



Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 December 2012¹

Case C-439/11 P

Ziegler SA

v

European Commission

(Appeal — Competition — Cartels — Article 81(1) EC and Article 53(1) EEA — Legal effects of Commission guidelines — Appreciable effect on trade between Member States — Setting of fines — Effective judicial review — Right to fair legal process — Objective impartiality of the Commission — Principle of equal treatment and non-discrimination — ‘Removals cartel’ — International removal services market in Belgium)

I – Introduction

1. This case offers the Court the opportunity to refine its case-law on the legal effects of the many guidelines issued by the European Commission in its capacity as European Union competition authority. The focus of interest here is the ‘Guidelines on the effect on trade concept’ from 2004² and the ‘Guidelines on the method of setting fines’³ published in 2006.

2. In addition, a number of fundamental legal problems connected with the Commission’s conduct of proceedings under antitrust law for the imposition of fines – problems which are the subject of debate time and time again – are also raised. Those problems relate, first, to the calculation of the fine and, second, to the issue of the Commission’s objective impartiality in its capacity as the investigating and decision-making authority.

3. These questions of law arise in connection with the ‘removals cartel’ which the Commission uncovered on the international removal services market in Belgium a few years ago and which it made the subject of a decision imposing fines (‘the contested decision’)⁴ on 11 March 2008. In addition to nine other companies or groups of companies, the Commission accused Ziegler SA (‘Ziegler’ or ‘the appellant’) of participating in the removals cartel and imposed a fine on it.

1 — Original language: German.

2 — Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ 2004 C 101, p. 81; ‘the 2004 Guidelines’).

3 — Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003 (OJ 2006 C 210, p. 2; ‘the 2006 Guidelines on fines’).

4 — Commission Decision of 11 March 2008 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.543 – International Removal Services), notified under document number C(2008) 926 final, summarised at OJ 2009 C 188, p. 16; the full text of the decision is only available on the internet, on the website of the Commission’s Directorate-General for Competition, in a non-confidential version in French (<http://ec.europa.eu/competition/antitrust/cases/index.html>).

4. Following the General Court's dismissal of its action at first instance for the annulment of that decision by judgment of 16 June 2011⁵ ('the judgment of the General Court' or 'the judgment under appeal'), Ziegler lodged the present appeal with the Court of Justice. Interestingly, the Commission also does not agree with key passages of the grounds of the judgment under appeal and requests that the Court uphold that judgment on other grounds. The question whether and to what extent such a substitution of the grounds of a judgment is permissible in appeal proceedings must therefore also be a subject of discussion in the present case.

5. The Court will soon be required to deal with a number of further questions of law in the other pending appeal proceedings concerning the removals cartel.⁶

II – Background to the dispute

6. Ziegler describes itself as a family company established in Brussels (Belgium) and owned by individuals who are all descendants of the company's founders and by two holding companies also linked to the Ziegler family.⁷ Removal services account for a significant part of Ziegler's activity. Until December 2003 those services were provided by a division of the company; since December 2003 they have been provided by a separate company by the name of Ziegler Relocation SA (formerly Euro Time), which is part of the Ziegler group.⁸

7. According to the results of the Commission's investigations, a cartel existed on the international removal services market in Belgium from 1984 to 2003, involving ten removal companies⁹ for different periods¹⁰ and to differing extents.

8. In the contested decision, the Commission found that the cartel was a global cartel in the form of a single and continuous infringement¹¹ based on a total of three kinds of agreement:¹²

- *agreements on prices*, in which the removal companies involved entered into arrangements concerning the payment for their services to customers;
- *agreements on a system of financial compensation for rejected offers or for not quoting at all (commissions)*; the competitors of the company winning the contract for an international removal were intended to receive some financial compensation, whether they themselves had submitted a quote for the contract or abstained from doing so; those commissions were included in the final price for the respective removal services, unnoticed by the customers;
- *agreements on sharing the market by means of a system of false quotes (cover quotes)* submitted to the customer or the person who was moving by a removal company which did not intend to carry out the removal; to that end, a company indicated in each case to its competitors the price, the rate of insurance and the storage costs that they were to quote for the fictitious service.

5 — Case T-199/08 *Ziegler v Commission* [2011] ECR II-3507.

6 — See Case C-429/11 P *Gosselin Group v Commission and Others*; Case C-440/11 P *Commission v Stichting Administratiekantoor Portielje and Others*; and Case C-444/11 P *Team Relocations and Others v Commission*. Furthermore, I delivered my Opinion in Case C-441/11 P *Commission v Verhuizingen Coppens* on 24 May 2012 and my Opinion in Case C-440/11 P *Commission v Stichting Administratiekantoor Portielje and Others* on 29 November 2012. On 6 December 2012 the Court delivered its judgment in *Commission v Verhuizingen Coppens*.

7 — Paragraph 3 of the judgment under appeal.

8 — Paragraph 2 of the judgment under appeal.

9 — Allied Arthur Pierre, Compas, Coppens, Gosselin, Interdean, Mozer, Putters, Team Relocations, Transworld and Ziegler (see, for example, recital 345 of the contested decision).

10 — These periods lasted between three months and more than 18 years.

11 — See, inter alia, recitals 307, 314 and 345 of the contested decision.

12 — See recital 121 of the contested decision and paragraphs 10 and 13 to 15 of the judgment under appeal.

9. Whilst the agreements on commissions and cover quotes applied throughout the duration of the cartel (from 1984 to 2003), the implementation of the agreements on prices could not be proved after May 1990.¹³

10. In the contested decision, the Commission inferred from its factual findings that the companies involved had infringed Article 81(1) EC and Article 53(1) EEA by, in different periods, ‘directly and indirectly fixing prices for international removal services in Belgium, sharing part of the market, and manipulating the procedure for the submission of tenders’.¹⁴

11. The contested decision was served on 31 legal persons in total, on which the Commission also imposed fines of various amounts¹⁵ in respect of the infringement, in some cases individually and in some cases jointly and severally. The Commission used the method set out in its 2006 Guidelines on fines to calculate the amount of the fines in the contested decision.

12. According to the Commission’s findings in Article 1(j) of the contested decision, Ziegler had participated in the global cartel in the period from 4 October 1984 to 8 September 2003, that is to say for the whole time that it existed. Under Article 2(l) of the contested decision, a fine of EUR 9.2 million was imposed on the company, without any order as to joint and several liability.

13. Several of the addressees of the contested decision sought redress at first instance by way of actions for annulment before the Court of First Instance (now ‘the General Court’).¹⁶

14. The action brought by Ziegler on 3 June 2008 was dismissed by the General Court on 16 June 2011 by the judgment under appeal, and Ziegler was ordered to pay the costs.¹⁷

III – Procedure before the Court

15. By written pleading of 25 August 2011, Ziegler brought the present appeal. It claims that the Court should:

- declare its appeal admissible and well-founded;
- set aside the judgment of the General Court and give final judgment itself on the subject-matter of the dispute;
- grant the form of order sought at first instance and, therefore, annul the contested decision, or, in the alternative, cancel the fine imposed on the appellant in that decision, or, in the further alternative, substantially reduce that fine;
- order the Commission to pay the costs both at first instance and on appeal.

13 — See recitals 123 to 153 of the contested decision.

14 — Article 1 of the contested decision.

15 — The individual fines amounted to between EUR 1 500 and EUR 9 200 000.

16 — See, in addition to the judgment under appeal, four further judgments of 16 June 2011, in Joined Cases T-204/08 and T-212/08 *Team Relocations and Others v Commission* [2011] ECR II-3569; Joined Cases T-208/08 and T-209/08 *Gosselin Group and Others v Commission* [2011] ECR II-3639; Case T-210/08 *Verhuizingen Coppens v Commission* [2011] ECR II-3713; and Case T-211/08 *Putters International v Commission* [2011] ECR II-3729.

17 — An application made by Ziegler for suspension of operation of Article 2 of the contested decision and for an exemption from the need to provide a bank guarantee was likewise unsuccessful; see the order of the President of the General Court of 15 January 2009 in Case T-199/08 R *Ziegler v Commission*, and the order of the President of the Court of Justice of 30 April 2010 in Case C-113/09 P(R) *Ziegler v Commission*.

16. The Commission, for its part, contends that the Court should:

- dismiss the appeal and substitute certain grounds of the judgment of the General Court;
- in the alternative, dismiss the action for annulment; and
- order the appellant to bear the costs.

17. The appeal was examined before the Court of Justice on the basis of the written documents and at the hearing of 24 October 2012.

IV – Assessment

18. Ziegler’s appeal is based on four grounds of appeal which are concerned with various questions of law regarding appreciable effect on trade between Member States, the calculation of the amount of the fine and the requirement of impartiality on the part of the Commission.

A – Preliminary questions

19. Before examining the substance of the grounds of appeal put forward by Ziegler, two preliminary questions must be discussed concerning, first, the admissibility of parts of the arguments advanced by the Commission and, second, the admissibility of certain aspects of the arguments advanced by Ziegler.

1. The admissibility of the Commission’s request that certain grounds of the judgment be substituted

20. In the context of the first and second grounds of appeal, the Commission requests that the Court uphold the judgment under appeal whilst substituting some of the grounds of that judgment stated by the General Court with other grounds (French: ‘substitution de motifs’). In particular, in the context of the first ground of appeal, the Commission takes the view that the duty, accepted by the General Court, to define the market does not exist. In the context of the second ground of appeal, it disputes *inter alia* the fact that the 2006 Guidelines on fines resulted in a general tightening of the requirements governing the statement of reasons for decisions imposing a fine.

21. Ziegler considers this request to be inadmissible because the argument advanced by the Commission is imprecise and, in addition, the latter has no legal interest in raising those points.

22. With regard to Ziegler’s first objection, it need only be stated that it is sufficiently clear from the defence to the appeal which parts of the grounds of the judgment under appeal the Commission would like to see replaced and which grounds, instead of the grounds selected by the General Court, it would consider correct. Contrary to the view expressed by Ziegler, the Commission was not required to make a specifically-worded proposal.

23. It must be noted in relation to the second objection that the Court has already in fact held certain forms of order requested by the Commission seeking the substitution of grounds of a judgment to be inadmissible where the latter does not have a sufficient legal interest.¹⁸ The requirement of an interest in bringing proceedings, which in this connection applies to both privileged and non-privileged appellants,¹⁹ demands that the appeal is ultimately capable of procuring an advantage to the party bringing it.²⁰

24. However, this case-law on the inadmissibility of forms of order seeking the substitution of grounds of a judgment concerns only cases either in which the Commission itself lodges an appeal or cross-appeal,²¹ or in which the Commission asks the Court of Justice to correct alleged errors in law in the General Court's statement of grounds, even though those errors do not even form the subject-matter of the appeal.²²

25. The situation here is different: the Commission has not lodged a (cross-)appeal and – save in the case of one exception which remains to be mentioned²³ – it has not, in the presentation of its written and oral arguments before the Court, gone beyond the scope of the subject-matter of the appeal lodged by Ziegler. Rather, the Commission has in essence simply defended the judgment of the General Court, specifically against Ziegler's allegations of errors in law. It is in the context of this matter of dispute that it has requested that grounds of the judgment be substituted and the operative part of the judgment upheld.

26. It is settled case-law that in such circumstances the substitution of grounds of a judgment in appeal proceedings is permissible,²⁴ irrespective of whether the substitution is made by the Court of Justice on its own initiative or the Court follows the 'form of order' sought by or a 'suggestion' by one of the parties to the proceedings. The Court cannot confine itself to the arguments put forward by the appellant in support of its claims, or else it might be forced, in some circumstances, to base its decisions on erroneous legal considerations.²⁵ By substituting a legally erroneous ground contained in the judgment under appeal, the Court is able – in a manner consistent with the principle of procedural economy – to fulfil its duty to ensure that in the interpretation and application of the Treaties the law is observed (second sentence of Article 19(1) TEU).

18 — Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraphs 23 to 26, and judgment of 21 December 2011 in Case C-329/09 P *Iride v Commission*, paragraphs 48 to 51.

19 — *GlaxoSmithKline Services and Others v Commission and Others*, cited in footnote 18, paragraphs 23 to 26, and Case C-27/09 P *France v People's Mojahedin Organization of Iran* [2011] ECR I-13427, paragraphs 43 to 50.

20 — Case C-19/93 P *Rendo and Others v Commission* [1995] ECR I-3319, paragraph 13, last sentence; Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission* ('Akzo and Akcros') [2010] ECR I-8301, paragraphs 22 and 23; *GlaxoSmithKline Services and Others v Commission and Others*, cited in footnote 18, paragraph 23; and *France v People's Mojahedin Organization of Iran*, cited in footnote 19, paragraph 43.

21 — *GlaxoSmithKline Services and Others v Commission and Others*, cited in footnote 18, paragraph 15.

22 — *Iride v Commission*, cited in footnote 18, paragraph 48.

23 — See below, point 27 of this Opinion.

24 — Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* [2011] ECR I-4727, paragraph 118, and Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya v Commission* [2011] ECR, paragraph 171; to the same effect, see also Case C-30/91 P *Lestelle v Commission* [1992] ECR I-3755, paragraphs 27 and 28; Case C-93/02 P *Biret International v Council* [2003] ECR I-10497, paragraphs 59 to 65; and Joined Cases C-120/06 P and C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECR I-6513, in particular paragraph 187.

25 — See, to that effect, the order of 27 September 2004 in Case C-470/02 P *UER v M6 and Others*, paragraph 69, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden v API and Commission* [2010] ECR I-8533, paragraph 65.

27. A different assessment need be made only in the case of the statements made by the Commission concerning the EUR 40 million threshold. This is because the passage of the judgment under appeal in which the General Court deals with that issue²⁶ does *not* form the subject-matter of any of the pleas in law advanced by Ziegler in the appeal proceedings.²⁷ Accordingly, the Commission is likewise unable to request the substitution of any grounds stated in that passage of the judgment under appeal.

28. Leaving aside this exception, the form of order requested by the Commission seeking the substitution of grounds of the judgment is admissible. I will comment on whether it is well founded at the appropriate juncture in my examination of the individual grounds of appeal put forward by Ziegler.

29. If the substitution of individual passages of the grounds of the judgment under appeal were in fact to be required, this does not mean, contrary to the view of the Commission, that the appeal is inadmissible, but rather that it is unfounded,²⁸ since to that extent the pleas in law advanced by Ziegler against the judgment under appeal are rendered nugatory, that is to say they become ineffective (French: ‘inopérant’).²⁹

2. The Commission’s allegation that in the course of the administrative procedure Ziegler failed to cast doubt on the existence of an appreciable effect on trade

30. At several points in its written submissions, the Commission stresses that in the course of the administrative procedure Ziegler did not question the existence of an appreciable effect on trade between Member States, but rather it raised a complaint in that regard only in the course of the procedure before the General Court.

31. From the perspective of procedural economy, such a course of action is undoubtedly highly regrettable. However, a complaint cannot be raised in that connection as a matter of law. Indeed, there is no provision of European Union law which would entail the unenforceability of all complaints not made during the administrative procedure in an antitrust case.³⁰ Accordingly, Ziegler’s arguments regarding the appreciable effect on trade are admissible.

B – *Substantive assessment of the appeal*

32. The contested decision was adopted prior to the entry into force of the Treaty of Lisbon. The provisions of the European Treaties as contained in the version of the Treaty of Nice, that is to say the prohibition on cartels contained in Article 81(1) EC and the obligation to state reasons laid down in Article 253 EC, are therefore the pertinent provisions for the purposes of the legal assessment of that decision. However, the following observations may readily be transposed to Article 101(1) TFEU and to the second paragraph of Article 296 TFEU.

26 — Paragraphs 56 to 63 of the judgment under appeal.

27 — The appellant challenges the very next passage of the judgment under appeal, in paragraphs 64 to 74 thereof; that passage is devoted not to the EUR 40 million threshold but to the 5% market share threshold (see, in this regard, the first ground of appeal).

28 — Case C-76/01 P *Eurocoton and Others v Council* [2003] ECR I-10091, paragraph 52; Case C-203/07 P *Greece v Commission* [2008] ECR I-8161, paragraphs 42 and 43; and Case C-520/09 P *Arkema v Commission* [2011] ECR I-8901, paragraph 31.

29 — Case C-35/92 P *Parliament v Frederiksen* [1993] ECR I-991, paragraph 31; *FIAMM and Others v Council and Commission*, cited in footnote 24, paragraphs 187 to 189; and *France v People’s Mojahedin Organization of Iran*, cited in footnote 19, paragraph 79.

30 — Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6371, paragraphs 89 to 91.

1. Appreciable effect on trade between Member States (first ground of appeal)

33. Ziegler's first ground of appeal concerns paragraphs 64 to 74 of the judgment under appeal, in which the General Court deals with the issue of whether the removals cartel was capable of affecting trade between Member States.

34. Article 81(1) EC prohibits anti-competitive agreements between undertakings only where they 'may affect trade between Member States'. This 'inter-State clause' defines the boundary between the areas covered by national competition law and by European Union competition law.³¹

35. The Court has consistently held that the actual or potential impact of an agreement on trade between Member States must 'not be insignificant',³² that is to say any effect on trade must be 'appreciable'.³³

36. In its 2004 Guidelines, the Commission – in reliance on the case-law of the Courts of the European Union – set out particular criteria on the basis of which it may be assessed whether an agreement between undertakings is capable of appreciably affecting trade between Member States. Those criteria include not least a 5% threshold applicable to the aggregate market share of the undertakings party to an agreement held on the markets concerned by that agreement³⁴ ('the 5% criterion').

37. Ziegler takes the view that the General Court made various errors in its interpretation and application of that 5% criterion.

a) The need to define the relevant market in advance where the 5% criterion is applied (first part of the first ground of appeal)

38. The primary allegation made by the appellant in the context of the first part of the first ground of appeal is that the General Court wrongly 'exempted' the Commission from the requirement to define the market in connection with the 5% criterion.

39. The background to this complaint lies in the General Court's reasoning in paragraphs 66 to 72 of the judgment under appeal. In those paragraphs, the General Court takes as a starting point the consideration that in order to calculate a market share the market must logically be defined first, and that in paragraph 55 of its 2004 Guidelines the Commission specifically committed itself to providing such a definition of the market in connection with the 5% criterion.³⁵ The General Court goes on to hold that the Commission failed to comply with that obligation because it failed to define the market.³⁶ However, in the view of the General Court, the Commission did nevertheless, in the circumstances of the case, 'establish to the requisite legal standard'³⁷ that the 5% threshold had been exceeded. The decisive factor for that conclusion by the General Court was its view that the

31 — Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299; Joined Cases 6/73 and 7/73 *Commercial Solvents v Commission* [1974] ECR 223, paragraph 31; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 47; and Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, paragraph 33.

32 — Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 60; *Ambulanz Glöckner*, cited in footnote 31, paragraph 48; *Asnef-Equifax*, cited in footnote 31, paragraph 34; Case C-49/07 *MOTOE* [2008] ECR I-4863, paragraph 39; and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others v Commission* [2009] ECR I-8681, paragraph 36.

33 — *Asnef-Equifax*, cited in footnote 31, paragraph 35, and *Erste Group Bank and Others v Commission*, cited in footnote 32, paragraphs 37, 46 and 66.

34 — Paragraphs 52(a) and 53 of the 2004 Guidelines.

35 — Paragraphs 66 and 67 of the judgment under appeal.

36 — Paragraph 68 of the judgment under appeal.

37 — Paragraph 69 of the judgment under appeal.

Commission had ‘provided a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope’.³⁸ The Commission was therefore ‘exceptionally’ entitled to base its decision on the 5% criterion without expressly determining the market within the meaning of its 2004 Guidelines.³⁹

40. Ziegler submits that insufficient reasons are provided in the judgment under appeal on this point and that, in any event, the grounds of the judgment are contradictory and substantively inaccurate.

41. In the following points of this Opinion, I shall begin by considering the complaint regarding an insufficient statement of grounds (see section i) immediately below), before examining the legal requirements applicable to the definition of the market in relation to the 5% criterion (see section ii) below) and briefly dealing with the substantive failings in connection with the definition of the market alleged by Ziegler (see section iii) below).

i) The complaint regarding an insufficient and contradictory statement of grounds

42. First of all, Ziegler complains that the General Court failed to state any reasons why it ‘exempted’ the Commission from the requirement to define the market in connection with the 5% criterion. It goes on to claim that, in any event, the grounds of the judgment are contradictory.

43. Contrary to the view of the Commission, in addition to the substantive complaints made by the appellant regarding the definition of the market, this complaint has independent significance. This is because, irrespective of whether the General Court applied the correct requirements or excessively high requirements with regard to the definition of the market *in substantive terms*, it must duly state the reasons on which its judgment is based from *a formal perspective*: it is required to set out the reasons which in its view were the decisive reasons for the decision at first instance.

44. The duty of the General Court to state the reasons on which its judgments are based follows from Article 36, in conjunction with the first paragraph of Article 53, of the Statute of the Court of Justice. It is settled case-law that a judgment must disclose in a clear and unequivocal fashion the reasoning followed by the General Court, in such a way as to enable the persons concerned to ascertain the reasons for the decision adopted and this Court to exercise its power of review.⁴⁰ In addition, the reasons given in a judgment of the General Court must not be contradictory.⁴¹

45. It does in fact appear *prima facie* that the General Court has been caught up in significant contradictions in the present case, since, on the one hand, it fails to see a definition of the market in the contested decision in connection with the application of the 5% criterion⁴² and, on the other hand, it finds with regard to ‘the international removal services in Belgium’ that the Commission ‘provided a sufficiently detailed description of the relevant sector, including supply, demand and geographic scope’.⁴³ In addition, although it considers a definition of the relevant market to be mandatory in relation to the application of the 5% criterion, it at the same time takes the view that the Commission was entitled to base its decision on precisely that 5% criterion in the present case ‘without expressly determining the market ...’.⁴⁴

38 — Paragraph 70 of the judgment under appeal.

39 — Paragraph 72 of the judgment under appeal.

40 — Case C-259/96 P *Council v de Nil and Impens* [1998] ECR I-2915, paragraphs 32 and 33; Case C-202/07 P *France Télécom v Commission* [2009] ECR I-2369, paragraph 29; and Case C-280/08 P *Deutsche Telekom v Commission* [2010] ECR I-9555, paragraph 136.

41 — Examples of the Court’s review of grounds of judgments of the General Court to determine whether they are contradictory can be found in Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 202, and Case C-380/09 P *Melli Bank v Council* [2012] ECR, paragraph 41; see also Case C-47/07 P *Masdar (UK) v Commission* [2008] ECR I-9761, paragraph 76.

42 — Paragraph 68 of the judgment under appeal.

43 — Paragraph 70 of the judgment under appeal.

44 — Paragraph 72 of the judgment under appeal.

46. However, if looked at more closely, the General Court in fact simply expressed itself clumsily in this regard, since it is sufficiently clear from the overall context of the relevant passage of the judgment that the contested decision does contain a description of the market by the Commission ('the international removal services market in Belgium') and that the General Court considers that description to be sufficient to equate it with an actual definition of the market and to serve as the basis for the application of the 5% criterion. If construed kindly, the statements made by the General Court on this matter are therefore not contradictory, contrary to first impressions.

47. Furthermore, it is likewise sufficiently clear from the reasoning of the General Court why, 'exceptionally', it did not 'reject' the findings of the Commission concerning the 5% criterion. Indeed, the General Court ultimately took the view that the description of the relevant sector in the contested decision contained all the information necessary for the application of the 5% criterion, and therefore that that description was equivalent to the market definition which it itself considered essential.

48. The complaint regarding an insufficient and contradictory statement of grounds for the judgment must therefore be rejected.

ii) The legal requirements applicable to the definition of the market

49. The appellant further complains that – contrary to the account of the General Court – the contested decision does not contain a precise definition of the services concerned or the relevant market, since the mere determination of a 'sector' ('international removal services in Belgium') is not equivalent to a complete definition of the relevant market.

50. It must be pointed out first of all in this regard that, under the 'inter-State clause' contained in Article 81(1) EC, it is by no means always necessary to define the market concerned. This is because proof of an appreciable effect on trade between Member States can also be furnished without a definition of the market, for example where there is evidence that undertakings intend by means of a specific practice to hinder exports to or imports from other Member States on a significant scale.⁴⁵

51. However, if a competition authority or a court bases its decision specifically on the 5% criterion in order to prove an appreciable effect on trade for the purposes of the 'inter-State clause', a determination of the market concerned becomes essential, since without the prior definition of the relevant market the calculation of market shares is impossible. In this regard, the General Court is correct where it states that 'in order to calculate a market share the market must logically be defined first'.⁴⁶

52. However, as the Commission rightly points out, the description of the relevant market in connection with the 5% criterion does not necessarily have to be provided with the same degree of precision as a market definition which is to be used to assess the conduct of competing undertakings. The legal requirements applicable to the definition of the market concerned may, rather, vary greatly depending on the aim pursued by that market definition. The definition of a market tends to have to be more precise the more complex the economic connections and the more extensive the analyses needed to assess those connections, for example where it is found that an undertaking occupies or is abusing a dominant position on the market under Article 82 EC (now Article 102 TFEU) or in the case of decisions based on prognoses concerning future market developments in certain merger control procedures.

⁴⁵ — Paragraph 25 of the 2004 Guidelines.

⁴⁶ — Paragraph 66 of the judgment under appeal.

53. The appellant therefore errs where it takes the view that the concept of ‘definition of a market’ must always be understood to mean the same thing, and that in the present case the Commission should have provided, as the basis for the application of the 5% criterion, the same detailed market description as would be standard in a different context.

54. It is my view that the General Court was entitled to hold, without erring in law, that the Commission’s reference to the ‘international removal services sector in Belgium’, which covers all removal services from and to Belgium, irrespective of whether they are commissioned by private individuals, undertakings or public institutions,⁴⁷ restricted the facts of the present case with sufficient precision to enable the application of the 5% criterion.⁴⁸

55. Nor, contrary to Ziegler’s view, do the 2004 Guidelines lay down stricter requirements applicable to the definition of the market concerned as regards the present case.

56. It is true that, contrary to the view taken by the Commission, the 2004 Guidelines do contain more than just a codification of the case-law existing to date on the issue of the effect on trade between Member States, since in those guidelines the Commission sets out its ‘methodology for the application of the effect on trade concept’⁴⁹ and announces that in certain circumstances it will not institute proceedings against undertakings or impose any fines on them.⁵⁰ By publishing those guidelines, the Commission entered into a self-imposed commitment which it must observe when exercising its discretion in relation to economic facts and conditions in connection with the effect on trade between Member States.⁵¹ Accordingly, it may not without a valid reason apply a methodology other than that set out in the 2004 Guidelines when it is examining whether the conduct of undertakings for the purposes of Articles 81 EC and 82 EC (Articles 101 TFEU and 102 TFEU) is capable of having an appreciable effect on trade between Member States.

57. However, in substantive terms, the 2004 Guidelines are restricted to the very brief statement that in order to apply the 5% criterion it is ‘necessary to define’ the relevant market.⁵² The 2004 Guidelines are silent on the question at issue here, namely the degree of detail with which that market is to be defined.

58. Contrary to Ziegler’s view, not even the reference in the 2004 Guidelines to the Notice on the definition of the relevant market⁵³ takes matters further. This is because that notice likewise does not preclude the fact that the definition of the relevant markets must be provided in greater or lesser specific detail depending on the competition problem to be resolved. Even the Notice on the definition of the relevant market recognises that the definition of the market is closely related to the respective objectives pursued⁵⁴ and may lead to different results ‘depending on the nature of the competition issue being examined’.⁵⁵ It therefore leaves sufficient scope for a pragmatic approach to be taken to the definition of the market, tailored to the circumstances of the individual case.

47 — Paragraph 11 of the judgment under appeal and recital 2 of the contested decision.

48 — Paragraph 70 of the judgment under appeal.

49 — Paragraph 3 of the 2004 Guidelines.

50 — Penultimate and last sentences of paragraph 50 of the 2004 Guidelines.

51 — See, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* (‘*Dansk Rørindustri*’) [2005] ECR I-5425, paragraph 211; Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraphs 207 and 208; *Arkema v Commission*, cited in footnote 28, paragraph 88; and Case C-272/09 P *KME and Others v Commission* [2011] ECR I-12789, paragraph 100. See, to the same effect, in relation to the law on State aid, for example, Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paragraph 62. In addition, see also – outside the context of competition law – Case 190/82 *Blomefield v Commission* [1983] ECR 3981, paragraph 20.

52 — Paragraph 55 of the 2004 Guidelines.

53 — Commission Notice on the definition of the relevant market for the purposes of Community competition law (OJ 1997 C 372, p. 5), cited in footnote 41 of the 2004 Guidelines.

54 — Point 10 of the Notice on the definition of the relevant market.

55 — Point 12 of the Notice on the definition of the relevant market.

59. Furthermore, in a comparatively simple case such as that at issue here, it would fundamentally run counter to the requirements of efficient and resource-saving administrative activity if the Commission were required to spend more time than absolutely necessary on the definition of the market in connection with the application of the 5% criterion.

60. All things considered, Ziegler's argument relating to the legal requirements applicable to the definition of the market must be rejected.

iii) The alleged substantive deficiencies relating to the definition of the market

61. Finally, the appellant claims that the description of the services concerned and the market ('international removal services in Belgium') accepted by the General Court in the present case is substantively inaccurate, both with regard to the determination of the relevant services market and in connection with the definition of the geographically relevant market.

62. By this complaint, Ziegler is challenging in particular paragraph 71 of the judgment under appeal, in which the General Court states that 'the Commission was justified in finding that international removal services in Belgium were the relevant services' and that the market thus described 'was correctly identified by the Commission as the relevant market'.

63. The appellant bases its criticism of that passage of the judgment primarily on considerations relating to the interchangeability of international removal services and makes submissions regarding both supply and demand.

64. However, in that connection, the appellant appears to overlook the fact that the question of the supply and demand situation on a particular market and whether the removal services in question are interchangeable is not a question of law but rather one of fact in relation to which the Court of Justice has no jurisdiction in appeal proceedings,⁵⁶ save in the case of any distortion, which is not claimed here.

65. Accordingly, Ziegler's criticism of the findings made by the General Court at issue here in relation to the definition of the market must be rejected as inadmissible.

66. The first part of the first ground of appeal therefore fails in its entirety.

b) Proof that the 5% threshold was exceeded in the present case (second part of the first ground of appeal)

67. In the alternative, Ziegler claims in the second part of the first ground of appeal that the General Court infringed its duty to state the reasons on which its judgment was based and the principle of adversarial proceedings in finding that the combined market share of the participants in the cartel in the present case was 'well above 5%'.

⁵⁶ — Order in Case C-19/95 P *San Marco v Commission* [1996] ECR I-4435, paragraph 39; Case C-136/92 P *Commission v Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 49; Case C-521/09 P *Elf Aquitaine v Commission* [2011] ECR I-8947, paragraph 68; *Comitato 'Venezia vuole vivere' v Commission*, cited in footnote 24, paragraph 149; and Joined Cases C-628/10 P and C-14/11 P *AOI and Others v Commission* ('AOI') [2012] ECR, paragraph 85.

68. The appellant's challenge is directed in particular against the last two sentences of paragraph 71 of the judgment under appeal, in which the Court holds that 'for the 5% threshold not to be reached, the size of the market would have to be at least EUR 435 million' and adds that '(t)he only way the market concerned could attain such a size would be to start from a much larger market than that of international removal services in Belgium, which was, however, correctly identified by the Commission as the relevant market'.

69. Ziegler relies here on the finding of the General Court that only a much larger market than that of 'international removal services in Belgium' could attain a size of EUR 435 million. In Ziegler's view, no reasons are stated by the General Court for this finding; Ziegler is further of the opinion that the underlying assumptions did not form the subject-matter of adversarial discussion involving the parties in the course of the proceedings at first instance.

70. Neither allegation is valid.

71. Self-evident facts do not require a more detailed explanation. This is the case with the passage of the judgment at issue here: it is self-evident that the participants in the cartel may be assumed to hold smaller market shares only if – taking as a basis the turnovers determined for the respective undertakings – it is assumed that the market volume is considerably greater. The calculation made by the General Court, namely that the size of the relevant market would have to be EUR 435 million in order for the market shares held by the participants in the cartel to fall from double-digit values (according to the General Court's findings, almost 30%⁵⁷) to below 5%, therefore required no greater explanation in the grounds of the judgment.

72. With regard to the figures on which the calculations made by the General Court are based, and contrary to Ziegler's claim, those figures were indeed discussed with the parties to the proceedings. They are taken from the Commission's written response to the questions put by the General Court in the course of the first instance proceedings,⁵⁸ on which Ziegler was free to submit its observations at any time. Furthermore, it is clear from the judgment under appeal that Ziegler was even expressly asked about this issue by the General Court at the hearing at first instance.⁵⁹

73. In this connection, the appellant wrongly claims that the Commission's figures are unreliable. It is true that at another point in the judgment under appeal the General Court found that the Commission had made an error of assessment affecting the calculation of the market volume.⁶⁰ The blanket conclusion that the Commission's figures are generally not fit for use cannot, however, be drawn from that error.

74. In any event, the accuracy and resilience of the data determined by the Commission are matters concerned with the establishment of facts and the assessment of evidence which as such – save in the case of distortion – are not reviewed by the Court of Justice in its appellate jurisdiction.⁶¹ Since Ziegler has not complained of distortion in relation to facts or evidence, the undertaking must abide by the General Court's determination of the facts and assessment of evidence in the judgment under appeal.

75. It is clear from the foregoing considerations that the second part of the first ground of appeal also has no prospect of success.

57 — Third sentence of paragraph 71 of the judgment under appeal.

58 — The total size of the international removal services market in Belgium, excluding the turnover achieved by the removal undertakings in their capacity as subcontractors, is put at EUR 67.5 million in paragraph 15 of the Commission's written pleading of 22 March 2010.

59 — See paragraph 71 of the judgment under appeal: 'Third, in answer to the Court's questions, the applicant itself stated, at the hearing ...'.

60 — In paragraph 71 of the judgment under appeal, the General Court expressly corrects the figures determined by the Commission regarding the size of the market; that correction relates to the duplicated inclusion of the removal services provided by undertakings in their capacity as subcontractors.

61 — See the case-law cited in footnote 56.

c) The question whether exceeding the 5% threshold is sufficient to find an appreciable effect on trade (third part of the first ground of appeal)

76. By the third part of its first ground of appeal, which is also put forward in the alternative, Ziegler objects in particular to paragraph 73 of the judgment under appeal, which reads as follows:

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

77. The appellant is of the opinion that the General Court made an error of law in this passage of the judgment because it found there to be an appreciable effect on trade between Member States solely by virtue of the fact that the combined market share of the participants in the cartel exceeded the 5% threshold. In Ziegler’s view, this is incompatible with both case-law and paragraph 53 of the 2004 Guidelines.

78. It is true that the question of an effect on trade between Member States must be assessed taking into account all the relevant circumstances of the individual case in question. This is because the Court has consistently held that, in order that an agreement between undertakings may affect trade within the European Union, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States, such as might prejudice the realisation of the aim of a single market in all the Member States.⁶²

79. An effect on trade within the European Union is normally the result of a combination of several factors which, taken separately, are not necessarily decisive.⁶³ This, however, does not stop one individual aspect – in particular a market share which significantly exceeds the 5% threshold – from amongst the set of circumstances of law and of fact to be taken into consideration from turning out to be, in a specific case, the decisive aspect, which taken on its own already points with a sufficient degree of probability to an appreciable effect on trade between Member States.⁶⁴

80. However, in the present case, there is ultimately no need to determine whether the fulfilment of the 5% criterion was able on its own to justify acceptance that there was a risk of an appreciable effect on trade between Member States. As the Commission rightly points out, the removals cartel was characterised by two additional features on the basis of which the General Court – regardless of the existence of a market share exceeding the 5% threshold – was entitled to presume there to be an appreciable effect on trade.

62 — Case 5/69 *Völk* [1969] ECR 295, paragraph 5; Case 1/71 *Cadillon* [1971] ECR 351, paragraph 6; Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 22; *Bagnasco and Others*, cited in footnote 32, paragraph 47; *Asnef-Equifax*, cited in footnote 31, paragraph 34; and *Erste Group Bank and Others v Commission*, cited in footnote 32, paragraph 36.

63 — Case C-250/92 *DLG* [1994] ECR I-5641, paragraph 54; *Bagnasco and Others*, cited in footnote 32, paragraph 47; *Asnef-Equifax*, cited in footnote 31, paragraph 35; and *Erste Group Bank and Others v Commission*, cited in footnote 32, paragraph 37.

64 — See, to that effect, Case 19/77 *Miller International Schallplatten v Commission* [1978] ECR 131, paragraph 9, and Case 107/82 *AEG-Telefunken v Commission* (*AEG*) [1983] ECR 3151, paragraphs 56 to 58; in Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others v Commission* [1983] ECR 1825, paragraph 86 in conjunction with paragraph 82, even market shares of less than 5% were considered to be a sufficient basis on which to assume there to be an appreciable effect on trade.

81. First, according to the findings of the General Court, the removals cartel concerned all international removal services from and to Belgium, that is to say, all international removals for which Belgium was either the starting point or the destination. The entire territory of a Member State was therefore affected by the cartel. Such a cartel has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the Treaties are designed to bring about.⁶⁵

82. Second, the removals cartel, in which major removals undertakings established in and outside Belgium were involved,⁶⁶ was especially concerned with international removals from and to Belgium, with the result that, by its very nature, it must have had a significant influence specifically on cross-border trade between Member States.⁶⁷

83. The General Court was fully aware of these two additional factors when it considered the matter of the 5% criterion in the present case.⁶⁸ It would therefore be wrong to presume that the General Court based its acceptance of an appreciable effect on trade solely on the basis that the 5% threshold was exceeded, even though consideration of paragraph 73, the paragraph at issue here, in isolation may – on a cursory reading – give that impression.

84. All in all, the General Court cannot be accused of having ignored the legal requirements of the ‘inter-State clause’ contained in Article 81(1) EC.

85. No other conclusion may be drawn from paragraph 53 of the 2004 Guidelines, by which the Commission entered into a self-imposed commitment in relation to the exercise of its discretion.⁶⁹ It is true that, under that provision, exceeding the 5% threshold as such can form the grounds for the presumption of an appreciable effect on trade within the European Union only where the agreement in question is also *by its very nature capable* of affecting trade between Member States. However, this additional requirement is without doubt satisfied in the case of a hardcore restriction such as the cartel at issue here, which according to the findings of the General Court also concerns *international*, that is to say cross-border, removal services.

86. An infringement of paragraph 53 of the 2004 Guidelines is therefore likewise out of the question.

87. This third part of the first ground of appeal is unfounded overall, with the result that the first ground of appeal must be rejected in its entirety.

2. The statement of reasons concerning the amount of the fine (second ground of appeal)

88. By its second ground of appeal, Ziegler objects to paragraphs 88 to 94 of the judgment under appeal. The appellant accuses the General Court of having placed insufficient requirements on the statement of reasons contained in the contested decision regarding the calculation of the fine and, by so doing, of having ignored the requirements to state reasons for legal acts of the European Union and the fundamental right to fair legal process (see section a) below). In the alternative, the appellant claims that the General Court infringed the ‘principle of equal treatment and non-discrimination’ and provided an inadequate statement of grounds for its own judgment (see section b) below).

65 — Case 8/72 *Vereeniging van Cementhandelaren v Commission* [1972] ECR 977, paragraph 29; *Remia and Others v Commission*, cited in footnote 62, end of paragraph 22; *Asnef-Equifax*, cited in footnote 31, paragraph 37; and *Erste Group Bank and Others v Commission*, cited in footnote 32, paragraph 38.

66 — The addressees of the decision imposing fines comprise undertakings established both inside and outside Belgium (see Article 4 of the contested decision).

67 — See, to the same effect, in relation to the activity of travel agents, Case 311/85 *Vlaamse Reisebureaus* [1987] ECR 3801, paragraph 18.

68 — See, in this regard, the findings of the General Court regarding the services affected by the removals cartel in paragraph 11 and its comments on the ‘description of the relevant sector’ in paragraphs 70 and 71, i.e. the paragraphs immediately before the passage at issue here in paragraph 73 of the judgment under appeal.

69 — See above, point 56 of this Opinion.

89. The background to these complaints is the Commission's new practice, introduced in the 2006 Guidelines on fines, of calculating the basic amount of fines in antitrust cases, and a deterrent factor to be applied, on the basis of a particular proportion of the value of the sales⁷⁰ of each undertaking concerned. Depending on the degree of gravity of the infringement, the percentage used to determine the basic amount of the fine is between 0% and 30% of the value of sales;⁷¹ a percentage of between 15% and 25% of the value of sales is taken into account to calculate the deterrent factor.⁷²

90. In the view of the General Court, this method of calculating fines brings with it increased requirements in relation to the reasons stated for decisions imposing fines. The General Court holds that the Commission must not, as a rule, simply categorise an infringement using particular levels of gravity (such as, for example, 'very serious' in this case) without explaining in greater detail how exactly it determined the percentage of the value of sales, on the basis of which the basic amount of the fine and the deterrent factor are ultimately calculated.⁷³

91. Nevertheless, the General Court deemed it to be sufficient in the present case for the Commission to apply a proportion of the value of sales equivalent to 17% as the basis for the calculation of the fine *without providing any more detailed explanation* and to state as the sole reason for that decision the 'very serious' nature of the infringement.⁷⁴ In the view of the General Court, such reasoning is sufficient 'where the Commission applies a percentage very close to the lower end of the scale laid down for the most serious restrictions, that being, moreover, highly favourable to the applicant. In that case, supplementary reasons going beyond the reasoning inherent in the guidelines are not necessary. By contrast, had the Commission wished to apply a higher percentage, it would have had to provide more detailed reasons'.⁷⁵

92. It is on the basis of these statements that Ziegler alleges that, although the General Court acknowledged in theory that increased requirements relating to the statement of reasons apply with regard to the calculation of fines, it did not enforce those requirements as far as the Commission was concerned in this specific case but rather virtually 'exempted' the Commission from its duty to state reasons.

a) The complaint regarding an impermissible 'exemption' from the requirement to state reasons (first part of the second ground of appeal)

93. Ziegler's main claim in the context of this second ground of appeal is that the General Court failed to observe the legal requirements governing the statement of reasons for the calculation of fines in antitrust cases by the Commission, namely, first, the requirements following from the obligation, enshrined in primary law, to state the reasons for legal acts of the European Union, in conjunction with the 2006 Guidelines on fines, and second, the requirements stemming from the fundamental right to fair legal process.

70 — Points 13 to 18 of the 2006 Guidelines on fines explain exactly how the value of sales is to be determined.

71 — Point 19 of the 2006 Guidelines on fines.

72 — Point 25 of the 2006 Guidelines on fines.

73 — Paragraph 92 in conjunction with paragraph 91 of the judgment under appeal; with regard to the deterrent factor, see also paragraph 94 of that judgment.

74 — Recitals 543 and 556 of the contested decision and paragraphs 93 and 94 of the judgment under appeal.

75 — Paragraph 93 of the judgment under appeal.

i) The obligation to state reasons under Article 253 EC (now the second paragraph of Article 296 TFEU)

94. First of all, as far as the obligation to state the reasons for legal acts of the European Union is concerned, Ziegler relies on Article 296 TFEU. In fact, Article 253 EC applies to the present case;⁷⁶ however, so far as is relevant in the present case, that provision lays down the same legal requirements applicable to the statement of reasons for legal acts of the European Union as the second paragraph of Article 296 TFEU.

95. According to settled case-law, the statement of reasons required under Article 253 EC must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution of the European Union 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 carry out its review.⁷⁷

96. As the Court of Justice has pointed out, the obligation to state reasons for legal acts of the European Union is particularly important where determining the amount of fines imposed in cartel cases is concerned. In this regard, the Commission must, in particular, explain the weighting and assessment of the factors taken into account.⁷⁸

97. However, contrary to the view which Ziegler appears to take, this in no way means that the same degree of intensity should be required in relation to the Commission's statement of reasons for every decision imposing a fine. Nor can a general and fundamental tightening of the requirements to state reasons in relation to the calculation of fines, from which the General Court might have 'exempted' the Commission in the present case, be inferred from the 2006 Guidelines on fines.

98. Rather, it continues to be the case, including in relation to the imposition of fines in cartel proceedings, that the nature and scope of the statement of reasons which the Commission must provide for its decision ultimately depend on the circumstances of each 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 it is of direct and individual concern, may have in obtaining explanations.⁷⁹

99. It is also apparent from case-law that a decision of the Commission which fits into a well-established line of decisions may be reasoned in a summary manner, for example by a reference to those decisions.⁸⁰ The same applies where the decision was adopted in a context with which the persons concerned were familiar.⁸¹ It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.⁸²

76 — See above, point 32 of this Opinion.

77 — Case 24/62 *Germany v Commission* [1963] ECR 63; Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-413/06 P *Bertelsmann and Sony v Impala* [2008] ECR I-4951, paragraph 166; and AOI, cited in footnote 56, paragraph 72; to the same effect, see also Case 2/56 *Geitling v High Authority* [1957] ECR 3, and Case 73/74 *Groupeement des fabricants de papiers peints de Belgique and Others v Commission ('Papiers peints')* [1975] ECR 1491, paragraph 30.

78 — *KME and Others v Commission*, cited in footnote 51, paragraph 101; Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085, paragraph 61; and Case C-389/10 P *KME Germany and Others v Commission* [2011] ECR I-13125, paragraph 128.

79 — *Deutsche Telekom v Commission*, cited in footnote 40, paragraph 131, and *Elf Aquitaine v Commission*, cited in footnote 56, paragraph 150.

80 — *Papiers peints*, cited in footnote 77, paragraph 31; Case C-295/07 P *Commission v Département du Loiret* [2008] ECR I-9363, paragraph 44; and *Elf Aquitaine v Commission*, cited in footnote 56, paragraph 155.

81 — Case C-335/09 P *Poland v Commission* [2012] ECR, paragraph 152, and Case C-417/11 P *Council v Bamba* [2012] ECR, paragraph 54.

82 — *Commission v Sytraval and Brink's France*, cited in footnote 77, paragraph 63; *Bertelsmann and Sony v Impala*, cited in footnote 77, paragraphs 166 and 178; *Deutsche Telekom v Commission*, cited in footnote 40, paragraph 131; and *Elf Aquitaine v Commission*, cited in footnote 56, paragraph 150.

100. Taking the foregoing as the relevant benchmark, the General Court rightly held in the present case that the contested decision provided sufficient reasons with regard to the calculation of the basic amount of the fine and the deterrent factor.

101. The contested decision fits seamlessly into the new administrative practice of the Commission, as made transparent in relation to cartel proceedings by the 2006 Guidelines on fines. Those guidelines already contain numerous explanations which did not need to be repeated by the Commission in the contested decision. For example, the guidelines state *inter alia* that ‘horizontal price-fixing, market-sharing and output-limitation agreements ..., which are usually secret’ – i.e. *hardcore restrictions* – ‘will be heavily fined’; in accordance with the guidelines, for such infringements a basic amount ‘at the higher end of the scale’ of between 0% and 30% of the value of sales and a deterrent factor of between 15% and 25% of that value are to be applied.⁸³

102. As a ‘very serious infringement’ by which it was intended to influence the setting of prices and to share jobs between the participants in the cartel, the removals cartel undoubtedly fell within precisely that category of practices and therefore – in accordance with the 2006 Guidelines on fines – a fine had to be imposed consisting of a basic amount ‘at the higher end of the scale’ of between 0% and 30% of the value of sales plus a deterrent factor of between 15% and 25% of that value.

103. The fact that a basic amount of 17% of the value of sales, the percentage finally fixed by the Commission, is in the upper half of the scale of between 0% and 30% of the value of sales is quite clear and requires no further explanation. If anything, it is in fact questionable whether a proportion of the value of sales equivalent to 17% is actually ‘at the higher end of that scale’, as required by the 2006 Guidelines on fines,⁸⁴ or whether that percentage has perhaps been set too low. However, in this regard, Ziegler has no legitimate interest in any further explanations, since a comparatively lower percentage is more favourable to it than a higher percentage.⁸⁵ The same is true of the deterrent factor of 17% of the value of sales applied by the Commission, since that factor is likewise not particularly high on the established scale of between 15% and 25% of the value of sales.⁸⁶

104. It is certainly conceivable that sometimes a lower proportion of the value of sales than envisaged in the 2006 Guidelines on fines might be taken as the basis for the calculation of the basic amount of a fine imposed in cartel proceedings on account of particular circumstances of the individual case; this possibility is expressly provided for in the guidelines, not least by the use of the word ‘generally’.⁸⁷ However, contrary to Ziegler’s view, a general tightening of the requirements to state reasons applicable to decisions imposing fines cannot be inferred from this. Rather, the Commission is required to deal with particular circumstances of the individual case when stating the reasons for its decision to impose a fine only where it is actually aware of such circumstances. Where an undertaking is aware of circumstances which might justify the use of a lower proportion of the value of sales than that stated in the guidelines for the purpose of calculating the fine, it is for that undertaking to bring those circumstances to the Commission’s attention. However, as far as can be seen, Ziegler has not claimed that it specifically relied on any such factors in connection with the calculation of the basic amount of the fine or the deterrent factor.

83 — Points 23 and 25 in conjunction with points 21 and 22 of the 2006 Guidelines on fines.

84 — See again point 23 of the 2006 Guidelines on fines.

85 — With regard to the criterion of a legitimate interest in connection with the assessment of the statement of reasons for legal acts of the European Union, see above in point 98 of this Opinion.

86 — See again point 25 of the 2006 Guidelines on fines.

87 — See the third sentence of point 23 of the 2006 Guidelines on fines.

105. Finally, the legal requirements applicable to the statement of reasons for decisions imposing fines must be higher the more complex the case in question and the higher the proportion of the value of sales taken into account by the Commission in order to calculate the basic amount and the deterrent factor.⁸⁸ It is consistent with the spirit and purpose of the obligation to state reasons that the explanations to be given by the Commission must be more detailed the greater the extent to which the penalty imposed exceeds the minimum requirements laid down in the guidelines on fines. This is because the interest of the undertaking concerned in learning the reasons for any particularly harsh decision made by the Commission also increases to that same extent. This is not however the situation here, since the case is not characterised by any particular complexity and the Commission has based the calculation of the fine on a comparatively low proportion of sales.

106. All in all, the General Court has therefore correctly applied the legal requirements governing the examination of the statement of reasons for the contested decision. Accordingly, the complaint regarding a breach of the obligation to state reasons is unfounded.

ii) The fundamental right to fair legal process

107. In addition to a breach of the general obligations to state reasons, Ziegler also complains of an infringement of the fundamental right to fair legal process and relies in that regard on Article 6 of the ECHR⁸⁹ and on Article 47 of the Charter of Fundamental Rights of the European Union.

108. It must be pointed out first of all in this connection that it is not in dispute that Ziegler did not claim such an infringement at first instance. Nor, contrary to Ziegler's view, is such a claim a mere addition to or further development of its criticism at first instance of the statement of reasons for the contested decision, but rather a new and inadmissible plea in law based on the infringement of completely different legal provisions. The fact that in the meantime a number of more recent judgments of the European Court of Human Rights have been delivered in relation to Article 6 of the ECHR does not change the factual or legal position, such that the assertion of a new plea would be justified. More particularly, a new plea of this kind cannot form the subject-matter of substantive discussion before the Court of Justice in appeal proceedings⁹⁰ (Article 42(2), in conjunction with Article 118, of the Rules of Procedure of the Court of Justice of 19 June 1991).⁹¹

109. However, even if Ziegler's claim regarding the fundamental right to fair legal process were to be considered admissible, it would in any event be unfounded.

110. It is true that there is an indisputable connection between the obligation to state reasons for legal acts of the European Union and the fundamental right to fair legal process, since only if the person concerned is duly informed of the reasons for a measure is he able to determine whether it makes sense to seek legal redress against that measure and can the competent courts duly review the legality of the measure.

111. However, as already mentioned,⁹² the requirements governing the provision of a proper statement of reasons for the contested decision were satisfied in the present case, since – in conjunction with the 2006 Guidelines on fines – the reasons for the calculation of the amount of the fine were clearly discernible and could easily be reviewed in the course of fair judicial proceedings.

88 — To that effect, see also paragraph 92 of the judgment under appeal.

89 — European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4 November 1950).

90 — *Dansk Rørindustri*, cited in footnote 51, paragraphs 88 and 89; *France Télécom v Commission*, cited in footnote 40, paragraph 60; and *AOI*, cited in footnote 56, paragraph 111.

91 — Since the appeal was lodged before 1 November 2012, the assessment of its admissibility is governed by the Rules of Procedure of the Court of Justice of 19 June 1991.

92 — See, in this regard, points 94 to 106 of this Opinion.

112. Finally, the appellant's claim that the General Court does not duly exercise its power of unlimited jurisdiction where it accepts a statement of reasons such as that in the contested decision is totally unsubstantiated. Ziegler has wholly failed to submit to what extent the General Court should have conducted a more intensive examination of the contested decision. In particular, it has not put forward any evidence to show that specifically the statement of reasons relating to the calculation of the fine provided by the Commission in the present case would have made it impossible or simply more difficult to conduct a comprehensive judicial review of any questions of fact or of law raised by the contested decision.

113. In conclusion, Ziegler's argument relating to the fundamental right to fair legal process must therefore be rejected as inadmissible or, in any event, as unfounded.

b) The complaint advanced in the alternative concerning an infringement of the principle of equal treatment and of the obligation of the General Court to state the reasons for its judgments (second part of the second ground of appeal)

114. In the alternative, the appellant argues that the 'exemption' from the obligation to state reasons granted to the Commission in the judgment under appeal runs counter to the principle of equal treatment and non-discrimination and, in addition, that insufficient reasons have been stated for that exemption.

i) The principle of equal treatment and non-discrimination

115. The principle of equal treatment – sometimes also referred to as 'the principle of equal treatment or non-discrimination'⁹³ – is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights.⁹⁴ Its significance in connection with the imposition of fines in cartel cases has been acknowledged by the Court of Justice on multiple occasions.⁹⁵

116. The infringement of that principle complained of by the appellant is said to consist in the fact that the General Court unjustifiably treats cases such as the present case, in which the fine is calculated on the basis of a proportion of the value of sales equivalent to 17%, in the same way as other cases in which a proportion of the value of sales equivalent to 15% might be taken into account.

117. These submissions by Ziegler are extremely vague and appear to be based on a purely hypothetical comparison with a completely theoretical situation, not described in any greater detail, in which the Commission might take into account a proportion of the value of sales equivalent to 15% and not – as is the case here – one equivalent to 17% for the purpose of calculating the fine.

118. In view of the lack of precision of the appellant's submissions, I have significant doubts as to whether this aspect of its argument may be regarded as admissible at all.⁹⁶

119. However, the argument is in any event unfounded.

93 — See, for example, Case C-300/04 *Eman and Sevinger* [2006] ECR I-8055, paragraph 57.

94 — *Akzo and Akcros*, cited in footnote 20, paragraph 54.

95 — Case C-280/98 P *Weig v Commission* [2000] ECR I-9757, paragraphs 63 to 68; Case C-291/98 P *Sarrió v Commission* [2000] ECR I-9991, paragraphs 97 to 100; *Dansk Rørindustri*, cited in footnote 51, paragraph 304; and, recently, *AOI*, cited in footnote 56, paragraph 58. See also points 48 to 53 of my Opinion in *AOI*.

96 — With regard to the legal requirements governing the precision of arguments advanced by appellants, see, inter alia, *France Télécom v Commission*, cited in footnote 40, paragraph 55; Case C-227/04 P *Lindorfer v Council* [2007] ECR I-6767, paragraphs 82 to 84; and Case C-369/09 P *ISD Polska and Others* [2011] ECR I-2011, paragraph 66.

120. The calculation of fines is not a mechanical process by which it is possible to determine in advance and with mathematical precision what percentage of the value of sales should be applied when calculating the basic amount of the fine and the deterrent factor for every cartel. Nor would such an ability to predict the fine down to the last decimal point even be appropriate, since that would make it all too simple for the participants in the cartel to determine in advance the ‘cost’ of their unlawful conduct and calculate whether it is more lucrative for them to engage in unlawful or lawful business practices.

121. Accordingly, when it imposes fines on undertakings involved in a cartel, the Commission – as the competition authority – must necessarily enjoy a certain degree of discretion as regards determining the proportion of the value of sales on the basis of which the fine is calculated.⁹⁷ The fact that that proportion may be 17% of the value of sales in the present case and 15% in another cartel case lies in the very nature of the calculations of such fines and cannot be called into question by reliance on the principle of equal treatment, provided that the Commission remains within the framework of the guidelines on fines, by which it made commitments in relation to the exercise of its discretion.⁹⁸

122. As a counterbalance to this discretion enjoyed by the Commission in connection with determining the proportion of the value of sales taken as the basis for the calculation of a fine, its decisions to impose fines are subject to the unlimited jurisdiction of the Courts of the European Union (Article 261 TFEU, in conjunction with Article 31, of Regulation No 1/2003).⁹⁹ In the hypothetical example given by Ziegler, if the General Court considered a proportion of the value of sales equivalent to 15% to be more appropriate or fairer, it could therefore exercise its discretion to apply that percentage rather than the 17% applied by the Commission and reduce the fine imposed accordingly.

123. In the light of the foregoing, Ziegler’s argument based on the principle of equal treatment must be rejected.

ii) The requirements applicable to the statement of grounds in the judgment under appeal

124. In addition, Ziegler claims that the General Court infringed its duty to state reasons for the judgment at first instance. This failure to state reasons is said to lie in the fact that the General Court allowed the Commission in the present case to set the deterrent factor at 17% of the value of sales by relying solely on the ‘very serious nature’ of the infringement. The General Court therefore fails to provide more detailed reasons for a departure from point 25 of the 2006 Guidelines on fines, which provides for account to be taken of ‘a number of factors’.

125. The obligation of the General Court to state the reasons on which its judgments are based follows from Article 36, in conjunction with the first paragraph of Article 53, of the Statute of the Court of Justice. As has already been said, the statement of the reasons on which a judgment is based must clearly and unequivocally disclose the General Court’s thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review.¹⁰⁰

97 — With regard to the Commission’s discretion in relation to the calculation of fines in cartel cases, see, in general, Case C-308/04 P *SGL Carbon v Commission* [2006] ECR I-5977, paragraph 46; Case C-407/04 P *Dalmine v Commission* [2007] ECR I-829, paragraph 133; and Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921, paragraph 43.

98 — See, to that effect, *JCB Service v Commission*, cited in footnote 51, paragraph 205; Case C-534/07 P *Prym and Prym Consumer v Commission* [2009] ECR I-7415, paragraph 98; and Case C-549/10 P *Tomra Systems and Others v Commission* [2012] ECR, paragraphs 104 to 108.

99 — See, in addition, *KME and Others v Commission*, cited in footnote 51, paragraphs 103 and 106; *Chalkor v Commission*, cited in footnote 78, paragraphs 63 and 67; and *KME Germany and Others v Commission*, cited in footnote 78, paragraphs 130 and 133.

100 — See above, point 44 and footnote 40 of this Opinion.

126. In the present case, the General Court provided a very clear explanation as to why it considered it to be lawful to set a deterrent factor equivalent to 17% of the value of sales: it referred to its immediately preceding considerations regarding the calculation of the basic amount of the fine and gave as the reasons for that reference, first, the fact that ‘the lower limit of the scale is the same’ for the calculation of both elements and, second, that the Commission likewise gives the same reasons for both calculations by means of an internal reference within the recitals of the contested decision.¹⁰¹

127. The considerations of the General Court in relation to this issue follow clearly and unambiguously from the judgment under appeal. Ziegler may take a different view from the General Court on the substance of the matter. However, that fact cannot in itself vitiate the judgment under appeal for failure to state reasons.¹⁰²

128. The complaint concerning an inadequate statement of grounds in the judgment under appeal is therefore unfounded.

129. It may be mentioned simply as an aside that the legal view taken by Ziegler in relation to points 22 and 25 of the 2006 Guidelines on fines is also unconvincing in substantive terms. The general statement made by the Commission in those guidelines to the effect that it ‘has regard to a number of factors’ when setting the deterrent factor constitutes a very general description of its administrative practice and does not necessarily mean that the Commission must rely on all those factors in every single case and provide a detailed statement of reasons for its decision in this regard. The relevant factors and the number of such factors are matters which are rather dependent on the individual case in question. As far as can be seen, Ziegler has not made any specific submissions in the present case to the effect that account should have been taken of other factors ignored by the Commission in connection with the setting of the basic amount of the fine, including the deterrent factor.

130. Considered in its entirety, the second ground of appeal is therefore in part inadmissible and in part unfounded.

3. The Commission’s ‘objective impartiality’ (third ground of appeal)

131. The third ground of appeal is directed against paragraphs 103 to 107 of the judgment under appeal, in which the General Court considers the impartiality of the Commission, upon which doubts are cast by Ziegler. Ziegler complains that the General Court failed to provide a proper statement of grounds for its judgment in this regard and, in addition, that it infringed the fundamental rights to fair legal process and to good administration.

132. The background to this complaint is that the Commission regards itself as one of the victims of the removals cartel. In view of this fact, Ziegler is of the opinion that the Commission should not itself have been permitted to adopt a decision on the removals cartel, because it is both victim and judge at the same time.

133. Accordingly, given the particular circumstances of the present case, the appellant considers the impartiality of the Commission to be impaired. Ziegler does not, however, call into question generally the European Union’s system of antitrust law enforcement, including the institutional role of the Commission as competition authority.

¹⁰¹ — Paragraph 94 of the judgment under appeal.

¹⁰² — Case C-362/05 P *Wunenburger v Commission* [2007] ECR I-4333, paragraph 80, and Case C-583/08 P *Gogos v Commission* [2010] ECR I-4469, paragraph 35.

a) The alleged failure to state reasons for the judgment under appeal (first part of the third ground of appeal)

134. First of all, Ziegler accuses the General Court of having failed to respond to its complaint made at first instance concerning the objective impartiality of the Commission. In the view of the appellant, in its judgment the General Court examined only the requirement of subjective impartiality and not that of objective impartiality. The judgment under appeal is therefore vitiated by a failure to state reasons.

135. It is not in dispute that the appellant is ultimately complaining of an infringement of the obligation to state the reasons on which judgments at first instance are based (Article 36, in conjunction with the first paragraph of Article 53, of the Statute of the Court of Justice) when it claims that the General Court failed to examine one of the pleas in law put forward by it at first instance.¹⁰³ In the context of an appeal it is necessary to bear in mind that the purpose of review by the Court of Justice is, primarily, to examine to what extent the General Court took into consideration, in a legally correct manner, all the arguments upon which the appellant relies.¹⁰⁴

136. In the present case, in paragraphs 103 to 107 of the judgment under appeal, the General Court examined – albeit only briefly – the argument advanced by Ziegler at first instance regarding the alleged partiality of the Commission and set out why it rejected the related plea in law put forward by Ziegler.

137. Admittedly, the General Court does not draw a clear distinction in that regard between objective and subjective impartiality. This is without doubt regrettable. However, the substantive accuracy of the findings made in the judgment under appeal – here the issue of whether the same requirements are to be applied to objective impartiality as to subjective impartiality – is not a problem pertaining to the obligation to state reasons incumbent on the General Court, but rather a question of substantive law.¹⁰⁵ The fact that the General Court, on the merits, arrived at a different conclusion from the appellant cannot in itself vitiate the judgment for failure to state reasons.¹⁰⁶

138. The first part of the third ground of appeal is therefore unfounded.

b) The fundamental rights to fair legal process and to good administration (second part of the third ground of appeal)

139. In addition, Ziegler claims infringement of its fundamental rights to fair legal process and to good administration. That infringement is said to consist in the fact that in the present case the Commission was ‘judge in its own cause’. To this end, the appellant relies on Article 6 of the ECHR and on Articles 47 and 41 of the Charter of Fundamental Rights.

103 — Case C-283/90 P *Vidrányi v Commission* [1991] ECR I-4339, paragraph 29; Case C-68/91 P *Moritz v Commission* [1992] ECR I-6849, paragraphs 37 to 39; and *Gogos v Commission*, cited in footnote 102, paragraph 29.

104 — *France Télécom v Commission*, cited in footnote 40, paragraph 41.

105 — See my comments on the second part of the third ground of appeal (below in points 139 to 150 of this Opinion).

106 — *Wunenburger v Commission*, cited in footnote 102, paragraph 80, and *Gogos v Commission*, cited in footnote 102, paragraph 35.

140. The Commission is not a ‘tribunal’ within the meaning of Article 6 of the ECHR or Article 47 of the Charter of Fundamental Rights.¹⁰⁷ However, as the competition authority of the European Union, it must observe the right to good administration, which is enshrined in Article 41 of the Charter as a fundamental right of the European Union.¹⁰⁸ Under that provision, every person has inter alia the right to have his or her affairs handled *impartially* by the institutions, bodies and other agencies of the European Union.

141. There are two aspects to that requirement of impartiality: *subjective impartiality*, meaning that no official of the agency concerned must show bias or personal prejudice in any way whatsoever, and *objective impartiality*, meaning that there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the agency concerned.¹⁰⁹

142. This ground of appeal is concerned solely with the second aspect, that is to say the requirement of objective impartiality. Ziegler claims that the Commission was unable to handle the present case with objective impartiality because it was itself one of the main victims of the removals cartel and because Commission officials ‘requested cover quotes’ (sic).¹¹⁰ The General Court ignored this fact in the judgment under appeal.

143. For the purposes of this appeal, the issue of whether the General Court should have annulled the contested decision in the event of a breach of the requirement of objective impartiality by reason of a lack of competence ? as argued by Ziegler ? or by reason of infringement of the right to good administration may be left unresolved, since in any event there are no indications at all in the present case that the General Court might have overlooked a lack of objective impartiality on the part of the Commission.

144. In particular, a lack of objective impartiality on the part of the Commission cannot exist solely by virtue of the fact that the Commission brings proceedings against and fines a cartel which has operated to the financial disadvantage of the European Union.¹¹¹ In this regard, the Commission is in the same position as State authorities which for example bring actions against those responsible for tax evasion and avoidance and as local authorities which prosecute parking offenders. Although Ziegler claims that, in contrast to such State and local authorities, the Commission has a very strong independent interest as an institution of the European Union and employer of officials affected by the removals, it completely fails to substantiate that argument.¹¹²

107 — Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others v Commission* [1980] ECR 3125, paragraph 81, and *Musique Diffusion française and Others v Commission*, cited in footnote 64, paragraph 7; see also, to the same effect recently, European Court of Human Rights, *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, §§ 58 and 59, 27 September 2011, regarding the Italian competition authority, the Autorità Garante della Concorrenza e del Mercato.

108 — The fact that Article 41 of the Charter of Fundamental Rights, and not Article 47 thereof, applies in administrative proceedings in cartel cases before the Commission is clear, inter alia, from Case C-109/10 P *Solvay v Commission* [2011] ECR I-10329, last sentence of paragraph 53, and Case C-110/10 P *Solvay v Commission* [2011] ECR I-10439, last sentence of paragraph 48.

109 — See, to that effect, in relation to the impartiality of tribunals, Case C-308/07 P *Gorostiaga Atxalandabaso v Parliament* [2009] ECR I-1059, paragraph 46, and order of 15 December 2011 in Case C-411/11 P *Altner v Commission*, paragraph 15; see also European Court of Human Rights, *Didier v. France* (dec.), no. 58188/00, § 2, ECHR 2002-VII.

110 — In the language of the case: ‘... des fonctionnaires de la Commission étaient impliqués en tant que demandeurs de devis de complaisance fournis par les entreprises de déménagement concernées ...’.

111 — See, to the same effect, the Opinion of 26 June 2012 of Advocate General Cruz Villalón in Case C-199/11 *Otis and Others* [2012] ECR, points 56 to 71, which sheds light on a similar issue from the perspective of civil proceedings brought by the Commission against undertakings involved in a cartel. The Court of Justice gave the parties to the present dispute the opportunity to comment on that Opinion at the hearing on 24 October 2012.

112 — It is worth mentioning in this connection that recital 598 of the contested decision is incorrectly cited by the appellant. Indeed, contrary to what is implied by Ziegler, the Commission in no way presented itself in that recital as ‘among the main victims’ of the removals cartel. The wording of the recital is a great deal more general, namely that ‘Belgian and international public bodies’ ‘appear to be among’ the ‘main victims’ of the practice of providing cover quotes. The position is similar in connection with the defence submitted by the Commission at first instance, paragraph 1 of which is referred to by Ziegler. Once again, that paragraph merely states in general terms that some of the natural persons whose removals were concerned were officials of the European institutions, including Commission officials.

145. Ultimately, the decisive factor as far as the issue of objective impartiality is concerned is that within the organisation of the authority in question the necessary precautions are taken to avoid any semblance of bias in the eyes of the persons concerned. To that end, it must be ensured in particular that proceedings against an infringement are not brought, and a punishment imposed in that regard, by the service which has felt the impact of that infringement.

146. Neither the documents in the case file nor the oral submissions of the parties made before the Court give any specific indications whatsoever that the Commission failed to take the necessary precautions in the present case. For example, two different and completely separate services within the Commission are responsible for the utilisation of removal services and the prosecution of infringements of competition law. Although both services are admittedly subject to the decision-making power of all the Members of the Commission acting collectively,¹¹³ they fall within the area of responsibility of different Commissioners.¹¹⁴

147. In addition, in this regard, the position within the organisational structure of the European Union is ultimately not significantly different from that within a local authority, all of the services of which ? those responsible for its budget and those responsible for prosecuting parking offenders alike ? are subject to the authority of a joint, politically appointed leadership, such as a mayor, local authority council or college of aldermen. The same is true of State authorities tasked with pursuing and punishing tax evasion and tax fraud. Even though they enjoy independence as a matter of substance, those authorities are ultimately part of the same State organisational structure as the agencies responsible for the administration of the national budget. This fact is incapable in itself of calling into question their objective impartiality.¹¹⁵

148. Finally, Ziegler's argument that Commission officials 'requested cover quotes' must be rejected. First, the Court of Justice has in its possession no information to suggest that Commission officials obtained quotes from removal undertakings knowing, or merely suspecting, that they were cover quotes. Even in response to questioning at the hearing, Ziegler's argument in this regard went no further than extremely general and unsubstantiated claims. Second, no evidence came to light in the course of the judicial proceedings that the same Commission officials who handled those quotes were also tasked with bringing proceedings against and imposing fines on the removals cartel.

149. The effective enforcement of the competition rules laid down in the Treaties, one of the principal tasks of the Commission, would be placed in considerable jeopardy if that authority were automatically to be deprived of the competence to pursue and punish infringements as soon as the financial interests of the European Union or of its officials were concerned, even if only remotely. As is clear not least from the present case, nor is it possible ? contrary to Ziegler's view ? to resolve this problem of enforcement reliably by involving one or more national competition authorities instead of the Commission, since national authorities may also be victims of the cartels in question.¹¹⁶

150. In conclusion, the General Court cannot seriously be accused of having ignored the requirements which follow from the principles of fair legal process and good administration as far as the present case is concerned.

113 — Article 1 of the Rules of Procedure of the Commission (see also Article 17(6)(b) TEU).

114 — Article 217(2) EC (now Article 17(6)(b) TUE and Article 248 TFEU).

115 — In this regard, see also *Otis and Others*, cited in footnote 111, paragraph 64; see, in a similar vein, the Opinion of Advocate General Cruz Villalón in that case, point 41.

116 — In this regard, see again recital 598 of the contested decision, according to which 'Belgian and international public bodies' 'appear to be among' the 'main victims' of the practice of providing cover quotes.

151. This is all the more true in view of the fact that, as an administrative authority, the Commission does not have to satisfy the same strict requirements as an independent tribunal within the meaning of Article 47 of the Charter of Fundamental Rights. Rather, the actions of the Commission, including decisions adopted by it on fines under antitrust law, are subject to independent judicial review by the Courts of the European Union.¹¹⁷ In a case such as this one, contrary to what appears to be Ziegler's view,¹¹⁸ the Commission is therefore definitely not prosecutor and judge at the same time.

c) Interim conclusion

152. The second part of the third ground of appeal is therefore also unfounded. Consequently, this ground of appeal should be rejected in its entirety.

4. The principle of equal treatment and non-discrimination (fourth ground of appeal)

153. By its fourth and final ground of appeal, Ziegler objects to paragraphs 165 to 172 of the judgment under appeal. In that passage of the judgment, the General Court examines the issue of whether, when the contested decision was adopted, Ziegler's economic difficulties required that the fine imposed on it be reduced, and whether the Commission treated Ziegler less favourably in this regard than Interdean NV, another undertaking involved in the removals cartel.

154. The appellant accuses the General Court of failing to have regard to 'the general principle of equal treatment and non-discrimination' when it reviewed the contested decision. The unequal treatment overlooked by the General Court is said to consist in the fact that, in the administrative procedure, Interdean was granted a 70% reduction of the fine imposed on it, on the basis of point 37 of the 2006 Guidelines on fines, whereas Ziegler's situation was not even examined on the basis of that provision of the guidelines, even though by its own admission Ziegler was also experiencing financial difficulties.

155. As previously mentioned,¹¹⁹ the principle of equal treatment is a general principle of European Union law, enshrined in Articles 20 and 21 of the Charter of Fundamental Rights, which is of considerable importance in connection with the imposition of fines in cartel cases. That principle 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.¹²⁰

156. In that connection, the comparability of different situations must be assessed with regard to all the elements which characterise them. These elements must in particular be determined and assessed in the light of the subject-matter and purpose of the European Union act which makes the distinction in question.¹²¹ The principles and objectives of the field to which the act relates must also be taken into account.¹²²

117 — With regard to the fact that the Commission is not a tribunal, see the case-law cited above in footnote 107; with regard to the judicial review of the activities of the Commission, see, inter alia, *KME and Others v Commission*, cited in footnote 51, paragraphs 102 to 106; *Chalkor v Commission*, cited in footnote 78, paragraphs 62 to 67; *KME Germany and Others v Commission*, cited in footnote 78, paragraphs 129 to 133; and *Otis and Others*, cited in footnote 115, paragraphs 59 to 64.

118 — Ziegler bases its written and oral submissions in relation to the third ground of appeal inter alia on *Kyprianou v. Cyprus* [GC], no. 73797/01, § 127, ECHR 2005-XIII, in which it is held that the confusion of roles between complainant, witness, prosecutor and judge may prompt justified doubts as to the impartiality of a court or tribunal ('... the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench ...').

119 — See above, point 115 of this Opinion.

120 — Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 95; Case C-127/07 *Arcelor Atlantique et Lorraine and Others ('Arcelor')* [2008] ECR I-9895, paragraph 23; and *Akzo and Akcros*, cited in footnote 20, paragraph 54.

121 — *Arcelor*, cited in footnote 120, paragraphs 25 and 26; Case C-236/09 *Association Belge des Consommateurs Test-Achats and Others* [2011] ECR I-773, paragraph 29; Case C-221/09 *AJD Tuna* [2011] ECR I-1655, paragraph 93; and Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECR I-3727, paragraph 32.

122 — *Arcelor*, cited in footnote 120, paragraph 26, and *Luxembourg v Parliament and Council*, cited in footnote 121, paragraph 32.

157. In the present case, Ziegler claims that the General Court should have found its situation to be comparable to that of Interdean, in particular from the perspective of its inability to pay, and taken account of that situation in the context of point 37 of the 2006 Guidelines on fines.

158. It is therefore necessary to examine whether an allegedly reduced ability to pay ? which Ziegler's argument assumes ? is in itself capable of making the positions of two undertakings comparable, having regard to the subject-matter and objectives of point 37 of the 2006 Guidelines on fines.

159. It must be observed in this regard that point 37 of the 2006 Guidelines allows the Commission to calculate a fine in a different manner to the general method specified in those guidelines on account of the 'particularities' of the individual case in question. The fine calculated in accordance with the general method may therefore be increased or reduced as a result of the application of point 37.

160. However, with regard to the reduction of a fine, the provision laid down in point 37 of the 2006 Guidelines on fines ? unlike that in point 35 ? makes no direct reference to an undertaking's inability or reduced ability to pay in a specific social and economic context. The two provisions of the 2006 Guidelines mentioned are, rather, dependent on the satisfaction of different conditions and do not have the same purpose. Point 37, in addition to point 35, would be superfluous as the basis for an exceptional reduction of fines if the two provisions were intended to be interpreted and applied such that their substance were essentially the same.

161. Accordingly, even if at the time the contested decision was adopted Ziegler had had a reduced ability to pay or was even unable to pay for the purposes of point 35 of the 2006 Guidelines on fines, that fact alone would not have been decisive from the perspective of point 37 of the guidelines for the purpose of concluding that Ziegler's situation was comparable to that of Interdean.

162. It is true that an undertaking's inability to pay may also be relevant to some degree in the context of point 37 of the 2006 Guidelines on fines when assessing the particularities of the case in question, namely the particular financial circumstances. However, the bar for grant the reduction of a fine under point 37 must be set considerably higher than that applicable to point 35. In other words, the ability of the undertaking concerned to pay must be affected to an exceptionally great extent in order for particular financial circumstances to be found for the purposes of point 37.

163. Otherwise, it would have to be feared that the strict requirements applicable to the reduction of a fine by reason of an inability to pay, as laid down in point 35 of the 2006 Guidelines on fines, could be circumvented by reliance on the much more generally worded point 37, and there would be a serious risk of the absolutely exceptional nature of reductions in fines, which forms the basis of point 35,¹²³ being eroded by the use of point 37.

164. With regard to the application of point 37 of the 2006 Guidelines on fines, the General Court therefore rightly compared the severity of the effects of the fines set in accordance with the general method on the ability of Ziegler and of Interdean to pay, taking as a basis their respective annual turnover.¹²⁴ It did so because, unlike what appears to be the appellant's view, not every restriction on an undertaking's ability to pay can be cause for a reduction in the fine under Article 37 of those guidelines, even if the size of that reduction may vary. Rather, particular financial circumstances for the purposes of point 37 of the guidelines may be found only where an undertaking's ability to pay is affected to an exceptionally great degree which goes significantly beyond the scale of the (mere) inability to pay within the meaning of point 35.

¹²³ — See the introductory wording to point 35 of the 2006 Guidelines on fines: 'In exceptional cases ...'.

¹²⁴ — Paragraph 171 of the judgment under appeal.

165. It is undisputed in the present case that Ziegler ? unlike Interdean ? put forward neither in the course of the administrative procedure nor during the first instance proceedings any particular factors which even only *prima facie* would form reasons why, in its case, particular financial circumstances beyond the alleged restriction on its ability to pay (point 35 of the 2006 Guidelines) might exist which would have justified a reduction of the fine (point 37 of those guidelines). The burden of proving the existence of such circumstances rests with the party who relies on them. There was nothing to prevent Ziegler from making appropriate submissions in this regard, especially since the necessary information would have had to come first and foremost from that undertaking itself.

166. Since Ziegler did not make any appropriate submissions on the basis of which the existence of particularities within the meaning of point 37 of the guidelines might have been found to exist, the General Court was able to consider, without erring in law, that Ziegler and Interdean were not in a comparable situation and that an infringement of the principle of equal treatment could therefore not be found to exist.

167. All in all, the fourth ground of appeal is therefore also unfounded.

C – Interim conclusion

168. As none of the grounds of appeal put forward by Ziegler can be upheld, the appeal should be dismissed in its entirety.

V – Costs

169. If, as I propose in this case, the appeal is dismissed, the Court will make a decision as to costs (Article 184(2) of the Rules of Procedure of 25 September 2012), the detailed provisions for which are set out in Articles 137 to 146, in conjunction with Article 184(1), of those Rules of Procedure.¹²⁵

170. It follows from Article 138(1) in conjunction with Article 184(1) of the Rules of Procedure that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs and Ziegler has been unsuccessful in its submissions, the latter must be ordered to bear the costs.

VI – Conclusion

171. In the light of the foregoing considerations, I propose that the Court should:

- (1) dismiss the appeal;
- (2) order Ziegler SA to bear the costs.

¹²⁵ — In accordance with the general principle that new rules of procedure apply to all proceedings pending at the time of the entry into force of those rules (settled case-law, see Joined Cases 212/80 to 217/80 *Meridionale Industria Salumi and Others* [1981] ECR 2735, paragraph 9), the decision as to costs in the present case is governed by the Rules of Procedure of the Court of Justice of 25 September 2012, which entered into force on 1 November 2012 (to the same effect, *Commission v Verhuizingen Coppens*, cited in footnote 6, paragraphs 83 to 85). There are, however, no substantive differences from Article 69(2) in conjunction with Articles 118 and 122(1) of the Rules of Procedure of the Court of Justice of 19 June 1991.