

JUDGMENT OF THE COURT (Sixth Chamber)

1 February 2018 (*)

(Appeal — Competition — Agreements, decisions and concerted practices — Article 101 TFUE — Price fixing — International air freight forwarding services — Tariff agreement affecting the final price of services)

In Case C-271/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 11 May 2016,

Panalpina World Transport (Holding) Ltd, established in Basle (Switzerland),

Panalpina Management AG, established in Basle,

Panalpina China Ltd, established in Hong Kong (China),

represented by S. Mobley, A. Stratakis and A. Gamble, Solicitors,

appellants,

the other party to the proceedings being:

European Commission, represented by V. Bottka, G. Meessen and P.J.O. Van Nuffel, acting as Agents,

defendant at first instance,

THE COURT (Sixth Chamber),

composed of C.G. Fernlund (Rapporteur), President of the Chamber, J.-C. Bonichot and E. Regan, Judges,

Advocate General: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 By their appeal, Panalpina World Transport (Holding) Ltd ('Panalpina Holding'), Panalpina Management AG and Panalpina China Ltd (together 'Panalpina and Others') ask the Court to set aside the judgment of the General Court of the European Union of 29 February 2016, *Panalpina World Transport (Holding) and*

Others v Commission (T-270/12, not published, ‘the judgment under appeal’, EU:T:2016:109) by which the General Court dismissed their application for annulment of 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, ‘the decision at issue’), in so far as it concerns the appellants, and for reduction of the fines imposed on them in that decision.

Background to the dispute

- 2 It is apparent from the decision at issue and the background to the dispute, as described in paragraphs 1 to 13 of the judgment under appeal, that Panalpina and Others provide international air freight forwarding services.
- 3 These services consist of organising a transport operation aggregating a number of services covering the whole or part of the transport operation, from both a logistical (packaging, transportation, storage, handling, and consolidation) and administrative point of view (tax, insurance and customs formalities). Freight forwarders thus provide their customers with a combination of several services as a single package.
- 4 By the decision at issue, the European Commission identified four charging mechanisms on which air freight forwarders acted in concert in breach of Article 101 TFEU. These were:
 - the New Export System (NES), a pre-clearance system for exports from the United Kingdom to third countries outside the European Economic Area (EEA);
 - the Advanced Manifest System (AMS), a customs procedure requiring information on goods imported into the United States to be communicated to the US authorities prior to their arrival;
 - the Currency Adjustment Factor (CAF), a currency adjustment factor intended to manage the risks arising from the appreciation of the renminbi-yuan (CNY) compared with the US dollar (USD);
 - the Peak Season Surcharge (PSS), a temporary rate adjustment coefficient imposed as a reaction to rising demand in certain peak season periods from or to Hong Kong (China) and South China.
- 5 Panalpina and Others were held liable only for their participation in the CAF, AMS and PSS.
- 6 Paragraph 5 of the judgment under appeal is worded as follows:

‘The Commission’s findings relating to the AMS, CAF and PSS cartels may be summarised as follows:

- the AMS cartel [concerned a situation in which] a number of international freight forwarders agreed from at least 19 March 2003 until 19 August 2004 to fix a surcharge at a level that would enable them to cover at least the costs associated with the AMS; the discussions between the undertakings participating in the cartel and the monitoring of its implementation took place, in particular, in the context of the Freight Forward International Association (named Freight Forward Europe before 1 January 2004);
- the CAF cartel ... was aimed at finding an agreement on a common tariff strategy in order to deal with a risk of a fall in profits owing to the appreciation of the Chinese

currency, the [renminbi-yuan], against the United States dollar, following the decision of the People's Bank of China in 2005 that it would no longer peg the renminbi to the United States dollar; a number of international freight forwarders decided to convert all contracts with their customers into renminbi and, if that was not possible, to introduce a surcharge (CAF) and to set its level; the discussions took place in China between 27 July 2005 and 13 March 2006;

- the PSS cartel ... concerned an agreement between a number of international freight forwarders between August 2005 and May 2007 relating to the application of a temporary rate adjustment factor; that factor was imposed as a reaction to increased demand in the air freight forwarding sector at certain times, such as the Christmas period, which led to a shortage of transporting capacity and an increase in transport rates; it was designed to protect the freight forwarders' margins.'

- 7 In accordance with Articles 1(2)(f) and 2(2)(f), of the decision at issue, Panalpina Management and Panalpina Holding were ordered jointly and severally to pay a fine of EUR 23 649 000 for their participation from 19 March 2003 to 19 August 2004 in the AMS cartel.
- 8 In accordance with Articles 1(3)(i) and 2(3)(i) of the decision at issue, Panalpina China and Panalpina Holding were ordered jointly and severally to pay a fine of EUR 3 251 000 for their participation in the CAF cartel from 27 July 2005 to 9 December 2005.
- 9 In accordance with Articles 1(4)(g) and 2(4)(g) of the decision at issue, Panalpina China and Panalpina Holding were ordered jointly and severally to pay a fine of EUR 19 584 000 for their participation from 9 August 2005 to 21 May 2007 in the PSS cartel.

The procedure before the General Court and the judgment under appeal

- 10 By application lodged at the General Court Registry on 12 June 2012, Panalpina and Others brought an action for partial annulment of the decision at issue and reduction of the amount of the fines imposed on them by the decision at issue.
- 11 By the judgment under appeal, the General Court dismissed the action.

Forms of order sought by the parties

- 12 By their appeal, Panalpina and Others claim that the Court should:
 - set aside the judgment under appeal, in so far as it rejects the first ground of appeal raised by the appellants concerning the infringements;
 - annul Article 2(2) and (3) of the decision at issue, in so far as those measures concern the appellants, and, in the alternative, reduce the amount of the fines imposed on them, and
 - order the Commission to pay the costs.
- 13 The Commission contends that the Court should dismiss the appeal and order Panalpina and Others to pay the costs.

The appeal

Admissibility

1. *Arguments of the parties*

- 14 The Commission maintains that the appeal is manifestly inadmissible. It considers that, by that appeal, Panalpina and Others ask the Court to review factual assessments made by the General Court, without demonstrating a distortion of the evidence or other error of law. Furthermore, the line of argument put forward in support of the appeal merely reiterates that put forward at first instance and rejected in the judgment under appeal, without containing any specific argument concerning the value of sales adopted in respect of the PSS infringement.
- 15 Panalpina and Others maintain, first of all, that the grounds of appeal are clear. By applying the value of sales of international air freight forwarding services as the basis for calculating the fine rather than the value of sales affected by the AMS and CAF cartels, the General Court distorted the decision at issue, erred in the legal characterisation of the facts, infringed the principles of proportionality and equal treatment and its obligation to state reasons.
- 16 Furthermore, Panalpina and Others claim that although those grounds of appeal concern the grounds of the judgment under appeal relating to the AMS and the CAF cartels, this does not mean that they do not relate to the General Court's findings regarding the PSS cartel.

2. *Findings of the Court*

- 17 According to settled case-law, it follows from the second subparagraph of Article 256(1) TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Articles 168(1)(d) and 169(2) of the Rules of Procedure of the Court of Justice that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (judgments of 4 July 2000, *Bergaderm and Goupil v Commission*, C-352/98 P, EU:C:2000:361, paragraph 34, and of 24 January 2013, *3F v Commission*, C-646/11 P, not published, EU:C:2013:36, paragraph 51). An appeal that does not have such characteristics cannot be the subject of a legal assessment which would allow the Court of Justice to exercise its function in the area under examination and to carry out its review of legality (judgment of 7 November 2013, *Wam Industriale v Commission*, C-560/12 P, not published, EU:C:2013:726, paragraph 44).
- 18 In the present case, although, as the Commission submits, the appeal contains several arguments which are inadmissible, some of the arguments raised identify with the requisite degree of precision the contested elements of the judgment under appeal and explain, briefly but adequately, the legal arguments relied on.
- 19 Consequently, the arguments by which the Commission submits that the appeal is inadmissible in its entirety must be rejected.
- 20 By contrast, it should be noted that Panalpina and Others have referred several times in their appeal to the principles of proportionality and equal treatment but have failed to set out with the requisite degree of precision how the General Court infringed those principles or to identify the elements of the judgment under appeal contested in that respect. The appeal is confined to a mere abstract statement of those general principles without including arguments specifically identifying the errors of law allegedly vitiating the contested judgment. In those circumstances, the arguments alleging breach of the principles of proportionality and equal treatment must be declared inadmissible.

- 21 In addition, the appeal does not contain any arguments relating to the General Court's assessments concerning the calculation of the fine for the PSS cartel. It is only at the stage of the reply, in response to the Commission's argument that Panalpina and Others claimed that their arguments against the calculation of the fines for the AMS and CAF cartels 'are of general application to the infringements, including the PSS cartel' and that their silence in respect of the PSS cartel 'does not exclude the appellants' contestation of the [General Court's] approach to the PSS cartel'.
- 22 It follows from Article 127(1) of the Rules of Procedure, which applies to the procedure on an appeal by virtue of Article 190(1) of those rules, that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.
- 23 It is not apparent, however, from the present proceedings that the arguments put forward by Panalpina and Others in their reply, in response to the objection of inadmissibility raised by the Commission in its defence, are based on matters of law or fact of which the appellants were not aware at the time of lodging their appeal.
- 24 Therefore, the arguments of Panalpina and Others alleging an error of law concerning the calculation of the fine for the PSS cartel must be declared inadmissible.

Substance

- 25 By their appeal, Panalpina and Others take issue with the General Court for holding, in paragraphs 117 to 121 of the judgment under appeal, that the Commission was entitled to use the value of sales of international air freight forwarding services as the basis for calculating the amount of the fines imposed on them, even though the infringements concerned only the AMS and the CAF. They claim that the General Court distorted the decision at issue, ruled on the basis of a misinterpretation of the rules for calculating fines, failed to state adequate reasons in respect of paragraph 117 of the judgment under appeal and did not follow the approach adopted in Case COMP/39.309 — LCD.
- 26 It should be noted that that entire line of argument is based on the premiss that the General Court brought freight forwarding services taken as a whole within the sphere of the infringements established in the decision at issue for which the appellants were found responsible, even though those infringements relate solely to the AMS, CAF and PSS.
- 27 However, that premiss is incorrect since it confuses the infringements complained of with the definition of the relevant market affected by those infringements.
- 28 It is common ground that the relevant product market is that of international air freight forwarding services and not that of its various charging components, on whose pricing Panalpina and Others and the other undertakings covered by the decision at issue agreed. Although, in the decision at issue, the Commission found four distinct infringements, corresponding to the four agreements in question relating to the four items intended to be incorporated in the price of international air freight forwarding services, that is to say, the NES, AMS, CAF and PSS, and although those agreements each have their own particular characteristics, be it in their substantive or geographical or material content, their period for which they were in effect, or the undertakings which participated in them, the fact remains that they all concern the market for international air freight forwarding services as a package of services.
- 29 Therefore, the General Court, after observing in paragraph 116 of the judgment under appeal, in the course of its sovereign assessment of the facts, not contested in the present appeal, that 'there is a specific demand for freight forwarding services as a package of services', and then, in paragraph 117 of that judgment, that 'the AMS, CAF

and PSS cartels affected freight forwarding services as a package of services', did not err in law in finding, in paragraph 119 of the judgment under appeal, that 'the Commission was entitled to hold, without committing any error of law, that the aim of [the AMS cartel] was not to restrict competition with respect to AMS filing services as individual services, but competition with respect to freight forwarding services as a package of services'. The same is true of the ground set out in paragraph 121 of the judgment under appeal, relating to the CAF cartel.

- 30 It should be recalled that point 13 of the 2006 Guidelines on the method of setting fines imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; 'the 2006 Guidelines') provides in respect of the calculation of fines that 'in determining the basic amount of the fine to be imposed, the Commission will take the value of ... sales of goods or services to which the infringement directly or indirectly relates'. While that concept of the 'value of sales' cannot be extended to cover sales which do not fall within the scope of the infringement, it cannot be limited only to the value of sales for which it is established that they were actually affected by that infringement. Having regard to the objective pursued by point 13 of the 2006 guidelines, which consists in adopting as the starting point for the calculation of the fine imposed on an undertaking an amount which reflects the economic significance of the infringement and the size of the undertaking's contribution to it, the concept of the 'value of sales' must therefore be understood as referring to sales on the market concerned by the infringement (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, paragraphs 76, 77 and 81).
- 31 Therefore, in order to determine the basic amount of the fine to be imposed in the present case, pursuant to point 13 of the 2006 Guidelines, it was appropriate to take account of the value of sales on the market for international air freight forwarding services, since the sales falling within the sphere of the infringements in question were made on that market. The Commission was thus entitled to use the sales on the relevant market as the starting point for calculating the fines.
- 32 The General Court did not therefore err in holding, in paragraph 123 of that judgment, that 'the Commission did not exceed the self-imposed limits in point 13 of the 2006 Guidelines by using the values of sales made by the applicants in the provision of freight forwarding services as a package of services and not solely the values of sales made with the AMS, CAF and PSS surcharges'.
- 33 It follows from all the foregoing considerations that the appeal must be dismissed in its entirety.

Costs

- 34 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, which apply to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 35 Since the Commission has applied for costs and Panalpina and Others have been unsuccessful, the latter must be ordered to pay the costs.

3. On those grounds, the Court (Sixth Chamber) hereby:

- 1. Dismisses the appeal;**

2. Orders Panalpina World Transport (Holding) Ltd, Panalpina Management AG and Panalpina China Ltd to bear their own costs and to pay those incurred by the European Commission.

Fernlund

Bonichot

Regan

– Delivered in open court in Luxembourg on 1 February 2018.

1. A. Calot
Escobar

2. C.G Fernlund

3. Registrar

4. President of
the Sixth Chamber