Reports of Cases

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

30 March 2022 *

(Competition – Agreements, decisions and concerted practices – Market for airfreight – Decision finding an infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport – Coordination of elements of the price of airfreight services (fuel surcharge, security surcharge, payment of commission on surcharges) – Exchange of information – Territorial jurisdiction of the Commission – Rights of the defence – Equality of arms – Article 266 TFEU – State coercion – Single and continuous infringement – Amount of the fine – Value of sales – Gravity of the infringement – Duration of participation in the infringement – Mitigating circumstances – Substantially limited involvement – Aggravating circumstances – Repeated infringement – Unlimited jurisdiction)

In Case T-324/17,

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

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

SAS AB, established in Stockholm,

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

applicants,

v

European Commission, represented by A. Dawes and C. Vollrath, acting as Agents, and by B. Doherty, Barrister,

defendant,

APPLICATION under Article 263 TFEU seeking, in essence, annulment of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) in so far as it relates to the applicants and, in the alternative, a reduction of the amount of the fine imposed on them,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

* Language of the case: English.

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

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure and further to the hearing on 11 July 2019,

gives the following

Judgment

I. Background to the dispute

1 The applicants, SAS Cargo Group A/S ('SAS Cargo'), Scandinavian Airlines System Denmark-Norway-Sweden ('SAS Consortium') and SAS AB, are active in the market for airfreight ('freight'). SAS Cargo, which offers freight services, is an indirectly wholly owned subsidiary of SAS. Until 1 June 2001, SAS Cargo did not exist as a separate legal entity, but was a business unit within SAS Consortium. SAS Consortium is owned by SAS.

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

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

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

A. Administrative procedure

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

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

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

6 On 14 and 15 February 2006, the Commission carried out unannounced inspections at the premises of various carriers pursuant to Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU] (OJ 2003 L 1, p. 1).

7 Following the inspections, a number of carriers, including SAS Cargo and SAS Consortium, submitted an application under the 2002 notice referred to in paragraph 5 above.

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

9 In response to the Statement of Objections, the addressees submitted written observations.

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

B. The Decision of 9 November 2010

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

– Air Canada;

– Air France-KLM ('AF-KLM');

– Société Air France ('AF');

– Koninklijke Luchtvaart Maatschappij NV ('KLM');

– British Airways plc;

– Cargolux Airlines International SA ('Cargolux');

– Cathay Pacific Airways Ltd ('CPA');

– Japan Airlines Corp.;

– Japan Airlines;

– Lan Airlines SA;

– Lan Cargo SA;

– Lufthansa Cargo;

– Lufthansa;

– Swiss;

– Martinair Holland NV ('Martinair');

– Qantas Airways Ltd ('Qantas');

– SAS;

– SAS Cargo;

– SAS Consortium;

– SAC;

– Singapore Airlines Ltd ('SIA').

12 The objections raised provisionally against the other addressees of the Statement of Objections were abandoned ('the non-incriminated carriers').

13 The grounds of the Decision of 9 November 2010 described a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement, covering the territory of the EEA and of Switzerland, by which the carriers incriminated in the Decision of 9 November 2010 had coordinated their behaviour as regards the pricing of freight services.

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

'Article 1

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

…

j) SAS … from 17 August 2001 until 14 February 2006;

k) [SAS Cargo] from 1 June 2001 until 14 February 2006;

l) [SAS Consortium] from 13 December 1999 until 28 December 2003;

…

Article 2

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

…

q) SAS … from 1 May 2004 until 14 February 2006;

r) [SAS Cargo] from 1 May 2004 until 14 February 2006;

…

Article 3

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

…

o) SAS … from 19 May 2005 until 14 February 2006;

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

…

Article 4

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

…

j) SAS … from 1 June 2002 until 14 February 2006;

k) [SAS Cargo] from 1 June 2002 until 14 February 2006;

l) [SAS Consortium] from 1 June 2002 until 28 December 2003.

…

Article 5

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

…

o) [SAS Consortium]: EUR 5 355 000;

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

q) [the applicants] jointly and severally: EUR 5 265 750;

r) [SAS Cargo] and SAS … jointly and severally: EUR 32 984 250;

s) [SAS Cargo]: EUR 22 308 250;

…

Article 6

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

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

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

15 By application lodged at the Registry of the General Court on 25 January 2011, the applicants brought an action seeking annulment of the Decision of 9 November 2010 in so far as the decision concerned them or, in the alternative, reduction of the amount of the fines imposed on them. The other carriers incriminated in the Decision of 9 November 2010, with the exception of Qantas, also brought actions against that decision before the Court.

16 By judgments of 16 December 2015, *Air Canada* v *Commission* (T-9/11, not published, EU:T:2015:994), *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-28/11, not published, EU:T:2015:995), *Japan Airlines* v *Commission* (T-36/11, not published, EU:T:2015:992), *Cathay Pacific Airways* v *Commission* (T-38/11, not published, EU:T:2015:985), *Cargolux Airlines* v *Commission* (T-39/11, not published, EU:T:2015:991), *Latam Airlines Group and Lan Cargo* v *Commission* (T-40/11, not published, EU:T:2015:986), *Singapore Airlines and Singapore Airlines Cargo Pte* v *Commission* (T-43/11, not published, EU:T:2015:989), *Deutsche Lufthansa and Others* v *Commission* (T-46/11, not published, EU:T:2015:987), *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), *Air France-KLM* v *Commission* (T-62/11, not published, EU:T:2015:996), *Air France* v *Commission* (T-63/11, not published, EU:T:2015:993) and *Martinair Holland* v *Commission* (T-67/11, EU:T:2015:984), the Court annulled, in whole or in part, the Decision of 9 November 2010 in so far as it concerned, respectively, Air Canada, KLM, Japan Airlines and Japan Airlines Corp., CPA, Cargolux, Latam Airlines Group, SA (formerly Lan

Airlines) and Lan Cargo, SAC and SIA, Lufthansa, Lufthansa Cargo and Swiss, British Airways, the applicants, AF-KLM, AF and Martinair. The Court held that that decision was vitiated by a defective statement of reasons.

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

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

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

20 In the third place, after noting that neither of the two possible readings of the operative part of the Decision of 9 November 2010 was consistent with the grounds thereof, the Court considered whether, in the context of at least one of those two possible readings, the internal contradictions of that decision were likely to undermine the applicants' rights of defence and prevent the Court from conducting its review. As regards the first reading, namely that there were four separate single and continuous infringements, first of all, the Court held that the applicants had not been in a position to understand to what extent the evidence set out in the grounds and relating to the existence of a single and continuous infringement was liable to establish the existence of the four separate infringements found in the operative part, or to contest the sufficiency of that evidence. Secondly, it held that the applicants had not been able to understand the line of reasoning that had led the Commission to find them liable for an infringement, including in respect of routes which they did not operate within the parameters defined by each article of the Decision of 9 November 2010.

D. The contested decision

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

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

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

– Air Canada;

– AF-KLM;

– AF;

– KLM;

– British Airways;

– Cargolux;

– CPA;

– Japan Airlines;

– Latam Airlines Group;

– Lan Cargo;

– Lufthansa Cargo;

– Lufthansa;

– Swiss;

– Martinair;

– SAS;

– SAS Cargo;

– SAS Consortium;

– SAC;

– SIA.

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

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

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

27 According to recital 109 of the contested decision, the objective of the coordinated application of the FSC was to ensure that carriers throughout the world imposed a flat-rate surcharge per kilo for all relevant shipments. A complex network of mainly bilateral contacts among carriers was established to coordinate and monitor the application of the FSC, the precise date of application often, according to the Commission, being decided at local level usually with the principal local carrier taking the lead and others following. That coordinated approach was extended to the SSC and to the refusal to pay commission, with the result that the latter became net revenue for the carriers and created an additional incentive for them to continue with the coordination relating to the surcharges.

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

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

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

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

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

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

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

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

34 In the third place, in Section 4.6 of the contested decision, the Commission carried out the assessment of the contacts at issue. The assessment of the evidence relied on against the applicants is set out in recitals 790 to 792 of the contested decision.

35 In the fourth place, in Section 5 of the contested decision, the Commission applied Article 101 TFEU to the facts of the case, while stating, in footnote 1289 to that decision, that the considerations adopted applied also to Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement. Thus, first, in recital 846 of that decision, the Commission found that the incriminated carriers had coordinated their conduct or influenced price setting, which 'ultimately [amounted] to price fixing with regard to' the FSC, the SSC and the payment of commission on surcharges. In recital 861 of that decision, the Commission described the 'overall scheme to coordinate the pricing behaviour for [freight] services', the investigation of which had revealed the existence of a 'complex infringement consisting of

various actions which [could] be either classified as an agreement or concerted practice, within which the competitors knowingly substituted practical cooperation between them for the risks of competition'.

36 Secondly, in recital 869 of the contested decision, the Commission found that the 'conduct in question [constituted] a single and continuous infringement of Article 101 of the TFEU'. It thus found in that the arrangements at issue pursued a single anticompetitive aim of distorting competition in the freight sector within the EEA, including when coordination took place at local level and experienced local variations (recitals 872 to 876), concerned a 'single product/service', namely 'the provision of [freight] services and the pricing thereof' (recital 877), concerned the same undertakings (recital 878), were of a single nature (recital 879) and related to three elements, namely the FSC, the SSC and the refusal to pay commission, which were 'frequently discussed side by side in the same competitor contact' (recital 880).

37 In recital 882 of the contested decision, the Commission added that the applicants were involved in two of the three elements of the single infringement, namely the FSC and the SSC, but that 'given their involvement in the other elements of the infringement they could have reasonably foreseen exchanges between the parties on such a related matter as commissioning on surcharges and were prepared to take the risk'.

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

39 Fourthly, in recitals 885 to 890 of the contested decision, the Commission examined the relevance of contacts in third countries and of contacts concerning routes which the carriers had never operated or which they could not legally have operated. It considered that, given the worldwide nature of the cartel at issue, those contacts were relevant to establishing the existence of the single and continuous infringement. In particular, it found that the surcharges were measures of general application that were not route-specific but were intended to be applied on all routes, on a worldwide basis, including routes to and from the EEA and Switzerland. It stated that the refusal to pay commission was equally general in nature. In addition, the Commission considered that there were no insurmountable barriers that prevented carriers from providing freight services on routes which they had never operated or which they could not legally have operated, in particular because of the agreements which they were able to conclude between themselves.

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

41 Sixthly, in recitals 922 to 971 of the contested decision, the Commission examined the WOW alliance. In recital 971 of that decision, it concluded that:

'Having regard to the WOW Alliance Agreement and its implementation the Commission finds that the coordination of the surcharges between the WOW [alliance] members was conducted outside the legitimate framework of the alliance that does not justify it. The members were in fact aware that such coordination is illegitimate. Furthermore, they were aware that, the coordination of surcharges involved a number of [carriers] not participating in [the WOW

alliance]. Consequently, the Commission finds that the evidence concerning contacts between WOW [alliance] members … constitutes evidence of their participation in the infringement of Article 101 of the TFEU as described in this Decision.'

42 Seventhly, in recitals 972 to 1021 of the contested decision, the Commission examined the legislation of seven third countries, which a number of the incriminated carriers maintained had required them to collude on surcharges, thereby impeding the application of the relevant competition rules. The Commission considered that those carriers had failed to prove that they had acted under coercion from those third countries.

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

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

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

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

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

> '(1043) In the case of [inbound freight services], Article 101 of the TFEU and Article 53 of the EEA Agreement are applicable because the service itself that is the subject of the price fixing infringement is to be performed and is indeed performed, in part, within the territory of the EEA. Moreover, many contacts by which the addressees coordinated surcharges and the non-payment of commission took place in the EEA or involved participants in the EEA.
>
> (1044) … the example given in the [Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (OJ 2008 C 95, p. 1)] is not relevant here. [That notice] relates to the geographic allocation of turnover of undertakings for the purpose of establishing whether the turnover thresholds of Article 1 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [(OJ 2004 L 24, p. 1)] are met.
>
> (1045) In addition, anti-competitive practices in third countries with regard to … freight transportation to the EU/EEA are liable to have immediate, substantial and foreseeable effects within the EU/EEA, as the increased costs of air transport to the EEA, and consequently higher prices of imported goods, are by their very nature liable to have effects on consumers in the EEA. In this case the anti-competitive practices eliminating competition between carriers offering [inbound freight services] were liable to have such effects also on the provision of [freight] services by other carriers within the EEA, between the different hub airports used by carriers from third countries in the EEA and airports of destination of those shipments in the EEA to which the carrier from the third country does not fly.
>
> (1046) Finally, it has to be underlined that the Commission has found a world-wide cartel. The cartel was implemented globally and the cartel arrangements concerning inbound routes formed an integral part of the single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement. The cartel arrangements were in many cases organised centrally and the local staff were merely implementing them. The uniform application of the surcharges on a world wide scale was a key element of the cartel.'

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

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

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

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

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

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

48 In so far as the applicants are concerned, the Commission found that the duration of the infringement was from 13 December 1999 to 14 February 2006.

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

50 As regards, in particular, its determination of the amount of the fines, the Commission stated that it took into account the gravity and duration of the single and continuous infringement as well as possible aggravating and mitigating circumstances. To that end, it applied the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines').

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

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

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

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

– in so far as concerned intra-EEA routes, for SAS, SAS Cargo and SAS Consortium respectively: from 17 August 2001 to 14 February 2006, from 1 June 2001 to 14 February 2006 and from 13 December 1999 to 28 December 2003, equating to four years and five months, four years and eight months and four years and giving rise to multipliers of $4\frac{5}{12}$, $4\frac{8}{12}$ and 4 respectively;

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

– in so far as concerned EU-Switzerland routes, for SAS, SAS Cargo and SAS Consortium respectively: from 1 June 2002 to 14 February 2006, from 1 June 2002 to 14 February 2006 and from 1 June 2002 to 28 December 2003, equating to three years and eight months, three years and eight months and one year and six months and giving rise to multipliers of $3\frac{8}{12}$, $3\frac{8}{12}$ and $1\frac{6}{12}$ respectively;

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

55 In recital 1219 of the contested decision, the Commission found that, given the specific circumstances of the case and taking into account the criteria mentioned in paragraph 53 above, the additional amount should be set at 16% of the value of sales. In recitals 1221, 1223 and 1227 to 1229 of that decision, the Commission stated that that additional amount should be divided between SAS, SAS Cargo and SAS Consortium in such a way as to reflect the duration of the participation of each of those entities in the single and continuous infringement.

56 Consequently, in recitals 1240 to 1242 of the contested decision, the basic amount of the fine to be imposed on SAS, SAS Cargo and SAS Consortium was assessed, respectively, at EUR 106 000 000, EUR 108 000 000, and EUR 14 000 000, which was reduced to EUR 60 000 000, EUR 61 000 000 and EUR 14 000 000, respectively, after a reduction of 50% on the basis of point 37 of the 2006 Guidelines ('the general 50% reduction') to reflect the fact that part of the services relating to inbound routes and outbound routes from the EEA to third countries ('outbound routes') was performed outside the territory covered by the EEA Agreement and that part of the harm was therefore likely to have occurred outside that territory.

57 In recitals 1243 to 1245 of the contested decision, in accordance with point 28 of the 2006 Guidelines, the Commission imposed on SAS Cargo and on SAS Consortium an increase of 50% in the basic amount of the fine for repeated infringement.

58 In recitals 1258 and 1259 of the contested decision, in accordance with point 29 of the 2006 Guidelines, on account of their limited involvement in the single and continuous infringement, the Commission granted the applicants, on account of mitigating circumstances, a reduction of 10% of the basic amount of the fine.

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

60 By contrast, in recitals 1268 and 1271 of the contested decision, the Commission rejected the applicants' argument that they could derive a legitimate expectation as to the limits of the Commission's territorial jurisdiction to find an infringement of the competition rules from a decision of the Danish competition authority of 2002.

61 Consequently, in recital 1293 of the contested decision, the Commission set the basic amount of the fines of SAS, SAS Cargo and SAS Consortium, after adjustment, at EUR 45 000 000, at EUR 76 250 000 and at EUR 17 500 000, respectively.

62 In recitals 1347 to 1354 of the contested decision, the Commission took account of the applicants' contribution in the context of their leniency application and applied a reduction of 15% to the fine, with the result that, as stated in recital 1404 of the contested decision, the amount of the fine imposed on SAS, SAS Cargo and SAS Consortium was set at EUR 38 250 000, EUR 64 812 500 and EUR 14 875 000 respectively.

63 The operative part of the contested decision, in so far as the present dispute is concerned, reads as follows:

'Article 1

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

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

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

…

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

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

…

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

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

…

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

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

…

Article 2

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

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

Article 3

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

…

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

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

(p) [the applicants] jointly and severally: EUR 5 265 750;

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

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

…

Article 4

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

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

Article 5

This Decision is addressed to:

…

[the applicants]

…'

II. Procedure and forms of order sought

64 By application lodged at the Registry of the General Court on 29 May 2017, the applicants brought the present action.

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

66 The applicants lodged their reply at the Court Registry on 8 January 2018.

67 The Commission lodged its rejoinder at the Court Registry on 1 March 2018.

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

69 On 25 June 2019, in the context of the measures of organisation of procedure laid down in Article 89 of the Rules of Procedure, the Court put written questions to the parties. The parties replied within the prescribed period.

70 At the hearing on 11 July 2019, the parties presented oral argument and answered the questions put by the Court. Following the hearing, the applicants were requested to adduce the agreement relating the WOW alliance and an air services agreement ('ASA'). They complied with that request within the prescribed period.

71 The oral part of the procedure was closed on 18 July 2019.

72 By order of 7 January 2021, the Court (Fourth Chamber, Extended Composition), considering that it lacked sufficient information and that it was necessary to invite the parties to submit their observations on an argument which had not been debated between them, ordered the reopening of the oral part of the procedure pursuant to Article 113 of the Rules of Procedure.

73 The Commission replied, within the time limit set, to a series of questions put by the Court on 12 January, 2 March and 12 April 2021. The applicants submitted their observations on the replies of the Commission on 14 May 2021.

74 By decision of 26 July 2021, the Court again closed the oral part of the procedure.

75 The applicants claim that the Court should:

– adopt a measure of organisation of the procedure or a measure of inquiry ordering the Commission to grant them access to the entire case file, or adopt such other measure as the Court deems necessary;

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

– in the alternative, reduce the amount of the fine imposed on them in the contested decision;

– order the Commission to pay the costs.

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

– dismiss the action;

– alter the amount of the fine imposed on the applicants by withdrawing the benefit of the general 50% reduction and the general 15% reduction, should the Court find that the turnover from the sale of inbound freight services could not be included in the value of sales;

– order the applicants to pay the costs.

III. Law

77 In their action, the applicants put forward both a claim for annulment of the contested decision and a claim for a reduction in the amount of the fine imposed on them. The Commission, for its part, made an application seeking, in essence, an alteration of the amount of the fine imposed on the applicants, should the Court find that the turnover from the sale of inbound freight services could not be included in the value of sales.

A. The claim for annulment

78 The applicants put forward five pleas in law in support of their claim for annulment. Those pleas are as follows:

– The first alleges infringement of the rights of the defence and the principle of equality of arms, in so far as they were refused access to evidence, both inculpatory and exculpatory;

– The second alleges infringement of the right to be heard and a lack of jurisdiction on the part of the Commission, first, to apply Article 101 TFEU and Article 53 of the EEA Agreement to inbound freight services and, secondly, to apply Article 53 of the EEA Agreement to freight services provided on routes between Switzerland and the three EEA Member States that are not EU Member States, namely Iceland, the Principality of Liechtenstein and the Kingdom of Norway ('non-EU EEA-Switzerland routes');

– The third alleges an error of assessment of the conduct in which the applicants were involved and the finding that that conduct proved their participation in, or awareness of, the single and continuous infringement;

– The fourth alleges infringement of Article 266 TFEU, of the second paragraph of Article 296 TFEU and of Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), in so far as the contested decision is vitiated by internal inconsistencies;

– The fifth, submitted in the alternative, alleges errors in the determination of the amount of the fine imposed on the applicants.

1. The first plea in law, alleging infringement of the rights of the defence and the principle of equality of arms, in so far as they were refused access to evidence, both inculpatory and exculpatory

79 The applicants submit that the Commission infringed their rights of defence and the principle of equality of arms by refusing them access to relevant evidence, in particular evidence received by the Commission after the Statement of Objections was sent. The evidence in question is inculpatory and exculpatory evidence contained, first, in the replies of other addressees of the

Statement of Objections and in the documents accompanying those replies, secondly, in the submissions made to the Court by other carriers in their actions for the annulment of the Decision of 9 November 2010 and, thirdly, in the documents underlying the Commission's statement about the WOW alliance in its decision of 4 July 2005 in Case COMP/M.3770 – Lufthansa/Swiss.

80 As regards the inculpatory evidence that was not communicated to them and on which the Commission relied in the contested decision, the applicants submit that that evidence should be disallowed, in particular, certain documents concerning the regulatory framework applicable in Hong Kong, Japan, India, Thailand, Singapore, South Korea and Brazil.

81 As regards the exculpatory evidence, the applicants maintain that the evidence obtained by the Commission after notification of the Statement of Objections is likely to be exculpatory, since, objectively, it is linked to the objections formulated against them and might have been useful for their defence. Without having access to those documents, it is impossible for the applicants to know their contents. The applicants nevertheless suggest certain aspects of the case to which that evidence might relate, namely their conduct in the context of alliances; vertical capacity supply relationships between Lufthansa and other carriers; conduct in third countries that involved the applicants; internal speculation on the part of other carriers concerning public information regarding the applicants; disparate local conduct at issue and conduct at issue that did not involve the applicants.

82 The applicants add that it is their prerogative, not the prerogative of the Commission, to decide whether or not particular information is liable to be useful for their defence.

83 In support of their plea, the applicants rely on, inter alia, the judgments of 25 October 2011, *Solvay* v *Commission* (C-109/10 P, EU:C:2011:686), and of 29 June 1995, *Solvay* v *Commission* (T-30/91, EU:T:1995:115), and on Articles 41 and 47 of the Charter and Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'). In their observations on the Commission's replies to the Court's written questions of 12 April 2021, they also rely on the judgment of 25 July 2019 of the European Court of Human Rights, *Rook v. Germany* (CE:ECHR:2019:0725JUD000158615, §§ 58 and 59). According to the applicants, that judgment reaffirms the principle of the equality of arms, as resulting from the judgment of 29 June 1995, *Solvay* v *Commission* (T-30/91, EU:T:1995:115), and confirms that any limitation on the disclosure of documents that may be relevant must be strictly necessary to protect the fundamental rights of a third party or to safeguard an important public interest.

84 Furthermore, the applicants request the Court to adopt a measure of organisation of the procedure or a measure of inquiry ordering the Commission to give them access to the entire case file. At the hearing, the applicants amended their request, first, by limiting its scope to the replies to the Statement of Objections and the annexes thereto and, secondly, by extending it to the observations and documents submitted before the Court by the other incriminated carriers in their respective actions against the Decision of 9 November 2010.

85 The Commission disputes the applicants' arguments.

86 The Commission argues that the applicants have been given access to all the evidence to which they are entitled and that they are merely speculating when they claim that there might be additional exculpatory evidence on the file.

87 The Commission also argues that it carefully examined the applicants' requests for access to documents. The applicants are not entitled to have access to all the replies of other carriers to the Statement of Objections. The Commission is required to disclose such material to the applicants only to the extent that it contains new inculpatory or exculpatory evidence or is essential in order to enable them to dispute the figures used by the Commission in the Statement of Objections.

88 The Commission disputes the applicants' allegations concerning the aspects of the dispute in respect of which they were denied access to exculpatory evidence.

89 Lastly, the Commission objects to the measures of organisation of procedure or investigation requested by the applicants. The Commission considers it disproportionate, on the ground, inter alia, that the applicants have failed to provide any evidence to show that the documents in question would have been useful for the purposes of the proceedings.

90 In that regard, it must be noted that respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that there has been an infringement of the Treaty (judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 66).

91 A corollary of the principle of protection of the rights of the defence, the right of access to the file means that the Commission must give the undertaking concerned the opportunity to examine all the documents in the investigation file which may be relevant for its defence. Those documents include both incriminating evidence and exculpatory evidence, save where the business secrets of other undertakings, the internal documents of the Commission or other confidential information are involved (judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 68).

92 In that respect, it should be recalled that it is not until the beginning of the *inter partes* administrative stage that the undertaking concerned is informed, by means of the notification of the Statement of Objections, of all the essential evidence on which the Commission relies at that stage of the procedure and that that undertaking has a right of access to the file in order to ensure that its rights of defence are effectively exercised. Consequently, the other parties' replies to the Statement of Objections are not, in principle, included in the documents of the investigation file that the parties may consult (judgment of 30 September 2009, *Hoechst* v *Commission*, T-161/05, EU:T:2009:366, paragraph 163).

93 However, 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 101(1) TFEU, the other parties involved in that proceeding must be placed in a position in which they can express their views on such evidence. In such circumstances the passage in question or the document annexed thereto constitutes inculpatory evidence against the various parties alleged to have participated in the infringement (see judgment of 30 September 2009, *Hoechst* v *Commission*, T-161/05, EU:T:2009:366, paragraph 164 and the case-law cited).

94 According to the case-law, extracts from replies to the statement of objections constitute inculpatory evidence where the Commission uses them in the contested decision to support an objection which it alleges against the undertaking concerned (see, to that effect, judgment of 8 July 2008, *BPB* v *Commission*, T-53/03, EU:T:2008:254, paragraph 54).

95 Conversely, extracts from replies to the statement of objections that the Commission cites in the contested decision in order to summarise and respond to an argument put forward by an addressee of the statement of objections during the administrative procedure cannot be regarded as inculpatory evidence (see, to that effect, judgment of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 391).

96 It is for the undertaking concerned, as the case may be, to show that the result at which the Commission arrived in its decision might 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 inculpatory evidence (see, to that effect, judgment of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraphs 78 and 79; see also judgment of 30 September 2009, *Hoechst* v *Commission*, T-161/05, EU:T:2009:366, paragraph 165 and the case-law cited).

97 Where an exculpatory document has not been communicated, the undertaking concerned must only establish that its non-disclosure was able to influence, to its disadvantage, the course of the proceedings and the content of the decision of the Commission (see judgment of 30 September 2009, *Hoechst* v *Commission*, T-161/05, EU:T:2009:366, paragraph 166 and the case-law cited), or that it could have harmed or rendered more difficult the defence of that undertaking's interests during the administrative procedure (judgment of 19 December 2013, *Siemens and Others* v *Commission*, C-239/11 P, C-489/11 P and C-498/11 P, not published, EU:C:2013:866, paragraph 368).

98 In that regard, a passage in a reply to a Statement of Objections or a document annexed to such a reply which may be relevant for the defence of an undertaking in that it enables that undertaking to rely on evidence which is not consistent with the inferences made at that stage by the Commission constitutes exculpatory evidence (judgment of 12 July 2011, *Hitachi and Others* v *Commission*, T-112/07, EU:T:2011:342, paragraph 34).

99 However, the mere fact that other undertakings put forward the same arguments as the undertaking concerned and that they may have used more resources for their defence is not sufficient for those arguments to be regarded as exculpatory evidence (see judgment of 12 July 2011, *Hitachi and Others* v *Commission*, T-112/07, EU:T:2011:342, paragraph 35 and the case-law cited).

100 As regards documents that the Commission is not, as a general rule, required to divulge of its own initiative, it should be noted that the undertakings concerned cannot, in principle, reasonably invoke failure to communicate the alleged exculpatory evidence contained in the replies in question, since it did not request access to those replies during the administrative procedure (see, to that effect, judgment of 16 June 2011, *FMC Foret* v *Commission*, T-191/06, EU:T:2011:277 paragraph 292).

101 It should also be borne in mind that it is for the undertaking alleging an infringement of its rights of defence to adduce prima facie evidence that the documents which were not disclosed to it by the Commission would be useful for its defence (judgment of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, T-441/14, EU:T:2018:453, paragraph 80).

102 In the present case, a distinction must be drawn between the alleged inculpatory evidence and the alleged exculpatory evidence whose non-disclosure is challenged by the applicants.

(a) The alleged inculpatory evidence

103 The alleged inculpatory evidence to which the applicants claim they were not given access all relates to the description and analysis, set out in recitals 976 to 989 and 998 to 1012 of the contested decision, of the legislative framework and the administrative practice applicable to the establishment of carriers' rates in certain third countries. The applicants refer in that regard, first of all, to the Commission's direct references to the replies of CPA, British Airways, Cargolux, another carrier and Japan Airlines to the Statement of Objections, to documents that implicitly make reference to those replies and to the undisclosed documents on which the Commission relied even though those replies did not necessarily come from other carriers that were addressees of the Statement of Objections.

104 First of all, as regards the direct references in the contested decision to the replies to the Statement of Objections, it must be noted that, for the most part, they are not mere summaries of an argument developed by an addressee of the Statement of Objections, within the meaning of the case-law referred to in paragraph 95 above.

105 First, that applies to the statements of Japan Airlines and another carrier set out in recitals 1003, 1005 and 1006 of the contested decision, according to which (i) the Japanese authorities did not require, until 2006, any reference to the agreement between the designated carriers as stipulated by the ASA applicable in the context of the submission of applications for surcharge approvals and (ii) there was no obligation to coordinate flights between Japan and the United Kingdom.

106 As the applicants submit, it is apparent from the contested decision that the Commission relied on those statements to support the finding that there was no administrative practice obliging the incriminated carriers to coordinate on the surcharges during the infringement period and thus to support its view that the conduct in Japan fell within the scope of Article 101 TFEU and Article 53 of the EEA Agreement. In the part of the contested decision entitled 'Analysis of the Japanese regulatory system', in recitals 1005 and 1006 of the contested decision, the Commission relies on those statements to establish the following two findings. In the first place, the ASAs concluded between Japan and the States party to the EEA Agreement did not in practice oblige carriers to agree on tariffs since, in order to avoid such an obligation, it was sufficient for them to make reference, in their request relating to the FSC, to an alleged agreement within IATA. In the second place, the Japanese authorities imposed no coordination obligation in respect of flights between Japan and the United Kingdom.

107 Secondly, that also applies to the statements of CPA, Cargolux and British Airways referred to in recitals 977 to 979 of the contested decision, in which those three carriers acknowledge that the submission of individual applications for surcharge approval in Hong Kong was possible, in particular for a fixed amount of FSC. It is true that those assertions appear in a section of the

contested decision entitled 'Carriers' Arguments'. However, as the applicants rightly point out, in recital 987 of the contested decision, in the context of the analysis of the administrative practice in Hong Kong, the Commission states as follows:

'Other parties dispute the possible existence of a requirement [to discuss tariffs and submit a collective application to the Hong Kong Civil Aviation Department ("the CAD")] with some arguing that CAD encouraged rather than required concertation.'

108 However, that statement by the Commission can be understood only as referring to the statements of CPA, Cargolux and British Airways that are mentioned in recitals 977 to 979 of the contested decision.

109 Nevertheless, CPA's statements reproduced in recital 1004 of the contested decision cannot be classified as inculpatory evidence, since it is not apparent from the contested decision that the Commission relied on those statements in order to establish the single and continuous infringement.

110 Next, as regards the evidence that allegedly refers to those replies implicitly, contrary to what the applicants claim, it is not apparent from the passage in recital 1012 of the contested decision stating that 'it is not claimed that the parties were required to concert on the SSC or commissioning on surcharges', that the Commission relied on undisclosed inculpatory evidence. By that finding, the Commission merely observes that no evidence attesting to such an obligation was provided in response to the Statement of Objections.

111 Lastly, as regards the undisclosed documents on which the Commission allegedly relied even though they did not necessarily come from other carriers to which the Statement of Objections was addressed, the applicants refer to the documents that were used for the analysis of Japanese legislation and the ASAs applicable in third countries other than Hong Kong and Japan set out in recitals 998 to 1001, 1009, 1010 and 1013 to 1019 of the contested decision.

112 However, those recitals do not refer to any document at all in the investigation file, irrespective of whether produced before or after the Statement of Objections was sent. In those recitals, the Commission merely describes the applicable provisions of Japanese legislation and the ASAs to which the third countries concerned are parties and finds that it has not been established that they require carriers to implement price coordination. The provisions in question are those referred to by some of the carriers to which the Statement of Objections was addressed in their arguments in reply thereto, as is apparent from recitals 1002, 1003 and 1013 of the contested decision.

113 The applicants have failed to explain how the passages in question of the contested decision indicate the existence of one or more undisclosed inculpatory documents on which the Commission relies.

114 Even if, in that regard, the applicants intended to complain that the Commission did not provide them with access to the text of the legal provisions in question, it should be noted that the legal framework applicable in Japan and in the other relevant third countries with regard to surcharges cannot, in itself, constitute incriminating evidence and that, in any event, that information is in principle public and accessible (see, to that effect, judgment of 27 September 2006, *Jungbunzlauer* v *Commission*, T-43/02, EU:T:2006:270, paragraph 354). Moreover, paragraph 139 of the Statement of Objections stated that, in Japan, 'the coordination of the implementation [of

the FSC] between [carriers] [was] nowhere compulsory', and paragraph 1439 contained an analysis of the clauses relating to the joint setting of charges, as the case may be, in an ASA. The applicants were therefore afforded the opportunity, during the administrative procedure, to make known their views on the legal provisions in question.

115 In the light of the foregoing, it must be held that the Commission erred in refusing the applicants access to the passages of the replies to the Statement of Objections referred to in recitals 977 to 979, 1003, 1005 and 1006 of the contested decision and described in paragraphs 105 to 108 above.

(b) The alleged exculpatory evidence

116 In the present case, it must first be noted that it is common ground between the parties that the documents that, according to the applicants, contain the exculpatory evidence were the subject of requests for access, by the applicants, during the administrative procedure.

117 Next, it is important to note that the applicants, to a large extent, merely rely on the fact that some of the incriminated carriers or addressees of the Statement of Objections put forward the same arguments as they did in their replies to the Statement of Objections or in their observations before the Court. Such considerations are not sufficient to establish the existence of exculpatory evidence (see, to that effect, judgment of 12 July 2011, *Hitachi and Others* v *Commission*, T-112/07, EU:T:2011:342, paragraphs 43 and 44).

118 Moreover, in so far as the applicants speculate as to the existence of exculpatory documents provided by the other carriers, they do not provide any prima facie evidence to show that such documents would have been useful for the purposes of the present proceedings (see, to that effect, judgment of 27 September 2012, *Koninklijke Wegenbouw Stevin* v *Commission*, T-357/06, EU:T:2012:488, paragraph 164). Moreover, upholding the applicants' claims notwithstanding their general nature, would have the consequence of allowing them to benefit from the greater efforts made and resources invested, as the case may be, by the other carriers, contrary to the case-law referred to in paragraph 99 above.

119 As regards, more specifically, the documents underlying the Commission's statement about the WOW alliance in its decision of 4 July 2005 in Case COMP/M.3770 – Lufthansa/Swiss, it must be noted that the Commission did not rely on those documents in the procedure leading to the contested decision and that the reference made to that decision in footnote 1386 to the contested decision is, as noted by the Commission, based solely on public information.

120 As regards the evidence alleged to demonstrate the existence of capacity agreements between Lufthansa and the addressees of a number of emails sent by Lufthansa regarding an adjustment of its FSC rates, which would help to support a plausible alternative explanation for those emails, namely the legitimate communication of information by a supplier to its customers, it should be pointed out, first, that the applicants, as noted by the Commission, already raised in their reply to the Statement of Objections the argument that the addressees of the emails in question were customers of Lufthansa, secondly, that they already had, by means of the evidence in the investigation file, a list of the carriers party to a capacity purchase agreement with Lufthansa, as they themselves admitted at the hearing, and, thirdly, that the Commission, in the contested decision, rejected their argument by noting, in recital 797, that the announcements had made the

applicants aware that Lufthansa was engaged in negotiations with other carriers. It follows that the applicants have failed to demonstrate that the disclosure of that evidence could have been useful to them in the context of their defence.

121 As regards the evidence adduced by the non-incriminated carriers, the applicants' claim that that evidence could have been exculpatory for their defence, since the non-incriminated carriers were involved in contacts at issue which were relied on against the applicants in the contested decision, is based on extremely general conjecture. Given its general nature, the applicants' hypothesis cannot constitute a sufficiently precise indication of the existence of exculpatory evidence in the replies of those carriers (see, to that effect, judgment of 27 September 2012, *Koninklijke Wegenbouw Stevin* v *Commission*, T-357/06, EU:T:2012:488, paragraph 164).

122 The same applies to the applicants' argument that, since their employees only participated 'in a minor fraction' of the conduct at issue, the evidence relating to the majority of that conduct is in the hands of the other carriers involved.

123 Lastly, it is to no avail that the applicants rely on the judgment of 29 June 1995, *Solvay* v *Commission* (T-30/91, EU:T:1995:115), in which the Court stated that it was not for the Commission to decide on its own whether the documents seized in the investigation were exculpatory in relation to the undertakings concerned, since that case concerned documents that were part of the investigation file proper. It is clear from the case-law of the Court that the principle that it cannot be for the Commission alone to determine the documents of use in the defence of the undertaking concerned applies only to documents in the Commission's file and cannot apply to the replies given by other parties concerned to the statement of objections communicated by the Commission (judgment of 16 June 2011, *Heineken Nederland and Heineken* v *Commission*, T-240/07, EU:T:2011:284, paragraph 254).

(c) Conclusion

124 It must be concluded that the Commission was wrong to refuse the applicants access to the passages in the replies to the Statement of Objections referred to in recitals 977 to 979, 1003, 1005 and 1006 of the contested decision. In accordance with the case-law cited in paragraph 96 above, it will be assessed below (see paragraph 550 below), in the context of the examination of the merits of the Commission's assessments regarding the applicants' participation in the single and continuous infringement, whether the result at which the Commission arrived would have been different if those passages had to be disallowed as inculpatory evidence.

125 As regards the applicants' requests for the adoption of measures of organisation of procedure or measures of inquiry in order to obtain the production of the replies, and the annexes thereto, of the addressees of the Statement of Objections and the observations and documents submitted before the Court by the other carriers in their respective actions against the Decision of 9 November 2010, the applicants claim that the production of such documents would enable them to establish that those documents would have been useful for their defence and, therefore, that the non-disclosure thereof constituted an infringement of their rights.

126 In that regard, it is sufficient to note that the Court has been able to rule on the merits of the first plea on the basis of the evidence submitted before it, and that it is the sole judge of whether there is any need for the information available to it concerning the cases before it to be supplemented by taking the measures requested in the present case, which cannot be intended to make up for the

applicants' omission to adduce evidence (see, to that effect, judgment of 16 July 2009, *SELEX Sistemi Integrati* v *Commission*, C-481/07 P, not published, EU:C:2009:461, paragraph 44). It follows that the applicants' requests must be rejected, both in so far as they relate to the replies to the Statement of Objections and in so far as they relate to the observations submitted before the Court in the context of actions against the Decision of 9 November 2010.

2. The second plea in law, alleging infringement of the right to be heard and lack of jurisdiction

127 The applicants present the present plea in two parts, alleging, first, infringement of the right to be heard and a lack of jurisdiction on the part of the Commission to apply Article 101 TFEU and Article 53 of the EEA Agreement to inbound freight services and, secondly, a lack of jurisdiction on the part of the Commission to apply Article 53 of the EEA Agreement to non-EU EEA-Switzerland routes.

(a) The first part of the second plea, alleging infringement of the right to be heard and a lack of jurisdiction on the part of the Commission to apply Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes

128 The applicants submit, in essence, that the Commission infringed their right to be heard and exceeded the limits of its jurisdiction by finding and penalising an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes, which the Commission disputes.

129 It should be recalled that, as regards conduct adopted outside the territory of the EEA, the Commission's jurisdiction under public international law to find and penalise an infringement of Article 101 TFEU or Article 53 of the EEA Agreement may be established on the basis of the implementation test or the qualified effects test (see, to that effect, judgments of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraphs 40 to 47, and of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, T-441/14, EU:T:2018:453, paragraphs 95 to 97).

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

131 In recitals 1043 to 1046 of the contested decision, the Commission relied on both the implementation test and the qualified effects test in order to establish its jurisdiction under public international law to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes.

132 Since the applicants allege an error in the application of each of those two tests, the Court considers it appropriate to examine, first of all, whether the Commission was entitled to avail itself of the qualified effects test. To that end, the Court will consider whether the applicants are justified, first, in claiming infringement of their right to be heard in relation to the application of that test and, secondly, in claiming that the Commission erred in its application. In accordance with the case-law cited in paragraph 130 above, it is only where at least one of those two complaints is well founded that it will be necessary to ascertain whether the Commission was entitled to rely on the implementation test.

(1) The right to be heard

133 The applicants claim that the Commission deprived them of the opportunity to comment on the application of the qualified effects test during the administrative procedure. The Commission failed to state in the Statement of Objections that it intended to rely on the qualified effects test. In addition, the Commission failed to state therein the grounds on which it relied in the contested decision in order to conclude that the qualified effects test was satisfied.

134 The Commission disputes the applicants' line of argument.

135 In that regard, it should be recalled that the statement of objections constitutes the procedural safeguard applying the fundamental principle of EU law which requires observance of the rights of the defence in all proceedings (judgment of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission*, C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraph 35).

136 That principle requires, in particular, that the Statement of Objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (judgment of 3 September 2009, *Papierfabrik August Koehler and Others* v *Commission*, C-322/07 P, C-327/07 P and C-338/07 P, EU:C:2009:500, paragraph 36).

137 Article 27(1) of Regulation No 1/2003 and Article 11(2) of Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 TFEU] and [102 TFEU] (OJ 2004 L 123, p. 18), which apply that principle, require the Commission to adopt in its final decision only objections in respect of which the undertakings and associations of undertakings concerned have been afforded the opportunity of making known their views.

138 At the same time, account must be taken of the provisional nature of the statement of objections, with the result that the existence of differences between that document and the final decision is not only possible but lawful, in so far as the final decision reflects all the evidence submitted and discussed during the administrative procedure, including after the sending of the statement of objections (see, to that effect, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 67).

139 It is only if the final decision alleges that the undertakings concerned have committed infringements other than those referred to in the statement of objections or takes into consideration different facts that there will be an infringement of the rights of the defence (see judgment of 14 March 2013, *Fresh Del Monte Produce* v *Commission*, T-587/08, EU:T:2013:129, paragraph 706 and the case-law cited). According to the case-law, that is not the case where the alleged differences between the statement of objections and the contested decision do not concern any conduct other than that in respect of which the parties have already submitted observations and are therefore unrelated to any new complaint (judgment of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraphs 84 and 85).

140 It is common ground between the parties that, unlike the contested decision, the Statement of Objections does not refer to the qualified effects test. It should be noted, however, that, by relying in that decision on the qualified effects test to establish its jurisdiction under public international law to find and penalise an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes, the Commission neither advanced new objections against the applicants nor altered the content of those which it had provisionally included in the Statement of Objections.

141 The Commission had already stated in the Statement of Objections that it intended to find an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes. In paragraph 129 of the Statement of Objections, the Commission observed that the 'infringement covered … freight services within the EU/EEA and Switzerland and on routes between EU/EEA airports and third countries all over the world, in both directions'. Similarly, in paragraph 1430 of the Statement of Objections, the Commission stated that 'all the anti-competitive activities involving each of the participants fit within an overall aim, namely to agree on pricing or at least to remove pricing uncertainty in the EEA-wide market for air freight, including routes between EEA airports and third countries'.

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

143 Moreover, in their replies to the Statement of Objections, the applicants expressly disputed those assessments. Section 11 of SAS Cargo's reply to the Statement of Objections and section 6 of SAS Consortium's reply to the Statement of Objections are thus entirely dedicated to the examination of the Commission's jurisdiction to find an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes.

144 In recitals 1042 to 1046 of the contested decision, the Commission merely responded to those arguments, in accordance with the possibility afforded to it, in the light of the administrative procedure, to revise or supplement its arguments of fact or law in support of its objections (see, to that effect, judgment of 29 March 2012, *Telefónica and Telefónica de España* v *Commission*, T-336/07, EU:T:2012:172, paragraph 82).

145 In those circumstances, the fact that the qualified effects test was not specifically discussed during the administrative procedure is irrelevant for the purposes of assessing whether the applicants' rights of defence were respected.

146 It follows that the applicants are not justified in claiming that the Commission infringed their rights of defence by relying on the qualified effects test for the first time in the contested decision.

147 Nor are the applicants justified in claiming that the application of the qualified effects test in recitals 1045 and 1046 of the contested decision is based on facts which the Commission had not relied on in the Statement of Objections. The facts on which those recitals are based are all set out

in the Statement of Objections. Thus, the ground referred to in recital 1045 of the contested decision, relating to the effect of the conduct at issue on consumers in the EEA, is based on considerations relating to the price structure of freight services, the role of freight forwarders as intermediaries between the carriers and the shippers, and the nature of the single and continuous infringement (including its classification as a restriction of competition 'by object') which were referred to in paragraphs 7, 104, 1396 to 1411 and 1434 to 1438 of the Statement of Objections. Similarly, the ground relating to the effects on competition for interlining services set out in that same recital is based on the considerations relating to the operation of the freight sector referred to in paragraphs 7, 9, 102 and 105 of the Statement of Objections. The geographic scope of the cartel at issue and the inclusion of inbound freight services in the single and continuous infringement referred to in recital 1046 of the contested decision are addressed in paragraphs 3, 125, 129, 1045, 1390, 1394 and 1430 of the Statement of Objections.

148 It follows that the applicants have failed to demonstrate that their right to be heard was infringed in that regard.

(2) The qualified effects test

149 In the application, the applicants disputed the applicability of the qualified effects test, claiming, in essence, that that test was not recognised under EU law and that it had been invoked in breach of the principle of non-retroactivity. However, in the reply, they stated that they were withdrawing those arguments in the light of the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632).

150 The applicants maintain, nevertheless, that the Commission erred in its application of the qualified effects test. The applicants claim that the Commission reversed the burden of proof and relied on considerations that were incorrect and contrary to public international law for the purposes of concluding that that test was satisfied.

151 According to the applicants, it follows from the judgment of 6 September 2017, *Intel* v *Commission* (C-413/14 P, EU:C:2017:632, paragraphs 49 to 51), that the effects of the agreement or practice at issue must be specifically on competition within the internal market. Those effects must be immediate, substantial, foreseeable and probable.

152 In the present case, first, the Commission found that the surcharges were passed on through the production and distribution chain and affected consumers in the EEA by increasing the prices of imported goods. Such effects are neither immediate nor foreseeable. Furthermore, not only are they unsubstantiated, they are purely speculative. The refusal to pay commission, in particular, affected solely freight forwarders.

153 The Commission also failed to prove that the effects of the relevant conduct on consumers in the EEA were substantial. That conduct concerned only two surcharges, which represented a fraction of the final price. As a matter of economic theory, coordination on a small element of the price has no effect on the competitiveness of the total price. Moreover, the effect of the conduct in which the applicants were involved in third countries could only have improved, and not hindered, the competitiveness of the goods imported into the EEA. That conduct led to lower surcharges in the United States, Hong Kong, Japan and Thailand.

154 Secondly, the Commission referred to the effects on competition of interlining services which third-country carriers, without services to the final destination EEA airport, buy from other carriers. In the contested decision, the Commission's description of those effects was unclear and inadequate. Furthermore, the Commission did not adduce any evidence in support of its reasoning and it is doubtful whether such evidence exists.

155 The Commission disputes the applicants' line of argument.

156 In the contested decision, the Commission relied, in essence, on three separate grounds in order to find that the qualified effects test was satisfied in the present case.

157 The first two grounds are set out in recital 1045 of the contested decision. As the Commission confirmed in reply to the written and oral questions put by the Court, those grounds concern the effects of coordination in relation to inbound freight services taken in isolation. The first ground is that the 'increased costs of air transport to the EEA, and consequently the higher prices of imported goods [were], by their very nature, liable to have effects on consumers in the EEA'. The second ground concerns the effects of coordination in relation to inbound freight services 'also on the provision of [freight] services by other carriers within the EEA, between the different hub airports used by carriers from third countries in the EEA and airports of destination of those shipments in the EEA to which the carrier from the third country does not fly'.

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

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

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

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

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

162 In the present case, the applicants dispute the relevance of the effect at issue (see paragraphs 163 to 179 below), and its foreseeability (see paragraphs 183 to 200 below), its substantiality (see paragraphs 201 to 216 below) and its immediacy (see paragraphs 217 to 226 below).

– *The relevance of the effect at issue*

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

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

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

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

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

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

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

170 It follows therefrom that, as the Commission observed in recital 917 of the contested decision, there is no need to take account of the actual effects of the conduct at issue once its anticompetitive object has been established (see, to that effect, judgments of 13 July 1966,

Consten and Grundig v *Commission*, 56/64 and 58/64, EU:C:1966:41, p. 342, and of 6 October 2009, *GlaxoSmithKline Services and Others* v *Commission and Others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 55).

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

172 The applicants cannot, moreover, complain that the Commission failed to analyse the effect at issue sufficiently.

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

174 Contrary to the applicants' submission, it cannot be considered that that effect is irrelevant for the purposes of applying the qualified effects test on the ground that it does not specifically impact competition in the internal market.

175 In that regard, in the first place, it should be noted that the applicants have failed to explain what they mean to convey with that argument.

176 In the second place, it must be observed that the applicants are mistaken if their argument is to be interpreted as meaning that the conduct at issue, in so far as it related to inbound routes, was not capable of restricting competition in the EEA, on the ground that that conduct took place in third countries where the freight forwarders who sourced inbound freight services from the incriminated carriers are established.

177 In that connection, it should be noted that the qualified effects test must be applied in the light of the economic and legal context of the conduct at issue (see, to that effect, judgment of 25 November 1971, *Béguelin Import*, 22/71, EU:C:1971:113, paragraph 13).

178 In the present case, it is apparent from recitals 14, 17 and 70 of the contested decision and from the parties' replies to the measures of organisation of procedure of the Court that the carriers sell their freight services exclusively or almost exclusively to freight forwarders. As regards inbound freight services, almost all those sales take place at the point of origin of the routes in question, outside the EEA, where those freight forwarders are established. It is apparent from the application that, between 1 May 2004 and 14 February 2006, the applicants achieved only a negligible proportion of their sales of inbound freight services to customers based in the EEA.

179 It must, however, be observed that, although freight forwarders purchase those services, they do so, inter alia, as intermediaries, in order to consolidate them into a package of services, the purpose of which is, by definition, to organise the integrated transport of goods to the territory of

the EEA on behalf of shippers. As is apparent from recital 70 of the contested decision, the latter may in particular be the purchasers or owners of the goods transported. It is therefore at the very least likely that they are established in the EEA.

180 It follows that, provided that the freight forwarders pass any additional costs resulting from the cartel at issue on to the price of their service packages, it is in particular on competition that occurs between freight forwarders in order to attract those shippers as customers that the single and continuous infringement, in so far as it concerns inbound routes, is liable to be felt and, consequently, it is in the internal market or within the EEA that the effect at issue is liable to materialise.

181 Consequently, the additional cost which shippers might have had to pay and the higher prices of goods imported into the EEA which may have resulted are among the effects produced by the conduct at issue on which the Commission was entitled to rely for the purposes of applying the qualified effects test.

182 In accordance with the case-law cited in paragraph 161 above, the question is therefore whether that effect has the required foreseeability, substantiality and immediacy.

– *The foreseeability of the effect at issue*

183 The requirement of foreseeability seeks to ensure legal certainty by guaranteeing that the undertakings concerned may not be penalised on account of effects which might indeed result from their conduct, but which they could not reasonably expect to occur (see, to that effect, Opinion of Advocate General Kokott in *Otis Gesellschaft and Others*, C-435/18, EU:C:2019:651, point 83).

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

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

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

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

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

189 The applicants have failed to establish that a 'waterbed effect' was so probable as to render the effect at issue unforeseeable.

190 The applicants merely make a vague reference to 'economic theory' and a reference, in the context of the third part of the fifth plea, to the oral statement of an expert at the hearing before the Commission. First, that statement is not accompanied by the study on which it is based, nor by the underlying raw data that would have enabled the Court to determine its plausibility. Secondly, that statement is based on a methodology that is not well suited to the scope of the single and continuous infringement as defined in the contested decision. The 'difference in differences' method, on which that statement is based, compares the evolution of prices charged on routes that are 'potentially affected by the discussions and on the routes known not to have been affected by any discussions', which, moreover, it failed to identify. Conversely, in recital 889 of the contested decision, the Commission found that the FSC and SSC were 'measures of general application that [were] not route specific' and that 'were intended to be applied on all routes, on a worldwide basis, including routes to … the EEA'. Thirdly, it should be noted that that statement concerns AF and, to a lesser extent, KLM. Even though that statement concludes that there was a 'waterbed effect' in the present case, it was only on the ground that the rates charged by AF and KLM were sufficiently flexible and could fall sufficiently rapidly to neutralise any increase in the FSC and the SSC. By contrast, the applicants stated that the 'airfreight rates [were] decided in advance for at least six months [and that] carriers offset increased fuel costs through an add-on charge (FSC) that can be adapted more quickly to reflect fluctuations in the fuel price'.

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

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

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

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

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

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

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

198 For the reasons set out in paragraph 179 above, it was equally foreseeable for the incriminated carriers that, as is apparent from recital 1045 of the contested decision, that effect would occur in the EEA.

199 Since the effect at issue was part of the normal course of events and was economically rational, it was not, moreover, necessary for the applicants to operate on the market for importing goods or the downstream resale market for those goods in order to be able to foresee it.

200 It must therefore be concluded that the Commission has established to the requisite standard that the effect at issue was foreseeable.

– *The substantiality of the effect at issue*

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

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

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

204 In the first place, it is apparent from recital 1146 of the contested decision that the duration of the single and continuous infringement amounted to 21 months in so far as it concerned EU-third country routes, and 8 months in so far as it concerned non-EU EEA-third country routes. It is apparent from recitals 1215 and 1217 of that decision that this is also the duration of all the incriminated carriers' participation, with the exception of Lufthansa Cargo and Swiss.

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

206 In the third place, as regards the nature of the infringement, it is apparent from recital 1030 of the contested decision that the object of the single and continuous infringement was to restrict competition between the incriminated carriers, inter alia on EEA-third country routes. In recital 1208 of that decision, the Commission concluded that the 'fixing of various elements of the price, including particular surcharges, constitute[d] one of the most harmful restrictions of competition' and therefore found that the single and continuous infringement merited the application of a gravity factor 'at the higher end of the scale' provided for in the 2006 Guidelines.

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

208 It is apparent from a letter of 8 July 2005 from the Hong Kong Association of Freight Forwarding & Logistics to the Chairman of the Cargo Sub-Committee ('the CSC') of the Board of Airline Representatives ('the BAR') in Hong Kong that the surcharges represent a 'very significant part' of the total price of the air waybills which the freight forwarders were required to pay. Likewise, in their written pleadings before the Court, the applicants stated that the surcharges represented between 5 and 30% of the price of freight services. As is apparent from the tables and charts in Annex A.109 to the application, that percentage reached its highest level during the period in relation to which the Commission found an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes, namely 21.7% in 2004 and 29.8% in 2005.

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

210 Again for the sake of completeness, as regards the size of the undertakings that participated in the conduct at issue, it is apparent from recital 1209 of the contested decision that the combined market share of the incriminated carriers on the 'worldwide market' was 34% in 2005 and was 'at least as high' for freight services provided on EEA-third country routes, which included both outbound and inbound routes. Moreover, during the infringement period, the applicants themselves achieved a significant turnover on the inbound routes, in excess of EUR 119 000 000 in 2005.

211 The applicants do not put forward any argument capable of casting doubt on the substantial nature of the intended effect.

212 First, the applicants' argument based on the 'waterbed effect' theory has already been rejected in paragraphs 188 and 190 above.

213 Secondly, as regards the applicants' argument that the incriminated carriers set the FSC and the SSC on routes from Hong Kong, Thailand, Japan and the United States below competitive levels, so as to improve rather than restrict the competitiveness of goods imported into the EEA, it should be recalled that it is in principle for the person alleging facts in support of a claim to adduce proof of such facts (order of 25 January 2008, *Provincia di Ascoli Piceno et Comune di Monte Urano* v *Apache Footwear and Others*, C-464/07 P(I), not published, EU:C:2008:49, paragraph 9; see also, to that effect, judgment of 6 March 2001, *Connolly* v *Commission*, C-274/99 P, EU:C:2001:127, paragraph 113).

214 The applicants have failed to adduce any evidence whatsoever to establish that the incriminated carriers set the FSC and the SSC below competitive levels on routes from Hong Kong, Thailand and Japan. As regards routes from the United States, the applicants merely submit that the contacts in which they participated 'maintained a 1:1 conversion from EUR to USD for the FSC resulting in a discount of 17% due to the depreciation of the USD versus the EUR'. However, the applicants do not in any way demonstrate that the resulting FSC was below competitive levels.

215 It cannot therefore be considered that it was likely that the incriminated carriers would set the FSC and the SSC on routes from Hong Kong, Thailand, Japan and the United States below competitive levels, so as to improve rather than restrict the competitiveness of goods imported into the EEA.

216 It must therefore be concluded that the Commission has established to the requisite standard that the effect at issue was substantial.

– *The immediacy of the effect at issue*

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

218 The direct causal link must not, however, be regarded as being the same as a single causal link, which would mean always finding as a matter of course that the chain of causality is broken where the action of a third party was a contributory cause of the effects at issue (see, to that effect, Opinion of Advocate General Kokott in *KONE and Others*, C-557/12, EU:C:2014:45, points 36 and 37).

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

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

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

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

223 That conclusion cannot be called into question by the applicants' argument, put forward at the hearing, that, in order to affect 'consumers in the EEA' to which the Commission refers in recital 1045 of the contested decision, that additional cost had to pass through a 'long chain of intermediaries', including shippers, freight forwarders and importers. That argument is based on two incorrect premisses.

224 The first of the premisses at issue is that the 'consumers in the EEA' referred to in recital 1045 of the contested decision are end consumers, that is to say, natural persons who are acting for purposes outside their trade or profession. The concept of consumer in competition law does not refer only to end consumers but to all users, whether direct or indirect, of the goods or services which were the subject of the conduct at issue (see, to that effect, Opinion of Advocate General Mengozzi in *MasterCard and Others* v *Commission*, C-382/12 P, EU:C:2014:42, point 156).

225 It is apparent from recital 70 of the contested decision, the merits of which have not been effectively challenged by the applicants, that 'shippers may be the purchasers or sellers of traded goods or the owners of goods that need to be moved rapidly over relatively long distances'. In its pleadings, the Commission stated that those goods could be imported for their direct consumption or as inputs for the production of other products. As regards inbound freight services, those shippers may, as the Commission rightly points out, be based in the EEA. The reference to 'consumers in the EEA' in recital 1045 of the contested decision must therefore be interpreted as including shippers.

226 The second of the premisses at issue is that, even if the reference to 'consumers in the EEA' in recital 1045 of the contested decision were to encompass only end consumers, the latter could acquire the imported goods only following the intervention of a 'long chain of intermediaries'. End consumers are also likely to acquire those goods directly from the shipper.

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

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

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

229 According to the case-law, Article 101 TFEU may be applied to practices and agreements that serve the same anticompetitive objective, provided that it is foreseeable that, taken together, they will have immediate and substantial effects in the internal market. Undertakings cannot be allowed to avoid the application of the EU competition rules by combining a number of types of conduct that pursue the same objective, each of which, taken on its own, is not capable of

producing an immediate and substantial effect in that market, but which, taken together, are capable of producing such an effect (judgment of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, T-441/14, EU:T:2018:453, paragraph 106).

230 The Commission may thus base its jurisdiction to apply Article 101 TFEU to a single and continuous infringement as found in the decision at issue on the foreseeable, immediate and substantial effects of that infringement in the internal market (judgment of 12 July 2018, *Brugg Kabel and Kabelwerke Brugg* v *Commission*, T-441/14, EU:T:2018:453, paragraph 105).

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

232 In recital 869 of the contested decision, the Commission characterised the conduct at issue as a single and continuous infringement, including in so far as it concerned inbound freight services. In so far as the applicants contest that characterisation in general and the finding of the existence of a single anticompetitive aim of distorting competition within the EEA, on which it is based, their arguments will be examined in the context of the third plea in law, which relates to that issue.

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

234 In those circumstances, the Commission is correct in noting that prohibiting it from applying the qualified effects test to the conduct at issue taken as a whole might lead to an artificial fragmentation of comprehensive anticompetitive conduct, capable of affecting the market structure within the EEA, into a collection of separate forms of conduct which might escape, in whole or in part, the European Union's jurisdiction (see, to that effect, judgment of 6 September 2017, *Intel* v *Commission*, C-413/14 P, EU:C:2017:632, paragraph 57). It must therefore be held that the Commission was entitled, in recital 1046 of the contested decision, to examine the effects of the single and continuous infringement taken as a whole.

235 As regards agreements and practices which, first, had the object of restricting competition at least in the European Union, the EEA and Switzerland (recital 903 of that decision), secondly, brought together carriers with significant market shares (recital 1209 of that decision) and, thirdly, a significant part of which related to intra-EEA routes for a period of more than six years (recital 1146 of that decision), there can be little doubt that it was foreseeable that, taken as a whole, the single and continuous infringement would produce immediate and substantial effects in the internal market or within the EEA.

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

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

(b) The second part of the second plea in law, relating to non-EU EEA-Switzerland routes

238 The applicants claim that Article 11(2) of the EC-Switzerland Air Transport Agreement reserves to the Swiss authorities the jurisdiction to find and penalise an infringement of the competition rules on non-EU EEA-Switzerland routes.

239 In Article 1(3) of the contested decision, the Commission found an infringement of Article 53 of the EEA Agreement on non-EU EEA-third country routes. Given that the Swiss Confederation is not a party to the EEA Agreement, it is necessarily a 'third country' within the meaning of that article. Article 1(3) of the operative part of the contested decision is therefore vitiated by an illegality consisting of an infringement of Article 11(2) of the EC-Switzerland Air Transport Agreement.

240 The Commission disputes the applicants' line of argument.

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

242 It should be noted in that regard that the principle of effective judicial protection is a general principle of EU law, which is now set out in Article 47 of the Charter. That principle, which corresponds, in EU law, to Article 6(1) ECHR, requires that the operative part of a decision by which the Commission finds infringements of the competition rules must be particularly clear and precise and that the undertakings held liable and penalised must be in a position to understand and to contest the imputation of that liability and the imposition of those penalties, as set out in the wording of that operative part (see judgment of 16 December 2015, *Martinair Holland* v *Commission*, T-67/11, EU:T:2015:984, paragraph 31 and the case-law cited).

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

244 In Article 1(3) of the contested decision, the Commission found that the applicants had 'infringed Article 53 of the EEA Agreement as regards routes between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and airports in third countries' from 19 May 2005 to 14 February 2006. The Commission neither expressly included non-EU EEA-Switzerland routes amongst those routes, nor expressly excluded them.

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

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

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

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

249 In accordance with the principle recalled in paragraph 247 above, it must therefore be assumed that the phrase 'airports in third countries' employed in Article 1(3) of the contested decision has the same meaning as the phrase 'airports outside the EEA' employed in Article 1(2) and, therefore, excludes airports in Switzerland.

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

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

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

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

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

255 The grounds of the contested decision therefore confirm that the concepts of 'airports in third countries' and 'airports outside the EEA' have the same meaning. In accordance with the definition set out in footnote 1514, it must therefore be held that both concepts exclude airports in Switzerland.

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

257 The Commission also acknowledged that it had included in the value of sales an amount of EUR 262 084 in respect of sales of freight services made by the applicants in 2005 on non-EU EEA-Switzerland routes. According to the Commission, the reason for this is that it 'unfortunately' did not exclude that amount from the figures provided to it by the applicants.

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

259 The second part of the plea and, consequently, the present plea must be rejected.

3. The third plea in law, alleging an error of assessment in relation to the conduct in which the applicants were involved and the conclusion that that conduct proved their participation in, or awareness of, the single and continuous infringement

260 The present plea alleges that the Commission made errors and was insufficiently rigorous in its assessment of the conduct in which the applicants were allegedly involved. That plea consists of 10 parts alleging, first, errors in the assessment of the worldwide nature of the single and continuous infringement, secondly, errors in the assessment of the conduct relating to the bilateral alliance with Lufthansa, thirdly, errors in the assessment of the email exchange of December 1999 in the context of the Star Cargo alliance, fourthly, errors in the assessment of the conduct relating to the WOW alliance, fifthly, errors relating to the inclusion of block space agreements in the single and continuous infringement, sixthly, errors in the assessment of contacts in third countries, seventhly, errors in the assessment of speculation on the part of other carriers as to the applicants' conduct, eighthly, errors relating to the inclusion in the single and continuous infringement of disparate local events that took place in a few countries, ninthly, errors in the assessment of the applicants' knowledge of the conduct of the other incriminated carriers and, tenthly, errors in the overall assessment of the body of evidence relied on by the Commission.

261 In the present case, the Court considers it appropriate to examine, first, the first to fourth parts of the present plea, then the eighth part and, lastly, the fifth, sixth, seventh, ninth and tenth parts.

(a) The first part of the plea, alleging a number of illegalities in the finding of a single and continuous infringement of a worldwide nature

262 In the context of the present part of the plea, the applicants claim that the Commission committed a number of illegalities in the finding of a single and continuous infringement of a worldwide nature. They raise three complaints in support of the present part of the plea. Those complaints allege, first, breach of the obligation to state reasons and erroneous findings as regards the worldwide nature of the single and continuous infringement, secondly, erroneous findings regarding the single nature of the infringement at issue, outside the 'core group' of the cartel at issue, and, thirdly, erroneous findings as regards the continuous nature of the infringement.

(1) The first complaint, alleging breach of the obligation to state reasons and erroneous findings as regards the worldwide nature of the single and continuous infringement

263 The applicants claim that the Commission erred in finding that the practices described in Section 4 of the contested decision had a global scope.

264 First of all, the conclusion in Article 1 of the contested decision that the practices at issue relate to a worldwide infringement is irreconcilable with the fact that the Commission acknowledged that certain countries were not covered by that infringement, thus infringing Article 296 TFEU.

265 Next, the mere fact that the FSC and the SSC are typical components of the price for freight services does not mean that the conduct in question affected these surcharges in each and every country. The Commission cannot infer from conduct affecting a limited number of routes the existence of a global cartel without any evidence of conduct affecting all other routes. In that regard, the applicants criticise the finding in recital 889 of the contested decision that surcharges are measures of general application that are not route specific.

266 Lastly, contrary to what is apparent from recital 890 of the contested decision, the mere fact that carriers might have entered into capacity agreements with other carriers, extending their networks beyond the routes on which they themselves operated, does not prove that they were involved in illegal conduct on all routes throughout the world, in particular, in numerous countries that are not Member States.

267 The Commission disputes the applicants' line of argument.

268 It must be observed at the outset that, contrary to the applicants' claims, the Commission did not conclude, in the operative part of the contested decision, that there was a worldwide infringement. The reference to the coordination of the conduct of the incriminated carriers as regards 'pricing behaviour in the provision of … freight services on a global basis' in the introductory paragraph of Article 1 of that decision is merely a statement of fact that the Commission characterised, in paragraphs 1 to 4 of that article, as an infringement of the competition rules applicable on routes that it considered to be, during the periods at issue, within its jurisdiction, namely intra-EEA routes between 7 December 1999 and 14 February 2006 (paragraph 1), EU-third country routes between 1 May 2004 and 14 February 2006 (paragraph 2), non-EU EEA-third country routes between 19 May 2005 and 14 February 2006 (paragraph 3) and EU-Switzerland routes between 1 June 2002 and 14 February 2006 (paragraph 4).

269 Since the operative part of the contested decision leaves no room for doubt, it is therefore solely for the sake of completeness that the Court adds that the grounds of the contested decision confirm that conclusion. Those grounds thus also make reference to, first, an infringement of the applicable competition rules, the geographic scope of which is limited to specific types of routes (recitals 1146 and 1187) and, secondly, a 'worldwide cartel' (recitals 74, 112, 832 and 1300), a cartel of 'worldwide nature' (recital 887) or a cartel 'implemented globally' (recital 1046).

270 Recital 1210 of the contested decision does, admittedly, deviate from the rule, in that it refers to 'the geographic scope of the infringement [which] was worldwide'. However, it must be stated that the context of that isolated reference to a worldwide infringement tends to show that it is a mere clerical error and should read 'the geographic scope of the cartel [at issue] was worldwide'. That reference is followed by the following sentences:

'For the purposes of establishing the gravity of the infringement, this means that the cartel [at issue] covered the whole of the EEA and Switzerland. That includes airfreight services … on routes in both directions between airports within the EEA, on routes between airports in countries within the EU and airports outside the EEA, on routes between airports in the EU and airports in Switzerland and on routes between airports in the EEA Contracting Parties not being Member States and airports in third countries.'

271 Consequently, far from being inconsistent with the statement of reasons for the contested decision, the finding of the existence of tariff coordination for the provision of freight services worldwide reflects the position expressed by the Commission, throughout the contested decision, on the geographic scope of the cartel at issue.

272 The applicants' arguments cannot call that finding into question.

273 First, in so far as they rely, not on the content of the contested decision, but on the differences between the contested decision and the Statement of Objections for the purpose of concluding that certain countries were not covered by the single and continuous infringement, it must be

borne in mind that the Commission is not obliged to explain any differences between its final assessments and its provisional assessments set out in the Statement of Objections (judgment of 27 February 2014, *InnoLux* v *Commission*, T-91/11, EU:T:2014:92, paragraph 96). In those circumstances, the Commission's silence with regard to such differences in the contested decision cannot be interpreted as an implicit waiver of the characterisation of the cartel at issue as being worldwide. The fact that certain countries were not mentioned either in the Statement of Objections or in the contested decision does not contradict the finding, in the grounds of the contested decision, that the cartel at issue was worldwide in nature. Since it referred, in the contested decision, to the worldwide nature of the cartel at issue, the Commission was able to dispense with referencing each of the countries concerned, without that omission hindering the understanding of the grounds of that decision.

274 Secondly, the applicants rely on recital 1375 of the contested decision, in which the Commission found that the statements of another incriminated carrier in the context of the leniency procedure did not represent significant added value, on the ground that they concerned events which took place in Dubai (United Arab Emirates) and which were not part of the contested decision.

275 The assessments at issue are set out in Section 8.6 of the contested decision, concerning the application of the leniency procedure, and relate to the determination of the rate of reduction of the basic amount of the fine which, according to the Commission, should be granted to an incriminated carrier.

276 Even if those assessments were to be understood, as the applicants submit, as concluding that the conduct that took place in Dubai and referred to in the Statement of Objections did not fall within the scope of the cartel at issue, that is not, as such, inconsistent with the finding of a worldwide cartel.

277 The Commission stated, in recital 889 of the contested decision, that the surcharges were 'measures of general application' that 'were intended to be applied on all routes, on a worldwide basis', and that the same was true of the refusal to pay commission, which was equally 'general in nature'. It noted that the implementation of the surcharges was carried out in the framework of a multi-level structure, at a central and local level, as described in recitals 107, 1046 and 1300 of the contested decision. In those circumstances, the exclusion of local conduct from the scope of the cartel at issue is not inconsistent with that cartel being worldwide.

278 In the light of the foregoing, the existence of an infringement of the obligation to state reasons resulting from alleged internal inconsistencies affecting the contested decision must be excluded.

279 In the second place, as regards the general applicability of the surcharges and the refusal to pay commission, it should be noted that the Commission referred in the contested decision to multiple items of evidence and that, in the present part of the plea, the applicants have failed to explain in what way such evidence is insufficiently probative.

280 That evidence, some of which is referred to by way of example in footnote 1323 to the contested decision, sufficiently supports the Commission's conclusion that the surcharges were generally applicable 'on all routes, on a worldwide basis'. Thus, as regards the FSC, it should be noted in particular that recital 140 of the contested decision refers to an internal Swiss email in which it is stated that AF 'will levy worldwide a [FSC] of EUR 0.10/ USD 0.10 Kg', that KLM 'will exactly do the same' and that Lufthansa 'is going into the same direction but not confirmed at this minute'. Furthermore, in recital 162 of the contested decision, reference is made to an exchange of emails

between Lufthansa and Japan Airlines of 27 September 2000 in which it is stated that Lufthansa Cargo intended to apply a certain amount of FSC 'worldwide', while, in recital 210 of that decision, reference is made to Martinair's leniency statement, according to which Martinair took part in exchanges with a number of carriers on the implementation of a worldwide FSC.

281 Similarly, footnote 1323 to the contested decision refers to announcements of increases or decreases in the FSC or the SSC which 'referred to a worldwide application of the surcharge that was not limited to a specific route'.

282 As regards the SSC, it should be noted that, in recital 608 of the contested decision, the Commission referred to an email in which British Airways explained to Lufthansa that it wished to introduce an 'exceptional handling fee' worldwide. Moreover, in recital 666 of that decision, the Commission referred to the minutes of a meeting of 30 March 2004 of the Executive Committee of the CSC of the BAR in Hong Kong. It is apparent from those minutes that the amount of the SSC from Hong Kong was based on the 'global benchmark'.

283 As regards the refusal to pay commission, it is true that the Commission did not, in footnote 1323 to the contested decision, give any specific examples of evidence to substantiate that it was applied 'on all routes, on a worldwide basis'.

284 However, first, it should be noted that, since the surcharges were generally applicable 'on all routes, on a worldwide basis', it was likely that the same applied to the refusal to pay commission. In recital 879 of the contested decision, the Commission found that the refusal to pay commission and the other two elements of the single and continuous infringement were complementary in so far as they had 'ensured that surcharges were not subject to competition through the negotiation of commission (in fact discounts on the surcharges) with customers'.

285 Secondly, it is important to note that the Commission has, elsewhere than in footnote 1323 to the contested decision, referred to evidence substantiating the application of the refusal to pay commission 'on all routes, on a worldwide basis'. Thus, in recital 679 of the contested decision, the Commission referred to an internal email concerning the refusal to pay commission in which Swiss' freight manager asked its regional directors to 'participate wherever relevant in local BAR meetings'. Similarly, in recital 683 of the contested decision, the Commission mentions an internal memorandum addressed to CPA freight sales managers stating that 'as long as local conditions allow C[PA] should adopt a common approach and response to the issue [of requests for commission on surcharges]' and 'should therefore consider following any rejection of such request or claim for commission and other related actions that may be coordinated by your local [carrier] associations'.

286 The Commission also adduced evidence that such coordination had taken place in many countries around the world, including Hong Kong (recital 503 of the contested decision), Switzerland (recital 692 of that decision), Italy (recitals 694 to 698 of that decision), France (recital 699 of that decision), Spain (recital 700 of that decision), India (recital 701 of that decision) and the United States (recital 702 of that decision).

287 The applicants' claim that the Commission, owing to the general nature of the assertion recalled in paragraph 277 above, proceeded on the basis of unsubstantiated extrapolations, is based on the existence of local conduct that resulted from local regulations. It should be noted that the Commission stated in footnote 1323 to the contested decision, and as the applicants moreover agree, that the implementation of the surcharges was carried out within the framework of a

multi-level structure and that the rate of the surcharges varied and was discussed separately 'due to the local market conditions or regulations'. It follows that the Commission did not intend to assert, contrary to what the applicants suggest, that the surcharge rates were applied uniformly on all routes worldwide.

288 Furthermore, as regards the alleged absence of any link between that local conduct and an overarching cartel, it must be stressed that the applicants are mistaken. In recital 832 of the contested decision, the Commission stated that the cartel at issue 'operated on a worldwide basis'. The Commission explained that the cartel at issue was based on a complex network of mainly bilateral contacts that took place in various places in the world and at various levels within the undertakings concerned (recitals 109 and 1300 of that decision). According to the Commission, the 'arrangements [of the cartel at issue] were in many cases organised centrally' and implemented locally by local staff (recital 1046 of that decision). In the Commission's view, that enabled local staff to adapt to local conditions, 'on all routes, on a worldwide basis', the surcharges and the refusal to pay commission, which were measures of general application (recitals 876, 889 and 890 of, and footnote 1323 to, that decision).

289 First, local staff received instructions from their head office regarding the implementation of the surcharges and reported back to them (see recitals 171, 226, 233, 284, 381, 584 and 594). Moreover, local staff were bound by the decisions taken at head-office level. Recital 237 of the contested decision refers to an internal email in which a Qantas employee stated that almost all carriers in Hong Kong had indicated their intention to follow CPA, but that Qantas and a number of incriminated carriers, including the applicants, had expressed that they needed to seek instructions from their head offices before doing so. In recital 295 of the contested decision, reference is made to the minutes of the meeting of the CSC of the BAR of 23 January 2003 in Singapore which state that 'member carriers commented that the fuel index has increased, but they have not received any instruction from their head offices to increase the [FSC]'. Likewise, recital 414 of the contested decision refers to an email from the local manager of CPA in Belgium, from which it is apparent that SAC 'claimed initially they would [also increase the FSC as of 1 October 2004] but then were recalled by [head office] to go for 04 Oct [2004]', which had been the subject of a number of previous contacts at head-office level (recitals 406, 410 and 411).

290 Secondly, it is apparent from the contested decision that coordination at local level often followed immediately after the announcements made at head-office level. By way of illustration, following Lufthansa's announcement on the introduction of the FSC on 28 December 1999 (recital 138), the question was addressed in Hong Kong on 10, 13 and 19 January 2000 (recitals 147 to 149) and in India in that same month (recitals 151 and 152). The same applies to Lufthansa's announcement of 17 February 2003 (recital 274), which was followed by contacts in Canada (recital 291) and Thailand (recital 298) on that same day and in Singapore the following day (recital 296). That is also the case with Lufthansa's announcement of 21 September 2004 (recitals 409 to 411), which was followed by contacts in Hong Kong on that same day (recital 431) and in Switzerland on 23 and 24 September 2004 (recitals 426 and 427).

291 The applicants reply by referring to their line of argument, put forward elsewhere in the present plea, by which they dispute their participation in the single and continuous infringement. In that regard, it must be pointed out that the finding of a single infringement and its scope is distinct from the question as to whether liability for that infringement is imputable, in whole or in part, to an undertaking. Consequently, since the applicants have failed to explain how demonstrating

that they did not participate in the single infringement is also capable of establishing that the finding of a multi-level structure within the cartel at issue is erroneous, the reference to that line of argument must be rejected as ineffective.

292 In the third place, as regards the finding in recital 890 of the contested decision that carriers could have entered into capacity agreements, it is sufficient to note that that finding does not have the purpose alleged by the applicants. It is apparent from the wording, purpose and context of that recital that it does not concern the liability of the various incriminated carriers for the single and continuous infringement, but the existence of that infringement, which the applicants do not dispute in the context of the present part of the plea. That recital expressly refers to the 'existence of the single and continuous infringement'. As regards recitals 112 and 885 to 887 of that decision, they indicate that for the Commission, it was a question of demonstrating that the contacts that took place in third countries or contacts concerning routes on which the incriminated carriers did not operate and could not directly operate were relevant for the purpose of establishing the existence of the single and continuous infringement or a cartel of global scope.

293 In any event, the applicants' criticism must be rejected in so far as it relies exclusively on the fact that certain competition authorities in third countries did not find that the applicants had had the possibility of entering into capacity agreements on routes to their respective countries. When the Commission penalises the unlawful conduct of an undertaking, even conduct that results from an international cartel, it aims to safeguard free competition in the internal market. On account of the specific nature of the legal interests protected at EU level, the Commission's assessments pursuant to its relevant powers may diverge considerably from those by authorities of non-Member States (judgments of 29 June 2006, *Showa Denko* v *Commission*, C-289/04 P, EU:C:2006:431, paragraph 55, and of 2 February 2012, *Dow Chemical* v *Commission*, T-77/08, not published, EU:T:2012:47, paragraph 102). Moreover, there is no principle or convention of public international law under which the Commission could be obliged, when imputing unlawful conduct under EU competition law, to take account of the assessments made by the competent authorities of a non-Member State in the field of competition law (judgment of 2 February 2012, *Dow Chemical* v *Commission*, T-77/08, not published, EU:T:2012:47, paragraph 102).

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

(2) The second complaint, alleging erroneous findings regarding the single nature of the infringement

295 The applicants maintain that the six factors referred to in recitals 872 to 884 of the contested decision (that is to say, a single anticompetitive aim; a single product or service; the undertakings involved; the single nature of the infringement; the discussion of various aspects in parallel, and involvement in the various aspects of the infringement) are not sufficient to link together all the conduct listed in Section 4 of the contested decision in so far as concerns the carriers outside the 'core group' of the cartel at issue.

296 It should be borne in mind that an infringement of the prohibition in principle laid down in Article 101(1) TFEU can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that provision. When the various actions form part of an 'overall plan', because their identical object distorts competition within the internal market, the Commission is entitled to ascribe

responsibility for those actions on the basis of participation in the infringement considered as a whole (see, to that effect, judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 41 and the case-law cited).

297 When determining whether there has been a single infringement and an overall plan, the fact that the various actions of the undertakings form part of an 'overall plan' on account of their identical object distorting competition within the common market, is decisive. For the purposes of that assessment, the at least partial identity of the undertakings concerned (see, to that effect, judgment of 13 September 2013, *Total Raffinage Marketing* v *Commission*, T-566/08, EU:T:2013:423, paragraphs 265 and 266, and the case-law cited), as well as the material, geographic and temporal overlap between the acts and conduct at issue may be relevant.

298 That applies, in particular, as regards the identical nature of the goods or services concerned, the identical nature of the detailed rules for implementation, the identical nature of the natural persons involved on behalf of the undertakings and the identical nature of the geographical scope of the practices at issue (judgment of 17 May 2013, *Trelleborg Industrie and Trelleborg* v *Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraph 60).

299 According to the case-law, those factors must be assessed as a whole (judgment of 16 September 2013, *Masco and Others* v *Commission*, T-378/10, EU:T:2013:469, paragraph 58).

300 In the present case, in recitals 872 to 883 of the contested decision, the Commission relied on six factors for the purpose of concluding that the conduct at issue formed part of a single infringement. First, the existence of a single anticompetitive objective (recitals 872 to 876), secondly, the fact that that conduct related to the same service (recital 877), thirdly, the identical nature of the undertakings involved in the various instances of conduct at issue (recital 878), fourthly, the single nature of the infringement (recital 879), fifthly, the fact that the discussions in which the incriminated carriers participated took place in parallel (recital 880) and, sixthly, the involvement of the majority of the incriminated carriers in the three elements of the single and continuous infringement (recitals 881 to 883).

301 In recital 900 of the contested decision, the Commission added to those factors the fact that the same individuals were involved in the various instances of conduct at issue.

302 In the first place, as regards the existence of a single anticompetitive aim, it is apparent from recital 872 of the contested decision that the aim of the incriminated carriers was 'distorting competition in the airfreight sector in the EEA by coordinating their pricing behaviour with respect to the provision of airfreight services by eliminating competition concerning the charging, amount and timing of the FSC, the SSC and the [refusal to pay commission]'.

303 In the context of the present complaint, the applicants dispute that assessment only in part. They claim that the sole purpose of the contacts that took place in third countries was to enable the incriminated carriers to comply with local legislation. They also submit that other conduct resulted from discussions that took place in the context of legitimate cooperation agreements such as the bilateral alliance with Lufthansa, the WOW alliance or the Star Cargo alliance.

304 It should be noted that the applicants adduce no evidence in support of their challenge and essentially confine themselves to referring, in general terms, to their line of argument put forward elsewhere in the present plea, by which they dispute their participation in the single and continuous infringement. That line of argument will be analysed in the context of the examination of the other parts of the present plea.

305 In the second place, the applicants claim that there is no single worldwide market for all airfreight services, but rather a vast number of relevant markets.

306 In that regard, it should be noted that, for the purposes of applying Article 101(1) TFEU, the reason for defining the relevant market is to determine whether an agreement is liable to affect trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the internal market. There is an obligation on the Commission to define the relevant market in a decision applying Article 101(1) TFEU only where it is impossible, without such a definition, to determine whether the agreement, decision by an association of undertakings 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 within the internal market (see judgment of 27 February 2014, *InnoLux* v *Commission*, T-91/11, EU:T:2014:92, paragraph 129 and the case-law cited).

307 In the present case, the applicants do not claim that it was impossible to determine whether the single and continuous infringement had as its object to restrict and distort competition in the internal market and was capable of affecting trade between Member States without first defining the relevant market.

308 In those circumstances, it cannot be found that it was necessary to define the relevant market in order to determine whether the single and continuous infringement was capable of affecting trade between Member States. The Commission was therefore right to find, in recital 74 of the contested decision, that it was not required to define that market and, accordingly, to refrain from doing so.

309 The Commission was also right nevertheless to find, in recital 877 of the contested decision, that the 'arrangements [concerned] the provision of [freight] services and the pricing thereof' and related to a 'single product/service'.

310 In the case of infringements of Article 101 TFEU such as that at issue in the present case, it is actually the agreements and the activities of the cartel that determine the relevant markets (see, to that effect, judgment of 27 February 2014, *InnoLux* v *Commission*, T-91/11, EU:T:2014:92, paragraph 131 and the case-law cited).

311 However, as held in paragraphs 205 and 288 above, the Commission concluded that the surcharges were measures of general application that were intended to be applied 'on all routes, on a worldwide basis' and that the refusal to pay commission was equally 'general in nature'.

312 It follows that the members themselves of the cartel at issue determined the products or services that were the subject of their discussions and concerted practices by including freight services in their discussions, without any distinction according to their place of departure or origin, except to make adjustments according to local conditions (footnote 1323 to the contested decision).

313 The Commission was therefore entitled to categorise the provision of freight services as a 'single service', as described in recitals 14 to 18 of the contested decision.

314 In the third place, the applicants maintain that, apart from the contacts that took place amongst the core group of the cartel at issue, the majority of the conduct at issue concerned undertakings that were very different. They give the example of the contacts that took place in Hong Kong that were referred to in the contested decision, which involved around 50 undertakings whereas only 14 of them were held liable for the single and continuous infringement.

315 In that regard, it is apparent from recital 878 and recitals 881 to 883 of the contested decision that the Commission found that there was a significant overlap between the undertakings which had participated in the various elements of the single and continuous infringement. First, all of the incriminated carriers had participated in the element relating to the FSC and, secondly, almost all of the incriminated carriers had participated in the other two elements.

316 The example of the contacts that took place in Hong Kong is not capable of rebutting that finding since the fact that some of the incriminated carriers were not involved in those contacts is not inconsistent with the establishment of their participation in the three elements of the single and continuous infringement or in a number of them. As regards the argument that the number of carriers involved in those contacts – in addition to the incriminated carriers – is evidence of the diversity of the participants in the conduct at issue, it must be observed that, as is apparent from the case-law cited in paragraphs 297 and 298 above, the identical nature of the undertakings involved in the various instances of conduct at issue is not an essential precondition for classifying the latter as a single and continuous infringement, but merely one of a number of factors that must be taken into consideration by the Commission when determining whether there was an overall plan (see judgment of 16 September 2013, *Masco and Others* v *Commission*, T-378/10, EU:T:2013:469, paragraph 32 and the case-law cited). Moreover, it must be observed, as noted by the Commission, that that argument does not preclude that the conduct at issue of the incriminated carriers was intended to implement at local level the decisions taken at head-office level as part of the multi-level structure described in recitals 107, 1046 and 1300 of the contested decision.

317 In the fourth place, the applicants claim, in essence, that the Commission ignored, with regard to the nature of the single and continuous infringement, the specific features of the coordination that was necessary due to local legislation or which formed part of legitimate alliances. In that regard, the applicants merely reiterate the arguments already raised in support of their criticism of the existence of a single anticompetitive aim. Those arguments must, therefore, be rejected on the same grounds.

318 The applicants also argue that the refusal to pay commission can be distinguished from the other elements of the single infringement by the fact that it arose from a public disagreement between the carriers and the freight forwarders regarding the interpretation of standard clauses, as opposed to 'secret coordination of [the FSC and the SSC] among a handful of carriers'.

319 In that regard, it is indeed apparent from recitals 675 to 702 of the contested decision that the carriers and freight forwarders had diverging legal interpretations regarding the issue of the payment of commission on surcharges. That disagreement related, in particular, to the interpretation of certain standard clauses understood to impose an obligation to pay commission. However, the incriminated carriers did not simply define a common position on that issue and defend it in a coordinated manner before the relevant courts or promote it

collectively to public authorities and other trade associations. On the contrary, the carriers acted in concert by agreeing – at a multilateral level – to refuse to negotiate the payment of commission with freight forwarders and to grant them discounts on surcharges. Thus, in recital 695 of the contested decision, the Commission referred to an email of 19 May 2005, in which a regional manager of Swiss in Italy stated that 'all [participants in a meeting held on 12 May 2005] confirmed that [they] will not accept any [FSC/SSC] remuneration'. In recital 696 of the contested decision, reference is made to an email of 14 July 2005 in which CPA stated that 'everyone [who had participated in a meeting the day before] reconfirmed the firm intention not to accept any negotiation' concerning the payment of commission. Similarly, in recital 700 of that decision, the Commission relied on an internal email in which a Cargolux employee informed the head office that a meeting was held 'with all [the carriers] operating at [Barcelona airport]' and indicated that 'it was a general opinion that we [should] not pay any [commission] on surcharges'.

320 It is also apparent from the contested decision that several carriers exchanged information – on a bilateral level – in order to ensure each other that they would continue to adhere to the refusal to pay commission, as they had previously agreed. By way of illustration, recital 688 of that decision describes a telephone conversation of 9 February 2006 during which Lufthansa asked AF whether its position on the refusal to pay commission remained unchanged.

321 Consequently, the aim of the refusal to pay commission is separate from the public disagreement of a legal nature referred to by the applicants. As is apparent from recitals 874 and 899 of the contested decision, the refusal to pay commission was such as to strengthen the coordination relating to surcharges. According to the Commission, that amounted to a concerted refusal to grant freight forwarders discounts on surcharges, by which the incriminated carriers 'ensured that pricing uncertainty, which could have arisen from competition on commission payments [in the context of negotiations with freight forwarders], remained suppressed' (recital 874) and thus aimed to eliminate competition in respect of surcharges (recital 879). The applicants' argument that the public nature of the refusal to pay commission conflicts with the secret nature of the coordination relating to the FSC and the SSC therefore has no factual basis.

322 It follows that it is also necessary to reject the request for a measure of organisation of procedure made by the applicants in the reply and seeking to obtain, in support of the present argument, the production of the leniency statements on which the description of an alleged 'core group' in the contested decision is based. It is not necessary to supplement the information available to the Court in order to respond to the arguments by which the applicants challenge the characterisation, in the contested decision, of the nature of the single infringement (see paragraph 126 above).

323 In the fifth place, the applicants submit that they were not involved in the examples given by the Commission, in recital 880 of the contested decision, of elements of the infringement discussed in parallel. That assertion relates to the applicants' participation in the single and continuous infringement and not to the existence of such an infringement. Therefore, in accordance with the considerations set out in paragraph 291 above, it is irrelevant in the context of the present complaint.

324 In the sixth place, the applicants claim that the involvement of the incriminated carriers in one or more elements of the single and continuous infringement does not, in itself, demonstrate that they are linked. That argument is ineffective since the Commission did not base its finding of the

existence of a single infringement on that fact alone, but on a body of evidence referred to in paragraph 300 above, the sufficiency of which has not been validly called into question by the applicants in the context of the present complaint.

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

(3) The third complaint, alleging erroneous findings as regards the continuous nature of the infringement

326 The applicants claim that the Commission failed to substantiate to the requisite standard the continuous nature of the infringement. They maintain that the members of the cartel at issue participated only in sporadic or isolated conduct at a local or regional level.

327 The Commission disputes the applicants' line of argument.

328 It should be noted that, in the context of the present complaint, the applicants merely reiterate their arguments relating to the geographic scope of the cartel at issue which has already been examined and rejected in the context of the first complaint in the present part of the plea. In addition, whereas it is apparent from Section 4 of the contested decision that the contacts on which the Commission relied for the purpose of establishing the existence of the single and continuous infringement took place throughout the infringement period and were consistent with the pursuit of a single anticompetitive aim (see paragraphs 302 to 304 above and paragraphs 439 and 467 below), the applicants merely make a general reference to the sporadic and isolated nature of the contacts at issue and fail to identify any period during which the single infringement at issue was interrupted.

329 The present complaint must therefore be rejected, as, consequently, must the present part of the plea in its entirety.

(b) The second part of the plea, alleging errors in the assessment of the conduct relating to the bilateral alliance with Lufthansa

330 In the context of the present part, the applicants rely on Commission Decision 96/180/EC of 16 January 1996 relating to a proceeding under Article [101 TFEU] and Article 53 of the EEA Agreement (IV/35.545 – LH/SAS) (OJ 1996 L 54, p. 28; 'the 1996 exemption'). That decision granted an exemption from the prohibition laid down in Article 101(1) TFEU to the general alliance agreement by which Lufthansa and the applicants agreed on a worldwide joint pricing policy and the widest possible integration of their freight services. The applicants maintain that, in the light of that exemption, the Commission ought to have excluded from the body of evidence relied on against them the bilateral contacts they had with Lufthansa referred to in recitals 223, 597, 618 to 620 and 673 of the contested decision.

331 The Commission disputes the applicants' line of argument.

332 As is apparent both from recitals 791 and 792 of the contested decision and from the Commission's written pleadings before the Court, the bilateral contacts between Lufthansa and the applicants were not relied on against the applicants for the purposes of establishing their participation in the single and continuous infringement in so far as they were covered by the 1996 exemption. As is apparent from recitals 24 and 28 of that exemption, the alliance between the

applicants and Lufthansa was broad in scope and '[the parties intended] to establish worldwide an integrated transport system involving … a joint pricing policy', in particular for freight services. It is, moreover, common ground between the parties that the bilateral contacts between Lufthansa and the applicants concerning the FSC and SSC were within the scope of the exempt alliance.

333 For the purpose of addressing the present part of the plea, it is therefore necessary to examine whether, as is apparent from footnotes 1251 and 1258 to the contested decision, the contacts referred to in recitals 223, 618 and 620 of the contested decision contribute to establishing conduct that exceeds the scope of the 1996 exemption by characterising the applicants' conduct as participation in multilateral coordination within the WOW alliance or, as regards recital 673, in anticompetitive contacts with competitors other than Lufthansa. By contrast, in so far as the Commission does not rely either on the contact of 2 October 2001, referred to in recital 597 of the contested decision, or on that of 13 January 2003, referred to in recital 619 of that decision, in order to establish that the applicants participated in the single and continuous infringement, the applicants' arguments in that regard must be rejected as ineffective and the analysis must be limited to the contacts referred to in recitals 223, 618, 620 and 673 of the contested decision.

334 In the first place, recital 223 of the contested decision refers to an internal Lufthansa email exchange of 3 and 11 April 2002. In that exchange, Lufthansa refers, first, to SAC's position against the reintroduction of the FSC and, secondly, to the comparatively cooperative attitude of the applicants. The Commission takes the view, in recital 791 of the contested decision, that that evidence helps to support the finding that the applicants participated in coordination within the WOW alliance as regards the FSC.

335 In that regard, it should be pointed out, as noted by the applicants, that it is not apparent from the email exchange in question that they had been in contact with SAC in relation to the FSC. Furthermore, it cannot be inferred, as the Commission does in its reply to the written questions put by the Court, that Lufthansa, in comparing the cooperation of the applicants and SAC, both of which are indeed parties to the WOW alliance, was necessarily referring to the cooperation of the applicants within the framework of that alliance rather than within the framework of the alliance covered by the 1996 exemption.

336 Contrary to what the Commission also appears to submit in its reply to the Court's written questions, the decision of a large number of carriers, including the applicants and Lufthansa, to reintroduce the FSC in April 2002 (recitals 209 and 210 of the contested decision) is not such as to lead to an interpretation of the email exchange that is different from that set out in paragraph 335 above. First, the applicants are not among the carriers referred to in recitals 209 and 210 of the contested decision as having taken part in a discussion regarding the FSC and, in particular, regarding its reintroduction at the beginning of 2002. Secondly, it cannot be inferred from the fact that the applicants also reintroduced the FSC in April 2002 that immediately before that time the applicants had contacts with Lufthansa which went beyond the scope of the 1996 exemption, in particular with SAC in the context of the WOW alliance. It should also be noted that the Commission does not rely, in the contested decision, on the evidence set out in recitals 209 and 210 for the purposes of establishing the applicants' participation in the single and continuous infringement.

337 In the light of the foregoing, it must be concluded that the evidence set out in recital 223 of the contested decision does not establish the applicants' participation in the coordination regarding the FSC within the WOW alliance, but rather merely supports the existence of contacts between

the latter and Lufthansa concerning the FSC. In view of the nature of those contacts and the application, at the material time, of the 1996 exemption, that evidence must be regarded as being devoid of any probative value.

338 In the second place, recitals 618 and 620 of the contested decision refer, in particular, to a number of internal Lufthansa emails sent between the end of November 2002 and the beginning of March 2003, concerning the SSC level applicable in Hong Kong. The Commission takes the view, in recital 792 of the contested decision, that that evidence contributes to establishing that the applicants coordinated the SSC level with the members of the WOW alliance. The applicants dispute the Commission's findings concerning two emails, sent on 5 December 2002 and 5 March 2003.

339 The first email, dated 5 December 2002, was sent by Lufthansa's manager in Hong Kong and reported that, at a recent meeting of the CSC of the BAR, most of the carriers stated that they would follow CPA and join a request for authorisation to reduce the SSC level. That manager then asked her contact to 'talk on his level in particular to [the applicants], [AF] and [Japan Airlines] [to ask] if they would change their mind and follow [Lufthansa]'s example of not lowering the [SSC]' and 'for his support in persuading [SAC] and [KLM] as both [carriers] had not yet decided whether to change their SSC', suggesting to him that this could be done 'in the framework of the following week's WOW [alliance] meeting' (see recital 618).

340 It is apparent from that email that the applicants participated in the meeting of the CSC of the BAR in question and that during that meeting they informed the other carriers of their position with regard to the proposed adjustment of the SSC level, which, moreover, the applicants do not dispute before the Court. Accordingly, that document contributes to establishing that the applicants were involved in coordinating the setting of the SSC level in Hong Kong with carriers other than Lufthansa, in the context of the CSC of the BAR. In that context, Lufthansa's suggestion, made in that same email, to address the issue of the SSC level in Hong Kong in the context of a forthcoming meeting of the WOW alliance must be understood, beyond its clear wording, in the light of the multilateral contacts that took place on that issue during the same period and in which both Lufthansa and the applicants took part. It follows that the Commission did not err in finding, in recital 792 of the contested decision, that that email supported the existence of coordination in relation to the SSC level between members of the WOW alliance.

341 The applicants rightly counter that there is no evidence that the WOW alliance meeting on that subject actually took place or even that a proposal to that effect was made by Lufthansa to the other members of the alliance. Nevertheless, that cannot prevent the Commission from relying on the email in question as incriminating evidence in the context of a larger body of evidence. The fact that Lufthansa intended to discuss that matter at a meeting of the WOW alliance is in itself an indication that the matter of the SSC level was being discussed between the members of that alliance (see, to that effect, judgment of 29 June 2012, *GDF Suez* v *Commission*, T-370/09, EU:T:2012:333, paragraph 226).

342 The second email, dated 5 March 2003, was an internal Lufthansa email sent by the manager in Hong Kong, informing her interlocutor that 'his efforts regarding the SSC with the WOW [alliance] partners' had been fruitful, referring to the latest information received from the applicants and SAC in that regard (recital 620 of the contested decision). That manager stated that the applicants had obtained the agreement of the Hong Kong authorities and that the SSC would be applied from 14 March 2003.

343 It is apparent from that document that Lufthansa contacted SAC and the applicants concerning the SSC applicable in Hong Kong and that it intended for those contacts to come under the WOW alliance.

344 It must, admittedly, be noted that the concrete details of that contact are not specified, in particular whether or not it was multilateral in nature. However, it is settled case-law that, while the Commission must produce precise and consistent evidence in order to establish an infringement, it is not necessary for every item of evidence produced by it to satisfy those criteria in relation to every aspect of the infringement. It follows that, even though the email in question does not in itself prove that the applicants were involved in multilateral contact with SAC and Lufthansa in the context of the WOW alliance, it is nevertheless important, in accordance with settled case-law (see judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 47 and the case-law cited), to examine in the context of the tenth part of the present plea whether, taken in conjunction with other evidence, that email was capable of constituting a body of evidence which allowed the Commission to make a conclusion to that effect.

345 In the third place, recital 673 of the contested decision refers to an internal email from an employee of Lufthansa's Tokyo office dated 30 October 2001 in which it is lamented that Lufthansa had 'missed the train', because it had failed to take the lead by filing with the Japanese authorities, in due time, an application concerning the SSC. As a consequence, the 'foreign airline alliance [for setting the SSC at] Euro 0.10-0.15 [per kilo]' had 'withered away' and, in the meantime, 'European heavyweights', namely AF, KLM, British Airways and the applicants had all filed an application for 500 to 600 Japanese yen per airway bill. That recital goes on to state that the addressee of that email forwarded it internally, commenting that he remained in favour of Lufthansa submitting an application for SSC at EUR 0.15 per kilo and that he was 'sure that the other European carriers [would] follow, when we signal that we will lead'.

346 Contrary to the applicants' submission, those items of evidence do not merely refer to the applications filed by other carriers with the Japanese authorities and show Lufthansa's desire to deviate from the amount of SSC requested, inter alia, by the applicants. The first email refers to an attempt at coordination between 'foreign airlines' with a view to agreeing on a certain amount of SSC and implicitly makes the link between the failure of that coordination and the filing, by a number of European carriers, including the applicants, of an application for another amount of SSC. The second email reveals Lufthansa's intention to advise those European carriers that it was going to take the lead by filing an application in line with the initial coordination aim. Accordingly, the evidence set out in recital 673 of the contested decision contributes to establishing the existence of anticompetitive contacts between the applicants and carriers other than Lufthansa.

347 In the light of the foregoing, first, it must be concluded that the evidence set out in recital 223 of the contested decision establishes only the existence of contacts between the applicants and Lufthansa concerning the FSC and, consequently, for the reasons set out in paragraph 337 above, it must be excluded from the body of evidence which the applicants contest as a whole in the tenth part of the present plea. Secondly, in so far as the email referred to in recital 620 of that decision does not establish, in itself, that the applicants were involved in multilateral contact with SAC and Lufthansa in the context of the WOW alliance, it will be apposite, in accordance with the case-law cited in paragraph 344 above, to examine in the context of the tenth part of the present plea whether, together with other evidence, including that described in recitals 618 and 673 of that

decision, it may nevertheless be included in a body of evidence rightly enabling the Commission to conclude that the applicants participated in the element of the single and continuous infringement.

(c) The third part of the plea, alleging errors in the assessment of the email exchange of December 1999 in the context of the Star Cargo alliance

348 The applicants claim that the Commission was wrong to include the email exchange of 13 and 14 December 1999 between the carriers of the Star Cargo alliance, namely the applicants, Lufthansa, three other carriers and Air Canada, in the body of evidence purported to establish the applicants' participation in, or awareness of, the single and continuous infringement.

349 First, the applicants submit that a contact relied on to establish the beginning of their participation in the single and continuous infringement should necessarily establish, in itself, the existence of an infringement and that the Commission was wrong to consider, in recital 921 of the contested decision, that the exchange in question must be assessed as part of an overall assessment of the body of evidence.

350 Secondly, they state that the exchange in question is covered by the 1996 exemption, since the single and continuous infringement relates only, for that period, to intra-EEA routes and the applicants and Lufthansa were the only carriers in the alliance to serve such routes. Moreover, the email exchange in question is also justified, according to the applicants, by the Star Cargo alliance and, in any event, is covered by the block exemption provided for by Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1).

351 Thirdly, they maintain that that exchange presents no objective link with the single and continuous infringement, as is apparent from the context of those contacts, namely the IATA resolution seeking to establish an FSC mechanism, the isolated nature of the exchange in question viewed in the context of an alliance that was abandoned shortly afterwards and the fact that the applicants and Lufthansa were the only carriers involved in that exchange against whom that exchange was relied on in the contested decision. The applicants add that the SAS Cargo employee involved in the exchange in question did not take part in any other contact at issue. Lastly, the applicants emphasise that the exchange in question reveals no more than an agreement with a carrier not to introduce an FSC, which, moreover, they did not comply with, since they followed Lufthansa's position that was communicated to them subsequently.

352 The Commission disputes the applicants' line of argument.

353 As a preliminary point, it should be noted that, in the context of the present part of the plea, the applicants do not merely dispute the probative value of the email exchange in question. They seek to call into question, more broadly, the date found by the Commission in recital 1148 of the contested decision to be the beginning of their participation in the single and continuous infringement, which is concomitant with the date on which that email exchange began, namely 13 December 1999.

354 In that regard, it must be borne in mind that, as is apparent from paragraph 344 above, in order to establish that there has been an infringement of Article 101(1) TFEU, the Commission must produce firm, precise and consistent evidence. However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the

infringement. It is sufficient if the body of evidence relied on by that institution, viewed as a whole, meets that requirement (see, to that effect, judgment of 1 July 2010, *Knauf Gips* v *Commission*, C-407/08 P, EU:C:2010:389, paragraph 47). Contrary to the applicants' submission, those principles also apply to the determination of the beginning of their participation in the single and continuous infringement (see, to that effect, judgments of 21 May 2014, *Toshiba* v *Commission*, T-519/09, not published, EU:T:2014:263, paragraphs 175 to 179, and of 12 December 2014, *Hansen & Rosenthal and H&R Wax Company Vertrieb* v *Commission*, T-544/08, not published, EU:T:2014:1075, paragraphs 166 to 179).

355 In the present case, the exchange in question, cited in recital 135 of the contested decision, began with an email from the applicants to Lufthansa, three other carriers and Air Canada. In that email, the applicants asked them, while expressing their own uncertainty in that regard, whether they intended to introduce an FSC in view of the fact that the price of fuel had exceeded the trigger threshold set by IATA in a draft resolution seeking to introduce an FSC. In response, a carrier agreed with the applicants, while Lufthansa stated as follows:

'we are also reluctant to take the initiative this time. If other, big competitors of ours were to go for it, we would follow, but in a different and less centralised approach.'

356 It can be inferred from that exchange that the applicants took the initiative to contact a number of carriers, in a multilateral context, in order to gauge whether or not they intended to introduce an FSC. It is also apparent that the replies of the carrier at issue and Lufthansa informed the applicants and the other addressees of their intentions with regard to the introduction of an FSC. Moreover, the applicants do not dispute that, as is apparent from the contested decision, that contact took place at the head-office level of the carriers involved.

357 It should also be noted that, in the two months following that initial contact, a number of other contacts involving the applicants, both at head-office level and local level, and showing a willingness to coordinate the FSC in a multilateral context, took place in Finland, Switzerland and Singapore. Those contacts are referred to in recitals 144 to 146 of the contested decision and have been established by evidence whose probative value cannot be denied (see paragraphs 438 to 467, 567 to 594 and 602 to 606 below). Those contacts involved both incriminated carriers other than those involved in the exchange of 13 and 14 December 1999 as well as Lufthansa (recitals 145 and 146 of the contested decision) and Air Canada (recital 145 of the contested decision).

358 It follows that the Commission did not err in finding that the email exchange in question contributed to establishing the applicants' participation in the single and continuous infringement or, consequently, by taking 13 December 1999 as the starting date of their participation.

359 None of the arguments put forward by the applicants is capable of calling that conclusion into question.

360 First, the factual context relied on by the applicants and recalled in paragraph 351 above does not call into question the nature and purpose of the contacts that took place via the email exchange in question, attesting to an intention on the part of the parties to the exchange to act in concert, at head-office level, regarding the introduction of an FSC. In particular, as regards the fact that the applicants' employee involved in the exchange in question did not take part in any other

anticompetitive contacts, it should be noted that it is not necessary for the natural persons involved in the various instances of conduct at issue to be the same for there to be a finding of a single and continuous infringement.

361 Furthermore, it is apparent from the evidence referred to in paragraph 357 above that, almost simultaneously with the email exchange in question, the applicants were involved in a series of contacts pursuing the same aim with other carriers, in addition to Air Canada and Lufthansa, which had also participated in that email exchange. In those circumstances, and contrary to the applicants' submission, it is not probable that that email exchange demonstrates a desire to act in concert that is limited, in scope, to the Star Cargo alliance.

362 Furthermore, as regards the IATA draft resolution, the applicants acknowledge that it was not applicable on the date of the email exchange in question. Consequently, the refusal of the competent authorities to approve it, albeit subsequently, is irrelevant.

363 Lastly, as regards the alleged lack of effects, on the applicants' conduct, of the concertation implemented in the context of the email exchange in question, it should be noted that the absence of actual effects on the conduct of the undertaking concerned is not, in itself, sufficient to preclude a finding that that conduct forms part of a single and continuous infringement. It should also be noted that the disclosure of sensitive information, such as that referred to in recitals 144 and 584 of the contested decision, removes uncertainty as to the future conduct of a competitor and thus directly or indirectly influences the strategy of the recipient of the information (see, to that effect, judgment of 24 March 2011, *Comap* v *Commission*, T-377/06, EU:T:2011:108, paragraph 70 and the case-law cited). Furthermore, it must be observed that, when an undertaking receives such information, without publicly distancing itself from the initiative in question or reporting it to the administrative authorities, it encourages the continuation of the infringement and compromises its discovery (judgment of 17 May 2013, *Trelleborg Industrie and Trelleborg* v *Commission*, T-147/09 and T-148/09, EU:T:2013:259, paragraph 68).

364 Secondly, the email exchange in question is not covered by either the 1996 exemption or the block exemption provided for in Regulation No 3975/87.

365 As a preliminary point, it must be borne in mind that, having regard to the general principle of the prohibition on cartels laid down in Article 101(1) TFEU, provisions derogating therefrom, such as those in the 1996 exemption or in Regulation No 3975/87, cannot be interpreted widely or so as to extend the effects of the acts containing them further than is necessary for the protection of the interests that they are intended to safeguard (see, to that effect, judgment of 22 April 1993, *Peugeot* v *Commission*, T-9/92, EU:T:1993:38, paragraph 37).

366 As regards, first of all, the application of the 1996 exemption, it must be observed that the applicants have failed to explain how the attempt to coordinate the FSC between six carriers, as attested by the email exchange in question, came within the scope of the alliance covered by the 1996 exemption and its objective of establishing, worldwide, an integrated transport system between the applicants and Lufthansa (see paragraph 332 above). In that regard, the claim that the Star Cargo alliance is merely an extension of the alliance covered by the 1996 exemption is not capable, even if it were to be established, of extending the 1996 exemption to cover the Star Cargo alliance, since that would require a wide interpretation of that exemption, which would be contrary to the case-law referred to in the preceding paragraph.

367 As regards the alternative argument to the effect that the Commission's decision-making practice with respect to alliances between the applicants and Lufthansa, as well as between both of them and another carrier, shows that it considered, at the time, that the other parties to the email exchange in question, established outside the EEA, were neither actual nor potential competitors on intra-EEA routes, it should be noted that the challenge to the worldwide nature of the cartel at issue and the competitive relationship between the carriers has already been examined and rejected in the context of the first complaint of the first part of the present plea (see paragraphs 279 to 293 above).

368 If, by referring to the Commission's decision-making practice in relation to them, the applicants seek to rely on the principle of the protection of legitimate expectations, it is for them to establish that they were given precise, unconditional and consistent assurances originating from authorised and reliable sources such as to give rise to justified expectations on their part (see, to that effect, judgment of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 97). The fact that the Commission did not adopt an individual exemption decision following the initiation of a procedure on the basis of Regulation No 3975/87 with respect to the alliance between the applicants, Lufthansa and another carrier is not capable of constituting, contrary to what is suggested by the applicants, a firm and definitive position on the inapplicability of Article 101(1) TFEU, as regards the impact of that alliance on intra-EEA routes, nor, a fortiori, on the absence of a competitive relationship between the applicants and Lufthansa, on the one hand, and the carrier at issue, on the other. Moreover, and in any event, since a number of members of the Star Cargo alliance were not members of the alliance between the applicants, Lufthansa and the carrier at issue, it must be held that the Commission had not been called upon to take a decision, in the procedure initiated on the basis of Regulation No 3975/87, on the facts relating to the email exchange in question.

369 As regards, next, the application of the block exemption provided for by Regulation No 3975/87, the applicants submit that the email exchange in question is covered by point (i) of the annex referred to in Article 2(1) of Regulation No 3975/87 because it merely concerned 'price structure'.

370 Article 2(1) of Regulation No 3975/87 provides:

'The prohibition laid down in Article [101(1) TFEU] shall not apply to the agreements, decisions and concerted practices listed in the Annex, in so far as their sole object and effect is to achieve technical improvements or cooperation. This list is not exhaustive.'

371 Point (i) of the annex referred to in that article is worded as follows:

'the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs, provided that such rules do not directly or indirectly fix transport fares and conditions;'

372 It is clear from those provisions that the exemption provided for therein is limited to conduct which has the sole object or effect of achieving technical improvements or cooperation. The fact that conduct is referred to in the annex to Regulation No 3975/87 is not therefore sufficient to derogate from the principle of the prohibition on cartels.

373 In the present case, it should be noted that the applicants do not invoke any object or effect consisting in achieving technical improvements or cooperation in connection with the contacts that took place via the email exchange in question. Furthermore, the applicants have not adduced any evidence intended to establish that such an object or effect was exclusively pursued.

374 Moreover, it is apparent from paragraph 355 above that, by their email of 13 December 1999, the applicants sought to gauge the intentions of the other carriers regarding whether they might introduce an FSC. It follows that, although that contact shows an intention to act in concert with other carriers regarding the introduction of the FSC, it does not, nevertheless, amount to an attempt to establish uniform rules concerning the structure and the conditions governing the application of freight tariffs, within the meaning of point (i) of the annex referred to in Article 2(1) of Regulation No 3975/87.

375 In the light of the foregoing, the applicants' claim regarding the benefit of the block exemption provided for in Article 2(1) of Regulation No 3975/87 must be rejected.

376 Thirdly, it has not been established that the email exchange in question could be justified by the scope of the Star Cargo alliance.

377 The applicants have failed to adduce prima facie evidence that the actual operation of that alliance involved its members coordinating with regard to the FSC. The applicants themselves noted that, although they attempted, together with Lufthansa, to form the Star Cargo alliance, their attempts failed in 2000. Although a reciprocal declaration of intentions between alliance members was indeed adopted in April 1999, as is apparent from the applicants' reply to the Statement of Objections, the applicants do not adduce any evidence of a subsequent start of operational implementation that would have justified the email exchange in question.

378 In the light of the foregoing, it must be held that the Commission did not err in finding that the email exchange in question contributed to establishing the applicants' participation in the single and continuous infringement and in determining, on the basis of that exchange, the starting date of the applicants' participation in that infringement.

379 Accordingly, the present part of the plea must be rejected.

(d) The fourth part of the plea, alleging errors in the assessment of the conduct relating to the WOW alliance

380 The present part alleges errors in the assessment of the conduct relating to the WOW alliance and consists of three complaints, alleging, first, errors in the finding that the contacts between members of the WOW alliance were illegitimate, secondly, wrongful omission to examine the compatibility of contacts within the WOW alliance with Article 101 TFEU and, thirdly, errors relating to the inclusion of those contacts in the scope of the single and continuous infringement.

(1) The first complaint, alleging errors in the finding that the contacts between members of the WOW alliance were illegitimate

381 The applicants note that the contested decision is based on 18 communications involving only WOW alliance carriers for the purpose of establishing their participation in the single and continuous infringement. They claim that the Commission was wrong, however, to find, in recital 971 of the contested decision, that contacts within the WOW alliance were 'outside the legitimate framework of the alliance'.

382 Conduct in the context of the WOW alliance was within the general scope of the agreement, the objective of which was, as described in recitals 928 to 931 of the contested decision, for its members to form an integrated cargo system and to combine their cargo businesses, including an integrated network, sales integration, and revenue and cost sharing. Thus, the applicants submit that the Commission has understated the implementation of the WOW alliance cooperation and overstated the scope of the contacts relating to surcharges.

383 The applicants also complain that they were never given an opportunity to be heard on certain facts and on certain of the Commission's conclusions regarding the extent of implementation of the WOW alliance and the scope of the coordination of surcharges within it.

384 Lastly, the applicants claim that the Commission wrongly relied on the evidence set out in recitals 950, 956 and 957 of the contested decision in order to attempt to show awareness of the illegitimate nature of the contacts within the WOW alliance.

385 The Commission disputes the applicants' line of argument.

(i) Infringement of the rights of the defence

386 As a preliminary point, it is necessary to examine the applicants' claim regarding infringement of their rights of defence in so far as, first, the Commission's findings relating to the extent of implementation of the WOW alliance and the scope of the contacts concerning surcharges within the WOW alliance were not mentioned in the Statement of Objections and, secondly, certain items of evidence other than those referred to in the context of the first plea were used in support of those findings without having been communicated to them beforehand.

387 As regards the first complaint made against the Commission, concerning a discrepancy between the content of the Statement of Objections and that of the contested decision, it must be borne in mind that, as stated in paragraph 136 above, respect for the rights of the defence requires, in particular, that the Statement of Objections contain the essential elements used against the undertaking concerned, such as the facts, the characterisation of those facts and the evidence on which the Commission relies.

388 However, as is apparent from paragraph 138 above, the assessments of fact and of law set out in the Statement of Objections are purely provisional and the Commission is not bound by them.

389 In the present case, it should be noted that the Statement of Objections referred, in recital 1321, to all the contacts evidencing the applicants' participation in the single and continuous infringement. It was stated, in recitals 1325 and 1327 of that statement, that the evidence of the applicants' participation in the elements of the single and continuous infringement concerning the FSC and the SSC related in particular to certain meetings and discussions that took place within the WOW alliance. Moreover, the applicants do not dispute that the objective of the cartel at issue, consisting, for the incriminated carriers, in coordinating their pricing behaviour in the provision of freight services on a global basis by means, in particular, of the FSC and the SSC, was already stated in the Statement of Objections. It follows that the scope of the contacts concerning surcharges within the WOW alliance was clear from the content of that statement and was not based, contrary to what the applicants claim, on a new allegation which appeared for the first time in the contested decision.

390 As regards the explanations in the contested decision relating to the extent of implementation of the WOW alliance, it is indeed common ground that they were not included in the Statement of Objections. It should be noted, however, that the purpose of those explanations is to analyse and respond to the detailed arguments, put forward by the applicants in particular, in the replies to the Statement of Objections, which seek to justify the contacts within the WOW alliance in the light of the legitimate objectives pursued by the latter. In so doing, the Commission does not introduce new facts alleged against the applicants, but confines itself to commenting on those put forward by the applicants and other carriers, addressees of the Statement of Objections and members of the WOW alliance, in their replies. Lastly, the Commission's legal assessment, in recital 971 of the contested decision, that the WOW alliance does not justify the coordination of surcharges conducted within that alliance, was already set out, albeit briefly, but to a sufficient legal standard, in paragraph 1446 of the Statement of Objections.

391 As regards the second complaint, relating to the non-disclosure, during the administrative procedure, of certain inculpatory evidence, referred to in recitals 933 and 949 of the contested decision, the principles set out in paragraphs 90 to 96 above concerning the scope of the right of access to the file apply.

392 The applicants thus maintain that Lufthansa's statement contained in the reply to the Statement of Objections and referred to in recital 933 of the contested decision, according to which 'the [WOW] alliance is now dormant and it is no longer possible to refer to the fact that it operates a route network' constitutes inculpatory evidence which has not been disclosed. In that regard, it should be noted that that statement is referred to in a section entitled 'Analysis of the WOW alliance – implementation of the Alliance Agreement' and is relied on for the purpose of supporting the finding that the WOW alliance was implemented only to a limited extent. It thus supports the Commission's view that the WOW alliance was not capable of justifying the coordination of surcharges conducted within it, given its limited implementation. Admittedly, no express reference is made to that statement in the subsequent recitals of the contested decision. The fact remains that the content of that statement and the way in which it forms part of the contested decision lead to the conclusion that it constitutes inculpatory evidence. However, that statement was not disclosed during the administrative procedure. It is therefore necessary not to take that statement into account when examining the merits of the Commission's findings challenged in the context of the present complaint, so as to determine, in accordance with the case-law referred to in paragraph 96 above, whether the result at which the Commission arrived in the contested decision might have been different if that statement had been disallowed as inculpatory evidence (see paragraphs 416 and 432 below).

393 The applicants also submit that the extract from the decision of 4 July 2005 in Case COMP/M.3770 – Lufthansa/Swiss, cited in recital 949 of the contested decision, constitutes inculpatory evidence which cannot be relied on against them. It is sufficient, for the purposes of rejecting that claim, to note that that extract is cited by the applicants themselves in their replies to the Statement of Objections and that the complaint to the effect that the Commission did not disclose to them the documents underlying the statement contained in that extract has already been rejected in the context of the examination of the first plea in law, in paragraph 119 above.

(ii) The scope of the WOW alliance and its actual implementation

394 By the present complaint, the applicants seek first of all to call into question the Commission's findings, in recitals 947 to 952 of the contested decision, that the scope of the WOW alliance and its actual implementation did not justify price coordination, in particular on surcharges, of the kind implemented in the context of the cartel at issue.

395 The applicants claim that the Commission understated, in the contested decision, the implementation of the WOW alliance, by distorting or failing to take account of certain facts. The integration of the partners' networks is thus apparent from the conclusion of agreements concerning joint freighters and capacity sharing. The Commission's assertion in recital 941 of the contested decision that the parties had not demonstrated that any implementation steps had been taken in relation to the project to integrate their IT systems, is, according to the applicants, contradicted, in particular, by the reference in recital 934 of that decision to an online common tracking system. The Commission also misrepresents the applicants' statements by stating that integrated handling functions were limited and that cooperation regarding a common brand was merely ad hoc. Lastly, the need to harmonise the products offered by members of the WOW alliance has not been refuted by the Commission and a number of sale integration initiatives were ignored in the contested decision.

396 In the present case, in recitals 947 to 952 of the contested decision, the Commission concluded that none of the initiatives allegedly taken in the context of the WOW alliance justified a general coordination on surcharges, on the ground that cooperation within that alliance had remained limited, had never reached the stage of integrated sales and pricing policies and had been limited, in essence, to targeted projects relating to certain routes, customers or products. In reaching that conclusion, the Commission relied on an analysis of the documents and statements provided during the administrative procedure by the incriminated carriers who were members of the alliance in question. It also referred, in recitals 951 and 952 of the contested decision, to a number of documents in the file which showed that the members of the WOW alliance pursued individual policies regarding surcharges that they were not prepared to deviate from for the purposes of that alliance.

397 The evidence put forward by the applicants in the context of the present part of the plea is not such as to call into question the merits of the conclusions reached by the Commission.

398 First of all, it must be noted that the applicants do not rely on the existence of a general integrated pricing policy within the WOW alliance. Next, the applicants have failed to show that the examples of commercial integration referred to in their written pleadings, such as the existence of joint sales agents in certain countries or the inclusion in the applicants' pricing list of destinations, as the case may be, served by other members of the WOW alliance, necessarily imply the existence of general coordination on tariffs or surcharges. That also applies to the harmonised products offered for sale by the WOW alliance, as referred to in recitals 938 to 940 of the contested decision. The harmonisation at issue concerned the conditions relating to the provision of the service, and in particular the guarantees provided, but it has not been established that it related to the pricing of those products. As regards the hypotheses of price coordination within the WOW alliance referred to in recital 946 of the contested decision, they related to specific initiatives, such as the operation of a joint freighter by the applicants and SAC on a specific route or the occasional submission of joint bids to certain customers, in particular freight forwarders. Accordingly, they cannot justify the implementation of general coordination on surcharges.

399 In the absence of proof of an integrated sales and pricing policy that goes beyond a few specific interventions, the other evidence put forward by the applicants seeking to dispute the Commission's analysis of the efforts to promote the brand and to implement integrated handling and an integrated IT system cannot, in itself, justify general coordination on surcharges.

400 Lastly, contrary to what is also claimed by the applicants in the context of the present complaint, the evidence referred to, inter alia, in recitals 956 and 957 of the contested decision shows that, for the partners in the WOW alliance, compliance of the contacts at issue with competition rules was not self-evident.

(iii) The scope of the contacts within the WOW alliance

401 The applicants seek to dispute the scope attributed by the Commission to the contacts within the WOW alliance, arguing that they related to specific and local initiatives which could not, as such, be linked to the single and continuous infringement.

402 The applicants thus dispute the scope attributed by the Commission in the contested decision to 18 contacts between members of the WOW alliance to which reference is made in recitals 401, 434, 484, 488, 490, 494, 496, 497, 512, 517, 531, 546, 596 and 628 to 632. They claim that none of them constitutes general coordination on surcharges. It is necessary to examine the applicants' claim in respect of each of the categories of contacts referred to.

403 In the first place, the contact referred to in recital 596 of the contested decision relates to a communication from SAC to Lufthansa and the applicants dated 1 October 2001, in which it states that it will introduce the SSC as from 8 October 2001. The applicants claim that that contact was made in the specific context of the United States and in connection with the launch, a few days previously, of harmonised express services under the WOW brand. Apart from the fact that they adduce no evidence of SAC's announcement being of such limited scope, it must be observed that the imminent introduction of an SSC by SAC was discussed, as early as 28 September 2001, in a number of separate forums involving other carriers (see recitals 592 and 594 of the contested decision), which makes the alternative explanation proposed by the applicants all the more implausible.

404 In the second place, as regards the contacts referred to in recitals 401, 434, 484, 494, 497, 512 and 546 of the contested decision, the applicants claim in essence that they were part of exchanges specific to 'Scandinavia' between members of the WOW alliance, relating to the method for converting the FSC into local currency, which were justified by the operation of joint freighters with Lufthansa and Japan Airlines, on the one hand, and with SAC, on the other. It should be noted that the applicants do not provide any evidence in support of that argument, whereas the evidence referred to in the contested decision is to be interpreted, in the absence of any evidence to the contrary and in view of the general applicability of the surcharges (see paragraphs 279 to 288 above and 445 below), as relating to Lufthansa's intentions concerning the general application of the SSC, irrespective of any specific project of the WOW alliance.

405 In the third place, as regards the communication referred to in recital 488 of the contested decision, the applicants rely on the specific regulatory context in Japan to exclude that that communication fell within the objectives pursued by the single and continuous infringement. That argument is examined below in the context of the second complaint in the sixth part of the present plea.

406 In the fourth place, as regards the emails referred to in recitals 490 and 496 of the contested decision, sent by the applicants' representative in the United States and referring to the coordination of the FSC implemented by members of the WOW alliance in that country, the applicants submit that they are justified in the context of the efforts made by that person to strengthen the alliance in the United States and the block space agreements made between members of that alliance. It is sufficient to note that, by their arguments, the applicants do not call into question the scope of the coordination of the FSC referred to in the emails in question and do not establish that it was limited to the block space agreements concluded between members of the alliance.

407 In the fifth place, as regards the email of 3 October 2005 referred to in recital 517 of the contested decision, the applicants claim that it related to the terms of a joint bid for a freight forwarder and thus was clearly not unrelated to the implementation of the WOW alliance. The Commission disputes that reading by the applicants and takes the view that the email in question deals in part with the general approach of members of the WOW alliance in relation to surcharges, irrespective of the joint bid in question. It also relies on the statement in that exchange stating that 'this issue [of the surcharges] has been discussed "slightly" during the last meeting [of the Global Sales Board], but no comments are made in to the [minutes of meeting] (antitrust!)'.

408 It is apparent from that email that its purpose was, as the applicants rightly note, to prepare for a meeting with the freight forwarder for whom the joint bid had been prepared, which was to take place 10 days later. The email reports, in that context, discussions at the level of the Global Sales Board, in which sat the vice-presidents of the WOW alliance members in charge of sales:

'It was mentioned WOW [alliance] will use [Lufthansa] model within "neutral markets"; US, Europe. Thus, some local agreements on other markets may apply, e.g. Japan (government involvement) or Asia markets where the competitors are using different models.'

409 The author of the email adds:

'In my documentation, I have found the mandate agreement issued to Exel negotiations last year (copy attached) where all carriers agreed to use [Lufthansa's] model for surcharges. Can we use the same wording in CAT/DHL case????????????? Might a possible question to [the Global Sales Board] for a quick answer?'

410 Although the latter extract indeed relates to the preparation of the joint bid in question, the extract set out in paragraph 408 above could also, in the light of its context, be part of the preparation of that bid, contrary to the Commission's assertions. In that regard, the reference to 'local agreements' can be interpreted as the application of specific agreements to the forwarder customer from certain airports and this interpretation is all the more likely as the purpose of the email was to agree on the terms of the joint bid to be made by the WOW alliance to that customer. It is true that the reference, expressed by the exclamation '(antitrust!)', inferring that the discussion that took place at the level of the Global Sales Board might be prohibited under competition law is evidence to the contrary. Nevertheless, in itself, that reference is not sufficient to render implausible the reading proposed by the applicants, which is based, not on unsubstantiated allegations, but on the actual content of the email in question.

411 Consequently, it must be held that the email of 3 October 2005 referred to in recital 517 of the contested decision falls exclusively within the objective of preparing a joint bid within the WOW alliance for a prospective customer and is not, therefore, capable of contributing to establishing the applicants' participation in the single and continuous infringement.

412 In the sixth place, as regards the contacts referred to in recitals 531 and 628 to 632 of the contested decision, the applicants claim, first, that they were justified by the project to operate a joint freighter with SAC on the Copenhagen-Chicago route and, secondly, that the coordination related exclusively to the application of the SSC on routes from Denmark.

413 In that regard, first of all, concerning the scope of the coordination implemented in the context of the contacts referred to above, it should be noted that those contacts were not limited to coordination regarding the SSC, since the contact referred to in recital 531 of the contested decision addresses the issue of surcharges more broadly. Secondly, as regards the contacts relating to the SSC, it is apparent in particular from recital 630 of the contested decision that, contrary to what the applicants claim, the scope of the contacts at issue was not limited to routes departing from Denmark, but concerned more broadly the imposition of the SSC in Europe at a harmonised rate. That is supported by the general tenor of the internal email described in that recital: 'at our WOW meeting for Europe we agreed that we would impose surcharges. Must realise that it is not as easy as we thought, or hoped'; 'if everybody goes in different direction it will take only a couple of days before we get the worst deal'; 'We have to decide in WOW if we wish to continue as previously or prefer a split up like KL[M]/AF'. It is also stated in the applicants' internal email cited in recital 632 of the contested decision that 'it is us, WOW, ie. [Lufthansa] + [the applicants] who have been bickering with [SAC] now for ever to raise their SSC to 0.13 from 0.10 …'. The rates of 0.10 and 0.13 do not correspond to the rates charged in Denmark by SAC as evidenced by the information provided by the applicants in Annex A.57.

414 It follows that the applicants' claim as to the limited scope of coordination in the evidence cited in recitals 531 and 628 to 632 of the contested decision must be rejected. Consequently, it must be held that the contacts in question were rightly considered to contribute to establishing the applicants' participation in the single and continuous infringement, without it being necessary to rule on the argument, which is now ineffective, that coordination on surcharges of a more limited scope was justified on account of the operation of a joint freighter.

415 In the light of all the foregoing, it must be concluded that the email of 3 October 2005 referred to in recital 517 of the contested decision is to be regarded as falling exclusively within the objective of preparing a joint bid within the WOW alliance for a prospective customer and is not, therefore, capable of contributing to establishing the applicants' participation in the single and continuous infringement. Consequently, it must be excluded from the body of evidence which the applicants contest as a whole in the tenth part of the present plea.

416 It also follows from the foregoing that it cannot be held that the result at which the Commission arrived in the contested decision might have been different if Lufthansa's statement contained in the reply to the Statement of Objections and set out in recital 933, in relation to which it was held, in paragraph 392 above, that the Commission had wrongly refused to grant the applicants access, had been disallowed as inculpatory evidence. Even in its absence, the Commission was entitled, on the basis of the evidence available to it, to conclude that the WOW alliance did not justify the coordination on surcharges that had been carried out within it, in view of its limited implementation.

(2) The second complaint, alleging wrongful omission to examine the compatibility of contacts within the WOW alliance with Article 101 TFEU

417 The applicants claim that the Commission erred in failing to carry out a prior examination of the compatibility of contacts within the WOW alliance with Article 101 TFEU. First, they maintain that the Commission departed in a discriminatory and retroactive manner from the analysis it applies to other airline alliances, which would involve analysing overlaps between members of the WOW alliance on a relevant market. Secondly, it failed to take account of the applicants' statements relating to the application of Article 101(3) TFEU.

418 The Commission disputes the applicants' line of argument.

(i) Retroactive and discriminatory application of a new interpretation of the rules applicable to airline alliances

419 It should be noted that the principle that penalties must have a proper legal basis and the principle of legal certainty cannot be interpreted as prohibiting the gradual clarification of the rules of criminal liability, but may preclude the retroactive application of a new interpretation of a rule establishing an offence (see, to that effect, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 217).

420 That is particularly true of a judicial interpretation which produces a result which was not reasonably foreseeable at the time when the offence was committed, especially in the light of the interpretation put on the provision in the case-law at the material time (see judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 218 and the case-law cited).

421 Those principles are also applicable to the Commission when interpreting the provisions of Articles 101 and 102 TFEU for the purpose of adopting a decision imposing a penalty (see, to that effect, judgments of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 222, and of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 149).

422 In the present case, the applicants rely on a number of decisions of the Commission authorising a merger between two carriers, on the basis of either Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, corrigendum OJ 1990 L 257, p. 13), or on the basis of Regulation No 139/2004. They do not refer, in that regard, to the residual cases in which Article 101 TFEU may be found to be applicable when a concentration operation is being examined, in accordance, in particular, with Article 2(4) of Regulation No 139/2004. In so doing, they rely on the application of substantive rules other than those resulting from Article 101 TFEU and may not therefore rely on them for the purpose of criticising the Commission for having retroactively applied a new interpretation of the rules applicable in the present case.

423 As regards, next, the applicants' reliance on Commission decisions granting exemptions to certain airline alliances under the procedure applicable prior to the entry into force of Regulation No 1/2003, it is apparent from recitals 922 to 925 of the contested decision that the Commission did not examine whether Article 101 TFEU was inapplicable to the WOW alliance, but analysed

only whether the contacts within the WOW alliance which were relied on in the contested decision remained within the scope of that alliance or exceeded the forms of cooperation covered and actually implemented by that alliance. Consequently, since they did not have the same object, the decisions relied on by the applicants cannot be regarded as reflecting a different interpretation of Article 101 TFEU from that adopted in the contested decision.

424 The applicants also claim that the WOW alliance was discriminated against in comparison with other airline alliances in so far as the liability of some of the members was not established in the contested decision. In that regard, it is sufficient to note that, according to settled case-law, the fact that an undertaking which was in a position similar to that of an applicant was not found by the Commission to have committed any infringement cannot constitute a ground for setting aside the finding of an infringement by that applicant, provided it was properly established, the circumstances of that other undertaking not even being the subject of proceedings before the EU Courts (see judgment of 16 June 2015, *FSL and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 461 and the case-law cited).

(ii) The failure to take into account the applicants' statements relating to the application of Article 101(3) TFEU

425 As stated in Article 2 of Regulation No 1/2003, the undertaking or association of undertakings claiming the benefit of Article 101(3) TFEU is to bear the burden of proving that the conditions of that paragraph are fulfilled. Consequently, a person who relies on Article 101(3) TFEU must demonstrate that those conditions are satisfied, by means of convincing arguments and evidence (judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 196).

426 The Commission, for its part, must adequately examine those arguments and that evidence, that is to say, it must determine whether they demonstrate that the conditions for the application of Article 101(3) TFEU are satisfied. In certain cases, those arguments and that evidence may be of such a kind as to require the Commission to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof borne by the person who relies on Article 101(3) TFEU has been discharged. In such a case, the Commission must refute those arguments and that evidence (judgment of 24 May 2012, *MasterCard and Others* v *Commission*, T-111/08, EU:T:2012:260, paragraph 197).

427 In the present case, the applicants, in their replies to the Statement of Objections, claimed the benefit of Article 101(3) TFEU in relation to the WOW alliance. However, even if the WOW alliance satisfied the conditions for the application of those provisions, the fact remains, first, that the scope of the cartel at issue was not identical to that of the WOW alliance and, secondly, that the contacts between members of the WOW alliance relied on in the contested decision exceeded, in essence, the framework of the implementation of that alliance. Accordingly, the Commission did not err in failing to provide explanations regarding the evidence adduced by the applicants in relation to Article 101(3) TFEU and merely concluding, in recital 1050 of the contested decision, that the alliance agreements concluded between the incriminated carriers could not legitimise the conduct at issue.

(3) The third complaint, alleging errors relating to the inclusion of contacts within the WOW alliance in the scope of the single and continuous infringement

428 The applicants claim that their contacts within the WOW alliance were not, objectively, part of the single and continuous infringement and that they do not prove that they were aware of it. The applicants rely on a number of differences between the contacts within the WOW alliance and the 'cross-alliance' communications in the context of the single and continuous infringement, relating, inter alia, to their objective, participating employees, timing, involvement of the competent authorities and *modus operandi*.

429 At the outset, it must be stated that the applicants rely, in seeking to deny the existence of an objective link between the contacts between members of the WOW alliance and the single and continuous infringement, on a series of factors based on the incorrect premiss that those contacts formed part of the implementation of the WOW alliance. That applies to the arguments relating to a different objective, contacts with the authorities concerning the formation of the WOW alliance and the absence of rivalry between members of that alliance.

430 As is apparent from the examination of the first two complaints of the present part of the plea, the discussions that took place within the WOW alliance meet a number of the criteria that the Courts of the European Union regard as being relevant for the purpose of assessing the single nature of an infringement (see paragraph 298 above) and which the Commission relied on in the contested decision in order to characterise the conduct at issue as 'a single complex and continuous infringement' (see paragraph 300 above). Like the other conduct that the Commission considered to form part of the single and continuous infringement, those discussions concerned all freight services (single service). Similarly, they all related to the future intentions of the carriers involved, or even the adoption of a common course of conduct, concerning the introduction or implementation of surcharges (anticompetitive objective and single nature of the infringement).

431 Moreover, the applicants' arguments are not such as to call into question the existence of an overall plan. First, as regards the lack of identity of the employees that participated in the contacts between members of the WOW alliance and in the other contacts at issue, it must be recalled that it is not necessary for the natural persons involved to be the same for there to be a finding of a single infringement (see paragraph 360 above) and, in addition, it must be noted that, in both cases, the participating employees often worked at head-office level, contrary to the applicants' submission. Secondly, a number of factors highlighted by the applicants, such as the form, verbal or written, of contacts between members of the WOW alliance, even if they were to be established, are not, in view of their minor nature, such as to call into question the Commission's findings relating to the existence of a single infringement. Thirdly, the claim regarding the perception of the members of the alleged 'core group' as to the role of the discussions within the WOW alliance, apart from remaining unsubstantiated in the applicants' written pleadings, is not such as to call into question the probative value of the various contacts identified in the contested decision involving the members of that alliance and the conclusions that the Commission drew therefrom as to the identical nature of the anticompetitive object.

432 It follows that the present complaint must be rejected as, accordingly, must the fourth part of the plea in its entirety, bearing in mind that the findings made in paragraph 415 above will be taken into account in the overall examination of the tenth part of the present complaint.

(e) The eighth part of the plea, alleging errors relating to the inclusion in the single and continuous infringement of disparate local events that took place in a few countries

433 The applicants claim that the contacts referred to in recitals 144, 173, 174, 395, 411, 425, 559 and 584 of the contested decision were disparate and local in nature and could not therefore be used to establish their participation in, or awareness of, the single and continuous infringement on a worldwide scale. They also claim that the Commission has failed to rebut the arguments and evidence submitted by the applicants for the purposes of establishing that there was no intrinsic link between those contacts and those that took place in the context of the cartel at issue.

434 Those contacts and the single and continuous infringement did not pursue the same objective, involved different carriers and employees and differed in their timing, location and content. Furthermore, those contacts were isolated in nature, involved local employees in Germany, Denmark and Finland and non-incriminated carriers, or carriers against whom those contacts were not relied on, and concerned individual discussions on specific local issues. The fact that such contacts were reported to the applicants' head office cannot automatically establish coordination or an exchange of information at the level of the applicants' head office which exceeds the local matter concerned.

435 The applicants also claim that a number of the contacts at issue did not lead to any coordination and had no effect on their conduct.

436 The applicants add that the contacts at issue did not make their staff aware of the cartel around the core group and that the Commission has not established that the natural persons involved intended, by their involvement in those contacts, to contribute to a global cartel.

437 The Commission disputes the applicants' line of argument.

438 It should be noted that, like the WOW alliance contacts examined in the fourth part of the present plea, the four series of contacts referred to in recitals 144, 173, 174, 395, 411, 425, 559 and 584 of the contested decision meet a number of the criteria that the Courts of the European Union regard as being relevant for the purpose of assessing the single nature of an infringement (see paragraph 298 above) and which the Commission relied on in the contested decision for the purpose of characterising the conduct at issue as 'a single complex and continuous infringement' (see paragraph 300 above).

439 In the first place, like the other conduct that the Commission considered to form part of the single and continuous infringement, those four series of contacts concerned all freight services (single service). Similarly, they all related to the future intentions of the carriers involved, or even the adoption of a common course of conduct, concerning the introduction or implementation of surcharges (anticompetitive objective and single nature of the infringement).

440 First, the internal email exchange from 5 to 11 January 2000 described in recital 144 of the contested decision refers to discussions between the applicants' local manager in Finland and three other incriminated carriers concerning the introduction of the FSC (see also paragraph 357 above). In the course of those discussions, British Airways' local manager explained that British Airways '[had] still not decided if [the FSC would] be implemented or not', while KLM's local manager proposed that 'we should all stick to this [FSC]' and a Lufthansa employee confirmed that Lufthansa 'will stick [to] this [FSC]'.

441 Secondly, the 'coffee round' of 22 January 2001 described in recitals 173 and 174 of the contested decision concerned, in particular, the implementation of the FSC. It is thus apparent from an internal memorandum from a Martinair employee regarding that meeting, as summarised in recital 174 of the contested decision, that '[Lufthansa] was going to decrease the FSC level on 1 February 2001 while [Cargolux, Swiss, another carrier, KLM and British Airways] maintained the FSC level'.

442 Thirdly, recitals 395, 411, 425 and 559 of the contested decision describe a number of contacts that took place between 2004 and 2005 concerning the implementation of the FSC. First of all, an email of 22 September 2004 by which Lufthansa sent various carriers an announcement of an increase in the FSC (recital 411), then meetings of 3 September 2004 and 17 November 2005 of the Board of Airlines Representatives in Germany ('BARIG'), during which Lufthansa provided various carriers with information about the FSC (recitals 425 and 559) and, lastly, a meeting of the CSC of the BAR of Singapore on 23 July 2004, during which an SAC official asked other carriers, in relation to the examination of the FSC, to 'exercise some level of cooperation for future exercises, in view of the need for greater transparency with regard to these surcharges' (recital 395).

443 Fourthly, recital 584 of the contested decision describes an email of 25 September 2001. It is apparent from the email, as summarised by the Commission in that recital, that a local SAC employee 'in Scandinavia' communicated to the applicants 'the plans of competitors … that [were] all … considering the introduction of an SSC but would prefer [the applicants] to move first'.

444 In the second place, as regards the location, timing, content and allegedly local character of the four series of contacts at issue and of the persons involved in them, the applicants must be found to be mistaken.

445 It is true that, as noted by the applicants, some of the contacts referred to in recitals 144, 173, 174, 395, 411, 425, 559 and 584 of that decision had a local dimension and some of them did not take place at the same time as the announcements regarding the decisions on FSC and SSC. It must, however, be observed that, far from demonstrating that those contacts did not form part of the single and continuous infringement, those circumstances are merely a consequence of the manner in which the cartel at issue was implemented. As is apparent from recital 889 of the contested decision, the surcharges were measures of general application that were not route-specific but were intended to be applied on all routes, on a worldwide basis. For that reason, as the Commission explained in footnote 1323 and in recitals 876 and 1046 of the contested decision, the decisions concerning surcharges were generally taken at the head-office level of each carrier, because of their worldwide application, but were implemented at the local level by local staff and could be subject to variations in particular in the light of local market conditions or regulations.

446 First, it must be noted that, as the applicants in essence acknowledge, the internal email exchange referred to in recital 144 of the contested decision took place in the month following the exchange of emails of 13 and 14 December 1999 between the carriers of the Star Cargo alliance (see paragraph 360 above), soon after the announcement of the introduction of the FSC, and related to the response to be given to the opposition that that announcement had drawn from the Finnish Forwarders Association. It is, moreover, the applicants' head office that initiated that exchange. It should be noted that it was an employee of the applicants' head office who asked the applicants' office in Helsinki (Finland) to have 'close unofficial contact' with a Lufthansa employee

concerning the opposition expressed by the Finnish Forwarders Association when the FSC was introduced. It was also the head office that encouraged the applicants' office in Helsinki to respond to that association without '[referring] to other carriers as this can be a problem with anti-trust watching authorities'.

447 Secondly, it should be noted that the 'coffee round' of 22 January 2001 and the BARIG cargo committee meeting of 17 November 2005 referred to, respectively, in recitals 173 and 174 and in recital 559 of the contested decision concerned, at the very least, the implementation in Germany of a change in the level of the FSC decided at head-office level. It is apparent from Martinair's internal memorandum described in paragraph 441 above, as summarised in recital 174 of that decision, that the outcome of the 'coffee round' of 22 January 2001, to which Lufthansa's Director of Sales for Asia and Australia had invited a number of competitors, was that '[Lufthansa] was going to decrease the FSC level on 1 February 2001 while [Cargolux, Swiss, another carrier, KLM and British Airways] maintained the FSC level'. It is apparent from recitals 168 to 171 and 182 of that decision that those reductions, which were to be implemented in Germany, were also applied on a broader scale. In addition, the BARIG cargo committee meeting of 17 November 2005 concerned, inter alia, the announcement by Lufthansa of a reduction in the FSC as from 28 November 2005. It is apparent from recitals 552 to 556 and 562 of the contested decision that that reduction was also applied on a broader scale.

448 Thirdly, it should be observed that the BARIG cargo committee meeting of 3 September 2004 referred to in recital 425 of the contested decision concerned a number of 'topics' in relation to which Lufthansa informed the other participants of its 'news'. Those topics included, inter alia, the FSC. In the application, the applicants state that this concerned amendments to the FSC.

449 Recital 411 of the contested decision refers to an email in which Lufthansa, 19 days later, sent to 16 carriers, a number of whom had attended the BARIG cargo committee meeting described in paragraph 448 above, its announcement regarding an increase in the FSC with effect from 4 October 2004. It is not disputed that that email was sent by Lufthansa's German sales manager to its local counterparts.

450 However, the evidence in the Commission's file establishes that the scope of that email was not exclusively local. At the very least, it was intended to ensure the local implementation of an increase decided at head-office level. It is not apparent from either the contested decision nor from the applicants' written pleadings that that increase was not also intended to apply in other countries.

451 On the contrary, it is apparent from recital 409 of the contested decision that, on the day before that email was sent, the manager of CPA in Belgium forwarded, internally to the head office, the announcement of an increase in Lufthansa's FSC and stated that there would be, on the same day, a 'final discussion … with the "industry" [to] decide the Belgian kick off date'. Thus, it is apparent from CPA's internal emails referred to in recital 414 of the contested decision that 'most freighter operators in [Brussels] [had] decided to increase as of 01st Oct 04', but that SAC, after indicating its intention to do the same, was 'recalled by [its head office] to go for 04 Oct [2004]' (see paragraph 289 above).

452 In addition, the applicants stated in the application that one and the same German sales manager had been sent the announcements relating to the FSC that Lufthansa had sent them between 2003 and 2004, including that described in recital 411 of the contested decision.

453 Fourthly, it should be observed that, as the applicants acknowledge in the application, the email referred to in recital 584 of the contested decision was addressed to their chief executive officer. It is also apparent from that recital that the local SAC employee who, in that email, sent the applicants information on the intention of a number of carriers to introduce an SSC also sent them to SAC's head office.

454 It is true that, unlike the contacts referred to in recitals 144, 173, 174, 559 and 584 of the contested decision, the email referred to in recital 584 of that decision was sent before a decision concerning the SSC had been taken at the carriers' head-office level. However, that can be explained by the fact that that email was sent when it was not yet certain that the SSC would be introduced.

455 Fifthly, it is apparent from recital 372 of the contested decision that the meeting of the CSC of the BAR of Singapore of 23 July 2004 referred to in recital 395 of that decision was part of discussions between carriers that took place in the summer of 2004, both at head-office level and local level, concerning the introduction of new trigger points, the recent increase in fuel prices and the increase of the FSC. The applicants have not adduced the slightest evidence to call that interpretation into question.

456 The Commission was therefore correct to rely on the contacts referred to in recitals 144, 173, 174, 395, 411, 425, 559 and 584 of the contested decision in order to establish the applicants' participation in the single and continuous infringement.

457 None of the applicants' arguments is capable of calling that finding into question.

458 In the first place, it should be observed that the applicants are not justified in claiming that the Commission was required to demonstrate that the natural persons who participated in the four contacts at issue each intended, by their involvement in those contacts, to contribute to the cartel at issue. Nor may the applicants maintain that the Commission was required to show that those contacts were such as to enable the persons involved to become aware of the 'cartel around the core group'.

459 According to the case-law, an undertaking which has participated in a single and complex infringement through its own conduct, which fell within the definition of an agreement or a concerted practice having an anticompetitive object for the purposes of Article 101(1) TFEU and was intended to help bring about the infringement as a whole, may also be liable in respect of the conduct of other undertakings in the context of the same infringement throughout the period of its participation in the infringement. That is the position where it is shown that the undertaking intended, through its own conduct, to contribute to the common objectives pursued by all the participants and that it was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives or that it could reasonably have foreseen it and was prepared to take the risk (see, to that effect, judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 42 and the case-law cited).

460 An undertaking may thus have participated directly in all the forms of anticompetitive conduct comprising the single and continuous infringement, in which case the Commission is entitled to attribute liability to it in relation to that conduct as a whole and, therefore, in relation to the infringement as a whole. Equally, an undertaking may have participated directly in only some of the forms of anticompetitive conduct comprising the single and continuous infringement, but have been aware of all the other unlawful conduct planned or put into effect by the other participants in the cartel in pursuit of the same objectives, or could reasonably have foreseen that

conduct and have been prepared to take the risk. In such cases, the Commission is also entitled to attribute liability to that undertaking in relation to all the forms of anticompetitive conduct comprising such an infringement and, accordingly, in relation to the infringement as a whole (judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 43).

461 It follows that three conditions must be met in order to establish participation in a single and continuous infringement, namely the existence of an overall plan pursuing a common objective, the intentional contribution of the undertaking concerned to that plan, and its awareness (proved or presumed) of the offending conduct of the other participants in which it did not participate directly (judgment of 16 June 2011, *Putters International* v *Commission*, T-211/08, EU:T:2011:289, paragraph 35; see also judgment of 13 July 2018, *Stührk Delikatessen Import* v *Commission*, T-58/14, not published, EU:T:2018:474, paragraph 118 and the case-law cited).

462 There was, however, no need for the same to apply to each of the natural persons involved.

463 In the second place, as regards the fact that not all of the contacts referred to in recitals 144, 173, 174, 395, 411, 425, 559 and 584 of the contested decision were relied on against all of the carriers involved, it should be recalled that, as is clear from recital 845 of the contested decision, it is not necessary for every item of evidence produced by the Commission to establish with certainty that the infringement has been committed. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, and whose various elements are able to reinforce each other, meets that requirement (see judgment of 16 November 2011, *Sachsa Verpackung* v *Commission*, T-79/06, not published, EU:T:2011:674, paragraph 60 and the case-law cited).

464 The Commission was therefore correct in stating in recital 716 of the contested decision that it '[did] not necessarily hold every recital … and every single item of evidence therein to be of equal value' and that 'rather, the recitals to which reference [was] made [formed] part of the overall body of evidence [on which it relied] and [had] to be evaluated in this context'.

465 However, it has not been established that the Commission had a body of evidence against the carriers at issue in the contacts in question equivalent to that which it had against the applicants.

466 In the third place, for reasons similar to those set out in paragraph 363 above, the applicants may not rely on the lack of effects on their conduct of the contacts referred to in recitals 144 and 584 of the contested decision.

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

(f) The fifth part of the plea, alleging errors relating to the inclusion in the single and continuous infringement of contacts relating to block space agreements

468 The applicants claim that the Commission made an error of fact and of law in concluding that Lufthansa's collective emails referred to in recitals 446, 450, 482 and 495 of the contested decision formed part of the single and continuous infringement even though they concerned the application of an FSC in the context of block space agreements between Lufthansa and other carriers.

469 In the first place, according to the applicants, it is possible to find evidence of the existence and terms of those agreements only in documents to which they did not have access and which they asked to be produced in the context of the first plea, namely Lufthansa's leniency statements and the replies of other carriers to the Statement of Objections. The applicants' interpretation is, nevertheless, supported by the following three factors. First, those emails were sent between March and August 2005 by Lufthansa's pricing department to the 'network' employees of other carriers which purchased capacity on Lufthansa's aircraft. Those services are responsible for managing the block space agreements between carriers and are generally not involved in pricing or in the fixing of surcharges. Secondly, Lufthansa referred to the addressees of those emails as 'dear partners'. Thirdly, the existence of block space agreements between Lufthansa and the addressees of those emails is the only plausible explanation for the change of addressees from one email to another.

470 In the second place, the Commission failed to demonstrate that the emails from Lufthansa Cargo referred to in recitals 446, 450, 482 and 495 of the contested decision were part of the single and continuous infringement.

471 The applicants claim that the Commission failed to discharge its burden of proof and failed to provide sufficient reasons for the contested decision in so far as that decision did not respond to any of the arguments and evidence submitted by the applicants. Those arguments and evidence show that there was no intrinsic link or interaction between those emails and the communications that took place in the context of the cartel at issue. First of all, Lufthansa's emails referred to in recitals 446, 450, 482 and 495 of the contested decision were sent in each case to between 10 and 12 carriers, none of which belonged to the 'core group' and more than half of which were not found to have participated in the cartel at issue. Next, the employees to whom those emails were addressed were responsible for the management of block space agreements. Moreover, the applicants' employee to whom those emails were sent did not receive any of the other emails which the Commission relied on against them. Lastly, the sending of those emails, which contained exclusively publicly accessible information, coincided with the introduction of an FSC in the block space agreements between carriers in 2005.

472 In addition, the Commission did not explain how the applicants' employee to whom the emails from Lufthansa referred to in recitals 446, 450, 482 and 495 of the contested decision were addressed intended to contribute to the single and continuous infringement, by passively receiving emails containing public announcements concerning FSCs for which there was a legitimate commercial justification.

473 In the third place and in any event, Lufthansa's emails referred to in recitals 446, 450, 482 and 495 of the contested decision could not have had any influence on the applicants' conduct. The applicants determined their surcharge policy in the context of their cooperation with Lufthansa as part of the exempted alliance. That cooperation was carried out through exchanges of bilateral emails between the head offices of the two carriers, which always preceded Lufthansa's collective emails.

474 The Commission disputes the applicants' line of argument.

475 In that regard, in the first place, it should be noted that, like the other instances of conduct that were part of the single and continuous infringement, the emails referred to in recitals 446, 450, 482 and 495 of the contested decision concerned all freight services (single

service) and concerned the amount and timing of the FSC (anticompetitive objective and single nature of the infringement). The purpose of all those emails was to inform the addressees of Lufthansa's intention to increase its FSC as from a specific future date.

476 Contrary to the applicants' submission, it cannot be held that it was exclusively a matter of ensuring the proper performance of hypothetical block space agreements.

477 It is apparent from recital 482 of the contested decision that the contacts in question served, at least in part, to support the cartel at issue. In recital 482 of the contested decision, the Commission cited the reply of a carrier to the email from Lufthansa cited in that same recital. In that reply, that carrier informs Lufthansa that: 'we have instructed our offices to implement the increase accordingly'.

478 However, it is not apparent from the evidence that that response was part of the implementation of a commercial agreement between the carrier at issue and Lufthansa. The fact that that carrier has not been found liable in relation to the single and continuous infringement and that it shared those intentions bilaterally is not such as to refute that finding.

479 Furthermore, it is apparent from an examination of the chronology of the contacts relating to the FSC that those collective emails sent by Lufthansa triggered a cascade of actions by the other carriers in relation to their own FSC. For example, Lufthansa's communication of 22 August 2005 (recital 495) led, on the same day or the next day, to internal exchanges within the applicants (recital 496), Japan Airlines (recital 497) and another carrier (recital 498) regarding the increase of the FSC.

480 Lastly, the applicants may not rely on the public nature of the information disseminated in the context of the contacts described in recitals 446, 450, 482 and 495 of the contested decision. First, it should be noted that the exchange of publicly available information infringes Article 101(1) TFEU, where it underpins another anticompetitive arrangement (see, to that effect, judgment of 7 January 2004, *Aalborg Portland and Others* v *Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 281).

481 As is apparent from recitals 118, 121, 125, 706 and 848 of the contested decision and from paragraphs 476 and 478 above, that was the case as regards the contacts described in recitals 446, 450, 482 and 495 of the contested decision.

482 Moreover, it should be observed, as noted by the Commission, that, in the context of the contacts described in recitals 446, 450, 482 and 495 of the contested decision, Lufthansa did not merely disclose publicly available information to the parties to hypothetical block space agreements. On the contrary, Lufthansa sent them collective emails, thus revealing to all the addressees the identity of the carriers concerned (see recital 797 of the contested decision), as well as the amount and timing of the FSC for which they were liable under those hypothetical agreements.

483 Moreover, the applicants do not even claim that such collective emails were necessary for the implementation of those hypothetical agreements and the documents in the Commission's file show that that was not the case. It is thus apparent from recital 453 of the contested decision that, on 22 March 2005, Lufthansa sent to one of the parties to those hypothetical agreements the press release announcing an increase in the FSC which it had previously sent to its 'dear partners' by means of a collective email (recital 450). Similarly, it is apparent from the emails in

Annexes A.59 to A.61 to the application that it was on a bilateral basis that SAC informed the applicants of its intention to increase the FSC for which they were liable under the block space agreements which they had concluded.

484 In the second place, it should be observed that the sender of three of those four emails (recitals 446, 482 and 495 of the contested decision) is an employee of Lufthansa which the applicants themselves describe as being 'apparently the central lynchpin of the global [single and continuous infringement]' and 'the central [Lufthansa] employee within the core group'. The sender of the fourth of those emails (recital 450 of the contested decision) was Lufthansa's pricing manager. That person was involved in at least one other contact at issue (recital 455 of the contested decision). Moreover, it is apparent from the email of 7 April 2005 referred to in recital 457 of the contested decision that Lan Airlines' pricing director asked one of his colleagues to contact Lufthansa's pricing manager in order to discuss the fuel price index.

485 It is nevertheless true that the applicants' employee to whom Lufthansa's emails referred to in recitals 446, 450, 482 and 495 of the contested decision were addressed did not participate in other conduct that the Commission found to be part of the single and continuous infringement. That is not, however, sufficient to show that those emails did not form part of the single and continuous infringement. There is a certain overlap between the other addressees of those emails and the natural persons who participated in other conduct found to form part of that infringement. In particular, the Lan Airlines employee who was sent the email referred to in recital 495 of the contested decision participated in the contacts at issue described in recital 474 of that decision.

486 Furthermore, it should be borne in mind that it is not necessary for the natural persons involved in the various instances of conduct at issue to be the same for there to be a finding of a single and continuous infringement. Nor is it necessary for the nature of the undertakings involved to be the same (see paragraph 316 above).

487 In the third place, it should be noted that the method, namely collective emails, by which Lufthansa informed many carriers of its intention to change the FSC level in the near future was not used only in the context of contacts which the applicants claim were intended to implement block space agreements. Lufthansa used that same method for other contacts, both at head-office level (recitals 279 and 346 of the contested decision) and local level (recitals 313 and 507 of the contested decision).

488 In the fourth place, as regards the fact that sending those emails coincided with the inclusion of surcharges in the block space agreements, it must be observed that those emails are also contemporaneous with numerous other contacts at issue, which are not claimed to have been intended to implement such agreements.

489 As regards the complaint alleging a failure to state reasons put forward in the context of the present part of the plea, it must be recalled that, under Article 296 TFEU and Article 41(2)(c) of the Charter, decisions adopted by the Commission must state the reasons on which they are based.

490 The statement of reasons must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (see, to that effect, judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 147).

491 The requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom that measure is of concern within the meaning of the fourth paragraph of Article 263 TFEU, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU and Article 41(2)(c) of the Charter must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 150, and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 45).

492 In the present case, the Commission described the 'basic principles and structure of the cartel' in recitals 107 to 112 of the contested decision and described in recitals 118 to 120 of that decision the contacts concerning the FSC, which included, inter alia, emails containing public information, including to non-incriminated carriers. In recitals 869 to 883 of that decision, it explained the reasons why it had concluded that there was a single infringement. In recital 719 of that decision, it examined the evidence relied on against the applicants as regards the element of the single and continuous infringement relating to the FSC, including that referred to in recitals 446, 450, 482 and 495 of that decision.

493 In those circumstances, having regard also to the relevant case-law and, moreover, as is apparent from the substantive arguments put forward in the context of the present part of the plea (see paragraphs 475 to 488 above), it must be held that the contested decision enabled the applicants to understand why the Commission found that that evidence formed part of the single and continuous infringement notwithstanding the arguments put forward at the stage of the administrative procedure and enabled the Court to exercise its power of review.

494 The present part must therefore be rejected.

495 In those circumstances, assuming that the applicants intended to reiterate, in the context of the present part of the plea, their request for the production of Lufthansa's leniency statements and the replies of other carriers to the Statement of Objections, the Court finds that the production of such documents is not liable to be of any use in the examination of the present part of the plea and, therefore, that there is no need, by way of a measure of organisation of procedure, to request the Commission to produce them.

(g) The sixth part of the plea, alleging errors in the assessment of contacts in third countries

496 The applicants claim that the Commission erred in fact and in law by including in the single and continuous infringement the applicants' conduct related to EEA-third country routes. The applicants put forward, in essence, five complaints in support of that claim. Those complaints allege, first, breach of the principles of sovereignty and non-interference, secondly, errors in the assessment of the State coercion to which the applicants claim to have been subjected in a number of third countries, thirdly, errors in the application of Article 101(1) TFEU to conduct

relating to inbound routes prior to 1 May 2004 and of Article 8 of the EC-Switzerland Air Transport Agreement to conduct relating to EU-Switzerland routes prior to 1 June 2002, fourthly, errors in the assessment of the conduct that took place in Switzerland and, fifthly, an error relating to the inclusion in the single and continuous infringement of the applicants' conduct in third countries.

(1) The first complaint, alleging breach of the principles of sovereignty and non-interference

497 The applicants claim, in essence, that the Commission infringed the principle of sovereignty enshrined in Article 1 of the Convention on International Civil Aviation, signed in Chicago (United States) on 7 December 1944, and the principle of non-interference by applying the qualified effects test to penalise conduct that took place and was implemented in third countries and which those countries, for their own political reasons, decided to authorise.

498 The Commission has not made any specific comments on the present complaint.

499 Customary international law recognises the principle that each State has complete and exclusive sovereignty over its airspace (judgment of 21 December 2011, *Air Transport Association of America and Others*, C-366/10, EU:C:2011:864, paragraphs 103 and 104). That principle is codified in Article 1 of the Convention on International Civil Aviation, on which the applicants rely in their written pleadings.

500 The principle of non-interference is also recognised by customary international law. Also referred to as the principle of non-intervention, that principle concerns the right of any sovereign State to conduct its affairs without external interference and constitutes a corollary of the principle of sovereign equality of States (judgment of 16 October 2014, *LTTE* v *Council*, T-208/11 and T-508/11, EU:T:2014:885, paragraph 69).

501 Assuming that the applicants may rely before the Court on the principles of sovereignty over airspace and non-interference, it must be observed that the Commission did not infringe them in any way by applying the qualified effects test in order to penalise conduct that took place and was implemented in third countries and which those countries, for their own political reasons, decided to authorise. The application of Article 101(1) TFEU to conduct that will foreseeably produce immediate and substantial effects in the EEA is justified under public international law (see judgment of 12 July 2018, *Viscas* v *Commission*, T-422/14, not published, EU:T:2018:446, paragraph 101 and the case-law cited) and, therefore, the principles of sovereignty over airspace and non-interference.

502 It is apparent from paragraphs 149 to 237 above that it was foreseeable that the single and continuous infringement would produce substantial and immediate effects in the internal market and within the EEA.

503 The present plea must therefore be rejected.

(2) The second complaint, alleging errors in the assessment of the State coercion to which the applicants claim to have been subjected in a number of third countries

504 For the purpose of assessing whether the incriminated carriers were subject to State coercion in a number of third countries, it is apparent from recitals 972 to 1021 of the contested decision that the Commission analysed the scope of the ASAs, which are concluded between two countries in order to determine the conditions under which one or more air routes are served by the carriers designated in that regard. It thus stated, inter alia, that the provisions of the ASAs at issue in the present case were generally not applied by the contracting parties in whose territory the incriminated carriers had committed the single and continuous infringement. Next, having analysed the rules and administrative practices of a number of third countries, namely Hong Kong, Japan, the Republic of India, the Kingdom of Thailand, the Republic of Singapore, the Republic of South Korea and the Federative Republic of Brazil, the Commission ruled out the possibility that any State coercion could justify non-application of Article 101 TFEU to the conduct of the incriminated carriers.

505 The applicants claim that that reasoning is vitiated by a number of errors.

506 First, they submit that, as regards freight services, condemning conduct authorised by a third country under EU competition rules constitutes an infringement of the principle of legal certainty, Article 59 of the Vienna Convention on the Law of Treaties of 23 May 1969 and Article 351 TFEU, by disregarding the procedure laid down in Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries (OJ 2004 L 157, p. 7).

507 Secondly, as regards SAS Cargo's conduct in relation to freight services from Hong Kong, Japan and Thailand, the applicants claim, in essence, that the Commission incorrectly assessed the evidence and arguments that they put forward and, consequently, misapplied Article 101 TFEU and Article 53 of the EEA Agreement to conduct that was actually covered by the ASAs concluded between those third countries and the 'Scandinavian States' or by local regulations. As regards SAS Cargo's conduct in relation to freight services from India, Singapore, South Korea and Brazil, the Commission did not truly attempt to assess the applicable laws and practices as part of its analysis of the regulatory regimes, with the result that its decision is based on assertions that are incorrect or unsupported by evidence.

508 The Commission disputes the applicants' line of argument.

509 In that regard, it must be borne in mind that Article 101(1) TFEU applies only to anticompetitive conduct engaged in by undertakings on their own initiative. If anticompetitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 101 TFEU does not apply. In such a situation, the restriction on competition is not attributable, as that provision implicitly requires, to the autonomous conduct of the undertakings (see judgment of 11 November 1997, *Commission and France* v *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraph 33 and the case-law cited).

510 Conversely, if national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition, Article 101 TFEU may apply. In the absence of any binding regulatory provision imposing anticompetitive conduct, the Commission

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

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

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

513 Those considerations apply in the same way to the laws and conduct of a Member State or a contracting party to the EEA Agreement and to those of a third country (see, to that effect, judgment of 30 September 2003, *Atlantic Container Line and Others* v *Commission*, T-191/98 and T-212/98 to T-214/98, EU:T:2003:245, paragraph 1131), as is in essence apparent from footnote 1435 to the contested decision.

514 It is in the light of those considerations that the Court must examine whether the applicants are justified in claiming that the Commission erred in its examination of the legislation applicable to flights from Hong Kong, Japan and the other third countries in question.

515 To that end, it should be borne in mind that it has been held in paragraph 115 above that the Commission erred in refusing the applicants access to the passages of the replies to the Statement of Objections referred to in recitals 977 to 979, 1003, 1005 and 1006 of the contested decision, and that those must consequently be disallowed as inculpatory evidence in the context of the examination of the merits of that decision.

(i) Hong Kong

516 Recitals 976 to 993 of the contested decision concern, first, the ASAs signed by the Hong Kong Special Administrative Region of the People's Republic of China and, secondly, the regulatory regime in Hong Kong. According to those recitals, the Commission considered that there was no requirement on carriers in Hong Kong to discuss tariffs.

517 In the first place, the Commission acknowledged in recitals 981 to 986 of the contested decision, that most of the ASAs signed by the Hong Kong Special Administrative Region of the People's Republic of China required tariffs charged by the designated carriers of the contracting countries to be approved by the competent authorities, namely the CAD in Hong Kong, and that they

allowed prior price consultation between the designated carriers. Nevertheless, according to that decision, those ASAs did not, in any event, require such consultations before an application for approval.

518 In support of that conclusion, the Commission reproduced, in recital 983 of the contested decision, the wording of a standard clause found in a number of ASAs which reads as follows:

'The tariffs referred to in paragraph (1) of this Article may be agreed by the designated airlines of the Contracting Parties seeking approval of the tariffs, which may consult other airlines operating over the whole or part of the same route, before proposing such tariffs. However, a designated airline shall not be precluded from proposing, nor the aeronautical authorities of the Contracting Parties from approving, any tariff, if that airline shall have failed to obtain the agreement of the other designated airlines to such tariff or because no other designated airline is operating on the same route.'

519 In recital 985 of the contested decision, the Commission added that the ASA between the Czech Republic and the Hong Kong Special Administrative Region of the People's Republic of China, for example, stated that no country would require carriers to discuss tariffs.

520 In that regard, the applicants put forward two arguments. The first submits that the Commission did not cite paragraph 1 of the clause found in a number of ASAs signed by the Hong Kong Special Administrative Region of the People's Republic of China, which imposes a collective surcharge regime, and the second submits that the Basic Law of that administrative region provides for ASAs to be directly applicable.

521 As regards the first argument, it should be noted that it is apparent from paragraph 1 of the clause found in a number of ASAs to which the Hong Kong Special Administrative Region of the People's Republic of China is a party that the tariffs of the designated carriers must be approved by the competent authorities of the parties, taking into account a number of relevant factors. Although it is stipulated that the tariffs of other carriers are included in such factors, it is not, however, stipulated that they must be set following a discussion between the operators concerned. Thus, contrary to the applicants' submission, paragraph 1 of the abovementioned clause cannot be understood to impose a collective surcharge regime. The applicants' first argument must therefore be rejected.

522 That having been established, it is not necessary to rule on the second argument regarding ASAs being directly applicable under the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. Since the ASAs do not impose a collective surcharge regime, they cannot preclude the application, by the Commission, of Article 101 TFEU or of Article 53 of the EEA Agreement to the conduct at issue on the basis of the State coercion defence, irrespective of their legal status in Hong Kong.

523 Moreover, it should be noted that the applicants do not dispute that the clauses in the ASAs relating to tariff discussions between designated carriers on specific routes are not capable of authorising general tariff discussions between multiple carriers serving different destination countries of the type referred to in the contested decision.

524 In the second place, as regards administrative practice in Hong Kong, the Commission found, in recitals 987 to 989 of the contested decision, that it had not been established that the CAD had required consultation between carriers for the purposes of submitting a collective application for approval of tariffs. In particular, none of the carriers provided any evidence establishing that the CAD had expressly imposed the filing of collective applications.

525 In recital 992 of the contested decision, the Commission concluded, first, with regard to the FSC, that the CAD had not been prepared to accept individual applications for an FSC mechanism, but that it had been prepared to accept individual applications for a fixed amount FSC and, secondly, with regard to the other surcharges, that the carriers had not alleged that the CAD required collective applications.

526 In that regard, the applicants submit that, between 2000 and 2006, the CAD, which they claim has wide discretion, was not prepared to accept individual applications from carriers for a fixed amount FSC. The CAD required the CSC of the BAR to agree on an index-based FSC mechanism and therefore examined only collective applications following discussions between carriers on the applicable tariffs. It was only when investigations into surcharges began in a number of countries in 2006 that the CAD finally began to approve FSCs outside the index-based mechanism. The calculation of the amount of the FSC followed the same regime until the CAD decided, in 2004, no longer to require approval for the FSC. The applicants adduce a number of items of evidence in support of their claims, in particular the letters from the CAD of 5 September 2008 and 3 September 2009 addressed to the Commission, whilst maintaining that the Commission did not produce any evidence showing that the CAD had received and approved individual applications for FSCs of a fixed amount before 14 April 2006.

527 In that regard, first, it should be noted that, in support of their claims, the applicants adduce a number of documents that do not originate from the CAD, but which have been drawn up by themselves or by other carriers.

528 Some of the documents consist of press articles, online publications of Hong Kong Shippers' Council and documents from the CSC of the BAR. Although it is true that those various documents refer to the existence, from 1997, of measures taken by the carriers or authorities of Hong Kong to introduce an index-based FSC mechanism or collective applications for the approval of the FSC by the CAD, the fact remains that none of them shows that it would be impossible for a carrier to file an individual application to the CAD in respect of a fixed FSC or the SSC.

529 Secondly, as regards the letters from the CAD to the Commission, it should be noted that the letter of 5 September 2008 stated that the CAD had required, during the period from 2000 to 2007, that all carriers wishing to impose a surcharge on freight originating in Hong Kong obtain prior approval, that, in that context, the CAD considered that collective applications were both efficient, reasonable and legal and that such a practice was in line with the ASAs concluded by the Hong Kong Special Administrative Region of the People's Republic of China. The fact that it is stated that collective applications are an efficient manner by which to apply for, review and approve surcharges and that the CAD considers that form of application to be lawful in Hong Kong does not establish that the legislation or administrative practices in Hong Kong required collective applications and excluded individual applications in relation to the FSC.

530 Likewise, the letter of 3 September 2009 reads as follows:

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

531 That letter accordingly merely sets out the conditions required by the CAD when the CSC of the BAR and the carriers consider a collective application relating to an index-based FSC. In contrast, it does not refer to there being a general obligation to file a collective application for an FSC, nor to it being impossible to file an individual application for a fixed FSC. It does not therefore contradict recital 992 of the contested decision, from which it is apparent that collective applications involving discussions between carriers were required only for an index-based FSC mechanism, and that individual applications remained possible for a fixed amount FSC.

532 It follows from the foregoing that the applicants have failed to establish that any law or conduct on the part of the Hong Kong authorities, including the ASAs concluded by those authorities, obliged them to discuss their tariffs with other carriers and made it impossible to submit an individual application to the CAD for a fixed amount FSC. They have not therefore established that the Commission erred in finding, in the contested decision, that Hong Kong regulations did not preclude the application of Article 101(1) TFEU.

(ii) Japan

533 Recitals 995 to 1012 of the contested decision relate, first, to the ASAs concluded by Japan and, secondly, to the Japanese regulatory regime. According to those recitals, the Commission considered that there was no requirement on carriers in Japan to discuss tariffs.

534 In the first place, as regards the ASAs concluded by Japan, the contested decision, in recital 995, reproduces the wording of a clause contained in the agreement concluded with the Kingdom of the Netherlands which is also found in other agreements and provides:

'agreement on tariffs shall, wherever possible, be reached by the designated airlines concerned through the rate-fixing machinery of the IATA. When this is not possible, tariffs in respect of each of the specified routes shall be agreed between the designated airlines.'

535 After stating in recital 996 of the contested decision that, according to one carrier, the ASAs required, rather than permitted, price-fixing agreements, the Commission noted in recital 997 of that decision that the agreement concluded with the United Kingdom of Great Britain and Northern Ireland had been amended in 2000 by a memorandum of understanding providing that the designated carriers would not be required to consult on tariffs prior to an application for approval. According to recitals 1005 to 1008 of that decision, even though it is apparent from the ASAs that, subject to certain conditions, carriers had to agree on tariffs, such discussions were strictly limited to designated carriers on specified routes and did not in any event relate to general discussions between multiple carriers. Lastly, in practice, the parties to the ASAs did not

seek to enforce those agreements with the result that the obligations stemmed rather from the national legal and administrative provisions in force in Japan, which was reinforced by the fact that the parties claim that coordination was required for the FSC, but not for the SSC.

536 In that regard, first, the applicants submit that the Commission failed to cite paragraph 1 of the standard clause reproduced in the contested decision. Secondly, the applicants note that the constitution and legislation of Japan provided for the direct applicability of the ASAs in Japan, which is not called into question by the non-application of the tariff clauses by the 'Scandinavian countries'. Thirdly, they maintain that they are not concerned by the ASA concluded between Japan and the United Kingdom of Great Britain and Northern Ireland.

537 First, as regards the claim that the Commission failed to cite paragraph 1 of the standard clause reproduced in the contested decision, it should be noted that that paragraph lists the factors to be taken into account when setting tariffs and provides that those factors are to be determined in accordance with the following provisions of the article in which it is contained. It is therefore not apparent from either that provision or the provision reproduced in the contested decision that the ASAs impose a coordination obligation between carriers for the determination of surcharges. Moreover, the applicants have not put forward any substantiated argument capable of establishing the contrary.

538 Secondly, it should be noted that the applicants do not dispute that the clauses in the ASAs relating to tariff discussions between designated carriers on specific routes are not capable of authorising general tariff discussions between multiple carriers serving different destination countries of the type referred to in the contested decision.

539 That having been established, it is not necessary to rule on the argument regarding the ASAs being directly applicable under the constitution and legislation of Japan. Since the ASAs do not impose a coordination obligation between carriers for the determination of surcharges, and since they do not authorise general tariff discussions between multiple carriers serving different destination countries, they cannot preclude the application, by the Commission, of Article 101 TFEU and Article 53 of the EEA Agreement to the conduct at issue on the basis of the State coercion defence, irrespective of their legal status in Japan.

540 Thirdly, the fact that the applicants are not concerned by the ASA concluded between Japan and the United Kingdom of Great Britain and Northern Ireland is irrelevant, since it has been concluded that, irrespective of the content of that agreement, the other ASAs signed by Japan did not impose a coordination obligation between carriers for the determination of surcharges and did not allow general tariff discussions between multiple carriers serving different destination countries.

541 In the second place, with regard to Japanese legislation and administrative practices, the Commission referred, in recitals 998 to 1004 of the contested decision, to certain provisions of the Japanese Civil Aviation Law and to statements made by carriers concerning the administrative practices of the Japanese Civil Aviation Bureau ('JCAB'). In recitals 1009 to 1011 of that decision, the Commission found, first, that it was not expressly clear from that law that tariff coordination was obligatory and, secondly, that the incriminated carriers had not provided any evidence capable of establishing that such an obligation had been imposed by the JCAB's administrative practice. In addition, the carriers have not claimed that such an obligation applied to the SSC and to the refusal to pay commission.

542 In that regard, the applicants submit that they adduced evidence showing that the JCAB had not accepted their applications for individually determined FSC amounts. They also maintain that, following the adoption, in 2000, of an IATA resolution specifically related to the FSC applicable to flights from Japan, the JCAB had approved, in 2001, an FSC mechanism for national carriers with which foreign carriers were obliged to comply. Consequently, first, all amendments to the FSC needed to be the subject of an application to the JCAB by the national carriers. Secondly, it was for foreign carriers to agree to the new tariffs by making an application to that effect to the JCAB. The same practices applied in relation to the SSC.

543 It should be noted that the evidence produced by the applicants in support of their assertions are not documents originating from the JCAB, but rather documents drawn up by the applicants themselves. Furthermore, some of those documents consist of letters sent to the Commission or the Court without being accompanied by any other evidence. One of those documents is a telex, which has not been translated into the language of the case and is dated 2 December 1996, meaning that it therefore precedes the start of the infringement period by more than three years. Another document consists of a document attached to an application for an increase of the FSC which does not prove that it was impossible to make an individual application to the JCAB. A further document states that the FSC was excluded for flights from Japan for the purposes of protecting the local economy, without further explanation. Consequently, none of those documents establishes the existence of State coercion justifying the non-application of Article 101(1) TFEU.

544 Nor does the other evidence adduced by the applicants establish that Japanese legislation or administrative practice required coordination with regard to the level of the FSC. That evidence is based on a resolution adopted by IATA and documents from the carriers themselves, which, at best, establish that certain carriers made applications relating to the FSC levels, some of which were approved, but do not show that they were obliged to do so.

545 Thus, in so far as it does not establish the existence of such an obligation, none of the evidence produced by the applicants is capable of invalidating the information in recitals 198, 244, 256, 391, 392, 488 and 491 of the contested decision, from which it is apparent that the initiative to file collective applications concerning the FSC is attributable to the carriers and not to the JCAB.

546 In the third place, as regards the SSC, first of all, the applicants maintain that they acted in the same way as for the FSC, in that they waited for the submission of an application by the national carriers to the Japanese authorities before filing an application for similar tariffs. However, they do not adduce any evidence to substantiate those claims.

547 Next, the applicants submit that the factors on which the Commission relies, namely the contacts referred to in recitals 597 and 673 of the contested decision, were part of multilateral coordination within the WOW alliance, and are therefore covered by the 1996 exemption, with the applicants referring, in that regard, to the line of argument put forward in the context of the second part of their third plea. However, it is apparent from recital 1012 of the contested decision that the Commission found that the parties to the proceedings had not submitted that they were under an obligation to act in concert on the SSC, without making any reference to those contacts. Consequently, the applicants' arguments in that regard are ineffective in the context of the present complaint.

548 The applicants' arguments relating to the SSC must therefore be rejected in their entirety.

549 It follows from the foregoing that the applicants have failed to establish that any law or conduct on the part of the Japanese authorities, including the ASAs concluded by that third country, obliged them to discuss their tariffs with other carriers as regards the FSC, the SSC or the payment of commission on surcharges. They have not therefore established that the Commission erred in finding, in the contested decision, that Japanese legislation did not preclude the application of Article 101(1) TFEU and Article 53 of the EEA Agreement.

550 It also follows from the foregoing that it has not been established that the result at which the Commission arrived in the contested decision might have been different if the passages of the replies to the Statement of Objections, in relation to which it was held, in paragraph 124 above, that the Commission had wrongly refused to grant the applicants access, had been disallowed as inculpatory evidence. Even in their absence, the Commission was justified, on the basis of the evidence available to it, in concluding that Article 101 TFEU and Article 53 of the EEA Agreement were applicable to the conduct of the incriminated carriers that took place in Hong Kong and Japan.

(iii) Other third countries

551 In recitals 1013 to 1019 of the contested decision, the Commission analysed the regulatory regimes applicable in the Republic of India, the Kingdom of Thailand, the Republic of Singapore, the Republic of South Korea and the Federative Republic of Brazil. It noted that the ASAs concluded between those third countries and EU Member States provided, as a general rule, for a regime for the tariffs of carriers to be approved by the competent authorities. Next, as regards the Kingdom of Thailand and the Republic of Singapore, it considered that, although the relevant ASAs also generally contained a clause according to which tariffs would, if possible, be agreed between the designated carriers, such tariff provisions did not cover general tariff discussions between multiple operators, such as those at issue in the present case.

552 In recital 1019, the Commission found that, 'following the reasoning … in respect of Hong Kong and Japan', the State coercion defence had not been established in the case of India, Thailand, Singapore, South Korea and Brazil.

553 In the same recital, the Commission specified that that analogy was valid on the grounds that, first, the tariff provisions in the ASAs applicable in those third countries were limited to the designated carriers on specified routes and did not extend to general tariff discussions between multiple operators providing services to multiple national destinations and, secondly, the applicable national legal and administrative provisions had not been shown to require tariff coordination.

554 The applicants submit that the Commission did not sufficiently examine the regulatory regimes applicable in India, Thailand, Singapore, South Korea and Brazil. First of all, they dispute that tariff discussions under the ASAs are limited to designated carriers on specified routes by making reference to their analysis of the rules in force in Hong Kong and Japan, from which it is apparent that compliance with the ASA tariff clauses may require concertation between carriers on tariffs. Next, they maintain that the legislation and administrative practice applicable in Thailand required carriers to coordinate their tariffs by relying, inter alia, on an official instruction from the Thai Department of Aviation ('the DOA').

555 In the first place, as regards the ASAs, the applicants refer to the arguments put forward in their analysis of the rules applicable in Hong Kong and Japan, in order to establish that paragraph 1 of the standard clause of those agreements reproduced in the contested decision is the basis for

regimes requiring tariff discussions between carriers. It has been established, in paragraphs 521 to 523 and 537 to 539 above, that the applicants have not established that the application of the ASAs in force in Hong Kong and Japan constituted the basis for local regimes imposing discussions regarding surcharges between carriers. Consequently, the applicants cannot rely, by analogy, on their observations in that regard in order to challenge the Commission's analysis, set out in recitals 1013 to 1019 of the contested decision, that the ASAs concluded by the Republic of India, the Kingdom of Thailand, the Republic of Singapore, the Republic of South Korea and the Federative Republic of Brazil are incapable of precluding the application of Article 101(1) TFEU and Article 53 of the EEA Agreement.

556 In the second place, as regards the actions of the State authorities in Thailand, it is apparent from recital 396 of the contested decision that, in August 2004, certain carriers met and decided to submit a collective application to increase the FSC to the DOA, with Lufthansa stating in that regard that it hoped that that 'joint approach [would be] successful'. It also follows from recital 464 of the contested decision that, in January 2005, a Thai carrier had already announced its FSC to the DOA and that the other carriers were 'discussing … the issue'.

557 It is apparent from those factors, the correctness of which is not disputed by the applicants, that, in August 2004, certain carriers took the initiative to act collectively in order to obtain an increase in the FSC from the DOA and that, in January 2005, the DOA was able to accept individual applications relating to the FSC. It is also apparent that carriers enjoyed autonomy as to whether they should follow the initiative of the national carrier in that regard. The Commission was therefore, prima facie, justified in finding that it had not been established that the legal provisions and administrative practice in force in Thailand required tariff coordination.

558 However, account must be taken of the instruction of the DOA in the letter of 20 July 2005 adduced by the applicants both during the administrative procedure and before the Court.

559 It is apparent from that letter that, in response to a request from a carrier, the DOA decided to make a provisional adjustment to the FSC tariffs from Thailand, setting the rate of that surcharge and a ceiling corresponding to the rates then applied by IATA, and required the carrier at issue to communicate those provisional tariffs to all carriers, with a view to them implementing the adjustments thus agreed.

560 It is thus clear from that instruction that the carriers were required to comply with the provisional adjustment of tariffs adopted by the DOA and notified by the carrier at issue.

561 In adopting such an instruction, the DOA, in so far as the FSC is concerned, did not merely encourage or facilitate the adoption, by the applicants, of anticompetitive conduct. By setting the FSC tariffs and imposing those tariffs on all the carriers, the DOA created a legal framework which in itself eliminated any possibility of competitive behaviour between the carriers as regards the determination of the amount of the FSC applicable to flights departing from Thailand.

562 It follows from all the foregoing, as regards the rules applicable in Thailand, that the applicants have been able to establish, without being effectively contradicted by the Commission, that, as from 20 July 2005, the authorities of that country created a legal framework that in itself eliminated any possibility of competitive behaviour between carriers as regards the determination of the amount of the FSC applicable to flights departing from Thailand.

Nevertheless the applicants have not established that Thai legislation eliminated all possibility of competition in respect of the FSC or that, as regards the FSC, all possibility of competition was eliminated for the period prior to 20 July 2005.

563 Consequently, the contested decision must be annulled in so far as it found that Article 101(1) TFEU and Article 53 of the EEA Agreement were applicable to the applicants' conduct as regards the determination of the FSC for flights departing from Thailand between 20 July 2005 and 14 February 2006.

564 Lastly, the applicants' arguments alleging infringement of the principle of legal certainty, of Article 59 of the Vienna Convention on the Law of Treaties of 23 May 1969 and of Article 351 TFEU must be rejected. Those arguments are based on the premiss that the Commission disregarded the procedure laid down in Regulation No 847/2004. Yet the applicants have failed to explain why that procedure should have been applied or how the Commission failed to comply with it. Nor have they explained how the alleged failure to comply with that procedure infringes, in the present case, the principle of legal certainty, Article 59 of the Vienna Convention on the Law of Treaties and Article 351 TFEU.

(3) The third complaint, alleging errors in the application of Article 101(1) TFEU to conduct relating to inbound routes prior to 1 May 2004 and of Article 8 of the EC-Switzerland Air Transport Agreement to conduct relating to EU-Switzerland routes prior to 1 June 2002

565 The applicants criticise the Commission for relying, in order to establish their participation in the single and continuous infringement, on contacts relating to routes that fell outside its jurisdiction to penalise infringements of Article 101(1) TFEU and Article 8 of the EC-Switzerland Air Transport Agreement. Those contacts related to inbound routes prior to 1 May 2004 (recitals 135, 146, 237, 295, 587, 595 to 597, 618, 620, 660, 665 and 673 of the contested decision) and to EU-Switzerland routes prior to 1 June 2002 (recitals 145 and 204 of that decision).

566 The Commission disputes the applicants' line of argument.

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

568 In the absence of such legislation, Articles 104 and 105 TFEU apply and impose an obligation on the Member States to apply Articles 101 and 102 TFEU to the authorities of the Member States, and limit the Commission's powers in this area to investigating, on application by a Member State or on its own initiative, and in conjunction with the competent authorities of the Member States which lend their assistance to it, cases of suspected infringement of the principles laid down in those provisions and, where appropriate, proposing appropriate measures to bring them to an end (judgment of 30 April 1986, *Asjes and Others*, 209/84 to 213/84, EU:C:1986:188, paragraphs 52 to 54 and 58).

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

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

571 The consequence thereof was a division of powers between the Member States and the Commission for the application of Articles 101 and 102 TFEU as described in paragraph 568 above.

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

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

574 Regulation No 1/2003 and Decision of the EEA Joint Committee No 130/2004 of 24 September 2004 amending Annex XIV (Competition), Protocol 21 (on the implementation of the competition rules applicable to undertakings) and Protocol 23 (concerning the cooperation between the surveillance authorities) to the EEA Agreement (OJ 2005 L 64, p. 57), which subsequently incorporated that regulation into the EEA Agreement, initially left that regime intact. Article 32(c) of that regulation provided that the latter '[did not] apply to air transport between [European Union] airports and third countries'.

575 Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries (OJ 2004 L 68, p. 1), Article 1 of which repealed Regulation No 3975/87 and Article 3 of which repealed Article 32(c) of Regulation No 1/2003, conferred on the Commission the power to apply Articles 101 and 102 TFEU to EU-third country routes from 1 May 2004.

576 The EC-Switzerland Air Transport Agreement entered into force on 1 June 2002. It is from that date that the Commission became competent to apply Article 8 of that agreement to EU-Switzerland routes.

577 In the present case, it is common ground between the parties that the Commission did not, in the operative part of the contested decision, find an infringement of Article 101 TFEU on EU-third country routes before 1 May 2004 or of Article 8 of the EC-Switzerland Air Transport Agreement on EU-Switzerland routes before 1 June 2002.

578 The applicants nevertheless consider, in essence, that the Commission rendered the contested decision unlawful by referring to contacts relating to routes that, in the relevant periods, were allegedly outside its territorial jurisdiction (recitals 135, 145, 146, 204, 237, 295, 587, 595 to 597, 618, 620, 660, 665 and 673 of the contested decision) in order to establish their participation in the single and continuous infringement on routes which fell within its jurisdiction.

579 As a preliminary point, it should be noted that the Commission did not, in recitals 790 to 792 of the contested decision, in which it listed its evidence against the applicants, rely against them on the contact referred to in recital 597 of that decision (see paragraph 333 above).

580 That being said, it must be observed that the material in the Commission's file does not fully support the interpretation of the content of the other contacts referred to in paragraph 578 above, which the applicants have put forward before the Court. As regards those contacts, a distinction must be made between, on the one hand, the contacts referred to in recitals 135 and 596 of the contested decision and, on the other, those referred to in recitals 145, 146, 204, 237, 295, 587, 595, 618, 620, 660, 665 and 673 of that decision. According to the applicants, the former concern contacts that merely involved carriers established outside the European Union, whereas the latter concern contacts that took place outside the European Union.

581 As regards the contacts referred to in recitals 135 and 596 of the contested decision, it should, however, be noted that they involved both carriers established in the EEA and carriers established outside the EEA. In recital 135 of that decision, the Commission cites a contact that started with an email from SAS to Lufthansa, to three other carriers and to Air Canada. In that email, while expressing their own uncertainty, SAS asked their interlocutors whether they intended to introduce an FSC in view of the fact that the price of fuel had exceeded the trigger threshold set by IATA in a draft resolution seeking to introduce an FSC. In response, as noted in paragraph 355 above, a carrier expressed its agreement with SAS, while Lufthansa stated as follows:

'we are also reluctant to take the initiative this time. If other, big competitors of ours were to go for it, we would follow, but in a different and less centralised approach'.

582 Moreover, as stated in paragraph 440 above, it is apparent from recital 144 of the contested decision that, less than one month after the contact referred to in recital 135, discussions took place between the applicants' local manager in Finland, who internally asked, inter alia, 'How is it going for [Lufthansa] this time?' and three other incriminated carriers regarding the introduction of the FSC.

583 Recital 596 of the contested decision refers to an email of 1 October 2001 in which SAC informed Lufthansa and the applicants that it would impose an insurance and security surcharge from 8 October 2001. That email was, moreover, preceded by a contact, which, it is not disputed, concerned intra-EEA routes, namely the contact referred to in recital 584 of the contested decision. In the context of that contact, as summarised in that recital, a local SAC employee 'in

Scandinavia' communicated to the applicants the 'plans of competitors', including AF and Lufthansa, which 'all [were] considering the introduction of an SSC but [preferred the applicants to] move first'.

584 However, in the case of contacts involving a number of carriers established in the EEA, in view of the finding of the general applicability of the surcharges in recital 889 of the contested decision and in the absence of concrete evidence showing that intra-EEA routes were excluded, it cannot be found that those contacts related exclusively to EU-third country routes.

585 The applicants are therefore not justified in maintaining that the contacts referred to in recitals 135 and 596 of the contested decision exclusively concerned routes which, during the periods at issue, fell outside the Commission's jurisdiction to find and penalise an infringement of Article 101 TFEU or of Article 8 of the EC-Switzerland Air Transport Agreement.

586 As regards, however, the contacts referred to in recitals 146, 237, 295, 587, 595, 618, 620, 660, 665 and 673 of the contested decision, it is common ground between the parties that those contacts took place in third countries or, at the very least, that they involved local employees of the incriminated carriers in third countries. It should be noted, however, that there was nothing to prevent the incriminated carriers from coordinating with each other or exchanging information in such countries concerning intra-EEA freight services. By way of illustration, in recital 296 of the contested decision, mention is made of an internal email from the Qantas office in Singapore of 18 February 2003 in which reference is made to the introduction of a certain amount of FSC by British Airways 'in Europe'. Similarly, in recital 206 of the contested decision, reference is made to a letter of 19 November 2001 in which the Chairman of the BAR CSC in Hong Kong invited the members of the association to 'advise [him] if [their] head offices [had] any plan to reduce or withdraw the [FSC] in overseas markets'.

587 That being so, it should be noted that the present part of the plea would fail even if the contacts referred to in recitals 145, 146, 204, 237, 295, 587, 595, 618, 620, 660, 665 and 673 of the contested decision related exclusively to routes which, during the periods at issue, fell outside the Commission's jurisdiction.

588 In that regard, it should be recalled that the Commission may rely on contacts pre-dating the infringement period in order to construct an overall impression of the situation and thus support the interpretation of certain items of evidence (judgment of 8 July 2008, *Lafarge* v *Commission*, T-54/03, not published, EU:T:2008:255, paragraphs 427 and 428). That would apply even if the Commission were not competent to find and penalise an infringement of the competition rules predating that period (see, to that effect, judgments of 30 May 2006, *Bank Austria Creditanstalt* v *Commission*, T-198/03, EU:T:2006:136, paragraph 89, and of 22 March 2012, *Slovak Telekom* v *Commission*, T-458/09 and T-171/10, EU:T:2012:145, paragraphs 45 to 52).

589 In the part of the contested decision entitled 'Basic principles and structure of the cartel', in recital 107, the Commission stated that its investigation had revealed a worldwide cartel based on a network of bilateral and multilateral contacts, which took place 'at various levels in the undertakings concerned … and in some instances related to various geographical areas'.

590 In recitals 109, 110, 876, 889 and 1046 of, and footnote 1323 to, the contested decision, the Commission set out the mode of operation of the cartel, which involves a multi-level structure. According to the Commission, the surcharges were measures of general application that were not route-specific but were intended to be applied on all routes. Decisions concerning surcharges

were generally taken at the head-office level of each carrier. The head offices of the carriers were thus 'in contact with each other' when a change to the surcharge level was imminent. At local level, carriers coordinated, partly in order to better implement the instructions received from their respective head offices and adapt them to the local market conditions and local regulations, partly to coordinate and implement local initiatives. In recital 111 of the contested decision, the Commission stated that the local associations of carrier representatives were used for that purpose, in particular in Hong Kong and Switzerland.

591 The contacts at issue fell precisely within that context. First, those contacts concerned, in whole or in part, the introduction or implementation of surcharges in Switzerland (recitals 145 and 204), Hong Kong (recitals 237, 587, 618, 620, 660 and 665), Singapore (recitals 146 and 295), Japan (recital 673) or, more generally, in South-East Asia (recital 595). Secondly, the majority of those contacts either involved employees in the head office of the incriminated carriers or referred to instructions from or communications with such employees (recitals 237, 295, 595, 618, 620 and 673). Thirdly, a number of those contacts either reflected, at local level, announcements made or decisions taken previously at central level (recitals 204 and 673), or were at least contemporaneous with discussions between the head offices or decisions taken at head-office level concerning surcharges (recitals 145, 146, 237, 295, 587 and 595). Fourthly, the majority of those contacts took place in the context of, or ancillary to, local associations of carrier representatives (recitals 145, 146, 204, 295, 587, 618, 660 and 665).

592 Moreover, the applicants have not claimed that those contacts fail to support their interpretation of other evidence that is not alleged to fall outside the Commission's jurisdiction. Thus, the contacts at issue referred to in recitals 145, 146, 204, 237 and 295 of the contested decision are amongst some 20 contacts at issue that the Commission cited in recital 791 of the contested decision in order to establish the applicants' participation in the three elements of the single and continuous infringement relating to the FSC.

593 As regards the contacts at issue referred to in recitals 587, 595, 618, 620, 660, 665 and 673 of the contested decision, they represent 7 of the 14 contacts at issue that the Commission referred to in footnotes 1258 to 1260 to that decision in order to establish that the applicants were aware of coordination regarding the SSC which exceeded their contacts with Lufthansa, on the ground that they had direct contacts with a number of carriers concerning the implementation of the SSC.

594 It follows that the Commission was justified in relying on the contacts referred to in recitals 145, 146, 204, 237, 295, 587, 620, 595, 618, 660, 665 and 673 of the contested decision in order to create an overall picture of the cartel at issue and thus support its interpretation of the evidence on which it relied in order to ascribe to the applicants liability for the elements of the single and continuous infringement relating to the FSC and the SSC.

595 The present complaint must therefore be rejected.

(4) The fourth complaint, alleging errors in the assessment of the conduct that took place in Switzerland

596 The applicants claim that the Commission erred in its assessment of three contacts that took place in Switzerland, namely those referred to in recitals 145, 204 and 443 of the contested decision. According to the applicants, those contacts do not establish that they were involved in the coordination of surcharges.

597 In the first place, an examination of the email described in recital 145 of the contested decision shows that the applicants, Air Canada and Lufthansa were 'exceptions to the agreement' between carriers consisting in applying, in Switzerland, the same policy as Swiss as regards FSCs. The conversations described in that email concern Lufthansa, KLM and AF, whereas the information relating to the applicants was in the public domain.

598 In the second place, the email from a local employee of the applicants to the chairman of the Swiss association of carriers, the Air Cargo Council Switzerland ('ACCS') referred to in recital 204 of the contested decision merely states that they had announced the withdrawal of their FSCs. That information had already been made publicly available. It is, moreover, incorrect to take the view that ACCS collected and coordinated, for the benefit of its members, information in the public domain concerning the FSC. On the contrary, ACCS pursued the legitimate aim of providing information regarding surcharges to carriers' customers.

599 In the third place, the email referred to in recital 443 of the contested decision was not addressed to the applicants, who had previously closed their office in Switzerland and left ACCS. That email was admittedly sent to a sales agent of the applicants, but that agent also worked for approximately 20 other carriers.

600 The Commission contends that the interpretation of the email described in recital 145 of the contested decision proposed by the applicants is difficult to reconcile with its wording, whereas the emails referred to in recital 204 of that decision formed part of an established mechanism for exchanging information within ACCS. As for the email referred to in recital 443 of that decision, it was received by a sales agent of the applicants and could therefore be attributed to them.

601 It is appropriate to examine in turn the three contacts that are the subject of the present complaint.

602 In the first place, the contact referred to in recital 145 of the contested decision is an email from Swiss on 10 January 2000, from which the Commission inferred, in recital 851 of that decision, that Lufthansa and the applicants had participated in an agreement to use the chargeable weight for the purposes of determining the amount of the FSC.

603 In that email, it is stated that, 'in Switzerland all carriers agreed to apply same policy as [Swiss]', which consisted in using the chargeable weight rather than the actual weight to calculate the FSC, with Lufthansa being the 'only significant exception'.

604 It is true that, as noted by the applicants, that email states that, like Lufthansa and Air Canada, they would continue to use the criterion of actual weight. That email also refers to the hesitations of other incriminated carriers in that regard.

605 However, that does not in any way call into question the existence of discussions regarding the introduction of the FSC to which the applicants and those other incriminated carriers were party. Although the email referred to in recital 145 of the contested decision highlights the contradiction between the applicants' preference and that of other carriers, this is only to illustrate how 'confusion on who will really apply what remains'.

606 In those circumstances, the Commission was entitled, without erring, to conclude in recital 851 of the contested decision that the applicants had participated in the agreement in question even though they had decided not to apply it 'at that stage'.

607 In the second place, the contacts referred to in recital 204 of the contested decision are emails sent to the members of ACCS on 6 and 7 December 2001. In those emails, the applicants, Martinair, AF and Japan Airlines all state that they will remove the FSC.

608 Contrary to the applicants' submission, the sole purpose of those emails was not to facilitate the transmission, to the carriers' customers, of information that was already in the public domain. The contacts referred to in recital 204 of the contested decision were responses to a request from the chairman of ACCS of 4 December 2001 referred to in recital 203 of that decision. In that email, the chairman of ACCS stated that his employer, Malaysian Airlines, had ceased to apply the FSC to Kuala Lumpur (Malaysia) for the Asian market and that he would therefore himself be 'put under pressure' to cease applying it.

609 It is true, as noted by the applicants, that the chairman of ACCS added that he wished to 'know the newest update' of the addressees of his email in view of his meeting the following day with a freight forwarders' association. His comments must, however, be read in the light of his previous emails. His email of 4 December 2001 was not the first in which he questioned the members of his association regarding their possible plans to remove the FSC. In an email of 21 November 2001 referred to in recital 202 of the contested decision, the chairman of ACCS complained of having learned from third-party sources that KLM would suspend the FSC from 1 December 2021, asked to be informed of any moves in that regard and noted that 'our organisation is a big question mark if we [do] not stick together'. He also urged the members of ACCS 'not to follow [the] KLM decision and keep the [FSC] at least until the end of the year'. In reply, a number of carriers informed the members of ACCS of their intentions in that regard.

610 As regards the fact that the information communicated was in the public domain, it should be borne in mind that the exchange of publicly accessible information infringes Article 101(1) TFEU where it underpins another anticompetitive arrangement (see paragraph 480 above). As is apparent from paragraphs 607 to 609 above, that is the case in the present instance.

611 It follows that the applicants have failed to establish that the Commission erred in its assessment of the contacts referred to in recital 204 of the contested decision.

612 In the third place, as regards the email referred to in recital 443 of the contested decision, which was sent not to the applicants but to one of their sales agents, it must be borne in mind that, if an agent, commercial representative or intermediary works for the benefit of a principal undertaking, he or she may in principle be treated as an auxiliary organ forming an integral part of that undertaking, who must carry out the latter's instructions and thus forms an economic unit with that undertaking (see, to that effect, judgment of 11 December 2003, *Minoan Lines* v *Commission*, T-66/99, EU:T:2003:337, paragraph 125 and the case-law cited).

613 According to the case-law, the decisive factor for the purposes of determining whether such an economic unit exists is to be found in the agreement concluded with the principal undertaking and, in particular, in the clauses of that agreement, implied or express, which it contains concerning the assumption of the financial and commercial risks linked to the performance of contracts concluded with third parties. That question must be analysed on a case-by-case basis, taking account of the real economic situation rather than the legal categorisation of the contractual relationship in national law (see, to that effect, judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio*, C-217/05, EU:C:2006:784, paragraph 46).

614 It has also previously been held that it tends not to suggest economic unity where, at the same time as he or she conducts business for the account of his or her principal, an agent undertakes, as an independent dealer, a very considerable amount of business for his or her own account on the market for the product or service in question (see, to that effect, judgment of 11 December 2003, *Minoan Lines* v *Commission*, T-66/99, EU:T:2003:337, paragraph 128 and the case-law cited).

615 First, the Commission has not adduced any evidence to show that the sales agent who received the email referred to in recital 443 of the contested decision did not bear the economic risk associated with the performance of the agreement which he had concluded with the applicants. Nor did it claim that that agent did not determine his conduct on the market independently and merely applied the instructions given to him by the applicants.

616 Secondly, the Commission does not dispute that, at the same time as he conducted business for the applicants, that agent provided services to approximately 20 other carriers. Nor does the Commission claim that that agent participated on behalf of the applicants in the activities that were the subject of the email referred to in recital 443 of the contested decision.

617 Moreover, and contrary to the Commission's contention, it cannot be considered that that agent sent the applicants the information contained in the email referred to in recital 443 of the contested decision. The Commission, on which the burden of proof rests, has failed to establish that that was the case.

618 Accordingly, in the absence of other firm, precise and consistent evidence capable of establishing that the email referred to in recital 443 of the contested decision substantiated the applicants' participation in the single and continuous infringement, it must be excluded from the body of evidence which the applicants contest as a whole in the tenth part of the present plea.

(5) The fifth complaint, alleging an error relating to the inclusion in the single and continuous infringement of the applicants' conduct in third countries

619 The applicants claim that the Commission failed to discharge its burden of proving that 'all the third country conduct' formed part of the single and continuous infringement.

620 The applicants also claim that the Commission failed to fulfil its obligation to state reasons in so far as it failed to refute the evidence and arguments that the applicants submitted for the purposes of demonstrating that there was no intrinsic link between that conduct and the communications that took place in the context of the cartel at issue. That evidence and those arguments show that those communications and the conduct in the scope of the cartel at issue pursued different objectives, involved different carriers and employees and had different content, timing and degrees of publicity.

621 The applicants add that the Commission has not established that their local staff intended to contribute to a global cartel concerning the coordination of the FSC by participating in the conduct that took place in third countries. Their participation in that conduct did not, moreover, indicate any acceptance of the risk associated with the cartel at issue.

622 The Commission disputes the applicants' line of argument.

623 It should be noted that the present complaint overlaps with the argument that the Court has already examined and rejected in the context of the examination of the first complaint in the first part of the present plea, in paragraph 288 above.

624 Consequently, the present complaint must be rejected. The present part of the plea must therefore be upheld in so far as it concerns the determination of the FSC for flights from Thailand between 20 July 2005 and 14 February 2006 and recital 443 of the contested decision. The remainder of the present part of the plea must be rejected.

(h) The seventh part of the plea, alleging errors in the assessment of speculation on the part other carriers as to the applicants' conduct

625 The applicants criticise the Commission for finding that the evidence described in recitals 196, 273, 406 and 415 of the contested decision formed part of the single and continuous infringement. According to the applicants, that evidence relates to contacts to which they were not party and contains only publicly available information in their regard.

626 The Commission disputes the applicants' line of argument. In particular, as regards the CPA table described in recital 196 of the contested decision, the Commission states that it suggests that the applicants had communicated some of the information at issue to CPA before it was made public. It adds that the applicants are unable to prove that the remaining information at issue was already in the public domain, at least as regards two carriers, and that recitals 173, 237 and 394 of the contested decision describe other evidence of contacts between the applicants' staff and CPA. As regards the contacts referred to in recitals 406 and 415 of the contested decision, the Commission maintains that, in those messages, AF examined the applicants' future conduct. Those messages prove that AF and KLM planned to align their FSC policy with that of Lufthansa and the applicants. The Commission adds that the contacts described in recitals 173, 174, 425, 546 and 966 support its point of view.

627 In recital 791 of the contested decision, the Commission described various contacts at issue in which the applicants, in its view, participated. At the end of that recital, the Commission added, referring to recitals 196, 273, 406, 415, 425, 506, 491 and 559 of the contested decision, that 'there [was] some further evidence relating to contacts with competitors'.

628 The present part of the plea relates to four of those eight recitals.

629 In the first place, in recital 196 of the contested decision, the Commission referred to a file found on the laptop of a CPA employee. That file was entitled 'FSC summary 06 Dec 01' and contains a table titled 'FSC removal by country'. It is apparent in particular from that table that, 'in Scandinavia', the applicants had planned to remove the FSC on 20 December 2001, but that for CPA the 'official notice' was still 'pending'.

630 However, the applicants had already announced, by means of a press release of 5 December 2001, that they would remove the FSC with effect from 20 December 2007. As is apparent from the file relating to the administrative procedure, five of the seven other carriers identified in the table titled 'FSC removal by country' had publicly announced between 21 November and 6 December 2001 that they would remove the FSC in December 2001.

631 As regards the other two carriers identified in the table in question, it is true that the applicants have not established that they had announced their plan to remove the FSC on 6 December or an earlier date. It must, however, be observed, as noted by the applicants, that the dates on which the announcement of their project to remove the FSC was published do not appear in the file relating to the administrative procedure and that one of them had ceased to exist on the date on which the action was brought. In those circumstances, since the announcements in question were published more than 15 years before that date, the applicants cannot be held liable in that regard.

632 The Commission was therefore not justified in inferring from the document referred to in recital 196 of the contested decision that an anticompetitive contact had taken place involving the applicants. The mere fact that the applicants participated in multilateral contacts several months (recitals 173 and 237) or even years apart (recital 394) in which CPA also participated is not capable of calling that conclusion into question.

633 In the second place, in recital 273 of the contested decision, the Commission referred to an internal Qantas email of 17 February 2003 from which it is apparent that a number of carriers, including the applicants, '[had] indicated they [would] be increasing the FSC from GBP 0.06/kg to GBP 0.09/kg' and that '[Lufthansa] Germany [were] expected to announce an increase from EUR 0.10/kg to EUR 0.15/kg [the next day]'.

634 The applicants admittedly argue that Qantas could have obtained that information indirectly, for example via their website or a freight forwarder. However, they have failed to adduce the slightest evidence to substantiate that argument.

635 The only document on which the applicants rely in support of their argument is a newsletter published by a freight forwarder on 14 February 2003. However, that bulletin does not mention the applicants. On the contrary, it states as follows:

'We have received notice as of Friday, February 14th that Cargolux, … , British, KLM, … , and the Lan Chile Group (approx five [carriers]) will increase their FSC by five-cents to $0.15/kg. We anticipate receiving notice from virtually all [carriers] next week.'

636 The applicants have therefore failed to establish that the Commission erred in relying against them on the email referred to in recital 273 of the contested decision.

637 In the third place, the Commission referred to two exchanges of internal AF emails.

638 First, in recital 406 of the contested decision, the Commission relied on an internal AF email of 20 September 2004. That email concerns the situation in Denmark and is worded as follows:

'We just got the info that [Lufthansa] will increase the FSC to 0.3 Euros on Oct 04th [2004]. I guess [SAS] will follow very quickly so we adjust ourself to the [SAS] level.'

639 The use of the wording 'I guess' in that email shows a degree of uncertainty as to the applicants' intentions which tends to cast doubt on the existence of such a contact.

640 The other documents in the file are not conclusive either. An overall reading of the exchanges in which that email is included shows that the assumption made in recital 406 of the contested decision was intended solely to anticipate the lack of information as to the applicants' intentions.

In those exchanges, it is stated that the applicants' announcement is 'not ready yet' and that 'I think we should wait to hear the position' of the applicants. Reference is also made to the possibility that the applicants might 'not [advise]'.

641 Contrary to the Commission's contention, there is nothing to suggest that AF expected the applicants to inform it of their intention to increase the FSC by bilateral and non-public means. On the contrary, it is apparent from an internal AF email of 23 September 2004 that it was ultimately through a newsletter of the applicants, to which it had subscribed, that AF became aware of those intentions.

642 Secondly, in recital 415 of the contested decision, the Commission refers to an email of 23 September 2004 entitled 'fuel surcharge Denmark', in which AF asks KL[M] if it had been able to 'fix the issue on KL alignment on AF, [Lufthansa] and [the applicants]'.

643 However, neither that email nor those which preceded or followed it refer to any contact between AF and the applicants. Nor do they imply that such contact took place. On the contrary, it is apparent from an internal AF email of 20 September 2004 and the applicants' written pleadings that the intention was to ensure that, following the merger between AF and KLM, KLM ceased to charge a lower FSC than the competition.

644 The other evidence to which the Commission refers (recitals 173, 174, 425, 546 and 966 of the contested decision) do not invalidate that conclusion.

645 First of all, the exchange of emails referred to in recital 546 of the contested decision does not establish that there was contact between AF and the applicants. As the Commission states, that exchange shows only that the applicants aligned their conduct with that of AF and KLM and induced SAC to do the same. Moreover, that exchange dates from November 2005. It therefore took place more than a year after the email referred to in recital 415 of the contested decision.

646 Next, the meeting of 22 January 2001 referred to in recitals 173 and 174 of the contested decision precedes the email referred to in recital 415 of the contested decision by more than three years.

647 Furthermore, contrary to what is stated in recital 966 of the contested decision, it was not to the applicants that AF sent the email of 27 June 2005 from which it is apparent that 'we have "agreed" to 3.30 DKK AF/KL[M] from 7 July 2005'. AF sent that email to Lufthansa, which subsequently transferred it to the applicants.

648 Lastly, the contact at issue referred to in recital 425 of the contested decision is a BARIG cargo committee meeting of 3 September 2004, in which the applicants, Lufthansa and AF participated, among others. It is true that that meeting concerned, inter alia, the FSC. However, as is apparent from paragraph 448 above, it was for Lufthansa to communicate to the other participants in that meeting its latest news in that regard. Moreover, as is apparent from the minutes of that meeting, that meeting related above all to the situation in Germany.

649 The Commission cannot therefore infer from that meeting that there were local contacts between AF and the applicants in Denmark.

650 In the light of the foregoing and in the absence of other firm, precise and consistent evidence establishing that the contacts referred to in recitals 196, 406 and 415 of the contested decision substantiated the applicants' participation in the single and continuous infringement, they must be excluded from the body of evidence which the applicants contest as a whole in the tenth part of the present plea.

(i) The ninth part of the plea, alleging errors in the assessment of the applicants' knowledge of the conduct of the other incriminated carriers

651 The applicants claim that the Commission failed to discharge its burden of proving that they were aware or should have been aware of all the anticompetitive conduct concerning surcharges and the refusal to pay commission in which they did not participate and in relation to which they were not prepared to bear the risk.

652 In accordance with the case-law cited in paragraph 459 above, in order to ascribe to the applicants the single and continuous infringement as a whole, the Commission was required to establish either that the applicants had participated in all the conduct comprising that infringement or that they were aware of all the unlawful conduct which the other participants in the cartel planned or put into effect in pursuit of the same objectives, and in which the applicants had not directly participated, or which the applicants could have reasonably foreseen and in relation to which they were prepared to bear the risk.

653 However, the mere fact that there is identity of object between an agreement in which an undertaking participated and an overall cartel does not suffice to render that undertaking responsible for the overall cartel. That applies even where there are objective links between that agreement and the overall cartel. It is only if the undertaking concerned, when participating in an agreement, knew or should have known that in so doing it was joining in the overall cartel that its participation in the agreement concerned can constitute the expression of its accession to that cartel (see, to that effect, judgment of 30 November 2011, *Quinn Barlo and Others* v *Commission*, T-208/06, EU:T:2011:701, paragraphs 144 and 150 and the case-law cited).

654 It is for the Commission to prove that the undertaking concerned had the requisite knowledge of the anticompetitive conduct planned or put into effect by the other participants in the overall cartel but in which it did not directly participate (see, to that effect, judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 67).

655 In order to do so, the Commission must adduce evidence that is sufficiently precise and consistent to establish that the undertaking concerned had such knowledge (see, to that effect, judgment of 20 March 2002, *Sigma Tecnologie* v *Commission*, T-28/99, EU:T:2002:76, paragraph 51).

656 The Commission is not, however, required to establish that the undertaking concerned was aware, or should have been aware, in detail, of the concerted practices that took place in the context of the contacts at issue in which it did not participate. Nor is it necessary for it to establish that the undertaking in question was aware, or should have been aware of all of those contacts (see, to that effect, judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, T-259/02 to T-264/02 and T-271/02, EU:T:2006:396, paragraph 193).

657 The undertaking concerned must merely be aware of the general scope and the essential characteristics of the cartel as a whole (see judgment of 10 October 2014, *Soliver* v *Commission*, T-68/09, EU:T:2014:867, paragraph 64 and the case-law cited).

658 Where that is the case, the fact that an undertaking did not take part in all the constituent elements of a cartel or that it played only a minor role in the elements in which it did participate must be taken into consideration only when the gravity of the infringement is assessed and, as the case may be, in determining the amount of the fine (see judgment of 10 October 2014, *Soliver* v *Commission*, T-68/09, EU:T:2014:867, paragraph 65 and the case-law cited).

659 It is in the light of those principles that it is necessary to determine whether the Commission was justified in concluding that the applicants had the requisite knowledge of the conduct of the other incriminated carriers in which they did not participate directly concerning, first, the surcharges and, secondly, the refusal to pay commission.

(1) The surcharges

660 The applicants maintain that they were not, and could not have been, aware of the various instances of conduct engaged in by the other incriminated carriers in relation to the surcharges. They put forward two arguments in support of that claim.

661 In the first place, the applicants note that the Commission wrongly relied, in recital 791 of the contested decision, on emails from Lufthansa containing announcements concerning the FSC in order to establish that they knew, or at least should have known, that Lufthansa was coordinating the FSC with other carriers. Those emails merely contain Lufthansa's public announcements concerning the FSC, they do not reveal anything about prior coordination within the core group, they concern only the periods between February 2003 and September 2004 and between March 2005 and September 2005 and were sent by Lufthansa's sales manager in Germany either to his local counterparts at 18 carriers, a number of which were not held responsible for the single and continuous infringement, or to carriers that purchased capacity from Lufthansa.

662 In the second place, the Commission failed to examine five arguments and items of evidence that the applicants had submitted for the purposes of establishing that their staff were unaware of the conduct of the other carriers, had no reason to suspect them and were not prepared to accept the risk.

663 First, Lufthansa's internal guidelines, a copy of which was sent to the applicants, show that Lufthansa had actively taken measures to comply with the competition rules as regards surcharges. Those guidelines never referred to the prior announcement of coordination between Lufthansa and the other incriminated carriers, most of which belonged to the core group. In support of their argument, the applicants rely on a resolution of Lufthansa's board of directors of 21 December 1999 regarding the introduction of the FSC.

664 Secondly, Lufthansa confirmed that it had not informed the applicants of its contacts with other carriers. When Lufthansa's central employee within the core group sent the applicants information concerning those carriers, he did not reveal that he had previously communicated with those carriers, but referred instead to his personal expectations or to publicly accessible information.

665 Thirdly, the applicants' employees did not belong to the core group. The latter was composed of senior executives of the main carriers and their personal contacts at other carriers.

666 Fourthly, the applicants could not have known about the activities of the core group through the behaviour of its members on the market.

667 Fifthly, the applicants could not have been aware of the conduct that took place in third countries in which they did not engage. Moreover, there is no evidence that the applicants were prepared to assume the risk of such conduct. On the contrary, they received express assurances from the Danish competition authority that there was no risk in that regard.

668 The Commission disputes the applicants' line of argument.

669 It should be borne in mind that, in recital 882 of the contested decision, the Commission concluded that the applicants were 'involved in two of the three elements (FSC and SSC)' of the single and continuous infringement, and not that they merely had proven or presumed knowledge of it. However, it is clear from the Commission's replies to the arguments put forward by Air Canada and British Airways in recitals 894 to 897 of the contested decision that it did not consider that the applicants had directly participated in all the anticompetitive activities which fell within those elements.

670 In the first place, as regards the FSC, the Commission, in recital 791 of the contested decision, referred to eight contacts for the purpose of establishing that the applicants 'knew or at least should have known that [Lufthansa] coordinated the FSC implementation with other carriers'. As is apparent from footnote 1248 to the contested decision, these are the emails described in recitals 274, 279, 346, 411, 446, 450, 482 and 495 of the contested decision, by which Lufthansa communicated its announcements regarding the increase of the FSC to various carriers.

671 The addressees of those 8 emails include a total of 10 incriminated carriers. Five of those carriers, namely Air Canada, CPA, Japan Airlines, SAC and the applicants, were among the addressees of all those emails. The remaining five carriers, namely AF, Cargolux, KLM, Lan Airlines and Martinair, received between two and five of those emails.

672 The applicants participated in other anticompetitive contacts with each of those 10 carriers, with the exception of Lan Airlines. Thus, first of all, the applicants communicated with Air Canada and KLM concerning both the establishment of the FSC and its implementation (recitals 135, 144 to 146, 174 and 394 of the contested decision). Next, the applicants coordinated with Japan Airlines, Lufthansa and SAC concerning the implementation of the FSC, both in the context of the WOW alliance (recitals 401, 434, 484, 488, 490, 494, 496, 497, 512, 531 and 546 of that decision) and outside it (recitals 145, 146, 204 and 559 of that decision). Lastly, the applicants participated in contacts concerning the implementation of the FSC with AF (recitals 146, 174, 204 and 394 of the contested decision), Cargolux (recitals 174 and 394 of the contested decision), Martinair (recitals 204 and 394 of the contested decision) and CPA (recitals 295 and 394 of the contested decision).

673 A number of the contacts identified in the preceding paragraph involved the author of the eight emails in question, namely Lufthansa, and at least four of the incriminated carriers which were among their addressees (recitals 145, 146 and 394 of the contested decision).

674 The fact that the addressees of the emails described in recitals 274, 279, 346, 411, 446, 450, 482 and 495 of the contested decision included non-incriminated carriers or incriminated carriers that had entered into block space agreements with Lufthansa is irrelevant for reasons similar to those set out in paragraphs 463 to 465 and 475 to 495 above.

675 As regards the fact that the emails in question concerned only the periods between February 2003 and September 2004 and between March 2005 and September 2005, it must be held that the evidence relied on against the applicants in recital 791 of the contested decision establishes, as the Commission observes in that recital, the applicants' awareness of a wider cartel involving Lufthansa and other incriminated carriers, including for the period prior to the emails at issue. That is the case, in particular, with the 'coffee round' of 22 January 2001 described in recital 174 of the contested decision, at which the change in the FSC level, in which Lufthansa, the applicants and a number of other incriminated carriers took part, was discussed (see paragraph 447 above). The same is true of the email referred to in recital 237 of the contested decision, referring to contacts involving both the applicants and Lufthansa and a number of other incriminated carriers concerning the application of the FSC.

676 In those circumstances, since the applicants have also failed to establish that there might be a plausible alternative explanation for the emails described in recitals 274, 279, 346, 411, 446, 450, 482 and 495 of the contested decision, other than the coordination of the FSC, the Commission was entitled to conclude that the emails were of such a nature as to give the applicants sufficient knowledge of the coordination between Lufthansa and other incriminated carriers.

677 In addition, it must be noted that several other contacts at issue to which the Commission refers in the contested decision were of such a nature as to give the applicants sufficient knowledge of the coordination between Lufthansa and other incriminated carriers. That is the case, in particular, with regard to the email of 27 June 2005 referred to in recital 966 of the contested decision, from which it is apparent that 'we have "agreed" to 3.30 DKK AF/[KLM] from 7 July 2005'. As is apparent from paragraph 647 above, it is not an email which AF sent to the applicants but an email from AF which Lufthansa forwarded to them.

678 That is also the case for the email of 17 February 2003, also referred to in recital 966 of the contested decision. In that email, Lufthansa states the following to the applicants:

'as discussed last week, we will increase the [FSC as from] 03.03.2003. I have attached the press release in German, the English version will follow very shortly. As I have seen [British Airways], [KLM], … are out as well. Heard that [Cargolux], … and others to follow as well.'

679 Contrary to the applicants' submission, it cannot be considered that that email merely revealed to them what Lufthansa expected as regards 'other carriers' actions or publicly available information'. On the contrary, it is apparent from that email that, unlike British Airways, KLM and another carrier, Cargolux and yet another carrier had not yet communicated their intentions to the public. As regards the use of the words 'heard that', it shows that, as the Commission observes, Lufthansa did not merely inform the applicants of its expectations.

680 The Commission therefore did not err in finding, in recital 791 of the contested decision, that the applicants had sufficient knowledge of the coordination between Lufthansa and other incriminated carriers.

681 The Commission was also entitled to consider that the applicants had sufficient knowledge of the conduct in third countries at which they were not present from the evidence referred to in recital 791 of the contested decision. It is apparent from recital 889 of the contested decision that the FSC was a measure of general application that was not route-specific and was intended to be applied on all routes, on a worldwide basis (see paragraphs 277 to 291 above). Any diligent operator aware of the scope of that coordination would have known, or at least should have known, that it extended to the third countries in which it did not operate.

682 The assurances that the applicants have received from the Danish competition authority are of no assistance to them in that regard. It is apparent from recitals 1268 and 1271 of the contested decision that the applicants claim to have received those assurances in the form of a decision in which the Danish competition authority stated that the Commission 'was competent concerning intra EU routes only, and not on [EU-third country routes]'. However, that decision dates from 2002. It therefore precedes the extension of the Commission's competence to apply Article 101 TFEU to international air transport on EU-third country routes with the entry into force of Regulation No 411/2004 and to apply Article 53 of the EEA Agreement to international transport on non-EU EEA-third country routes with the entry into force of Decision of the EEA Joint Committee No 40/2005 of 11 March 2005 amending Annex XIII (Transport) and Protocol 21 (on the implementation of competition rules applicable to undertakings) to the EEA Agreement (OJ 2005 L 198, p. 38). Thus, in recital 1271 of the contested decision, the Commission did not err in finding that the decision of the Danish competition authority on which the applicants rely concerned a 'previous legal situation' and could not give rise to legitimate expectations on the part of the applicants.

683 The Commission was therefore correct to consider that the applicants had the requisite knowledge of the coordination concerning the FSC between Lufthansa and other incriminated carriers and in third countries in which they did not operate.

684 In the second place, as regards the SSC, in recital 792 of the contested decision, the Commission summarised the evidence on which it relied in concluding that the applicants had participated directly in the element of the single and continuous infringement relating to the SSC. The Commission thus inferred, inter alia, from that evidence that the applicants had 'knowledge of the wider coordination of the SSC as they had [had] direct contact with competitors concerning the implementation of the SSC'.

685 In the context of the present part of the plea, the applicants do not put forward any argument capable of calling that reasoning into question. At most it can be inferred from their written pleadings that they criticise the Commission for considering that they were aware of the coordination relating to the SSC in countries in which they did not operate.

686 It is apparent from recital 889 of the contested decision that, like the FSC (see paragraph 681 above), the SSC was a measure of general application that was not route-specific and was intended to be applied on all routes, on a worldwide basis. Any diligent operator aware of the scope of that coordination would therefore have known, or at least should have known, that it extended to the third countries in which it did not operate.

687 In the light of the foregoing, it must be concluded that the applicants are not justified in criticising the Commission for concluding that they had sufficient knowledge of the components of the element of the single and continuous infringement relating to the SSC in which they did not participate directly.

688 None of the other arguments advanced by the applicants is capable of casting doubt on those conclusions.

689 First, since the evidence relied on by the Commission was such as to give the applicants sufficient knowledge of the contacts at issue relating to surcharges in which they did not participate directly, it was not necessary for them to be able to become aware of them also by other means, in particular through their discussions with Lufthansa, observation of the conduct of their competitors on the market or by being part of the alleged 'core group'.

690 Consequently, the Commission cannot be criticised for not having expressly examined the applicants' arguments in that regard.

691 Secondly, as regards the argument relating to the measures that Lufthansa allegedly took to comply with competition rules, first of all, it should be noted that the applicants have not established that they were aware of such measures during the infringement period. On the contrary, as the applicants themselves acknowledge in the reply, they were not 'able [to] recover any email in which [Lufthansa] sent its 2000 guidelines on the introduction of the FSC to [SAS Cargo]'.

692 Next, it should be observed that the only evidence on which the applicants rely in support of the present argument is a resolution of Lufthansa's board of directors of 21 December 1999 regarding the introduction of the FSC. As the Commission rightly notes, that resolution relates exclusively to the announcement of the introduction of the FSC at the end of December 1999 and does not in any way establish that there was an internal policy of compliance with competition rules as regards the implementation of surcharges.

693 Last and in any event, it must be observed that, as noted by the Commission, the assurances that the applicants may have obtained as regards compliance with competition rules could not reasonably justify the conclusion that Lufthansa complied with the competition rules. As a matter of principle, undertakings themselves bear the risk of any incorrect assessment of their legal situation, in accordance with the general maxim that ignorance of the law is no defence (judgment of 15 July 2015, *Socitrel and Companhia Previdente* v *Commission*, T-413/10 and T-414/10, EU:T:2015:500, paragraph 304).

694 The present complaint must therefore be rejected.

(2) Refusal to pay commission

695 The applicants claim that the Commission was wrong to consider that, in view of their involvement in the elements of the single and continuous infringement relating to surcharges, they could reasonably have foreseen the conduct of the other incriminated carriers concerning the refusal to pay commission and were prepared to bear the risk. First, the refusal to pay commission did not have the same anticompetitive aim as the surcharges. Secondly, and in any event, the mere identity of object of the various elements of the single and continuous infringement is not sufficient to establish that the applicants had the knowledge required regarding the refusal to pay commission.

696 The Commission contends, in essence, that the applicants could reasonably have foreseen the refusal to pay commission and were prepared to assume the risk, on the ground that the various elements of the single and continuous infringement were inextricably linked. The anticompetitive object of the surcharges would have been undermined if the surcharges had been subject to a form of price competition through commission.

697 In its rejoinder, the Commission adds that the reply and the annexes thereto as well as the emails referred to in recitals 680 and 686 of the contested decision show that the payment of commission had been discussed within the WOW alliance and that the applicants knew or should have known that they and the other carriers did not pay commission on surcharges.

698 It should be noted that, in recital 882 of the contested decision, the Commission found, in essence, that the applicants were directly involved in only two of the three elements of the single and continuous infringement, namely those relating to the FSC and the SSC. The Commission nevertheless considered that the applicants could also be held liable for the third element of the single and continuous infringement, namely that relating to the refusal to pay commission. According to the Commission, in view of their involvement in those elements of the single and continuous infringement, the applicants could have 'reasonably foreseen exchanges between the parties on such a related matter as [the refusal to pay commission] and were prepared to take the risk'. In its rejoinder, the Commission stated that that was the case because the 'purpose of co-ordination on surcharges (i.e. avoiding competition on price) would be undermined if surcharges were subject to commission'.

699 In so doing, the Commission did not base its conclusions on specific evidence, but, in essence, merely presumed that the applicants were aware of the element of the single and continuous infringement relating to the refusal to pay commission on the basis of its identity of object with the other two elements of that infringement. In accordance with the case-law referred to in paragraph 653 above, the objective economic complementarity between the surcharges and the refusal to pay commission is not, even if established, sufficient to establish that the applicants should reasonably have foreseen it.

700 It must therefore be held that the evidence on which the Commission relied in recital 882 of the contested decision was not such as to establish that the applicants had the requisite awareness of the anticompetitive activities of the other incriminated carriers concerning the refusal to pay commission.

701 In its written pleadings, the Commission nonetheless referred to three other items of evidence in the file relating to the administrative procedure to establish that the applicants were or should have been aware of those activities and that they were prepared to take the risk.

702 The first item of evidence is an internal email of 9 June 2005 referred to in recital 680 of the contested decision. In that email, an employee of the applicants reports the content of a conversation that he had had on the same day with 'old contacts in [Cargo Accounts Settlement Systems; "CASS")] Switzerland' regarding concerted actions by freight forwarders' associations concerning the payment of commission on surcharges. The employee states that 'the whole question is exceptionally sensitive from a competition point of view, and it is important that the [the WOW alliance] does not [respond] collectively and that individual [members of the WOW alliance] do not give a "collective" reply'. According to that employee, 'the best course of action would be that CASS, like in Switzerland, would advise about the consequences'.

703 There is nothing in the contested decision to suggest that CASS advised, in Switzerland, carriers to agree, in the context of a bilateral or multilateral framework, to refuse to negotiate the payment of commission with freight forwarders and to grant them rebates on surcharges. Nor can it be inferred from the contested decision that CASS communicated to the applicants evidence suggesting that the other incriminated carriers had acted in concert in such a way or envisaged doing so. On the contrary, it is apparent from the internal email of 9 June 2005 referred to in recital 680 of the contested decision that, in Switzerland, it was stated only, first, that prices and commission were a 'bilateral question between [freight forwarder] and [carrier]', secondly, that a freight forwarder could not unilaterally decide on adjustments and, thirdly, in essence, that the way in which freight forwarders proceeded could have significant consequences.

704 The Commission is therefore not justified in considering that the internal email of 9 June 2005 referred to in recital 680 of the contested decision establishes that the applicants were aware of the unlawful conduct planned or put into effect by the other incriminated carriers as regards the refusal to pay commission.

705 Nor is the Commission justified in inferring from the internal exchanges which followed the email of 9 June 2005 referred to in recital 680 of the contested decision that the refusal to pay commission was the subject of discussions within the WOW alliance. On the contrary, as is apparent from the email of 14 June 2005 referred to in that same recital, an employee of the applicants excluded that possibility, stating that 'we cannot discuss this in [the WOW alliance] but have to deal with it in each company separately'.

706 The second item of evidence on which the Commission relies in its written pleadings in order to conclude that the applicants were aware of the unlawful conduct planned or put into effect by the other incriminated carriers as regards the refusal to pay commission is an email of 28 December 2005. It should be noted that that email is described in recital 686 of the contested decision. In that email, an SAC employee asks a number of carriers, including the applicants, whether 'you have heard' of a recent communiqué from DHL in Germany received by his Frankfurt (Germany) office and announcing the future collection of a commission on surcharges. The SAC employee adds that the communiqué refers to IATA Resolution 805zz, he states that he is unsure what that resolution is and thanks the recipients for their comments.

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

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

709 It follows that the email of 28 December 2005 described in recital 686 of the contested decision does not in itself prove that the applicants participated in the element of the single and continuous infringement relating to the refusal to pay commission. In accordance with the settled case-law cited in paragraph 344 above, it is nevertheless necessary to examine whether, taken in

conjunction with other evidence, that email was capable of constituting a body of evidence rightly enabling the Commission to make a conclusion to that effect (see paragraphs 711 and 712 below).

710 The third item of evidence on which the Commission relies in its written pleadings in order to conclude that the applicants were aware of the unlawful conduct planned or put into effect by the other incriminated carriers as regards the refusal to pay commission is an extract from SAS Cargo's reply to the Statement of Objections. It is apparent from that extract that, on 10 June 2005, one of the applicants' employees sent an email to another carrier concerning the commission on surcharges against the express instructions of his superiors. The Commission merely maintains, however, that that extract 'shows that [the applicants] received information on [commission on surcharges] from Lufthansa and that [their] employee responded', without specifying the content of that information or, a fortiori, arguing that it concerned a potential concerted response to the freight forwarders.

711 In those circumstances, and even supposing that those three items of evidence to which the Commission referred in the course of the proceedings could be taken into consideration, it cannot be considered that, assessed either individually or jointly, they were such as to give the applicants the requisite awareness of the unlawful conduct planned or put into effect by the other incriminated carriers as regards the refusal to pay commission.

712 In the absence of other firm, precise and consistent evidence capable of establishing such awareness, it must be concluded that the Commission erred in holding the applicants liable for the element of the single and continuous infringement relating to the refusal to pay commission. The present complaint must therefore be upheld and Article 1 of the contested decision must be annulled in so far as it holds the applicants liable for that element of the single and continuous infringement. The Court dismisses the present part of the plea as to the remainder.

(j) The tenth part of the plea, alleging errors in the overall assessment of the body of evidence relied on by the Commission

713 The applicants claim that, in the contested decision, the Commission listed a series of isolated, disjointed and local conduct without examining whether there were objective links between them and that it therefore erred in inferring from the body of evidence relied on that the applicants participated in the elements of the single and continuous infringement relating to the FSC and the SSC.

714 As regards the contacts at issue that took place between December 1999 and December 2001, the evidence relied on by the Commission corresponds, in some cases, to conduct unrelated to transport within the EEA. The other contacts are not sufficient to establish the applicants' participation in the single and continuous infringement, either because they do not prove that contacts with other carriers took place, or because they concern facts covered by an alliance, or because they do not fall within the material, geographic or temporal scope of the single and continuous infringement. Moreover, most of the evidence relied on concerning the contacts at issue that took place between May 2004 and February 2006 is ineffective or relates to legitimate conduct in the context of alliances or conduct required by local regulations. In any event, that evidence reflects a series of isolated and local incidents.

715 As regards the conduct related to the SSC, most predate May 2004. They have no connection with transport within the EEA, relate to facts covered by an alliance or local regulation or do not prove the existence of contacts between the applicants and other carriers. The only conduct subsequent to May 2004 relates to legitimate behaviour in the context of an alliance.

716 The Commission disputes the applicants' line of argument.

717 By the present part of the plea, the applicants claim, in essence, that it is apparent from the first to ninth parts of the present plea that the body of evidence relied on by the Commission in recitals 791 and 792 of the contested decision, viewed as a whole, is not capable of establishing that they participated in the elements of the single and continuous infringement relating to the FSC and the SSC.

718 In the present case, in the first place, as regards the conduct relating to the FSC, it is apparent from the examination of the first to ninth parts of the present plea that, of the approximately 40 contacts at issue on which the Commission relied, only 6 must be excluded from the body of evidence relied on in recital 791 of the contested decision. These are the contacts referred to in recitals 196, 223, 406, 415, 443 and 517 of the contested decision.

719 In that regard, first, it should be observed that the contacts reported in recitals 223 and 517 of the contested decision are among the 13 contacts at issue that the Commission relied on in order to conclude that the implementation of the FSC was discussed between the members of the WOW alliance, including the applicants. As is apparent from the examination of the second to fourth parts of the present plea, the 11 remaining contacts are sufficient to justify that conclusion.

720 Secondly, it should be noted that the contact referred to in recital 443 of the contested decision is among the three contacts at issue on which the Commission relied in order to conclude that the applicants had exchanged emails with the members of ACCS, revealing the actions they had planned and their future announcements. As is apparent from the examination of the fourth complaint in the sixth part of the present plea, the two remaining contacts are sufficient to justify that conclusion.

721 Thirdly, it should be noted that the contacts referred to in recitals 196, 406 and 415 of the contested decision are among the eight contacts at issue referred to in recital 791 of the contested decision in support of the finding that 'there is some further evidence relating to contacts with competitors'. As is apparent from the use of the word 'further', this finding was made for the sake of completeness. Therefore, even if the exclusion of the contacts referred to in recitals 196, 406 and 415 of the contested decision were such as to vitiate that finding, that would have no bearing on the ability of the body of evidence relied on in recital 791 of the contested decision to establish, as the case may be, the applicants' participation in the element of the single and continuous infringement relating to the FSC.

722 In any event, it must be observed that, as is apparent from the examination of the sixth to eighth parts of the present plea, the five other contacts relied on in support of the finding that 'there is some further evidence relating to contacts with competitors' were sufficient to justify it.

723 Fourthly, the contacts referred to in recitals 196, 223, 406, 415, 443 and 517 of the contested decision occurred in periods in respect of which the Commission has other evidence supporting the finding of the applicants' participation in the element of the single and continuous infringement relating to the FSC, as is apparent in particular from recitals 204, 237, 401, 411, 425, 434, 531 and 546 of the contested decision.

724 It follows from the foregoing that the applicants' arguments in support of the present part of the plea are not capable of calling into question the body of evidence relied on by the Commission in recital 791 of the contested decision in order to establish their participation in the element of the single and continuous infringement relating to the FSC.

725 In the second place, as regards the conduct relating to the SSC, it must be stated that the applicants' line of argument in support of the present part of the third plea reproduces, in essence, the argument underlying its first nine parts of the plea in so far as it concerns the element of the single and continuous infringement relating to the SSC. However, that argument has been rejected.

726 Moreover, as regards the emails referred to in recitals 618 and 620 of the contested decision, it was found in paragraphs 338 to 344 above that they did not constitute direct evidence of the applicants' involvement in the element of the single and continuous infringement relating to the SSC, but only evidence that had to be assessed with all the other elements put forward by the Commission in recital 792 of the contested decision. The emails referred to in recitals 618 and 620 of the contested decision are part of the nine contacts at issue referred to in recital 792 of the contested decision in support of the finding that the applicants coordinated the SSC level with the members of the WOW alliance. In addition, there is the contact referred to in recital 673 of that decision. As is apparent from the examination of the fourth, sixth and eighth parts of the present plea, those contacts were sufficient to justify the finding of coordination of the SSC level between members of the WOW alliance.

727 The applicants' line of argument cannot therefore call into question the body of evidence relied on by the Commission in recital 792 of the contested decision in order to establish their participation in the element of the single and continuous infringement relating to the SSC.

728 It is therefore necessary to reject the present part of the plea and, consequently, to conclude that, subject to the errors found in paragraph 562 above as regards their participation in the coordination of the FSC in Thailand between 20 July 2005 and 14 February 2006 and in paragraph 712 above as regards their participation in the element of the single and continuous infringement relating to the refusal to pay commission, the applicants have failed to establish, in the context of the present plea, that the Commission erred in determining the extent of their participation in the single and continuous infringement.

4. The fourth plea in law, alleging infringement of Article 266 TFEU, the right to property enshrined in Article 17 of the Charter and the obligation to state reasons

729 The fourth plea, by which the applicants claim that the contested decision is vitiated by internal inconsistencies, is divided into three parts, alleging, first, infringement of Article 266 TFEU, secondly, infringement of the right to property enshrined in Article 17 of the Charter and, thirdly, breach of the obligation to state reasons.

(a) The first part of the plea, alleging infringement of Article 266 TFEU

730 The applicants claim that the Commission infringed Article 266 TFEU by failing to take the necessary measures to comply with the judgment of 16 December 2015, *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990). Thus, the contested decision is vitiated by the same inconsistencies as those which the Court identified in that judgment between the theory of a single and continuous infringement, on the one hand, and contradictory findings of liability on the part of the various carriers which participated in the infringing conduct, on the other. The applicants cite in that regard the divergent conclusions which the Commission reached concerning an exchange of emails of 13 and 14 December 1999, from which it inferred the beginning of their participation in the single and continuous infringement, while excluding the participation of the other two carriers involved in that email exchange.

731 The Commission disputes the applicants' line of argument.

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

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

734 Under Article 266 TFEU, the institution concerned is required to ensure that any act intended to replace the annulled act is not vitiated by the same irregularities as those identified in the annulling judgment (see, to that effect, judgment of 29 April 2004, *IPK-München and Commission*, C-199/01 P and C-200/01 P, EU:C:2004:249, paragraph 83).

735 By judgment of 16 December 2015, *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), the Court found that the Decision of 9 November 2010 was vitiated by contradictions between its grounds and its operative part, the former describing a single and continuous infringement, relating to all the routes covered by the cartel in which the 21 addressees of the Decision of 9 November 2010 allegedly participated, whereas the latter referred either to four separate single and continuous infringements, or to just one single and continuous infringement, liability for which was attributed to the carriers which, as regards the routes mentioned in Articles 1 to 4 of the Decision of 9 November 2010, had participated directly in the unlawful conduct referred to in each of those articles or had been aware of the collusion on those routes and had accepted the risk (see paragraph 17 above).

736 In addition, the Court considered that the grounds of the Decision of 9 November 2010 contained significant internal inconsistencies in so far as they contained assessments that were difficult to reconcile with the existence of a single cartel covering all of the routes referred to in the operative part, as described in the grounds (judgment of 16 December 2015, *SAS Cargo Group and Others* v *Commission*, T-56/11, not published, EU:T:2015:990, paragraph 75). One of those assessments

found that the starting date of participation in the infringement for certain carriers was 1 May 2004, on the ground that those carriers could not be held liable for the infringement as regards intra-EEA routes and that Regulation No 1/2003 had become applicable to the routes they served only from that date (judgment of 16 December 2015, *SAS Cargo Group and Others* v *Commission*, T-56/11, not published, EU:T:2015:990, paragraph 76).

737 In the present case, the applicants have not put forward any argument to show that the contradictions noted above were reproduced in the contested decision. They merely observe that the beginning of their participation in the single and continuous infringement was determined on the basis of the email exchanges of 13 and 14 December 1999, unlike other carriers which were nonetheless involved in those exchanges. They do not state how that fact establishes that the contested decision maintained the contradictions identified in the judgment of 16 December 2015, *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), and, in particular, contradicts the finding of a single and continuous infringement, relating to all the routes covered by the cartel, in which all of the incriminated carriers participated.

738 Moreover, contrary to the applicants' assertions, the Court did not rule, in paragraph 85 of the judgment of 16 December 2015, *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), that the Commission had given insufficient reasons for the Decision of 9 November 2010 by finding that the email exchange of 13 and 14 December 1999 was evidence of the applicants' participation, but not that of the other carriers party to that exchange. In that paragraph, the Court addressed the consequences of the contradictions in the Decision of 9 November 2010 if its operative part were to be read as describing four separate single and continuous infringements. In that regard, the Court referred to the applicants' allegation that the Commission had treated the exchange of emails of 13 and 14 December 1999 in a discriminatory manner solely to illustrate the consequences of those contradictions. As the Court observes, in essence, in paragraph 85 of the judgment of 16 December 2015, *SAS Cargo Group and Others* v *Commission* (T-56/11, not published, EU:T:2015:990), those contradictions deprived the applicants of the possibility to understand whether they had been treated differently to the other addressees of the Decision of 9 November 2010 involved in the email exchanges at issue on the ground that those other addressees did not operate certain routes.

739 The applicants have therefore failed to establish that the contested decision is vitiated by an infringement of Article 266 TFEU. The present part of the plea must therefore be rejected.

(b) The second part of the plea, alleging infringement of the right to property enshrined in Article 17 of the Charter

740 The applicants claim that the Commission acted in an arbitrary and selective way in their regard, thus infringing the right to property enshrined in Article 17 of the Charter, which should, under Article 52(3) of the Charter, have the same meaning and scope as Article 1 of Additional Protocol No 1 to the ECHR. To impose a fine on them constitutes an unjustified interference with their right to property, on account of its arbitrary and inconsistent nature, in so far as the Commission did not hold certain infringers liable for the infringement, or held them liable for a shorter period.

741 The Commission disputes the applicants' line of argument.

742 As has been pointed out in paragraph 424 above, the fact that an undertaking in a position similar to that of an applicant was not found by the Commission to have committed any infringement cannot constitute a ground for setting aside the finding of an infringement by that applicant, provided it was properly established, the circumstances of that other undertaking not even being the subject of proceedings before the EU Courts. The same applies where the undertaking concerned relies on the fact that the undertaking which is allegedly in a similar position was not penalised for part of its participation in the infringement (see, to that effect, judgment of 9 March 2017, *Samsung SDI and Samsung SDI (Malaysia)* v *Commission*, C-615/15 P, not published, EU:C:2017:190, paragraph 38).

743 In the context of the present part of the plea, referring once again to the Commission's assessments relating to the email exchange of 13 and 14 December 1999, the applicants specifically criticise the Commission for acting arbitrarily in failing to hold liable some of those responsible for the single and continuous infringement, or in finding them liable for a shorter period. The present part of the plea must therefore be rejected.

744 In any event, as regards the fact that the Commission failed to hold certain infringers of the single and continuous infringement liable, it should be borne in mind that, as is apparent from paragraph 463 above, the possibility of establishing an undertaking's participation in an infringement depends on all the evidence against it, as the Commission correctly points out. Thus, it is apparent from paragraph 464 above that the Commission was right to state that it '[did] not necessarily hold every recital … and every single item of evidence therein to be of equal value' and that 'rather, the recitals to which reference [was] made [formed] part of the overall body of evidence [on which it relied] and [had] to be evaluated in this context'. It follows that the fact that a non-incriminated undertaking or an undertaking found liable to a lesser extent is mentioned in certain documents relied on by the Commission against incriminated undertakings is not sufficient to consider that the former is in a similar situation to the latter, as regards their liability for the infringement in question.

745 It follows that the Commission was entitled, without in any way rendering the contested decision arbitrary, to take the view that an overall assessment of the contacts at issue relied on against the applicants was sufficient to incriminate them, while taking the view that there was no sufficiently convincing body of evidence to incriminate the non-incriminated carriers which had participated in some of those contacts.

746 Similarly, as regards the differences between the dates which the Commission found to be the starting dates of the applicants' participation in the infringement and that of the other two incriminated carriers involved in the email exchange of 13 and 14 December 1999, it must be borne in mind that the determination of the date on which an undertaking began to participate in the infringement may depend on a body of evidence established concomitantly with, before or after the date concerned (see, to that effect, judgment of 16 June 2015, *FSL and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 178).

747 The Commission was therefore entitled, again without rendering the contested decision arbitrary, to consider that a body of evidence established concomitantly was sufficient to incriminate SAS Consortium as from 13 December 1999, while considering that there was no such body of evidence to incriminate, as of the same date, the other two incriminated carriers which had also participated in the email exchange of 13 and 14 December 1999.

748 Consequently, the Commission cannot be criticised for having identified different starting dates of participation in the single and continuous infringement for the applicants, on the one hand, and the other two incriminated carriers, on the other, even though all those carriers were involved in the email exchange of 13 and 14 December 1999.

749 Moreover, as the Commission correctly notes, without being challenged in that regard, the dates on which participation in the single and continuous infringement began correspond, for each of the three incriminated carriers, to the dates of the first incriminating emails they sent (see recitals 135 and 161 of the contested decision) and, as regards the applicants, they sent the email of 13 December 1999. It follows that there is an objective justification for the different starting dates of participation in the single and continuous infringement found by the Commission in the present case. Any arbitrary conduct on the part of the Commission in that regard must therefore be ruled out.

750 It follows that the complaint alleging infringement of the right to property, which was based entirely on the allegedly arbitrary and inconsistent nature of the proceedings in the present case, must be rejected.

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

(c) The third part of the plea, alleging breach of the duty to state reasons

752 The applicants claim, in essence, that the Commission does not give sufficient reasons for its decision, first, not to hold liable certain carriers involved in the single and continuous infringement and, secondly, to find a different starting date for participation in the single and continuous infringement for the other incriminated carriers involved in the email exchanges of 13 and 14 December 1999.

753 The Commission disputes the applicants' line of argument.

754 In that regard, first, as regards the Commission's decision not to hold liable certain carriers involved in the infringement, it must be borne in mind that the Commission was under no obligation to set out in the contested decision the reasons why other carriers were not held liable for the single and continuous infringement. The obligation to state the reasons on which a measure is based cannot encompass an obligation for the institution from which it emanates to give reasons for the fact that it did not adopt other measures of a similar kind addressed to third parties (judgment of 8 July 2004, *JFE Engineering* v *Commission*, T-67/00, T-68/00, T-71/00 and T-78/00, EU:T:2004:221, paragraph 414).

755 In the present case, the applicants rely specifically on the Commission's failure to explain why undertakings which were in a situation similar to their own were not held liable for the single and continuous infringement.

756 It follows that that line of argument cannot succeed.

757 Moreover, as regards the alleged infringement of the obligation to state reasons on account of the allegedly inconsistent treatment of the email exchange of 13 and 14 December 1999, it should be noted that, in recital 1169 of the contested decision, the Commission set 13 December 1999 as the

starting date of the applicants' participation in the infringement. In the same recital, it set the starting date for the participation of the two other incriminated carriers involved in the email exchange of 13 and 14 December 1999, respectively, as 21 September 2000 and 14 December 1999.

758 As stated in paragraph 749 above, it is apparent from the contested decision that those dates correspond, for each of the three incriminated carriers involved in the exchange of emails of 13 and 14 December 1999, to the dates of the first incriminating emails they sent. In recital 1148 of the contested decision, the Commission identified those emails. As far as the applicants are concerned, these are the emails referred to in recitals 135 and 790 to 792 of the contested decision. As regards the two other incriminated carriers involved in the email exchanges of 13 and 14 December 1999, these are the emails referred to, respectively, in recitals 161 and 717 to 720 of the contested decision and recitals 135 and 773 to 777 of the contested decision.

759 Consequently, the Court must reject as unfounded the claim that the Commission gave insufficient reasons for its decision to set a different starting date for participation in the infringement for the three incriminated carriers which were involved in the email exchanges of 13 and 14 December 1999.

760 It follows from the foregoing that the present part of the plea must be rejected and, consequently, the fourth plea must be rejected in its entirety.

5. The fifth plea in law, alleging errors in the determination of the amount of the fine imposed on the applicants

761 The applicants put forward their fifth plea in the alternative, in the event that the Court should find that the Commission was entitled to impose a fine on them. The present plea is based, in essence, on five parts alleging, first, errors in the calculation of the value of sales, secondly, errors in the assessment of the gravity of the single and continuous infringement, thirdly, errors in the assessment of the duration of the single and continuous infringement, fourthly, errors in the application of point 28 of the 2006 Guidelines on repeated infringement, and, fifthly, errors in the assessment of mitigating circumstances.

(a) The first part of the plea, alleging errors in the calculation of the value of sales

762 The applicants claim that the Commission infringed point 13 of the 2006 Guidelines by including, in the value of sales, some of their sales which were not related, directly or indirectly, to the single and continuous infringement. This concerns, first, sales on non-EU EEA-Switzerland routes, secondly, sales that took place 'outside the EEA', thirdly, sales on routes unrelated to the 'handful of routes' on which the applicants participated in local and isolated incidents and, fourthly, amounts linked to price components of freight services other than the FSC and the SSC.

763 Point 13 of the 2006 Guidelines is worded as follows:

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

764 As is apparent from the case-law, that point pursues the objective of adopting as the starting point for the setting of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it (judgments of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 57, and of 28 June 2016, *Portugal Telecom* v *Commission*, T-208/13, EU:T:2016:368, paragraph 237).

765 Consequently, while the concept of the 'value of sales' referred to in point 13 of the 2006 Guidelines admittedly cannot extend to encompassing sales made by the undertaking in question which do not come within the scope of the alleged cartel, it would, however, be contrary to the goal pursued by that provision if that concept were to be understood as applying only to turnover achieved by the sales in respect of which it is established that they were actually affected by that cartel (judgments of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 76, and of 1 February 2018, *Panalpina World Transport (Holding) and Others* v *Commission*, C-271/16 P, not published, EU:C:2018:59, paragraph 30).

766 Such a limitation would, moreover, have the effect of artificially minimising the economic significance of the infringement committed by a particular undertaking since the mere fact that a limited amount of direct evidence of sales actually affected by the cartel had been found would lead to the imposition of a fine which bore no actual relation to the scope of application of the cartel in question. Such a reward for being secretive would also adversely affect the objective of the effective investigation and sanctioning of infringements of Article 101 TFEU and, therefore, cannot be permitted (judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 77).

767 It is in the light of those considerations that the four errors which the applicants claim vitiate the calculation of the value of sales in the contested decision must be analysed.

(1) Inclusion, in the value of sales, of turnover from the sale of airfreight services on non-EU EEA-Switzerland routes

768 The applicants complain that the Commission included, in the value of sales, the sales of airfreight services on non-EU EEA-Switzerland routes, in respect of which the Commission did not have jurisdiction to find and penalise an infringement of competition rules.

769 The Commission contends that the applicants' line of argument is based on a misinterpretation of the contested decision, according to which an infringement of Article 53 of the EEA Agreement was found on non-EU EEA-Switzerland routes. The Commission also contends that the applicants' line of argument is purely abstract, on the ground that they do not specify whether they serve those routes or, if so, what share of their turnover they derive from those routes.

770 In the reply, the Commission adds that the applicants' sales on non-EU EEA-Switzerland routes are so low that their exclusion from the value of sales would have no impact on the amount of the fine.

771 It is apparent from paragraphs 763 to 766 above that the value of sales cannot include sales which do not fall, directly or indirectly, within the scope of the infringement at issue.

772 In that regard, it has been held in paragraph 251 above that the Commission did not hold the applicants liable for an infringement of Article 53 of the EEA Agreement on non-EU EEA-Switzerland routes in Article 1(3) of the contested decision. Those routes did not fall within the scope of the single and continuous infringement. They were not related to the single and continuous infringement, within the meaning of point 13 of the 2006 Guidelines, and could not therefore be included in the value of sales.

773 In response to the written and oral questions of the Court, the Commission acknowledged that it had included in the value of sales an amount of EUR 262 084 in respect of sales of freight services made by the applicants in 2005 on non-EU EEA-Switzerland routes.

774 It follows that, as the Commission agreed at the hearing, the calculation of the value of sales in the contested decision is vitiated by error in so far as it includes those sales.

(2) Inclusion, in the value of sales, of turnover from sales that 'took place outside the EEA' and the general reduction of 50%

775 The applicants criticise the Commission for having included, in the value of sales, the turnover from sales that took place outside the EEA, which were not therefore made, in direct or indirect relation to the infringement, in the relevant geographic area within the EEA, within the meaning of point 13 of the 2006 Guidelines. It was not sufficient to grant the incriminated carriers the general reduction of 50% to reflect the fact that inbound and outbound services were partially supplied outside the EEA and that part of the harm caused by the cartel in so far as it related to those routes materialised outside the EEA.

776 The Commission's approach was imprecise, arbitrary and vitiated by an inadequate statement of reasons. The Commission thus failed to identify clearly the proportion of inbound and outbound services or the alleged harm that occurred outside the EEA. The contested decision does not contain any analysis of the place where that harm occurred or the place where the services in question were provided. In particular, the Commission was not entitled to take the view that the turnover from sales of inbound services was equivalent to that from sales of outbound services, since it knew that the revenue that the applicants generated on inbound routes was much higher than that which they generated on outbound routes.

777 Nor does the contested decision contain any analysis intended to establish whether the approach followed, which diverged from point 13 of the 2006 Guidelines, could lead to equal treatment of all carriers.

778 The Commission disputes the applicants' line of argument.

779 As a preliminary point, it should be observed that the applicants do not identify precisely the sales which, in their view 'took place outside the EEA'. It must, however, be noted that, in the context of the second plea, the applicants submitted that sales of freight services were 'handled locally' and that the 'contacts between the freight forwarders and carriers [occurred] at the point of origin' of the routes, since the carriers could meet freight forwarders' requirements only if they could transport products from that point.

780 It should be stated that the point of origin of outbound freight services is, by definition, within the territory of the EEA. Conversely, the point of origin of inbound freight services is, by definition, outside the territory of the EEA. The applicants' reference to sales that 'took place outside the EEA' must therefore be understood as referring to sales of inbound freight services.

781 That having been clarified, it should be recalled that point 13 of the 2006 Guidelines makes the inclusion, in the value of sales, of turnover from the goods or services of the undertaking concerned subject to the condition that they are 'goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA'.

782 Point 13 of the 2006 Guidelines does not thus refer to 'sales negotiated' or 'sales invoiced' within the EEA, but refers only to 'sales' in the EEA. It follows that that point does not preclude the Commission from using sales to customers established outside the EEA, or require account to be taken of sales negotiated or billed in the EEA. Otherwise, an undertaking participating in an infringement would merely have to ensure that it negotiates, or bills, its sales to subsidiaries of its customers located outside the EEA in order to ensure that those sales would not be taken into account in the calculation of the amount of a potential fine, which would therefore be much smaller (see, to that effect, judgment of 9 March 2017, *Samsung SDI and Samsung SDI (Malaysia)* v *Commission*, C-615/15 P, not published, EU:C:2017:190, paragraph 55).

783 As regards the interpretation of the concept of 'sales … within the EEA' which the applicants seek to draw from the Commission's decision in Case COMP/39.406 – Marine hoses, it is sufficient to note that the Commission's practice in earlier decisions does not itself serve as a legal framework for fines imposed in competition matters, since that framework is defined solely in Regulation No 1/2003 and the 2006 Guidelines (see judgment of 9 September 2011, *Alliance One International* v *Commission*, T-25/06, EU:T:2011:442, paragraph 242 and the case-law cited), and that it has not, in any event, been demonstrated that the facts of the case giving rise to that decision, such as the markets, goods, countries, undertakings and periods concerned, were comparable to those of the present case (see, to that effect, judgment of 29 June 2012, *E.ON Ruhrgas and E.ON* v *Commission*, T-360/09, EU:T:2012:332, paragraphs 262 and the case-law cited).

784 That concept must be interpreted in the light of the objective of point 13 of the 2006 Guidelines. That objective is, as is apparent from paragraphs 764 and 766 above, to adopt as the starting point for the calculation of fines an amount which reflects, inter alia, the economic significance of the infringement on the relevant market, while the turnover achieved on the goods or services in respect of which the infringement was committed constitutes an objective criterion giving a proper measure of the harm which that infringement does to normal competition (see judgment of 28 June 2016, *Portugal Telecom* v *Commission*, T-208/13, EU:T:2016:368, paragraph 236 and the case-law cited).

785 It is thus for the Commission, for the purposes of determining whether sales were made 'within the EEA', within the meaning of point 13 of the 2006 Guidelines, to opt for a criterion which reflects the reality of the market, that is to say, which is the best for ascertaining the effects of the cartel on competition in the EEA.

786 In recitals 1186 and 1197 of the contested decision, the Commission stated that, in calculating the value of sales, it had taken into account the turnover from the sale of freight services on intra-EEA routes, EU-third country routes, EU-Switzerland routes and non-EU EEA-third country routes.

As is apparent from recital 1194 of that decision, the sales related to EU-third country routes and non-EU EEA-third country routes included both sales of outbound freight services and sales of inbound freight services.

787 In recital 1194 of the contested decision, in order to justify the inclusion of turnover from the sale of those services in the value of sales, the Commission referred to the need to take account of their 'specificities'. It thus observed, inter alia, that the single and continuous infringement related to those services and that the 'anti-competitive arrangements [were] likely to have a negative impact on the internal market in respect of both [of them]'.

788 As is apparent from paragraphs 156 to 237 above and contrary to what the applicants maintain, it was foreseeable that the single and continuous infringement, including in so far as it related to inbound routes, would produce substantial and immediate effects in the internal market or within the EEA and was thus liable to harm normal competition within the EEA. In recitals 1194 and 1241 of the contested decision, the Commission nevertheless acknowledged that part of the 'harm' resulting from the conduct at issue in respect of EEA-third country routes was likely to fall outside the EEA. It also noted that some of those services were provided outside the EEA. It therefore relied on point 37 of the 2006 Guidelines and granted the incriminated carriers a reduction of 50% of the basic amount of the fine in relation to EEA-third country routes.

789 In those circumstances, to hold that the Commission could not include, in the value of sales, 50% of the turnover generated on those routes would amount to prohibiting it from taking into account, for the purposes of calculating the amount of the fine, sales which fall within the scope of the single and continuous infringement and which were liable to harm competition within the EEA.

790 Contrary to the applicants' claims, that reduction is not vitiated by illegality. As is apparent from recital 1241 of, and footnote 1536 to, the contested decision, the Commission applied that reduction under point 37 of the 2006 Guidelines, which empowers it to depart from the general methodology set out in those guidelines where justified by the particularities of a given case or the need to achieve deterrence in a particular case.

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

792 Where the Commission decides, as in the present case, to apply point 37 of the 2006 Guidelines and thus to depart from the general methodology set out in those guidelines, by which it limited the discretion it may itself exercise in setting the amount of fines, the requirement to state reasons is all the more applicable. Those reasons must be all the more specific because that point simply makes a vague reference to 'the particularities of a given case' and thus leaves the Commission a broad discretion where it decides to make an exceptional adjustment of the basic amount of the fines to be imposed on the undertakings concerned. In such a case, the Commission's respect for the rights guaranteed by the EU legal order in administrative

procedures, including the obligation to state reasons, is of even more fundamental importance (judgment of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 48).

793 In the present case, it should be noted that the Commission adhered to the general methodology of the 2006 Guidelines for almost all the stages of the calculation of the fine and departed from it under point 37 only in order to apply the general reduction of 50% to the basic amount. The reasons why the Commission decided to depart in that way from the general methodology of the 2006 Guidelines, which it had followed during the previous stages of the calculation of the basic amount of the fine, are set out in recitals 1194 and 1241 of the contested decision. As has already been stated in paragraph 788 above, those recitals indicate that some of the services in question were provided outside the EEA and that part of the 'harm' relating to the conduct at issue on EEA-third country routes was likely to materialise outside the EEA.

794 In stating that those circumstances justified a reduction of 50% of the basic amount for both inbound and outbound routes, the Commission explained to the requisite standard the reasons underlying the general reduction of 50% and thus enabled the applicants to understand the justification of the methodology used and the Court to verify that justification.

795 As regards the justification of the general reduction of 50%, it must be observed that the Commission cannot be accused of arbitrariness. The Commission based its approach on two objective criteria (see paragraph 793 above), the validity of which the applicants have not challenged, namely, first, the places where freight services on EEA-third country routes were provided and, secondly, the places where the harm resulting from the single and continuous infringement materialised in so far as it concerned those routes.

796 As regards the alleged failure to carry out a precise analysis of those places, it must be held that the Commission was entitled to make an exceptional adjustment to the basic amount on the basis that the two criteria adopted justified a reduction such as that granted.

797 The applicants' argument that they generated a higher turnover on inbound routes than on outbound routes is irrelevant in that regard. First, that argument, which relates exclusively to the applicants' individual situation, is not capable of establishing that the two criteria set out in recitals 1194 and 1241 of the contested decision, which relate more generally to inbound and outbound freight services and to the harm caused by the single and continuous infringement in connection with those services, are incorrect. Secondly, and in any event, that argument assumes that the general reduction of 50% is based on the premiss that the relevant turnover was divided equally between inbound and outbound routes, which is not apparent from the contested decision.

798 In so far as the applicants claim that the Commission should nevertheless have adjusted the percentage of that reduction on the basis of the turnover proportions of each of the incriminated carriers, it must be borne in mind that, when determining the amount of the fine, there cannot, by the application of different methods of calculation, be any discrimination between the undertakings which have participated in an agreement or a concerted practice contrary to Article 101(1) TFEU (see, by analogy, judgment of 19 July 2012, *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, C-628/10 P and C-14/11 P, EU:C:2012:479, paragraph 58 and the case-law cited).

799 Applying a different method of calculation to the carriers in question according to the proportion of their turnover from inbound and outbound routes would, moreover, be tantamount to conferring an advantage on some of them on the basis of a criterion which is irrelevant in the light of the gravity and duration of the infringement (see, by analogy, judgment of 7 September 2016, *Pilkington Group and Others* v *Commission*, C-101/15 P, EU:C:2016:631, paragraph 66 and the case-law cited).

800 Furthermore, in so far as the applicants claim that they were treated unequally in relation to the incriminated carriers that generated a higher turnover on outbound routes than on inbound routes, it must be borne in mind that the principle of equal treatment, which constitutes a general principle of EU law enshrined in Article 20 of the Charter, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (see judgment of 12 November 2014, *Guardian Industries and Guardian Europe* v *Commission*, C-580/12 P, EU:C:2014:2363, paragraph 51 and the case-law cited).

801 Since the applicants have invoked a breach of the principle of equal treatment, it is for them precisely to identify comparable situations in relation to which they consider to have been treated differently or different situations in relation to which they consider to have been treated in the same way (see, to that effect, judgment of 12 April 2013, *Du Pont de Nemours (France) and Others* v *Commission*, T-31/07, not published, EU:T:2013:167, paragraph 311).

802 In the present case, the applicants have failed to identify such situations.

803 It follows that the Commission was entitled to use 50% of the turnover on EEA-third country routes as an objective criterion giving a proper measure of the harm which the applicants' participation in the cartel at issue did to normal competition, provided that it resulted from sales having a link with the EEA (see, to that effect, judgment of 27 February 2014, *InnoLux* v *Commission*, T-91/11, EU:T:2014:92, paragraph 47).

804 Such a link exists in the present case as regards inbound routes, since, as is apparent from recitals 1194 and 1241 of the contested decision and as the Commission maintains in its written pleadings, inbound freight services are provided in part within the EEA. As stated in paragraph 198 above, those services are intended precisely to enable the transport of goods from third countries to the EEA. As the Commission rightly points out, part of their 'physical' service is by definition carried out in the EEA, where part of the transport of those goods takes place and where the cargo plane lands.

805 In those circumstances, the Commission was entitled to find that sales of inbound freight services had been made within the EEA within the meaning of point 13 of the 2006 Guidelines.

806 The present complaint must therefore be rejected and it must be concluded that the Commission did not err in including, in the value of sales, 50% of the turnover from the sale of inbound freight services.

(3) Inclusion, in the value of sales, of the total price of freight services rather than only the surcharges

807 The applicants claim that the Commission infringed point 13 of the 2006 Guidelines by including, in the value of sales, elements of the price of freight services which it has not established had any connection with the single and continuous infringement. These include, in particular, tariffs and surcharges other than the FSC and the SSC.

808 The Commission disputes the applicants' line of argument.

809 It must be borne in mind that the concept of the value of sales, within the meaning of point 13 of the 2006 Guidelines, reflects the price, excluding tax, charged to the customer for the goods or services which were the subject of the infringement at issue (see, to that effect, judgments of 6 May 2009, *KME Germany and Others* v *Commission*, T-127/04, EU:T:2009:142, paragraph 91, and of 18 June 2013, *ICF* v *Commission*, T-406/08, EU:T:2013:322, paragraph 176 and the case-law cited). Having regard to the objective pursued by that point, set out in point 6 of those guidelines, which consists in adopting as the starting point for the calculation of the amount of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the relative size of the undertaking's contribution to it (see paragraph 764 above), the concept of the value of sales must thus be understood as referring to sales on the market concerned by the infringement (see judgment of 1 February 2018, *Kühne + Nagel International and Others* v *Commission*, C-261/16 P, not published, EU:C:2018:56, paragraph 65 and the case-law cited).

810 The Commission may therefore use the total price which the undertaking charged its customers on the relevant market for goods or services to determine the value of sales, without it being necessary to distinguish or deduct the various elements of that price according to whether or not they were the subject of coordination (see, to that effect, judgment of 1 February 2018, *Kühne + Nagel International and Others* v *Commission*, C-261/16 P, not published, EU:C:2018:56, paragraphs 66 and 67).

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

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

813 In addition, it should be observed that the approach advocated by the applicants amounts to considering that the price elements that were not specifically the subject of coordination between the carriers at issue must be excluded from the value of sales.

814 In that regard, it must be borne in mind that there is no valid reason to exclude from the value of sales any inputs the cost of which is outside the control of the parties to the alleged infringement (see, to that effect, judgment of 6 May 2009, *KME Germany and Others* v *Commission*, T-127/04, EU:T:2009:142, paragraph 91). Contrary to what the applicants maintain, the same applies to price elements which, like rates, were not specifically the subject of that coordination, but form an integral part of the selling price of the product or service in question (see, to that effect,

judgment of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraph 5030).

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

816 The Commission therefore did not infringe point 13 of the 2006 Guidelines when it concluded, in recital 1190 of the contested decision, that the entire amount of sales linked to the services at issue should be taken into account, without it being necessary to split it into its constituent elements.

817 The present complaint must therefore be rejected.

(4) The inclusion, in the value of sales, of sales on routes unrelated to the 'handful of routes' on which the applicants participated in local and isolated incidents

818 The applicants complain that the Commission used the value of sales 'related to broad geographic areas', even though the conduct of which they were accused related mostly to local and isolated incidents affecting at most a 'handful of routes'.

819 It would be all the more apposite to exclude sales not covered by the single and continuous infringement since, first, only a small number of sales were affected by the conduct at issue given that the applicants' general policy was to apply the same surcharges as Lufthansa pursuant to the alliance subject to the 1996 exemption and, secondly, the alleged illegality of a number of elements of the single and continuous infringement has not been established. That is the case, in particular, for EEA-third country routes in respect of which the Commission did not assess the regulatory regimes of third countries.

820 The Commission disputes the applicants' line of argument.

821 It should be borne in mind that, as is apparent from all of the foregoing, the Commission was entitled to ascribe to the applicants liability for the single and continuous infringement on intra-EEA routes, EU-third country routes, EU-Switzerland routes and non-EU EEA-third country routes. It follows that the single and continuous infringement covers all of those routes, and not only the 'handful of routes' on which the applicants claim to have been involved in local and isolated incidents.

822 The Commission was therefore entitled, without infringing point 13 of the 2006 Guidelines, to include, in the value of sales, sales made on all intra-EEA routes, EEA-third country routes, EU-Switzerland routes and non-EU EEA-third country routes.

823 In the light of the foregoing, the complaint concerning the inclusion, in the value of sales, of turnover from the sale of airfreight services on non-EU EEA-Switzerland routes must be upheld and the present part of the plea must be rejected as to the remainder.

(b) The second part of the plea, alleging errors in the assessment of the gravity of the single and continuous infringement

824 The applicants claim that the Commission infringed Article 23(3) of Regulation No 1/2003 and points 19 and 20 of the 2006 Guidelines by applying an excessive gravity factor of 16%. According to the applicants, the Commission did not take account of all the relevant circumstances of the present case when determining the gravity of the single and continuous infringement. In particular, the Commission failed to take account of the applicants' individual liability.

825 The applicants put forward, in essence, five complaints in support of that claim.

826 In the first place, the Commission wrongly failed to take into account the fact that the single and continuous infringement did not cover the entire price of the services in question and that the coordination of two (minor) elements of the total price, with no demonstrated effect on the total price, is plainly less grave than the coordination of the entire price, with proven effects on the market.

827 In the second place, the gravity factor of 16% applied by the Commission represents between 45 and 320% of the value of the surcharges concerned and thus exceeds the maximum threshold of 30% referred to in point 21 of the 2006 Guidelines. The surcharges, taken together, represented annually between 5 and 35% of the total value of concerned sales between February 2000 and February 2006.

828 In the third place, in recital 1199 of the contested decision, the Commission assumed, without any justification, that the single and continuous infringement had operated 'to the detriment of … customers and ultimately the general public'.

829 In the fourth place, the application of the same gravity factor to all the addressees of the contested decision is contrary to the principle of individual punishment and the principle of proportionality. The 10% reduction granted to the applicants on account of mitigating circumstances in recital 1259 of the contested decision does not fully reflect the difference between the applicants' situation and that of the other incriminated carriers.

830 In the fifth place, the conduct of the applicants was outside the core group and was generally limited to coordination complying with the ASAs in third countries and cooperation in the context of alliances. That conduct was not secret, was mostly made public by publication in newspapers or on the internet and was submitted to or approved by competition authorities.

831 The Commission disputes the applicants' line of argument.

832 Under Article 23(3) of Regulation No 1/2003, in fixing the amount of the fine, regard is to be had inter alia to the gravity of the infringement.

833 Points 19 to 23 of the 2006 Guidelines read as follows:

'19. The basic amount of the fine will be 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.

20. The 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.

21. 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.

22. In 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.

23. Horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition. As a matter of policy, they will be heavily fined. Therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale.'

834 According to the case-law, a horizontal agreement by which the undertakings concerned agree not on the total price but on one element thereof constitutes a horizontal price-fixing agreement within the meaning of point 23 of the 2006 Guidelines and is therefore among the most harmful restrictions of competition (see, to that effect, judgment of 29 February 2016, *UTi Worldwide and Others* v *Commission*, T-264/12, not published, EU:T:2016:112, paragraphs 277 and 278).

835 It follows that, as the Commission pointed out in recital 1208 of the contested decision, such an agreement generally merits a gravity factor at the higher end of the scale of 0 to 30% referred to in point 21 of the 2006 Guidelines.

836 According to the case-law, a gravity factor which is significantly lower than the upper limit of that scale, is highly favourable to an undertaking which is party to such an agreement (see, to that effect, judgment of 11 July 2013, *Team Relocations and Others* v *Commission*, C-444/11 P, not published, EU:C:2013:464, paragraph 125) and may even be warranted in view of the very nature of the infringement (see judgment of 26 September 2018, *Philips and Philips France* v *Commission*, C-98/17 P, not published, EU:C:2018:774, paragraph 103 and the case-law cited).

837 In recital 1199 of the contested decision, the Commission specifically considered that the 'agreements and/or concerted practices to which [the contested decision] relates concerned the fixing of various elements of the price'.

838 The Commission was thus entitled, in recitals 1199, 1200 and 1208 of the contested decision, to characterise the conduct at issue as a horizontal price-fixing agreement or practice, even though it 'did not cover the entire price for the services in question'.

839 The Commission was therefore entitled to conclude, in recital 1208 of the contested decision, that the agreements and practices at issue were among the most harmful restrictions of competition and, accordingly, merited a gravity factor 'at the higher end of the scale'.

840 The gravity factor of 16% which the Commission adopted in recital 1212 of the contested decision, which was significantly lower than the upper limit of the scale referred to in point 21 of the 2006 Guidelines, could therefore have been warranted in view of the very nature of the single and continuous infringement.

841 However, it must be observed that, as is apparent from recitals 1209 to 1212 of the contested decision, the Commission did not rely solely on the nature of the single and continuous infringement in order to set the gravity factor at 16%. The Commission thus referred in that decision to the combined market shares of the incriminated carriers worldwide and on intra-EEA and EEA-third country routes (recital 1209), to the geographic scope of the cartel at issue (recital 1210) and to the implementation of the agreements and practices at issue (recital 1211).

842 However, the applicants do not dispute, in the context of the present part of the plea, the merits of those factors for the purposes of setting the gravity factor.

843 In those circumstances, the applicants cannot claim that a gravity factor of 16% was unlawful.

844 None of the applicants' arguments can call that conclusion into question.

845 In the first place, in so far as the applicants submit that the Commission should have taken account of the allegedly public nature of their actions, it must be observed that that argument has no basis in law or in fact. In law, it should be borne in mind that the secret nature of a cartel is indeed a factor liable to exacerbate its gravity. However, point 23 of the 2006 Guidelines does not make classification of an infringement as one of the most harmful competition restrictions subject to its being secret. That point merely states that horizontal price-fixing agreements, which are, by their very nature, among the most harmful restrictions of competition, 'are usually secret'. It follows that the secret nature of an infringement is not an essential condition for it to be classified as harmful within the meaning of point 23 of the 2006 Guidelines and for it to be penalised accordingly (see, to that effect and by analogy, judgment of 14 December 2006, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, T-259/02 to T-264/02 and T-271/02, EU:T:2006:396, paragraph 252).

846 Therefore, even if it were to be established, the secret nature of the applicants' conduct is not such as to call into question the lawfulness of the gravity factor applied in recital 1212 of the contested decision.

847 In fact, it must be observed, as noted by the Commission, that the applicants did not merely participate in public conduct. On the contrary, they participated in secret conduct, a number of which even show an active desire for concealment. In recital 144 of the contested decision, the Commission refers to an exchange of internal emails of January 2000 in which an employee of the applicants told his colleagues to 'make sure not to refer to other carriers [in a reply to a letter from the Finnish Forwarders Association], as this [could] be a problem with anti-trust watching authorities' (see paragraph 400 above).

848 In the second place, in so far as the applicants rely on the absence of proven effects of the single and continuous infringement and on the fact that the Commission failed to prove that it had operated 'to the detriment of … customers and ultimately the general public', it must be borne in mind that 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) provided that, in assessing the criterion of the infringement's gravity, account had be taken of, inter alia, its actual impact on the market, where this could be measured.

849 However, that requirement no longer appears in the 2006 Guidelines, which are applicable in the present case. Accordingly, those guidelines do not require the Commission to take into consideration the actual impact of the infringement on the market in order to determine the

percentage of the value of sales used for gravity in accordance with points 19 to 24 of those guidelines (see, to that effect, judgment of 16 June 2015, *FSL Holdings and Others* v *Commission*, T-655/11, EU:T:2015:383, paragraph 539).

850 Nor does the case-law require it to do so, at least with regard to a restriction of competition 'by object'.

851 The gravity of an infringement of competition rules must be determined by reference to numerous factors. Those factors include, in particular, the particular circumstances of the case, its context and the deterrent effect of fines; moreover, no binding or exhaustive list of the criteria which must be applied has been drawn up (order of 25 March 1996, *SPO and Others* v *Commission*, C-137/95 P, EU:C:1996:130, paragraph 54, and judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 241).

852 The effects on the market may indeed be taken into account amongst those factors, but they are crucial only when one is dealing with agreements, decisions or concerted practices which do not directly have as their object the prevention, restriction or distortion of competition and which are not therefore liable to fall within the scope of application of Article 101 TFEU except as a result of their actual effects (judgment of 12 December 2018, *Servier and Others* v *Commission*, T-691/14, under appeal, EU:T:2018:922, paragraph 1809).

853 If it were otherwise, the Commission, at the stage of calculating the amount of the fine, would be under an obligation to which, according to settled case-law, it is not subject for the purposes of applying Article 101 TFEU where the infringement in question has an anticompetitive object (see judgment of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 64 and the case-law cited).

854 In recital 903 of the contested decision, the Commission classified the conduct at issue as a restriction of competition 'by object'. Contrary to the applicants' submission, it was therefore not required to take into consideration the actual impact of the single and continuous infringement on the market.

855 The fact remains that, if the Commission considers it appropriate, for the purposes of calculating the amount of the fine, to take account of the actual impact of the infringement on the market, it cannot rely on a mere presumption, but must provide specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in that market (judgment of 3 September 2009, *Prym and Prym Consumer* v *Commission*, C-534/07 P, EU:C:2009:505, paragraph 82).

856 Similarly, although the Commission is not required, for the purpose of setting fines, to establish that the infringement in question conferred an unlawful advantage on the undertakings concerned, or to take into consideration, where applicable, the absence of such an advantage, the assessment of the unlawful gains from the infringement may be relevant if the Commission relies precisely on such gains for the purpose of setting the gravity factor (see, to that effect, judgment of 15 March 2000, *Cimenteries CBR and Others* v *Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, EU:T:2000:77, paragraphs 4881 and 4882).

857 In recital 1199 of the contested decision, when setting the gravity factor, the Commission found that the agreements and practices at issue had 'operated to the benefit of the [incriminated carriers] and to the detriment of their customers and ultimately the general public'. Yet the Commission did not refer to any evidence in support of that finding.

858 It should be observed, however, that the finding at issue is not an independent ground that the Commission relied on in order to assess the gravity of the single and continuous infringement, but one of a number of considerations which it took into account in assessing the nature of that infringement in recitals 1199 to 1208 of the contested decision. That consideration does not constitute the necessary basis for the conclusion that the infringement concerned the fixing of elements of the price of freight services and was, therefore, such as to justify a gravity factor at the lower end of the 'scale' referred to in point 23 of the 2006 Guidelines for the most serious restrictions of competition. Accordingly, the present argument is not such as to call into question the assessment of the nature of the infringement at issue as set out in the contested decision. Consequently, since the applicants have failed to establish that the gravity factor was not justified in the light of the other factors taken into account in the contested decision (see paragraphs 841 and 842 above), the present argument must be rejected.

859 In the third place, as regards the complaint that the gravity factor applied represents between 45 and 320% of the value of the surcharges concerned and thus exceeds the maximum threshold of 30% of the value of sales referred to in point 21 of the 2006 Guidelines, it is sufficient to observe that the applicants rely on the incorrect premiss that the Commission should have taken into account only the amount of the surcharges rather than the full price of the services in question for the purposes of setting the value of sales (see paragraphs 809 to 816 above).

860 In the fourth place, as regards the Commission's alleged failure to take account of the individual contribution of each of the incriminated carriers for the purposes of setting the gravity factor, it should be borne in mind that the factors capable of affecting the assessment of the gravity of the infringements include the conduct of each of the undertakings, the role played by each of them in the establishment of the agreement, decision or concerted practice, the profit which they were able to derive from it, their size, the value of the goods concerned and the threat that infringements of that type pose to the objectives of the European Union (see judgment of 26 January 2017, *Roca Sanitario* v *Commission*, C-636/13 P, EU:C:2017:56, paragraph 49 and the case-law cited).

861 It should be borne in mind, however, that the taking into account of differences between the conduct of the various undertakings that participated in the same infringement need not necessarily occur when setting the gravity factor, but may occur at another stage in the setting of the fine, such as when the basic amount of the fine is adjusted in the light of mitigating or aggravating circumstances under points 28 and 29 of the 2006 Guidelines (see, to that effect, judgment of 26 January 2017, *Roca* v *Commission*, C-638/13 P, EU:C:2017:53, paragraph 67 and the case-law cited).

862 In the context of determining the gravity factor, in recital 1208 of the contested decision, the Commission stated that it would take into account the 'fact that certain carriers may have played a minor … role … as a possible mitigating circumstance'. Thus, it took the view, in recitals 1258 and 1259 of that decision, that the applicants' participation in the single and continuous infringement was limited in scope and, consequently, it granted them a 10% reduction in the basic amount of the fine on account of mitigating circumstances.

863 It follows that the Commission did not err in not taking into account the applicants' limited participation in the single and continuous infringement also when setting the gravity factor. As regards the question whether the 10% reduction in the amount of the fine which the applicants received on account of their limited participation in the single and continuous infringement in the context of the assessment of mitigating circumstances was sufficient, it overlaps with the fifth part of the present plea and will be examined in the context of that part.

864 The present part of the plea must therefore be rejected.

(c) The third part of the plea, alleging errors in the assessment of the duration of the single and continuous infringement

865 The applicants complain that the Commission erred in assessing the duration of the infringement.

866 The arguments put forward by the applicants in support of the present part of the plea overlap with those on which they rely in support of the third plea. As is apparent from paragraphs 353 to 358 above, that line of argument is unfounded.

867 The present part of the plea must therefore be rejected.

(d) The fourth part of the plea, alleging errors in the increase of the basic amount on account of repeated infringement

868 The applicants claim that the Commission erred in increasing by 50% the basic amount of the fine imposed on SAS Consortium and SAS Cargo to reflect the fact that SAS Consortium had been an addressee of Commission Decision 2001/716/EC of 18 July 2001 relating to a proceeding pursuant to Article [101 TFEU] and Article 53 of the EEA Agreement (case COMP.D.2 37.444 – SAS/Maersk Air and Case COMP.D.2 37.386 – Sun-Air v SAS and Maersk Air) (OJ 2001 L 265, p. 15).

869 According to the applicants, Decision 2001/716, first, concerned an infringement which is neither identical nor similar to that described in the contested decision and, secondly, cannot justify an increase in the amount of the fine in respect of conduct prior to 18 July 2001, the date on which Decision 2001/716 was adopted.

870 In addition, the applicants claim that they received assurances from the Danish competition authority in 2002 that the EU authorities would not be in a position to take action against tariffs for freight transport approved or coordinated by public authorities and applicable to EU-third country routes. The applicants also maintain that the Commission, through its decision-making practice, encouraged the creation of alliances between carriers including price coordination.

871 As follows from point 28 of the 2006 Guidelines and from the case-law of the Court of Justice, the aggravating circumstance of repeated infringement is characterised by the continuation or repetition by an undertaking of the same or a similar infringement after the Commission or a national competition authority has made a finding that that undertaking had infringed Article 101 or 102 TFEU (see judgment of 5 March 2015, *Commission and Others* v *Versalis and Others*, C-93/13 P and C-123/13 P, EU:C:2015:150, paragraph 87 and the case-law cited).

872 According to the case-law, infringements are similar, or of the same type, for the purposes of establishing a finding of repeated infringement, if they both consist of an infringement of the same provisions of the TFEU (see, to that effect, judgments of 12 December 2007, *BASF and UCB* v *Commission*, T-101/05 and T-111/05, EU:T:2007:380, paragraph 64; of 6 May 2009, *Outokumpu and Luvata* v *Commission*, T-122/04, EU:T:2009:141, paragraph 56; and of 30 September 2009, *Hoechst* v *Commission*, T-161/05, EU:T:2009:366, paragraph 147).

873 The Commission taking repeated infringement into account meets the imperative of punishing repeated infringements of the competition rules by the same undertaking (judgment of 17 June 2010, *Lafarge* v *Commission*, C-413/08 P, EU:C:2010:346, paragraph 61) and is intended to induce undertakings which have demonstrated a tendency towards infringing the competition rules to change their conduct (judgment of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 39).

874 The finding and the appraisal of the specific features of a repeated infringement come within the Commission's discretion in relation to the choice of factors to be taken into consideration for the purpose of determining the amount of fines (judgment of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 38). In exercising that power, the Commission may, in each individual case, take into consideration the indicia which confirm an undertaking's tendency to infringe competition rules, including, for example, the time that has elapsed between the infringements in question (judgment of 8 February 2007, *Groupe Danone* v *Commission*, C-3/06 P, EU:C:2007:88, paragraph 39). According to the case-law, the Commission does not disregard the limits of that power by finding that the aggravating circumstance of repeated infringement applies in a case where the second infringement, which began before the establishment of the first infringement, did not mainly take place before that finding (see, to that effect, judgment of 8 July 2008, *BPB* v *Commission*, T-53/03, EU:T:2008:254, paragraphs 394 to 396).

875 It is in the light of the abovementioned considerations and principles that the present part of the plea must be examined.

876 In the first place, as regards the alleged lack of similarity between the single and continuous infringement and the market-sharing agreement penalised by Decision 2001/716, it must be noted that those infringements both concern a horizontal agreement which the Commission considered infringed Article 101 TFEU. Those infringements must therefore be regarded as similar for the purpose of establishing the existence of repeated infringement.

877 That conclusion is not called into question by Commission Decision 2005/503/EC of 29 September 2004 relating to a proceeding under Article [101 TFEU] (case COMP/C.37.750/B2 – Brasseries Kronenbourg – Brasseries Heineken) (OJ 2005 L 184, p. 57), relied on by the applicants, in which the Commission considered that a previous price agreement was not of the same type as the 'armistice' agreement at issue in that decision. It is settled case-law that the Commission's previous decision-making practice does not in itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 1/2003 and in the 2006 Guidelines and that it has not, in any event, been established that the facts of the case giving rise to that decision were comparable to those of the present case.

878 In the second place, as regards the Commission's failure to distinguish and exclude, in the application of the increase of 50% in the basic amount for repeated infringement, the period of the single and continuous infringement which preceded the adoption of Decision 2001/716, first of all, it must be observed that, in accordance with the case-law referred to in paragraph 871 above, the aggravating circumstance of repeated infringement covers a situation where the second infringement is continued after the finding of the first infringement, which presupposes that it began before the first infringement was found. That applies, in the present case, to the participation of SAS Consortium and SAS Cargo in the single and continuous infringement, respectively, from 13 December 1999 and 1 June 2001, that is to say, before 18 July 2001, the date on which Decision 2001/716 was adopted.

879 Next, in recital 1244 of the contested decision, the Commission was justified, when assessing the characteristics of repeated infringement, in taking account of the fact that the applicants had in the present case continued a similar infringement for almost five years after the adoption of Decision 2001/716. That shows, first, that most of the single and continuous infringement took place after, and not before, the first finding of infringement, thereby distinguishing the facts of the present case from those at issue in the judgment of 11 March 1999, *Thyssen Stahl* v *Commission* (T-141/94, EU:T:1999:48), relied on by the applicants. Secondly, it attests to the applicants' tendency not to draw the appropriate conclusions from a finding that they had infringed the competition rules (see, to that effect, judgment of 8 July 2008, *Lafarge* v *Commission*, T-54/03, not published, EU:T:2008:255, paragraph 727).

880 Last, it should be noted that point 28 of the 2006 Guidelines does not, as regards the method of increasing the basic amount on account of repeated infringement, distinguish according to whether the repeated infringement consists in the repetition or continuation of an infringement, and states only that 'the basic amount will be increased by up to 100% for each infringement established'. By applying an increasing coefficient for repeated infringement to the basic amount taken as a whole, the Commission therefore complied with the indicative rules of conduct which it has imposed on itself and from which it cannot, in principle, depart (see, to that effect, judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 60). Nevertheless, although point 28 of the 2006 Guidelines does not provide for the possibility of adjusting the basis of assessment for the increase on account of repeated infringement in order to take account, where appropriate, of the relative part of the infringement period that preceded the first finding of infringement, it does not preclude the increase percentage from reflecting such a consideration.

881 In the light of the circumstances of the case, as recalled in particular in paragraph 879 above, the rules governing repeated infringement in the event of the finding of a similar infringement (see paragraphs 878 and 880 above) and the need for deterrence underpinning the application of the aggravating circumstance of repeated infringement (see paragraph 873 above), it must be held that the Commission did not err in applying an increase of 50% to the basic amount of the fine imposed on SAS Cargo and SAS Consortium.

882 That conclusion is not called into question by the applicants invoking an infringement of the principle of the presumption of innocence, in support of which they have not adduced any arguments.

883 In the third place, the applicants rely on assurances received from the Danish competition authority. That argument has already been examined and rejected in the context of the third plea (paragraph 682 above).

884 As regards the Commission's decision-making practice relating to alliances between carriers including price coordination, it should be borne in mind that the conduct ascribed to the applicants did not fall exclusively within the ambit of the legitimate objectives of the various alliances to which they belonged. The conduct that did relate to such objectives, apart from that described in recital 517 of the contested decision, was not relied on against the applicants (see paragraph 332 above).

885 It follows that the present part must be rejected.

(e) The fifth part of the plea, alleging errors in the consideration of mitigating circumstances

886 The applicants claim, in essence, that the Commission infringed point 29 of the 2006 Guidelines by failing to consider all the relevant factors in its assessment of mitigating circumstances and by granting them an insufficient reduction in the amount of the fine on account of the mitigating circumstances which it took into account. In that regard, the applicants note that SAS Cargo's participation in the infringement was limited, that the coordination of surcharges was in many cases required by the regulatory regimes in third countries, that the creation of alliances between carriers including price coordination was a practice encouraged by the Commission, and that the 2002 decision of the Danish competition authority had given rise to a legitimate expectation that SAS Cargo's compliance with the ASAs in third countries did not fall within the scope of EU competition rules.

887 The Commission disputes the applicants' line of argument.

888 In that regard, it should be borne in mind that point 27 of the 2006 Guidelines provides that, in setting the amount of the fine, the Commission may take into account circumstances that result in an increase or decrease in the basic amount, on the basis of an overall assessment which takes account of all the relevant circumstances.

889 Point 29 of the 2006 Guidelines provides that the basic amount of the fine may be reduced where the Commission finds that mitigating circumstances exist. That point contains an indicative and non-exhaustive list of five types of mitigating circumstances which may be taken into account, including the substantially limited nature of the involvement of the undertaking in question in the infringement and the authorisation or encouragement of the anticompetitive conduct in question by public authorities or by legislation.

890 First, in recital 1263 of the contested decision, the Commission found that there was no regulatory regime which required the incriminated carriers to collude on their fares. However, it found, in recitals 1264 and 1265 of that decision, that some regulatory regimes had encouraged the incriminated carriers to engage in anticompetitive conduct and, consequently, granted them the general reduction of 15%, in accordance with point 29 of the 2006 Guidelines.

891 It should be noted that the applicants' arguments challenging that assessment are the same as those which they put forward in support of the sixth part of the third plea (see paragraphs 505 to 507 above). The applicants maintain that the general reduction of 15% should have been greater, on the ground that 'the laws and administrative practices' of the countries in question 'more than simply "[encouraged]" the coordination of surcharges: in many cases this was required'.

892 In that regard, in the first place, it should be observed that the relevant legislation either encouraged the conduct at issue on EEA-third country routes, in which case a reduction in the amount of the fine may be justified under point 29 of the 2006 Guidelines (see paragraphs 888 to 889 above), or required it, in which case no infringement of the competition rules could have been established, or any penalty imposed in respect of that conduct (see, to that effect, judgment of 11 November 1997, *Commission and France* v *Ladbroke Racing*, C-359/95 P and C-379/95 P, EU:C:1997:531, paragraph 33 and the case-law cited).

893 In so far as the applicants submit, in essence, that a number of regulatory regimes required coordination, their line of argument must be rejected as ineffective in so far as, even if it were well founded, it would vitiate the finding of an infringement, and not the application of point 29 of the 2006 Guidelines, which is at issue in the context of the present part of the plea.

894 In the second place and in any event, it should be noted that the applicants' line of argument is based on an incorrect analysis of the regulatory regimes at issue. As was held in paragraphs 509 to 563 above, except as regards the coordination of the FSC in Thailand between 20 July 2005 and 14 February 2006, the applicants have failed to establish that their conduct in third countries was the result of State coercion. As regards that coordination, the applicants have established the existence of State coercion. That coordination does not therefore form part of the single and continuous infringement and cannot therefore result in a penalty for the applicants. Consequently, it cannot be taken into account as part of the mitigating circumstance regarding the impact of the rules of third countries on their conduct.

895 As regards the applicants' reference to Commission Decision C(2008) 5955 final of 15 October 2008 relating to a proceeding under Article [101 TFEU] (Case COMP/39188 – Bananas), it is sufficient to note that the mere fact that the Commission has in its previous decisions granted a certain rate of reduction for specific conduct does not imply that it is required to grant the same proportionate reduction when assessing similar conduct in a subsequent administrative procedure (see judgment of 6 May 2009, *KME Germany and Others* v *Commission*, T-127/04, EU:T:2009:142, paragraph 140 and the case-law cited). The applicants cannot therefore rely on the reduction in the amount of the fines granted in that other case.

896 In those circumstances, it must be held that the Commission did not err in setting the general reduction of 15%.

897 Secondly, in recitals 1258, 1259, 1268, 1271, 1274, 1278 and 1279 of the contested decision, the Commission rejected the applicants' arguments based on their allegedly passive role in the single and continuous infringement, their legitimate expectations arising from a decision of the Danish competition authority of 2002 and the limited nature of the effects and implementation of the single and continuous infringement. By contrast, in recital 1258 of the contested decision, the Commission granted the applicants, Air Canada and Lan Cargo a reduction of 10% of the basic amount of the fine on account of their substantially limited involvement in that infringement.

898 The applicants claim that those assessments are vitiated by three errors, which the Court will examine in turn.

899 First, as regards the claim that the 10% reduction in the basic amount of the fine granted to the applicants on account of their limited participation in the single and continuous infringement was insufficient, it should be borne in mind that, in recital 1258 of the contested decision, the

Commission, in assessing the limited nature of the participation in the single and continuous infringement of the applicants, Lan Airlines and Air Canada, took account of the fact that they had 'not [participated] in all elements of th[at] infringement'.

900 The degree of participation in the single and continuous infringement of the applicants, Lan Airlines and Air Canada is described in recitals 882 and 883 of the contested decision. In those recitals, the Commission found that the applicants, Lan Airlines and Air Canada had participated directly in only one or two of the three elements of the single and continuous infringement, but that they could also be held liable for those aspects in which they had not directly participated on the ground that they were aware of them or could reasonably have foreseen them and were prepared to take the risk.

901 In paragraphs 698 to 712 above, it has been held that the Commission was wrong to ascribe to the applicants liability for the element of the single and continuous infringement relating to the refusal to pay commission. The Commission therefore overestimated the degree of their participation in the single and continuous infringement and, accordingly, rendered the contested decision unlawful in so far as it did not grant them a reduction of more than 10% in the basic amount of the fine on account of their limited participation in the single and continuous infringement.

902 Secondly, the argument relating to the decision-making practice designed to exempt alliances between carriers has already been examined and rejected in the context of the third part of the present plea (see paragraphs 367 and 368 above).

903 Thirdly, the complaint relating to the legitimate expectations which the applicants derived from a decision of the Danish competition authority of 2002 has already been examined and rejected in paragraph 682 above.

904 The present part of the plea must therefore be rejected, subject to the error found in paragraph 901 above as regards the 10% reduction granted to the applicants on account of their limited participation in the single and continuous infringement.

905 It follows from the foregoing that the present plea must be rejected, subject to the error found in paragraph 901 above and the error found in paragraph 774 above relating to the inclusion, in the value of sales, of revenues from freight services that the applicants had generated on non-EU EEA-Switzerland routes.

906 In the light of all the foregoing considerations, it is appropriate to uphold the sixth part of the third plea in so far as it concerns routes from Thailand to the EEA between 20 July 2005 and 14 February 2006 as regards the element of the single and continuous infringement relating to the FSC, the ninth part of the third plea in so far as it concerns the refusal to pay commission, the first part of the fifth plea in so far as it relates to the inclusion, in the value of sales, of turnover relating to non-EU EEA-Switzerland routes, and the fifth part of the fifth plea in so far as the Commission did not grant a reduction in the basic amount of the fine of more than 10% on account of the applicants' limited participation in the single and continuous infringement.

907 Consequently, Article 1(1)(o), (p) and (q), (2)(o) and (p), (3)(o) and (p) and (4)(o), (p) and (q) of the contested decision must be annulled in so far as it finds that the applicants participated in the element of the single and continuous infringement relating to the refusal to pay commission. Article 1(2)(o) and (p) and (3)(o) and (p) of the contested decision must also be annulled in so far

as it finds an infringement of Article 101 TFEU and Article 53 of the EEA Agreement on routes from Thailand to the EEA between 20 July 2005 and 14 February 2006 as regards the element relating to the FSC.

908 It cannot, however, be held that those illegalities are such as to require the contested decision to be annulled in its entirety. Although the Commission made an error of assessment in ascribing to SAS and SAS Cargo the single and continuous infringement as regards the element relating to the refusal to pay commission and as regards the element relating to the FSC in so far as it concerns routes from Thailand to the EEA between 20 July 2005 and 14 February 2006, it must be held that it has not been established, in the present action, that the Commission erred in finding that the applicants had participated in that infringement.

909 Lastly, Article 3(n) to (r) of the contested decision must be annulled on the ground that it takes into account, for the purpose of calculating the fine, first, a reduction of 10% granted to the applicants on account of their limited participation in the single and continuous infringement and, secondly, as regards the value of sales, revenue from freight services that the applicants generated on non-EU EEA-Switzerland routes.

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

B. The claim for amendment of the amount of the fine imposed on the applicants

911 The applicants ask the Court, in essence, to exercise its unlimited jurisdiction significantly to reduce the amount of the fine imposed on them.

912 As a preliminary point, it is apparent from the application that, in essence, the applicants seek to rely, in support of the present head of claim, on all the arguments raised in support of the fifth plea in their application for annulment and request the Court to draw the appropriate inferences from the errors which it has found in relation to their participation in the single and continuous infringement.

913 The first four arguments concern the value of sales (first part of the fifth plea):

– by their first argument, the applicants claim that the revenues from freight services that they generated on non-EU EEA-Switzerland routes should not be included in the value of sales;

– by their second argument, the applicants submit that their turnover from inbound freight services should not be included in the value of sales;

– by their third argument, the applicants maintain that account should be taken only of the value of the surcharges and not of the total price of freight services;

– by their fourth argument, the applicants complain that the Commission included in the value of sales revenues generated on routes unrelated to the cartel at issue.

914 The fifth to ninth arguments concern the gravity factor (second part of the fifth plea):

– by their fifth argument, the applicants submit that account should be taken of the fact that the cartel at issue is less grave and less harmful than coordination of the whole price;

– by their sixth argument, the applicants submit that account should be taken of the fact that the gravity factor of 16% represents between 45 and 320% of the value of the surcharges;

– by their seventh argument, the applicants submit that account should be taken of the fact that the cartel at issue did not operate to the detriment of the general public;

– by their eighth argument, the applicants maintain that a single gravity factor of 16% does not sufficiently take account of their specific situation;

– by their ninth argument, the applicants submit that account should be taken of the fact that the conduct in which they took part was public and generally in accordance with the rules applicable in third countries.

915 By their tenth argument, the applicants submit that account should be taken of the fact that their participation in the cartel did not begin on 13 December 1999 (third part of the fourth and fifth pleas).

916 By their eleventh argument, the applicants claim that account should be taken of the absence of repeated infringement (fourth part of the fifth plea).

917 The twelfth to fifteenth arguments relied on by the applicants in support of the present claims concern mitigating circumstances:

– by their twelfth argument, the applicants maintain that their limited participation in the cartel at issue should be taken into account;

– by their thirteenth argument, the applicants submit that the coordination of the surcharges was, in many cases, imposed by the regulatory regimes of third countries;

– by their fourteenth argument, the applicants submit that account should be taken of the fact that alliances between carriers was a practice encouraged by the Commission;

– by their fifteenth argument, the applicants submit that account should be taken of the fact that the decision of the Danish competition authority of 2002 created a legitimate expectation that the applicants' compliance with the ASAs in third countries did not fall within the scope of EU competition rules.

918 The Commission contends that the applicants' claims should be rejected and requests that the benefit of the general reduction of 50% and that of 15% be withdrawn from them in the event that the Court should find that the turnover from the sale of inbound freight services should not have been included in the value of sales.

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

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

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

922 In order to satisfy the requirements of Article 47 of the Charter when conducting a review in the exercise of their unlimited jurisdiction with regard to the fine, the Courts of the European Union are, for their part, bound, in the exercise of the powers conferred by Articles 261 and 263 TFEU, to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not commensurate with the gravity or the duration of the infringement (see judgment of 18 December 2014, *Commission* v *Parker Hannifin Manufacturing and Parker-Hannifin*, C-434/13 P, EU:C:2014:2456, paragraph 75 and the case-law cited; judgment of 26 January 2017, *Villeroy & Boch Austria* v *Commission*, C-626/13 P, EU:C:2017:54, paragraph 82).

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

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

925 The Court considers that it is not appropriate, in order to determine the amount of the fine to be imposed on the applicants, to depart from the method of calculation followed by the Commission in the contested decision, which it has not previously determined to be vitiated by illegality, as follows from the examination of the fifth plea. Although it is for the Court, in the exercise of its

unlimited jurisdiction, to assess for itself the circumstances of the case and the nature of the infringement in question in order to determine the amount of the fine, the exercise of unlimited jurisdiction cannot result, when the amount of the fines to be imposed is determined, in discrimination between undertakings which have participated in an agreement or concerted practice contrary to Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the EC-Switzerland Air Transport Agreement. Accordingly, the guidance which can be drawn from the 2006 Guidelines is, as a general rule, capable of guiding the Courts of the European Union in their exercise of that jurisdiction where the Commission has applied those guidelines for the purposes of calculating the fines imposed on the other undertakings penalised by the decision which those Courts are asked to examine (see, to that effect, judgment of 6 December 2012, *Commission* v *Verhuizingen Coppens*, C-441/11 P, EU:C:2012:778, paragraph 80 and the case-law cited).

926 In those circumstances, first of all, it must be observed, in particular in the light of the clarifications provided by the Commission in response to the questions put by the Court on 12 January, 2 March and 12 April 2021, that the Commission considered that the total value of sales was EUR 17 739 806 for SAS Consortium and EUR 238 196 616 for SAS Cargo and SAS. Those values included revenues of EUR 262 084 generated on non-EU EEA-Switzerland routes, which the Court held in paragraphs 768 to 774 above did not fall within the scope of the single and continuous infringement. That revenue must therefore be excluded from the values of sales, in accordance with the applicants' first argument.

927 As regards the infringement period before May 2004 relied on against the applicants, like the Commission did in recital 1197 of the contested decision, it is necessary to take as a basis, on intra-EEA routes and on EU-Switzerland routes, values of sales amounting, respectively, to EUR 17 112 706 and EUR 627 100, taking into account only States which were already Contracting Parties to the EEA Agreement or members of the European Union before May 2004.

928 Moreover, it should be noted that the third argument, which relates to the inclusion of the full price of freight services in the value of sales, refers to the third complaint raised in the context of the first part of the fifth plea on which the applicants rely in support of the claim for annulment. The Court examined and rejected that complaint in paragraphs 807 to 817 above and nothing in the arguments put forward by the applicants in support of that complaint makes it possible to consider that the inclusion in the value of sales of the full price of freight services was such as to result in an inappropriate value of sales being used. On the contrary, excluding the price elements of freight services other than surcharges from the value of sales would have the effect of artificially minimising the economic importance of the single and continuous infringement.

929 As regards the second argument, which relates to the inclusion, in the value of sales, of turnover from the sale of inbound freight services, it must be observed that it refers to the second complaint raised in the context of the first part of the fifth plea on which the applicants rely in support of their claims for annulment. The Court has examined and rejected that complaint in paragraphs 775 to 806 above and nothing in the arguments put forward by the applicants in support of it makes it possible to consider that the inclusion in the value of sales of turnover from the sale of inbound freight services was such as to result in an inappropriate value of sales being used. On the contrary, excluding the turnover from the sale of inbound freight services from the value of sales would have prevented the imposition on the applicants of a fine which was a proper measure of the harm which their participation in the cartel at issue did to normal competition (see, to that effect, judgment of 28 June 2016, *Portugal Telecom* v *Commission*, T-208/13, EU:T:2016:368, paragraph 236).

930 As regards the fourth argument, relating to the inclusion, in the value of sales, of revenue generated on routes unrelated to the cartel at issue, it is based, as is apparent from the examination of the claim for annulment (see paragraphs 818 to 822 above), on an erroneous premiss, namely that the Commission was not entitled to ascribe to the applicants liability for the single and continuous infringement on intra-EEA routes, EU-third country routes, EU-Switzerland routes and non-EU EEA-third country routes. It must, therefore, be rejected.

931 That having been noted, it is apparent from the Commission's answers to the question put to it by the Court on 12 April 2021 that the values of sales referred to in paragraphs 926 and 927 above exclude the applicants' turnover on routes operated exclusively within Denmark, Sweden and Norway respectively ('the internal routes').

932 When questioned by the Court as to the compatibility of such an exclusion with the principle of equal treatment and point 13 of the 2006 Guidelines, first, the Commission observed that, according to the case-law subsequent to the Decision of 9 November 2010, the excluded revenues referred to in paragraph 931 above did indeed concern sales relating directly or indirectly to the infringement, within the meaning of point. Secondly, it stated that it was possible that such 'internal sales' had not been deducted from the value of sales applied to the other incriminated carriers, since it had not invited those carriers to do so during the administrative procedure when it had asked them about their turnover for the purpose of calculating the amount of the fine, and since those carriers, with the exception of the applicants, had not stated in their replies that they had chosen to exclude such 'internal sales'.

933 Nevertheless, the Commission considers, in essence, that the Court should not take account of the turnover generated by the applicants on internal routes in the exercise, as the case may be, of its unlimited jurisdiction, since the fine imposed on the applicants remains appropriate and proportionate, even without taking account of that turnover. Moreover, the other incriminated carriers that might have included such internal sales in the turnover figures communicated to the Commission during the administrative procedure cannot benefit from an unlawful act committed in favour of another.

934 When asked to respond to the Commission's replies, the applicants submitted, as did the Commission, that there was no need to include, in their values of sales, the turnover that they had generated on the internal routes. First, there is no resulting inequality of treatment to the detriment of the other incriminated carriers, since those carriers, which had not referred to making 'internal sales' during the administrative procedure, were not in a situation comparable to that of the applicants. Secondly, only the exempted bilateral cooperation with Lufthansa had an 'influence' on the services that they provided on the internal routes. The applicants also rely on the judgments of the Court of Justice delivered in connection with Commission Decision C(2012) 1959 final of 28 March 2012 relating to a proceeding under Article 101 TFEU and Article 53 of the EEA Agreement (Case COMP/39462 – Freight forwarding).

935 In the present case, Article 1(1) of the contested decision holds the incriminated carriers liable for an infringement of Article 101 TFEU and Article 53 of the EEA Agreement as regards routes between airports within the EEA. Unlike paragraphs 2 to 4 of that article, which relate to routes that are necessarily international in nature, the wording of paragraph 1 is to be understood as covering any route between airports, provided that both the point of origin and the point of destination are located in the EEA. It follows that Article 1(1) covers conduct taking place both on routes between Member States or Contracting Parties to the EEA Agreement and on routes operated within a single Member State or a single contracting party.

936 In those circumstances, the turnover generated by the incriminated carriers on routes operated within a single Member State or a single contracting party clearly falls within the scope of the single and continuous infringement, and it would not be a fair assessment of the economic importance of that infringement and of the role played by each of the incriminated carriers in that regard if that turnover were not to be taken into account for the purposes of calculating the amount of the fine.

937 Furthermore, it should be noted that the requests for information which the Commission sent to the incriminated carriers during the administrative procedure and by which it sought, inter alia, to ascertain their turnover on intra-EEA routes refer to 'routes where the airports of origin and destination were both within the EEA', without specifying that those routes needed to be cross-border. In the contested decision, the Commission states in recital 1197, as regards the value of sales, that 'the [intra-EEA] turnover [was] within the then [18 of the 28] Contracting Parties to the EEA agreement' and that 'the [EU-Switzerland] turnover [was] on routes between the then [15 of the 25] Member States and Switzerland'. The use of the words 'within' in one case and the word 'between' in the other shows the Commission's intention, in the first case, not to distinguish between domestic and cross-border routes, otherwise it would have stated that the intra-EEA turnover was generated on the routes 'between' the Contracting Parties.

938 The foregoing interpretation reflects the Commission's intention as understood by the incriminated carriers, as is borne out by the fact that the applicants expressly maintained, during the administrative procedure, that sales on internal routes should be excluded from the value of their sales on intra-EEA routes. The request for the exclusion of internal routes makes sense only if, in principle, it is accepted that they were included in the intra-EEA routes.

939 It follows that the turnover generated by the incriminated carriers on intra-EEA routes within a single Contracting Party was not included in the value of sales inadvertently, as the Commission maintains. That turnover was included in the value of sales used by the Commission in the contested decision on the basis of the methodology it followed, and reflected the geographic scope of the single and continuous infringement, as is apparent from Article 1(1) of the contested decision.

940 Therefore, with a view also to ensure equal treatment between the incriminated carriers that brought an action against the contested decision, the Court must reinstate, in the values of sales referred to in paragraphs 926 and 927 above, the turnover generated by the applicants on the internal routes, which amounts to EUR 7 991 282.

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

942 The fifth to ninth arguments do not prove the contrary. Those arguments refer, in essence, to complaints put forward in the context of the second part of the fifth plea raised by the applicants in support of the claim for annulment. However, the Court examined and rejected that part in paragraphs 824 to 864 above and there is nothing to support the view that those arguments justify a gravity factor of less than 16%.

943 As regards, in particular, the alleged lack of effects of the single and continuous infringement on the general public, referred to in the seventh argument put forward in support of the present claims, it should be added that the amount of a fine cannot be regarded as inappropriate solely because it does not reflect the economic harm that has been or may have been caused by the

alleged infringement (judgment of 29 February 2016, *Schenker* v *Commission*, T-265/12, EU:T:2016:111, paragraph 287). That argument does not therefore justify a reduction in the gravity factor.

944 By contrast, the Court considers that the gravity factor must be reduced in order to take account of the fact that the coordination relating to the FSC on routes from Thailand to the EEA between 20 July 2005 and 14 February 2006 did not, as regards the FSC, infringe Article 101 TFEU and Article 53 of the EEA Agreement. That leads to a reduction in the scope of that element. In so far as that reduction is of limited duration and does not concern flights from the EEA to Thailand, the Court considers that it is sufficient to reduce the gravity factor from 16% to 15.7% to take account of this.

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

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

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

948 It follows that, for the same reasons as those set out in recitals 1198 to 1212 of the contested decision and in paragraph 944 above, the Court considers that an additional amount of 15.7% is appropriate.

949 It is also necessary to apply the method used by the Commission to calculate the additional amount applied to each of the three applicants, as set out in recitals 1221 to 1229 of the contested decision.

950 Moreover, it is apparent from recitals 1214 to 1217 of the contested decision that the Commission relied, as regards the duration of the applicants' participation in the single and continuous infringement, on the following multiplication factors:

– $4\frac{5}{12}$ for SAS, $4\frac{8}{12}$ for SAS Cargo and 4 for SAS Consortium on the intra-EEA routes;

– $1\frac{9}{12}$ for SAS and SAS Cargo on EU-third country routes;

– $3^{8}/_{12}$ for SAS and SAS Cargo and $1^{6}/_{12}$ for SAS Consortium on EU-Switzerland routes;

– $^{8}/_{12}$ for SAS and SAS Cargo on non-EU EEA-third country routes.

951 Since the Court has not found any errors in the determination of the duration of the single and continuous infringement, it is necessary to reject the tenth argument and to apply the multiplication factors set out in the preceding paragraph.

952 The basic amount of the fine must therefore be set at EUR 19 953 394.43 for SAS Consortium, EUR 92 200 925.36 for SAS Cargo and EUR 93 345 061.65 for SAS.

953 As regards the general 50% reduction, the Commission's request that the benefit of that reduction be withdrawn from the applicants cannot be granted. As is apparent from the defence, that request presupposes that the Court holds that the turnover from the sale of inbound freight services could not be included in the values of sales. The Court refused to do so in paragraph 929 above.

954 Consequently, the basic amount, after application of the general reduction of 50%, which applies only to the basic amount in so far as it relates to non-EU EEA-third country routes and EU-third country routes (see recital 1241 of the contested decision), which the applicants have not effectively challenged in the context of the application for annulment and which is not inappropriate, must be fixed, after rounding, at EUR 19 900 000 for SAS Consortium, EUR 65 000 000 for SAS Cargo and EUR 65 000 000 for SAS. In that regard, the Court considers it appropriate to round that basic amount down to the first two digits, unless this leads to a reduction of more than 2% of the amount before rounding, in which case the amount is rounded to the first three digits. That method is objective, affords all the incriminated carriers which brought actions against the contested decision the benefit of a reduction and avoids any unequal treatment (see, to that effect, judgment of 27 February 2014, *InnoLux* v *Commission*, T-91/11, EU:T:2014:92, paragraph 166).

955 As regards the eleventh argument, relating to the absence of repeated infringement, it must be borne in mind that the Commission, in recitals 1243 to 1245 of the contested decision, imposed on SAS Cargo and SAS Consortium an increase of 50% in the basic amount of the fine on account of repeated infringement. The applicants' line of argument overlaps with that put forward in support of the fourth part of the fifth plea relied upon in support of the claim for annulment, which the Court examined and rejected in paragraphs 868 to 885 above, and there is no reason to consider that the applicants' repeated infringement justifies an increase in the basic amount of the fine of less than 50%.

956 Lastly, as regards the adjustments to the basic amount of the fine, it should be borne in mind that the applicants benefited from the general reduction of 15%, which they claim is insufficient in the context of the fifth part of the fifth plea in support of the claim for annulment and in the context of the thirteenth to fifteenth arguments. Those arguments are the same as those put forward in the context of the fifth part of the fifth plea, which the Court examined and rejected in paragraphs 886 to 904 above, and nothing in those arguments is capable of justifying an additional reduction on account of the encouragement arising from certain regulatory regimes or from relevant practices or assurances. Conversely, the Commission's request that the benefit of that reduction be withdrawn from the applicant cannot be granted for reasons similar to those set out in paragraph 953 above.

957 Moreover, in recitals 1258 and 1259 of the contested decision, the Commission granted the applicants a 10% reduction in the basic amount of the fine on account of their limited participation in the single and continuous infringement, which the applicants consider insufficient in their twelfth argument in support of the present claims. It should be borne in mind that the Commission was wrong to ascribe to the applicants liability for the element of the single and continuous infringement relating to the refusal to pay commission and that it therefore overestimated the extent of their participation in the single and continuous infringement. It was therefore inappropriate to grant the applicants a reduction of only 10% on that basis.

958 In those circumstances, in view of the limited period during which the incriminated carriers coordinated the refusal to pay commission in relation to the duration of the single and continuous infringement as a whole, the Court considers that a reduction of 21% on account of the applicants' limited participation in the single and continuous infringement is appropriate.

959 By contrast, the Court does not consider that the exclusion, from the body of evidence, of the contacts described in recitals 196, 223, 406, 415, 443 and 517 of the contested decision justifies an additional reduction being granted to the applicants on that basis. Those contacts concerned exchanges relating to the FSC which took place in the context of the WOW alliance (recitals 223 and 517), ACCS (recital 443) and, more generally, at head-office level (recitals 196, 406 and 415). First, it must be pointed out that, despite the exclusion of those contacts from the body of evidence on which the Commission could rely, the applicants' participation in each of those three types of exchanges and, a fortiori, in the element of the single and continuous infringement relating to the FSC in general remains amply substantiated. Secondly, it should be noted that none of those exchanges concerns the SSC. Granting the applicants a reduction of more than 21% on account of their limited participation in the single and continuous infringement would therefore be inappropriate.

960 Furthermore, it must be held that the 15% leniency reduction granted to the applicants remains appropriate.

961 In the light of all the foregoing considerations, the amount of the fine imposed on the applicants must be calculated as follows: first, the basic amount is determined by applying, in view of the gravity of the single and continuous infringement, a percentage of 15.7% to the value of sales made by the applicants in 2005 on intra-EEA routes, EU-third country routes, non-EU EEA-third country routes and EU-Switzerland routes, then, in respect of the duration of the infringement, the multiplication factors described in paragraph 950 above, as adapted according to the findings made in paragraph 951 above, and, lastly, an additional amount of 15.7%, resulting in an intermediate amount of EUR 19 900 000 for SAS Consortium, EUR 92 200 925.36 for SAS Cargo and EUR 93 345 061.65 for SAS. After applying the general reduction of 50%, that amount, rounded, is EUR 19 900 000 for SAS Consortium, EUR 65 000 000 for SAS Cargo and EUR 65 000 000 for SAS. Next, after an increase of 50% in the basic amount for repeated infringement, as regards SAS Consortium and SAS Cargo, the application of the general reduction of 15% and an additional reduction of 21% on account of the applicants' limited participation in the single and continuous infringement, the amount must be fixed at EUR 22 686 000 for SAS Consortium, at EUR 74 100 000 for SAS Cargo and at EUR 43 647 500 for SAS. Lastly, those amounts must be reduced by 15% for leniency, resulting in a fine of a final amount of EUR 19 283 100 for SAS Consortium, EUR 62 985 000 for SAS Cargo and EUR 37 100 375 for SAS.

962 As regards the amounts of the fines for which the applicants are held jointly and severally liable, the Court considers that there is no need to depart from the method described by the Commission in recitals 1226 and 1231 to 1234 of the contested decision. The fine imposed on SAS Consortium alone must therefore be set at EUR 7 030 618, the fine imposed on SAS Cargo and SAS Consortium jointly and severally must be set at EUR 5 937 909, the fine imposed on SAS Cargo, SAS Consortium and SAS jointly and severally must be set at EUR 6 314 572, the fine imposed on SAS Cargo and SAS jointly and severally must be set at EUR 29 045 427 and the fine imposed on SAS Cargo must be set at EUR 21 687 090.

IV. Costs

963 Under Article 134(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order each party to bear its own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

964 In the present case, the applicants have been successful in respect of a substantial part of their claims. Accordingly, it is fair in the circumstances of the case to decide that the applicants are to bear one quarter of their own costs and that the Commission is to bear its own costs and three quarters of the applicants' costs.

On those grounds

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. **Annuls Article 1(1)(o), (p) and (q), (2)(o) and (p), (3)(o) and (p), and (4)(o), (p) and (q) of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) in so far as it finds that SAS AB, SAS Cargo Group A/S and Scandinavian Airlines System Denmark-Norway-Sweden participated in the component of the single and continuous infringement relating to the refusal to pay commission on surcharges;**

2. **Annuls Article 1(2)(o) and (p) in so far as it finds an infringement of Article 101 TFEU on routes from Thailand to the European Union between 20 July 2005 and 14 February 2006 as regards the element relating to the FSC, and Article 1(3)(o) and (p), in so far as it finds an infringement of Article 53 of the EEA Agreement on routes from Thailand to the European Economic Area between 20 July 2005 and 14 February 2006 as regards the element relating to the FSC;**

3. **Annuls Article 3(n) to (r);**

4. **The amount of the fine imposed on Scandinavian Airlines System Denmark-Norway-Sweden is set at EUR 7 030 618, the fine imposed on SAS Cargo Group and Scandinavian Airlines System Denmark-Norway-Sweden jointly and severally must be set at EUR 5 937 909, the fine imposed on SAS Cargo Group, Scandinavian**

Airlines System Denmark-Norway-Sweden and SAS jointly and severally must be set at EUR 6 314 572, the fine imposed on SAS Cargo Group and SAS jointly and severally must be set at EUR 29 045 427 and the fine imposed on SAS Cargo Group must be set at EUR 21 687 090;

5. **Dismisses the action as to the remainder;**

6. **Orders the European Commission to bear its own costs and three quarters of the costs of SAS Cargo Group, Scandinavian Airlines System Denmark-Norway-Sweden and SAS;**

7. **Orders SAS Cargo Group, Scandinavian Airlines System Denmark-Norway-Sweden and SAS to bear one quarter of their own costs.**

Kanninen Schwarcz Iliopoulos

Spielmann Reine

Delivered in open court in Luxembourg on 30 March 2022.

E. Coulon H. Kanninen
Registrar President

Table of contents

I. Background to the dispute . . . 2

A. Administrative procedure . . . 2

B. The Decision of 9 November 2010 . . . 3

C. The action challenging the Decision of 9 November 2010 before the Court . . . 6

D. The contested decision . . . 7

II. Procedure and forms of order sought . . . 17

III. Law . . . 19

A. The claim for annulment . . . 19

1. The first plea in law, alleging infringement of the rights of the defence and the principle of equality of arms, in so far as they were refused access to evidence, both inculpatory and exculpatory . . . 19

(a) The alleged inculpatory evidence . . . 23

(b) The alleged exculpatory evidence . . . 25

(c) Conclusion . . . 26

2. The second plea in law, alleging infringement of the right to be heard and lack of jurisdiction . . . 27

(a) The first part of the second plea, alleging infringement of the right to be heard and a lack of jurisdiction on the part of the Commission to apply Article 101 TFEU and Article 53 of the EEA Agreement on inbound routes . . . 27

(1) The right to be heard . . . 28

(2) The qualified effects test . . . 30

(i) The effects of coordination in relation to inbound freight services taken in isolation . . . 31

– The relevance of the effect at issue . . . 32

– The foreseeability of the effect at issue . . . 34

– The substantiality of the effect at issue . . . 36

– The immediacy of the effect at issue . . . 38

(ii) The effects of the single and continuous infringement taken as a whole . 39

(b) The second part of the second plea in law, relating to non-EU EEA-Switzerland routes . . . 41

3. The third plea in law, alleging an error of assessment in relation to the conduct in which the applicants were involved and the conclusion that that conduct proved their participation in, or awareness of, the single and continuous infringement . . . 44

(a) The first part of the plea, alleging a number of illegalities in the finding of a single and continuous infringement of a worldwide nature . . . 44

(1) The first complaint, alleging breach of the obligation to state reasons and erroneous findings as regards the worldwide nature of the single and continuous infringement . . . 44

(2) The second complaint, alleging erroneous findings regarding the single nature of the infringement . . . 49

(3) The third complaint, alleging erroneous findings as regards the continuous nature of the infringement . . . 54

(b) The second part of the plea, alleging errors in the assessment of the conduct relating to the bilateral alliance with Lufthansa . . . 54

(c) The third part of the plea, alleging errors in the assessment of the email exchange of December 1999 in the context of the Star Cargo alliance . . . 58

(d) The fourth part of the plea, alleging errors in the assessment of the conduct relating to the WOW alliance . . . 62

(1) The first complaint, alleging errors in the finding that the contacts between members of the WOW alliance were illegitimate . . . 62

(i) Infringement of the rights of the defence . . . 63

(ii) The scope of the WOW alliance and its actual implementation . . . 65

(iii) The scope of the contacts within the WOW alliance . . . 66

(2) The second complaint, alleging wrongful omission to examine the compatibility of contacts within the WOW alliance with Article 101 TFEU . . . 69

(i) Retroactive and discriminatory application of a new interpretation of the rules applicable to airline alliances . . . 69

(ii) The failure to take into account the applicants' statements relating to the application of Article 101(3) TFEU . . . 70

(3) The third complaint, alleging errors relating to the inclusion of contacts within the WOW alliance in the scope of the single and continuous infringement . . . 71

(e) The eighth part of the plea, alleging errors relating to the inclusion in the single and continuous infringement of disparate local events that took place in a few countries . . . 72

(f) The fifth part of the plea, alleging errors relating to the inclusion in the single and continuous infringement of contacts relating to block space agreements 76

(g) The sixth part of the plea, alleging errors in the assessment of contacts in third countries 80

(1) The first complaint, alleging breach of the principles of sovereignty and non-interference 81

(2) The second complaint, alleging errors in the assessment of the State coercion to which the applicants claim to have been subjected in a number of third countries 82

(i) Hong Kong 83

(ii) Japan 86

(iii) Other third countries 89

(3) The third complaint, alleging errors in the application of Article 101(1) TFEU to conduct relating to inbound routes prior to 1 May 2004 and of Article 8 of the EC-Switzerland Air Transport Agreement to conduct relating to EU-Switzerland routes prior to 1 June 2002 91

(4) The fourth complaint, alleging errors in the assessment of the conduct that took place in Switzerland 95

(5) The fifth complaint, alleging an error relating to the inclusion in the single and continuous infringement of the applicants' conduct in third countries . . . 98

(h) The seventh part of the plea, alleging errors in the assessment of speculation on the part other carriers as to the applicants' conduct 99

(i) The ninth part of the plea, alleging errors in the assessment of the applicants' knowledge of the conduct of the other incriminated carriers 102

(1) The surcharges 103

(2) Refusal to pay commission 107

(j) The tenth part of the plea, alleging errors in the overall assessment of the body of evidence relied on by the Commission 110

4. The fourth plea in law, alleging infringement of Article 266 TFEU, the right to property enshrined in Article 17 of the Charter and the obligation to state reasons 112

(a) The first part of the plea, alleging infringement of Article 266 TFEU 113

(b) The second part of the plea, alleging infringement of the right to property enshrined in Article 17 of the Charter 114

(c) The third part of the plea, alleging breach of the duty to state reasons 116

5. The fifth plea in law, alleging errors in the determination of the amount of the fine imposed on the applicants . . . 117

(a) The first part of the plea, alleging errors in the calculation of the value of sales . . . 117

(1) Inclusion, in the value of sales, of turnover from the sale of airfreight services on non-EU EEA-Switzerland routes . . . 118

(2) Inclusion, in the value of sales, of turnover from sales that 'took place outside the EEA' and the general reduction of 50% . . . 119

(3) Inclusion, in the value of sales, of the total price of freight services rather than only the surcharges . . . 124

(4) The inclusion, in the value of sales, of sales on routes unrelated to the 'handful of routes' on which the applicants participated in local and isolated incidents . . . 125

(b) The second part of the plea, alleging errors in the assessment of the gravity of the single and continuous infringement . . . 126

(c) The third part of the plea, alleging errors in the assessment of the duration of the single and continuous infringement . . . 131

(d) The fourth part of the plea, alleging errors in the increase of the basic amount on account of repeated infringement . . . 131

(e) The fifth part of the plea, alleging errors in the consideration of mitigating circumstances . . . 134

B. The claim for amendment of the amount of the fine imposed on the applicants . . . 137

IV. Costs . . . 146