on the lawfulness of the contested decision since it vitiates a ground included in that decision for the sake of completeness.

232 Measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (judgment of 5 October 2004, *Commission* v *Greece*, C-475/01, EU:C:2004:585, paragraph 18).

233 The findings at issue in the Decision of 9 November 2010 were not, at the time of the adoption of the contested decision, either annulled, withdrawn or declared invalid. Accordingly, they produced legal effects to which the Commission could usefully refer, irrespective of whether they were also final.

234 In addition, it should be noted that, in accordance with the first paragraph of Article 60 of the Statute of the Court of Justice of the European Union, an appeal against a judgment of the General Court does not in principle have suspensory effect (order of 7 July 2016, *Commission* v *Bilbaína de Alquitranes and Others*, C-691/15 P-R, not published, EU:C:2016:597, paragraph 16). Thus, the fact that the applicant brought an appeal did not prevent the Commission from giving effect to the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), in accordance with Article 266 TFEU.

235 In any event, the appeal that the applicant brought against the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), was not capable of broadening the scope of the claims for partial annulment which the applicant submitted before the General Court given that, in accordance with Article 170(1) of the Rules of Procedure of the Court of Justice, 'an appeal shall seek … the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order'.

236 Since they were not challenged before the General Court, and could not be challenged only at the appeal stage, the findings at issue of the Decision of 9 November 2010 therefore became definitive as against the applicant on the date when the period for bringing proceedings laid down in Article 263 TFEU expired (see, to that effect, judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861, paragraph 98). That date is substantially earlier than the date of adoption of the contested decision.

237 Second, as regards the allegedly wrongful omission on the part of the Commission to state the reasons for its reliance on the uncontested findings of the Decision of 9 November 2010 in the contested decision, it must be noted that that complaint has no factual basis, as is apparent from paragraphs 206 and 207 above.

238 Even if the applicant intends by that complaint to challenge the legality of the actual reference in the contested decision to the uncontested findings of the Decision of 9 November 2010 in the light of the findings of the judgment of

16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), it must be rejected as unfounded in that it is based on a failure to have regard to the authority of the grounds of that judgment in relation to findings which did not form part of the subject matter of the dispute, in accordance with what has been held in paragraph 221 above.

239 Third, as regards the complaint alleging an inadequate statement of reasons for the fine imposed on the applicant in the light of the uncertainties with regard to the scope of the infringement attributed to it, the General Court has already noted, in paragraph 209 above, that those alleged uncertainties are the result of the scheme of legal remedies and of the fact that the applicant sought only a partial annulment of the Decision of 9 November 2010. That justification is set out in the contested decision (see paragraphs 206 and 207 above).

240 Furthermore, it should be borne in mind that the statement of reasons 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 it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality (see, to that effect, judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 147).

241 Observance of the obligation to state reasons must be assessed by reference to the circumstances of the 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 concern within the meaning of the fourth paragraph of Article 263 TFEU, 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 meets the requirements of Article 296 TFEU and of Article 41(2)(c) of the Charter 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 (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 150, and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 45).

242 It must be noted that, in the present case, the mere fact that the contested decision attributes liability for certain components of the infringement to a greater number of participants than did the Decision of 9 November 2010 with regard to the same unlawful conduct is not, contrary to what the applicant submits, such as to call for additional explanations, since it is not a factor which the Commission took into account for the purposes of calculating the fine.

243 In that regard, it must indeed be noted, as the applicant submits, that the Commission examined, in recital 1209 of the contested decision, the combined worldwide market share of the incriminated carriers among other relevant factors for determining the gravity of the single and continuous infringement. Moreover,

contrary to what the Commission claims, it is not apparent from recital 1212 of the contested decision that it did not have regard to that market share. The Commission merely stated in that recital that it took into account 'in particular the nature and geographic scope of the infringement'.

244 However, it is apparent from all of the arguments relating to the gravity of the single and continuous infringement, set out in recitals 1198 to 1212 of the contested decision, that, in accordance with the case-law of the Court of Justice (see, to that effect, judgment of 26 January 2017, *Roca* v *Commission*, C-638/13 P, EU:C:2017:53, paragraph 67), the Commission carried out an overall assessment of the various relevant factors, without consideration of any specific aspects of certain material or geographic components of the single and continuous infringement or, at that stage, of the varying degree of involvement of the incriminated carriers. The additional amount was also determined on the basis of that overall assessment, as is apparent from recital 1219 of the contested decision. In the context of that overall assessment, the differences referred to in paragraph 242 above were not such as to require the Commission to set out additional reasoning for a proper understanding of the fine imposed on the applicant.

245 As regards the applicant's argument, put forward in response to a written question from the General Court, that, in general, the lower number of participants in some of the unlawful conduct found against the applicant in the Decision of 9 November 2010 as against that found in the contested decision justified it benefiting from a reduction in the fine, it should be noted that that argument relates to the substantive legality of the contested decision and not to an inadequate statement of reasons. Moreover, that claim is not substantiated in any way.

246 It follows from the foregoing that the reference in the contested decision to the findings of infringement of the Decision of 9 November 2010 which were not contested by the applicant did not oblige the Commission, at the stage of justifying the amount of the fine, to provide an additional statement of reasons.

247 Fourth, the complaint alleging lack of jurisdiction on the part of the Commission to impose a fine which does not relate exclusively to the findings of infringement made in the contested decision also cannot succeed.

248 Pursuant to Article 23(2)(a) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 or 102 TFEU.

249 Moreover, the Courts of the European Union have already held that the Commission's power to adopt a particular act necessarily also includes the power to amend that act, on condition that the provisions on the relevant power and the formal requirements and the procedures laid down in that regard are complied with (judgment of 9 December 2014, *Lucchini* v *Commission*, T-91/10,

EU:T:2014:1033, paragraph 108). In the specific case in which a particular act has been annulled in part, that power must include the power to adopt a new decision which, where appropriate, supplements the parts of the act which have become final.

250 In the present case, first of all, it must be noted that the findings of infringement at issue, set out in the Decision of 9 November 2010, were made in the same procedure as that which led to the contested decision and following the same Statement of Objections.

251 Next, it should be noted that the Commission took care in the contested decision to explain why it took account of the operative part of the Decision of 9 November 2010 in so far as it concerns the applicant and why it accordingly limited the scope of the new findings of infringement made against it (see paragraphs 206 and 207 above).

252 Lastly, as is stated in recitals 9 and 11 of the contested decision, the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), annulled the Decision of 9 November 2010 in so far as, inter alia, that decision imposes a fine on the applicant, which led the Commission, in order to give effect to that judgment, again to adopt in the contested decision a provision by which it imposed a fine on the applicant for its participation in the single and continuous infringement.

253 In the light of the foregoing, it must be held that the Commission acted within the limits of its competence.

254 Assuming that, in the context of the present complaint, the applicant also seeks to allege an infringement of the obligation to state reasons in that the contested decision refers to ‘reasons given [by the Commission] in an earlier (annulled) decision’, first, it should be noted that the aspects of the Decision of 9 November 2010 which were not contested by the applicant were not annulled. Second, it should be noted that the Commission is entitled, in circumstances such as those of the present case in which it adopts a new decision to give effect to a judgment of the Court partially annulling a decision, to refer to the grounds of the partially annulled decision (see, to that effect, judgment of 19 January 2016, *Toshiba* v *Commission*, T-404/12, EU:T:2016:18, paragraph 95).

255 The present complaint must therefore be rejected, as must the third plea in its entirety.

6. The fifth plea, alleging errors and inadequate reasoning in connection with the taking into account of several regulatory schemes

256 The fifth plea alleges errors and infringement of the obligation to state reasons in connection with the taking into account of several regulatory schemes. This plea is divided into two parts, the first alleging an error of assessment of the regulatory

schemes in force in Hong Kong, Japan, India, Thailand, Singapore, South Korea and Brazil and inadequate reasoning with regard to the regulatory schemes of India, Thailand, Singapore, South Korea and Brazil, and the second alleging failure to state reasons for and the inadequacy of the general 15% reduction.

(a) The first part of the plea, alleging an error of assessment of the regulatory schemes and inadequate reasoning with regard to the regulatory schemes of certain third countries

257 The applicant submits that the Commission erred in law in taking the view that the principles governing the State-coercion defence are applicable when the laws of a third State are at issue. In addition, it submits that the Commission's assessment of the regulatory schemes in force in Hong Kong and Japan is vitiated by errors which also vitiated its assessment of the regulatory schemes in force in India, Thailand, Singapore, South Korea and Brazil.

(1) The applicability of the principles governing the State-coercion defence

258 In the reply, the applicant submits that the principles governing the State-coercion defence are not applicable in the present case, since the laws of third countries are at issue. First of all, third countries are not subject to EU law, in particular to the principles of primacy, of direct effect and of sincere cooperation, but to their own laws, and undertakings established in those countries must comply with local laws and administrative practices, without being able to 'export' EU competition law. Next, account should be taken of the principles of respect for international law and of international comity, and of the principle of *pacta sunt servanda*, under which third countries are deemed to acquit their international obligations in good faith, in this case the implementation of international Air Service Agreements ('the ASAs').

259 The Commission disputes those arguments.

260 In that regard, even assuming that the present complaint is admissible under Article 84(1) of the Rules of Procedure despite having been submitted for the first time at the reply stage, first of all, it should be noted that Article 101(1) TFEU applies only to anticompetitive conduct engaged in by undertakings on their own initiative. If anticompetitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 101 TFEU does not apply. In such a situation, the restriction of competition is not attributable, as that provision implicitly requires, to the autonomous conduct of the undertakings (see judgment of 11 November 1997, *Commission and France* v *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraph 33 and the case-law cited).

261 Conversely, if national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition,

Article 101 TFEU may apply. In the absence of any binding regulatory provision imposing anticompetitive conduct, the Commission is entitled to conclude that the operators in question enjoyed no autonomy only if it appears on the basis of objective, relevant and consistent evidence that that conduct was unilaterally imposed upon them by the national authorities through the exercise of irresistible pressures, such as, for example, the threat to adopt State measures likely to cause them to sustain substantial losses (see judgment of 11 December 2003, *Minoan Lines* v *Commission*, T-66/99, EU:T:2003:337, paragraphs 177 and 179 and the case-law cited).

262 According to the case-law, this is not the case where a law or conduct is limited to encouraging or facilitating autonomous anticompetitive conduct by undertakings (see, to that effect, judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, T-259/02 to T-264/02 and T-271/02, EU:T:2006:396, paragraph 258).

263 Lastly, it is clear from the case-law that it is for the undertakings concerned to demonstrate that a State law or State conduct was of such a kind as to deprive them of all independent choice in their commercial policy (see, to that effect, judgment of 7 October 1999, *Irish Sugar* v *Commission*, T-228/97, EU:T:1999:246, paragraph 129). Although it is for the authority alleging an infringement of the competition rules to prove it, it is for the undertaking raising a defence against the finding of an infringement of those rules to demonstrate that the conditions for applying the rule on which such defence is based are satisfied, so that the authority will then have to resort to other evidence (see judgment of 16 February 2017, *Hansen & Rosenthal and H&R Wax Company Vertrieb* v *Commission*, C-90/15 P, not published, EU:C:2017:123, paragraph 19 and the case-law cited).

264 Contrary to what the applicant submits, those principles are also applicable where the regulatory schemes of third countries are at issue (see, to that effect, judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 1131), as is apparent, in essence, from footnote No 1435 to the contested decision.

265 None of the applicant's arguments is such as to call into question the applicability of those principles to the case at hand.

266 In the first place, contrary to what the applicant submits, it is clear from the case-law cited in paragraphs 260 to 262 above that the State-coercion defence is justified not by the principles of sincere cooperation, direct effect or primacy of EU law, but by the lack of independent choice of the undertakings concerned in their commercial policy, which justifies the disapplication of Article 101 TFEU.

267 While it is true that, unlike third countries, the Member States are required not to introduce or maintain in force measures which may render ineffective the competition rules applicable to undertakings (judgment of 9 September 2003, *CIF*,

C-198/01, EU:C:2003:430, paragraph 45), the fact remains that, in the context of an examination of the applicability of Article 101 TFEU to the conduct of undertakings that complies with legislation of a Member State, a prior evaluation of that legislation should be directed solely to ascertaining whether it leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of the undertakings so that its compatibility with the Treaty rules on competition cannot be regarded as decisive (see, to that effect, judgment of 11 November 1997, *Commission and France* v *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraphs 31 and 35).

268 In the second place, the application of Article 101 TFEU to conduct engaged in by undertakings that took place and was implemented in third countries is justified under public international law where it is foreseeable that that conduct will have immediate and substantial effects in the European Union (see, to that effect, judgment of 12 July 2018, *Viscas* v *Commission*, T-422/14, not published, EU:T:2018:446, paragraph 101 and the case-law cited).

269 In particular, the argument relating to disregard of the principle of 'international comity' amounts to calling into question the Commission's jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement to conduct such as that found to exist and penalised in this case and has, as such, already been rejected by the Court of Justice (see, to that effect, judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others* v *Commission*, 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447, paragraph 22).

270 Moreover, the applicant does not explain how the application of Article 101 TFEU to conduct engaged in by undertakings that took place and was implemented in third countries, in so far as it applies to the anticompetitive conduct of economic operators which is not made compulsory by local regulatory schemes, would call into question the laws or administrative practices of those third countries or the way in which they perform their obligations under international law. In so far as the applicant submits that the regulatory schemes of the third countries at issue in actual fact made tariff coordination between the incriminated carriers compulsory, its arguments will be examined below.

271 It follows from the foregoing that the present complaint must be rejected.

(2) The assessment of the regulatory schemes at issue

(i) Hong Kong

272 The applicant submits that the Commission erred in finding, in recitals 976 to 993 of the contested decision, that the carriers were not under any obligation to discuss the FSC in Hong Kong. In the applicant's view, the combination of the ASAs entered into between Hong Kong and the Member States and the administrative practices of the Hong Kong authorities created a situation which in fact required carriers to submit collective FSC applications.

273 First of all, the applicant relies on a letter from the CAD of 3 September 2009 addressed to the Commission and submits that that letter was not mentioned in the contested decision. The applicant submits that it is apparent from that letter that, in practice, the CAD required that collective applications for surcharges be submitted to it for approval. In its reply, the applicant adds that good administration required the Commission to test with the CAD whether its interpretation of the administrative practices in Hong Kong, as are set out in the letters addressed to it by the CAD, was valid.

274 Next, the applicant submits that the finding in recital 992 of the contested decision that the CAD was prepared to examine individual applications for a fixed amount of FSC is not supported by any evidence and is contradicted by certain evidence adduced by Lufthansa in the context of the leniency procedure.

275 Lastly, the Commission erred in finding, in recital 992 of the contested decision, that it was merely 'more difficult' to submit an individual application for a fixed amount of FSC than a collective index-based application. Given the volatility of fuel prices, the usual periods for the CAD to consider applications for approval of surcharges and the objective of the CAD, there was no plausible possibility of making such an individual application.

276 The Commission disputes those arguments.

277 It is apparent from recital 988(c) of the contested decision that the Hong Kong CAD sent to the President of the Commission a letter dated 5 September 2008 in which it stated that collective applications of carriers relating to the FSC were both lawful and desirable in administrative terms without, however, mentioning any prohibition imposed on carriers on filing an individual application. In recital 992 of the contested decision, the Commission took the view that the CAD was not prepared to accept individual applications for an FSC mechanism, but that it was prepared to accept individual applications for a fixed amount of FSC.

278 First, contrary to what the applicant submits, it is not apparent from the letter from the CAD of 3 September 2009 addressed to the Commission relating to the tariff negotiations involving the Hong Kong BAR CSC that that assessment is incorrect.

279 That letter reads as follows:

> 'The Commission should be absolutely clear that, in respect of the [FSC] index-based mechanism, we required that the BAR-CSC and the participating carriers agree on the details of the collective applications, including the amount of the surcharge for which approval was sought, the evidence to be provided to CAD supporting the applications and the single mechanism to be used for determining the surcharge. The CAD also mandated and required the participating carriers to levy specifically the surcharge approved. Moreover, we mandated and required BAR-CSC to submit for approval to CAD any change in the list of carriers participating in the collective applications and we made it clear that such carriers should not levy any [FSC] without CAD's express approval to BAR-CSC.'

280 That letter thus merely sets out the conditions required by the CAD where the BAR CSC and the carriers envisage an index-based collective application relating to the FSC. However, it does not refer to a general obligation to file a collective application for an FSC or to the impossibility of filing an individual application for a fixed FSC.

281 In addition, the applicant is wrong to complain that the Commission failed to have regard to the principle of good administration by adopting its own interpretation of the letters of 5 September 2008 and 3 September 2009 without determining with the CAD whether that interpretation was valid.

282 The rights guaranteed by the EU legal order in administrative procedures include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (judgment of 16 June 2015, *FSL and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 405).

283 In the present case, the Commission was entitled, without making an error or failing to examine carefully and impartially the relevant aspects of the administrative file, first, to interpret the letter of 5 September 2008 as setting out the requirements of the CAD concerning tariff coordination of carriers in the event of a collective application relating to an FSC index-based mechanism, but not as stating that it was impossible to file an individual application, and, second, to argue before the General Court that the letter of 3 September 2009 did not contradict that interpretation.

284 In those circumstances, the principle of good administration did not require the Commission to determine with the CAD whether the inferences that it could legitimately draw from those two letters were valid. This is all the more so since it was for the applicant and the other undertakings concerned to demonstrate that a State law or State conduct was of such a kind as to deprive them of all independent choice in their commercial policy, as is apparent from the case-law cited in paragraph 263 above.

285 Second, as regards the complaint that the Commission erred in finding in the contested decision that the CAD was prepared to examine individual applications for a fixed FSC, it is apparent from recital 988(d) of the contested decision that an individual application of Lufthansa was examined and rejected by the CAD in the course of September 2006.

286 It is true that, as the applicant submits, the Commission failed to cite an example of an individual application which it is claimed was accepted by the CAD. In addition, it is apparent from an email of 19 September 2006 addressed to CPA, annexed to the application, that Lufthansa confirmed its participation in the applications for approval of the FSC which were coordinated by the BAR CSC on the ground that the CAD did not accept that a carrier could submit an individual application. That document is supported by CPA's reply to the Statement of Objections, annexed to the defence, from which it is apparent that, in the course of

September 2006, following the submission by Lufthansa of an individual application, the CAD forced that carrier to comply with the collective system of FSC approval.

287 However, the Commission admitted, in recital 992 of the contested decision, that the CAD was not prepared to accept individual applications for an FSC index-based mechanism, while stating that individual applications for a fixed amount of FSC could be accepted, and mentioned, in recital 988(d) of that decision, that Lufthansa's individual application in September 2006 had been rejected not on the ground that it was an individual application, but because the index proposed at that time by that carrier had been rejected. The evidence on which the applicant relies does not contradict those conclusions. It is apparent from the email of 19 September 2006 addressed to CPA that Lufthansa's application concerned changes relating to the index-based methodology for determining the FSC and from CPA's reply to the Statement of Objections that Lufthansa's application, which was rejected by the CAD, related to a methodology for setting the FSC.

288 Furthermore, it is apparent from the other items of evidence included by the two parties in the file before the General Court that:

– in an email of 13 October 2006, Qantas stated that it would continue to apply the BAR CSC's FSC mechanism applicable at the time, without stating the reasons for that choice;

– in the declaration made by Lufthansa in its leniency application, it is stated that the BAR CSC provided certain clarifications with regard to the methodology relating to the FSC because of a request by the CAD for a common registration of a uniform FSC index coordinated between the carriers;

– in its reply to the Statement of Objections, CPA stated that the CAD had confirmed to it its 'preference' for collective BAR CSC applications, for the examination of which it had developed 'a streamlined and efficient approval process';

– in the letter from the CAD of 5 September 2008, the filing of collective applications was presented as an 'efficient' means at the administrative level.

289 Those items of evidence, because they are not consistent with each other, do not in themselves allow it to be determined whether, for the CAD, the submission of collective applications was a mere preference justified by administrative considerations or an obligation formally imposed on carriers.

290 Lastly, as the Commission contends, the applicant has not produced any document expressly proving that only collective applications could be communicated to the CAD and that the latter had, as a matter of principle, rejected all individual applications relating to a fixed amount of FSC.

291 Accordingly, the applicant has not proved that the Commission erred in concluding in recital 992 of the contested decision that, as regards the FSC, even if the CAD was not prepared to accept individual applications for an FSC mechanism, individual applications for a fixed amount of FSC could be accepted.

292 Third, the applicant is not justified in challenging recital 992 of the contested decision, which states that it was 'more difficult or less practical' to submit to the CAD an individual application for a fixed amount of FSC than an index-based collective application. The applicant's argument that such an individual application was in actual fact inconceivable because it would have exposed the carrier making the application to considerable losses on account of the volatility of fuel prices and the periods for the CAD to consider applications, cannot succeed.

293 The applicant's claims are supported only by a chart showing the development of fuel prices. However, that chart does not suffice in itself to prove that those claims are well founded.

294 It follows from all of the foregoing that the applicant's arguments challenging the assessment of Hong Kong's regulatory scheme must be rejected in their entirety.

(ii) Japan

295 The applicant submits that the Commission erred in finding, in recitals 994 to 1012 of the contested decision, that the carriers were not under any obligation to discuss rates in Japan. First, it submits that the Memorandum of Understanding entered into in 2000 between Japan and the United Kingdom is not legally binding and therefore could not repeal the tariff provisions of the ASA that was entered into between those two countries, an ASA which, moreover, pre-dated the United Kingdom's accession to the Treaty establishing the European Economic Community and was therefore covered by the scheme laid down in the second paragraph of Article 351 TFEU.

296 Second, the applicant disputes that the ASAs entered into between Member States of the European Union and Japan applied only to designated carriers. First of all, it is apparent from those agreements that tariff discussions could include consultations with carriers operating over the whole or part of the route concerned. Next, the scope of those consultations should be considered in the light of the combined effect of all ASAs governing flights from Japan, which is equivalent to that of a multilateral agreement.

297 Third, the applicant maintains that the ASAs, and in particular the tariff clauses thereof, were legally binding and that the Commission failed to examine, contrary to the principle of good administration and even though it bore the burden of proof, the statements of the incriminated carriers that those ASAs were actually applied by the Japanese authorities.

298 Fourth, in reply to a question put by the General Court, the applicant submits that the ASAs entered into by Japan as well as the Japanese domestic legislation, taken together, required carriers to consult each other on rates subject to the approval of the Japanese Civil Aviation Bureau.

299 The Commission disputes the applicant's arguments.

300 None of those arguments can succeed.

301 In the first place, it should be noted that the Commission never claimed or disputed in the contested decision that the binding force of the ASA entered into between Japan and the United Kingdom should be assessed in the light of the second paragraph of Article 351 TFEU. Moreover, the applicant relies on that provision without setting out the consequences that the Commission should have drawn from the application of that provision to the present case. The applicant's arguments based on the second paragraph of Article 351 TFEU must therefore be rejected.

302 In the second place, as regards the applicant's argument that the tariff clauses of the ASAs entered into between Member States of the European Union and Japan did not apply only to designated carriers, it should be noted that that argument is based on an incorrect analysis of the ASAs at issue. It is true that the clauses of Article 11 of the ASA entered into between Japan and the United Kingdom, which were reproduced in the application, provide, in essence, that rates must be the subject of prior discussions between designated carriers, where appropriate under the mechanism established within IATA, and that, in the event that an agreement is reached, that agreement must be approved by the competent authorities of both parties. Those clauses also provide that, if the designated carriers cannot reach an agreement, it is for the competent authorities of both parties to determine the rates in question by agreement between themselves. However, as noted in recitals 1007 and 1012 of the contested decision, those clauses do not require multilateral discussions on the rates applicable to different routes. At most, those clauses provide that designated carriers are to consult other carriers which operate over the whole or part of the same route or are to take account of the rates charged by those other carriers before entering into tariff agreements.

303 That finding is not contradicted by the applicant's argument that account should be taken of the combined effect of all ASAs governing flights from Japan, which is equivalent to that of a multilateral agreement. Although such a combined effect could explain the existence of contacts between the designated Japanese carrier and various designated carriers from other countries in order to establish rates applicable to a number of routes, it cannot justify multilateral exchanges on the scale of those referred to in recitals 185 to 199, 244, 256 and 257 of the contested decision, which describe, inter alia, direct contacts between a number of incriminated carriers which did not necessarily involve the designated Japanese carrier.

304 It follows from the foregoing that the applicant has not proved that the tariff clauses of the ASAs made contacts between multiple carriers flying to multiple destinations compulsory.

305 Consequently, the arguments alleging that the Memorandum of Understanding entered into in 2000 between Japan and the United Kingdom could not amend the ASA entered into by those countries must also be rejected. It is true that, as the Commission admits in reply to a question put by the General Court, the value of that memorandum is not equivalent to the value of that ASA, a statement which contradicts recitals 997 and 1006 of the contested decision. The fact remains that, even though the tariff clauses of the ASA at issue remained in force after 2000, they did not make the contacts between multiple carriers flying to multiple destinations compulsory, as is stated by the Commission in recital 1007 of the contested decision.

306 It is also appropriate to reject the arguments alleging, first, that that ASA creates rights and obligations not only between the signatories, but also with respect to the applicant in its capacity as a designated carrier which 'was part of the State' on the day on which that agreement was entered into, and, second, that the combination of the provisions of the ASAs entered into by Japan, which had direct effect under Japanese law, and Article 105(4) of the Japanese Civil Aeronautics Act prohibited the Japan Civil Aviation Bureau from approving rates that were not subject to an agreement between carriers, so that the latter were required to consult each other.

307 Even though the binding force of the tariff clauses of the ASAs, on account of the direct effect of those ASAs or of Japanese law, has been established, the applicant has failed to prove that those clauses made the contacts between multiple carriers flying to multiple destinations, which are referred to by the Commission in the contested decision, compulsory.

308 In the third place, the applicant's argument alleging that the Commission failed to examine the statements of the incriminated carriers that the ASAs were legally binding and that those ASAs, and in particular their tariff clauses, were actually applied by the Japanese authorities, is not substantiated in any way. In particular, the applicant has neither mentioned nor produced any statement by a carrier which is capable of confirming its claims. In those circumstances, the applicant, which bears the burden of proving that the conduct of a third country restricts competition, in accordance with the case-law cited in paragraph 263 above, cannot reasonably complain that the Commission failed to examine such statements.

309 It follows from all of the foregoing that the applicant's arguments relating to the regulatory scheme applicable in Japan must be rejected in their entirety.

(iii) Other third countries

310 As regards other third countries, the applicant refers to recital 1019 of the contested decision, which states that 'following the reasoning outlined in this Section in detail in respect of Hong Kong and Japan the Commission does not consider that a defence of State coercion is substantiated in regard to India, Thailand, Singapore, [South] Korea and Brazil'.

311 Principally, the applicant infers from that recital that the errors of assessment made by the Commission in its examination of the regulatory schemes of Hong Kong and Japan and identified in the application vitiate the Commission's examination of the regulatory schemes of India, Thailand, Singapore, South Korea and Brazil. In the alternative, the applicant submits that the Commission's reasoning concerning those other third countries is manifestly inadequate as a basis for rejecting the arguments put forward by the incriminated carriers.

312 The Commission disputes the applicant's arguments.

313 In the first place, since, as is apparent from paragraphs 272 to 294 above, the General Court did not find any error vitiating the examination of the regulatory schemes of Hong Kong and Japan in the contested decision, the applicant's principal arguments must be rejected.

314 In the second place, as regards the arguments put forward in the alternative relating to the inadequacy of the statement of reasons for the contested decision, it should be borne in mind that, as is apparent from paragraph 241 above, the question whether the statement of reasons for an act meets the requirements of Article 296 TFEU and of Article 41(2)(c) of the Charter 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.

315 In the present case, it is true that, in recital 1019 of the contested decision, the Commission took the view that, 'following the reasoning … in respect of Hong Kong and Japan', the State-coercion defence was not substantiated in the case of India, Thailand, Singapore, South Korea and Brazil.

316 Nonetheless, in that recital, the Commission stated that that analogy was valid on the ground, first, that the tariff provisions laid down in the ASAs applicable in India, Thailand, Singapore, South Korea and Brazil were limited to designated carriers on specified routes and did not extend to general tariff discussions between multiple operators providing services to multiple country destinations and, second, that the applicable domestic legal and administrative provisions had not been shown to require tariff coordination.

317 In so doing, the Commission set out to the requisite legal standard the reasons why it rejected the arguments of the carriers relating to the regulatory framework in force in India, Thailand, Singapore, South Korea and Brazil, enabling the

applicant to understand them and the General Court to exercise its jurisdiction to exercise its powers of review.

318 The arguments alleging infringement of the obligation to state reasons must therefore be rejected.

319 In the third place, assuming that the applicant is complaining that the Commission did not actually examine the Indian, Thai, Singaporean, South Korean and Brazilian regulatory schemes, its argument must be rejected.

320 As the Commission correctly contended in reply to a question put by the General Court, in accordance with the case-law cited in paragraph 263 above, it was for the incriminated carriers to prove that the regulations applicable in the third countries in question imposed an obligation to coordinate rates. However, the applicant does not adduce any evidence demonstrating that the Commission ignored the evidence that the incriminated carriers had adduced during the administrative procedure as regards the legislation applicable in India, Thailand, Singapore, South Korea and Brazil.

321 It follows from the foregoing that the applicant's arguments relating to the Indian, Thai, Singaporean, South Korean and Brazilian regulatory schemes must be rejected in their entirety.

322 This part of the present plea must therefore be rejected.

(b) The second part, alleging failure to state reasons for the general 15% reduction and the inadequacy of that general reduction

323 The applicant complains that the Commission failed to set out the reasons underlying the amount used for the general reduction of 15%.

324 It also submits that the Commission found, in any event, in the contested decision that the regulatory schemes in the third countries could have encouraged the incriminated carriers to coordinate with each other as regards surcharges and that the general 15% reduction granted on that basis appears inadequate, since greater reductions were granted by virtue of the regulatory framework in previous decisions.

325 The Commission disputes those arguments.

326 In that regard, it should be borne in mind that, concerning the setting of the amount of the fine, the Commission is required to indicate in its decision the factors which enabled it to determine the gravity of the infringement and its duration, there being no requirement for any more detailed explanation or indication of the figures relating to the method of calculating the fine. It must nevertheless explain the weighting and assessment of the factors taken into account (see judgment of 10 November 2017, *Icap and Others* v *Commission*, T-180/15, EU:T:2017:795, paragraph 291 and the case-law cited).

327 In the contested decision, after analysing the regulatory schemes applicable in the third countries in question in recitals 972 to 1019, the Commission concluded in recital 1020 that no obligation imposed by a State could justify the disapplication of Article 101 TFEU to the conduct at issue. In recital 1021 and in recitals 1260 to 1265 of that decision, it took the view that the regulatory schemes and the approach of the regulatory authorities in question had nevertheless encouraged anticompetitive conduct. Accordingly, it classified them as mitigating circumstances and concluded that it was justified in reducing the basic amount of the fine by 15%.

328 It follows that the contested decision discloses in a clear and unequivocal fashion the Commission's reasoning justifying the grant of a reduction in the fine of 15% by virtue of the applicable regulatory schemes, in particular the link between the relevant factors taken into account, namely regulatory pressure, and the adjustment factor for the basic amount.

329 The reasoning of the contested decision justifying the amount of the general 15% reduction is therefore sufficient.

330 Furthermore, even assuming that greater reductions were granted by virtue of the applicable regulatory framework in previous decisions, it cannot be inferred therefrom that the amount of the general reduction of 15% is in itself inadequate. The mere fact that the Commission has in its previous decisions granted a certain rate of reduction for specific conduct does not imply that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (see judgment of 6 May 2009, *KME Germany and Others* v *Commission*, T-127/04, EU:T:2009:142, paragraph 140 and the case-law cited). The applicant cannot therefore plead in aid a reduction in the amount of fines granted in that other case.

331 Moreover, although the applicant submits that the general 15% reduction is manifestly too low given the nature and extent of the legal or regulatory issues identified in the contested decision, it should be noted that the Commission took account of those issues in the contested decision when it granted that general reduction, as is apparent from the statement of reasons set out in paragraph 327 above. In its written submissions, the applicant does not explain how the reasons given by the Commission could be criticised.

332 This part of the present plea must therefore be rejected, as must the fifth plea in its entirety.

7. The sixth plea, alleging an error of assessment of the applicant's participation in an infringement relating to the refusal to pay commission

333 The applicant submits that the Commission made an error of assessment in concluding that it had participated in the component of the single and continuous infringement relating to the refusal to pay commission. The applicant observes

that, in recital 743 of the contested decision, the Commission based that conclusion on four sets of evidence, namely (i) contacts with Qantas; (ii) an email from SAC of 28 December 2005; (iii) email exchanges between members of the Italian Board of Airline Representatives ('the IBAR'); and (iv) email exchanges between members of Air Cargo Council Switzerland ('ACCS'). In the applicant's view, those items of evidence do not support the Commission's conclusion, a view which the Commission disputes.

334 As a preliminary point, it should be borne in mind that it is for the Commission to prove the infringements of the competition rules that it finds. It must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (judgment of 16 September 2013, *Wabco Europe and Others* v *Commission*, T-380/10, EU:T:2013:449, paragraphs 42 and 47).

335 It is not necessary, however, for every item of evidence produced by the Commission to support such a finding. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement (judgment of 16 September 2013, *Wabco Europe and Others* v *Commission*, T-380/10, EU:T:2013:449, paragraph 48).

336 It is in the light of those considerations that it is appropriate, first, to examine each of the four sets of evidence on which the Commission relied in recital 743 of the contested decision and, second, to determine whether the Commission was justified, in the context of an overall assessment, to infer from the body of evidence relied on that the applicant had participated in the component of the single and continuous infringement relating to the refusal to pay commission.

(a) The four sets of evidence relied on in recital 743 of the contested decision

(1) The Qantas contacts

337 The applicant complains that the Commission relied against it on the contacts with Qantas described in recital 685 of the contested decision. In the applicant's view, those contacts were lawful. They were made in the context of a joint services agreement ('JSA') approved by the UK Office of Fair Trading in 2005 and by the Australian Competition and Consumer Commission.

338 The Commission replies that the JSA did not permit coordination of policies on the payment of commission on surcharges. In its rejoinder, the Commission adds that the JSA covered only certain 'designated routes'. However, the contacts described in recital 685 of the contested decision related to the general policy of the applicant and of Qantas.

339 The Commission maintains that, in any event, its conclusions regarding the applicant's participation in the refusal to pay commission are not dependent on whether or not the contacts referred to in recital 685 of the contested decision were lawful. Indeed, the Commission argues that it relied on a body of evidence.

340 In that regard, it must be observed that, on 20 June 1995, the applicant and Qantas entered into an agreement under which they agreed to cooperate and establish a network of airline services on designated routes. On 3 April 2000, the applicant and Qantas entered into a new agreement, namely the JSA. According to recitals (B) and (D), the JSA was intended to replace the agreement of 20 June 1995 and further improve the ability of the applicant and of Qantas to offer seamless, competitive, high-quality and cost-effective passenger air transport and air cargo services.

341 On 10 May 2000, the Australian Competition and Consumer Commission authorised the JSA on public benefit grounds. On 1 March 2005, the Australian Competition and Consumer Commission re-authorised the JSA for a period of five years based on similar considerations.

342 In the meantime, on 29 July 2003, the applicant provided a draft notification of the JSA to the Commission, which referred the matter to the Office of Fair Trading. On 21 July 2005, the Office of Fair Trading informally notified the applicant and Qantas that the JSA was caught by Article 101(1) TFEU but that it was unlikely to give rise to restrictions of competition which could not be 'exempted' under paragraph 3 of that provision. The Office of Fair Trading added that, in view of the parties' small market shares, the JSA was unlikely to have an appreciable effect on competition in the cargo market. The Office of Fair Trading concluded that the file was closed, about which the Commission was informed.

343 In the present case, it must be noted that the Commission does not argue that the JSA is contrary to the applicable competition rules or that it was exploited in the context of the single and continuous infringement. It argues that the contacts described in recital 685 of the contested decision went beyond, first, the material scope of the JSA and, second, the territorial scope thereof.

344 In those circumstances, for the purpose of addressing this part of the present plea, it is appropriate to examine whether, as the Commission maintains, the contacts referred to in recital 685 of the contested decision go beyond the material and territorial scope of the JSA and can therefore contribute to proving the applicant's participation in the component of the single and continuous infringement relating to the refusal to pay commission.

345 In that regard, first, as regards the material scope of the JSA, it is appropriate to observe that clause 7.1(b), (c) and (e) thereof provides that the applicant and Qantas may coordinate their activities in the areas of marketing, sales and pricing, respectively. Clause 7.2(b) states that the coordination of the marketing, sales and pricing activities of Qantas and of the applicant in accordance with clause 7.1 may include agreeing 'customer rebates, incentives and discounts'.

346 The parties agree that the freight forwarders are customers of the carriers and that, as is apparent in particular from recitals 5 and 879 of the contested decision, commission on surcharges is in actual fact a rebate or a discount on surcharges.

The parties also agree that the contacts referred to in recital 685 of the contested decision concerned the refusal to pay commission on surcharges to freight forwarders. It follows that, contrary to what the Commission maintains, those contacts were caught by clause 7.1(b), (c) and (e) of the JSA and, consequently, fell within the material scope thereof.

347 Second, as regards the territorial scope of the JSA, it must be observed that clause 7.1 thereof applies to the coordination of the marketing, sales and pricing activities of the applicant and of Qantas to the extent that they relate wholly or partly to the designated routes. These are routes between Australia and Europe via any intermediate point, between Australia and intermediate points in Europe and between Europe and intermediate points in Australia or such other routes as the parties to that agreement may agree. It is apparent from an annex to the applicant's reply to the Statement of Objections that the applicant and Qantas had expressly agreed that 24 routes would be subject to the JSA, including the route between London (United Kingdom) and Bangkok (Thailand), that between London and Singapore (Singapore) and the routes between Singapore, on the one hand, and Sydney, Perth, Melbourne or Darwin (Australia), on the other.

348 In the present case, the 'email chain' on which the Commission relied in recital 685 of the contested decision comprises a total of eight emails exchanged between 20 and 23 December 2005. Those emails can be grouped into three categories. The first of those three categories consists of the first three emails of the 'email chain' in question. Those three emails are dated 20 and 21 December 2005 and concern Qantas' pricing policy. In particular, they concern the inclusion of surcharges in Qantas' rates and the question whether the full amount of the prices charged by Qantas is, accordingly, likely to have commission sought by freight forwarders applied to it.

349 Contrary to what the applicant suggests, it is implausible that the three emails in question related exclusively to the routes covered by the JSA and not to Qantas' general policy. As is apparent from the second of those emails, they concerned Qantas' 'general market rates'. Neither the JSA nor routes which are claimed specifically to fall within the geographic scope thereof are mentioned.

350 It cannot, however, be inferred from the three emails in question that the applicant participated in contacts relating to the refusal to pay commission. It should be noted that the applicant and Qantas are neither amongst the senders of those emails nor amongst their recipients. The three emails in question are exchanges between third parties to those undertakings, in particular freight forwarders and freight forwarders associations.

351 The second of the three categories of email in question comprises the fourth to sixth emails of the 'email chain' described in recital 685 of the contested decision. Those three emails are dated 21 December 2005. These are exchanges through which employees of the applicant received the three emails referred to in the

preceding paragraph. It is apparent from one of those exchanges that the applicant received those emails not through Qantas, but 'through a back route'.

352 However, nothing in those exchanges allows it to be concluded with a sufficient degree of certainty that the applicant's interest in the issue of the inclusion of surcharges in Qantas' rates exceeded the geographic scope of the JSA. First, an employee of the applicant stated the following: 'This shows that what you do in one part of the world does get feedback to the UK.' Second, that employee stated that the issue was likely to be of interest to Australia, Singapore and Bangkok, namely places to and from which there were routes which the applicant and Qantas had expressly agreed to be subject to the JSA (see paragraph 347 above).

353 The last of the three categories of email in question comprises the last two emails of the 'email chain' referred to in recital 685 of the contested decision. Those emails, dated 23 December 2005, constitute an exchange between the applicant and Qantas. They also do not allow it to be concluded with a sufficient degree of certainty that the applicant and Qantas exchanged information which it is claimed goes beyond the geographic scope of the JSA. In the first of those two emails, an employee of the applicant forwarded the previous emails to a Qantas employee, stating that those were 'an example of one hand not talking to the other' – thus pointing to pre-existing cooperation between the applicant and Qantas – which the considerations set out in the preceding paragraph suggest relate to the JSA. The reply of the Qantas employee on the same day – who clarified that there was no question of paying commission on the surcharges – does not allow a conclusion to the contrary.

354 At most, the 'email chain' described in recital 685 of the contested decision therefore demonstrates that the applicant and Qantas discussed commission on surcharges in the context of the implementation of the JSA.

(2) The email from SAC of 28 December 2005

355 The applicant submits that the email from SAC of 28 December 2005 merely identifies the number and identity of the other carriers that were also contacted by DHL regarding the latter's intention to apply commission on surcharges. It has not been proved that the applicant replied or intended to reply to that email. The obligation to distance itself publicly which the Commission appears to impose on the applicant is unjustified in the light of the case-law.

356 The Commission replies that the anticompetitive nature of the email from SAC of 28 December 2005 is clear. The sender's self-evident purpose in sending that email was to coordinate with other carriers in relation to the payment of commission on surcharges to DHL. The fact that that sender included the applicant amongst the recipients of the email in question suggested that the applicant was perceived by him to be one of the carriers whose opinion should be ascertained in order to establish a common position in breach of Article 101 TFEU. The applicant, for its part, refrained from distancing itself from that email.

357 It should be noted that the email of 28 December 2005 is described in recital 686 of the contested decision. In that email, an SAC employee writes to a number of carriers, including the applicant, saying that he '*wondered if* [*they*] *have heard*' of a recent communiqué from DHL in Germany received by his Frankfurt office (Germany) and announcing the future collection of a commission on surcharges. The SAC employee adds that the communiqué refers to IATA Resolution 805zz, states that he is not sure what that resolution is and thanks the recipients for their comments.

358 There is nothing in the wording of the email in question that expressly invites those carriers to agree to refuse to pay commission or, moreover, to exchange information on the commercial response that they intended to provide to the communiqué in question.

359 In view of the uncertainties regarding IATA Resolution 805zz that are expressed in the email in question, it is conceivable that the questions raised by the SAC employee simply related to whether any commission on surcharges was due. The response of an employee of another carrier to the email in question suggests that that was the case. In an internal email of 3 January 2006, that employee asked whether it was necessary to 'check with the legal department' of the carrier. However, the reply of another employee of the carrier at issue suggests that the email from SAC could also be understood as concerning the commercial response to be provided to the communiqué from DHL. In another internal email of 3 January 2006, that employee mentioned that he had spoken to Lufthansa, which had stated, inter alia, that it would 'not accept any such invoices'.

360 It follows that the email of 28 December 2005 described in recital 686 of the contested decision does not in itself prove that the applicant participated in the component of the single and continuous infringement relating to the refusal to pay commission. In accordance with settled case-law (see judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 47 and the case-law cited), it is nevertheless necessary to examine whether, together with other evidence, that email could constitute a body of evidence which enabled the Commission to conclude that that was indeed the case (see paragraphs 386 and 387 below).

(3) The exchange of emails between members of the IBAR

361 The applicant submits that none of the emails exchanged between the members of the IBAR on 30 March and 19 May 2005 was sent by or copied to it. It is true that the internal email from Swiss of 19 May 2005 mentions that the applicant 'could not join the meeting [of 12 May 2005], but is of the same opinion'. However, that sentence is ambiguous and cannot suffice to establish the applicant's liability in the absence of other evidence supporting its involvement in exchanges between carriers concerning the refusal to pay commission. That conclusion is all the more valid because it is clear from internal discussions at the applicant that clear instructions were given to its employees not to participate in such discussions.

362 The Commission disputes the applicant's arguments. The IBAR itself acknowledged in its email of 30 March 2005 that coordination between carriers would have to be concealed. It asked the carriers to 'use the draft reply quoted here below with maximum care – each carrier must use the gist of the draft and not just copy as it is'. There is no evidence that the applicant subsequently distanced itself publicly from this. As regards the internal email from Swiss of 19 May 2005, it tends to confirm that the applicant communicated its opinion on the refusal to pay commission to the IBAR or to a competitor knowing that it would be passed on to the carriers attending the meeting of 12 May 2005. If the applicant had been unwilling to coordinate with them, it would not have been possible for them to be informed of the applicant's 'opinion'.

363 In that regard, it should be noted that the present complaint relates to two email exchanges between the IBAR and its members, to which the Commission referred in recitals 694 and 695 of the contested decision.

364 First, in recital 694 of the contested decision, the Commission relied on an email of 30 March 2005 by which the IBAR, while describing the subject as 'very delicate', forwarded to the applicant and other carriers a draft reply to a letter from the Italian freight forwarders association (ANAMA) concerning the payment of commission on surcharges. That draft, which states that the payment of commission has no legal basis and is contrary to established commercial and contractual practice, is accompanied by a request to use it 'with maximum care – each carrier must use the gist of the draft and not just copy as it is'.

365 It should be noted that the email in question was intended to encourage the carriers which were the recipients thereof, including the applicant, to adopt, in their replies to ANAMA, a common line of argument regarding commission on surcharges and, more specifically, regarding whether it was due. However, although the insistence on the 'very delicate' nature of the subject and the request to use the proposed line of argument 'with maximum care' and 'not just [to] copy as it is' may raise doubts as to the context of the approach taken by IBAR, that email does not in itself prove that those carriers agreed to refuse to pay commission on surcharges to freight forwarders. As is apparent from recitals 675, 676, 726 and 738 of the contested decision, it is precisely such concertation, and not the adoption of a common line of argument or the coordinated sending thereof to a freight forwarders association, that the Commission alleges against the incriminated carriers.

366 In those circumstances, it must be concluded that the email of 30 March 2005 is not in itself capable of supporting the Commission's conclusion that the applicant participated in the component of the single and continuous infringement relating to the refusal to pay commission. In accordance with the case-law cited in paragraph 360 above, it is nevertheless necessary to examine whether, together with other evidence, that email could constitute a body of evidence which enabled the Commission to conclude that that was indeed the case (see paragraphs 386 and 387 above).

367 Second, in recital 695 of the contested decision, the Commission referred to an internal email from Swiss of 19 May 2005. In that email, the following is stated: 'On 12 May [2005] [the] following carriers decided to meet at [Lufthansa] Cargo Italy: …, [Lufthansa], [Swiss], [AF], [KLM], [Cargolux] and [JAL] (more than 50% of the market). We all confirmed that we will not accept any [FSC/SSC] remuneration. [The applicant] could not join the meeting but is of the same opinion …'.

368 It must be noted that these are not direct evidence of the applicant's participation in the component of the single and continuous infringement relating to the refusal to pay commission. On the contrary, they are remarks in this connection which the local manager in Italy of another incriminated carrier attributed to the applicant.

369 First, those remarks are described in a way that is neither precise nor detailed. The sender of the email in question does not explain why the applicant was unable to attend the meeting of 12 May 2005. He also does not explain where he received his information regarding the applicant's opinion. Such circumstances may invoke a certain circumspection with regard to the conclusions which the Commission seeks to draw from the email in question. Second, the Commission has not adduced any contemporaneous evidence of a nature to substantiate those conclusions. It is in no way apparent from recitals 696 to 698 of the contested decision that the applicant participated in the contacts that subsequently took place in Italy regarding the refusal to pay commission.

370 In those circumstances, the internal email from Swiss of 19 May 2005 can be considered to have only weak evidential value. In accordance with the case-law cited in paragraph 360 above, it is nevertheless necessary to examine whether, together with other evidence, that email could constitute a body of evidence which enabled the Commission to conclude that that was indeed the case (see paragraphs 386 and 387 below).

(4) The email exchanges between members of ACCS

371 The applicant submits that the Commission erred in relying against it on two emails from the ACCS chairman of 5 and 13 June 2005. Those emails are not of an anticompetitive nature and therefore did not call for any public distancing on the part of the applicant. Moreover, there is no evidence in the contested decision that the meeting of 17 June 2005 mentioned in the email referred to in recital 693 of the contested decision was held.

372 The Commission contends that the email of 5 June 2005 was the start of a round of anticompetitive coordination, from which the applicant was required to distance itself publicly. However, it did not distance itself from that email or from the email of 13 June 2005. In so far as it maintains that it was not required to distance itself from those emails, the applicant ignores the obvious nature and purpose of the proposed meeting, at which the carriers were to agree on a common approach for responding to the requests for commission from the members of Spedlogswiss.

373 In any event, the applicant replied to the email of 5 June 2005. By email of 9 June 2005, it actively indicated its willingness to participate in the proposed meeting, stated that it wished beforehand to 'share … some [information]' regarding the efforts of freight forwarders associations to request commission on behalf of their members and intended to submit proposals to its competitors as to the actions which should be collectively agreed upon. The applicant thus sought to ensure that all carriers followed a common policy of not individually engaging in any bilateral discussion or negotiation with Spedlogswiss.

374 In that regard, it should be noted that the emails at issue are described in recitals 692 and 693 of the contested decision.

375 First, in recital 692 of the contested decision, the Commission referred to an email of 5 June 2005 sent by the ACCS chairman to a number of carriers, including the applicant, in order to suggest that they attend a meeting on 17 June 2005 in order informally to discuss the letter sent to most of them by the Swiss freight forwarders association (Spedlogswiss) on 30 May 2005. In its reply to that email, a service provider, referred to as ATC Aviation Services, asked the ACCS chairman whether ACCS would reply to Spedlogswiss or whether the various carriers were to reply individually. It is apparent from recital 692 of the contested decision that the recipients of that email were divided in that regard. A number of carriers thus supported a common response from ACCS, while the ACCS chairman stated that the competition authorities might consider it to be a price discussion.

376 Second, in recital 693 of the contested decision, the Commission mentioned an email from the ACCS chairman of 13 June 2005. That email again refers to the meeting scheduled for 17 June 2005 and also includes a draft common reply to Spedlogswiss, submitted to the carriers for approval or for comments. However, that draft merely states that ACCS was asked to reply to Spedlogswiss on behalf of its members and that, under IATA Resolution 805zz, 'Spedlogswiss as an association cannot be used as a platform to impose commercially related business multilaterally.'

377 It follows that the exchanges on which the Commission relies in recitals 692 and 693 of the contested decision concerned an assessment of the merits of the position of a freight forwarders association under IATA Resolution 805zz. Nothing in those exchanges proves that the incriminated carriers agreed to refuse to pay commission on surcharges to freight forwarders. As stated in paragraph 365 above, it is precisely such concertation, and not the adoption of a common legal position or the coordinated sending thereof to a freight forwarders association, which the Commission alleges against the incriminated carriers.

378 It is true that, at the end of the email from the ACCS chairman of 13 June 2005, the following is also stated:

‘you might be still contacted directly again at a later stage on a bilateral basis. It is therefore still a necessity to discuss our further steps as scheduled in our meeting dated 17 June 2005.’

379 However, it must be noted that the Commission has failed to adduce any evidence to show that it was reasonably foreseeable that such ‘further steps’ could include any concerted refusal to pay commission on surcharges.

380 It is also true that, as the Commission notes, the applicant, in an email of 9 June 2005, replied to the email of 5 June 2005 that it wished to ‘share … some info’ with its competitors.

381 It must be borne in mind, however, that, under Article 263 TFEU, the Court must confine itself to a review of the legality of the contested decision on the basis of the reasons set out therein (see judgment of 9 September 2015, *Philips* v *Commission*, T-92/13, not published, EU:T:2015:605, paragraph 43 and the case-law cited). The participation of an undertaking in an infringement of the competition rules must therefore be assessed solely by reference to the evidence assembled by the Commission in that decision. The only relevant question is therefore whether that participation is or is not proved in the light of that evidence (judgments of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 726, and of 12 July 2018, *The Goldman Sachs Group* v *Commission*, T-419/14, EU:T:2018:445, paragraph 85).

382 As it admitted in its reply to the measures of organisation of procedure of the General Court, the Commission did not rely on the email of 9 June 2005 in the contested decision.

383 Contrary to what the Commission maintained in response to those measures of organisation of procedure, the view cannot be taken that it relied on that email solely in order to respond to the argument put forward by the applicant in the application. That argument is that there was nothing in the emails described in recitals 692 and 693 of the contested decision from which the applicant should have distanced itself. In accordance with the case-law cited in paragraph 334 above, it was for the Commission to prove in the contested decision that the applicant had to distance itself publicly from those emails. The Commission could not, without reversing the burden of proof, do so for the first time in its written submissions before the General Court.

384 In any event, it should be noted that the ‘info’ at issue in the email of 9 June 2005 related once again to the legal analysis of the position of the freight forwarders and to the approach to be taken to communicate that legal analysis to Spedlogswiss. Contrary to what the Commission maintains, nothing in that email suggests that the applicant intended to ensure ‘that all the carriers followed a common policy of not individually engaging in any bilateral discussions or

negotiations with Spedlogswiss'. In that email, the applicant merely stated that it wished the members of ACCS to agree to respond to Spedlogswiss that it was not 'correct' for the latter to approach the carriers individually rather than ACCS and that any 'bilateral discussions and agreements can be done only between individual airlines and individual freight forwarders'.

385 At most, the contacts referred to in recitals 692 and 693 of the contested decision therefore show that the members of ACCS exchanged information regarding the merits of the position of a freight forwarders association under IATA Resolution 805zz.

(b) Overall assessment of the body of evidence

386 It follows from the foregoing that, of the items of evidence on which the Commission relied in recital 743 of the contested decision, only three were capable of supporting the Commission's conclusion that the applicant participated in the component of the single and continuous infringement relating to the refusal to pay commission. These are the email from SAC of 28 December 2005, described in recital 686 of the contested decision, and the email from the IBAR of 30 March 2005 and the internal email from Swiss of 19 May 2005, referred to, respectively, in recitals 694 and 695 of that decision. However, in view of the ambiguity of the exchanges described in the first two of those recitals and of the weak evidential value of the email referred to in the third, and in the absence of other evidence, it must be concluded that the Commission did not rely on a body of evidence sufficient to prove the applicant's participation in the component of the single and continuous infringement relating to the refusal to pay commission.

387 The present plea must therefore be upheld and Article 1(1)(e), (2)(e) and (3)(e) of the contested decision annulled in so far as the Commission found the applicant liable for the component of the single and continuous infringement relating to the refusal to pay commission. As for Article 1(4)(e), it must be annulled in its entirety.

8. The seventh plea, alleging errors in the determination of the value of sales

388 The present plea, by which the applicant submits that the Commission erred in determining the value of sales, is divided into two parts. The first part alleges infringement of point 13 of the 2006 Guidelines in that the value of sales was determined by reference to the turnover generated by the sale of freight services generally rather than by reference to the revenue derived specifically from the FSC and the SSC, with which the single and continuous infringement was associated, and the second relates to the inclusion in the value of sales of the turnover generated on inbound routes.

(a) The first part of the plea, alleging errors relating to the inclusion in the value of sales of all the revenue generated by the sale of services

389 The applicant submits that the Commission infringed point 13 of the 2006 Guidelines by determining the value of sales by reference to the turnover generated by the sale of freight services generally rather than by reference to the revenue derived specifically from the FSC and the SSC, which alone were affected by the single and continuous infringement. By doing so, the Commission included in the value of sales the turnover resulting from rates which, however, had nothing to do with the single and continuous infringement and therefore do not fall within the scope thereof.

390 The applicant submits that the judgment of 6 May 2009, *KME Germany and Others* v *Commission* (T-127/04, EU:T:2009:142, paragraph 91), does not support the Commission's reasoning. That judgment concerned the question whether a cost of production was to be included in the value of sales. That cost was included in the turnover covered by the cartel at issue. Conversely, in the present case, the turnover resulting from rates comes outside the scope of the single and continuous infringement.

391 In its reply, the applicant adds that it is inconsistent that the Commission is able, on the one hand, to exclude rates from its investigation due to insufficient evidence and, on the other hand, to impose fines as if the infringement had also related to such rates.

392 The Commission disputes the applicant's arguments.

393 It must be borne in mind that the concept of the value of sales, within the meaning of point 13 of the 2006 Guidelines, reflects the price, excluding tax, charged to the customer for the goods or services which were the subject of the infringement at issue (see, to that effect, judgments of 6 May 2009, *KME Germany and Others* v *Commission*, T-127/04, EU:T:2009:142, paragraph 91, and of 18 June 2013, *ICF* v *Commission*, T-406/08, EU:T:2013:322, paragraph 176 and the case-law cited). Having regard to the objective pursued by that point, set out in point 6 of those guidelines, which consists in adopting as the starting point for the calculation of the amount of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it, the concept of the value of sales must thus be understood as referring to sales on the market concerned by the infringement (see judgment of 1 February 2018, *Kühne + Nagel International and Others* v *Commission*, C-261/16 P, not published, EU:C:2018:56, paragraph 65 and the case-law cited).

394 The Commission may therefore use the total price which the undertaking charged its customers on the relevant market for goods or services to determine the value of sales, without it being necessary to distinguish or deduce the various elements of that price according to whether or not they were the subject of coordination

(see, to that effect, judgment of 1 February 2018, *Kühne + Nagel International and Others* v *Commission*, C-261/16 P, not published, EU:C:2018:56, paragraphs 66 and 67).

395 As the Commission notes, in essence, the FSC and the SSC are not distinct goods or services which may be the subject of an infringement of Articles 101 or 102 TFEU. On the contrary, as is apparent from recitals 17, 108 and 1187 of the contested decision, the FSC and the SSC are only two elements of the price of the services at issue.

396 It follows that, contrary to what the applicant submits, point 13 of the 2006 Guidelines did not preclude the Commission from taking into account the entire amount of sales linked to the services at issue, without splitting it into its constituent elements.

397 In addition, it should be observed that the approach advocated by the applicant amounts to taking the view that the price elements which were not specifically the subject of coordination between the incriminated carriers must be excluded from the value of sales.

398 In that regard, it must be borne in mind that there is no valid reason to exclude from the value of sales any inputs the cost of which is outside the control of the parties to the alleged infringement (see, to that effect, judgment of 6 May 2009, *KME Germany and Others* v *Commission*, T-127/04, EU:T:2009:142, paragraph 91). Contrary to what the applicant maintains, the same applies to price elements which, like rates, were not specifically the subject of coordination, but form an integral part of the selling price of the product or service in question (see, to that effect, judgment of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 5030).

399 To decide otherwise would have the consequence of requiring the Commission not to take gross turnover into account in some cases but to do so in others, on the basis of a threshold which would be difficult to apply and would give scope for endless and insoluble disputes, including allegations of unequal treatment (judgment of 8 December 2011, *KME Germany and Others* v *Commission*, C-272/09 P, EU:C:2011:810, paragraph 53).

400 Nor can the applicant maintain that the Commission penalised it as if the cartel at issue had also covered rates. In accordance with the general methodology laid down by the 2006 Guidelines, the nature of the infringement is taken into account at a later stage in the calculation of the fine, in the determination of the gravity factor, which, pursuant to point 20 of those guidelines, is to be assessed on a case-by-case basis for all types of infringements, taking account of all the relevant circumstances of the case (judgment of 29 February 2016, *Schenker* v *Commission*, T-265/12, EU:T:2016:111, paragraphs 296 and 297).

401 The Commission therefore did not err or contradict itself when it concluded, in recital 1190 of the contested decision, that the entire amount of sales linked to freight services should be taken into account, without it being necessary to split it into its constituent elements.

402 This part of the present plea must therefore be rejected.

(b) The second part, alleging an error relating to the inclusion in the value of sales of the turnover generated on inbound routes

403 The applicant submits that, in the absence of jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes, the Commission could not include the turnover generated on those routes in the value of sales.

404 The Commission disputes the applicant's argument.

405 It must be noted that this part of the present plea is based on the premiss that the Commission did not have jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes. However, it is apparent from paragraphs 77 to 175 above that that premiss is incorrect.

406 This part of the present plea must therefore be rejected, as must the seventh plea in its entirety.

9. The eighth plea, alleging errors made by the Commission in the calculation of the reduction granted to the applicant under the leniency programme

407 In the eighth plea, first, the applicant submits that the Commission erred in law by taking the view that its leniency application of 27 February 2006 did not constitute 'significant added value' on the ground that it supported information that the Commission had already obtained from Lufthansa.

408 Second, the applicant submits that it provided new evidence that there were arrangements involving a number of other carriers, evidence which was used by the Commission in the contested decision, but the importance of which it seeks to downplay by wrongly claiming that it was already public.

409 Third, the applicant states that it provided evidence which, at the very least, enabled the extent and duration of the infringement found to be proved.

410 Fourth, the applicant submits that the Commission's assessment that the statements that it made in the context of its leniency application were evasive or unclear is both irrelevant and wrong.

411 Fifth, the applicant submits that it was treated unfairly in relation to other leniency applicants which benefited from greater reductions, even though some were the subject of the same criticism in the contested decision as the applicant concerning the evidential value of their statements and others, such as Air Canada, showed an uncooperative attitude.

412 The Commission disputes the applicant's arguments.

413 In accordance with point 20 of the 2002 Leniency Notice, 'undertakings that do not meet the conditions [to obtain immunity from fines] may be eligible to benefit from a reduction of any fine that would otherwise have been imposed'.

414 Point 21 of the 2002 Leniency Notice provides that, 'in order to qualify [for a reduction of its fine under point 20 of the notice] an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence'.

415 Point 22 of the 2002 Leniency Notice defines the concept of added value as follows:

> 'The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.'

416 The first subparagraph of point 23(b) of the 2002 Leniency Notice provides for three fine-reduction bands. The first undertaking to meet the condition laid down in point 21 of that notice is entitled to receive a reduction of between 30 and 50% in the amount of the fine, the second undertaking to a reduction of between 20 and 30%, and subsequent undertakings to a reduction of up to 20%.

417 The Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (judgments of 10 May 2007, *SGL Carbon* v *Commission*, C-328/05 P, EU:C:2007:277, paragraph 88, and of 20 May 2015, *Timab Industries and CFPR* v *Commission*, T-456/10, EU:T:2015:296, paragraph 177).

418 Furthermore, the fact that the Commission makes use of all the evidence available to it, and thus also of the information provided by the applicant in its leniency application, does not establish that the applicant's information represented significant added value with respect to the evidence already in the Commission's possession (see, to that effect, judgment of 13 July 2011, *ThyssenKrupp Liften*

Ascenseurs v *Commission*, T-144/07, T-147/07 to T-150/07 and T-154/07, EU:T:2011:364, paragraph 398).

419 Lastly, a statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly (see judgment of 17 May 2011, *Elf Aquitaine* v *Commission*, T-299/08, EU:T:2011:217, paragraph 343 and the case-law cited).

420 In recitals 1363 to 1371 of the contested decision, the Commission considered that the evidence provided by the applicant when it submitted its leniency application on 27 February 2006 did not represent 'significant added value', thus precluding it from being regarded as the first undertaking to meet the condition laid down in point 21 of the 2002 Leniency Notice. It was only at a later stage of the administrative procedure that the Commission concluded, on the basis of evidence submitted subsequently by the applicant, that the applicant was the ninth undertaking to satisfy the condition laid down in point 21 of that notice (see recital 1381 of the contested decision).

421 Thus, the Commission noted, in recital 1364 of the contested decision, that the evidence provided by the applicant on 27 February 2006 was 'composed of many documents that were already known to the Commission from inspections, a few new documents of limited value to the Commission and a corporate statement that is evasive and unclear in respect of the cartel and [the applicant's] participation in it'.

422 The Commission concluded from this, in recital 1365 to the contested decision, that that evidence '[did] therefore not provide significant added value as neither the leniency statement made nor the documents submitted on 27 February 2006 [provided] the Commission with significant relevant additional evidence of the alleged infringement'.

423 First, it should be noted that, contrary to what the applicant submits, the Commission did not rule out the possibility that the evidence submitted by the applicant on 27 February 2006 has 'significant added value' on the sole ground that it merely supported information already in its possession. Thus, the Commission found, inter alia, that many documents submitted by the applicant were already in its possession, in particular because they had been found during an inspection carried out at its premises (recital 1370 of the contested decision). The Commission also stated that certain documents provided by the applicant did not relate to the single and continuous infringement (recitals 1367 and 1370 of that decision) or that they did not substantiate the existence of that infringement (recital 1367 of that decision).

424 Second, as regards the evidence adduced by the applicant and deemed, in its view, to prove that there were the arrangements referred to in paragraph 408 above, it consists of [*confidential*]. [2] That evidence was used by the Commission

[2] Confidential information redacted.

[*confidential*]. However, the Commission stated in recital 1370 of the contested decision, [*confidential*] and without being contradicted by the applicant, that it had prior knowledge of that contact [*confidential*].

425 Third, as regards the evidence which, in the applicant's view, enabled the extent and duration of the single and continuous infringement to be expanded, that evidence consists of [*confidential*]. That evidence was used [*confidential*].

426 Recital 126 of the contested decision reads as follows:

[*confidential*]

427 However, it is apparent from recitals 124 and 125 of the contested decision that, [*confidential*], the Commission already had information on the contacts [*confidential*].

428 In addition, it is apparent from recital 193 of the contested decision that, thanks to the documents obtained during the inspection carried out at the applicant's premises, the Commission already had evidence [*confidential*].

429 Thus, an internal email [*confidential*].

430 As regards, next, recital 336 of the contested decision, it reads as follows:

[*confidential*]

431 The applicant's statements, as summarised in recital 336 of the contested decision, support the information provided in that regard by Lufthansa at the time of its leniency application and summarised in recitals 124 and 125 of the contested decision. [*confidential*]. It must nevertheless be noted that the evidence provided by the applicant and summarised in recital 336 consisted of statements made after the facts at issue in the procedure initiated by the Commission or of indirect evidence [*confidential*].

432 Fourth, as regards the Commission's assessment of [*confidential*], according to which the applicant is 'evasive and unclear as regards the cartel [at issue] and the participation of [the applicant] in that cartel' (recital 1364 of the contested decision), it must be noted that the applicant does not dispute that it did not expressly admit, [*confidential*], the anticompetitive nature of its exchanges with Lufthansa relating to the FSC. The fact that it does not acknowledge that it participated in anticompetitive conduct is not irrelevant when it comes to assessing the added value of its oral statement.

433 In the light of all the foregoing, the view must be taken that the Commission did not err in concluding, in the light of the evidence already available to it and the content of the applicant's leniency application of 27 February 2006, that that leniency application did not represent significant added value within the meaning of point 21 of the 2002 Leniency Notice.

434 As regards the complaint alleging unequal treatment in relation to other leniency applicants, it must be noted that the applicant's argument refers to Martinair, Japan Airlines, CPA, Cargolux and Air Canada.

435 In that regard, it should be borne in mind that the principle of equal treatment is a general principle of EU law, enshrined in Article 20 of the Charter. According to settled case-law, that principle requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 51 and the case-law cited).

436 Breach of the principle of equal treatment as a result of different treatment thus presupposes that the situations concerned are comparable, having regard to all the elements which characterise them. The elements which characterise different situations, and hence their comparability, must in particular be determined and assessed in the light of the subject matter and purpose of the EU act which makes the distinction in question (see judgment of 20 May 2015, *Timab Industries and CFPR* v *Commission*, T-456/10, EU:T:2015:296, paragraph 202 and the case-law cited).

437 It is apparent from the contested decision that none of the carriers mentioned is in a situation comparable to that of the applicant. As regards Martinair, Japan Airlines, CPA and Cargolux, the contested decision states as follows:

– 'none of the documents submitted [by Martinair] were in the Commission's possession before[;] the statement is of a self-incriminating nature' (recital 1307);

– 'in its submissions of 10 March 2006 [Japan Airlines] provided evidence of contacts between competitors concerning the FSC[;] in particular [Japan Airlines] provided evidence of contacts previously unknown to the Commission in respect of contacts within the WOW [alliance], price coordination in respect of specific products, European headquarter level coordination in respect of the FSC and coordination by additional carriers[;] it also corroborated certain information already in the Commission's possession which it had received either through inspections or through provision by the applicant for immunity' (recital 1315);

– '[CPA] provided self-incriminating information which made it possible to establish its presence in particular at a number of meetings and exchanges[; CPA] provided evidence regarding the coordination of the FSC level [in many countries], incriminating itself and numerous other carriers[; CPA] provided documents that show how [CPA] lobbied national carriers in numerous countries' (recital 1335);

– '[Cargolux] provided new self-incriminating evidence which assisted the Commission in defining the scope of its involvement. … [Cargolux]

provided new information on the involvement of other carriers in the single and continuous infringement, in particular in relation to the commissioning of surcharges' (recital 1359).

438 As regards Air Canada, it is apparent from the contested decision that its application for withdrawal of its leniency application was refused and that the action taken by it at the stage of the procedure leading to the adoption of the contested decision was not such, in the Commission's view, as to call into question the cooperation found in the context of the procedure leading to the adoption of the Decision of 9 November 2010. Moreover, the applicant has failed to explain in what way its own situation, characterised by the rejection of its first leniency application because of a lack of significant added value, is similar to that of Air Canada, which allegedly infringed its obligation to cooperate under the 2002 Leniency Notice.

439 Accordingly, the present complaint must be rejected, as must the eighth plea in its entirety.

10. The ninth plea, alleging breach of the principle of equal treatment and an error in the assessment of the starting date of the infringement

440 The applicant submits that the Commission has not adduced evidence that its participation in the cartel at issue began on 22 January 2001 rather than in October 2001. The only evidence on which the Commission relied in order to set the starting date of the applicant's participation at 22 January 2001 is the internal Martinair memorandum mentioned in recital 174 of the contested decision ('the Martinair memorandum'). First, the context of the Martinair memorandum makes the Commission's interpretation that it sets out collective future positions on the FSC unlikely. There is no evidence between 22 January and October 2001 of any communication involving the applicant regarding the FSC. Conversely, there were at that time multiple FSC-related communications between other carriers in which the applicant was neither involved nor mentioned.

441 Second, as a leniency applicant, the applicant had no reason to minimise the duration of its participation in the single and continuous infringement.

442 Third, the Commission admits that the applicant's participation in coffee meetings in 2000 is not sufficient to determine the starting date of its participation in the single and continuous infringement. However, the Commission does not explain why it distinguishes those coffee meetings from the 'coffee round' of 22 January 2001.

443 Fourth, the applicant accepts that the Martinair memorandum calls for an explanation on its part. First of all, the Commission implicitly but clearly accepted that the Martinair memorandum was not conclusive evidence since multiple carriers which did not receive the Statement of Objections were also in attendance at the meeting of 22 January 2001. The Commission could not therefore, without

breaching the principle of equal treatment, use that single memorandum in order to set the starting date of the applicant's participation in the single and continuous infringement. Next, the Martinair memorandum presents the applicant in a significantly different manner compared to the other carriers (in particular by putting its name in brackets). A more plausible explanation than that of the Commission is that the applicant's position was cited only by way of comparison in that memorandum. Lastly, there is no evidence that the applicant took coordinated action concerning the FSC after the meeting of 22 January 2001. Furthermore, freight rates were also discussed at that meeting. However, the contested decision specifically excludes those rates from the scope of the single and continuous infringement.

444 The Commission disputes the applicant's arguments.

445 It must be noted that, in recital 1148 of the contested decision, the Commission found that the applicant's participation in the single and continuous infringement began on 22 January 2001, when a 'coffee round' took place. The content of that meeting is recorded in the Martinair memorandum. As the Commission found in recital 174 of the contested decision, it is apparent from that memorandum that several carriers, including the applicant, participated in the meeting in question. As the Commission notes, the applicant does not deny this in any way. It is also apparent from the Martinair memorandum that the FSC was discussed at the meeting in question, which the applicant also does not deny.

446 The applicant's criticisms relate to the evidential value of the Martinair memorandum, which the applicant describes as 'obscure', and to the nature of the discussions concerning the FSC held at the 'coffee round' of 22 January 2001. The applicant submits that that memorandum does not show either that the participants in that meeting '[set] out collective future positions on the FSC' or that the applicant commented on its future intentions.

447 In that regard, it must be borne in mind that the disclosure of sensitive business information to one or more competitors has an anticompetitive effect inasmuch as the independence of the undertakings concerned in their conduct on the market is modified as a result. The Commission is not obliged to prove the anticompetitive effects of such practices on the relevant market if they are capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the internal market (see, to that effect, judgment of 16 September 2013, *Wabco Europe and Others* v *Commission*, T-380/10, EU:T:2013:449, paragraph 78).

448 It follows from the case-law that it is not necessary for the disclosure of sensitive business information to be reciprocal in order for it to be classified as anticompetitive (see, to that effect, judgment of 24 March 2011, *Comap* v *Commission*, T-377/06, EU:T:2011:108, paragraph 70 and the case-law cited).

449 It also follows from the case-law that where it is established that an undertaking has participated in anticompetitive meetings between competing undertakings, it is for that undertaking to put forward evidence to establish that its participation was without any anticompetitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see judgment of 3 May 2012, *Comap* v *Commission*, C-290/11 P, not published, EU:C:2012:271, paragraph 74 and the case-law cited).

450 If an undertaking's participation in such a meeting is not to be regarded as tacit approval of an unlawful initiative or as subscribing to what is decided there, the undertaking must publicly distance itself from that initiative in such a way that the other participants will think that it is putting an end to its participation, or it must report the initiative to the administrative authorities (see judgment of 3 May 2012, *Comap* v *Commission*, C-290/11 P, not published, EU:C:2012:271, paragraph 75 and the case-law cited).

451 In the present case, it must be observed that the Martinair memorandum contains, in its description of the remarks exchanged at the 'coffee round' of 22 January 2001, the following passage:

'[FSC]

As is apparent from the specialist press [Lufthansa] will reduce the [FSC] from 1 February from EUR 0.17 to EUR 0.10. Statement made by Lufthansa that when the index increases twice in a row to reach 170 again, EUR 0.17 will be charged again.

The following [carriers] will remain at EUR 0.17: [Cargolux], [Swiss], [another carrier], KL[M] ([the applicant] EUR 0.15).'

452 Contrary to what the applicant maintains, it is unambiguous from that passage that, at the 'coffee round' of 22 January 2001, a number of carriers mentioned their intention whether or not to change the amount of the FSC. The Commission was therefore justified in concluding that that meeting was anticompetitive.

453 Since the applicant has not claimed that it publicly distanced itself from those discussions, the view must be taken that the Commission was entitled, in accordance with the case-law cited in paragraphs 447 to 450 above, to rely on the Martinair memorandum in order to set the starting date of the applicant's participation in the single and continuous infringement, it being irrelevant in that regard whether the applicant itself informed the other participants in that meeting of its intention whether or not to change the level of the FSC.

454 In any event, it must be added that the Commission rightly inferred from the Martinair memorandum that the applicant itself informed the other participants in that meeting of its intention to leave the level of its FSC unchanged. Contrary to what the applicant claims, the use of brackets around its name in the passage in question does not allow a conclusion to the contrary. The only plausible reading of

that passage is that the use of those brackets was merely to indicate that, unlike Cargolux, Swiss, KLM and the other carrier at issue, which intended to maintain the level of their FSC at EUR 0.17, the applicant intended to maintain the level of its FSC at EUR 0.15.

455 The fact that, as the applicant submits, the level of the applicant's FSC remained unchanged between 18 September 2000 and November 2001 and that the Commission did not rely against the applicant on any contact between 22 January 2001 and October 2001 does not contradict that interpretation in any way, but is explained by the operation of the cartel at issue. In recital 884 of the contested decision, the Commission stated that 'the frequency of the contacts between the carriers varied over time'. It found that the contacts relating to the FSC were 'particularly frequent where the fuel indices approached a level at which an increase or decrease would be triggered but may have been less frequent at other times'.

456 Once the FSC had been introduced in early 2000, it was not, as is apparent from recitals 157 to 165 of the contested decision, until the summer of 2000 that the price of fuel increased sufficiently to prompt carriers to start discussions in September and October of the same year concerning the increase of the FSC or the introduction thereof by those that had not yet done so. However, the evidence described in those recitals refers only to a low number of contacts a significant proportion of which were bilateral.

457 It was not, as is apparent from recitals 166 to 183 of the contested decision, until Lufthansa announced a reduction in the FSC at the beginning of 2001 that incriminated carriers engaged in more frequent and multilateral contacts concerning the FSC. The 'coffee round' of 22 January 2001 forms part of the discussions during which carriers debated whether they would follow that reduction.

458 Furthermore, as is apparent from recital 184 of that decision, the contacts concerning the FSC resumed in the autumn of 2001, when the fuel price dropped again. The applicant does not deny having taken part in some of those contacts.

459 In those circumstances, any incentives for the applicant to minimise the duration of its participation in the single and continuous infringement are irrelevant for the purposes of examining the present plea.

460 The Commission therefore did not err in setting the starting date of the applicant's participation in the single and continuous infringement at 22 January 2001.

461 None of the applicant's arguments is such as to invalidate that finding.

462 First, the fact that the 'coffee round' of 22 January 2001 also related to rates and that rates were not included within the scope of the single and continuous infringement in no way diminishes the evidential value of the Martinair memorandum, nor does it make the Commission's approach inconsistent. It

should be noted that the Commission relied not only on the Martinair memorandum, but on a body of evidence in order to conclude that there was a single and continuous infringement. It is not claimed that the Commission had sufficiently firm, precise and consistent evidence to prove that the incriminated carriers infringed Article 101(1) TFEU by coordinating rates. With stronger reason, the applicant cannot criticise the Commission for not having relied on the Martinair memorandum in order to set the starting date of its participation in a hypothetical infringement relating to rates at 22 January 2001.

463 Second, the applicant cannot rely on the fact that certain carriers which are not among the addressees of the contested decision were among the participants in the 'coffee round' of 22 January 2001.

464 It is not claimed that the Commission had a body of evidence against the carriers referred to above that was equivalent to that which it had against the applicant and that those carriers were, consequently, in a comparable situation. The applicant is therefore not justified in alleging unequal treatment, let alone in attributing to the Commission an implicit admission that the Martinair memorandum was insufficiently conclusive.

465 Third, the applicant submits, without being contradicted by the Commission, that, in 2000, it participated in coffee meetings similar to the 'coffee round' of 22 January 2001. However, it must be noted that such contacts do not alter the anticompetitive nature of that meeting and cannot therefore demonstrate that the applicant is justified in submitting that the Commission ought to have set the month of November 2001 as the starting date of the applicant's participation in the single and continuous infringement.

466 The present plea must therefore be rejected.

467 In the light of all the foregoing considerations, the sixth plea, alleging an error of assessment of the applicant's participation in the component of the single and continuous infringement relating to the refusal to pay commission, must be upheld. Consequently, Article 1(1)(e), (2)(e) and (3)(e) of the contested decision should be annulled in so far as the Commission found the applicant liable for the component of the single and continuous infringement relating to the refusal to pay commission. As for Article 1(4)(e), it should be annulled in its entirety.

468 However, it cannot be held that those illegalities are such as to require the contested decision to be annulled in its entirety. Although the Commission made an error of assessment in finding that the applicant participated in the component of the single and continuous infringement relating to the refusal to pay commission, it must be found that the applicant has not shown, in the present action, that the Commission erred in finding that the applicant had participated in that infringement.

469 The remainder of the claim for annulment must be rejected.

B. The claim for modification of the fine imposed on the applicant

470 The applicant asks the General Court, in essence, to exercise its unlimited jurisdiction to cancel the fine imposed on it or reduce the amount thereof.

471 As a preliminary point, it should be noted that the applicant has failed expressly to identify the complaints that it intends to raise in support of this claim. However, it can be inferred from paragraphs 5 and 6 of the application that the applicant relies, in support of this claim, on arguments which are essentially identical to those on which it relied in support of its claim for annulment, in so far as they are relevant for the purpose of the exercise of the General Court's unlimited jurisdiction. In addition to those arguments, there are two which it puts forward in its replies to the measures of organisation of procedure of the General Court and which concern sales on non-EU EEA-Switzerland routes.

472 The first three arguments concern, in essence, the calculation of the value of sales:

– by its first argument, the applicant maintains that only the value of the surcharges, and not the total price of freight services, should be taken into account (first part of the seventh plea);

– by its second argument, the applicant submits that its turnover from inbound freight services cannot be included in the value of sales (fourth plea and second part of the seventh plea);

– by its third argument, in response to the measures of organisation of procedure of the General Court, the applicant submits that the revenue derived from freight services that it generated on non-EU EEA-Switzerland routes cannot be included in the value of sales.

473 The fourth argument concerns, in essence, the gravity factor and the additional amount. By that argument, put forward in response to the measures of organisation of procedure of the General Court, the applicant submits, in essence, that the geographic scope of the single and continuous infringement would be reduced if the plea raised of the Court's own motion were upheld, which would be such as to justify a reduction in the gravity factor and the additional amount.

474 The fifth argument concerns the adjustment of the multipliers by virtue of the alleged reduced duration of the applicant's participation in the single and continuous infringement (ninth plea).

475 The sixth and seventh arguments concern, in essence, adjustments of the basic amount of the fine:

– by its sixth argument, the applicant states that the general 15% reduction is inadequate in the light of the nature and extent of the legal or regulatory issues identified in the contested decision (fifth plea, second part);

– by its seventh argument, the applicant claims that its non-participation in the component of the single and continuous infringement relating to the refusal to pay commission should be taken into account for the purpose of determining the extent of its participation in the single and continuous infringement (sixth plea).

476 The eighth argument on which the applicant relies in support of this claim concerns the application of the 2002 Leniency Notice. According to that argument, the applicant should have been granted a reduction of 30 to 50% rather than 10% under its leniency application (eighth plea).

477 As for the ninth argument, which does not relate to any specific stage in the calculation of the fine, it alleges that that fine does not relate exclusively to the findings of infringement made in the contested decision.

478 The Commission contends that the applicant's claims should be rejected and maintains, in essence, that the benefit of the general 15% reduction should be withdrawn from the applicant should the General Court conclude that turnover from the sale of inbound freight services cannot be included in the value of sales.

479 In EU competition law, the review of legality is supplemented by the unlimited jurisdiction which the Courts of the European Union are afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts of the European Union, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the amount of the fine or penalty payment imposed (see judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 63 and the case-law cited).

480 That exercise involves, in accordance with Article 23(3) of Regulation No 1/2003, taking into consideration, with respect to each undertaking sanctioned, the seriousness and duration of the infringement at issue, in compliance with the principles of, inter alia, adequate reasoning, proportionality, the individualisation of penalties and equal treatment, and without the Courts of the European Union being bound by the indicative rules defined by the Commission in its guidelines (see, to that effect, judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 90). It must, however, be pointed out that the exercise of unlimited jurisdiction provided for in Article 261 TFEU and Article 31 of Regulation No 1/2003 does not amount to a review of the Court's own motion, and that proceedings before the Courts of the European Union are *inter partes*. With the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, it is therefore for the applicant to raise pleas in law against the decision at issue and to adduce evidence in support of those pleas (judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 64).

481 It is thus for the applicant to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded (judgment of 8 December 2011, *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 65).

482 In order to satisfy the requirements of Article 47 of the Charter when conducting a review in the exercise of their unlimited jurisdiction with regard to the fine, the Courts of the European Union are, for their part, 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 (see judgment of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 75 and the case-law cited; judgment of 26 January 2017, *Villeroy & Boch Austria* v *Commission*, C-626/13 P, EU:C:2017:54, paragraph 82).

483 Lastly, in order to determine the amount of the fine, it is for the Courts of the European Union to assess for themselves the circumstances of the case and the nature of the infringement in question (judgment of 21 January 2016, *Galp Energía España and Others* v *Commission*, C-603/13 P, EU:C:2016:38, paragraph 89) and to take into account all of the factual circumstances (see, to that effect, judgment of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 86), including, where appropriate, additional information which is not mentioned in the Commission decision imposing the fine (see, to that effect, judgments of 16 November 2000, *Stora Kopparbergs Bergslags* v *Commission*, C-286/98 P, EU:C:2000:630, paragraph 57, and of 12 July 2011, *Fuji Electric* v *Commission*, T-132/07, EU:T:2011:344, paragraph 209).

484 In the present case, it is for the General Court, in the exercise of its unlimited jurisdiction, to determine, in the light of the arguments put forward by the parties in support of this claim, the amount of the fine which it considers most appropriate, having regard in particular to the findings made when examining the pleas raised in support of the claim for annulment and the plea raised of the General Court's own motion, and taking into account all the relevant factual circumstances.

485 The General Court considers that it is not appropriate, in order to determine the amount of the fine to be imposed on the applicant, to depart from the method of calculation followed by the Commission in the contested decision, which it has not previously determined to be vitiated by illegality, as follows from the examination of the third, fifth and seventh to ninth pleas above. Although it is for the Court, in the exercise of its unlimited jurisdiction, to assess for itself the circumstances of the case and the nature of the infringement in question in order to determine the amount of the fine, the exercise of unlimited jurisdiction cannot result, when the amount of the fines to be imposed is determined, in

discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement. Accordingly, the guidance which can be drawn from the 2006 Guidelines is, as a general rule, capable of guiding the Courts of the European Union in their exercise of that jurisdiction where the Commission has applied those guidelines for the purposes of calculating the fines imposed on the other undertakings penalised by the decision which those Courts are asked to examine (see, to that effect, judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 80 and the case-law cited).

486 In those circumstances, first, it must be noted that the total value of sales made by the applicant in 2005 was EUR 588 230 122, taking into account the accession of 10 new Member States from May 2004. As regards the applicant's third argument that the revenue generated by the applicant on non-EU EEA-Switzerland routes should be excluded from the value of sales, that argument must be rejected. It is apparent from the applicant's replies to the measures of organisation of procedure of the General Court that it is 'not aware of any waybills for cargo transactions on the Switzerland–Norway route between 19 May 2005 and 14 February 2006 and did not fly to Liechtenstein or Iceland in that period'. Moreover, it itself acknowledged that 'its value of sales is likely to remain unchanged' as a result of the exclusion of sales made on those routes during the infringement period.

487 As regards the infringement period before May 2004 relied on against the applicant, like the Commission in recital 1197 of the contested decision, it is necessary to take as a basis, on intra-EEA routes and on EU-Switzerland routes, values of sales amounting, respectively, to EUR 9 209 404 and EUR 585 680, taking into account only States which were already contracting parties to the EEA Agreement or members of the European Union before May 2004.

488 Furthermore, as regards the first argument, which relates, in essence, to the inclusion of the full price of freight services in the value of sales, it refers to the first part of the seventh plea raised by the applicant in support of the claim for annulment. The General Court examined and rejected that part of that plea in paragraphs 389 to 402 above and nothing in the arguments raised by the applicant in support of it makes it possible to consider that the inclusion in the value of sales of the full price of freight services was such as to result in an inappropriate value of sales being used. On the contrary, excluding the price elements of freight services other than surcharges from the value of sales would have the effect of artificially minimising the economic importance of the single and continuous infringement.

489 As regards the second argument, which concerns the inclusion in the value of sales of turnover from the sale of inbound freight services, it must be observed that it refers to the fourth plea and to the second part of the seventh plea relied on in support of the claim for annulment. The General Court examined and rejected those pleas in paragraphs 77 to 175 and 403 to 406 above, respectively, and

nothing in the arguments put forward in support of them makes it possible to consider that the inclusion in the value of sales of turnover from the sale of inbound freight services was such as to result in an inappropriate value of sales being used. On the contrary, excluding the turnover from the sale of inbound freight services from the value of sales would prevent a fine from being imposed on the applicant which is a proper measure of the harm which the applicant's participation in the cartel at issue did to normal competition (see, to that effect, judgment of 28 June 2016, *Portugal Telecom* v *Commission*, T-208/13, EU:T:2016:368, paragraph 236).

490 Next, it should be noted that, for the reasons set out in recitals 1198 to 1212 of the contested decision, the single and continuous infringement merits a gravity factor of 16%.

491 The fourth argument raised by the applicant in support of this claim does not establish the contrary. That argument presupposed that the General Court would uphold the plea raised of its own motion. Since that plea has been rejected, the fourth argument should be rejected.

492 As regards the additional amount, it must be borne in mind that, according to point 25 of the 2006 Guidelines, irrespective of the duration of an undertaking's participation in the infringement, the Commission includes in the basic amount a sum of between 15 and 25% of the value of sales, in order to deter undertakings from entering into horizontal price-fixing, market-sharing and output-limitation agreements. That point states that, for the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors, in particular those referred to in point 22 of the 2006 Guidelines. Those factors are the same which the Commission takes into account for the purpose of setting the gravity factor and include the nature of the infringement, the combined market share of all the parties concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

493 The Courts of the European Union have inferred from this that, even if the Commission does not set out a specific statement of reasons as regards the proportion of the value of sales used as the additional amount, the mere reference to the analysis of the factors used in order to assess the gravity of the infringement suffices in that respect (judgment of 15 July 2015, *SLM and Ori Martin* v *Commission*, T-389/10 and T-419/10, EU:T:2015:513, paragraph 264).

494 In recital 1219 of the contested decision, the Commission found that the 'percentage to be applied for the additional amount should be 16%' given the 'specific circumstances of the case' and the criteria used to determine the gravity factor.

495 It follows that, on the same grounds as those set out in recitals 1198 to 1212 of the contested decision, the General Court finds that an additional amount of 16% is appropriate.

496 Moreover, it is apparent from recitals 1214 to 1217 of the contested decision that the duration of the applicant's participation in the single and continuous infringement is five years on intra-EEA routes, one year and nine months on EU-third country routes, three years and eight months on EU-Switzerland routes and eight months on non-EU EEA-third country routes. Since the Commission has lawfully established the duration of the applicant's participation in the single and continuous infringement, it is appropriate to reject the fifth argument and to use multipliers of 5, $1^{9}/_{12}$, $3^{8}/_{12}$ and $^{8}/_{12}$, respectively.

497 The basic amount of the fine must therefore be set at EUR 262 987 992.

498 Accordingly, the basic amount of the fine after applying the general 50% reduction, which applies only to the basic amount in so far as it concerns non-EU EEA-third country routes and EU-third country routes (see recital 1241 of the contested decision), which the applicant has not disputed in the context of the claim for annulment and which is not inadequate, must be set, after rounding, at EUR 136 000 000. In that regard, the General Court considers it appropriate to round the basic amount down to the two first digits, unless this leads to a reduction of more than 2% of the amount before rounding, in which case that amount is rounded down to the first three digits. That method is objective, affords all the incriminated carriers which brought actions against the contested decision the benefit of a reduction and avoids any unequal treatment (see, to that effect, judgment of 27 February 2014, *InnoLux* v *Commission*, T-91/11, EU:T:2014:92, paragraph 166).

499 Lastly, as regards the adjustments of the basic amount of the fine, it should be borne in mind that the applicant benefited from the general 15% reduction, the adequacy of which in particular is disputed by the applicant in the second branch of the fifth plea raised in support of the claim for annulment and in the sixth argument. For reasons similar to those set out in paragraphs 330 and 331 above in the context of the examination of the fifth plea, it must be held that nothing in the arguments put forward in that context is such as to demonstrate the inadequacy of that reduction. Conversely, the Commission's claim seeking withdrawal of the benefit of that reduction cannot be upheld. As is apparent from the rejoinder, that claim presupposes that the General Court would conclude that turnover from the sale of inbound freight services could not be included in the value of sales. However, the General Court refused to do so in paragraph 489 above.

500 Moreover, as regards the applicant's seventh argument, it should be noted that, in recitals 1258 and 1259 of the contested decision, the Commission granted Air Canada, Lan Cargo and SAS Cargo a reduction of 10% in the basic amount of the fine by virtue of their limited participation in the single and continuous infringement. This was due to the fact that that those carriers 'operated on the

periphery of the cartel [at issue], entered into a limited number of contacts with other carriers, and they did not participate in all elements of the [single and continuous] infringement'. The last part of that sentence must be read in the light of recitals 882 and 883 of the contested decision, from which it is apparent that, in the Commission's view, Air Canada, Lan Cargo and SAS Cargo did not participate directly in the three components of the single and continuous infringement, but had the requisite knowledge of those in which they had not participated and were prepared to take the associated risk.

501 In the present case, the applicant did not operate on the periphery of the cartel at issue and did not enter into only a limited number of contacts with other carriers. However, as is apparent from the examination of the sixth plea, it has not been proved that the applicant participated directly in the component of the single and continuous infringement relating to the refusal to pay commission, or even that it had the requisite knowledge of that component and was prepared to take the associated risk.

502 In those circumstances, the General Court considers it appropriate to grant the applicant a reduction of 16% by virtue of its limited participation in the single and continuous infringement.

503 Furthermore, as regards the applicant's eighth argument, the 10% leniency reduction should be considered still to be appropriate. That argument refers to the ninth plea raised in support of the claim for annulment, which the General Court examined and rejected, and nothing in that plea makes it possible to consider that that reduction was inadequate. The same applies to the ninth argument, which refers to the third plea raised in support of the claim for annulment.

504 In the light of all the foregoing considerations, the amount of the fine imposed on the applicant must be calculated as follows: first, the basic amount is determined by applying, in view of the gravity of the single and continuous infringement, a percentage of 16% to the value of sales made by the applicant in 2005 on intra-EEA routes, EU-third country routes, non-EU EEA-third country routes and EU-Switzerland routes; then, in respect of the duration of the infringement, multipliers of 5, $1^{9}/_{12}$, $^{8}/_{12}$ and $3^{8}/_{12}$, respectively; and, lastly, an additional amount of 16%, resulting in an intermediate amount of EUR 262 987 992. After applying the general 50% reduction, that amount, rounded down, is EUR 136 000 000. Next, after applying the general 15% reduction and the 16% reduction on account of limited involvement, that amount must be set at EUR 93 840 000. Lastly, the latter amount must be reduced by 10% by way of leniency. This results in a fine of a final amount of EUR 84 456 000 to be imposed on the applicant.

IV. Costs

505 Under Article 134(3) of the Rules of Procedure of the General Court, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court

may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

506 In the present case, the applicant has been successful in respect of a substantial part of its claims. In those circumstances, it is fair in the circumstances of the case to decide that the applicant is to bear two thirds of its own costs and that the Commission is to bear its own costs and pay one third of the applicant's costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. Annuls Article 1(1)(e), (2)(e) and (3)(e) of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) in so far as it finds that British Airways plc participated in the component of the single and continuous infringement relating to the refusal to pay commission on surcharges;

2. Annuls Article 1(4)(e) of Decision C(2017) 1742 final;

3. Sets the amount of the fine imposed on British Airways under Article 3(e) of Decision C(2017) 1742 final at EUR 84 456 000;

4. Dismisses the action as to the remainder;

5. Orders the European Commission to bear its own costs and to pay one third of the costs incurred by British Airways;

6. Orders British Airways to bear two thirds of its own costs.

Kanninen Schwarcz Iliopoulos

Spielmann Reine

Delivered in open court in Luxembourg on 30 March 2022.

E. Coulon

Registrar President

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