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EUROOPAN UNIONIN TUOMIOISTUIN
EUROPEISKA UNIONENS DOMSTOL

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 5 September 2024 [1]

Cases C-367/22 P, C-369/22 P, C-370/22 P, C-375/22 P, C-378/22 P, C-379/22 P, C-380/22 P, C-381/22 P, C-382/22 P, C-385/22 P, C-386/22 P, C-401/22 P and C-403/22 P

Air Canada (C-367/22 P), Air France (C-369/22 P), Air France-KLM (C-370/22 P), LATAM Airlines Group and Lan Cargo (C-375/22 P), British Airways (C-378/22 P), Singapore Airlines and Singapore Airlines Cargo (C-379/22 P), Deutsche Lufthansa and Others (C-380/22 P), Japan Airlines (C-381/22 P), Cathay Pacific Airways (C-382/22 P), Koninklijke Luchtvaart Maatschappij (C-385/22 P), Martinair Holland (C-386/22 P), Cargolux Airlines (C-401/22 P) and SAS Cargo Group and Others (C-403/22 P)
v
European Commission

(Appeal – Competition – Agreements, decisions and concerted practices – European market for airfreight – Article 101(1) TFEU and Article 53 of the EEA Agreement– Coordination on elements of the prices of airfreight services – Fuel surcharge, security surcharge and refusal to pay commissions on surcharges – Single and continuous infringement – Jurisdiction of the Commission – 'Qualified effects' test – Partial annulment of the decision at issue – Evidence of participation in the infringement – Principle of equal treatment – Limitation period in respect of the Commission's power to impose penalties – Fines – Unlimited jurisdiction)

[1] Original language: French.

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I. Introduction

1. This Opinion concerns a series of 13 appeals lodged by airlines ('the appellants') [2] against judgments of the General Court of the European Union of 30 March 2022 ('the judgments under appeal') [3] for annulment of the European Commission Decision of 17 March 2017 ('the decision at issue') [4] relating to a cartel in the form of a single and continuous infringement on the market for airfreight ('the cartel at issue').

2. The cartel at issue, implemented in its entirety over the period from 7 December 1999 to 14 February 2006, was penalised by the Commission on the basis of 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') and concerns the freight services provided on the following routes: between airports within the EEA ('intra-EEA routes'), between airports within the European Union and airports located outside the EEA ('EU-third country routes'), between airports located in countries that are Contracting Parties to the EEA Agreement but not EU Member States and airports located in third countries ('non-EU EEA-third country routes' and, together with EU-third country routes, 'EEA-third country routes') and between airports within the European Union and Swiss airports ('EU-Switzerland routes').

2 These proceedings concern the following airlines: Air Canada, Air France-KLM, Société Air France ('Air France'), Koninklijke Luchtvaart Maatschappij NV ('KLM'), British Airways plc, Cargolux Airlines International SA ('Cargolux'), Cathay Pacific Airways Ltd, Deutsche Lufthansa AG ('Lufthansa'), Japan Airlines International Co. Ltd ('Japan Airlines'), LATAM Airlines Group SA and Lan Cargo SA, Martinair Holland NV ('Martinair'), SAS Cargo Group and Others ('SAS Cargo Group'), Singapore Airlines Ltd and Singapore Airlines Cargo Pte Ltd ('Singapore Airlines').

3 Judgments of 30 March 2022, *Martinair Holland* v *Commission* (T-323/17, EU:T:2022:174, 'the judgment in *Martinair*'); *SAS Cargo Group and Others* v *Commission* (T-324/17, EU:T:2022:175, 'the judgment in *SAS Cargo Group*'); *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-325/17, EU:T:2022:176, 'the judgment in *KLM*'); *Air Canada* v *Commission* (T-326/17, EU:T:2022:177, 'the judgment in *Air Canada*'); *Cargolux Airlines* v *Commission* (T-334/17, EU:T:2022:178, 'the judgment in *Cargolux Airlines*'); *Air France-KLM* v *Commission* (T-337/17, EU:T:2022:179, 'the judgment in *Air France-KLM*'); *Air France* v *Commission* (T-338/17, EU:T:2022:180, 'the judgment in *Air France*'); *Japan Airlines* v *Commission* (T-340/17, EU:T:2022:181, 'the judgment in *Japan Airlines*'); *British Airways* v *Commission* (T-341/17, EU:T:2022:182, 'the judgment in *British Airways*'); *Deutsche Lufthansa and Others* v *Commission* (T-342/17, EU:T:2022:183, 'the judgment in *Deutsche Lufthansa*'); *Cathay Pacific Airways* v *Commission* (T-343/17, EU:T:2022:184; 'the judgment in *Cathay Pacific Airways*'); *LATAM Airlines Group and Lan Cargo* v *Commission* (T-344/17, EU:T:2022:185, 'the judgment in *LATAM Airlines Group and Lan Cargo*'); and *Singapore Airlines and Singapore Airlines Cargo* v *Commission* (T-350/17, EU:T:2022:186, 'the judgment in *Singapore Airlines*').

4 Decision C(2017) 1742 final 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).

3. This Opinion, which is focused on various grounds of appeal, primarily concerns the jurisdiction of the Commission to find and penalise a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement in relation to the freight services on routes from third countries to the EEA ('inbound routes' and 'inbound freight services') and, more specifically, the application of the 'qualified effects' test on the territory of the EEA to agreements implemented outside the EEA. The main issues raised by those appeals concern:

– the question whether the 'qualified effects' test is sufficient to substantiate the jurisdiction of the Commission to find and penalise an infringement of Article 101(1) TFEU and Article 53 of the EEA Agreement with regard to inbound freight services, as well as the standard of proof required in that regard and the application of that test in the present case, in particular in the light of the judgment of 6 September 2017, *Intel* v *Commission*; [5]

– the issue of whether the concept of a 'single and continuous infringement' requires, implicitly, that each constituent element of that infringement, examined individually, can constitute an infringement of Article 101 TFEU and Article 53 of the EEA Agreement, and whether that concept is relevant in assessing the jurisdiction of the Commission to find and penalise an infringement of those provisions with regard to inbound freight services, in particular in the light of the judgment of 16 June 2022, *Sony Corporation and Sony Electronics* v *Commission*. [6]

II. Background to the dispute

4. As far as is relevant for the purposes of this Opinion, the facts and the legal context of the cases forming the subject matter of the appeals, as set out in the decision at issue and the judgments under appeal, can be summarised as follows.

A. The cartel at issue

5. In the freight sector, airlines provide for the carriage of cargo by air ('the carriers') and, as a general rule, such carriage occurs on a market operating on different levels: upstream, carriers supply their freight services to freight forwarders, in return for a price consisting, on the one hand, of rates calculated on a per-kilogram basis and, on the other hand, of surcharges intended to cover certain costs; downstream, the freight forwarders arrange the transport of that cargo on behalf of shippers. In order to be able to serve all major cargo destinations in the world with sufficient frequency, the carriers developed a system of agreements, including in the context of broader alliances between carriers.

5 C-413/14 P, EU:C:2017:632, 'the judgment in *Intel*'.

6 C-697/19 P, EU:C:2022:478, 'the judgment in *Sony*'.

6. The cartel at issue concerns the following three elements: the introduction and administration of a surcharge intended to tackle the increase in the cost of fuel ('the fuel surcharge') [7] and a surcharge intended to address the costs of certain security measures adopted following the terrorist attacks of 11 September 2001 ('the security surcharge'), [8] as well as the refusal to pay commission on the surcharges ('the refusal to pay commission'). [9]

B. Procedure before the Commission and the decision at issue

7. On completion of an investigation opened in 2005, [10] and further to a statement of objections adopted on 19 December 2007 ('the statement of objections'), [11] the Commission adopted, on 9 November 2010, a first decision ('the 2010 decision') [12] in which it found there to be 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 concerning, inter alia, the fuel surcharge, the security surcharge and the refusal to pay commission. [13]

7 This surcharge, introduced in 1996, has been abolished several times and then reintroduced and has been adjusted on several occasions since then (see recitals 114 to 117 of the decision at issue).

8 This surcharge was justified by the increase in costs as a result of higher insurance premiums, increased security costs and operational inefficiencies, such as the rerouting of certain flights (see recitals 577 to 580 of the decision at issue).

9 This commission was linked to the costs borne by the freight forwarders in order to collect the surcharges from the shippers on behalf of the carriers (see recitals 675 to 677 of the decision at issue).

10 In the course of that investigation, which followed an application for immunity made by Lufthansa and some of its subsidiaries pursuant to the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice'), 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) –, received applications from some of them in accordance with the 2002 Leniency Notice and sent a number of requests for information.

11 The statement of objections concerned 27 carriers in total, amongst them the appellants.

12 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). That decision concerned 21 carriers, including the appellants.

13 By that decision, the Commission, first of all, observed that the incriminated carriers had coordinated their behaviour as regards the pricing for the provision of freight services, next, imposed penalties on those carriers and, finally, required them to bring to an end the infringements committed immediately and to refrain from any act or conduct described in that decision or having the same or similar object or effect.

8. The General Court having annulled the 2010 decision, in whole or in part, by judgments of 16 December 2015, [14] on account of defective statements of reasons, the Commission resumed the procedure and adopted the decision at issue, on 17 March 2017, in respect of 19 carriers ('the incriminated carriers'), amongst them the appellants. [15] In that decision, the Commission found there to be 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 those carriers had coordinated their behaviour as regards the pricing for the provision of freight services worldwide through the fuel surcharge, the security surcharge and the refusal to pay commission.

9. In the first place, the Commission described and analysed the basic principles and structure of the cartel at issue, stating that the investigation had uncovered a worldwide cartel based on a network of bilateral and multilateral contracts over a long period of time among competitors, with the common objective of coordinating their behaviour with regard to various elements of the price of freight services, namely the fuel surcharge, the security surcharge and the refusal to pay commission. [16]

10. In the second place, the Commission applied Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Freight Agreement to the facts of the present case. [17]

11. As a preliminary point, it examined the limits of its *territorial and temporal jurisdiction* to find and penalise an infringement of the competition rules in the case in question and stated that it would not apply Article 101 TFEU to the

14 As far as the appellants are concerned, see judgments in *Air Canada* v *Commission* (T-9/11, EU:T:2015:994); *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-28/11, EU:T:2015:995); *Japan Airlines* v *Commission* (T-36/11, EU:T:2015:992); *Cathay Pacific Airways* v *Commission* (T-38/11, EU:T:2015:985); *Cargolux Airlines* v *Commission* (T-39/11, EU:T:2015:991); *LATAM Airlines Group and Lan Cargo* v *Commission* (T-40/11, EU:T:2015:986); *Singapore Airlines and Singapore Airlines Cargo Pte* v *Commission* (T-43/11, EU:T:2015:989); *Deutsche Lufthansa and Others* v *Commission* (T-46/11, EU:T:2015:987); *British Airways* v *Commission* (T-48/11, EU:T:2015:988, confirmed on appeal by the judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861); *SAS Cargo Group and Others* v *Commission* (T-56/11, EU:T:2015:990); *Air France-KLM* v *Commission* (T-62/11, EU:T:2015:996); *Air France* v *Commission* (T-63/11, EU:T:2015:993); and *Martinair Holland* v *Commission* (T-67/11, EU:T:2015:984).

15 The Commission relied on the same statement of objections of 19 December 2007. On 20 May 2016, it sent a letter to the carriers penalised in the 2010 Decision which had brought an action against that decision before the General Court, informing them that it intended to adopt a new decision and inviting them to submit their comments in that regard.

16 See Sections 4.1 and 4.3 to 4.6 of the decision at issue. According to recital 119 of that decision, in the case of the implementation of the fuel surcharge at local level, a system was often applied whereby leading airlines on particular routes or in certain countries would announce the change first and then be followed by others. In addition, local airlines' associations provided multilateral fora for discussion which could be used in that regard.

17 See Section 5 of the decision at issue.

agreements and practices prior to 1 May 2004 relating to the EU-third country routes, [18] Article 53 of the EEA Agreement to the agreements and practices prior to 19 May 2005 relating to the EEA-third country routes [19] or Article 8 of the EC-Switzerland Air Transport Agreement to the agreements and practices prior to 1 June 2002 relating to the EU-Switzerland routes. [20]

12. In addition, in response to the arguments contesting the extraterritorial application of Article 101 TFEU and Article 53 of the EEA Agreement to inbound freight services, [21] the Commission took the view, after noting that those provisions were applicable to arrangements that are either implemented within the European Union or the EEA (under the 'implementation' test) or that have immediate, substantial and foreseeable effects within the European Union or the EEA (under the 'qualified effects' test), [22] that, in the present case, those two tests were satisfied.

13. First, the *implementation test* was satisfied because the cartel at issue was applicable in the EEA: the services in question were performed, in part, within the territory of the EEA and many contacts by which the addressees had coordinated

18 See recitals 822 to 824 of the decision at issue. Before that date (a date marked by the entry into force of Regulation No 1/2003), 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) conferred upon the Commission jurisdiction to apply Articles 101 and 102 TFEU to international air transport between airports within the European Union, to the exclusion of international air transport between the airports of a Member State and those of a third country, which remained subject to Articles 104 and 105 TFEU.

19 See recitals 825 to 828 of the decision at issue. Before that date (a date marked by the entry into force 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)), Protocol 21 to the EEA Agreement on the implementation of competition rules applicable to undertakings (OJ 1994 L 1, p. 181) extended the rules laid down in Regulation No 3975/87 (see footnote 18 to this Opinion) to the implementation of the competition rules laid down in the EEA Agreement, thus precluding the Commission from being able to apply 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.

20 See recitals 829 to 832 of the decision at issue. Before that date (a date marked by the entry into force of Decision No 1/2007 of the joint Community/Switzerland Air Transport Committee set up under the Agreement between the European Community and the Swiss Confederation on Air Transport of 5 December 2007 replacing the Annex to the Agreement between the European Community and the Swiss Confederation on Air Transport (OJ 2008 L 34, p. 19)), Regulation No 3975/87 applied (see footnote 18 to this Opinion). The Commission explained that the decision at issue did not purport to find any infringement of Article 8 of the EC-Switzerland Air Transport Agreement in relation to freight services between Switzerland and third countries.

21 See recitals 1036 to 1040 of the decision at issue.

22 See recital 1042 of the decision at issue.

the surcharges and the non-payment of commission had taken place in the EEA or had involved participants in the EEA. [23]

14. Second, the *qualified effects* test was satisfied for three reasons. The first two reasons, contained in recital 1045 of the decision at issue, concerned the effects of the *coordination in relation to inbound freight services taken in isolation*, whereas the third reason, contained in recital 1046 of the decision at issue, concerned the effects of the *single and continuous infringement taken as a whole*. More specifically:

– the first reason related to the fact that the increased costs of air transport to the EEA, and consequently higher prices of imported goods, were by their very nature liable to have effects on consumers in the EEA;

– the second reason also concerned the effects of the coordination in relation to inbound freight services on the provision of freight services by other carriers within the EEA, between the different hubs in the EEA used by carriers from third countries and the airports of destination of those shipments in the EEA, to which the third-country carrier did not fly;

– the third reason related to the fact that the cartel had been implemented globally and that the arrangements of that cartel concerning inbound routes formed an integral part of the single and continuous infringement. [24]

15. Primarily, the Commission, first of all, found that the incriminated carriers [25] had coordinated their behaviour or influenced pricing, which ultimately amounted to price fixing with regard to the fuel surcharge, the security surcharge and the refusal to pay commission. [26] It stated that the conduct in question constituted a single and continuous infringement of Article 101 TFEU [27] as well

23 See recital 1043 of the decision at issue.

24 See recital 1046 of the decision at issue. The Commission explained that the cartel arrangements were in many cases organised centrally and that the local personnel were merely implementing them, with the uniform application of the surcharges on a worldwide scale forming a key element of the cartel.

25 In Section 6 (more specifically, recitals 1070 to 1145) of the decision at issue, the Commission identified the incriminated carriers, as 'undertakings', as being the addressees of the decision at issue.

26 See recitals 846 to 861 of the decision at issue. The Commission identified an overall scheme to coordinate pricing behaviour for freight services which constituted a complex infringement consisting of various actions which can be classified either as an agreement or a concerted practice, within which the competitors had knowingly substituted practical cooperation between them for the risks of competition.

27 First, that conduct pursued a single anticompetitive aim consisting in distorting competition in the freight sector in the EEA, concerned a single service (namely, the provision of freight services and their pricing), involved the same undertakings, was single in nature and covered three elements, namely the fuel surcharge, the security surcharge and the refusal to pay commission, which had been frequently discussed side by side in the same competitor contacts

as a restriction of competition by object, at least in the European Union, in the EEA and in Switzerland. [28]

16. Next, the Commission found that the single and continuous infringement was capable of affecting appreciably trade between Member States, between Contracting Parties to the EEA Agreement and between Contracting Parties to the EC-Switzerland Air Transport Agreement [29] and that the cartel at issue did not qualify for a derogation under Article 107(3) TFEU. [30]

17. Lastly, the Commission determined the total duration of the infringement, establishing that the cartel at issue had started on 7 December 1999 and lasted until 14 February 2006, [31] and the duration of that infringement in respect of each appellant. [32]

18. In the third and last place, the Commission imposed remedies and fines. [33]

(see recitals 869 to 880 of the decision at issue). While some of the appellants (namely, Air Canada, SAS Cargo Group and LAN Cargo) were not involved in all three elements of the single infringement, the Commission nevertheless took the view that, given their involvement in the other elements of the infringement, they could have reasonably foreseen exchanges between the parties on the other elements and were prepared to take the risk of so doing, and also that there was evidence that those appellants were aware of the discussions regarding those other elements (see recitals 881 to 883 of the decision at issue). Second, the infringement at issue was continuous in nature (see recital 884 of the decision at issue).

28 See recitals 903 to 921 of the decision at issue. In that context, the Commission considered that, given the worldwide scale of the cartel at issue, the contacts in third countries and the contacts concerning routes which the carriers had never operated or which they could not legally have operated were nevertheless relevant to establishing the existence of the single and continuous infringement (see recitals 885 to 890 of the decision at issue). The Commission also examined the regulations in certain third countries, rejecting the arguments of a number of incriminated carriers that those regulations required them to cooperate in relation to surcharges because those carriers had not provided evidence that they had acted under coercion from those third countries (see recitals 972 to 1023 of the decision at issue).

29 See recitals 1024 to 1035 of the decision at issue.

30 See recitals 1047 to 1052 of the decision at issue.

31 More specifically, the Commission established and explained that that cartel had infringed: Article 101 TFEU over the period from 7 December 1999 to 14 February 2006, in relation to air transport between airports within the European Union, and from 1 May 2004 to 14 February 2006, with regard to air transport on EU-third country routes; Article 53 of the EEA Agreement from 7 December 1999 to 14 February 2006, in relation to air transport on intra-EEA routes, and from 19 May 2005 to 14 February 2006, with regard to 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, in relation to air transport on EU-Switzerland routes (see recital 1146 of the decision at issue).

32 See recitals 1147 to 1169 of the decision at issue.

33 See Section 8 of the decision at issue. In accordance with the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2), the Commission calculated the basic amount of the fine taking into account the value of sales and the gravity and duration of the infringement and applying the additional

C. Procedure before the General Court and the judgments under appeal

19. By applications lodged at the Registry of the General Court on 29, 30 and 31 May 2017, the appellants brought actions seeking, in the main, the annulment, in whole or in part, of the decision at issue in so far as they are concerned and the cancellation of, or the reduction in the amount of, the fine imposed.

20. In support of their actions, the appellants relied, in particular, on pleas in law relating to the Commission's jurisdiction, [34] breaches of procedural requirements and the merits of the decision at issue. The General Court subsequently raised of its own motion the plea based on the Commission's lack of jurisdiction in the light of 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.

21. In the judgments under appeal, the General Court dismissed the actions brought by Martinair, KLM, Cargolux, Air France-KLM, Air France, Lufthansa and Singapore Airlines Cargo. [35] However, it annulled the decision at issue in part and reduced the fine imposed for certain carriers' participation in the infringement on the following routes:

– in the cases of Japan Airlines and Cathay Pacific Airways, on intra-EEA routes and EU-Switzerland routes; [36]

– in the case of Air Canada, on intra-EEA routes, EU-third country routes and non-EU EEA-third country routes, as regards the element of the single and continuous infringement relating to the refusal to pay commission; [37]

– in the case of British Airways, on the one hand, on intra-EEA routes and EU-third country routes as regards the element of the single and continuous

amount (Section 8.3 of the decision at issue), made adjustments based on aggravating and mitigating circumstances (Section 8.4 of that decision) and the 10% of turnover limit (Section 8.5 of the decision), took account of the applications for leniency (Section 8.6 of the same decision) and of the ability to pay of the incriminated carriers (Section 8.7 of the decision at issue), in order finally to determine the amount of the fines to be imposed on those carriers (see Section 8.8 of that decision).

34 Those pleas related to the possibility of finding and penalising an infringement concerning inbound freight services as well as services on EU-third country routes before 1 May 2004 and on non-EU EEA-third country routes before 19 May 2005.

35 Judgments in *Martinair*, *KLM*, *Cargolux*, *Air France-KLM*, *Air France*, *Deutsche Lufthansa and Singapore Airlines*.

36 Respectively, Article (1)(1)(h) and (4)(h) of the decision at issue (judgment in *Japan Airlines*) and Article 1(1)(g) and (4)(g) of that decision (judgment in *Cathay Pacific Airways*).

37 Article 1(1)(a), (2)(a), 3(a) and 4(a) of the decision (judgment in *Air Canada*).

infringement relating to the refusal to pay commission and, on the other hand, on non-EU EEA-third country routes; [38]

– in the case of LATAM Airlines Group and Lan Cargo, on the one hand, on intra-EEA and non-EU EEA-third country routes and, on the other hand, on EU-third country routes, as regards the security surcharge and the refusal to pay commission, as well as the fuel surcharge before 22 July 2005; [39]

– in the case of SAS Cargo Group, on the one hand, on intra-EEA, EU-third country and non-EU EEA-third country routes, as regards the refusal to pay commission, and, on the other hand, on EU-third country and non-EU EEA-third country routes from Thailand between 20 July 2005 and 14 February 2006 as far as concerns the fuel surcharge. [40]

III. Procedure before the Court of Justice and forms of order sought

22. By documents lodged at the Registry of the Court of Justice between 7 and 17 June 2023, the appellants lodged appeals against the judgments under appeal. They claim, in essence, that the Court should:

– set aside the judgments under appeal;

– annul, consequently, the decision at issue in so far as concerns them or, in the alternative, reduce the amount of the fine;

– in the alternative, refer the case back to the General Court; and

– order the Commission to pay the costs of both sets of proceedings.

23. The Commission contends that the Court should:

– dismiss the appeals and order the appellants to pay the costs;

– in the alternative, if the appeals are upheld, refer the cases back to the General Court and reserve the costs.

24. The parties also responded to the questions put by the Court at the hearings held on 10 to 22 April 2024.

38 Respectively, on the one hand, Article 1(1)(e), (2)(e) and 3(e) of the same decision and, on the other hand, Article 1(4)(e) thereof (judgment in *British Airways*).

39 Respectively, Article 1(1)(i) and (j), (3)(i) and (j) and (4)(i) and (j) of the decision at issue; Article 1(2)(i) and (j) of that decision; and Article 3(i) of the decision (judgment in *LATAM Airlines Group and Lan Cargo*).

40 Respectively, Article 1(1)(o), (p) and (q), (2)(o) and (p), (3)(o) and (p) and (4)(o), (p) and (q) of the decision at issue; Article 1(2)(o) and (p) of that decision; Article 1(3)(o) and (p) of the decision; and Article 3(n) to (r) of the same decision (judgment in *SAS Cargo Group*).

IV. Analysis

25. The appeals lodged by the appellants can be broken down into a series of grounds which overlap to a large extent. This Opinion concerns the following grounds:

– the grounds relating to the jurisdiction of the Commission (Section A), namely the Commission's jurisdiction to find an infringement concerning inbound freight services solely on the basis of the 'qualified effects' test (1), the application of that 'qualified effects' test (2), and certain procedural defects in the judgments under appeal (3);

– certain grounds relating to the General Court's examination of the merits of the decision at issue (Section B), namely participation in the 'single and continuous infringement' (1), the annulment (only) in part of that decision (2) and the limitation period in respect of the Commission's power to impose penalties (3); and

– grounds relating to the exercise of unlimited jurisdiction by the General Court (Section C).

A. The grounds relating to the Commission's lack of jurisdiction to find and penalise an infringement of Article 101(1) TFEU and Article 53 of the EEA Agreement concerning inbound freight services

26. In the decision at issue, the Commission affirmed its jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement in respect of the coordination in relation to inbound freight services ('the Commission's extraterritorial jurisdiction'), [41] because the implementation test and the qualified effects test were both satisfied. [42]

27. In the judgments under appeal, the General Court held that the Commission's extraterritorial jurisdiction could be established on the basis either of the implementation test or the qualified effects test [43] and that those tests were alternative tests. [44] It concluded, in this instance, that the qualified effects test was

41 I would point out that the term 'extraterritorial jurisdiction' used in this Opinion refers, in general terms, to the application of EU and EEA competition law by the Commission in respect of practices undertaken outside the EEA by undertakings that are also established outside the EEA, setting aside any discussion as to the exact scope of such a definition (see, inter alia, Opinion of Advocate General Wathelet in *InnoLux* v *Commission* (C-231/14 P, EU:C:2015:292, point 37)).

42 See point 12 of this Opinion.

43 See, inter alia, judgment in *Air Canada*, paragraph 212.

44 See, inter alia, judgment in *Air Canada*, paragraph 213.

satisfied and that there was therefore no need to examine the application of the implementation test. [45]

28. The appellants challenge that analysis, raising, in essence, two series of arguments: the first alleging that the Commission's jurisdiction could not be based on the application solely of the qualified effects test (1) and the second alleging errors in the application of that test (2). They also raise grounds or complaints relating to certain procedural defects in the judgments under appeal, which it is appropriate to examine last (3).

1. The Commission's jurisdiction to find and penalise an infringement concerning inbound freight services solely on the basis of the 'qualified effects' test

29. Several appellants [46] allege that the General Court erred in law because it assessed the Commission's extraterritorial jurisdiction solely on the basis of the qualified effects test, which is a necessary condition but not enough to establish such jurisdiction, without carrying out an analysis of the anticompetitive effects within the internal market on the basis of the implementation test. [47] According to those appellants, first, the qualified effects test is merely a test under *public international law* to determine the national law (here: EU law) applicable for the purpose of regulating conduct adopted by a third country and not a test which can determine the Commission's extraterritorial jurisdiction under *EU law*. [48] Second, the implementation test, which the General Court did not examine, is the essential test of EU law to establish the Commission's extraterritorial jurisdiction, [49] which

45 See, inter alia, judgment in *Air Canada*, paragraph 279.

46 The airlines in question are, more specifically, the following: Air Canada (first part of the first ground), Japan Airlines (first ground), Air France (second part of the first ground), Air France-KLM (second part of the second ground), Singapore Airlines (second part of the first ground), Deutsche Lufthansa (first part of the sole ground) and Cargolux (first part of the first ground).

47 One appellant (namely, Singapore Airlines, by the first part of its first ground) also broaches this argument from the perspective of the distortion of the plea in law relating to the Commission's lack of jurisdiction, because the General Court responded to that plea as if it were based on a challenge to the Commission's jurisdiction on the (alternative) basis of public international law, which was a necessary condition but was insufficient to establish the Commission's jurisdiction in the present case.

48 Furthermore, the appellants argue that, since the concept of 'qualified effects' in public international law is fundamentally distinct from that of a 'restriction of competition' under Article 101 TFEU and Article 53 of the EEA Agreement, determining the territorial scope of a provision of an EU Treaty on the basis of public international law is contrary to the fundamental principle of the autonomy of EU law vis-à-vis both Member State law and international law.

49 In the case of Article 101 TFEU, this is apparent, the appellants allege, from the 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, 'the judgment in *Wood pulp*', paragraphs 11 to 18).

requires the relevant market to be defined, the economic and legal context analysed and the counterfactual scenario examined.

30. It is therefore necessary to examine whether the General Court was right to hold that the qualified effects test could, on its own, serve as the basis for the Commission's jurisdiction in the circumstances of the present case.

31. I note that the *qualified effects test*, even though there is no established and common formulation of it, [50] is generally recognised in public international law [51] as a judicial principle under which national competition law may be applied in the case of economic effects, on the national territory, of practices which occurred outside that territory by undertakings also established outside the territory (hence: the 'extraterritorial' application of that law), [52] a fact which does not appear to be called into question by the parties. [53]

50 It would appear that the most common formulation of that test in competition law, as drawn up in the United States, refers to 'direct, substantial and foreseeable effects' on US trade, as specified in the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (Pub. L. No 97-290, 96 Stat. 1246 (codified at 15 U.S.C. § 6a)). Under that legislation, in essence, the Sherman Act was no longer to apply to conduct involving commercial trade with foreign countries, other than imports, unless that conduct has a 'direct, substantial and reasonably foreseeable effect' on domestic trade, the importation trade or the exportation business of a national person. See, inter alia, in legal literature, Claudel, E., 'Territorialité vs extraterritorialité: les affres du champ d'application dans l'espace du droit européen de la concurrence', *L'extraterritorialité en droit de l'Union européenne*, 2021, p. 142; Wagner-von Papp, F., 'Competition Law, Extraterritoriality & Bilateral Agreements', *Research Handbook on International Competition Law*, 2012, pp. 23 to 39.

51 Moreover, I do not share the General Court's view that the qualified effects test (like the implementation test) not only forms the basis for the Commission's jurisdiction 'under public international law' or allows the application of the EU and EEA competition rules to be justified 'under public international law' (see, inter alia, judgment in *Air Canada*, paragraphs 212 and 226) but is also 'enshrined in the wording of Article 101 TFEU and Article 53 of the EEA Agreement' (judgment in *Air Canada*, paragraph 233) and is therefore relevant, as a test under EU law, where those provisions are applied. In my view, that test is a specific test of public international law which is separate from the tests relating to the application of Article 101 TFEU and Article 53 of the EEA Agreement and, as I will go on to explain, is not the same as the test of a restriction of competition (by object or effect) in the internal market (see point 42 of this Opinion).

52 See, inter alia, Opinions of Advocate General Mayras in *Imperial Chemical Industries* v *Commission* (48/69, EU:C:1972:32, pp. 699 and 700); of Advocate General Darmon in Joined Cases *Ahlström Osakeyhtiö and Others* v *Commission* (89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:258, 'the Opinion in the *Wood pulp* case', points 19 to 46); and of Advocate General Wahl in *Intel Corporation* v *Commission* (C-413/14 P, EU:C:2016:788, 'the Opinion in the *Intel* case', point 297). As Advocate General Darmon explains in his Opinion in the *Wood pulp* case (points 19 to 21), the effects doctrine – as the basis on which State jurisdiction is founded under international law – derives from the principle of territoriality and, more specifically, from the principle of objective territoriality (which is separate from that of subjective territoriality), which permits a State 'to deal with acts which originated abroad but which were completed, at least in part, within its own territory'. See also OECD Revised Recommendation of the Council Concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade, 1995 (available in English only at the following address: http://www.oecd.org/daf/competition/21570317.pdf). See, in legal

32. However, the origin and nature of the *implementation* test are more controversial. According to the appellants, that test stems primarily from the judgment in *Wood pulp* and is not a test under public international law but rather a concept of EU law, developed by the Court in order to establish the application of Article 101 TFEU. Nevertheless, it does not appear to me that, in the judgment in *Wood pulp*, the Court intended to introduce an *additional* test for establishing such jurisdiction [54] or, in any case, an exclusive test, cumulative test or higher-ranking

literature, Martyniszyn, M., 'Extraterritoriality in competition law: changing friction', Parrish, A., and Ryngaert, C. (eds.), *Research Handbook on Extraterritoriality in International Law*, Northampton, 2023, pp. 35 to 48.

53 A development in the case-law of the Court of Justice in this regard is noted in legal literature (see, inter alia, Puetz, A., '"Extraterritoriality" in European Law: Airfreight and Beyond', *Air and Space Law*, Vol. 46, No 6, 2021, pp. 770 to 774; Munari, M., 'Sui limiti internazionali all'applicazione extraterritoriale del diritto europeo della concorrenza', *Rivista di Diritto Internazionale*, Vol. 1, 2016, pp. 42 to 50). Notwithstanding the fact that the qualified effects test appeared to be taken into account in very old case-law (judgment of 25 November 1971, *Béguelin Import*, 22/71, EU:C:1971:113, paragraph 11), as endorsed by the proposals of certain Advocates General (see Opinions of Advocate General Mayras in *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:32, pp. 699 and 700, and of Advocate General Darmon in the *Wood pulp* case, points 19 to 46). The Court examined the question of the extraterritorial application of EU competition rules first of all from the perspective of the single economic entity doctrine (see judgment of 14 July 1972, *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:70, paragraphs 130 to 141), then from that of the implementation test (see judgment in *Wood pulp*, paragraphs 12 to 17) and finally from the perspective of the effects test (see judgment in *Intel*, paragraphs 40 to 47). On the ambiguities of the effects doctrine and its 'notoriously opaque' relationship with the implementation doctrine, see, inter alia, Wagner-von Papp, F., 'Competition Law, Extraterritoriality & Bilateral Agreements', *Research Handbook on International Competition Law*, 2012, pp. 42 to 46. See also Prete, L., 'On implementation and effects: the recent case-law on the territorial (or extraterritorial?) application of EU competition rules', *Journal of European competition law & practice*, Vol. 9, No 8, 2018, p. 493. The latter author considers that the implementation test, echoing Advocate General Wahl in his Opinion in the *Intel* case, is a sub-category of the effects test, whereas, according to the Court in the judgment in *Intel*, the implementation test is an alternative test to the effects test.

54 Faced with the explicit proposal from Advocate General Darmon in his Opinion in those cases to use the qualified effects test (in his words, the 'direct, substantial and foreseeable effect test') as the test of the jurisdiction of the European Union (at the time, the European Economic Community) (points 57 and 58 of that Opinion), the Court simply referred, after distinguishing between the formation of the cartel and its implementation (judgment in *Wood pulp*, paragraph 16), to the fact that the cartel in question had been 'implemented' within the internal market (at the time, the common market) (judgment in *Wood pulp*, paragraph 17). In *Wood pulp*, the 'implementation' referred to by the Court relates to the fact that the incriminated undertakings, all of which were established in third countries, sold directly to purchasers established in the European Union (judgment in *Wood pulp*, paragraph 12). In addition, the Court explicitly referred to the European Union's jurisdiction in the light of the territoriality principle as universally recognised in public international law (judgment in *Wood pulp*, paragraph 18). Accordingly, it would appear that the Court, at the very least implicitly, viewed the implementation of the cartel at issue in the European Union as an indisputable demonstration of its effects on the internal market, without intending to introduce a subsequent (alternative or cumulative) test. In any event, in the judgment in *Intel*, the Court explained that the qualified effects test pursued the same objective as the implementation test, namely that of preventing conduct which, while not adopted within the European Union, has *anticompetitive effects* liable to have an impact on the EU market (paragraph 45 of that judgment).

test than the qualified effects test with a view to establishing the Commission's jurisdiction, as was implicitly acknowledged by the Court in the judgment in *Intel*. [55]

33. That being said, the appellants appear to me to be confusing, on the one hand, the question of the Commission's extraterritorial jurisdiction under public international law and, on the other hand, the application of Article 101 TFEU and Article 53 of the EEA Agreement to the present case, that is to say, the question of the anticompetitive nature of the cartel at issue within the internal market. [56]

34. The Commission has jurisdiction to apply the EU and EEA competition rules to the extent that, respectively, the FEU Treaty and the EEA Agreement apply. While the 'extraterritorial' application of those rules is subject to the conditions laid down in public international law and therefore, inter alia, to the qualified effects test, the jurisdiction of the Commission to find and penalise, within the meaning of EU law, an infringement of Article 101 TFEU and Article 53 of the EEA Agreement is subject only to the (substantive) test of a restriction of competition (by object or effect) within the internal market.

35. The appellants seek to subvert that aspect by arguing that the reference in Article 101 TFEU and Article 53 of the EEA Agreement to a restriction of competition 'within the internal market' introduces, in essence, a *criterion of jurisdiction* which means that Commission has to show that the impugned conduct has actual effects on the internal market before it is able, under those provisions, to assess whether there is a restriction of competition by object or effect. In my view, that interpretation is contrary to the wording and the purpose of those provisions, since it introduces an artificial distinction between, on the one hand, the *effects of the impugned conduct within the internal market* (the test which allegedly concerns the Commission's jurisdiction to take action against such behaviour) and, on the other hand, the existence of a *restriction of competition by object or effect* (a substantive test relating to the application of the provision in question). In addition, the reference in those same provisions to the effects in the internal market does not constitute, in my view, a criterion specifically governing the jurisdiction of the Commission, [57] but is rather one of the elements of the substantive test governing the application of the provisions in question.

55 Paragraph 62. See also, to that effect, Opinion of Advocate General Wahl in the *Intel* case, point 290.

56 By the term 'internal market', I am referring both to the internal market of the European Union and that of the EEA.

57 Unlike, for example, the criterion of the effect on trade between Member States, which distinguishes the scope of application (by the Commission or by Member States' authorities) of EU law from the law of the Member States (see, inter alia, judgment of 28 April 1998, *Javico*, C-306/96, EU:C:1998:173, paragraph 15, and Opinion of Advocate General Mayras in *Imperial Chemical Industries* v *Commission*, 48/69, EU:C:1972:32, p. 697).

36. In my view, the Commission was required to justify its extraterritorial jurisdiction solely on the basis of public international law (and therefore in the light of the qualified effects test). After it had established that that condition was met, the Commission could then find and penalise any infringement of Article 101 TFEU and Article 53 of the EEA Agreement, provided that the impugned conduct satisfies the substantive conditions laid down in those provisions, including that of a restriction of competition, by object or effect, within the internal market.

37. In conclusion, I do not consider that the General Court erred in law where it held that the Commission's extraterritorial jurisdiction was to be assessed solely on the basis of the qualified effects test. I must therefore now turn to considering whether the General Court erred in law in holding that the Commission had applied that test correctly.

2. The application of the 'qualified effects' test

38. In the judgments under appeal, the General Court took the view that, in the decision at issue, the Commission had relied on three reasons to find that the qualified effects test was satisfied, with the first two concerning the effects of the coordination in relation to inbound freight services taken in isolation (recital 1045 of the decision at issue) and the third concerning the effects of the single and continuous infringement taken as a whole (recital 1046 of that decision). [58] In those judgments, the General Court accepted the first and third reasons, finding that there was no need to examine the second. [59]

39. The appellants contest the General Court's assessment concerning, on the one hand, the demonstration of the qualified effects of the coordination in relation to inbound freight services considered in isolation (the first reason relied on by the Commission) (a) and, on the other hand, the use of the concept of a 'single and continuous infringement' taken as a whole (the third reason relied on by the Commission) (b). [60]

58 See point 14 of this Opinion.

59 See, inter alia, judgment in *Air Canada*, paragraph 279. At the hearings, the Commission was particularly insistent that assessment of the qualified effects test in relation to the *single and continuous infringement taken as a whole* (the third reason) was sufficient to demonstrate the application of that test, and that the assessment relating to the qualified effects of the *coordination in relation to inbound freight services taken in isolation* (the first reason) was an assessment which it had undertaken for the sake of completeness, in response to the arguments put forward by the parties.

60 I note, moreover, that it is not always easy to distinguish between, on the one hand, the effects of the coordination in relation to inbound freight services, which are analysed here, and, on the other hand, those of the single and continuous infringement taken as a whole, which will be examined in points 77 to 93 of this Opinion. I wonder, in that regard, whether the information used by the Commission in recitals 1045 and 1046 of the decision at issue did not merit a joint analysis. That being so, it is necessary to analyse those elements separately in order to assess the reasoning of the General Court.

(a) The examination of the qualified effects of the coordination in relation to inbound freight services considered in isolation

40. As far as concerns the first reason relied on by the Commission in recital 1045 of the decision at issue, a number of appellants [61] allege that the General Court erred in law, in the first place, by endorsing the Commission's finding that the coordination in relation to inbound freight services could be classified as a restriction of competition by object, and that it was therefore not required to carry out an assessment of the anticompetitive effects (1) and, in the second place, by taking the view that the Commission had demonstrated that that conduct had qualified effects, that is to say, immediate, substantial and foreseeable effects, in the EEA (2).

(1) The criterion of a restriction of competition by object as an irrelevant criterion

41. According to the appellants, the existence of a restriction of competition by object, as found by the Commission and endorsed by the General Court, is not a relevant criterion in respect of the examination of the qualified effects test for the purpose of assessing the Commission's extraterritorial jurisdiction. The examination of that jurisdiction pursues a different aim from that of the assessment of the existence of a restriction of competition by object and thus requires a higher standard of proof than the latter. Accordingly, the Commission could not dispense with an analysis of the actual effects of the coordination in relation to inbound freight services solely because the impugned conduct constituted a restriction of competition by object, [62] and it should have assessed whether there was a causal link between that conduct and the alleged anticompetitive effect within the EEA. [63]

42. As I have observed in points 33 and 34 of this Opinion, a distinction must be drawn between, on the one hand, the Commission's extraterritorial jurisdiction on the basis of public international law and, on the other hand, the question of the

61 More specifically, Air Canada (second part of the first ground), Air France (second part of the first ground), Air France-KLM (second part of the second ground), Singapore Airlines (third, fourth and sixth parts of the first ground), British Airways (second part of the first ground), Deutsche Lufthansa (fourth part of the sole ground), LATAM Airlines Group and Lan Cargo (second part of the third ground), Japan Airlines (second part of the second ground), Cathay Pacific (first and third parts of the first ground), KLM and Martinair (first and second parts of the first ground), Cargolux (second part of the first ground) and SAS Cargo Group (first and fourth parts of the third ground).

62 The appellants refer in particular to recitals 917, 1190 and 1277 of the decision at issue, in which the Commission stated, in essence, that it was not required to assess the anticompetitive effects of the conduct at issue given the anticompetitive object of that conduct.

63 According to the appellants, the qualified effects test could not be satisfied, by reference to merely possible, speculative or hypothetical effects, as otherwise the Commission would have jurisdiction to tackle any infringement by object of the competition rules anywhere in the world.

anticompetitive nature of the cartel at issue within the internal market. The qualified effects test, which is the basis under public international law for the extraterritorial application of competition rules, is not the same as an analysis of a restriction of competition by object or effect with a view to applying those provisions. [64] They are quite simply two different elements of analysis. [65]

43. In the present case, the Commission examined the existence of qualified effects within the meaning of public international law in recitals 1045 and 1046 of the decision at issue, which are part of Section 5.3.8 of that decision which focuses on its extraterritorial jurisdiction. [66] The Commission did not rely on the existence of a restriction of competition by object in those recitals. While, in other recitals of that decision, the Commission did consider that it did not have to assess the actual anticompetitive effects of the incriminated carriers' conduct since it had relied on the anticompetitive object of that conduct, it did so in a different context and with a different aim. For example, in recital 917 of the decision, the Commission took the view that it was not necessary to demonstrate actual anti-competitive effects in order to find an infringement of Article 101 TFEU and Article 53 of the EEA Agreement. It did not use that argument to substantiate, as a preliminary point, the extraterritorial application of those provisions on the basis of public international law. Furthermore, that consideration appears in

64 While, to my knowledge, the Court has not given a clear ruling on that matter, Advocate General Darmon had raised it, in his Opinion in the *Wood pulp* case, observing that it was uncertain whether the concept of an 'effect' laid down in Article 101 TFEU (at the time, Article 85 EECT) constituted, strictly speaking, the basis of the Commission's extraterritorial jurisdiction. He did however explain that, while that concept, like that of an 'object', makes it possible to establish an infringement of substantive competition law in cases where the European Union's jurisdiction itself is indisputable, it may also be relied upon to serve a different function, as a criterion of jurisdiction, and its scope is then not necessarily identical to that of an effect in substantive law (see point 10 of that Opinion).

65 That being said, it cannot be ruled out that demonstrating that a practice implemented in a third country has an anticompetitive object having regard to the internal market may be sufficient to take the view that the qualified effects test is also satisfied. Even though the two tests in question pursue different aims, the elements upon which the Commission relies to show that a practice has an anticompetitive object might also be sufficient to establish that that practice is liable to produce qualified effects within the internal market. In any event, even though they are two different tests, I am of the view that the standard of proof to establish the extraterritorial application of EU competition law within the meaning of public international law cannot be higher than that needed to show that there is a restriction of competition (by object or effect) within the meaning of Article 101 TFEU and Article 53 of the EEA Agreement (see points 51 to 57 of this Opinion).

66 That section, entitled 'the applicability of Article 101 of the TFEU and Article 53 of the EEA Agreement to inbound routes', was intended, as is apparent in particular from recital 1036 of the decision at issue, to respond to the argument raised by certain parties who, relying inter alia on the judgments in *Wood pulp* and of 25 March 1999, *Gencor* v *Commission* (T-102/96, EU:T:1999:65), claimed that those provisions did not apply to inbound routes.

Section 5.3.3 of the decision at issue, which is focused on the (substantive) analysis of the restriction of competition. [67]

44. In the judgments under appeal, the General Court interpreted the qualified effects test, explaining, in essence, that that test 'does not require it to be established that the conduct at issue had any anticompetitive effect which actually occurred in the internal market or within the EEA', rather that, 'on the contrary, according to the case-law, it is sufficient to take account of the probable effects of that conduct on competition'. [68]

45. In the light of those clarifications, I do not agree with the appellants' argument that the General Court took the view that the Commission, after classifying the conduct in question as a restriction of competition by object, was no longer required to show that that conduct had qualified effects.

46. The General Court did state, in a passage that may be a cause for confusion, that, 'where the 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 classification of conduct as a restriction of competition "by effect" within the meaning of those provisions presupposes'. [69]

47. However, in my view, in that passage, the General Court likely intended to make the point that it would be paradoxical to require an analysis of a restriction of competition *by effect* on the basis of conduct which may be classified as a restriction of competition *by object*. [70] In any case, that passage has no impact at all on the substance of the General Court's reasoning, since, in the subsequent paragraphs of the judgments under appeal, the General Court duly analysed the Commission's application of the qualified effects test in the light of its key

67 The Commission also mentioned the fact that it was not required to assess the anticompetitive effects of the conduct at issue in the light of the anticompetitive object of that conduct in recitals 1190 and 1277 of the decision at issue, which concern, respectively, the determination of the basic amount of the fines and the application of mitigating circumstances in the context of the fines.

68 See, inter alia, judgment in *Air Canada*, paragraph 230, which refers to the judgment in *Intel*, paragraph 51.

69 See, inter alia, judgment in *Air Canada*, paragraph 232. That line of reasoning is subsequently developed, inter alia, in paragraphs 233 to 237 of the judgment in *Air Canada*, in which the General Court repeats, in essence, the finding that a restriction of competition by object does not require an assessment of the anticompetitive effects.

70 This interpretation is akin, in my view, to the observation made by Advocate General Darmon in his Opinion in the *Wood pulp* case, cited in footnote 64 to this Opinion.

elements, namely the foreseeable, substantial and immediate nature of the effects, and not the existence of any restriction by object. [71]

48. Furthermore, the appellants' argument that, where a practice is implemented outside the EEA, it cannot have the object of restricting competition within the EEA [72] is irrelevant, since it concerns the merits of the General Court's factual assessment as to the existence of a distortion of competition. [73] In any event, the appellants appear to me to have failed to show that that argument is well founded, since, as the Commission established and as the General Court confirmed, the cartel had been implemented worldwide and had the common object of restricting competition everywhere in the world, including in the EEA.

49. In conclusion, I consider that neither the Commission nor the General Court applied the criterion of a restriction of competition by object as a relevant criterion in connection with assessing the Commission's extraterritorial jurisdiction, and that the appellants' arguments in that regard are ineffective.

(2) The demonstration that qualified effects exist

50. According to the appellants, the General Court was wrong to conclude that, in the decision at issue, the Commission, which bears the burden of proof, had demonstrated that the impugned conduct had qualified effects, that is to say immediate, substantial and foreseeable effects in the EEA. More specifically, they allege, first, that the General Court merely found that the effects mentioned by the Commission were simply 'liable' to occur, using, in essence, an inadequate standard of proof (i) and, second, that the General Court's analysis of the qualified effects is, in any event, incorrect, since the effects of the impugned conduct on competition in the EEA are not immediate, substantial and foreseeable (ii).

(i) The relevant standard of proof

51. By the first reason relied on in recital 1045 of the decision at issue, the Commission concluded that the anticompetitive practices in third countries with regard to inbound freight services were liable to have immediate, substantial and foreseeable effects in the European Union or in the EEA, because, in essence, the

71 See, inter alia, judgment in *Air Canada*, paragraphs 238 to 279.

72 According to the appellants, it follows from the judgment of 28 April 1998, *Javico* (C-306/96, EU:C:1998:173) that, if an anticompetitive agreement is intended to apply in a territory outside the EEA, it cannot be regarded as having the object of appreciably restricting competition within the common market, and that, even though conduct may be regarded as a restriction by object where it takes place in the EEA, the same conduct is not caught by Article 101 TFEU if it occurs outside the EEA.

73 Furthermore, the appellants have not succeeded in refuting the fact that the anticompetitive contacts, including those undertaken at local level with the appellants' local representatives, covered all routes worldwide and were not restricted just to the local market, in order to ensure that the freight forwarders cannot circumvent the cartel by sending freight on indirect routes.

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.

52. The General Court developed that argument in the judgments under appeal, relying on recitals 14, 17 and 70 of the decision at issue and on the parties' responses to the measures of organisation of procedure. It found that the carriers sold their freight services exclusively or almost exclusively to freight forwarders, and that the latter purchased those services in particular as intermediaries, in order to consolidate them into a package of services the purpose of which was to organise the integrated transport of goods to the territory of the EEA on behalf of shippers, who might in particular be the purchasers or owners of the goods transported and were likely established in the EEA. According to the General Court, 'provided that' the freight forwarders pass any additional costs resulting from the cartel at issue on to the price of their service packages, it was in particular on competition that occurs between freight forwarders in order to attract those shippers as customers that the single and continuous infringement on inbound routes was liable to have an impact and, consequently, it was in the internal market or within the EEA that the effect at issue was liable to materialise. Consequently, the effects produced by the conduct at issue consist in the additional cost which shippers might have had to pay and the higher prices of goods imported into the EEA which may have resulted from that cost. [74] The General Court concluded, inter alia, that those effects were part of 'the normal course of events' and were 'economically rational' or in accordance with the 'normal functioning of the market'. [75]

53. The appellants criticise, in the main, the 'permissive' attitude of the General Court as regards the standard of proof used by the Commission, which – they allege – allowed the Commission to establish its jurisdiction on the basis of purely hypothetical effects, which would permit it to take action against any infringement of competition rules whatsoever anywhere in the world. The appellants argue that the Commission did not identify restrictions of competition in the internal market, even though it ought to have shown that those effects were not simply 'liable' to occur but 'likely' or, in any event, 'more likely than not' to occur.

54. In that regard, it is my view that the Commission could rely on the fact that the impugned conduct, which was implemented outside the EEA, was 'liable' to produce qualified effects in the EEA. Accordingly, in order to demonstrate the existence of qualified effects (and therefore its extraterritorial jurisdiction), the Commission was not required to establish the existence of actual effects, such as,

74 See, inter alia, judgment in *Air Canada*, paragraphs 238 to 244.

75 See, inter alia, judgment in *Air Canada*, paragraphs 260 and 276. Those findings concern, respectively, the foreseeability and immediacy of the effects but are, in my view, indicative of the approach adopted by the General Court in relation to the standard of proof.

for example, those needed to show there to be a restriction of competition by effect within the meaning of Article 101 TFEU. As the Court observed in the judgment in *Intel*, the qualified effects test pursues the objective of preventing conduct which, while not adopted within the European Union, has anticompetitive effects 'liable' to have an impact on the EU market. [76]

55. That finding is not called into question by the General Court's reference, in the judgments under appeal, to paragraph 51 of the judgment in *Intel*, which refers to the 'probable effects' of the impugned conduct on competition. [77] The appellants conclude from that reference that it is not enough that those effects are 'liable' to occur (contrary to the standard of proof required to establish a restriction of competition by object), but that the threshold of probability or likelihood is attained only if it has been shown that it is 'more likely than not' that the practice will have an anticompetitive effect. However, in the scheme of the judgment in *Intel*, the analysis of the foreseeability of the effects, like that of their immediacy and substantial nature, forms part of the overall analysis of the qualified effects test, in relation to which the Court of Justice clarified, in paragraph 45 of that judgment in particular, that those effects were effects 'liable' to occur in the internal market. That is how, in my view, the reference in the judgments under appeal to paragraph 51 of the judgment in *Intel* is to be interpreted.

56. Furthermore, if, as regards proof of anticompetitive conduct, the Commission may find merely that the impugned practice has an anticompetitive object, without it being required to demonstrate the existence of actual effects on the market, it appears to me all the more reasonable that, in order to establish its jurisdiction, as a preliminary step, the Commission is not obliged to demonstrate that the impugned conduct, which is implemented outside the internal market, produces actual effects in that market. It would otherwise be paradoxical, for example, for even a restriction of competition by object to be treated, essentially, as a restriction of competition by effect where it occurs in an extraterritorial context.

57. In conclusion, I consider that, contrary to what the parties claim, it fell to the Commission to state that the practices in question were 'liable' to have qualified effects on competition within the internal market, without it being required to provide proof that those effects had occurred or that their occurrence was 'more likely than not'. It is therefore necessary to consider, in the light of the standard of proof defined above, whether the General Court erred in law in finding that, in the present case, the Commission had demonstrated the existence of qualified effects.

76 See judgment in *Intel*, paragraph 45.

77 See judgment in *Air Canada*, paragraph 230.

(ii) The existence of qualified effects in the present case

58. As the appellants state, the Commission relied, in recital 1045 of the decision at issue, providing a very concise statement of reasons, on a relatively lengthy chain of events which it assumed to have occurred. It is indeed true that the Commission did not expand exhaustively upon its reasoning, which appears to be relatively brief. However, it remains to be examined whether that reasoning is nevertheless sufficient to establish its jurisdiction in the light of the standard of proof defined in points 54 to 57 of this Opinion.

59. In essence, it appears to me that, by a rather simplistic formulation, the Commission applied a presumption based on the following: first of all, the coordination between the carriers regarding the surcharges and the refusal to pay commission had an impact on the prices of airfreight services sold to the freight forwarders; next, that that increase entailed, in turn, the increase in the prices applied by the freight forwarders to the shippers; and, finally, that the latter increase had an effect on the prices charged by the shippers to consumers established in the EEA.

60. The relevant question is therefore whether, as the General Court found in the judgments under appeal, the effects envisaged by the Commission were part of 'the normal course of events' and 'economically rational'. [78] In other words, can it be concluded, on the basis of a line of reasoning that is essentially founded on a presumption, that the coordination between the carriers regarding the surcharges and the refusal to pay commission, as regards inbound freight services, was liable to have as an immediate, substantial and foreseeable effect the increase in the prices of transport services for consumers established in the EEA?

61. In that regard, whilst keeping in mind the necessary caution to be exercised when using presumptions as proof in competition law, [79] whilst also taking into account the fact that establishing the Commission's extraterritorial jurisdiction, in the present case, was merely a preliminary stage to the examination of the merits of its decision, it is my view that the General Court, having established that such a chain of events was, in the normal course of events, 'liable' to occur, at least prima facie, could conclude that the Commission had, at least, satisfied the initial burden of proof borne by it [80] and that it was thus for the appellants to adduce evidence to the contrary.

78 See point 52 of this Opinion.

79 See, inter alia, in legal literature, Fernández, C., 'Presumptions and Burden of Proof in EU Competition Law: The Intel Judgment', *Journal of European Competition Law & Practice*, Vol. 10, No 7, 2019; Kalintiri, A., 'Analytical shortcuts in EU competition enforcement: proxies, premises and presumptions', *Journal of Competition Law & Economics*, Vol. 16, No 3, 2020.

80 For example, the Court has held that it was established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, could be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods or services, that it could be

62. It is therefore necessary to examine whether the General Court erred in law when it took the view that the arguments raised and the evidence produced by the appellants to challenge the existence of qualified effects were incapable of calling into question the Commission's conclusion regarding, respectively, the immediacy, substantial nature and foreseeability of those effects. [81]

– *The immediacy of the effects*

63. According to the appellants, the effects of the carriers' conduct on competition in the EEA were not direct or immediate, since they were dependent on the independent actions of other actors in the value chain, namely the freight forwarders and shippers, which precludes any causal link between the carriers' conduct and its presumed effects. The Commission, in its analysis endorsed by the General Court, defined as 'qualified' effects which are merely indirect, that is to say, the possible knock-on effect of additional costs arising from the cartel at issue on the prices applied by the freight forwarders to the shippers and by the latter to their customers, without conducting any examination of the relevant markets, in particular downstream, and without even defining the market, which was fundamental to determine whether the members of the cartel were competitors. [82]

64. In the judgments under appeal, the General Court approved the very brief reasoning followed by the Commission in the decision at issue, taking the view, in essence, that the requirement of a 'direct causal' link between the conduct at issue and the effect under consideration cannot be confused with 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. [83] In the present case, the intervention of freight forwarders, in respect of

considered redundant, for the purpose of applying Article 101 TFEU, to prove that they had actual effects on the market. Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular of consumers (see, by analogy, judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 51 and the case-law cited)).

81 In that regard, it should be clarified, as a preliminary point, that several of the arguments raised by the appellants in their appeals concern points of fact which, in principle, fall outside the scope of the Court of Justice's review. It is settled case-law that the appraisal of the facts by the General Court does not constitute a question of law which is subject, as such, to review by the Court of Justice, save where the evidence produced before the General Court has been distorted, which is for the applicant to show and which must be obvious from the documents in the Court's file, without there being any need to carry out a new appraisal of the facts and the evidence (see, to that effect, judgment of 28 January 2021, *Qualcomm and Qualcomm Europe* v *Commission* (C-466/19 P, EU:C:2021:76, paragraphs 42 and 43 and the case-law cited)).

82 Moreover, the appellants claim that the General Court relied on the effects on the inbound routes in the third countries where the carriers were established and not within the internal market, whereas any effect produced by that conduct within the internal market is at least two stages downstream from the conduct observed in that third country.

83 See, inter alia, judgment in *Air Canada*, paragraph 274. I note, moreover, that, in the judgments under appeal, the General Court observed that the requirement of the immediacy of the effects produced by the conduct at issue relates to the causal link between that conduct and the effect

which it was foreseeable that, with complete independence, they would pass on to shippers the additional costs that they had had to pay had, indeed, been capable of contributing to the occurrence of the effect at issue, but was not in itself such as to break the causal chain which resulted from the cartel at issue 'in accordance with the normal functioning of the market'. [84]

65. In that regard, it seems to me that the appellants are simply challenging the speculative or superficial nature of those findings.

66. It is true that the Commission's analysis, endorsed by the General Court, is very simplistic and, for example, probably would not satisfy a standard of proof such as that required to demonstrate a restriction of competition by effect or, even less, that required in the context of an action for damages. However, in the light of the standard of proof defined in points 51 to 57 of this Opinion, it does not appear to me that the appellants succeed in demonstrating that the chain of events presumed by the Commission is not, at the very least, 'liable' to occur, [85] nor that the findings made by the General Court in that regard are vitiated by a distortion of the facts.

– *The substantial nature of the effects*

67. According to the appellants, the Commission had not demonstrated that the effects of the carriers' conduct on competition in the EEA were substantial, since it had not conducted any analysis of whether the freight services represented a significant proportion of the costs of shippers established in the EEA. [86]

68. In that regard, it is true that, in the decision at issue, the Commission did not quantify the impact of the presumed increased in the prices of the inbound airfreight services on the prices ultimately paid by the shippers established in the EEA or on the prices paid by their customers established in the EEA.

under consideration (the General Court refers to the Opinion of Advocate General Kokott in *Kone and Others*, C-557/12, EU:C:2014:45, points 33 and 34, concerning the assessment of the causal link in the context of the civil liability of the members of a cartel), whereas, in the judgment of 25 March 1999, *Gencor* v *Commission* (T-102/96, EU:T:1999:65, paragraphs 93 to 95), it had assessed the criterion of an immediate effect from a chronological standpoint, having regard to the period in which the effect is felt and not to the cause of that effect.

84 See, inter alia, judgment in *Air Canada*, paragraphs 275 and 276.

85 See footnote 80 to this Opinion.

86 In addition, the General Court failed to take account of the evidence from which it was allegedly apparent that the majority of the shippers were established outside the EEA and that the percentage of the appellants' sales to shippers established in the EEA on inbound routes was low (in one case, 0.04% of sales). Furthermore, in recital 1241 of the decision at issue, the Commission nevertheless reduced by 50% the basic amount of the fine, thereby acknowledging that some of the harm could have been caused outside the EEA.

69. In the judgments under appeal, the General Court nevertheless endorsed the Commission's conclusion by relying, in essence, on contextual elements which are not mentioned in recital 1045 of the decision at issue but which are apparent from the overall analysis of that decision. In the first place, it referred to the significant *duration* of the infringement, to which reference is made in recital 1146 of that decision; in the second place, it pointed to the *scope* of that infringement which, as is apparent from recital 889 of the decision, concerned measures of general application, such as the fuel surcharge and the security surcharge, which were not route-specific and which were intended to be applied on all routes on a worldwide basis, including routes to the EEA; in the third place, it relied on the *nature* of the infringement, pointing out that, as is apparent from recitals 1030 and 1208 of the same decision, the object of that infringement was to restrict competition and concerned a particularly serious restriction, namely the fixing of various elements of the price. [87] The General Court also pointed, for the sake of completeness, first, to the fact that the surcharges which formed the subject matter of the cartel at issue represented, during the infringement period, a *significant proportion of the total price* of freight services, as the Commission made clear in recital 1031 of the decision at issue, [88] and, second, to the *size of the undertakings* that participated in the impugned conduct, the combined market share of which on the worldwide market, according to recital 1209 of that decision, was 34% in 2005, including on global (inbound and outbound) EEA-third country routes. [89]

70. In that regard, the appellants simply criticise the lack of a precise calculation in the analysis carried out by the Commission and endorsed by the General Court. However, given the standard of proof defined in points 51 to 57 of this Opinion, I consider that the Commission was not required, in the assessment of its own jurisdiction, to carry out such a calculation. [90] The question of the calculation of the actual economic knock-on effects at the various levels of the chain potentially arises in the context of an analysis of the restriction of competition by effect, the determination of the fine or actions for damages.

87 See, inter alia, judgment in *Air Canada*, paragraphs 265 to 267.

88 See, inter alia, judgment in *Air Canada*, paragraphs 268 to 270. The General Court relies, in that regard, on a letter from the Hong Kong Association of Freight Forwarding & Logistics to the Chairman of the Cargo Sub-Committee (CSC) of the Board of Airline Representatives (BAR) in Hong Kong. At the hearing, the Commission's representatives observed that the costs associated with the surcharges fell with a range which represented approximately between 10% and 14.5% of the sale price.

89 See, inter alia, judgment in *Air Canada*, paragraph 271, in which the General Court mentions that the appellants generated a significant turnover on the inbound routes.

90 Furthermore, the Court of Justice pointed out that there was no need, in the context of the application of Article 101 TFEU, to show the actual effects on the market of certain collusive behaviour, such as cartels, leading to horizontal price-fixing (see case-law cited in footnote 800 to this Opinion).

– *The foreseeability of the effects*

71. According to the appellants, the effects estimated by the Commission and found to exist by the General Court are neither foreseeable nor probable, since the assumption that the increase in the prices of inbound freight services would be passed on by the freight forwarders to the shippers established in the internal market is improbable. [91] The Commission did not examine the effect of the impugned practices (limited to the surcharges) on the sale price of the freight services, on the total transport costs charged to the shippers by the freight forwarders or on the price charged by the shippers to consumers. The presumed effects of the impugned conduct remain hypothetical or of minimal significance, and the existence of a causal link, to which the General Court refers, is neither relevant nor reasoned. [92]

72. In the judgments under appeal, the General Court noted that effects the occurrence of which the members of the cartel at issue ought reasonably to be aware on the basis of practical experience satisfy the requirement of foreseeability, [93] and it relied once more on contextual elements which are mentioned not in recital 1045 of the decision at issue but in other sections of that decision, to conclude that that requirement was satisfied in the present case. After observing, with reference to recitals 846, 909, 1199 and 1208 of that decision, that experience shows that collusive conduct consisting in horizontal price-fixing leads inter alia to price increases, [94] the General Court analysed the foreseeability of the effects of the impugned conduct, first, on the prices applied by the carriers and, second, on the prices charged by the freight forwarders. As far as concerns, first, the prices applied by the carriers, the General Court took the view that it was foreseeable that the horizontal fixing of the fuel surcharge and the security surcharge would lead to an increase in the level of those surcharges, an increase

91 The appellants claim that the General Court based its view on a 'chain of foreseeability' consisting of three stages: first of all, it was foreseeable that the fixing of the surcharges would lead to an increase in the level of those surcharges and in the prices of freight services; next, it was foreseeable that the freight forwarders would pass on the additional costs of the freight services to the shippers; and, finally, it was foreseeable that the shippers would pass on those costs in the price of their goods sold within the EEA (see, inter alia, judgment in *Japan Airlines,* paragraphs 120 to 129).

92 According to the appellants, an assessment of the likelihood of there being repercussions from the conduct at issue requires a complex factual and economic analysis. In addition, the Commission failed to establish that an anticompetitive effect was 'more likely than not' (see footnote 76 to this Opinion), that is to say a likelihood greater than 50%, since the Commission reduced by 50% the basic amount of the fine because some of the harm caused by the conduct on the EEA-third country routes had probably been caused outside the EEA (recital 1241 of the decision at issue).

93 See, inter alia, judgment in *Air Canada*, paragraph 247. The General Court relied, in this regard, on the Opinion of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, point 42).

94 The General Court referred, inter alia, to the judgment of 11 September 2014, *CB* v *Commission* (C-67/13 P, EU:C:2014:2204, paragraph 51).

reinforced by the refusal to pay commission, and that increases the price of freight services. [95] With regard, second, to the knock-on effects of the price of inbound freight services on the prices charged by the freight forwarders, the General Court concluded that the price of the freight services constituted an input for freight forwarders, a variable cost the increase in which, in principle, has the effect of increasing the marginal cost in the light of which the freight forwarders determine their own prices, [96] and that it was reasonably foreseeable to the carriers that the freight forwarders would pass on such additional costs to the shippers. [97] In the General Court's view, those factors were sufficient to conclude that the effect of the impugned conduct was part of the 'normal course of events' and 'economically rational'. [98]

73. In that regard, it should be observed that, in paragraph 51 of the judgment in *Intel*, the Court of Justice explained that, in order for the condition relating to the requirement of the foreseeability of effects to be satisfied, it was sufficient to take account of the probable effects of conduct on competition. In addition, as Advocate General Kokott observed in her Opinion in *Kone and Others*, [99] any loss the incurrence of which the cartel members ought reasonably to take into consideration on the basis of practical experience is foreseeable (or ensues via an adequate causal link), unlike loss which results from an entirely extraordinary train of events and, therefore, ensues via an atypical causal chain. In that regard,

95 See, inter alia, judgment in *Air Canada*, paragraphs 250 to 252. The General Court relied, in this regard, on recitals 874, 879 and 899 of the decision at issue, in which the Commission explained that the purpose of the single and continuous infringement in question was to remove pricing uncertainty in the airfreight sector, and on recital 17 of that decision, in which the Commission explained that carriers add the surcharges to the rates negotiated with the freight forwarders (or, on rare occasions, directly with the shippers). At the same time, the General Court dismissed as unsubstantiated the argument alleging that, in the absence of an agreement on prices (on the part of the carriers' customers) and therefore in a situation in which there was competition in the downstream services, the increase in the prices applied by the carriers would be offset by a corresponding reduction in rates and other surcharges on the basis of a 'waterbed effect' (see, inter alia, judgment in *Air Canada*, paragraph 252). Some of the appellants also refer to an economic report which the Commission did not take into account because the argument relating to the waterbed effect referred to a restriction of competition by effect, whereas the Commission had applied the criterion of a restriction of competition by object (recital 1190 of the decision at issue). However, the General Court dismissed that report as irrelevant in its appraisal of the facts (see, inter alia, judgment in *Air France*, paragraphs 142 and 143).

96 See, inter alia, judgment in *Air Canada*, paragraphs 253 to 258. The General Court relied, in that regard, on recitals 14 and 70 of the decision at issue, in which the Commission had stated, in essence, that the customers of the airfreight services were primarily freight forwarders.

97 The General Court explained that the cost of the goods the transportation of which freight forwarders organise on behalf of shippers incorporated the price of the forwarding services and, in particular, the price of the freight services, relying on recitals 70 and 1031 of the decision at issue, in which the Commission had concluded, in essence, that the transport prices in question represented a proportion of the end selling price of the goods transported, which had an impact on their sale.

98 See, inter alia, judgment in *Air Canada*, paragraph 260.

99 C-557/12, EU:C:2014:45, point 42.

as the Court has held, practices leading to horizontal price-fixing by cartels are especially liable to affect trade. [100]

74. It appears to me that those principles apply in the present case, given, in particular, that it was extremely likely that the increases in the surcharges triggered by the cartel would contribute to the increase in the prices of the freight services provided by the freight forwarders and that the price of the freight services, which is an input for the freight forwarders, would have the effect of increasing the marginal cost in the light of which the freight forwarders define their own prices and, downstream, of increasing the costs of shippers and therefore the prices charged by them. Furthermore, the fact that part of the cartel at issue involved coordinating the freight forwarders' refusal to pay commission is indicative of their tendency to pass on the surcharges systematically. [101]

75. In conclusion, the appellants do not appear to me to have succeeded in overturning the presumption summarised in point 59 of this Opinion and in demonstrating that the impugned conduct was not liable to produce immediate, substantial and foreseeable effects in the internal market or that the Commission's findings in that regard are vitiated by a distortion of the facts.

(b) The use of the concept of a 'single and continuous infringement' taken as a whole

76. With regard to the third reason relied on by the Commission in recital 1046 of the decision at issue to demonstrate that the qualified effects test was also satisfied having regard to the effects of the single and continuous infringement taken as a whole, the appellants allege that the General Court erred in law because it approved the Commission's conclusions concerning, first of all, the relevance of the examination of the qualified effects of the coordination in relation to inbound freight services having regard to the single and continuous infringement as a whole (1); next, the demonstration of the effects of the single and continuous infringement taken as a whole (2); and, finally, the use of the atypical concept of a 'world-wide cartel' (3).

100 See footnote 80 to this Opinion.

101 See recitals 675 to 677 of the decision at issue in which the Commission observes that the freight forwarders were particularly concerned about being unable to receive commission for collecting the surcharges on behalf of the airlines.

(1) The relevance of the examination of the qualified effects of the coordination in relation to inbound freight services having regard to the single and continuous infringement as a whole

77. Several appellants [102] argue that, in the judgments under appeal, the General Court held that the Commission could base, in recital 1046 of the decision at issue, its extraterritorial jurisdiction on the account taken of the qualified effects of the single and continuous infringement as a whole and not each form of conduct taken individually, whereas, in order to be able to establish that jurisdiction, each element of a single and continuous infringement must be liable, taken in isolation, to produce such effects and to pursue the sole objective of restricting competition within the EEA (and therefore to be able to constitute an infringement of the provisions in question). [103] Furthermore, conduct adopted on markets outside the EEA cannot have the object of restricting competition within the EEA. In addition, nor does the use, in the same recital 1046 of the decision at issue, of the concept of a 'world-wide cartel' to describe the single and continuous infringement affect the legal characterisation of the conduct in the light of Article 101(1) TFEU and Article 53 of the EEA Agreement.

78. In the judgments under appeal, the General Court observed that, on the basis of case-law of the Court of Justice, there is nothing to prevent an assessment of whether the Commission has the necessary jurisdiction to apply, in each case, EU (or EEA) competition law in the light of the conduct of the undertakings in question, taken as a whole, having regard to the single and continuous infringement. [104] In the present case, it stated that, in recitals 869 and 1046 of the decision at issue, the Commission had characterised the conduct at issue, in the main, as a 'single and continuous infringement', including in so far as it concerned inbound freight services, and had examined the effects of that infringement taken as a whole, as a cartel implemented globally. [105] Having

102 More specifically, Air Canada (second part of the first ground), British Airways (third ground), Air France (second part of the first ground), Air France-KLM (second part of the second ground), LATAM Airlines Group and Lan Cargo (first part of the third ground), Singapore Airlines (fifth part of the first ground), Deutsche Lufthansa (second part of the sole ground), Japan Airlines (first part of the second ground), Cathay Pacific (second part of the first ground), Cargolux (third part of the first ground), KLM (fourth part of the first ground) and SAS Cargo Group (fifth part of the third ground).

103 As Advocate General Wahl observed in his Opinion in the *Intel* case (point 319), the concept of a 'single and continuous infringement' is merely a procedural rule aimed at alleviating the evidentiary burden of competition authorities and a principle of evidence used to categorise an infringement of Article 101(1) TFEU. Otherwise, according to the appellants, the Commission could use that concept to extend its jurisdiction to conduct adopted anywhere in the world with no connection to the EEA.

104 The General Court relied, in this regard, on the judgment in *Intel*, paragraph 50, and that of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission* (T-441/14, EU:T:2018:453, paragraphs 105 and 106).

105 See, inter alia, judgment in *Air Canada*, paragraphs 284 to 286. The General Court explained that the uniform application of the surcharges formed part of an overall strategy designed to

confirmed those findings by the analysis of the plea relating to the merits of the imputation to the appellants of the liability for the single and continuous infringement, the General Court concluded that it was foreseeable that, taken as a whole, the single and continuous infringement would produce immediate and substantial effects in the internal market, in view of the fact that, as the Commission observed in recitals 903, 1209 and 1146 of that decision respectively, the impugned conduct had the object of restricting competition, in particular within the European Union and the EEA, and brought together carriers with significant market shares, a significant part of which related to intra-EEA routes for a period of more than six years.

79. In that regard, it is necessary to examine whether, as the appellants argue, the concept of a 'single and continuous infringement' implicitly presupposes that each constituent element of the infringement, examined separately, constitutes an infringement and pursues the objective of distorting competition within the EEA or whether, as the General Court held, that concept allows consideration to be given to the anticompetitive objective of the single and continuous infringement taken as a whole.

80. In the judgment in *Sony*, the Court concluded – after recalling the characteristics of the concept of a 'single and continuous infringement' [106] and explaining that an undertaking which has participated in such an infringement may also be liable in respect of the conduct of other undertakings in the context of that infringement for the entire period of its participation in the infringement, without its direct participation in all the anticompetitive forms of conduct of which that infringement is composed being necessary [107] – that, while the concept

neutralise the risk that the freight forwarders could circumvent the effects of the cartel at issue by opting for indirect routes which would not be subject to coordinated surcharges to transport goods, given that, as was apparent from recital 72 of the decision at issue, there is not the same time sensitivity associated with freight transport as there is with passenger transport, so that freight could be routed with a higher number of stopovers and that, as a result, indirect routes were substitutable for direct routes. In so doing, the Commission avoided the risk of 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, as was apparent from paragraph 57 of the judgment in *Intel*. Furthermore, the General Court dismissed the argument that the Commission was required, in the present case, to define the relevant market (see, inter alia, judgment in *Air Canada*, paragraphs 287 and 288).

106 It is clear from well-established case-law of the Court of Justice that an infringement of Article 101 TFEU (and the same applies in relation to Article 53 of the EEA Agreement) may be the result not only of an isolated act, but also of a series of acts or of continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. Accordingly, if the different actions form part of an 'overall plan' because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole (see, to that effect, judgment in *Sony*, paragraph 62 and the case-law cited).

107 See, to that effect, judgment in *Sony*, paragraphs 63 and 64 and the case-law cited.

of a 'single and continuous infringement' presupposes a complex of practices that may also constitute, in themselves, an infringement of Article 101 TFEU (and the same applies in relation to Article 53 of the EEA Agreement), it cannot be deduced on that basis that each of those practices must, in itself and taken in isolation, necessarily be characterised as a separate infringement of those provisions. [108]

81. Although those principles were developed in the context of an argument alleging infringement of the rights of defence, [109] I see no reason to justify not applying them in the context of the assessment of the Commission's extraterritorial jurisdiction. [110]

82. In conclusion, the General Court does not appear to me to have erred in holding that the Commission could rightly base its extraterritorial jurisdiction having regard to the effects of the single and continuous infringement taken as a whole. It is therefore necessary to determine whether it was right to hold that the Commission had demonstrated the existence of the effects of that single and continuous infringement in the internal market.

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

83. Air Canada and SAS Cargo Group [111] submit that the Commission's application of the qualified effects test in respect of the single and continuous infringement, as endorsed by the General Court, is erroneous, because recital 1046 of the decision at issue does not include any analysis of those effects.

108 See, to that effect, judgment in *Sony*, paragraph 67. As the Court also clarified, precluding the Commission from applying the qualified effects test to the collusive conduct taken as a whole would risk leading 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 the European Union's jurisdiction (judgment in *Intel*, paragraph 57).

109 See judgment in *Sony*, paragraphs 66 to 72. In that regard, the Court held that, where the Commission intends to allege against the addressees of a statement of objections not only a single and continuous infringement, but also each of the forms of conduct comprising that infringement taken individually as separate infringements, observance of the rights of defence of those addressees requires the Commission to set out, in that statement, the necessary elements to enable them to understand that the Commission alleges against them both that single and continuous infringement and each of those separate infringements (paragraph 73 of that judgment).

110 The qualified effects doctrine can apply only in relation to infringements (here: infringements of competition law) as provided for in EU law.

111 In the context, respectively, of the second part of the first ground and the fifth part of the third ground.

84. By that recital, the Commission observed, in essence, that the cartel had been implemented globally and that the cartel arrangements concerning inbound routes formed an integral part of the single and continuous infringement. [112]

85. In that regard, it is true that that recital does not contain any specific analysis of the effects of the single and continuous infringement, taken as a whole, on the internal market, in the light of the conduct relating to inbound freight services. However, in order to approve the Commission's conclusion, the General Court again referred to other recitals of that decision, from which it is apparent that the Commission took the view that the behaviour in question, first of all, constituted a restriction of competition by object (recital 903 of the decision), next, concerned carriers with significant market shares (recital 1209 of the same decision) and, finally, related, to a significant extent, to intra-EEA routes and had been implemented for a period of more than six years (recital 1146 of the decision at issue). [113]

86. Once again, it must be observed that the Commission's analysis in recital 1046 of the decision at issue would not satisfy, for example, the standard of proof required to demonstrate the existence of a restriction of competition by effect. However, in the light of the standard of proof defined in points 51 to 57 of this Opinion and in view of the findings contained in the decision at issue as a whole, I consider that the General Court did not err in law in taking the view that the Commission had provided – at the very least initial – proof of the qualified effects of the single and continuous infringement as a whole.

87. For their part, the appellants simply contest the lack of an analysis of the actual effects of the impugned conduct, without demonstrating that the Commission's findings are vitiated by a distortion of the facts. In addition, as regards the argument that, in order for Article 101 TFEU and Article 53 of the EEA Agreement to be applied, the impugned conduct must have the *specific object* of distorting competition in the EEA, it is sufficient to observe that the aim of the cartel was to achieve a uniform application of the surcharges globally, so as to prevent those surcharges from being circumvented by the use of other (inbound) routes, which demonstrates the intention to restrict competition in the EEA too. [114] Furthermore, contrary to what the appellants claim, that interpretation does not entail on its own, in my view, the risk of the Commission being allowed to use the concept of a 'single and continuous infringement' to

112 See point 14 of this Opinion.

113 See, inter alia, judgment in *Air Canada*, paragraph 290.

114 As is apparent from the decision at issue and as was subsequently confirmed by the General Court in the judgments under appeal, the appellants participated in a global cartel, the characteristics of which were the same across the world and which were not route-specific. The appellants have not succeeded in showing that the General Court erred in law or distorted evidence produced by the Commission when it held, in particular, that the contacts between carriers, including those conducted at local level, were limited to inbound freight services and did not form part of the overall strategy of the cartel at issue.

extend its jurisdiction to conduct adopted anywhere in the world, with no connection to the EEA, and thus of acting as the 'competition arbiter' on the global stage. The Commission is, however, required to demonstrate that that conduct, adopted in pursuit of a common objective, is liable to have anticompetitive effects within the EEA, on the basis both of the qualified effects test (which relates to jurisdiction) and the (substantive) criterion of a restriction of competition, by object or effect, within the internal market. [115]

88. Therefore, the General Court did not err in law, in my view, when it found that the coordination in relation to inbound freight services was liable not only to produce qualified effects as such, but also to do so in the context of the single and continuous infringement and of the anticompetitive object of that infringement.

(3) The use of the concept of a 'world-wide cartel'

89. LATAM Airlines Group and Lan Cargo criticise the General Court for having failed to address the plea that the Commission did not have jurisdiction to find there to be a 'world-wide cartel'. [116] The General Court found that that plea was based on the incorrect premiss that the Commission found, in the operative part of the decision at issue, an *infringement* of the competition rules relating to routes between airports situated outside the EEA, whereas the appellants argued that the Commission did not have jurisdiction to make the *finding* relating to the worldwide nature of the cartel, a finding which, whether it is a finding of fact or a legal finding '*sui generis*', has harmful effects, being in particular binding on the national courts called upon to hear and determine civil actions for damages concerning that cartel.

90. In that regard, I note that the Commission stated, in Article 1 of the decision at issue, that the appellants had committed the 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 coordinating their pricing behaviour in the provision of airfreight services on a global basis'. In the reasons for that decision, the Commission characterised that conduct as a 'world-wide cartel'. [117]

91. As the General Court finds in paragraphs 151 and 358 of the judgment in *LATAM Airlines Group and Lan Cargo*, the reference, in Article 1 of the decision,

115 As the General Court has explained, the fact that, in a world market, other parts of the world are affected by the impugned conduct (in the case in question: a concentration) cannot prevent the European Union from exercising its control over that conduct which substantially affects competition within the internal market (see, by analogy, judgment of 25 March 1999, *Gencor* v *Commission* (T-102/96, EU:T:1999:65, paragraph 98)). The Commission's extraterritorial jurisdiction is limited to the consequences of that conduct on the internal market, with subsequent knock-on effects of that conduct in other territories being disregarded.

116 This is their third ground of the appeal, which relates to the fourth plea raised at first instance.

117 See, inter alia, recitals 889 and 1046 of the decision at issue.

to the existence of coordination 'worldwide' (and the same applies to the references to the 'world-wide cartel' in the reasons for the same decision) is merely a finding of fact, from which the Commission concluded that there was a single and continuous infringement of the provisions cited above. [118] Accordingly, the Commission does not appear to me to have exceeded the limits of its jurisdiction. It simply defined the (global) context of the cartel and drew conclusions by making findings which fall unquestionably within its jurisdiction.

92. In that regard, the fact that the General Court took the view, in paragraph 362 of the judgment in *LATAM Airlines Group and Lan Cargo*, that the appellants' argument was based on the incorrect premiss that the Commission found an infringement of rules on competition which encompassed routes between airports located outside the EEA merely indicates that, in the General Court's view, only a *legal finding of an infringement* of competition rules on a global basis – which was not the case here (as it concerned merely a *finding of fact as to a coordination* of the appellants' conduct globally) – could affect the jurisdiction of the Commission. [119]

93. Furthermore, nor can the possibility of the Commission making findings of fact be precluded on the basis of any binding or persuasive effect of those findings on decisions of national courts and authorities, including those made pursuant to Article 16 of Regulation No 1/2003, [120] in view of the fact that those findings do not entail an application of the rules on competition beyond the Commission's powers. [121] It will be for those authorities or courts to assess the probative value to be given to the Commission's findings of fact.

118 However, the statement made by the Commission in recital 1210 of the decision at issue, namely that the scope of the *infringement* (and not of the cartel) was worldwide, is incorrect. It is nonetheless clear, given the context in which that decision was adopted, that this is an error which has no bearing on the Commission's conclusions concerning the single and continuous infringement forming the subject matter of the decision, as the General Court observed, inter alia, in paragraph 153 of the judgment in *LATAM Airlines Group and Lan Cargo*.

119 This fact distinguishes the present cases from the case which formed the subject of the judgment in *Sony*, in which the Court of Justice found that the General Court, having started from the premiss that each of the forms of conduct comprising the single and continuous infringement alleged in the statement of objections had necessarily to be characterised as a separate infringement, had confused the concept of 'conduct' and that of 'infringement', and that, therefore, the appellants could not understand, in the absence of any clear indication in the statement of objections, that the Commission intended to allege against them not only the single and continuous infringement alleged in that statement, but also several separate infringements consisting of the different bilateral contacts referred to in that statement (see paragraphs 77 and 78 of the judgment in *Sony*).

120 Article 16 of that regulation establishes inter alia that, when national courts and competition authorities of the Member States rule on agreements, decisions or practices under Article 101 or Article 102 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.

121 In that regard, I would point out, furthermore, that the Opinion of Advocate General Szpunar in *Glawischnig-Piesczek* (C-18/18, EU:C:2019:458, point 100), cited by the appellants, is not

94. In any event, the issue is not whether the Commission could use the term 'world-wide cartel' but rather to ascertain whether the use of that term entails an error of law or of assessment or whether it is the result of a distortion of the facts, which is not demonstrated here.

3. Certain procedural defects in the judgments under appeal

95. According to certain appellants, in examining the Commission's assessment of its extraterritorial jurisdiction, the General Court, first, substituted its assessment for the Commission's inadequate assessment, thereby undertaking a substitution of grounds (a), next, assessed the legality of the decision at issue on the basis of factors occurring after that decision in breach of the appellants' rights of defence (b) and, finally, reversed the burden of proof borne by the Commission and placed it on the appellants (c).

(a) The substitution of grounds

96. Several appellants [122] claim that the General Court substituted its own reasoning for that of the Commission as regards the application of the qualified effects test. Whereas the Commission devoted only recital 1045 of the decision at issue to the analysis of the qualified effects of the coordination in relation to inbound freight services, referring only in general terms to the 'immediate, substantial and foreseeable effects' of the coordination in relation to inbound freight services, the General Court devoted many paragraphs of the judgments under appeal to the application of that test, taking account, in particular, of the relevance of the foreseeability, substantial nature and immediacy of the effects. In addition, the General Court also interpreted recital 1046 of the decision at issue as meaning that that recital is likewise based on the qualified effects test. [123] Moreover, the General Court addressed shortcomings in the decision at issue by relying on new facts, inter alia as regards the effect on competition between the carriers and on the shippers and the goods, as well as on evidence taken from recitals not contained in the section of the decision at issue relating to the qualified

relevant here. In the point on which they rely, the Advocate General observes, in essence, that, when adjudicating on the removal worldwide of information disseminated via the internet, the court of a Member State must adopt an approach of self-limitation, in the interest of international comity, thus limiting the extraterritorial effects of its injunctions concerning harm to private life and personality rights. Leaving aside the context, which is admittedly very different, it is clear that, in that passage, the Advocate General is referring to judicial decisions (injunctions) and not to findings of fact.

122 More specifically, Air Canada (second part of the first ground), Air France (second part of the first ground), Air France-KLM (second part of the second ground), British Airways (first part of the first ground), Singapore Airlines (seventh part of the first ground), Deutsche Lufthansa (third part of the sole ground), Japan Airlines (second part of the second ground), Cathay Pacific (fourth part of the first ground), KLM (third part of the first ground), Cargolux (fifth part of the first ground) and SAS Cargo Group (second part of the third ground).

123 See point 14 of this Opinion.

effects or not appearing in that decision. The General Court thus substituted its assessment for that of the Commission.

97. It is true, in that regard, as I have observed in points 58 and 85 of this Opinion, that the Commission's examination of its own extraterritorial jurisdiction set out in recitals 1045 and 1046 of the decision at issue is particularly brief, whereas the General Court devoted several paragraphs to the analysis of that test in the judgments under appeal, making a significant effort to explain and set out in detail, in response to arguments raised by the parties, the merits of the Commission's relatively simplistic reasoning. However, before being able to conclude that there has been a substitution of grounds, it has to be determined, first of all, to what extent the Commission was required to state reasons for its own extraterritorial jurisdiction in the decision at issue, next, whether the reasoning for that decision vis-à-vis extraterritorial jurisdiction may be regarded as adequate and, finally, whether the length of the judgments under appeal in relation to that question can be justified by the need for the General Court to respond to the appellants' arguments.

98. First, it seems to me likely that, as the Commission has observed in the context of these cases, Section 5.3.8 of the decision at issue, which concerns the applicability of Article 101 TFEU and Article 53 of the EEA Agreement to inbound routes (and therefore the Commission's extraterritorial jurisdiction), was included in response to arguments raised by the parties challenging that institution's jurisdiction in relation to those routes. There is no section of that decision concerning the Commission's jurisdiction in relation to intra-EEA routes and outbound routes, which was not challenged. Furthermore, I am not of the view that, when it adopts a decision, the Commission is in principle required systematically to state reasons for its own jurisdiction, regardless of the arguments raised by the parties in the course of the administrative procedure.

99. Next, I note, first, that, in the judgments under appeal, the General Court endorsed the finding by the Commission set out in recital 1045 of the decision at issue consisting, as I have stated in point 59 of this Opinion, in a presumption, also relying on contextual elements which, it is true, are not mentioned in that recital, but which are nevertheless apparent from the analysis carried out by the Commission in other passages of that decision. Second, it appears to me that, by recital 1046 of the decision at issue, the Commission simply linked its extraterritorial jurisdiction to its general jurisdiction to find and penalise the single and continuous infringement in question. In that regard, as I have observed in points 83 to 87 of this Opinion, the General Court simply approved that analysis by relying on subsequent recitals in that decision.

100. In my view, since the decision at issue, considered as a whole, contains information demonstrating that the conduct relating to inbound freight services was liable to have qualified effects on the internal market, in accordance with the standard of proof defined in points 51 to 57 of this Opinion, that finding makes it possible in itself to conclude that the reasons for that decision are sufficient to

support the Commission's conclusion. It is apparent from points 58 to 75 of this Opinion that the General Court did not err in law when it took the view that the Commission's examination of the existence of qualified effects was sufficient to substantiate its conclusion in that respect.

101. Lastly, in those circumstances, the imbalance between the Commission's very brief explanation in the decision at issue and the lengthy developments devoted to that same matter by the General Court in the judgments under appeal could well be explained by the General Court's need to respond to the arguments raised by the appellants. [124]

(b) Infringement of the rights of the defence

102. Air Canada, Cargolux and SAS Cargo Group allege that the General Court assessed the legality of the decision at issue on the basis of elements occurring subsequent to the statement of objections [125] or to that decision. [126] The General Court based the Commission's jurisdiction on the qualified effects test, which did not appear in the statement of objections or in the decision at issue, and thus infringed their rights of defence. [127]

103. In that regard, Regulation No 1/2003 provides that the Commission is to send to an undertaking on which it envisages imposing a penalty for an

124 See, to that effect, judgment of 2 April 2009, *Bouygues and Bouygues Télécom* v *Commission* (C-431/07 P, EU:C:2009:223, paragraph 68). In their actions at first instance, the appellants put forward very detailed pleas concerning the Commission's lack of extraterritorial jurisdiction and alleging, inter alia, an error in the application of the implementation and qualified effects tests, in respect either of the coordination in relation to the inbound freight services taken in isolation (and the relevance as well as the foreseeability, substantial nature and immediacy of those effects) or of the single and continuous infringement taken as a whole. See, in that regard, the second part of the fourth plea of the action forming the subject of the judgment in *Air Canada*; the second part of the first plea of the action forming the subject of the judgment in *Singapore Airlines*; the fourth plea of the action forming the subject of the judgment in *Deutsche Lufthansa*; the second and third parts of the sixth plea of the action forming the subject of the judgment in *Cargolux Airlines*; the second and third parts of the fourth plea of the action forming the subject of the judgment in *British Airways*; the second and third parts of the third plea of the action forming the subject of the judgment in *Air France*; the second and third parts of the third plea of the action forming the subject of the judgment in *Air France-KLM*; the second and third parts of the third plea of the action forming the subject of the judgment in *KLM*; the second and third parts of the sixth plea of the action forming the subject of the judgment in *Cathay Pacific Airways*; the first part of the second plea of the action forming the subject of the judgment in *SAS Cargo Group*; and the fifth plea of the action forming the subject of the judgment in *Japan Airlines*.

125 More specifically, SAS Cargo Group (first part of the second ground).

126 More specifically, Air Canada (second part of the first ground) and Cargolux (sixth part of the first ground).

127 The appellants also raise an argument that the General Court, in the judgments under appeal, added a new line of reasoning, an argument which, in my view, overlaps with that alleging a substitution of grounds examined in points 96 to 101 of this Opinion.

infringement of the competition rules a statement of objections which contains the essential elements used against that undertaking, such as the facts alleged, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it. [128]

104. While it is permissible for the Commission to qualify, in its final decision, a legal characterisation of the facts that it found, provisionally, in the statement of objections, taking account of the information that emerges during the administrative procedure, either withdrawing objections which turned out to be unfounded, or structuring and supplementing in fact and in law its arguments in support of the objections that it upholds, that means that the Commission must, in the statement of objections, set out each legal characterisation of the facts that it envisages upholding in its final decision. [129]

105. Therefore, the rights of defence of the undertaking concerned are infringed as a result of a discrepancy between the statement of objections and the final decision only where an objection that is upheld in the latter had not been set out in the statement of objections or if it had not been set out in a manner sufficient to enable the addressees of that statement effectively to make their arguments in the context of the procedure brought against them. [130]

106. In that regard, I consider that, since the statement of objections stated that the single and continuous infringement contested by the Commission covered routes with third countries, the appellants were able effectively to make their arguments in that respect.

107. As regards the decision at issue, Air Canada and Cargolux argue that the in-depth and detailed reasoning and interpretation by the General Court concerning the application of the qualified effects test were not part of that decision. [131] However, as is apparent from the foregoing analysis, it must be observed that the decision at issue does refer explicitly, in particular in recital 1045 thereof, to the immediate, substantial and foreseeable effects of the impugned conduct in the internal market, which gave those appellants the opportunity to raise considerably detailed pleas or complaints before the General Court. [132]

128 See judgment in *Sony*, paragraphs 69 and 70 and the case-law cited. Such a statement of objections constitutes the procedural safeguard applying the fundamental principle of EU law of the rights of the defence in all proceedings capable of leading to the imposition of a penalty.

129 See, to that effect, judgment in *Sony*, paragraph 71 and the case-law cited.

130 See, to that effect, judgment in *Sony*, paragraph 72 and the case-law cited.

131 This argument overlaps, in my view, to a large extent with that alleging a substitution of grounds, examined in points 96 to 101 of this Opinion.

132 Respectively, the fourth ground, alleging errors in the application of the qualified effects test, and the second part of the second ground, alleging that the impugned forms of conduct in the

(c) The reversal of the burden of proof

108. Some of the appellants [133] allege that the General Court rejected the plea alleging that the infringement did not have qualified effects because they had not refuted the existence of those effects, which the Commission had however failed to establish. [134] Thus, the General Court reversed the burden of proof borne by the Commission and placed it on the appellants. [135]

109. In that regard, I note that, according to settled case-law of the Court of Justice, although the legal burden of proof is borne by the Commission where it alleges an infringement of the competition rules, the factual evidence on which it relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged. [136]

110. In my view, the argument in question is conditional upon that concerning the demonstration of the existence of qualified effects, on the grounds that, if the General Court was right to find in the judgments under appeal that the Commission's reasoning in the decision at issue regarding the qualified effects of the impugned conduct on the internal market was correct, [137] it is reasonable to conclude that the Commission had satisfied its (initial) burden of proof and that it was for the parties to adduce evidence to call into question the Commission's assessments, thereby demonstrating that the decision at issue was vitiated by errors in law in that respect.

decision are new or their substance has been altered as compared with the statement of objections.

133 More specifically, Air Canada (second part of the first ground), Air France (second part of the first ground), Air France-KLM (second part of the second ground), Japan Airlines (second part of the second ground), Cargolux (fourth part of the first ground) and SAS Cargo Group (third part of the third ground).

134 The appellants claim that this applies in particular to the General Court's findings regarding the foreseeability of the effects and their immediacy**.**

135 The appellants argue that this is also demonstrated by the fact that the General Court used imprecise terms such as 'provided that', 'liable to' and 'which may have resulted'.

136 See, inter alia, to that effect, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 78 and 79). With regard to cartels in particular, in most cases, the existence of an anticompetitive practice must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. In those circumstances, it is sufficient that the body of evidence upon which the Commission relies, assessed altogether, satisfies that requirement (see, inter alia, to that effect, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 35 to 37 and the case-law cited)).

137 In view of the standard of proof defined in points 51 to 57 of this Opinion and in accordance with my assessment set out in points 58 to 75 of this Opinion.

111. Accordingly, I am of the view that, by rejecting the arguments raised by the parties in that regard, the General Court did not reverse the burden of proof, rather it simply found that the parties were unable to adduce evidence to the contrary.

112. In conclusion, I take the view that the General Court did not err in law when it established that the Commission had jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement in relation to inbound freight services.

B. The grounds relating to the merits of the decision at issue

113. Some of the appellants raise grounds concerning. respectively: the participation in the single and continuous infringement (1), the annulment only in part of the decision at issue with regard to LATAM Airlines Group and Lan Cargo (2), and the limitation period in respect of the Commission's power to impose penalties in relation to Air Canada and Singapore Airlines (3).

1. The participation in the single and continuous infringement

114. By the grounds analysed below, some of the appellants contest, from various perspectives, their participation in the single and continuous infringement penalised by the Commission. The matters considered concern Air Canada's liability for routes which it had never operated or which it could not legally have operated, namely the intra-EEA and EU-Switzerland routes ('the non-relevant routes') (a), the breach of the principle of equal treatment in relation to Cargolux (b), the liability for the security surcharge again in relation to Cargolux (c) and errors in the assessment of the evidence as regards Cathy Pacific Airways (d).

(a) Air Canada's liability for non-relevant routes

115. By its second ground, Air Canada claims that the General Court erred in law by finding it liable in respect of non-relevant routes.

116. In the decision at issue, the Commission rejected the arguments raised by some of the parties concerning the relevance of the contacts relating to non-relevant routes, relying, in essence, on the concept of a 'single and continuous infringement'. More specifically, the Commission concluded, first, that 'all the contacts were concerned with surcharges …, those contacts were held in parallel … and involved largely the same carriers' (recital 888), second, that 'surcharges [were] measures of general application that [were] not route specific' (recital 889) and, third, that 'contacts concerning routes that carriers never operated or which they could not legally have operated [were] relevant to establishing the existence of the single and continuous infringement as there were

no insurmountable barriers to the provision by the parties of airfreight services on those routes' (recital 890). [138]

117. In the judgment in *Air Canada*, the General Court rejected the appellant's argument by which it alleged that it had demonstrated that it faced 'insurmountable barriers' which prevented it from providing airfreight services on the non-relevant routes. [139]

118. Taking the view that the General Court, relying on an erroneous premiss, rejected that argument because the status as a potential competitor was not a condition for imputing to it liability in respect of those routes, the appellant raises four complaints.

119. First, in paragraphs 376 to 379 of the judgment in *Air Canada*, the appellant claims that the General Court, by focusing its response solely on the question of the status as a potential competitor, substituted its own reasoning. In that regard, I note that, in the paragraphs in question, the General Court merely observed that the status as a potential competitor to which the Commission referred in recital 890 of the decision at issue was not a decisive factor in the light of the other information examined in that decision and, in particular, the common anticompetitive objective and the appellant's participation in the concertation in relation to non-relevant routes as well as its awareness of activities connected with those routes in which the appellant had not directly participated. Thus, it does not appear to me that the General Court substituted its own assessment for that of the Commission.

120. Second, the appellant argues that the General Court infringed its rights of defence because the General Court relied, in paragraphs 364 to 377 of the judgment in *Air Canada*, on case-law and a line of argument which did not appear

138 In the latter regard, the Commission observed, by way of example, that 'each carrier could have overcome any legal or technical barriers to the provision of [those services] through [inter alia] arrangements with other carriers'. For instance, referring to other recitals of the decision at issue, the Commission gave the examples of 'interlining', block spacing and capacity sharing, and stated that 'the fact that the carriers coordinated their pricing behaviour in relation to the [fuel surcharge], the [security surcharge] and [the refusal to pay commission] on surcharges on all routes throughout the world [was] a strong indication that there were no insurmountable barriers to the provision of airfreight services on any route'.

139 The General Court explained, first of all, that the Commission could hold the appellant liable for the conduct at issue on the non-relevant routes, provided that it is demonstrated that the appellant intended to contribute by its own conduct to common aims pursued by all the incriminated carriers and that it was aware of the offending conduct planned or put into effect by them in pursuit of the same objectives and in which it did not participate directly, or that it could reasonably have foreseen that conduct and was prepared to take the risk (paragraph 377); next, it ruled out the Commission having imputed to the appellant liability for the single and continuous infringement on the basis of its status as a potential competitor (paragraphs 378 and 379); and, finally, it concluded, in essence, that, on the basis of the numerous contacts maintained with competitors, the appellant had either participated in the concentration in relation to the routes in question or was aware of the activities connected with that concentration (paragraphs 380 to 385).

in the decision at issue. In that regard, I note that, in those passages, the General Court simply set out the applicable principles in matters of restriction of competition by object in the context of a single and continuous infringement and did not infringe the appellants' rights of defence. [140]

121. Third, the appellant submits that the General Court failed to satisfy the obligation to state reasons by failing to explain the relevance of the case-law cited in arriving at the conclusion drawn in paragraph 377 of the judgment in *Air Canada*. In that regard, it is sufficient to state that, in the passage of that judgment, the General Court merely summarised, on the basis of the same case-law cited in paragraphs 364 to 376 of that judgment, the conditions under which the Commission could hold the appellant liable for a single and continuous infringement in relation to the non-relevant routes. However, that summary does not constitute the statement of reasons for its assessment relating to the appellant's liability, that statement being subsequently made, namely in paragraphs 378 to 385 of that judgment.

122. Fourth, the appellant alleges that the General Court erred in law in taking the view that that case-law made it possible to substantiate the conclusion that the existence of an – at the very least potential – competitive relationship between the carriers, to which reference is explicitly made in recital 890 of the decision at issue, was not a condition for imputing to the appellant liability for the single and continuous infringement at issue. However, it appears to me that, by that complaint, the appellant contests, without calling into question the first two reasons in which the Commission took account of the contacts relating to the non-relevant routes (recitals 888 and 889 of the decision at issue), the General Court's assessment regarding the third reason (recital 890 of that decision), arguing that, contrary to what the Commission had found, there were 'insurmountable barriers' preventing it from providing services on those routes (and therefore from being characterised as a 'potential competitor'). In that regard, the positions of the parties differ as to whether the three reasons on which the Commission relied, in recitals 888 to 890 of the decision at issue, are cumulative, as Air Canada submits, or whether, conversely, they are alternative, as the Commission asserts in its written pleadings.

123. In my view, the Commission simply listed, in recitals 888 to 890 of the decision at issue, the different factors on the basis of which it infers, in the present case, the liability of the parties which had relied on the argument at issue. Furthermore, it follows from case-law of the Court of Justice that, as the General Court stated in summary in paragraph 377 of the judgment in *Air Canada*, the imputation of liability to an undertaking in the context of a single and continuous infringement is dependent primarily on two factors, namely, first, the fact that that undertaking intended, through its own conduct, to contribute to the common objectives pursued by all of the participants and, second, that it had been aware of

140 Furthermore, the appellant in no way explains to what extent those references to case-law could have undermined its rights of defence.

the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives, or that it could reasonably have foreseen that conduct and was prepared to take the risk. [141] In that connection, as the General Court observed in paragraph 379 of the judgment in *Air Canada*, the status of a (potential) competitor is not a decisive factor for the purpose of imputing liability.

124. Accordingly, while it is true that the argument based on the lack of 'insurmountable barriers' to the provision of airfreight services on the non-relevant routes was part of the information on the basis of which the Commission held the appellant liable for the conduct adopted on those routes, that factor was not decisive in that regard. The General Court does not therefore appear to me to have erred in law when it endorsed, in paragraphs 380 to 385 of the judgment in *Air Canada*, the Commission's conclusion finding the appellant liable on the ground that, first, it had participated in the concertation in relation to the non-relevant routes and that, second, it was aware of the anticompetitive activities connected with those routes in which it had not directly participated.

(b) The breach of the principle of equal treatment in relation to Cargolux

125. By the second part of its fourth ground, Cargolux claims that the General Court breached the principle of equal treatment [142] because, first, it ruled out the involvement of British Airways in the element of the infringement relating to the refusal to pay commission and reduced the amount of the fine in the latter's regard but not that of Cargolux, despite the fact that there was similar evidence and, second, the Commission reduced the fine imposed on SAS Cargo Group in view of its limited participation in the element of the infringement relating to its refusal to pay commission but did not reduce Cargolux's fine, in spite of the similar duration of the conduct at issue.

126. With regard to the alleged breach of the principle of equal treatment in respect of Cargolux in comparison with British Airways, first of all, it is sufficient to find that, according to settled case-law of the Court of Justice, a decision finding that a cartel exists is a bundle of decisions addressed to its individual addressees, the validity of one of which does not affect that of the others. [143]

141 See, inter alia, judgment of 13 July 2023, *Nichicon Corporation* v *Commission* (C-757/21 P, EU:C:2023:575, paragraph 124 and the case-law cited).

142 It must be recalled that the principle of equal treatment is a general principle of EU law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights of the European Union. According to settled case-law of the Court of Justice, 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, inter alia, judgment of 24 September 2020, *Prysmian and Prysmian Cavi e Sistemi* v *Commission* (C-601/18 P, EU:C:2020:751, paragraph 101 and the case-law cited)).

143 For example, in the judgment of 14 September 1999, *Commission* v *AssiDomän Kraft Products and Others* (C-310/97 P, EU:C:1999:407, paragraphs 62 and 63), the Court held that the principle of legal certainty precludes, where a number of similar individual decisions imposing fines have been adopted pursuant to a common procedure and only some addressees have taken

Furthermore, it is also settled case-law that the principle of equal treatment must be reconciled with the principle of legality, according to which a person may not rely, to his or her benefit, on an unlawful act committed in favour of a third party. [144] Next, as the Commission argues, it is not the volume of evidence taken into consideration to demonstrate participation which matters, but rather whether the body of evidence upon which that institution relies, viewed as a whole, is sufficiently precise and consistent to support the firm conviction that the undertaking participated in the single and continuous infringement. [145] Finally, the evidence in the present case concerns the participation of the different carriers in the single and continuous infringement. That evidence must therefore be examined by the Commission having regard to the specific situation of each carrier and cannot be interpreted unequivocally regardless of its context. [146] That argument must therefore be rejected.

127. With regard to the alleged breach of the principle of equal treatment in respect of Cargolux in comparison with SAS Cargo Group, it is sufficient to observe that, while the General Court is bound, when exercising its unlimited jurisdiction, inter alia, by the obligation to state reasons and the principle of equal treatment, [147] in the present case, the General Court set out to the requisite legal standard the evidence used by it to determine the fine to be imposed on Cargolux. [148] As the proceedings brought before the General Court, in the present case, related to the decision at issue only in so far as it concerns Cargolux, that court cannot be regarded as being obliged to take into account the situation of other undertakings forming the subject of that decision, especially because, as is

legal action against the decisions concerning them and obtained their annulment, any necessity for the institution which adopted the decisions to re-examine, at the request of other addressees, in the light of the grounds of the annulling judgment, the legality of the unchallenged decisions and to determine, on the basis of that examination, whether the fines paid must be refunded.

144 See judgment of 16 June 2016, *Evonik Degussa and AlzChem* v *Commission* (C-155/14 P, EU:C:2016:446, paragraph 58 and the case-law cited).

145 See, to that effect, judgment in *Sony*, paragraph 101. Otherwise there would be a risk of the General Court treating different situations similarly, which constitutes a breach of the principle of equal treatment (see, to that effect, judgment of 19 May 2010, *Chalkor* v *Commission* (T-21/05, EU:T:2010:205, paragraph 104)).

146 Furthermore, according to settled case-law of the Court of Justice, the General Court is not obliged to justify the solution arrived at in one case in the light of that found in another brought before it, even if it concerns the same decision (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission* (C-444/11 P, EU:C:2013:464, paragraph 66 and the case-law cited)). In addition, the appellant contests the General Court's assessment of the evidence, without demonstrating that the latter had distorted the facts.

147 See, to that effect, judgment of 18 March 2021, *Pometon* v *Commission* (C-440/19 P, EU:C:2021:214, paragraph 138 and the case-law cited). The Court explains that, when the amount of the fine imposed on undertakings is determined, the exercise of unlimited jurisdiction cannot result in discrimination between those undertakings which participated in an infringement of the competition rules.

148 Judgment in *Cargolux Airlines*, paragraphs 631 to 647.

apparent from the judgment in *Cargolux Airlines*, the appellant did not raise the argument based on unequal treatment before the General Court.

(c) The liability of Cargolux in relation to the security surcharge

128. By the third part of its fourth ground, Cargolux argues that the General Court was wrong to hold that the Commission was justified in taking the view that Cargolux had continued to participate in the element of the single and continuous infringement relating to the security surcharge over the periods during which it was undisputed that there was no proof of the existence of contacts involving it ('the temporal gaps').

129. In the judgment in *Cargolux Airlines*, the General Court in fact acknowledged that the decision at issue revealed a 'gap' in the evidence relied on to establish the participation in question (paragraph 467). [149] That said, the General Court concluded, relying on the circumstances of that case (paragraphs 473 to 476), that the Commission was entitled to observe that the appellant's participation in the element of the single and continuous infringement relating to the security surcharge had continued during those periods (paragraph 477). The relevance of all those circumstances is contested by the appellant in support of arguments which, however, I find unconvincing.

130. As a preliminary point, I observe that, according to settled case-law of the Court of Justice, it should be recalled that the fact that evidence of the existence of an agreement or, at least, of its implementation by an undertaking has not been produced in relation to certain specific periods does not preclude the infringement from being regarded as established during a longer overall period than those periods, provided that such a finding is supported by objective and consistent indicia. In the context of an infringement extending over a number of years, the fact that the agreement is shown to have applied during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the agreement, provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement. [150]

131. Turning to the arguments relied on by the appellant, first, it refutes the General Court's finding, made in paragraph 473 of the judgment in *Cargolux Airlines*, that the fuel surcharge (in respect of which the appellant's participation had continued throughout the relevant period) and the security surcharge fell within the framework of one and the same infringement in pursuit of a single

149 The participation concerned was from 26 November 2002 (recital 618 of the decision at issue) to 14 January 2004 (recital 660 of that decision), as well as from 28 November 2004 (recital 640 of the decision) until the end of the single and continuous infringement, that is, 14 February 2006.

150 See, to that effect, judgment of 18 March 2021, *Pometon* v *Commission* (C-440/19 P, EU:C:2021:214, paragraph 112 and the case-law cited).

objective, reproducing the arguments raised in the context of the second part of the third ground of appeal, which are not examined in the context of this targeted Opinion. [151]

132. Second, the appellant contests the General Court's finding in paragraph 474 of the judgment in *Cargolux Airlines* that the implementation of the security surcharge required significantly less frequent contacts than the implementation of the fuel surcharge, as it was not based on an index with regular adjustments being required thereto. In so doing, it criticises factual assessments made by the General Court, without demonstrating any distortion of the facts or the evidence.

133. Third, the appellant argues that, in paragraph 475 of the judgment in *Cargolux Airlines*, the General Court reversed the burden of proof when it held that the appellant had not disputed that the effects of the coordination relating to the security surcharge had continued during the temporal gaps, or claimed that it had been unaware that the other incriminated carriers continued to coordinate on the security surcharge during that period. It seems to me, however, that, by those observations, the General Court simply intended to note that, once the Commission had established, in accordance with the burden of proof borne by it, that the security surcharge had produced effects until the end of the relevant period and that, during that period, contacts between the carriers had occurred, it was for the appellant to adduce any evidence to the contrary.

134. Fourth, the appellant contests the argument, set out in paragraph 476 of the judgment in *Cargolux Airlines*, that the appellant had not established or even alleged that it had publicly distanced itself from the coordination relating to the security surcharge during the temporal gaps or demonstrated that it had resumed fair and independent competitive conduct on the relevant market during those periods. However, the appellant does not furnish evidence from which it is apparent that that finding is vitiated by a distortion of the facts. Furthermore, that argument appears to me ineffective, given that that failure to distance itself publicly is not the only factor upon which the General Court based its conclusion. [152]

151 It appears to me, however, that, prima facie, the appellant is unsuccessful in demonstrating that those two forms of conduct did not fall within the framework of a single and continuous infringement.

152 Furthermore, according to settled case-law of the Court of Justice, tacit approval of an unlawful initiative, without publicly distancing oneself from the content of that initiative or reporting it to the administrative authorities, effectively encourages the continuation of the infringement and compromises its discovery. That complicity constitutes a passive mode of participation in the infringement which is capable of rendering the undertaking concerned liable. It follows from that case-law that the Commission may assume that the infringement – or the participation of an undertaking in the infringement – has not been interrupted, even if it has no evidence of the infringement in relation to certain specific periods, provided that the various actions which form part of the infringement pursue a single purpose and are capable of falling within the framework of a single and continuous infringement; and where the undertaking concerned has not relied on indicia or evidence establishing that, on the contrary, the infringement, or its participation in it,

135. I therefore propose that the part of the ground in question be rejected.

(d) Errors in the assessment of the evidence as regards Cathay Pacific Airways

136. By its fourth and fifth grounds, Cathay Pacific Airways claims, inter alia, that the General Court erred in law in accepting evidence in relation to the conduct adopted before the infringement period or falling outside the Commission's geographic jurisdiction in support of its conclusion that the appellant had participated in the single and continuous infringement. [153] In essence, by its main argument, the appellant alleges that the General Court approved the evidence used by the Commission without explaining if it regarded that evidence as being 'corroborative' evidence of other (direct) evidence or if it treated that evidence as direct evidence of the appellant's participation in the single and continuous infringement. [154]

137. In that regard, in the judgment in *Cathay Pacific Airways*, the General Court relied, when examining the first complaint of the third part of the third plea, alleging errors in the imputation to the appellant of the single and continuous infringement, on the account taken, inter alia, of contacts predating the infringement period and outside the Commission's geographic jurisdiction. [155]

138. With regard, in the first place, to the contacts predating the infringement period, first, the General Court observed that several of the contacts contested by the appellant concerned routes which fell within its jurisdiction (paragraphs 315 to 321). Second, it took the view that the remaining contested contacts, although they took place in third countries or involved local employees of the incriminated carriers in those countries, could nevertheless be relevant (paragraph 322) [156] and that, in essence, the assessment of those contacts was not decisive for the purposes

has not been pursued during those periods (see judgment of 18 March 2021, *Pometon* v *Commission* (C-440/19 P, EU:C:2021:214, paragraphs 113 and 114 and the case-law cited)).

153 This argument is developed in the context of the fifth ground and, incidentally, in the context of the fourth ground, which sets out, in essence, arguments relating to the assessment of the evidence relating to the appellant's participation in the single and continuous infringement, which are not the subject of this targeted Opinion.

154 The appellant's arguments analysed below therefore gloss over the merits of the assessment of the relevant evidence by the Commission and the General Court and raise, in essence, the question of the extent to which the Commission and the General Court should have established, in relation to each item of evidence, its nature as direct evidence of the single and continuous infringement or as evidence 'corroborating' the interpretation of other evidence.

155 That is to say, the contacts relating, respectively, to the EU-third country routes prior to 1 May 2004 and to the Swiss-third country routes.

156 According to the General Court, 'nothing prevented the incriminated carriers from coordinating with one another or exchanging information in such countries in relation to other freight services, including intra-EEA freight services'.

of the solution adopted (paragraph 323). It was solely in that context that the General Court examined, in essence, the relevance of those contacts in relation to the single and continuous infringement in question (paragraphs 325 to 327) [157] and concluded that the appellant had 'fail[ed] to argue that those contacts did not corroborate the interpretation of other items of evidence' and that it was not alleged that '[they] were outside the Commission's jurisdiction'. It explained that the 40 or so contacts contested by the appellant were among the almost 90 contacts at issue which the Commission had examined in the decision at issue (paragraph 328).

139. With regard, in the second place, to the contacts outside the Commission's geographic jurisdiction, the General Court similarly explained, first, that, since those contacts concerned routes from Switzerland without distinction, the Commission cannot be criticised for considering that they also concerned EU-Switzerland routes (paragraph 332) and, second, that those contacts also tended to corroborate the almost 90 contacts used by the Commission to establish the appellant's participation in the single and continuous infringement (paragraphs 333 and 334).

140. In that regard, it must be recalled that the principle which prevails in EU law in relation to the probative value of evidence is that of the unfettered evaluation of evidence and that the only relevant criterion for the purpose of assessing the evidence adduced relates to its credibility. [158] While it is for the Commission to produce sufficiently precise and consistent evidence to support the belief that the infringement was committed, it is not necessary for every item of evidence produced to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement. [159]

157 The General Court carried out that examination in the light of its own case-law, to which reference is made in paragraph 324 of the judgment in *Cathay Pacific Airways*, that the Commission may rely on contacts predating the infringement period (in respect of which it lacked jurisdiction) in order to construct an overall picture of the situation and thus support the interpretation of certain items of evidence (see judgments of 8 July 2008, *Lafarge* v *Commission* (T-54/03, EU:T:2008:255, paragraphs 427 and 428); of 30 May 2006, *Bank Austria Creditanstalt* v *Commission* (T-198/03, EU:T:2006:136, paragraph 89); and of 22 March 2012, *Slovak Telekom* v *Commission* (T-458/09 and T-171/10, EU:T:2012:145, paragraphs 45 to 52)).

158 See, inter alia, judgment of 25 January 2007, *Dalmine* v *Commission* (C-407/04 P, EU:C:2007:53, paragraph 63).

159 See, inter alia, judgment of 1 July 2010, *Knauf Gips* v *Commission* (C-407/08 P, EU:C:2010:389, paragraph 47). The Court of Justice has held that, in most cases, the existence of an anticompetitive practice or an anticompetitive agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules, and that such coincidences and indicia, when evaluated overall, may provide information not just about the mere existence of anticompetitive practices or agreements, but also about the duration of continuous anticompetitive conduct or the period of application of an agreement concluded in breach of the competition rules (see, to that effect, judgment of 18 March 2021, *Pometon* v *Commission* (C-440/19 P, EU:C:2021:214, paragraphs 110 and 111 and the case-law cited)).

141. In the present case, I do not consider that the General Court was obliged to specify whether each item of evidence examined in the judgment in *Cathay Pacific Airways* was direct proof or evidence of a corroborative nature, since the evidence examined was sufficient to support the belief that the infringement had been committed, in accordance with the principle of the unfettered evaluation of evidence mentioned in the preceding point of this Opinion.

142. In the judgment in *Cathay Pacific Airways*, the General Court, first, referred to the relevance of some of the evidence contested by the appellant (paragraphs 315 to 321), which is not called into question by the appellant in context of the arguments examined and, second, explained that the other evidence contested by the appellant could be relevant (paragraphs 322 and 332), whilst explaining that, in any event, those contacts could be useful in order to 'corroborate' the other evidence, in view of the fact that those contacts were just some of the almost 90 contacts upon which the Commission had relied in the decision at issue (paragraphs 328 and 333).

143. The classification of contacts intended to 'corroborate' the other evidence was therefore made by the General Court in the alternative and in respect of some of the contacts at issue, which is not called into question by the arguments on which the appellant relies.

144. Accordingly, in the circumstances of the present case, I am of the view that the General Court was not required to categorise the probative value of each item of that evidence for the purpose of approving the Commission's assessment regarding the relevance of those contacts and that the appellant's arguments must be rejected.

2. The annulment (only) in part of the decision at issue in relation to LATAM Airlines Group and Lan Cargo

145. By their first ground, LATAM Airlines Group and Lan Cargo claim that, having ruled out the liability of the appellants in relation to the components of the single and continuous infringement relating to the security surcharge and the refusal to pay commission, the General Court wrongly annulled the decision at issue in part only because, in their view, those components are inseparable from the other element of the single and continuous infringement: the fuel surcharge. More specifically, the General Court did not state reasons for the separability of those components and reversed, by placing it on the appellants, the burden of

This clearly does not prevent the General Court from being able, where appropriate, to adopt a more ad hoc approach, by which it seeks to explain the probative value of certain evidence (in this case, authors refer to an '"atomistic" approach of the need of corroboration': see Castillo de la Torre, F., and Gippini Fournier, E., 'Evidence, Proof and Judicial Review in EU Competition Law', *Elgar Competition Law and Practice*, Edward Elgar Publishing, Cheltenham, 2024, p. 308).

proving their non-liability for the fuel surcharge. In any event, it erred in relation to the separability of the components.

146. In that regard, the Court of Justice has already held, in essence, that while, in the context of a single and continuous infringement, the Commission is entitled to attribute to an undertaking liability only for the conduct in which it directly participated and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by that undertaking and where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk. The Court has specified, however, that that cannot relieve that undertaking of its liability for the conduct in which it is established that it took part or for which it can actually be held responsible. [160] A Commission decision categorising a global cartel as a single and continuous infringement can be divided in that manner only if the undertaking in question has been put in a position, during the administrative procedure, to understand that it is also alleged to have engaged in each of the forms of conduct comprising that infringement, hence to defend itself on that point, and only if the decision is sufficiently clear in that regard. [161]

147. In addition, as the Commission states in its written observations, the latter two conditions are not in dispute in the present case, since the statement of objections and the decision at issue clearly set out that the appellants had participated in each of the components of the single and continuous infringement.

148. That being said, the appellants argue that, in the present case, the security surcharge and the refusal to pay commission were not separable from the fuel surcharge, as regards 'equivalent components' of the single and continuous infringement, between which the Commission did not establish any hierarchy in the decision at issue. [162] Furthermore, the Commission itself acknowledged that

160 See, to that effect, judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 44). The fact that an undertaking did not take part in all aspects of an anticompetitive arrangement or that it played only a minor role in the aspects in which it did participate is not material for the purpose of establishing the existence of an infringement on its part, given that those factors need to be taken into consideration only when the gravity of the infringement is assessed and only if and when it comes to determining the fine (paragraph 45 and the case-law cited).

161 See judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 46). See, in legal literature, Cournot, M., 'Participation in a Complex Infringement: A Questionable Assessment by the Court of Justice', *European Law Reporter*, 2013, pp. 225 to 231; Robin, C., 'Réunion avec des concurrents: parfois une preuve de participation à une entente, parfois non', *Revue Lamy de la Concurrence: droit, économie, régulation*, 2013, Noº37, p. 26; Muguet-Poullennec, G., 'Infraction complexe et "éléments séparables"', *Revue Lamy de la Concurrence: droit, économie, régulation,* 2013, No 37, pp. 76 and 77.

162 They proceed from the principle that only a partial annulment of ancillary components would not alter the substance of a single and continuous infringement within the meaning of the judgment of 21 January 2016, *Galp Energía España and Others* v *Commission* (C-603/13 P, EU:C:2016:38, paragraph 86).

the two components in question were inseparable when it concluded, in recital 863 of that decision, that 'it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which would progressively manifest itself in both agreements and concerted practices'. [163]

149. I note that, as the Commission observes in its written observations, the need to demonstrate that the components which a party wishes to have annulled in part are 'separable' from the rest of the measure does not mean that those components must necessarily be classified as 'ancillary'. [164] The question is therefore whether the conduct relating to the fuel surcharge, in respect of which the General Court found the appellants liable, is 'separable' from the conduct relating to the security surcharge, in relation to which the General Court ruled out the appellants' liability.

150. In addition, it does not appear to me that the expression used by the Commission in recital 863 of the decision at issue, namely that 'it would be artificial to split up such continuous conduct … by treating it as consisting of several separate infringements', is decisive as regards the classification of the infringement in question. By that expression, the Commission intended to explain the parameters of the concept of a 'single and continuous infringement' as applied to the different practices adopted by the parties in pursuit of the same anticompetitive objective, regardless of whether those practices were separate infringements, as it clearly states in recital 862 of that decision. [165] Furthermore, as the Commission reiterated in the course of the procedure before the Court, any finding of a single and continuous infringement is based on the premiss that it would be artificial to split up that infringement into its various components.

163 The appellants observe that the same expression (it would be 'artificial to split up [the] continuous conduct' in question) was used in the Commission decision forming the subject of the judgment of 4 July 2013, *Commission* v *Aalberts Industries and Others* (C-287/11 P, EU:C:2013:445, paragraph 65), by which the Court held that that decision could not be annulled in part.

164 Furthermore, in the judgment of 21 January 2016, *Galp Energía España and Others* v *Commission* (C-603/13 P, EU:C:2016:38, paragraph 86), to which the appellants refer, the Court of Justice merely concluded that, in the circumstances of that specific case, the fact that the components which the General Court had found did not prove the liability of the party in question were merely 'ancillary' components was a sufficient reason to find those components to be 'separable'. That conclusion does not mean, however, that components must always be 'ancillary' in order for them to be 'separable'.

165 Furthermore, with regard to the judgment of 4 July 2013, *Commission* v *Aalberts Industries and Others* (C-287/11 P, EU:C:2013:445, paragraphs 64 and 65), on which the appellants rely, it is clear from paragraph 65 of that judgment that the statement to the effect the Commission itself found that it would be artificial to split up the continuous conduct in question in order to rule out the possibility of a partial annulment was made in the alternative, with the Court having primarily relied on the fact that, in the decision which formed the subject of the judgment, the Commission had not stated that the other component of the single and continuous infringement constituted an infringement.

151. However, while it is true that, in the statement of objections and the decision at issue, the Commission demonstrated that the appellants had participated in the component of the single and continuous infringement relating to the fuel surcharge [166] (which is not disputed in the ground being examined), it is likewise true that, in that decision, the Commission did not specify that the coordination relating to the fuel surcharge, in respect of which the appellants were held liable, was not only one *component* of the single and continuous infringement, but also that it was a separate *infringement*.

152. In the judgment in *LATAM Airlines Group and Lan Cargo*, the General Court annulled the decision at issue in so far as it imputed to the appellants the elements of the single and continuous infringement relating to the security surcharge and the refusal to pay commission, but held that it was not necessary to annul the decision at issue in its entirety because the appellants had not demonstrated that the Commission had erred in law in finding that they had participated in that *infringement*. [167] In addition, the General Court gives no explanation as to whether the conduct relating to the fuel surcharge was an infringement separate from the conduct relating to the security surcharge and from the refusal to pay commission.

153. However, if the spotlight is turned on the substance of the assessment carried out by the Commission, it is apparent from the decision at issue as a whole that the practices concerning each of the elements of the single and continuous infringement were deemed by that institution to be infringements of Article 101 TFEU and Article 53 of the EEA Agreement. For example, in recital 846 of that decision, the Commission explained that the addressees of the decision had entered into bilateral and multilateral contacts by which they had coordinated their conduct or influenced price setting, which ultimately amounted to price fixing with regard to the fuel surcharge, the security surcharge and the refusal to pay commission. It is thus clear from that passage that the impugned conduct, which was categorised as 'price fixing', and thus implicitly as an infringement of the provisions cited, comprised the three elements of the single and continuous infringement. I doubt that the parties concerned were all unaware that their conduct in respect of each of the elements of the infringement or, at the very least,

166 See, inter alia, recital 775 of the decision at issue.

167 Judgment in *LATAM Airlines Group and Lan Cargo*, paragraphs 631 and 632, which refer to paragraph 581 of that judgment, in which the General Court had concluded that, although the Commission erred in finding that the appellants could be held liable for the element of the single and continuous infringement relating to the fuel surcharge from 25 February 2003 to 21 July 2005, the appellants had not shown that the Commission had erred in finding that they had participated in that infringement after that date.

the coordination relating to the two surcharges, [168] constituted, on its own, 'price fixing' and therefore an infringement of those provisions. [169]

154. It therefore appears to me that the General Court was not obliged to state explicitly its position as to whether the fuel surcharge was an 'infringement' per se, since the appellants had been put in a position, during the administrative procedure, to understand that they were also alleged to have engaged in each of the forms of conduct comprising the single and continuous infringement and, consequently, to defend themselves on that point, and since the decision at issue was sufficiently clear in that regard. [170]

155. With regard, finally, to the appellants' argument based on the reversal of the burden of proof, it is sufficient to observe that, in paragraph 632 of the judgment in *LATAM Airlines Group and Lan Cargo*, which is challenged by the appellants, the General Court, when it notes that the appellants '[had] not demonstrated that the Commission [had] erred in law in finding that they had participated in that infringement', refers to paragraph 581 of that judgment, which concludes the preceding analysis concerning the appellants' participation in the element of the single and continuous infringement relating to the fuel surcharge from 22 July 2005, as stated in paragraph 580 of the judgment. Accordingly, it was after finding that the Commission had adduced evidence of such participation that the General Court added that the appellants had not furnished proof to the contrary. In so doing, it did not reverse the burden of proof but rather merely found that, having been presented with the evidence produced by the Commission, the appellants had not furnished proof to the contrary.

3. The limitation period in respect of the Commission's power to impose penalties in relation to Air Canada and Singapore Airlines

156. By their third and fourth grounds respectively, Air Canada and Singapore Airlines claim that the General Court should have found of its own motion that the power to impose penalties in respect of their conduct relating to the intra-EEA and EU-Switzerland routes was time-barred as of 14 February 2016, [171] as it did, at the

168 That conclusion might, depending on the circumstances, be less clear as regards the refusal to pay commission, which constitutes conduct ancillary to the surcharges.

169 However, I do not believe that recital 871 of the decision at issue, upon which the Commission relies in that regard in its written observations, is relevant. In that recital, the Commission simply stated, inter alia, that some of the activities (meetings, contacts, exchanges) which constitute evidence of the single and continuous infringement 'could be regarded as infringements in themselves', without providing any clarification in that regard.

170 See judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 46).

171 The starting point for the limitation period is the date on which the single and continuous infringement ceased, that is to say, on 14 February 2006, in accordance with Article 25(2) of Regulation No 1/2003. In the alternative, that period expired on 9 November 2015 if the view was taken that the limitation period was interrupted until the 2010 Decision.

request of the parties to the proceedings, in the case of Japan Airlines, Cathay Pacific Airways and LATAM Airlines Group. [172] They argue that the plea based on the limitation period in respect of the Commission's power to impose penalties under Article 25 of Regulation No 1/2003 is a plea involving a matter of public policy in accordance with a number of fundamental principles. [173]

157. As a preliminary point, I note that, as certain Advocates General have observed, [174] a plea involves a matter of public policy where, first, the rule infringed is designed to serve a fundamental objective or fundamental value of the EU legal order and plays an important role in the attainment of that objective or the upholding of that value and, second, that rule was laid down in the interest of third parties or the public in general and not merely in the interest of the persons directly concerned.

158. While, to date, the EU Courts have not ruled on the question of whether the General Court has jurisdiction to raise of its own motion a plea based on the limitation period applicable to a decision to impose a fine for the infringement of competition law, I propose that that question be answered in the negative. The limitation period at issue may indeed serve, to some extent, fundamental objectives of the EU legal order. However that period is determined not in the interest of third parties or the public, but solely that of the persons concerned.

159. Indeed, first, that period does not appear to me to constitute a procedural time limit but rather a time limit which results in the extinction of the legal action.

160. In that regard, I note that, although it concerned different fields, the Court of Justice has held that limitation constitutes an objection to admissibility which, unlike procedural time limits, is not absolute, but extinguishes the action for liability solely at the request of the defendant [175] and, in the context of civil

172 See judgments in *Japan Airlines* (paragraphs 193 to 226); *British Airways* (paragraphs 220 to 223 and 226); *Cathay Pacific Airways* (paragraphs 244 to 247); and *LATAM Airlines Group and Lan Cargo* (paragraphs 133 to 139).

173 More specifically, the principles in question are those of legal certainty, the proper administration of justice, procedural economy, the public interest in the application of competition law and the principle of equal treatment.

174 See, inter alia, Opinions of Advocate General Jacobs in *Salzgitter* v *Commission* (C-210/98 P, EU:C:2000:172, points 141 and 142), and of Advocate General Mengozzi in *British Airways* v *Commission* (C-122/16 P, EU:C:2017:406, point 103).

175 See judgment of 8 November 2012, *Evropaïki Dynamiki* v *Commission* (C-469/11 P, EU:C:2012:705, paragraphs 49 to 53 and the case-law cited). In paragraph 52 of that judgment, the Court clarified that, in contrast to procedural time limits, the limitation period in question, by resulting in the extinction of the legal action, is a matter of substantive law since it affects the enforceability of a subjective right which the person concerned can no longer effectively assert before the courts. In paragraph 53 of the judgment, it added that the limitation period laid down in the first paragraph of Article 46 of the Statute of the Court of Justice of the European Union has the function, inter alia, first, of ensuring protection of the rights of the aggrieved person, who must have sufficient time in which to gather the appropriate information with a view to a possible action, and, second, of preventing the aggrieved person from being able to delay

service proceedings, that a plea alleging disregard for a limitation period did not involve a matter of public policy. [176] The rationale for those decisions is, in my view, applicable in the present case. The purpose of the rule in question is to protect not the public interest but the interests of the individuals concerned.

161. Accordingly, contrary to the appellants' submissions, the limitation period at issue is not comparable to the time limit for bringing an action pursuant to Article 263 TFEU, the public policy nature of which is undisputed. In the latter situation, there is a public interest, based inter alia on the principle of legal certainty, in actions for annulment of decisions not being initiated after the applicable time limit, which would seriously undermine the legal certainty of third parties as regards the legality of an act of an EU institution once that time limit has expired. [177]

162. Second, it does not appear to me that exceeding the time limit in question can have the effect of the institution concerned lacking powers.

163. While the Court has observed that certain periods operating as a time bar constituted pleas involving a matter of public policy, in so far as they affected the lack of powers *ratione temporis* of the institution which had adopted the measures at issue, [178] such a consequence can attach not simply to the expiry of the time limit for the adoption of the measure, but rather to the lack of a legal basis, or the removal of the legal basis, empowering the institution which adopted the measure

indefinitely the exercise of his or her right to damages. That period definitely protects the aggrieved person and the person responsible for the harm. That principle was applied by the Court with regard to the limitation period laid down in Article 10(3) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ 2014 L 349, p. 1) (see judgment of 22 June 2022, *Volvo and DAF Trucks* (C-267/20, EU:C:2022:494, paragraphs 45 to 47)).

176 See judgment of 14 June 2016, *Marchiani* v *Parliament* (C-566/14 P, EU:C:2016:437, paragraph 94). That case concerned a debt related to the parliamentary assistance allowance received unduly by the applicant.

177 According to settled case-law of the Court of Justice, that time limit for bringing proceedings is a matter of public policy, having been established in order to ensure that legal positions are clear and certain and to prevent any discrimination or arbitrary treatment in the administration of justice. It is for the EU Courts to determine, of their own motion, whether that time limit has been observed (see, inter alia, judgment of 23 January 1997, *Coen* (C-246/95, EU:C:1997:33, paragraph 21)).

178 See judgment of 13 July 2000, *Salzgitter* v *Commission* (C-210/98 P, EU:C:2000:397, paragraphs 55 and 56), which concerns the compatibility, in the context of the ECSC Treaty, of aid notified after expiry of the time limit for notification laid down in the Fifth Steel Aid Code (Commission Decision No 3855/91/ECSC of 27 November 1991 establishing Community rules for aid to the steel industry (OJ 1991 L 362, p. 57)), and certain cases concerning the period which operates as a time bar laid down for the adoption of decisions in the context of the Cohesion Fund (judgment of 4 September 2014, *Spain* v *Commission* (C-192/13 P, EU:C:2014:2156, paragraph 103) and the European Regional Development Fund (ERDF), judgment of 24 June 2015, *Spain* v *Commission* (C-263/13 P, EU:C:2015:415, paragraph 57)).

to act. [179] Accordingly, the expiry of the limitation period at issue does not, on its own, have the effect that the Commission lacks powers as regards the adoption of penalties.

164. Third, the public policy nature of a plea based on the expiry of the limitation period cannot be justified by the essentially criminal nature of the fines in competition matters in the context of the application of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('ECHR'). [180]

165. While, notwithstanding the provisions of Article 23(5) of Regulation No 1/2003, which state that decisions imposing fines for infringement of competition law are not criminal in nature, the Court has acknowledged, at the very least implicitly, the de facto criminal nature of penalties for infringement of EU competition law for the purposes of the application of the criminal component of Article 6(1) ECHR, [181] I do not consider competition law to be part of the 'hard core' of criminal law, and therefore the guarantees provided for in criminal law *stricto sensu* do not apply with their full stringency. [182] It follows that the de facto criminal nature of the fines does not give rise, on its own, to a public interest in

179 The General Court arrived at a similar conclusion in the judgment of 13 May 2014, *McBride and Others* v *Commission* (T-458/10 to T-467/10 and T-471/10, EU:T:2014:249, paragraphs 25 to 36), confirmed on appeal by the judgment of 14 June 2016, *Commission* v *McBride and Others* (C-361/14 P, EU:C:2016:434). See, in legal literature, Clausen, F., *Les moyens d'ordre public devant la Cour de justice de l'Union européenne*, Collection droit de l'Union européenne, Bruylant, Namur, 2018, pp. 185 to 187, 223 and 247.

180 As far as concerns the assessment of the criminal nature of administrative proceedings and penalties, it must be recalled that, according to case-law of the Court of Justice, three criteria are relevant. The first is the legal classification of the offence under national law, the second is the very nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur (see, inter alia, to that effect, judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 35).

181 Pursuant to the criteria laid down by the European Court of Human Rights in its judgment of 8 June 1976, *Engel and Others v. The Netherlands*, CE:ECHR:1976:0608JUD000510071 (see, also, ECtHR, 27 September 2011, *A. Menarini Diagnostis v. Italie*, CE:ECHR:2011:0927JUD004350908, §§ 39 to 44). Certain Advocates General (in particular, Advocate General Bot in his Opinion in *ThyssenKrupp Nirosta* v *Commission*, C-352/09 P, EU:C:2010:635, point 49, and Advocate General Pitruzzella in his Opinion in *Whiteland Import Export*, C-308/19, EU:C:2020:639, point 91) have explicitly observed that the fines referred to in Article 23 of Regulation No 1/2003 'are comparable in nature and size to criminal penalties' and that the resulting procedure 'is therefore covered by "criminal" within the meaning of Article 6(1) [ECHR]'. See, with regard to the Court of Justice, judgment of 18 July 2013, *Schindler Holding and Others* v *Commission* (C-501/11 P, EU:C:2013:522, paragraph 33).

182 See, by analogy, with regard to the rights of the defence, judgment of 20 December 2023, *Crédit agricole and Crédit agricole Corporate and Investment Bank* v *Commission* (T-113/17, EU:T:2023:847, paragraphs 46 and 47). According to the terminology used by the ECtHR, since proceedings for the imposition of a fine are not part of the 'hard core' of criminal law, the guarantees offered by the criminal component of Article 6 ECHR will not necessarily apply with their full stringency (see ECtHR, 23 November 2006, *Jussila v. Finland*, CE:ECHR:2006:1123JUD007305301, § 43).

the limitation of the power to impose penalties in accordance with Article 25 of Regulation No 1/2003.

166. Fourth, the same is true as regards references in case-law of the Court of Justice to the public policy nature of competition law [183] and, more specifically, to economic public policy. [184] The fact that competition law operates, in essence, for the benefit of (economic) public policy does not mean that all such provisions fall within the scope of that public policy. [185]

167. With regard, finally, to the principle of equal treatment, two observations should be made: first, according to settled case-law of the Court of Justice, in the main, a decision finding that a cartel exists is a bundle of decisions addressed to its individual addressees, the validity of one of which does not affect that of the others; [186] second, if the Court has consistently held that those undertakings which have brought actions are not in the same procedural situation as those undertakings which have not done so, [187] the same principle should apply, in my view, in respect of undertakings which have raised a plea relating to limitation.

168. Furthermore, I note that the examination of a limitation period usually involves a factual assessment which, if factual evidence is not offered by the party concerned, runs counter to the principle that the subject matter of an action is defined by the parties and does not lend itself to being initiated *ex officio* by the EU Courts. [188] Furthermore, I wonder whether the possibility of a decision finding an infringement being annulled *ex officio* after the deadline for bringing an action risks making actions for damages brought by individuals (private enforcement) more uncertain. [189]

183 The Court has held, in essence, that Articles 101 and 102 TFEU are a matter of public policy which must be automatically applied by national courts (see, inter alia, judgments of 1 June 1999, *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 39), and of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 31)).

184 The appellants rely, in this regard, on decisions by national courts.

185 Some authors refer, in this regard, to the 'public policy of direction and not protection', the objective of which is to work towards a better organised society and economy in the general interest (see, to that effect, Petit, N., *Droit européen de la concurrence*, Paris, 2013, p. 39).

186 See point 126 of this Opinion.

187 See, inter alia, to that effect, judgment of 14 November 2017, *British Airways* v *Commission* (C-122/16 P, EU:C:2017:861, paragraph 98).

188 See, by analogy, judgment of 8 July 1999, *Shell* v *Commission* (C-234/92 P, EU:C:1999:361, paragraph 68), in which the Court of Justice held, in essence, that the General Court cannot be obliged to order that the oral procedure be reopened on the ground of an alleged obligation to raise of its own motion public policy objections other than on the basis of the factual evidence in the case file (see, in legal literature, Corthaut, T., *EU Ordre Public*, Alphen aan den Rijn, 2012, p. 226).

189 The Court has observed on several occasions that the existence of avenues for compensation for civil damages can also perform a public interest role, since those avenues are liable to act as a

169. In conclusion, it is my view that the limitation period should not be interpreted as a plea involving a matter of public policy which must be raised by the EU Courts of their own motion. The grounds in question should therefore be rejected.

C. The General Court's exercise of unlimited jurisdiction in relation to SAS Cargo Group

170. In the judgment in *SAS Cargo Group*, the General Court, after upholding the appellants' second head of claim for a reduction in the amount of the fine, annulled in part the decision at issue in relation to the companies of SAS Cargo Group and exercised its unlimited jurisdiction [190] to reduce the fine imposed on them. However, in calculating the basic amount of the fine, it took account of the turnover generated on routes within the same Member State ('the internal sales') [191] in the value of those companies' sales, having observed that that turnover had not been included by the Commission 'inadvertently'. [192] The General Court proceeded in that manner because the turnover relating those internal sales fell within the scope of the single and continuous infringement [193] and 'with a view also to ensure equal treatment between the incriminated carriers that brought an action against the [decision at issue]', [194] the fact notwithstanding

deterrent against the infringement of competition rules (see, inter alia, judgment of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraphs 26 and 27)). In addition, it seems to me that the possibility of calling into question *ad infinitum* a decision finding an infringement which, in accordance with Article 16 of Regulation No 1/2003, is binding on national courts, leaves injured parties in a situation of uncertainty as to the possibility of pursuing the infringement of competition rules by means of follow-up actions.

190 As a reminder, the system of judicial review of Commission decisions relating to proceedings under Articles 101 and 102 TFEU consists in a review of the legality of the acts of the institutions for which provision is made in Article 263 TFEU, which may be supplemented, pursuant to Article 261 TFEU and Article 31 of Regulation No 1/2003, and at the request of the applicant, by the General Court's exercise of unlimited jurisdiction with regard to the penalties imposed in that regard by the Commission (see judgments of 25 July 2018, *Orange Polska* v *Commission* (C-123/16 P, EU:C:2018:590, paragraph 104 and the case-law cited), and of 12 January 2023, *Lietuvos geležinkeliai* v *Commission* (C-42/21 P, EU:C:2023:12, paragraphs 151 and 152 and the case-law cited)).

191 The turnover in question relates to the sales which the appellants had made on routes operated exclusively within Denmark, Sweden and Norway, which had been excluded in the course of the administrative procedure further to a request made by the appellants (see judgment in *SAS Cargo Group*, paragraphs 926 to 931).

192 See judgment in *SAS Cargo Group*, paragraph 939.

193 In paragraph 936 of the judgment in *SAS Cargo Group*, the General Court explained that the turnover in question 'clearly [fell] within the scope of the single and continuous infringement' and that 'it would not be a fair assessment of the economic importance of that infringement and of the role played by each of the incriminated carriers in that regard if that turnover were not to be taken into account for the purpose of calculating the amount of the fine'.

194 Judgment in *SAS Cargo Group*, paragraph 940.

that the Commission, when questioned by the General Court as to the compatibility of such an exclusion with the principle of equal treatment and with point 13 of its Guidelines on the method of setting fines, [195] considered that there was no need to take account of that turnover in the calculation of the fine. [196] Accordingly, the reduction of the fine by the General Court was lower than that which would have been imposed had that correction not been made.

171. By their fifth ground, the appellants in the case in *SAS Cargo Group* claim that, in exercising its unlimited jurisdiction, the General Court infringed the right to be heard and the adversarial principle (1), the obligation to state reasons (2), the principle *ne ultra petita* (3), and the presumption of innocence and the principle of equal treatment (4).

1. The right to be heard and the adversarial principle

172. With regard, in the first place, to the right to be heard and the adversarial principle, the appellants in the case in *SAS Cargo Group* claim that they were not put in a position to contest the General Court's conclusion that the fine was discriminatory, since that point had not been raised by any of the parties to the proceedings.

173. It should be observed at the outset that the right to be heard and the adversarial principle form part of the rights of the defence and apply to any procedure which may result in a decision by an EU institution perceptibly affecting a person's interests. [197]

174. As a rule, the right to be heard guarantees every person the opportunity to make known his or her views effectively during an administrative procedure and before the adoption of any decision liable to affect his or her interests adversely, [198] whereas the adversarial principle means, first, that the parties have a right to a process of inspecting and commenting on the evidence and observations

195 Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2).

196 Judgment in *SAS Cargo Group*, paragraphs 932 and 933.

197 More specifically, in all proceedings in which sanctions, especially fines or penalty payments, may be imposed observance of the rights of the defence is a fundamental principle of EU law which has been emphasised on numerous occasions in the case-law of the Court of Justice. On appeal, the purpose of the review by the Court of Justice is, first, to examine to what extent the General Court took into consideration, in a legally correct manner, all the essential factors to assess the gravity of particular conduct in the light of Articles 101 and 102 TFEU and Article 23 of Regulation No 1/2003 and, second, to ascertain whether the General Court responded to the requisite legal standard to all the arguments raised by the appellant with a view to having the fine cancelled or reduced (see, to that effect, judgment of 8 February 2007, *Groupe Danone* v *Commission* (C-3/06 P, EU:C:2007:88, paragraphs 68 and 69 and the case-law cited)).

198 See, to that effect, judgment of 22 November 2012, *M.* (C-277/11, EU:C:2012:744, paragraph 85 and the case-law cited).

submitted to the court and, moreover, that a judicial decision may not be founded on facts and documents which the parties, or one of them, have not had an opportunity to examine and on which they have been unable to comment. [199]

175. However, as the General Court observes in paragraph 937 of the judgment in *SAS Cargo Group*, and as the same appellants state in the case in *SAS Cargo Group* in their written observations, the General Court asked them to take a view on the answers given by the Commission to the questions that it put, including a question concerning the turnover used by the Commission as the basis for its calculations as regards the fines imposed, by which the General Court explicitly asked what prompted the Commission to exclude the turnover relating to internal sales.

176. In those circumstances, the General Court does not appear to me to have infringed the appellants' right to be heard in the case in *SAS Cargo Group* or the adversarial principle, since the appellants, having raised a plea relating to the revision of the fine imposed on them were heard in relation to the inclusion of the turnover relating to the internal sales in the value of sales and were able to make known their views effectively in that regard.

177. As regards the appellants' argument in the case in *SAS Cargo Group*, according to which the question put to them lacked sufficient content for the right to be heard to be regarded as having been satisfied, it must be observed that the question put to the Commission, in relation to which those appellants had been asked to take a view, explicitly referred to the fact that the turnover excluded what was called 'cabotage in Scandinavia'. It was therefore foreseeable that the General Court, regardless of the position adopted by the Commission, could review that element in its analysis. [200] Furthermore, whilst it is incumbent upon the General Court to respect the parties' rights of defence, it cannot, however, be obliged to request that they comment on the reasoning which it is minded to adopt in order to decide the case before it. [201]

199 See, to that effect, judgment of 2 December 2009, *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraphs 50 and 52 and the case-law cited).

200 On the concept of 'foreseeability', see judgment of 26 September 2013, *Alliance One International* v *Commission* (C-679/11 P, EU:C:2013:606, paragraph 111).

201 See, to that effect, judgment of 28 May 2013, *Abdulrahim* v *Council and Commission* (C-239/12 P, EU:C:2013:331, paragraph 49). Furthermore, as the General Court has observed, the Commission is not required, once it has indicated the factual and legal criteria on which it will base its calculation of the amount of the fines, to specify the way in which it will use each of those elements in order to determine their level. To give indications as regards the amount of the fines envisaged, before the undertakings have been invited to submit their comments on the allegations against them, would be to anticipate the Commission's decision and would thus be inappropriate (see judgment of 7 November 2019, *Campine and Campine Recycling* v *Commission* (T-240/17, EU:T:2019:778, paragraph 356 and the case-law cited)). The same principle should apply, in my view, when the General Court substitutes its own assessment for that of the Commission in order to determine the amount of the fine in the exercise of its unlimited jurisdiction.

2. The obligation to state reasons

178. According to the appellants, in the case in *SAS Cargo Group*, the General Court failed to satisfy its obligation to state reasons by having not responded to their observations to the effect that they were not in a situation similar to that of the other carriers and that there was no unlawful conduct on the internal routes which would have justified the inclusion of the turnover relating to the internal sales in the value of sales.

179. However, in paragraphs 935, 936 and 939 of the judgment in *SAS Cargo Group*, the General Court held, first, that Article 1(1) of the decision at issue covered conduct taking place both on routes between Member States or Contracting Parties to the EEA Agreement and on routes operated within the same Member State or the same contracting party; second, that, in those circumstances, the internal sales fell within the scope of the single and continuous infringement; and, third, that it was 'inadvertently' that the turnover relating to the internal sales had not been included in the value of sales. The General Court concluded, in paragraph 940 of that judgment, that, 'with a view also to ensure equal treatment between the incriminated carriers that brought an action against the [decision at issue]', the turnover relating to the internal sales had to be included in the value of sales.

180. In that regard, it appears to me that the General Court clearly disclosed the reasoning which it followed, which, moreover, allowed the appellants in that case to develop their arguments to challenge the General Court's conclusions. [202] It is true that the General Court's reasoning appears inconsistent where, in paragraph 932 of the judgment in *SAS Cargo Group*, it infers from the Commission's response to its questions that it was possible that the turnover relating to the internal sales was not deducted from the value of sales applied to the other incriminated carriers and, in paragraph 939 of that judgment, it concludes that that turnover was not included in the value of sales. However, that

[202] It should be borne in mind that the obligation on the General Court to state reasons under the second paragraph of Article 296 TFEU and Article 36 of the Statute of the Court of Justice of the European Union requires it to disclose in a clear and unequivocal manner the reasoning that it has followed, in a way that allows the interested parties to understand the justification for the decision taken and permits the Court of Justice to exercise its powers of review. That obligation does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to understand the grounds of the General Court's judgment and provides the Court of Justice with sufficient information to exercise its powers of review when examining an appeal (see, inter alia, judgment of 21 December 2023, *United Parcel Service* v *Commission* (C-297/22 P, EU:C:2023:1027, paragraph 47 and the case-law cited)). More specifically, in the context of its obligation to state reasons, it is for the General Court to set out in detail the factors which it took into account when setting the amount of the fine (see judgment of 14 September 2016, *Trafilerie Meridionali* v *Commission* (C-519/15 P, EU:C:2016:682, paragraph 52)).

finding appears to be concerned rather with the merits of the reasoning of the General Court [203] and will be examined below. [204]

3. The principle ne ultra petita

181. According to the appellants in the case in *SAS Cargo Group*, the General Court infringed the principle *ne ultra petita* by correcting the basic amount of the fine in a manner unfavourable to the appellants, going beyond (if not against) the conclusions of the Commission, thus undertaking an *ex officio* review which falls outside its jurisdiction.

182. As a preliminary point, it should be recalled, as I observed in my Opinion in *Westfälische Drahtindustrie and Pampus Industriebeteiligungen* v *Commission*, [205] that, when they exercise their unlimited jurisdiction under the powers conferred by Article 31 of Regulation No 1/2003, the EU Courts are empowered, in addition to reviewing the legality of the penalty, to substitute their own assessment in relation to the determination of the amount of that penalty for that of the Commission, the author of the act in which that amount was initially fixed. Consequently, the EU Courts may vary the contested act, even without annulling it, in order to cancel, reduce or increase the amount of the fine imposed, that jurisdiction being exercised taking into account all the factual circumstances (*de novo* review). [206] It therefore follows that, while the scope of that unlimited jurisdiction is strictly limited, unlike the review of legality, to determining the amount of the fine, [207] the EU Courts are empowered to exercise that jurisdiction only where the question of the amount of the fine is submitted for their

203 It is settled case-law of the Court of Justice that the General Court's obligation to state reasons, which is an essential procedural requirement, must be distinguished from the merits of the reasoning which goes to the substantive legality of the measure at issue (see, inter alia, judgment of 12 January 2023, *Jouvin* v *Commission* (C-719/21 P, EU:C:2023:15, paragraph 29 and the case-law cited)).

204 See points 190 to 192 of this Opinion.

205 C-70/23 P, EU:C:2024:105, points 41 and 42.

206 See also, to that effect, judgment of 25 July 2018, *Orange Polska* v *Commission* (C-123/16 P, EU:C:2018:590, paragraph 106 and the case-law cited).

207 See judgment of 21 January 2016, *Galp Energía España and Others* v *Commission* (C-603/13 P, EU:C:2016:38, paragraphs 75 to 77 and the case-law cited).

assessment, [208] with the exercise of that jurisdiction removing the final transfer to the EU Courts of the power to impose penalties. [209]

183. It must, however, also be pointed out that, according to the Court of Justice, the exercise of unlimited jurisdiction 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*. Therefore, with the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, it is for the applicant to raise pleas in law against the contested decision and to adduce evidence in support of those pleas. [210] It follows that the General Court's unlimited jurisdiction does not escape the principle that the subject matter of an action is defined by the parties of which the principle *ne ultra petita* is a corollary. [211]

208 In other words, that jurisdiction is exercised 'at the request of the appellants' (see, inter alia, to that effect, order of 7 July 2016, *Westfälische Drahtindustrie and Pampus Industriebeteiligungen* v *Commission* (C-523/15 P, EU:C:2016:541, paragraph 30 and the case-law cited)). In practice, the Court of Justice is not very demanding in that regard, having held, for example, that an application for variation of the fine may be implicitly contained in an application for annulment (see judgment of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin* (C-434/13 P, EU:C:2014:2456, paragraph 83)).

209 See, also, order of 7 July 2016, *Westfälische Drahtindustrie and Pampus Industriebeteiligungen* v *Commission* (C-523/15 P, EU:C:2016:541, paragraph 34). In that regard, the Court of Justice has specified that, unlike Article 23 of Regulation No 1/2003, which confers on the Commission the power to impose fines for infringement of the competition rules, Article 31 of that regulation endows the General Court with unlimited jurisdiction which forms an integral part of its power to rule on actions brought against decisions by which the Commission has imposed such a fine. Consequently, the purpose of Article 31 of Regulation No 1/2003 is not to empower the General Court to impose a new fine which is legally distinct from that fixed by the Commission, but to supplement the judicial review by allowing the General Court to vary the amount of the fine initially imposed (see judgment of 4 July 2024, *Westfälische Drahtindustrie and Pampus Industriebeteiligungen* v *Commission* (C-70/23 P, EU:C:2024:580, paragraph 41)).

210 See, to that effect, judgment of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 64). See, also, by analogy, judgment of 26 September 2018, *Infineon Technologies* v *Commission* (C-99/17 P, EU:C:2018:773, paragraphs 108 and 109). In that latter judgment, the Court of Justice explained that, given that, before the General Court, the appellant did not challenge some of the findings made in the decision at issue, the appellant cannot claim that the General Court misconstrued the scope of its unlimited jurisdiction. In addition, the Court of Justice has previously held that not even the disproportionate nature of a fine imposed by a Commission decision can be the subject of a review by the General Court of its own motion, since that cannot constitute a plea involving a matter of public policy (see judgment of 14 March 2013, *Viega* v *Commission* (C-276/11 P, EU:C:2013:163, paragraph 57 and the case-law cited)).

211 The principle *ultra petita* prohibits a court required to rule on an action for annulment from going beyond the forms of order sought by the parties. This prohibition is an expression of the notion that the subject matter of a case is delimited by the parties and the court may go no further than that subject matter (see, inter alia, Opinion of Advocate General Kokott in *Commission* v *Alrosa* (C-441/07 P, EU:C:2009:555, point 146 and the case-law cited), and Opinion of Advocate General Mengozzi in *British Airways* v *Commission* (C-122/16 P, EU:C:2017:406, points 83 and 84)).

184. Apart from that guidance, the scope, by the EU Courts, of the exercise of its unlimited jurisdiction as to the amount of a fine imposed by the Commission within the meaning of Articles 101 and 102 TFEU has been the subject of a debate, [212] in particular as regards the possibility of increasing the fine where an application has not been made to that effect ('*reformatio in peius*') [213] or of raising certain matters *ex officio*, [214] a debate which, to date, has not yet been ruled on by the Court. [215]

185. In the judgment in *SAS Cargo Group*, the General Court examined the forms of order sought by the appellants seeking the amendment (specifically the reduction) of the amount of the fine (paragraphs 911 to 917) and upheld them in part, by reducing that amount (paragraphs 961 and 962), whilst taking into

212 See, by way of example, Bernardeau, L., and Christienne, J.-P., *Les amendes en droit de la concurrence: pratique décisionnelle et contrôle juridictionnel du droit de l'Union*, Brussels, 2013, pp. 795 to 883; Forrester, I.S., 'A Challenge for Europe's Judges: The Review of Fines in Competition Cases', *European Law Review*, Vol. 36, No 2, 2011, pp. 185 to 207; Wahl, N., 'Enjeu et limites actuelles de la jurisprudence relative à la compétence de pleine juridiction conférée au juge de l'Union en matière de concurrence', in Tizzano, A. (ed.), *La Cour de justice de l'Union européenne sous la présidence de Vassilios Skouris (2003-2015). Liber amicorum Vassilios Skouris*, Brussels, 2015, pp. 727 to 740; Expert, H., and Poullet, C., 'La compétence de pleine juridiction conférée au juge de l'Union en matière de concurrence: complément ou accessoire du contrôle de légalité?', in Giacobbo Peyronnel, V., and Verdure, C. (eds.), *Contentieux du droit de la concurrence de l'Union européenne*, Brussels, 2017, pp. 545 to 592.

213 See, inter alia, Cournot, M., 'L'interdiction de statuer ultra petita s'applique-t-elle au juge de l'amende?', *Revue des Affaires Européennes*, 2015, No 1, pp. 123 and 124; Lenaerts, K., Gutman, K., and Nowak, J.T., *EU Procedural Law*, Oxford, 2023, pp. 635 to 638. Some authors advocate a broad power to rule *ultra petita*, observing that the appellant cannot be expected to request that its own fine be increased (see, to that effect, Christienne, J.-P., 'Le contrôle juridictionnel des amendes après l'arrêt Telefónica: la pleine juridiction entre effervescence et évanescence', *Concurrences*, 2014, p. 31, and Gaulard, G., *La pleine juridiction du juge de l'Union européenne en droit de la concurrence*, Brussels, 2020, p. 273), even though it is not uncommon, in practice, for the Commission, in particular by means of counterclaims, to request that the amount of the fine be increased (see, inter alia, Barbier de La Serre, É., and Lagathu, E., 'The Law on Fines Imposed in EU Competition Proceedings: On the Road to Consistency', *Journal of European competition law & practice*, 2014, p. 400). Other writers note that the EU Courts are somewhat reticent to increase fines (Castillo de la Torre, F., and Gippini Fournier, E., '*Evidence, Proof and Judicial Review in EU Competition Law*', op. cit., pp. 465 to 470).

214 See, inter alia, Clausen, F., *Les moyens d'ordre public devant la Cour de justice de l'Union européenne*, op. cit., pp. 407 to 413.

215 While the Commission contends, in its written observations, that unlimited jurisdiction may take precedence over the principle '*ne ultra petita*', I would point out that, to date, the Court has not endorsed such an approach, which had however been proposed by certain Advocates General. See, for example, Opinions of Advocate General Poiares Maduro in *Groupe Danone* v *Commission* (C-3/06 P, EU:C:2006:720, point 49) and of Advocate General Mengozzi in *Commission* v *Tomkins* (C-286/11 P, EU:C:2012:499, point 37) as regards the marginal role played by the *non ultra petita* rule as a limit on the exercise of unlimited jurisdiction by the EU Courts, and Opinion of Advocate General Kokott in *Fresh Del Monte Produce* v *Commission* and *Commission* v *Fresh Del Monte Produce* (C-293/13 P and C-294/13 P, EU:C:2014:2439, point 273) on the fact that there is no prohibition of *reformatio in peius* as regards the possibility of increasing a fine.

account, with a detrimental effect on those appellants and contrary to the views of the two parties, a point of fact which had not been contested, namely the turnover relating to internal sales.

186. In so doing, the General Court, acting under its unlimited jurisdiction, gave a ruling in the context of a plea raised by the appellants in the case in *SAS Cargo Group* seeking the reduction of the fine and re-examined all the elements relating to the calculation of the fine, by exercising its discretion [216] and taking into account all relevant factual circumstances. [217]

187. While the General Court, when seised on the basis of its unlimited jurisdiction in the context of a plea relating to the reduction of the fine, did not, prima facie, go beyond the form of order sought (*petitum*) by the appellants in the case in *SAS Cargo Group*, [218] I wonder whether it did not exceed the limits of its unlimited jurisdiction by amending one of the constituent elements of the basic value of sales contrary to the view adopted by the two parties. While, when it rules in the context of a plea raised by the parties, the General Court can re-examine all the elements relating to the calculation of the fine by exercising its discretion, it cannot call into question factual conclusions which have not been contested by the parties. If that were the case, contrary to the case-law cited in point 183 of this Opinion, the principle that the subject matter of an action is defined by the parties would serve no purpose in the context of the General Court's unlimited jurisdiction. [219]

216 It is settled case-law that a review of unlimited jurisdiction exercised by the General Court involves, inter alia, a review of both the law and the facts as well as the power to assess the evidence, to annul the contested decision and to alter the amount of fines (see, inter alia, judgments of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraph 67), and *KME Germany and Others* v *Commission* (C-389/10 P, EU:C:2011:816, paragraph 133)). Once the General Court is called upon to exercise unlimited jurisdiction, that review extends to all the relevant factual circumstances (see the case-law cited in point 183 of this Opinion). For example, a partial annulment of the finding of infringement may lead the General Court to reassess the amount of the fine 'in the light of all the circumstances of the case' (see judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 82)). As the General Court has observed on several occasions, the amount of the fine cannot be maintained when it is the result of taking into account a factually incorrect matter (see, to that effect, judgment of 12 July 2019, *Quanta Storage* v *Commission* (T-772/15, EU:T:2019:519, paragraph 276 and the case-law cited).

217 According to the Court of Justice, a partial annulment of the finding of an infringement may lead the General Court to reassess the amount of the fine 'in the light of all the circumstances of the case' (see judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 82)). See, also, in legal literature, Clausen, F., *Les moyens d'ordre public devant la Cour de justice de l'Union européenne*, op. cit., p. 395.

218 The *petitum* sought by those appellants concerned the revision of the fine in the context of the exercise of unlimited jurisdiction, which the General Court exercised by upholding their application in part.

219 The Court has made it clear, in particular, that the mere bringing of an action does not entail the definitive transfer to the EU Courts of the power to impose penalties (see judgment of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission* (C-238/99 P,

188. Furthermore, I also wonder whether a factor such as the turnover relating to internal sales, which falls within the geographical scope of the cartel at issue and concerns not only the calculation of the amount of the fine but also the finding of the infringement, may be called into question of its own motion by the General Court, outside its assessment of the lawfulness of the decision at issue. It seems to me that, although this issue too remains highly controversial, to date the Court of Justice has limited the General Court's unlimited jurisdiction to determining the amount of the fine imposed by the Commission, to the exclusion of the factual elements which affect the establishment of the infringement.[220]

189. In the present case, it seems to me that the contours of the geographical scope of the infringement, as regards intra-State flights, have not been clearly defined by the Commission. It was only in Section 5.3.7 of the decision at issue, relating to the 'effect upon trade between Member States, between EEA Contracting Parties and between the contracting parties of the Swiss Agreement' that the Commission dealt with the geographical scope of the infringement. In that regard, in that decision, the Commission explained that 'the cartel arrangements covered the whole EEA area as well as Switzerland' and, in substance, had the object of restricting competition between carriers 'in respect of routes within the EEA, between the Contracting Parties to the Swiss Agreement and also between the EEA and third countries' (recital 1030). Contrary to the findings of the General Court in paragraphs 935 and 936 of the judgment in *SAS Cargo Group*, it is not apparent from those passages that the turnover relating to internal sales 'clearly falls within the scope of the single and continuous infringement'.

4. The presumption of innocence and the principle of equal treatment

190. According to the appellants in the case in *SAS Cargo Group*, the General Court infringed the presumption of innocence [221] and the principle of equal

C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraph 693)) and that the exercise of unlimited jurisdiction does not amount to a review of its own motion, since the General Court is not obliged to undertake a full investigation of its own motion (see, to that effect, judgment of 8 December 2011, *Chalkor* v *Commission* (C-386/10 P, EU:C:2011:815, paragraphs 64 to 66)).

220 The Court of Justice has held that the unlimited jurisdiction enjoyed by the General Court on the basis of Article 31 of Regulation No 1/2003 concerns solely the assessment by that court of the fine imposed by the Commission, to the exclusion of any alteration of the constituent elements of the infringement lawfully determined by the Commission in the decision under examination by the General Court (see judgment of 21 January 2016, *Galp Energía España and Others* v *Commission* (C-603/13 P, EU:C:2016:38, paragraph 77)). See, in legal literature, Bernardeau, L., and Christienne, J.-P., *Les amendes en droit de la concurrence: pratique décisionnelle et contrôle juridictionnel du droit de l'Union*, op. cit., p. 868; Expert, H., and Poullet, C., 'La compétence de pleine juridiction conférée au juge de l'Union en matière de concurrence: complément ou accessoire du contrôle de légalité ?', op. cit., pp. 563 and 564 and, in a critical sense, Gaulard, G., *La pleine juridiction du juge de l'Union européenne en droit de la concurrence*, op. cit., pp. 222 to 228.

221 I note that the appellants in the case in *SAS Cargo Group* do not provide any explanations as regards the alleged infringement of the presumption of innocence. As a reminder, according to

treatment [222] because it included the turnover relating to the internal sales in the value of sales so as to treat the appellants fairly as compared with the other carriers, even though it considered it to be merely 'possible' (and not demonstrated to the requisite legal standard) that those other carriers had not excluded those figures.

191. In paragraphs 935 to 937 of the judgment in *SAS Cargo Group*, the General Court took the view, in essence, that the internal sales fell within the scope of the single and continuous infringement and therefore should have been included in the value of sales, which, according to the General Court, was also the Commission's intention.

192. However, while taking into account the limits of the Court of Justice's review at the appeal stage of the action taken by the General Court', [223] it must be

the case-law of the Court of Justice, that principle will be infringed if a judicial decision or a statement by a public official concerning a person charged with a criminal offence contains a clear declaration, in the absence of a final conviction that the person concerned has committed the crime in question. In that context, the importance of the choice of words by the judicial authorities, of the particular circumstances in which they were made and of the nature and context of the proceedings at issue should be underlined (see judgment of 18 March 2021, *Pometon* v *Commission* (C-440/19 P, EU:C:2021:214, paragraph 62 and the case-law cited)).

222 According to settled case-law, while it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited discretion to rule on the amount of fines imposed on undertakings for infringements by them of EU law, the General Court is bound by certain requirements, which include the duty to state reasons, by which it is bound in accordance with Article 36 of the Statute of the Court of Justice of the European Union, applicable to the General Court under the first paragraph of Article 53 of the Statute, and the principle of equal treatment (see, to that effect, judgment of 12 January 2023, *Lietuvos geležinkeliai* v *Commission* (C-42/21 P, EU:C:2023:12, paragraphs 153 and 154 and the case-law cited)). In addition, a breach of the principle of equal treatment as a result of different treatment presumes 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 the purpose of the European Union act which makes the distinction in question. The principles and objectives of the field to which the act relates must also be taken into account (see judgment of 11 July 2013, *Team Relocations and Others* v *Commission* (C-444/11 P, EU:C:2013:464, paragraph 187 and the case-law cited)).

223 In an appeal, the task of the Court of Justice is limited to examining whether, in exercising its power of review, the General Court made an error of law. Under Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal must be limited to points of law and must lie on grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the applicant and infringement of EU law by the General Court. An appeal may therefore be based only on grounds relating to the infringement of rules of law, to the exclusion of any appraisal of the facts. The General Court has exclusive jurisdiction, first, to establish the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and, second, to assess those facts. It follows that the appraisal of the facts by the General Court does not constitute, save where the clear sense of the evidence produced before it is distorted, a question of law which is subject, as such, to review by the Court of Justice (see, to that effect, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission* (C-204/00 P,

pointed out that that conclusion is not based on any reliable evidence. As the appellants submit, in paragraph 932 of the judgment in *SAS Cargo Group*, the General Court found that it was *possible*, as was apparent from the response provided by the Commission to its questions, that the turnover relating to the internal sales had *not been deducted* from the value of sales applied to the other incriminated carriers. [224] That being said, in paragraph 939 of that judgment, the General Court concluded, in essence, that those internal sales were *not included* in the value of sales and, in paragraph 940 of the judgment, included that turnover. In other words, the premiss that it was possible that those sales were excluded from the value of sales by the other appellants led the General Court to the conclusion that those sales were indeed included in that value, which required it to include those sales in the value of sales of the appellants in the case in *SAS Cargo Group*. In so doing, the General Court, in my view, distorted the evidence. [225]

193. In the light of all the foregoing, I propose that the appellants' fifth ground in the case in *SAS Cargo* be upheld and, consequently, that the case be referred back to the General Court so that it may rule on the merits of the second head of claim, seeking a reduction in the amount of the fine.

V. Conclusion

194. In the light of the foregoing considerations, I propose that the Court:

– dismiss the appeals in *Air Canada* v *Commission* (C-367/22 P), *Air France* v *Commission* (C-369/22 P), *Air France-KLM* v *Commission* (C-370/22 P), *LATAM Airlines Group and Lan Cargo* v *Commission* (C-375/22 P), *British Airways* v *Commission* (C-378/22 P), *Singapore Airlines and Singapore Airlines Cargo* v *Commission* (C-379/22 P), *Deutsche Lufthansa and Others* v *Commission* (C-380/22 P), *Japan Airlines* v *Commission* (C-381/22 P), *Cathay Pacific Airways* v *Commission* (C-382/22 P), *Koninklijke Luchtvaart Maatschappij* v *Commission* (C-385/22 P), *Martinair Holland* v *Commission* (C-386/22 P), and *Cargolux Airlines* v *Commission* (C-401/22 P);

– set aside the judgment of the General Court of the European Union of 30 March 2022, *SAS Cargo Group and Others* v *Commission* (T-324/17,

C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraphs 47 to 49)).

224 At the hearing, the Commission stated that it was unable to confirm whether or not this figure had been included in the value of sales by the other appellants.

225 Moreover, the reasoning of the General Court is even less clear in so far as it proceeded in this manner 'with a view also to ensure equal treatment between the incriminated carriers that brought an action against the [decision at issue]' (paragraph 940 of the judgment in *SAS Cargo Group*), the adverb 'also' indicating that the General Court relied on the principle of equal treatment for the sake of completeness, which raises doubts as to the basis of its reasoning.

EU:T:2022:175), as regards the second head of claim, seeking a reduction in the amount of the fine;

– refer the case back to the General Court for a decision on the merits of the second head of claim;

– dismiss the appeal as to the remainder.