JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

16 June 2011 *

In Case T-199/08,

Ziegler SA, established in Brussels (Belgium), represented by J.-L. Lodomez and J. Lodomez, lawyers,

applicant,

v

European Commission, represented initially by A. Bouquet and O. Beynet, and subsequently by A. Bouquet and N. von Lingen, acting as Agents,

defendant,

APPLICATION for the annulment of Commission decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International Removal Services), and, in the alternative, the annulment or reduction of the fine imposed on the applicant,

* Language of the case: French.

THE GENERAL COURT (Eighth Chamber),

composed of S. Papasavvas, acting as President, N. Wahl and A. Dittrich (Rapporteur), Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 27 April 2010,

gives the following

Judgment

Facts

A — *Subject-matter of the dispute*

1 According to Commission Decision C(2008) 926 final of 11 March 2008 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/38.543 — International Removal Services) ('the Decision'), a summary of which is published in the *Official Journal of the European Union* of 11 August 2009 (OJ 2009 C 188, p. 16), the applicant, Ziegler SA ('Ziegler') participated in a cartel on

the international removal services market in Belgium, relating to the direct or indirect fixing of prices, market sharing and the manipulation of the procedure for the submission of tenders. The Commission states that the cartel operated for almost 19 years (from October 1984 to September 2003). Its members fixed prices, issued false quotes ('cover quotes') to customers and compensated each other for rejected offers by means of a financial compensation system ('commissions').

B — *Applicant*

2 The applicant was founded in 1908 under the name Transports internationaux, Ziegler et Cie. Since 1981 it has been called Ziegler, and in 1983 it became a public limited company. Up to December 2003, the removals business was a division of the applicant. On 11 December 2003, Ziegler's 'Removals' division was transferred to Euro Time, which is part of the Ziegler group and whose name was changed to Ziegler Relocation SA.

3 Ziegler describes itself as a family company owned by individuals who are all descendants of the company's founders and by two holding companies also linked to the Ziegler family.

4 In the financial year ending 31 December 2006, Ziegler achieved a turnover of EUR 124 million on its own and a consolidated turnover of EUR 244 420 326 with its subsidiaries. On its internet site, Ziegler describes itself as a holding company directing a large European logistics network (referred to as a 'group'), with a turnover of almost of EUR 1.5 billion and employing over 4 000 people.

C — *Administrative procedure*

5 According to the Decision, the Commission opened the procedure on its own initiative because it had information that certain Belgian companies operating in the international removals sector were party to agreements that might be caught by the prohibition in Article 81 EC.

6 Accordingly, unannounced investigations were carried out at the premises of Allied Arthur Pierre NV, Interdean NV, Transworld International NV and Ziegler in September 2003, under Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87). Following those investigations, Allied Arthur Pierre applied for immunity from fines or a reduction in fine in accordance with the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice'). Allied Arthur Pierre admitted that it had participated in agreements on commissions and cover quotes, listed the competitors involved, inter alia a competitor previously unknown to the Commission's services, and submitted documents corroborating its oral statements.

7 In accordance with Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), several written requests for information were sent to the undertakings involved in the anti-competitive agreements, to some competitors and to a professional organisation. On 18 October 2006, the statement of objections was adopted and notified to several undertakings. All the addressees replied to it. Their representatives, with the exception of Amertranseuro International Holdings Ltd, Stichting Administratiekantoor Portielje, Team Relocations Ltd and Trans Euro Ltd, exercised their right of access to the documents contained in the Commission's file, which were accessible only on the Commission's premises. They were granted access between 6 and 29 November 2006. The hearing was held on 22 March 2007.

8 On 6 July 2007, Allied Arthur Pierre submitted additional evidence concerning the agreements on commissions and cover quotes in relation to Allied Arthur Pierre, Interdean and Ziegler since 1988. A 'letter of facts' was sent to all the parties on 23 August 2007, stating that the Commission intended to use that evidence against Allied Arthur Pierre, Interdean and Ziegler. The Commission sent a copy of that evidence, in annex to the letter of facts, to all the parties. The parties were given the opportunity to make known their views.

9 On 11 March 2008, the Commission adopted the Decision.

D — *Decision*

10 The Commission states that the addressees of the Decision, including the applicant, participated in a cartel in the international removal services sector in Belgium or are deemed responsible therefor. The participants in the cartel fixed prices, shared customers and manipulated the submission of tenders at least from 1984 to 2003. As a result, they have committed a single, continuous infringement of Article 81 EC.

11 According to the Commission, the services concerned include the removal of goods of both natural persons — private individuals or employees of an undertaking or a public institution — and undertakings or public institutions. Such removals are characterised by the fact that Belgium is either the starting place or the destination. Having regard to the fact, also, that the international removal companies in question are all located in Belgium and that the cartel's activity takes place in Belgium, the Commission considered that the geographic centre of the cartel was Belgium.

12 The combined turnover of the participants in the cartel for international removal services in Belgium in 2002 was estimated by the Commission at EUR 41 million. As it estimated the size of the sector at approximately EUR 83 million, the combined market share of the undertakings involved was considered to be approximately 50 %.

13 The Commission states that the aim of the cartel was, inter alia, to establish and maintain high prices and to share the market contemporaneously or successively in various forms: agreements on prices, agreements on sharing the market by means of a system of false quotes ('cover quotes') and agreements on a system of financial compensation for rejected offers or for not quoting at all ('commissions').

14 The Commission considers that, between 1984 and the early 1990s, the cartel operated inter alia on the basis of written price-fixing agreements. At the same time the commissions and cover quotes were introduced. A commission is a hidden element in the final price which the customer had to pay without receiving a corresponding service. It is a sum of money that the removal company winning the contract for an international removal owed to the competitors that did not secure the contract, whether they submitted an estimate or abstained from doing so. It is therefore a sort of financial compensation for the removal companies that did not win the contract. The members of the cartel issued invoices to each other for commissions on the rejected offers or offers not made, referring to fictitious services, and the total for those commissions was invoiced to customers. The Commission states that that practice must be deemed to be indirect fixing of prices for international removal services in Belgium.

15 The members of this cartel also cooperated in submitting cover quotes, which led customers, that is to say, employers paying for the removal, into the mistaken belief

that they could choose according to competition-based criteria. A cover quote is a fictitious quotation submitted to the customer or the person who was moving by a removal company which did not intend to carry out the removal. Through the submission of cover quotes, the removal company that wanted the contract ('the requesting firm') ensured that the institution or undertaking received several quotes, either directly or indirectly via the person who was moving. To that end, the requesting firm indicated to its competitors the price, the rate of insurance and the storage costs that they were to quote. That price, which was higher than the price quoted by the requesting firm, was then indicated in the cover quotes. According to the Commission, since the employer will usually choose the removal company that offers the lowest price, the companies involved in the same international removal as a rule knew in advance which of them would secure the contract for that removal.

16 The Commission also points out that the price quoted by the requesting firm could be higher than it might otherwise have been because the other companies involved in that removal would have submitted cover quotes indicating a price stated by the requesting firm. By way of example, the Commission refers, in recital 233 of the Decision, to an internal Allied Arthur Pierre email message dated 11 July 1997 which stated: 'The customer has asked for two cover quotes, so we can ask for a high price.' Therefore, the Commission states that the submission of cover quotes to customers was a manipulation of the tendering procedure so that the prices quoted in all the bids were deliberately higher than the price of the requesting firm, and at all events higher than they would have been in a competitive environment.

17 The Commission maintains that those arrangements were in place until 2003. Those complex activities had the same object of fixing prices, sharing the market, and thus of distorting competition.

18 In conclusion, the Commission formulated the operative part of the Decision, Article 1 of which is worded as follows:

'By directly and indirectly fixing prices for international removal services in Belgium, sharing part of the market, and manipulating the procedure for the submission of tenders, the following undertakings have infringed Article 81(1) [EC] … in the periods indicated:

…

(j) [Ziegler], from 4 October 1984 to 8 September 2003.'

19 Consequently, in Article 2(l) of the Decision, the Commission imposed a fine of EUR 9.2 million on the applicant.

20 For the purposes of calculating the amount of the fines, the Commission applied, in the Decision, the methodology set out in its 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').

21 On 24 July 2009, the Commission adopted Decision C(2009) 5810 final amending the Decision in relation to the value of sales of two other addressees of the Decision.

Procedure and forms of order sought by the parties

22 By application lodged at the Court Registry on 3 June 2008, the applicant brought the present action.

23 By order of 15 January 2009 in Case T-199/08 R *Ziegler* v *Commission*, not published in the ECR, the President of the Court dismissed the application for interim measures by which the applicant sought the suspension of operation of Article 2(l) of the Decision. By order of 30 April 2010 in Case C-113/09 P(R) *Ziegler* v *Commission,* not published in the ECR, the President of the Court of Justice dismissed the applicant's appeal against that order.

24 Upon hearing the report of the Judge-Rapporteur, the General Court (Eighth Chamber) decided to open the oral procedure and to put certain questions to the Commission while also requesting it to produce certain documents. The Commission complied with that request within the prescribed period. In addition, by order of 9 March 2010, the General Court ordered the Commission to produce the confidential version of the Decision. That document was not communicated to the applicant. Since, after examining the confidential passages, the General Court considered that that document did not contain information necessary to give judgment in the present case, it decided not to add it to the file and returned it to the Commission.

25 The parties presented their oral arguments and their replies to questions put by the Court at the hearing on 27 April 2010.

26 The applicant claims that the Court should:

— annul the Decision;

— in the alternative, cancel the fine imposed;

— in the further alternative, substantially reduce the amount of that fine;

— order the Commission to pay the costs.

27 Furthermore, the applicant requests the Court to order the full administrative file to be lodged at the Court Registry, pending judgment.

28 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

29 The applicant puts forward five pleas for the annulment of the Decision and four alternative pleas for the cancellation or reduction of the fine.

A — *Pleas for the annulment of the Decision*

1. *The first plea, alleging manifest errors of assessment and errors of law in the assessment of the conditions necessary for the application of Article 81(1) EC*

(a) Arguments of the parties

30 First, the applicant submits that the definition of the market adopted by the Commission is too narrow. It accepts that 'international removal services whose starting place or destination is Belgium' are not interchangeable with 'international removals' on the demand side, but claims that the services are interchangeable on the supply side. The Commission cannot therefore restrict the market solely to the companies offering 'international removal [services] whose starting place or destination is Belgium', but ought to have taken into account all the companies offering 'international removal services', regardless of their location. The applicant states that the strong presence of foreign companies on the Belgian market demonstrates that the geographic market could not be restricted to Belgium alone.

31 Second, the applicant complains that the Commission overestimated the turnover of the companies active on the market and hence the size of the market. The applicant submits that the correct approach to the turnover of the companies active in the international removals sector requires a distinction to be drawn between the turnover generated as a subcontractor in an international removal and that generated as a company controlling an international removal. The applicant submits that only the turnover for international removals for which a company has acted as the 'controlling company' ought to have been taken into account in order to determine the turnover of the companies concerned, the total volume of the market and the market shares of those companies. The applicant observes that the Commission did take that argument into account and discount that share of turnover for the purposes of calculating the fine. For those reasons, the applicant takes the view that its turnover in 2002 was EUR 2 897 000 instead of EUR 4 114 500.

32 Third, the applicant claims that, consequently, the Commission failed to prove that trade between Member States was appreciably affected, since the EUR 40 million threshold contained in the '*De minimis* notice' had not been reached. The applicant submits that several companies stated that their estimates were approximate and that it was important, in order not to include the same figure twice in the estimate, to subtract the figure achieved as a subcontractor from the figure declared. In its reply, the applicant adds that the 5 % threshold for the aggregate market share of the companies concerned was not reached either. In any event, the presumptions contained in that notice are not sufficient to prove that there was an appreciable effect on trade.

33 The Commission observes that the object of the cartel was to restrict competition. Consequently, it was not necessary to define the relevant market — which it did not do — and the applicant's arguments in that regard are ineffective. In addition, the argument based on the definition of the market is ineffective since, even if it had been necessary to define the market and this had been defined more widely, that could not

lead to the annulment of the Decision, since the existence of the cartel is not disputed by the applicant.

34 For the sake of completeness, the Commission states that the applicant's arguments are unfounded. The fact that foreign operators may compete with Belgian companies for removals whose starting place or destination is Belgium, and that there is a strong presence of foreign companies on that market, does not alter the Commission's finding that the geographic centre of the cartel was Belgium.

35 As regards the size of the market, the Commission contends that, if the applicant's arguments refer to the Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) [EC] (*de minimis*) (OJ 2001 C 368, p. 13), its arguments are ineffective, since hard-core restrictions, that is price-fixing and market-sharing, are always prohibited, regardless of the market shares of the companies concerned.

36 If the applicant is referring to the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC] (OJ 2004 C 101, p. 81 'the 2004 Guidelines'), its arguments would also be unfounded, if not ineffective. The Commission states that the negative presumption of point 52 of the 2004 Guidelines refers to two cumulative conditions, namely a turnover of under EUR 40 million and market shares of less than 5 %. The Commission found that neither condition had been met. In addition, in the case of an agreement that by its very nature is capable of affecting trade between Member States, the positive presumption of point 53 of the 2004 Guidelines provides that it is sufficient if only one of the two alternative conditions is met.

37 At the rejoinder stage, the Commission added that it also based the effect on trade between Member States on the cross-border nature of the removals and challenges the admissibility of the argument, put forward in the reply, that the 5 % threshold was not reached in the present case.

38 The Commission also states that, in the estimates of the financial value of the sector, the turnover achieved as a subcontractor was included. It emphasises that it had used two methods to estimate the size of the relevant sector, both of which produced a value of EUR 83 million and therefore an aggregate market share of 50 %. On the other hand, in calculating the value of sales to be taken into account as the basis for calculating fines, the Commission agreed to exclude for all the participants the sales achieved as a subcontractor.

(b) Findings of the Court

39 The first plea is divided into three limbs which should be considered together, because they are closely related. The first limb concerns the definition of the market and the second the size of the relevant market and the market shares of the companies concerned. On that basis, by the third limb, the applicant disputes the Commission's finding that there was an appreciable effect on the trade between Member States.

40 First of all, it is appropriate to examine the Commission's argument that the complaints alleging that the relevant market has been defined incorrectly, and that the size of that market and the market shares of the companies concerned have been incorrectly estimated, are ineffective.

Preliminary observations

41 The Commission submits that, according to case-law, the relevant market need not be defined in the case of obvious restrictions of competition. Since in the present case the cartel did indeed have as its object obvious restrictions of competition, the Commission concludes that it was not necessary to define the relevant market and that the applicant's arguments are therefore ineffective.

42 That argument cannot be accepted.

43 Admittedly, for the purpose of the application of Article 81(1) EC, the Commission is not required to show the actual anti-competitive effects of agreements or practices which have as their object the prevention, restriction or distortion of competition (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342, and Case T-143/89 *Ferriere Nord* v *Commission* [1995] ECR II-917, paragraph 30, upheld by the Court of Justice in Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraphs 12 to 15).

44 Nevertheless, in accordance with settled case-law, Article 81(1) EC is not applicable if the effect of a restrictive practice on intra-Community trade or on competition is not 'appreciable'. An agreement escapes the prohibition laid down in Article 81(1) EC if it restricts competition or affects trade between Member States only insignificantly (Case 56/65 *LTM* [1966] ECR 235, 249; Case 5/69 *Völk* [1969] ECR 295, paragraph 7; Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 12 and 17; and Case T-213/00 *CMA CGM and Others* v *Commission* [2003] ECR II-913, paragraph 207).

45 Consequently, there is an obligation on the Commission to define the market in a decision applying Article 81 EC where it is impossible, without such a definition, to determine whether the agreement or concerted practice at issue is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition (Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 230).

46 Thus, it is the Commission's assessment in relation to those conditions for the application of Article 81 EC which is called into question by the applicant in the first plea, since the definition and size of the market and the market shares held are in fact merely preliminaries (see, to that effect, Case T-29/92 *SPO and Others* v *Commission* [1995] ECR II-289, paragraph 75).

47 As to whether the restriction of competition is appreciable, it is not, however, clear from the application that the applicant seeks to raise an objection in that regard, since, with the exception of a simple reference to the judgment in *Völk*, cited in paragraph 44 above, in the first alternative plea, the applicant does not seem to distinguish between the appreciable nature of the restriction of competition and the appreciable nature of the effect on trade between Member States. Therefore, assuming that an objection alleging infringement of the *de minimis* rule has been raised, it would therefore be inadmissible in accordance with Article 44(1)(c) of the Rules of Procedure of the General Court, which requires a detailed objection.

48 As regards the appreciable effect on trade between Member States, the applicant seems at times to confuse the *de minimis* notice with the 2004 Guidelines. However, it is clear that in the first plea — while the applicant mentions a '*de minimis*' notice — it is in fact referring to the 2004 Guidelines. The applicant has expressly challenged whether the Commission has proved that trade between Member States was appreciably affected (paragraph 32 above). For that reason, the Commission's assertion that

the applicant has raised a new argument at the reply stage must be rejected, since the reference to the 5 % threshold in the reply only supplements an existing plea and is not a new one.

49 In the Decision, in order to establish that there was an appreciable effect on trade between Member States, the Commission bases its assessment on the 2004 Guidelines which state minimum thresholds for market shares and consolidated turnovers for the companies concerned. Under point 55 of those Guidelines, in order to apply the 5 % market share threshold provided for in points 52 and 53 thereof, it is first necessary to determine the relevant market.

50 Consequently, in so far as they refer to the assessment of the appreciable effect on trade between Member States, and in particular to the 5 % threshold, the complaints alleging an incorrect definition of the relevant market and an incorrect estimation of the size of that market and of the market shares of the companies concerned are not ineffective. That conclusion is not affected by the fact that the applicant has not disputed the existence of the cartel, since that admission does not contain an admission that that cartel had an appreciable effect on trade. In addition, contrary to what the Commission asserts, the absence of such an appreciable effect — an effect which is a condition for the application of Article 81(1) EC — would give rise to the annulment of the Decision on the ground of the Commission's lack of competence.

The appreciable effect on trade between Member States

51 In recital 373 of the Decision, the Commission considers that, under the 2004 Guidelines, the effects of the agreements may be presumed to be appreciable, because the total market shares of the relevant removal companies exceeds 5 % of the market for international removal services in Belgium and the turnover achieved by the parties through the services concerned exceeds EUR 40 million. In the present case, the relevant removal companies achieved a turnover of more than EUR 41 million in 2002

and their total market share is about 50 %. In addition, the Commission contends in its rejoinder that, in recital 372 of the Decision, it also based its assessment on the cross-border nature of the removals in order to demonstrate that there was an effect on trade. It should therefore be examined whether the Commission has established, in the Decision, that there was an appreciable effect on trade between Member States.

— Cross-border nature

52 As regards, first of all, the cross-border nature of the relevant removals, it is clear that that cross-border nature — which is not disputed — is not identical to the issue of whether trade between Member States was 'appreciably' affected.

53 If every cross-border transaction were automatically capable of appreciably affecting trade between Member States, the concept of appreciability, which is, however, a condition for the application of Article 81(1) EC established by case-law, would be devoid of meaning. In that connection, the Commission also acknowledged, at the hearing, that even in the case of an infringement by object, the infringement must be capable of affecting intra-Community trade appreciably. That is, moreover, also apparent from the 2004 Guidelines, since the positive presumption, laid down in point 53 thereof, applies only to agreements or practices that by their very nature are capable of affecting trade between Member States.

54 At the hearing, the Commission relied, however, on the judgment in Case 311/85 *Vereniging van Vlaamse Reisbureaus* [1987] ECR 3801 in order to substantiate its claim that the cross-border nature of the removals was by itself sufficient to establish its competence. It is clear that that judgment, and in particular paragraph 18 thereof,

does not address the issue of the appreciable effect on trade. Indeed, that term is not even referred to in the judgment.

55 In any event, the Decision does not contain any reasoning based solely on the cross-border nature of the relevant removals. In particular, it is apparent from both the wording and the context of recital 372 of the Decision that that recital, which does not mention the judgment in *Vereniging van Vlaamse Reisbureaus*, cited in paragraph 54 above, does not seek to demonstrate an appreciable effect on trade.

— The EUR 40 million threshold

56 As regards the EUR 40 million threshold, the applicant complains that the Commission overestimated the combined turnover of the participants in the cartel.

57 Acceding to a request from the applicant, the Court invited the Commission to produce certain documents in order to allow the applicant to be fully able to dispute that figure. The Commission therefore produced non-confidential versions of the replies from the other addressees of the Decision to the statement of objections and their replies to its requests for information. However, at the hearing, the applicant stated that it was not advancing any argument on the basis of the documents submitted by the Commission. Therefore, assuming that the Commission's approach to subcontracting is correct, the total amount of sales would thus continue to be above the EUR 40 million threshold, even taking into account Decision C(2009) 5810 (paragraph 21 above), which reduces the consolidated turnover by over EUR 600 000.

58 It must, however, be held that the applicant's arguments based on the need to draw a distinction between the turnover generated as a subcontractor and the turnover generated as a company controlling an international removal are well founded. Indeed, in order not to include the same figure twice in the estimate of the sales concerned, the turnover achieved as a subcontractor has to be deducted from the turnover achieved through the services in question. Otherwise, for a single removal, the figure for the turnover achieved as a subcontractor would be included first in the turnover of the company which controls the service and again in that of the subcontractor. Furthermore, the subcontractor turnovers were not generated on the removal services market intended for the final consumer.

59 The explanation provided by the Commission in recital 530 of the Decision in order to justify its decision to exclude those sales in calculating the fine is, indeed, convincing. However, that cannot explain why it would be appropriate to include the same figure twice in estimating the size of the market for the purposes of ascertaining whether there was an appreciable effect on trade. That estimate and the estimate of the combined turnover of the participants in the cartel are therefore vitiated by a manifest error of assessment.

60 That conclusion is supported by the Commission's replies to the Court's written and oral questions.

61 The Commission attempted, first, to put forward an argument based on point 54 of the 2004 Guidelines. However, that provision simply excludes sales between entities that form part of the same undertaking and is in no way concerned with the issue of subcontracting. It cannot, in particular, act as a basis for the argument *a contrario* which the Commission seems to advance.

62 Second, the Commission contended in its written reply that its approach does not 'necessarily' result in the double counting of the same removal, because, first, a number of Belgian movers did not form part of the cartel, and, second, the subcontracting

was in some cases carried out on behalf of foreign movers. The Commission therefore concedes implicitly that in the other cases that approach amounted to including twice the turnovers achieved as a subcontractor. In addition, at the hearing, the Commission acknowledged that there was double counting when the subcontracting was between two participants in the cartel. Moreover, it admitted that if its methodology were corrected on that point, the EUR 40 million threshold would no longer be reached.

63 It is clear from the foregoing that the Commission has failed to prove that the EUR 40 million threshold has been reached in the present case.

— The 5 % threshold

64 As regards the 5 % threshold, the applicant submits that the Commission ought to have defined the market and ought to have included all the 'international removal services'.

65 As regards that second complaint, the assertion that the Commission took as its starting point too narrow a market must be rejected. The Commission was fully entitled to find that the cartel had as its object the restriction of competition in the sector of international removals to and from Belgium. The removals in question were characterised by the fact that Belgium was either the starting place or the destination and that the cartel's activity took place in Belgium. In addition, in estimating the size of the market, the Commission took into account the turnovers of the foreign companies on that market. Consequently, the Commission was justified in finding that international removal services in Belgium were the relevant services.

66 As regards the complaint alleging the failure to define the market, it is clear that in order to calculate a market share the market must logically be defined first. As the Court has already observed at paragraph 49 above, point 55 of the 2004 Guidelines expressly recognises that '[i]n order to apply the market share threshold, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market'. That obligation is also clear from other language versions of that point (for example in German 'muss').

67 In addition, as regards the binding nature of the guidelines adopted by the Commission, the Court has already held that, in adopting such rules of conduct and announcing by publishing them that they will henceforth apply to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations (Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 211).

68 It is common ground that the Commission has failed to comply with the obligation laid down in point 55 of the 2004 Guidelines. In its pleadings and at the hearing, it stressed not only that it was not required to define the market concerned but also that it had not done so. Consequently, the Commission's finding that the 5 % threshold was reached should, theoretically, be rejected.

69 However, in the circumstances of the case, the Court considers that the Commission has, nevertheless, established to the requisite legal standard that the second alternative condition provided for in the presumption laid down in point 53 of the 2004 Guidelines was met.

70 In recitals 88 to 94 of the Decision, the Commission provided a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope. Therefore, the Commission identified the relevant services and market precisely. The Court considers that such a description of the sector can be sufficient in so far as it is sufficiently detailed to enable the Court to verify the Commission's basic assertions and in so far as, on that basis, it is clear that the combined market share far exceeds the 5 % threshold.

71 In that connection, it should be observed, first, that the Commission was justified in finding that international removal services in Belgium were the relevant services (paragraph 65 above). Second, on that basis, the Commission estimated the size of the market at EUR 83 million and the combined market share of the participants in the cartel at approximately 50 %. Those figures must be adjusted in order to take into account the corrections resulting from Decision C(2009) 5810 (paragraph 21 above) and from the exclusion of the sales achieved as a subcontractor (paragraph 59 above), which, according to the Commission, results in a combined turnover of over EUR 20 million and a combined market share of approximately 30 %. That market share is still, however, well above 5 %. Third, in answer to the Court's questions, the applicant itself stated, at the hearing, that, for the 5 % threshold not to be reached, the size of the market would have to be at least EUR 435 million. The only way the market concerned could attain such a size would be to start from a much larger market than that of international removal services in Belgium, which was, however, correctly identified by the Commission as the relevant market.

72 Accordingly, the Court considers that, exceptionally, the Commission was entitled to base its decision on the second alternative condition of point 53 of the 2004 Guidelines without expressly determining the market within the meaning of point 55 of those Guidelines.

73 Lastly, as the Commission correctly observed, in the context of the positive presumption laid down in point 53 of the 2004 Guidelines, it is sufficient if only one of the two alternative conditions is met in order to prove that the effect on trade between Member States is appreciable.

74 It follows that the applicant's first plea must be rejected.

2. *The second plea, alleging manifest errors of assessment and errors of law in the application of Article 81(1) EC*

75 This plea is divided into three limbs. The first two limbs seek a reduction in the fine on account of mitigating circumstances. By the third limb, the applicant claims a reduction in the fine on account of its economic and financial difficulties.

(a) Arguments of the parties

76 First, the applicant submits that the Commission was aware that the system of cover quotes existed and that it tolerated it for years. The practice was known to Commission officials and was so widespread within its services that it is inconceivable that the Commission was never aware of that practice. Over 30 % of the infringements found in relation to cover quotes concerned Commission officials. As regards the argument that the Commission, as an institution, was not aware of that system, the applicant states that this is 'pure fiction'. In addition, that practice was known to Directors-General, directors, heads of unit and Commissioners. However, the Commission tolerated that system by allowing its officials to take advantage of it.

77 The applicant submits that that conduct of the Commission, which for years did nothing to put an end to the practice of cover quotes, was liable to give rise to a certain confusion as to whether the practice constituted an infringement. That fact and the lateness of the Commission's intervention justify a reduction in the fine.

78 Second, the applicant claims that the system of cover quotes did not result from a cartel or concerted practice but was a response to market demand, because the cover quotes were requested by the customers themselves. Consequently, it would have been extremely difficult for the companies concerned to refuse to provide cover quotes without the risk of displeasing their customers and losing them.

79 Third, the applicant invokes the economic and financial difficulties which it has faced for a number of years. In that connection, the Commission did not correctly assess the circumstances put forward by the applicant although, under point 35 of the 2006 Guidelines, it may take account of an undertaking's inability to pay in a specific social and economic context. The applicant states that the mere reference to the fact that the fine represents only 3.76 % of its worldwide turnover in 2006 is not sufficient to determine its ability to pay. In actual fact, it is almost insolvent.

80 The Commission disputes those arguments and states that the plea is, rather, one that relates to the amount of the fine.

(b) Findings of the Court

81 The second plea, put forward in the section of the application entitled 'Pleas for the annulment of the Decision', is allegedly based on 'manifest errors of assessment and errors of law in the application of Article 81(1) EC'. However, it seeks only a reduction

in the fine on account of mitigating circumstances and economic and financial difficulties, and not the annulment of the Decision. Although at the hearing the applicant opposed reclassification of the plea, it is clear that, in the application, it simply states that the circumstances relied on justify a 'reduction in the fine'. Consequently, those arguments will be addressed when the Court examines the pleas relating to the amount of the fine (paragraphs 150 et seq. below).

3. *The third plea in law, alleging infringement of the obligation to state reasons*

82 In this plea, the applicant alleges a failure to state reasons with regard to the calculation of the basic amount of the fine (first limb) and with regard to the rejection of its argument based on its economic and financial difficulties (second limb).

(a) Arguments of the parties

83 The applicant submits that, as regards the gravity of the infringement, the Commission simply set the proportion of the value of sales to be taken into account at 17 %, without further explanation. Similarly, as regards the additional amount applied as a deterrent, the Commission selected a figure at the lower end of the band, that is 17 %, without further explanation. Thus, the reasons in relation to the amount of the fine are purely formal and the applicant is unable to grasp the methodology applied by the Commission in order to arrive at those results. The Commission classified the infringements found as 'among the most serious'. Under point 23 of the 2006

Guidelines, the proportion of the value of sales taken into account ought to have been set 'at the higher end of the scale'. However, the Commission set that proportion at a level scarcely above the mid-point of the scale, without explaining the reasons for that choice and without indicating the circumstances and factors that led it to that result.

84 As regards its economic and financial difficulties, the applicant states that the Commission rejected the arguments simply by claiming that the fine calculated for Ziegler represented only 3.76 % of the company's worldwide turnover in 2006. However, although the Commission is not required to adopt a position in relation to all the arguments raised by the applicant, it cannot, according to the applicant, overlook them in their entirety. In so doing, the Commission also infringed the applicant's right to be heard.

85 The Commission disputes those arguments and observes that any defects in the statement of reasons concerning the setting of the fine, in particular the gravity of the infringement or the ability to pay, would not give rise to the annulment of the Decision.

(b) Findings of the Court

86 First of all, it should be noted that the complaints relied on in this plea relate also only to the fine imposed and not to the finding of an infringement. As the Commission correctly observed, an infringement of the obligation to state reasons in relation to the setting of the fine would not result in the annulment of the Decision in its entirety. Such an infringement of essential procedural requirements would only affect Article 2 of the Decision, by virtue of which the fines are imposed.

87 It is settled case-law that the statement of reasons required by Article 253 EC, which is an essential procedural requirement within the meaning of Article 230 EC, must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted it in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, paragraph 31; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; and Case T-82/00 *BIC and Others* v *Council* [2001] ECR II-1241, paragraph 24).

88 As regards the first limb of the present plea, it must be stated that the reasoning with respect to the setting of the basic amount of the fine, including the additional amount applied as a deterrent, is indeed not very detailed. However, the Court of Justice has held that the Commission fulfilled its obligation to state reasons when it indicated in its decision the factors which enabled it to measure the gravity of the offence and that it is not required to set out a more detailed account or the figures relating to the method of calculating the fine (see Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraph 252, and the case-law cited).

89 In the present case, in recital 542 of the Decision, the Commission set out the reasons which led it to conclude that the infringement was very serious, namely the very nature of the obvious restrictions of competition identified. In addition, it explained, in the same recital, why it had not examined the geographical area and the impact of the infringement, referring to case-law which states that in the case of flagrant restrictions, the infringement may be classified as very serious without it being necessary for such conduct to cover a particular geographical area or have a particular impact (Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917,

paragraphs 84 and 85, and Joined Cases T-49/02 to T-51/02 *Brasserie nationale and Others* v *Commission* [2005] ECR II-3033, paragraphs 178 and 179). It follows that, in the light of that case-law, the Commission gave sufficient reasons for classifying the infringement as 'very serious'.

90 However, first, it is desirable for the Commission to augment its reasoning as to the calculation of fines in order to enable undertakings to acquire a detailed knowledge of the method of calculating the fine imposed on them. More generally, such a course of action may serve to render the administrative act more transparent and facilitate the exercise by the General Court of its unlimited jurisdiction, which enables it to review not only the legality of the contested decision but also the appropriateness of the fine imposed (Case C-248/98 P *KNP BT* v *Commission* [2000] ECR I-9641, paragraph 46).

91 Second, it should be observed that the case-law cited by the Commission refers to the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty (OJ 1998 C 9, p. 3) and that it goes back to a time before the adoption of guidelines. The 2006 Guidelines have, however, brought about a fundamental change in the methodology for setting fines. In particular, the threefold categorisation of infringements ('minor', 'serious' and 'very serious') has been abolished, and a scale from 0 % to 30 % introduced in order to enable finer distinctions to be made. In addition, the basic amount of the fine is now 'related to a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement' (point 19 of the 2006 Guidelines). As a general rule, 'the proportion of the value of sales taken into account will be set at a level of up to 30 % of the value of sales' (point 21). As regards horizontal price-fixing, market-sharing and output-limitation agreements 'which … are, by their very nature, among the most harmful restrictions of competition', the proportion of the value of sales taken into account must generally be set 'at the higher end of the scale' (point 23).

92 In those circumstances, the Commission may no longer, as a rule, simply state reasons only for the classification of an infringement as 'very serious' and not for the choice of the proportion of sales taken into account. As stated above, the corollary of the Commission's margin of discretion in the area of fines is an obligation to state reasons which enables the person concerned to ascertain the reasons for the measure adopted and the Court to exercise its review.

93 In the present case, in recital 543 of the Decision, the Commission set the percentage at a level scarcely above the mid-point of the scale, namely at 17 %, basing its choice solely on the 'very serious' nature of the infringement. However, the Commission has failed to explain in a more detailed manner how the classification of the infringement as 'very serious' has led it to set the percentage at 17 % and not at a percentage considerably more 'at the higher end of the scale'. That reasoning can be sufficient only where the Commission applies a percentage very close to the lower end of the scale laid down for the most serious restrictions, that being, moreover, highly favourable to the applicant. In that case, supplementary reasons going beyond the reasoning inherent in the guidelines are not necessary. By contrast, had the Commission wished to apply a higher percentage, it would have had to provide more detailed reasons.

94 In view of the fact that, as regards the additional amount applied as a deterrent, recital 556 of the Decision refers to recital 542 and that the lower limit of the scale is the same, the considerations above apply equally to the complaints relating to the statement of reasons for the setting of that amount. Consequently, the first limb of the plea must be rejected.

95 As regards the second limb of the plea, concerning the applicant's economic and financial difficulties, it is necessary, according to settled case-law, to make a distinction between the ground for complaint alleging the absence or inadequacy of a statement of reasons and that alleging that the statement of reasons for the decision was

incorrect because of an error as to the facts or in the legal assessment. The latter aspect falls under the examination of the substantive legality of the contested decision and not the infringement of procedural requirements and thus cannot give rise to an infringement of Article 253 EC (*Commission* v *Sytraval and Brink's France*, cited in paragraph 87 above, paragraphs 67 and 72, and Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 47).

96 In the present case, the Commission responded to the applicant's arguments in recital 632 of the Decision, where it stated that the fine represented only 3.76 % of its worldwide turnover in 2006, which can be considered as fulfilling the obligation to state reasons. If it were accepted that that simple calculation is not sufficient to determine the applicant's ability to pay, that would go to the substantive legality of the Decision and would not be a failure to state reasons (see paragraphs 165 et seq. below). Therefore, the second limb of the plea must be rejected.

97 It follows that the third plea must be rejected.

4. *The fourth plea, alleging infringement of the rights of the defence*

98 The fourth and fifth pleas concern alleged infringements of the rights of the defence. In the fourth plea, alleging infringement of the right to a fair hearing and of the general principle of sound administration, the applicant calls into question the Commission's impartiality.

(a) Arguments of the parties

99 The applicant claims that, since a large proportion of the cover quotes at issue had been requested by Commission officials, the Commission ought to have declined jurisdiction in favour of the Belgian competition authorities. The Commission, which stated by its own admission that it was the victim of such practices, was, in the present case, both judge and party. Consequently, there is an objective risk of bias.

100 The applicant submits that the proof of that bias is inferred, in particular, from the fact that the same case was used several times by the Commission, which allowed it to inflate artificially the number of infringements found. In addition, the risk of bias is reflected in the fact that, overall, the Decision makes an extremely severe assessment of the situation whereas, in actual fact, the practices at issue were very marginal.

101 Lastly, in a document entitled 'Observations on the Report for the Hearing' and at the hearing, the applicant stated that, after the Decision was adopted, cover quotes continued to be requested from the movers concerned by Commission officials of all ranks and even by an outgoing member of the Commission.

102 The Commission contends that, as regards the alleged objective risk of bias, the argument is ineffective as a plea for annulment and unfounded.

(b) Findings of the Court

103 The applicant submits that the Commission's conduct resulted in a serious restriction of the exercise of its rights of defence and that the Decision should therefore be annulled. Such a claim is without foundation.

104 Indeed, the applicant has not put in question the Commission's competence, in the present case, to adopt a decision in relation to a proceeding under Article 81 EC. Moreover, as is apparent from the case-law, the lack of objectivity allegedly shown by the Commission does not constitute an infringement of the rights of the defence capable of leading to annulment of the contested decision but must be placed in the context of the review of the assessment of the evidence or of the statement of reasons for the decision (see Joined Cases T-191/98 and T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 464, and case-law cited).

105 Consequently, the present plea is ineffective as a plea for annulment.

106 For the sake of completeness, it should be noted that that plea is also unfounded. The matters raised by the applicant are not of such a kind as to demonstrate that the alleged bias of the Commission or of one of its officials was reflected in the Decision (see, to that effect, Case T-31/99 *ABB Asea Brown Boveri* v *Commission* [2002] ECR II-1881, paragraph 105). The contention that the Commission 'artificially inflated the number of infringements found' is unfounded. If several documents appear in the table in annex to the Decision for the same removal in respect of which a cover quote was issued or a commission paid, that does not 'inflate' the infringement, but simply indicates that several documents relate to the same removal. As regards the argument that the practices at issue were not 'widespread' but 'very marginal', it is sufficient to note that the cartel operated for almost 20 years and that it concerned approximately 30 % of the market (see paragraph 71 above), and to refer to the applicant's statements that the practice was in response to market demand and was so widespread that it would have been 'extremely difficult to refuse to provide cover quotes without the risk of displeasing [its] customers and losing them'. Lastly, as regards the arguments put forward by the applicant in the observations on the report for the hearing and at the hearing, it is clear that they cannot substantiate its assertion that the Commission was biased in investigating the case. In that connection, the applicant fails to show

how the conduct of which certain officials are accused, even if proved, could have infringed the right to a fair procedure.

107 It follows that the fourth plea must be rejected.

5. *The fifth plea, alleging infringement of the rights of the defence*

108 The fifth plea alleges infringement of the right of access to the file and of the principle of sound administration.

(a) Arguments of the parties

109 The applicant complains that the Commission refused it access to the replies to the statement of objections of the other addresses of that statement and to the replies to the Commission's requests for information. The investigation file was in essence compiled with the written submissions, documents and comments from one of the participants of the alleged cartel. The Commission defined the market share of the 10 companies in question solely on the basis of the worldwide turnover declared by those companies further to the 2005 request for information. Therefore, it would be interesting to know the breakdown of the turnover of the other companies in order to challenge the size of the market and the market shares of each of the companies in question established by the Commission. In any event, it is not for the Commission to determine on its own the documents and information which are useful for the applicant's defence.

110 Since the Commission failed to grant access to the parties' replies, the applicant submits that it ought, at the very least, to have adopted the appropriate measures to facilitate comparison of the figures which had been declared to it. Because the applicant had been refused access, it was not in a position to monitor effectively the figures established by the Commission. Knowledge of those figures would have enabled the applicant effectively to dispute the Commission's presumption concerning the appreciable effect on trade between Member States.

111 The Commission contends that the figures on the size of the market are neither incriminating nor exculpating evidence. The applicant was affected solely by its own reply, since, as regards the setting of fines, only the value of sales, and not the subcontracts, was taken into account. Therefore, the figures provided by the other participants in the cartel are irrelevant to the applicant.

(b) Findings of the Court

112 The applicant submits, in essence, that the Commission's refusal of its request for access to the replies of the other addressees of the statement of objections and to the replies to the requests for information constitutes an infringement of its rights of defence, since the Commission failed to adopt appropriate measures to facilitate comparison of the figures which had been declared to it.

113 In that connection, according to case-law, respect for the rights of the defence, which constitutes a fundamental principle of Community law and must be observed in all circumstances, in particular in all proceedings liable to give rise to penalties, including administrative procedures, requires that the undertaking concerned must be in a position to make known its views on the truth and relevance of the facts, complaints and circumstances relied on by the Commission (Joined Cases T-109/02, T-118/02,

T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 66, and the case-law cited).

114 As regards, in particular, the replies to a statement of objections, the Court has held that if the Commission wishes to rely on a passage in a reply to a statement of objections or on a document annexed to such a reply in order to prove the existence of an infringement in a proceeding under Article 81(1) EC, the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence (see Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 343, and case-law cited).

115 In that connection, it should be noted that, with the exception of the evidence contained in the 'letter of facts' sent to the applicant on 23 August 2007, the Decision is not based on any fact, objection or circumstance that was not already contained in the statement of objections. As regards the 'letter of facts', the applicant does not dispute the Commission's assertions that that document did not include an additional objection, but simply referred to additional evidence on which the applicant was able to express its views.

116 As regards the turnovers and market shares, whose breakdown must — in the applicant's submission — be known in order to challenge the size of the market and the market shares of each of the companies in question, it should be noted that the figures used in recitals 89 and 373 of the Decision in order to prove that there was an appreciable effect on trade between Member States were already present in the statement of objections.

117 Consequently, the Commission did not rely on the replies to the statement of objections in order to establish the existence of the infringement, but based its decision on figures already known to the applicant.

118 However, it is clear that the applicant was not in a position, on the basis of the statement of objections alone, to dispute the figures used by the Commission to prove that there was an appreciable effect on trade. Indeed, an individual company concerned has not much opportunity of ascertaining whether the combined turnovers and market shares of all the members of a cartel exceed the EUR 40 million threshold or the 5 % threshold. Each company can only dispute its own figures with certainty. Therefore, in order to dispute the size of the market and the market shares of the other companies in question, and in order to assert its own arguments concerning those figures, it was essential to know the breakdown of the other companies' turnovers, failing which the applicant was not in a position to make known its views effectively on the truth and relevance of the facts, objections and circumstances put forward by the Commission.

119 In the context of a measure of organisation of procedure, the Court, therefore, requested the Commission to submit to it the relevant passages of the non-confidential versions of the replies of the other addresses of the Decision to the statement of objections and replies to the requests for information, in so far as those replies related to the figures used by the Commission in the statement of objections. Those documents were added to the file, with the result that the applicant was in a position to acquaint itself with them. However, it has already been noted in paragraph 57 above that, at the hearing, the applicant confirmed that it was not advancing any argument on the basis of the documents submitted by the Commission.

120 Accordingly, it must be held that there has been no breach of the applicant's rights of defence.

121 Admittedly, it is apparent from the case-law that an infringement of the rights of the defence at the stage of the administrative procedure cannot be remedied by the mere fact that access was made possible to the information at issue at a later stage, in particular during the judicial proceedings relating to an action in which annulment of the contested decision is sought (Joined Cases 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 *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 104).

122 However, in order to ascertain whether the non-disclosure of a document could have harmed the defence of an undertaking during the administrative procedure, a distinction must be drawn between access to documents which may exculpate the undertaking and access to documents establishing the existence of the infringement which it is alleged to have committed (*Aalborg Portland and Others* v *Commission*, cited at paragraph 121 above, paragraph 130).

123 As regards the latter documents, the Court of Justice has held that it was 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 (*Aalborg Portland and Others* v *Commission*, cited at paragraph 121 above, paragraph 73). That conclusion applies *a fortiori* when it is a question not of documents which the Commission relied on to prove the existence of the alleged infringement, but documents which could call in question the existence of an infringement of Article 81(1) EC on the ground that there was no appreciable effect on trade. However, the applicant has not even attempted to furnish such proof (see paragraph 119 above).

124 Consequently, this plea must be rejected.

125 As regards the applicant's request that the Court should order the full administrative file to be lodged at the Court Registry, it must be found that the Court has acceded to that request in relation to the relevant passages of the replies of the other addressees of the Decision to the statement of objections and to the replies to the requests for information from the Commission. As to the remainder, the applicant has failed to explain the relevance of the documents requested, and the request must therefore be refused.

B — *Pleas for the cancellation or reduction of the fine*

126 The applicant raises four alternative pleas, the first for the cancellation of the fine, and the remaining pleas, in the further alternative, for a substantial reduction in the fine.

1. *The appreciable effect on trade and competition*

(a) Arguments of the parties

127 The applicant reiterates that, in order for a cartel to be caught by the prohibition laid down in Article 81 EC, the undermining of competition and the effect on trade between Member States must be appreciable.

128 The Commission refers to its arguments relating to the first plea.

(b) Findings of the Court

129 It is clear that this plea is in fact concerned with two conditions for the application of Article 81(1) EC. It is therefore appropriate to refer to the observations made in the appraisal of the first plea (paragraphs 47 et seq. above), where the applicant's complaints were examined and rejected.

2. *The gravity of the infringement*

(a) Arguments of the parties

130 The applicant submits that the gravity of infringements must be assessed in the light of numerous factors, in particular, the specific circumstances of the case and its context. However, the Commission failed to take account of those principles and concerned itself only with a single criterion, that is the actual nature of the infringement.

131 As regards the direct price-fixing agreements, the applicant claims that the minimum prices which Allied Arthur Pierre intended to impose were not applied by any of the parties. In addition, the practices penalised did not result in an actual increase in the sales prices. Consequently, the fine is completely disproportionate to the actual extent of the practices complained of, to their actual effect on the market and on competition and to the number of infringements found. The Commission also infringed the principle of equal treatment by including, for the applicant alone, the turnover for activities not affected by the infringement in the calculation of the fine, and by giving advantage to other operators, in particular Allied Arthur Pierre and Interdean, more heavily involved in the cartel. Lastly, the Commission failed to demonstrate the actual impact of the cartel on the market although that effect is measurable.

132 The Commission contends that all those arguments are ineffective because the infringements in question, such as price-fixing and market sharing, are inherently serious.

133 The Commission also observes that its wide margin of discretion in setting fines has always been made clear in the case-law. In the present case, with regard to setting the percentage of sales determining the amount of the fine (17 %), the Commission

only categorised the infringement as 'very serious', in accordance with that case-law, because of the nature of the restrictions concerned. Had other factors been taken into account, a higher rate would, moreover, have been set. By contrast, no account was taken in that assessment of the impact of the infringement. In addition, market shares are irrelevant to setting the fine.

(b) Findings of the Court

134 The applicant submits that the Commission erred in determining the gravity of the infringement solely on the basis of its inherent nature.

135 In that connection, it should be noted that, in recital 542 of the Decision, the Commission states that agreements or concerted practices involving the type of restriction identified in this case may be classified as 'very serious' solely on the basis of their nature, without it being necessary for such conduct to cover a particular geographic area or have a particular impact. In support of that assertion, the Commission refers, both in the Decision and in the defence, to the judgment in *Scandinavian Airlines System* v *Commission*, cited in paragraph 89 above.

136 In that judgment, the General Court held that gravity is to be assessed by taking into account such matters as the nature of the restrictions on competition, that the gravity of the infringement could be established by reference to the nature and the object of the abusive conduct, and that it is clear from settled case-law that factors relating to the object of a course of conduct may be more significant for the purposes of setting the amount of the fine than those relating to its effects (see paragraph 83 of the judgment in *Scandinavian Airlines System* v *Commission*, and the case-law cited).

137 In the present case, the infringement consisted in price-fixing and market sharing. Such a clear breach of competition law is, by its nature, particularly serious.

138 In addition, unlike the 1998 Guidelines, the 2006 Guidelines no longer mention the need to take account of 'the effective economic capacity of offenders to cause significant damage to other operators' in order to assess gravity, nor the 'actual impact [of the infringement] on the market, where this can be measured'.

139 However, the 2006 Guidelines expressly state that '[t]he assessment of gravity will be made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case'. In addition, it has already been noted in paragraph 91 above that the 2006 Guidelines have brought about a fundamental change in the methodology for setting fines. In particular, the threefold categorisation of infringements ('minor', 'serious' and 'very serious') has been abolished, and a scale from 0% to 30% introduced in order to enable finer distinctions to be made. Under point 19 of the 2006 Guidelines, the basic amount of the fine must be 'related to a proportion of the value of sales, depending on the degree of gravity of the infringement'. As a general rule, 'the proportion of the value of sales taken into account will be set at a level of up to 30% of the value of sales' (point 21 of the Guidelines).

140 Therefore, the Commission cannot use its margin of discretion in the imposition of fines, and thereby determine the precise level from 0% to 30%, without also taking into account the particular circumstances of the case. Thus, point 22 of the 2006 Guidelines provides that, '[i]n order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower end or at the higher end of that scale, the Commission will have regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented'.

141 That difficulty in determining an exact percentage is reduced to a certain extent in the case of secret horizontal price-fixing and market-sharing agreements in which, under point 23 of the 2006 Guidelines, the proportion of the value of sales taken into account will generally be set 'at the higher end of the scale'. It is clear from that point that, for the most harmful restrictions, the rate should, at the very least, be above 15 %.

142 In the present case, the Decision should not be annulled in that regard on the ground that the rate of 17 % was set solely on the basis of the inherently serious nature of the infringement. Where the Commission simply applies a rate equal or almost equal to the minimum rate laid down for the most serious restrictions, it is not necessary to take into account additional factors or circumstances. That would be required only if a higher rate had to be established. In that connection, the applicant certainly does not argue that the Commission ought to have adopted a higher rate and the Commission has not claimed that the Court should increase the amount of the fine.

143 Consequently, the complaint alleging that the gravity of the infringement was calculated in an abstract manner must be rejected.

144 As regards the complaint based on an alleged infringement of the principle of equality, it is sufficient to note that Allied Arthur Pierre benefited from a reduction under the 2002 Leniency Notice because of its cooperation with the Commission. As regards Interdean, the Court will examine the issue as to why a reduction was granted to that company, and not the applicant, in the context of the fourth alternative plea (paragraphs 170 et seq. below). Lastly, the Commission disputes as having no factual basis the assertion that it was only in relation to the applicant that it included the turnover for activities not affected by the infringement in the calculation of the fine. In that connection, it is clear from the Decision that it was only in order to calculate the 10 % threshold that the applicant's worldwide turnover, and hence its activity other than international removals in Belgium, was taken into account. Therefore, that complaint must also be rejected.

3. *The mitigating circumstances*

(a) Arguments of the parties

145 The applicant relies on three mitigating circumstances.

146 First, the applicant observes that the fact that it took without delay the measures necessary to comply with the rules of Community competition law could have been regarded as a mitigating circumstance.

147 Second, the Commission failed to take into account the fact that the cover quotes had been issued because they were a response to market demand. The Commission cannot claim that such a widespread practice within its services remained totally unknown to it for so long. That fact is therefore liable to have sustained and encouraged the belief that the practice was not unlawful, since it was procured by members of public services.

148 Third, the applicant submits that it never substantially contested that the infringements had in fact taken place.

149 The Commission disputes those arguments.

(b) Findings of the Court

150 In the present plea, as in the first and second limbs of the second main plea, the applicant relies on three mitigating circumstances.

Termination of the offending conduct

151 As regards the termination of the offending conduct by the applicant, it must be held that this does not constitute a mitigating circumstance justifying a reduction in the fine.

152 As the Commission correctly observed, point 29, first indent, of the 2006 Guidelines provides that, although the basic amount of the fine may be reduced where the undertaking concerned provides evidence that it terminated the infringement as soon as the Commission intervened, that 'will not apply to secret agreements or practices (in particular, cartels)'. In addition, the benefit of that mitigating circumstance is limited to cases where the infringement is terminated as soon as the Commission intervenes. However, the applicant participated in the infringement until 8 September 2003 whereas the inspections took place after that date, that is on 16 September 2003.

Belief in the lawfulness of the offending conduct

153 Point 29, last indent, of the 2006 Guidelines provides that '[t]he basic amount may be reduced … where the anti-competitive conduct of the undertaking has been authorised or encouraged by public authorities or by legislation.'

154 The applicant claims that the fact that the Commission was aware of the offending practice and that it tolerated it for years led it to the legitimate, albeit mistaken, belief that that practice was lawful. In addition, the practice was merely a response to market demand.

155 In that connection, the Commission is fully entitled to emphasise that the person in contact with the supplier, for example, the Commission official, is not the true customer of the removal companies. In recital 264 of the Decision, it observes that it is for the undertaking or public institution paying for the removal to select a removals company. It is precisely with the aim of securing a choice that many undertakings and public institutions require the submission of several quotes. Consequently, the Court must reject the arguments that the cover quotes were issued because they were a response to market demand, or that they were only submitted after the customer had made his selection.

156 The fact that officials of an institution may have requested cover quotes cannot therefore be relied on by the applicant, which ought to have known that such requests could not be formulated on behalf of or at the instigation of the institutions, since they were clearly contrary to their financial interests. The requirement to provide three estimates was intended precisely to ensure a minimum level of competition and to prevent a single removals company from being able to set unilaterally the price of a move.

157 In addition, even if facts known to a person working for the Commission could be imputed to the latter as an institution, mere knowledge of anti-competitive conduct does not imply that that conduct was implicitly 'authorised or encouraged' by the Commission within the meaning of point 29, last indent, of the 2006 Guidelines. Alleged inaction cannot be treated in the same way as a positive act such as an authorisation or encouragement.

158 Lastly, the applicant has failed to show that the alleged inaction on the part of the Commission had in fact led it to believe that the practice of cover quotes was lawful or that the Commission had created confusion in that regard. The economic rationale for an agent's obligation to provide several estimates is well-known. It is not merely

a formality but a means of identifying the most advantageous offer. Therefore, the infringement of the competition rules is so obvious in the present case, in particular as regards the cover quotes, that a diligent operator cannot submit that it had a legitimate belief that that practice was lawful.

159 In any event, it must be noted that the applicant's arguments relate only to the cover quotes. The practice of cover quotes is only one of the three elements of a single and continuous infringement, which also comprises a written agreement on prices and an agreement for the payment of commissions.

Not contesting the facts

160 Unlike the Commission Notice [of 18 July 1996] on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4), the 2002 Leniency Notice does not provide for a reduction for not substantially contesting the facts. On the basis of Allied Arthur Pierre's cooperation, the Commission already possessed the evidence enabling it to establish the infringement and the fact that the applicant did not contest the facts had no added value. Accordingly, the Commission was fully entitled to find that there was no need to grant the applicant a reduction in the fine on account of its cooperation.

161 Consequently, the present plea must be rejected.

4. *The exceptional circumstances*

(a) Arguments of the parties

162 In the alternative pleas, the applicant relies on its inability to pay, as in the third limb of the second plea and the second limb of the third plea.

163 The Commission refers to its observations made in the second and third pleas.

(b) Findings of the Court

164 It should be noted that, in the examination of the present plea, the Court also takes into account the arguments relied on in the third limb of the second plea and in the second limb of the third plea. The applicant therefore relies, in essence, on its inability to pay the fine and complains of unequal treatment compared with Interdean.

165 As regards, first, the applicant's alleged inability to pay, it should be noted that in order to benefit from an exceptional reduction in the fine on account of economic difficulties, pursuant to point 35 of the 2006 Guidelines, a request must be submitted and two cumulative conditions must be met, namely, first, an insuperable difficulty in paying the fine and, second, the existence of a specific 'social and economic context'.

166 As regards the first condition, the Commission simply observed, in recital 632 of the Decision, that, '[c]onsidering the fine … only represents 3.76 % of the company's worldwide turnover in 2006, this fine would not irretrievably jeopardise [the applicant's] economic viability.' Therefore, the Commission concluded that the first condition was not met.

167 It is clear that that assessment is abstract and takes no account of the applicant's specific circumstances. A simple calculation of the fine as a percentage of the company's worldwide turnover cannot of itself lead to the conclusion that the fine is not liable to irretrievably jeopardise the applicant's economic viability. If that were the case, it would be possible to set out specific thresholds for the application of point 35 of the 2006 Guidelines. Consequently, recital 632 of the Decision cannot be a basis for rejecting Ziegler's claim.

168 As regards the second condition, the Commission found, in recitals 651 and 655 of the Decision, that the social and economic context in the present case did not show a specific character as provided for in point 35 of the 2006 Guidelines and that, therefore, all the requests for a reduction in the fine on that basis had to be rejected. Since the applicant has not challenged the finding that that second condition was not met, the Commission was justified in rejecting the applicant's arguments for a reduction in the fine on account of its economic and financial difficulties.

169 The fact that that reasoning is contained in the section on the assessment of Interdean's position and not that dealing with Ziegler is not capable of calling that finding into question. It is clear from the wording of recitals 651 and 655 of the Decision that the finding made there applies equally to the applicant.

170 As regards, second, the alleged infringement of the principle of equal treatment compared with Interdean, it is clear that the Commission refused Interdean's request under point 35 of the 2006 Guidelines for the same reason as that applied in relation to the applicant, that is the lack of a '[specific] social and economic context' (see recital 655 of the Decision). There is therefore no difference in treatment in that regard.

171 It is true that, nevertheless, the Commission granted Interdean a reduction in the fine in accordance with point 37 of the 2006 Guidelines. It is, however, apparent from the Decision that Interdean's position and that of the applicant are not comparable. In that connection, it is sufficient to note that the applicant's fine is far below the 10% threshold of its total turnover, whereas Interdean's fine before it was reduced would have far exceeded that threshold.

172 Third, the applicant submits that its situation has worsened since the Decision was adopted. However, as the applicant indeed expressly acknowledged at the hearing, events after the adoption of the Decision cannot affect its lawfulness. Therefore, that plea must be rejected.

173 It follows that the action must be dismissed in its entirety.

Costs

174 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, including those of the application to the Court for interim measures, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Ziegler SA to pay the costs, including those relating to the interim proceedings before the Court.**

Papasavvas Wahl Dittrich

Delivered in open court in Luxembourg on 16 June 2011.

[Signatures]

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