Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

26 February 2026*

(Appeal – Competition – Agreements, decisions and concerted practices – Market for airfreight – Decision of the European Commission finding an infringement of Article 101 TFEU, Article 53 of the Agreement on the European Economic Area and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport – Coordination of elements of the price of air freight services (fuel surcharge, security surcharge and refusal to pay commission on surcharges) – Rights of the defence – Right of access to the file – Inculpatory and exculpatory evidence – Inbound freight services – Territorial jurisdiction of the Commission – Qualified effects – Statement of objections – Right to be heard – Single and continuous infringement – Geographic scope of the cartel – State coercion defence – Conditions under which applicable – Proof of participation in a single and continuous infringement – Calculation of the fine – Unlimited jurisdiction of the General Court of the European Union – Distortion)

In Case C-403/22 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 17 June 2022,

SAS Cargo Group A/S, established in Kastrup (Denmark),

Scandinavian Airlines System Denmark-Norway-Sweden, established in Stockholm (Sweden),

SAS AB, established in Stockholm,

represented by B. Creve and M. Kofmann, advokater, and by G. Forwood and J. Killick, avocats,

appellants,

the other party to the proceedings being:

European Commission, represented by A. Dawes and C. Zois, acting as Agents, and by B. Doherty, Barrister-at-Law,

defendant at first instance,

THE COURT (Fifth Chamber),

* Language of the case: English.

composed of I. Jarukaitis (Rapporteur), President of the Fourth Chamber, acting as President of the Fifth Chamber, E. Regan and D. Gratsias, Judges,

Advocate General: A. Rantos,

Registrar: R. Stefanova-Kamisheva, Administrator,

having regard to the written procedure and further to the hearing on 19 April 2024,

after hearing the Opinion of the Advocate General at the sitting on 5 September 2024,

gives the following

Judgment

1 By their appeal, SAS Cargo Group A/S ('SAS Cargo'), Scandinavian Airlines System Denmark-Norway-Sweden ('SAS Consortium') and SAS AB (together, 'SAS Cargo and Others') seek to have 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, 'the judgment under appeal', EU:T:2022:175), by which the General Court dismissed in part their action seeking, principally, annulment, in whole or in part, of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 [TFEU], Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) ('the decision at issue'), in so far as it concerns them, and, in the alternative, a reduction in the amount of the fine imposed on them by that decision.

Legal context

The EC-Switzerland Air Transport Agreement

2 The Agreement between the European Community and the Swiss Confederation on Air Transport, signed in Luxembourg on 21 June 1999 and approved on behalf of the European Community by Decision 2002/309/EC, Euratom of the Council, and of the Commission as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1) ('the EC-Switzerland Air Transport Agreement'), entered into force on 1 June 2002. Articles 8 and 9 of that agreement correspond, *mutatis mutandis*, to Articles 101 and 102 TFEU, respectively.

3 Under Article 11 of that agreement:

'1. The provisions of Articles 8 and 9 shall be applied … by the Community institutions in accordance with Community legislation as set out in the Annex to this Agreement, taking into account the need for close cooperation between the Community institutions and the Swiss authorities.

2. The Swiss authorities shall rule, in accordance with the provisions of Articles 8 and 9, on the admissibility of all agreements, decisions and concerted practices … concerning routes between Switzerland and third countries.'

4 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) was made applicable under the same agreement, with effect from 5 December 2007, by 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). On that date, it replaced 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), and has appeared in the annex to the EC-Switzerland Air Transport Agreement since the entry into force of that agreement.

The FEU Treaty

5 Article 101(1) TFEU provides:

'The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

…'

The EEA Agreement

6 Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement') corresponds, *mutatis mutandis*, to Article 101 TFEU.

7 Regulation No 1/2003, as amended by Council Regulation (EC) No 411/2004 of 26 February 2004 (OJ 2004 L 68, p. 1), was incorporated into the EEA Agreement by, on the one hand, Decision of the EEA Joint Committee No 130/2004 of 24 September 2004 amending Annex XIV (Competition), Protocol 21 (On the implementation of competition rules applicable to undertakings) and Protocol 23 (Concerning the cooperation between the surveillance authorities) to the EEA Agreement (OJ 2005 L 64, p. 57), which entered into force on 19 May 2005, and, on the other hand, Decision of the EEA Joint Committee No 40/2005 of 11 March 2005 amending Annex XIII (Transport) and Protocol 21 (on the implementation of competition rules applicable to undertakings) to the EEA Agreement (OJ 2005 L 198, p. 38), which entered into force on the same day.

The 2006 Guidelines

8 Points 13, 25, 28, 29 and 37 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines') state as follows:

'13. In determining the basic amount of the fine to be imposed, the [European] Commission will take the value of the undertaking's sales of goods or services to which the infringement directly or indirectly … relates in the relevant geographic area within [the European Economic Area (EEA)]. It will normally take the sales made by the undertaking during the last full business year of its participation in the infringement …

…

25. In addition, irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales … in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements. For the purpose of deciding the proportion of the value of sales to be considered in a given case, the Commission will have regard to a number of factors …

…

28. The basic amount may be increased where the Commission finds that there are aggravating circumstances, such as:

– where an undertaking continues or repeats the same or a similar infringement after the Commission or a national competition authority has made a finding that the undertaking infringed Article [101] or [102 TFEU]: the basic amount will be increased by up to 100% for each such infringement established;

…

29. The basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as:

…

– where the anticompetitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation. …

…

37. Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case may justify departing from such methodology or from the limits specified in point 21.'

Background to the dispute and the decision at issue

9 The background to the dispute and the decision at issue, as set out in paragraphs 1 to 63 of the judgment under appeal, may, for the purposes of the present proceedings, be summarised as follows.

10 SAS Cargo and Others are active in the market for airfreight services. SAS Cargo, which offers freight services, is an indirectly wholly owned subsidiary of SAS. Until 1 June 2001, SAS Cargo did not exist as a separate legal entity, but was a business unit within SAS Consortium. SAS Consortium is owned by SAS.

11 In the freight sector, airlines provide for the carriage of cargo by air ('the carriers'). As a general rule, carriers supply freight services to freight forwarders, who arrange the transport of that cargo on behalf of shippers. In return, those freight forwarders pay those carriers a price consisting, on the one hand, of rates calculated on a per kilogram basis and, on the other hand, of various surcharges.

The administrative procedure

12 On 7 December 2005, the Commission received an application for immunity, under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3), lodged by Deutsche Lufthansa AG ('Lufthansa') and two of its subsidiaries, Lufthansa Cargo AG and Swiss International Air Lines AG. The application alleged that anticompetitive contacts were being maintained between a number of carriers with regard to elements of the price of services provided in the market for airfreight, namely the introduction of 'fuel' and 'security' surcharges and the refusal on the part of those carriers to pay the freight forwarders a commission on the surcharges ('the refusal to pay commission').

13 On 14 and 15 February 2006, the Commission carried out unannounced inspections at the premises of a number of carriers.

14 Following those inspections, a number of carriers, including SAS Cargo and SAS Consortium, submitted an application for immunity under the notice on immunity from fines and reduction of fines in cartel cases, referred to in paragraph 12 of the present judgment.

15 On 19 December 2007, the Commission addressed a statement of objections to 27 carriers, including SAS Cargo and Others, all of which subsequently submitted written observations. An oral hearing was held from 30 June to 4 July 2008.

The initial decision

16 On 9 November 2010, the Commission adopted Decision C(2010) 7694 final relating to a proceeding under Article 101 [TFEU], Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight) ('the initial decision'). That decision was addressed to 21 carriers, which included SAS Cargo and Others.

17 The decision stated, in its grounds, that the incriminated carriers had coordinated their behaviour as regards the pricing of freight services, by reaching an agreement on the fuel surcharge, the security surcharge and the refusal to pay commission, and had, in doing so, participated in a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement, covering the territory of the EEA and Switzerland.

The judgments of 16 December 2015

18 By judgment of 16 December 2015, *SAS Cargo and Others* v *Commission* (T-56/11, EU:T:2015:990), the General Court annulled the initial decision in so far as it concerned SAS Cargo and Others. By 12 other judgments of the same day, the General Court also annulled that decision, in whole or in part, in so far as it concerned 12 other carriers or groups of carriers.

19 The General Court found that that decision was vitiated by a defective statement of reasons.

The decision at issue

20 On 20 May 2016, the Commission sent a letter to the carriers referred to in the initial decision and which had brought an action against the latter before the General Court to inform them of its intention again to adopt a decision in which it would find that they had participated in a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement on all of the routes referred to in that initial decision. Those carriers were given a period of one month in which to submit their observations. All availed themselves of that opportunity.

21 On 17 March 2017, the Commission adopted the decision at issue, which was addressed to 19 carriers, including SAS Cargo and Others.

22 That decision states that the incriminated carriers coordinated their behaviour as regards the pricing of freight services worldwide, by reaching an agreement on the fuel surcharge, the security surcharge and the refusal to pay commission ('the cartel at issue'), and had, in doing so, participated in a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement.

23 In Section 4 of that decision, headed 'Description of the events', the Commission stated, inter alia, that the investigations had uncovered a worldwide cartel based on a network of bilateral and multilateral contacts over a long period of time among competitors regarding the conduct which they had decided on, intended to adopt, or contemplated adopting with regard to various elements of the charges for freight services referred to in the preceding paragraph. It stated that the common objective of that network of contacts was to coordinate competitors' pricing behaviour or to reduce uncertainty with regard to their pricing policies. It then described the contacts concerning the fuel surcharge, the security surcharge and the refusal to pay commission, respectively, and assessed the factual evidence concerning (i) the cartel at issue as a whole and (ii) each of the addressees of that decision.

24 In Section 5 of the decision at issue, headed 'The application of the relevant competition rules', the Commission applied Article 101 TFEU to the facts of the case, while stating that the references to that article were also to be read as references to Article 53 of the EEA Agreement and to Article 8 of the EC-Switzerland Air Transport Agreement, since those provisions apply *mutatis mutandis*, unless otherwise provided.

25 In that connection, as regards its jurisdiction, the Commission examined the limits of its territorial and temporal jurisdiction to find and penalise an infringement of the competition rules in the case at hand.

26 First, in recitals 822 to 832 of the decision at issue, which make up Subsection 5.2 of that decision, headed 'Jurisdiction of the Commission', the Commission observed, in essence, that it would not apply, first of all, Article 101 TFEU to agreements and practices prior to 1 May 2004 concerning routes between airports within the European Union and airports outside the EEA ('EU-third country routes'); next, Article 53 of the EEA Agreement to agreements and practices prior to 19 May 2005 concerning EU-third country routes and routes between airports in countries that are Contracting Parties of the EEA Agreement but are not EU Member States and airports in third countries ('non-EU EEA-third country routes'); and, lastly, Article 8 of the EC-Switzerland Air Transport Agreement to agreements and practices prior to 1 June 2002 concerning routes between airports within the European Union and Swiss airports ('EU-Switzerland routes'). It stated, in recital 832 of that decision, that the latter decision did 'not purport to find an infringement of Article 8 of the [EC-Switzerland Air Transport Agreement] concerning freight services on routes between Switzerland and third countries'.

27 Second, in recitals 1036 to 1046 of the decision at issue, which make up Subsection 5.3.8 of that decision under the heading 'The applicability of Article 101 of the TFEU and Article 53 of the EEA Agreement to inbound routes', the Commission set out the grounds on which it rejected the arguments, put forward by various incriminated carriers, that it had exceeded the limits of its territorial jurisdiction under the rules of public international law by finding and penalising an infringement of those two provisions on routes from third countries to the EEA ('inbound routes' and, as regards freight services offered on those routes, 'inbound freight services').

28 In particular, in recital 1045 of the decision at issue, the Commission stated that anticompetitive practices with regard to inbound freight services were 'liable to have immediate, substantial and foreseeable effects within the EU [and the] EEA, as the increased costs of air transport to the EEA, and consequently higher prices of imported goods, are by their very nature liable to have effects on consumers in the EEA'. It added that, in the case at hand, those practices were liable to have such effects on the provision of airfreight 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.

29 Furthermore, in recital 1046 of that decision, the Commission noted that the cartel at issue was 'implemented globally', that the cartel arrangements concerning inbound routes formed an integral part of the single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement and that the uniform application of the surcharges on a worldwide scale was a key element of that cartel.

30 Subsection 5.3 of the decision at issue, relating to the application in the case at hand of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Freight Agreement, comprises recitals 833 to 1052 of that decision. First, in recital 846 of that decision,

the Commission found that the incriminated carriers had coordinated their conduct or influenced price setting, 'ultimately amounting to price fixing with regard to' the fuel surcharge, the security surcharge and the payment of commission on surcharges to freight forwarders. In recital 861 of that decision, the Commission found that the 'overall scheme to coordinate the pricing behaviour for [freight] services' revealed by its investigation demonstrated the existence of a 'complex infringement consisting of various actions which [could] be either classified as an agreement or concerted practice, within which the competitors knowingly substituted practical cooperation between them for the risks of competition'.

31 Second, in recital 869 of the decision at issue, the Commission considered that 'the conduct in question constitute[d] a single and continuous infringement of Article 101 [TFEU]', stating, in recitals 870 to 902 of the decision, that the arrangements in question pursued a single anticompetitive aim of distorting competition in the freight sector within the EEA, concerned the provision of freight services and the pricing thereof, concerned the same undertakings, were of a single and continuous nature, and related to three elements, namely the fuel surcharge, the security surcharge and the refusal to pay commission. In that context, it stated, inter alia, in recital 882 of that decision, that SAS Cargo and Others were involved in two of the three elements of the single infringement, namely that relating to the security surcharge and that relating to the fuel surcharge, but that 'given their involvement in the other elements of the infringement they could have reasonably foreseen exchanges between the parties on such a related matter as commissioning on surcharges and were prepared to take the risk'.

32 Third, in recital 903 of the decision at issue, the Commission found that the anticompetitive conduct in question had the object of restricting competition at least in the European Union, the EEA and Switzerland. In recital 917 of that decision, the Commission added, in essence, that there was, therefore, no need to take into account the actual effects of that conduct.

33 In recitals 922 to 971 of that decision, the Commission examined the WOW alliance, which at the material time comprised Lufthansa, SAS Cargo, Singapore Airlines Cargo Pte Ltd and Japan Airlines International Co. Ltd ('Japan Airlines'). It stated, in recital 971, that, 'having regard to the WOW Alliance Agreement and its implementation the Commission finds that the coordination of the surcharges between the WOW [alliance] members was conducted outside the legitimate framework of the alliance that does not justify it. The members were in fact aware that such coordination is illegitimate. Furthermore, they were aware that the coordination of surcharges involved a number of [carriers] not participating in [the WOW alliance] Consequently, the Commission finds that the evidence concerning contacts between WOW [alliance] members … constitutes evidence of their participation in the infringement of [Article 101 TFEU] as described in this Decision.'

34 Fourth, in recitals 972 to 1021 of the decision at issue, the Commission examined the regulatory systems in place in seven third countries, which several of the incriminated carriers maintained had required them to collude on surcharges, thereby impeding the application of the relevant competition rules. The Commission considered that those carriers had failed to prove that they had acted under duress from those third countries.

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

36 Section 7 of the decision at issue, headed 'Duration of the infringement', contains recitals 1146 to 1169 of that decision. As is apparent from recital 1146 of that decision, the Commission found that the cartel at issue had started on 7 December 1999 and lasted until 14 February 2006. In recital 1146, it stated that that cartel had infringed:

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

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

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

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

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

37 In recital 1169 of that decision, the Commission found that the duration of the infringement to be taken into account in so far as concerned SAS Cargo and Others ran from 13 December 1999 until 14 February 2006.

38 In Section 8 of the decision at issue, the Commission examined the remedies to be taken and the fines to be imposed, by reference to the 2006 Guidelines. It applied, inter alia, on the basis of point 37 of those guidelines, a reduction of 50% to the basic amounts of the fines, since part of the services relating to inbound routes and outbound routes from the EEA to third countries, with the exception of EU-Switzerland routes, were performed outside the territory covered by the EEA Agreement and part of the harm was therefore likely to have occurred outside that territory. In addition, in accordance with point 29 of those guidelines, it granted the incriminated carriers an additional 15% reduction in the basic amounts, on the ground that certain regulatory regimes had encouraged the cartel at issue.

39 The Commission also found, in recitals 1221, 1223 and 1227 to 1229 of the decision at issue, that the additional amount of 16% of the value of sales, under point 25 of the 2006 Guidelines, should be divided between SAS Cargo and Others in such a way as to reflect the duration of the participation of each of those entities in the single and continuous infringement, imposed on SAS Cargo and SAS Consortium, in accordance with point 28 of those guidelines, an increase of 50% in the basic amount of the fine for repeated infringement, and in accordance with point 29 of those guidelines, it granted SAS Cargo and Others a 10% reduction in the basic amount of the fine on account of their limited participation in the single and continuous infringement. The Commission moreover applied a reduction of 15% to their fine in order to take account of their contribution in the context of their leniency application. Thus, the amount of the fine imposed on SAS, SAS Cargo and SAS Consortium was set at EUR 38 250 000, EUR 64 812 500 and EUR 14 875 000 respectively.

40 Articles 1, 3 and 4 of the operative part of the decision at issue are worded as follows:

'*Article 1*

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

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

…
(o) [SAS] from 17 August 2001 until 14 February 2006;
(p) [SAS Cargo] from 1 June 2002 until 14 February 2006;
(q) [SAS Consortium] from 13 December 1999 until 28 December 2003;

…

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

…
(o) [SAS] from 1 May 2004 until 14 February 2006;
(p) [SAS Cargo] from 1 May 2004 until 14 February 2006;

…

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

…
(o) [SAS] from 19 May 2005 until 14 February 2006;
(p) [SAS Cargo] from 19 May 2005 until 14 February 2006;

…

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

…
(o) [SAS] from 1 June 2002 until 14 February 2006;
(p) [SAS Cargo] from 1 June 2002 until 14 February 2006;
(q) [SAS Consortium] from 1 June 2002 until 28 December 2003;

…

Article 3

For the single and continuous infringement referred to in Article 1 …, the following fines are imposed:

…

(n) [SAS Consortium]: EUR 5 355 000;

(o) [SAS Cargo and SAS Consortium] jointly and severally: EUR 4 254 250;

(p) [SAS Cargo and Others] jointly and severally: EUR 5 265 750;

(q) [SAS Cargo and SAS] jointly and severally: EUR 32 984 250;

(r) [SAS Cargo]: EUR 22 308 250;

…

Article 4

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

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

The procedure before the General Court and the judgment under appeal

41 By application lodged at the Registry of the General Court on 29 May 2017, SAS Cargo and Others brought an action for the adoption by the General Court of measures of organisation of procedure or measures of inquiry ordering the Commission to grant them access to the entire case file before it, or any other measure which the General Court deemed necessary, annulment, in whole or in part, of the decision at issue, in so far as it concerns them, and, in the alternative, a reduction of the amount of the fine imposed on them in that decision.

42 In support of that action, SAS Cargo and Others raised five pleas for annulment. The first alleged infringement of their rights of defence and the principle of equality of arms, in so far as they were refused access to evidence, both inculpatory and exculpatory. The second alleged infringement of the right to be heard and a lack of jurisdiction on the part of the Commission, first, to apply Article 101 TFEU and Article 53 of the EEA Agreement to inbound freight services and, second, to apply Article 53 of the EEA Agreement to freight services provided on routes between Switzerland and the three EEA Member States that are not EU Member States ('non-EU EEA-Switzerland routes'). By their third plea, they alleged an error of assessment of the conduct in which they were involved and of the fact that that conduct proved their participation in, or awareness of, the single and continuous infringement. The fourth plea alleged infringement of Article 266 TFEU, of the second paragraph of Article 296 TFEU and of Article 17 of the Charter

of Fundamental Rights of the European Union ('the Charter'), in so far as the decision at issue is vitiated by internal inconsistencies. The fifth plea alleged errors in the determination of the amount of the fine imposed on them.

43 In support of their claim for amendment of the amount of the fine, they put forward all the arguments raised in support of their fifth plea for annulment.

44 By order of 7 January 2021, the General Court reopened the oral part of the procedure, taking the view that it was necessary to invite the parties to submit their observations on an argument which had not been debated between them. In that context, the General Court put written questions to the Commission on 12 January, 2 March and 12 April 2021. The Commission replied to the latter question on 22 April 2021 ('the reply of 22 April 2021'). SAS Cargo and Others submitted their observations on the Commission's replies to all those questions on 14 May 2021. On 26 July 2021, the General Court again closed the oral part of the procedure.

45 By the judgment under appeal, the General Court:

– annulled 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 in so far as it finds that SAS Cargo and Others participated in the element of the single and continuous infringement relating to the refusal to pay commission;

– annulled:

– first, Article 1(2)(o) and (p) of that decision, in so far as it finds an infringement of Article 101 TFEU on routes from Thailand to the European Union between 20 July 2005 and 14 February 2006 as regards the element relating to the fuel surcharge, and

– second, Article 1(3)(o) and (p) of that decision, in so far as it finds an infringement of Article 53 of the EEA Agreement on routes from Thailand to the EEA between 20 July 2005 and 14 February 2006 as regards the component relating to the fuel surcharge;

– annulled Article 3(n) to (r) of that decision;

– set the amount of the fine imposed:

– on SAS Consortium at EUR 7 030 618,

– on SAS Cargo and SAS Consortium jointly and severally at EUR 5 937 909,

– on SAS Cargo and Others jointly and severally at EUR 6 314 572,

– on SAS Cargo and SAS jointly and severally at EUR 29 045 427, and

– on SAS Cargo at EUR 21 687 090;

– dismissed the action as to the remainder; and

– ordered the Commission to bear its own costs and to pay three quarters of the costs of SAS Cargo and Others, and the latter to bear one quarter of their own costs.

46 The General Court, inter alia, upheld the first plea in part. In that regard, it considered that the Commission had erred in refusing SAS Cargo and Others access to certain passages of the replies to the Statement of Objections referred to in the decision at issue. However, it considered that that had no bearing on the Commission's finding relating to the applicability of Article 101 TFEU and Article 53 of the EEA Agreement to the offending conduct that took place in Hong Kong and Japan.

47 As regards the second plea, it held that, in Article 1(3) of the decision at issue, the Commission had not found SAS Cargo and Others liable for an infringement of Article 53 of the EEA Agreement on non-EU EEA-Switzerland routes. It nevertheless found that the Commission had acknowledged that it had failed to exclude from the value of sales an amount of EUR 262 084 in respect of sales of freight services made by SAS Cargo and Others in 2005 on non-EU EEA-Switzerland routes. However, taking the view that that circumstance related exclusively to the revenues to be taken into account for the purposes of calculating the basic amount of the fine, it rejected that second plea.

48 In the context of the third plea, which it upheld in part, the General Court held, inter alia, that the fact that certain items of evidence relied on against SAS Cargo and Others in the decision at issue had to be rejected, as the latter claimed, did not call into question the body of evidence relied on by the Commission to establish their participation in the element of the single and continuous infringement relating to the fuel surcharge or in that relating to the security surcharge. It found, however, as regards the rules applicable in Thailand, that SAS Cargo and Others had succeeded in establishing that, as from 20 July 2005, the authorities of that country had created a legal framework that eliminated any possibility of competitive behaviour between carriers as regards the determination of the amount of the fuel surcharge applicable to flights departing from Thailand. It also found that the Commission had erred in holding them liable for the element of the single and continuous infringement relating to the refusal to pay commission.

49 In the context of the fifth plea, the General Court found, inter alia, that, since the Commission was wrong to ascribe to SAS Cargo and Others liability for the element of the single and continuous infringement relating to the refusal to pay commission, that institution had overestimated the extent of their participation in the single and continuous infringement. It held that, consequently, the Commission had rendered the decision at issue unlawful in so far as it did not grant SAS Cargo and Others, on account of their limited participation in the single and continuous infringement, a reduction of more than 10% in the basic amount of the fine.

50 As a result of those findings, it annulled the decision at issue to the extent indicated in paragraph 45 of the present judgment and rejected the remainder of the claim for annulment.

51 As regards the claim that the amount of the fine should be altered, the General Court excluded – from the value of sales – revenue generated on non-EU EEA-Switzerland routes, since those routes did not fall within the scope of the single and continuous infringement.

52 However, it found, in the light of the Commission's reply to one of its written questions and in order to ensure equal treatment of the incriminated carriers which had brought an action against the decision at issue, that it was necessary to reinstate, in the value of sales to be taken into account for SAS Cargo and Others, the turnover which they had generated on routes operated exclusively within Denmark, Sweden and Norway ('the internal routes'), which amounted to EUR 7 991 282.

53 Furthermore, in view of the fact that it upheld in part certain pleas for annulment, it reduced the gravity factor for the infringement by comparison with that applied in the decision at issue, applied an additional amount slightly lower than that applied by the Commission, and applied a rate of reduction on account of the appellants' limited participation in the single and continuous infringement which was higher than that set by the Commission. By contrast, it considered that the exclusion of certain items of evidence did not justify an additional reduction on account of limited participation in the single and continuous infringement.

54 Calculating the fine on the basis of those factors, the General Court held that the fines imposed on the appellants had to be set at the amounts indicated in paragraph 45 of the present judgment.

55 The General Court dismissed the action as to the remainder.

Forms of order sought by the parties to the appeal

56 SAS Cargo and Others claim that the Court should:

– set aside the judgment under appeal in so far as it dismisses their action for annulment;

– annul in whole or in part the decision at issue, in so far as it relates to them;

– cancel or substantially reduce the fine imposed on them;

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

– order the Commission to pay the costs both of the appeal and of the proceedings before the General Court.

57 The Commission contends that the Court should:

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

– in the alternative, if the appeal is upheld, refer the case back to the General Court and reserve the costs.

The appeal

58 SAS Cargo and Others put forward five grounds in support of their appeal. Their first ground of appeal alleges that the General Court erred in law in its assessment of the infringement of their rights of defence and of their right of access to the file. Their second ground of appeal alleges errors of law concerning their right to be heard in relation to the application of the test based on the qualified effects of anticompetitive practices in the European Union ('the qualified effects test') and inbound routes. By their third ground of appeal, they allege that the General Court erred in law as regards the application of that test. Their fourth ground of appeal alleges errors of law in the assessment of the existence of a single and continuous infringement. By their fifth ground of appeal, they allege errors of law in the General Court's exercise of its unlimited jurisdiction.

The first ground of appeal, relating to the rights of the defence and the right of access to the file

59 SAS Cargo and Others' first ground of appeal consists of two parts. By the first part, they claim that the General Court infringed their rights of defence and their right of access to the Commission's administrative file by not penalising the Commission's failure to give them access to inculpatory evidence. By the second part, they allege the same infringements as regards access to exculpatory evidence.

The first part, relating to inculpatory evidence

– *Arguments of the parties*

60 SAS Cargo and Others state that they had claimed before the General Court that their rights of defence had been infringed because the decision at issue relied on descriptions of third-country regulatory frameworks and administrative practices which are taken from, inter alia, the replies of other carriers to the Statement of Objections and from documents referring to those replies. However, those documents were not communicated to them, although they are inculpatory evidence. Although, as is apparent from paragraphs 104 to 109, 115 and 124 of the judgment under appeal, the General Court did indeed uphold their line of argument as regards certain replies to the Statement of Objections, it wrongly refused to grant them access to other categories of inculpatory documents.

61 In the first place, in paragraph 110 of the judgment under appeal, the General Court erred in law in finding that the Commission had not relied on undisclosed documents relating to the security surcharge in Japan. It is apparent from recitals 1008 and 1012 of the decision at issue (i) that certain parties had claimed that coordination was required in respect of the fuel surcharge and not in respect of the security surcharge and (ii) that evidence, albeit unsatisfactory, had been submitted to it by other carriers. SAS Cargo and Others, which had themselves submitted observations concerning the security surcharge demonstrating that recital 1008 was incorrect, should therefore have had access to the replies to the Statement of Objections provided by those other carriers, in order to verify the Commission's findings in that regard.

62 In the second place, in paragraphs 112 to 114 of that judgment, the General Court erred in law in finding that it was not necessary for SAS Cargo and Others to have access to the materials used by the Commission to assess the regulatory regimes of Japan and other third countries, on the grounds that the decision at issue only described the applicable provisions and that the information concerning the legislative framework of the third countries in question was, in principle, public and accessible.

63 First, the content of national law is a question of fact and must be established by evidence. The Commission's findings concerning the regulatory frameworks of those third countries must therefore necessarily have been based on documents in the file but which were not disclosed. In addition, it was incriminating evidence, as it was used against SAS Cargo and Others. Second, the judgment of the General Court of 27 September 2006, *Jungbunzlauer* v *Commission* (T-43/02, EU:T:2006:270), cited in paragraph 114 of the judgment under appeal, concerns not national law but the case-law of the EU Courts and is therefore irrelevant. Third, there is no evidence on the record to show that the regulations in question were publicly accessible. Fourth, as is apparent

from paragraphs 558 to 661 of the judgment under appeal, the decision at issue also mentions the administrative requirements in the other third countries whose regulatory regimes are addressed in that decision. However, those requirements are not publicly available.

64 In the third place, the General Court failed to address SAS Cargo and Others' argument that the Commission should have provided them with access to the replies of the other addressees of the Statement of Objections which concerned Japanese regulations. Thus, the General Court did not respond, in particular, to their argument concerning recital 1011 of the decision at issue, of which it nevertheless took formal note in paragraph 103 of the judgment under appeal. It should, at the very least, have stated the reasons why it did not take into account SAS Cargo and Others' arguments concerning pieces of inculpatory evidence which could have led to the partial or full annulment of the decision at issue.

65 The General Court's findings in paragraphs 115 and 124 of the judgment under appeal are, as a result of the foregoing, also incorrect.

66 The Commission replies that that part is unfounded.

– *Findings of the Court*

67 A corollary of the principle of protection of the rights of the defence, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence. Those documents include both incriminating evidence and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 22 and the case-law cited; see also, to that effect, judgment of 14 May 2020, *NKT Verwaltung and NKT* v *Commission*, C-607/18 P, EU:C:2020:385, paragraph 262).

68 In accordance with the settled case-law of the Court of Justice, the failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document. If there were other documentary evidence of which the parties were aware during the administrative procedure that specifically supported the Commission's findings, the fact that an incriminating document not communicated to the person concerned was inadmissible as evidence would not affect the validity of the objections upheld in the contested decision. It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 13 and the case-law cited).

69 In the present case, as regards, in the first place, the complaint directed against paragraph 110 of the judgment under appeal, it should be noted, on the one hand, that, in that paragraph, the General Court stated that it was not apparent from the passage cited from recital 1012 of the decision at issue stating that 'it is not claimed that the parties were required to concert on the [security surcharge] or [the refusal to pay commission]', that the Commission relied on

undisclosed inculpatory evidence. In that regard, it noted that, by that finding, the Commission was merely observing that no evidence attesting to such an obligation had been provided in response to the Statement of Objections.

70 By claiming, in essence, that the Commission relied on an alleged absence of submissions concerning the requirement to concert on the security surcharge as, in itself, inculpatory evidence, SAS Cargo and Others are in fact merely calling into question the General Court's reading of recital 1012 in the judgment under appeal.

71 However, in accordance with the second subparagraph of Article 256(1) TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal is to be limited to points of law.

72 The General Court thus has exclusive jurisdiction to find and appraise the relevant facts and assess the evidence. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. The assessment of those facts and that evidence does not therefore constitute, save in the case of their distortion, a question of law subject, as such, to review by the Court of Justice in the context of an appeal (judgments of 28 May 1998, *Deere* v *Commission*, C-7/95 P, EU:C:1998:256, paragraph 22, and of 18 March 2021, *Pometon* v *Commission*, C-440/19 P, EU:C:2021:214, paragraph 50 and the case-law cited).

73 That complaint is therefore inadmissible, since SAS Cargo and Others do not claim that, in paragraph 110 of the judgment under appeal, the General Court distorted the decision at issue.

74 On the other hand, in so far as SAS Cargo and Others claim that recital 1008 of the decision at issue was incorrect, it is sufficient to note that that line of argument is directed not against the judgment under appeal, the contested passages of which do not even specifically mention that recital, but against the decision at issue. That line of argument must therefore be rejected as inadmissible (see, by analogy, judgment of 29 June 2023, *TUIfly* v *Commission*, C-763/21 P, EU:C:2023:528, paragraph 53 and the case-law cited).

75 In the second place, it should be noted that, as stated in paragraph 111 of the judgment under appeal, the General Court focused, in paragraphs 112 to 114 thereof, on responding to SAS Cargo and Others' line of argument relating to undisclosed documents on which the Commission relied, even though those documents did not necessarily come from other carriers that were addressees of the Statement of Objections. They referred in that regard to the documents that were used for the analysis of Japanese legislation and air services agreements ('ASAs') applicable in third countries other than Hong Kong and Japan, referred to in recitals 998 to 1001, 1009, 1010 and 1013 to 1019 of the decision at issue.

76 In paragraph 112 of that judgment, the General Court found that recitals 998 to 1001, 1009, 1010 and 1013 to 1019 did not refer to any document at all in the investigation file and that the Commission merely described therein the applicable provisions of Japanese legislation and the ASAs to which the third countries concerned are parties and found that it was not established that those provisions required carriers to implement price coordination. The General Court also noted that the provisions in question were those referred to by certain carriers to which the Statement of Objections was addressed in their arguments in reply thereto, as was apparent from recitals 1002, 1003 and 1013 of the decision at issue.

77 In paragraph 113 of that judgment, the General Court noted that SAS Cargo and Others had failed to explain how the passages in question of that decision indicated the existence of one or more undisclosed inculpatory documents on which the Commission relied.

78 In paragraph 114 of that judgment, it added that, even if SAS Cargo and Others intended to complain that the Commission did not provide them with access to the wording of the legal provisions in question, the legal framework applicable in Japan and in the other relevant third countries with regard to surcharges cannot, in itself, constitute incriminating evidence and that, in any event, that information is in principle public and accessible. It added that, moreover, the Statement of Objections had afforded them the opportunity to make known their views on the legal provisions in question during the administrative procedure.

79 It is apparent from those factors, first of all, that, in paragraphs 112 and 113, the General Court did not find that it was not necessary for SAS Cargo and Others to have access to the documents which the Commission had used to assess the regulatory regimes of Japan and other third countries, as they maintain in the present complaint, but that the passages of the decision at issue to which they referred did not indicate the existence of undisclosed inculpatory documents on which the Commission relied in that decision. The criticism aimed at paragraphs 112 and 113 must therefore, in so far as it is based on that misreading of the judgment under appeal, be rejected as unfounded.

80 Next, in so far as SAS Cargo and Others refer to paragraph 114 of the judgment under appeal by claiming that the documents in question are indeed inculpatory documents, that the case-law cited in paragraph 114 is not relevant and that the public nature of the rules concerned has not been established, it is sufficient to note that that line of argument relates to findings of the General Court which are included for the sake of completeness, as is apparent from paragraphs 75 to 78 of the present judgment. Consequently, that line of argument must be rejected as ineffective, in accordance with the settled case-law of the Court of Justice, according to which complaints directed against grounds included in a decision of the General Court purely for the sake of completeness cannot lead to the decision being set aside and are therefore ineffective (judgments of 15 October 2002, *Limburgse Vinyl Maatschappij and Others* v *Commission*, C-238/99 P, 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 537, and of 4 October 2024, *thyssenkrupp* v *Commission*, C-581/22 P, EU:C:2024:821, paragraph 263 and the case-law cited).

81 Lastly, in so far as SAS Cargo and Others dispute paragraphs 558 to 561 of the judgment under appeal, it is sufficient to note that, in those paragraphs, the General Court referred to an instruction of the Civil Aviation Department of Thailand contained in a letter adduced by SAS Cargo and Others both during the administrative procedure and before the General Court. SAS Cargo and Others do not put forward any legal arguments to explain how that finding is capable of revealing an error of law committed by the General Court in the assessment of the line of argument submitted to it by SAS Cargo and Others concerning alleged inculpatory evidence carried out in paragraphs 103 to 115 of the judgment under appeal.

82 However, in accordance with the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) and Article 169(2) of the Rules of Procedure of the Court of Justice, an appeal is to indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or ground concerned is inadmissible. Thus, elements of an appeal that contain no argument specifically

identifying the error of law allegedly vitiating the judgment in respect of which the appeal is brought do not fulfil that requirement and must be rejected as inadmissible (judgment of 4 October 2024, *Ferriere Nord* v *Commission*, C-31/23 P, EU:C:2024:851, paragraphs 51 and 52 and the case-law cited).

83 The complaint directed against paragraphs 558 to 561 is therefore inadmissible.

84 In the third place, it should be recalled that the General Court's obligation to state reasons under Article 36 of the Statute of the Court of Justice of the European Union, read in conjunction with the first paragraph of Article 53 thereof, requires that court to disclose clearly and unequivocally its reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to exercise its power of review (judgments of 11 April 2013, *Mindo* v *Commission*, C-652/11 P, EU:C:2013:229, paragraph 29, and of 26 September 2024, *Covestro Deutschland and Germany* v *Commission*, C-790/21 P and C-791/21 P, EU:C:2024:792, paragraph 113 and the case-law cited).

85 However, that obligation does not require that the General Court 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 on appeal (judgments 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, paragraph 372, and of 26 September 2024, *Covestro Deutschland and Germany* v *Commission*, C-790/21 P and C-791/21 P, EU:C:2024:792, paragraph 114 and the case-law cited).

86 It is apparent from paragraphs 103 to 109 of the judgment under appeal that the General Court responded to SAS Cargo and Others' line of argument that the Commission should have provided them with access to the replies of the other addressees of the Statement of Objections which were relied on and which relate to Japanese regulations. As stated in paragraph 103, that line of argument concerned, inter alia, recital 1011 of the decision at issue, which specifically relates to the replies submitted to the Statement of Objections by Japan Airlines and other carriers in relation to the fuel surcharge for flights from Japan. In the light of the case-law referred to in paragraphs 84 and 85 of the present judgment, the alleged infringement by the General Court of its obligation to state reasons has therefore not been established.

87 It follows from the foregoing that the first part of the first ground of appeal must be rejected as inadmissible in part and unfounded in part.

The second part, relating to exculpatory evidence

– *Arguments of the parties*

88 SAS Cargo and Others state that they had claimed, before the General Court, that their rights of defence had been infringed because the Commission had failed to provide them with potentially exculpatory materials received by the Commission after the Statement of Objections, in particular the replies of other carriers to the Statement of Objections and the observations of

other addressees of the Statement of Objections which were submitted before the General Court in the context of their actions against the initial decision. In rejecting that line of argument, the General Court erred in law.

89 In the first place, the General Court, in paragraph 123 of the judgment under appeal, held that the principle stemming from its judgment of 29 June 1995, *Solvay* v *Commission* (T-30/91, EU:T:1995:115), according to which it is not for the Commission alone to determine whether a document is useful for the defence, does not apply to evidence subsequent to the Statement of Objections. The judgment which it cited in that regard, namely the judgment of the General Court of 16 June 2011, *Heineken Nederland and Heineken* v *Commission* (T-240/07, EU:T:2011:284), does not preclude access being granted when necessary to respect the principle of equality of arms. The right to good administration and the right to a fair trial enshrined in Articles 41 and 47 of the Charter require the prosecution authorities to disclose all material evidence in their possession. In order to determine whether access to evidence should be granted, the key question is not when it was included in the Commission's file, but only whether it could have been useful for the defence. The appellants rely, in that regard, on the fact that the rights granted by the Charter must be accorded the same scope as those guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. The case-law of the European Court of Human Rights requires prosecution authorities to disclose all material evidence in their possession, both for and against the accused, even if they do not consider it material.

90 In the second place, the reference to the judgment of the General Court of 12 July 2011, *Hitachi and Others* v *Commission* (T-112/07, EU:T:2011:342), made in paragraph 117 of the judgment under appeal, is irrelevant, since that judgment addresses 'arguments' made by other addressees of the Statement of Objections, whereas SAS Cargo and Others requested access to the 'data' of other carriers. It is very likely that the exculpatory evidence from one carrier would also exculpate other carriers, as the Commission acknowledged by disclosing certain evidence subsequent to that statement.

91 In the third place, in paragraphs 118 to 122 of the judgment under appeal, the General Court distorted the evidence and failed to respond to their line of argument by finding that they had not provided any prima facie evidence to show that the documents requested would have been useful for the proceedings. Such prima facie evidence was, however, set out in the application and in the reply before the General Court as regards the conduct of the WOW alliance, conduct in third countries, other carriers' internal speculation about SAS Cargo and Others and local disparate conduct and vertical capacity supply agreements and the emails relating thereto, the 'Dear Partner' emails. A very large part of that evidence was not examined by the General Court.

92 As regards, in particular, those emails, the General Court, in paragraphs 476 to 487 of the judgment under appeal, rejected SAS Cargo and Others' plausible explanation that they had been sent in an unsolicited and unreciprocated manner by Lufthansa to the airlines which were its customers, with the result that it treated those emails as inculpatory evidence. However, in the related case that gave rise to the judgment of the General Court of 30 March 2022, *Latam Airlines Group and Lan Cargo* v *Commission* (T-344/17, EU:T:2022:185), the General Court, in paragraph 512 of that judgment, treated those emails as exculpatory evidence. It thus infringed the principle that a judgment, including its grounds, must be *erga omnes*. Identical evidence should be assessed in the same way, irrespective of the case.

93 In the fourth place, regarding evidence from non-incriminated carriers, the General Court, in paragraph 121 of the judgment under appeal, erred in law or alternatively failed to state reasons for its decision, by finding that SAS Cargo and Others' line of argument was based on 'extremely general conjecture'. In reality, SAS Cargo and Others submitted specific evidence that the replies of Air Canada and another carrier contained, in so far as they concerned them, exculpatory evidence or, in other words, prima facie evidence that those documents would have been useful for their defence. The General Court therefore infringed the principle of equality of arms and the rights of the defence. SAS Cargo and Others refer, inter alia, to paragraphs 477 and 478 of the judgment under appeal, in which the General Court relied on emails exchanged between Lufthansa and another carrier as inculpatory evidence against SAS Cargo and Others. However, Lufthansa was not incriminated. Moreover, SAS Cargo and Others were not able to access the defence and evidence submitted by Lufthansa, which strongly suggests a refusal to grant access to exculpatory evidence. The General Court failed to explain why that prima facie evidence was insufficient and did not rule on all the prima facie evidence adduced.

94 In the fifth place, in paragraph 118 of the judgment under appeal, the General Court erred in law in finding that access to potentially exculpatory evidence subsequent to the Statement of Objections would allow SAS Cargo and Others to benefit from the greater efforts made and resources invested, as the case may be, by other carriers. A person's resources should have no bearing on its rights of defence. The case-law only establishes that arguments in other replies to the Statement of Objections cannot be presumed to be exculpatory.

95 The Commission contends that this part of the ground of appeal is inadmissible in part and unfounded in part.

– *Findings of the Court*

96 Where an allegedly exculpatory document has not been communicated, it is settled case-law that, in order to establish that its rights of defence have been infringed, the undertaking concerned must only establish that the non-disclosure of that document was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission. It is thus sufficient for the undertaking to show that it would have been able to use the exculpatory documents in its defence, in the sense that, had it been able to rely on them during the administrative procedure, it would have been able to put forward evidence which did not agree with the findings made by the Commission at that stage and would therefore have been able to have some influence on the Commission's assessment in any decision it adopted, at least as regards the gravity and duration of the conduct of which it was accused and, accordingly, the level of the fine. The undertaking concerned must therefore establish, first, that it did not have access to certain exculpatory evidence and, second, that it could have used that evidence for its defence (see, to that effect, judgments of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraphs 23 and 24, and of 14 May 2020, *NKT Verwaltung and NKT* v *Commission*, C-607/18 P, EU:C:2020:385, paragraph 265 and the case-law cited).

97 In the present case, it should be noted, in the first place, that, as SAS Cargo and Others submit, the General Court stated, in paragraph 123 of the judgment under appeal, that it was to no avail that they relied on the judgment of the General Court of 29 June 1995, *Solvay* v *Commission* (T-30/91, EU:T:1995:115), given that it had already held, in paragraph 254 of its judgment of 16 June 2011, *Heineken Nederland and Heineken* v *Commission* (T-240/07, EU:T:2011:284), that the principle that it cannot be for the Commission alone to determine the documents of use in the defence of

the undertaking concerned applies only to documents in the Commission's file and cannot apply to the replies given by other parties concerned to the Statement of Objections communicated by the Commission.

98 By asserting that the General Court was wrong to find that the Commission was entitled to carry out an initial assessment of potentially exculpatory material contained in other cartel participants' replies to the Statement of Objections, SAS Cargo and Others are claiming, in essence, the right to full and automatic access to those replies. However, as the Court has already held, such a right does not exist. Given that it is for the undertaking pleading an infringement of its rights of defence to adduce prima facie evidence that such documents which were not disclosed to it by the Commission would be useful for its defence, it cannot be concluded that merely because it did not provide full and automatic access to other cartel participants' replies to the Statement of Objections, the Commission infringed an undertaking's rights of defence (see, to that effect, judgments of 28 November 2019, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, C-591/18 P, EU:C:2019:1026, paragraph 40, and of 14 May 2020, *NKT Verwaltung and NKT* v *Commission*, C-607/18 P, EU:C:2020:385, paragraphs 259, 260 and 265).

99 In that regard, it should be noted that the case-law of the European Court of Human Rights relied on by SAS Cargo and Others does not establish a right of full and automatic access to the file during an administrative procedure. In any event, SAS Cargo and Others do not explain how that case-law might call into question the Commission's approach, which consists, in the case of documents it has received after notification of the objections, precisely in giving access to those documents where these may constitute new evidence, whether of an incriminating or an exculpatory nature (see, by analogy, judgment of 14 May 2020, *NKT Verwaltung and NKT* v *Commission*, C-607/18 P, EU:C:2020:385, paragraphs 268 and 269).

100 The first complaint of this part of the ground of appeal is therefore unfounded.

101 In the second place, as regards the complaint relating to paragraph 117 of the judgment under appeal, it should be observed that the General Court noted in that paragraph that SAS Cargo and Others, to a large extent, merely relied on the fact that some of the incriminated carriers or addressees of the Statement of Objections had put forward the same arguments as they had in their replies to the Statement of Objections or in their observations before the General Court. The General Court stated that such considerations were not sufficient to establish the existence of exculpatory evidence, referring in that regard to paragraphs 43 and 44 of its judgment of 12 July 2011, *Hitachi and Others* v *Commission* (T-112/07, EU:T:2011:342).

102 It follows from the case-law already recalled in paragraph 96 of the present judgment that, where an exculpatory document has not been communicated, the undertaking concerned must establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission. Accordingly, it cannot be held that, by the general assertions made by SAS Cargo and Others before the General Court, as recalled in paragraph 117 of the judgment under appeal, SAS Cargo and Others satisfied that burden.

103 The complaint directed against paragraph 117 of the judgment under appeal is therefore unfounded.

104 In the third place, in so far as SAS Cargo and Others claim that, in paragraphs 118 to 122 of the judgment under appeal, the General Court distorted the evidence and failed to respond to their line of argument, it should be noted that SAS Cargo and Others criticise not the legal test set out in paragraph 118 of the judgment under appeal, recalled, in essence, in the preceding paragraph of the present judgment, but the General Court's application of that test.

105 In that regard, in paragraph 119 of the judgment under appeal, the General Court referred to the documents underlying the Commission's statement relating to the WOW alliance in its decision of 4 July 2005 in Case COMP/M.3770 – Lufthansa/Swiss (OJ 2005 C 204, p. 3), and noted, in essence, that the Commission had not relied on those documents in the procedure leading to the decision at issue. In paragraph 120 of the judgment under appeal, it also examined the evidence alleged to demonstrate the existence of capacity agreements between Lufthansa and the addressees of a number of emails sent by Lufthansa regarding an adjustment of its fuel surcharge rates. In that context, it noted that SAS Cargo and Others had already raised, in their reply to the Statement of Objections, an argument in that regard, that they already had, by means of the evidence in the investigation file, a list of the carriers party to a capacity purchase agreement with Lufthansa and that the Commission had already rejected their argument in recital 797 of the decision at issue. It inferred from this that SAS Cargo and Others had failed to demonstrate that the disclosure of that evidence could have been useful to them in the context of their defence.

106 In paragraph 121 of the judgment under appeal, the General Court also examined the line of argument of SAS Cargo and Others relating to the evidence adduced by the non-incriminated carriers, according to which it could have been exculpatory for SAS Cargo and Others since the non-incriminated carriers were involved in contacts at issue which were relied on against SAS Cargo and Others in the decision at issue. It took the view, in that regard, that SAS Cargo and Others were engaging '[in] extremely general conjecture' and that, given its general nature, their hypothesis could not constitute a sufficiently precise indication of the existence of exculpatory evidence in the replies of those carriers. In paragraph 122 of that judgment, it added that the same was true of their argument that, since their employees only participated 'in a minor fraction' of the conduct at issue, the evidence relating to the majority of that conduct is in the possession of the other carriers involved.

107 It must therefore be stated that, by their criticism of paragraphs 119 to 122 of the judgment under appeal, SAS Cargo and Others are in fact seeking to call into question the General Court's assessments of the facts and evidence in those paragraphs. The possible relevance and probative value of the alleged exculpatory evidence is clearly of a factual nature, so that it is not, as such, subject to review by the Court of Justice (judgment of 19 December 2012, *Heineken Nederland and Heineken* v *Commission*, C-452/11 P, EU:C:2012:829, paragraph 28 and the case-law cited). That criticism is therefore inadmissible.

108 In that regard, it cannot be held, as SAS Cargo and Others also claim, that, in paragraphs 119 to 122, the General Court distorted the evidence and failed to respond to their line of argument. First, there is distortion where, without recourse to new evidence, the assessment of the existing evidence is clearly incorrect or manifestly at odds with its wording. However, such distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence. Moreover, where an appellant alleges distortion of the evidence by the General Court, that person must indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in that person's view, led to such distortion (see, to that effect, judgments of 26 September 2024,

JCDecaux Street Furniture Belgium v *Commission*, C-710/22 P, EU:C:2024:787, paragraph 63, and of 22 May 2025, *Luossavaara-Kiirunavaara* v *Commission*, C-621/23 P, EU:C:2025:368, paragraph 108 and the case-law cited).

109 The line of argument set out in paragraph 91 of the present judgment is, in the light of those requirements, insufficient to establish the distortions alleged, since SAS Cargo and Others do not state, inter alia, how the General Court's assessment in the judgment under appeal is manifestly incorrect.

110 Second, in the light of the case-law already referred to in paragraphs 84 and 85 of the present judgment, it cannot be held that, by rejecting as it did, in paragraphs 119 to 122 of the judgment under appeal, the arguments submitted to it by SAS Cargo and Others, the General Court infringed its obligation to state reasons.

111 In the fourth place, it is sufficient to note that, by the line of argument set out in paragraph 93 of the present judgment, SAS Cargo and Others are again challenging paragraph 121 of the judgment under appeal, putting forward arguments similar to those already rejected in paragraphs 104 to 110 of the present judgment. That line of argument must therefore also be rejected as in part inadmissible and in part unfounded.

112 In the fifth place, since the line of argument set out in paragraph 94 of the present judgment relates only to the second sentence of paragraph 118 of the judgment under appeal, which, as the word 'moreover' indicates, constitutes a ground included purely for the sake of completeness, it is ineffective, in accordance with the case-law referred to in paragraph 80 of the present judgment.

113 It follows from the foregoing that the second part of the first ground of appeal must be rejected as in part inadmissible, in part ineffective and in part unfounded, as must, consequently, the first ground of appeal in its entirety.

The second ground of appeal, concerning the right to be heard in relation to the qualified effects test

114 SAS Cargo and Others' second ground of appeal consists of three parts. By the first part, they claim that the General Court erred in law in finding that the fact that the Commission had relied on the qualified effects test in the decision at issue, without that test being mentioned in the Statement of Objections, did not entail an infringement of their right to be heard. By the second part, they submit that the General Court was wrong to find that the evidence relied on in that decision as a basis for the application of that test was already sufficiently set out in the Statement of Objections. By the third part, they claim that the General Court erred in law in finding that their reply to the Statement of Objections demonstrated that their rights of defence had been respected.

The first part, relating to the need to present the qualified effects test in the Statement of Objections

– *Arguments of the parties*

115 SAS Cargo and Others submit that, in paragraph 140 of the judgment under appeal, the General Court erred in law when it found that, by relying on the qualified effects test to establish jurisdiction, the Commission had not advanced new objections or altered the content of the

objections in the Statement of Objections. The case-law requires that a Statement of Objections should contain the facts relied on against its addressee, but also the characterisation of those facts. However, since the General Court accepted, in paragraph 140, that the Statement of Objections did not refer to the qualified effects test, it could not conclude, without erring, that the fact that that test had not been specifically discussed during the administrative procedure was irrelevant and did not entail an infringement of their rights of defence. The Commission should at the very least have adopted a Statement of Objections supplementing the 2007 Statement of Objections and organised a new hearing, since it had made significant adjustments to its analysis.

116 Contrary to what the Commission maintains, SAS Cargo and Others put forward, in paragraph 34 of their application before the General Court, an argument alleging an error in the 'characterisation of the facts', namely an argument that the Statement of Objections did not state that the Commission intended to rely on the facts in order to establish 'immediate, substantial and foreseeable effects' or the application of the qualified effects test. SAS Cargo and Others also submit that they are not obliged to express the appeal in the same terms as the application.

117 The Commission replies that this part of the ground of appeal is inadmissible pursuant to Article 170 of the Rules of Procedure of the Court of Justice. Before the General Court, SAS Cargo and Others argued not that the Commission should, in the Statement of Objections, have presented them with the qualified effects test 'by way of a characterisation of facts', but only that the Commission's analysis was based on findings of fact which had not been communicated to them, that the Statement of Objections did not mention that the Commission intended to rely on the facts subsequently specified in recital 1045 of the decision at issue and that they had not had the opportunity to respond to those allegations. It states that, in any event, that part of the ground of appeal is unfounded.

– *Findings of the Court*

118 Under the second sentence of Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal. Thus, the jurisdiction of the Court of Justice in the examination of an appeal is confined to a review of the findings of law on the pleas argued before the General Court. A party cannot therefore put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court, since that would amount to allowing that party to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court (judgments of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 34, and of 2 February 2023, *Spain and Others* v *Commission*, C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraph 29 and the case-law cited).

119 An appellant is nevertheless entitled to lodge an appeal relying, before the Court of Justice, on grounds and arguments which arise from the judgment under appeal itself and seek to criticise, in law, its correctness (judgments of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission*, C-176/06 P, EU:C:2007:730, paragraph 17, and of 2 February 2023, *Spain and Others* v *Commission*, C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraph 30 and the case-law cited).

120 In the present case, it is true that it is not apparent from the judgment under appeal, in particular paragraph 133 thereof, that SAS Cargo and Others raised, before the General Court, a complaint relating to the lack of a legal characterisation, in the Statement of Objections, of the qualified effects test. Moreover, they do not claim that, in that judgment, the General Court distorted the line of argument which they had submitted to it.

121 However, as they submit in the context of the present part of the second ground of appeal, it is apparent from paragraph 34 of their application at first instance that, before the General Court, they had claimed that the Statement of Objections did not state that the Commission intended to rely on the factual findings set out in that statement, which they moreover disputed, in order 'to establish "immediate, substantial and foreseeable effects"' or 'the application of the effects criterion'.

122 It is true that, in so doing, they did not explicitly claim that the Commission had failed to legally characterise the basis for its international jurisdiction. However, the General Court found, in paragraph 140 of the judgment under appeal, that it was common ground between the parties that, unlike the decision at issue, the Statement of Objections did not refer to the qualified effects test and, in paragraph 145 of that judgment, that the fact that that test had not been specifically discussed during the administrative procedure was irrelevant for the purposes of assessing whether their rights of defence had been respected, given the factors which it had set out in paragraphs 140 to 144 of that judgment.

123 In those circumstances, and in the light of the case-law referred to in paragraph 119 of the present judgment, the plea of inadmissibility raised by the Commission must be rejected and the substance of the present part of the second ground of appeal must be examined.

124 In that regard, it is settled case-law that in all proceedings in which penalties, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of EU law which must be fully complied with (see, to that effect, judgments of 13 February 1979, *Hoffmann-La Roche* v *Commission*, 85/76, EU:C:1979:36, paragraph 9, and of 16 June 2022, *Quanta Storage* v *Commission*, C-699/19 P, EU:C:2022:483, paragraph 61 and the case-law cited).

125 In that regard, Regulation No 1/2003 provides that the parties are to be sent a statement of objections which must clearly set out all the essential matters on which the Commission relies at that stage of the proceedings. That statement of objections constitutes the procedural safeguard applying the fundamental principle of EU law, which requires observance of the rights of the defence in all proceedings capable of leading to the imposition of a penalty. That principle requires, in particular, that the Statement of Objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts, the gravity and duration of the alleged infringement and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see, to that effect, judgments of 29 June 2006, *Showa Denko* v *Commission*, C-289/04 P, EU:C:2006:431, paragraph 69, and of 16 June 2022, *Quanta Storage* v *Commission*, C-699/19 P, EU:C:2022:483, paragraph 62 and the case-law cited).

126 In the present case, in paragraph 141 of the judgment under appeal, the General Court held that the Commission had already stated in the Statement of Objections that it intended to find an infringement of Article 101 TFEU and Article 53 of the EEA Agreement as regards inbound

routes. It stated in that regard that, in paragraph 129 of the Statement of Objections, the Commission had thus observed that the 'infringement covered … freight services within the [European Union]/EEA and Switzerland and on routes between EU/EEA airports and third countries all over the world, in both directions'. It further observed that, in paragraph 1430 of the Statement of Objections, the Commission had stated that 'all the anticompetitive activities involving each of the participants fit within an overall aim, namely to agree on pricing or at least to remove pricing uncertainty in the EEA-wide market for air freight, including routes between EEA airports and third countries'.

127 In paragraph 142 of the judgment under appeal, the General Court added that the Commission had also justified its jurisdiction to find an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes at the stage of the Statement of Objections. In that regard, the General Court found that, in paragraph 1390 of the Statement of Objections, the Commission had stated that it was 'competent to apply Article [101 TFEU] to the arrangements concerning air transport between [EU] airports and third countries which may have affected trade between Member States'. Moreover, it observed that, in paragraph 1394 of the Statement of Objections, the Commission had added that it was also 'competent to apply Article 53 of the EEA Agreement … to the arrangements relating to air transport between EEA airports and third countries which may have affected trade between Member States and Contracting Parties of the EEA Agreement or between Contracting Parties of the EEA Agreement'.

128 The General Court moreover found, in paragraph 147 of that judgment, that the facts on which recitals 1045 and 1046 of the decision at issue were based were all set out in the Statement of Objections.

129 It follows from this that in finding, in the decision at issue, that the cartel at issue covered conduct related to sales in countries that are not members either of the European Union or of the EEA, the Commission did not base that decision on objections on which SAS Cargo and Others had not been able to present their arguments, contrary to the obligation referred to in paragraph 125 of the present judgment. In the light of the factors set out by the Commission in the Statement of Objections, as stated by the General Court in paragraphs 141, 142 and 147 of the judgment under appeal, paragraphs which SAS Cargo and Others do not claim distort that statement, SAS Cargo and Others could not have been unaware that the Commission would allege against them an infringement of Article 101 TFEU and Article 53 of the EEA Agreement in relation to that conduct.

130 Moreover, the characterisation of the precise legal test on which the Commission considers that it can base its international jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement to anticompetitive conduct adopted outside those territories has no bearing on the content of the essential factors on which it considers it may base that jurisdiction and which it seeks to rely on against an undertaking which it intends to penalise for an infringement of those provisions.

131 Accordingly, it cannot be held that the Commission infringes the rights of defence of the undertakings to which a statement of objections is addressed, and in particular their right to be heard as regards the Commission's international jurisdiction to penalise anticompetitive conduct adopted outside the territory of the European Union or the EEA, merely because it does not expressly state, in that statement, that it intends to base its jurisdiction to penalise such conduct on 'the implementation test' or on the 'qualified effects test', or even on another legal test that it might consider, depending on the circumstances, capable of justifying such jurisdiction, where it

states, as in the present case, in that statement, that it intends to penalise the undertakings to which the Statement of Objections is addressed for an infringement of Article 101 TFEU and Article 53 of the EEA Agreement by reason of such conduct and where it sets out the essential factors which it intends to take into account for that purpose.

132 It follows from the foregoing that the General Court did not err in law in finding, in paragraphs 140 to 142 and 146 of the judgment under appeal, that, by relying, in the decision at issue, on the qualified effects test to establish its jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes, the Commission neither advanced new objections against SAS Cargo and Others nor altered the content of those which it had provisionally included in the Statement of Objections. The Commission had, in the Statement of Objections, already (i) stated that it intended to penalise them for such an infringement on those routes and (ii) set out the essential elements establishing its jurisdiction to do so.

133 It follows from the foregoing that the first part of the second ground of appeal must be rejected as unfounded.

The second part, relating to the content of the Statement of Objections

– *Arguments of the parties*

134 SAS Cargo and Others claim that, in paragraphs 141 and 142 of the judgment under appeal, the General Court erred in finding that the Statement of Objections had given them sufficient information relating to the qualified effects test and that, therefore, their rights of defence had been respected. The passages of that statement referred to in paragraphs 141 and 142 of that judgment are mere assertions unsupported by evidence. Section 5.2 of that statement, relating to the Commission's jurisdiction, does not mention either that test, its constituent elements or the evidence establishing that it was satisfied in the present case.

135 Moreover, in paragraph 147 of the judgment under appeal, the General Court was wrong to find that the evidence relied on in the decision at issue to establish the qualified effects test was sufficiently set out in the Statement of Objections, without further clarification. Thus, the General Court's approach would have required SAS Cargo and Others to guess the legal test adopted by the Commission and to search throughout that statement to see whether it contained evidence to substantiate that test. The passages of the Statement of Objections cited in paragraph 147 do not even contain the relevant facts.

136 The Commission contends that this part of the second ground of appeal is unfounded.

– *Findings of the Court*

137 In the first place, in so far as SAS Cargo and Others submit, in essence, that the General Court erred in finding that the Statement of Objections contained sufficient information to enable them to understand that the Commission intended to find an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes and that their rights of defence had therefore been respected, it is sufficient to note that that line of argument cannot be

distinguished, in essence, from that which SAS Cargo and Others have already put forward in support of the first part of the present ground of appeal. It must therefore be rejected as unfounded for the same reasons as those set out in paragraphs 124 to 133 of the present judgment.

138 In the second place, as regards SAS Cargo and Others' complaint against paragraph 147 of the judgment under appeal, it should be noted that, in that paragraph, the General Court stated that the appellants were not justified in claiming that the application of the qualified effects test in recitals 1045 and 1046 of the decision at issue was based on facts which the Commission had not relied on in the Statement of Objections.

139 In that regard, it stated that the facts on which recitals 1045 and 1046 are based were all set out in the Statement of Objections. Thus, the General Court specified that the ground referred to in recital 1045, relating to the effect of the conduct at issue on consumers in the EEA, was based on considerations relating to the price structure of freight services, the role of freight forwarders as intermediaries between the carriers and the shippers, and the nature of the single and continuous infringement, which were referred to in paragraphs 7, 104, 1396 to 1411 and 1434 to 1438 of the Statement of Objections. It also noted that the ground relating to the effects on competition for interlining services set out in recital 1045 of the decision at issue was based on the considerations relating to the operation of the freight sector referred to in paragraphs 7, 9, 102 and 105 of the Statement of Objections. As regards the geographic scope of the cartel at issue and the inclusion of inbound freight services in the single and continuous infringement referred to in recital 1046 of the decision at issue, it found that they were addressed in paragraphs 3, 125, 129, 1045, 1390, 1394 and 1430 of the Statement of Objections.

140 Accordingly, by claiming that the General Court was wrong to find that the evidence relied on in the decision at issue in order to establish that the qualified effects test was satisfied had been sufficiently set out in the Statement of Objections and that the passages referred to of that statement did not contain the relevant facts, SAS Cargo and Others are seeking to obtain from the Court of Justice a new assessment of the content of the Statement of Objections as set out by the General Court in the judgment under appeal, without even alleging distortion. Such a new assessment of the facts falls outside the scope of the jurisdiction on appeal of the Court of Justice, in accordance with the case-law referred to in paragraph 72 of the present judgment.

141 It follows from the foregoing that the second part of the second ground of appeal must be rejected as inadmissible in part and unfounded in part.

The third part, relating to the replies of SAS Cargo and Others to the Statement of Objections

– *Arguments of the parties*

142 SAS Cargo and Others submit that the General Court was wrong to indicate, in paragraph 143 of the judgment under appeal, that respect for their rights of defence was evidenced by their replies to the Statement of Objections. Those replies could not rectify the deficiencies of the Statement of Objections that relate to the qualified effects test. Paragraph 144 of that judgment is therefore also incorrect in so far as the General Court states therein that recitals 1042 to 1046 of the decision at issue merely responded to the arguments of SAS Cargo and Others, since they never addressed the latter test. While it is true that the arguments set out in a Statement of Objections can be revised or supplemented, it is not permissible to change the essential elements of the alleged infringement. Consequently, paragraph 145 of that judgment, in which the General Court found

that the failure to discuss the qualified effects test was irrelevant, and paragraph 146 thereof, in which it held that SAS Cargo and Others' rights of defence had therefore not been infringed, are also incorrect.

143 The Commission replies that this part of the second ground of appeal is unfounded.

– *Findings of the Court*

144 It is sufficient to note that the present part of the second ground of appeal is based on the premiss that the Statement of Objections was incomplete because, in that statement, the Commission had not expressly stated that it intended to establish its jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement as regards inbound routes on the qualified effects test. It follows from the analysis of the first part of the present ground of appeal that that premiss is incorrect.

145 It follows that the third part of the second ground of appeal must be rejected as unfounded and that, consequently, the second ground of appeal must be rejected as in part inadmissible and in part unfounded.

The third ground of appeal, relating to the application of the qualified effects test

146 SAS Cargo and Others' third ground of appeal consists of five parts. By the first part, they claim that the judgment under appeal is vitiated by inconsistencies and misapplication of the qualified effects test. By the second part, they claim that the General Court unlawfully substituted its own reasoning for that set out by the Commission in the decision at issue. By the third part, they allege an unlawful reversal of the burden of proof. By the fourth part, they submit that the General Court applied an incorrect test as regards the immediacy of the effect which it assessed. By the fifth part, they claim that the General Court erred in law in concluding that the Commission's jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement to inbound routes could be established on the basis of the single and continuous infringement.

The first part, alleging inconsistencies and errors in the application of the qualified effects test

– *Arguments of the parties*

147 SAS Cargo and Others submit that paragraphs 167 to 171, 179 to 181, 197, 198, 203, 221, 222 and 226 of the judgment under appeal are vitiated by inconsistencies and misapplication of the qualified effects test. As stated by the General Court in paragraphs 161 and 165 of that judgment, the application of that test requires the Commission to establish probable, foreseeable, immediate and substantial effects. However, the references by the General Court to infringements by object and to proof of actual effects, in paragraphs 167, 170 and 171 of that judgment, fail to address the matter of whether the Commission established that those four conditions were satisfied. The concept of a restriction of competition 'by object' is irrelevant to the Commission's international jurisdiction, unless it is accepted that it is never necessary to demonstrate anticompetitive effects in order to establish such jurisdiction.

148 It was for the General Court, as regards the effects on consumers which it identified – namely (i) an increase in the price of the services purchased by shippers established in the EEA ('the effect on shippers'), which is referred to in paragraphs 179 and 181 of the judgment under appeal, and (ii) an increase in the price of goods purchased by end consumers in the EEA ('the effect on goods'), which is referred to in paragraphs 181 and 226 of that judgment – to examine whether each of those effects was probable, foreseeable, substantial and immediate, with probability and foreseeability constituting separate criteria, as indicated in paragraph 51 of the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632). The General Court was not justified in changing, in the course of its analysis, the description of the effect which it was examining in order to satisfy the qualified effects test more easily.

149 However, that was the manner in which the General Court proceeded. It does not even mention the word 'probable' in paragraphs 166 to 237 of the judgment under appeal, with the exception of paragraphs 188 and 189 of that judgment, in which it requires SAS Cargo and Others to bear the burden of proof. Furthermore, the General Court did not establish that the effect on shippers and the effect on goods respectively satisfied the other three conditions of the qualified effects test, but referred variously to one or other of those effects and to one or other of those conditions. SAS Cargo and Others refer, in that regard, to paragraphs 179, 198, 203, 221 and 222 of that judgment. That approach significantly lowered the burden of proof on the Commission, as paragraph 180 of that judgment illustrates.

150 Paragraph 179 is moreover vitiated by a failure to consider all relevant facts, or, alternatively a failure to state reasons, leading to a misapplication of the qualified effects test and an infringement of the presumption of innocence. The General Court failed to consider either contradictory evidence submitted by SAS Cargo and Others concerning the effect on shippers established in the EEA, which are rare on inbound routes, or the minimum additional cost represented by the amount of the surcharges for purchasers based in the EEA, even though that evidence rules out the substantial nature of the effect on shippers. Paragraph 226 of the judgment under appeal is, moreover, incorrect in that the General Court relied on a factual assertion relating to an effect on goods which is purely hypothetical and therefore incapable of demonstrating the existence of a substantial and immediate effect on shippers. Since the General Court relied on a mere assumption that the effect on shippers was substantial, it was sufficient for SAS Cargo and Others to put forward an explanation which casts a different light on the facts relied on by the Commission.

151 The Commission contends that this part of the third ground of appeal is inadmissible in part and unfounded in part.

– *Findings of the Court*

152 As a preliminary point, it should be noted that, in paragraph 156 of the judgment under appeal, the General Court found that, in the decision at issue, the Commission had, in essence, relied on three separate grounds in order to find that the qualified effects test was satisfied in the present case. In paragraph 157 of that judgment, it noted that the first two grounds were set out in recital 1045 of the decision at issue and that they both concerned the effects of coordination in relation to inbound freight services taken in isolation. Thus, in paragraph 157, it found that the first ground was that the 'increased costs of air transport to the EEA, and consequently the higher prices of imported goods [were], by their very nature, liable to have effects on consumers in the EEA' ('the effect on the prices of imported goods') and that the second ground concerned the effects of coordination in relation to inbound freight services 'also on the provision of

[freight] services by other carriers within the EEA, between the different hub airports used by carriers from third countries in the EEA and airports of destination of those shipments in the EEA to which the carrier from the third country does not fly'. In paragraph 158 of that judgment, the General Court noted that the third ground was set out in recital 1046 of the decision at issue and concerned the effects of the single and continuous infringement taken as a whole. In paragraph 159 of that judgment, it stated that it considered it appropriate to examine the first and third of those grounds, which it did in paragraphs 160 to 227 and 228 to 236 respectively of the judgment under appeal.

153 It follows that, contrary to what SAS Cargo and Others claim, the General Court, in the paragraphs of the judgment under appeal to which they refer, did not focus on ascertaining whether the conditions for determining the existence of qualified effects were satisfied as regards both an alleged 'effect on shippers' and an alleged 'effect on goods'. It carried out that examination solely in relation to the effect on the prices of imported goods; as is apparent from paragraph 162 of the judgment under appeal, SAS Cargo and Others maintained that that effect was not amongst the effects produced by the conduct at issue which the Commission was entitled to take into account for the purposes of applying the qualified effects test.

154 It is therefore necessary to reject at the outset SAS Cargo and Others' line of argument that the judgment under appeal is vitiated by inconsistencies in that the effect in respect of which the General Court examined whether it served to establish the Commission's international jurisdiction in the light of the qualified effects test varies in the course of its analysis, as well as the line of argument that is based on the premiss that the General Court identified two effects in the judgment under appeal, which it analysed in a variable manner, thereby committing errors of law, unlawful reversals of the burden of proof and infringements of its obligation to state reasons, since those lines of argument are based on a misreading of the judgment under appeal.

155 Furthermore, in so far as, by that part of the third ground of appeal, SAS Cargo and Others further submit, in the first place, that the General Court erred in law by referring to the concept of a restriction of competition 'by object' in paragraphs 167, 170 and 171 of the judgment under appeal, when that concept is irrelevant to the Commission's international jurisdiction, and, consequently, by failing to ascertain whether the conditions for establishing the qualified effects test were satisfied in the present case, it should be noted that those paragraphs are part of the General Court's analysis, set out in paragraphs 163 to 185 of that judgment, relating to the assessment of the relevance of the effect on the prices of imported goods, namely, as has already been noted in paragraph 152 of the present judgment, the first of the three grounds on which the Commission relied in recitals 1045 and 1046 of the decision at issue as the basis of its finding that the qualified effects test had been satisfied in the present case.

156 In that regard, it is true that, in that context, the General Court stated, in paragraph 167 of the judgment under appeal, that where conduct has been found by the Commission, as in the case at hand, 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 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.

157 Similarly, it stated, in paragraph 170 of the judgment under appeal, that, as the Commission had observed in recital 917 of the decision at issue, there is no need to take account of the actual effects of the conduct at issue, since its anticompetitive object is established.

158 It inferred from this, in paragraph 171 of the judgment under appeal, that interpreting the qualified effects test as requiring proof of the actual effects of the conduct at issue even where there is a restriction of competition 'by object', would amount to making the Commission's jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement subject to a condition which has no basis in the wording of those provisions.

159 However, it cannot be inferred from paragraphs 167, 170 and 171 that the General Court found that the classification of the infringement at issue as an infringement 'by object' rendered redundant any assessment of the probability of the occurrence, within the EEA, of effects serving to establish the Commission's jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement to conduct outside the EEA.

160 It is in fact clear from an overall reading of paragraphs 163 to 181 of the judgment under appeal that, in the disputed paragraphs, the General Court merely concerned itself with explaining that the fact that, in recital 917 of the decision at issue, the Commission had stated that it had made no assessment of the anticompetitive effects of the anticompetitive practices in question did not mean that the Commission had, on account of the nature of those practices, failed to assess whether those practices had had, on competition within the European Union or the EEA, an effect on which the Commission's jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement to inbound freight services having regard to the qualified effects test could be based.

161 Furthermore, as SAS Cargo and Others submit and as the General Court recalled, in essence, in paragraphs 161 and 165 of the judgment under appeal, it follows from the case-law that the qualified effects test allows the application of EU or EEA competition law to be justified under public international law when it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union or in the EEA. In that regard, it is sufficient to take account of the probable effects of conduct on competition in order for the requirement of foreseeability to be satisfied. Furthermore, it is sufficient that the conduct in question is 'liable' to have an immediate effect in the European Union or in the EEA in order for the requirement of immediacy to be satisfied (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 49, 51 and 52).

162 As it stated in paragraph 182 of the judgment under appeal, the General Court ascertained whether the effect on the prices of imported goods satisfied those conditions in paragraphs 183 to 227 of the judgment under appeal, paragraphs 183 to 200 of that judgment relating to the foreseeability of that effect, paragraphs 201 to 216 of that judgment relating to the substantiality of that effect and paragraphs 217 to 226 of that judgment relating to its immediacy.

163 It follows from those factors that SAS Cargo and Others are not justified in complaining, in essence, that the General Court (i) relied on the concept of a restriction of competition 'by object' in order to establish that the qualified effects test was satisfied in the present case and (ii) failed to ascertain whether it was established that the effect on the prices of imported goods met the conditions for finding that that test was satisfied. The line of argument to that effect set out in paragraph 147 of the present judgment is therefore unfounded.

164 In the second place, in so far as SAS Cargo and Others complain that the General Court failed to examine whether the effect on the prices of imported goods was 'probable', it should be noted that, in accordance with the case-law referred to in paragraph 161 of the present judgment, it is sufficient to take account of the probable effects of conduct on competition in order for the

requirement of foreseeability to be satisfied. Therefore, the requirement of probability is not distinguishable from that of foreseeability. As has already been stated in paragraph 162 of the present judgment, the General Court did in fact examine, in the judgment under appeal, the foreseeability of the effect on the prices of imported goods. That line of argument is therefore based on a misreading of the case-law by SAS Cargo and Others.

165 In the third place, in so far as SAS Cargo and Others criticise paragraph 179 of the judgment under appeal, it should be noted that, in that paragraph, the General Court observed that, although freight forwarders purchase inbound freight services, they do so, inter alia, as intermediaries, in order to consolidate them into a package of services, the purpose of which is, by definition, to organise the integrated transport of goods to the territory of the EEA on behalf of shippers. It added that it was apparent from recital 70 of the decision at issue that the latter may in particular be the purchasers or owners of the goods transported and that it was therefore at the very least likely that they were established in the EEA.

166 It must therefore be stated that paragraph 179 of the judgment under appeal contains only findings of fact, which, in the absence of any allegation of distortion, are not subject to review by the Court of Justice on appeal, in accordance with the case-law referred to in paragraph 72 of the present judgment. SAS Cargo and Others' line of argument seeking to establish that paragraph 179 is incorrect is therefore inadmissible.

167 Furthermore, in so far as they also claim that paragraph 179 results in a breach by the General Court of its obligation to state reasons, it should be noted that, in paragraph 178 of the judgment under appeal, the General Court found, inter alia, that it was apparent from recitals 14, 17 and 70 of the decision at issue and from the parties' replies to the measures of organisation of procedure which it had adopted that the carriers sell their freight services exclusively or almost exclusively to freight forwarders and that, as regards inbound freight services, almost all those sales took place at the point of origin of the routes in question, outside the EEA, where the freight forwarders are established. In that regard, it found that it was apparent from SAS Cargo and Others' application that, between 1 May 2004 and 14 February 2006, they had achieved only a negligible proportion of their sales of inbound freight services to customers based in the EEA. In the light of those factors and of the case-law already referred to in paragraphs 84 and 85 of the present judgment, SAS Cargo and Others' claim that the General Court failed to take into account the evidence which they had submitted to it and infringed its obligation to state the reasons on which the judgment under appeal is based cannot be accepted.

168 Moreover, in so far as, by that complaint, they dispute the General Court's assessment of those factors, it should be recalled that the obligation to state reasons is an essential procedural requirement that must be distinguished from the question whether the reasoning is well founded, which goes to the substantive legality of the measure at issue (judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 67, and of 4 October 2024, *UPL Europe and Indofil Industries (Netherlands)* v *Commission*, C-262/23 P, EU:C:2024:862, paragraph 134 and the case-law cited). They are therefore once again challenging, and inadmissibly, findings of fact made by the General Court in paragraph 179 of the judgment under appeal without criticising it for any distortion.

169 The same applies to the allegation of a breach of the presumption of innocence. Under the cloak of alleging that the General Court infringed that principle, SAS Cargo and Others in fact seek to obtain a new assessment of the facts and evidence concerning the substantiality of the effect on

the price of imported goods, without claiming distortion of those facts and that evidence. That allegation is therefore inadmissible, in accordance with the case-law referred to in paragraph 72 of the present judgment.

170 In the fourth place, it is apparent from an overall reading of paragraphs 217 to 226 of the judgment under appeal that, in paragraph 226 of the judgment under appeal, the General Court merely set out the reasons why it considered that the second premiss on which SAS Cargo and Others based their argument put forward at the hearing, seeking to establish that the effect on the prices of imported goods did not have the required immediacy and that, in order to affect 'consumers in the EEA', the additional cost had to pass through a 'long chain of intermediaries', including shippers, freight forwarders and importers, was incorrect. Thus, in paragraph 226, it noted that that second premiss was that, even if the reference to 'consumers in the EEA' in recital 1045 of the decision at issue were to encompass only end consumers, the latter could acquire the imported goods only following the intervention of a 'long chain of intermediaries'. In that regard, it took the view that end consumers are also likely to acquire goods directly from the shipper.

171 It follows from the foregoing that, under the cloak of an allegation of errors of law, SAS Cargo and Others are in fact seeking to obtain from the Court of Justice a new assessment of the facts and evidence, which is not subject to review on appeal, in accordance with the case-law already referred to in paragraph 72 of the present judgment.

172 It follows from all of the foregoing that the first part of the third ground of appeal must be rejected as inadmissible in part and unfounded in part.

The second part, relating to a substitution of grounds

– *Arguments of the parties*

173 SAS Cargo and Others submit that, in paragraphs 173, 179 to 181, 185 to 188, 191, 193, 195, 198, 199, 204, 205, 208 to 210, 220, 224 to 226 and 233 of the judgment under appeal, the General Court erred in law by substituting its own reasoning for that of the Commission. According to the case-law of the Courts of the European Union, those courts are not permitted to fill a gap in the statement of reasons for a Commission decision, to distort the content of that decision, or to take into consideration or adduce new facts which were not set out in that decision.

174 However, first, the effect on shippers does not appear in the decision at issue, which was therefore distorted in paragraphs 173, 179 to 181, 225 and 226 of the judgment under appeal, in part by the introduction of new facts. In particular, paragraph 173 presents recital 1045 of the decision at issue as relating exclusively to the effect on shippers, whereas it is clearly concerned with the effect on goods. Moreover, in order to fill the gaps in that decision, paragraph 173 contains a new fact, namely that it is at the very least likely that the shippers are established in the EEA. That new fact allowed the General Court to cut out a step in the chain of intermediaries between the surcharges and consumers in the EEA, enabling it to find, in paragraphs 180 and 181 of that judgment, that freight forwarders would directly pass on the additional costs to an entity established in the EEA. That new fact was also used in paragraphs 198 and 225 of that judgment to establish that the conditions of foreseeability and immediacy had been satisfied.

175 Second, in paragraph 226 of the judgment under appeal, the General Court introduced a new fact concerning the effect on goods, namely that end consumers are, in its view, also likely to acquire goods directly from a shipper. That is the only basis which enabled it to reject SAS Cargo and Others' argument that the effect on the goods was not immediate, even though the General Court, moreover, never found that the Commission had showed that immediacy. The definition of the effect on goods in the judgment under appeal is, moreover, different from that adopted in the decision at issue, which constitutes a new substitution of grounds.

176 Third, the General Court was wrong, in paragraphs 185 to 187, 193, 196, 204, 205, 209 and 210 of the judgment under appeal, to fill the gaps in the Commission's reasoning by combining items of evidence taken from recitals outside the section of the decision at issue relating to qualified effects in order to develop new reasoning. In addition, it did not even carry out a critical examination of those items of evidence, as is illustrated by paragraph 209 of that judgment, which cites recital 1031 of that decision, whereas the finding set out in that recital is based on irrelevant evidence.

177 Fourth, in paragraph 208 of the judgment under appeal, the General Court relied on evidence concerning the substantial nature of the effect which it analysed that was not in the decision at issue. However, the General Court cannot rely on a ground which does not appear in the decision at issue, even if the evidence underlying that ground is contained in the application or its annexes.

178 The Commission contends that this part of the third ground of appeal is inadmissible in part and unfounded in part.

– *Findings of the Court*

179 It is clear from the case-law that, admittedly, the scope of judicial review provided for in Article 263 TFEU extends to all the elements of Commission decisions relating to proceedings under Articles 101 and 102 TFEU, which are subject to in-depth review by the General Court, in law and in fact, in the light of the pleas raised by the applicant at first instance and taking into account all the elements submitted by the latter. However, in the context of that review, the Courts of the European Union may in no circumstances substitute their own reasoning for that of the author of the contested act (judgment of 4 July 2024, *Westfälische Drahtindustrie and Pampus Industriebeteiligungen* v *Commission*, C-70/23 P, EU:C:2024:580, paragraph 38 and the case-law cited).

180 The General Court therefore cannot fill, by means of its own reasoning, a gap in the reasoning in that act in such a way that its examination does not relate to any assessment carried out in that act (judgment of 18 July 2013, *UEFA* v *Commission*, C-201/11 P, EU:C:2013:519, paragraph 65 and the case-law cited).

181 However, where the General Court merely responds to the line of argument raised before it and explains the reasoning of the act at issue, it cannot be considered that the General Court is substituting its own reasoning for that of the author of that act (see, to that effect, judgments of 12 June 2014, *Deltafina* v *Commission*, C-578/11 P, EU:C:2014:1742, paragraph 56, and of 23 November 2023, *Ryanair* v *Commission*, C-209/21 P, EU:C:2023:905, paragraph 49).

182 In the present case, in the first place, it should be noted that the line of argument set out in paragraph 174 of the present judgment is based, at least in part, on the premiss that the General Court identified, in the judgment under appeal, two separate effects in order to ascertain whether the Commission had established to the requisite standard, in the decision at issue, that the qualified effects test was satisfied, including an alleged 'effect on shippers', which it is claimed did not appear in the decision at issue. However, it is apparent from the grounds set out in paragraphs 152 and 153 of the present judgment that that premiss is incorrect. Accordingly, in so far as that line of argument is based on that misreading of the judgment under appeal, it is unfounded.

183 As to the remainder, it must be observed that, in paragraph 173 of the judgment under appeal, the General Court noted that, in recital 1045 of the decision at issue, the Commission had considered, in essence, that the single and continuous infringement, in so far as it related to inbound routes, was liable to increase the amount of the surcharges and, consequently, the total price of inbound freight services and that freight forwarders had passed on that additional cost to shippers based in the EEA, who had had to pay a higher price for the goods they had purchased than would have been charged in the absence of that infringement.

184 In recital 1045, the Commission did indeed note that anticompetitive practices in third countries with regard to air freight transportation to the European Union/EEA are liable to have immediate, substantial and foreseeable effects within the European Union/EEA, as the increased costs of air transport to the EEA, and consequently higher prices of imported goods, are by their very nature liable to have effects on consumers in the EEA. It is moreover apparent from paragraphs 178 to 180 and 196 of that judgment, which refer in particular to recitals 14, 17, 70 and 1031 of the decision at issue, that it was on the basis of items of evidence in that decision that the General Court examined the role of shippers in setting the final price of goods in the EEA, which is referred to in recital 1045 of the decision at issue.

185 In the second place, as regards the claim of substitution of grounds relating to paragraph 226 of the judgment under appeal, it is based on an alleged 'effect on goods' which was allegedly taken into account by the General Court. It follows from paragraphs 152 and 153 of the present judgment that, like the alleged 'effect on shippers', that premiss has no basis in the judgment under appeal.

186 In the third place, in so far as SAS Cargo and Others complain that, in paragraphs 185 to 187, 193, 196, 204, 205, 209 and 210 of the judgment under appeal, the General Court combined items of evidence taken from recitals outside the section of the decision at issue relating to the Commission's international jurisdiction, it should be noted that the fact that the evidence set out in those paragraphs was not expressly relied on by the Commission in the part of that decision devoted to establishing its territorial jurisdiction cannot establish the existence of an unlawful substitution of grounds (i) in the light of the case-law referred to in paragraph 180 of the present judgment, which requires only that the General Court's assessment concern the assessments contained in the act under its review, and (ii) given that, as is clear from those paragraphs of the judgment under appeal, the first sentence of recital 1045 of the decision at issue contained, albeit succinctly, the factors that enabled the General Court to ascertain whether the Commission had established its extraterritorial jurisdiction in the light of the qualified effects test. It is those factors which, read in conjunction with the other recitals of that decision, referred to in the same paragraphs of the judgment under appeal, enabled the General Court to ascertain that the Commission had established the existence of such effects.

187 Furthermore, in so far as SAS Cargo and Others claim that the General Court did not carry out a critical examination of that evidence, they seek to obtain a new assessment of that evidence by the Court of Justice without alleging any distortion. That line of argument is therefore inadmissible, in accordance with the case-law referred to in paragraph 72 of the present judgment.

188 In the fourth place, as regards the criticism of paragraph 208 of the judgment under appeal, it is sufficient to note that, as indicated in paragraph 207 of that judgment, paragraph 208, which, moreover, contains only findings of fact, is included purely for the sake of completeness. Consequently, the complaint relating to that paragraph must, in any event, be rejected as ineffective, in accordance with the case-law referred to in paragraph 80 of the present judgment.

189 It follows from the foregoing that the second part of the third ground of appeal must be rejected as in part inadmissible, in part ineffective and in part unfounded.

The third part, alleging an unlawful reversal of the burden of proof

– *Arguments of the parties*

190 SAS Cargo and Others submit that, in paragraphs 180, 181, 188 to 190, 194 to 199 and 221 of the judgment under appeal, the General Court unlawfully reversed the burden of proof by requiring SAS Cargo and Others to disprove the existence of qualified effects, without first seeking to ascertain whether the Commission had demonstrated such effects in the decision at issue. The qualified effects test only applies to effects that are probable. However, recital 1045 of the decision at issue does not provide any evidence of any effects and relies on unsubstantiated assertions. Thus, the General Court erred in law, first of all, in paragraphs 180 and 181 of that judgment, by being satisfied with those hypotheticals, next, in paragraphs 188 to 191 of that judgment, by alleging that SAS Cargo and Others did not disprove an effect even though it had not ascertained whether the Commission had adduced sufficiently meaningful evidence of that effect, and, lastly, in paragraphs 180, 196, 197, 199 and 219 of that judgment, by accepting that the Commission merely assumed that the surcharges had been passed on, while requiring, in paragraphs 194 and 221 thereof, that SAS Cargo and Others disprove that passing on. However, the passing on of costs can never be assumed. Furthermore, contrary to what is claimed by the Commission, the present part of the third ground of appeal is admissible, since it identifies errors of law committed by the General Court.

191 The Commission replies that SAS Cargo and Others merely challenge the findings of fact made in the judgment under appeal. In any event, this part of the third ground of appeal is unfounded.

– *Findings of the Court*

192 In so far as this part of the third ground of appeal is based on the general premiss that the General Court required SAS Cargo and Others to disprove the existence of qualified effects, without first seeking to ascertain whether the Commission had demonstrated the existence of such effects in the decision at issue, it must be borne in mind, first, that, in paragraphs 183 to 227 of the judgment under appeal, the General Court ascertained whether the Commission had established to the requisite standard that the effect on the prices of imported goods – which, as has already been held in paragraph 152 of the present judgment, was the first of the three grounds on which the Commission relied, in recitals 1045 and 1046 of the decision at issue, in order to establish its jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA

Agreement as regards inbound freight services – met the conditions of foreseeability, substantiality and immediacy required in order to be able to conclude that the qualified effects test was satisfied.

193 Second, it is apparent from the analysis of the second part of the present ground of appeal that it is to no avail that SAS Cargo and Others claimed in that regard that, in those paragraphs of the judgment under appeal, the General Court substituted its own grounds for those set out by the Commission in the decision at issue in order to justify its jurisdiction to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement as regards inbound freight services.

194 It follows that it is necessary to reject as unfounded SAS Cargo and Others' general claim that the General Court unlawfully reversed the burden of proof by being satisfied with hypotheticals or assumptions and by requiring them to disprove the existence of qualified effects, without first of all seeking to ascertain whether the Commission had demonstrated those effects in the decision at issue.

195 As to the remainder, in so far as, by this part of the third ground of appeal, SAS Cargo and Others allege, in the first place, an unlawful reversal of the burden of proof in paragraphs 180, 181, 191, 196, 197, 199 and 219 of the judgment under appeal, it is sufficient to note that, in those paragraphs, the General Court merely made factual findings, without placing on SAS Cargo and Others the burden of proving any evidence whatsoever. There is therefore no basis for that allegation in the judgment under appeal.

196 In the second place, in so far as paragraphs 188 to 190 of the judgment under appeal are referred to, it must be noted that, admittedly, in paragraph 189 of that judgment, the General Court stated that SAS Cargo and Others had failed to demonstrate that a waterbed effect was so probable as to render the effect on the prices of imported goods unforeseeable. However, that finding is preceded, in paragraphs 187 and 188 of that judgment, by an examination at the conclusion of which the General Court inferred, on the basis of the factors contained in the decision at issue, that it was foreseeable for the incriminated carriers that the horizontal fixing of the fuel surcharge and the security surcharge together with the refusal to pay commission would lead to an increase in the total price of inbound freight services.

197 Thus it was only once it had found that, in the decision at issue, the Commission had established the foreseeability of such an increase to the requisite standard that the General Court examined whether SAS Cargo and Others had adduced evidence to rebut that finding. SAS Cargo and Others having alleged, in that regard, the existence of a 'waterbed effect', the General Court found, in paragraph 190 of the judgment under appeal, that they merely made a vague reference to 'economic theory' and a reference to the oral statement of an expert at the hearing before the Commission; that oral statement was not accompanied by either the study or the data on which it was based and relied on a methodology which was inconsistent with the scope of the single and continuous infringement as defined in the decision at issue, for the reasons which it set out in that paragraph. It also noted, in essence, that that statement concerned other carriers, whose charging methods were more flexible than those which SAS Cargo and Others indicated that they used.

198 It should be borne in mind that, according to settled case-law, it is for the Commission to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement of competition law. By contrast, it is for the undertaking raising a defence against the finding of such an infringement to prove that that

defence must be upheld. However, even though, according to those principles, the burden of proof is borne either by the Commission or by the undertaking concerned, the factual evidence on which a party 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 rules on the burden of proof have been met (see, to that effect, judgment of 21 December 2023, *Royal Antwerp Football Club*, C-680/21, EU:C:2023:1010, paragraph 120 and the case-law cited).

199 That case-law, which is based on the general rules on the taking of evidence, can be transposed to the situation in which the Commission must assert its territorial jurisdiction over conduct originating outside the territory of the European Union or of the EEA.

200 It follows that, given that the General Court had found beforehand that the Commission had established the circumstances which the General Court had set out in paragraphs 187 and 188 of the judgment under appeal to the requisite standard, it cannot be held that, by its finding in paragraphs 189 and 190 of the judgment under appeal, the General Court unlawfully reversed the burden of proof. The complaint relating to paragraph 189 is therefore unfounded.

201 In the third place, in so far as SAS Cargo and Others claim that, in paragraphs 194 and 221 of the judgment under appeal, the General Court unlawfully reversed the burden of proof by requiring them to disprove that the downstream surcharges had been passed on even though that passing on had not been established by the Commission, it should be noted that, admittedly, in paragraph 194, the General Court stated that SAS Cargo and Others did not put forward any evidence to demonstrate that the circumstances of the present case were not conducive to passing on the additional costs resulting from the single and continuous infringement on inbound routes to shippers downstream. Similarly, in paragraph 221, the General Court found that SAS Cargo and Others did not establish, or even allege, that the foreseeable passing on of the additional costs to shippers located in the EEA is wrongful or extraneous to the normal functioning of the market.

202 However, first, paragraph 194, relating to the foreseeability condition, is preceded, in paragraph 193 of the judgment under appeal, by a finding that it is apparent from recitals 14 and 70 of the decision at issue that the price of freight services constitutes an input for freight forwarders, and that it is a variable cost the increase in which, in principle, has the effect of increasing the marginal cost in relation to which the freight forwarders determine their own prices.

203 Second, paragraph 221 is preceded, in paragraphs 217, 218 and 220 of the judgment under appeal, by a reiteration of the principles governing, according to the General Court, the assessment of the condition of immediacy required in order to find that the qualified effects test is satisfied in a given case. That paragraph is also preceded, in paragraph 219 of that judgment, by the finding that, in the present case, the intervention of freight forwarders in respect of which it was foreseeable that, with complete independence, they would pass on to shippers the additional costs that they had had to pay – even though that intervention was capable of having contributed to the occurrence of the effect on the prices of imported goods – was not, however, in itself such as to break the causal chain between the conduct at issue and that effect and thus deprive it of its immediacy. It should moreover be borne in mind that, in paragraphs 192 to 195 of the judgment under appeal, the General Court held, in particular in the light of the factors set out in recitals 14 and 70 of the decision at issue, that that passing on by freight forwarders was established.

204 It was therefore only after having first found, in essence, that the Commission had established that passing on to the requisite standard that the General Court then found that SAS Cargo and Others had not put forward any evidence capable of disproving that passing on, either in the context of its assessment of the effect of that passing on the foreseeability of the effect on the prices of imported goods or in the context of its assessment of the immediacy of that effect.

205 Thus, in the light of the case-law referred to in paragraph 198 of the present judgment, in addition, it cannot be held that, in paragraphs 194 and 221 of the judgment under appeal, the General Court unlawfully reversed the burden of proof.

206 It follows from the foregoing that the third part of the third ground of appeal must be rejected as unfounded.

The fourth part, relating to the immediacy of the effect on prices of imported goods

– *Arguments of the parties*

207 SAS Cargo and Others submit that, in paragraph 222 of the judgment under appeal, the General Court applied an incorrect test in order to satisfy itself as to the immediacy of the effect which it examined, by failing to ascertain whether there was a sufficiently direct causal link between the harmful conduct and the damage alleged, as required, inter alia, by paragraph 53 of the judgment of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission* (C-419/08 P, EU:C:2010:147). In paragraphs 219 and 221 of the judgment under appeal, the General Court merely considered that the effect was immediate because it was foreseeable. However, the foreseeability condition is a specific condition to be satisfied in the context of the application of the qualified effects test, and is distinct from the immediacy condition.

208 Moreover, paragraph 220 of that judgment is vitiated by an unlawful reversal of the burden of proof, in that the General Court suggests that the intervention of a third party breaks the chain of causation only if that intervention is wrongful and extraneous to the normal functioning of the market, which places on SAS Cargo and Others the burden of rebutting that condition of immediacy. In that regard, since the freight forwarders' market was cartelised, the 'wrongful' intervention could have been established. The General Court did not, however, take that into account. In paragraphs 224 and 225 of that judgment, the General Court also relied on the effect on shippers in order to demonstrate the immediacy of the passing on of the additional costs, whereas there was nothing to suggest that a general effect on consumers in the EEA was sufficiently immediate.

209 The Commission contends that this part of the third ground of appeal is inadmissible.

– *Findings of the Court*

210 In the first place, it should be noted that, in paragraph 53 of the judgment of 18 March 2010, *Trubowest Handel and Makarov* v *Council and Commission* (C-419/08 P, EU:C:2010:147), on which SAS Cargo and Others rely in support of the present part of the third ground of appeal, the Court of Justice recalled its case-law according to which the principles common to the laws of the Member States to which the second paragraph of Article 340 TFEU refers cannot be relied upon to found an obligation on the European Union to make good every harmful consequence,

even a remote one, of conduct of its institutions, given that the condition under that paragraph relating to a causal link concerns a sufficiently direct causal nexus between the conduct of the institutions and the damage.

211 Furthermore, in accordance with the case-law referred to in paragraph 161 of the present judgment, it is sufficient that the anticompetitive conduct in question is liable to have an immediate effect in the European Union or in the EEA in order for the requirement of immediacy to be satisfied, which, together with the requirements of foreseeability and substantiality, makes it possible to find the existence of qualified effects capable of establishing the Commission's jurisdiction to find and penalise anticompetitive conduct adopted outside the territory of the European Union or the EEA.

212 It must therefore be held that paragraph 53 of that judgment, which relates to the conditions under which the European Union's non-contractual liability may be incurred, is unrelated to that condition of immediacy. It is therefore to no avail that SAS Cargo and Others rely on paragraph 53 in order to establish the existence of an error of law in the General Court's analysis of that condition.

213 It should also be borne in mind that the question whether the effect on the prices of imported goods satisfied each of the three conditions referred to in paragraph 211 above was analysed by the General Court, separately for each condition, in paragraphs 183 to 227 of the judgment under appeal. It is therefore also to no avail that SAS Cargo and Others claim, in essence, that the General Court erred in law by conflating, in paragraphs 219 and 221 of the judgment under appeal, the conditions of foreseeability and immediacy. In particular, the General Court was fully entitled to examine, in paragraph 219 of that judgment, whether it was foreseeable that freight forwarders would pass on to shippers the additional costs that they had had to pay, since, as recalled in paragraph 211 of the present judgment, it is sufficient that the anticompetitive conduct in question is liable to have an immediate effect in the European Union or in the EEA in order for the requirement of immediacy to be satisfied.

214 In the second place, in so far as SAS Cargo and Others criticise paragraph 220 of the judgment under appeal on account of the reversal of the burden of proving the condition of immediacy which stems from that paragraph, that line of argument cannot be distinguished, in essence, from that already examined in paragraphs 201 and 203 to 205 of the present judgment. That line of argument must therefore be rejected for the same reasons.

215 In the third place, in so far as SAS Cargo and Others submit that the General Court failed to take account of the fact that the freight forwarders' market was cartelised and that there was nothing to suggest that a general effect on consumers in the EEA was sufficiently immediate, they are in fact seeking to have the Court of Justice carry out a new assessment of the facts and evidence, without even claiming that the General Court distorted them. That line of argument is therefore inadmissible, in accordance with the case-law referred to in paragraph 72 of the present judgment.

216 The fourth part of the third ground of appeal must therefore be rejected as in part inadmissible and in part unfounded.

The fifth part, relating to the possibility of basing the Commission's international jurisdiction on the existence of a single and continuous infringement

– *Arguments of the parties*

217 SAS Cargo and Others claim that the General Court erred in law in paragraph 236 of the judgment under appeal when it held that the Commission was entitled to find that the qualified effects test was satisfied by taking into account the single and continuous infringement as a whole. The concept of a 'single and continuous infringement' has a purely procedural dimension and can therefore neither extend the ambit of the Treaties nor change international law.

218 First of all, the General Court misinterpreted recital 1046 of the decision at issue, which does not refer to the term 'effect' or to an immediate, substantial and foreseeable effect. That recital does not therefore constitute a standalone basis for the Commission's jurisdiction.

219 Next, paragraph 235 of that judgment is incorrect since, as already explained, the fact that the conduct in question has as its object the restriction of competition cannot be relied on in order to establish the Commission's jurisdiction. In paragraphs 230 and 236 of that judgment, the General Court also erred in law in relying on the existence of a single and continuous infringement in order to establish the Commission's jurisdiction. Recital 872 of the decision at issue establishes that the single and continuous infringement applied only to the airfreight sector 'in the EEA'. The single and continuous infringement cannot both contain 'non-EEA' components to establish the Commission's jurisdiction and be 'confined' to the EEA.

220 Lastly, paragraphs 228 and 234 of that judgment are incorrect in that the General Court held that the Commission had jurisdiction to penalise conduct on inbound routes which, moreover, did not satisfy the qualified effects test. The use, to that end, of the 'doctrine of single and continuous infringement' extends too broadly the reasoning of the Court of Justice in the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632).

221 The Commission contends that this part of the third ground of appeal must be rejected.

– *Findings of the Court*

222 It is sufficient to note that, by the first part of their second plea before the General Court, examined by the General Court in paragraphs 128 to 237 of the judgment under appeal, SAS Cargo and Others merely challenged the Commission's jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement to the conduct at issue in so far as it related to inbound freight services. In that connection, the General Court found, in paragraph 227 of the judgment under appeal, that the Commission was entitled to find that the qualified effects test was satisfied as regards coordination in relation to inbound freight services taken in isolation, with the result that the Commission's jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement to the conduct at issue – in so far as that jurisdiction was disputed – was established. It follows that it was for the sake of completeness that, in paragraphs 228 to 236 of the judgment under appeal, the General Court examined whether the Commission, in order to establish its jurisdiction to apply Article 101 TFEU and Article 53 of the EEA Agreement to the conduct at issue, was also entitled to find, in recital 1046 of the decision at issue, that the qualified effects test was satisfied having regard to the effects of the single and continuous infringement taken as a whole.

223 Moreover, as is clear from the examination of the first to fourth parts of the present ground of appeal, the General Court did not err in law in finding to that effect in paragraph 227 of the judgment under appeal.

224 In those circumstances, it must be held that the present part of the present ground of appeal is aimed at grounds of the judgment under appeal included purely for the sake of completeness and is, consequently, ineffective, in accordance with the case-law referred to in paragraph 80 of the present judgment.

225 It follows from all of the foregoing that the third ground of appeal must be rejected as in part inadmissible, in part ineffective and in part unfounded.

The fourth ground of appeal, relating to the single and continuous infringement

226 SAS Cargo and Others' fourth ground of appeal consists of three parts. By the first part, they allege inconsistency between the grounds and the operative part of the decision at issue as regards the geographic scope of the conduct in question. The second part alleges errors of law in the assessment of the State coercion defence. By the third part, they claim that the General Court erred in law when it upheld the Commission's finding characterising the conduct in question as a single and continuous infringement.

The first part, alleging inconsistency in the decision at issue as regards the geographic scope of the conduct in question

– *Arguments of the parties*

227 SAS Cargo and Others submit that the General Court erred in law in rejecting their line of argument that the Commission had erred in characterising the scope of the anticompetitive conduct in question as 'global'. In particular, there is an inconsistency between the operative part of the decision at issue, which finds such a scope, and the grounds of that decision, which acknowledge that routes to and from Dubai did not fall within the scope of the cartel at issue. SAS Cargo and Others also state that they claimed that that decision adduced no proof of misconduct in most third countries and that the existence of a global cartel could not be extrapolated from evidence concerning only some specific routes.

228 In that regard, first, in paragraphs 268 and 269 of the judgment under appeal, the General Court erred in law in finding that the reference, in Article 1 of the operative part of that decision, to coordination 'on a global basis' was merely a 'statement of fact' and, consequently, that that operative part 'leaves no room for doubt'. The reference to the 'global basis' is essential in order to understand Article 1 as a whole, since the routes identified in the remaining paragraphs thereof do not refer to particular countries. As a result of that reference to the 'global basis', paragraphs 2 and 3 of Article 1 of the decision at issue necessarily apply to all routes between airports in the EEA and all the third countries mentioned in those provisions. Consequently, there is also a contradiction between, on the one hand, that operative part, from which it is not possible to tell that Dubai and Thailand do not fall within the scope of the decision at issue, and, on the other, the recitals of that decision, in particular recital 1375 thereof, which indicates that the conduct in Dubai did not form part of the cartel. The Commission could not remedy that

contradiction by informing the applicant in a different case, namely that which gave rise to the judgment of 30 March 2022, *Cathay Pacific Airways* v *Commission* (T-343/17, EU:T:2022:184), that Dubai was indeed excluded from that scope.

229 Second, paragraphs 276 and 277 of the judgment under appeal, in which the General Court stated that 'the exclusion of local conduct from the scope of the cartel at issue is not inconsistent with that cartel being worldwide', are vitiated by a substitution of grounds, an error of logic and internal inconsistencies, since the term 'worldwide' means 'everywhere in the world'. Paragraph 277 also highlights a contradiction between the grounds set out in recitals 889 and 890 of the decision at issue, on the hand, and recital 1375 thereof, on the other. The conduct in question could not simultaneously be 'on all routes' and not be on routes from Dubai, or, in part, not include Thailand. By attempting to remedy that contradiction, the General Court carries out an unlawful substitution of grounds, whereas it should have found that contradiction and annulled that decision accordingly.

230 Third, paragraph 270 of the judgment under appeal, in which the General Court states that the reference to a worldwide infringement in recital 1210 of the decision at issue is a 'mere clerical error', quite literally involves rewriting that decision. The only plausible interpretation of the operative part thereof is that that decision found a worldwide infringement, or at least an infringement on all routes worldwide within the jurisdiction of the European Union.

231 Fourth, paragraph 286 of the judgment under appeal infringes the presumption of innocence and reverses the burden of proof inasmuch as the General Court held in that paragraph that evidence of coordination in seven jurisdictions was sufficient to establish global coordination. The operative part of the decision at issue implies that the carriers are liable for routes between the EEA and all third countries. However, although the Commission failed to adduce evidence of that, the General Court required the carriers to disprove that certain routes fell within the cartel at issue.

232 Fifth, in paragraphs 276 to 278 of the judgment under appeal, the General Court infringed the principle of the presumption of innocence by suggesting that Dubai fell within the scope of the cartel at issue even though it could not have been unaware that that was not the case, in the light of the Commission's statements before it in the case which gave rise to the judgment of 30 March 2022, *Cathay Pacific Airways* v *Commission* (T-343/17, EU:T:2022:184).

233 Sixth, the conclusion in paragraph 313 of the judgment under appeal, regarding the single nature of the infringement, is vitiated because it relied on the incorrect premiss in paragraph 311 of that judgment that the conduct at issue was worldwide in scope.

234 The Commission observes that this part of the fourth ground of appeal is inadmissible in part and unfounded in part.

– *Findings of the Court*

235 In the first place, it should be noted that, in paragraph 268 of the judgment under appeal, the General Court stated that, in the present case, contrary to SAS Cargo and Others' claims, the Commission had not concluded, in the operative part of the decision at issue, that there was a worldwide infringement. It observed, in that regard, that the reference to the coordination of the conduct of the incriminated carriers as regards 'pricing behaviour in the provision of [freight] services on a global basis' in the introductory paragraph of Article 1 of that decision was merely a

statement of fact that the Commission characterised, in paragraphs 1 to 4 of that article, as an infringement of the competition rules applicable on routes that it had considered to be, during the periods at issue, within its jurisdiction, namely intra-EEA routes between 7 December 1999 and 14 February 2006, EU-third country routes between 1 May 2004 and 14 February 2006, non-EU EEA-third country routes between 19 May 2005 and 14 February 2006, and EU-Switzerland routes between 1 June 2002 and 14 February 2006.

236 It specified, in paragraph 269 of that judgment, that, since the operative part of the decision at issue left no room for doubt, it was solely for the sake of completeness that it added that the grounds of the decision at issue confirmed that conclusion, which it set out in the remainder of paragraph 269 and in paragraphs 270 and 271 of that judgment. On those grounds, it concluded, in paragraph 271, that the finding of the existence of tariff coordination for the provision of freight services worldwide reflected the position expressed by the Commission, throughout the decision at issue, on the geographic scope of the cartel at issue.

237 In that regard, it is necessary to distinguish the concept of 'conduct', which refers to a body of facts, from the concept of 'infringement', which refers to the legal classification given to that conduct (see, to that effect, judgment of 16 June 2022, *Quanta Storage* v *Commission*, C-699/19 P, EU:C:2022:483, paragraph 70).

238 In the present case, it is clear from the wording of Article 1 of the decision at issue, which SAS Cargo and Others do not claim to have been distorted by the General Court, that the Commission did not hold SAS Cargo and Others liable for a 'worldwide infringement', since the reference to the fact that the addressees of that decision had 'coordinat[ed] their pricing behaviour in the provision of airfreight services on a global basis with respect to the fuel surcharge, the security surcharge and the payment of commission payable on surcharges' is in fact merely a factual description of the anticompetitive conduct at issue, which does not in itself constitute a legal characterisation capable of establishing the existence of a contradiction in the operative part of the decision at issue.

239 It also follows from those factors that, since the General Court was right to find that the Commission had not concluded, in the operative part of the decision at issue, that there was a worldwide infringement, it cannot be held that there is a contradiction between, on the one hand, the finding of such an infringement and, on the other, the grounds of the decision at issue.

240 Furthermore, in so far as SAS Cargo and Others claim that there is a contradiction between, on the one hand, the fact that the routes identified in the other paragraphs of Article 1 do not refer to specific countries, with the result that it must be held, given that that operative part refers to a 'worldwide cartel', that all routes between EEA airports and all third countries are covered, and, on the other hand, the grounds of that decision, from which it is apparent that Dubai and Thailand are not included in that cartel, it is sufficient to note that it follows from what has been stated in paragraphs 235 to 239 of the present judgment that that line of argument is based on a misreading of the scope of that operative part.

241 In the light of the foregoing, the line of argument set out in paragraph 228 of the present judgment is unfounded.

242 In the second place, as regards the line of argument set out in paragraph 229 of the present judgment, it should be noted, first, that it is inadmissible in accordance with the case-law referred to in paragraph 82 hereof in so far as, by that line of argument, SAS Cargo and Others

merely allege that paragraphs 276 and 277 of the judgment under appeal are vitiated by 'a substitution of grounds, an error of logic and internal inconsistencies' on the ground that the term 'worldwide' means 'everywhere in the world', since such statements are too vague and general to make it possible to establish the existence of an error of law in paragraphs 276 and 277 of the judgment under appeal. The same is true of the line of argument set out in paragraph 232 of the present judgment in so far as it relates, in essence, to paragraphs 276 and 277 of the judgment under appeal and by which SAS Cargo and Others again merely allege a breach of the presumption of innocence.

243 Second, in so far as, by that line of argument set out in paragraph 229 of the judgment under appeal, SAS Cargo and Others claim, in essence, that, in paragraph 277, the General Court erred in law by failing to point out the contradiction in the grounds which it highlighted, it should be noted that, in paragraph 277, the General Court found that the Commission had stated, in recital 889 of the decision at issue, that the surcharges were 'measures of general application' which 'were intended to be applied on all routes, on a worldwide basis', and that the same was true of the refusal to pay commission, which was equally 'general in nature'. The General Court also stated that it had noted that the implementation of the surcharges was carried out in the framework of a multi-level structure, at a central and local level, as described in recitals 107, 1046 and 1300 of the decision at issue. It inferred from this that, in those circumstances, the exclusion of local conduct from the scope of the cartel at issue was not inconsistent with that cartel being worldwide.

244 It must therefore be stated that (i) in paragraph 277 of the judgment under appeal, the General Court did not indicate, as SAS Cargo and Others claim, that the conduct at issue applied at the same time '[to] all routes' and not to Dubai or, in part, to Thailand and that (ii) paragraph 277 does not reveal any contradiction in the grounds of the decision at issue. It merely sets out the difference between (i) the general scope of the surcharges in question and (ii) the structure according to which their adoption was discussed and implemented. The argument of SAS Cargo and Others summarised in paragraph 243 of the present judgment is therefore based on a misreading of the judgment under appeal.

245 In the third place, it is sufficient to note that, as the General Court indicated in paragraph 269 of the judgment under appeal, paragraph 270 of that judgment is included purely for the sake of completeness. Consequently, the line of argument set out in paragraph 230 of the present judgment is, in any event, ineffective, in accordance with the case-law referred to in paragraph 80 of the present judgment.

246 In the fourth place, as regards the line of argument set out in paragraph 231 of the present judgment, SAS Cargo and Others make a manifestly incorrect reading of paragraph 286 of the judgment under appeal when they claim that the General Court held that coordination in seven jurisdictions was sufficient to establish global coordination. In paragraph 286, the General Court merely stated that the Commission had adduced evidence that the coordination relating to the refusal to pay commission had taken place in many countries around the world, 'including' France, Hong Kong, India, Italy, Spain, Switzerland, and the United States. As to the remainder, in so far as SAS Cargo and Others seek to challenge that assessment, they are in fact challenging the General Court's assessment of the facts and evidence. It is therefore, to that extent, inadmissible, in accordance with the case-law referred to in paragraph 72 of the present judgment.

247 In the fifth and last place, it is sufficient to note that the sixth complaint relied on by SAS Cargo and Others in support of the present part of the fourth ground of appeal is based on the premiss that they have succeeded in establishing that the General Court erred in law in finding that the Commission was justified in concluding that the surcharges were measures of general application that were intended to be applied 'on all routes, on a worldwide basis' and that the refusal to pay commission 'was equally general in nature'. However, it follows from the foregoing analysis that SAS Cargo and Others have not succeeded in establishing that that premiss is well founded.

248 It follows from all of the foregoing that the first part of the fourth ground of appeal must be rejected as inadmissible in part, ineffective in part, and unfounded in part.

The second part, relating to the State coercion defence

– *Arguments of the parties*

249 SAS Cargo and Others claim that the General Court erred in law in its assessment of their State coercion defence. That error vitiates paragraphs 500, 501, 509 to 514, 532, 549, 562 and 564 of the judgment under appeal. The General Court required SAS Cargo and Others to prove that national legislation of third countries obliged them to engage in the conduct in question. The case-law cited in that regard by the General Court in paragraphs 509 to 512 of that judgment is relevant only in the context of decisions by Member States. The principle of non-interference, which is a corollary to the principle of States' sovereign equality, grants third countries the right to conduct their own affairs without external interference.

250 In the present case, ASAs or local regulations encouraged tariff discussions between designated carriers on specific routes, so that the Commission was under an obligation, in accordance with the applicable principles of international law, to exercise moderation and restraint in the exercise of its powers. The General Court therefore erred in law in its assessment of the State coercion defence. The applicability of that defence is not limited to situations in which national legislation and practice require carriers to discuss tariffs, but extends to conduct which is specifically regulated and encouraged under national legislation and practice. That error vitiates not only paragraphs 509 to 514 of the judgment under appeal, but also the findings relating to practices existing in a number of third countries.

251 Thus, in the first place, the General Court's findings relating to Hong Kong cannot stand. It follows from paragraph 531 of the judgment under appeal that the national authorities did not wish to receive individual applications for the introduction of a fuel surcharge. Thus, properly construed, the State coercion defence was satisfied, since any collective conduct in Hong Kong was encouraged by those authorities, agreed with the customers and did not therefore constitute an anticompetitive cartel. Paragraphs 515 to 532 of the judgment under appeal concerning the liability of the appellants in Hong Kong are therefore incorrect.

252 In the second place, the findings of the General Court concerning Japan, set out in paragraphs 537 to 540 of the judgment under appeal, and the conclusions which it drew from them in paragraphs 549 and 550 of that judgment, cannot stand either. First, the ASAs concluded with Japan stipulated a coordination obligation for tariffs, including surcharges. By asserting the contrary in paragraph 537 of that judgment, the General Court distorted the plain meaning of the tariff clause in question, set out in paragraph 140 of the application before the General Court. At the least, those agreements with Japan encouraged coordination. In paragraph 538 of that

judgment, the General Court also distorted the line of argument of SAS Cargo and Others. It is apparent from the appellants' pleadings before the General Court that they stated that ASA tariff clauses allowed general tariff discussions between multiple carriers serving different destination countries within the EEA, explaining in particular that the Japanese Civil Aviation Bureau had approved the same surcharge level for all EEA countries. The General Court also distorted, in paragraph 545 of that judgment, their arguments relating to the fuel surcharge. It stated that the initiative to file collective applications concerning that surcharge was attributable to the carriers, and not to that Japanese authority, even though there were never any collective applications in Japan, but only individual applications following coordination, as shown by the evidence appended to those pleadings.

253 Second, paragraph 543 of the judgment under appeal distorts evidence in that the General Court found in that paragraph that documents which SAS Cargo and Others '[drew up] themselves' are at issue, whereas that is not the case. In particular, SAS Cargo and Others produced (i) a resolution of the International Air Transport Association (IATA) of May 2000, setting a single fuel surcharge level for all international routes, and (ii) a Japan Airlines interoffice communication showing that the Japanese Civil Aviation Bureau had adopted the fuel surcharge mechanism and a letter from that company confirming that that mechanism had been requested by customers. Recital 1002 of the decision at issue also mentions a document produced by Japan Airlines supporting their position, but SAS Cargo and Others were refused access to that evidence. SAS Cargo and Others also referred to the statement of the counsel of another carrier at the hearing before the Commission, contradicting a statement ascribed to that carrier in the decision at issue. By failing to address that evidence and by denying SAS Cargo and Others access to evidence subsequent to the Statement of Objections, although that evidence was clearly identified, the General Court also infringed the principle of equality of arms.

254 In the third place, as regards the other third countries whose regulatory regimes are addressed in the decision at issue, namely the Republic of India, the Kingdom of Thailand, the Republic of Singapore, the Republic of Korea and the Federative Republic of Brazil, only one incident involving SAS Cargo and Others after 1 May 2004 is mentioned, in recital 506 of the decision at issue. However, that evidence, regarding Thailand, is manifestly insufficient to prove an infringement relating to those other countries, particularly as it was exculpatory. In paragraphs 558 to 562 of the judgment under appeal, the General Court even agrees that the only incident allegedly implicating SAS Cargo and Others in alleged cartel conduct in Thailand was not contrary to competition law, since it was apparent from evidence produced by SAS Cargo and Others that the Thai authorities had imposed the fuel surcharge levels which the carriers had to adhere to, which eliminated any possibility of competition from 20 July 2005. However, the General Court nonetheless erred in law by finding that SAS Cargo and Others had not demonstrated that all possibility of competition was eliminated prior to that date.

255 In that regard, first, the General Court should have considered not whether the conduct in question was mandatory, but whether it was encouraged. Second, the only evidence linking SAS Cargo and Others to unlawful conduct in Thailand, described in recital 506 of the decision at issue, concerned compliance with an official instruction from the Thai Department of Aviation. Paragraph 562 of the judgment under appeal is therefore vitiated by an internal inconsistency. Third, SAS Cargo and Others adduced evidence establishing that, from 2003, identical binding surcharge levels were imposed on routes to the EEA from Thailand, evidence which the Commission has never disputed. The General Court therefore erred in law by postulating the opposite in paragraph 562 of the judgment under appeal, without addressing the evidence adduced by SAS Cargo and Others. Fourth, the fact that a Thai carrier was not held liable for an

infringement establishes that evidence submitted by that carrier, after the Statement of Objections, contained additional exculpatory evidence, to which the appellants should have had access.

256 As regards the Commission's assessment of the regulatory regimes referred to in paragraph 254 of the present judgment, set out in recital 1019 of the decision at issue, it is based on a simple cross-reference to its reasoning for the regimes in Hong Kong and Japan, as stated in paragraph 552 of the judgment under appeal. Therefore, if the Court of Justice were to reject the General Court's findings concerning the latter two countries, it should also disregard the General Court's findings set out in paragraphs 555 to 557, 562 and 563, concerning those other third countries. Moreover, since Thailand and Dubai did not fall within the scope of the cartel at issue, the General Court should have given SAS Cargo and Others the benefit of the doubt and found that a worldwide cartel could not be assumed without proof. It therefore infringed the presumption of innocence. For the same reasons, paragraphs 623 and 624 of the judgment under appeal are also incorrect.

257 The Commission replies that that part of the ground of appeal is, in part, inadmissible and, in part, unfounded.

– *Findings of the Court*

258 As a preliminary point, it should be noted that, in paragraphs 500 and 501 of the judgment under appeal, the General Court stated (i) that the principle of non-interference is recognised by customary international law and (ii) that, even if SAS Cargo and Others could rely on that principle, the Commission had not infringed it by applying the qualified effects test to penalise conduct that took place and was implemented in third countries which, for political reasons, decided to authorise that conduct. In that regard, it noted that the application of Article 101(1) TFEU to conduct that will foreseeably produce immediate and substantial effects in the EEA is justified under public international law and, therefore, in particular under the principle of non-interference.

259 It must therefore be held that paragraphs 500 and 501, which constitute the General Court's analysis of the first complaint in the sixth part of the third plea raised before it, which alleged infringement of the principles of sovereignty and non-interference, do not relate to the General Court's analysis of the State coercion defence, which was examined by the General Court in paragraphs 504 to 564 of the judgment under appeal and which is the only defence referred to in the present part of the fourth ground of appeal.

260 SAS Cargo and Others do not put forward any argument explaining how paragraphs 500 and 501 of the judgment under appeal contain incorrect assessments in the light of the State coercion defence, which is not the subject of those paragraphs. The criticism directed at those paragraphs is therefore inadmissible, in accordance with the case-law cited in paragraph 82 of the present judgment.

261 Furthermore, in so far as SAS Cargo and Others claim, in the first place, that the General Court applied the wrong legal test in its assessment of their State coercion defence, it should be borne in mind that Articles 101 and 102 TFEU apply only to anticompetitive conduct engaged in by undertakings on their own initiative. If anticompetitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, those articles do not apply. In such a situation, the restriction

of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Those articles may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of the undertakings (see, to that effect, judgments of 11 November 1997, *Commission and France* v *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraphs 33 and 34, and of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 80).

262 The possibility of excluding particular anticompetitive conduct from the scope of Articles 101 and 102 TFEU, on the ground that it has been required of the undertakings in question by existing national legislation or that the legislation has eliminated any possibility of competitive conduct on their part, has thus been only partially accepted by the Court of Justice (judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 81 and the case-law cited).

263 Thus, the Court has held that if a national law merely encourages or makes it easier for undertakings to engage in autonomous anticompetitive conduct, those undertakings remain subject to Articles 101 and 102 TFEU (judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C-280/08 P, EU:C:2010:603, paragraph 82 and the case-law cited).

264 Contrary to what SAS Cargo and Others claim, that case-law does not distinguish between the national laws of the Member States and those of third countries.

265 Furthermore, in accordance with the case-law referred to in paragraph 198 of the present judgment, although it is for the authority alleging an infringement of the competition rules to prove it, it is for the undertaking raising a defence against a finding of an infringement of those rules to demonstrate that the conditions for applying the rule on which such defence is based are satisfied, so that the authority will then have to resort to other evidence.

266 It follows from those factors that SAS Cargo and Others are not justified in submitting that the General Court erred in law in paragraphs 509 to 512 of the judgment under appeal by recalling therein, in essence, the guidance drawn from the case-law set out in paragraphs 258 to 263 and 265 of the present judgment and, by finding, in paragraph 513 of the judgment under appeal, that that guidance applies in the same way to the laws and conduct of a Member State or a contracting party to the EEA Agreement and to those of a third country and, consequently, by finding that it was for them to prove that the national legislation of the third countries concerned had not encouraged them but obliged them to adopt the conduct at issue.

267 To accept the interpretation of that State coercion defence put forward by SAS Cargo and Others would, moreover, run counter to the necessarily strict application to which that defence must be subject; that strict application is alone capable of not contradicting the unequivocal wording of Articles 101 and 102 TFEU, which apply to the conduct of undertakings.

268 Accordingly, in so far as this part of the fourth ground of appeal is based on the premiss that, in order for a defence alleging State coercion by a third country to be upheld, it is sufficient that the legislation of that country encourages the adoption of anticompetitive conduct, it must be rejected as unfounded, since that premiss is incorrect.

269 In the second place, as regards SAS Cargo and Others' arguments concerning the General Court's findings relating to Japan, it should be noted, as regards their first allegation of distortion, that, in paragraph 537 of the judgment under appeal, the General Court stated that, as regards SAS Cargo and Others' claim that the Commission failed to cite, in the decision at issue, paragraph 1 of the standard clause of the ASAs concluded by Japan, that paragraph lists the factors to be taken into account when setting tariffs and provides that those factors are to be determined in accordance with the following provisions of the article in which it is contained. The General Court inferred from this that it was not apparent from either that provision or the provision reproduced in the decision at issue that those ASAs impose a coordination obligation between carriers for the determination of surcharges. It added that, moreover, SAS Cargo and Others did not put forward any substantiated argument capable of establishing the contrary.

270 In paragraph 140 of the application before the General Court, SAS Cargo and Others had explained that that paragraph 1, which appears in the ASA applicable to SAS Cargo, stated as follows:

'The tariffs on any agreed service shall be established at reasonable levels, due regard being paid to all relevant factors including cost of operation, reasonable profit, characteristics of service (such as standards of speed and accommodation) and the tariffs of other airlines for any part of the specified route. These tariffs shall be fixed in accordance with the following provisions of this Article.'

271 It must therefore be held that, in the light of the case-law referred to in paragraph 108 of the present judgment, the alleged distortion has not been established, since paragraph 537 of the judgment under appeal faithfully sets out the content of that paragraph 1.

272 As regards the claim of distortion concerning paragraph 538 of the judgment under appeal, it should be noted that, in that paragraph, the General Court stated that SAS Cargo and Others did not dispute that the clauses in the ASAs relating to tariff discussions between designated carriers on specific routes are not capable of authorising general tariff discussions between multiple carriers serving different destination countries of the type referred to in the decision at issue.

273 In paragraph 128 of their application before the General Court, which was allegedly distorted in paragraph 538 of the judgment under appeal, they had argued as follows:

'… the local aviation authorities in Hong Kong, Japan and Thailand did not apply the tariff clauses on a route-by-route basis. Rather, they determined surcharge levels according to whether routes were international or domestic (e.g. Japan) or according to IATA Tariff Conference areas (e.g. Hong Kong, Thailand). Since all EEA countries belong to the category of international routes and the same IATA Tariff Conference area …, the same surcharge level was approved for all routes to the EEA. The reason for this approach is to limit the transaction costs for local flag carriers and local forwarders and shippers … Thus, as a direct consequence of the administrative regimes implementing the applicable ASAs, the Asian authorities required all cargo carriers transporting freight to Europe to apply the same surcharge level, albeit through different methods as explained below. This was fully in accordance with the ASA tariff clauses, since the same local airline(s) were designated carrier(s) in each applicable ASA. The authorities of Hong Kong and the UAE (Dubai) explained this to the Commission …'

274 Although SAS Cargo and Others had thus claimed that 'the Asian authorities required all cargo carriers transporting freight to Europe to apply the same surcharge level', it is not apparent from paragraph 128 of their application before the General Court that they maintained that the ASAs concluded by Japan allowed general tariff discussions between multiple carriers serving different destination countries within the EEA, such as the discussions penalised by the decision at issue. In the light of the case-law referred to in paragraph 108 of the present judgment, the second allegation of distortion has therefore not been established either.

275 As regards the third allegation of distortion, concerning paragraph 545 of the judgment under appeal, the General Court stated, in that paragraph, that, in so far as it did not establish the existence of an obligation on carriers to concert on the level of the fuel surcharge, none of the evidence produced by SAS Cargo and Others was capable of invalidating the information in recitals 198, 244, 256, 391, 392, 488 and 491 of the decision at issue, from which it is apparent that the initiative to file collective applications concerning the fuel surcharge was attributable to the carriers and not to the Japanese Civil Aviation Bureau. It must therefore be held that, by their line of argument set out in paragraph 252 of the present judgment relating to paragraph 545 of the judgment under appeal, SAS Cargo and Others are in fact criticising the reading of those recitals of the decision at issue which are cited by the General Court in paragraph 545 of that judgment. It cannot therefore, by that reading, have distorted their line of argument relating to the fuel surcharge. That third allegation is therefore unfounded.

276 As regards the line of argument concerning paragraph 543 of the judgment under appeal, relating, on the one hand, to the alleged distortion of the evidence, set out in paragraph 253 of the present judgment, it is sufficient to note that, in paragraph 543 of the judgment under appeal, the General Court, after assessing the evidence produced by SAS Cargo and Others in support of their assertions, concluded that none of the documents produced established the existence of State coercion justifying the non-application of Article 101(1) TFEU. Under the cloak of an allegation of distortion, SAS Cargo and Others therefore in fact seek to obtain a new assessment of that evidence by the Court of Justice. That line of argument is therefore, to that extent, inadmissible, in accordance with the case-law referred to in paragraph 72 of the present judgment.

277 On the other hand, in so far as, by that line of argument, they submit that the General Court failed to respond to some of their arguments, they claim that the General Court infringed its obligation to state reasons. It is settled case-law that the ground of appeal alleging that the General Court failed to respond to arguments relied on at first instance amounts essentially to pleading a breach of the obligation to state reasons which derives from Article 36 of the Statute of the Court of Justice, applicable to the General Court by virtue of the first paragraph of Article 53 of that statute, and from Article 117 of the Rules of Procedure of the General Court (judgment of 28 September 2023, *Changmao Biochemical Engineering* v *Commission*, C-123/21 P, EU:C:2023:708, paragraph 185 and the case-law cited). In the light of the case-law referred to in paragraph 85 of the present judgment and in the light of what the General Court stated not only in paragraph 543, but also in paragraphs 542 and 544 of the judgment under appeal, which also set out the evidence that SAS Cargo and Others had produced before the General Court and the assessment of that evidence by the General Court, such an infringement has not been established.

278 As regards the claim that the General Court infringed the 'principle of equality' by not granting them access to evidence subsequent to the Statement of Objections, it is sufficient to note that, even if that claim were admissible, it is no different from that set out in the first ground of appeal and must therefore, in any event, be rejected on the same grounds.

279 In the third place, as regards the line of argument set out in paragraphs 254 to 256 of the present judgment, it must, first, be held that it is inadmissible in accordance with the case-law set out in paragraph 72 of the present judgment in so far as, by that line of argument, SAS Cargo and Others, under the cloak of allegations of errors of law concerning the situation that prevailed in Thailand, seek to obtain a new assessment of the facts and evidence.

280 Second, in so far as, by that line of argument, SAS Cargo and Others dispute the internal consistency of the decision at issue, that line of argument is inadmissible, in accordance with the case-law referred to in paragraph 74 of the present judgment.

281 Third, in so far as, by that line of argument, they submit that the General Court failed to address all the evidence which they had adduced, it is sufficient to note that the action of the Thai authorities was examined by the General Court in paragraphs 556 to 561 of the judgment under appeal and that, in paragraph 562 of that judgment, the General Court concluded that, as regards the rules applicable in Thailand, SAS Cargo and Others had been able to establish, without being effectively contradicted by the Commission, that, as from 20 July 2005, the authorities of that country had created a legal framework that in itself eliminated any possibility of competitive behaviour between carriers as regards the determination of the amount of the fuel surcharge applicable to flights departing from Thailand. It also noted that, nevertheless, they had not established that Thai legislation eliminated any possibility of competition in respect of the security surcharge or that, as regards the fuel surcharge, all possibility of competition was eliminated for the period prior to 20 July 2005.

282 It must therefore be held that, by the third argument set out in paragraph 255 of the present judgment, they seek to obtain from the Court of Justice, under the cloak of an allegation that the General Court infringed its obligation to state reasons, a new assessment of the facts and the evidence. That line of argument is therefore inadmissible, in accordance with the case-law referred to in paragraph 72 of the present judgment.

283 Fourth, in so far as they claim that they should have had access to additional exculpatory evidence, that line of argument is no different from that set out at the end of paragraph 253 of the present judgment and must be rejected for the same reasons as those already set out in paragraph 278 of the present judgment.

284 Fifth, as regards the line of argument set out in paragraph 256 of the present judgment, it is sufficient to note that there are no errors of law in paragraphs 555 to 557, 562 and 563 of the judgment under appeal, since SAS Cargo and Others' claims in that regard are based on the premiss that they have succeeded in establishing that the General Court's findings relating to the regulatory regimes in Hong Kong and Japan were incorrect. As is apparent from the foregoing analysis, that premiss is unfounded.

285 As regards the allegation of infringement of the presumption of innocence, it is also based on the fact that the Kingdom of Thailand was not included among the countries in respect of which SAS Cargo and Others could be accused of infringing Article 101(1) TFEU. Although the General Court found that such an infringement could not be found against them in respect of flights departing from that third country as regards the fuel surcharge from 20 July 2005, it did not rule out the existence of such an infringement in respect of all flights from that country for the entire period of the infringement, with the result that the premiss of that line of argument is also factually incorrect.

286 As regards the criticism relating to the inclusion of third countries within the scope of the single and continuous infringement, in paragraphs 623 and 624 of the judgment under appeal, it is sufficient to note that it is based on the same arguments as those which have already been rejected in the two preceding paragraphs of the present judgment.

287 It follows from all of the foregoing that the second part of the fourth ground of appeal must be rejected as in part inadmissible and in part unfounded.

The third part, relating to the characterisation of the conduct in question as a single and continuous infringement

– *Arguments of the parties*

288 SAS Cargo and Others submit that the General Court erred in law in rejecting their arguments challenging the Commission's finding that the conduct described in the decision at issue constituted a single and continuous infringement. The conduct in question was so disparate that it could not reasonably be lumped together as a 'single' infringement. The General Court's assessment in that regard is incorrect in multiple respects.

289 In the first place, in paragraphs 302 to 304 of the judgment under appeal, the General Court failed to address the key point raised by SAS Cargo and Others, namely that the conduct referred to in Section 4 of the decision at issue arose in various contexts, with a variety of aims. It is true that, in paragraph 302, the General Court refers to each type of conduct. However, it never engaged with the central point that those different types of conduct lacked commonality. The General Court thereby infringed its obligation to state reasons.

290 In the second place, the General Court erred in relation to the conduct that took place in Switzerland. In paragraphs 612 to 618 of the judgment under appeal, it confirmed that the only contact concerning SAS Cargo and Others that took place after 1 June 2002 was not illegal. However, in paragraph 604 of that judgment, the General Court distorted the evidence by referring to a concept of 'continuation' in the use of the criterion of actual weight. It also failed, in paragraphs 604 and 605 of that judgment, to respond to the arguments and evidence put forward in paragraph 161 of the application at first instance, by which they disputed, in essence, not the existence of a particular meeting, but their participation in that meeting. Moreover, it follows from paragraph 605 that there was no agreement on the use, in order to calculate the fuel surcharge, of actual weight rather than 'chargeable weight', whereas the General Court, in paragraph 606 of that judgment, endorsed the Commission's conclusion that the appellants had participated in such an agreement but had decided not to apply it. Paragraph 610 of the judgment under appeal is also incorrect in so far as it is mentioned therein that a communication by an employee of the appellants concerning the abolition of the fuel surcharge infringed Article 101(1) TFEU, even though that communication was public. The General Court should have examined whether that communication led to greater price transparency or facilitated compliance with the cartel. By failing to do so, it infringed its obligation to state reasons. Furthermore, for that local conduct from December 2001 concerning surcharges on routes from Switzerland, neither Article 101 TFEU nor Article 8 of the EC-Switzerland Air Transport Agreement was applicable, with the result that paragraph 611 of that judgment is wrong in law.

291 In the third place, the General Court erred in its assessment of the statements of other carriers regarding the conduct of SAS Cargo and Others. The General Court was fully entitled, in paragraphs 625 to 650 of the judgment under appeal, to find that the email evidence set out in several recitals of the decision at issue did not prove the existence of illegal contacts between them and other carriers. However, it was wrong not also to cast doubt on the relevance of an internal email sent by an employee of another carrier based in the United Kingdom on 17 February 2003, referred to in recital 273 of the decision at issue. In paragraphs 634 and 635 of that judgment, it held that SAS Cargo and Others had not adduced any evidence in support of their position. However, it erred in failing to consider the actual point they were raising. Thus, first, the General Court did not take account of certain arguments which they had put forward. Second, contrary to the assertion in paragraph 635, they did not rely solely on the freight forwarder receiving notices from other carriers. It follows from those errors that that evidence cannot be relied upon in relation to them either.

292 In the fourth place, it is true that the General Court accepted, in particular in paragraphs 407 to 411 of the judgment under appeal, that certain conduct was justified in view of the WOW alliance. However, it was wrong to find that some conduct within that alliance 'went too far' in the absence of a common integrated pricing policy. In any event, even if such contacts within that alliance had constituted an infringement of Article 101(1) TFEU, those contacts would have formed part of the single and continuous infringement only if there had been an objective link between those contacts and that single and continuous infringement or if SAS Cargo and Others had intended to participate in the global cartel rather than in conduct related to that alliance. However, the General Court failed to demonstrate the existence of such an objective link between the contacts within the WOW alliance and the single and continuous infringement. Paragraph 430 of that judgment contains only an assertion in that regard, with the result that the judgment is insufficiently reasoned. It follows that paragraphs 428 to 432 of that judgment should be disregarded and, consequently, that the contacts within the WOW alliance should be excluded from the evidence of SAS Cargo and Others' participation in the single and continuous infringement.

293 In the fifth place, as regards vertical supply agreements, the rejection, in paragraphs 475 to 487 of the judgment under appeal, of the explanation given by SAS Cargo and Others concerning their receipt of the 'Dear Partner' emails is incorrect. First, paragraphs 477 to 479, 484 and 485 of that judgment are insufficiently reasoned and infringe the principles of personal liability and presumption of innocence, since they refer only to the contacts or actions of employees of other carriers, without addressing the involvement of SAS Cargo and Others in those contacts or their awareness of those contacts. Those paragraphs cannot therefore establish that SAS Cargo and Others committed an infringement. Second, paragraph 479 of that judgment reproduces the Commission's position set out in its defence before the General Court, without addressing the argument or the evidence put forward by SAS Cargo and Others. Third, in paragraphs 480 and 481 of that judgment, the General Court failed to examine whether the evidence relied upon by the Commission enabled it to conclude correctly that there was no plausible alternative explanation for SAS Cargo and Others' receipt of those emails. Fourth, the General Court's statements in paragraphs 482 and 483 of the judgment under appeal are not supported either in the Statement of Objections or in the decision at issue. They therefore constitute an unlawful substitution of grounds, with the result that paragraphs 482 and 483 should be rejected.

294 In the sixth place, the General Court erred as regards SAS Cargo and Others' awareness of the single and continuous infringement. It acknowledged, in paragraph 669 of the judgment under appeal, that the Commission had not established SAS Cargo and Others' direct participation in

all anticompetitive activities. It follows that the Commission was required to prove that they were aware of the other carriers' conduct or could reasonably have foreseen it. In that regard, in paragraph 670 of that judgment, the General Court noted that the decision at issue referred to eight contacts. First of all, SAS Cargo and Others argued, without any response to that argument, that those contacts did not reveal anything about the coordination in question. Next, since four of those emails were 'Dear Partner' emails, they cannot be relied on, as is apparent from the preceding paragraph of the present judgment. The other four emails were distorted by the General Court, which, moreover, did not give sufficient reasons for its position. Moreover, in paragraphs 671, 672, 677 and 678 of the judgment under appeal, the General Court engaged in an unlawful substitution of grounds. In addition, in paragraphs 678 and 679 of that judgment, it distorts the plain meaning of another email, dated 17 February 2003, and does not take account of exculpatory evidence. As regards paragraphs 681 and 683 of that judgment, they should also be rejected, since the General Court did not in any way explain the reasons why the emails relied on enabled SAS to become aware of conduct in which it was not involved. Paragraph 685 of that judgment is also incorrect, since it imperfectly presents SAS Cargo and Others' argument, to which the General Court responds in that paragraph. The General Court could not remedy the inadequacy of the eight emails relied on by the Commission in recital 791 of the decision at issue by merely referring to other recitals, without explaining how those contacts had enabled SAS Cargo and Others to become aware of conduct in which they had not taken part. The General Court's analysis, in paragraphs 660 to 694 of the judgment under appeal, concerning SAS Cargo and Others' awareness with respect to the conduct of the other carriers should therefore be rejected, as should the General Court's findings in paragraphs 713 to 728 of that judgment concerning the extent of their participation in the infringement.

295 The Commission contends that this part of the fourth ground of appeal is inadmissible inasmuch as it relates to findings of fact made by the General Court, and unfounded as to the remainder.

– *Findings of the Court*

296 It is clear from well-established case-law that an infringement of Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from 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. Thus, if the various instances of conduct 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 instances of conduct on the basis of participation in the infringement considered as a whole (see, to that effect, judgments of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41 and the case-law cited, and of 27 June 2024, *Servier and Others* v *Commission*, C-201/19 P, EU:C:2024:552, paragraph 240).

297 An undertaking which has participated in such a single and continuous infringement through its own conduct, which fell within the definition of an 'agreement' or a 'concerted practice' having an anticompetitive object within the meaning of Article 101(1) TFEU and was intended to help bring about the infringement as a whole, may accordingly be held liable also in respect of the conduct of other undertakings in the context of that infringement throughout the period of its participation in the infringement (see, to that effect, judgments of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 42 and the case-law cited, and of 27 June 2024, *Servier and Others* v *Commission*, C-201/19 P, EU:C:2024:552, paragraph 241).

298 In that regard, it should be recalled that, for the purpose of characterising various instances of conduct as a single and continuous infringement, it is not necessary to ascertain whether they present a link of complementarity, in the sense that each of them is intended to deal with one or more consequences of the normal pattern of competition, and, through interaction, contribute to the attainment of the set of anticompetitive effects desired by those responsible, within the framework of a global plan having a single objective. On the other hand, the condition relating to a 'single objective' does require that it be ascertained whether there are any elements characterising the various instances of conduct forming part of the infringement which are capable of indicating that the instances of conduct in fact implemented by other participating undertakings do not have the same object or the same anticompetitive effect and, consequently, do not form part of an 'overall plan' by virtue of their identical object that distorts the normal pattern of competition within the internal market (judgments of 26 January 2017, *Villeroy & Boch* v *Commission*, C-644/13 P, EU:C:2017:59, paragraph 50 and the case-law cited, and of 27 June 2024, *Servier and Others* v *Commission*, C-201/19 P, EU:C:2024:552, paragraph 242).

299 In the present case, in so far as, in the first place, SAS Cargo and Others claim that the General Court failed to state reasons for the judgment under appeal by failing to respond to their line of argument that the conduct in question arose in a variety of contexts, with a variety of aims, with the result that it could not be characterised as a single infringement, it is sufficient to note that the complaint raised by SAS Cargo and Others alleging incorrect findings as regards the single nature of the infringement was examined by the General Court not only in paragraphs 302 to 304 of the judgment under appeal, but in paragraphs 296 to 325 of that judgment as a whole. In that context, in addition to its analysis, carried out in paragraphs 302 to 304, of SAS Cargo and Others' line of argument disputing the existence of a single anticompetitive aim, the General Court found, inter alia, in paragraph 317 of the judgment under appeal, that the appellants claimed that the Commission ignored, with regard to the nature of the single and continuous infringement, the specific features of the coordination that was necessary due to local legislation or which formed part of legitimate alliances, and rejected that line of argument on the ground that SAS Cargo and Others were merely reiterating the arguments already raised in support of their criticism of the existence of a single anticompetitive aim, so that those arguments had to be rejected on the same grounds.

300 In addition, in paragraphs 318 to 321 of that judgment, the General Court analysed the line of argument by which SAS Cargo and Others claimed that the refusal to pay commission could be distinguished from the other elements of the single infringement by the fact that that refusal had arisen from a disagreement between the carriers and the freight forwarders regarding the interpretation of standard clauses, as opposed to 'secret coordination of [the fuel surcharge and the security surcharge] among a handful of carriers'. It rejected it, finding, in essence, that it was apparent from the decision at issue that the aim of the refusal to pay commission was not only separate from the public disagreement of a legal nature referred to by SAS Cargo and Others, but was such as to strengthen coordination relating to surcharges.

301 The General Court therefore set out the reasons why SAS Cargo and Others had not succeeded in establishing that, as a result of those alleged various contexts and variety of aims, the single nature of the infringement had not been established to the requisite standard by the Commission in the decision at issue. Therefore, in the light of the case-law referred to in paragraphs 84 and 85 of the present judgment, the alleged infringement of the obligation to state reasons has not been established.

302 In the second place, as regards the line of argument set out in paragraph 290 of the present judgment, it should be noted, first of all, that, in so far as SAS Cargo and Others thereby claim a distortion by the General Court in paragraph 604 of the judgment under appeal, inasmuch as it referred to a concept of 'continuation' ('they would continue to use') in the use of the criterion of actual weight, it is sufficient to note that that argument does not meet the requirements of precision under the case-law referred to in paragraph 108 of the present judgment, since SAS Cargo and Others do not set out, inter alia, the content of the email alleged to have been distorted. That argument is therefore inadmissible.

303 Next, in so far as SAS Cargo and Others claim that the General Court infringed its obligation to state reasons by failing to respond to the line of argument which they had set out in paragraph 161 of their application at first instance, it is sufficient to recall that, as has already been stated in paragraph 85 of the present judgment, that obligation to state reasons does not require that the General Court provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case, provided that the reasoning of the judgment under appeal 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 on appeal. The General Court assessed SAS Cargo and Others' line of argument relating to the conduct in Switzerland, which was the subject of paragraphs 158 to 164 of that application, in paragraphs 597 to 618 of the judgment under appeal. Moreover, SAS Cargo and Others do not even claim that they were not placed in a position to understand why their line of argument at first instance was upheld only in part by the General Court. In those circumstances, the alleged infringement of the obligation to state reasons has not been established.

304 Lastly, in so far as SAS Cargo and Others criticise paragraphs 605, 606 and 610 of the judgment under appeal, it is sufficient to note that they are in fact seeking to have the Court of Justice substitute its own assessment of the facts and evidence for that made by the General Court without criticising it for any distortion. It follows that those criticisms are inadmissible, in accordance with the case-law set out in paragraph 72 of the present judgment.

305 In the third place, it must be stated that, by the line of argument set out in paragraph 291 of the present judgment, SAS Cargo and Others are again seeking to obtain from the Court of Justice a new assessment of the facts and evidence relating to the assertions of the other carriers regarding their conduct that was carried out by the General Court in paragraphs 629 to 650 of the judgment under appeal, and more specifically of the General Court's assessments by which it granted only in part their request that certain contacts should be excluded from the body of evidence relied on in relation to them in the decision at issue. That line of argument, which does not allege any distortion by the General Court, is therefore also inadmissible, in accordance with the case-law set out in paragraph 72 of the present judgment.

306 In the fourth place, the same is true, in essence, of the line of argument set out in paragraph 292 of the present judgment since SAS Cargo and Others seek thereby to obtain from the Court of Justice a new assessment of the facts and evidence relating to the scope of the contacts that took place within the WOW alliance.

307 As to the remainder, in so far as SAS Cargo and Others claim that the General Court failed to demonstrate that there was an objective link between those contacts and the single and continuous infringement, it must be held that SAS Cargo and Others' complaint relating to the inclusion of contacts within the WOW alliance in the scope of the single and continuous infringement was examined by the General Court not in paragraph 430 alone of the judgment

under appeal, but in paragraphs 429 to 431 of that judgment, in which the General Court set out in detail the reasons why the factors put forward by SAS Cargo and Others in order to demonstrate the absence of an objective link between the contacts amongst the members of the WOW alliance and the single and continuous infringement were not, in essence, such as to call into question the existence of the overall plan found in the decision at issue. The alleged infringement of the obligation to state reasons has therefore not been established.

308 In the fifth place, as regards the line of argument set out in paragraph 293 of the present judgment, it should be noted, first, that, in so far as SAS Cargo and Others thereby claim that the General Court erred in its assessment of the scope of the 'Dear Partners' emails, they are again seeking to have the Court of Justice substitute its own assessment of the facts and evidence for that made by the General Court in paragraphs 477 to 485 of the judgment under appeal without criticising it for any distortion. That line of argument is therefore also inadmissible, in accordance with the case-law set out in paragraph 72 of the present judgment.

309 Second, in so far as SAS Cargo and Others allege a breach of the principles of personal responsibility and the presumption of innocence, it is sufficient to note that that claim is based on the premiss that the 'Dear Partner' emails, which are, as is apparent from paragraph 468 of the judgment under appeal, collective emails sent by Lufthansa Cargo, do not prove that they committed an infringement since they refer only to the contacts or actions of employees of other carriers, without addressing the involvement of SAS Cargo and Others in those contacts or their awareness of them. In reality, that allegation therefore invites the Court of Justice to review the facts and evidence already assessed by the General Court in paragraphs 475 to 488 of the judgment under appeal without criticising the General Court for any distortion. It is therefore inadmissible, in accordance with the case-law set out in paragraph 72 of the present judgment.

310 Third, the claim that the General Court infringed its obligation to state reasons cannot be upheld either. Although paragraphs 480 and 481 of the judgment under appeal merely set out the reasons why the General Court held that it was to no avail that SAS Cargo and Others relied on the public nature of the information disseminated in the context of the emails described in recitals 446, 450, 482 and 495 of the decision at issue, paragraphs 475 to 479 and 482 to 488 of that judgment examine the other arguments and evidence which SAS Cargo and Others had submitted to the General Court and which sought, inter alia, to establish that those emails concerned not the single and continuous infringement, but the application of a fuel surcharge in the context of block space agreements between Lufthansa and other carriers.

311 In that regard, it found, for the reasons set out in paragraphs 476 to 483 of the judgment under appeal, that, contrary to what SAS Cargo and Others maintained, it could not be held that those emails were intended exclusively to ensure the proper performance of hypothetical block space agreements. On the other hand, it found that their purpose was to inform their addressees, including SAS Cargo, collectively, of Lufthansa's intention to increase its fuel surcharge as from a specific future date. In the light of those factors and in the light of the case-law referred to in paragraphs 84 and 85 of the present judgment, it cannot be held that the General Court failed to examine whether the evidence on which the Commission relied had enabled it correctly to conclude that there was no plausible alternative explanation for the receipt by SAS Cargo and Others of those emails.

312 Fourth, as regards the claim of substitution of grounds, it should be noted that, on the one hand, in paragraph 482 of the judgment under appeal, it was by referring to the emails described in recitals 446, 450, 482 and 495 of the decision at issue and in recital 797 thereof that the General

Court observed that Lufthansa had not merely communicated publicly available information to the parties to hypothetical block space agreements, but that, on the contrary, it had sent them collective emails, thus revealing to all the addressees the identity of the carriers concerned as well as the amount and timing of the fuel surcharge for which they were liable under those hypothetical agreements. On the other hand, in paragraph 483 of that judgment, it was by referring to recitals 453 and 450 of the decision at issue and to Annexes A.59 to A.61 to the application at first instance that the General Court held that SAS Cargo and Others did not even claim that such collective emails were necessary for the implementation of those hypothetical agreements and that the documents in the Commission's file showed that that was not the case. The alleged substitution of grounds has therefore not been established, since the General Court's findings in paragraphs 482 and 483 relate to the assessments set out in the decision at issue and respond to the line of argument put forward by SAS Cargo and Others to it, in accordance with the case-law referred to in paragraphs 180 and 181 of the present judgment.

313 In the sixth place, as regards the line of argument set out in paragraph 294 of the present judgment, it should be noted, first, that it is true that, in paragraph 669 of the judgment under appeal, the General Court found that the Commission had concluded that SAS Cargo and Others were involved in two of the three elements of the single and continuous infringement, namely the fuel surcharge and the security surcharge, and not that they merely had proven or presumed knowledge of that infringement, but that the Commission had not considered that they had directly participated in all the anticompetitive activities which fell within those elements.

314 However, the General Court then, one the one hand, in paragraphs 670 to 676 of the judgment under appeal, set out the reasons why, in view of the contacts described therein and the fact that SAS Cargo and Others had, moreover, failed to establish that there might be a plausible alternative explanation for the emails described in recitals 274, 279, 346, 411, 446, 450, 482 and 495 of the decision at issue, other than the coordination of the fuel surcharge, the Commission was entitled to conclude that the emails were of such a nature as to give the appellants sufficient knowledge of the coordination between Lufthansa and other incriminated carriers. In that regard, it also set out considerations that were included purely for the sake of completeness in paragraphs 677 to 679 of the judgment under appeal. It moreover set out, in paragraphs 681 and 682 of that judgment, the reasons why the Commission had rightly considered that SAS Cargo and Others had the requisite sufficient knowledge of the conduct relating to the fuel surcharge implemented in third countries in which they were not present.

315 On the other hand, in paragraphs 684 to 693 of the judgment under appeal, it set out the reasons why, in the light of the evidence in the decision at issue and the arguments which SAS Cargo and Others had submitted to it, they were not justified in criticising the Commission for concluding that they had sufficient knowledge of the components of the element of the single and continuous infringement relating to the security surcharge in which they had not participated directly.

316 SAS Cargo and Others are not therefore justified in claiming, in essence, by the sixth complaint of this part of the fourth ground of appeal, that the General Court erred in law by failing to ascertain whether the Commission had proved that they were aware of the anticompetitive activities of the other carriers in which they had not directly participated. Furthermore, in so far as, by their line of argument, they claim that the General Court did not properly assess the scope of certain contacts or emails to which it referred, gave incorrect weight to certain emails or recitals of the decision at issue, which are insufficiently conclusive, in comparison with others, or failed to take account of certain allegedly exculpatory evidence, they are in fact challenging the assessment of the facts

and evidence that the General Court carried out in paragraphs 669 to 693 of the judgment under appeal. Consequently, that line of argument is, to that extent, inadmissible, in accordance with the case-law referred to in paragraph 72 of the present judgment.

317 Second, the allegations of distortion made against the General Court, which relate to paragraphs 670, 678 and 679 of the judgment under appeal, do not meet the requirements of precision arising from the case-law set out in paragraph 108 of the present judgment. Those allegations are thus inadmissible.

318 Third, in the light of the factors set out in paragraphs 313 to 315 of the present judgment and the case-law referred to in paragraphs 84 and 85 thereof, the allegation of infringement of the obligation to state reasons, set out in paragraph 294 of the present judgment, is unfounded.

319 Fourth, the claim of substitution of grounds by the General Court in paragraphs 671, 672, 677 and 678 of the judgment under appeal, in the light of the case-law referred to in paragraph 180 of the present judgment, is also unfounded, since those paragraphs merely set out elements contained in the decision at issue.

320 It follows from the foregoing considerations that the third part of the fourth ground of appeal must be rejected as in part inadmissible and in part unfounded.

321 Consequently, the fourth ground of appeal must be rejected as in part inadmissible, in part ineffective and in part unfounded.

The fifth ground of appeal, alleging errors of law in the General Court's exercise of its unlimited jurisdiction

Arguments of the parties

322 SAS Cargo and Others submit that the General Court erred in law in the exercise of its unlimited jurisdiction, which should lead the Court of Justice, should it not annul the fine in its entirety as a result of the first four grounds of appeal, to reduce the amount of that fine.

323 In paragraph 940 of the judgment under appeal, the General Court found that, with a view to ensuring equal treatment between the incriminated carriers, it was necessary to 'reinstate' in the value of sales the turnover achieved by SAS Cargo and Others exclusively on internal routes. In that regard, it acknowledged, in paragraph 934 of that judgment, that neither the appellants nor the Commission had requested such a change to the fine. It nevertheless found, in paragraph 932 of that judgment, that, according to the Commission's reply to a question which it had sent to it, it was 'possible' that the other carriers had not deducted their turnover on their routes internal to a single country. It then held, in paragraphs 935 to 937 and 939 of that judgment, without it having been raised in the course of the proceedings before it, that the wording of Article 1(1) of the decision at issue and a request for information sent to the carriers indicated that the turnover relating to routes internal to a single country should have been included in the value of sales. The General Court then appeared to assume, in paragraphs 938 and 939 of the judgment under appeal, that the carriers had included that turnover in the value of their sales and consequently found, in paragraph 940 of that judgment, that the fine imposed on SAS Cargo and Others was discriminatory.

324 In the first place, by thus adjusting the fine in a manner that goes beyond the form of order sought in the application submitted to it, the General Court infringed the principle *ne ultra petita*, the scope of which is not altered by the unlimited jurisdiction of the General Court. By their claims and their fifth plea before the General Court, SAS Cargo and Others sought a reduction in the amount of the fine. Moreover, in their observations on the reply of 22 April 2021, they expressly stated that turnover relating to internal routes should not be included in the value of sales for the purpose of calculating any new fine that the General Court might impose in the exercise of its unlimited jurisdiction. Similarly, in response to a question from the General Court, the Commission stated unequivocally that the General Court should not take account of SAS Cargo and Others' sales within one and the same EEA country if it decided to exercise its unlimited jurisdiction. In those circumstances, the General Court did not have jurisdiction to raise that issue of its own motion, since it was not a matter of public policy.

325 In the second place, the General Court infringed SAS Cargo and Others' right to be heard and the principle of the adversarial nature of proceedings. The appellants were never given the opportunity to challenge its finding that the fine was discriminatory, since no party to the proceedings had raised that issue. Even though the General Court may, of its own motion, increase the amount of the fine, the undertaking concerned should at least have the same right to be heard as that to which it is entitled where the Commission seeks to adjust the fine during either the administrative or the judicial proceedings, in particular in order to ensure full equality of arms.

326 In that regard, SAS Cargo and Others state that, admittedly, on 28 April 2021, the Registry of the General Court invited them to comment on the Commission's replies to several questions put by the General Court, including the reply of 22 April 2021. However, that reply stated in no uncertain terms that the turnover generated by sales relating to internal routes should not be included in the value of sales. They were never asked to reply to the General Court's question in that regard and at no point were they informed by the General Court of its intention to increase the fine to include sales from internal routes, on the basis of the principle of equal treatment. In any event, even if the question put to the Commission had also been addressed to them, such a question would have been too imprecise for their right to be heard to be regarded as having been respected.

327 In the third place, the General Court, in paragraphs 932 and 939 of the judgment under appeal, infringed the presumption of innocence and the principle of equal treatment to the detriment of SAS Cargo and Others. The Commission made clear, in its reply of 22 April 2021, that it did not know whether the other carriers had included the turnover of internal routes. In addition, some carriers did not operate such routes, with the result that they could not have been discriminated against. The General Court itself acknowledges, in paragraph 932, that the Commission had stated that it was 'possible' that the other carriers had excluded turnover generated on internal routes.

328 In so doing, it also erred in law by relying on hypothetical evidence. In view of the existence of doubt as to whether the other carriers included their internal routes, the General Court should, in accordance with the case-law of the Courts of the European Union, have found in favour of SAS Cargo and Others. The factors noted by the General Court in paragraphs 935 and 937 of the judgment under appeal are irrelevant in that regard, as they do not establish whether the other carriers included or excluded turnover generated on internal routes from their turnover figures communicated to the Commission. The General Court never examined the other carriers' data and the Commission never confirmed that such turnover was included. Thus, those factors do not establish the existence of discrimination or ensure that the judgment under appeal is not itself discriminatory. Paragraph 938 of that judgment is, moreover, illogical, since the request of SAS

Cargo and Others to which it refers stems from the fact that the Commission's request for information was ambiguous. As regards paragraph 939 of that judgment, it has no factual basis and distorts the reply of 22 April 2021.

329 In the fourth place, in paragraphs 934 and 940 of the judgment under appeal, the General Court infringed its obligation to state reasons by not addressing the observations of SAS Cargo and Others that (i) they were not in a comparable position to that of other carriers, since they alone had requested the Commission to exclude the internal routes, and (ii) there had been no unlawful conduct on the internal routes, since their actions on the Scandinavian cabotage markets were influenced only by their lawful coordination with Lufthansa.

330 Consequently, the Court of Justice should annul the inclusion by the General Court of the sales relating to internal routes in the turnover taken into consideration for the calculation of the appellants' fine and, correspondingly, reduce the fine.

331 The Commission observes that it had invited SAS Cargo and Others, during the administrative procedure, to provide it with their turnover figures and that the latter asked the Commission to exclude the turnover relating to routes within a single Member State, to which it agreed, as indicated in its reply to the General Court of 22 April 2021. It states that it explained to the General Court that, in accordance with the case-law of the Court of Justice as that case-law had developed since the adoption of the initial decision, it should have included that turnover in the value of sales. It adds that it specified that it was difficult to determine whether other carriers had included that type of turnover in the data which they had provided to it and that, consequently, in the interests of fairness, it had proposed that the General Court should not include that turnover for the purposes of calculating the appellants' fine. The General Court did not accept that proposal. That does not, however, mean that the fifth ground of appeal is well founded.

332 In the first place, in the exercise of its unlimited jurisdiction, the General Court is authorised to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine imposed. In addition, the Courts of the European Union may vary the contested act, even without annulling it, in order to cancel, reduce or increase the fine imposed, taking into account all the relevant circumstances. The fact that the Commission had excluded turnover on routes within a single Member State from the value of SAS Cargo and Others' sales was such a circumstance. If the position of SAS Cargo and Others were to be accepted, that would make any increase in the fine impossible, since an applicant would never request such an increase and would therefore have a right of veto over that increase. Thus, since the unlimited jurisdiction of the General Court is not limited to an applicant's arguments, that jurisdiction takes precedence over the principle *ne ultra petita*.

333 In the second place, there was moreover no infringement of SAS Cargo and Others' right to be heard. The General Court did indeed give them the opportunity to submit their observations on that specific aspect of the calculation of turnover, the Commission having expressly addressed that point in its reply of 22 April 2021. The fact that they were not invited to reply specifically to the General Court's question is irrelevant.

334 In the third place, at that stage of the grounds of the judgment under appeal, the General Court had already thoroughly examined the facts of the case and held SAS Cargo and Others liable for an infringement of competition law. Consequently, they could no longer benefit from the presumption of innocence at the stage of the calculation of the amount of the fine.

335 In the fourth place, the General Court found, in paragraph 936 of the judgment under appeal, that all turnover figures directly or indirectly linked to the single and continuous infringement had to be included in the value of sales, even if they related to domestic routes. There would be a breach of the principle of equal treatment only if other persons in the same situation as SAS Cargo and Others had been treated differently. It is for SAS Cargo and Others to demonstrate this, which they did not do, since they merely speculated that that might have been the case.

336 In the fifth and last place, the General Court, in the light of the case-law relating to the scope of its obligation to state reasons, responded sufficiently to the line of argument put forward by SAS Cargo and Others concerning the comparability of their situation with that of other carriers, the Commission referring, in that regard, to paragraphs 765, 766 and 936 of the judgment under appeal.

Findings of the Court

337 As SAS Cargo and Others essentially criticise, by the present ground of appeal, paragraphs 931 to 940 of the judgment under appeal, it should be noted that, in paragraph 931 of the judgment under appeal, the General Court found that it was apparent from the Commission's replies to a written question sent to it that the total value of sales which it had used for the purpose of calculating the fine imposed on SAS Cargo and Others excluded the turnover achieved by SAS Cargo and Others exclusively on internal routes.

338 In paragraph 932 of that judgment, it stated that, when questioned on the compatibility of such an exclusion with the principle of equal treatment and point 13 of the 2006 Guidelines, the Commission had observed, first, that, according to the case-law subsequent to the initial decision, that excluded revenue did indeed concern sales relating directly or indirectly to the infringement, within the meaning of point 13, and, second, 'that it was possible that such "internal sales" had not been deducted from the value of sales applied to the other incriminated carriers, since it had not invited those carriers to do so during the administrative procedure when it had asked them about their turnover for the purpose of calculating the amount of the fine, and since those carriers, with the exception of [SAS Cargo and Others], had not stated in their replies that they had chosen to exclude such "internal sales"'.

339 It added, in paragraph 933 of that judgment that, nevertheless, the Commission considered that the General Court should not take account of the turnover generated by SAS Cargo and Others on internal routes in the exercise, as the case may be, of its unlimited jurisdiction, since the fine imposed on the appellants remained appropriate and proportionate, even without taking account of that turnover. It added that, according to the Commission, the other incriminated carriers that might have included such internal sales in the turnover figures communicated to the Commission during the administrative procedure could not benefit from an unlawful act committed in favour of another.

340 In paragraph 934 of that judgment, the General Court noted that, when asked to respond to the Commission's replies, SAS Cargo and Others had also submitted that there was no need to include, in the values of their sales, the turnover that they had generated on the internal routes.

341 In paragraph 935 of the judgment under appeal, the General Court nevertheless held that it could be inferred from the wording of Article 1(1) of the decision at issue that it covers conduct taking place both on routes between Member States or Contracting Parties to the EEA Agreement and on routes operated within a single Member State or a single contracting party.

342 In paragraph 936 of that judgment, the General Court held that, in those circumstances, the turnover generated by the incriminated carriers on routes operated within a single Member State or a single contracting party 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 purposes of calculating the amount of the fine.

343 In paragraph 937 of that judgment, the General Court added that, furthermore, the requests for information which the Commission had sent to the incriminated carriers during the administrative procedure and by which it sought, inter alia, to ascertain their turnover on intra-EEA routes referred to 'routes where the airports of origin and destination were both within the EEA', without specifying that those routes needed to be cross-border. It also observed that, in the decision at issue, the Commission stated in recital 1197, as regards the value of sales, that 'the [intra-EEA] turnover [was] within the then [18 of the 28] Contracting Parties to the EEA agreement' and that 'the [EU-Switzerland] turnover [was] on routes between the then [15 of the 25] Member States and Switzerland'. The use of the word 'within' in one case and the word 'between' in the other showed the Commission's intention, in the first case, not to distinguish between domestic and cross-border routes, otherwise it would have stated that the intra-EEA turnover was generated on routes 'between' the Contracting Parties.

344 In paragraph 938 of that judgment, it found that that interpretation reflected the Commission's intention as understood by the incriminated carriers. It added that that was borne out by the fact that SAS Cargo and Others expressly maintained, during the administrative procedure, that sales on internal routes should be excluded from the value of their sales on intra-EEA routes, on the ground that that request for the exclusion of internal routes made sense only if, in principle, it was accepted that they were included in the intra-EEA routes.

345 In paragraph 939 of the judgment under appeal, the General Court found that it followed that the turnover generated by the incriminated carriers on intra-EEA routes within a single Contracting Party '[had not been] included in the value of sales inadvertently, as the Commission maintain[ed]', but that that turnover was among the factors requested by the Commission during the administrative procedure, was included in the value of sales used by the Commission in the decision at issue on the basis of the methodology it followed, and reflected the geographic scope of the single and continuous infringement, as is apparent from Article 1(1) of the decision at issue.

346 Lastly, in paragraph 940 of that judgment, it added that, therefore, with a view also to ensuring equal treatment between the incriminated carriers that brought an action against the decision at issue, the General Court had to reinstate, in the values of sales used as a basis for calculating the fine imposed on SAS Cargo and Others, the turnover generated by them on the internal routes, which amounted to EUR 7 991 282.

347 By ruling in that way, the General Court, as SAS Cargo and Others submit, vitiated the judgment under appeal by several errors of law. First, in paragraph 939 of the judgment under appeal, the General Court not only contradicted its own presentation of the reply of 22 April 2021, which it had set out in paragraph 932 of the judgment under appeal, but also distorted that reply by taking the view that, in that reply, the Commission had merely stated that the turnover generated by the incriminated carriers on intra-EEA routes within a single Contracting Party had not been included in the value of sales inadvertently, whereas it was manifestly clear from the substance of

that reply, which SAS Cargo and Others appended to their appeal, that the Commission's position was more nuanced and could not reasonably support the General Court's interpretation of it in paragraph 939.

348 In paragraph 4 of that reply, the Commission had first of all presented the non-inclusion of any turnover achieved by other addressees of the decision at issue on routes operated within a single Member State or a single contracting party, not as a certainty, but as a mere possibility ('the Commission may inadvertently not have deducted sales within one and the same EEA country when calculating the fines of certain other addresse[e]s of the 2017 Decision').

349 In addition, it had stated that that possible non-inclusion, even if it was inadvertent, was explained by two reasons. The first reason was that, in its request for information of 26 January 2009, it had not specifically indicated whether the incriminated carriers should include or exclude sales of freight services on routes operated within a single Member State or a single contracting party from their turnover achieved in 2005 on routes between airports in the 18 or 28, depending on the period, States comprising the EEA. The second reason was that, in their replies to that request for information, the carriers which had stated that they had achieved a turnover in 2005 in relation to routes between airports in the 18 or 28 (depending on the period) States comprising the EEA, had not stated, with the exception of SAS Cargo and Others, whether they had included or excluded from their turnover sales of freight services made on routes operated within a single EEA State.

350 It had inferred from this, in paragraph 5 of the reply of 22 April 2021 that, in order to reconcile the principles of legality and equal treatment, the General Court should not take into account the turnover achieved by SAS Cargo and Others on those internal routes if it decided to exercise its unlimited jurisdiction, explaining in that regard (i) that despite that non-inclusion, the fine imposed on SAS Cargo and Others was still appropriate and proportionate and (ii) that even if other carriers might have included sales made on routes operated within a single EEA State, those carriers could not rely in their favour on an error which the Commission had made when calculating SAS Cargo and Others' fine.

351 Second, by taking the view moreover, in paragraph 938 of the judgment under appeal, that it could rely on 'the Commission's intention as understood by the incriminated carriers' and in finding that its position was borne out by the fact that SAS Cargo and Others had maintained that sales on internal routes should be excluded from the value of sales on intra-EEA routes, in that paragraph the General Court also manifestly exceeded the limits of a reasonable assessment of the evidence submitted to it. That supposed intention on the part of the Commission, which the General Court considered it could base on the Commission's use, in recital 1197 of the decision at issue, of the words 'within' and 'between', which are, to say the least, ambiguous as to whether the value of sales achieved on internal routes should be excluded from the value of sales achieved on intra-EEA routes, was directly contradicted by the position expressed by that institution in its reply of 21 April 2021. Moreover, as SAS Cargo and Others have claimed, their position as regards the exclusion of those sales from the relevant turnover could result from the fact that the Commission's request for information was ambiguous. The Commission had itself admitted that fact in that reply.

352 It follows from those factors that, third, and as SAS Cargo and Others claim, the General Court also erred in law, in paragraph 940 of the judgment under appeal, by basing on supposed evidence its decision to reinstate in the value of sales serving as a basis for calculating the fine imposed on SAS Cargo and Others the turnover achieved by them on internal routes, in order to ensure equal treatment between the carriers which sought the annulment of the decision at issue.

As is apparent from paragraphs 347 to 351 of the present judgment, the evidence submitted to it in no way established that all of the incriminated carriers which had challenged the decision at issue had, unlike SAS Cargo and Others, had their turnover which may have been achieved on routes operated within a single EEA State included in the value of their sales which served as the basis for the calculation of their fines. The General Court therefore did not have information which would have enabled it to establish with certainty a breach of the principle of equal treatment which it was required to rectify.

353 It follows from all of the foregoing that the arguments set out in paragraphs 327 and 328 of the present judgment are well founded. Consequently, the fifth ground of appeal must be upheld and the judgment under appeal set aside in so far as it sets, in point 4 of its operative part, the amount of the fine imposed on SAS Cargo and Others on the basis of turnover including the sales of freight services which they achieved in 2005 exclusively on internal routes, without it being necessary to examine the other arguments put forward in support of that ground of appeal.

The action before the General Court

354 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

355 In the present case, in view of, in particular, the fact that SAS Cargo and Others' action before the General Court is based on pleas that were the subject of an exchange of arguments before that Court and whose examination does not require any further measure of organisation of procedure or inquiry to be taken in the case, the Court of Justice considers that the state of the proceedings is such that it may give final judgment in the matter and that it should do so, within the limits of the matter before it (see, by analogy, judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 108 and the case-law cited).

356 Given that the Court of Justice has dismissed the appeal brought by SAS Cargo and Others in so far as, by that appeal, they challenged the judgment under appeal inasmuch as it rejected their claims for annulment of the decision at issue, the action in Case T-324/17 continues to exist only to the extent that it concerns the exercise by the General Court of its unlimited jurisdiction. Furthermore, in view of the fact that the judgment under appeal has been set aside in part in that regard and of the fact that, by their appeal, SAS Cargo and Others challenged the General Court's exercise of its unlimited jurisdiction only as regards the reinstatement, in the turnover used as the basis for the calculation of their fine, of the value of their sales of freight services achieved on internal routes, only SAS Cargo and Others' argument that such turnover must not be included in that turnover used as a basis for calculating the fine remains to be examined.

357 It follows from the reasons set out in paragraphs 347 to 352 of the present judgment that such turnover must not be included.

358 Accordingly, the Court considers that it is necessary only to reconsider the inclusion carried out by the General Court. In that regard, given (i) the General Court's decision to adopt the method of calculating the fines applied by the Commission in the decision at issue, which follows the methodology set out in the 2006 Guidelines, which is not challenged on appeal, and (ii) the need to ensure equal treatment of the carriers penalised by that decision and to correct the clerical

errors vitiating the General Court's calculations, it is appropriate to set the amount of the fine imposed on SAS Consortium at EUR 4 744 224, the amount of the fine imposed on SAS Cargo and on SAS Consortium jointly and severally at EUR 4 069 120, the amount of the fine imposed on SAS Cargo and Others jointly and severally at EUR 4 365 056, the amount of the fine imposed on SAS Cargo and SAS jointly and severally at EUR 27 730 944, and the amount of the fine imposed on SAS Cargo at EUR 21 974 880.

Costs

359 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

360 Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

361 Under Article 138(3) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, where each party succeeds on some and fails on other heads, the parties are to bear their own costs.

362 In the present case, since SAS Cargo and Others and the Commission have each succeeded on some and failed on other heads and have each applied for costs against the other party, both SAS Cargo and Others and the Commission must be ordered to bear their own costs of the proceedings at first instance and on appeal.

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

1. **Sets aside points 4, 6 and 7 of the operative part of the judgment of the General Court of the European Union of 30 March 2022, *SAS Cargo Group and Others* v *Commission* (T-324/17, EU:T:2022:175);**

2. **Dismisses the appeal as to the remainder;**

3. **Sets the amount of the fine imposed on Scandinavian Airlines System Denmark-Norway-Sweden at EUR 4 744 224, sets the amount of the fine imposed on SAS Cargo Group A/S and on Scandinavian Airlines System Denmark-Norway-Sweden jointly and severally at EUR 4 069 120, sets the amount of the fine imposed on SAS Cargo Group, on Scandinavian Airlines System Denmark-Norway-Sweden and on SAS AB jointly and severally at EUR 4 365 056, sets the amount of the fine imposed on SAS Cargo Group and on SAS jointly and severally at EUR 27 730 944, and sets the amount of the fine imposed on SAS Cargo Group at EUR 21 974 880;**

4. **Orders SAS Cargo Group A/S, Scandinavian Airlines System Denmark-Norway-Sweden, SAS AB and the European Commission to bear their own costs of the proceedings at first instance and on appeal.**

Jarukaitis Regan Gratsias

Delivered in open court in Luxembourg on 26 February 2026.

A. Calot Escobar
Registrar

I. Jarukaitis
Acting President of the Chamber