Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 10 September 2015 [1]

Case C-428/14

DHL Express (Italy) Srl,
DHL Global Forwarding (Italy) SpA
v
Autorità Garante della Concorrenza e del Mercato

(Request for a preliminary ruling from the Consiglio di Stato (Italy))

(Competition policy — Article 101 TFEU — Agreements, decisions and concerted practices — International freight forwarding sector — Leniency — Cooperation between the Commission and the competition authorities of the Member States (NCA) — European competition network (ECN) — ECN Model Leniency Programme — Binding nature or otherwise of the ECN Model Leniency Programme for NCAs — Relationship between an application for immunity submitted to the Commission and a summary application for immunity submitted to an NCA)

I – **Introduction**

1. The present request for a preliminary ruling, lodged at the Registry of the Court by the Council of State (Consiglio di Stato, Italy) on 18 September 2014, concerns the interpretation of Article 101 TFEU, Article 4(3) TEU and Article 11 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]. [2]

2. The request was made in the context of proceedings brought by DHL Express (Italy) Srl and DHL Global Forwarding (Italy) SpA (together referred to as 'DHL'), which are subsidiaries of Deutsche Post AG, against the Autorità Garante della Concorrenza e del Mercato (Authority responsible for competition compliance and enforcement of market rules; 'the Autorità').

1 — Original language: French.
2 — OJ 2003 L 1, p. 1.

II – **Legal background**

A – *Regulation No 1/2003*

3. Recital 15 of Regulation No 1/2003 reads:

‘The Commission and the competition authorities of the Member States should form together a network of public authorities applying the Community competition rules in close cooperation. For that purpose it is necessary to set up arrangements for information and consultation. Further modalities for the cooperation within the network will be laid down and revised by the Commission, in close cooperation with the Member States’.

4. Article 11 of Regulation No 1/2003, headed ‘Cooperation between the Commission and the competition authorities of the Member States’, is worded as follows:

‘1. The Commission and the competition authorities of the Member States shall apply the Community competition rules in close cooperation.

2. The Commission shall transmit to the competition authorities of the Member States copies of the most important documents it has collected with a view to applying Articles 7, 8, 9, 10 and Article 29(1). At the request of the competition authority of a Member State, the Commission shall provide it with a copy of other existing documents necessary for the assessment of the case.

3. The competition authorities of the Member States shall, when acting under Article 81 [EC] or Article 82 [EC], inform the Commission in writing before or without delay after commencing the first formal investigative measure. This information may also be made available to the competition authorities of the other Member States.

4. No later than 30 days before the adoption of a decision requiring that an infringement be brought to an end, accepting commitments or withdrawing the benefit of a block exemption regulation, the competition authorities of the Member States shall inform the Commission. To that effect, they shall provide the Commission with a summary of the case, the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action. This information may also be made available to the competition authorities of the other Member States. At the request of the Commission, the acting competition authority shall make available to the Commission other documents it holds which are necessary for the assessment of the case. The information supplied to the Commission may be made available to the competition authorities of the other Member States. National competition authorities may also exchange between themselves information necessary for the assessment of a case that they are dealing with under Article 81 [EC] or 82 [EC].

5. The competition authorities of the Member States may consult the Commission on any case involving the application of Community law.

6. The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 81 [EC] and 82 [EC]. If a competition authority of a Member State is already acting on a case, the Commission shall only initiate proceedings after consulting with that national competition authority.’

B – *Commission Notice on Cooperation within the Network of Competition Authorities* [3]

5. Paragraph 1 of the Notice on Cooperation within the NCA states:

'Regulation (EC) No 1/2003 … (1) creates a system of parallel competences in which the Commission and the Member States' competition authorities … (2) can apply Article [101 TFEU and Article 102 TFEU]. Together the NCAs and the Commission form a network of public authorities: they act in the public interest and cooperate closely in order to protect competition. The network is a forum for discussion and cooperation in the application and enforcement of EC competition policy. It provides a framework for the cooperation of European competition authorities in cases where Articles [101 TFEU and 102 TFEU] are applied and is the basis for the creation and maintenance of a common competition culture in Europe. The network is called "European Competition Network" (ECN).'

6. Under paragraph 38 of that notice:'38. In the absence of a European Union wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority. It is therefore in the interest of the applicant to apply for leniency to all competition authorities which have competence to apply Article [101 TFEU] in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question. In view of the importance of timing in most existing leniency programmes, applicants will also need to consider whether it would be appropriate to file leniency applications with [all] the relevant authorities simultaneously. It is for the applicant to take the steps which it considers appropriate to protect its position with respect to possible proceedings by these authorities.'

C — *The ECN Model Leniency Programme*

7. Within the framework of the ECN, a model leniency programme was adopted during the year 2006 ('the 2006 ECN Model Leniency Programme'). That programme, which has not been published and is available only in English, French and German, can be consulted on the Commission Internet site. [4] It was revised in November 2012 [5] ('the 2012 ECN Model Leniency Programme'), that is to say, after the events in the main proceedings, including the contested decision of the Autorità.

8. Paragraph 5 of the 2006 ECN Model Leniency Programme provides, with regard to immunity from 'Type 1A' fines:

'The CA will grant an undertaking immunity from any fine which would otherwise have been imposed provided:

a) the undertaking is the first to submit evidence which in the CA's view, at the time it evaluates the application, will enable the CA to carry out targeted inspections in connection with an alleged cartel;

b) the CA did not, at the time of the application, already have sufficient evidence to adopt an inspection decision/seek a court warrant for an inspection or had not already carried out an inspection in connection with the alleged cartel arrangement; and

c) the conditions attached to leniency are met.'

3 — OJ 2004 C 101, p. 43 ('the ECN Notice on Cooperation').

4 — http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

5 — http://ec.europa.eu/competition/ecn/mlp_revised_2012 _en.pdf.

9. According to paragraph 2 of the Explanatory notes annexed to the 2006 ECN Model Leniency Programme, '[t]he purpose of leniency programmes is to assist CAs in their efforts to detect and terminate cartels and to punish cartel participants. The CAs consider that … voluntary assistance with the above objectives has an intrinsic value for the economic well-being of individual Member States as well as the Common Market which may justify immunity in certain cases (Type 1A and 1B) and a reduction of … any fine in others (Type 2).'

10. Paragraphs 22 to 25 of the 2006 ECN Model Leniency Programme concern '[s]ummary applications in Type 1A cases'.

11. Paragraph 22 of the 2006 ECN Model Leniency Programme provides that 'where the Commission is "particularly well placed" to deal with a case in accordance with paragraph 14 of the Network Notice, the applicant that has or is in the process of filing an application for immunity with the Commission may file summary applications with any NCAs which the applicant considers might be "well placed" to act under the Network Notice. Summary applications should include a short description of the following:

— the name and address of the applicant;

— the other parties to the alleged cartel;

— the affected product(s);

— the affected territory(-ies);

— the duration;

— the nature of the alleged cartel conduct;

— the Member State(s) where the evidence is likely to be located; and

— information on its other past or possible future leniency applications in relation to the alleged cartel.'

12. Paragraph 24 of the 2006 ECN Model Leniency Programme provides that '[s]hould an NCA having received a summary application decide to request specific further information, the applicant should provide such information promptly. Should an NCA decide to act upon the case, it will determine a period of time within which the applicant must make a full submission of all relevant evidence and information required to meet the threshold. If the applicant submits such information within the set period, the information provided will be deemed to have been submitted on the date when the summary application was made.'

C – *National law*

13. On 15 February 2007, the Autorità adopted a Notice on the non-imposition or reduction of penalties under Article 15 of Law No 287/90 ('Communicazione sulla non imposizione e sulla riduzione delle sanzioni ai sensi dell'articolo 15 della legge 287/90), which contains the national leniency programme ('the Autorità Notice').

14. Article 16 of that programme, entitled 'Summary application', provides as follows:

'In cases where the Commission is best placed to deal with a case and conduct the procedure, an undertaking which has submitted or is preparing to submit to the Commission an application for non-imposition of penalties may submit to the Autorità a similar application for leniency, drafted in "summary" form, where it considers that the Autorità is also in a position to take action in the matter. Pursuant to [paragraph] 14 of the Commission Notice on Cooperation within the Network of Competition Authorities, the Commission is best placed where one or more agreements or practices, including networks of agreements or of similar practices, have an impact on competition in more than three Member States.'

15. Article 17 of that programme provides that 'a summary leniency application seeking non-imposition of penalties must contain at least:

a) the name and address of the applicant undertaking;

b) the name and address of the other undertakings participating in the cartel;

c) a description of the cartel in question, including:

— specific details of the nature of the cartel;

— an indication of the goods and services covered by the cartel, its geographic extent and its duration;

d) an indication of the Member States in which the evidence of the infringement may be likely to be obtained;

e) information concerning other applications for leniency which the undertaking has already submitted or intends submitting to other competition authorities in connection with the same infringement.'

16. According to Article 18 of that programme, '[T]he Autorità shall issue, at the request of the undertaking, an acknowledgement confirming the date and time of receipt of the summary application and shall inform it whether it is in principle still possible to allow non-imposition of penalties in respect of the cartel in question. If the Autorità considers it useful to seek additional information, it shall set a period within which the undertaking must furnish such information. If the Autorità decides to take action in the case, it shall set a period for completion of the application for leniency and allow the undertaking to produce the information and evidence referred to in paragraph 3. If the application is completed within the period set by the Autorità, it shall be regarded as received in its entirety as at the date of submission of the summary application ...'.

III – **The facts of the main proceedings and the questions referred to the Court**

17. On 5 June 2007, DHL submitted to the European Commission an application for an immunity marker under its Notice on immunity from fines and reduction of fines in cartel cases,[6] in this case a cartel infringing Article 101 TFEU in the sector of international sea, air and road freight forwarding.[7]

18. On 24 September 2007, the Commission granted DHL conditional immunity for the entire international freight forwarding sector, namely the sea, air and road sectors.

19. On 20 December 2007, DHL brought to the attention of the Commission certain information concerning the conduct of undertakings in the international road freight forwarding sector in Italy.

20. However, the Commission subsequently decided to pursue only the part of the cartel concerning international air freight forwarding services. By decision of 28 March 2012, it found that certain undertakings had participated for several years in a cartel in the international air freight forwarding services sector, in breach of Article 101 TFEU.[8] It considered that the Deutsche Post AG group had been the first undertaking to provide information and evidence meeting the conditions of paragraph 8(a) of its Leniency Notice and the amount of the fine to be imposed on it was reduced by 100% for the infringements in question.

21. Similarly, on 12 July 2007, DHL submitted to the Autorità a summary application for immunity under Article 16 of the Autorità Notice. It provided information concerning conduct in the international freight forwarding sector.

22. It is apparent from the request for a preliminary ruling that, according to the Autorità and the interveners, namely Agility Logistics Srl ('Agility') and Schenker Italiana SpA, a subsidiary of Deutsche Bahn AG ('Schenker'), the summary application for immunity submitted by DHL did not concern the international road freight forwarding sector.

23. In contrast, according to DHL, its summary application of 12 July 2007 concerned illegal conduct observed throughout the international freight forwarding and transport market. DHL considered, in particular, that, whilst it was true that its summary application did not give actual and specific examples of conduct observed in relation to road freight forwarding, that was merely due to the fact that such conduct had not yet been discovered.

6 — OJ 2006, C 298, p. 17, 'the Commission Leniency Notice'.

7 — The function of a marker is to enable an applicant for immunity to 'reserve' the first place in the order of arrival of leniency applications and to supplement that application subsequently. Paragraph 14 of the Commission Leniency Notice provides that '[a]n undertaking wishing to apply for immunity from fines should contact the Commission's Directorate-General for Competition. The undertaking may either initially apply for a marker or immediately proceed to make a formal application to the Commission for immunity from fines …' According to paragraph 15 of the same notice, 'the Commission services may grant a marker protecting an immunity applicant's place in the queue for a period to be specified on a case-by-case basis in order to allow for the gathering of the necessary information and evidence. To be eligible to secure a marker, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct. The applicant should also inform the Commission on other past or possible future leniency applications to other authorities in relation to the alleged cartel and justify its request for a marker. Where a marker is granted, the Commission services determine the period within which the applicant has to perfect the marker by submitting the information and evidence required to meet the relevant threshold for immunity. … If the applicant perfects the marker within the period set by the Commission services, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted'.

8 — Commission Decision of 28 March 2012 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement (Case COMP/39.462 — Freight forwarding) (notified under document C(2012) 1959).

24. On 23 June 2008, DHL submitted to the Autorità an additional summary application for non-imposition of a fine, supplementing the application initially submitted on 12 July 2007. According to DHL, 'the present declaration merely constitutes, for all purposes and effects, a supplement to the application submitted on 12 July 2007, in so far as the additional conduct to which it relates does not amount to a separate infringement not covered by the original declaration and is nothing more than a new manifestation of infringements already reported and, as such, the Commission took account of them for the purposes of the leniency granted to the undertaking'.

25. On 5 November 2007, Deutsche Bahn AG submitted to the Commission a leniency application, in its own name and in that, in particular, of Schenker, concerning conduct relating to international sea freight forwarding. That statement was supplemented on 19 November 2007 when Deutsche Bahn AG/Schenker provided the Commission with information on the Italian road freight forwarders' cartel.

26. On 12 December 2007, Schenker submitted to the Autorità a summary application for leniency, providing information on the Italian road freight forwarders' cartel.

27. On 20 November 2007, Agility submitted to the Commission a summary application for reduction of a fine on behalf of the group to which it belongs.

28. On 12 May 2008, Agility Logistics International BV, the parent company of the group to which Agility belongs, submitted orally to the Autorità, on behalf also of the companies controlled by it, which include Agility, a summary application for leniency.

29. By decision of 15 June 2011, in Case 1722 — International logistics (Procedure No 22521), ('the contested decision'), the Autorità decided that several undertakings, including DHL, Schenker and Agility Logistics International BV had, in breach of Article 101 TFEU, taken part in a cartel in the international road freight forwarding sector affecting operations to and from Italy.

30. In the contested decision, the Autorità recognised that Schenker was the first company to have applied for immunity from fines in Italy for road freight forwarding. Under the national leniency programme, that company had no fine imposed on it. On the other hand, DHL and Agility were ordered to pay a fine, reduced respectively to 49% and 50% of the initial amount.

31. The Autorità considered that, in its application of 12 July 2007, DHL had requested immunity from fines only for air freight and sea freight forwarding, the application in respect of road forwarding having been filed by DHL only on 23 June 2008.

32. DHL brought a claim for partial annulment of the contested decision before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court for Lazio, Italy; 'the TAR') on the ground that it had not been accorded the first place in the queue for the national leniency programme and therefore immunity from fines. DHL also sought, in the alternative, reduction of the fines imposed by that decision.

33. According to DHL, an application submitted to the Commission and a summary application submitted to the Autorità must be regarded jointly as a single application, by virtue of the link existing between the procedures, which has an impact on the order of priority of leniency applications, based on priority in time in relation to each infringement. By cross-appeals lodged on 18 and 23 June 2011 respectively, Schenker and Agility alleged that it was illegal for DHL to be admitted to the leniency programme. According to Schenker and Agility, DHL should have been excluded from the leniency programme for infringing its obligation to cooperate with the Autorità.

34. The TAR rejected the application brought by DHL, stating that, as a matter of principle, the leniency programmes of the Commission and the Autorità were autonomous and independent. DHL appealed against the TAR judgment to the Consiglio di Stato.

35. The Consiglio di Stato considers it necessary to seek a ruling from the Court as to the binding nature — or otherwise — for the national competition authorities ('NCAs') of the 2006 and 2012 ECN Leniency Model Programmes and in particular clarification as to whether the principle whereby that programme has no binding legal effects on national courts, established by the Court in the judgment in *Pfleiderer* (C-360/09, EU:C:2011:389), also applies to NCAs. It also queries the possible existence of a legally relevant link between an application for immunity submitted to the Commission and a summary application submitted to an NCA. The referring court, finally, raises a question as to the legality of the Autorità's conduct, before publication of the 2012 ECN Model Leniency Programme, in so far as it allowed undertakings that had submitted an application to the Commission for reduction of the fine to file summary applications for immunity.

36. In those circumstances, the Consiglio di Stato decided to stay its proceedings and to submit the following questions to the Court for a Preliminary ruling:

'On a proper construction of Article 101 TFEU, Article 4(3) TEU and Article 11 of Regulation (EC) No 1/2003, does it follow that:

(i) national competition authorities [NCAs] may not, in their own implementation practices, deviate from the instruments defined and adopted by the European Competition Network and, in particular, from the Model Leniency Programme, in a case such as that at issue before the referring court, without running counter to the findings of the Court of Justice of the European Union in paragraphs 21 and 22 of the judgment of 14 June 2011 in Case C-360/09 [*Pfleiderer*]?

(ii) a legal link exists between the main application for immunity that an undertaking has submitted or is about to submit to the Commission and the summary application for immunity submitted by that undertaking to an NCA in respect of the same cartel, with the effect that — notwithstanding the content of paragraph 38 of the Commission Notice on Cooperation within the Network of Competition Authorities — the NCA is obliged, under paragraph 22 of the 2006 ECN Model Leniency Programme (now paragraph 24 according to the numbering of the 2012 ECN Model Leniency Programme) and the related Explanatory Note 45 (now Explanatory Note 49 according to the numbering of the 2012 Model Leniency Programme), to take the following steps:

    (a) to assess the summary application in the light of the main application for immunity, examining whether the summary application accurately reflects the content of the main application; and

    (b) failing which — if the NCA believes that the summary application received is narrower in material scope than the main application submitted by the same undertaking, on the basis of which the Commission has granted conditional immunity to that undertaking — to contact the Commission or that undertaking in order to ascertain whether, following the submission of the summary application, that undertaking has identified, through its internal investigations, actual and specific examples of conduct in the sector purportedly covered by the main application for immunity but not by the summary one?

(iii) pursuant to paragraphs 3 and 22 to 24 of the 2006 ECN Model Leniency Programme and Explanatory Notes 8, 41, 45 and 46 and taking account of the amendment introduced by paragraphs 24 to 26 of the 2012 ECN Model Leniency Programme and Explanatory Notes 44 and 49, an NCA, which, at the material time, applied a leniency programme as described in the

main proceedings, could, with regard to a given secret cartel in respect of which the first undertaking has submitted or was about to submit to the Commission a main application for immunity, legitimately take receipt of:

(a) only a summary application for immunity from that undertaking; or

(b) also additional summary applications for immunity from various undertakings that had initially submitted to the Commission 'unacceptable' applications for immunity or applications for a reduction in the fine, in particular where the main applications submitted by the latter undertakings were made after the first undertaking was granted conditional immunity?'

IV – **Procedure before the Court**

37. Written observations were submitted by DHL, Schenker, Agility, the Italian, German, French, Austrian and United Kingdom Governments and the Commission. With the exception of the German and Austrian Governments, they all presented oral argument at the hearing on 9 July 2015.

A – *The first question*

38. By its first question, the national court, referring to paragraphs 21 and 22 of the judgment in *Pfleiderer* (C-360/09, EU:C:2011:389), asks essentially whether acts of the ECN, in particular its 2006 Model Leniency Programme, are binding on NCAs or whether, on the contrary, they may choose not to apply the instruments defined and adopted by the ECN. [9]

39. All the parties, with the exception of DHL, consider that the 2006 ECN Model Leniency Programme is not binding on NCAs.

9 — My answer to the first question concerning the 2006 ECM Model Leniency Programme applies *mutatis mutandis* to the 2012 ECM Model Leniency Programme, even if the latter is not applicable *ratione temporis* to the facts of the main proceedings.

40. It must be borne in mind that, in paragraph 22 of the judgment in *Pfleiderer* (C-360/09, EU:C:2011:389), the Court held that the 2006 ECN Model Leniency Programme had no binding effect *on the courts and tribunals of the Member States.*[10] The Court also confirmed that whilst Commission communications concerning, first, cooperation within the ECN[11] and, second, immunity from fines and the reduction of fines in cartel cases[12] were liable to have an impact on the practice of the NCA,[13] neither the provisions of the TFEU regarding competition law nor Regulation No 1/2003 provided for common leniency rules.[14]

41. I consider that the acts of the ECN, including its 2006 Model Leniency Programme, are likewise not binding on the NCAs.

42. It is appropriate to emphasise in the first place that, pursuant to Article 35(1) of Regulation No 1/2003, '[t]he '[NCAs] designated' by the Member States to apply Articles 101 TFEU and 102 TFEU 'may include courts.' It follows that, pursuant to the judgment in *Pfleiderer* (C 360/09, EU:C:2011:389), acts of the ECN, including its 2006 Model Leniency Programme, are not binding upon NCAs that are courts of the Member States. Article 5 of Regulation No 1/2003, which concerns the powers of the competition authorities, provides that they are to have powers to apply Articles 101 TFEU and 102 TFEU and lists the decisions which they can take. Given that that provision draws no distinction between NCAs according to their administrative or judicial nature, I consider that it would be inconsistent for the acts of the ECN to be binding on NCAs that are of an administrative nature and not on NCAs that are of a judicial nature.

43. Moreover, it is clear from paragraph 1 of the Notice on Cooperation within the ECN that that network constitutes a forum for discussion and cooperation for the application of Union competition policy and is intended in particular to provide a framework for the cooperation of the European competition authorities in cases where Articles 101 TFEU and 102 TFEU are applied. It follows that the ECN, which is not vested with legislative power, cannot adopt acts which are binding on the NCAs. The latter may therefore decline to apply the instruments defined and adopted by the ECN.[15]

10 — Emphasis added. 'The ECN Model leniency Programme is a non-binding instrument which seeks to bring about de facto or "soft" harmonisation of the leniency programmes of the national competition authorities to ensure that potential applicants are not discouraged from applying for leniency as a result of the discrepancies between the leniency programmes within the ECN. … Despite the non-legislative nature of this instrument and indeed other instruments such as the Cooperation Notice and the Joint Statement, *their practical effects* in relation in particular to the operations of national competition authorities and the Commission cannot be ignored.' Emphasis added. See the Opinion of Advocate General Mazák in *Pfleiderer* (C-360/09, EU:C:2011:389, paragraph 26). See also paragraph 7 of the Explanatory Notes annexed to the 2006 ECN Model Leniency Programme which provides in particular that the programme 'is meant to trigger soft harmonisation of the existing leniency programmes and to facilitate the adoption of such programmes by the few CAs who do not currently operate one.'

11 — See, to that effect, paragraph 38 of the Notice on Cooperation within the ECN. See also paragraph 4 of the Report on the State of Convergence of the 2009 leniency programmes, which provides that the 2006 ENC Model Leniency Programme is not a legally binding document. The authorities, however, gave a political commitment to deploy all efforts to align their respective leniency programmes, failing which to introduce aligned programs. The document is available only in English on the Internet site http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf.

12 — OJ 2006 C 298, p. 17.

13 — Judgment in *Pfleiderer* (C-360/09, EU:C:2011:389, paragraphs 21 and 23).

14 — *Pfleiderer*, paragraph 20. As the Commission emphasised, 'each Member State is free to adopt, or not adopt, a leniency programme in the field of competition law. If a competition authority decides to adopt a national leniency programme, it is autonomous from the leniency programmes of the other Member States and the European Commission leniency Programme, provided of course that it is in conformity with European law, in particular Article 4(3) TEU, Regulation No 1/2003 and the general principles of European law'.

15 — Including the 2006 ECN Model Leniency Programme.

44. In that regard, the fact that certain NCAs gave a formal commitment [16] to observe the principles set out in the Notice on Cooperation within the ECN does not change either its status as a forum for discussion and cooperation or the non-binding nature of its acts. Moreover, as regards more particularly the ECN Model Leniency Programme, it is apparent even from its name — a 'model' programme — and from its content that it is of a purely programmatic nature. [17] Indeed, the declared objective of the ECN Model Leniency Programme is to encourage the NCAs to take it into account if and when they adopt and implement a national leniency programme [18] without thereby being obliged to comply with it. [19] In other words, the 2006 ECN Model Leniency Programme is intended to promote, by 'soft-law' means, the voluntary alignment of any Member States' leniency programmes [20] relating to competition.

45. Furthermore, the NCA are not obliged to put in place leniency programmes pursuant to Article 101 TFEU or by virtue of Regulation No 1/2003 or of their obligation of sincere cooperation under Article 4( ) TEU. However, where a Member State establishes a leniency programme, [21] whether or not based on the ECN Model Leniency Programme, it must comply with EU law and ensure that the rules which it lays down or applies do not undermine the effective application of Articles 101 TFEU and 102 TFEU. [22]

46. Finally, pursuant to Article 51(1) thereof, the provisions of the Charter of Fundamental Rights of the European Union ('the Charter') are addressed to the Member States when they implement EU law. It follows that the Member States, including their NCAs, are bound by the provisions of the Charter and general Union principles when they implement Articles 101 TFEU and 102 TFEU. Consequently, when an NCA adopts a leniency programme, which is in principle likely to have legal effects, it must comply with the general principles of EU law, including those of non-discrimination, proportionality, legal certainty, protection of legitimate expectations [23] and entitlement to sound administration. [24]

16 — See paragraph 72 of the Notice on Cooperation within the ECN, which states that '[t]he principles set out in this notice will also be abided by those Member States' competition authorities which have signed a statement in the form of the Annex to this Notice. In this statement they acknowledge the principles of this notice, including the principles relating to the protection of applicants claiming the benefit of a leniency programme and declare that they will abide by them. A list of these authorities is published on the website of the European Commission.' The Autorità is one of the NCAs that signed the statement in question.

17 — I would also observe that the 2006 ECN Model Leniency Programme was not published in series L of the *Official Journal of the European Union*, the purpose of which is to publish legally binding acts, or even in series C of the *Official Journal of the European Union*, which contains non-binding acts such as information, recommendations and opinions concerning the Union. See, by analogy, the judgment in *Expedia* (C-226/11, EU:C:2012:795, paragraph 30). The 2006 ECN Model Leniency Programme can be consulted on the Commission Internet site at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

18 — See paragraph 3 of the 2006 ECN leniency programme, which provides that '[t]he ECN members commit to using their best efforts, within the limits of their competence, to align their respective programmes with the ECN Model Programme. *The ECN Model Programme does not prevent a CA from adopting a more favourable approach towards applicants within its programme*. Paragraph 11 states that '*[t]he ECN Model Programme does not give rise to any legal or other legitimate expectations on the part of any undertaking*.' Emphasis added. See paragraph 4 of the 2009 ECN Report on assessment of the state of convergence, which confirms that '[t]he Model Programme is not a legally binding document. Document available only in English on the Internet site http://ec.europa.eu/competition/ecn/model_leniency_programme.pdf.

19 — See, by analogy, the judgment in *Expedia* (C-226/11, EU:C:2012:795, paragraph 31).

20 — In my opinion, the 2006 ECN Model Leniency Programme constitutes a sort of 'route map' for such leniency programmes as the Member States might adopt in the field of competition. Moreover, if a national programme is based on the 2006 ECN Model Leniency Programme, the model programme may possibly serve as a source of interpretation in accordance with national law.

21 — In paragraph 25 of the judgment in *Pfleiderer* (C-360/09, EU:C:2011:389), the Court held that 'leniency programmes are useful tools if efforts to uncover and bring to an end infringements of competition rules are to be effective and serve, therefore, the objective of effective application of Articles 101 TFEU and 102 TFEU'. See also the judgment in *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraph 42).

22 — See the judgments in *Pfleiderer* (C-360/09, EU:C:2011:389, paragraph 24) and *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraph 27 and the case-law cited).

23 — See, by analogy, the judgment in *Expedia* (C-226/11, EU:C:2012:795, paragraph 28).

24 — The right to sound administration is enshrined in Article 41 of the Charter. According to the case-law of the Court, it is apparent from the wording of Article 41 of the Charter that that article does not apply to the Member States but only to the Union institutions and bodies (see, to that effect, the judgments in *Cicala* (C-482/10, EU:C:2011:868, paragraph 28); *YS and Others* (C-141/12 and C-372/12, EU:C:2014:2081, paragraph 67), and also *Mukarubega* (C-166/13, EU:C:2014:2336, paragraph 44). That said, entitlement to sound administration is a general principle of Union law. Given that, in the main proceedings, the Autorità is implementing Article 101 TFEU, the requirements deriving from the general principle of entitlement to sound administration are applicable. See, to that effect, the judgment in *N.* (C-604/12, EU:C:2014:302, paragraphs 49 and 50).

47. It is apparent from the foregoing that the 2006 ECN Model Leniency Programme is not in any way binding upon NCAs. However, when a Member State adopts a leniency programme, whether or not based on the 2006 ECN Model Leniency Programme, it must comply with EU law and, specifically in the field of competition law, ensure that the rules that it establishes or applies do not undermine the effective application of Articles 101 TFEU and 102 TFEU. Moreover, the Member States, including their NCAs, are governed by the provisions of the Charter and general Union principles when they implement Articles 101 TFEU and 102 TFEU. Consequently, when an NCA adopts a leniency programme, which is in principle likely to have legal effects, that programme must comply with the Charter and the general principles of EU law, including those of non-discrimination, proportionality, legal certainty, protection of legitimate expectations and entitlement to sound administration.

B – *The second question*

48. The second question from the referring court concerns the existence or otherwise of a legal link 'between the main application for immunity that an undertaking has submitted or is about to submit to the Commission and the summary application for immunity submitted by that undertaking to an NCA in respect of the same cartel'. [25]

1. The admissibility of question 2(a)

49. In question 2(a), the referring court is more particularly interested in whether a summary application for immunity submitted to an NCA must be assessed in the light of an application submitted to the Commission, provided that 'the summary application accurately reflects the content of the main application' [26] submitted to the Commission.

50. The French Government considers that question 2(a) is hypothetical and therefore inadmissible. It is said to be apparent from the request for a ruling and from the file before the Court that, in the main proceedings, the summary application for immunity submitted to the Autorità by DHL did not faithfully reflect the content of the application for immunity it had submitted to the Commission.

51. Questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it. [27]

52. It is apparent from the documents before the Court that on 5 June 2007 DHL submitted to the Commission a request for an immunity marker in respect of infringements of Union competition law in the international sea, air and road freight forwarding sectors whereas, according to the contested decision, the summary application submitted by DHL on 12 July 2007 to the Autorità related only to international air and sea freight forwarding and did not concern the sector of international road freight forwarding.

25 — See the terms of the second question submitted by the referring court.

26 — Idem.

27 — Judgment in *Ioannis Katsivardas — Nikolaos Tsitsikas* (C-160/09, EU:C:2010:293, paragraph 27 and the case-law cited).

53. According to the request for a preliminary ruling, DHL contended that its summary application for immunity submitted to the Autorità on 12 July 2007 did not contain actual and specific examples of illicit behaviour in the road sector in Italy solely because, as at that date, they had not yet been discovered. Nevertheless, according to DHL, the Autorità was required, in interpreting the content of its summary application, to take account of its link with the application for immunity submitted to the Commission.

54. The main proceedings arose, at least in part, from that divergence between the scope of the application for immunity submitted by DHL to the Commission and the scope, according to the contested decision, of the summary application submitted by DHL to the Autorità, and from the Commission's decision to pursue only the part of the cartel relating to international air freight forwarding services.

55. In my opinion, it is not clear from the request for a preliminary ruling that that divergence in the assessment of the facts has been definitively settled by the Italian courts. At the hearing on 9 July 2015, the Italian Government also confirmed that, in the appeal procedure, the referring court enjoyed unlimited jurisdiction. Consequently, I consider that the requested interpretation of EU law referred to in question 2(a) is not lacking in utility for the referring court.

2. The substance

56. In my opinion, it is appropriate to answer questions 2(a) and (b) together.

57. DHL contends that a summary application essentially constitutes an 'appendix' to and an anchoring point, at national level, for the main application submitted to the Commission. In its view, to consider the summary application separately from the general context in which it came into being, as the Autorità did in the contested decision, distorts its function. Since the summary application for immunity does not have to give anything more than a brief description of the cartel reported to the Commission, DHL submits that it must be assessed in the light of the main application, provided that it faithfully reflects the content thereof. DHL does not claim that, either formally or substantively, its summary application at national level and its main application at Union level are identical; they are clearly two distinct applications, but they are very closely linked by their nature, given that the summary application for immunity can exist only where there is a main application for immunity.

58. Like all the other parties which have submitted observations, I do not share DHL's position.

a) National law

59. It should be emphasised once more that the 2006 ECN Model Leniency Programme, including paragraph 22 thereof, is not binding on the NCAs and that the Member States are not obliged, under EU law, to put in place a system of summary applications for leniency. However, where an NCA does put in place a system of summary applications, it must, in accordance with my answer to the first question, comply with EU law, in particular Article 101 TFEU, the provisions of the Charter and the general principles of EU law.

60. It is apparent from the documents before the Court that the Autorità has established a system of summary leniency applications which is largely based on the 2006 ECN Model Leniency Programme, in particular paragraph 22 thereof.[28] Moreover, it seems, subject to verification by the referring court, that Article 17 of the Autorità Notice imposes on the applicant for leniency among other things the requirement to 'indicate the goods and services covered by the cartel, its geographic extent and its duration'.

61. Again, subject to verification by the referring court, it appears that the Autorità Notice does not place any obligation on the Autorità 'to contact the Commission, or that undertaking, in order to ascertain whether, following the submission of the summary application, that undertaking has identified, through its internal investigations, actual and specific examples of conduct in the sector purportedly covered by the main application for immunity but not by the summary one'.[29]

62. However, the national court raises more particularly the question whether EU law imposes on an NCA an obligation to assess a summary application for leniency addressed to it in the light of the application for leniency submitted to the Commission 'for the same cartel' and in certain circumstances to contact the Commission or the undertaking itself.

b) Paragraph 38 of the Notice on Cooperation within the ECN

63. In accordance with my answer to the first question, I consider that in addition to the fact that the 2006 ECN Model Leniency Programme is not legally binding on NCAs, it is clear from paragraph 38 of the Notice on Cooperation within the ECN that, in the absence of a centralised and unified leniency system within the Union, an application for leniency addressed to the Commission cannot be regarded as being an application addressed to an NCA.[30]

64. It follows that in Union competition law there is no 'one-stop shop' for the processing of leniency applications or even, as the Commission observed at the hearing on 9 July 2015, automatic exchange of such applications between the NCAs and the Commission under Article 11 of Regulation No 1/2003.

65. To defend its position in the context of a possible procedure initiated by those authorities, the applicant must request leniency from *all* the competition authorities which are competent to apply Article 101 TFEU in the territory affected by the infringement and which may be considered as well placed to take action against such an infringement. In fact, '*it is for the applicant* to take the steps which it considers appropriate to protect its position with respect to possible proceedings by these authorities.'[31]

66. Consequently, paragraph 38 of the Notice on Cooperation within the ECN lays down the principle that the various Commission leniency programmes and those of the NCAs and the applications relating thereto are autonomous and independent.

28 — See Articles 16 to 18 of the Autorità Notice. I would also observe that the Autorità appears on the '[l]ist of authorities accepting summary applications as provided by the ECN Model Leniency Programme in Type 1A cases'. The term 'Type 1A' refers to situations which allow an exemption from any fine. Document available only in English on the Commission Internet site http://ec.europa.eu/competition/ecn/list_of_authorities.pdf.

29 — See the terms of the second question submitted by the national court.

30 — It is apparent from the wording of the second question and the terms it uses: 'notwithstanding the provision made under paragraph 38 of the Commission Notice on Cooperation within the Network of Competition Authorities' that the referring court itself considers that that provision in principle excludes any legal link between an application for immunity submitted by an undertaking or about to be submitted by an undertaking to the Commission and the 'summary application for immunity submitted by that undertaking to an NCA in respect of the same cartel'. Since the 2006 ECN Model Leniency Programme was adopted after the adoption of the Notice on Cooperation within the ECN (2004), I consider that the second question amounts in reality to ascertaining whether the programme in question made any change to paragraph 38 of the Notice on Cooperation within the ECN.

31 — Emphasis added. See paragraph 38 of the Notice on Cooperation within the ECN.

c) Paragraphs 1 and 22 of the 2006 ECN Model Leniency Programme and paragraph 45 of the Explanatory Notes annexed to it

67. I would observe first of all that paragraph 1 of the 2006 ECN Model Leniency Programme provides that 'in a system of parallel competences between the Commission and national competition authorities, an application for leniency to one authority is not to be considered as an application for leniency to another authority. It is therefore in the interest of the applicant to apply for leniency to *all competition authorities* which have competence to apply Article [101 TFEU] … in the territory which is affected by the infringement and which may be considered well placed to act against the infringement in question.' [32]

68. Given that the applicant's obligation to request leniency from all the competent authorities may give rise to multiple leniency applications made at the same time, paragraph 22 of the 2006 ECN Model Leniency Programme advocates a uniform model for summary applications in order to lighten the burden that such multiple applications represent for undertakings and for the NCAs. [33]

69. Paragraph 22 of the 2006 ECN Model Leniency Programme also provides that, where an undertaking has filed or is in the process of filing an application for immunity with the Commission, it may file a summary application briefly setting out specified information with any NCA which the applicant considers might be 'well placed' to act. 'By filing a summary application, the applicant protects its position as the first in the queue with the CA concerned for the alleged cartel.' [34]

70. Moreover, paragraph 22 of the 2006 ECN Model Leniency Programme gives a list of the information which 'should' [35] appear in the summary application. I would observe that that list includes information concerning the scope of the cartel in question and '[i]nformation on its other past or possible future leniency applications in relation to the alleged cartel.'

71. It is apparent from paragraph 45 of the Explanatory notes annexed to the 2006 ECN Model Leniency Programme that the aim of such information is to enable the NCA to decide, first, whether it wishes to take action in the case in question and, second, whether the information furnished enables the competition authority to determine whether the undertaking is in a 'Type 1A' situation [36] as provided for by paragraph 5 of the 2006 ECN Model Leniency Programme.

72. Whilst the submission of a summary application to an NCA presupposes the prior or subsequent filing of an application for immunity with the Commission [37] and whilst the 2006 ECN Model Leniency Programme provides for 'temporary' moderation of the information and evidence to be furnished by an undertaking to an NCA, that programme does not, however, envisage any legal link between the application for immunity submitted to the Commission and the summary application submitted to an NCA. [38]

32 — Emphasis added.

33 — See paragraphs 39 and 40 of the Explanatory Notes annexed to the 2006 ECN Model Leniency Programme. It follows that paragraph 22 of the 2006 ECN Model Leniency Programme confirms the terms of paragraph 38 of the Notice on Cooperation within the ECN.

34 — See paragraph 40 of the Explanatory Notes annexed to the 2006 ECN Model Leniency Programme.

35 — It should be borne in mind that that model programme, including the list in question, is not in my opinion binding on NCAs.

36 — Paragraphs 22 to 25 of the 2006 ECN Model Leniency Programme provide for the submission of summary applications for immunity to NCAs only in 'Type 1A' cases which, according to paragraph 5 of the 2006 ECN Model Leniency Programme, are concerned with the level of assistance given to the NCA by the company submitting the application for leniency.

37 — See paragraph 22 of the 2006 ECN Model Leniency Programme.

38 — As regards the wording of the second preliminary question, it should be noted that the 2006 ECN Model Leniency Programme does not use the term 'main application'. In that regard, I endorse the observation made by the German Government that such a term is not appropriate since it might be construed as meaning that a summary application submitted to an NCA is a type of annex to the application submitted to the Commission.

73. The application filed with the Commission and the summary application submitted to an NCA are in fact autonomous applications since it is clear from paragraph 22 of the 2006 ECN Model Leniency Programme and from the applicant's obligation to provide information, in particular concerning the product or products and territory or territories affected, that it is the responsibility of the applicant alone to correctly define the scope of its summary application.

74. Consequently, if the information to be provided in the summary application in particular concerning the scope of the infringement in question is admittedly reduced, it must be sufficiently precise to ensure protection of the applicant and its place in the order of arrival of immunity applications in circumstances where, as in the main proceedings, the Commission decides not to take action on the basis of the application for immunity submitted to it. In that regard, it should be emphasised that if the scope of the cartel covered by the summary application is not precise enough, the applicant risks losing its place in the order of arrival of leniency applications to the ANC — which seems to be DHL's case according to the contested decision. [39]

75. It follows that, regardless of whether or not the summary application submitted to an NCA faithfully reflects the application for immunity submitted to the Commission, an NCA is not obliged to assess the summary application in the light of the application for immunity submitted to the Commission and that applies even if the NCA has information concerning other leniency applications concerning the same cartel, in accordance with paragraph 22 of the 2006 ECN Model Leniency Programme.

76. Indeed, whilst the Commission and the NCAs may, within the ECN, exchange information gathered, [40] including in the context of leniency applications [41], it is not incumbent upon the NCA [42] in cases where it considers that the material scope of a summary application is narrower than that of the application submitted by the same undertaking to the Commission, 'to contact the Commission, or that undertaking, in order to ascertain whether, following the submission of the summary application, that undertaking has identified, through its internal investigations, actual and specific examples of conduct in the sector purportedly covered by the main application for immunity but not by the summary one'. [43]

77. I consider, like the Austrian Government, that an obligation on the NCAs to verify a summary application with the Commission 'would contradict the declared intention of the authorities meeting in the ECN not to establish a 'one-stop shop' for leniency applications within the European Union and to obtain autonomy for each leniency programme.' In my opinion, the fact that, pursuant to paragraph 22 of the 2006 ECN Model Leniency Programme, the applicant must provide, when submitting its summary application, 'information on its other past or possible future leniency applications in relation to the alleged cartel' does not impose on the NCAs any obligation to verify the summary application with the Commission.

39 — A situation strongly disputed by DHL.

40 — The Italian Government annexed to its written observations an email of 9 July 2008 from the Directorate General for Competition ('DG Comp') addressed to the Autorità. It appears from the email that the Autorità submitted to the Commission, during an ECN meeting, a question concerning the treatment of various leniency applications submitted at that time by DHL to the Commission and the Autorità. In that email, DG Comp confirmed that '[a]pplicants should be aware (and are informed so by the Commission) that any conditional immunity granted by the Commission does not extend to Member States/NCA and a separate application is required. If Company A, in making its application in Italy, has not covered itself fully by omitting road freight forwarding it is quite simply an error on its part'. Contrary to DHL's observations at the hearing, the actual content of that email confirms that despite the power of the Commission and of the NCAs to exchange information within the ECN, it is not incumbent upon an NCA to contact the Commission with regard to various leniency applications. It also confirms, first, the principle of the autonomy and independence of leniency applications submitted to the Commission and leniency applications submitted to NCAs and, second, the fact that it is the responsibility of the applicant alone to correctly define the scope of its (summary) leniency application submitted to an NCA.

41 — See paragraph 25 of the 2006 ECN Model Leniency Programme, paragraph 41(1) of the Notice on Cooperation within the ECN and Articles 11 and 12 of Regulation No 1/2003.

42 — Under the 2006 ECN Model Leniency Programme.

43 — See the terms of the second question.

78. Moreover, the imposition on the NCAs of an obligation to contact the Commission or the undertaking in question in the circumstances described in the second question would run counter not only to the principle of the autonomy and independence of leniency programmes within the Union, but would also be liable to unduly attenuate the duty of cooperation of those seeking leniency, which is one of the pillars of the leniency system. I also consider that any failure in that duty of cooperation is liable to affect the order of arrival recorded for leniency applications and consequently to cause damage to other applicants for leniency in respect of the same cartel — which would amount to a breach of the general principles of EU law, including the principles of non-discrimination, proportionality, legal certainty, protection of legitimate expectations and entitlement to sound administration.

d) Paragraphs 13 and 24 of the 2006 ECN Model Leniency Programme

79. It is clear that the effectiveness of the Commission's and the NCAs' leniency programmes is based in particular on the obligation of a leniency applicant to cooperate with the authorities, pursuant to paragraph 13(2) of the 2006 ECN Model Leniency Programme, 'genuinely, fully and on a continuous basis *from the time of its application* with the CA until the conclusion of the case'.[44]

80. Indeed, according to paragraph 24 of that model programme, an undertaking that has lodged a summary application must, at the request of the NCA, provide supplementary information and, 'should an NCA decide to act upon the case ... the applicant must make a full submission of all relevant evidence and information required to meet the threshold.'

81. I therefore endorse the observations of the French Government, at the hearing, to the effect that it falls solely to the undertaking which has filed a summary application to disclose to the NCA all information relevant to its application. Information provided after filing of the summary application cannot, however, alter the material scope of that application, for example by adding another sector to it,[45] for which it will not then benefit from the same ranking in the order of arrival of leniency applications as for the sectors covered by the summary application.

82. It is clear from the foregoing that EU law does not establish any legal link between an application for immunity submitted by an undertaking or about to be submitted by an undertaking to the Commission and a summary application for immunity submitted by it to an NCA for the same cartel such as to require an NCA, under paragraph 22 of the 2006 ECN Model Leniency Programme and paragraph 45 of the Explanatory notes annexed to the 2006 ECN Model Leniency Programme, to assess the summary immunity application submitted to it in the light of the application submitted or to be submitted to the Commission or to contact the Commission or the undertaking itself, in order to establish whether the latter, after submission of the summary application, has ascertained the existence of actual and specific examples of behaviour in the sector allegedly covered by the application for immunity submitted to the Commission but not covered by the summary application for immunity.

44 — Emphasis added. See paragraph 13(2) of the 2006 ECN Model Leniency Programme.

45 — I would also observe that the principle of the autonomy and independence of leniency applications submitted to the Commission and summary applications submitted to NCAs is emphasised in paragraph 46 of the Explanatory Notes annexed to the 2012 ECN Model Leniency Programme, which provides that 'a summary application should be a *proper summary* of the leniency application submitted at the Commission. Therefore, if a leniency applicant has received a summary application marker from an NCA, and it subsequently provides information and evidence to the Commission which indicates that the alleged cartel is significantly different in scope than reported to the NCAs in its summary applications (for example, it covers an additional product), the applicant should consider updating the NCAs where it has filed summary applications in order to keep the scope of its protection at the NCAs identical to the scope of protection at the Commission.' Emphasis added.

C – *The third question*

83. By its third question, the referring court asks whether, under the 2006 ECN Model Leniency Programme, an NCA may, under its national leniency programme and in respect of a cartel for which a first undertaking has filed or is about to file with the Commission an application for immunity, accept a summary leniency application only from that undertaking or whether it may also accept applications from other undertakings.

1. Admissibility

84. The Italian and the Austrian Governments consider that the third question from the national court is inadmissible because it is concerned not with an interpretation of EU law but with an interpretation of national law, namely the scope of the leniency programme established by the Autorità Notice. Schenker, for its part, considers that the third question would be inadmissible if the Court were to consider that the 2006 ECN Model Leniency Programme is not binding.

85. I consider that the third question is admissible. It should be borne in mind that it is not the responsibility of the Court to rule on the interpretation of national law or assess its effects in the context of proceedings under Article 267 TFEU, that being a task exclusively for the referring court or, where appropriate, the competent national courts. I consider that it is clear from the actual wording of the third question, from the documents before the Court and from the oral argument presented to the Court that the third question is concerned with interpretation of EU law, even if that question also refers to national law, namely the national leniency programme. It is therefore incumbent on the Court, in the present case, to limit its examination to EU law in providing an interpretation which is helpful to the referring court. Moreover, the fact that the 2006 ECN Model Leniency Programme is not, in my opinion, binding does not rule out the applicability of other EU law provisions in the context of the main proceedings.

2. The substance

86. I consider that the third question has arisen because paragraphs 22 to 25 of the 2006 ECN Model Leniency Programme are concerned with the filing of summary applications for immunity with NCAs only in 'Type IA' cases and where the undertaking has submitted or is about to submit an application for immunity to the Commission. [46] It follows that that programme does not provide for summary applications in particular when an undertaking applies only for a reduction of a fine to the Commission and/or to an NCA. The 2012 ECN Model Leniency Programme has considerably widened on this point the circumstances in which a summary application may be filed with an NCA. [47]

87. In that connection, according to DHL, Article 16 of the Autorità Notice allows filing of a summary application only by the undertaking which has already submitted or is about to submit to the Commission an application for non-imposition of penalties. It considers that it follows from that provision that the only permitted summary application is an application for immunity and that, in the circumstances of the main proceedings, the summary applications from Schenker and Agility did not meet that condition and they could not therefore protect their position at national level by submitting summary applications to the Autorità. DHL adds that, given that it filed an application for immunity with the Commission, 'the other undertakings which subsequently offered their cooperation to the

46 — Indeed, according to paragraph 46 of the Explanatory Notes annexed to the 2006 ECN Model Leniency Programme, 'the ECN Model Programme only provides for the filing of summary applications in Type 1A cases'. Also, according to that paragraph, 'summary applications in Type 1B and Type 2 cases are neither necessary nor always practicable'.

47 — According to paragraph 42 of the Explanatory Notes annexed to the 2012 ECN Model Leniency Programme, '[s]ummary applications will be possible irrespective of the applicant's position(s) in the leniency queue at the Commission and the NCA, i.e. in Type 1A, Type 1B and Type 2 applications'.

Commission — such as Schenker and Agility, in this case — might possibly protect their position at national level only by submitting to the NCA concerned main applications for reduction of fines, given that ... that reduction could not be lodged in summary form at that time. It follows, therefore, that the submission of proper leniency applications to the [Autorità] by Schenker and Agility must be correctly dated with the date of perfection of the respective summary applications — that is to say 11 June 2009 in the case of Schenker and 11 January 2010 in the case of Agility. In both cases, that date is later than 23 June 2008, the date of DHL's submission of the supplementary summary applications which, according to the [Autorità], contained the first and only application for favourable treatment for the appellant companies in the main proceedings regarding the international road freight forwarding sector'. [48]

88. It must be borne in mind that neither the 2006 ECN Model Leniency Programme nor indeed the 2012 ECN Model Leniency Programme is binding on NCAs. Moreover, whilst it is true that the 2006 ECN Model Leniency Programme provides for the filing of summary immunity applications to NCAs only in 'Type IA' cases, it is clear from paragraph 3 of the 2006 ECN Model Leniency Programme that this 'does not prevent' an ANC from adopting a more favourable approach towards undertakings which seek leniency under its programme.

89. I consider therefore that an NCA may make provision in its leniency programme for a system of summary applications that is not based on the 2006 ECN Model Leniency Programme or on the 2012 ECN Model Leniency Programme, provided, however, that that system complies with the general principles of EU law, including the principles of non-discrimination, proportionality, legal certainty, protection of legitimate expectations and entitlement to sound administration.

90. The Italian Government indicated in its written observations [49] that the Autorità's leniency programme did not at the time material to the main proceedings expressly provide for the possibility of the Autorità 'accepting a summary application submitted following a main application simply for reduction of a penalty'. It considers, however, that that did not infringe any provision or any principle of EU law, given that the 2006 ECN Model Leniency Programme is not a legally binding document for NCAs and that, in any event, it is that programme itself which considers the widest participation of undertakings in the leniency system to be desirable. [50]

91. According to DHL, paragraph 16 of the Autorità Notice at the material time was clear and allowed the filing of a summary application by an undertaking which had already submitted or was preparing to submit to the Commission an application for non-imposition of penalties'. It considers that 'the acceptance, by the [Autorità] of applications for immunity submitted in summary form by Schenker and Agility without fulfilment of the conditions referred to [in paragraph 16 of the Autorità Notice] constituted… a veritable misuse of procedure .... In December 2007, when Schenker submitted its summary application, the Commission had already granted DHL conditional immunity three months earlier (for the three market sectors at issue). … Without fulfilment of the fundamental condition allowing summary applications, there could not be any interpretative doubt whatsoever and the applications for immunity from Schenker and Agility were inadmissible'. [51]

48 — See paragraph 26 of DHL's observations.

49 — See paragraph 77.

50 — It observes that paragraph 8 of the Explanatory Notes annexed to the 2006 ECN Model Leniency Programme expressly provides for 'the possibility for a CA to add further detailed provisions which suit its own enforcement system or to provide for a more favourable treatment of its applicants if it considers it to be necessary in order to ensure effective enforcement'.

51 — DHL adds that 'Schenker and Agility asked the Commission for favourable treatment on 5 and 20 November 2007 — that is to say not less than five months after the application from DHL to the Commission and even after the inspections conducted by the latter, in particular in Italy — and, at the time of their application to the Commission, they had already been informed that conditional immunity had already been granted to another undertaking. Therefore, since the 'summary' applications from Schenker and Agility to the [Autorità] were linked to ordinary applications for reduction of fines to the Commission, they could only have given rise to a reduction at national level as well. However, as they had been formulated as applications for immunity, they should not even have been placed in the [Autorità]'s investigative file.'

92. Schenker also considers that, by virtue of its notice, the Autorità could accept summary applications from undertakings which had submitted to the Commission an application for the reduction of fines. It considers that the only condition referred to in paragraph 16 of the Autorità Notice applicable *ratione temporis* in the main proceedings was that an undertaking which intended submitting a 'summary' leniency application should have '*already submitted or be about to submit an application for immunity to the Commission ...*'. 'Since any undertaking which had not yet submitted an immunity application to the Commission cannot by definition know whether it will be 'the first in chronological order' in relation to the infringement which it seeks to report (that is to say, whether its immunity application will be 'accepted'), the fact that another undertaking has already sought immunity from the Commission for the same infringement and/or that it has already obtained the relevant conditional immunity is of no importance and cannot undermine the right of the undertaking in question also to submit to the [Autorità] (or to another NCA) an application for leniency in 'summary' form'. [52]

93. Agility adds that 'it can easily be inferred from the wording of the national leniency programme that it is possible for [the Autorità] to receive more than one summary application. Article 16 of the national rules and [paragraph 22 of the 2006 ECN Model Leniency Programme] provide for the possibility of submitting a summary application for an undertaking 'that has [filed] or is in the process of filing an application for immunity with the Commission'. Since it is the mere intention to submit a leniency application (and not actual submission) which is important and it precedes knowledge by the undertaking of its order of arrival (and a possible grant of conditional immunity), the wording of [paragraph 22 of the 2006 ECN Model Leniency Programme and Article 16 of the Autorità Notice] manifestly accepts that several undertakings find themselves in the same situation, so that their summary applications are each admissible'. [53]

94. Whilst it is beyond doubt that the possible adoption of national leniency rules and the application thereof are matters for the Member States and that they may adopt a more favourable approach towards undertakings which seek leniency under their own leniency programmes than the approach provided for by the 2006 ECN Model Leniency Programme, subject to due compliance with EU law, in particular Article 101 TFEU, the provisions of the Charter and the general principles of EU law, [54] it is nevertheless apparent from the observations submitted to the Court that there is real uncertainty as to the meaning and/or scope of the Autorità Notice.

95. It is consequently a matter for the referring court to determine the meaning and scope of that notice in order to ascertain whether the Autorità actually departed from it and, if so, whether by so doing it infringed EU law, in particular the general principles of law. In that regard, the referring court must in particular verify in the main proceedings whether equal treatment for all leniency applicants and entitlement to sound administration have been respected and whether legitimate expectations have been protected.

V – **Conclusion**

96. In the light of the foregoing considerations, I propose that the Court should reply as follows to the questions referred to it for a preliminary ruling by the Consiglio di Stato:

(1) The 2006 ECN Model Leniency Programme has no binding effect on the competition authorities (NCAs) in the Member States. However, when a Member State adopts a leniency programme, whether or not based on the 2006 ECN Model Leniency Programme, it must comply with EU

52 — See paragraphs 58 to 60 of Schenker's observations.

53 — See paragraph 63 of Agility's observations.

54 — See, by analogy, the judgments in *Pfleiderer* (C-360/09, EU:C:2011:389, paragraph 24) and *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraph 27 and the case-law cited).

law and, specifically in the field of competition law, ensure that the rules that it establishes or applies do not undermine the effective application of Articles 101 TFEU and 102 TFEU. Moreover, the Member States, including their NCAs, are bound by the provisions of the Charter of Fundamental Rights of the European Union and the general principles of EU law when they implement Articles 101 TFEU and 102 TFEU. Consequently, when an NCA adopts a leniency programme, which is in principle capable of having legal effects, that programme must comply with the Charter and the general principles of EU law, including the principles of non-discrimination, proportionality, legal certainty, protection of legitimate expectations and entitlement to sound administration.

(2) EU law does not establish, between an application for immunity submitted or about to be submitted by an undertaking to the European Commission and a summary application for immunity which it submitted to an NCA in respect of the same cartel, any legal link whereby an NCA would be bound, under paragraph 22 of the 2006 ECN Model Leniency Programme and paragraph 45 of the Explanatory Notes annexed to the 2006 ECN Model Leniency Programme, to appraise the summary application for immunity submitted to it in the light of the application submitted or to be submitted to the Commission or to contact the Commission or the undertaking itself in order to establish whether the latter, after filing the summary application, has ascertained the existence of actual and specific examples of conduct in the sector allegedly covered by the application for immunity submitted to the Commission but not covered by the summary application.

(3) The Member States may adopt a more favourable approach towards undertakings which seek leniency under their own leniency programmes than the approach provided for in the 2006 ECN Model Leniency Programme, subject to due compliance with EU law, in particular Article 101 TFEU, the provisions of the Charter and the general principles of EU law.