EUROPEAN COMMISSION
DG Competition

CASE AT.39462 – Freight forwarding

(Only the English and German text is authentic)

CARTEL PROCEDURE

Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 7 Regulation (EC) 1/2003

Date: 28/03/2012

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EUROPEAN COMMISSION

Brussels, 28.3.2012
C(2012) 1959 final

COMMISSION DECISION

of 28.3.2012

addressed to:
DSV Air & Sea SAS, Agility Logistics Limited, Agility Logistics Limited (Hong Kong), Beijing Kintetsu World Express Co., Ltd., CEVA Freight (UK) Limited, CEVA Freight Shanghai Limited, EGL, Inc., DHL Global Forwarding (UK) Limited, DHL Management (Schweiz) AG, DHL Global Forwarding (China) Co., Ltd., DHL Global Forwarding (Hong Kong) Limited, Deutsche Post AG, Exel Freight Management (UK) Limited, Exel Group Holdings (Nederland) B.V., DHL Logistics (China) Co., Ltd., DHL Supply Chain (Hong Kong) Limited, Exel Limited, Expeditors Hong Kong Ltd., Expeditors International of Washington, Inc., Hellmann Worldwide Logistics Ltd. Hong Kong, Hellmann Worldwide Logistics GmbH & Co. KG, Kuehne + Nagel Ltd. (UK), Kuehne + Nagel Management AG, Kuehne + Nagel Ltd. (Shanghai), Kuehne + Nagel Ltd. (Hong Kong), Kuehne + Nagel International AG, Nippon Express (China) Co., Ltd., Panalpina Management AG, Panalpina China Ltd, Panalpina World Transport (Holding) Ltd, Schenker Limited, Schenker AG, Schenker China Ltd., Schenker International (H.K.) Ltd., Deutsche Bahn AG, Toll Global Forwarding (Hong Kong) Limited, Toll Global Forwarding Limited, UPS Supply Chain Solutions, Inc., UPS SCS (China) Ltd., United Parcel Service, Inc., UTi Worldwide (UK) Ltd, UTi Nederland B.V., UTi Worldwide, Inc., Yusen Shenda Air & Sea Service (Shanghai) Ltd.

relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the EEA Agreement
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(Only the English and German texts are authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community[1], and in particular Article 7 and Article 23(2) thereof,

[1] OJ L 1, 4.1.2003, page 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 respectively of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty where appropriate. The TFEU also introduced certain changes in

Having regard to the Commission Decision of 5 February 2010 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty[2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case[3],

Whereas:

1. INTRODUCTION

(1) The addressees of this Decision participated in a set of agreements and concerted practices amounting to four separate infringements of Article 101(1) of the Treaty on the Functioning of the European Union (the Treaty) and Article 53(1) of the Agreement creating the European Economic Area (EEA) covering the EEA territory by which the addressees coordinated their pricing behaviour in the provision of international freight forwarding services with respect to various surcharges.

(2) Pricing coordination related to four different surcharges: new export system (NES), advanced manifest system (AMS), currency adjustment factor (CAF) and peak season surcharge (PSS). Each of the surcharges was discussed at different meetings and on different dates concerning different types of surcharges.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. The freight forwarding services

(3) Freight forwarding can be defined as "the organisation of transportation of items[4] (possibly including activities such as customs clearance, warehousing, ground services etc.) on behalf of customers according to their needs. The freight forwarding business has been segmented into domestic and international freight forwarding and freight forwarding by air, land and sea"[5].

(4) Another definition of freight forwarding and logistics services was adopted by The International Federation of Freight Forwarders Associations ("FIATA")[6] and The

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terminology, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this Decision.

2 OJ L 123, 27.4.2004, page 18.

3 OJ

4 As opposed to the transport itself.

5 Commission Decision of 24 November 2005 in Case No. COMP/M. 3971 – *Deutsche Post/Exel*.

6 FIATA is the umbrella organisation representing the whole industry.

European Association of Forwarding, Transport, Logistic and Customs Services ("CLECAT")[7]. According to that definition "Freight Forwarding and Logistic services means services of any kind relating to the carriage (performed by single mode or multimodal transport means), consolidation, storage, handling, packing or distribution of the Goods as well as ancillary and advisory services in connection therewith, including but not limited to customs and fiscal matters, declaring the Goods for official purposes, procuring insurance of the Goods and collecting or procuring payment or documents relating to the Goods. Freight Forwarding Services also include logistical services with modern information and communication technology in connection with the carriage, handling or storage of the Goods, and de facto total supply chain management."[8]

(5) The services referred to in Recitals (3) and (4) do not have to be provided exclusively by freight forwarders. For instance, a customer may buy customs clearance services from a third party independent of the freight forwarder or he may also buy the air transportation directly form the carrier and carry out ancillary services by himself. The advantage of purchasing all these individual services together from a freight forwarder is that the freight forwarder can offer these services as one package, which can save both time and money for the customer.

(6) The infringements described in this Decision all relate to the provision of freight forwarding services by air. The majority of freight forwarders do not possess their own airplanes and they act in general as intermediaries between the carriers (airlines) and the sender (shipper) and/or the recipient (or consignee) of the goods. In the daily business, freight forwarders predominantly act as consolidators, that is to say, they try to arrive at the optimal mix of the freight shipped for their customers in order to fit it in the available space that the freight forwarders acquired from the carriers. The contractual relations between carriers and freight forwarders are predominantly governed by the IATA[9] regulatory framework.

(7) The infringements which are the subject of this Decision relate to the supply of freight forwarding services on an international scale as freight forwarders tend to provide freight forwarding services all over the world. The freight forwarding services concerned by this Decision were supplied on routes from (i) the European Economic Area to the United States (AMS infringement), (ii) the United Kingdom[10] to third countries outside the European Economic Area (NES infringement), (iii) China to the European Economic Area (CAF infringement) and (iv) South China[11] to the European Economic Area (PSS infringement). This increases the significance of the four infringements as the trade lanes between United States, Europe and Asia are

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7 CLECAT is the umbrella organisation on the European level.

8 See http://www.fiata.com/uploads/media/CL0406_04.pdf.

9 IATA (International Air Transport Association) is a global organisation of airlines and represents 93% of scheduled international air traffic (both passenger and cargo flights). The organisation serves as an intermediary between airlines and passengers as well as freight forwarders via neutrally applied agency service standards and centralised financial systems. Source: http://www.iata.org.

10 Including the services relating to the shipments originating from other EEA countries transiting through the United Kingdom.

11 Dongguan, Guangzhou, Hong Kong, Macau, Shenzhen and Zhuhai.

the most important trade lanes when measured in terms of the amount of shipped goods.[12]

(8) On all the lanes concerned, the freight forwarding services could be demanded by both customers at the points of origin and of destination of the goods. This business model very well reflects an easy tradability of the freight forwarding services across the boarders according to the needs of the customers.

2.2. Undertakings subject to the present proceedings

2.2.1. CEVA/EGL

(9) CEVA Group Plc. (hereinafter "**CEVA**") is the parent company of two formerly independent freight forwarders: TNT Logistics and EGL, Inc. (hereinafter "**Eagle**"). The ultimate parent company of CEVA is Apollo Management VI L.P., a private equity investment company.

(10) CEVA acquired Eagle, including its subsidiaries EGL Eagle Global Logistics (UK) Limited (later renamed CEVA Freight (UK) Limited) and EGL Eagle Global Logistics Shanghai Limited (later renamed CEVA Freight Shanghai Limited) in August 2007, which strengthened its position on the global freight forwarding market. Eagle, a US based company headquartered in Texas is a provider of domestic and international air and sea freight forwarding as well as domestic land freight forwarding services. It also has minor, ancillary activities in contract logistics services.

(11) The total turnover generated by the Freight Management segment of CEVA group in 2008 was EUR 2.864 billion[13].

2.2.2. Deutsche Bahn (including Schenker and BAX)

(12) Deutsche Bahn AG (hereinafter "**DB**") is a company with its headquarters in Berlin, Germany, heading a group active in various economic sectors, including freight forwarding. DB was established as a joint stock company under private law in 1994. The total turnover of the DB group in 2008 was EUR 33.452 billion[14].

(13) DB's subsidiary covering most of the activities in international freight forwarding is Schenker AG (hereinafter "**Schenker**") along with its own subsidiaries or affiliated companies including Schenker China Ltd. and Schenker International (H.K.) Ltd. The headquarters of Schenker are in Essen, Germany. Schenker was acquired by DB in 2002 and DB holds 100% of Schenker's shares through its subsidiary DB Mobility Logistics AG (formerly Stinnes AG). The Schenker group is present in more than 1 100 offices in over 130 countries and has 60 000 employees worldwide.

(14) DB further acquired US freight forwarder BAX Global Inc. including its subsidiaries BAX Global Ltd. (UK) and BAX Global (China) Co. Ltd. in 2005. […][15].

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12 […]

13 See the CEVA Group Plc.'s 2008 Annual Report, page 22, 23.

14 See Deutsche Bahn's 2008 Annual Report.

15 […]

(15) DB is active in the freight forwarding sector via its DB Schenker Logistics business unit, which consists of divisions for Land Transport, Air/Ocean Freight and Contract Logistics/SCM. The total turnover of DB Schenker Logistics in 2008 was EUR 14.680 billion[16].

(16) In order to integrate the services provided by DB Schenker Rail and DB Schenker Logistics a new trademark DB Schenker was created. The new trademark covers all transport and logistics activities of DB.

2.2.3. Deutsche Post (including Danzas, DHL and Exel)

(17) Deutsche Post AG (hereinafter "**DPAG**") is the ultimate parent company of the world's largest provider of air and ocean freight services and one of the leading overland freight forwarders in Europe and the Middle East. DPAG emerged from Deutsche Bundespost in 1995 and was converted into a joint stock company under private law. Since 20 November 2000, DPAG has been listed on the Frankfurt Stock Exchange as well as on all other German exchanges. The headquarters of DPAG are in Bonn, Germany.

(18) DPAG has acquired several independent freight forwarding companies. Most important was the acquisition of the Swiss provider of freight forwarding services Danzas and the acquisition of the largest American service provider in the field of international airfreight, Air Express International (AEI). In December 2002 one of the largest freight forwarders, DHL International became a wholly owned subsidiary of DPAG, which already had a majority interest in the company since 1 January 2002.

(19) In 2003 DPAG bundled its entire express and logistics (also freight forwarding) business under the DHL brand. In December 2005 DPAG acquired a British freight forwarding company Exel Plc (later renamed "Exel Limited"), including its subsidiaries or affiliated companies Exel Freight Management (UK) Limited, Exel Group Holdings (Nederland) B.V., Exel-Sinotrans Freight Forwarding Co. Ltd. (later renamed DHL Logistics (China) Co., Ltd.) and Exel Hong Kong Limited (later renamed DHL Supply Chain (Hong Kong) Limited).

(20) The DPAG Group[17], including its subsidiaries or affiliated companies DHL Global Forwarding (UK) Limited, DHL Management (Schweiz) AG, DHL Global Forwarding (China) Co. Ltd. and DHL Global Forwarding (Hong Kong) Limited is organised into four operating divisions, namely Mail, Express, Global Forwarding/Freight and Supply Chain/Corporate Information Solutions[18].

(21) The total revenue of the DPAG group in 2008 was EUR 54.474 billion, out of which EUR 10.585 billion was generated by the air and ocean freight forwarding services.

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16 See http://www.dbschenker.com/site/logistics/dbschenker/com/en/about__dbschenker/key__figures/key_figures_alt.html

17 In order to integrate different activities of the individual branches in the DPAG holding, the trademark Deutsche Post World Net (DPWN) was created.

18 In March 2008, the Logistics Division was dissolved and replaced by the Global Forwarding/Freight and Supply Chain/Corporate Information Solutions division.

The Global Forwarding/Freight division is present in 150 countries and the total number of its employees equalled 41 499 in 2008[19].

2.2.4. Expeditors

(22) Expeditors International of Washington, Inc. (hereinafter "**Expeditors International**") is a global logistics company, with most of its revenue derived from air and sea freight forwarding. It has over 10 000 employees at 226 locations on six continents, and operates through a worldwide network of owned offices and exclusive or semi-exclusive agents[20].

(23) Expeditors Hong Kong Ltd. (hereinafter "**Expeditors HK**") was established in 1985 in Hong Kong and its principal business activity is the global logistics management, including international freight forwarding and consolidation, for both air and ocean freight. The annual turnover of Expeditors HK in 2007 was approximately EUR [21].

(24) Expeditors HK is […] wholly owned by Expeditors International.

(25) Expeditors International group reported worldwide revenues of approximately EUR 3.83 billion[22] for the financial year 2008. Over 50% of its revenues is derived from air freight business. Geographically, most of the revenue is generated in the United States and the Far East, where it has substantial operations, especially in China[23].

2.2.5. Hellmann

(26) Hellmann Worldwide Logistics GmbH & Co. KG (hereinafter "**Hellmann**") is a German-based global provider of freight forwarding, warehouse and courier services. The company was founded in 1871 by Carl Heinrich Hellmann in Osnabruck, Germany and continues to be owned by the Hellmann family, namely Jost Hellmann and Klaus Hellmann.[24]

(27) Hellmann group has a network of 341 offices in 134 locations across the globe. It has diversified into various segments of the freight industry – it has launched parcels and freight networks, a recycling operation, a perishable logistics operation and a marketing call centre throughout Western and Eastern Europe. Hellmann's freight forwarding activities are distributed throughout the world with its largest sea freight division located in Europe and its largest air freight operations division located in Asia.[25]

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19 See the Deutsche Post AG 2008 Annual Report, page 65, 67, 73.

20 Transport Intelligence report – Global Freight Forwarding 2008 ("TI report"), September 2008, page 134.

21 Expeditors Hong Kong Ltd 2007 Annual Report, page 5. HKD […] converted into EUR by using the average exchange rate of the European Central Bank for 2007 EUR 1 = HKD 10.6912 (see ECB Monthly Bulletin, July 2008, page S 73).

22 Expeditors International of Washington, Inc.'s 2008 Annual Report, page 16, USD 5 633.878 million converted into EUR by using the average exchange rate of the European Central Bank for 2008 EUR 1 = USD 1.4708 (see ECB Monthly Bulletin, May 2009, page S 73).

23 TI report, page 134 (see above).

24 TI report, page 150.

25 TI report, page 150,158.

(28) Hellmann Worldwide Logistics Ltd. Hong Kong (hereinafter "**Hellmann HK**"), a company indirectly wholly owned by Hellmann and two wholly owned subsidiaries of Hellmann HK, Hellmann Perishable Logistics Ltd., Hong Kong and Hellmann Worldwide Logistics (Shanghai) Ltd., Shanghai are active in the business of freight forwarding out of China (including Hong Kong).

(29) The total turnover of the Hellmann group in 2008 was EUR 2.87 billion, of which EUR 819.6 million were generated by the air freight division (EUR 260.2 million in Europe and EUR 324.8 million in Asia)[26].

2.2.6. Kintetsu

(30) Kintetsu World Express, Inc. (hereinafter "**KWE**") is a Japan based company established in 1948, listed under the First Section of Tokyo Stock Exchange since September 2003. KWE's principal businesses are international and domestic freight forwarding, using transportation provided by airlines and shipping companies, and representation on behalf of air carriers. It ranks among the top companies in the world in provision of international air freight services.

(31) KWE group has 43 affiliated companies worldwide (including Beijing Kintetsu World Express Co., Ltd.) and 11 domestic companies in Japan. It generates about 50 % of its operating income from overseas affiliates.

(32) The total global turnover of KWE group in 2007 was approximately EUR 1.81 billion[27], of which approximately EUR 945 million[28] were generated by the airfreight forwarding services.

2.2.7. Kuehne + Nagel

(33) Kuehne + Nagel (hereinafter "**KN**") is a freight forwarding and logistics group with operations located throughout the world. The ultimate holding company of the KN group is Kuehne + Nagel International AG (hereinafter "**KN International**") with its registered office in Schindellegi, Switzerland. KN International is a company listed on the SWX Swiss Exchange.

(34) The main shareholder of the KN group is Kuehne Holding AG, which holds 55.75% of KN International and is 100% owned by Klaus-Michael Kuehne. The remaining shares of KN International are free floating shares (42.59%) and treasury shares (1.66%).

(35) The KN group (including its operational subsidiaries Kuehne + Nagel Ltd. *(UK)*, Kuehne + Nagel Ltd. *(Shanghai)* and Kuehne + Nagel Ltd. *(Hong Kong)*) has 900 sites and offices in more than 100 countries, employing 51 000 staff[29]. The main

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26 Hellmann Worldwide Logistics GmbH & Co. KG 2008 Annual Report.

27 TI report, page 167, ¥ 292.3 billion converted into € by using the average exchange rate of the European Central Bank for 2007 EUR 1 = 161.25 Japanese yen (see ECB Monthly Bulletin, July 2008, page S 73).

28 TI report, page 169, ¥ 152.311 billion converted into € by using the average exchange rate of the European Central Bank for 2007 EUR 1 = 161.25 Japanese yen (see ECB Monthly Bulletin, July 2008, page S 73).

29 TI report, page 174.

business units of the KN group are (i) Sea and Air Logistics, (ii) Contract Logistics, and (iii) Rail and Road Logistics. Other business activities are Insurance Brokerage and Real Estate. The corporate staff of the KN group are employed in Kuehne + Nagel Management AG (hereinafter "**KN Management**"). KN Management provides management services in the business sectors finance, legal, real estate, and operational for the KN group.

(36) The Group's total turnover was approximately EUR 12.77 billion in fiscal year 2007[30], of which approximately EUR 5.87 billion was generated by the Sea freight division and approximately EUR 2.26 billion by the Air Freight division[31].

2.2.8. Nippon Express

(37) Nippon Express (China) Co., Ltd. (hereinafter "**Nippon China**") (formerly Uni Sky Express Service Co., Ltd.) is an international freight forwarder providing services out of China. Prior to November 2008, the company was a joint venture of Nippon Express (HK) Co., Ltd. (a company wholly owned by Nippon Express Co. Ltd.) and a local, Chinese entity Beijing Kingnav Science & Technology Co., Ltd.

(38) As of November 2008, Nippon Express (HK) Co., Ltd. holds 95% shareholding in Nippon China. Nippon China is therefore part of the Nippon Express group ultimately owned by Nippon Express Co. Ltd. a company based in Japan and active in air/ocean freight forwarding operations throughout the world.

(39) The Nippon Express group operates in 383 locations in 37 countries with 16 427 employees[32]. The group's main area of activity includes the transportation sector and related businesses, such as warehouse management, travel services, custom services and other such services

(40) In 2007 Nippon Express group had a worldwide turnover of approximately EUR 11.8 billion[33].

2.2.9. Panalpina

(41) Panalpina group is a global provider of forwarding and logistics services, specializing in intercontinental air freight and ocean freight shipments. The group, which also includes subsidiaries Panalpina Management AG and Panalpina China Ltd, operates a network of some 500 branches in 90 countries; in a further 60 countries, the group closely cooperates with selected partners. It employs more than 15 000 people worldwide[34].

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30 *Ibid*., TI report, page 174, CHF 20.97 billion converted into EUR by using the average exchange rate of the European Central Bank for 2007 EUR 1 = CHF 1.6427 (see ECB Monthly Bulletin, July 2008, page S 73).

31 TI report, page 176, CHF 9.642 billion and CHF 3.719 billion converted into EUR by using the average exchange rate of the European Central Bank for 2007 EUR 1 = CHF 1.6427 (see ECB Monthly Bulletin, July 2008, page S 73).

32 As at 31 December 2008, […].

33 TI report, page 182. ¥ 1 901.4 billion converted into EUR by using the average exchange rate of the European Central Bank for 2007 EUR 1 = 161.25 Japanese yen (see ECB Monthly Bulletin, July 2008, page S 73).

34 TI report, page 189.

(42) The ultimate holding company of the Panalpina group is Panalpina World Transport (Holding) Ltd (hereinafter "**Panalpina**"). The company has its registered seat in Basel, Switzerland. It is exclusively listed on the SWX Swiss Exchange. The main shareholder of Panalpina is the Ernst Göhner Foundation which holds 43.6% of its shares[35].

(43) The total turnover of Panalpina group was approximately EUR 6.45 billion in 2007. In 2007, the Panalpina group derived 47.5% of its revenues from air freight forwarding, 37.8% from ocean freight forwarding and 14.7% from associated supply chain management services. The most important market for the group was the Asia-Europe-Asia route.[36]

2.2.10. Agility/Geologistics

(44) Public Warehousing Company K.S.C. (hereinafter "**PWC**") is a company publicly listed on the Kuwait Stock Exchange and Dubai Financial Market. The company was established in 1979 by the government of Kuwait under the name "The Public Warehousing Company" as a warehousing and property development company. It was privatised in 1997 and following the privatisation began to widen the scope of its business activities[37]. PWC business was rebranded Agility in 2006.

(45) The Agility group (which includes subsidiaries Agility Logistics Limited and Agility Logistics Limited (Hong Kong)) is present in more than 100 countries with over 550 offices. The group employs 32 000 people. Since 2005, the Agility group has made a number of acquisitions to diversify its business, particularly focusing on freight management services. It acquired, among others, GeoLogistics Corporation in September 2005[38] (hereinafter "**GeoLogistics**"), a US corporation with a global network of over 400 offices, thus significantly bolstering the group's freight forwarding capabilities.

(46) The total turnover of the Agility group in 2007 was approximately EUR 4.1 billion[39], of which 63.8% was represented by Freight & Project Forwarding.

2.2.11. DSV/ABX

(47) ABX is headquartered in Brussels, employs 6 700 full-time employees in 35 countries and operates in 65 other countries through agents, partners and joint-ventures. ABX offers air and sea freight forwarding services globally and international road transport in Europe. It also provides contract logistics solutions in Europe. ABX has a particularly strong presence in Western and

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35 This was the situation as of 31 December 2010.

36 See the Panalpina 2007 Annual Report, page 12, CHF 10.592 billion converted into EUR by using the average exchange rate of the European Central Bank for 2007: EUR 1 = CHF 1.6427 (see ECB Monthly Bulletin, July 2008, page S 73).

37 TI report, page 96.

38 […].

39 TI report, page 97. KWD 1.667 billion converted into EUR by using the exchange rate converter of finance.yahoo.com portal as of 5 June 2009 applying the exchange rate EUR 1 = KWD 0.4082.

Southern Europe. It also operates an extensive and strong network in Asia-Pacific and in the Americas[40].

(48) In August 2006, 3i, a private equity company, third party funds advised by 3i and the management of ABX acquired the shares of ABX LOGISTICS Worldwide SA/NV (hereinafter "**ABX**"), the then intermediate parent company of ABX Logistics International (France) SA (later renamed to ABX LOGISTICS Air & Sea (France) SAS and currently named DSV Air & Sea SAS), from SNCB (Belgian railways). In October 2008, the ABX group was acquired by DSV Air & Sea Holding A/S[41].

(49) The ABX group achieved a consolidated global turnover of EUR 1.8 billion in 2007. Its Air & Sea activities achieved a turnover of over EUR 1.3 billion in 2007 which placed ABX among the top European Air & Sea freight forwarders.[42]

2.2.12. Toll/BALtrans

(50) The BALtrans group was founded in Hong Kong in 1982 as a Hong Kong based freight forwarding company providing freight services mainly to its Hong Kong based customers for shipments to the rest of the world, with foreign services provided by foreign agents. The BALtrans group, through its holding company BALtrans Holdings Limited, was listed on The Hong Kong Stock Exchange from 1992 to 2008.

(51) On 19 December 2007, Toll Group Australia, through its subsidiary Toll (BVI) Limited, made a public cash offer to acquire all the issued shares of BALtrans Holdings Limited. On 9 April 2008, BALtrans Holdings Limited (later renamed Toll Global Forwarding Limited) was privatised becoming a wholly owned subsidiary of Toll Group. It is an investment holding company within the Toll Group. Toll Holdings Limited, the ultimate entity of the Toll Group, is listed on the Australian Securities Exchange.

(52) Toll Global Forwarding (Hong Kong) Limited (formerly BALtrans Logistics (Hong Kong) Ltd.) (hereinafter "**Toll HK**"), one of the Toll Group entities is incorporated and domiciled in Hong Kong. The principal business activities of Toll HK are the provision of air and sea freight forwarding services and investment holding. The global turnover of Baltrans HK (not including that of its subsidiaries) for the financial year 2007 was approximately EUR 115.9 million[43].

(53) The aggregate revenue of BALtrans group for freight forwarding services in the calendar year 2007 was EUR […][44].

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40 DSV press release: http://www.newsdesk.se/view/pressrelease/dsv-and-abx-logistics-join-forces-224035.

41 […].

42 DSV press release: http://www.newsdesk.se/view/pressrelease/dsv-and-abx-logistics-join-forces-224035.

43 BALtrans Logistics (Hong Kong) Ltd.'s 2007 Annual Report, page 6. HKD 1 239 046 448 converted into EUR by using the average exchange rate of the European Central Bank for 2007 EUR 1 = HKD 10.6912 (see ECB Monthly Bulletin, July 2008, page S 73).

44 […].

2.2.13. UPS (including Emery/Menlo)

(54) United Parcel Service, Inc. (hereinafter "**UPS**") is the world's largest package delivery company, a leader in less-than-truckload industry, and a global leader in supply chain management. Its forwarding and logistics business provides services in more than 175 countries and territories worldwide, and includes supply chain design and management, freight distribution, customs brokerage, mail and consulting services[45].

(55) In recent years, UPS group, including its subsidiaries UPS Supply Chain Solutions, Inc. (hereinafter "**UPS SCS**") and UPS SCS (China) Ltd. had its service portfolio extended into heavy air and ground forwarding through two acquisitions. In 2005, the company acquired Menlo Worldwide (formerly Emery) Forwarding, Inc. (hereinafter "**Menlo**"). Following the acquisition by UPS, Menlo merged into UPS SCS, effective 1 May 2005, and thereupon ceased to exist[46]. In the same year, UPS also acquired Overnite Corp., later rebranded as UPS Freight[47].

(56) The headquarters of UPS are located in Atlanta, Georgia, United States. The group employs 425 300 staff, of which over 85% are located in the United States.[48]

(57) In 2008 UPS reported a global turnover of approximately EUR 35 billion[49], of which approximately EUR 4.28 billion were generated by the Forwarding Services & Logistics unit[50].

2.2.14. UTi

(58) UTi Worldwide, Inc. (hereinafter "**UTi**") is a holding company which was incorporated in the British Virgin Islands in January 1995 and its operations are conducted through subsidiaries. UTi and its subsidiary companies including UTi Worldwide (UK) Ltd and UTi Nederland B.V. constitute a global, non-asset based supply chain management business providing supply chain logistics, services and planning and optimization solutions. Their services include freight forwarding, customs brokerage and warehousing services such as the coordination of shipping and the storage of raw materials, supplies components and finished goods.

(59) UTi reported worldwide turnover of approximately EUR 3.21 billion[51] for its financial year ended January 31, 2008, of which approximately 38% accounted for the airfreight forwarding services[52].

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45 United Parcel Service, Inc.'s 2007 Annual Report, page 1 of the 10-K form.

46 […].

47 United Parcel Service, Inc.'s 2007 Annual Report, page 3 of the 10-K form.

48 TI report, page 225.

49 United Parcel Service, Inc.'s 2008 Annual Report, AR-6 form, USD 51.486 billion converted into EUR by using the average exchange rate of the European Central Bank for 2008 EUR 1 = USD 1.4708 (see ECB Monthly Bulletin, July 2009, page S 73).

50 United Parcel Service, Inc.'s 2008 Annual Report, USD 6.293 billion converted into EUR by using the average exchange rate of the European Central Bank for 2008 EUR 1 = USD 1.4708 (see ECB Monthly Bulletin, July 2009, page S 73).

51 […].USD 4.4 billion converted into EUR by using the average exchange rate of the European Central Bank for 2007 EUR 1 = USD 1.3705 (see ECB Monthly Bulletin, July 2008, page S 73).

52 UTi Worldwide Inc.'s 2008 Annual Report, page 4.

2.2.15. Yusen Shenda

(60) Yusen Shenda Air & Sea Service (Shanghai) Ltd. (hereinafter "**Yusen Shanghai**") was established in 2002 as a joint venture of Yusen Air & Sea Service (HK) and Shanghai Shenda IMP & EXP Co., Ltd. Yusen Shanghai is principally engaged in the business of international air & sea freight agency services.

(61) In 2007, Yusen Shanghai achieved a worldwide turnover of approximately EUR 60.6 million[53].

(62) Yusen Shanghai is part of the group owned by Yusen Air & Sea Service Co., Ltd. (hereinafter "**Yusen Japan**").The principal shareholder of Yusen Japan is Nippon Yusen Kabushi Kaisha with a 59.68% shareholding with the remaining shares held mainly by financial institutions and financial investors. Yusen Japan group is active in the business of freight forwarding, in particular by air.

(63) The global turnover of the Yusen Japan Group in the financial year 2007-2008 was approximately EUR 1.16 billion[54]. More than 75% of the Yusen Japan group turnover was generated in the business segment of international air freight forwarding. In addition, the group is active in sea freight forwarding (approximately 18% of the group's total turnover) and to a minor extent in logistics and warehousing services[55].

2.3. Description of the sector

2.3.1. The supply

(64) Freight forwarding services can be provided by air, sea or/and land. The infringements covered by this Decision relate only to the provision of freight forwarding services by air. The airlines, which are also referred to as carriers, provide the aircraft for the physical transportation of the goods by air. To some extent, the airlines can also organise the transportation of the goods to and from the aircraft, which is predominantly done by road and/or rail. However, this transportation to and from the aircraft and the required organisational elements are usually undertaken by freight forwarders.

(65) Freight forwarders act as intermediaries between the carriers and the sender (the shipper) and/or the recipient (or consignee) of the goods. Freight forwarders follow a multitude of different business models. Whereas smaller players may focus solely on a certain type of logistics service, such as transportation by truck, major international players may offer an integrated freight forwarding service for the organisation of the entire transportation chain, which may include elements of transportation by land, ocean and air. In this context, freight forwarders often provide door-to-door logistics solutions.

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53 Yusen Shenda Air & Sea Service (Shanghai) Ltd.'s 2007 Annual Report, page 4. RMB 631 051 400.42 converted into EUR by using the average exchange rate of the European Central Bank for 2007 EUR 1 = RMB 10.4178 (see ECB Monthly Bulletin, July 2008, page S 73).

54 Yusen Shenda Air & Sea Service (Shanghai) Ltd. 2008 Annual Report, ¥ 187.518 billion converted into EUR by using the average exchange rate of the European Central Bank for 2007 EUR 1 = 161.25 Japanese yen (see ECB Monthly Bulletin, July 2008, page S 73).

55 […].

(66) The prevailing activity of freight forwarders in the air freight forwarding segment is the so-called consolidation. Under this business model, the freight forwarders acquire the freight space from the air lines and subsequently attempt to reach an optimal mix of the freight shipped on behalf of their customers by trying to find a compromise between its size and weight.[56] In the ideal case, they manage to use all the available space and tonnage by mixing very dense shipments with the volumetric freight.

(67) While freight forwarders often do not have their own transportation fleets and rather utilise the capacity available from transport providers, this is not always the case. Some freight forwarders may act as operating carriers with their own aircraft. Freight forwarders may also engage in capacity block booking enabling them to charter the entire capacity of an aircraft for a certain period or trade lane. These charters are often undertaken jointly by several freight forwarders.

(68) Freight forwarding services are worldwide in scope with global actors located all over the world. The density of lanes follows the frequency of economic contacts between the regions. By far, the most intensive trade flows follow the axis Asia-Europe-North America.[57]

2.3.2. The demand

(69) Customers of freight forwarding services, or shippers, may vary greatly in size and sophistication, ranging from individuals sending single shipments for private purposes to large multinational companies that use freight forwarders for their entire supply chain and have continuous and complex logistics requirements. The nationality of the customers differs as well, as it reflects the globalized characteristics of the freight forwarding sector. One customer can, according to its economic needs, demand freight forwarding services in several countries. The different size and needs of customers are then reflected in the contracts the customers conclude with freight forwarders.

(70) Freight forwarders' customer structure can be divided into two categories depending on whether the freight service charges are billed at origin (prepaid shipments) or at destination (collect shipments). Prepaid means that the charges for freight are borne by the shippers at origin. Collect means that the freight payment is collected from the consignee at the destination location.

2.4. Inter-state trade

(71) Freight forwarding is a cross border service the aim of which is to convey products that are traded internationally, thus providing one of the essential elements for realizing the flow of traded goods today. International trade includes trade between Member States of the Union, between Member States of the European Economic Area and to and from the European Economic Area and third countries. Consequently, international freight forwarding has the potential to affect trade between Member States. From information received from the parties, it is apparent

[56] The overall characteristic of the freight is determinant in this regard. On the one hand, there is freight of a very high density (heavy but small) and on the other hand there is freight, which is very bulky, but light.

[57] […].

that many of the freight forwarders that are addressees of this Decision were active in providing freight forwarding services in all or nearly all of the EEA Member States.[58] In addition, customers of the freight forwarding services concerned by this Decision were established in the European Economic Area.

3. PROCEDURE

3.1. Immunity application

(72) The Commission services received on […] an application for a marker/immunity from fines under points 14 and 15 of the 2006 Commission notice on immunity from fines and reduction of fines in cartel cases (hereinafter "the Leniency Notice").[59] It was received from lawyers acting on behalf of Deutsche Post AG, Deutsche Post Beteiligungen and Exel Ltd. and its subsidiaries and affiliates including the DHL Global Freight Forwarding business (hereinafter "Deutsche Post") […]. The Commission granted Deutsche Post conditional immunity pursuant to point 8 (a) of the Leniency Notice by decision of 24 September 2007.

(73) After the Commission's decision to grant conditional immunity Deutsche Post continued to cooperate with the Commission […].

3.2. Inspections

(74) On 10-12 October 2007, the Commission carried out unannounced inspections pursuant to Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Article 81 and 82 of the Treaty establishing the European Community (hereinafter " Regulation 1/2003") at the premises of the following freight forwarders: Eagle (UK), Kuehne & Nagel (UK), Schenker (Germany) and Mahe Freight (Denmark). An unannounced inspection was also carried out at the premises of FEDESPEDI (the Italian association of freight forwarders).

3.3. Leniency applications

(75) Subsequent to the inspections seven leniency applications were filed.

(76) On […] Deutsche Bahn AG and its subsidiaries, in particular Stinnes AG and Schenker AG, applied for leniency […].

(77) On […] PWC[60] on behalf of the group applied for leniency […].

(78) On […] ABX[61] applied for leniency on behalf of all other legal entities which are part of the undertaking to which ABX Spain belongs, […].

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58 http://www.dhl.com/en.html, http://www.dbschenker.com/site/logistics/dbschenker/com/en/start.html, http://www.ups.com/ etc.

59 OJ C 298, 8.12.2006, page 17.

60 The application for leniency was filed via the UK subsidiary Agility Logistics Limited which was the addressee of the first request for information. Agility Logistics Limited submitted the application on behalf of itself and the group of which it forms part.

(79) On […] CEVA Group Plc. and Eagle Inc. applied for leniency […].

(80) On […] Nippon Express Co., Ltd. applied for leniency.

(81) […].

(82) On […] Yusen Air & Sea Service (Europe) B.V. on behalf of the whole Yusen group, applied for leniency […].

(83) The Commission has addressed several Article 18 requests to the addressees of this Decision and to third parties.

(84) The Commission addressed on 5 February 2010 letters to Deutsche Bahn AG, PWC, CEVA and Yusen informing them, pursuant to point 29 of the Leniency Notice, of its intention to apply a reduction of a fine within a specified band as provided for in point 26 of the Leniency Notice following their applications for leniency.

(85) On 5 February 2010 the Commission addressed letters to ABX and Nippon informing them that the evidence submitted by those undertakings did not constitute significant added value within the meaning of the Leniency Notice and that the Commission therefore did not intend to grant any reduction of fine to those undertakings.

(86) On 5 February 2010, the Commission initiated proceedings in this case and adopted a Statement of Objections

(87) The Statement of Objections was notified on 5 February 2010 to the following 47 addressees:

(1) DSV Air & Sea SAS

(2) Agility Logistics Ltd (UK)

(3) Agility Logistics Limited (Hong Kong)

(4) Public Warehousing Company K.S.C.

(5) Beijing Kintetsu World Express Co., Ltd.

(6) Kintetsu World Express, Inc.

(7) CEVA Freight (UK) Limited

(8) CEVA Freight Shanghai Limited

(9) EGL Inc.

(10) DHL Global Forwarding (UK) Limited

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[61] The application for leniency was filed via the Spanish subsidiary ABX Logistics España S.A. which submitted the application on behalf of itself and the group of which it forms part.

(11) DHL Management (Schweiz) AG

(12) Danzas Zhong Fu Freight Agency Co. Ltd. (currently DHL Global Forwarding (China) Co. Ltd.)

(13) DHL Global Forwarding (Hong Kong) Limited

(14) Deutsche Post AG

(15) Exel Freight Management (UK) Limited

(16) Exel Group Holdings (Nederland) B.V.

(17) DHL Logistics (China) Co., Ltd.

(18) DHL Supply Chain (Hong Kong) Limited

(19) Exel Limited

(20) Expeditors Hong Kong Ltd.

(21) Expeditors International of Washington, Inc.

(22) Hellmann Worldwide Logistics Ltd. Hong Kong

(23) Hellmann Worldwide Logistics GmbH & Co. KG

(24) Kuehne + Nagel Ltd. (UK)

(25) Kuehne + Nagel Management AG

(26) Kuehne + Nagel Ltd. (Shanghai)

(27) Kuehne + Nagel Ltd. (Hong Kong)

(28) Kuehne + Nagel International AG

(29) Nippon Express (China) Co., Ltd.

(30) Panalpina Management AG

(31) Panalpina China Ltd

(32) Panalpina World Transport (Holding) Ltd

(33) Schenker Limited

(34) Schenker AG

(35) Schenker China Ltd.

(36) Schenker International (H.K.) Ltd.

(37) Deutsche Bahn AG

(38) Toll Global Forwarding (Hong Kong) Limited

(39) Toll Global Forwarding Limited

(40) UPS Supply Chain Solutions, Inc.

(41) UPS SCS (China) Ltd.

(42) UPS SCS (Asia) Ltd.

(43) United Parcel Service, Inc.

(44) UTi Worldwide (UK) Ltd.

(45) UTi Nederland B.V.

(46) UTi Worldwide Inc.

(47) Yusen Shenda Air & Sea Service (Shanghai) Ltd.

(88) The addressees had access to the Commission's investigation file in the form of CD-ROM copy. With the CD-ROM, the undertakings received a list specifying the documents contained in the investigation file (with consecutive page numbering) and indicating the degree of accessibility of each document. In addition, the undertakings were informed that the CD-ROM gave the parties full access to all the documents obtained by the Commission during the investigation, except for business secrets and other confidential information and parts of the file which are only 'accessible at the Commission's premises'. All parties made use of their right to access these parts at the Commission's premises.

(89) All parties replied to the Statement of Objections and participated[62] in an Oral Hearing which took place on 6 - 9 July 2010.

4. DESCRIPTION OF THE EVENTS

(90) In Sections 4.1 to 4.4, each infringement will be individually discussed. Notwithstanding the undertakings' sometimes varying degree of involvement, the following common elements can be identified:

(a) Most of the addressees were involved in several infringements covered by this Decision;

(b) All infringements related to the same industry and covered air freight forwarding services only[63];

[62] Except for Toll Global Forwarding Limited.

[63] Unlike in case COMP 39258 Airfreight, which related to the collusion between air carriers, the present case involves exclusively anticompetitive arrangements between the freight forwarders which operate downstream of airlines.

(c) The cartel members concerted and agreed on surcharges imposed due to changing conditions on the market, in the case of each infringement;

(d) The coordinated approach was similar on each infringement, namely first, the undertakings agreed whether to apply a surcharge and second, they discussed the levels of the surcharges and/or the timing of the introduction;

(e) In all the infringements the undertakings discussed the implementation of the agreed surcharges on the market.

(91) The following undertakings were in the following periods parties to the individual infringements mentioned in Recital (90) and are the addressees of this Decision:

Table 1:

Parties to the individual infringements

	NES (New Export System) *Description* - exports out of the UK to third countries outside the EEA *Infringement* - agreement on the imposition and on the level of the surcharge - monitoring of the implementation of the surcharge	**AMS (Advanced Manifest System)** *Description* - exports out of the EEA to the US *Infringement* - agreement not to compete - agreement on the introduction of a surcharge and exchange of pricing information - monitoring of the implementation of the arrangements	**CAF (Currency Adjustment Factor)** *Description* - exports out of China to EEA *Infringement* - agreement on a change of the quotation of contracts and on an imposition and level of a CAF - monitoring of the implementation of the agreement	**PSS (Peak Season Surcharge)** *Description* - exports out of South China *Infringement* - agreement on the introduction of a PSS and its timing - exchange of pricing information - monitoring of the implementation of the arrangements
DHL	X (1 October 2002 - 10 March 2003)	X (19 March 2003 - 19 August 2004)	X (27 July 2005 - 13 March 2006)	X (9 August 2005 - 21 May 2007)
Eagle	X (1 October 2002 - 10 March 2003)		X (27 July 2005 - 13 March 2006)	
Hellmann				X (6 December 2005 - 21 May 2007)

Emery/Menlo (UPS)	X (1 October 2002 - 10 March 2003)			
Kuehne & Nagel	X (1 October 2002 - 10 March 2003)	X (8 April 2003 - 19 August 2004)	X (27 July 2005 - 13 March 2006)	X (9 August 2005 - 21 May 2007)
BAX	X (1 October 2002 - 10 March 2003)		X (27 July 2005 - 13 March 2006)	
Geologistics (Agility)		X (19 March 2003 - 19 August 2004)		X (9 August 2005 - 21 May 2007)
Exel	X (1 October 2002 - 10 March 2003)	X Exel Freight Management (UK) Limited (25 March 2003 - 19 August 2004) Exel Group Holdings (Nederland) B.V. (21 October 2003 – 19 August 2004)	X (27 July 2005 - 13 March 2006)	X (9 August 2005 – 13 January 2006)
ABX		X (19 March 2003 - 19 August 2004)		
Panalpina		X (19 March 2003 - 19 August 2004)	X (27 July 2005 - 9 December 2005)	X (9 August 2005 - 21 May 2007)
UTi		X UTi Worldwide (UK) Ltd (19 March 2003 - 21 October 2003) UTi Nederland B.V. (21 October 2003 - 19 August 2004)		
UPS		X (19 March 2003 - 21 October 2003)	X (27 July 2005 – 13 March 2006)	

Schenker		X (25 March 2003 - 19 August 2004)	X (29 July 2005 - 13 March 2006)	X (3 September 2005 - 23 June 2006)
Baltrans (Toll)				X (9 August 2005 - 21 May 2007)
Expeditors				X (21 September 2005- 23 June 2006)
Nippon			X (27 July 2005 – 31 October 2005)	
Kintetsu			X (27 July 2005 - 13 March 2006)	
Yusen			X (27 July 2005 – 31 October 2005)	

4.1. New Export System (NES)

(92) The principal evidence relied on consists of documents obtained during the inspections, replies to requests for information, documents submitted by applicants under the Leniency Notice, as well as corporate statements by them.

(93) The following undertakings were party to the infringement:

Table 2:

Parties to NES infringement

Company	**Period**
DHL	1 October 2002 - 10 March 2003
Kuehne & Nagel	1 October 2002 - 10 March 2003
Eagle	1 October 2002 - 10 March 2003
Emery (UPS)	1 October 2002 - 10 March 2003
BAX	1 October 2002 - 10 March 2003
Exel	1 October 2002 - 10 March 2003

4.1.1. General remarks

(94) In mid-2002 the UK customs authorities introduced the New Export System ("NES"), a pre-clearance system which was created in relation to both air and ocean freight and concerned exports from the United Kingdom, namely goods that were transported out of the United Kingdom to countries outside of the European Economic Area. The New Export System enabled exporters to comply electronically with the UK requirement to submit a declaration for all goods exported from the United Kingdom to a destination outside the European Economic Area. NES was put in place at all UK maritime ports on 27 October 2002 and at all UK airports on 31 July 2003.

(95) In the same period, several freight forwarders met and concerted on the application of NES in order to eliminate competition between them. They agreed to introduce a surcharge to cover costs related to NES declarations. They further agreed on the level and timing of the introduction of the surcharge as well as monitoring its implementation.

(96) The main forum for discussing the NES between competitors was the so called Gardening Club (hereinafter also referred to as "GC"), an informal association of freight forwarders acting under cover of a social group, ostensibly sharing the same interest for gardening[64].

(97) The infringement was focused on the lane from the United Kingdom to destinations outside the European Economic Area and concerned air freight forwarding only.

4.1.2. Nature of the illicit contacts between competitors concerning the NES

(98) In the Autumn of 2002 the Gardening Club members met in Staines, United Kingdom, in a restaurant called Mamma Mia's, at which time they reached a price fixing agreement concerning NES. Firstly, the matter discussed was whether the freight forwarders should introduce a fee related to NES. Secondly, once the competitors had agreed to impose a surcharge, the GC members defined three categories of clients and agreed upon the level of the fee to be charged to each group. Finally, it was agreed at the meeting that they would apply the strategy of pre-entry, meaning that a fee would be introduced for air freight forwarding services on the same date as the UK authorities put into place the NES for ocean freight forwarding services (that is to say, 28 October 2002), even though the UK authorities' official launch of the NES for airfreight was not until 31 July 2003.

(99) After the initial agreement, the GC members stayed in close contact by email and telephone in order to keep each other informed about developments, in particular the implementation of the price agreement reached on the NES. Such contacts included notably customers' reaction to the charge or cases of non-application of the tariffs agreed.

64 […].

4.1.3. Description of the events

(100) The origin of the Gardening Club meeting where the NES surcharge was to be discussed can be traced back to Eagle […]. In his personal notes taken during a British International Freight Association ("BIFA") meeting on 11 September 2002 he noted down in relation to the NES surcharge that the Gardening Club should meet in order *"to discuss costs/charging"*.[65] The meeting was organised subsequently and in an internal […] email of 30 September 2002 it was stated that the meeting was to *"discuss possible suggested pricing"*.[66]

(101) The Gardening Club meeting took place over lunch on 1 October 2002, at Staines, United Kingdom. The following undertakings attended the meeting:

(a) Eagle […]

(b) Kuehne & Nagel […]

(c) Exel […]

(d) Emery […]

(e) DHL […]

(f) BAX […].[67]

(102) The undertakings attending the meeting agreed on the amounts of the NES surcharge to be charged on the market according to specific types of customers. Detailed results of the meeting were summarized in a coded email sent by Eagle […][68] on 10 October 2002 on the "new prices for asparagus"[69], and stated as follows: *"[A]s discussed and agreed..[..] Standard Asparagus: full tariff GBP 25-00 first two asparagus foc after which a charge of between GBP 2-50 and GBP 4-50 will apply; Contractual Asparagus: guideline tariff GBP 14-00 to GBP 16-00 note first two asparagus foc after which a charge of between GBP 1-00 and GBP 2-00 will apply; Commercial Bulk Quantity: commercial to apply subject to conditions as discussed"*. The email was sent to Exel […], Emery […], […], Kuehne & Nagel […] and DHL […] with a request to forward it to BAX […].[70]

(103) The Gardening Club members knew that they were not supposed to be discussing or reaching agreements on the level of the NES fee so they chose to use code words[71].

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65 […].

66 […].

67 […].

68 […] was in charge of the preparation of the summary of the meeting as is shown by the wording of the email as well as by […]'s personal notes taken on 4 October 2002 which contain under "things to do" a task "Garden Club rates".

69 NES tariffs.

70 […].

71 […]. *Standard asparagus* were NES fees for standard customers (also called as smaller or one-off shippers). *Contractual asparagus* were NES fees for the majority of freight forwarding customers who negotiate terms with the forwarders but who do not necessarily issue tenders for business (also known as non-contract customers). *Commercial Bulk Quantity* were NES fees for largest multinational customers (also known as MNC or contract customers). […].

Awareness of the illegality of the behaviour in which the GC members were engaging is also demonstrated by an email from […] (DHL) to […] (BAX) which refers to the fact that the levels set for NES in the email from […] of Eagle from 10 October 2002 are as agreed at the Staines meeting and concludes with reference to the fact that *"this message will self destruct in 2 minutes"*.[72] […].[73]

(104) The conclusions from the meeting were also confirmed by an internal […] report on the meeting sent by […] on 3 October 2002.[74] He informed that an agreement was concluded on the amount of the NES surcharge with competitors at DHL, Emery, Eagle, Kuehne & Nagel, Exel and BAX. The email reads as follows:

"*Following a meeting with my counterparts* […]*, the consensus was that a tariff charge of 25£ for one-off shippers was fair. For the 80% of our customers who are non-contract, a figure of 15£ was thought achievable and for MNC's or contract customers, 8£. I have to say that it was also thought that many agents are unprepared for NES and some are quoting figures without thought, i.e. between 1 and 3 £. The agents present have all agreed to contact customers to get the charges implemented and will share limited feedback at our next meeting scheduled for early November."*[75]

(105) A similar message was also disseminated in an internal […] email sent by […] on 4 October 2002.[76] In a further internal […] email sent on 14 October 2002 […] confirmed that the undertakings attending the GC meeting agreed to start charging from 28 October 2002.[77]

(106) Following the meeting, the GC members implemented in their respective companies the tariffs agreed. […] [78] […][79].[…][80][…].[81] Part of the conclusions from the meeting on 1 October 2002 was also the agreement to charge the NES surcharge for both ocean and air freight movements starting from 28 October 2002 and therefore not to follow the phased approach indicated in Recital (94). This is confirmed by an internal […] email sent by […].[82]

(107) The GC further monitored the implementation of the agreement reached on NES tariffs and also discussed actual and potential disputes between some freight forwarders. This monitoring exercise was aimed at ensuring that the agreement reached at the meeting on 1 October 2002 was respected. Cases where pressure was applied to ensure adherence to the agreement are discussed in Recitals (108)-(111).

(108) In mid-October 2002 rumours spread that Emery intended to charge a basic tariff of GBP 8.00 and only starting from November. Eagle […] demanded an explanation of

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72 […].
73 […].
74 […].
75 […].
76 […]. The email referred to "a broad agreement reached within the forwarding community".
77 […].
78 […].
79 […].
80 […].
81 […].
82 […].

this from Emery […] who confirmed Emery's willingness to support its competitor.[83] […] further explained that Emery had difficulties with one particular customer who refused to pay at all as it claimed that BAX and another forwarder would not be implementing the fee until April 2003. […] sent the email also to BAX […] asking for explanations. Eagle […] further forwarded this email exchange to Exel […] and Kuehne & Nagel […] for information, adding rumours of DHL offering GBP 5.00 per entry to another client, and asking their advice[84].

(109) At the same time, […] of DHL was informed by one of his colleagues that Kuehne & Nagel did not intend to charge anything for NES. […] therefore contacted Kuehne & Nagel […] in order to get his standpoint.[85] […] admitted that his company did not have the intention to charge any NES fee for airfreight until January 2003, but in light of the pressure from other freight forwarders he would review this decision. He also assured […] that Kuehne & Nagel were not looking to take any commercial advantage of not charging the NES surcharge for airfreight forwarding services.[86] In the following days Kuehne & Nagel […] informed DHL […] that they would introduce the NES surcharge from 11 November 2002.[87]

(110) The same issue was also raised in an email sent by Exel […] to Eagle […], Kuehne & Nagel […], Emery […], DHL […] and BAX […] on 4 November 2002. […] raised concerns about the non-implementation of the agreement with regard to Kuehne & Nagel.[88] Kuehne & Nagel […] explained that the delay in implementing the NES surcharge on the agreed date was due to technical problems and that the charge would be imposed during November 2002.[89] This email is yet another typical example of the use of the code words within the GC and it reads as follows:

"a recent call from a representative of one of the largest market gardens to the velcro establishment pointed out an apparent late release of said marrows

i would appear that the sprinkler system in some of V outlets was under repair which has caused a delay in releasing the new crop.

new equipment is on its way to enable fresh marrows and baby courgettes to hit the shops this month.

up to my elbows in fertilizer

practising horticulturist edwards"

(111) Another case of market monitoring among the members of the GC concerned […]. On 1 November 2002 Eagle […] informed […], Exel […] and DHL […] in a coded email of the rumours that […] was not applying the agreed tariffs. At this time he

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83 […].
84 […].
85 […].
86 […].
87 […].
88 […].
89 […], fresh marrows and baby courgettes referred to the NES fee.

was wondering whether this was due to the fact that nobody had informed […][…][90], who were absent from the meeting, about the meeting's outcome or whether it was due to the fact that […] was not high enough in the company hierarchy to be able to influence company strategy[91]. In reply, Exel […]informed the others that he had spoken to […], who agreed to follow the common strategy.

(112) In an internal […] email dated 13 November 2002, […] informed about further contacts […] in relation to the NES surcharge in order to persuade his colleagues about the imposition of the surcharge. According to the email, the undertakings had confirmed that all of them were charging the NES surcharge in the market.[92] Hence, the existence of the common agreement on the NES surcharge, reached during the Gardening Club meeting, was often used by the individuals who attended the meeting to persuade their respective internal organisations about the imposition of the surcharge to their customers.[93]

(113) An internal […] email of 10 March 2003 states *"NES – there is a cartel working on the top 10 forwarders"*. The email further states that the amounts being charged were as per the initial agreement.[94] No further relevant documentary evidence has been found beyond this date.

(114) The Commission therefore considers that the cartel continued at least until 10 March 2003, namely the last date on which the existence of the cartel was confirmed. Most of the undertakings indeed implemented this agreement in the market in the weeks following the meeting of 1 October 2002 (Recitals (108)-(112)). Furthermore, there is no evidence that the parties openly and unequivocally distanced themselves from the cartel prior to 10 March 2003.

4.1.4. Assessment of the parties' arguments

(115) Kuehne & Nagel claims that it did not join the agreement reached at the meeting on 1 October 2002. This is according to Kuehne & Nagel confirmed by an internal […] email, according to which Kuehne & Nagel had the intention to charge the NES starting from January.[95] Kuehne & Nagel further submits that it did not join the agreement until 4 November 2002, the date when […] indicated in his email[96] that Kuehne & Nagel joined the agreement.[97]

(116) No evidence on the file indicates that Kuehne & Nagel did not want to join the agreement or even distanced itself from it. Kuehne & Nagel attended the GC meeting on 1 October 2002 where the necessary arrangements were agreed among the members and it did not raise any objections. The company therefore knew the conclusions from the meeting and could use this when planning its business conduct. One of the possible decisions could have therefore been to cheat on the agreement

90 […]
91 […].
92 […]
93 […].
94 […].
95 […].
96 […].
97 […].

and to implement it later than its competitors. This could be then used by Kuehne & Nagel as a commercial advantage against its competitors, however it does not mean that the company distanced itself from the agreement. Moreover, the evidence shows that Kuehne & Nagel agreed to implement the agreement immediately after it was contacted by DHL in this regard and it stated that late implementation was only caused by technical problems on the side of Kuehne & Nagel.[98]

(117) Kuehne & Nagel further submits that the company did not disclose its intended level of the NES surcharge to the other members of the GC. The only instance, when such disclosure was mentioned, was the internal […] email, in which […] states that Kuehne & Nagel will charge a fee similar to that charged by […].[99] However, Kuehne & Nagel submits that […]'s email is not credible, as he often fabricated contacts with competitors.[100]

(118) It should be noted first that the GC members reached an agreement on the level of the fee during the meeting on 1 October 2002 and the argument of Kuehne & Nagel that it did not disclose its intended level of the NES fee is immaterial in that respect. Kuehne & Nagel attended the cartel meeting of 1 October 2002 and it did not voice any disagreement either at that time or at the time when they received the email from Eagle […] with the conclusions from that meeting. Kuehne & Nagel contests the evidence regarding monitoring of the implementation of the fee agreed on 1 October 2002. Contrary to Kuehne & Nagel's claims, there is no reason to doubt the credibility of the internal […] email sent by […] that provides evidence of a monitoring measure involving Kuehne & Nagel. As the evidence referred to in Recitals (109)-(110) shows, Kuehne & Nagel had assured the GC members that it will implement the NES fee in November 2002 (this means only slightly later than the original agreement). The email that Kuehne & Nagel contests was sent on 14 October 2002, namely two weeks after the GC meeting and 4 days after […] received […]'s email summarizing the levels of the NES surcharge agreed at the meeting. When […] therefore refers to *"soundings with other agents"* and to the fact that all *"have indicated they will be charging at similar rates to ours"*, it can be assumed that he refers to the contact he had with his competitors during the GC meeting on 1 October 2002. This is also confirmed by the […].[101] To discredit the email of […], Kuehne & Nagel refers to discussion in the file on evidence concerning another infringement[102], not the NES cartel. […][103].

(119) DB claims that BAX did not enter into an agreement on the level of the NES surcharge at the 1 October 2002 meeting, as its representative left before any specific discussion regarding the NES surcharge took place. Moreover, according to DB, BAX did not accede to the pricing agreement.[104]

(120) DB confirms that […] of BAX attended the meeting of 1 October 2002. The SO referred to several pieces of evidence, which clearly indicate that the purpose of the

98 […].
99 […].
100 […].
101 […].
102 […].
103 […].
104 […].

meeting was to discuss the NES pricing and it must have been known to the participants prior to the meeting.[105] All the participants (including […] must have therefore attended the meeting with the intention to discuss/agree on the NES surcharge. This is also confirmed by […].[106] In addition, there is no evidence to show that […] left the meeting early as DB claims, or that he did not attend the relevant part of the meeting. Furthermore, following the meeting, […] received […]'s email containing the levels of the NES surcharge agreed during the meeting which was forwarded to him by […] of DHL.[107] He did not raise any concerns or objections. On the contrary, he even asked, whether there were *"any updates/agreements on the gardening front between the fellow gardeners".*[108] This clearly shows that BAX did not have any intention to distance itself from the agreement, but was even interested to find out, whether further agreements were reached during the meeting.

(121) DB submits that […] held the position of […] at the time of the infringement and had no pricing authority within BAX UK. According to DB, […] exceeded powers entrusted to him when discussing the NES pricing. DB therefore claims that following the 1 October 2002 meeting, he was told by his superior not to engage in any further contacts and not to pass on any information received during this meeting.[109]

(122) The evidence on the file indicates that it is not true that […] did not have any pricing authority within BAX. In an […] email dated 11 October 2002, he makes specific suggestions regarding the NES fees to be charged by BAX. […].[110][…] which states among others *"It appears the "Garden Club" in London agreed £25 but that has been discounted locally to £15."*[111] Moreover, […] disclosed the existence of the GC […] and even mentioned that he will discuss the NES pricing with the competitors prior to the meeting on 1 October 2002.[112] […]. Finally, an employee does not have to be authorized specifically by its employers to represent it in cartel meetings that are illegal, clandestine activities[113], it suffices that the representative is authorised to act for the product or service in question. Furthermore, even an alleged ignorance of the facts or the law on the part of the employer or managers cannot relieve the undertaking of its responsibility for the unlawful acts carried out via its representatives.[114]

(123) According to […], the NES prices, which were internally implemented by […].[115]

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105 […], ID 2961, page 179.
106 […].
107 […].
108 […].
109 […].
110 […].
111 […].
112 […].
113 See for example Case T-78/06 *Armando Alvarez v Commission (not yet published)*, paragraph 39.
114 Joined Cases 100/80 to 103/80 *Musique diffusion française e.a. v Commission*, [1983] ECR 1825, paragraph 97; Case T-9/99 HFB and others v Commission, [2002] ECR II-1487, paragraph 275; Case T-15/99 Brugg Rohrsysteme v Commission, [2002] ECR II-1613, paragraph 58; Case T-236/01 Tokai Carbon v Commission, [2004] ECR p.II-1181, paragraph 277.
115 […].

(124) An email sent by […] of Exel to […] of Kuehne & Nagel, […] of Emery, […] of DHL and […] of BAX, where he was complaining about Kuehne & Nagel not implementing the NES fee, indicates that he was more than satisfied with the level of the NES applied by BAX. The relevant part of the email reads as follows: *"I understand that the Gardens of BAX had a late summer and are growing nicely now […]"*[116] […].[117][…]. Finally, it is noted that as BAX attended the GC meeting, the company was aware of the conclusions from the meeting and therefore also knew the planned market behaviour of its competitors. Pricing information should not be under any circumstances exchanged between undertakings, as competitiors should decide on matters such as setting a new surcharge independently without the kind of discussions that took place in the context of the GC.

(125) DB further claims that a general understanding as to the imposition of the NES surcharge was reached within BIFA in advance of the 1 October 2002 GC meeting.[118]

(126) It is evident that the discussions within BIFA only concerned a possible introduction of the NES surcharge, as the minutes of the meeting only mention that it will be recommended for the members of BIFA to charge for the NES service. However the minutes do not mention any discussions, much less an agreement, on the level of the NES surcharge.[119] This also the reason […] noted during the BIFA meeting that costs and charging needs to be discussed within the GC.[120]The conclusion that the competitors only discussed and agreed on a uniform approach towards the NES charges at the 1 October 2002 GC meeting is also confirmed by the internal […] email[121]of 25 September 2002 […].

(127) According to DB, the Commission did not show any evidence that GC members agreed on the pre-entry strategy for the NES fee. DB further claims that the freight forwarders were either required by law, or through their need to meet certain service standards, to submit airfreight export declarations through the NES from 28 October onwards.[122]

(128) The internal […] email referred to in the SO clearly indicated that the GC agreed that they would all start charging a full NES surcharge from 28 October 2002.[123] This is also confirmed by an email dated 28 October 2002 sent from […] of DHL to […] of Eagle (an employee of […]), in which […] reassured […] that the company is *"sticking to unofficial agreement re tariff and implementation date of today"*.[124] Moreover, it is true that the NES was partly implemented on 28 October 2002 as submitted by DB, however the full implementation by the UK authorities followed from 31 July 2003. The agreement among the competitors therefore enabled them to

116 […].
117 […].
118 […].
119 […].
120 […].
121 […].
122 […].
123 […].
124 […].

coordinate the date of the implementation of the surcharge and to decrease the uncertainty on the market.

4.1.5. Conclusion

(129) The members of the Gardening Club representing Eagle, Kuehne & Nagel, DHL, BAX, Emery and Exel participated in a price fixing agreement and concerted practices in relation to the NES surcharge from 1 October 2002. The members of the Gardening Club engaged in illegal price fixing meeting and email exchanges to reach the agreement. The participants organised the meeting in order to agree on the introduction of the surcharge (Recital (100)), the level of the surcharge (Recital (102)) and the timing of the introduction of the surcharge (Recital (104)).

(130) Following the meeting of 1 October 2002 the parties started to work on the implementation of the agreed tariffs within their respective companies and began to charge customers the NES fee well in advance of the final introduction of the system by the UK authorities (31 July 2003) as per the agreement[125]. Although difficulties in implementing the agreement arose with larger customers, the email exchanges between the parties in October and November 2002 demonstrate the existence of the agreement and the will of the undertakings to implement it. Moreover, to ensure the full implementation of the agreement in the market the undertakings monitored the market in order to discover the cases of non-compliance among the GC members.

4.2. Advanced Manifest System (AMS)

(131) The principal evidence relied on consists of documents obtained during inspections, replies to requests for information, documents submitted by applicants under the Leniency Notice, as well as corporate statements by them.

(132) The following undertakings participated in the infringement:

Table 3:

Parties to AMS infringement

Company	**Period**
DHL	19 March 2003 – 19 August 2004
Schenker	25 March 2003 – 19 August 2004
Geologistics (Agility)	19 March 2003 – 19 August 2004
ABX	19 March 2003 – 19 August 2004
Kuehne & Nagel	8 April 2003 – 19 August 2004
Panalpina	19 March 2003 – 19 August 2004

[125] See above Recitals (106), (108)-(111).

Exel	25 March 2003 – 19 August 2004
UTi	19 March 2003 – 19 August 2004
UPS	19 March 2003 – 21 October 2003

4.2.1. General remarks

(133) Advanced Manifest System (AMS) is a procedure introduced by the US Bureau of Customs and Border Protection (CBP) requiring information in relation to cargo shipments being imported into the United States prior to their arrival. The concept of an advanced manifest system with US customs, namely the requirement by US customs to obtain advance information on goods to be shipped to the United States, has existed since the 1980s, but it did not involve the payment of any fee to freight forwarders.

(134) The system was profoundly amended by the US authorities as a reaction to new security measures after the terrorist attacks of 11 September 2001.[126] The amendment was introduced in two steps, first for ocean freight on 31 October 2002 (often referred to as the 24 Hour Manifest System), then for air freight on 4 March 2004.

(135) The system consists mainly in an advanced electronic transmission of shipment information to US Customs. The relevant information to comply with the AMS requirements is set out by the carriers in their flight manifest. The information must be presented to US Customs prior to arrival at the first port of entry into the US territory. The implementation and enforcement of the AMS by the US customs was carried out in three stages during 2004: 13 August for East Coast US airports of entry, 13 October for Central US airports of entry and 13 December for West Coast US airports of entry. However, introduction of this regulatory requirement by the US customs did not imply any specific monetary obligation towards the authorities although it led to an increase in the costs of the forwarders.

(136) From at least the beginning of 2003 the introduction of the AMS fee by freight forwarders for their customers and its putting into effect was the subject of coordination among a number of freight forwarders.

(137) Evidence on the file demonstrates that the AMS cartel operated from at least 19 March 2003. This is the date when the first FFE/FFI meeting[127] discussing the AMS surcharge took place. The cartel was in force until at least 19 August 2004, when the last FFE/FFI meeting discussing the AMS surcharge of which the Commission is aware took place.

(138) The infringement covered by this part of this Decision relates to freight forwarding services provided on routes from the European Economic Area to the United States.

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126 The procedure became more burdensome compared to the previous practise. More detailed information regarding the sender (such as his name and address) and transported goods (description etc.) had to be transmitted to the US authorities.

127 Freight Forward Europe (Freight Forward International since 2004), was an association of freight forwarders based in Brussels in Belgium. Membership of the association was limited to large freight forwarders only. The FFI no longer exists.

4.2.2. Nature of the illicit contacts between competitors concerning the AMS

(139) A network of bilateral and multilateral contacts was built up from early 2003 onwards involving a number of freight forwarders. The main forum for discussions was the freight forwarders' association FFE (from 1 January 2004 renamed FFI), which concerned about one third of the worldwide air freight forwarding sector.[128] Its members were the biggest players in the freight forwarding sector and FFE/FFI was considered to be a leading association in the sector. All addressees of this Decision (except UPS) were, in relation to the AMS infringement, members of FFE/FFI at the time of the infringement.[129] The agreements and concerted practices of its members (see Recitals (464)-(488) for legal qualification of the AMS infringement) had therefore the power to influence other competitors who were not members of the association.[130] Bilateral and multilateral discussions concerning the AMS were also frequent among competitors outside the FFE/FFI in individual Member States.

(140) The undertakings exchanged information concerning their planned actions connected with the putting into effect of the AMS surcharge that they agreed to introduce, including technical questions. However the freight forwarders did not only discuss technical problems, they also coordinated their pricing behaviour. The contacts concentrated mainly on the question whether to impose any AMS surcharge, which would cover higher costs arising from the amendments to the AMS introduced by the US authorities. The main reason for these contacts was the uncertainty on the market relating to the level of costs that the new obligations might evoke and the way that these costs should be charged to customers.

(141) At the FFE meeting on 19 March 2003 an agreement was reached among competitors to charge the customers for additional workload connected with the putting into effect of the AMS surcharge and its administration. The undertakings further agreed that they should not use this surcharge as a tool for competing with each other. In conclusion, an agreement was reached that an AMS fee should be applied on the market and that this should at least cover freight forwarders' costs connected with the application of the AMS (see Recital (146)).

(142) Further discussions concentrated on an agreement on the possible level of the surcharge. There was a general understanding among the undertakings that a minimum price range should be applied (see Recital (147)).[131] The freight forwarders attempted to agree a uniform charge/range of charges but they did not ultimately succeed in agreeing an exact amount/range. The companies therefore further concerted their market behaviour and exchanged the individual amounts they intended to charge in the market for the fulfilment of the AMS requirements, as well as the charges they began to charge when the AMS procedure was launched (see Recital (146).

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128 […].

129 The only exception was UPS, who was not a member of FFE, but was interested in joining the FFE and applied for membership. Nevertheless, its employees attended certain FFE meetings in 2003.

130 […]. In this respect see a FFI presentation dated 16 November 2004 reporting about the AMS implementation stating *"FFI clearly seen as leader on AMS project by carriers/forwarding community"*.

131 This part of the collusion is in line with the agreement mentioned in Recital (141) not to compete with each other. A possible agreement on a minimum AMS fee/range of fees would prevent any competition among the undertakings.

(143) The content of the discussions was not reflected for the most part in the official minutes of FFE/FFI, as the competitors were aware of the fact that they were not allowed to hold pricing discussions during the meetings. This is confirmed by some emails reporting on the results of the meetings (see Recital (152)).

4.2.3. Description of the events

(144) The AMS fee was discussed primarily within FFE/FFI. The topic was discussed during regular meetings and phone calls of the FFE/FFI Airfreight Committee and at CEO meetings[132].

(145) The AMS was for the first time discussed within FFE during a meeting of the FFE/FFI Airfreight Committee on **19 March 2003 in London**. The attending parties were:

(a) Panalpina […]

(b) ABX […]

(c) DHL […]

(d) […]

(e) GeoLogistics […]

(f) UTi […]

(g) UPS […]

(h) Schenker, Exel and Kuehne & Nagel were excused.[133]

(146) The official minutes of the meeting of 19 March 2003 show that freight forwarders agreed two basic rules on how to approach the AMS issue. First, an agreement was reached that *"customers should be charged for the additional costs faced by forwarders on the implementation of additional security measures"*. Under the action points of the minutes it was further stated that FFE agreed that *"FFE should charge the customer for additional work load as a result of the security measures […]"* and that *"FFE should not use the charges as commercial advantage"*.[134]

(147) […], this part of the agreement was an expression of a common will of the undertakings not to use the new surcharge as a tool for competition, "*as it was in none of the forwarders' interest to absorb all or part of these additional costs"*.[135] He further stated that there was a general understanding among the global airfreight heads at the FFE/FFI Airfreight Committee to ensure that a certain minimum range

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132 FFI was governed by the CEOs of the participating companies who met twice a year at the so-called FFI CEO meetings. These meetings mainly concerned strategic plans for the future of the industry.

133 […] (Official minutes of the FFE/FFI Airfreight Committee meeting).

134 […].

135 […].

of AMS fees would be applied when the AMS system was implemented in 2004.[136] […] that this understanding was communicated down to the country airfreight heads at the various companies as guidance in setting their AMS fees locally.[137]

(148) The conclusions from the FFE/FFI Airfreight Committee meeting were then presented by […] of Panalpina during the CEO Committee meeting on 8 April 2003 in Brussels.[138] The presentation contained among others a section called "FFE Action on Advance Airfreight Manifest System", which informed the CEOs about the agreement reached during the meeting of the FFE/FFI Airfreight Committee:

"FFE agreed that:

- the customers should be charged for the additional costs faced by forwarders/logistics providers on the implementation of additional security measures

- FFE should not use the charges as commercial advantage […]."

(149) The conclusions reached at the FFE/FFI Airfreight Committee meeting represented a basic agreement reached among FFE/FFI members. The agreement was an expression of a common will to cooperate and to apply certain rules when setting the surcharge. The basic rule agreed by the parties was a common understanding that the surcharge should at least cover the costs of the putting into effect of the surcharge by individual freight forwarders. This is also confirmed by […], which states that the conclusion not to use the charge as a commercial advantage meant that *"none of the freight forwarders should undercharge their customers since this might lead to certain customers moving to those freight forwarders who were charging very low AMS fees."*[139]

(150) The AMS was further discussed at the following FFE/FFI meetings (see Recitals (151)-(163)). As the basic agreement regarding the introduction and the way of setting the minimum level of the fee had been already reached, the freight forwarders mainly discussed the expected levels of the AMS fee, which they were intending to apply on the market.

(151) The next meeting of the FFE/FFI Airfreight Committee took place on **21 October 2003 in Brussels**. The freight forwarders discussed the expected timing for the adoption of the AMS Bill and exchanged views about the way the information required by the AMS program should be sent to the US customs. They also agreed that forwarders should not be charged by carriers, if the required information were to be sent to customs through carriers and not directly by freight forwarders.[140] Participants at this meeting were:

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136 This statement is supported by the minutes of the FFE/FFI Airfreight Committee meeting of 19 March 2003, see Recital (146).

137 […].

138 […]. The meeting took place in Brussels and was attended by Kuehne & Nagel […], Exel […], ABX […],[…], DHL […], GeoLogistics […], Panalpina […], Schenker […] and UTi […].[…] was excused. […].

139 […].

140 […].

(a) Panalpina […]

(b) ABX […]

(c) DHL […]

(d) Exel […]

(e) GeoLogistics […]

(f) Kuehne & Nagel […]

(g) Schenker […]

(h) UTi […]

(i) […]

(j) UPS […]

(k) FFE […].[141]

(152) The official minutes further mention that the participants at the meeting *"[…] also discussed about charges for the additional security measures required by the future AMS legislation […]"*.[142] According to […] the freight forwarders exchanged the AMS fees they intended to charge for the filing of data required under the AMS procedure. He recalled that the fees proposed by freight forwarders differed substantially. Whereas other FFE/FFI members proposed a USD 40 charge (this fee was similar to the fee levied in ocean freight), he proposed a EUR or USD 15 to 20 charge.[143] This surcharge was, in his opinion, more realistic and he felt it would be easier to convince customers to accept this surcharge in airfreight, where shipments are generally smaller than in ocean freight.[144] This information is also confirmed by […], who recalled […] discussing the idea that all freight forwarders should apply an AMS fee within a set range, however […] stated that the range mentioned by […] was between EUR or USD 8-12 .[145]

(153) A further FFE/FFI Airfreight Committee meeting took place on **24 March 2004 in Basel**. The participating companies were:

(a) Panalpina […]

(b) Schenker […]

(c) ABX […]

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141 […] (Official minutes of the FFE/FFI Airfreight Committee meeting).

142 […].

143 This is also confirmed by an internal […] email sent by […] dated 9 January 2004, in which he informed his colleagues that he had proposed a fee of between 15 and 20 EUR/USD at the last FFI meeting […].

144 […]

145 […].

(d) DHL […]

(e) Exel […]

(f) GeoLogistics […]

(g) Kuehne & Nagel […]

(h) UTi […]

(i) FFI […]

(j) […] was excused.[146]

(154) […] an agreement was reached during this meeting to collect an AMS fee within a reasonable agreed range (15-20 EUR/USD).[147] He also added in an internal […] email that this agreement is not reflected in the official minutes from the meeting because the undertakings were aware that they were not allowed *"to talk pricings"*[sic].[148]

(155) During a CEO Committee meeting which took place on **5 May 2004 in Brussels**, […] of Panalpina gave a presentation on the activities of the FFE/FFI Airfreight Committee. […] informed the participants at that meeting that the Airfreight Committee had also reached agreement that members should be ready to put into effect the AMS system for the entire US region as from 13 August 2004, that is to say, not in the phased approach mentioned in Recital (135).[149]

(156) The ongoing exchanges of the planned levels of the AMS fee are also confirmed by an internal […] email sent by […] on 5 August 2004. In this email he informs about the feedback from various freight forwarders "in regards to the fee they will charge to there customers". He complains about their inability to agree a uniform fee even within their own organisation.[150]

(157) On the other hand, an internal UTi email sent on 3 August 2004 indicates that the members of the FFI discussed a minimum level of AMS fee. According to this email, UTi intended to *"follow the FFI guideline"* to charge EUR 8.[151] The same level was also indicated in an internal email of […] sent on 5 August 2004. This email refers to a contact with Exel, according to which an AMS fee of EUR 8 was agreed among *"major global players"*.[152]

(158) The AMS procedure was launched by the US customs on 13 August 2004 and this was also the date when the freight forwarders started to charge their customers for the AMS filing. On 19 August 2004 the first experience with the application of the

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146 […] (Official minutes of the FFE/FFI Airfreight Committee meeting).

147 […].

148 […].

149 […].

150 […].

151 […]. From Recital (159), it is apparent that this amount of the AMS fee was then applied by several undertakings and also represented a minimum level charged in the market.

152 […].

fee in the market was discussed during the FFE/FFI Airfreight Committee conference call. Participants to the conference call were:

(a) […]

(b) Exel […]

(c) Geologistics […]

(d) Kuehne & Nagel […]

(e) Panalpina […]

(f) Schenker […]

(g) UTi […]

(h) FFI […]

(i) ABX and DHL were excused.[153]

(159) The official minutes of this call show that the attending companies exchanged information about the fees each undertaking charged for the AMS. The figures show that the undertakings were not able to agree on a uniform fee. […] these charges were all essentially within the general range of fees that had been previously discussed.[154] The relevant part of the minutes reads as follows:

"Charging to customers

The group is holding firm on charging to the customers. The fees vary from:
- Panalpina: EUR 10 or equivalent worldwide with the exceptions of Germany EUR 8 and Switzerland SFr 25

- K&N: EUR 12 or equivalent worldwide with the exceptions of Germany EUR 8 and Switzerland SFr 25

- Schenker: Europe EUR 10-15 with the exception of Germany EUR 8 and Switzerland SFr 25 – Americas/Asia USD 20

- Geologistics: Worldwide EUR 10/USD 12.50 with some adaptations in certain markets

- Exel: Worldwide EUR 8/USD 10 with some adaptations in certain markets
- UTi: Worldwide EUR 8/USD 10 with some adaptations in certain markets
- For Germany all the members are charging for all shipments to the USA and do not follow the phased in approach."[155]

153 […] (Official minutes of the FFE/FFI Airfreight Committee & AAMS Task force conference call).
154 […].
155 […].

(160) The fee of EUR 8 agreed for Germany[156] was one of the examples of the specific AMS tariffs agreed at local level in several countries in the context of the same infringement. Similar agreements to the one for Germany were also reached for France[157], Denmark[158], Sweden[159] and the United Kingdom[160]. Local variations were enabled by an agreement concluded within the FFE/FFI Airfreight Committee (see Recital (147)), while the only general guidance to be followed from the agreement was that the fee should reach a certain minimum amount[161].

(161) At the 19 August 2004 conference call the undertakings also discussed cases, when, according to their knowledge, members of FFI were not charging any AMS fee. […] the participants agreed that not charging a fee would be unacceptable and any such undertakings should be reported to the FFI:[162]

"Cases of non compliance

- It was reported that from customer side information was given that Expeditors and Danzas are not charging their customers at all

- The group has agreed to inform the members of the AFC[163] in case they hear from the market that their company should apparently not charge to give them an opportunity to react"[164]

However, […] stated that there were no further meetings, where any cases of non-compliance were discussed.[165]

(162) The minutes of the conference call further refer to the agreement among the undertakings that the whole fee structure would need to be addressed again during the next meeting when more information from the carrier as well as the customer side would be known.[166]

(163) In the following months the undertakings continued to monitor and exchange experience with the acceptance of the surcharge in the market, as is proved by the presentation on activities of the FFE/FFI Airfreight Committee held at the CEO meeting on 16 November 2004 in Strasbourg which refers to the need to *"exchange information on customer reaction to charges levied by the forwarders"*.[167]

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156 See also […].

157 […].In France the association decided to increase the minimum security surcharge by EUR 4 and the per kg rate by EUR 0.02 per kg. In the months following the implementation it was decided to apply a fixed AMS fee.

158 […]. In Denmark it was agreed to charge EUR 12.

159 […]. In Sweden the fee was discussed among several undertakings, it was agreed to charge EUR 10-15.

160 […]. In the UK the fee was discussed among members […]. It was agreed to charge between 10 and 15 euro, the […] members also coordinated the wording of the letter sent to customers.

161 […]

162 […].

163 The FFE/FFI Airfreight Committee.

164 […].

165 […].

166 […].

167 […].

4.2.4. Assessment of the parties' arguments

(164) In relation to the first meeting on 19 March 2003, Kuehne & Nagel claims that the company was not informed about the outcome of the meeting that they did not attend. Furthermore, Kuehne & Nagel submits that the company did not inform the FFE members that it would intend to join the agreement. Kuehne & Nagel therefore claims that the duration of its participation should be shortened accordingly.[168]

(165) The main conclusions from the FFE/FFI Airfreight Committee meeting of 19 March 2003 were summarized in the presentation made by […] of Panalpina during the CEO Committee meeting on 8 April 2003 informing the CEOs, including Kuehne & Nagel, about the agreement reached at the 19 March meeting. Therefore Kuehne & Nagel can not claim that they were not informed about it.[169] The fact that Kuehne & Nagel did not inform the FFE members that it adheres to the agreement reached at the meeting is not relevant. Kuehne & Nagel was informed about the decision reached at the meeting and did not in any way distance itself from the agreement. Moreover, the fact that Kuehne & Nagel continued to participate at the meetings clearly indicates its adherence to the cartel agreement.

(166) In relation to this meeting of 19 March 2003 Panalpina claims that there was no agreement on the imposition of the AMS surcharge. According to Panalpina, it was apparent at the time of the meeting that AMS fees would become prevalent in the freight forwarding industry. What is contained in the minutes cannot be therefore classified as an agreement on the imposition of the AMS surcharge but only as a mere reflection of the anticipated market development. Moreover, Panalpina claims that the statement in the minutes saying that the fee should not be used as a commercial advantage does not mean that the surcharge should create an additional source of income, but that it should only recover the costs arising from the AMS requirements.[170]

(167) Even if the imposition of the AMS surcharge was an anticipated market development, the freight forwarders could not be sure, how this problem would be approached by other freight forwarders. An increase in input costs of freight forwarders does not automatically lead to a new fee imposed on their own customers. The agreement on the imposition of the AMS surcharge gave Panalpina the additional knowledge and certainty of the market behaviour of its competitors. Moreover, this part of the agreement has to be read together with the second main conclusion of the meeting, mainly the agreement not to use the fee as a commercial advantage, which gave a specific knowledge of the pricing intentions of its competitors.[171] In this regard, it is not important, whether the fee should create an additional source of income or should only recover the costs connected with the putting into effect of the AMS. The decisive factor is the fact that the competitors discussed pricing issues and agreed on a common approach concerning the future pricing.

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168 Kuehne & Nagel's reply to the Statement of Objections, page 35.

169 […].

170 Panalpina's reply to the Statement of Objections, page 13, 14.

171 […].

(168) UTi claims in relation to the meeting of 19 March 2003 that it did not participate in any agreement, as the FFE/FFI Airfreight Committee could not take any decisions and it is not proved that UTi agreed with other FFE members to apply an AMS fee.[172]

(169) The minutes of the meeting clearly refer to an agreement reached by the FFE members, it is not relevant, in how far the agreement from the FFE/FFI Airfreight Committee was binding for its members.[173] Moreover, this agreement was one month later presented at the CEO meeting as an agreement reached among the members of the FFE/FFI Airfreight Committee and no objections were raised by the CEOs.[174] None of the official FFE documents or documents provided by UTi indicates that UTi was not joining this agreement or distanced itself from it and that it informed other FFE members accordingly.

(170) UPS submits that the minutes of the meeting of 19 March 2003 explicitly refer to an agreement among FFE members. However, UPS was not a member of FFE and it argues that it was only a guest at the meeting and that therefore it could not join the agreement. Furthermore, according to UPS, […], who represented UPS at the meeting, could not distance himself from the agreement, as it only reflected obvious economic reality. UPS further claims that any conclusion of the FFE/FFI Airfreight Committee needed to be approved by the CEO meeting.[175]

(171) It is true that UPS has never been a member of FFE, however the company applied for membership and this was also the reason it attended the FFE/FFI Airfreight Committee on 19 March 2003. UPS did not provide any document, which would indicate that UPS would disagree with the agreement reached at the meeting and would be concerned by the potentially anti-competitive content of the discussions[176]. UPS can therefore without any doubt be seen as an integral part of the agreement. Moreover, even the mere knowledge of the intentions of its competitors regarding the AMS pricing would suffice.

(172) Furthermore, it is not true that the agreement only reflected obvious economic reality, freight forwarders always had the chance not to apply the AMS surcharge or to set it at very low level and to use this factor as a commercial advantage when competing for new business. This was also the reason the freight forwarders agreed not to use the charge as a tool for competition and to set the fee at a level, which would at least cover the costs. Finally, it is not true that each decision of the FFE/FFI Airfreight Committee needed the approval of the CEO meeting, the purpose of the presentation at the CEO meeting was only to report on the recent activities of the Committee and nothing in the presentation indicates that any formal approval of the steps taken was needed. Moreover, employees representing the freight forwarders at the FFE/FFI Airfreight Committee meetings were responsible for the airfreight business in the individual undertakings and they were therefore fully responsible for taking qualified decisions in relation to this business segment.

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172 UTi's reply to the Statement of Objections, page 18.

173 […].

174 […].

175 UPS' reply to the Statement of Objections, page 12, 13.

176 See, to that effect Case T-83/08, *Denki Kagaku Kogyo Kabushiki Kaisha* v *Commission* (not yet published), paragraphs 52-53 and 65.

(173) In relation to the CEO meeting on 8 April 2003, Kuehne & Nagel claims that the mere participation of […] at the meeting does not in any way prove that he was present at the very moment when the conclusions from the FFE/FFI Airfreight Committee meeting on 19 March 2003 were mentioned and even if he was, whether he actually took note of the relevant part, as it was only half a page of a 26 page long presentation. Moreover, the company also claims that it is not evident whether this part of the presentation was even given and even if it was whether […] could realize the anti-competitive content thereof.[177]

(174) The decisive factor in relation to the meeting on 8 April 2003 is the fact that Kuehne & Nagel attended the meeting, which is not contested by the company. Furthermore, Kuehne & Nagel did not show any evidence, which would credibly prove that its representative was not present for the relevant part of the meeting or was not able to understand the content of the presentation. Moreover, the presentation was disseminated to the parties and the summary of the conclusions concerning the AMS surcharge is sufficiently self-explanatory to be understood without further clarification.[178]

(175) In relation to the FFE/FFI Airfreight Committee meeting on 21 October 2003, Kuehne & Nagel claims that the Commission did not prove whether any anti-competitive issues were discussed during this meeting. According to the company it is not evident whether the relevant part of the minutes, which was quoted by the Commission in the Statement of Objections refers to fees charged by carriers to freight forwarders or to fees charged by freight forwarders to shippers. Kuehne & Nagel further states that the statement of […] clearly shows that the intentions of the meeting participants in relation to the level of the fee differed significantly and that there is no evidence that Kuehne & Nagel disclosed its plans regarding the future charging of the AMS fee.[179]

(176) From the context of the minutes, it is evident that they refer to fees charged by freight forwarders.[180] This is obvious when reading the previous paragraph of the minutes, which speaks about fees charged by carriers and in particular, in the last sentence, about the agreement among freight forwarders not to pay any fee to carriers. In the next paragraph, to which the Commission refers, a new topic is dealt with, namely AMS fees charged by freight forwarders to shippers. Furthermore, it is not relevant, whether the parties' pricing intentions were the same or not, as it is sufficient that the commercially sensitive information were exchanged among them. In this regard, it is also not important whether Kuehne & Nagel disclosed its prices, as the mere knowledge of the pricing intentions of other parties suffices.

(177) Both Panalpina and UPS submit that the minutes of the meeting of 21 October 2003 merely record discussions regarding the anticipated costs arising from the AMS requirements and nothing in the minutes indicates that the amount of the AMS surcharge was discussed during the meeting (contrary to the minutes of the conference call on 19 August 2004, which recorded an exchange of prices). Moreover, Panalpina states that no reference to the discussions on the amounts of the

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177 Kuehne & Nagel's reply to the Statement of Objections, page 36, 38.

178 […].

179 Kuehne & Nagel's reply to the Statement of Objections, page 39-40.

180 […].

AMS surcharge was made in the presentation on the FFE/FFI Airfreight Committee activities at the FFE CEO meeting.[181]

(178) The reason the discussions regarding the amounts were not reflected in the FFE/FFI minutes of 21 October 2003 is explained by an email of […] of DHL, who mentions that the pricing discussions are not reflected in the minutes, as the freight forwarders knew that they are not allowed to talk about prices.[182] For the same reason, it is not decisive that the outcome of the discussions was not mentioned in the presentation at the next CEO meeting. The fact that pricing discussions were recorded in the minutes of the conference call of 19 August 2004 is not relevant, as this still does not prove that the prices could not have been discussed during the previous meeting and does not weaken the specific evidence regarding the meeting on 21 October 2003. Moreover, the conference call of 19 August 2004 took place six days after the AMS was launched by the US authorities and this fact could have affected the "willingness" of the parties to include the exchange of the charged AMS fees in the minutes of the meeting.

(179) Panalpina and UPS further submit in relation to the meeting of 21 October 2003 that the recollections of […] and […] differ or contradict each other, when it comes to the exact amounts or ranges of the AMS fee. […] refers to an exchange of AMS fee, while […] only recalls […] having been the one who disclosed the level of the fee. Moreover, according to UPS, none of the evidence indicates that UPS disclosed its planned level of the fee.[183]

(180) The minutes of the 21 October 2003 meeting clearly state that the freight forwarders discussed charges for the additional security measures and then specified the way these charges should be charged to customers. The wording *"charges for additional security measures"* clearly indicates that they discussed fees for additional costs incurred by the new rules.[184] Furthermore, the differing recollections of […] and […] concerning details of the fees exchanged among the undertakings is understandable when taking into account the time gap between the relevant meeting and the date of the submission of the leniency statements that were based on the recollection of both […] and […]. While there might be differences in details of their recollections, both confirm that the level of AMS fees was discussed during the meeting.[185] In this regard, it is not relevant, whether all participants of the meeting exchanged the planned figures or whether only some of them disclosed their intentions, the fact that none of the participants distanced himself is decisive. It is therefore also not relevant, whether UPS disclosed any of its pricing information as well.

(181) In relation to the FFE/FFI Airfreight Committee meeting on 24 March 2004, Kuehne & Nagel claims that the Commission did not sufficiently prove that any agreement was reached at the meeting and even if it was the case, whether any of the

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181 Panalpina's reply to the Statement of Objections, page 15; UPS' reply to the Statement of Objections, page 14.

182 […].

183 Panalpina's reply to the Statement of Objections, page 15, 16, UPS' reply to the Statement of Objections, page 14.

184 […].

185 […];[…].

conclusions reached at the meeting were communicated to local branches of Kuehne & Nagel.[186]

(182) The email sent by […] after the meeting on 24 March 2004 clearly indicates that pricing issues were discussed during the meeting.[187] […], in which he explained the content of the email.[188] Moreover, it is not important, whether the conclusions reached at the meeting were communicated to local branches, it suffices for finding an infringement that the undertaking gained the knowledge.

(183) Panalpina claims that the freight forwarders only discussed technical issues surrounding the operation of the AMS at the meeting on 24 March 2004. According to Panalpina, this is confirmed by the minutes which do not mention any discussions regarding pricing issues. Moreover, Panalpina claims that the email[189] relied on in the Statement of Objections does not refer to an agreement regarding pricing, but to a general consensus amongst the freight forwarders when it comes to technical issues. Finally, Panalpina claims that the part of the email referring to the non-inclusion of pricing discussions in the minutes refers to discussions concerning the unwillingness of freight forwarders to accept charges from airlines and not to discussions regarding pricing.[190]

(184) As mentioned in Recital (178), discussions regarding pricing were not recorded in the minutes, as the freight forwarders knew that they are not allowed to discuss such issues among them. This is also the reason the minutes of the meeting on 24 March 2004 refer only to discussions on technical issues. Moreover, it is not true that the contemporaneous email relied on in the Statement of Objections does not refer to an agreement regarding pricing. […], the author of the email, clearly […] that when referring to consensus among freight forwarders, he was referring to the agreement to collect an AMS fee within a reasonable agreed range.[191]

(185) In relation to the CEO meeting on 5 May 2004, Kuehne & Nagel claims that no agreement was reached among the competitors regarding the application of the AMS surcharge for the entire US region as from 13 August 2004. According to Kuehne & Nagel the minutes of the meeting only refer to an agreement among the freight forwarders that the required technical systems necessary for the transmission of data should be prepared from that date.[192]

(186) Contrary to Kuehne & Nagel's claim, the relevant part of the minutes clearly speaks about readiness *"to implement the AAMS [Air AMS] system for the entire US region as from 13 August 2004"* (that means, for all shipments from Europe to the entire United States, and not only to the East Coast as planned by the United States customs) and not just about the necessity of having the system prepared to this date.[193]

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186 Kuehne & Nagel's reply to the Statement of Objections, page 40.
187 […].
188 […].
189 […].
190 Panalpina's reply to the Statement of Objections, page 17-18.
191 […].
192 Kuehne & Nagel's reply to the Statement of Objections, page 41-42.
193 […].

(187) Panalpina, on the other hand, agrees that the FFI members targeted to put the AMS surcharge into effect across the board and not to follow the phased approach that was announced by US customs. Nevertheless, Panalpina claims that FFI members merely wanted to avoid difficulties that would arise while determining whether the final destination was currently subject to AMS and it was therefore not motivated by an intention to generate an extra income.[194]

(188) The way the AMS surcharge should be put into effect on the market is price sensitive information, which was shared among competitors. The agreement not to follow the phased approach but to apply the surcharge across the board had a direct impact on customers, who also had to pay the AMS surcharge in cases when this was actually still not required by United States customs. The motivation of the parties is not important in this situation.

(189) In relation to the FFE/FFI Airfreight Committee meeting on 5 May 2004 Agility claims that the agreement to apply the AMS surcharge across the board over the whole US territory was never put into effect.[195]

(190) Whether the agreement was finally put into effect on the lanes between Europe and the United States is not relevant. The decisive element is the fact that the freight forwarders gathered at the meetings and agreed on a common approach. Moreover, a continuous coordination in this regard is proved by the minutes of the FFI meeting on 19 August 2004, which point out that all freight forwarders applied the AMS across the board in the case of Germany.[196]

(191) Agility further claims that the internal UTi email concerning an agreement among freight forwarders on the level of the fee amounting to EUR 8 is not corroborated by any other evidence on the Commission's file.[197]

(192) A reference to an agreement on the level of the AMS surcharge amounting to EUR 8 was also made in an internal […] email (apart from the UTi email). This […] email refers to a phone call with Exel, which referred to an agreement among major global freight forwarders to apply a fee of EUR 8.[198]

(193) In relation to the FFE/FFI Airfreight Committee conference call on 19 August 2004, Kuehne & Nagel claims that […], who attended the call, was not responsible for pricing. Furthermore, Kuehne & Nagel together with Panalpina claim that monitoring or sanctions for the non-application of the AMS surcharge were never put into effect on the market.[199]

(194) It is not relevant, whether […] was responsible specifically for pricing within the undertaking. He was representing Kuehne & Nagel on the call relating to the freight forwarding service that was the subject of the infringement and, as the minutes show,

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194 Panalpina's reply to the Statement of Objections, page 19.

195 Agility's reply to the Statement of Objections, page 10.

196 […].

197 Agility's reply to the Statement of Objections, page 11.

198 […].

199 Kuehne & Nagel's reply to the Statement of Objections, page 43, Panalpina's reply to the Statement of Objections, page 27.

he was able to share the relevant information with other participants. In fact no specific authorisation is required by an employer to its representative to conclude cartel agreements, it suffices that the representative is authorised to act for the product or service in question. Even an alleged ignorance of the facts or the law on the part of the employer or managers cannot relieve the undertaking of its responsibility for the unlawful acts carried out via its representatives.[200] In relation to monitoring and sanctioning, it is not relevant, whether these measures were put into effect on the market or not. The fact is that the minutes show that the freight forwarders agreed on these measures.[201] This indicates firstly that there must have been an agreement regarding the AMS surcharge and secondly, that the parties had an intention to monitor the application of this agreement on the market.

(195) ABX claims that its level of representation at the FFE/FFI Airfreight Committee meetings on 19 March 2003, 21 October 2003 and 24 March 2004 was low and that ABX did not play an active role in the discussions. Moreover, ABX claims that it did not share its intended AMS fee with other competitors at the meeting on 21 October 2003.[202]

(196) When assessing ABX's participation in the cartel, it is not relevant, whether the company was represented by high level employees and whether it actively participated in the cartel's discussions. Its mere participation in the meetings suffices for finding an infringement, as it had a full picture about things discussed at the meetings and could use this knowledge accordingly when setting its policy in relation to the AMS pricing.

(197) In relation to the FFE/FFI Airfreight Committee conference call on 19 August 2004 ABX claims that it did not participate in the conference call and therefore could not exchange the AMS fees and monitor the market. In this regard ABX also claims that the last contact they had with the group was on 24 March 2004 and that they did not participate in any of the following contacts.[203]

(198) It is true that ABX did not attend the conference call, however ABX received the minutes of the call, in which both the figures and the agreement regarding the monitoring were mentioned. The same also applies to ABX's claim regarding absence at the FFI gatherings/phone calls following the 24 March 2004 meeting, as ABX continued to receive the minutes of the meetings and did not distance itself from the group[204].

(199) UTi claims that the discussions concentrated on technical issues.[205]

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200 Joined Cases 100/80 to 103/80 *Musique diffusion française e.a. v Commission*, [1983] ECR 1825, paragraph 97; Case T-9/99 *HFB and others v Commission*, [2002] ECR II-1487, paragraph 275; Case T-15/99 Brugg Rohrsysteme v Commission, [2002] ECR II-1613, paragraph 58; Case T-236/01 Tokai Carbon v Commission, [2004] ECR p.II-1181, paragraph 277.

201 […].

202 ABX's reply to the Statement of Objections, page 5-6.

203 ABX's reply to the Statement of Objections, page 6-7.

204 See to that effect Case T-26/06 *Trioplast Wittenheim SA* v *Commission* (not yet published), paragraphs 45, 47.

205 UTi's reply to the Statement of Objections, page 15.

(200) While it is true that technical issues were one of the most discussed topics among the FFE/FFI members, it is not accurate that the discussions concentrated exclusively on these issues. There is sufficient evidence that price related issues were discussed as well (see for example Recitals (146), (148), (152) or (157)).

(201) UTi claims that the AMS fee was not discussed in the framework of the FFE/FFI Airfreight Committee meetings but rather among the biggest freight forwarders outside the FFI. Moreover, UTi submits that, according to DHL, the AMS fee was discussed by global airfreight heads and […] who attended the meetings on behalf of UTi was only a mid-level employee and did not attend such meetings.[206] Agility refers to contacts outside the framework of FFE/FFI and claims that it was not part of such contacts. According to Agility, this was mainly due to the fact that Agility was a relatively small market player […] at the relevant period of time.[207]

(202) There is no evidence on the file that would suggest that these topics were exclusively discussed by global airfreight heads outside the official FFE/FFI meetings. The contact among several competitors, to which UTi refers[208], only illustrates local discussions of the so called "Gardening Club" in the United Kingdom.[209] Furthermore, […]'s reference to global airfreight heads only indicates that it was a common habit that the FFI members were represented by airfreight heads at the meetings of the FFE/FFI Airfreight Committee rather than by lower ranked employees.[210] It does not however mean that only global airfreight heads were allowed to discuss such things and if a company had been represented by a lower ranked employee, it would have been suspended from the discussions. Moreover, UTi was represented at least at two meetings by a high-level employee, namely […].[211] In general, the participation of UTi and Agility is sufficiently evidenced by the minutes of the meetings, which list the participants.

(203) UTi claims that the meeting minutes do not establish the participation of UTi in any agreement regarding the AMS surcharge and they do not prove that UTi's representatives were present during the potentially relevant portions of these meetings.[212]

(204) The minutes of the relevant meetings show that UTi was listed among the participants of the meeting and they also clearly indicate what was agreed at the meetings. These agreements are always presented as a decision of the whole association and nothing in the minutes indicates that UTi would oppose any such decisions during the meetings or would distance itself. Furthermore, the minutes were circulated among the FFE/FFI members, UTi had therefore a chance to contest any of the conclusions if they disagreed with the wording. None of the documents provided by UTi (including their internal documents) indicates their disapproval or dissatisfaction with the discussions within the group.

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206 UTi's reply to the Statement of Objections, page 14.

207 Agility's reply to the Statement of Objections, page 5.

208 UTi's reply to the Statement of Objections, page 14, paragraph 4.2.1.3.

209 […].

210 […].

211 Meetings on 19 March 2003 and 21 October 2003.

212 UTi's reply to the Statement of Objections, page 19-20.

(205) UTi claims that its charges were set independently and they were not in any way influenced by the discussions within FFE/FFI. It also claims that the evidence shows that no final agreement was reached regarding the AMS fee and there was a lot of inconsistency in the discussions.[213]

(206) It is incorrect that UTi's AMS fee was set independently and/or in response to carriers' announcements, as it was UTi's internal email, which specifically referred to FFI's recommendation to charge an AMS fee of EUR 8.[214] Moreover, it is not important, whether any final agreement was reached regarding the fee to be charged (as stated in the SO), it suffices for finding an infringement that the FFE/FFI members were in contact with each other and disclosed (even if only some of them) their pricing intentions to the group.

(207) Agility claims that no discussions regarding actual pricing levels took place until the meeting on 21 October 2003 and that the evidence concerning the discussions on the amount of the AMS surcharge at the meetings on 21 October 2003 and 24 March 2004 is based only on the evidence brought forward by DHL.[215]

(208) It is not relevant that the first discussions regarding actual pricing levels took place only at the meeting on 21 October 2003. Already the conclusions reached at the first meeting on 19 March 2003 were evidently of an anti-competitive nature and related to price setting. The discussions at the next meetings only further elaborated the basic agreement reached at the first meeting. It is true that the evidence regarding the pricing discussions at the 21 October 2003 and 24 March 2004 meetings is very much based on the […] oral statements, however at least for the meeting of 21 October, a pricing discussion is also referred to in the official minutes of the meeting.[216]

4.2.5. Conclusion

(209) The facts mentioned in Sections 4.2.1-4.2.4 show that the cartel among the FFE/FFI members existed from 19 March 2003 until at least 19 August 2004. The participating undertakings coordinated their conduct and influenced price setting in relation to the AMS surcharge. The undertakings started to coordinate their market behaviour immediately after it became public that the new procedure would be introduced in the market.

(210) The basic agreement to charge customers for the AMS administration and the additional work incurred by the procedure was reached at a meeting of the FFE/FFI Airfreight Committee on 19 March 2003, at which time the basic rules for the price setting of the AMS surcharge were discussed. In particular, the undertakings agreed not to compete on this specific part of the price for freight forwarding services by setting the AMS fee at least at a level, which would cover the costs of its application.

(211) At the following meetings, the FFE/FFI members not only discussed technical measures connected with the application of the AMS surcharge, but they also shared

213 UTi's reply to the Statement of Objections, page 17.
214 […].
215 Agility's reply to the Statement of Objections, page 8-9.
216 […].

the intended levels of the AMS fee with other freight forwarders. The fact that certain freight forwarders disclosed their pricing intentions during the FFI meetings further decreased the uncertainty of the undertakings in relation to the market behaviour of their competitors. The information thus disclosed was therefore capable of influencing the business conduct of the undertakings in relation to the AMS surcharge, as they took into account, directly or indirectly, the information obtained from their competitors when setting the surcharge. The final prices which were applied in the market were therefore a result of frequent pricing discussions held among the FFI members.

(212) Consequently, the final fees applied by individual undertakings were within the range of fees previously discussed among the competitors. The fees amounted at least to EUR 8 which is broadly in line with the initial agreement among undertakings not to compete with each other on the level of the surcharge and to set the surcharge at least at a level covering the costs of its introduction. In many countries the AMS fee was concretised in the frame of agreements reached on a local level, which followed the guidance agreed within FFE/FFI[217].

4.3. Currency Adjustment Factor (CAF)

(213) The principal evidence relied on consists of documents obtained during the inspections, replies to requests for information, documents submitted by applicants under the Leniency Notice, as well as corporate statements by them.

(214) The following undertakings participated in the infringement:

Table 4:

Parties to CAF infringement

Company	**Period**
DHL	27 July 2005 – 13 March 2006
Exel	27 July 2005 - 13 March 2006
UPS	27 July 2005 – 13 March 2006
Kuehne & Nagel	27 July 2005 - 13 March 2006
Nippon	27 July 2005 – 31 October 2005
Kintetsu	27 July 2005 – 13 March 2006
BAX	27 July 2005 - 13 March 2006
Yusen	27 July 2005 - 31 October 2005
Eagle	27 July 2005 - 13 March 2006

[217] […].

Panalpina	27 July 2005 - 9 December 2005
Schenker	29 July 2005 - 13 March 2006

4.3.1. General remarks

(215) The Chinese currency Renminbi (RMB) was pegged to the USD until July 2005. On 21 July 2005 the currency peg was lifted by the People's Bank of China and the RMB appreciated against the USD by roughly 2.1% from 8.28 RMB to 8.11 RMB. Furthermore the People's Bank of China announced that the RMB would no longer be pegged to the USD and would become subject to a managed floating exchange rate (daily ± 0.3%) based on market supply and demand with reference to a basket of currencies. The initial appreciation of the RMB on 21 July 2005 was therefore only the beginning of the exchange rate fluctuations between the RMB and the USD.

(216) The USD was a key currency for freight forwarding business in China. A big part of European customers[218] were invoiced in USD as the USD was considered to be a more international currency in China than the euro.[219] On the other hand, freight forwarders were billed by carriers and other local service providers in RMB. The appreciation of the RMB therefore strongly influenced the margins of freight forwarders, as the local services paid in RMB became more expensive when calculated in USD. The freight forwarders coordinated their actions, which had a significant impact on the price of freight forwarding services. This impact was felt not just in exports from China to the United States, but, due to the strong position of the USD as an international currency, also in exports from China to the European Economic Area.

(217) It is concluded from the evidence on file that the cartel lasted from at least 27 July 2005, the date on which the first meeting regarding the common response to the RMB appreciation took place, until at least 13 March 2006, when the last meeting took place.

(218) The infringement covered by this part of the Decision relates to freight forwarding services provided on the routes from China to the European Economic Area. The discussions related only to the air freight forwarding sector because the service providers in the ocean freight forwarding were mostly paid in USD and not in RMB.

4.3.2. Nature of the illicit contacts between competitors concerning the CAF

(219) As a consequence of the change in Chinese currency policy, freight forwarders met in order to agree on a common approach. Shortly after the announcement of the People's Bank of China regarding the revaluation of the RMB, […], the sales director of Exel, initiated the first contacts with other international freight forwarders (see Recital (227)). A number of meetings were organised in the following months in order to discuss the common approach of undertakings and the reaction of the market (see Recitals (228) - (263)). The freight forwarders created a group, as they believed

[218] These were both customers based in the European Economic Area and EEA undertakings with local subsidiaries in China.

[219] […].

the official association (Shanghai International Freight Forwarder Association – SIFFA[220]) would not respond to the new situation quickly enough.[221]

(220) The invitations to the meetings were sent by email. Each meeting was organised by a different undertaking. The number of invited undertakings began increasing as further forwarders were invited by the undertakings already attending. Meetings were frequent in the initial period when the main principles of the common market response to the appreciation of the RMB were discussed. At a later stage, the frequency of the meetings and the number of attendees decreased as the situation on the market stabilised. In total there were 5 meetings relating to CAF (see Recitals (228) - (263)).

(221) The meetings were organised in order to agree a common approach among freight forwarders to the RMB appreciation. The attendees at the meetings only consisted of international freight forwarders, since local forwarders did not face conversion losses, as they invoiced customers in RMB and not in USD.

(222) The two main conclusions from the meetings were the following. First, an agreement was reached among undertakings that the freight forwarders should shift all contracts with their customers to RMB. This was opposed by many customers, since a significant part of the payments were made overseas and the Chinese currency was not accepted by these customers. The second conclusion was that CAF should be applied just in cases where customers refused to accept the quotation in RMB. The level of the CAF was initially agreed at 2.1% (see Recital (232)).

(223) It was further agreed to prepare a common customer letter containing the main agreements from a meeting (see Recital (235)). The letter was then to be distributed by individual undertakings to their customer base. The meetings clearly show that a uniform way of handling the exchange rate changes was the way the freight forwarders would collectively act in order to maintain their margins.

(224) After a common agreement on the new measures was reached at the first meeting, the discussions in the following meetings focused on the implementation of the agreement. First, the companies which had not sent the common customer letter were persuaded to do so as the companies which had already implemented the agreement showed their frustration at the slow dissemination of customer letters by other undertakings. This could in their eyes threaten the successful implementation of the agreement on the market as well as their market position. Second, the undertakings exchanged their experience with the market response, especially the acceptance or otherwise of the agreed measures by those customers that were shared by several freight forwarders attending the meetings.

(225) The undertakings further exchanged their views via frequent email exchanges, which kept the non attending companies informed about recent developments within the group and the points agreed at the meetings. A special yahoo email account was opened in order to coordinate the discussions and to collect all emails in one email box. The participants also attempted to persuade SIFFA to carry out the same

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220 SIFFA includes primarily representatives from the state owned undertakings, it mostly deals with local governmental regulations, […].

221 […].

measures as they did,[222] as this would have helped the undertakings to persuade their customers to accept the new measures.

(226) The companies were only partly successful with the implementation of the changes they agreed during their meetings. Large customers in particular were reluctant to accept any amendment to their existing contracts with freight forwarders which were often long term and did not contain any clauses regarding exchange rate changes or currency adjustments. Freight forwarders were therefore at least partly successful with the implementation for small and medium-size customers, who did not have long term contracts.

4.3.3. Description of the events

4.3.3.1. Preliminary contacts

(227) The discussions about the market reaction to the appreciation of RMB started with bi-/multilateral contacts among some competitors[223]. These initial contacts showed that the key players were interested in a broader scope of coordination which would allow them to coordinate their market behaviour with a larger group of competitors and to discuss the necessary measures more deeply.[224] This effort resulted later on in the organisation of the first meeting of the group. The initiators of the first meeting were Exel […] and BAX […] who discussed the organisation of the meeting bilaterally. The primary goal was *"to set an industry trend"* in relation to the RMB appreciation.[225] […], Exel […] preferred an informal meeting to a meeting within SIFFA which generally worked very slowly and not all international freight forwarders were then members of that body.[226]

4.3.3.2. First meeting: 27 July 2005

(228) The first meeting which dealt with the appreciation of the RMB took place on 27 July 2005. The invitation was sent by email by […] of Exel on 25 July 2005, however some of the companies were also contacted by telephone[227]. The invited companies were DHL […],[…], UPS […], Panalpina […], Kintetsu […], Schenker […], BAX […] and Eagle […].

(229) The invitation to the first meeting sent by Exel […] reads as follows:

"Dear friends in the industry

I understand from some of you that there have been discussions on how our industry would be tackling the issues relating to the appreciation of RMB. A few of us feel that it would be useful if we gather informally to discuss this issue.

"I therefore take the liberty in sending out this email in inviting all of you to an

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222 […].

223 The undertakings involved were for example BAX, Exel, […],[…], DHL and Kuehne & Nagel. […].

224 […].

225 […].

226 […].

227 […].

informal meeting. Please feel free to invite other industry friends whom you notice are missing above […]."

Hence, the meeting was called after several undertakings decided that it would be good to discuss a common industry response to the appreciation of RMB. The email further encouraged the addressees of the invitation to invite further undertakings which were not addressed in the invitation.[228]

(230) In a further email sent a day before the meeting Exel […] specified the location of the meeting: Renaissance Yangze Shanghai Hotel. He also mentioned that Exel would be responsible for the cost of the venue.[229]

(231) The companies participating in the meeting were:

(a) DHL

(b) Exel

(c) UPS

(d) Kuehne & Nagel

(e) Nippon[230]

(f) Kintetsu

(g) BAX

(h) Yusen

(i) Eagle

(j) Panalpina.[231]

(232) In an internal […] email sent following the meeting […] (who participated at the meeting on behalf of […]) informed about the agreement reached at the meeting. The agreement had three main points. First, all new contracts with customers should be quoted in RMB only. Second, in case of existing contracts the undertakings should change from USD to RMB, or if this shift was not accepted by a customer, a currency adjustment factor of 2.1% should be imposed. Third, the attending undertakings agreed to draft a common letter informing their customers about the agreed changes. It was further agreed that the letter would be sent out on 1 August 2005.[232]

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228 […]. The email invited the addressees to discuss " *how the industry would be tackling the issues relating to the appreciation of RMB. A few of us feel that it would be useful if we gather informally to discuss this issue*".

229 […].

230 Nippon which was not copied in the invitation email was invited by email sent by DHL […].[…].

231 […].

232 […].

(233) This is also confirmed by an internal […] email sent on the same day by […] who attended the meeting on behalf of […]. The email states amongst others:

"[…] The meeting went pretty well, at least all the attendees understand that we need work closely and stand firm to our customers once if any customer claimed other competitors didn't charge such kind of CAF we need to clarify with each other to avoid any bluffing. […]"

This shows that the attendees agreed that they would have to cooperate closely and jointly approach customers in order to put into effect the agreement on the market. They also agreed that a monitoring of the market will be necessary.[233]

(234) As mentioned in Recital (232), the undertakings participating in the meeting agreed to draft a common customer letter in order to inform customer about the agreed measures. […] of BAX was nominated to draft the letter because he was the only native English speaker in the group.[234] A draft letter was bilaterally discussed between BAX […] and Exel […].[235] As both agreed on the wording, BAX […] sent, on 29 July 2005, an email to the other attendees of the meeting, attaching the draft agreed with Exel […].[236]

(235) The customer letter contained a summary of the main conclusions from the meeting on 27 July 2005, stating:

"[…] A: with effect from 1 August 2005, all new businesses will be engaged with quotations and business agreements in Chinese Yuan as the base currency for rate negotiations. Should you decide to pay in USD, then this will be at the equivalent of People's Bank of China exchange rate at the time of payment. B: for all existing contracts (price in USD) until renewal date a currency adjustment factor CAF will be introduced due to the recent Chinese Yuan currency revaluation. CAF will be 2.1% on total invoice value for all invoices with effect from 1 August 2005. Renewal of such contracts or renegotiations will be based on rates quoted in Chinese Yuan. Should the Chinese Yuan exchange rate be significantly changed again prior to contract renewal, CAF will be further adjusted accordingly.[…]"[237]

(236) The email to which the customer letter was attached stated *"The key message is highlighted and you may customize the other contents of the letter if you wish. Please try to retain the key message to have consistency thru [sic] the industry."*[238] […] consistency was important, because the participants were unsure how the market was going to react to the message and that, if any company deviated, it would be hard for any competitor to succeed in implementing the changes.[239]

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233 […].
234 […].
235 […].
236 […].
237 […].
238 The highlighted part of the customer letter which should not be changed are the points A and B quoted in Recital (235).
239 […].

(237) The email sent by BAX attaching the draft letter further asked the other cartel participants to respond by stating whether they accepted the wording of the letter. It also informed them that a special email account was created in order to collect customers' reactions and *"for any communications within our new forwarding community"*.[240] The email address was rmb_rates_china@yahoo.com.[241] […] of BAX created this account at […]'s instruction because it was clear to several undertakings in the group that their discussions might violate the antitrust laws outside of China.[242] This is also confirmed by an email sent by […] of BAX to […] of Panalpina and the rest of the group, in which he recommends using the email account by stating:

"[…] just a caution on this, please use the internet address when you send this and don't use your own mail address, it could be an issue, just for your safety! […]"[243]

(238) In the following days the first undertakings started to implement the agreed measures and announced the dissemination of the customer letters. They also sent samples of their customer letters prepared on the basis of the draft to the freight forwarders' forum. The wording of these letters was more or less identical.[244]

(239) The undertakings attending the first meeting further agreed to inform other freight forwarders which had not attended the meeting about the agreement reached. According to an email sent by Exel […] Schenker should be contacted by Kuehne & Nagel; BAX should contact […],[…][…] and […]; Exel should contact […]; Panalpina should contact […] and Nippon should contact Japanese freight forwarders. The undertakings were also asked to report about the outcome of the contact.[245] This step then resulted in an enlargement of the group by several undertakings.[246]

(240) In an email on 29 July 2005 Schenker […] apologised to the undertakings attending the first meeting as he was not able to attend, however he confirmed Schenker would follow the agreement (*"united front"*) and would participate in the next meeting.[247] Later on, he also informed […] about the existence of the group and invited it to participate in the meetings as well.[248]

(241) As described in Recitals (234)-(235), the undertakings agreed to send out customer letters summarising the agreement reached at the meeting on 27 July 2005. Soon, it became apparent that not all the attendees at the meeting did so. This was mainly due to the fact that the new measures had to be approved by the freight forwarders' respective head offices, before being sent to customers.[249] The head offices were

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240 Before the creation of the email account was announced to the rest of the group, BAX […] discussed this matter with Exel […].[…] liked the idea and asked […] to set an auto forward from the mailbox to him and […] in order to follow immediately the reaction of other members of the group. […].

241 […].

242 […].

243 […].

244 […].

245 […].

246 Other undertakings than mentioned in this email were invited as well. ID 2846, page 179-182, 189-190.

247 […].

248 […].

249 […].

often reluctant to approve the new measures, as they mainly feared opposition from large customers, if they had to pay their contracts in RMB instead of in USD.

(242) The slow progress with the implementation of the agreement on the market was frustrating for those companies which had already sent out their letters and asked their customers to accept the new measures[250]. The customers didn't want to accept the changes and they referred to the fact that these were not proposed by other freight forwarders. The undertakings which had not sent out their customer letters were therefore asked to do so in an email sent by Kuehne & Nagel […], because he was afraid that they would not be able to sustain the pressure from customers much longer. The email reads as follows:

"Dear colleagues,

can I please urge you to step forward and go out in the market and inform your customers. We as KN are already now facing exactly the situation. which we all wanted to avoid, which is that we are out in the market trying to push this through and our customers are telling us that the competition has not given them any notice. So far I have only seen confirmation from Schenker and DHL. Your fast action is requested, as KN, DHL and Schenker cannot push this through alone.

We were all in alignment after last week's meeting, so let us please stick to the agreed action and step up the pace. This serves all our interest. If you are not going out in the market as soon as possible, we will not be able to sustain the pressure much longer.

Please try to push your network to get this into the market."[251]

(243) A similar message was also sent by Kuehne & Nagel […] who stressed the fact that companies not applying the agreed measures lost profit everyday and the same could happen to the undertakings which had already implemented the agreement as they could not sustain the pressure from customers much longer. He concludes by stating *"Money talks, please explain your corporate office that they loose profit amounting to 2.1% of the total turnover and I am sure they will wholeheartedly support this!!".*[252]

(244) Shortly after, BAX announced that it had sent out the letters as well. BAX, Panalpina, Schenker and […] also announced that the first customers had accepted the implementation of the new measures.[253]

4.3.3.3. Second meeting: 12 August 2005

(245) The second meeting took place on 12 August 2005. The invitation was sent by BAX […] on 9 August 2005. The invited companies were DHL […], Kuehne & Nagel

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250 In the first phase of the implementation those companies were DHL, Kuehne & Nagel and Schenker […].

251 […].

252 […]. The email recommended "to put this into the market now", otherwise the undertakings will lose revenue.

253 […].

[…], UPS […], Panalpina, Kintetsu […], Yusen […], Schenker […], Exel […],[…], Nippon […], Eagle […] and […]. The meeting was held at the Radisson Hotel Shanghai New World.[254]

(246) The companies participating in the meeting were:

(a) Yusen

(b) BAX

(c) Exel

(d) DHL

(e) Kuehne & Nagel

(f) UPS

(g) Panalpina

(h) Kintetsu

(i) Schenker

(j) Nippon

(k) […]

(l) […]

(m) […]

(n) Eagle

(o) […].[255]

(247) It was also mentioned that other companies not attending the meeting ([…]) were informed about its outcome.[256]

(248) The meeting's purpose was to catch up on whether or not the measures proposed at the first meeting were successful, namely whether the customer letters had been sent out, whether any feedback had been obtained from customers and whether invoicing could take place in RMB.[257] During the meeting, some of the attending undertakings declared that some of their small and medium-size customers had already accepted the changes. On the other hand, the attendees claimed that global account teams

254 […].

255 […][…] (Nippon's internal report from the meeting). […] (Internal Kuehne & Nagel email reporting on the meeting).

256 […].

257 […].

within the freight forwarders were reluctant to implement the changes, however some undertakings announced first successes with these customers as well.[258]

(249) The participants agreed on a forum where they could exchange information about the acceptance of the surcharge by their biggest customers which were shared by several undertakings in order to show them *"a united front"*.[259] Some specific customers were already discussed during the meeting.[260] However it was agreed that such customers should be discussed in smaller groups during conference calls, in which only the relevant undertakings would be represented.[261] The undertakings also confirmed that they wanted to stick to the agreement reached at the first meeting, namely they would try to primarily change the currency of the contracts from USD to RMB and, if this was not possible, to impose a CAF of 2.1%[262], although they had received a lot of resistance from their European offices[263].

(250) In the following weeks, the undertakings exchanged several emails regarding specific customers which refused to pay the CAF to certain undertakings. Those resisting customers referred to the fact that other freight forwarders (which were also present at the CAF meetings) were not applying any CAF. The undertakings therefore asked their competitors for clarification why they were not following the common agreement in the case of these specific accounts. The relevant email sent by […] of Panalpina reads as follows:

"[…] We are receiving actually the complaint that we are trying to cheat to make extra-profits by being the only who do approach them… even […] claims the same despite everyone being concerned during our last meeting.

Can you please confirm ASAP that you did enforce within your network the CAF implementation with you MNA customers, as I am coming under pressure from our overseas network for unilateral actions taken."[264]

Some of the undertakings then responded that they had not waived the surcharge to any of their customers.[265]

4.3.3.4. Third meeting: 15 September 2005

(251) The third meeting was hosted by Kuehne & Nagel on 15 September 2005. The invitation was sent by […] on 12 September 2005. The meeting took place at Howard Johnson Hotel, Shanghai. The invited undertakings were […], BAX […], Exel […], UPS […], Yusen […], Nippon Express […], Eagle […], DHL […], Panalpina […], Kintetsu […], Schenker […] and […].[266]

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258 […].
259 […].
260 […].
261 […].
262 […].
263 […].
264 […].
265 […].
266 […].

(252) The companies participating in the meeting were:

(a) DHL

(b) Eagle

(c) Exel

(d) Kuehne & Nagel

(e) Panalpina

(f) Schenker

(g) Nippon

(h) Kintetsu.[267]

(253) The undertakings mainly discussed the implementation of the agreement in the market. Each attendee presented the steps taken by his undertaking since the first meeting. Each freight forwarder also provided examples of key customers who had agreed or rejected the CAF or the quotation in RMB.[268] The undertakings also started accusing each other that not all of them were implementing the agreed steps in the market.[269]

(254) In the weeks following the meeting, some specific customers, which declined the payment of CAF, were discussed multilaterally via email.[270] As the rate of the acceptance of the new measures in the market was rather unsatisfying […] of DHL asked in […] email whether the undertakings still *"stay firm on imposing CAF on the specific customers discussed in the email exchanges"*.[271] […] of Panalpina wrote back that the company would definitely stick to the agreement.[272]

4.3.3.5. Fourth meeting: 18 November 2005

(255) The fourth meeting was hosted by DHL. The invitation was sent by […] on 2 November 2005. The meeting took place on 18 November 2005 at the Shanghai Mariott Hotel Hongqiao. The invited undertakings were: […], BAX […], UPS […], Schenker […], Kuehne & Nagel […], Exel […], Yusen […], Nippon Express […], Kintetsu […], Eagle […] and Panalpina […]. The invitation also encouraged the invited undertakings to bring to the meeting lists of customers who were still rejecting the payment of CAF. It further mentioned that issues relating to the imposition of CAF would be discussed during the meeting.[273]

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267 […] (Internal Schenker email).

268 […].

269 […].

270 […]. The undertakings participating in the email exchanges were all invitees to the meeting on 15 September 2005 mentioned in Recital (251) (that means all participants of the meeting including […] and […] who had been invited but did not attend the meeting).

271 […].

272 […].

273 […].

(256) The companies participating in the meeting were:

(a) DHL

(b) Exel

(c) Eagle

(d) Kuehne & Nagel

(e) Kintetsu

(f) […]

(g) BAX.[274]

(257) The undertakings communicated again their updated results of the discussions with customers. It was once more confirmed that they were mainly successful with the acceptance of RMB quotations/CAF by small and medium-size customers. In contrast, the big customers mostly rejected these measures. It was therefore once more stressed that a joint *"approach will make more pressure to the client, or at least make a serious attention of the issues"*.[275]

(258) Some new suggestions were made on how to make the communications of the CAF group safer in the future, as some of the freight forwarders were afraid that the meetings might be considered in violation of antitrust law. Special rules were therefore recommended for future email communications.[276] Some suggestions were also made regarding the participation of the undertakings. It was recommended to attend the meetings regularly and send substitutes in case of unavailability. The undertakings were also encouraged to invite new undertakings to attend the meetings.[277]

(259) As a follow up to the discussions regarding specific customers during the meeting on 18 November 2005, it was agreed to organise a conference call on 21 November 2005 regarding RMB quoting in relation to *"BIG NAME tender/bid* respectively".[278] The conference call was organized by […] of Exel, it was scheduled on 21 November 2005 at 14.00. Invited undertakings were DHL […], BAX […], Kintetsu […], Eagle […] and Kuehne & Nagel […].[279] Panalpina […] and Schenker […] attended as well. Eagle, who did not attend, was informed about the conclusions by […] of Exel.[280] The participation of BAX is not very clear, however the evidence shows that even if it did not attend, it was updated about the conclusions by […] as well.[281] During the phone call, currency issues in relation to a tender announced by a

274 […].

275 […].

276 The recommended measures which should keep the discussions secret were no forwarding of emails to third parties and no replies to emails, in which the previous emails would be included.

277 […].

278 […].

279 […].

280 […].

281 […].

specific customer […] were discussed.[282] After the phone call, the undertakings exchanged several emails where they further shared their experience with this customer and updated each other on further developments regarding the customer's tender.[283]

4.3.3.6. Fifth meeting: 13 March 2006

(260) The last meeting took place on 13 March 2006 at the Hotel Inter-Continental, Pudong, Shanghai. The meeting was organised by Exel […] who sent the invitation on 8 March 2006. The invited undertakings were Schenker […], BAX […], Eagle […], Kintetsu […], Panalpina […], DHL […], UPS […] and Kuehne & Nagel […]. From the invitation it appears that the intention of the organiser was to discuss other matters as well as the CAF.[284] In response to the invitation, […] of Schenker welcomed the idea of organising the meeting by stating:

"[…] very good idea, in particular in connection with the recently ongoing further appreciation of the RMB we need to adjust the CAF level where it is still in place. […]"[285]

(261) The companies participating in the meeting were:

(a) Kuehne & Nagel

(b) DHL

(c) UPS

(d) BAX

(e) Schenker

(f) Kintetsu

(g) Exel

(h) Eagle.[286]

(262) At the meeting the undertakings followed-up informally on how CAF implementation was proceeding, as the freight forwarders were still unsuccessful with the implementation of the CAF with multinational customers. The group also agreed that the CAF should be raised from 2.1 % to 3% due to the RMB's further appreciation against the USD.[287]

(263) Following the meeting on 13 March 2006 there were no further meetings between competitors at which the CAF was discussed. As the exchange rate of the RMB

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282 […].
283 […].
284 […].
285 […].
286 […].
287 […].

against the USD changed frequently since the beginning of 2006, any further agreements on the level of a CAF would not have been helpful or achievable.[288]

4.3.4. Assessment of the parties' arguments

(264) Several undertakings (CEVA[289], Kuehne & Nagel[290], Panalpina[291] and Kintetsu[292]) claim that they had a preexisting policy addressing the issue of the appreciation of RMB and that this currency policy was set independently.

(265) It is not relevant whether undertakings already had a preexisting currency policy, as they can still have different motivation why to attend the cartel meetings. It is crucial that the undertakings participated in the agreement and gained knowledge about the planned pricing behaviour of their competitors and could use this information when planning their future business conduct. The undertakings provided several documents that indicate that the conclusions reached at the meetings were an important factor taken into account when discussing their internal currency policy. Evidence provided by CEVA clearly shows that the imposition of the 2.1% CAF was seriously discussed within the undertaking, although the company submits that it had its preexisting policy.[293] Moreover, the specific currency policy of CEVA was even subject to discussions among the participants of the 12 August 2005 meeting.[294] An internal Panalpina email from 22 July 2005 indicates that the behaviour of Panalpina's competitors was one of the factors taken into account when setting its internal currency policy. Moreover, the reply to this email clearly shows that although Panalpina made a decision to charge a CAF, the company was in reality not very sure how to approach the issue. The conclusions from the meeting could have been very helpful for Panalpina.[295] In the case of Kintetsu, the meetings with the competitors within the group enabled Kintetsu to establish a common platform with other Japanese freight forwarders […].[296] This evidence clearly shows that despite the fact that the undertakings might have made a decision regarding its currency policy prior to the first meeting of the group, the meetings still played an important role for them.

(266) CEVA claims that its representatives told the other participants of the first meeting of the group that they lacked the authority to implement the agreement without prior approval of its headquarters. This approval was according to CEVA never obtained and the representatives of CEVA at the meetings never indicated to the other participants that such approval was obtained. CEVA also submits that it must have been therefore clear to the participants that CEVA was not in a position to join the agreement. Moreover, CEVA claims that it did not organise any of the meetings, it did not set up the common email account, it was not very active in the email

288 […].
289 CEVA's reply to the Statement of Objections, page 45.
290 Kuehne & Nagel's reply to the Statement of Objections, page 54.
291 Panalpina's reply to the Statement of Objections, page 15.
292 Kintetsu's reply to the Statement of Objections, page 31.
293 CEVA's reply to the Statement of Objections, Exhibits 7-8.
294 […].
295 Panalpina's reply to the Statement of Objections, Annex 3, Document B-C.
296 […];[…].

exchanges and it was also not asked to contact other potential participants of the meetings.[297]

(267) In the email to which the Statement of Objections refers, CEVA was ranked among those undertakings which were still seeking approval from their headquarters. This does not imply that it was clear to other cartel members that it did not obtain the approval.[298] There is also no evidence on the file that would indicate that CEVA did not actually receive the approval later on and that this message would have been passed on to the rest of the group either. In any event no specific authorisation or approval is required by an employer to its representative to conclude cartel agreements, it suffices that the representative is authorised to act for the product or service in question. Even an alleged ignorance of the facts or the law on the part of the employer or managers cannot relieve the undertaking of its responsibility for the unlawful acts carried out via its representatives.[299] The implementation of an anti-competitive agreement is a separate matter from whether such an agreement was concluded. Even if the unlawful agreement were subsequently not implemented by one or more participants, this does not free the participating undertakings from their liability under Union competition rules. Moreover, CEVA continued to attend the meetings of the group and to participate in the email exchanges and it did not in any way distance itself from the agreement or from the group. Therefore, it is reasonable to think that the rest of the cartel members continued to believe that CEVA aligned itself to the group's decisions (see also Recitals (500) - (502)).

(268) CEVA claims that it was not very successful with the implementation of the agreement, therefore the majority of its business was unaffected by any CAF agreement.[300]

(269) It is not relevant, to what extent CEVA was successful with the implementation of the agreement. Its adherence to the cartel was represented by its regular participation in the meetings and in the email exchanges.

(270) Kuehne & Nagel claims that the agreement only involved current contracts and not new contracts, as the freight forwarders could easily adjust the exchange rate in the contract according to the current situation.[301] Moreover, according to Kuehne & Nagel, the sole purpose of the agreement was to balance the negative impact of the change in the currency policy of the People's Bank of China.[302]

(271) Contrary to Kuehne & Nagel's claim the agreement evidently also involved new contracts. The common letter agreed among the parties says that all new contracts should be shifted to RMB as base currency. In case of a customer wanting to pay in USD, a current exchange rate would be used for the purposes of the calculation.[303]

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297 CEVA's reply to the Statement of Objections, page 51-55.

298 […].

299 Joined Cases 100/80 to 103/80 *Musique diffusion française e.a. v Commission*, [1983] ECR 1825, paragraph 97; Case T-9/99 H*FB and others v Commission*, [2002] ECR II-1487, paragraph 275; Case T-15/99 Brugg Rohrsysteme v Commission, [2002] ECR II-1613, paragraph 58; Case T-236/01 *Tokai Carbon v Commission*, [2004] ECR p.II-1181, paragraph 277.

300 CEVA's reply to the Statement of Objections, page 57-61.

301 Kuehne & Nagel's reply to the Statement of Objections, page 52.

302 Kuehne & Nagel's reply to the Statement of Objections, page 57.

303 […].

When it comes to the alleged purpose of the meetings, the fact that competitors met and discussed pricing issues is decisive. It is not relevant whether the purpose of the meeting was only to balance the negative impact of the change in the currency policy or to make extra profit.

(272) DB claims that BAX did not participate in the conference call on 21 November 2005.[304]

(273) The evidence on the file strongly suggests that BAX participated in the call. In an email sent to the invitees one day before the conference call […] of BAX states that he won't be able to participate, however he also adds that […] will attend instead of him.[305] Moreover, the evidence shows that if […] was not able to participate, BAX was nevertheless aware of the content of the discussions and was briefed about the outcome of the conference call. This is confirmed by an email sent by […] of BAX to […] of Exel after the conference call took place. In this email […] mentions that *"[…] we will get back to you but as discussed we are fully supportive of this approach for said customer."*[306].

(274) Panalpina claims that […], who attended the meetings on its behalf, did not have the authority to represent Panalpina at the meetings. Moreover, Panalpina further claims that the common letter agreed among the members of the cartel was sent only to Chinese based customers.[307]

(275) It is not relevant, whether […] had the authority to represent Panalpina or not, he was participating at the meetings and he never indicated to the rest of the group that he could not join any of the agreement because of the lack of authorisation. Moreover, the evidence clearly shows that his superiors knew about his participation at the meetings and even initiated this participation.[308] The fact that the letter was sent by Panalpina only to Chinese customers is not relevant.

(276) UPS claims that there is no evidence that any of its employees attended any meeting or participated in any contact between 1 September 2005 and 7 March 2006 and the duration should be shortened accordingly.[309]

(277) It is evident that in the period between 1 September 2005 and 7 March 2006 UPS was among the addressees of the email communications sent within the group. It is true that most of the emails were sent to the email address of […], who had left the company on 1 September 2005 and the emails might not have been therefore read. However from the evidence on the file it is evident that many emails were also sent to the email address of […] of UPS.[310] UPS was therefore well informed about the further development of the group and did not distance itself from its participation in the cartel. Moreover, as stated in Recital (261), UPS also participated at the last meeting of the group which further showed its continuous adherence to the cartel.

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304 DB's reply to the Statement of Objections, page 72-73.

305 […].

306 […].

307 Panalpina's reply to the Statement of Objections, page 17-18.

308 Panalpina's reply to the Statement of Objections, Annex 3, Document D.

309 UPS's reply to the Statement of Objections, page 27.

310 […].

(278) In relation to the meeting on 27 July 2005, Kintetsu claims that […], who represented Kintetsu at the meeting, was not in a position to take decisions on behalf of Kintetsu. His only task was to report to his senior management. According to Kintetsu he could not therefore agree to prepare a common customer letter as stated in Recital 152 of the Statement of Objections, neither could he raise any objections, as this was alien to Chinese business culture.[311]

(279) It is not true that […] was a junior employee. He was […], which can not be considered as a junior position. Moreover, it is more than sufficient for finding an infringement, if he only participated at the meeting in order to listen and report to his superiors as stated in Kintetsu's response. This indicates an evident interest of Kintetsu in the outcome of the discussions within the group and that Kintetsu did definitely not have the intention to raise any objections or even walk away from the meeting as claimed in its response.

(280) Kintetsu claims that it lied to other participants when informing them about its intention to contact its headquarters in order to get the approval for the wording of the letter. This information was given to the group so as not to "lose face" and to be "polite". […] that it also never sent the agreed letter to its customers, although it informed about its dissemination in a letter sent to the group. In result, Kintetsu claims to have distanced itself from the agreement.[312]

(281) It is not relevant what the intentions of Kintetsu were when sending its emails to the rest of the group. Kintetsu continued to participate in the meetings of the group and did not publically distance itself from the rest of the group, although it claims in its response that it did. No evidence in the file shows that any of the cartel members would have indicated any doubts about Kintetsu's participation in the agreement and about its behaviour towards the rest of the group. There was evidently no reason to doubt Kintetsu's adherence to the agreement, as Kintetsu continued to participate in the meetings[313] and it did not ask not to be copied in the email exchanges sent among the cartel members any more. The fact that one part of the agreement concerning the introduction of CAF was not acceptable for Japanese customers was communicated to the rest of the group by Kintetsu[314] on 3 August 2005 and other members appear to have understood these specific circumstances and accepted them, as they continued to invite the Japanese freight forwarders to meetings and also copied them in further email exchanges. […].[315]

(282) Kintetsu further claims that it was not trying to keep the agreement secret and informed SIFFA as the representative of the Chinese government about it (see Recital (225)).[316]

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311 Kintetsu's reply to the Statement of Objections, page 33-34.

312 Kintetsu's reply to the Statement of Objections, page 36-38.

313 Kintetsu voluntarily offered itself to be the one contacting SIFFA regarding the agreed measures and even sent "a copy of our mutually agreed letter" to SIFFA. Kintetsu's reply to the Statement of Objections, Annex 3.22.

314 […].

315 […].

316 Kintetsu's reply to the Statement of Objections, page 41.

(283) SIFFA was evidently approached in order to ensure a broader implementation of the agreed measures in the freight forwarding sector and not because the companies would have to seek any authorisation from the Chinese official authorities.[317] Moreover, […], SIFFA was only a semi-official association generally dominated by the primary state-owned freight forwarders. It could not therefore give the companies any authorisation in the name of the Chinese government. However, it appears that if such an association would have publicly supported the agreed measures, it would have been welcomed by all cartel members. In conclusion, by approaching SIFFA, Kintetsu only further proved its thorough adherence to the agreement.

(284) Kintetsu also submits that the wording of Kintetsu's letter to customers differed considerably from the wording agreed among the cartel members.[318]

(285) It is true that the letter is not identical with the letter agreed among the cartel members, but on the other hand it does not contain any information that would be inconsistent with the agreement. The letter only reflects a different business strategy towards Japanese customers and does not in any way indicate Kintetsu's departure from the agreement. Moreover, the wording of letter partly replicates the original agreed version.

(286) In relation to the meeting on 15 September 2005, Kintetsu claims that […] only listened and did not intervene in any way in the conversation.[319] The same argument was also raised by Kintetsu in relation to the conference call organised on 21 November 2005.[320]

(287) As mentioned in Recital (279), the mere passive participation at the meetings/phone calls suffices for the involvement of Kintetsu in the cartel. No evidence on the file indicates that Kintetsu tried to distance itself from the agreement.

(288) In relation to the meeting on 13 March 2006, Kintetsu claims that this was just an informal chat over good food in small groups at separate tables. Kintetsu further claims that CAF was not discussed at Kintetsu's table.[321]

(289) The contemporaneous evidence on the file clearly speaks about a mutual agreement reached at the meeting of 13 March 2006[322] and the topic of the planned discussion was also clearly indicated in an email sent prior to the meeting[323].

(290) In relation to the meeting on 27 July 2005, Yusen claims that […], who attended the meeting on behalf of Yusen, were only responsible for import business and not for exports. Moreover, Yusen claims that they did not know about the purpose of the meeting and they remained passive during the meeting. They also do not remember

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317 This is also confirmed by the email sent by Kintetsu to the rest of the group, which says concerning a possible implementation of the agreement in SIFFA: *"[…] We think that it will definitely bring us big benefit and great convenience while negotiating with our customers."* Kintetsu's reply to the Statement of Objections, Annex 3.22.

318 Kintetsu's reply to the Statement of Objections, page 44.

319 Kintetsu's reply to the Statement of Objections, page 45.

320 Kintetsu's reply to the Statement of Objections, page 48.

321 Kintetsu's reply to the Statement of Objections, page 48.

322 […].

323 […].

any conclusion being reached.[324] In general terms, Yusen further stresses its low level of participation in the email exchanges. It also states that it did not make use of the information received from the group, as according to Yusen these were useless for the company.[325]

(291) It is not relevant, for which part of the business Yusen's representatives were responsible, as it is more than evident that they had the full capacity to represent Yusen at the meeting. Moreover, it does not matter that they did not know the topics to be discussed prior to the meeting and they did not act actively during the meeting, as they remained at the meeting, listened and reported back to their superiors. Furthermore, the claim that Yusen took a passive role must be rejected as well, as Yusen continued to participate in the email exchanges. If the information received by email were irrelevant for the company, it could have asked to be removed from the mailing list. Consequently, Yusen did not distance itself from the agreement following the meeting and was therefore seen by the other participants as an integral part of the cartel.

(292) In relation to the meeting on 12 August 2005, Yusen claims that […], who participated on behalf of Yusen, was not aware that currency issues would be discussed during the meeting. He spoke only when he was asked to describe the company's policy and disclosed that Yusen would not implement CAF. He did not participate in any other discussion during the meeting, as the company was not implementing CAF.[326]

(293) The impossibility of the putting into effect of the CAF with Japanese customers was communicated by the Japanese freight forwarders to the rest of the group[327] and was clearly accepted by the "westerners", as no objections were raised against this approach. Nevertheless, the introduction of CAF was only one part of measures agreed among the parties, the second one being the change of the quotation from USD to RMB (see Recitals (232) and (235)). The latter was the more preferred solution by both Japanese and non-Japanese cartel members. This means that Yusen was not in any way disqualified from the discussions, as these were not at all concentrating exclusively on CAF. This explains why Yusen was still seen as an integral part of the group by the others and was subsequently copied in the emails.

(294) Yusen claims that it never confirmed its acceptance with the wording of the common customer letter, as CAF was not acceptable for the company.[328]

(295) As mentioned in Recital (293), the difficulty in implementing of the CAF by Japanese undertakings was communicated to the rest of group and was accepted as a fact. It is therefore evident that Yusen was not expected to implement this part of the agreement.

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324 Yusen's reply to the Statement of Objections, page 8-9.
325 Yusen's reply to the Statement of Objections, page 10-12.
326 Yusen's reply to the Statement of Objections, page 14.
327 […].
328 Yusen's reply to the Statement of Objections, page 13.

4.3.5. Conclusion

(296) The eleven undertakings listed in Recital (214) were all active members of the cartel which was created following a change in the currency policy of the People's Bank of China. The first meeting was organised in order to agree a common pricing strategy following the depreciation of the USD. The undertakings agreed on common pricing measures designed to preserve their profits without risking any loss of business to competitors. Specifically, the undertakings agreed that freight forwarders should shift contacts to RMB or charge a CAF of 2.1% (subsequently increased to 3%) for all USD contracts.

(297) Following the first meeting the undertakings remained in contact via emails and agreed on the wording of a common letter, which was sent to their customers and informed them about the agreed changes. They further monitored the reaction of the market and exchanged their experience with the acceptance of the CAF for specific customers who were shared by the undertakings. These issues were further discussed during subsequent meetings held in the following months, as well as in numerous emails exchanged among the undertakings.

(298) The contacts were organised mainly due to the fact that the undertakings were aware of the fact that only a collective approach could ensure the successful implementation of the agreed measures. Under normal conditions of competition based on independent pricing decisions, customers might choose a different service provider rather than accept a price increase. This was also the reason why the undertakings which had already implemented the agreement in the market were pushing the others to do the same, as customers refused to pay the surcharge with reference to freight forwarders who had not yet applied the CAF.

(299) The main purpose for the organisation of the meetings was the elimination of pricing uncertainty on the freight forwarding market resulting from the change in the currency policy of the People's Bank of China and its effects on the market. The agreements and the coordination of their market behaviour helped the undertakings to minimize the harm that they could suffer from changing conditions on the market. The undertakings were well aware of the fact that these discussions could constitute a breach of antitrust law in many countries, and therefore took several measures in order to hide the existence of the contacts among them.[329]

4.4. Peak Season Surcharge (PSS)

(300) The principal evidence relied on consists of documents obtained during the inspections, replies to requests for information, documents submitted by applicants under the Leniency Notice, as well as corporate statements by the applicants.

(301) The following undertakings participated in the infringement:

[329] […].

Table 5:

Parties to PSS infringement

Company	**Period**
DHL	9 August 2005 – 21 May 2007
Exel	9 August 2005 – 13 January 2006
Panalpina	9 August 2005 – 21 May 2007
Baltrans (Toll)	9 August 2005 – 21 May 2007
Geologistics (Agility)	9 August 2005 – 21 May 2007
Kuehne & Nagel	9 August 2005 – 21 May 2007
Expeditors	21 September 2005 – 23 June 2006
Schenker	3 September 2005 – 23 June 2006
Hellmann	6 December 2005 - 21 May 2007

4.4.1. General remarks

(302) The Peak Season Surcharge (PSS) is a temporary rate adjustment factor which is imposed as a reaction to rising demand in the air freight forwarding sector in specific time periods. Fluctuations in the demand for freight forwarding services are a typical feature of the industry and they predominantly correspond with the changing demand for the forwarded goods in the target countries. In the European Economic Area, the demand for consumer goods peaks before the Christmas period and it is also the period when the PSS is applied.

(303) The rise in demand leads to a shortage of transporting capacity. Carriers therefore increase their rates by 20-30% during peak season, which is also referred to as general rate increase (GRI). The freight forwarders try to cover these temporary increased costs of transport in order to safeguard their margins by means of a special surcharge, the PSS.

(304) PSS is typically applied in ocean freight forwarding. In the air freight forwarding sector, PSS is applied mainly on shipments from some Asian countries to Europe […]. The contacts described in Section 4.4.3 […] concern the implementation of the PSS on routes to Europe, […].

(305) The European peak season lasts generally every year from September until Christmas, sometimes until January (the Chinese New Year). As a consequence of the imposition of the surcharge, all shipments from China to Europe become more expensive at the peak season time than during the rest of the year.

(306) The freight forwarders were not always able to implement the PSS in the years preceding the contacts described below in Section 4.4.3. This was due to a variety of

reasons but mainly due to customer opposition. In order to ensure successful implementation of the PSS, the freight forwarders therefore coordinated their approach.

(307) […]. The Commission has gathered evidence proving the existence of a cartel regarding the PSS from Hong Kong and South China to the European Economic Area. It is concluded from the evidence on file that the cartel operated at least from 9 August 2005 when the first known multilateral meeting took place until at least 21 May 2007 when the last known multilateral meeting discussing the PSS took place.

4.4.2. Nature of the illicit contacts between competitors concerning the PSS

(308) […].

(309) In the years 2005, 2006 and 2007 undertakings gathered at the "Breakfast Meetings" organised by DHL […]. The main purpose of the meetings was to establish a common agreement on the introduction of the PSS to Europe.[330] There were 7 meetings in total, 3 in 2005, 3 in 2006 and 1 meeting in 2007.

(310) During the Breakfast Meetings the undertakings discussed primarily the question of whether to impose a PSS in the peak period of the relevant year. After the agreement was reached, the undertakings further agreed on timing, that means mainly from when the PSS should be imposed and how long it should be maintained. The meetings were therefore organised before the peak season period, nevertheless they also often took place during the peak season period (this was the case when the undertakings either monitored the implementation of the PSS or decided to prolong it). The undertakings did not agree on a specific amount of the PSS, as each freight forwarder had a different structure of carriers with different GRIs applied. However, the evidence on file indicates that some discussions regarding the amount of the surcharge took place in the years 2005 and 2006 as well. In 2007 the undertakings agreed only on the imposition of the surcharge.

(311) The motivation for convening the first Breakfast Meeting in August 2005 was the fact that some freight forwarders were not able to introduce a PSS in 2004 due to the resistance from their European offices. The goal in 2005 was to coordinate efforts among the freight forwarders in Hong Kong and to agree a common approach in order to ensure a successful application of that year's PSS.[331]

(312) As the PSS in 2005 proved to be successful, the freight forwarders met also for the following two years. All meetings were organised by DHL. The purpose of the meetings remained the same, namely, the agreement on the imposition of the PSS, its timing and eventually its amount. In 2005, the parties also agreed on the extension of the surcharge.

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330 […].

331 […]. The purpose of the meetings was also clearly defined in an internal […] email summarizing the results of one of the meetings. The email stated that the goal of the meeting is "*to pass the GRI/PSS message in market at the same and right time agreed by and from these key industrial players to the Customer and Sales Counterpart*". […].

(313) There were neither agendas nor minutes taken during these meetings. […] this was primarily due to concerns by some members that the topics discussed might not be appropriate under foreign antitrust laws.[332] The invitations to the meetings were sent by […] of DHL, a secretary of […], to a selected list of freight forwarders, mostly Executive Committee members of Hong Kong Association of Freight Forwarding and Logistics (HAFFA).[333] All the participants to the meetings were solely global freight forwarders, as their customer structure and airline contacts were different from those of local freight forwarders.

4.4.3. Description of the events

4.4.3.1. 2005 Breakfast Meetings

(314) The **first** of the Breakfast Meetings took place on 9 August 2005 at the Coffee Shop, Grand Hyatt Hotel, Wanchai, Hong Kong. The invitation was sent by email by DHL […]. The invited undertakings were Kuehne & Nagel […], Schenker […], Panalpina […],[…], Exel […], Geologistics […], Baltrans […],[…] and […]. The invitation informed that the purpose of the meeting would be a discussion regarding the PSS to Europe.[334]

(315) The companies participating in the meeting were[335]:

(a) DHL […]

(b) Exel […]

(c) […]

(d) Panalpina […]

(e) Baltrans […]

(f) […]

(g) Geologistics […]

(h) Kuehne & Nagel […].[336]

(316) The meeting was summarized in internal emails of several undertakings.[337] According to them the attendees of the meeting agreed to implement a PSS for 2005, starting from 1 September 2005. The customer letters informing about the introduction of the PSS were to be sent out on 16 August 2005. The undertakings also agreed to inform undertakings which were not attending the meeting about its

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332 […].

333 […].

334 […].

335 […].

336 […].

337 DHL (the email was sent by […] who attended the meeting on behalf of DHL), […];[…]; Geologistics (the email was sent by […] who attended the meeting on behalf of Geologistics), […]; Kuehne & Nagel (the email was sent by […] who attended the meeting on behalf of Kuehne & Nagel), […].

outcome[338] and to meet again in the middle of September.[339] One of the emails summarizing the meeting was an internal email of […] with the subject *"AFR PSS to EU"* and it reads as follows:

"[…] I met […] this morning and agreed to have a similar PSS […] effective 1 SEP […]. We agreed to send out our letters to our customers by 16 AUG n sit down again to review the market in mid SEP. […]"[340]

(317) Moreover, in an internal email […], who attended the meeting on behalf of […], referred to an alleged agreement reached on the level of the PSS. The relevant part of the email reads as follows:

"[…] Have attended the meeting this morning. We (Forwarders) are going to increase the selling rate to our customers from 20 to 25% (all decide by our own) with effective on the first date of Sept. 05 […]"[341]

(318) A reference regarding the discussions on the level of the surcharge was also made by […] in an internal […] email. In this email he refers to the existence of simultaneous pricing behaviour of all major freight forwarders. The relevant part of the email reads as follows:

"[…] As additional information, we know for certain that the PSS (with more or less similar amounts) is implemented from all major competitors, partly already since September 1st / 15th onwards. […]"[342]

(319) As agreed during the first meeting, a **second meeting** was organised on 21 September 2005 at the Coffee Shop, Grand Hyatt Hotel, Wanchai, Hong Kong. The organiser was again DHL […]. The invitation was sent by […] on 13 September 2005 to the same recipients as for the first meeting (see Recital (314)). According to the invitation, the undertakings were supposed to exchange the *"latest updates and the latest status on PSS Europe"*.[343]

(320) The meeting was attended by:

(a) DHL […]

(b) Exel […]

(c) […]

(d) Panalpina […]

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338 […].

339 […].

340 […].

341 […].

342 […]. Schenker did not attend the Breakfast meeting on 9 August 2005. However, as mentioned in Recital (316), Schenker was among the undertakings who were supposed to be informed of the outcome of the discussions by its participants following the meeting.

343 […].

(e) Baltrans […]

(f) Geologistics […]

(g) Expeditors […].[344]

(321) The meeting was summarized in an internal […] email of the same day. The attendees mainly exchanged their experience with the implementation of the PSS on the market. They agreed that the implementation was much easier than the previous year, some companies even announced that they would apply a second round of PSS (slightly higher than the first one) starting around the second week of October 2005[345]. They agreed again that they would inform the non-attending companies about the outcome of the meeting.[346]

(322) A **third meeting** was organised on 6 December 2005 again at the Coffee Shop, Grand Hyatt Hotel, Wanchai, Hong Kong. The organiser was DHL […] and the invited companies were also the same as for the meetings on 9 August 2005 and 21 September 2005 (see Recitals (314) and (319)). According to the invitation, the meeting was called in relation *"to the Extension of PSS Europe"*, as the originally agreed PSS was about to expire at the end of December 2005.[347]

(323) The meeting was attended by:

(a) DHL […]

(b) Exel […]

(c) […]

(d) Panalpina […]

(e) Baltrans […]

(f) Kuehne & Nagel […]

(g) Expeditors […]

(h) Schenker […]

(i) Hellmann […]

(j) […].[348]

(324) The meeting was summarized in internal […] and […] emails.[349] According to them the attendees of the meeting agreed on an extension of the PSS until the end of

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344 […].

345 […].

346 […]. It was agreed that Exel would inform […] and […], DHL already informed […], Panalpina would inform Kuehne & Nagel (who promised to follow the agreement), Hellmann and Schenker.

347 […].

348 […].

349 […].

January 2006. They also evaluated the results of the discussions in relation to 2005 and agreed that the project proved to be successful. Therefore they agreed to organise the meetings also in the following year with more competitors invited to the meetings.[350] The […] email reads as follows:

"[…] […] and I had had a breakfast mtg with our encounterparts this morning. We had the following common understanding:

a) we all go for extension of PSS to […] the EU […] till end of JAN. […]

b) all felt the PSS to EU […] were very successful this year and wd like to do the same next year.

c) we wd sit down again and exchange views on the actual buying costs for 2006 some time in JAN 2006 before CNY. […]"[351]

(325) The relevant corresponding part of the […] email states:

"[…] I had last week a check with our Top 10 competitors in HKG and ALL agreed to have the PSS extended until end of January 2006. This sets the direction – we stick to what we announced earlier, i.e. […] PSS […]"[352]

The above […] email from […] was written in response to the email sent by […] office in the United Kingdom stating:

"Please can you clarify the situation regarding PSS […] Our competitors in the U.K. seem unwilling to commit […]"

4.4.3.2. 2006 Breakfast Meetings

(326) The **fourth** meeting was organised on 13 January 2006 at the China Club, Old Bank of China Building, Hong Kong. The organiser was again DHL […]. The invited undertakings were Kuehne & Nagel […], Panalpina […], Expeditors […], Exel […],[…], Baltrans […], Schenker […], Hellmann […],[…], Geologistics […],[…] and […].[353]

(327) The meeting was attended by:

(a) DHL […]

(b) Exel […]

(c) Expeditors […]

(d) Panalpina […]

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350 […].
351 […].
352 […].
353 […].

(e) Baltrans […]

(f) Kuehne & Nagel […]

(g) Schenker […]

(h) Hellman […]

(i) […]

(j) Geologistics […].[354]

(k) […] could not attend the meeting but they announced they would follow the group decision.[355]

(328) […] the primary purpose of the meeting on 13 January 2006 was to receive updates from the group on how successful the extension of the PSS had been. The attending undertakings exchanged reactions from customers as well as from the freight forwarders' internal European […] sales teams. More general market developments were discussed as well.[356]

(329) **A fifth** meeting was organised by DHL […] on 3 February 2006. The venue was again at the China Club, Old Bank of China Building, Hong Kong. The group of invited undertakings stayed the same as for the 13 January 2006 meeting.[357]

(330) The meeting was attended by:

(a) DHL […]

(b) Expeditors […]

(c) Panalpina […]

(d) Baltrans […]

(e) Hellmann […]

(f) Kuehne & Nagel […]

(g) Schenker […]

(h) Geologistics […]

(i) […]

(j) […]

(k) […]

---

354 […].
355 […].
356 […].
357 […].

(l) […].

(331) […],[…] and […] had initially responded that they would attend, but […] they did not participate in the end.[358] […] responded to the invitation that he could not come to the meeting however he would contact DHL […] in order to get the feedback from the meeting.[359]

(332) The meeting was summarized in an internal […] email sent by […] on 11 February 2006, as well as by a […]. The meeting primarily focused on supply and demand developments for 2006, but the group also exchanged views on how the PSS had established itself in the market and whether there was any room for a further extension, or a general rate increase. The attending freight forwarders reached an agreement that since buying rates had increased year-over-year, forwarding rates should not be discounted in 2006 as much as they had been discounted in 2005.[360]

(333) In this regard, an internal […] email refers to an agreement among the attending undertakings on a common rate increase of HKD 1.50. The relevant part of the email reads as follows:

"[…] At this point, the group has verbally agreed for a GRI announcement of […] HK$1.50 per kg for HKG/EUROPE by end of Feb or early March. […]"[361]

(334) **The sixth** of the Breakfast Meetings was organised on 23 June 2006. The organiser was again […] of DHL and the venue the China Club, Old Bank of China Building, Hong Kong. The invited undertakings were Kuehne & Nagel […], Panalpina […], Expeditors […],[…], Baltrans […], Schenker […], Hellmann […],[…], Geologistics […],[…],[…],[…],[…],[…] and […].[362]

(335) The participating companies were:

(a) DHL […]

(b) Expeditors […]

(c) Hellmann […]

(d) Panalpina […]

(e) Kuehne & Nagel […]

(f) […]

(g) Geologistics […]

(h) […]

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358 […].
359 […].
360 […];[…].
361 […].
362 […].

(i) […]

(j) […]

(k) Schenker […].[363]

(l) […] did not attend the meeting but announced they would follow the group decision. Baltrans, […] and […] did the same.[364]

(336) The results of the meeting were reported in several internal emails and also […].[365] According to them the participating undertakings agreed a PSS for the coming season for […] Europe. It was agreed that the PSS for Europe would start on 1 September 2006.

(337) Furthermore, an internal […] email indicates that the participants of the meeting also discussed level of the PSS. […] did not attend the meeting, nevertheless it was briefed about its outcome by […] of DHL. The relevant part of the email reads as follows:

"[…] The below lunch meeting organised by […] was held today. Just like last year, the meeting is to quietly agree the PSS this year. It was agreed: […] 20% for Europe wef Sep 1. Nobody raised any objection […]."[366]

(338) A reference to discussions regarding the level of the PSS during the meeting in June 2006 was also made a year later in an internal […] email. The relevant part of the email reads as follows:

"[…] There was no conclusion of the planned date of PSS implementation, but they agreed in principle that the PSS implementation this year would be later than last year. I was told that they implemented HKD1.50/kg last year. […]"[367]

4.4.3.3. 2007 Breakfast Meetings

(339) **The last** of the Breakfast Meetings took place on 21 May 2007. The meeting was held at the China Club, Old Bank of China Building, Hong Kong and was again hosted by DHL […]. The invited undertakings were Kuehne & Nagel […], Panalpina […],[…],[…], Baltrans […], Schenker […], Hellmann […],[…], Geologistics […],[…],[…],[…],[…],[…] and […].[368]

(340) The meeting was attended by:

(a) DHL […]

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363 […].

364 […].

365 […], Schenker (an email sent by […] announced the implementation of PSS within Schenker, in order to strengthen his arguments a reference was made to the fact that all major freight forwarders would implement it as well). […].

366 […].

367 […].

368 […].

(b) Baltrans […]

(c) Geologistics […]

(d) Panalpina […]

(e) […]

(f) […]

(g) Kuehne & Nagel […]

(h) Hellman […]

(i) […].[369]

(341) […] the meeting was similar to the June 2006 gathering. The group exchanged views on the PSS from Hong Kong and South China to Europe […] and discussed whether and roughly when to implement such surcharges. There was also some broad speculation on market developments more generally.[370] According to an internal […] email, the discussion regarding the imposition of the PSS was quite heavy as the market conditions were not ideal and some freight forwarders were envisaging not implementing the surcharge in 2007. In the end, an agreement was reached that all the participating undertakings would send letters to customers informing them about the implementation of the PSS but no agreement on specific timing and amount was reached except that the PSS would be implemented later in the year than in 2006. The relevant […] email reads as follows:

"[…] However, compared to last year, almost all participants agreed that the air export market was extra-ordinary soft this year for […] European […] traffics. Given such a soft market condition, there was a long argument if the implementation of PSS could be taken place this year. At the end of the debate, all participants agreed to implement PSS again this year. […] There was no conclusion of the planned date of PSS implementation, but they agreed in principle that the PSS implementation this year would be later than last year. […] Then, they all agreed to deliver a consistent message to the airlines to reduce their rate in peak season in order to maintain the profitability. […]"[371]

(342) The 21 May 2007 meeting was the last gathering of the group, although the participants at this meeting agreed to meet once more in July 2007 in order to discuss the date of the implementation and the value of the PSS.[372] […], the meetings eventually dissolved following […]'s move to […]'s Singapore office.[373] No further evidence was identified which would prove any further multilateral discussions took place regarding the PSS from Hong Kong to Europe.

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369 […].
370 […].
371 […].
372 […]. In fact this meeting didn't take place.
373 […].

4.4.4. Assessment of the parties' arguments

(343) Kuehne & Nagel claims in relation to the first meeting on 9 August 2005 that the discussions on the PSS surcharge were only a mere reaction to the general rate increase by carriers. Moreover, according to Kuehne & Nagel, the company had already decided prior to the meeting about the passing-on of the increased costs to its customers.[374]

(344) It is not relevant, whether or not the discussions on the PSS surcharge were organised as a mere reaction to the increased costs of the transport services. The fact that the freight forwarders met and discussed pricing issues cannot be justified by the necessity to cover increased external cost elements. Moreover, it is not important, whether or not Kuehne & Nagel decided prior to the meeting to apply a PSS, while as a result of its participation at the meeting, Kuehne & Nagel could have decided to change its policy or it could have attended with the intention to persuade other participants of the meeting to follow the same policy as Kuehne & Nagel. That this was the case is proven by an internal […] email reporting on the outcomes of the 9 August 2005 meeting, which specifically states in relation to Kuehne & Nagel that the company had a preexisting decision to apply the PSS from the middle of August, however, in light of the discussions the company decided to *"align also to 1SEP"*.[375]

(345) In relation to the meeting on 9 August 2005 both Kuehne & Nagel and Panalpina submit that no agreement on the level of the fee was reached during the meeting. Kuehne & Nagel claims that such an important conclusion would have been mentioned in its internal email summarizing the meeting and it is therefore unlikely that any agreement was concluded during the meeting.[376] According to Panalpina, freight forwarders were free to decide on the level of the PSS. Moreover Panalpina submits that the internal emails of […] and Kuehne & Nagel do not mention any agreement on the level of the PSS and the same also applies to […].[377]

(346) Firstly, the fact that the discussions regarding pricing are not mentioned in the internal Kuehne & Nagel email summarizing the meeting does not prove that these discussions did not take place. In this regard, the Commission possesses two contemporaneous emails of […] and […] which clearly indicate that pricing was discussed during the meeting.[378] Secondly, even if no fixed agreement was reached on the level of the PSS to be charged to customers, a mere discussion on the level of the surcharge suffices for finding an infringement. This is also in line with the oral statement of […] mentioned by Panalpina, which states that no specific amount was agreed (however this indicates that there was a discussion and/or exchange on the level of the surcharge).[379] Moreover, […] states in this regard that the employees of […] who participated in the meetings do not recollect any discussions concerning specific amounts of the PSS having taken place.[380] However, such a statement does not exclude that such discussions could have actually taken place, which is further

374 Kuehne & Nagel's reply to the Statement of Objections, page 64.
375 […].
376 Kuehne & Nagel's reply to the Statement of Objections, page 64.
377 Panalpina's reply to the Statement of Objections, page 44.
378 […],[…].
379 […].
380 […].

confirmed by an internal […] email[381] indicating that at least a general discussion on the levels was held at the meeting of 9 August 2005.

(347) In relation to the meeting on 9 August 2005, Panalpina claims that it might be possible that some participants of the meeting mentioned 1 September 2005 as a starting date of the peak season, however Panalpina disagrees that the participants reached or attempted to reach any agreement on the introduction of the PSS, its timing or level.[382]

(348) The Commission is in possession of several contemporaneous emails, which indicate that the participants of the 9 August 2005 meeting agreed on the introduction of the PSS and its timing. In this regard, an internal Kuehne & Nagel email states *"What we agreed is to announce the rate increase to the client on/about Sept. 01"*. The same reference to an agreement among the freight forwarders is also mentioned in […][383], as well as in […][384].

(349) Panalpina submits in relation to the meeting of 21 September 2005 that the only purpose of the meeting was to exchange general information regarding market developments. Panalpina denies that the parties discussed the implementation of the PSS or a possibility of a second round of PSS.[385]

(350) The meeting invitation already gave an indication that the main purpose of the meeting would be to share latest experience with the PSS.[386] Moreover, in the Statement of Objections the Commission referred to an internal […] email sent immediately after the meeting, in which […], summarizes the main interesting points discussed during the meeting. This email indicates that all participants shared the opinion that *"the PSS was much smoother than last year"* and even mentions that Panalpina was among the two companies, which stated that they would go for a second round of PSS.[387] The content of the email is also confirmed by […].[388]

(351) According to Kuehne & Nagel, […] of Kuehne & Nagel did not attend the Breakfast Meetings on 21 September 2005 and 6 December 2005.[389]

(352) Firstly, it is an undisputed fact that Kuehne & Nagel attended the first Breakfast Meeting on 9 August 2005, during which the PSS for 2005 was agreed on and which was therefore the key meeting in relation to the 2005 PSS. Furthermore, the Commission does not dispute the fact the fact that […] did not attend the Breakfast Meeting on 21 September 2005 and it is also fully in line with the Commission's findings in the Statement of Objections and in the Decision, which do not mention Kuehne & Nagel among the participants of this meeting.[390] Moreover, the evidence on the file shows that Kuehne & Nagel had already indicated prior to the meeting on

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381 […].
382 Panalpina's reply to the Statement of Objections, page 44-45.
383 […].
384 […].
385 Panalpina's reply to the Statement of Objections, page 45.
386 […].
387 […].
388 […].
389 Kuehne & Nagel's letter of 19 July 2010 submitted following the oral hearing in this case.
390 See in this regard Recital (207) of the Statement of Objections and Recital (320) of this Decision.

21 September 2005 that the company would follow the measures agreed at the meeting[391], which only prove the genuine adherence of the company to the agreement.

(353) Secondly, the evidence on the file shows that […], contrary to Kuehne & Nagel's arguments, did attend the meeting on 6 December 2005. His participation is primarily confirmed by […], which mentions […] among the participants of the meeting.[392] It is essential to stress in this regard that DHL was organising all seven Breakfast Meetings and the participation of Kuehne & Nagel is confirmed by […] of DHL, who was responsible for the organisation on behalf of […].[…].

(354) Moreover, the participation of Kuehne & Nagel at the meeting of 6 December 2005 is also indirectly confirmed by an internal […] email that summarizes the Breakfast Meeting on 6 December 2005. […], who participated at the meeting on behalf of […], refers in this email to a meeting *"with our Top 10 competitors"*. The number of participants mentioned in this email corresponds with the number of companies enumerated in the […] and confirms therefore […]'s recollection and records. It is therefore concluded that there is no reason to doubt the participation of […] of Kuehne & Nagel at the Breakfast Meeting on 6 December 2005.

(355) Hellmann claims that the meeting on 6 December 2005, which was the first meeting Hellmann attended, was not of an anti-competitive nature in relation to Hellmann, as the company did not take part in the previous two meetings, where the imposition of the PSS surcharge was agreed. According to Hellmann the agreement on the extension of the PSS surcharge reached at the meeting on 6 December 2005 was therefore of no importance to the company.[393]

(356) It is undisputed that Hellmann participated in the 6 December 2005 meeting, where pricing issues were discussed. The fact that Hellmann did not attend the previous two meetings, where the basic agreement on the imposition of the PSS surcharge was reached, is not important. The mere participation at the third meeting enabled Hellmann to obtain information about the future behaviour of its competitors and on the agreement reached in relation to the PSS and Hellmann could use this information when setting its own business strategy. Moreover, the continuous participation of Hellmann at the following meetings shows that the information obtained at the 6 December 2005 meeting must have been very useful for the company, as its interest in participating in the Breakfast Meetings remained.

(357) According to Panalpina, the participants of the meeting of 6 December 2005 only exchanged general market information concerning the demand and concerning possible indications from carriers about their intention to extend their peak season rates. According to Panalpina, there was no agreement on the extension of the PSS.[394]

(358) The Commission is in possession of two emails referring to the issues discussed during the 6 December 2005 meeting. Both emails clearly indicate that the

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391 […].

392 […].

393 Hellmann's reply to the Statement of Objections, page 11.

394 Panalpina's reply to the Statement of Objections, page 46.

participants of the meeting agreed on the extension of the PSS to Europe. The first email is an internal […] email sent by […], in which […] refers to an agreement that the parties would *"go for extension of PSS to […] the EU […] market till end of JAN"*.[395] This agreement is also confirmed by an internal Schenker email which states that all participants agreed to extend the PSS until the end of January.[396]

(359) According to Kuehne & Nagel, the meeting of 13 January 2006 only reflected the previous agreement on the PSS for 2005 and it did not have anything in common with the PSS for 2006. A similar claim was also made by Kuehne & Nagel in relation to the meeting on 3 February 2006.[397]

(360) Even the mere exchange of information regarding the implementation of the PSS is clearly of an anti-competitive nature, as it is a follow-up to the original agreement on the imposition of the surcharge, which is monitored by such arrangements and/or discussions. It is therefore not relevant that no future plans of the competitors were discussed at these two meetings.

(361) In relation to the meeting on 13 January 2006, Panalpina claims that the purpose of the meeting was to exchange further general information regarding developments in the market. According to Panalpina this information exchange would have enabled participants to assess, whether the extension of the peak season was still supportable on the market. However, Panalpina claims that the purpose of the meeting was not to monitor the implementation, as there was no agreement to be monitored.[398]

(362) Panalpina confirms in its response that the participants of the meeting of 13 January 2006 exchanged their views as to whether the PSS was still supportable on the market. As already shown in Recital (324), an agreement existed in relation to the extension of the PSS. It is therefore logical that the information exchange concerned this agreement reached on 6 December 2005. This is confirmed by an […], which clearly indicates that the participants mainly exchanged their experience with the implementation of the PSS extension.[399]

(363) In relation to the meeting on 3 February 2006 Kuehne & Nagel further submits that a discussion regarding a possible extension of the PSS is not of an anti-competitive nature. Moreover, Kuehne & Nagel claims that the internal […] email[400] used in the Statement of Objections only refers to a general rate increase by carriers, which needs to be communicated to customers, and does not refer to a common rate increase by freight forwarders.[401]

(364) A discussion regarding a "possible extension" of the PSS is evidently of an anti-competitive nature, as it concerns costs to be imposed on customers. Moreover, it is evident from the email sent by […] that it uses the term GRI and PSS in parallel, as there is a close interaction between the two. This is also the reason the email speaks

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395 […].
396 […].
397 Kuehne & Nagel's reply to the Statement of Objections, page 66.
398 Panalpina's reply to the Statement of Objections, page 46.
399 […].
400 […].
401 Kuehne & Nagel's reply to the Statement of Objections, page 66-67.

about implementing *"the GRI/PSS"*, although it is evident that GRI can not be implemented by the freight forwarders as such, because it is set by the carriers.[402] Furthermore, the email clearly indicates that the freight forwarders were those, who agreed on the GRI (that means PSS) based on the feedback from customers. They additionally agreed to have another meeting in order *"to review the result of the joint announcement"*. Finally, it must be noted that even a mere agreement among the freight forwarders to pass on the rate increase imposed by carriers to their customers would be clearly of an anti-competitive nature.

(365) Panalpina submits that at the meeting on 3 February 2006 the parties only exchanged information regarding market developments, as it was clear that based on the previous exchanges, it was likely that the peak season had come to an end. Moreover, according to Panalpina the internal […] email can not be assessed as a contemporaneous email, as it was sent 8 days after the meeting and the email indicates that it is a revised version of the document. Furthermore, Panalpina submits that the email contradicts the […], which is relied upon by the Commission.[403]

(366) It is evident that the purpose of the 3 February 2006 meeting was mainly to evaluate a possible further extension of the PSS, as well as to discuss the overall prospects for the year 2006, as the peak season was coming to an end. The discussion was again based on information obtained by the freight forwarders from their clients and carriers and the purpose of the discussions was to coordinate the market behaviour of the competitors. Furthermore, there is no reason to doubt the credibility of the […] email[404] just because it was sent 8 days after the meeting and it indicates that it was revised. Moreover, the […] email does not in any way contradict the […], as the latter only says that its employees could not recall any pricing discussions having taken place.[405] This statement does not rule out that such discussion did actually take place.

(367) According to Kuehne & Nagel no agreement on pricing was reached during the meeting on 23 June 2006. Kuehne & Nagel claims that the internal […] email can not be used as evidence, as […] did not attend the meeting and was only briefed about its outcome following the meeting.[406]

(368) The fact that discussions regarding pricing took place during the 23 June 2006 meeting is evidenced not only by the internal […] email, but also by the internal email of […]. It is true that neither […] nor […] attended the meeting, but they were briefed about its outcome. […] was informed on the same day that the meeting took place by […] of DHL[407] and […] received this information about the previous meeting as background information at the next meeting in May 2007[408]. Both emails indicate that the participants of the meeting at least exchanged pricing information.

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402 The same applies when the email states, for example, *"It is also agreed to that the GRI/PSS will be focused only for* […] *EUROPE market."* or *"there is no enforcement from the group for the GRI/PSS implementation"*.

403 Panalpina's reply to the Statement of Objections, page 46.

404 […].

405 […].

406 Kuehne & Nagel's reply to the Statement of Objections, page 68.

407 […].

408 […].

(369) In relation to the meeting on 23 June 2006 Panalpina claims that similar to the meeting on 9 August 2005 the purpose of the meeting was to exchange general market information in order to predict when the 2006 peak season might begin. However, according to Panalpina, there was no agreement reached regarding the PSS.[409]

(370) The Commission possesses several pieces of evidence that clearly show that the participants of the meeting of 23 June 2006 agreed on the introduction of the PSS and its timing. This agreement is referred to in […].[410] Moreover, the agreement is also specifically mentioned in internal emails of […] and […].[…] did not attend the meeting, nevertheless it was briefed by […] of DHL. The internal […] email specifically says that the participants of the meeting agreed (as in the previous year, when […] attended the meeting) on the introduction of the PSS.[411] […] did not attend the 23 June 2006 meeting either, however in its internal email summarizing the conclusions from a Breakfast Meeting in May 2007, […] states that the existence of the agreement on the introduction and timing of the 2006 PSS was mentioned by the participants in the discussion on the 2007 PSS.[412] The PSS agreement is also indirectly mentioned in an internal Schenker email, which informs about the implementation of the PSS within Schenker and adds that the PSS will be also applied by all major freight forwarders in Hong Kong.[413]

(371) Kuehne & Nagel claims in relation to the meeting of 21 May 2007 that no anti-competitive agreement was reached during this meeting.[414]

(372) It is true that no agreement on the specific timing of the introduction of the PSS was reached at the meeting. Nevertheless, from the internal […] email summarizing the meeting, it is evident that the freight forwarders intensively discussed the introduction of the PSS and at the end *"all participants agreed to implement PSS again this year"*.[415] This agreement is clearly of an anti-competitive nature and is also confirmed by the […] statement.[416]

(373) According to Panalpina the purpose of the 21 May 2007 meeting was to exchange general market information in order to predict the start of the 2007 peak season. However, according to Panalpina, there was no agreement reached regarding the PSS. Panalpina also argues that there are discrepancies between the evidence relied on by the Commission, as the […] statement does not mention any agreement on the PSS introduction.[417]

(374) Both […] and the internal […] email mention that the participants of the meeting discussed the introduction and timing of the PSS. The fact that […] states that undertakings not only discussed the introduction of the PSS, but also roughly

409 Panalpina's reply to the Statement of Objections, page 49.
410 […].
411 […].
412 […].
413 […].
414 Kuehne & Nagel's reply to the Statement of Objections, page 69.
415 […].
416 […].
417 Panalpina's reply to the Statement of Objections, page 47-48.

discussed its timing, indicates that a general understanding on the introduction of the PSS must have been reached during the meeting, otherwise the discussion on the timing would not make any sense. The statement is therefore fully in line with the […] email that says that the participants agreed after a lengthy discussion that a PSS would be implemented in 2007 and that no agreement was reached on a fixed date for its introduction.[418]

(375) Agility claims that it was not considered to be a major player and it was therefore not a member of the core group of freight forwarders formed by DHL, Exel, Expeditors, Kuehne & Nagel, Panalpina and Schenker. Moreover, according to Agility, […], who represented the company at most of the meetings, held only a junior position within the undertaking and had only a limited command of English. Agility therefore claims that his role at the meetings was purely passive, as he did not really understand the discussions.[419]

(376) In relation to the Breakfast Meetings, there is no evidence that a core group of specific freight forwarders was created in order to discuss certain issues among them. Moreover, it is also apparent that a possibly low level of representation was not a factor that would in any way disadvantage a party from the participation in the discussions at the meeting, as the participation at the meetings was not restricted to high-ranking executives/employees. Furthermore, we can assume that […]'s command of English was sufficient enough to follow the discussions, as he was appointed by his superior with the knowledge that meetings would be held in English. The sufficient knowledge of English enabling […] to express himself is confirmed by an internal […] email, which summarizes the Breakfast Meeting on 21 September 2005 and which specifically mentions the statement of Geologistics that it is keen to go for the second round of PSS.[420] This email also indicates that contrary to what Agility claims, Geologistics was active in the meetings. Finally, […]'s sufficient command of English is also confirmed by an internal Geologistics email sent from […] to […], as the wording of the email indicates standard knowledge of the language.[421]

(377) Panalpina claims that it was the understanding of its representatives at the meetings that the discussions concerned only prepaid business. Moreover, according to Panalpina its representatives at the meetings did not have the authority to implement the PSS with customers based in the European Economic Area.[422]

(378) […] clearly indicates that one of the main reasons for the organisation of the Breakfast Meetings was the opposition from the European offices, when it came to the implementation of the PSS in the previous years. According to the statement, the coordinated effort was therefore meant to increase the chances of the successful PSS implementation.[423] There are also several contemporaneous documents which show that the discussions involved both prepaid and collect business. An internal […] email mentions that the participants of the 3 February 2006 meeting agreed that they

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418 […].

419 Agility's reply to the Statement of Objections, page 40-44, 47.

420 […].

421 […].

422 Panalpina's reply to the Statement of Objections, page 43-44.

423 […].

would have *"difficulties or barriers from overseas sales counterpart or corporate office"* to implement the PSS.[424] An internal […] email summarizing the meeting on 21 September 2005 (in which Panalpina participated) states that the participants agreed that the implementation of PSS was *"much smoother than last year"* especially in relation to their European offices.[425]

(379) According to Panalpina the undertakings in general only exchanged non-commercially sensitive information regarding market trends that could have affected beginning and duration of the peak season. Panalpina submits that the information was obtained from the public domain and that the exchange of information enabled the freight forwarders to better understand the likelihood of a peak season, the date of its introduction and its duration. Nevertheless, Panalpina claims that there was no agreement concerning the introduction of PSS and each freight forwarder was therefore free to decide whether to impose a PSS or not.[426]

(380) It is true that the participants of the Breakfast Meetings exchanged information regarding market trends in order to assess the imposition of PSS. Even if the information exchanged would have been in the public domain at the time of the meeting[427], the evidence on the file clearly indicates that, contrary to Panalpina's claims, an agreement on the introduction of the PSS was reached among the participants of the meetings for each of the respective years.[428]

(381) Expeditors claim that senior executives of the company responsible for pricing decisions were wholly unaware of the attendance of Expeditors' employees at the Breakfast Meetings. According to Expeditors, the same applied also to other participants of the meetings.[429]

(382) It is not relevant to what extent the senior executives of Expeditors were aware of the attendance of their employees at the Breakfast Meetings. What matters is the fact that Expeditors participated at the meetings in which discussions about prices took place. Moreover, the evidence on the file shows that the behaviour of Expeditors' representatives at the meetings did not in any way indicate that they would lack the authority to make the pricing decisions. On the contrary, they were able to disclose the future plans of the company regarding the PSS pricing. The evidence also shows that this was also the case for undertakings other than Expeditors.[430] Furthermore, in […] specifically says that the meetings were organised in order to ensure better success for PSS both with customers and with European sales organisations.[431]

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424 […].

425 […].

426 Panalpina's reply to the Statement of Objections, page 43.

427 Although it is rather doubtful whether this was the case with for example data regarding the planned amounts of shipments obtained from customers, certain information from carriers regarding the planned pricing policy or planned extension of GRI.

428 See, for example, […],[…],[…],[…].

429 Expeditors' reply to the Statement of Objections, page 17, 25.

430 […].

431 […].

4.4.5. Conclusion

(383) The cartel was created in order to face the price uncertainty on the market at times when carriers increase their rates due to the peak season. The freight forwarders therefore gathered in order to coordinate the steps which would help them implement the PSS in the market, in order to cover the increased costs of transport. As some undertakings faced difficulties with the implementation of the PSS in 2004, […] of DHL decided to create a special group of freight forwarders in Hong Kong to ensure the successful imposition of the PSS in the market in 2005 and subsequently.

(384) The freight forwarders present at the Breakfast Meetings agreed on a number of issues regarding the PSS. First, each year between 2005-2007 they agreed to charge the PSS to their customers. The decision had to be made mainly with regard to the general situation on the market, as many freight forwarders were reluctant to implement any PSS if the market conditions were weak. The common agreement among freight forwarders gave them confidence that their pricing would be in line with rest of the industry.

(385) Subsequently, freight forwarders agreed on the timing of the imposition of the surcharge. The question of timing was crucial for the attending undertakings, as nobody wanted to be the first or only one announcing the imposition of the PSS on the market, as this could result in a loss of business. The parallel imposition of the surcharge removed this danger, as the undertakings were aware of the fact that the competing undertakings attending the meetings were taking the same steps.

(386) As mentioned in Sections 4.4.1-4.4.4, the levels of the PSS were discussed in 2005 and 2006. Although no fixed agreements were reached during the meetings due to the complicated way of calculating the surcharge in the case of each competitor, the contemporaneous evidence clearly indicates that the intended PSS levels were at least exchanged among the attending undertakings.

5. APPLICATION OF ARTICLE 101 OF THE TREATY AND ARTICLE 53 OF THE EEA AGREEMENT

5.1. The Treaty and the EEA Agreement

5.1.1. Relationship between the Treaty and the EEA Agreement

(387) The EEA Agreement, which contains provisions on competition analogous to the Treaty, came into force on 1 January 1994[432].

(388) The agreements and concerted practices as set out in this Decision applied to the territory of the Union and the European Economic Area, except for the NES cartel which covered solely the territory of the United Kingdom (but also included services

[432] The case-law of the Court of Justice and the General Court in relation to the interpretation of Article 101 of the Treaty applies equally to Article 53 of the EEA Agreement. See Recitals 4 and 15 as well as Article 6 of the EEA Agreement and Article 3(2) of the EEA Surveillance and Court Agreement, OJ L 344, 31.1.1994, p. 3; and EFTA States' official gazettes. Accordingly, in this Decision reference is only made to Article 101 of the Treaty on the understanding that the same considerations apply to Article 53 of the EEA Agreement.

in relation to shipments originating in other EEA countries transiting through the United Kingdom). The cartel members provided the freight forwarding services affected by the infringements covered by this Decision on the lanes (i) from all Member States (at the time) and the three EFTA-countries which were Contracting Parties to the EEA-Agreement (namely Norway, Iceland and Liechtenstein) (NES, AMS) and (ii) to all Member States (at the time) and the three EFTA-countries which were Contracting Parties to the EEA-Agreement (namely Norway, Iceland and Liechtenstein) (PSS, CAF).

(389) Insofar as the arrangements affected competition in the internal market and trade between Member States, Article 101 of the Treaty applies; as regards the operation of the cartel in Norway, Iceland and Liechtenstein and its effect upon trade between the Union and those EFTA countries which were or are part of the European Economic Area, Article 53 of the EEA Agreement applies.

(390) The Commission notes that by virtue of the accession of Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia on 1 May 2004 and Bulgaria and Romania on 1 January 2007, Article 101(1) of the Treaty applies to the infringements concerning those Member States.

5.1.2. Jurisdiction

(391) In this case the Commission is the competent authority to apply both Article 101 of the Treaty and Article 53 of the EEA Agreement on the basis of Article 56 of the EEA Agreement. Articles 101 and 102 of the Treaty apply irrespective of where the undertakings are located or where the agreement has been concluded, provided that the agreement or practice is implemented inside the Union/European Economic Area. In addition for the purposes of establishing Union law jurisdiction it is sufficient that an agreement or practice involving third countries or undertakings located in third countries is capable of affecting cross-border economic activity inside the Union/European Economic Area[433].

5.1.2.1. NES surcharge

(392) The anti-competitive conduct was intended to cover the costs of freight forwarders resulting from the procedures introduced by the UK authorities. The NES surcharge related to the provision of the freight forwarding services concerning the export of goods out of the United Kingdom[434] and the anti-competitive conduct took place within the Union/European Economic Area. The meetings involving discussions on that surcharge were attended by both EEA and non-EEA undertakings.

(393) The fact that some of the undertakings concerned, at the time of the facts, were based outside the Union/EEA does not exclude the application of both Article 101 of the Treaty and Article 53 of the EEA Agreement, as the concertation between the undertakings concerned took place within the Union/European Economic Area, the agreement was implemented inside the Union/European Economic Area and the

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433 In this regard see paragraphs 100-101 of the Guidelines on the effect on trade concept contained in Article 81 and 82 of the Treaty ("Notice on the effect on trade"); OJ C 101, 27.4.2004,.

434 Including the services relating to the shipments originating from other EEA countries transiting through the United Kingdom.

restrictions of competition therefore occurred within the internal market, because it is there that the competitors, including several freight forwarders established in the Union/European Economic Area, were in competition to sell their services to their customers.[435]

5.1.2.2. AMS surcharge

(394) The anti-competitive conduct was intended to cover the costs of freight forwarders resulting from the procedures introduced by the US authorities. The AMS surcharge involved the provision of freight forwarding services concerning export of goods to the United States, amongst others from the European Economic Area, and thus the anti-competitive conduct also took place also within the Union/EEA. The meetings involving discussions on those surcharges were attended by both EEA and non-EEA undertakings.

(395) The fact that some of the undertakings concerned, at the time of the facts, were based outside the Union/European Economic Area does not exclude the application of both Article 101 of the Treaty and Article 53 of the EEA Agreement to them, as the concertation between the undertakings concerned took place within the Union/European Economic Area and the agreement/concerted practice was implemented inside the Union/European Economic Area.[436]

5.1.2.3. CAF and PSS surcharges

(396) The discussions concerning the CAF and PSS surcharges took place outside the Union and involved local entities of international freight forwarding companies established in mainland China and Hong Kong. The contacts concerned the provision of freight forwarding services in relation to the import of goods into the Union/European Economic Area. However neither the nationality of the cartel participants, nor the place of conclusion of the agreement, exclude the application of Article 101 of the Treaty to agreements that are operative or implemented within the territory of the European Economic Area.[437]

(397) The Court of Justice has, in fact, stated in its judgement in the *Woodpulp* case that an infringement of Article 101 of the Treaty *"consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of the prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented."*[438] Thus, in the light of the *Woodpulp* case, the place of

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435 Case T-395/94 *Atlantic Container Line AB and Others v Commission*, [2002] ECR II-875, paragraph 72.

436 Case T-395/94 *Atlantic Container Line AB and Others v Commission*, [2002] ECR II-875, paragraph 72.

437 Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to C-129/85 *Ahlström and others v Commission* [1988] ECR 5193 ("Woodpulp"), paragraphs 16 and 17 and Case 22/71 *Béguelin Import v GL Import Export*, [1971] ECR 949, paragraph 11.

438 Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to C-129/85 *Ahlström and others v Commission* [1988] ECR 5193 ("Woodpulp"), paragraphs 16 and 17 and Case 22/71 *Béguelin Import v GL Import Export*, [1971] ECR 949, paragraph 16.

formation of the anti-competitive conduct is irrelevant and the focus should properly be on the place of its implementation.

(398) Furthermore, in *Woodpulp*, the Court held that where producers (of wood pulp) established in third countries *"sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market. It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 [now Article 101 of the Treaty]"*[439].

(399) In the *Gencor* case the General Court confirmed that "*According to Wood pulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant*"[440]. Moreover with regard to the examined merger it stated that as the effect in the Union of this merger was *"immediate, substantial and foreseeable"*, the Commission was competent to examine it even if the undertakings merging had their main field of activity in a third country.[441]

(400) In the light of the aforementioned case-law, the Commission has jurisdiction to apply Article 101 of the Treaty and Article 53 of the EEA Agreement to both the CAF and PSS infringements for the reasons explained in Recitals (401)-(404).

(401) Firstly, the CAF and PSS surcharges were directly applied by the undertakings involved in the respective infringements to their customers on the trade lane China (mainland) – European Economic Area and South China/Hong Kong – European Economic Area respectively. A significant amount of customers who entered into contracts with freight forwarders in respect of these lanes were based in the European Economic Area[442]. Thus the undertakings involved in the infringements were selling their services directly to customers (purchasers) based in the European Economic Area and were engaged accordingly in competition within the European Economic Area. The arrangements were therefore implemented within the European Economic Area.

(402) Secondly, some undertakings pointed out that not only were their customers established in the European Economic Area, but, as a matter of standard practice,

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439 See Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to C-129/85 *Ahlström and others v Commission* [1988] ECR 5193, paragraphs 12 and 13.

440 Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraph 87.

441 Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraph 90.

442 For example, […] stated in their reply to request for information […], that "*approximately 80% to 90% of the air shipments from Hong Kong to the EEA countries are negotiated with customers based in the EEA*". According to […], the proportion of procuring EEA based customers on the lanes from China and Hong Kong to Europe was not lower than 74% in the years 2004 to 2007. […] provided largely similar numbers, in which the proportion of EEA based customers was between 70-80% between 2004-2007 […].

their EEA-based customers were invoiced by the EEA-incorporated affiliates of the entities involved directly in the anti-competitive conduct[443].

(403) Thirdly, as described in Section 2 above, freight forwarding services include services of any kind relating to the carriage of goods and in general, freight forwarders act as intermediaries between the carriers (airlines) and the sender (shipper) and/or the recipient (or consignee) of the goods. In broader terms, the service involves arrangement of cargo movement from a point of origin to a point of destination. Such a service is completed when the cargo reaches the point of destination. Given that the trade lane affected by both the CAF and PSS infringements had a point of destination in the European Economic Area, the service of the undertakings involved in the respective infringements for which the competition took place in the European Economic Area was also performed in part within the European Economic Area and hence implemented in the European Economic Area. The Commission therefore has jurisdiction on a territorial basis.

(404) Fourthly, in the case of the PSS the cartel participants specifically targeted cargo services from South China and Hong Kong to the European Economic Area and the meetings were organised specifically for this purpose.[444]

5.1.2.4. Arguments of the parties and their assessment by the Commission

NES and AMS

(405) Kuehne & Nagel claims that the Commission has the jurisdiction to apply Article 101 of the Treaty only in cases, when the arrangements have effect in the European Economic Area. Moreover, according to Kuehne & Nagel the place where the anti-competitive conduct took place is in this regard not important. Kuehne & Nagel defines the NES and AMS conducts as export cartels with no repercussions on the EEA market, as the exports mainly concerned final goods and any reimports in the European Economic Area were therefore rather unlikely. Kuehne & Nagel concludes that this is in particular the case for the collect business[445] [446].

(406) Firstly, neither the NES nor AMS cartels can be described as export cartels, as their purpose was not to restrict the competition in the export country, namely. the United States, but predominantly in the country of the origin, namely in the United Kingdom and in the EEA countries.

(407) In case of the NES, the cartel was set up in the United Kingdom by UK entities. It is evident that the cartel affected, at least partly, freight forwarding services that were provided in the United Kingdom and in the European Economic Area. This was the case for the prepaid business, where the paying customers (shippers) were located in the place of origin of the shipped goods, namely in the European Economic Area. For this reason, the cartel arrangements were evidently implemented in the European

443 Panalpina World Transport Ltd. (reply to request for information dated 26 February 2009, […], see also ABX LOGISTICS Worldwide S.A./N.V. (reply to request for information dated 24 March 2009, […].

444 […].

445 For the distinction between prepaid and collect business, see Recital (70).

446 Kuehne & Nagel's reply to the Statement of Objections, pages 15-18, 45-46.

Economic Area, as this was the geographical area, where the competition for freight forwarding services took place.

(408) It is therefore evident that we are not dealing in the case of the NES cartel with an export cartel. The relevant sector directly affected by the arrangements was the freight forwarding sector in the European Economic Area, as this was the sector which was subject to discussions among the competitors. Contrary to that, the market for the exported goods was affected only indirectly due to the increased costs of the exported goods. The NES infringement can not therefore be described as an export cartel, as its primary goal was collusion in relation to the EEA freight forwarding market and EEA based customers and this was the geographical area, where a significant part of the harm caused by the cartel was felt.

(409) A similar situation also exists in relation to the AMS infringement. As in the case of the NES, a significant proportion of the freight forwarding services affected by the AMS cartel was provided in the European Economic Area to the customers based in the European Economic Area (prepaid business). It was therefore the sector of freight forwarding services in the European Economic Area that was primarily and directly affected by the AMS infringement, as the agreement/concerted practice was implemented in the European Economic Area. The cartel had thus a direct impact on the competition in the European Economic Area, while the impact on the competition in the third countries outside the European Economic Area can also not be excluded.

CAF and PSS

(410) DB claims that the Commission will need to show that the agreed measures were successfully implemented in relation to customers within the European Economic Areain order to establish jurisdiction.[447]

(411) Contrary to DB's arguments, it is not necessary to prove that the freight forwarders successfully put into effect the agreed measures within the European Economic Area. In the case of both the PSS and CAF, freight forwarders intended to apply and implement the agreements not only in the place of origin, but also in the place of destination, namely the European Economic Area. This is where a substantial part of their customers were located and where the freight forwarders entered into price competition in order to win new orders from their potential customers.[448]

(412) The object of the agreements was therefore to restrict competition on the EEA market. The fact that the arrangements were for various reasons only partly put into effect on the EEA market is not relevant, as the extent of the actual implementation of the infringement is not a relevant factor when assessing the existence of the Commission's jurisdiction to apply Article 101 of the Treaty in cases of restrictions by object.[449] Moreover, the fact that the participants to the collusive arrangements took measures to put the infringement into effect for customers in the European

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447 DB's reply to the Statement of Objections, page 76.

448 See to this effect Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to C-129/85 *Ahlström and others v Commission* [1988] ECR 5193, paragraph 12.

449 See to this effect Case T-66/99 *Minoan Lines v Commission* [2003] ECR II-5515, paragraph 208 and Case T-347/94 *Mayr-Melnhof v Commission* [1998] ECR II-1751, paragraph 135.

Economic Area shows that it was implemented in the European Economic Area, regardless of whether these efforts were only partly successful.

(413) DB submits that the Commission assumes in the SO that the freight forwarding services on the China/Hong Kong to the European Economic Area trade lanes are only concluded when the cargo reaches its point of destination in the European Economic Area. Nevertheless, DB claims that it could be alternatively concluded that the freight forwarders do not engage in competition with each other for the provision of freight forwarding services as such, but engage in competition for the provision of various distinct forwarding services with divergent market players. According to DB, such distinct services could be entirely performed outside the European Economic Area (such as the organisation of air transport services on behalf of shippers) and it claims that this is also the place where the competition takes place (as the agreement was implemented mainly in relation to small and medium sized customers who are mainly located in China). This assumption can be according to DB also supported by the Commission's approach under Council Regulation (EC) No 139/2004 (hereinafter referred to as the "Merger Regulation"), where the allocation of the undertaking's turnover to a country plays a vital role and refers to the related Jurisdictional Notice[450].[451]

(414) Contrary to DB's claims, the Commission does not conclude that for the establishment of the Commission's jurisdiction to apply Article 101 of the Treaty it is necessary that the cargo reaches the point of destination in the European Economic Area. The primary argument for establishing Union jurisdiction is the fact that the competition with other freight forwarders, which is restricted by the cartel, took place, at least partly, in the European Economic Area. The arguments put forward in Recital (403) regarding the jurisdiction on the territorial basis serve as further support for the establishement of the Commission's jurisdiction. The General Court has confirmed jurisdiciton when there is "mere sale within the Community" irrespective of the location of the sources of supply[452] (see Recital (399)). In view of that, it is noted that in this case the services concerned by the cartel were performed in part in the European Economic Area (in the freight forwarding there are always services at both ends, at the point of origin and at the destination) and paid by customers in the European Economic Area.

(415) Moreover, it would be artificial to split the freight forwarding services into various distinct services, as it is the whole complex of the offered services which characterises the freight forwarding as attractive to customers. Nevertheless, even if distinct elements of the service were to be addressed, the Commission could still establish its jurisdiction. The fact that an affected distinct element (for example, the organisation of the air transport service) may be partly performed outside the European Economic Area, does not deprive the Commission of the jurisdiction to apply Article 101 of the Treaty and Article 53 of the EEA Agreement, as it is the

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450 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, 16.04.2008, page 1–48 (the " Jurisdictional Notice").

451 DB's reply to the Statement of Objections, page 77 and 92.

452 Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paragraph 90, for reference see also Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change*, not yet published, paragraphs 124-125.

place of competition for customers which is of paramount importance. In any event, the guidance for mergers was not intended to establish any general principle as to the place where infringements concerning freight forwarding services should be seen as implemented, nor could such guidance affect the jurisdictional scope of Article 101 of the Treaty as determined by the Union Courts.

(416) The fact that the freight forwarders succeeded in puting into effect the agreement mainly in relation to small and medium sized customers located in particular in China is not relevant, as the primary goal of the freight forwarders was to implement the agreement in relation to all customers, including those located in the European Economic Area. DB points to no contrary indication in the file. The fact that the freight forwarders did not fully succeed in applying the PSS surcharge in relation to large multinational customers cannot detract from the fact that this is what they intended with their agreement and that they took deliberate steps to achieve it.

(417) Regarding DB's reference to the Jurisdictional Notice, contrary to what DB claims, freight forwarding service does not consist of a number of distinct services, but represents a single package (see Recital (867)). Once it is established that the collusive arrangement affected the entire freight forwarding service (which is the case in these proceedings – see Recitals (867) - (873)) then there is no difference between the approach applied in this case and that following from the Jurisdictional Notice (which in any event does not have a direct relevance in this case), as the turnover of undertakings concerned would be located in the European Economic Area, which supports the Commission's conclusion on the establishment of jurisdiction within the European Economic Area.

(418) DB further claims that due to the limited implementation of the agreement in the European Economic Area, the arrangements were not able to have any substantial effects either on the buyer's market in the European Economic Area (consignee) or any indirect effects on the final consumers' market where the shipped goods were finally sold. Moreover, according to DB the charge of only 2.1% of the freight rate is not able to affect the selling prices of the shipped goods, as the transport costs amount to no more than 5% of the selling price. A similar claim was also raised by Yusen.[453] DB finally submits that according to the case-law[454] the indirect and insignificant effects in the European Economic Area are insufficient to establish the jurisdiction.[455]

(419) The Commission based its jurisdiction to apply Article 101 of the Treaty on the so-called implementation doctrine as established in the Woodpulp case[456]. The decisive factor for establishing jurisdiction is therefore not the effect of the agreement on the EEA market but the place where such agreement was implemented. Accordingly the

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453 Yusen's reply to the Statement of Objections, page 23.

454 DB refers to the Case T-204/03 Haladjian Freres SA v Commission, [2006] ECR II-3779, paragraph 167.

455 DB's reply to the Statement of Objections, page 78.

456 Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to C-129/85 *Ahlström and others v Commission* [1988] ECR 5193.

Commission's jurisdiction to apply Article 101 of the Treaty is covered by the territoriality principle as universally recognized in public international law.[457]

(420) According to Kintetsu, the Commission has jurisdiction to apply Article 101 of the Treaty only if the agreement is implemented in the European Economic Area, the agreement has immediate, substantial and foreseeable effect in the European Economic Area and the agreement may affect trade between Member States.[458]

(421) The Commission can not agree that it only has jurisdiction to apply Article 101 of the Treaty if all three conditions cited by Kintetsu are fulfilled, as those conditions are not cumulative. The Commission based its jurisdiction to apply Article 101 of the Treaty on the implementation doctrine as established in the Woodpulp case[459]. According to that judgment, the Commission is not obliged to prove that the agreement had immediate, substantial and foreseeable effect in the European Economic Area and that it may have affected trade between Member States[460], but it suffices that the agreement was implemented in the European Economic Area.

(422) Kintetsu further submits that the actual sales of the freight forwarding services took place in China and not elsewhere and no European currency was involved.[461] A similar claim was also submitted by Yusen, which argues that in the case of Yusen the agreement was not implemented in the European Economic Area.[462]

(423) The evidence shows that the competition took place both in China and in the European Economic Area, as a significant part of the customers were located in the European Economic Area (see Recital (401)). Moreover, in order to establish the jurisdiction of the Commission to apply Article 101 of the Treaty the size of the EEA business of each of the freight forwarders is not relevant, rather jurisdiction is a question of the application of the competition rules on the overall anti-competitive conduct. Furthermore, as regards the claim raised by Kintetsu concerning the fact that no European currency was involved, the Commission refers to Recital (216), which shows that it was a common feature on the Asia-Europe routes that the contracts with European customers were concluded in USD. This reflects one of the characteristic of international freight forwarding, which deals in several currencies depending on local circumstances as well as on customers' preferences. These circumstances indicate that the fact that no European currency was involved in the cartel arrangements is from the jurisdictional point of view of no relevance.

(424) Kintetsu claims that the substantial effect test concerning the market shares as defined in Gencor should not be limited to the trade lanes China-European Economic Area or Europe-Asia, but the worldwide shares should be taken into account, because the potential competition in freight forwarding is large. Kintetsu therefore submits that the 'possible' impact of the arrangements is extremely limited and the agreement

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457 Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to C-129/85 *Ahlström and others v Commission* [1988] ECR 5193, paragraph 18.

458 Kintetsu's reply to the Statement of Objections, page 65.

459 Joined Cases C-89, C-104, C-114, C-116, C-117 and C-125 to C-129/85 *Ahlström and others v Commission* [1988] ECR 5193.

460 For a more detailed analysis of the effect on trade between Member States, see Section 5.2.1.3.

461 Kintetsu's reply to the Statement of Objections, page 66.

462 Yusen's reply to the Statement of Objections, page 20-21.

did not have foreseeable effect, as there was no immediate or significant effect in the European Economic Area.[463] Yusen also claims that the agreement did not have any immediate, substantial and foreseeable effect in the European Economic Area.[464]

(425) Firstly, as already mentioned in Recital (419) the Commission based its jurisdiction on the fact that the agreements were implemented in the European Economic Area. Moreover, the Commission does not accept that the relevant geographic market that is subject to the investigation is the worldwide market with freight forwarding services, as there is no indication that the cartel arrangements would be wider. The trade lane South China/HongKong-European Economic Area was specifically subject to the cartel arrangements as a distinct trade lane in case of the PSS cartel[465]. Furthermore, it appears that the lane between China and European Economic Area shows clear differences in structure, characteristics and functioning from any suggested worldwide market for freight forwarding services. Finally, the descriptions provided in Sections 4.3 and 4.4 show that the CAF/PSS arrangements were discussed separately on the basis of specific routes/currencies involved, not globally within the frame of a worldwide freight forwarding market.

(426) Kuehne & Nagel submits that the Commission did not prove that the participants of the Breakfast Meetings specifically targeted the lane from South China/Hong Kong to the European Economic Area. Moreover, Kuehne & Nagel claims that contrary to Recital 245 of the SO this fact can not be used to establish the Commission's jurisdiction to apply Article 101 of the Treaty.[466] A similar claim was also raised by DB.[467]

(427) It is an established fact that the Breakfast Meetings were specifically organised for the purpose of discussing the PSS on the lane from South China/Hong Kong to the European Economic Area. This is confirmed by several contemporaneous documents, which make reference to the discussions and agreements which related to this trade lane.[468] Moreover, as already mentioned in Recital (241) of the Statement of Objections, a significant amount of customers who entered into contracts with freight forwarders in respect of this lane were based in the European Economic Area and the goal of the freight forwarders was to apply the PSS also towards these customers. Contrary to the arguments of Kuehne & Nagel and DB, there is therefore a direct link between the geographical scope of the targeted lane and the Commission's jurisdiction to apply Article 101 of the Treaty, as this clearly shows that the agreement was implemented in the European Economic Area.

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463 Kintetsu's reply to the Statement of Objections, page 66-68.
464 Yusen's reply to the Statement of Objections, page 20.
465 […].
466 Kuehne & Nagel's reply to the Statement of Objections, page 66-68.
467 DB's reply to the Statement of Objections, page 92.
468 See, for example […].

5.2. The relevant competition rules

5.2.1. Article 101(1) of the Treaty and Article 53 of the EEA Agreement are applicable in this Case

5.2.1.1. The nature of the infringement

5.2.1.1.1. Agreements and concerted practices

Principles

(428) Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement prohibit anti-competitive *agreements between undertakings, decisions of associations of undertakings and concerted practices*.

(429) An 'agreement' may be considered to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action on the market. It does not have to be in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The existence of an agreement may be express or implicit in the behaviour of the parties. In addition, it is not necessary, in order for there to be an infringement of Article 101 of the Treaty, for the participants to have agreed in advance upon a comprehensive common plan. The concept of 'agreement' within the meaning of Article 101(1) of the Treaty applies to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(430) In its judgement in the *PVC II* case,[469] the General Court stated that: *"It is well established in the case-law that for there to be an agreement within the meaning of Article [101(1)] of the Treaty it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way"*.

(431) If, for instance, an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed. It is also well-settled case-law that "*the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings*".[470] Such distancing should take the form of an announcement by the company, for example,

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469 Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij NV and Others v. Commission* (PVC II), [1999] ECR II-931, paragraph 715.

470 See Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission*, [2004] ECR I-123, paragraph 85, Case T-334/94 *Sarrió SA v. Commission* [1998] ECR II-01439, paragraph 118; Case T-141/89 *Tréfileurope Sales SARL v. Commission* [1995] ECR II-791, paragraph 85; Case T-7/89 *SA Hercules Chemicals NV v. Commission* [1991] ECR II-1711, paragraph 232; and Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others v. Commission* (Cement)[2000] ECR II-491, paragraph 1389.

that it would take no further part in the collusive meetings and therefore did not wish to be invited to them[471].

(432) An agreement for the purposes of Article 101(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract under civil law. In addition, in the case of a complex cartel of long duration, the term "agreement" may properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice has pointed out, it follows from the express terms of Article 101(1) of the Treaty that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct.[472]

(433) Although Article 101(1) of the Treaty draws a distinction between the concept of *"concerted practices*" and "*agreements between undertakings"*, the object is to bring within the prohibition of this Article a form of co-ordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical co-operation between them for the risks of competition.[473]

(434) The criteria of co-ordination and co-operation laid down by the case-law, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the internal market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.[474]

(435) Thus, conduct may fall under Article 101(1) of the Treaty as a '*concerted practice'* even where the parties have not explicitly subscribed to a common plan defining their action on the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour.[475] In addition, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

(436) Although the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active on the market

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471 See to that effect also Case T-377/06, *Comap* v *Commission* (not yet published), paragraphs 75-78.

472 Case C-49/92P *Commission* v *Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 81.

473 Case 48/69, *Imperial Chemical Industries Ltd*. v *Commission* [1972] ECR 619, paragraph 64.

474 Joined Cases 40 to 48 50, 54 to 56, 111, 113 and 114-73. *Coöperatieve Vereniging "Suiker Unie" UA and Others* v *Commission* [1975] ECR 1663, paragraph 174.

475 Case T-7/89 *Hercules Chemicals NV* v *Commission*, [1999] ECR I-04235 paragraph 256.

will take account of the information exchanged with competitors in determining their own conduct on the market[476]. That conclusion also applies where the participation of one or more undertakings in meetings with an anti-competitive purpose is limited to the mere receipt of information concerning the future conduct of their market competitors[477]. Such concerted practice falls under Article 101(1) of the Treaty even in the absence of anti-competitive effects on the market.[478]

(437) In addition, it is established case-law that the exchange, between undertakings, in pursuance of a cartel falling under Article 101(1) of the Treaty, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that Article.[479]

(438) Indeed, in its judgment in the *HFB Holding* case[480], the General Court stated that "*it follows from the case-law that a concerted practice is caught by Article [81(1)] of the EC Treaty, even in the absence of anti-competitive effects on the market. First, it follows from the actual text of that provision that […] concerted practices are prohibited, regardless of their effect, when they have an anti-competitive object. Next, although the very concept of a concerted practice presupposes conduct by the participating undertakings on the market, it does not necessarily imply that that conduct should produce the specific effect of restricting, preventing or distorting competition*."

(439) In its judgment in the *Westfalen Gassen* case[481], in the light of the facts at hand, the General Court stated that "*[…] in the absence of evidence which it is for the applicant to adduce, it must be considered that the applicant, which remained active on the market in question after the meeting […], took account of the unlawful concerted practice, in which it participated at that meeting, when determining its own conduct on that market*." The Court referred to the judgment of the Court of Justice in the *Anic Partecipazioni* case[482]. In its judgement in the *T-Mobile Netherlands* case the Court of Justice further stated that a presumption of a causal connection between the concerted practice and the conduct of the undertaking on the market is preserved, "*[…] even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion*."[483]

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476 Case T-54/03 *Lafarge SA* v *Commission*, [2008] ECR II-00120, paragraph 259.

477 See Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, paragraph 58.

478 Case C-199/92 *P Hüls AG* v. *Commission*, [1999] ECR I-4287, paragraphs 158-166.

479 Cases T-147/89 *Société Métallurgique de Normandie* v *Commission* [1995] ECR II-1057*;* T-148/89 *Tréfilunion SA* v *Commission* [1995] ECR II-1063 and T-151/89 *Société des Treillis et Panneaux Soudés* v *Commission* [1995] ECR II-1191, respectively, paragraph 72.

480 Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others* v *Commission*, [2002] ECR II-1487, paragraph 217.

481 Case T-303/02, *Westfalen Gassen Nederland BV* v *Commission*, [2006] ECR II-4567, paragraph 133.

482 See Case C-49/92P *Commission* v *Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraphs 119 and 121.

483 See Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV* v *Raad van bestuur van de Nederlandse Mededingingsautoriteit*, [2009] ECR I-04529, paragraph 62.

(440) Furthermore, it is not necessary for the Commission to characterise the conduct as exclusively one or other form of illegal behaviour. The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would, however, be to artificially sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 101 of the Treaty lays down no specific category for a complex infringement of this type.[484]

5.2.1.1.1.1. Application to the NES infringement

(441) As demonstrated in Recitals (92)-(114) of this Decision the undertakings:

(a) Met within the Gardening Club in order to coordinate their market behaviour in relation to the NES surcharge (see in particular Recitals (101) - (104));

(b) Agreed on the imposition of the NES surcharge for airfreight starting from 28 October 2002, that is prior to the official launch of the system by the UK authorities at airports (pre-entry strategy) (see in particular Recitals (105) - (106));

(c) Discussed and agreed the price range of the NES surcharge according to the size of customers. The results of the meeting were summarized in an encoded email, which was distributed to the attendees of the meeting (see in particular Recital (102));

(d) Monitored the implementation of the arrangements. Special attention was paid to those attendees of the meetings which had not implemented the agreed surcharge. These undertakings were asked to act in accordance with the agreed terms (see in particular Recitals (107) - (112)).

5.2.1.1.1.1.1. Arguments by the parties and their assessment by the Commission

Agreement on pre-entry strategy

(442) The cartel participants agreed to apply the NES fee as from 28 October 2002 (pre-entry strategy), even though the official launch of the NES procedure was set by the UK authorities at 31 July 2003 (see Recitals (98), (104) and (106)). DB argues[485] that freight forwarders were either required by law or through their need to meet certain service standards, to submit airfreight export declarations through the NES from 28 October 2002 onwards. According to DB, the reference date of 31 July 2003 only marked the date as of which the entirety of the declaration process had to be undertaken electronically. DB maintains that the Commission has presented no evidence to show that the participants in the Gardening Club meeting of 1 October 2002 indeed agreed on such a pre-entry strategy.

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484 Case T-7/89 *Hercules Chemicals NV* v *Commission*, [1999] ECR I-04235, paragraph 264.

485 DB's reply to the Statement of Objections, page 10-11.

(443) The Commission observes that whereas the freight forwarders might have been prompted either by legal or factual circumstances to make use of the NES procedure as from 28 October 2002, they were not obliged to start charging their customers the NES fee from that date onwards. In that respect, DB's argumentation seems to disregard the fact that the agreement on pre-entry strategy as set out in this Decision refers to application of the NES surcharge and not the use of the NES platform prior to the official launch date of NES by the authorities.

(444) With respect to the evidence used for establishment of the agreement on pre-entry strategy, it is established case-law that there is no principle of Community law which precludes the Commission from relying on a single piece of evidence in order to conclude that Article 101(1) of the Treaty has been infringed, provided that its evidential value is undoubted and that the evidence itself definitely attests to the existence of the infringement in question. Regard should be had in particular to the source of the document, the circumstances in which it came into being, the addressee and whether, on its face, the document appears sound and reliable[486]. In this case, the Commission has based its findings on documentary evidence (see evidence referred to in Recitals (100)-(130)). The document summarising the results of the cartel meeting of 1 October 2002 (see Recital (102)) was produced by a direct witness of cartel events relatively shortly following the anti-competitive meeting where such an agreement was reached. The conclusions of the meeting were also confirmed by other documents, such as for example a report prepared in an even shorter time after the meeting by a representative of another cartel member (see Recital (104)) Furthermore, there are also various pieces of contemporaneous evidence on the subsequent contacts between competitors (see Recitals (103)-(114)). The Commission thus considers that it has proved this aspect of the NES infringement to the required legal standard.

(445) Furthermore, the Commission underlines that the agreement on pre-entry strategy constitutes an integral part of a wider single and continuous cartel scheme, principally involving price-fixing arrangements between competitors in respect of the NES surcharge and established on a basis of clear and unequivocal body of evidence (see Recitals (100)-(114)).

(446) It is therefore concluded that the DB's arguments are to be dismissed.

Participation in the 1 October 2002 meeting and accession to an NES pricing agreement

(447) DB claims[487] that the Commission does not present any direct evidence to show that […] (BAX UK) participated in the alleged NES pricing agreement concluded at the 1 October 2002 meeting and therefore, BAX UK cannot be held to have entered into the agreement on that date. On the contrary, DB suggests, while referring to the evidence on the Commission's file[488] that […] was not aware of an agreement reached on the 1 October 2002 meeting.

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486 Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others v. Commission* (Cement)[2000] ECR II-491, paragraph 1838. Opinion of Mr Vesterdorf acting as Advocate General in *Rhône-Poulenc* v *Commission*, cited in paragraph 1053 above, page II-956.

487 DB's reply to the Statement of Objections, page 11-12.

488 […].

(448) Furthermore, DB argues[489] that the Commission has presented no evidence showing that […] acceded to the NES pricing agreement at any later point in time following the 1 October 2002 meeting.

(449) The Commission finds that BAX UK acceded to the NES cartel agreement as from the 1 October 2002 meeting as set out in Recital (102) and further elaborated on in Recital (120). […] attended the 1 October 2002 meeting (something which DB also acknowledges) while being aware of the anti-competitive nature of the meeting in advance and made other cartel participants believe that BAX UK adhered to the NES cartel from that date. On this point, DB does not adduce any credible evidence to the contrary, but rather refers to personal recollection of events which took place more than 5 years before their reproduction, which is moreover very ambiguous[490]. The email inquiry by […] on updates/agreements within the Gardening Club[491] equally does not prove an absence at the part of the meeting where NES agreement was reached. Furthermore, in line with the settled case-law, it is sufficient for the Commission to show that the undertaking participated in a meeting at which anti-competitive agreement was concluded, without manifestly opposing it, to prove to the requisite standard that the undertaking participated in the cartel[492].

(450) Moreover, […]'s subsequent actions referred to in Recital (120) clearly show that he adhered to the NES price-fixing scheme without disassociating himself from it. Therefore, the arguments submitted by DB do not alter the Commission's findings that BAX UK adhered to the NES cartel as from 1 October 2002.

Probative value of evidence

(451) Kuehne & Nagel disputes[493] the credibility of internal emails produced by […] (DHL)[494] and used by the Commission in the SO to establish the existence of the NES infringement. The undertaking claims that its cartel participation and/or duration thereof cannot be corroborated by such internal emails.

(452) The Commission notes that Kuehne & Nagel contends that the probative value of individual pieces of evidence submitted by the Commission in relation to the NES infringement does not meet the requisite legal standard. However, in line with the established case-law, the evidence of participation in a cartel must be assessed in its entirety, taking into account all relevant circumstances of fact[495]. Moreover, as

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489 DB's reply to the Statement of Objections, page 12-13.

490 […].

491 […].

492 See, to that effect Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission* (Cement II), [2004] ECR I-123, paragraph 81.

493 Kuehne & Nagel's reply to the Statement of Objections, page 11.

494 See, for example, […].

495 See Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré SA and Others v Commission*, [2007] ECR II-947, paragraph. 155; see also the Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, II-869 – joint Opinion T-2/89 [1991] ECR II-1087, T-3/89 [1991] ECR II-1177, T-4/89 [1991] ECR II-1523, T-6/89 [1991] ECR II-1623, T-7/89 [1991] ECR II-1711, T-8/89 [1991] ECR II-1833, and T-9/89 to T-15/89 [1992] ECR II-499, II-629, II-757, II-907, II-1021, II-1155 and II-1275 in the *Polypropylene* judgments;

already explained in Recital (118), there are no objective reasons that would indicate that the contemporaneous internal emails drafted by […] of DHL lack the required credibility. The supporting documents mentioned in this Recital and also in Recitals (108) and (110) evidently show that the description provided by […] of DHL corresponds with the reality of the cartel conduct. Furthermore, […] of DHL confessed on a voluntarily basis […][496] that he made up some of his contacts in relation to the AMS surcharge, but no similar indication exists for the internal DHL emails regarding the NES surcharge.

(453) It is therefore proven overall by the evidence referred to in Recital (452) that in this case, the Commission has established to the requisite legal standard the existence of an anti-competitive agreement in relation to the NES and the participation of Kuehne & Nagel therein (as the evidence in Recitals (100)-(114) shows). Therefore, the argument put forward by Kuehne & Nagel has to be dismissed.

Agreement on the amount of NES charge

(454) Kuehne & Nagel argues[497] that its entry into an agreement on the amount of the NES is highly unlikely, as the NES fees actually charged differed from the amounts alleged to be agreed by the competitors pertaining to the Gardening Club circle. Furthermore, the undertaking submits that it did not disclose to its competitors information on the NES amounts to be charged to its customers.

(455) The Commission observes that any possible deviations from the arrangements agreed with competitors do not relieve the addressees of this Decision of full responsibility for participation in the NES cartel, unless they had publicly distanced themselves from the agreed measures (see Recital (431) above). The question of putting the collusive arrangements fully into effect is another matter and does not suffice to refute such participation[498].

(456) In this case, the Commission established to the requisite legal standard the existence of the cartel aimed, inter alia, at fixing the amounts of NES fees (see Recitals (100)-(114)). Furthermore, there is no evidence that Kuehne & Nagel distanced itself from the NES cartel scheme. If the amounts actually charged by Kuehne & Nagel departed from the collusive arrangements, this might demonstrate that the undertaking was simply trying to exploit the cartel for its own benefit or was faced with resistance from the customer base, but in legal terms can in no way be indicative of the level of its participation in the cartel. Moreover, the ranges of the NES fees submitted by Kuehne & Nagel in its reply to the Statement of Objections[499] do not deviate significantly from the ranges discussed within the Gardening Club. The adherence of Kuehne & Nagel to the agreement is also confirmed by a customer letter of Kuehne & Nagel that clearly shows that the levels of the NES fee that were subject to negotiations with customers were fully in line with those agreed at the Gardening Club.[500]

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496 […].

497 Kuehne & Nagel's reply to the Statement of Objections, page 10, 12.

498 Case 49/92P, *Commission v. Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 95.

499 Kuehne & Nagel's reply to the Statement of Objections, page 12.

500 […].

(457) Regarding the alleged non-disclosure of the NES fees to be actually levied on customers by Kuehne & Nagel, the Commission notes that this argument does not affect the legal appraisal of the NES infringement, the essence of which centres around the agreement reached at the meeting of the Gardening Club on 1 October 2002 (see Recital (102)). The actual implementation of the agreed fees by individual perpetrators and disclosure of information related thereto does not have a bearing on the establishment of their participation in the NES cartel scheme. In light of the above, the arguments submitted by Kuehne & Nagel are rejected.

Authorisation to act on behalf of the undertaking

(458) DB argues[501]that BAX UK cannot be held to have acceded to the NES agreement as […] (BAX UK) clearly exceeded the powers conferred on him by the BAX UK senior management, when engaging in competitor contacts concerning pricing issues. According to DB, […], at no time in his career with BAX UK, had any pricing authority within the BAX UK organisation. Furthermore, DB maintains that the BAX […] told […] not to engage in any further competitor contacts and not to pass on internally or otherwise use any information he had received from the 1 October 2002 meeting[502].

(459) The Commission notes that […] held a position on the Board of Directors of BAX UK during the material period[503]. Furthermore, regardless of […]'s position, in general no specific authorisation or approval is required by an employer to its representative to conclude cartel agreements.[504] It is settled case-law, that in order to be found guilty of an infringement, it is not necessary for there to have been action by, or even knowledge on the part of the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices[505]. It is therefore clear that […] had the authority to represent BAX UK in the Gardening Club meeting. Furthermore, […] revealed the existence of the Gardening Club to the BAX […] and informed the […] about the contemplated collusion with competitors on NES without being banned from participating in such collusion (see also Recital (120)). This could even be viewed as a collective tacit authorisation of the NES cartel conduct by […] BAX […]. Therefore, the Commission considers that […] had sufficient authority to commit BAX UK to the NES agreement reached at the 1 October 2002 meeting.

(460) Moreover, even if the matters discussed and agreed at the meeting were outside the scope of […]'s responsibilities, the mere presence, lack of dissociation and presumed ability to communicate internally the measures agreed (confirmed by evidence

501 DB's reply to the Statement of Objections, page 13-14.

502 […].

503 […].

504 Case T-78/06 *Álvarez v Commission*, not yet reported, paragraph 39.

505 Cases 100-103/80, *SA Musique Diffusion Française v. Commission* [1983] ECR 1825, paragraph 97. See also Case T-9/99, *HFB and others v Commission* [2002] ECR II-1487, paragraph 275, Case T-15/99, *Brugg Rohrsysteme v Commission* [2002] ECR II-1613, paragraph 58, Case T-236/01 *Tokai Carbon v Commission* [2004] ECR II-1181, paragraph 277.

referred to in Recital (122)) would have led the other participants to believe that BAX UK subscribed to what was decided and would comply with it[506].

(461) With respect to DB's argument that […] was reprehended by […] BAX […] following the 1 October 2002 meeting, it has to be equally dismissed as unfounded. A denouncement of the anti-competitive conduct made internally within an undertaking without manifesting its disassociation in relation to the cartel participant is devoid of any significance for the assessment of involvement of an undertaking in a cartel. […]. In view of the above, the Commission rejects the arguments submitted by DB.

Monitoring of NES pricing agreement

(462) DB claims[507] that BAX UK did not participate in the monitoring of the alleged NES pricing agreement.

(463) The Commission observes that monitoring of the agreed NES arrangements constitutes an integral part of the single and continuous NES infringement and while BAX UK might have refrained from monitoring actively, whether the NES agreement was honoured by other cartel participants, they did not distance themselves from this aspect of the cartel scheme. Moreover, BAX was involved in the email exchanges concerning implementation as well as monitoring of the implementation and BAX even confirmed its adherence to the agreement and implementation in the market (see Recitals (106)-(112)). Therefore, the argument brought forward by DB does not alter the findings of the Commission presented in this Decision.

5.2.1.1.1.2. Application to the AMS infringement

(464) As demonstrated in Recitals (131)-(163) of this Decision the undertakings:

(a) Discussed and coordinated their market behaviour in relation to the AMS surcharge at several FFE/FFI meetings (see in particular Recitals (145), (151), (153) and (158));

(b) Agreed to introduce an AMS surcharge (see in particular Recital (146));

(c) Agreed not to use the surcharge as a tool for competition among themselves (see in particular Recitals (147) and (149));

(d) Exchanged the levels of the AMS surcharge which some members of the cartel intended to charge, thereby reducing the uncertainty about the future conduct of competitors (see in particular Recitals (150), (152), (154), (156) and (157));

(e) Discussed the possibility to agree on a uniform amount of the surcharge and a common price band (see in particular Recitals (152), (154), (156), (157) and (159));

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506 Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission* , [2004] ECR I-123, paragraph 82.

507 DB's reply to the Statement of Objections, page 15.

(f) Exchanged information on the fee charged/introduced monitoring with a view to facilitating implementation of the arrangements previously agreed upon (see in particular Recitals (159) and (161)).

5.2.1.1.1.2.1. Arguments by the parties and their assessment by the Commission

Agreement on AMS surcharge

(465) Panalpina argues[508] that there was no agreement amongst the forwarders, at the 19 March 2003 FFI AFC meeting or otherwise, regarding the introduction of an AMS fee in respect of which they would not compete. Furthermore, UPS argues[509] that, given the economic and legal context, the alleged agreement (to introduce the AMS fee) was at most an agreement that forwarders would charge some undefined amount for the additional (and unknown) cost of work. The alleged agreement merely states the obvious in such a vague and general manner as to be meaningless, according to UPS.

(466) In the current case, the agreement on introduction of the AMS surcharge is clearly evidenced by the contemporaneous minutes from the meeting of the FFE/FFI Airfreight Committee of 19 March 2003 (see Recital (146)). This agreement was further communicated within FFI at the CEO level (see Recital (148)).

(467) Furthermore, not only have the cartel participants agreed on the principal issue of whether the AMS fee should be charged to the customers of the forwarders – something that was far from being obvious; they have also agreed not to use the surcharge as a tool for competition among themselves. This basic rule agreed by the parties was essentially a common understanding that the minimum surcharge should be set at the level of forwarders' costs for complying with the AMS procedure. This is corroborated by the statement from the immunity applicant (see Recital (147)) and also confirmed by […], which states that the conclusion not to use the charge as a commercial advantage meant that *"none of the freight forwarders should undercharge their customers since this might lead to certain customers moving to those freight forwarders who were charging very low AMS fees."*[510]

(468) In view of the foregoing, the arguments submitted by Panalpina and UPS must be dismissed.

Adoption of competitive conduct on the market

(469) Agility submits[511] that the agreed action concerning the AMS fee was not implemented and that its setting of the level of AMS fee constituted a unilateral, competitive response to a new cost which resulted from the introduction of new regulatory measures. Panalpina[512] argues that the introduction of the AMS fee represented the only commercially rational response of the industry and that the freight forwarders adopted competitive conduct on the market, both in relation to the

508 Panalpina's reply to the Statement of Objections, page 28.
509 UPS's reply to the Statement of Objections, page 15-17.
510 […].
511 Agility's reply to the Statement of Objections, page 16, 31.
512 Panalpina's reply to the Statement of Objections, page 24, 43.

specific surcharges and in general. UPS also submits[513] that the alleged AMS infringement did not affect UPS's independent and exhaustive internal evaluation regarding whether to charge any AMS fee and the level of that fee. Finally, UTi contends[514] that an impact of the alleged discussions and exchange of AMS fees on UTi's behaviour has not been established by the Commission.

(470) The parties to the AMS cartel have been found to have coordinated their market behaviour in relation to the AMS surcharge. In such circumstances, the argued unilateral actions or deviations from the arrangements agreed with competitors do not relieve the perpetrators addressed in this Decision of full responsibility for participation in the AMS cartel, unless they would publicly distance themselves from the agreed measures (see Recital (431) above). The question of putting the collusive arrangements fully into effect is another matter and does not suffice to refute such participation[515].

(471) Furthermore, in line with Recital (436) it may be presumed that undertakings taking part in unlawful contacts and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market. The fact that the parties may have had subjective intentions not disclosed to the competitors throughout the anti-competitive meetings or that they eventually did not abide by the conduct agreed when implementing the AMS pricing policy does not relieve them of full responsibility for taking part in collusive arrangements with an anti-competitive object. It is settled case-law that the liability of a particular undertaking in the infringement is properly established where it participated in cartel meetings with knowledge of their object, even if it did not proceed to implement any of the measures agreed at those meetings[516]. Moreover, in this case, none of the parties put forward an express proof of dissociation from the anti-competitive discussions. In conclusion, these arguments of the parties have to be rejected.

Rebuttal of the presumption of information exchange

(472) Agility considers that it is able to rebut the presumption that an undertaking takes account of information exchanged[517] by adducing evidence demonstrating lack of effect of competitor arrangements on Agility's pricing policy.

(473) Firstly, the rebuttable presumption established by the case-law and referred to by Agility only applies to concerted practices, while implication in elements manifested as unlawful agreements is not open to any such rebuttal and potential exoneration. In this case, AMS conduct could at least to some degree be characterised as an agreement within the meaning of Article 101(1) of the Treaty[518]. In any event, as set out in Recital (440), it is not necessary for the Commission to characterise the

513 UPS's reply to the Statement of Objections, page 9.

514 UTi's reply to the Statement of Objections, page 17.

515 Case 49/92P, *Commission v. Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 95.

516 Case T-53/03 *BPB v Commission* [2008] ECR II-1333, paragraph 90.

517 Case 49/92P, *Commission v. Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 121.

518 Nevertheless, while certain elements of the AMS conduct possibly could have been manifested in the form of unlawful concerted practices and other as cartel agreements, it would be artificial and hardly feasible to split up the conduct characterised by a single aim and draw a clear line between elements amounting to an agreement and those constituting a concerted practice (see Recital (440) and (545) in this respect).

conduct as exclusively one or other of those forms of illegal behaviour. Undertakings that have engaged in the AMS infringement could have otherwise partially evaded the application of Article 101(1) of the Treaty, which would result in undermining an effective enforcement of the Union competition law.

(474) Furthermore, according to the settled case-law where communications concern future pricing policies, it is considered that, by merely participating in the meetings, the participant could not fail to take into account the information obtained in order to determine policy which it intends to pursue on the market[519]. To rebut this presumption, the undertaking must show that the concerted arrangements did not have any influence whatsoever on its own conduct on the market[520]. The case-law suggests that the undertaking must at least have ended its participation in the anti-competitive discussions and have publicly distanced itself from what was discussed. By doing so, the undertaking would signal to its competitors that it was participating in those discussions in a spirit that was different from that of the others[521]. It is not sufficient to merely submit arguments claiming that there was no anti-competitive spirit, but the undertaking involved in such practices needs to adduce evidence to that effect[522].

(475) The Commission therefore considers that the evidence Agility submits in support of the fact that the FFI discussions did not have any effect on Agility's pricing falls short of the rebuttal standard. Agility does not demonstrate adequately that its prices and commercial decisions were not influenced by the sensitive price information it obtained about its competitors. In any event, it is very unlikely that a direct participant in a series of anti-competitive meetings which has not distanced itself from unlawful discussions or their outcome and which continued to pursue US-bound freight forwarding business would not be influenced by the information obtained during the FFI meetings.

Alleged lack of evidence on participation in AMS conduct

(476) UTi submits[523] that membership in FFI alone is insufficient to support the allegations against UTi and that the Commission never identifies actual participation by a UTi employee in any discussions regarding the AMS fee. According to UTi, the meeting minutes do not state that UTi representatives were present during the relevant portions of these meetings.

(477) According to settled case-law, it is sufficient for the Commission to show that the undertaking participated in meetings at which anti-competitive agreements were

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519 See Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, paragraph 58; Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, paragraph 122-123.

520 See, in this sense, Case C-199/92 *P Hüls AG v. Commission*, [1999] ECR I-4287, paragraph 167.

521 See, in this sense, Case C-199/92 *P Hüls AG v. Commission*, [1999] ECR I-4287, paragraph 155, Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission*, [2002] ECR II-1487, paragraphs 223-227 and Joined Cases See Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, paragraph 65.

522 See Joined Cases See Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, paragraphs 64-66.

523 UTi's reply to the Statement of Objections, page 19, 21.

concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel[524]. In this respect, the evidence referred to in the present Decision clearly confirms participation of UTi in the anti-competitive contacts regarding the AMS fee (see Recitals (145), (151), (153) and (158)).

(478) In this case, UTi does not dispute that it was a member of the FFI or that it attended the FFI meetings/phone conference described in this Decision (see Recitals (145), (151), (153) and (158)); it merely disputes presence of its representatives during the discussions having anti-competitive nature. However, UTi failed to provide any evidence demonstrating that it was not present at the relevant parts of the meetings and that it would have manifestly opposed anti-competitive discussions and agreed actions. Furthermore even in the unlikely case of absence during the relevant parts of the meetings, the outcome of the anti-competitive discussions (in particular of the first meeting) was reflected in detail in the minutes, which were distributed to all FFI members including to UTi and were not opposed by UTi. Moreover, the internal email of UTi sent following the AMS fee was agreed within FFI clearly proves that UTi was involved or at the very least must have been aware of the anti-competitive discussions on levels of the intended AMS fee (see Recital (157)). As UTi failed to provide proof of absence from and manifest opposition to the AMS conduct, UTi's argument has to be dismissed by the Commission. Mere assertion that the presence of UTi representatives during the anti-competitive parts of the discussions held throughout the FFI meetings cannot be confirmed on the basis of the minutes does not constitute such proof. Hence, such an assertion does not alter the findings of the Commission as to UTi's participation in the AMS cartel.

Passive participation

(479) UPS submits[525]that the March 19, 2003 FFE/FFI Airfreight Committee minutes explicitly refer only to an agreement among FFE members, rather than an agreement among all freight forwarders or all attendees of the meeting. It further refers to the fact that UPS was not a member of the FFI and argues that the silence of its representative at the meeting is insufficient to find that he joined any agreement. Furthermore, UPS claims[526] that evidence related to the 21 October 2003 meeting does not suggest that UPS divulged its plans for the AMS fee. ABX equally argues[527] that it is not established that ABX disclosed information about the AMS fee it intended to apply on the market. Kuehne & Nagel also claims[528] that it is not argued by the Commission, that it divulged any information on future AMS levels.

(480) Under the settled case-law, a party which even tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement. That complicity constitutes a mode of participation in the infringement

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524 Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission*, [2004] ECR I-123, paragraph 81.

525 UPS's reply to the Statement of Objections, page 12-14.

526 UPS's reply to the Statement of Objections, page 14.

527 ABX's reply to the Statement of Objections, page 9.

528 Kuehne & Nagel's reply to the Statement of Objections, page 40.

and is capable of rendering the undertaking liable[529]. In the current case, parties have neither publicly dissociated themselves from the decision on agreed action or discussions on the level of AMS fee, nor have they notified the relevant authorities about the unlawful conduct. Furthermore, even if some of the parties had played only a passive role (a minor role) in the aspects of the AMS infringement in which they were implicated this would not be material to the establishment of the existence of an infringement on their part[530]. When parties discussed and disclosed their views concerning price setting factors, they thereby disclosed the course of action which they contemplated adopting or at least enabled others to estimate competitors' future behaviour with regard to setting the AMS fee and its level and reduced uncertainty about it. Therefore, the mere presence at the meetings and the fact that an undertaking has received information concerning the future course of action to be taken by its competitors with respect to the AMS pricing policy is sufficient to establish its involvement in the AMS infringement. According to the settled case-law, the mere fact of receiving information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate the existence of an anti-competitive intention[531]. In light of the above, the argumentation submitted by UPS and ABX has to be dismissed by the Commission.

(481) Furthermore, UTi argues[532] that the Commission attempts to establish liability by imputing the conduct of certain FFI member companies to UTi. According to UTi (relying on the Commission's file), FFI decisions were adopted by dominant forwarders (not including UTi) outside the formal framework of FFI.

(482) For the purposes of the present Decision, the anti-competitive scheme which is subject to the Commission's assessment covers solely competitor conduct within the framework of FFI. UTi, as a member of FFI and a participant in all the anti-competitive contacts, subscribed to the cartel arrangements related to the AMS fee referred to in Recital (464).

Agreement and required parameters

(483) UPS suggests[533], with reference to the evidence on the administrative file[534] of the Commission that whatever was discussed at the 19 March 2003 meeting was not viewed by the participants as an agreement until it was discussed and approved by the FFE CEO Committee. Similarly, UTi contests[535] the allegation that the participants of the FFE/FFI Airfreight Committee meeting entered into an agreement on 19 March 2003, referring to the evidence[536] provided by Schenker which explains

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529 See to that effect Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission* (Cement II), [2004] ECR I-123, paragraph 84.

530 Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission* (Cement II), [2004] ECR I-123, paragraph 86.

531 See Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, paragraph 66 and Case T-53/03 *BPB v Commission* [2008] ECR II-1333, paragraph 154.

532 UTi's reply to the Statement of Objections, page 27.

533 UPS's reply to the Statement of Objections, page 13.

534 […].

535 UTi's reply to the Statement of Objections, page 18.

536 […].

that the FFE/FFI Airfreight Committee could generally not take decisions but rather to make proposals.

(484) An agreement for the purposes of Article 101(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract under civil law. It does not have to be in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. It was thus sufficient for undertakings involved in the AMS infringement to have expressed their joint intention to behave in a certain way on the market without entering into any binding agreements that would have to be adopted in line with the procedure foreseen in the constitutive documents of a certain association. Moreover, the action agreed at the 19 March 2003 meeting was presented the following month at the FFI CEO meeting as an agreement reached among the members of the FFE/FFI Airfreight Committee and no objections were raised by the CEOs[537].

Exchange of information at the 21 October 2003 meeting

(485) In relation to the content of the second FFE/FFI Airfreight Committee meeting, UPS claims[538] that there is insufficient corroboration for the finding that freight forwarders exchanged the AMS fees to be charged. UPS claims that, while the statement of […] is supported by the statement of […][539] to the extent that […] disclosed a certain range for DHL's AMS fee, neither the statement of […], nor the internal […] email written by […] corroborate the allegation of a multilateral exchange of surcharge information. Furthermore, UTi submits[540] that the meeting minutes reflect technical discussion on whether the AMS fee should be charged at origin or destination and that the Commission unreasonably relies on oral statements to interpret the minutes in question. Kuehne & Nagel also suggests that the Commission did not prove, whether any anti-competitive issues were discussed during this meeting[541].

(486) According to the settled case-law, as anti-competitive agreements are known to be prohibited, the Commission cannot be required to produce documents expressly attesting to contacts between the traders concerned. The fragmentary and sporadic items of evidence which may be available to the Commission should, in any event, be capable of being supplemented by inferences which allow the relevant circumstances to be reconstituted[542]. The existence of an anti-competitive practice or agreement may therefore be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules[543]. Furthermore, in cases where contemporaneous documents show that there was concertation between

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537 […].

538 UPS's reply to the Statement of Objections, page 14.

539 Currently part of DP undertaking.

540 UTi's reply to the Statement of Objections, page 20.

541 Kuehne & Nagel's reply to the Statement of Objections, page 39.

542 See Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, *Dresdner Bank and others v Commission*, [2006] ECR II-03567, paragraph. 64.

543 See Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP, *Dresdner Bank and others v Commission*, [2006] ECR II-03567, paragraph. 65; see also Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission* , [2004] ECR I-123, paragraphs. 55-57.

undertakings regarding their market behaviour, the burden is on the undertakings not merely to submit an alleged alternative explanation for such behaviour but to challenge the existence of the facts established by those documents[544].

(487) First, the evidence provided by […] consists of statements and a contemporaneous email, which are sufficiently precise and corroborate each other on the essential points. They confirm that the intended levels of the AMS fee were discussed and disclosed at least by DHL at the second FFE/FFI Airfreight Committee meeting. Information in these statements and the email in question originate or are authored by persons that were direct participants in the cartel meetings, which enhances the credibility of the evidence provided[545]. Moreover, the evidence on exchange of future pricing intentions provided by […] is further corroborated by the contemporaneous FFE/FFI Airfreight Committee meeting minutes produced independently and attesting to the anti-competitive objective and subject-matter of the discussion (see Recital (152)). Furthermore, the evidence relating to discussions in the second FFE/FFI Airfreight Committee meeting is consistent with and has to be interpreted in light of the entire body of evidence relied upon by the Commission for establishing the AMS infringement[546].

(488) Second, the fact that only one of the participants at a meeting reveals its intentions is not sufficient to exclude the possibility of an agreement or concerted practice[547]. Existence of reciprocal anti-competitive contacts is found, where one competitor discloses its future intentions or conduct on the market to other competitors when the latter requests it or, at the very least, accepts it[548]. The Commission considers that even if only one party revealed its pricing intentions during the meetings (let alone, if there are multilateral exchanges as in this case), such communication constitutes a concerted practice with an anti-competitive object.

5.2.1.1.1.3. Application to the CAF infringement

(489) As demonstrated in Recitals (219)-(263) of this Decision, the undertakings:

(a) Created a special group in order to discuss a collective approach following a change in the currency policy of the National Bank of China (see in particular Recitals (227) - (229), (231), (237), (245), (246), (251), (252), (255), (256), (260) and (261));

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544 See_Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij and Others* v *Commission (PVC II)* [1999] ECR II-931, paragraph 728, relied upon in joined Cases T-67/00 etc. *JFE Engineering Corp. v Commission*, [2004] ECR II-2501, paragraphs 186 and 187.

545 See to that effect Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering* v *Commission* [2004] ECR II-2501, paragraphs 207-210;

546 Due regard has to be given, in particular, to the evolving nature of the AMS cartel conduct and to the evidence on subsequent exchanges of pricing information within the FFI as well as the evidence on the adoption of EUR 8 fee guideline, indicating that unlawful exchanges of pricing intentions have preceded the adoption of EUR 8 fee.

547 See Joined Cases See Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, paragraph 54.

548 See to that effect Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others v. Commission* [2000] ECR II-491, paragraph 1849.

(b) Agreed on the imposition of CAF surcharge and on a currency switch in a quotation of the contracts (see in particular Recitals (232), (233) and (249));

(c) Agreed on the level of a CAF surcharge to be applied (see in particular Recital (232));

(d) Prepared a uniform template of a customer letter reflecting the agreed measures. The letter was distributed to the cartel members in order for it to be sent to customers without changing the key message reflecting the agreement reached at the meeting (see in particular Recitals (232), (234) - (236) and (238));

(e) Invited further undertakings to join the group and to follow the general approach agreed at the first meeting (see in particular Recital (239));

(f) Monitored the market and attempted to persuade undecided cartel members to implement the agreed measures. They informed each other about internal negotiations within their own organisations concerning the implementation of the agreed measures (see in particular Recitals (241) - (244));

(g) Informed each other about the general acceptance of the new measures on the market and discussed the feedback from individual customers common to several of the undertakings participating in the cartel (see in particular Recitals (248) - (250), (253), (254), (257), (259) and (262)).

5.2.1.1.1.3.1. Arguments by the parties and their assessment by the Commission

Secrecy of the CAF cartel arrangements and lack of governmental influence

(490) Kintetsu argues[549] that it was not trying to keep the CAF meetings or any alleged agreements reached at the meetings secret. Kintetsu claims that on the contrary, it was open towards the Chinese government about the whole matter, sought and received SIFFA's opinion regarding the jointly devised customer letter reflecting the agreement reached by the cartel participants.

(491) The Commission observes that for the purposes of the present case, SIFFA is an industry association of undertakings operating on the same market as the cartel participants rather than a governmental body. Even if SIFFA could be perceived as a government-related organisation, the cartel events which are constituent elements of the CAF cartel took place outside SIFFA and without its involvement. Mere endeavour to receive support from SIFFA in pursuing the outcome of anti-competitive arrangements and subsequent advice given by SIFFA cannot be viewed as a governmental imposition or facilitation of illegal behaviour that already occurred[550]. Contrary to what Kintetsu claims, its actions are rather a manifestation of active involvement in the CAF cartel as well as efforts to expand the ranks of cartel participants by involving the industry association and seeking endorsement of the agreed measures by the latter. Even if it was considered that the existence of the

549 Kintetsu's reply to the Statement of Objections, page 41.

550 See Case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato*, [2003] ECR I-08055, paragraphs 52-56.

collusion came thereby to the knowledge of third parties, there is no evidence suggesting that the full extent of the cartel, including the participants, organisational and operational matters would be known to the public or institutions.[551] Moreover, it is not disputed that the cartel meetings preceded the release onto the market of the measures that were agreed at those meetings. Hence, even if it were true that the parties had not kept the cartel arrangements secret and revealed the information about it to others, this would not alter the findings of the Commission[552].

Authorisation to act on behalf of the undertaking

(492) Yusen submits[553] that its employees sent to the first meeting were not responsible for export matters and their inability to speak on behalf of Yusen Shenda was also clear to other participants.

(493) Kintetsu also argues[554] that its representative at several CAF meetings was a junior manager who was not in the position to take decisions on behalf of Kintetsu. It is claimed by Kintetsu that he attended the meetings only to report to the senior management without intervening in the discussions.

(494) Similarly, Panalpina[555] claims that its representative in the CAF meetings did not have authority or instructions to represent the undertaking in respect of any agreement reached therein.

(495) The Commission notes that no specific authorisation or approval is required by an employer to its representative to conclude cartel agreements, it suffices that the representative is authorised to act for the product or service in question. It is settled case-law, that in order to be found guilty of an infringement, "it is not necessary for there to have been action by, or even knowledge on the part of the partners or principal managers of the undertaking concerned; action by a person who is authorized to act on behalf of the undertaking suffices"[556].

(496) The Commission notes that at least one of the Yusen attendees, […] was a senior manager undoubtedly vested with extensive competences. Moreover, the said senior manager reported on the contents of the discussion to his superior, whose name was later added to the mailing list of the individuals having access to the common email platform set up by the cartel participants for the purpose of coordinating their cartel activities[557].

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551 See in this sense Joined Cases T-259/02, T-264/02, T-271/02 and others. *Raiffeisen Zentralbank Osterreich AG and Others v Commission* [2006] ECR II-5169, paragraph 506.

552 See, for example, Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, paragraph 60.

553 Yusen's reply to the Statement of Objections, page 18,

554 Kintetsu's reply to the Statement of Objections, page 33,

555 Panalpina's reply to the Statement of Objections, page 17-18.

556 Joined Cases 100-103/80, *SA Musique Diffusion Française and others v Commission* [1983] ECR 1825, paragraph 97. See also Case T-9/99, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission* [2002] ECR II-1487, paragraph 275, Case T-15/99, *Brugg Rohrsysteme GmbH v Commission* [2002] ECR II-1613, paragraph 58, Joined Cases T-236/01 *Tokai Carbon GmbH and others v Commission* [2004] ECR II-1181, paragraph 277.

557 Yusen's reply to the Statement of Objections, page 9, 14.

(497) Even if the matters discussed and agreed were outside the scope of responsibilities of the import managers present on behalf of Yusen at the first meeting, the mere presence, lack of dissociation and presumed ability to communicate internally the measures agreed would have led the other participants to believe that Yusen subscribed to what was decided and would comply with it[558]. This conviction was reinforced by the fact that Yusen continued its participation in the cartel by attending the subsequent anti-competitive meeting (see Recitals (245) - (250)). In light of the above considerations, the arguments adduced by Yusen cannot be accepted by the Commission.

(498) Regarding Kintetsu's argument, the Commission notes that the person attending the meeting on behalf of the undertaking was expressly instructed to do so by his superior, a member of the Kintetsu's Board[559]. It is obvious that the instruction implied consent with attendance and representation of the undertaking at the competitor meeting. In view of the said consideration as well as other reasons provided by the Commission in Section 4.3 (in particular Recital (279)), Kintetsu's arguments must be rejected.

(499) With respect to the arguments submitted by Panalpina, the Commission notes that the original invitee to the CAF meetings was the […]. Ultimately, the meetings were attended by […] acting in the capacity of […]. There is no evidence that […] would not have been authorised to represent the undertaking in the CAF meetings, especially if for an anti-competitive agreement to be reached, no particular requirements regarding the authority to act are sought[560]. Moreover, it is reasonable to believe that the […] had instructed […] to attend the meetings. It is obvious that the instruction implied consent with attendance and representation of the undertaking at the competitor meeting. In view of the said consideration as well as other reasons provided by the Commission in Section 4.3 (in particular Recital (275)), Panalpina's arguments have to be dismissed.

Lack of implementation authority

(500) CEVA submits[561] that its employees present at the cartel meetings indicated to other participants that they lacked authority to commit to any proposed course of conduct without corporate approval of CEVA's head office. Namely, CEVA's employees stated to other cartel participants that in order to draft and send to CEVA's customers a letter reflecting the cartel agreement reached, endorsement by CEVA's headquarters was required. According to CEVA, it therefore should have been clear to the CAF cartel community that CEVA was not in the position to join the CAF cartel agreement.

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558 Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission*, [2004] ECR I-123, paragraph 82.

559 Annex 3.7 of Kintetsu's reply to the Statement of Objections […].

560 Cases 100-103/80, *SA Musique Diffusion Française and others v Commission* [1983] ECR 1825, paragraph 97. See also Case T-9/99, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission* [2002] ECR II-1487, paragraph 275, Case T-15/99, *Brugg Rohrsysteme GmbH v Commission* [2002] ECR II-1613, paragraph 58, Joined Cases T-236/01 *Tokai Carbon GmbH v Commission* [2004] ECR II-1181, paragraph 277.

561 CEVA's reply to the Statement of Objections, page 46, 52, 54.

(501) The Commission observes that CEVA showed its adherence to the CAF cartel by participating in the cartel activities without having distanced itself from them and therefore is found to have participated in the said infringement (see Recitals (228)-(263))[562].

(502) The Commission finds that the customer letter and its contents, reflecting the CAF agreement does not manifest adherence (or lack of it) to the CAF cartel, but is rather linked to the form of implementation of the agreed measures. The fact that the implementation of the CAF agreement was conditional on receiving approval of the headquarters does not invalidate the conclusion that the undertaking participated in the anti-competitive meetings and agreed on measures to be taken in concert with other competitors[563]. Furthermore, it has to be noted that the implementation of an anti-competitive agreement is a separate matter from whether such an agreement was concluded. Even if the unlawful agreement was not subsequently implemented by one or more participants, this does not free the participating undertakings from their liability under Union competition rules. In light of the above, CEVA's arguments have to be rejected.

Limited participation in anti-competitive meetings

(503) Yusen essentially claims[564] that it participated in both the meetings and group email forum set up for facilitating the cartel in a passive manner. In relation to the first of the two meetings, which Yusen attended, the undertaking claims to have had no prior knowledge of the subject-matter discussed and to have refrained from participation in the discussions at the meeting. Regarding the second meeting, Yusen suggests that its representative merely received information about the other freight forwarders internal policy with regard to their measures concerning the RMB appreciation. Furthermore, according to Yusen, the information received was of very limited use to the undertaking as they have already taken an internal position on how to address the situation[565]. Finally, Yusen submits that its participation in the email exchanges with other forwarders via the Logistic Community mailbox was also very limited and consisted of only two emails.

(504) Kintetsu equally argues[566] that it played a minor and/or passive role in relation to the CAF infringement due to its low profile during the meetings.

(505) According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel[567].

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562 Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission*, [2004] ECR I-123, paragraph 82.

563 See Case T-53/03 *BPB plc v Commission* [2008] ECR II-1333, paragraph 90.

564 Yusen's reply to the Statement of Objections, page 18.

565 Although, as it follows from the Yusen's reply to the Statement of Objections (page 26), its decision on the approach to the RMB appreciation was announced on 2 August 2005, that means after the meeting, where cartel participants agreed on measures addressing the situation.

566 Kintetsu's reply to the Statement of Objections, page 71.

567 See Joined Cases *Dansk Rørindustri A/S (C-189/02 P), Isoplus Fernwärmetechnik Vertriebsgesellschaft mbH and Others (C-202/02 P), KE KELIT Kunststoffwerk GmbH (C-205/02 P), LR af 1998 A/S (C-*

(506) Furthermore a party which tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement. That complicity constitutes at least a passive mode of participation in the infringement which is capable of rendering the undertaking liable[568].

(507) The Commission observes that in this case, Yusen's representatives attended two anti-competitive meetings without manifesting their disagreement or objections to the matters discussed and agreed. The conclusion that Yusen subscribed to the cartel scheme in relation to CAF and made other participants believe that it adheres to that scheme is also supported by a number of factual elements pointing to active involvement. First, Yusen did not terminate its participation after the first meeting. Instead, it sent a manager responsible for export matters to the second meeting, who not only received and accepted information about the policy intended to be pursued by other forwarders, but also disclosed Yusen's position on the matter[569] without distancing itself from the cartel behaviour. Second, the yahoo email account set up for the purpose of coordinating cartel activity and thus also all electronic competitor exchanges were fully accessible to Yusen[570]. Furthermore, it appears that Yusen never asked the administrator of the account to remove its name from the list of addressees[571]. Moreover, Yusen confirmed receipt of the customer letter template by using the common email platform[572], thereby demonstrating its adherence to the agreed conduct. Therefore, Yusen's arguments have to be dismissed by the Commission.

(508) In relation to Kintetsu, the Commission finds that Kintetsu not only actively shared with other cartel participants its internal policy for tackling the RMB appreciation, but it also actively approached SIFFA, a local industry association with a view to ensuring a broader implementation of the agreed measures in the freight forwarding sector (see Recitals (282) - (283)). Therefore, Kintetsu's involvement in the CAF infringement cannot be classified as passive, as suggested by the undertaking.

Commercially rational response to situation and subjective intentions

(509) Kintetsu argues[573] that it had already decided internally which measures it would take to address the appreciation of the RMB before the first CAF meeting. Yusen also submits[574] that it had decided on a strategy in relation to its customers prior to receiving the draft customer letter reflecting the agreed measures and circulated among the cartel participants. Kuehne & Nagel claims[575] that it had made an

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206/02 P), Brugg Rohrsysteme GmbH (C-207/02 P), LR af 1998 (Deutschland) GmbH (C-208/02 P) and ABB Asea Brown Boveri Ltd (C-213/02 P) v Commission [2005] ECR I-5425, paragraph 145 and Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission* (Cement II), [2004] ECR I-123, paragraph 81.

568 See to that effect Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission*, [2004] ECR I-123, paragraph 84.

569 Yusen's reply to the Statement of Objections, page 14.

570 Yusen's reply to the Statement of Objections, pages 10-12.

571 Yusen's reply to the Statement of Objections, pages 10-12.

572 Yusen's reply to the Statement of Objections, page 10.

573 Kintetsu's reply to the Statement of Objections, page 56.

574 Yusen's reply to the Statement of Objections, page 11.

575 Kuehne & Nagel's reply to the Statement of Objections, page 57.

autonomous decision as to how the appreciation of RMB should be tackled in relation to new quotations. CEVA submits[576] that it engaged in an independent assessment of its currency policy following the revaluation of the RMB. Panalpina suggests[577] that the competitor discussions reflected both the internal Panalpina discussions prior to the first CAF meeting and what was, in effect, the only commercially rational response to the situation. According to Panalpina, the competitor talks did not influence the decisions of the freight forwarders, but rather acted as a record of the unilateral decision of each freight forwarder to impose a CAF surcharge or move to quoting in RMB.

(510) In line with Recital (436) it may be presumed that undertakings taking part in unlawful concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market[578]. The fact that the parties may have had subjective intentions identical to or deviating from measures agreed throughout the anti-competitive meetings undoubtedly does not justify their participation in collusive arrangements with an anti-competitive object. According to settled case-law, collusive arrangements can be restrictive by object even if the parties had other motives or pursued their own interests. An undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit[579]. In the current case, having gained knowledge about the reaction of the competitors, the parties might have easily adapted their intended behaviour or receive assurance that their conduct is in line with what the competitors contemplate to undertake. Therefore the aforementioned arguments of the parties in this respect have to be rejected.

Public distancing

(511) Yusen argues[580] that it has objected expressly to the introduction of the CAF surcharge, hence purporting to show that it never agreed to impose the surcharge, let alone the level thereof.

(512) Similarly, Kintetsu claims[581] that it rejected, publicly and explicitly, introduction of the CAF item by forwarding other cartel participants its customer letter, which was silent on this element of the cartel agreement. Kintetsu suggests that with this letter, it did announce to the cartel participants that it did not subscribe to the cartel agreement as decided by others, and indicated that it would not implement it.

(513) The Commission notes that the alleged express objection to the introduction of the CAF was raised by Yusen at the second CAF meeting, where each of the participants was asked to describe internal policy in relation to the matter concerned. On that occasion, Yusen's representative stated that Yusen would not introduce the CAF, but

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576 CEVA's reply to the Statement of Objections, page 56.

577 Panalpina's reply to the Statement of Objections, page 18, 21.

578 See Joined Cases C-40-48/73, and others. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraph 173-174.

579 See to that effect Case T-59/02 *Archer Daniels Midland Co v. Commission* [2006] ECR II-3627, paragraph 189.

580 Yusen's reply to the Statement of Objections, page 3, 14, 18.

581 Kintetsu's reply to the Statement of Objections, page 56, 58.

had decided to quote in RMB instead[582]. The fact that Japanese forwarders would likely not succeed with the CAF implementation in relation to the Japanese customers was widely known and obviously accepted within the group of cartel participants[583]. Similar considerations apply to Kintetsu, which explained to other cartel participants that it would stay clear of CAF, because it is likely to be declined by the Japanese customers[584].

(514) Furthermore, the Commission observes that the anti-competitive agreement reached by the cartel participants in response to the unpegging of RMB currency was two-fold and did not solely concern the introduction of the CAF, but also currency switch from USD to RMB in contract quotations. One or other party may have reservations about some particular aspect of the arrangement while still adhering to the common enterprise[585].

(515) In this case, the Commission considers that Yusen and Kintetsu merely notified other cartel participants about their inability to enforce part of the agreed measures in relation to their customer base, rather than expressly objected to the unlawful agreement reached. Yusen did not make clear by its intervention at the second meeting that it dissociates itself from the conduct agreed. The same applies to Kintetsu, which by no means distanced itself from the anti-competitive scheme. On the contrary, the undertakings revealed whether and to what extent they will be able to push through the measures (see Recitals (281) and (293) for further details). In this context, the Commission observes that failure to put the concerted decision or its part into effect is another matter and does not suffice to refute participation in a cartel[586]. In view of the above considerations, arguments raised by Yusen and Kintetsu do not alter findings of the Commission as to Yusen's and Kintetsu's involvement in the CAF cartel and are rejected.

Cheating of cartel participants

(516) Kintetsu submits[587] that it took deliberate and misleading actions in relation to the other cartel participants, because it wanted to conceal its actual measures against the revaluation of the currency and because it did not want to be regarded as impolite.

(517) As set out in Recital (546), cheating may occur during the life-span of the cartel, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 101 of the Treaty. In fact, by sending misleading signals[588] to other cartel participants purporting to show Kintetsu's adherence to the CAF cartel, Kintetsu has only reinforced the other participants' belief that it

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582 Yusen's reply to the Statement of Objections, page 14.

583 […];[…].

584 Kintetsu's reply to the Statement of Objections, Annex 3.19 (ID 3870, page 232).

585 Commission Decision, case No IV/35.691/E-4 — *Pre-Insulated Pipe Cartel*, paragraph 134 and Case 49/92P, *Commission v. Anic Partecipazioni SpA*, [1999] ECRI-4125, paragraph 83. .

586 See to that effect Case 49/92P, *Commission v. Anic Partecipazioni SpA*, [1999] ECRI-4125, paragraph 95.

587 Kintetsu's reply to the Statement of Objections, page 36.

588 For example by lying to the forwarders that (i) they would consult headquarters, (ii) that they have sent official notification to customers with the wording replicating in part the template agreed by the cartel participants,etc;

subscribed to what was decided and would comply with it[589]. For the reasons set out in this Recital, Kintetsu's argument has to be rejected by the Commission.

Limited implementation

(518) Kuehne & Nagel submits[590]that it implemented CAF in 2005 only in relation to two customers, claiming that this matter of fact is of relevance for legal assessment of the CAF infringement.

(519) The Commission notes that it is settled case-law that the liability of a particular undertaking in the infringement is properly established where it participated in cartel meetings with knowledge of their object, even if it did not proceed to implement any of the measures agreed at those meetings[591]. Furthermore, the Commission observes that the anti-competitive agreement reached by the cartel participants in response to the unpegging of RMB currency was two-fold and did not solely concern the introduction of CAF, but also the currency switch from USD to RMB in contract quotations (see Recitals (232) and (235)). Therefore, the argument brought forward by Kuehne & Nagel has to be dismissed as unfounded.

Meeting of 13 March 2006

(520) Kuehne & Nagel argues[592] that the last CAF-related meeting relevant from the competition law perspective was held in November 2005 thus suggesting that the subsequent competitor contacts and in particular the meeting of 13 March 2006 did not have an anti-competitive nature.

(521) The Commission observes that the meeting of 13 March 2006 had an anti-competitive objective inherent in all previous CAF competitor meetings set out in this Decision and hence the said meeting constitutes an integral part of the common CAF cartel scheme. This conclusion is substantiated by the contemporaneous evidence referred to in this Decision (see in particular Recitals (260)-(262)). In light of the above, Kuehne & Nagel's argument has to be dismissed.

Wording of the customer letters

(522) CEVA argues[593] that its draft letter[594]differed significantly from the draft agreed within the cartel community of forwarders.

(523) The Commission observes that the letter devised by CEVA is largely identical to that proposed by the cartel community, maintaining both facets of the key message in the letter (with minor modification in relation to CAF applicability). Irrespective of that, actual wording of the customer letters prepared by the cartel participants has no bearing on establishment of their involvement in a cartel, as it does not represent a constitutive element of the CAF cartel, but rather the only form of putting the cartel

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589 See Joined Cases C-403/04 P and C-405/04 P, *Sumitomo Metal Industries Ltd and Nippon Steel Corp. v Commission* [2007] ECR I-729, paragraph 48.

590 Kuehne & Nagel's reply to the Statement of Objections, page 57.

591 See to that effect Case T-53/03 *BPB plc v Commission* [2008] ECR II-1333, paragraph 90.

592 Kuehne & Nagel's reply to the Statement of Objections, page 56.

593 CEVA's reply to the Statement of Objections, page 64.

594 […].

into effect. For the Commission to prove to the requisite standard that the undertaking participated in the cartel, it is sufficient to demonstrate that anti-competitive agreement was concluded at the CAF meetings and that the undertaking concerned participated in such meetings, without manifestly opposing them[595]. In this case, both, existence of the anti-competitive agreement as well as participation of CEVA in the anti-competitive meetings was established by the Commission to the requisite legal standard (see Recitals (228)-(263)) and thus CEVA's argument has to be rejected.

5.2.1.1.1.4. Application to the PSS infringement

(524) ***PSS****:* As demonstrated in Recitals (314)-(342) of this Decision the undertakings:

(a) Gathered at the so called Breakfast Meetings in order to adopt a collective approach in relation to the imposition of the PSS (see Recitals (314)-(315), (319)-(320), (322)-(323), (326)-(327), (329)-(330), (334)-(335) and (339)-(340));

(b) Agreed on the timing of the introduction and at one instance also on the extension of the PSS (see Recitals (316)-(318), (321), (324)-(325), (336)-(338), (341), (347)-(350), (357)-(358), (369)-(374) and (379)-(380));

(c) Exchanged the amounts of the PSS they intended to charge and concerted their behaviour in relation to the level of the PSS (see Recitals (317)-(318), (321), (333), (337)-(338), (346) and (363)-(368)).

5.2.1.1.1.4.1. Arguments by the parties and their assessment by the Commission

No agreement nor concerted practice

(525) Panalpina submits that contrary to the Commission's allegations the participants at the Breakfast Meetings did not reach any agreement regarding the introduction of the PSS. According to Panalpina this is especially because there was no enforcement or monitoring mechanism put in place and each freight forwarder was therefore free to decide unilaterally regarding the implementation of the PSS.[596] A similar claim was also raised by Agility which submits that there is no evidence on the Commission's file of any policing mechanism being agreed at the Breakfast Meetings to monitor the implementation of the discussions.[597]

(526) The evidence on the file clearly shows that the participants of the Breakfast Meetings did agree on the introduction of the PSS surcharge and its timing. This is confirmed by several contemporaneous emails, which refer to the fact that agreements concerning the introduction of the PSS and its timing were concluded during the Breakfast Meetings.[598] This conclusion is supported by […] in which it states that that the purpose of the meetings was to coordinate efforts among freight forwarders

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595 Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission* (Cement II), [2004] ECR I-123, paragraph 81.

596 Panalpina's reply to the Statement of Objections, page 50.

597 Agility's reply to the Statement of Objections, page 59.

598 For example […],[…],[…],[…]. See also Recitals (316)-(318), (321), (324)-(325), (336)-(338) and (341) of this Decision.

in order to ensure better success for the PSS both with customers and with freight forwarders' European sales organisations. The statement further adds that the freight forwarders discussed broader issues of how the PSS should be set, as well as the timing for the application of the surcharge and customer notifications.[599] The statement further refers in several places to agreements on the introduction and timing of the PSS surcharge that were reached during the individual Breakfast Meetings.[600]

(527) Moreover, an enforcement or monitoring mechanism does not in any way constitute a prerequisite for an agreement. The concept of an agreement within the meaning of Article 101 of the Treaty is very wide and according to settled case-law it does not take the form of a legally binding agreement. There are therefore no formal requirements, when it comes to constitutive elements of the agreement and/or enforcement/monitoring mechanisms. It is sufficient for an agreement within the meaning of Article 101 of the Treaty to exist that the undertakings in question expressed their joint intention to conduct themselves on the market in a specific way.[601]

(528) Panalpina further claims that the participants of the Breakfast Meetings only exchanged general information regarding market trends, levels of production in China's key markets, date of introduction of rate increases by carriers and other indicators of a change in demand and supply balance in the market. According to Panalpina the information was obtained from the public domain and was not of a commercially sensitive nature. It submits that the information exchange enabled the participants to better understand the likelihood of peak season, the date of its introduction and its length. Panalpina finally claims that in the specific economic context the exchange of information does not amount to a concerted practice, as there is no evidence of parallel commercial behaviour on the market. It says that there were sporadic communications of general market trends which could not have achieved any increase in transparency and somehow influenced the pricing of the undertakings and the commercial conduct in question, and therefore did not amount to a concerted practice. Furthermore, Panalpina submits that even if the communications in questions qualify as a concerted practice, this restriction does not amount to a restriction by object, as it is not even likely to lead to a collusive outcome.[602] A similar claim was also raised by Expeditors, which claim that the Commission's categorisation of the alleged arrangements as a restriction by object is entirely misconceived, as the freight forwarders agreed on something that was obvious.[603]

(529) As explained in Recitals (526) and (527), there are several factors which clearly indicated that agreements were reached in relation to the introduction of the PSS surcharge and its timing. Moreover, according to the settled case-law, even a mere

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599 […].

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601 Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission* [2002] ECR II-1487, paragraph 199; Case T-66/99 *Minoan Lines SA v Commission* [2003] ECR II-5515, paragraph 207; Case T-54/03 *Lafarge SA v Commission* [2008] ECR II-120*, paragraph 278.

602 Panalpina's reply to the Statement of Objections, page 50-52.

603 Expeditors' reply to the Statement of Objections, page 4.

exchange of publically available information (although it is very doubtful that all the information exchanged during the Breakfast Meetings was in the public domain and Panalpina did not demonstrate that this was the case) infringes Article 101 of the Treaty where this information exchange underpins another anti-competitive arrangement, as this circulation has the effect of increasing transparency on the market.[604]

(530) Moreover, it is clear that the mere exchange of intentions at the Breakfast Meetings enabled the participants to better understand the future behaviour of their competitors and to take this into account when planning their future business conduct. According to the settled case-law, in order to prove the existence of the concerted practice, it is sufficient that, by its statement of intention, the competitor eliminated or, at the very least, substantially reduced uncertainty as to the conduct to expect of the other on the market.[605] Moreover, as described in Recitals (314)-(386), it is clear that pricing issues were discussed during the Breakfast Meetings as well.[606]

(531) […] clearly says in this regard that the ultimate goal of the Breakfast Meetings was to coordinate market behaviour among the competitors in order to increase the chances of implementation of the PSS on the market.[607] This shows that the object of the discussions was clearly anti-competitive, as the increased transparency of the market should have increased the probability of the successful implementation of the PSS in relation to the customers and European offices. The Commission therefore does not have to take any additional steps and analyze the conditions in which the agreement/concerted practice functioned, as the purpose, for which the meetings were organised, is fully self-explanatory. Hence the Commission does not have to show in addition that the agreement/concerted practice resulted in restriction of competition in the interenal market.[608]

(532) Expeditors further claim that the PSS does not qualify as a price fixing arrangement under Article 101 of the Treaty, as such arrangement would be pointless unless the price agreement was accompanied by measures to curtail supply or at least maintain the status quo on the market in terms of market share. According to Expeditors, such arrangements were likely to lead to customers paying higher prices or not receiving desired quantities and an analysis of actual and likely effects is therefore necessary.[609]

(533) Firstly, it has to be said that the PSS is a temporary rate adjustment concerning increased transport costs. With help of the surcharge, freight forwarders try to pass on this increase to their customers. Breakfast Meetings served as a tool that should

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604 Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 *P Aalborg Portland v Commission* [2004] ECR I-123, paragraph 281.

605 Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95 to T-88/95, T-103/95 and T-104/95 *Cimenteries CBR SA v Commission* [2000] ECR II-491, paragraph 1852.

606 See Recitals (316)-(318), (321), (324)-(325), (332), (336)-(338), (341), (346)-(350), (357)-(358), (363)-(374) and (379)-(380).

607 […].

608 Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95 to T-88/95, T-103/95 and T-104/95 *Cimenteries CBR SA v Commission* [2000] ECR II-491, paragraph 1531.

609 Expeditors' reply to the Statement of Objections, page 19-21, 27.

ensure a more successful implementation of the PSS on the market. There was therefore no need to curtail supply or agree on market shares, as this was not a primary task of the agreement. Secondly, as already mentioned in Recital (527), there are no formal requirements, when it comes to the constitutive elements of an agreement. It suffices for there to be an agreement within the meaning of Article 101 of the Treaty that the undertakings in question expressed their joint intention to conduct themselves on the market in a specific way.[610] A lack of specific provisions regarding the restriction of supply or market shares therefore does not deprive the PSS arrangements of their characteristics of an agreement or concerted practice within the meaning of Article 101 of the Treaty.

Unilateral and competitive response

(534) Expeditors submit that the agreements in question did not have any appreciable adverse effect on the competition, as prices were not being maintained at an artificial level above competitive levels. According to Expeditors, this was mainly due to the weak position of freight forwarders, which were squeezed between powerful airlines and powerful customers.[611] A similar claim was also raised by Agility which submits that Geologistics' rate increases were consistent with the carriers' rate increases and that its conduct constituted a unilateral and competitive response to the prevailing market conditions.[612]

(535) As stated in Recital (311), one of the main reasons, why the Breakfast Meetings were organised by the parties, was the often unsuccessful implementation of the PSS in previous years. The freight forwarders gathered at the Breakfast Meetings in order to increase the chances compared to the normal market conditions for the introduction of the PSS and for its acceptance both by customers and the freight forwarders' European offices. The anti-competitive contacts aimed therefore to ensure a wider implementation of the PSS.

(536) Moreover, contrary to the claims submitted by Expeditors, the position of undertakings on the market is not predominantly evaluated on the basis of their strength in relation to their customers, but mainly on the basis of their market shares.[613] In the particular case of the PSS infringement, the meetings were attended mostly by global undertakings with a significant market power. Furthermore, the fact that the parties concluded at the end of 2005 that the contacts regarding the PSS in 2005 proved to be successful and it was therefore worth continuing with them in the next year as well[614] indicates that the agreements had the effect envisaged by the participating undertakings. The agreements in question therefore did have an appreciable adverse effect on competition.

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610 Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission* [2002] ECR II-1487, paragraph 199.

611 Expeditors' reply to the Statement of Objections, page 28-29.

612 Agility's reply to the Statement of Objections, page 60-62.

613 Case 19/77 *Miller International Schallplatten GmbH v Commission* [1978] ECR 131, paragraphs 9 and 15.

614 […].

Passive role and low level participation

(537) Hellmann claims that the company was passive during the meeting and it was not represented by its directors.[615] A similar claim was also raised by Agility.[616]

(538) To establish liability, the extent to which Hellmann actively participated at the meetings or whether Hellmann or Geologistics were represented by their senior employees is not important. Under settled case-law, a party which even tacitly approves of an unlawful initiative, without publicly distancing itself from its content or reporting it to the administrative authorities, effectively encourages the continuation of the infringement. That complicity constitutes a mode of participation in the infringement and is capable of rendering the undertaking liable[617]. In the current case, the undertakings neither publicly dissociated themselves from the decision on agreed action, nor did they notify the relevant authorities about the unlawful conduct. Furthermore, even if undertakings had played only a passive role or a minor role in the aspects of PSS infringement this would not be material to the establishment of an infringement on their part[618]. When parties discussed and agreed specific measures connected with the PSS implementation, they thereby disclosed the course of action which they contemplated adopting. Therefore, already the mere presence at the meetings and the fact that an undertaking has received information concerning the future course of action to be taken by its competitors with respect to the PSS pricing policy would be sufficient to establish its involvement in the PSS infringement. According to the settled case-law, the mere fact of receiving information concerning competitors, which an independent operator preserves as business secrets, is sufficient to demonstrate the existence of an anti-competitive intention[619]. In light of the above, the argumentation submitted by Hellmann and Agility has to be dismissed by the Commission.

No implementation

(539) Hellmann further submits that it did not implement the PSS.[620] A similar claim was also raised by Baltrans[621] and Agility[622]. Agility says that there is no evidence that the PSS discussions had any effect on Geologistics' decision to apply PSS. According to Agility, Geologistics was not able to implement the PSS at the level and/or on the dates that were discussed at the Breakfast Meetings.

(540) The Commission notes that it is settled case-law that the liability of a particular undertaking in the infringement is properly established where it participated in cartel meetings with knowledge of their object, even if it did not proceed to implement any

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615 Hellmann's reply to the Statement of Objections, page 5.

616 Agility's reply to the Statement of Objections, page 43.

617 See Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, paragraph 84.

618 Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, paragraph 86.

619 See Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, paragraph 66 and Case T-53/03 *BPB plc v Commission* [2008] ECR II-1333, paragraph 154.

620 Hellmann's reply to the Statement of Objections, page 13.

621 Baltrans' reply to the Statement of Objections, page 16.

622 Agility's reply to the Statement of Objections, page 56-58.

of the measures agreed at those meetings[623]. Moreover, it has to be added that there is no evidence that any alleged lack of implementation would have been caused by an internal decision of the undertakings.

(541) It is an established fact that Geologistics attended six of the seven Breakfast Meetings. This already indicates that the PSS related issues discussed at the meetings were of certain relevance for Geologistics. […].[624] Furthermore, it is settled case-law that subject to proof to the contrary, which the economic operators concerned must adduce, the presumption must be that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors for the purposes of determining their conduct on that market.[625] In this regard, it is therefore not necessary that the undertaking entirely or partly implements the agreement, but it suffices that it uses the knowledge obtained during the anti-competitive contacts when setting its own commercial policy.

Prior decision

(542) Kuehne & Nagel claims that the company made the decision to implement the PSS already prior to the first meeting and that the imposition of the PSS was only a mere passing on of increased transport costs.[626]

(543) It is not relevant whether Kuehne & Nagel had a pre-existing policy regarding the implementation of the PSS. By virtue of its participation at the meetings, Kuehne & Nagel gained knowledge about the planned action of its competitors. It could have therefore received assurance that its conduct was in line with what its competitors contemplate to undertake or if this was not the case, it could have adapted its intended behaviour accordingly. The fact that Kuehne & Nagel may have had a pre-existing pricing policy undoubtedly does not justify its participation in collusive arrangements with an anti-competitive object. According to settled case-law, collusive arrangements can be restrictive by object even if the parties had other motives or pursued their own interests. An undertaking which despite colluding with its competitors follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit[627]. In the current case, having gained knowledge about the reaction of the competitors, the parties could have easily adapted their intended behaviour or could have received assurance that their conduct was in line with what the competitors contemplated undertaking. Therefore the aforementioned arguments of the parties have to be rejected.

5.2.1.1.2. Single and continuous infringements

Principles

(544) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The General Court points out, *inter alia*, in

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623 See to that effect Case T-53/03 *BPB v Commission* [2008] ECR II-1333, paragraph 90.

624 […].

625 Case C-199/92 *P Hüls AG v Commission* [1999] ECR I-4287, paragraph 162.

626 Kuehne & Nagel's reply to the Statement of Objections, page 64.

627 See to that effect Case T-59/02 *Archer Daniels Midland Co v. Commission* [2006] ECR II-3627, paragraph 189.

Cement that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim.[628] The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 101 of the Treaty.[629]

(545) In *Anic Partecipazioni*, the Court of Justice upheld the General Court's finding that "*it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices.*[630]

(546) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 101 of the Treaty where there is a single common and continuing objective.

(547) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is for example the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk[631].

(548) In fact, as the Court of Justice stated in its judgement in Case *Commission v Anic Partecipazioni*[632], the agreements and concerted practices referred to in Article 101(1) of the Treaty necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, as reiterated by the General Court in *Cement*, that an infringement of Article 101 of the Treaty may result not only from an isolated act but also from a series of acts or from a continuous conduct. That

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628 Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others v. Commission* [2000] ECR II-491, paragraph 3699.

629 Case 49/92P, *Commission v. Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 81.

630 Case T-6/89 *Enichem Anic SpA v Commission*, ECR [1991] II-1623, paragraph 204, upheld by the ECJ in Case 49/92P, *Commission v. Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 82.

631 Case 49/92P, *Commission v. Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 83.

632 Case 49/92P, *Commission v. Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 79.

interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of Article 101 of the Treaty. When the different actions form part of an 'overall plan', because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.[633]

(549) Although Article 101 of the Treaty does not refer explicitly to the concept of single and continuous infringement, it is settled case-law of the Courts that an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel[634].

(550) The fact that the undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 101(1) of the Treaty. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed[635]. Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.[636]

5.2.1.1.2.1. Application in this case

(551) The Commission considers that the agreements and/or concerted practices found to exist in relation to each of NES, AMS, CAF and PSS constitute separate infringements. However, in respect of each surcharge there existed a single and continuous infringement which manifested itself by way of agreements and/or concerted practices. Regarding the NES conspiracy, parties gathered in a physical meeting as well as via email and phone contacts with an objective to reach price agreement in relation to the NES fee. In relation to the AMS cartel, the freight forwarders gathered in a series of meetings organised under the auspices of FFI in order to collude with respect to the AMS fee. As regards the CAF infringement, the

633 Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission*, [2004] ECR I-123, paragraph 258. See also Case C-49/92, *Commission v. Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraphs 78-81, 83-85 and 203.

634 Cases T-295/94, *Buchmann GmbH v Commission*, [1998] ECR II-813, paragraph 121; T-304/94, *Europa Carton AG v Commission*, [1998] ECR II-869, paragraph 76; T-310/94, *Gruber + Weber GmbH v Commission*, [1998] ECR II-1043, paragraph 140; T-311/94, *BPB de Eendracht NV, formerly Kartonfabriek de Eendracht NV, v Commission*, [1998] ECR II-1129, paragraph 237; T-334/94, *Sarrió v. Commission*, paragraph 169; T-348/94, *Enso Española SA v Commission*, [1998] ECR II-1875, paragraph 223. See also Case T-9/99, *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and Others v Commission*, [2002] ECR II-1487, paragraph 231.

635 Case 49/92 P *Commission v Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 90; Joined Cases C-204/00 P C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland A/S and Others v Commission* [2004] ECR I-123, paragraph 86

636 Joined Cases T-101/05 and T-111/05, *BASF AG and UCB SA v. Commission*, ECR [2007] II-4949, paragraph 160.

parties met on numerous occasions with a single aim to find a common response to RMB depreciation. In relation to the PSS cartel, a series of 'Breakfast Meetings' were held with a clear anti-competitive objective to establish a common agreement on PSS fee to Europe-bound shipments.

(552) There are a number of reasons the four infringements are separate and do not constitute a single and continuous infringement. Firstly, there was no overall plan but each infringement concerned a separate surcharge and related behaviour. No evidence suggesting an overall plan has been uncovered and there was no coordination of the various schemes by head offices. The infringements arose as a reaction to particular local circumstances and involved local personnel[637] without any wider considerations. Secondly, contacts in relation to each of the individual infringements took place in different locations around the world, covered different time periods and involved different representatives of the undertakings. At each meeting only one infringement was discussed. Thirdly and finally, in relation to each surcharge partly different undertakings were involved and the number of cartel members differed as well. Only three undertakings participated in all four infringements.

(553) The Commission therefore considers that the conduct described in the factual part of this Decision, consisting of agreements and/or concerted practices in the sense of Article 101 of the Treaty, presents the characteristics of four separate infringements. The Commission notes that none of the parties concerned claimed (even alternatively) that the behaviour set out in this Decision should be classified as less than four single infringements by regrouping certain or all of the infringements into one.

(554) The four separate infringements are however linked in a number of ways. In the first place, all infringements relate to the same industry, namely the provision of freight forwarding services. Equally, all infringements were pricing agreements which related to the imposition of surcharges introduced due to the changing conditions on the freight forwarding sector. Additionally, a number of undertakings were involved in two or more infringements. Furthermore, it is settled case-law that the Commission is not prevented from making a finding of several separate infringements of Article 101(1) of the Treaty in the same decision[638].

(555) Given that certain links do exist between the infringements, the Commission considers it appropriate to address the four infringements in one Decision. In the four present infringements, the Commission has considered the arrangements in each surcharge concerned and has identified the participants in each of the manifestations of the cartel and the role they played. There is no reason why the Commission should not adopt a single decision covering several infringements, even if some of the undertakings to which it is addressed are unconnected with some of those infringements, provided that the decision permits the addressees to obtain a clear view of the charges made against them.[639]

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637 With the exception of the AMS infringement.

638 See Case T-50/00 *Dalmine SpA v Commission* [2004] ECR II-2395, paragraph 235.

639 Joined cases C-40/73 to 48/73, C-50/73, C-54/73 to C-56/73, C-111/73, C-113/73 and C-114-*Coöperatieve Vereniging "Suiker Unie" UA and others v Commission* [1975] ECR 1663, paragraph 111.

(556) Conversely, the Commission considers that in relation to each specific surcharge the conduct constitutes a single and continuous infringement, that means, there are four single and continuous infringements.

(557) The evidence referred to in the current Decision shows the existence of a single and continuous infringement in respect of each of the four surcharges for at least the periods as follows;

(a) NES : 1 October 2002 - 10 March 2003

(b) AMS : 19 March 2003 -19 August 2004[640]

(c) CAF : 27 July 2005 – 13 March 2006[641]

(d) PSS : 9 August 2005 – 21 May 2007[642]

(558) The undertakings participating in each separate infringement expressed their joint intention to behave on the market in a certain way and adhered to a common plan to limit their individual commercial conduct in relation to each of the NES, AMS, CAF and PSS surcharges. The collusion was in pursuit of a single anti-competitive economic aim (different for each infringement): namely to reduce pricing uncertainty in relation to each separate surcharge.

(559) Furthermore, within each of the four cartels contacts took place between the same undertakings, and often the same individuals who made regular contact through meetings, telephone calls and emails over a continuous period of time.

(560) Whilst, in case of certain infringements, the participation of every cartel member in each multilateral meeting may not be established, the Commission considers that all cartel members continued to show their adherence to the cartel arrangements by participating in the cartel activities or at least by not distancing themselves from them. The cartel members continued to show their adherence to the cartel arrangements by oral and written contacts. Those undertakings which had not attended the meetings but were included among the addressees could closely follow through the email exchanges the current development of the implementation of the agreement on the market.

(561) Accordingly, in this case, the conduct in question constitutes four single and continuous infringements of Article 101(1) of the Treaty and Article 53(1) of the EEA Agreement.

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640 The Commission has discovered an AMS infringement for a shorter period in relation to the following undertakings: Exel (25 March 2003 – 19 August 2004), Kuehne & Nagel (8 April 2003 – 19 August 2004), DB (25 March 2003 – 19 August 2004), UPS (19 March 2003 – 21 October 2003), UTi Worldwide (UK) Ltd. (19 March 2003 – 21 October 2003) and UTi Nederland B.V. (21 October 2003 – 19 August 2004).

641 The Commission has discovered a CAF infringement for a shorter period in relation to the following undertakings: Schenker China Ltd. (29 July 2005 – 13 March 2006), Nippon (27 July 2005 – 31 October 2005), Panalpina (27 July 2005 – 9 December 2005) and Yusen (27 July 2005 – 31 October 2005).

642 The Commission has discovered a PSS infringement for a shorter period in relation to the following undertakings: Hellmann (6 December 2005 – 21 May 2007), Exel (9 August 2005 – 13 January 2006), Schenker (3 September 2005 – 23 June 2006) and Expeditors (21 September 2005 – 23 June 2006).

5.2.1.1.2.1.1. Arguments of the parties in relation to the AMS cartel and their assessment by the Commission

Assessment of cartel events and evidence in isolation, rather than in entirety

(562) Panalpina assessed the content of individual meetings and phone conferences of the FFE/FFI Airfreight Committee in isolation and essentially claims that the Commission failed to establish the anti-competitive nature of those competitor gatherings. Namely, the undertaking argues that there was no agreement amongst the forwarders, at the 19 March 2003 FFE/FFI Airfreight Committee meeting or otherwise, regarding the introduction of an AMS fee in respect of which they would not compete[643]. Furthermore, Panalpina claims that any exchange of future pricing information regarding the AMS or commercially sensitive information regarding the underlying costs is not reflected in the minutes of the FFE/FFI Airfreight Committee meetings held on 21 October 2003 and 24 March 2004 and that the evidence adduced by the Commission does not have sufficient probative weight to support the existence of such an unlawful exchange. Finally, it is submitted by Panalpina that the exchange of current pricing information during the 19 August 2004 conference call does not amount to a concerted practice and even if it does, it can not be viewed as a restriction of competition by object. Furthermore, Kuehne & Nagel[644] attempts to downplay the nature of the AMS conduct by analysing each of the anti- competitive contacts individually.

(563) First, the Commission has proven to the requisite legal standard that the FFE/FFI meetings relating to AMS taken as a whole and even each of these meetings taken separately (see Recitals (144) - (163) had an anti-competitive nature, while pursuing a single anti-competitive aim of a common application of the AMS surcharge. The AMS cartel constitutes a complex infringement with a single plan intended to restrict competition by reducing pricing uncertainty in relation to the AMS surcharge. The agreement to introduce the AMS surcharge, an understanding that the level of the surcharge should not go below the costs of the freight forwarders in complying with the AMS procedure, subsequent exchange of information on the levels of AMS surcharge that the freight forwarders intended to levy on their customers and monitoring of surcharges actually applied on the market by competitors clearly demonstrate the existence of a single cartel conduct of continuous and evolving nature. This conduct was manifested in the complex form combining both agreement and concerted practice, and whose individual elements are intrinsically linked by the objective to collude on AMS surcharge. Therefore, Panalpina's and Kuehne & Nagel's assessment of the AMS cartel is flawed in that, inter alia, it singles out and analyses legality of individual elements of the cartel conduct in isolation, rather than the entirety of the conduct.

(564) Second, Panalpina contends that the probative value of individual pieces of evidence submitted by the Commission in relation to individual elements of the AMS infringement does not meet the standard required by law, while disregarding the entire body of evidence used by the Commission for establishment of the

643 Panalpina's reply to the Statement of Objections, page 28.

644 Kuehne & Nagel's reply to the Statement of Objections, page 35-42.

infringement as a whole[645]. In line with the established case-law, the evidence of participation in a cartel must be assessed in its entirety, taking into account all relevant circumstances of fact[646]. It is true that the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place – a condition, which is met in this case. However, it is important to emphasise that it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement; it is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement[647].

(565) In the current case, the agreement on the introduction of the AMS surcharge as well as on basic rule for setting the level of the surcharge is demonstrably evidenced by the contemporaneous minutes from the meeting of the FFE/FFI Airfreight Committee of 19 March 2003 and further corroborated by additional evidence (see also Recitals (147)-(149)).

(566) Regarding the follow-on exchange of intended levels of AMS fee, documentary evidence from the period of the infringement is supported and substantiated by the statements provided by direct participants in the meetings concerned (Recitals (152) and (154)) and shall be viewed in conjunction with other evidence, for example contemporaneous emails confirming that the fee recommended by FFI should be EUR 8 (Recital (157)) and assessed in the context of the whole AMS cartel, which evolved from the agreement to introduce an AMS fee through the exchange of intended levels of surcharge to monitoring of AMS fees actually charged.

(567) In relation to actions taken by the competitors within the FFE/FFI framework in the wake of the introduction of the AMS procedure by the US customs authorities, it is clearly evident from the contemporaneous evidence that monitoring (Recital (161)) of the agreed measures was introduced, which fell under the single scheme of colluding on the AMS surcharge. The exchange of the AMS fee amounts charged constitutes a measure to monitor implementation. Such information exchanges at the level of an industry association made it possible to confront, directly and immediately, the cartel participants deviating from the agreed action as evidenced by the minutes from the FFE/FFI Airfreight Committee conference call[648]. The said exchanges are considered unlawful in that they were one of the central elements of the AMS cartel conduct[649]. As the Court of Justice held in *Aalborg*, "[…] *even though the information thus exchanged was in the public domain or related to historical and purely statistical prices, its exchange infringes Article 85(1) of the*

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645 See Case T-337/94, *Enso-Gutzeit OY v Commission* [2000] ECR II-00479, paragraph 151.

646 See Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission* [2007] ECR II-00947, paragraph 155; see also the Opinion of Judge Vesterdorf, acting as Advocate General, in Case T-1/89 *Rhône-Poulenc* v *Commission* [1991] ECR II-867, II-869 – joint Opinion in the *Polypropylene* judgments;

647 See Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02, *Bolloré and others v Commission* [2007] ECR II-00947, paragraph 155 and Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering* v *Commission* [2004] ECR II-2501, paragraphs 179 and 180.

648 […].

649 See to that effect Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-87/95, T-88/95, T-103/95 and T-104/95, *Cimenteries CBR and Others v. Commission* (Cement)[2000] ECR II-491, paragraph 1510.

Treaty where it underpins another anti-competitive arrangement. That interpretation is based on the consideration that the circulation of price information limited to the members of an anti-competitive cartel has the effect of increasing transparency on a market where competition is already much reduced and of facilitating control of compliance with the cartel by its members."[650]

(568) Although there may have been in some instances pieces of inchoate evidence, such evidence has to be viewed in conjunction with other evidence supplementing and substantiating such evidence. The facts set out in Section 4.2 constitute sufficient evidence for the establishment of the AMS cartel conduct as set out in this Decision.

5.2.1.2. Restriction of competition

(569) The anti-competitive behaviour in the present infringements had as their object the restriction of competition in the Union and European Economic Area.

(570) Article 101(1) of the Treaty and Article 53 (1) of the EEA Agreement expressly include as restrictive of competition agreements and concerted practices which[651]:

(a) directly or indirectly fix selling prices or any other trading conditions;

(b) limit or control production, markets or technical development;

(c) share markets or sources of supply.

(571) In this case, the collusive arrangements between the parties constituted agreements and/or concerted practices which had as their object to fix, directly or indirectly, selling prices or any other trading conditions pursuant to Article 101(1)(a) of the Treaty. More precisely, the undertakings agreed on[652] the introduction (NES, AMS, CAF, PSS) and level (NES, CAF) or principles of setting (AMS) of a number of surcharges or the timing of their introduction (NES, AMS, CAF, PSS), fixing of trading conditions (CAF) and exchanged sensitive information on prices (AMS, CAF, PSS). Such agreements and concerted practices on price or other trading conditions do by their very nature prevent, restrict or distort competition. In its judgment in *T-Mobile Netherlands* the Court of Justice further stated that *"[…] an exchange of information which is capable of removing uncertainties between participants as regards the timing, extent and details of the modifications to be adopted by the undertaking concerned, must be regarded as pursuing an anticompetitive object."*[653]

(572) The freight forwarders concerned coordinated in relation to all four infringements their behaviour to remove uncertainty in relation to various elements of price in the freight forwarding sector. Therefore they substituted practical cooperation between

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650 Joined Cases C-204/00 P and others. *Aalborg Portland A/S and others v Commission* [2004] ECR I-123, paragraph 281.

651 The list is not exhaustive.

652 See Recitals (441) in relation to NES, (464) in relation to AMS, (489) in relation to CAF and (524) regarding PSS for more details.

653 See Case C-8/08 *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV and Vodafone Libertel NV v Raad van Bestuur van de Nederlandse Mededingingsautoriteit*, [2009] ECR I-04529, paragraph 41.

them for the risks of competition. Furthermore, the participating undertakings took account of information exchanged with competitors in determining their own conduct on the market. In ceasing to determine independently their policy in the market, the participating undertakings thus undermined the concept inherent in the provisions of the Treaty relating to competition[654].

(573) The anti-competitive object of the parties is also shown by the fact that they took deliberate actions to conceal their meetings and to avoid detection of their arrangements. The participating companies made efforts to avoid being in possession of anti-competitive documents (CAF infringement)[655], they attempted to hide the illicit content of the contacts by not mentioning these parts in the official minutes from a meeting (AMS infringement)[656] or not taking minutes at all (PSS infringement)[657] and they also used specific code words (NES infringement)[658]. In addition to evidence of those precautionary measures, the Commission possesses documents which contained the express designation as "*Confidential*" and instructed the addressees not to distribute the document (*"DO NOT DISTRIBUTE"*)[659] which further indicates the illegal purpose of the contact and the intention to conceal it. Awareness of the illegality of such actions is demonstrated by other documents indicating that the participating individuals were aware of the illicit character of the contacts.[660]

(574) It is settled case-law that for the purpose of applying Article 101(1) of the Treaty and Article 53 of the EEA Agreement there is no need to take into account the actual effects of agreements/concerted practices where they have as their object the prevention, restriction or distortion of competition within the internal market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved[661].

(575) It is established in this case and in relation to the four infringements thereby covered, that the undertakings involved agreed on the imposition of new surcharges (NES, AMS, CAF, PSS), agreed on or coordinated the timing of their imposition (NES, AMS, CAF, PSS) and the levels to be charged (NES, CAF) or surcharge-setting principles (AMS), fixed trading conditions (CAF), exchanged commercially sensitive information (AMS, CAF, PSS), implemented (even if only partially) those agreements[662] (NES, AMS, CAF, PSS), monitored the implementation of those

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654 Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 192.

655 See CAF, […].

656 See AMS, […].

657 See PSS, […].

658 See NES, […].

659 See CAF, […]; PSS, […].

660 See NES, […]; CAF, […] and […].

661 Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 299, 342, Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraph 125 and Case C-209/07 *Beef Industry Development Society and Barry Brothers* [2008] ECR I-8637, paragraph 16. See also Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178 and Case T-38/02, *Danone v Commission* [2005] ECR II-4407, paragraph 150.

662 According to settled case-law, *"[t]he fact that an agreement having an anticompetitive object is implemented, even if only in part, is sufficient to preclude the possibility that the agreement had no effect on the market*" (see Case T-38/02 *Groupe Danone v. Commission*, [2005] ECR II-4407, paragraph 148).

agreements in the market and took steps to conceal the illicit contacts (NES, AMS, CAF, PSS). It is also well established that the anti-competitive object of the contacts at issue was to influence the market.[663]

5.2.1.2.1. Arguments by the parties in relation to the AMS cartel and assessment thereof by the Commission

(576) As a preliminary observation concerning the arguments presented by the parties in response to the SO, the Commission finds that the AMS cartel conduct constitutes an infringement of Article 101(1) of the Treaty by object. Therefore, the Commission will not address in this Decision the arguments of the parties as to whether the AMS infringement amounts to restriction of competition under Article 101(1) of the Treaty by effect.

(577) UPS argues[664] that the alleged AMS infringement does not meet the standard required to be considered an infringement by object. UPS submits that, given the economic and legal context, the alleged agreement (to introduce the AMS fee) was at most an agreement that forwarders would charge some undefined amount for the additional (and unknown) cost of work cannot have the object of restricting competition. The alleged agreement merely states the obvious in such a vague and general manner as to be meaningless, according to UPS.

(578) UPS further argues that an alleged agreement to refrain from using a surcharge for competitive advantage cannot have an anti-competitive object, where the regulations driving the costs were not even in existence and the costs of compliance were unknowable at the time[665].

(579) Moreover, UPS submits that there were no anti-competitive effects arising from UPS's presence at the two meetings in 2003 in view of inter alia, econometric and statistical analysis that UPS has provided to the Commission.

(580) Furthermore, UTi makes a similar argument to that of UPS[666] that before the introduction of the AMS procedure by the US customs authority, information-sharing could not have had any concrete "object or effect" on the competition.

(581) As demonstrated in Recitals (140)-(163) of this Decision, participants at the FFI meetings met with the clear aim to collude on the constitutive elements of the AMS surcharge, thereby reducing uncertainty as to the parties' response to regulatory developments in relation to their customers.

(582) Not only have the cartel participants agreed on the principal issue of whether the AMS fee should be charged to the customers of the forwarders – something that was far from being obvious- they have also agreed on the basic principle of setting the

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663 See, also Case C-105/04 P, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission of the European Communities* [2006] ECR I-8725 paragraphs 136-137; 142-143, 159-160; Joined Cases C-101/07 P et C-110/07 P *Coop de France bétail et viande and others v. Commission* [2008] ECR I-10193 , paragraphs 83-88; Case T-54/03 *Lafarge v Commission* [2008] ECR II-120, paragraphs 280-281 and 465-466.

664 UPS's reply to the Statement of Objections, page 15-17.

665 UPS's reply to the Statement of Objections, page 16.

666 UTi's reply to the Statement of Objections, page 25.

level of the fee. The common understanding that the level of the AMS fee should not drop below the costs of complying with the AMS fee has affected competition in that the cartel participants could have foreseen the direction taken in relation to the AMS pricing policy by their competitors. The Commission finds that the agreement on both the introduction of the fee as well as on a basic fee setting principle served at the very least as indications as to the future market developments in relation to the AMS pricing policy. As the General Court stated in *Hoechst "[i]t must be borne in mind […] that setting a price, even one that is merely indicative, affects competition because it allows all the participants in the cartel to foresee with a reasonable degree of certainty what pricing policy will be pursued by their competitors. More generally, such cartels entail direct interference with the essential parameters of competition on the relevant market. In expressing a common intention to apply a certain level of prices to their products, the producers concerned no longer determine their policy on the market in an autonomous manner, thus adversely affecting the concept inherent in the Treaty provisions on competition.*"[667]

(583) Even if it is assumed that at the time of the agreement reached on 19 March 2003 meeting, the rules governing the AMS procedure were not in the public domain whether in their final or draft form, the absence of regulatory rules could not have prevented the competitors from agreeing on sufficiently specific parameters (introduction of the fee, basic principle of setting the level of the fee) with clear anti-competitive objective. The said parameters were sufficiently specific so as to have anti-competitive object, especially considering that air AMS procedure was a new regulatory development that could have led to various market responses from the forwarders in the absence of the collusion established by this Decision. Moreover, that assumption is not valid in relation to the discussions of 21 October 2003 meeting[668], in which UPS participated and where information concerning intended levels/amounts of the AMS fee were exchanged. Furthermore, it should be borne in mind that an anti-competitive arrangement can be regarded as having been concluded where there is a concurrence of wills on the very principle of a restriction of competition. Thus, even if the parties did not agree on a specific course of conduct (which is not so in this case), while still concurring on principles of restricting competition, such behaviour cannot escape the application of Article 101(1) of the Treaty.[669].

(584) In any event, a gap between the timing of anti-competitive discussions within FFE/FFI and the introduction of the air AMS procedure by the US customs authorities could by no means render the competitor agreement and pricing discussions devoid of anti-competitive object, as it is a common feature of cartels that future market behaviour is coordinated among cartel participants.

(585) Having regard to the clear anti-competitive object of the AMS cartel conduct and to the settled case-law on the subject-matter[670], it is not necessary for the Commission

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667 Case T-410/03 *Hoechst GmbH v. Commission*, [2009] ECR II-3555, paragraph 349. See also Case T-64/02 Heubach v Commission [2005] ECR II-5137, paragraph 81.

668 Notice of Proposed Rulemaking regarding AMS was issued in July 2003 as it follows from page 18 of UPS's reply to the Statement of Objections.

669 See also Case T-186/06, Solvay SA v Commission (not yet published), paragraph 143 – 144.

670 See in particular Case T-62/98 Volkswagen AG v Commission [2000] ECR II-2707, paragraph 178 and case T-38/02, *Danone Group v Commission* [2005] ECR II-4407, paragraph 150. See also Case T-9/99

to demonstrate that the behaviour also produced anti-competitive effects on the market, irrespective of whether the behaviour constitutes an agreement or a concerted practice. Even if an absence of effects could be demonstrated by an analysis of the economic context of the anti-competitive conduct concerned, the restrictive object cannot be justified thereby[671].

(586) Moreover, the econometric analysis provided by UPS is seriously flawed, because, the model used has extremely low explanatory power of data and its R-square goodness-of-fit measure indicates that the model's predictions barely match the observed prices. Furthermore, it should be noted that, according to case-law, the impact of a cartel should not be assessed (on a condition that the Commission is required to do so, which is not the case for the purposes of the present proceedings) at the level of one undertaking but only can be considered at the level of the overall cartel[672]. It should therefore be concluded that a report which examines the impact of a cartel on one or a few undertakings does not match the requirements set up by case-law and cannot be relied on.

5.2.1.2.2. Arguments by the parties in relation to the CAF cartel and assessment thereof by the Commission

(587) As a preliminary observation concerning the arguments presented by the parties in response to the SO, the Commission finds that the CAF cartel conduct constitutes infringement of Article 101(1) of the Treaty by object. Therefore, the Commission will not address in this Decision the arguments of the parties which are not relevant in the light of this conclusion, in particular whether the CAF infringement amounts to restriction of competition under Article 101(1) of the Treaty by effect.

(588) Kintetsu argues[673] that the CAF conduct had no objective to fix prices or trading conditions in view of the specific context present in this case. It claims that the RMB currency appreciation was not a normal market situation and that the announcement of People's Bank of China to unpeg the RMB from the USD did not represent a normal currency risk. Kintetsu further submits that before the currency unpegging the freight forwarders were not able to determine independently the policy which they intended to adopt on the common market regarding the applied currency in its contracts with foreign customers.

HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission, [2002] ECR II-1487, paragraph 217.

671 Joined Cases C-403/04 P and C-405/04 P, Sumitomo Metal Industries Ltd*and Nippon Steel Corp. v Commission* [2007] ECR I-729, paragraph 43.

672 The Court of Justice held, concerning a Commission decision that was adopted prior to the first Commission's guidelines on the method of setting fines (Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, OJ C 9, 14.1.1998, page 3.) that "*when considering how the effect of the infringement has been taken into account, the [General Court] did not have to examine the individual conduct of the undertakings when […] the effects to be taken into account in setting the general level of fines are not those resulting from the actual conduct which an undertaking claims to have adopted, but those resulting from the whole of the infringement in which it had participated"*(see Case C-49/92P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 152.)

673 Kintetsu's reply to the Statement of Objections, page 60-65.

(589) The Commission observes that the regulatory regime applicable in the period prior to or after the unpegging of RMB neither required nor encouraged the parties to pursue the anti-competitive conduct found in this Decision[674]. During the period of the CAF cartel, the cartel participants were free to determine the currency used in the contract quotations and could have adopted unilateral measures addressing the sudden appreciation of the currency. However, instead of adopting competitive conduct on the market while facing risks of competition, they have engaged in a collusion with a view to adopt coordinated approach and thereby eliminate uncertainty as to the market response to the appreciation of RMB currency. Therefore, the arguments submitted by Kintetsu do not alter the finding of the Commission that the CAF cartel conduct amounted to a restriction of competition under Article 101(1) of the Treaty by object.

5.2.1.3. Effect upon trade between Member States and EEA Contracting Parties Exemption

(590) The Court of Justice and General Court have consistently held that: *"In order that an agreement between undertakings may affect trade between Member States, 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"*.[675] Whilst Article 101 of the Treaty *"does not require that agreements referred to in that provision have actually affected trade between Member States, it does require that it be established that the agreements are capable of having that effect"*.[676] However the influence must not be insignificant.[677]

(591) The arrangements which are the subject of this Decision should be regarded as having had an appreciable effect on trade between Member States and the contracting parties of the EEA Agreement. As shown in Section 2.4, the freight forwarding sector is characterised by substantial trade between Member States, as well as between the Union and the EFTA countries of the European Economic Area. Moreover, it has to be stressed that all four arrangements were supposed to be applied on all freight shipments on the relevant lanes and they were therefore not limited to any particular category of shipments.

(592) The application of Article 101 of the Treaty and Article 53 of the EEA Agreement to a cartel is not, however, limited to that part of the members' sales that actually involve the transfer of goods from one State to another. Nor is it necessary, in order

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674 See, by analogy Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* and *Autorità Garante della Concorrenza e del Mercato*, [2003] ECR I-08055, paragraphs 52-56.

675 Case 56/65 *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.).* [1966] ECR 282, paragraph 7; Case 42/84 *Remia and Others v. Commission* [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 and others, *Cimenteries CBR and Others v. Commission (Cement)* [2000] ECR II-491.

676 Joined Cases C-215/96 and C-216/96 *Bagnasco and Others v Banca Popolare di Novara soc. coop. arl. (BNP) and Cassa di Risparmio di Genova e Imperia SpA (Carige),* [1999] ECR I-135, paragraph 48; see also Case T-374/94, *European Night Services (ENS), Eurostar (UK) Ltd, formerly European Passenger Services Ltd (EPS), Union internationale des chemins de fer (UIC), NV Nederlandse Spoorwegen (NS) and Société nationale des chemins de fer français (SNCF) v. Commission*, [1998] ECR II-3141, paragraph 136.

677 Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619 paragraph 42.

for these provisions to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States.[678]

(593) In this case the agreements and/or concerted practices described in this Decision, must have resulted or were likely to result in the automatic diversion of trade patterns from the course they would otherwise have followed.[679]

(594) Effect on trade can be deduced from a number of factors of law or fact even if those factors taken in isolation would not be decisive[680].

(595) Paragraph 61 of the Notice on the effect on trade provides that agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States. Paragraph 64 provides that cartel agreements such as those involving price fixing and market sharing covering several Member States are by their very nature capable of affecting trade between Member States. Paragraph 101 provides that import into one Member State may be sufficient to trigger effects of this nature. Imports can affect the conditions of competition in the importing Member State, which in turn can have an impact on exports and imports of competing products to and from other Member States. The four agreements therefore directly restricted the flow of freight forwarding services between Member States.

(596) Moreover, freight forwarding services sector is characterised by a substantial volume of trade worldwide as well as between Member States.[681] Furthermore, there is a substantial volume of trade on the routes between China/South China and Hong Kong and the European Economic Area, between the European Economic Area and the United States and between the United Kingdom and third countries outside the European Economic Area.[682]

(597) The four infringements are capable of having an appreciable effect on trade between Union Member States and between contracting parties of the EEA Agreement. It is settled case-law in relation to transport services that agreements between competitors are capable of having an effect on the trade in goods between Member States, in so far as the prices for the transport services represent a proportion of the end selling price of the transported goods.[683] The position is analogous to that of freight forwarding services and transport services are a constituent element of freight forwarding services. The aim of freight forwarding services is also to convey products which are traded internationally from a point of origin to a point of destination. Such services represent a significant proportion of the end selling price of the forwarded goods.

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678 Case T-13/89 *Imperial Chemical Industries v. Commission* [1992] ECR II-1021, paragraph 304.

679 Joined Cases 209 - 215 and 218/78 *Van Landewyck and Others v. Commission* [1980] ECR 3125, paragraph 170.

680 See Joined Cases C-125/07P, C-133/07P, C-135/07P and C-135/07P *Erste Bank der österreichischen Sparkassen a.o. v Commission,* [2009] ECR I-8681, paragraphs 36-37.

681 The global freight forwarding sector size in 2007 was EUR 116 809 million according to Transport Inteligence Report, page 50. According to the same source, the European freight forwarding sector size was EUR 39,170 million in 2007 (page 79).

682 For illustration, see Recitals (614), (621) and (624).

683 Case T-395/94 *Atlantic Container Line AB and Others v Commission,* [2002] ECR II-875, paragraphs 80-82.

(598) The coordinated surcharges were applied in the Member States. The diminished price competition between forwarders was likely to reduce the advantages which would otherwise accrue to the more efficient of them. This was likely to affect in turn the normal pattern of losses and gains of market share which would have been expected in the absence of the coordination. These restrictions of competition between forwarders were consequently likely to influence and alter trade flows in forwarding services within the internal market, which would have been different in the absence of the coordination.

(599) Such price fixing cartels in the air freight forwarding sector could lead to a diversion to other modes of freight forwarding, reduce the total level of freight services provided or reduce the total level of imports and/or exports and thus have an effect on trade between Member States. Trade is accordingly capable of being directly affected in respect of the provision of freight forwarding services and also indirectly in respect of the forwarded goods.

(600) In respect of CAF and PSS contacts took place outside the European Economic Area and concerned the price for freight forwarding services from China (CAF) and South China and Hong Kong (PSS) to the European Economic Area. The arguments cited above in this Section support the conclusion that the effect on trade is established. In addition the fact that the selling price of forwarded goods to customers inside the European Economic Area may have increased is also relevant. This may have led to a diversion of customer purchasing patterns and may have influenced the subsequent trade of such goods within the Union. Equally, intermediate goods which entered the European Economic Area through this route may be constituent parts in finished goods which are traded throughout the European Economic Area.

(601) The AMS concerned the provision of freight forwarding services from the European Economic Area to the United States. The arguments cited above in this Section support the conclusion that the effect on trade is established, namely the fact that the cartel covered the entire European Economic Area, as well as the aspects mentioned in Recitals (598) and (599).

(602) The NES agreement concerned the provision of freight forwarding services from the United Kingdom to countries outside the European Economic Area. The arguments cited above in this Section support the conclusion that the effect on trade is established, namely the fact that the cartel was implemented in several Member States, as well as the aspects mentioned in Recitals (598) and (599). Furthermore, an important albeit not decisive element is the fact that undertakings from other Member States participated in the NES cartel.[684] It follows from the case-law that there is a strong presumption that a practice restrictive of competition applied throughout the territory of a Member State (in this case the entire United Kingdom) is liable to contribute to the compartmentalisation of the market and to affect intra-Union trade. *"That presumption can only be rebutted if an analysis of the*

[684] Joined Cases C-295/04 to C-298/04 *VincenzoManfredi v Lloyd Adriatico Assicurazioni SpA and others,* [2006] ECR I-6619 paragraph 44

characteristics of the agreement and its economic context demonstrates the contrary."[685]

(603) In this case, the cartel arrangements covered freight forwarding services to and from the European Economic Area. The existence of pricing contacts in relation to the NES, AMS, CAF and PSS surcharges must have resulted, or was likely to result, in the automatic diversion of trade patterns from the course they would otherwise have followed[686]. Moreover, it is evident that these effects on trade were appreciable in line with the paragraph 53 of the Notice on the effect on trade which stipulates that in order for the effects to be appreciable, the turnover of the parties in the services covered by the agreement must exceed 40 million euro or their market share must exceed 5% threshold. As already mentioned in Recital (7), the trade lanes between United States, Europe and Asia are the most important trade lanes when measured in terms of the amount of shipped goods. Furthermore, in case of each of the four infringements, most of the participating undertakings were among the major freight forwarders on the relevant lane with the overall market share significantly higher than the 5% required by the Notice on the effect on trade[687] (see also Recital (899)). According to the settled case-law, in the context of the positive presumption laid down in paragraph 53 of the Notice on the effect on trade 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.[688]

5.2.1.3.1. Arguments by the parties in relation to the NES cartel and assessment thereof by the Commission

(604) CEVA[689], Kuehne & Nagel[690] and UPS[691] argue that the agreement related only to air exports from the United Kingdom to countries outside the European Economic Area and it could not have any appreciable effect on trade between Member States. UPS also claims that in case of agreements concerning countries outside the European Economic Area, the Commission has a higher burden of proof to show an effect on trade. CEVA further submits that the NES agreement did not have the potential to affect trade between Member States, as it specifically applied only in one Member State.[692] Similarly, DB argues[693] that while the freight forwarding industry involves shipment of goods, also between Member States, the NES filing services cannot be defined as a cross-border activity.

(605) Unlike the parties submit in their replies to the Statement of Objections, the object of the NES agreement was predominantly to regulate competition inside the European

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685 See Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-135/07 P *Erste Bank der österreichischen Sparkassen a.o. v Commission* [2009] ECR I-8681, paragraph 39.

686 See Joined Cases 209 to 215 and 218/*78 Van Landewyck and others v Commission* [1980] ECR 3125, paragraph 170.

687 Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission*, [1993] ECR-II 389, paragraph 138, see also Joined Cases C-125/07 P, C-133/07 P and C-135/07 P *Erste Bank der österreichischen Sparkassen a.o. v Commission* [2009] ECR I-8681, paragraph 39-43.

688 Case T-199/08 *Ziegler v Commission*, [2011], not yet reported, paragraph 73.

689 CEVA's reply to the Statement of Objections, page 34.

690 Kuehne & Nagel's reply to the Statement of Objections, page 18.

691 UPS' reply to the Letter of Facts, page 2.

692 CEVA's reply to the Statement of Objections, page 35-36.

693 DB's reply to the Letter of Facts, page 11-12.

Economic Area, not in the export markets.[694] The NES cartel can therefore be clearly distinguished from so-called export cartels, as it focuses, at least in the case of the prepaid business[695], on the competition in the European Economic Area. The NES surcharge was introduced as a response to security procedures that had to be complied with in the United Kingdom, before the goods left the UK's territory, and applied regardless of the country of origin as well as destination of the goods. Hence, one can not maintain that the cartel intended to restrict competition in a foreign market and there is no higher burden of proof to show an effect on trade as claimed by UPS.

(606) Paragraph 103 of the Notice on the effect on trade in provides that effect on trade can be established when the object of an agreement is to restrict competition within the European Economic Area. Following the Notice on effect on trade, such agreements – which may concern both imports and exports - have a direct impact on competition inside the European Economic Area and trade between Member States and they are normally by their very nature capable of affecting trade between Member States.

(607) Furthermore, it is evident that the NES agreement[696] was not implemented purely in the UK territory. More specifically, the evidence shows that the freight forwarding services (including NES filing services) were demanded not only by the UK customers, but also by local UK offices of undertakings based in the European Economic Area, as well as directly by undertakings located outside the United Kingdom in other EEA countries[697]. Even if the element on which parties colluded related to the legislation covering one Member State, the restriction of competition occurred within the internal market because it is there that the freight forwarders were in competition to sell their services. This only confirms the fact that one of the key characteristics of the freight forwarding services is their unproblematic tradability across borders which leads to the conclusion that it is no longer possible to refer to individual national markets in the case of the freight forwarding sector.[698] This characteristic of the sector is also confirmed by the fact that the undertakings participating in the cartel were global players active in the whole EEA market.[699]

(608) Finally, it has to be noted that the effect on trade between Member States can be established to a sufficient degree on the basis of objective factors of law or fact. As to the factors of law, it is evident that the NES regulation as well as the related NES fee was applicable irrespective of the origin of the goods[700]. The NES was therefore applicable both to UK goods and to goods originating from other EEA countries that

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694 Case T-395/94 *Atlantic Container Line AB and Others v Commission* [2002] ECR II-875, paragraph 72, see also paragraph 103 of the Notice on the effect on trade.

695 For the explanation of the difference between prepaid and collect business, see Recital (70).

696 In this respect, the Commission notes that the NES agreement subject to its investigation involves freight forwarding services in general and not purely the NES service.

697 […].

698 In the context of the merger between Deutsche Bahn and BAX Global, the parties clearly submitted to the Commission that the geographic market for freight forwarding is no longer national, but at least EEA-wide. Case No IV/M.4045 – Deutsche Bahn / BAX Global, paragraph 9. See also to that effect Case No IV/M.1794 – Deutsche Post/Air Express International, paragraph 13 and Case No IV/M.3971 Deutsche Post/Exel, paragraphs 25 and 26.

699 Joined Cases C-295/04 to C-298/04 *VincenzoManfredi v Lloyd Adriatico Assicurazioni SpA and others*, [2006] ECR I-6619 paragraph 44

700 […];[…].

were in transit (transhipment) in the United Kingdom ("transhipped goods"). As to the actual application of the NES surcharge to the transhipped goods, it is evident that in some instances shipments were indeed transhipped via the United Kingdom and the NES applied to such shipments, although the replies of the freight forwarders involved in the NES infringement to a request for information indicate that such transit (transhipment) took place only to a very limited extent.[701] These two factors support the finding that the cross-border trade in the European Economic Area was capable of being affected by the NES cartel, which is emphasized by the fact that in some instances, the transhipped goods were also consolidated in the United Kingdom.[702]

(609) CEVA claims that the fact that the cartel members were part of a wider, global group of companies has no bearing on whether the NES agreement had an effect on trade between Member States.[703]

(610) As stipulated in the case-law referred to in the Statement of Objections and in this Decision[704], differing "nationality" of the cartel participants is an important element permitting the conclusion that the effect on trade exists, although this is not sufficient on its own. In this regard, despite CEVA's claims, it is not decisive that only local offices of the freight forwarders took part in the contacts. Moreover, it is evident that the conduct of such global undertakings on the UK market could have had repercussions on the competitive structure within the internal market, as the altered margins due to the conduct in the United Kingdom could have affected their business conduct in other Member States.

(611) DB claims that the aggregate turnover on the NES fees did not exceed EUR 40 million and the arrangements therefore could most likely not be considered capable of having any adverse effect on the attainment of the Single European Market or they affect the market only insignificantly. According to DB, the undertakings held only moderate market shares in a highly segmented Union market.[705]

(612) Firstly, it should be noted that the conditions for the establishment of the non-existence of the appreciable effect on trade between Member States as stipulated in paragraph 52 of the Notice on the effect on trade have to be met cumulatively. Assuming that the conditions set in paragraph 52 are also applicable to horizontal anti-competitive agreements such as the ones at issue in this Decision, this means that in order to establish the existence of no appreciable effect on trade the aggregate market share of the parties on the cartelised market has to be below 5% and the aggregate turnover of the undertakings concerned has to be below EUR 40 million. DB's claim therefore does not apply in this particular case, as DB did not provide any

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701 From the evidence provided by the parties, it is evident that […] and […] did not have any such shipments […]. In the case of […],[…] and […] the share of such shipments on the overall number of shipments from the UK to third countries outside the European Economic Area is below 1% […]. Furthermore, it has to be also noted that […],[…] and […] claim that the decision to tranship the shipments via the UK was generally an internal decision of the companies and no NES surcharge was therefore charged to customers.

702 […].

703 CEVA's reply to the Statement of Objections, page 43.

704 Joined Cases C-295/04 to C-298/04 *VincenzoManfredi v Lloyd Adriatico Assicurazioni SpA and others*, [2006] ECR I-6619, paragraph 44.

705 DB's reply to the Statement of Objections, page 16-17.

evidence that would show that the aggregate market share of the NES cartel members was below 5% at the time of the infringement.

(613) On the contrary, the relatively strong position of the parties on the UK and EEA market, both individually and in aggregate militate strongly in favour of an appreciable effect on trade as stipulated in paragraphs 45, 47 and 53 of the Notice on the effect on trade. The overall market share of the participating undertakings in the air freight forwarding market in the United Kingdom varied around 30%, which, having regard to the large degree of fragmentation of the freight forwarding industry is considerably high.[706] Largely the same market share was held by the parties also on the EEA market[707] as well as on the relevant routes[708] (see Recitals (897) - (899) for more information regarding the market shares on the trade lane affected by the NES cartel). Moreover, two leading market players both in the United Kingdom and in the European Economic Area (DHL and Exel) took part in the contacts and also the remaining parties to the infringement hold a strong position on the markets. The existence of these factors and the nature of the agreement show that the effect on trade was appreciable.

(614) Secondly, the service affected by the cartel was not the provision of the NES filing but the provision of the freight forwarding services in general. It is true that the freight forwarders agreed on the amount of the NES fee only, however the NES fee is part of the overall price paid by customers for the provision of freight forwarding services. The fact that the NES is billed as a separate surcharge is not relevant in this regard, as this is purely a strategic business decision applied throughout the freight forwarding sector.[709] The turnover reached by the parties on the relevant lane was significantly higher than the EUR 40 million required by paragraph 53 of the Notice on the effect on trade, which again indicates that the effect on trade was appreciable.[710]

(615) Hence, it is concluded in line with paragraph 53 of the Notice on the effect on trade that the effect on trade was appreciable because of the strong position of the parties on the market and the high turnover of the overall freight forwarding services concerned. Furthermore, it has to be noted that according to the settled case-law, in the context of the positive presumption laid down in paragraph 53 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.[711]

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706 […].

707 […].

708 According to DB's estimate […], undertakings involved in the NES infringement held 32.5% of the market on routes from the UK to third countries outside European Economic Area and Switzerland for air and ocean in 2002.

709 This is also confirmed by the evidence on the file, which indicates the freight forwarders were afraid that in consequence of too high levels of the NES fee, they might lose the entire customer and not only the part of the business connected with the NES filing ([…]– *"[…] my concern is that the NES is being used as a bargaining tool here to enable KN to break into our (lion's) share of the business [….]"*, […].

710 For illustration, the relevant turnover of a single cartel participant (DHL) on the affected lane exceeded by a large margin the EUR 40 million threshold […].

711 Case T-199/08 *Ziegler v Commission*, [2011], not yet reported, paragraph 73

5.2.1.3.2. Arguments by the parties in relation to the AMS cartel and assessment thereof by the Commission

(616) Kuehne & Nagel claims that there was no appreciable effect on trade between Member States, as the arrangements were implemented in the United States. In this regard, Kuehne & Nagel submits that paragraph 61 of the Notice on the effect on trade can not therefore be applied, as the agreement related to the United States (according to Kuehne & Nagel this is at least true for the collect business). Moreover, Kuehne & Nagel submits that the effect on trade was not appreciable due to the low level of the AMS fee.[712]

(617) It appears from the reply to the Statement of Objections provided by Kuehne & Nagel that the arrangements were not only implemented in the United States. A significant part of the customers were located in the European Economic Area and the freight forwarders were therefore offering their services in the European Economic Area as well. This means that the affected territories were both the European Economic Area and the United States.

(618) As mentioned in paragraph 61 of the Notice on the effect on trade, agreements covering several Member States (and in this particular case, the agreement covered the whole European Economic Area) are in almost all cases by their very nature capable of affecting trade between Member States. Moreover, it is evident that the effect on trade was appreciable, as the conditions stipulated in paragraph 52 of the Notice on the effect on trade regarding the non-appreciability of the agreements are not met.

(619) For establishing the existence of the appreciable effect on trade, it is required that the aggregate market share of the parties on the affected market exceeds 5% or that the aggregate turnover in the service concerned exceeds EUR 40 million.[713] Both conditions are fulfilled in this particular case. FFE/FFI was an association, which represented the interests of the major global freight forwarders and their market share was therefore far above the required threshold.[714] Moreover, as the United States is one of the most important export markets for the European Economic Area, the value of the freight forwarding services provided on this lane is therefore correspondingly high.

(620) DB claims that the aggregate turnover on the AMS fee did not exceed EUR 40 million and the arrangements therefore could most likely not be considered capable of having any adverse effect on the attainment of the Single European Market.[715]

(621) General rules applying to the assessment of the existence of the appreciable effect on trade were described in Recitals (612) and (614). DB's claim therefore does not apply in this particular case, as DB did not provide any evidence that would show that the aggregate market share of the FFE/FFI members was below 5% at the time of the

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712 Kuehne & Nagel's reply to the Statement of Objections, page 46-48.

713 Paragraph 53 of the Notice on the effect on trade.

714 Moreover, the stronger position of FFE/FFI is also confirmed by the FFI minutes following the AMS implementation which stated that FFI was seen as a leader on the AMS project by other freight forwarders […].

715 DB's reply to the Statement of Objections, page 49-50.

infringement. As indicated in Recital (619), the market share of the parties was on the contrary much higher than the required standard.[716] Moreover, the service affected by the cartel was not the provision of the AMS filing but the provision of freight forwarding services in general. It is true that the freight forwarders agreed on the amount of the AMS fee only, however the AMS fee is an integral part of the overall price paid by customers for the provision of freight forwarding services. It is therefore evident that the turnover reached by the parties on the relevant lane was significantly higher than the EUR 40 million required by paragraph 53 of the Notice on the effect on trade.[717]

5.2.1.3.3. Arguments by the parties in relation to the CAF and PSS cartels and assessment thereof by the Commission

(622) Kuehne & Nagel submits that the arguments put forward by the Commission in Recitals 290-293 of the Statement of Objections are only partly convincing when it comes to the establishment of the effect on trade between Member States. It also claims that arguments put forward in Recital 294 are a mere repetition of the previous arguments.[718] A similar claim was also made by Kintetsu.[719]

(623) As in the case of the AMS, the freight forwarding services were offered both in the European Economic Area and in China/Hong Kong. This means that part of the competition among the freight forwarders took place directly on the EEA market. The agreement was therefore, in line with paragraph 61 of the Notice on the effect on trade, covering several Member States and was thus capable of affecting trade between Member States. This is even more emphasized by the fact that the freight forwarding services as such are easily traded across borders.

(624) In order to assess the capability of the agreements to appreciably affect trade between Member States, a reference can be made to general rules described in Recital (619). In the particular case of the CAF and PSS cartels, the situation was not much different from the AMS cartel. Among the parties to the CAF and PSS agreements were the biggest market players and the market share of the undertakings on the EEA market and on the lanes affected by the arrangements was therefore significantly higher than the required 5%. The same can be said also about the turnover affected by the cartel, as the route between China/Hong Kong and the European Economic Area belongs to the most important trade lanes worldwide. The turnover reached by the undertakings is therefore accordingly high.[720]

(625) Kintetsu also claims that the assumption that the price of freight forwarding services represents a part of the end selling price of the forwarded goods is not correct.

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716 See also Joined Cases 100/80 to 103/80 *Musique diffusion française e.a. v Commission*, [1983] ECR 1825, paragraph 86 or Case T-65/89 *BPB Industries Plc and British Gypsum Ltd v Commission*, [1993] ECR-II 389, paragraph 138.

717 For illustration, the relevant turnover of a single cartel participant (DHL) on the affected lane exceeded by a large margin the EUR 40 million threshold […].

718 Kuehne & Nagel's reply to the Statement of Objections, page 71-72.

719 Kintetsu's reply to the Statement of Objections, page 69-70.

720 For illustration, the relevant turnover of a single cartel participant (DHL) on the affected lane exceeded by a large margin the EUR 40 million threshold ([…]).

Kintetsu submits that this is mainly due to the fact that transport can not be considered as part of the freight forwarding service.[721]

(626) It can not be accepted that the transport service is an entirely distinct part from the services offered by the freight forwarders. On the contrary, transport is an essential and characteristic part of the services offered by the freight forwarders, although the transport itself is provided by a third party. The overall price of the freight forwarding services is therefore one of the cost elements that are taken into account when calculating the final price of the forwarded goods paid by the customers. In this regard it is evident that the share of the price of the freight forwarding services in the overall price paid by the customer will be mainly depend on the value of the forwarded goods, namely the share will be lower in case of shipments with high value goods and higher in the case of low value goods.

(627) Yusen submits that it did not have any customers in the European Economic Area.[722]

(628) According to paragraph 15 of the Notice on the effect on trade it is immaterial for the Commission's assessment of the existence of the effect on trade between Member States whether or not the participation of a particular undertaking in the agreement had an appreciable effect on trade between Member States.[723] The question of Yusen's implementation of the arrangements in the European Economic Area is therefore not relevant in this regard.

5.2.2. Non-applicability of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement and no ancillary restraint

(629) The provisions of Article 101(1) of the Treaty may be declared inapplicable pursuant to Article 101(3) where an agreement or concerted practice "contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit", and does not impose restrictions on the undertakings concerned that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question. The Commission observes that these conditions of Article 101(3) of the Treaty must be fulfilled cumulatively in order for agreements or concerted practices to be exempted from the prohibition of Article 101(1) of the Treaty[724]. The same applies, *mutatis mutandis*, with respect to Article 53 of the EEA Agreement.

(630) According to Article 2 of Regulation (EC) No 1/2003 the burden of proving that the conditions of Article 101(3) of the Treaty are met is on the undertakings seeking to benefit from that provision.

(631) All practices set out in this Decision concern prices or trading conditions and their sole object is the restriction of competition. There is no indication that the

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721 Kintetsu's reply to the Statement of Objections, page 69.

722 Yusen's reply to the Statement of Objections, page 24.

723 See for instance Case T-2/89 *Petrofina v Commission* [1991] ECR II-1087, paragraph 226.

724 Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) issued by the Commission on 27 April 2004 ("Article 101(3) Guidelines"), point 42.

agreements and/or concerted practices between the parties to the cartels entailed any efficiency benefits or otherwise promoted technical or economic progress. Horizontal cartels relating to prices, like the practices which are subject to this Decision, are by definition the most detrimental restrictions of competition, as they benefit only the participating service providers but not consumers.

(632) Regarding the CAF infringement, Yusen claims[725] that the joint adoption of the RMB qualifies as the adoption of a standard which either does not constitute an infringement of Article 101(1) of the Treaty or which, at least, fulfils all criteria for an exemption under Article 101(3) of the Treaty.

(633) Firstly, Yusen argues[726] with reference to the Guidelines on Horizontal Cooperation Agreements[727] that the only anti-competitive part of the CAF meetings could have been the agreement to impose the CAF surcharge, but Yusen objected to the introduction of the surcharge, did not implement it and stopped attending anti-competitive meetings. Yusen claims that the switch to RMB was on the contrary pro-competitive and made the practice in China conform with the industry wide practice throughout the world, since international standard in air freight forwarding was and still is the 'currency of departure'. In Yusen's view, the switch just created a new level-playing field and the new standard was intended to create transparency for everybody within the industry.

(634) The Commission observes that Yusen took part in the agreement to shift the contracts with customers to RMB and introduce a CAF surcharge as set out in Recitals (228)-(250). Whether it implemented it or not is irrelevant for the purpose of establishing its involvement in the agreement. Moreover, the currency switch was achieved, also with Yusen's participation in a way incompatible with Union competition law (see Recitals (232), (234) and (235)). Yusen's claim that Article 101(1) does not apply, in other words, that it qualifies as an ancillary restraint cannot be upheld. Yusen did not demonstrate that the restriction was objectively necessary for the provision of the service or that it did not restrict actual or potential competition that would have existed without the restrictive agreement. In this respect, the Commission notes that the CAF-related collusion including the coordination on adoption of joint currency switch constitutes restriction of competition by object (see Recitals (571) and (572)) and thus is caught by the provision of Article 101(1)[728].

(635) Secondly, with respect to the applicability of the 101(3) exemption, Yusen argues that the joint switch to the same currency was indispensable in order to (i) enable customers to compare price quotations more easily, (ii) create level playing field, where financial risks were neutralised for both forwarders and customers and (iii) reduce transactional costs for both forwarders and customers. According to Yusen, the creation of transparent system resulting from the joint currency switch ensures effective competition, which benefits the customers. Furthermore, Yusen argues that

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725 Yusen's reply to the Statement of Objections, page 29-31.

726 Yusen's reply to the Statement of Objections, page 28-29.

727 Commission Notice — Guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, 2001/C3/02, paragraphs 163-164.

728 See Commission Notice – Guidelines on the application of Article 81(3) of the Treaty, 2004/C 101/08, paragraphs 18, 21 and 28.

the joint adoption of currency did not shift the currency risk into one direction, since the currency risk remained and thus competition on prices was not affected.

(636) The Commission maintains that the competitors have coordinated their behaviour regarding the joint currency switch in reaction to the appreciation of RMB with an anti-competitive aim to eliminate future losses and shift the currency risk to their customers. Whereas currency risk did not exist on the part of the forwarders prior to the unpegging of RMB, such risk has arisen following the currency appreciation and the competitors colluded with a clear aim to alleviate the currency burden and shift it to the customer base. The collusive practices relating to the joint currency switch went beyond what could be indispensable to attain any possible pro-competitive objective. The market transparency stemming from the collusion resulted in a reduced rather than effective competition. In light of the above, the Commission cannot accept the arguments submitted by Yusen.

(637) Furthermore and importantly, the Commission reiterates that Yusen is found to have been involved in the CAF infringement comprising also other elements than joint currency switch, namely an agreement on the imposition and the level of the CAF surcharge. However, Yusen failed to adduce arguments justifying Article 101(3) exemption of the complex single and continuous CAF infringement, while focusing solely on one of the cartel aspects (joint currency switch). The Commission notes that the CAF infringement is a hardcore cartel, which operated purely to the benefit of the cartel offenders. It is hardly conceivable that an arrangement concerning price-fixing which involves, among others, introduction of a price supplement in relation to the customer base would benefit the latter, either in qualitative or quantitative way.

(638) With respect to the PSS infringement, Expeditors argues[729] that even assuming that the arrangements constituted an appreciable restriction of competition so as to be caught by Article 101(1) of the Treaty (which Expeditors contests), the conditions for an exemption under Article 101(3) of the Treaty are fulfilled. Expeditors submits that (i) the PSS surcharge is the best if not the only means of efficiently balancing supply and demand when freight rates are raised by a demand spike, (ii) the shippers consequently enjoy the benefit of the increase in value of the goods shipped attributable to their being able to meet tight delivery and production deadlines in a period of acute capacity shortage and (iii) the coordination of timing of PSS announcements is necessary to achieve the economic benefits for consumers.

(639) The Commission observes that the PSS infringement involves collusion on both the timing of application as well as the introduction and levels of the PSS surcharge. The analysis proffered by Expeditors not only seems to disregard the complexity of the PSS cartel, but it also falls short of justifying how the concertation on the PSS surcharge (as opposed to the PSS surcharge itself) would contribute and be indispensable to improving the provision of freight forwarding services. The Commission considers that the hypothetical efficiencies described by Expeditors could equally be attained even in the absence of collusion on PSS by behaving unilaterally on the market in relation to the PSS surcharge. Coordination of timing of announcements as well as levels of the PSS surcharge created more transparency and stability among the cartel participants, thereby reducing competition to the benefit of

729 Expeditors' reply to the Statement of Objections, page 29-31.

the colluding parties without creating efficiencies which could benefit, either quantitatively or qualitatively their customers. In light of the above, the arguments made by Expeditors have to be dismissed.

(640) In conclusion, the parties have not proven that the conditions of Article 101(3) of the Treaty and Article 53(3) of the EEA Agreement are fulfilled with respect to any of the infringements set out in this Decision. Moreover, the parties did not notify any agreement or practice, which would have been a precondition for the application of ex-Article 81(3) of the EC Treaty under Article 4(1) of Council Regulation No 17 of 6 February 1962, first Regulation implementing Articles 85 and 86 of the EC Treaty (for cartels predating 1 May 2004).[730] Accordingly, an exemption under Article 101(3) of the Treaty cannot be granted in this case.

5.2.3. Non-applicability of the Air Transport Exemption

(641) DB[731] and CEVA[732] argue that the Commission does not have jurisdiction to impose fines for infringements of Article 101 of the Treaty relating to air transport services between the Union and third countries in view of an exemption applicable before 1 May 2004 ("**Air Transport Exemption or ATE**"). The parties argue that prior to that date there was no implementing regulation authorising the Commission to pursue such infringements. According to the parties, air transport, including routes between the Union and third countries was only made subject to Union competition law by Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries[733], which entered into force on 1 May 2004. Furthermore, they claim that based on the interpretation by the Union Courts[734], the ATE extends to activities that are directly related to the supply of air transport services, including to the NES and AMS service. They subsequently maintain (CEVA for the NES infringement, DB for the NES infringement and the AMS infringement until 1 May 2004) that because of the direct relationship with air transport and the services concerned, the Commission has no jurisdiction to apply Article 101 of the Treaty to the NES and AMS conducts.

(642) In more specific terms, according to DB, the fact that the contractual relations between carriers and freight forwarders are governed by the regulatory framework of the International Air Transport Association, which was designed for and applies to the air transport sector proves the close and direct relation between air transport and freight forwarding and ultimately points to the applicability of ATE to freight forwarding activities. DB further claims that NES as well as AMS[735] compliance are legal prerequisites of transportation of goods by air. CEVA argues that without a

730 OJ 13, 21.2.1962, page 204. English special edition: Series I Chapter 1959-1962 P. 0087. See, in this sense, for example, Joined Cases T-259/02 etc. *Raiffeisen Zentralbank Osterreich AG and Others v Commission* [2006] ECR II-5169, paragraph 213.

731 DB's reply to the Statement of Objections, page 18-22 and page 50-51.

732 CEVA's reply to the Statement of Objections, page 44.

733 OJ L 68, 6.3.2004, page 1.

734 Case C-82/01 P, *Aéroports de Paris v Commission* [2002] ECR I-9297, paragraphs 21-24 and Case T-219/99, *British Airways plc v Commission* [2003] ECR II-5917, paragraphs 155, 157 and 168.

735 DB also considers that the AMS imposes obligations on the carrier, given that the carrier is required to take certain steps for compliance with AMS regulations in relation to all shipments; however, DB fails to specify the obligations to be undertaken by the carrier;

declaration made via NES during the relevant time period, goods could not be cleared for export and as a consequence, any aircraft carrying such goods would be delayed and/or unable to take off.

(643) Furthermore, Kuehne & Nagel[736] invokes the applicability of the Air Transport Exemption in relation to all four infringements based on the complementarity of the activities pursued by the undertaking to air transport. Additionally, Kuehne & Nagel refers to Council Regulation 3975/87 of 14 December 1987 laying down the protocol for the application of the rules on competition to undertakings in the air transport sector [737] as constituting a basis for exemption from application of the provisions of Article 101(1) of the Treaty.

(644) As a preliminary remark, the Commission observes that the arguments submitted by Kuehne & Nagel cannot be deemed valid in relation to the CAF and PSS infringements, as the Air Transport Exemption expired on 1 May 2004, that is before the CAF and PSS events described herein took place. Furthermore, Regulation 3975/87 cannot serve as a basis for exemption of the NES, AMS, CAF and PSS conducts from the applicability of Article 101(1), as its scope did not extend to the services between Union and third countries.

(645) The Commission notes that Article 1 of EEC Regulation No 141 of the Council exempting transport from the application of Council Regulation No 17[738] essentially defines the material scope of the ATE for the purposes of the current assessment. That Article provides that agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets are subject to the ATE. According to settled case-law[739], the choice of the applicable regulation depends upon what the nature of the practices in question is. As set out in Recital (572), in this case the cartel participants coordinated their behaviour with a view to remove uncertainty in relation to various elements of price in the freight forwarding sector. Therefore, by nature, the cartel arrangements concerned freight forwarding rates and not transport rates, as required for the ATE to apply.

(646) Furthermore, even if freight forwarders have direct contractual relations with the carriers, these relations do not constitute a basis for the provision of freight forwarding services affected by the cartels set out in this Decision, but for air transport services, which are not subject to the Commission's scrutiny in the current case. Therefore, DB's argument suggesting the existence of a direct and close relation between air transport and freight forwarding has to be dismissed. The Commission considers that for the purposes of assessing the nature of freight forwarding services, subject to the scrutiny in this case, are the relations between the freight forwarders and the shippers as stipulated in contracts between the two. These relations do not concern the air transport sector but the freight forwarding sector and therefore evidently lack the required link to the provision of air transport service.

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736 Kuehne & Nagel's reply to the Statement of Objections, page 24-26, 48, 60, 72.

737 OJ L 374, 31.12.1987 page 1.

738 OJ L 68, 6.3.2004, page 2751. English special edition: Series I Chapter 1959-1962 P. 0291..

739 Case T-219/99, *British Airways plc v Commission* [2003] ECR II-5917, paragraph 171.

(647) The Commission acknowledges that NES as well as AMS compliance might be a legal precondition of a carriage within the freight forwarding sector and their non-fulfilment might jeopardise shipment of particular goods by air. However, neither the absence of freight forwarding service as a whole, nor the non-performance of the NES or AMS service is liable to jeopardise existence of the air transport service as such. Such observation also points to the conclusion that the NES as well as the AMS service are not directly linked to the supply of air transport services[740]. This is also confirmed by the fact that these services can also be provided not only by carriers or freight forwarders, but also by third party providers, which do not have anything in common with the provision of the transport services.

(648) In view of the foregoing, the Commission finds that the Air Transport Exemption does not extend to any of the cartel conducts which are subject to this Decision and dismisses the arguments brought forward by DB, CEVA and Kuehne & Nagel.

5.2.4. Industry and economic context argumentation

(649) Panalpina submits[741] that in assessing, whether the AMS, CAF and PSS infringements occurred, the behaviour of the parties has to be viewed in its relevant industry and economic context. According to Panalpina, inter alia, (i) the freight forwarding industry is highly fragmented and thus competitive, (ii) forwarders make a multitude of sales to a large number of different customers, (iii) costs which forwarders face arise as a result of external events (government regulations, pricing decisions of carriers), (iv) surcharges are pro-competitive and can be beneficial to the customer and (v) surcharges in relation to the AMS, CAF and PSS were underpinned by genuine, industry-wide changes in the costs of freight forwarding.

(650) Concerning the argument that the market for freight forwarding services is highly competitive, the Commission notes that Article 101 of the Treaty prohibits prevention, restriction or distortion of competition within the internal market. Therefore, parties cannot justify their involvement in cartel arrangements claiming that there is competition in the market. In the same vein, the remaining observations made by Panalpina describing the economic context, in which freight forwarders operate have therefore no impact on the analysis of the conducts set forth in this Decision. In view of the above, the observations made by Panalpina regarding the AMS, CAF and PSS infringements are rejected.

5.2.5. Procedural arguments

5.2.5.1. Four infringements, single Statement of Objections/Decision

(651) According to Kintetsu[742], the Commission's approach to include all the investigated cartel conducts in one Statement of Objections infringes the rights of defence of Kintetsu. In support of its argument, Kintetsu argues that the Commission's file made available to the undertaking included documents relating to all four infringements described in this Decision, rather than just the CAF-related documents,

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740 See to that effect Case C-82/01 P, *Aéroports de Paris v Commission* [2002] ECR I-9297, paragraph 23 and Case T-219/99, *British Airways plc v Commission* [2003] ECR II-5917, paragraph 168.

741 Panalpina's reply to the Statement of Objections, page 6-9 ([…]), page 7-10 ([…])

742 Kintetsu's reply to the Statement of Objections, page 51-55.

thereby making access to the file for Kintetsu unnecessarily complicated, more time-consuming and costly. Furthermore, Kintetsu submits that by putting all four infringements in one Statement of Objections/Decision, the Commission implies that Kintetsu are in one way or another involved or responsible for all four infringements.

(652) The Commission notes that according to Regulation No 1/2003, the rights of defence of the parties concerned shall be fully respected in the proceedings. They shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets[743]. Furthermore, in order to respect the rights of defence of undertakings, the Commission should give the parties concerned the right to be heard before it takes a decision[744].

(653) In this case, the Commission observes that it duly respected the right of all parties to be heard, including the right of access to the file on which the Commission's charges are based. The fact alone that Kintetsu was granted access to the Commission's file which included documents related to cartel conducts other than CAF cartel does not give a rise to a breach of the rights of defence. Kintetsu has been granted access to all the documents relevant for the CAF infringement and these documents were easily identifiable from the file, as they were specifically referred to in the Statement of Objections. The assertion that the Commission exceeded its obligation and also made available also documents unrelated to the CAF cartel did not restrict Kintetsu's rights of defence. Quite the opposite, by having access to documents pertaining to the other infringements covered by this Decision, Kintetsu has had the opportunity to compare evidence and arguments for the different infringements, thereby making it easier for Kintetsu to exercise its rights of defence in relation to the CAF infringement.

(654) Equally, the Commission could not breach Kintetsu's rights of defence by integrating in the same Statement of Objections/Decision charges relating to cartels other than that, in which Kintetsu was involved[745] as long as the charges brought against Kintetsu on which this Decision is based were also included in the Statement of Objections[746]. Moreover, both the Statement of Objections as well as the Decision clearly distinguish between individual charges and their addressees without leaving any room for unclarity or ambiguity as to the involvement of parties in individual infringements. In light of the aforesaid, the arguments submitted by Kintetsu have to be rejected.

5.2.5.2. Alleged dual representation by the law firm Cleary Gottlieb

(655) During the Oral Hearing, DB argued that Cleary Gottlieb Steen & Hamilton LLP (hereinafter "Cleary"), as the legal advisor of the immunity applicant (DP), had also been a legal counsel of the FFE/FFI association, under whose umbrella the discussions regarding the AMS took place and that DP was chairing the association at the time of its immunity application.

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743 Article 27(2) of Regulation No 1/2003; see also Case T-161/05 *Hoechst GmbH v Commission*, [2009] ECR II-3555, paragraphs 160-161.

744 Recital (10) of Commission Regulation (EC) No 773/2004.

745 See to that effect for example Case COMP/E-1/37.512 — *Vitamins*, decision of the Commission of 21 November 2001, where several infringements were dealt with in the same decision.

746 See to that effect Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler AG and others v Commission*, paragraph 41.

(656) DB argues[747] that Cleary's dual representation of both the FFE/FFI members and DP is incompatible with the applicable Brussels bar rules and contract law. According to DB, the breaches of contract law by Cleary acting as DP's agent are also attributable to DP. Moreover, in DB's view DP itself as a president of FFE/FFI has committed a breach of contract law by pursuing its own interests rather than carrying out the president's function in the interest of the association[748]. DB consequently seeks to establish causal connection between the said breaches of law and argues that the evidence submitted to the Commission by DP is tainted[749] and cannot be used by the Commission for the purposes of these proceedings. According to DB, validation of DP's immunity application which was tainted by irregularly obtained evidence and the Commission's knowledge thereof constitute an infringement of DB's rights of defence[750]. Furthermore, DB claims that by failing to inform the Commission of all of the relevant facts regarding DP's relationship with FFI and the legal advisors of FFE/FFI, DP does not fulfil the requirement of genuine cooperation as set out in the Leniency Notice[751]. As a result, DB argues that the Commission is required to discontinue the entire investigation in the current case or, as a minimum, to disregard DP's immunity application in its entirety.

(657) Furthermore, upon an invitation of the Hearing Officer made during the oral hearing, a number of other parties[752] also made submissions touching on the issue of a potential conflict of interest resulting from the alleged dual representation by Cleary. Expeditors submit[753] that there may have been a conflict of interest involving Cleary and arising out of their representation of both, DP and FFI, which taints the whole immunity application. However, Expeditors do not refer to any evidence or case-law in support of their assertion. Furthermore, UTi merely summarises facts surrounding the issue without making any allegations[754]. Finally, Nippon[755] remarks, quite rightly, that the Commission should not take the position of arbiter over the application of the relevant Bar rules. Furthermore, the undertaking suggests that if wrongful conduct cannot be attributed to DP, it should not affect its immunity status.

(658) First, the Commission observes that the anti-competitive arrangements reported by DP, including those relating to the AMS and activities of FFE/FFI are prohibited under Article 101 of the Treaty and are automatically void. On account of that, such anti-competitive arrangements could not enjoy the protection of and their divulgence could not be precluded by contract law. Indeed no principle of Union law or the Leniency Notice itself precludes the use as evidence by the Commission of commercially sensitive documents which are also under contractual protection within certain undertakings or associations. Second, none of the parties concerned by the matter (including DB itself) submitted fact-based and credible evidence proving that the information provided in the immunity application was obtained in an irregular manner. Third, the Commission observes that it is not competent to appraise

747 Written submission of DB dated 27 July 2010, page 36.
748 Written submission of DB dated 27 July 2010, page 22.
749 Written submission of DB dated 27 July 2010, page 27.
750 Written submission of DB dated 27 July 2010, page 28.
751 Written submission of DB dated 27 July 2010, page 31.
752 UTi, Expeditors, Nippon.
753 Observations of Expeditors of 23 July 2010, […].
754 UTi's letter of 23 July 2010 addressed to the Hearing Officer, […].
755 Nippon's letter of 22 July 2010, […].

potential breaches of either the Brussels Bar rules or any violation of contract law resulting from the alleged dual legal representation by Cleary. Moreover, irrespective of the outcome, such assessment would not impact on the legality of DP's immunity application and more generally of the proceedings in the current case. It is DP and not Cleary that is the party to these proceedings and the immunity applicant from which comes the evidence submitted to the Commission. Fourth, from the competition law enforcement perspective, DP cannot be prevented from reporting an infringement of competition law to the Commission and in the same vein no principle of Union law obliges the Commission to refrain from using the evidence so obtained merely because DP was chairing, at the time of its immunity application, the FFE/FFI association, whose members violated competition law. Any contractual obligations that might have existed on the part of DP are independent from the Commission's investigative powers and affect the bilateral relation of the immunity applicant and other parties but not the evidence that the Commission obtained in a lawful manner. Fifth, the evidence on AMS-related anti-competitive activities of FFE/FFI members was equally available to other FFE/FFI members and addressees of this Decision and nothing prevented them from coming forward to the Commission before DP. Sixth, with respect to the arguments regarding the absence of genuine cooperation on the part of DP, reference is made to Recital (1094). The Commission notes with reference to the Leniency Notice[756]that the cooperation of an undertaking and the genuineness requirement relate to the detection of a cartel and provision of information relevant for finding of competition law breaches[757], rather than information concerning the status of the immunity applicant in an association such as FFE/FFI assigned wholly independently of the cartel investigated by the Commission. In view of the above, any claims made by DB in connection with the said double representation issue are rejected

6. ADDRESSEES

6.1. Principles

(659) The Union competition law refers to activities of "*undertakings*". The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal.[758] When such an economic entity infringes Article 101 of the Treaty, it falls, according to the principle of personal responsibility, to the natural or legal person who operates the undertaking which participates in the cartel to answer for that infringement; in other words the principal

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756 See, for example, point 4 of the Leniency Notice.

757 With the exception of the establishment of the 'coercer' status on part of the immunity applicant as set out in point 13 of the Leniency Notice, which however was neither claimed by any of the parties in this case nor found by the Commission.

758 Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraphs 54 and 55 (not yet published) and the case law referred to therein. See also Case C-90/09 P *General Quimica and others v Commission* [2011], paragraph 35 (not yet published); Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others.* (Grand Chamber judgment), paragraph 95 (not yet published).

of the undertaking is liable[759]. The same principles hold true, *mutatis mutandis*, for the purposes of the application of Article 53 of the EEA Agreement.

(660) It is accordingly necessary to define the undertaking that will be held accountable for the infringement of Article 101 of the Treaty by identifying one or more legal persons that represent the undertaking. According to case-law, "*Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market"*.[760]

(661) The conduct of a subsidiary may be imputed to the parent company in particular where, although having a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities. In such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of Union competition law. In such circumstances, a decision imposing fines can be addressed to the parent company, without it being necessary to establish the personal involvement of the parent company in the infringement.[761]

(662) In the specific case where a parent company has a (direct or indirect) 100% shareholding or near 100% shareholding in a subsidiary which has infringed the Article 101 of the Treaty there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary.[762] In those circumstances, it is sufficient for the Commission to prove that the subsidiary is 100% or near 100% owned by the parent company in order to presume that the parent company exercises a decisive influence over the commercial policy of the subsidiary. The parent company can then be held jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.[763]

(663) In accordance with the principle of personal responsibility, legal entities within an undertaking having participated in their own right in an infringement and which have been acquired in the meantime by another undertaking continue to answer

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759 Opinion of Advocate General Kokott in *ETI SpA and others*, paragraphs 71 to 73.

760 See Case T-203/01 *Michelin v Commission* [2003] ECR II-4071, paragraph 290.

761 Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraphs 58 and 59 and the case law referred to therein. See also Case C-521/09 P *Elf Aquitaine SA* v *Commission*, paragraphs 54 and 55 (not yet published); Case C-90/09 P *General Quimica and Others v Commission* [2011], paragraphs 37 and 38 (not yet published).

762 Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraph 60 and the case law referred to therein. See also Case C-521/09 P *Elf Aquitaine SA* v *Commission*, paragraph 56 (not yet published); Case C-90/09 P *General Quimica and Others v Commission* [2011], paragraph 39 (not yet published).

763 Case C-97/08 P *Akzo Nobel and Others v Commission* [2009] ECR I-8237, paragraph 61 and the case law referred to therein, Case C-521/09 P *Elf Aquitaine SA* v *Commission*, paragraph 57 (not yet published); Case C-90/09 P *General Quimica and Others v Commission* [2011], paragraph 40 (not yet published).

themselves for their unlawful behaviour prior to their acquisition, when they have not been purely and simply absorbed by the acquirer, but continued their activities as subsidiaries.[764] In such a case, the acquirer might only be liable for the conduct of its new subsidiary from the moment of its acquisition if the latter persists in the infringement and liability can be established.[765]

(664) However, for the effective enforcement of competition law it may become necessary, by way of exception from the principle of personal responsibility, to attribute a cartel offence to the new operator of the undertaking which participated in the cartel if the new operator may in fact be regarded as the successor to the original operator, that is if he continues to operate the undertaking which participated in the cartel[766]. This so called "economic continuity" test applies in cases where the legal person responsible for running the undertaking has ceased to exist in law after the infringement has been committed[767] or in cases of internal restructuring of an undertaking where the initial operator has not necessarily ceased to have legal existence but no longer carries out an economic activity on the relevant market and in view of the structural links between the initial operator and the new operator of the undertaking[768].

(665) In certain circumstances the "economic continuity" test also applies in cases when the legal entity which participated in the infringement has not ceased to exist in law, but has preserved its legal personality for the sole purpose of its judicial liquidation after having ceased trading.[769] In such a case the General Court stated that given the fact that the new operator had been formed specifically to guarantee and maintain the continuation of the undertaking involved in the infringement, it must be considered to be economic successor of that undertaking[770].

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764 Case 279/98 *P Cascades v Commission* [2000] ECR I-9693, paragraphs 78 to 80: "*It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking. Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it*." See, to that effect also Case T-349/08, *Uralita, SA v Commission*, not yet published, paragraph 61: "*In accordance with that principle, the Commission may not impute to the purchaser of a legal entity liability for that entity's conduct prior to the purchase, such liability having to be imputed to the company itself where that company still exists.*" See also Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich AG and others v Commission*, [2006] ECR II-05169, paragraph 333.

765 Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission* [1998] ECR II-2111, at paragraph 80.

766 Opinion of Advocate General Kokott in *ETI SpA and others*, paragraphs 75 and 76; and Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 59.

767 Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 145.

768 See judgement in Joined Cases C-204/00 P (and other), *Aalborg Portland A/S a.o. v Commission* [2004] ECR I, 267, paragraphs 354-360, and Case T-43/02 *Jungbunzlauer AG v Commission*, [2006] ECR II, p. 3435, paragraphs 131-133, in Case T-161/05 *Hoechst v Commission*, judgment of 30 September 2009, paragraphs 50 - 52 and 63 and the case law referred to in those paragraphs. See also, *mutatis mutandis*, the judgement in relation to Art. 65(1) and (5) of ECSC Treaty in CaseT-134/94, *NMH Stahlwerke GmbH v Commission* [1999], ECR II-00239, paragraph 126.

769 See judgement in relation to Art. 65(1) and (5) of ECSC Treaty in Case T-134/94, *NMH Stahlwerke GmbH v Commission* [1999], ECR II-00239, paragraphs 123-141.

770 See Case T-134/94 *NMH Stahlwerke GmbH v Commission, cited above*, paragraphs 127-130 and 132.

(666) In its *Jungbunzlauer* judgment, the General Court stated that "the fact that a company continues to exist as a legal entity does not exclude the possibility that, with reference to Community competition law, there may be a transfer of part of the activities of that company to another which becomes responsible for the acts of the former"[771]. The Jungbunzlauer judgment is also important in establishing that economic succession can take place even when a mere function of managing the entire business of the group is transferred to another legal entity, without any transfer of tangible infringing assets[772].

(667) Moreover, the Court of Justice observed in ETI and others that "*a penalty imposed on an undertaking that continues to exist in law, but has ceased economic activity, is likely to have no deterrent effect*"[773]. Advocate General Kokott observed in the same case that "*an internal group restructuring may have the effect that the original operator of the undertaking is changed into an "empty shell". A penalty imposed on it under antitrust law would be ineffective*"[774].

6.2. Application to this case

(668) Applying the principles mentioned in Section 6.1, and as explained in this Section, this Decision is addressed not only to the legal entities whose direct involvement in the infringement emerges from the evidence presented in Section 5, but also to the ultimate and/or intermediate parent companies of these legal entities, which have not succeeded in rebutting the presumption of exercise of decisive influence over the conduct of their wholly or nearly wholly owned subsidiaries and, which are therefore presumed to be part of the same undertaking for the purposes of the application of Article 101 of the Treaty and 53 EEA Agreement. Names of the individuals participating in the infringements described in this Decision along with the name of the undertakings they represented are listed in a separate Annex I.

6.2.1. DSV Air & Sea SAS

(669) The evidence described in Section 4.2 shows that from 19 March 2003 to 19 August 2004, participation in the AMS infringement took place via an employee of DSV Air & Sea SAS (formerly ABX Logistics International (France) SA and later renamed ABX LOGISTICS Air & Sea (France) SAS) ("ABX"). The Commission therefore concludes that ABX is liable for its direct participation in the AMS cartel.

(670) This Decision is therefore addressed to ABX concerning the AMS infringement.

6.2.2. Agility Logistics Limited, Agility Logistics Limited (Hong Kong)

(671) The evidence described in Section 4.2 shows that from 19 March 2003 to 19 August 2004, participation in the AMS infringement took place via employees of Agility Logistics Limited ("ALUK") (formerly GeoLogistics Ltd. (UK)). Therefore, the

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771 Case T-43/02 *Jungbunzlauer AG v. Commission* [2006] ECR II-3435, paragraph 132.

772 Case T-43/02 *Jungbunzlauer AG v. Commission* [2006] ECR II-3435, paragraph 131.

773 Case C-280/06 *Autorità Garante della Concorrenza e del Mercato v Ente tabacchi italiani – ETI SpA and others*, [2007] ECR I-1089, paragraph 40.

774 Opinion of Advocate General Kokott in Case C-280/06 *ETI SpA and others*, paragraph 79.

Commission concludes that ALUK is liable for its direct participation in the AMS cartel.

(672) Furthermore, the evidence described in Section 4.4 shows that throughout the period from 9 August 2005 to 21 May 2007, participation in the PSS infringement took place via an employee of Agility Logistics Limited (Hong Kong) ("ALHK") (formerly GeoLogistics Ltd. (Hong Kong)). Therefore, the Commission concludes that ALHK is liable for its direct participation in the PSS cartel.

(673) This Decision is therefore addressed to ALUK concerning the AMS infringement and ALHK concerning the PSS infringement.

6.2.3. Beijing Kintetsu World Express Co., Ltd.

(674) The evidence described in Section 4.3 shows that throughout the period of infringement from 27 July 2005 to 13 March 2006, participation in the CAF infringement took place via employees of Beijing Kintetsu World Express Co., Ltd. ("KICN").Therefore, the Commission concludes that KICN is liable for its direct participation in the CAF cartel.

(675) This Decision is therefore addressed to KICN concerning the CAF infringement.

6.2.4. CEVA Freight (UK) Limited, CEVA Freight Shanghai Limited, EGL, Inc.

(676) The evidence described in Section 4.1 shows that from 1 October 2002 to 10 March 2003, participation in the NES infringement took place via employees of CEVA Freight (UK) Limited (formerly EGL Eagle Global Logistics (UK) Limited) ("CUK") and thus, the Commission concludes that CUK is liable for its direct participation in the NES cartel.

(677) Furthermore, the evidence described in Section 4.3 shows that throughout the period of infringement from 27 July 2005 to 13 March 2006, participation in the CAF infringement took place via employees of CEVA Freight Shanghai Limited (formerly EGL Eagle Global Logistics Shanghai Limited) ("CS").Therefore, the Commission concludes that CS is liable for its direct participation in the CAF cartel.

(678) Confidential Annex II accessible to CEVA Freight (UK) Limited, CEVA Freight Shanghai Limited and EGL, Inc.

(679) On 2 August 2007, EGL, Inc. ("EGL") was acquired by CEVA Group Plc through an agreement and plan of merger among CEVA Group Plc, CEVA Texas Holdco Inc. (a wholly-owned subsidiary of CEVA Group Plc) and EGL[775]. Based on the agreement, CEVA Texas Holdco Inc. was merged with and into EGL, with EGL surviving that merger and thus remaining intact. In line with the case-law referred to in Section 6.1 a presumption therefore exists that EGL exercised decisive influence over CUK and CS and consequently, that (i) CUK and EGL formed part of the same undertaking that committed the NES infringement and (ii) CS and EGL formed part of the same undertaking that committed the CAF infringement.

775 […].

(680) Moreover, there are further elements that corroborate the presumption that EGL exercised decisive influence over CUK and CS during the relevant infringement periods. The said presumption was not contested by EGL.

(681) Confidential Annex II accessible to CEVA Freight (UK) Limited, CEVA Freight Shanghai Limited and EGL, Inc.

(682) Confidential Annex II accessible to CEVA Freight (UK) Limited, CEVA Freight Shanghai Limited and EGL, Inc.

(683) Confidential Annex II accessible to CEVA Freight (UK) Limited, CEVA Freight Shanghai Limited and EGL, Inc.

(684) Accordingly, in respect of the NES cartel, the Commission concludes that EGL is jointly and severally liable with CUK for the whole infringement period. Furthermore, regarding the CAF cartel, the Commission concludes that EGL is jointly and severally liable with CS, equally for the whole infringement period.

(685) This Decision is therefore addressed to CUK concerning the NES infringement, CS concerning the CAF infringement and EGL concerning both infringements.

6.2.5. DHL Global Forwarding (UK) Limited, DHL Management (Schweiz) AG, DHL Global Forwarding (China) Co. Ltd., DHL Global Forwarding (Hong Kong) Limited, Deutsche Post AG

(686) The evidence described in Section 4.1 shows that in the period from 1 October 2002 to 10 March 2003, participation in the NES infringement took place via employees of DHL Global Forwarding (UK) Limited (formerly Danzas Limited and DHL Logistics (UK) Ltd.) ("DPUK") and thus the Commission concludes that DPUK is liable for its direct participation in the NES cartel.

(687) Furthermore, the evidence described in Section 4.2 shows that from 19 March 2003 to 19 August 2004, participation in the AMS infringement took place via employees of DHL Management (Schweiz) AG ("DPUS"). Therefore, the Commission concludes that DPUS is liable for its direct participation in the AMS cartel.

(688) The evidence described in Section 4.3 further shows that from 27 July 2005 to 13 March 2006, participation in the CAF infringement took place via employees of DHL Global Forwarding (China) Co. Ltd. (formerly Danzas Z.F. Freight Agency Co., Ltd. and later renamed Danzas Zhong Fu Freight Agency Co. Ltd.) ("DPCN"). Therefore, the Commission concludes that DPCN is liable for its direct participation in the CAF cartel.

(689) Finally, the evidence described in Section 4.4 shows that throughout the period from 9 August 2005 to 21 May 2007, participation in the PSS infringement took place via employees of DHL Global Forwarding (Hong Kong) Limited (formerly Danzas AEI (HK) Limited) ("DPHK"). Therefore, the Commission concludes that DPHK is liable for its direct participation in the PSS cartel.

(690) Confidential Annex II accessible to DHL Global Forwarding (UK) Limited, DHL Management (Schweiz) AG, DHL Global Forwarding (Hong Kong) Limited and Deutsche Post AG

(691) In line with the case-law referred to in Section 6.1 a presumption therefore exists that Deutsche Post AG ("DPAG") exercised decisive influence over DPUS, DPUK and DPHK and consequently, that (i) DPUK and DPAG formed part of the same undertaking that committed the NES infringement, (ii) DPUS and DPAG formed part of the same undertaking that committed the AMS infringement and (iii) DPHK and DPAG formed part of the same undertaking that committed the PSS infringement.

(692) Moreover, there are further elements that corroborate the presumption that DPAG exercised decisive influence over DPUS, DPUK and DPHK during the relevant infringement periods. The said presumption was not contested by DPAG.

(693) Confidential Annex II accessible to DHL Global Forwarding (UK) Limited, DHL Management (Schweiz) AG, DHL Global Forwarding (Hong Kong) Limited and Deutsche Post AG

(694) Accordingly, (i) in relation to the NES cartel, the Commission concludes that DPAG is jointly and severally liable with DPUK, (ii) in respect of the AMS cartel, the Commission concludes that DPAG is jointly and severally liable with DPUS and (iii) regarding the PSS cartel, the Commission concludes that DPAG is jointly and severally liable with DPHK - in all three instances for the whole infringement period.

(695) For the reasons referred to in this Section, this Decision is addressed to DPUK concerning the NES infringement, DPUS concerning the AMS infringement, DPCN concerning the CAF infringement, DPHK concerning the PSS infringement and DPAG concerning the NES, AMS and PSS infringement.

6.2.6. Exel Freight Management (UK) Limited, Exel Group Holdings (Nederland) B.V., DHL Logistics (China) Co., Ltd., DHL Supply Chain (Hong Kong) Limited, Exel Limited

(696) The evidence described in Section 4.1 shows that throughout the period from 1 October 2002 to 10 March 2003, participation in the NES infringement took place via an employee of Exel Freight Management (UK) Limited ("EXUK") and thus the Commission concludes that EXUK is liable for its direct participation in the NES cartel.

(697) Furthermore, the evidence described in Section 4.2 shows that participation in the AMS infringement took place from 25 March 2003 to 19 August 2004 via employees of EXUK and from 21 October 2003 to 19 August 2004 via employees of Exel Group Holdings (Nederland) B.V. ("EXNL"). Therefore, the Commission concludes that EXUK and EXNL are liable for their direct participation in the AMS cartel.

(698) The evidence described in Section 4.3 shows further that from 27 July 2005 to 13 March 2006, participation in the CAF infringement took place via employees of DHL Logistics (China) Co., Ltd. (formerly Exel-Sinotrans Freight Forwarding Co. Ltd.) ("EXCN"). Therefore, the Commission concludes that EXCN is liable for its direct participation in the CAF cartel.

(699) Finally, the evidence described in Section 4.4 throughout the period from 9 August 2005 to 13 January 2006, participation in the PSS infringement took place via employees of DHL Supply Chain (Hong Kong) Limited (formerly Exel Hong Kong

Limited and DHL Exel Supply Chain (Hong Kong) Limited) ("EXHK"). Therefore, the Commission concludes that EXHK is liable for its direct participation in the PSS cartel.

(700) Confidential Annex II accessible to Exel Freight Management (UK) Limited, Exel Group Holdings (Nederland) B.V., DHL Supply Chain (Hong Kong) Limited and Exel Limited. In line with the case-law referred to in Section 6.1 a presumption therefore exists that Exel Limited ("EXEL") exercised decisive influence over EXUK, EXNL and EXHK and consequently, that (i) EXUK and EXEL formed part of the same undertaking that committed the NES infringement, (ii) EXUK, EXNL and EXEL formed part of the same undertaking that committed the AMS infringement and (iii) EXHK and EXEL formed part of the same undertaking that committed the PSS infringement.

(701) Confidential Annex II accessible to Exel Freight Management (UK) Limited, Exel Group Holdings (Nederland) B.V., DHL Supply Chain (Hong Kong) Limited and Exel Limited

(702) Accordingly, in relation to the NES cartel, the Commission concludes that EXEL is jointly and severally liable with EXUK for the whole infringement period. Furthermore, in respect of the AMS cartel, the Commission concludes that EXEL is jointly and severally liable with (i) EXUK for the period 25 March 2003 to 19 August 2004 and with (ii) EXNL for the period 21 October 2003 to 19 August 2004. Finally, in respect of the PSS cartel, the Commission concludes that EXEL is jointly and severally liable with EXHK for the whole infringement period.

(703) For the reasons mentioned in this Section, this Decision is addressed to EXUK concerning the NES and AMS infringement, EXNL concerning the AMS infringement, EXHK concerning the PSS infringement, EXCN concerning the CAF infringement and EXEL concerning the NES, AMS and PSS infringement.

6.2.7. Expeditors Hong Kong Ltd., Expeditors International of Washington, Inc.

(704) The evidence described in Section 4.4 shows that throughout the period of infringement from 21 September 2005 to 23 June 2006, participation in the PSS infringement took place via employees of Expeditors Hong Kong Ltd. ("Expeditors HK"). Therefore the Commission concludes that Expeditors HK is liable for its direct participation in the PSS cartel.

(705) Throughout the infringement period identified above Expeditors International of Washington, Inc. ("EI") owned indirectly 100% of Expeditors HK ([…]).[776] In line with the case-law referred to in Section 6.1 a presumption therefore exists that EI exercised decisive influence over Expeditors HK and consequently, that Expeditors HK and EI formed part of the same undertaking that committed the infringement.

(706) Moreover, there are further elements that corroborate the presumption that EI exercised decisive influence over Expeditors HK during the relevant infringement period. The said presumption was not contested by EI.

[776] […].

(707) Confidential Annex II accessible to Expeditors Hong Kong Ltd. and Expeditors International of Washington, Inc.

(708) Confidential Annex II accessible to Expeditors Hong Kong Ltd. and Expeditors International of Washington, Inc.

(709) Accordingly, the Commission concludes that EI is jointly and severally liable with Expeditors HK for the whole infringement period.

(710) This Decision is therefore addressed to Expeditors HK and EI concerning the PSS infringement.

6.2.8. Hellmann Worldwide Logistics Ltd. Hong Kong; Hellmann Worldwide Logistics GmbH & Co. KG

(711) The evidence described in Section 4.4 shows that from 6 December 2005 to 21 May 2007, participation in the PSS infringement took place via employees of Hellmann Worldwide Logistics Ltd. Hong Kong ("HHK"). Therefore, the Commission concludes that HHK is liable for its direct participation in the PSS cartel.

(712) Throughout the infringement period identified above, Hellmann Worldwide Logistics GmbH & Co. KG ("HWL") owned indirectly 100% of HHK (via Hellmann International Forwarders GmbH).[777] In line with the case-law referred to in Section 6.1 a presumption therefore exists that HWL exercised decisive influence over HHK and consequently, that HHK and HWL formed part of the same undertaking that committed the PSS infringement.

(713) Moreover, there are further elements that corroborate the presumption that HWL exercised decisive influence over HHK during the relevant infringement period. The said presumption was not contested by HWL.

(714) Confidential Annex II accessible to Hellmann Worldwide Logistics Ltd. Hong Kong and Hellmann Worldwide Logistics GmbH & Co. KG

(715) Confidential Annex II accessible to Hellmann Worldwide Logistics Ltd. Hong Kong and Hellmann Worldwide Logistics GmbH & Co. KG

(716) Confidential Annex II accessible to Hellmann Worldwide Logistics Ltd. Hong Kong and Hellmann Worldwide Logistics GmbH & Co. KG

(717) Accordingly, in relation to the PSS cartel, the Commission concludes that HWL is jointly and severally liable with HHK for the whole infringement period.

(718) This Decision is therefore addressed to HHK and HWL concerning the PSS infringement.

[777] […].

6.2.9. Kuehne + Nagel Ltd. (UK), Kuehne + Nagel Management AG, Kuehne + Nagel Ltd. (Shanghai), Kuehne + Nagel Ltd. (Hong Kong), Kuehne + Nagel International AG

(719) The evidence described in Section 4.1 shows that throughout the period from 1 October 2002 to 10 March 2003, participation in the NES infringement took place via an employee of Kuehne + Nagel Ltd. *(UK)* ("KNUK") and thus the Commission concludes that KNUK is liable for its direct participation in the NES cartel.

(720) Furthermore, the evidence described in Section 4.2 shows that from 8 April 2003 to 19 August 2004, participation in the AMS infringement took place via employees of Kuehne + Nagel Management AG ("KNM"). Thus, the Commission concludes that KNM is liable for its direct participation in the AMS cartel.

(721) The evidence described in Section 4.3 further shows that from 27 July 2005 to 13 March 2006, participation in the CAF infringement took place via employees of Kuehne + Nagel Ltd. *(Shanghai)* ("KNCN"). Therefore, the Commission concludes that KNCN is liable for its direct participation in the CAF cartel.

(722) Finally, the evidence described in Section 4.4 shows that throughout the period from 9 August 2005 to 21 May 2007, participation in the PSS infringement took place via employees of Kuehne + Nagel Ltd. *(Hong Kong)* ("KNHK"). Therefore, the Commission concludes that KNHK is liable for its direct participation in the PSS cartel.

(723) Confidential Annex II accessible to Kuehne + Nagel Ltd. *(UK)*, Kuehne + Nagel Management AG, Kuehne + Nagel Ltd. *(Shanghai)*, Kuehne + Nagel Ltd. *(Hong Kong)* and Kuehne + Nagel International AG

(724) In line with the case-law referred to in Section 6.1 a presumption therefore exists that Kuehne + Nagel International AG ("KNI") exercised decisive influence over KNUK, KNM, KNCN and KNHK and consequently, that (i) KNUK and KNI formed part of the same undertaking that committed the NES infringement, (ii) KNM and KNI formed part of the same undertaking that committed the AMS infringement, (iii) KNCN and KNI formed part of the same undertaking that committed the CAF infringement and (iv) KNHK and KNI formed part of the same undertaking that committed the PSS infringement.

(725) Moreover, there are further elements that corroborate the presumption that KNI exercised decisive influence over KNM, KNUK, KNCN and KNHK during the relevant infringement periods. The said presumption was not contested by KNI.

(726) Confidential Annex II accessible to Kuehne + Nagel Ltd. *(UK)*, Kuehne + Nagel Management AG, Kuehne + Nagel Ltd. *(Shanghai)*, Kuehne + Nagel Ltd. *(Hong Kong)* and Kuehne + Nagel International AG

(727) Confidential Annex II accessible to Kuehne + Nagel Ltd. *(UK)*, Kuehne + Nagel Management AG, Kuehne + Nagel Ltd. *(Shanghai)*, Kuehne + Nagel Ltd. *(Hong Kong)* and Kuehne + Nagel International AG

(728) Confidential Annex II accessible to Kuehne + Nagel Ltd. *(UK)*, Kuehne + Nagel Management AG, Kuehne + Nagel Ltd. *(Shanghai)*, Kuehne + Nagel Ltd. *(Hong Kong)* and Kuehne + Nagel International AG

(729) Confidential Annex II accessible to Kuehne + Nagel Ltd. *(UK)*, Kuehne + Nagel Management AG, Kuehne + Nagel Ltd. *(Shanghai)*, Kuehne + Nagel Ltd. *(Hong Kong)* and Kuehne + Nagel International AG

(730) Accordingly, (i) regarding the NES cartel, the Commission concludes that KNI is jointly and severally liable with KNUK, (ii) in respect of the AMS cartel, the Commission concludes that KNI is jointly and severally liable with KNM, (iii) in relation to the CAF cartel, the Commission concludes that KNI is jointly and severally liable with KNCN and (iv) in respect of the PSS cartel, the Commission concludes that KNI is jointly and severally liable with KNHK - in all four instances for the whole infringement period.

(731) For the reasons mentioned in this Section, this Decision is addressed to KNUK concerning the NES infringement, KNM concerning the AMS infringement, KNCN concerning the CAF infringement, KNHK concerning the PSS infringement and KNI concerning all four infringements set out in this Decision.

6.2.10. Nippon Express (China) Co., Ltd.

(732) The evidence described in Section 4.3 shows that from 27 July 2005 until 31 October 2005, participation in the CAF infringement took place via employees of Nippon Express (China) Co., Ltd. ("Nippon China") (formerly Uni Sky Express Service Co., Ltd.). The Commission therefore concludes that Nippon China is liable for its direct participation in the CAF cartel.

(733) This Decision is therefore addressed to Nippon China with respect to the CAF cartel.

6.2.11. Panalpina Management AG, Panalpina China Ltd, Panalpina World Transport (Holding) Ltd

(734) The evidence described in Section 4.2 shows that from 19 March 2003 to 19 August 2004, participation in the AMS infringement took place via an employee of Panalpina Management AG ("PAG"). Thus, the Commission concludes that PAG is liable for its direct participation in the AMS cartel.

(735) Furthermore, the evidence described in Sections 4.3 and 4.4 respectively shows that (i) throughout the period from 27 July 2005 to 9 December 2005, participation in the CAF infringement and (ii) throughout the period from 9 August 2005 to 21 May 2007 participation in the PSS infringement took place via employees of Panalpina China Ltd ("PCN"). Therefore, the Commission concludes that PCN is liable for its direct participation in the CAF cartel and the PSS cartel.

(736) Throughout the infringement periods identified above Panalpina World Transport (Holding) Ltd ("PWT") owned directly 100% of PAG and 99.88% of PCN.[778] In line with the case-law referred to in Section 6.1 a presumption therefore exists that PWT exercised decisive influence over PAG and PCN and consequently, that (i) PAG and PWT formed part of the same undertaking that committed the AMS infringement and (ii) PCN and PWT formed part of the same undertaking that committed the CAF and the PSS infringement.

[778] […].

(737) Moreover, there are further elements that corroborate the presumption that PWT exercised decisive influence over PAG and PCN during the relevant infringement periods. The said presumption was not rebutted successfully by PWT (see Recitals (792) to (800).

(738) Confidential Annex II accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(739) Confidential Annex II accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(740) Confidential Annex II accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(741) Accordingly, (i) in respect of the AMS cartel, the Commission concludes that PWT is jointly and severally liable with PAG and (ii) regarding the CAF cartel and the PSS cartel, the Commission concludes that PWT is jointly and severally liable with PCN - in all instances for the whole infringement period.

(742) For the reasons mentioned in this Section, this Decision is addressed to PAG concerning the AMS infringement, PCN concerning the CAF and PSS infringements and PWT concerning the AMS, CAF and PSS infringements.

6.2.12. Schenker Limited, Schenker AG, Schenker China Ltd., Schenker International (H.K.) Ltd., Deutsche Bahn AG

(743) The evidence described in Section 4.2 shows that from 25 March 2003 to 19 August 2004, participation in the AMS infringement took place via employees of Schenker AG ("SAG"). Therefore, the Commission concludes that SAG is liable for its direct participation in the AMS cartel.

(744) Furthermore, the evidence described in Section 4.3 shows that from 29 July 2005 to 13 March 2006, participation in the CAF infringement took place via employees of Schenker China Ltd. ("SCN"). Therefore, the Commission concludes that SCN is liable for its direct participation in the CAF cartel.

(745) Finally, the evidence described in Section 4.4 shows that throughout the period from 3 September 2005 to 23 June 2006, participation in the PSS infringement took place via employees of Schenker International (H.K.) Ltd. ("SHK"). Therefore, the Commission concludes that SHK is liable for its direct participation in the PSS cartel.

(746) Throughout the infringement periods identified above Deutsche Bahn ("DB") owned indirectly 100% of SAG[779] ([…]), SCN ([…]) and SHK ([…]).[780]

(747) In line with the case-law referred to in Section 6.1 a presumption therefore exists that DB exercised decisive influence over SAG, SCN and SHK and consequently, that (i) SAG and DB formed part of the same undertaking that committed the AMS

[779] […]
[780] […].

infringement, (ii) SCN and DB formed part of the same undertaking that committed the CAF infringement and (iii) SHK and DB formed part of the same undertaking that committed the PSS infringement.

(748) Moreover, there are further elements that corroborate the presumption that DB exercised decisive influence over SAG, SCN and SHK during the relevant infringement periods. The said presumption was not contested by DB.

(749) Confidential Annex II accessible to Schenker AG, Schenker China Ltd., Schenker International (H.K.) Ltd. and Deutsche Bahn AG

(750) Confidential Annex II accessible to Schenker AG, Schenker China Ltd., Schenker International (H.K.) Ltd. and Deutsche Bahn AG

(751) Confidential Annex II accessible to Schenker AG, Schenker China Ltd., Schenker International (H.K.) Ltd. and Deutsche Bahn AG

(752) Confidential Annex II accessible to Schenker AG, Schenker China Ltd., Schenker International (H.K.) Ltd. and Deutsche Bahn AG

(753) Accordingly, (i) in respect of the AMS cartel, the Commission concludes that DB is jointly and severally liable with SAG, (ii) in relation to the CAF cartel, the Commission concludes that DB is jointly and severally liable with SCN and (iii) regarding the PSS cartel, the Commission concludes that DB is jointly and severally liable with SHK - in all three instances for the whole infringement period.

(754) Furthermore, the evidence described in Section 4.1 shows that throughout the period from 1 October 2002 to 10 March 2003, participation in the NES infringement took place via employees of BAX Global Ltd. (UK) ("BUK"). All activities of BUK were transferred to one of its affiliated companies, Schenker Limited ("SUK") […]. As a result of the transaction, BUK was inactive from 28 February 2007 and ceased to exist before the date of this Decision[781]. In view of the above as well as having regard to the case-law referred to in Section 6.1 thus the Commission concludes that SUK is liable for the participation of BUK in the NES cartel as an economic successor of the latter. For the sake of clarity DB is not held jointly and severally liable with SUK for SUK's liability as a successor to BUK.

(755) Finally, the evidence described in Section 4.3 shows that throughout the period from 27 July 2005 to 13 March 2006 participation in the CAF infringement took place via employees of BAX Global (China) Co. Ltd. ("BCN"). Therefore, BCN should be held liable for its direct participation in the CAF cartel. However, BCN was deregistered and liquidated in January 2009[782] without any legal successor and thus can no longer be addressee of this Decision. However, […], BCN entered into […] with one of its affiliated companies, SCN, pursuant to which the latter became its successor-in-title[783]. In view of the reasons referred to in this Section and in the light of the case-law referred to in Section 6.1, the Commission concludes that SCN is liable for the participation of BCN in the CAF cartel as an economic successor of the

781 This information was provided during the Oral Hearing held in this case by legal advisors of DB.
782 […].
783 […].

latter. For the sake of clarity DB is not held jointly and severally liable with SCN for SCN's liability as a successor to BCN.

(756) For the reasons mentioned in this Section, this Decision is addressed to SUK regarding the NES infringement, SAG concerning the AMS infringement, SCN concerning the CAF infringement, SHK concerning the PSS infringement and DB concerning the AMS, CAF and PSS infringement.

6.2.13. Toll Global Forwarding (Hong Kong) Limited, Toll Global Forwarding Limited

(757) The evidence described in Section 4.4 shows that throughout the period of infringement from 9 August 2005 to 21 May 2007, participation in the PSS infringement took place via an employee of Toll Global Forwarding (Hong Kong) Limited (formerly BALtrans Logistics (Hong Kong) Ltd.) ("Toll HK"). Therefore the Commission concludes that Toll HK is liable for its direct participation in the PSS cartel.

(758) Throughout the infringement period identified above Toll Global Forwarding Limited (formerly BALtrans Holdings Limited) ("Toll") owned indirectly 100% of Toll HK (via BJ Logistics Holdings Ltd[784]).[785] In line with the case-law referred to in Section 6.1 a presumption therefore exists that Toll exercised decisive influence over Toll HK and consequently, that Toll HK and Toll formed part of the same undertaking that committed the infringement.

(759) Moreover, there are further elements that corroborate the presumption that Toll exercised decisive influence over Toll HK during the relevant infringement period. The said presumption was not contested by Toll.

(760) Confidential Annex II accessible to Toll Global Forwarding (Hong Kong) Limited and Toll Global Forwarding Limited

(761) Confidential Annex II accessible to Toll Global Forwarding (Hong Kong) Limited and Toll Global Forwarding Limited

(762) Confidential Annex II accessible to Toll Global Forwarding (Hong Kong) Limited and Toll Global Forwarding Limited

(763) Confidential Annex II accessible to Toll Global Forwarding (Hong Kong) Limited and Toll Global Forwarding Limited

(764) Accordingly, the Commission concludes that Toll is jointly and severally liable with Toll HK for the whole infringement period.

(765) This Decision is therefore addressed to Toll HK and Toll concerning the PSS infringement.

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784 Toll owned Toll HK via JLS (HK) Limited and BJ Logistics Holdings Ltd until 19 October 2005, when JLS (HK) Limited transferred all of its shares in Toll HK to BJ Logistics Holdings Ltd.

785 […]

6.2.14. UPS Supply Chain Solutions, Inc., UPS SCS (China) Ltd., United Parcel Service, Inc.

(766) The evidence described in Section 4.2 shows that from 19 March 2003 to 21 October 2003, participation in the AMS infringement took place via an employee of UPS Supply Chain Solutions, Inc. ("UPS SCS"). Therefore, the Commission concludes that UPS SCS is liable for its direct participation in the AMS cartel.

(767) The evidence described in Section 4.3 further shows that participation in the CAF infringement from 27 July 2005 to 13 March 2006 took place via employees/individual responsible for business and operations[786] of UPS SCS (China) Ltd. ("UPS CN"). Therefore, the Commission concludes that UPS CN is liable for its direct participation in the CAF cartel during the abovementioned period.

(768) Throughout the infringement periods identified above United Parcel Service, Inc. ("UPS") held close to 100% of shares and voting rights of UPS SCS and UPS CN.[787] In line with the case-law referred to in Section 6.1 a presumption therefore exists that UPS exercised decisive influence over UPS SCS and UPS CN and consequently, that (i) UPS SCS and UPS formed part of the same undertaking that committed the AMS infringement, and (ii) UPS CN and UPS formed part of the same undertaking that committed the CAF infringement for the period 27 July 2005 - 13 March 2006. The said presumption was not contested by UPS.

(769) Accordingly, in respect of the AMS cartel, the Commission concludes that UPS is jointly and severally liable with UPS SCS for the whole infringement period. Furthermore in relation to the CAF infringement, the Commission concludes that UPS is jointly and severally liable with UPS CN for the whole infringement period.

(770) Furthermore, the evidence described in Section 4.1 shows that throughout the period from 1 October 2002 to 10 March 2003, participation in the NES infringement took place via employees of Emery Air Freight Corporation ("Emery"), a company renamed to Menlo Worldwide Forwarding, Inc. ("Menlo") in 2003 and acquired by UPS in December 2004. Following the acquisition by UPS, Menlo merged into UPS SCS, effective 1 May 2005, and thereupon ceased to exist[788]. Therefore, in view of the aforesaid facts as well as in the light of the case-law referred to in Section 6.1, the Commission concludes that UPS SCS is liable for the participation of Emery in the NES cartel as a legal and economic successor of the latter.

(771) For the reasons mentioned in this Section, this Decision is addressed to UPS SCS concerning the NES and AMS infringement, UPS CN concerning the CAF infringement and UPS concerning the AMS and CAF infringement.

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786 UPS Europe NV/SA reply to request for information dated 18 February 2009, Annex 10, page 8.

787 […]. UPS Europe NV/SA has confirmed in the email of 18 May 2009 ([…]) that UPS held throughout the infringement periods directly or indirectly close to 100% without providing detailed charts portraying the full ownership chain and all the changes in shareholdings that occurred throughout the relevant periods.

788 […].

6.2.15. UTi Worldwide (UK) Ltd, UTi Nederland B.V., UTi Worldwide, Inc.

(772) The evidence described in Section 4.2 shows that participation in the AMS infringement took place (i) from 19 March 2003 to 21 October 2003, via an employee ([…]) of UTi Worldwide (UK) Ltd ("UTi UK") and (ii) from 21 October 2003 to 19 August 2004 via an employee ([…]) of UTi Nederland B.V. ("UTi NL")[789]. The Commission therefore concludes that UTi UK and UTi NL are liable for their direct participation in the AMS cartel.

(773) Confidential Annex II accessible to UTi Worldwide (UK) Ltd, UTi Nederland B.V. and UTi Worldwide, Inc.

(774) In line with the case-law referred to in Section 6.1 a presumption therefore exists that UTi Worldwide, Inc. ("UTi") exercised decisive influence over UTi UK and UTi NL and consequently, that (i) UTi UK and UTi formed part of the same undertaking that committed the AMS infringement during the period from 19 March 2003 to 21 October 2003 and (ii) UTi NL and UTi formed part of the same undertaking that committed the AMS infringement during the period from 21 October 2003 to 19 August 2004.

(775) Confidential Annex II accessible to UTi Worldwide (UK) Ltd, UTi Nederland B.V. and UTi Worldwide, Inc.

(776) Accordingly, the Commission concludes that UTi is jointly and severally liable for participation in the AMS infringement (i) with UTi UK for the period 19 March 2003 to 21 October 2003 (ii) with UTi NL for the period 21 October 2003 to 19 August 2004.

(777) This Decision is therefore addressed to UTi UK, UTi NL and UTi concerning the AMS infringement.

6.2.16. Yusen Shenda Air & Sea Service (Shanghai) Ltd.

(778) The evidence described in section 4.3 shows that from 27 July 2005 until 31 October 2005, participation in the CAF infringement took place via employees of Yusen Shenda Air & Sea Service (Shanghai) Ltd. ("Yusen Shanghai"). The Commission therefore concludes that Yusen Shanghai is liable for its direct participation in the CAF cartel.

(779) This Decision is therefore addressed to Yusen Shanghai concerning the CAF infringement.

[789] UTi's email dated 20 May 2009 addressed to the Commission – clarification to the UTi Deutschland GmbH's reply to request for information dated 20 March 2009 ([…]).

6.3. Arguments of the parties and the Commission's assessment

Liability of former parent companies

(780) Agility argues[790] that for the part of the PSS infringement period prior to the acquisition of Agility by PWC (namely. between 9 August 2005 and 2 September 2005), Questor group ("Questor")/Alix Partners (allegedly owner of Questor) and Top Riches Limited jointly exercised control over the operations of ALHK and thus should be held jointly and severally liable with ALHK for the alleged PSS infringement for that period. Moreover, Agility suggests that Top Riches Limited, which held a […]% stake in ALHK until 7 May 2007 continued to exercise decisive influence over the latter and therefore in effect should be held liable for the alleged PSS infringement until the said date. Agility stresses that the assessment of parental liability should be carried out in relation to all companies that were parent companies of the infringing legal entity during the period of the alleged involvement, irrespective of whether the ownership is limited to a short period.

(781) Furthermore, Agility argues[791] that during the material period of the AMS cartel, Questor controlled and exercised decisive influence over ALUK. It also argues that Alix Partners as the owner of Questor during the relevant period should be regarded as forming part of the same economic entity for the purposes of the assessment of parental liability. According to Agility liability for the AMS cartel should therefore be attributed to Questor and/or Alix Partners as well.

(782) The Commission observes in relation to Agility that in respect of the entity that might have been parent company of the infringing Agility entities during the material infringement periods, but which does not have a controlling stake in the infringing companies any longer (former parent company), the Commission applied its discretion in not attributing liability to any such potential former parent across the infringements concerned (AMS cartel, PSS cartel)[792]. Furthermore, in the case of Agility, where parental liability could have been hypothetically attributed to both, the former parent and the current parent company (PWC), the Commission refrained from imputation of liability to the latter company as well. Moreover, Agility is not discriminated against any other Decision addressee in terms of non-attribution of liability to former parent companies[793].

(783) For the sake of clarity, the current parent companies of the companies having participated directly in the infringement were only addressed in this Decision and held jointly and severally liable, if they were found to have exercised decisive influence over the infringing companies during the entire material cartel periods. The Commission observes that in the case of Agility, no current parent company was

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790 Agility's reply to the Statement of Objections, page 62-65.

791 Agility's reply to the Statement of Objections, page 19-27.

792 See Joined Cases T-204/08 and T-212/08 *Team Relocations and Others v Commission*, not yet reported, paragraph 156; Case T-349/08 *Uralita v Commission*, not yet reported, paragraphs 59 and 60 and case law cited therein.

793 Except for the cases of internal restructuring (that means transfer of shares held in the direct cartel participant from the parent company addressed in this decision to a new parent company, while all, the direct cartel participant, the former and current parent company belong to the same undertaking), which could have occurred between the end of the infringement(s) and the date of this Decision..

found jointly and severally liable with the company having participated directly in the infringement.

(784) In light of the foregoing, arguments submitted by Agility have to be dismissed as unfounded.

Succession of liability

(785) With respect to the NES infringement and DB, the Commission addresses the Decision solely to the economic successor of the original infringing entity. According to DB, the infringing entity (BUK) was owned by Brink's during the relevant NES infringement period. DB argues[794] that the Commission's assessment was flawed in that DB (namely SUK) and not Brink's as a former parent company is held liable for the infringement. DB suggests that the Commission incorrectly relied on the principle of economic continuity, while ignoring the existing personal responsibility of Brink's which would render the former principle inapplicable. According to DB, Brink's as the initial operator of the undertaking which participated in the alleged cartel still continues to exist in law and thus it should be held liable for the NES cartel (if any), instead of SUK.

(786) Similarly, in relation to the CAF cartel DB claims[795] that the Commission should hold Brink's (former parent company) liable for the conduct of BCN, rather than SCN (economic successor of BCN), currently part of the DB group.

(787) Furthermore, the Commission addresses the Decision to UPS SCS holding it liable in its capacity as a legal and economic successor for the NES infringement committed by Emery (later renamed Menlo). UPS contests[796] the Commission's assessment in relation to attribution of liability on similar grounds as DB. Along the same lines as DB, UPS argues that the economic continuity principle does not apply (entity running the cartel undertaking still exists) and that liability rests with the former parent company controlling the infringing entity at the time of the infringement, namely Con-way.

(788) As a preliminary observation, the Commission holds that a clear distinction has to be drawn between the determination of the legal person responsible for the undertaking that participated in a cartel infringement and subsequent possibility of imputing liability of an infringing subsidiary's conduct to the parent company.

(789) According to the settled case-law, when an entity infringes competition rules, it falls to that entity, by virtue of the principle of personal responsibility, to answer for that infringement[797]. However both, DB and UPS appear to attribute in their argumentation personal responsibility for the infringements to the former parent companies**.** In this regard, it is important to stress that it has consistently been held

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794 DB's reply to the Statement of Objections, page 23-28.

795 DB's reply to the Statement of Objections, page 77-78.

796 UPS's reply to the Statement of Objections, page 4-8, as well as Letter of 23 July 2010 addressed to the Commission.

797 Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank AG and others v Commission* [2009] ECR I-8681, paragraph 77; See also, to that effect, Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 145, and Case C-279/98 P *Cascades v Commission* [2000] ECR I-9693, paragraph 78.

that the Commission has the power to impute liability for unlawful conduct to the parent company, to the subsidiary, or to the parent company jointly and severally with its subsidiary, which formed part of the undertaking during the period of the infringement**.**[798]

(790) In light of the above, in this case the Commission aimed first and foremost at identifying and holding liable the entities, which were authors of the infringement or their successors, where applicable. In cases referred to in Recitals (785)-(787)) the legal persons directly implicated in the infringements (BUK, BCN and Menlo respectively) ceased to exist with legal and economic succession upon absorption (UPS scenario) or economic succession […] (DB scenario). In these circumstances, it is necessary, to establish in so far as legal succession is involved, the legal person, which ensured legal continuity of the rights and obligations of the authors of infringement[799]. In the event of economic succession, it is necessary to identify the combination of physical and human elements which contributed to the infringement and then to identify the person who has become responsible for their operation, so as to avoid the result that, because of the disappearance of the person responsible for its operation when the infringement was committed, the undertaking may evade liability for it[800]. If no possibility of imposing a penalty on an entity other than the one which committed the infringement were foreseen, it would jeopardise the objective of suppressing conduct that infringes the competition rules and preventing its reoccurrence by means of deterrent penalties[801]. In light of the said principles, the Commission identified the successors of the original entities and holds them liable as set out in Recitals (754), (755) and (770).

(791) Liability could have been hypothetically attributed to the former parent companies of the infringing entities jointly and severally with the successors of the infringing entities under the parental liability principles. However, the Commission is not required to ascertain whether the infringing entity acted autonomously or in accordance with the instructions of a parent company[802]. In the current case, the Commission has decided not to attribute liability to any of the former parent companies of the entities involved in the respective infringements (see Recital (782)).

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798 Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 331 and the case-law cited, confirmed by the judgment of the Court of Justice of 24 September 2009, in Joint Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Bank der österreichischen Sparkassen v Commission*, [2009] ECR I-8681, paragraphs 81 and 82.

799 See Case T-349/08, *Uralita, SA v Commission*, not yet published, paragraphs 65, 67.

800 Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich AG and others v Commission*, [2006] ECR II-5169, paragraph 325; see also to that effect Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappijand Others v Commission* [1999] ECR II-931, paragraph 953. See, to that effect also Case T-349/08, *Uralita, SA v Commission*, not yet published, paragraph 68.

801 Case T-349/08, *Uralita, SA v Commission*, not yet published, paragraph 57 and the case law referred to therein.

802 Joined Cases T-259/02 to T-264/02 and T-271/02, *Raiffeisen Zentralbank Österreich AG and others v Commission*, paragraph 335.

Unsuccessful rebuttal of the presumption of parental liability

(792) Confidential Annex III accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(793) Confidential Annex III accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(794) Confidential Annex III accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(795) Confidential Annex III accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(796) Confidential Annex III accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(797) Confidential Annex III accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(798) Confidential Annex III accessible to Panalpina Management AG, Panalpina China Ltd and Panalpina World Transport (Holding) Ltd

(799) In conclusion, the Commission observes that the undertaking failed to demonstrate complete autonomy of its subsidiaries concerned by this case and thus also failed to rebut the presumption of exercise of decisive influence. Moreover, the aforesaid general statement as well as the more specific rebuttal unsupported by plausible evidence in the form of concrete and verifiable elements are insufficient for rebutting additional supporting elements relied on by the Commission[803] (see Recitals (738) - (740)).

(800) In view of the foregoing, the Commission's conclusions as to the establishment of the joint and several liability of PWT in Section 6.2.11 above remain intact.

Equal treatment for the purposes of inclusion of parties in the Decision

(801) In relation to the AMS infringement, UPS submits[804] that the Statement of Objections does not charge certain freight forwarders that were present at the FFE/FFI meetings and that were apparently more involved in the conduct of FFE/FFI than UPS was. More specifically, UPS notes that neither […] nor […] are among the addressees of the Statement of Objections, despite attending one of the anti-competitive FFI meetings each[805].

(802) Agility argues[806] in relation to its involvement in the PSS infringement that its role at the Breakfast Meetings was overstated by failing to include all of the participants in the Breakfast Meetings in the alleged PSS cartel. More specifically, Agility submits that the Statement of Objections should have also been addressed to […] given its

803 See Case C-521/09 P *Elf Aquitaine v Commission*, not yet reported, paragraph 61.

804 UPS's reply to the Statement of Objections, page 15.

805 Geodis participated in the meeting of 19 March 2003 and Eagle attended the 21 October 2003 meeting.

806 Agility's reply to the Statement of Objections, page 40, 45-48, 67.

level of involvement in the alleged infringement. In this respect, Agility claims that while it was a fringe player excluded from any of the bilateral or multilateral contacts which preceded and followed the Breakfast Meetings, […] fell within the core group of forwarders and was fully informed of the discussions that took place at the Breakfast Meetings[807].

(803) Furthermore, Expeditors submits[808] that while it was included among the addressees of the Statement of Objections, the Commission has not initiated proceedings against nine other undertakings[809] which attended, based on the evidence present on the file, the Breakfast Meetings. Similarly, Toll argues[810]that certain Breakfast Meetings participants were excluded from the Statement of Objections, despite them having acknowledged their participation in the meetings in replies to the Commission's request for information.

(804) As a general observation, the Commission notes that the choice of the addressees for the purposes of the Statement of Objections as well as of the present Decision is based on a set of clearly established criteria applicable to individual infringements.

(805) Namely, in respect of the AMS infringement, participation in at least half of the meetings of the FFE/FFI Airfreight Committee (that is attendance at two meetings out of four at least) was set as a benchmark for inclusion of the parties in the Statement of Objections. The Commission observes that meetings of the FFE/FFI Airfreight Committee were the principal forum for the AMS cartel discussions. While UPS attended two anti-competitive meetings (see Recitals (146)-(149) and (152) for information on the content of the meetings) thus participating in the cartel behaviour repeatedly, […] and […] only attended one meeting each. Therefore, the Commission considers that a differential treatment is well justified in this case.

(806) Regarding the PSS cartel the competitors' conduct within the framework of the Breakfast Meetings serves as a basis for establishment of the PSS infringement rather than bilateral or multilateral contacts outside that forum. As it is clear from Recitals (309)-(313), the core evidence relied on in this Decision stems from such meetings, whereas other bilateral and multilateral contacts are left out. Furthermore, the Commission notes that participation in more than half of the Breakfast Meetings (namely attendance at least in four meetings out of seven in total) was the main criterium used, when identifying companies to be addressed in the Statement of Objections/Decision. Compared with Agility, Expeditors, Toll as well as other addressees, the undertakings not addressed in the Statement of Objections/Decision were not found to be present at more than three Breakfast Meetings.

(807) In view of the foregoing, the Commission considers that it did not breach the requirement of equal treatment by including UPS, Agility, Toll and Expeditors among parties held liable for the AMS and PSS cartels respectively, as opposed to other undertakings which do not feature in the Decision. Furthermore, and in any event, according to the settled case-law, even if the situation of another economic operator to which the decision is not addressed were comparable to that of the

807 Agility refers to […].
808 Expeditors' reply to the Statement of Objections, page 32.
809 […].
810 Toll's reply to the Statement of Objections, page 10-11. Toll refers to […].

addressees, that could not constitute a ground for setting aside the finding of an infringement by the parties subject to the decision, provided that that infringement was properly established[811]. In this case, the respective participation of UPS in the AMS infringement and of Agility, Toll and Expeditors in the PSS infringement is clearly established[812]. The parties cannot therefore escape a penalty on the ground that no fine was imposed on other economic operators[813].

7. DURATION OF THE INFRINGEMENT

7.1. New Export System (NES)

(808) The duration of the alleged NES infringement to which this Decision relates and the period for the application of any fines is from 1 October 2002 to 10 March 2003.

(809) For the purposes of establishing the duration to be taken into account for each of the respective legal entities involved, the Commission has taken the date of the first known anti-competitive contact of the respective undertaking with its competitors as the onset date and the date of the last definitive piece of evidence which confirms the cartel was still ongoing as the date to which the cartel was at least in force.

(810) The first anti-competitive contact for the purposes of determining the duration of the infringement for each of the undertakings is 1 October 2002 and the end date of the cartel is 10 March 2003. There is no evidence on the file that the collusive arrangements would have continued after 10 March 2003.

(811) Kuehne & Nagel submits[814] that the starting date for its participation in the NES infringement can be set at 4 November 2002 at the earliest. This date marks the point in time, when Kuehne& Nagel's representative signalled in his email to other cartel participants[815] that he acceded to the NES agreement. Furthermore, Kuehne & Nagel claims that 4 November 2002 should also be treated as the end date of its participation in the NES cartel, since there is no incriminating evidence against it beyond that date and because the NES fees actually charged do not appear to confirm participation in any agreement after that date.

(812) UPS claims[816] with reference to the evidence on the Commission's file[817] that […], the only individual identified as having participated on behalf of Emery (which later merged into UPS) in the alleged NES infringement left the employment of Emery on 30 November 2002. Thus, it argues that Emery's participation in the NES conduct could not continue after that date. Subsequently, UPS submits that the Commission,

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811 Case T-120/04 *Peróxidos Orgánicos, SA* v *Commission* [2006] ECR II-4441, paragraph 77; Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich AG and others v*v *Commission* [2006] ECR II-5169, paragraph 139.

812 For UPS, see Recitals (145)-(152), for Expeditors Recitals (319)-(338) and for Agility and Toll Recitals (314)-(342).

813 See to that effect Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03, *Tokai v Commission* [2005] ECR II-10, paragraph 397.

814 Kuehne & Nagel's reply to the Statement of Objections, page 9, 14.

815 […].

816 UPS's reply to the Statement of Objections, page 31.

817 […].

in setting the level of any fine it may decide to impose, must take into account the fact that Emery's involvement in the NES-related discussions was limited to two months only.

(813) According to settled case-law, it is sufficient for the Commission to show that the undertaking concerned participated in meetings at which anti-competitive agreements were concluded, without manifestly opposing them, to prove to the requisite standard that the undertaking participated in the cartel[818].

(814) In the current case, the Commission has established to the requisite legal standard the existence of an anti-competitive agreement in relation to NES for the period 1 October 2002 - 10 March 2003 (see Recitals (100)-(114)). The Commission found that both Kuehne & Nagel's and Emery's representative participated in the 1 October 2002 meeting which was instrumental to the establishment of the NES cartel[819]. As there is no evidence that Kuehne & Nagel or Emery distanced themselves from the remainder of the duration of the NES cartel scheme, the arguments submitted by the undertakings concerning the duration of their participation in the NES cartel must be rejected.[820] Hence, the Commission maintains Kuehne & Nagel's and Emery's (UPS SCS's) participation in the NES infringement for its entire duration as set out in Recital (808).

(815) For parent companies the duration taken into account is the period that the parent exercised decisive influence over the subsidiary while the subsidiary was participating directly in the infringement.

(816) The duration taken into account for each respective legal person involved is therefore as follows:

Schenker Limited (as an economic successor of BAX Global Ltd. (UK))
from 1 October 2002 until 10 March 2003

CEVA Freight (UK) Limited
from 1 October 2002 until 10 March 2003

EGL, Inc.
from 1 October 2002 until 10 March 2003

DHL Global Forwarding (UK) Limited
from 1 October 2002 until 10 March 2003

Deutsche Post AG
from 1 October 2002 until 10 March 2003

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818 Joined Cases C-204/00P C-205/00P, C-211/00P, C-213/00P, C-217/00P and C-219/00P *Aalborg Portland A/S and Others v. Commission* (Cement II), [2004] ECR I-123, paragraph 81.

819 Kuehne & Nagel itself has confirmed this assertion in relation to the participation of its representative in the meeting (see Kuehne & Nagel's reply to the Statement of Objections, page 9).

820 The evidence on the file shows on the contrary that both Kuehne & Nagel and Emery fully supported the agreed measures and applied the agreed NES surcharge on the market, see, for example, […] for Emery or […] for Kuehne & Nagel.

Exel Freight Management (UK) Limited
from 1 October 2002 until 10 March 2003

Exel Limited
from 1 October 2002 until 10 March 2003

Kuehne + Nagel Ltd. ***(UK)***
from 1 October 2002 until 10 March 2003

Kuehne + Nagel International AG
from 1 October 2002 until 10 March 2003

UPS Supply Chain Solutions, Inc., (as an economic successor of Menlo Worldwide Forwarding, Inc.)
from 1 October 2002 until 10 March 2003

7.2. Advanced Manifest System (AMS)

(817) The duration of the alleged AMS infringement to which this Decision relates and the period for the application of any fines is from 19 March 2003 to 19 August 2004.

(818) For the purposes of establishing the duration to be taken into account for each of the respective legal entities involved, the Commission has taken the date of the first known anti-competitive contact of the respective undertaking with its competitors as the onset date and the date of the last known anti-competitive contact with the entities involved in the AMS infringement as the end date.

(819) The first anti-competitive contact for the purposes of determining the duration of the infringement for each of the undertakings is 19 March 2003 (with the exception of UTi Nederland B.V., Kuehne & Nagel, Schenker and Exel (both, Exel Freight Management (UK) Limited and Exel Group Holdings (Nederland) B.V.) – see Recitals (822)-(824)) and the end date of the cartel is 19 August 2004 (with the exception of UPS Supply Chain Solutions, Inc. and UTi Worldwide (UK) Ltd– see Recitals (824)-(825)).

(820) Regarding ABX[821], the Commission found that the last in the series of anti-competitive meetings attended by ABX was the meeting of 24 March 2004. However, ABX was aware of the offending conduct of the other participants even after that date and for the remainder of the AMS cartel's duration. In particular, ABX was informed, by receiving the minutes of the conference call held by the FFE/FFI Airfreight Committee on 19 August 2004[822] about the outcome of AMS-related anti-competitive discussions. The participants in the call concerned agreed to monitor the cases of non-compliance with the anti-competitive scheme. The anti-competitive content of the conference call was described in the minutes in detailed and intelligible manner. Monitoring arrangement constituted one of the elements, which were an integral part of the single and continuous cartel conduct. The AMS infringement evolved in nature and manifested itself in a number of forms

821 ABX's reply to the Statement of Objections, page 7-8.

822 This follows from the email to which the conference call minutes were attached ([…]).

throughout its life-span, including the monitoring arrangement. Even if ABX did not actively participate in this aspect of the AMS infringement, it was aware of it without having distanced itself from it and thereby showed adherence also to this part of the cartel conduct[823]. Therefore, the Commission has taken 19 August 2004 as the end date of ABX's participation in the AMS cartel.

(821) Kuehne & Nagel argues[824] that they did not participate at the first anti-competitive meeting of the FFE/FFI Airfreight Committee held on 19 March 2003, nor were they informed about the agreed measures. In relation to the FFE/FFI meeting of the CEOs of 8 April 2003, where the outcome of the previous FFE/FFI Airfreight Committee meeting was communicated, Kuehne & Nagel disputes[825] the fact that its representative would take note or even endorse the anti-competitive action agreed on AMS fee. In view of the above, Kuehne & Nagel claims to have participated in the AMS behaviour as from 21 October 2003 at the earliest.

(822) The evidence[826] shows that Kuehne & Nagel attended the CEO meeting of FFE/FFI held on 8 April 2003, where conclusions from 19 March FFE/FFI Airfreight Committee meeting were presented. The conclusions presented, which also covered the essential features of the anti-competitive agreement reached during the 19 March meeting were self-explanatory and did not require further clarification. Therefore, Kuehne & Nagel became aware of the unlawful conduct of other participants on 8 April 2003 at the latest. Moreover, as the undertaking did not publicly distance itself from what was agreed, it led the other participants to believe that like other cartel members it subscribed to what was decided at the FFE/FFI Airfreight Committee meeting of 19 March 2003 and would comply with it. This is confirmed by their participation in further anti-competitive contacts as set out in section 4.2.3 of the Decision. In light of the above, the starting date of Kuehne & Nagel's participation in the AMS infringement is set at 8 April 2003.

(823) Regarding Schenker's and Exel's participation in the AMS infringement, the undertakings also did not attend the first anti-competitive meeting of the FFE/FFI Airfreight Committee held on 19 March 2003. However, both Schenker and Exel Freight Management (UK) Limited received the minutes of the said meeting on 25 March 2003[827], which also marks the date from which implication in the AMS cartel is attributed to those two undertakings.

(824) For UTi Nederland B.V. and Exel Group Holdings (Nederland) B.V., the start date of the AMS cartel is 21 October 2003, as the Commission does not possess evidence on its file that those entities started their involvement in the AMS cartel prior to that date. Furthermore, for UTi Worldwide (UK) Ltd, the end date of the AMS cartel is

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823 See to that effect Case C-49/92P *Commission v. Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 83.

824 Kuehne & Nagel's reply to the Statement of Objections, page 35.

825 Kuehne & Nagel's reply to the Statement of Objections, page 36-38.

826 […] (see also Recital (148) of the Decision).

827 Further to its duty of ongoing cooperation under the Leniency Notice, Schenker pointed the Commission, in its reply to the Statement of Objections (page 44), to the […] referring to email, by which the relevant minutes were forwarded to it. For Exel, already the establishment of the original start date set at 19 March 2003 was not disputed by the undertaking.

21 October 2003, as there is no evidence on the file that the said entity continued its involvement in the AMS cartel beyond that date.

(825) For UPS Supply Chain Solutions, Inc., the end date of the AMS cartel is 21 October 2003, as there is no evidence on the file that the said entity continued its involvement in the AMS cartel beyond that date. UPS did not continue to be involved in any further meetings or communications from FFE/FFI regarding the AMS fee, which constitute a basis for the establishment of the AMS infringement, following their last known anti-competitive contact of 21 October 2003.

(826) For parent companies which participated indirectly in the infringement the duration taken into account is the period that the parent exercised decisive influence over the subsidiary while the subsidiary was participating directly in the infringement.

(827) The duration taken into account for each respective legal person involved is therefore as follows:

DSV Air & Sea SAS (formerly ABX LOGISTICS Air & Sea (France) SAS)
from 19 March 2003 until 19 August 2004

Agility Logistics Limited
from 19 March 2003 until 19 August 2004

DHL Management (Schweiz) AG
from 19 March 2003 until 19 August 2004

Deutsche Post AG
from 19 March 2003 until 19 August 2004

Exel Freight Management (UK) Limited
from 25 March 2003 until 19August 2004

Exel Group Holdings (Nederland) B.V.
from 21 October 2003 until 19 August 2004

Exel Limited
from 25 March 2003 until 19 August 2004

Kuehne + Nagel Management AG
from 8 April 2003 until 19 August 2004

Kuehne + Nagel International AG
from 8 April 2003 until 19 August 2004

Panalpina Management AG
from 19 March 2003 until 19 August 2004

Panalpina World Transport (Holding) Ltd
from 19 March 2003 until 19 August 2004

Schenker AG

from 25 March 2003 until 19 August 2004

Deutsche Bahn AG
from 25 March 2003 until 19 August 2004

UPS Supply Chain Solutions, Inc.
from 19 March 2003 until 21 October 2003

United Parcel Service, Inc.
from 19 March 2003 until 21 October 2003

UTi Worldwide (UK) Ltd
from 19 March 2003 to 21 October 2003

UTi Worldwide, Inc.
from 19 March 2003 until 21 October 2003

UTi Nederland B.V.
from 21 October 2003 until 19 August 2004

UTi Worldwide, Inc.
from 21 October 2003 until 19 August 2004

7.3. Currency Adjustment Factor (CAF)

(828) The duration of the alleged CAF infringement to which this Decision relates and the period for the application of any fines is from 27 July 2005 until 13 March 2006.

(829) For the purposes of establishing the duration to be taken into account for each of the respective legal entities involved, the Commission has taken the date of the first known anti-competitive contact of the respective undertaking with its competitors as the onset date and the date of the last known anti-competitive contact with the entities involved in the CAF infringement as the end date.

(830) The first anti-competitive contact for the purposes of determining the duration of the infringement for each of the undertakings is 27 July 2005 (with the exception of Schenker China Ltd. – see Recital (831)) and the end date of the cartel is 13 March 2006 (with the exception of Panalpina China Ltd, Nippon Express (China) Co., Ltd. and Yusen Shenda Air & Sea Service (Shanghai) Ltd. – see Recitals (832)-(835)).

(831) For Schenker China Ltd. the start date of the cartel is 29 July 2005[828], as there is no evidence on the file that the undertaking would have been involved in the CAF cartel before the said date.

(832) For Nippon Express (China) Co., Ltd. and Yusen Shenda Air & Sea Service (Shanghai) Ltd. the end date of the cartel is 31 October 2005[829], as there is no

[828] Date of the email referred to in Recital (240) ([…]).
[829] Date of the email referred to in Recital (254) ([…]).

evidence on the file that the undertakings would have continued their involvement in the CAF cartel beyond the said date.

(833) Although the last anti-competitive CAF meetings attended by Nippon Express (China) Co., Ltd. and Yusen Shenda Air & Sea Service (Shanghai) Ltd. were held on 15 September 2005 (Nippon) and 12 August 2005 (Yusen) respectively, the said undertakings had been the addressees of an email correspondence (including anti-competitive exchange of information, which constitutes a manifestation of the CAF cartel scheme) following the meetings and at least until 31 October 2005[830]. Neither Nippon, nor Yusen distanced themselves from the cartel before 31 October 2005 and the Commission has therefore taken that date as the end of their participation in the CAF cartel.

(834) Regarding Panalpina China Ltd, the end date of the cartel is 9 December 2005, as there is no evidence on the file that the undertaking continued its involvement in the CAF cartel beyond the said date.

(835) Although the last anti-competitive CAF meeting attended by Panalpina China Ltd was held on 18 November 2005, it had participated in a CAF-related competitor call[831] and addressee of an email correspondence (including anti-competitive exchange of information, which constitutes a manifestation of the CAF cartel scheme) following the meeting and at least until 9 December 2005[832]. Panalpina did not distance itself from the cartel before 9 December 2005 and the Commission has therefore taken that date as the end of Panalpina's participation in the CAF cartel.

(836) Kintetsu suggests[833] that the meeting of 13 March 2006 did not constitute anti-competitive CAF meeting. It claims that the informal lunch meeting held at the said date did not contain a centralized discussion on a CAF or follow-up. Therefore, according to Kintetsu, the Commission must take into account only the period 27 July 2005 – 18 November 2005, when determining the duration of the CAF infringement.

(837) The Commission observes that the meeting of 13 March 2006 had an anti-competitive objective inherent to all previous CAF competitor meetings set out in this Decision and hence the said meeting constitutes an integral part of the common CAF cartel scheme. This conclusion is substantiated by the contemporaneous evidence referred to in this Decision (see in particular Recitals (260)-(262)). In light of the above, Kintetsu’s arguments have to be dismissed.

(838) According to UPS [834] the Statement of Objections alleges that UPS participated in the CAF infringement from 27 July 2005 until 13 March 2006, but it does not contain evidence of any UPS employee's interaction with competitors between 1 September 2005[835] and 7 March 2006[836]. UPS therefore suggests that the

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830 See, for example, […].
831 See Recital (259)
832 […].
833 Kintetsu's reply to the Statement of Objections, page 79.
834 UPS's reply to the Statement of Objections, page 27.
835 The date on which the UPS employees involved in previous CAF cartel contacts left the company.

Commission fails, in its conclusions regarding the duration of the CAF infringement on the part of UPS, to take account of this interruption.

(839) The Commission notes that each of the CAF meetings described in this Decision constitutes a manifestation of adherence to the objective of the CAF infringement. Based on the documentary evidence, UPS's adherence to the single anti-competitive plan dated from 27 July 2005 and continued until 13 March 2006, namely the date of the last known manifestation of UPS's adherence to CAF cartel (see Recital (261)). Personnel changes leading to a temporary break in participation at the meetings occurred for reasons internal to the undertaking without having any bearing on adherence by UPS to the CAF infringement (see Recital (261)). Moreover, UPS resumed its participation in the CAF meetings following the change of personnel, which affirms continuous subscription to the cartel scheme. Therefore, since the interruption of UPS's participation was purely incidental and did not constitute dissociation from the cartel scheme, it has no impact on the Commission's findings as to the duration of UPS's participation in the CAF infringement[837].

(840) For parent companies the duration taken into account is the period that the parent exercised decisive influence over the subsidiary while the subsidiary was participating directly in the infringement.

(841) The duration taken into account for each respective legal person involved is therefore as follows:

Schenker China Ltd. (as an economic successor of BAX Global (China) Co. Ltd.)
from 27 July 2005 until 13 March 2006

Schenker China Ltd. (for direct involvement in the infringement)
from 29 July 2005 until 13 March 2006

Deutsche Bahn AG
from 29 July 2005 until 13 March 2006

Beijing Kintetsu World Express Co., Ltd.
from 27 July 2005 until 13 March 2006

CEVA Freight Shanghai Limited
from 27 July 2005 until 13 March 2006

EGL, Inc.
from 27 July 2005 until 13 March 2006

DHL Global Forwarding (China) Co. Ltd.
from 27 July 2005 until 13 March 2006

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836 The date on which […], a newly recruited employee of UPS, received an invitation to attend the meeting of 13 March 2006.

837 Case T-18/05 *IMI and Others v Commission* [2010] ECR II-1769, paragraph 97.

DHL Logistics (China) Co., Ltd.
from 27 July 2005 until 13 March 2006

Kuehne + Nagel Ltd. ***(Shanghai)***
from 27 July 2005 until 13 March 2006

Kuehne + Nagel International AG
from 27 July 2005 until 13 March 2006

Nippon Express (China) Co., Ltd.
from 27 July 2005 until 31 October 2005

Panalpina China Ltd
from 27 July 2005 until 9 December 2005

Panalpina World Transport (Holding) Ltd
from 27 July 2005 until 9 December 2005

UPS SCS (China) Ltd.
from 27 July 2005 until 13 March 2006

United Parcel Service, Inc.
from 27 July 2005 until 13 March 2006

Yusen Shenda Air & Sea Service (Shanghai) Ltd.
from 27 July 2005 until 31 October 2005

7.4. Peak Season Surcharge (PSS)

(842) The duration of the alleged PSS infringement to which this Decision relates and the period for the application of any fines is from 9 August 2005 until 21 May 2007.

(843) For the purposes of establishing the duration to be taken into account for each of the respective legal entities involved, the Commission has taken the date of the first known anti-competitive contact of the respective undertaking with its competitors as the onset date and the date of the last known anti-competitive contact with the entities involved in the PSS infringement as the end date.

(844) The first anti-competitive contact for the purposes of determining the duration of the infringement for each of the undertakings is 9 August 2005[838] (with the exception of Schenker International (H.K.) Ltd., Hellmann Worldwide Logistics Ltd. Hong Kong and Expeditors Hong Kong Ltd. – see Recital (845)) and the end date of the cartel is 21 May 2007 (with the exception of DHL Supply Chain (Hong Kong) Limited, Schenker International (H.K.) Ltd. and Expeditors Hong Kong Ltd. – see Recital (846)).

[838] This is the date of the first meeting among the competitors, for more details see Recitals (314) and (315).

(845) For Schenker International (H.K.) Ltd., the start date of the cartel is 3 September 2005[839], for Expeditors Hong Kong Ltd., the start date of the cartel is 21 September 2005 and for Hellmann Worldwide Logistics Ltd. Hong Kong, the start date of the cartel is 6 December 2005, as there is no evidence on the file that the said entities would have been involved in the PSS cartel before the abovementioned dates.

(846) For DHL Supply Chain (Hong Kong) Limited; the end date of the cartel is 13 January 2006 and for Schenker International (H.K.) Ltd. and Expeditors Hong Kong Ltd., the end date of the cartel is 23 June 2006, since these end dates are consistent with the evidence on the file.[840]

(847) In relation to the meetings held on 21 September 2005 and 6 December 2005 Kuehne & Nagel stated in a letter sent following the oral hearing in this case, that there is no evidence of the company's attendance at the meetings.[841]

(848) The Commission refers to its observations in relation to the disputed attendance of Kuehne & Nagel at 21 September 2005 and 6 December 2005 meetings set out in Recitals (352) - (354). Moreover, such claims do not have any impact on the establishment of the duration of Kuehne & Nagel's involvement in the PSS cartel.

(849) For parent companies which participated indirectly in the infringement the duration taken into account is the period that the parent exercised decisive influence over the subsidiary while the subsidiary was participating directly in the infringement.

(850) The duration taken into account for each respective legal person involved is therefore as follows:

Agility Logistics Limited (Hong Kong)
from 9 August 2005 until 21 May 2007

DHL Global Forwarding (Hong Kong) Limited
from 9 August 2005 until 21 May 2007

Deutsche Post AG
from 9 August 2005 until 21 May 2007

DHL Supply Chain (Hong Kong) Limited
from 9 August 2005 until 13 January 2006

Exel Limited
from 9 August 2005 until 13 January 2006

Expeditors Hong Kong Ltd.
from 21 September 2005 until 23 June 2006

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839 The date of the email referred to in Recital (318).

840 The last Breakfast Meeting attended by DHL Supply Chain (Hong Kong) Limited took place on 13 January 2006 (see Recitals (326) and (327)) and in the case of Schenker International (H.K.) Ltd. and Expeditors Hong Kong Ltd., the date of the last anti-competitive contact (meeting) took place on 23 June 2006 (see Recitals (334) and (335))

841 Kuehne & Nagel's letter of 19 July 2010, page 2.

Expeditors International of Washington, Inc.
from 21 September 2005 until 23 June 2006

Hellmann Worldwide Logistics Ltd. Hong Kong
from 6 December 2005 until 21 May 2007

Hellmann Worldwide Logistics GmbH & Co. KG
from 6 December 2005 until 21 May 2007

Kuehne + Nagel Ltd. ***(Hong Kong)***
from 9 August 2005 until 21 May 2007

Kuehne + Nagel International AG
from 9 August 2005 until 21 May 2007

Panalpina China Ltd
from 9 August 2005 until 21 May 2007

Panalpina World Transport (Holding) Ltd
from 9 August 2005 until 21 May 2007

Schenker International (H.K.) Ltd.
from 3 September 2005 until 23 June 2006

Deutsche Bahn AG
from 3 September 2005 until 23 June 2006

Toll Global Forwarding (Hong Kong) Limited
from 9 August 2005 until 21 May 2007

Toll Global Forwarding Limited
from 9 August 2005 until 21 May 2007

8. REMEDIES

8.1. Article 7(1) of Regulation No 1/2003

(851) Where the Commission finds that there is an infringement of Article 101 of the Treaty and Article 53 of the EEA Agreement it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation No 1/2003.

(852) In this case, it is not possible to declare with absolute certainty that the infringement has ceased.

(853) The Commission therefore intends to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

8.2. Article 23(2) of Regulation No 1/2003

(854) Under Article 23(2) of Regulation (EC) No 1/2003[842], the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 101 of the Treaty or Article 53 of the EEA Agreement. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

(855) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, the Commission must, in fixing the amount of the fine, have regard to all relevant circumstances and particularly the gravity and duration of the infringement. In doing so, the Commission will set the fines at a level sufficient to ensure deterrence. Moreover, the role played by each undertaking party to the infringement will be assessed on an individual basis. The Commission will reflect in the fines imposed any aggravating or mitigating circumstances pertaining to each undertaking.

(856) In setting the fines to be imposed, the Commission will refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003[843] (hereafter, "*the Guidelines on fines*"). Finally, the Commission will apply, as appropriate, the provisions of the 2006 Leniency Notice.

8.3. Calculation of the fines

8.3.1. Methodology for setting the fine amount

(857) In applying the Guidelines on fines, the basic amounts for each party result from the addition of a variable amount and an additional amount. The additional amount is calculated as a proportion of the value of sales of goods or services to which the infringement directly or indirectly relates in a given year (normally, the last full year of the infringement). The variable amount results from a proportion of the value of sales multiplied by the number of years of the company's participation in the infringement. The resulting basic amount can then be increased or reduced for each company if either aggravating or mitigating circumstances are retained. The fine may not exceed 10% of the total turnover of an undertaking concerned pursuant to Article 23 (2) of Regulation (EC) No 1/2003. The fine may then be reduced in application of the Leniency Notice, where applicable.

8.3.2. The value of sales

(858) The basic amount of the fine to be imposed on the undertakings concerned is to be set by reference to the value of sales[844], that is, the value of the undertakings' sales of goods or services to which the infringement directly or indirectly related in the relevant geographic area in the European Economic Area. The Commission will

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842 Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area "the Community rules giving effect to the principles set out in Articles 85 and 86 [now Articles 101 and 102 of the Treaty] of the EC Treaty […] shall apply *mutatis mutandis.*" (OJ L 305, 30.11.1994, page 6).

843 OJ C 210, 1.9.2006, p. 2.

844 Point 12 of the Guidelines on fines.

normally take the sales made by the undertakings during the last full business year of their participation in the infringement.[845] - It may however depart from this practice, should another reference period be more appropriate in view of the characteristics of the case[846].

(859) The basic amount consists of an amount of up to 30% of an undertaking's relevant sales in the European Economic Area, depending on the degree of gravity of the infringement and multiplied by the number of years of the undertaking's participation in the infringement, and an additional amount of between 15% and 25% of the value of an undertaking's sales, irrespective of duration.[847]

NES

(860) In accordance with the findings on the duration of the involvement in the NES infringement, the last business year of participation in the infringement is 2003 for all undertakings addressed by this Decision. However due to a special feature of the NES infringement, it is appropriate to apply a different method of calculation taking into account the short duration of the infringement. The turnover generated by the undertakings concerned only in the full calendar months of the infringement, namely the actual sales between October 2002 and February 2003, are therefore used to create an artificial representative full business year for the purposes of the fines calculation. This is done by dividing the actual sales by the correspondent number of months and multiplying by twelve. The services to which the infringement relates in this case are air freight forwarding services from the United Kingdom to countries outside the European Economic Area (including services in relation to shipments of goods originating from other EEA countries transiting through the United Kingdom) paid by customers located in the European Economic Area (so called prepaid business).

AMS

(861) In accordance with the findings on the duration of involvement in the AMS infringement, the last business year of participation in the infringement is 2004 for all undertakings addressed by this Decision, except for UPS[848]. However due to a special feature of the AMS infringement, it is appropriate to apply a different method of calculation taking into account the relatively short duration of the infringement. The turnover generated by the undertakings concerned only for the period of their participation in the infringement, namely the actual sales, are therefore used to create an artificial representative full business year for the purposes of the fines calculation. This is done by dividing the actual sales by the correspondent number of months and multiplying by twelve. The services to which the infringement relates in this case are air freight forwarding services from the European Economic Area to the United States paid by customers located in the European Economic Area (so called prepaid business).

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845 Point 13 of the Guidelines on fines.

846 Case T-76/06, *Plasticos Españoles (ASPLA) v Commission*, not yet reported, paragraphs 111-113;

847 Points 19-26 of the Guidelines on fines.

848 Its participation in the infringement lasted until 21 October 2003 and accordingly the last business year of UPS's participation was 2003.

CAF

(862) In accordance with the findings on the duration of the involvement in the CAF infringement, the last business year of participation in the infringement is 2006 for majority of undertakings[849] addressed by this Decision. However in this case, taking into account the short duration of the infringement (27 July 2005 – 13 March 2006), it is appropriate to take the turnover generated by the undertakings concerned only during the period of their participation in the infringement, namely the actual sales, are therefore used to create an artificial representative full business year for the purposes of the fines calculation. This is done by dividing the actual sales by the correspondent number of months and multiplying by twelve. The services to which the infringement relates in this case are air freight forwarding services from China (excluding Hong Kong) to the European Economic Area paid by customers located in the European Economic Area (so called collect business). Moreover, due to the specific characteristics of the cartel (the agreement related only to the sales that were made in the USD), the Commission takes into account only the sales made in USD.

PSS

(863) In accordance with the findings on the duration of the involvement in the PSS infringement, the last full business year of participation in the infringement is 2006 for all undertakings[850] addressed by this Decision. However due to a special feature of the PSS infringement, it is appropriate to apply a different method of calculation taking into account the seasonal characteristics of the surcharge. The turnover generated only during the peak season period, namely from September to December, will be therefore used (see Recital (305)). Moreover, as the peak season periods during the cartel lifespan (2005 and 2006 peak seasons) were subject to fluctuations, it is appropriate to take the average annual value of sales in the peak season periods as the basis for the fines calculation[851]. Depending on each undertaking's respective duration of participating in the infringement, either the actual sales of a single peak season or the average actual sales of the 2005 and 2006 peak seasons were considered to be the entire value of sales for an artificial representative full business year for the purposes of the fines calculation.

(864) The services to which the infringement relates in this case are air freight forwarding services from Hong Kong and South China[852] to the European Economic Area paid by customers located in the European Economic Area (so called collect business).

Arguments by the parties and their assessment by the Commission

(865) Several parties (Kuehne & Nagel[853], DSV[854], Panalpina[855], DB[856], Agility[857], CEVA[858], Hellmann[859], UPS[860] and Baltrans[861]) submit that for the purposes of the

849 Except for Panalpina, Nippon and Yusen.

850 Except for Schenker, Exel, Kuehne & Nagel and Expeditors.

851 The proxy in this case is calculated as the average of sales in the two four-month peak season periods during the cartel. This is adjusted to one peak season for Expeditors (2005), Schenker (2005), Exel (2005) and Hellmann (2006), in view of the duration of their involvement in the PSS cartel.

852 More specifically airports in Dongguan, Guangzhou, Macau, Shenzhen and Zhuhai. Such delimitation is based on the replies to the Article 18 request of 18 February 2009 provided by Expeditors ([…]) and Kuehne & Nagel ([…]) which, in the Commission's view most closely delineate the relevant area of South China affected by the PSS infringement.

calculation of the fine the value of sales should not include the aggregate freight forwarding sales reached on the relevant lane, but only the turnover reached in connection with the collection of the surcharges. According to the parties, this is mainly due to the fact that the infringements concerned only the surcharges which have their separate charge code and not the freight forwarding services in general. The parties also claim that the fine should be proportionate to the gravity of the offence based on the economic impact on the market concerned. The parties finally submit that the surcharges were barely implemented, that certain customers would never have accepted the surcharges and they accounted only for a very small fraction of the total value of invoices to customers. Consequently, they conclude that the Commission should take a similar approach to that it took in the Alloy case[862], where the basis for the fines calculation was only the surcharge itself. Panalpina[863] also claims that revenue attributable to ancillary services that are not related to the actual movement of freight by air (such as cargo pick up, ground handling, warehouse services and customs clearance) should be excluded from the value of relevant sales. Parties[864] further submit or appear to imply that in the alternative, the relevant sales should be based at most on the revenue relating to shipments for which the fees concerned (namely NES, AMS, CAF and PSS respectively) were actually charged.

(866) Specifically in relation to the NES and AMS infringement, Kuehne & Nagel claims that the NES and AMS filing are distinct services from the freight forwarding service, as they can be offered also by third undertakings and not only by freight forwarders. The company concludes that the NES and AMS services represent separate markets and for the purposes of the calculation of the fine, only the turnover generated with the NES and AMS surcharge should serve as a basis for the calculation of the fine.[865] A similar claim was also raised by DB.[866]

(867) The main feature of the freight forwarding sector subject to the Commission's scrutiny in this case is the fact that the freight forwarders offer their customers combination of several services (some of which could be possibly obtained from different service providers) in one package. Such approach saves time and money for the customer, who does not have to demand the individual parts of the services from

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853 Kuehne & Nagel's reply to the Statement of Objections, page 26-29, 60-61, 71.

854 DSV's reply to the Statement of Objections, page 10-11.

855 Panalpina's replies to the Statement of Objections, page 35-36 ([…]) and page 25, 27 ([…]); Panalpina'sletter of 5 October 2011, page 2 ([…]).

856 DB's reply to the Statement of Objections, page 52-53, 80.

857 Agility's reply to the Statement of Objections, page 29-31.

858 CEVA's reply to the Statement of Objections, page 65-68, 77.

859 Hellmann's reply to the Statement of Objections, page 18.

860 UPS' reply to the Statement of Objections, page 32.

861 Baltrans' reply to the Statement of Objections, page 18, 19.

862 Joined cases T-45/98 and 47/98 *Krupp Thyssen Stainless GmbH and Acciai speciali Terni SpA v Commission* [2001] ECR II-03757, paragraph 108.

863 Panalpina's letter of 5 October 2011, page 9 ([…]).

864 DB's reply to the Commission's Fine Calculation Letter of 25 October 2011 ("**Fines Letter**"), page 3,14 ([…]); Kintetsu's reply to the Fines Letter, p. 5 ([…]); UTi's reply to the Fines Letter, page 1 ([…]); CEVA's reply to the Fines Letter of 11 November 2011, page 3; Panalpina's response to the Commission's request for information of 20 January 2011, page 3 ([…]) and Panalpina's letter of 5 October 2011, page 3-4 ([…]).

865 Kuehne & Nagel's reply to the Statement of Objections, page 26-29, 48-49.

866 DB's reply to the Statement of Objections, page 30, 52-53.

different providers. The customers therefore do not approach the freight forwarders with the intention to obtain separate services, but it is the package that they are interested in. The fact that the parties agreed on the price of one part of the freight forwarding service had a direct impact on the overall price of the freight forwarding services paid by the customers.

(868) The freight forwarders' decision to set out in the bill the charge for this part of the price separately (but still on the same bill) is not relevant in this regard. The fact that the surcharges are identified separately to customers represents a common practice in the freight forwarding sector in relation to ancillary services provided by freight forwarders to customers. Separating the final price in several parts is just one of the ways in which a price can be presented to customers. The freight forwarders could just as well decide to include all the different surcharges in the overall price of the freight forwarding services. All in all, the way in which the price for freight forwarding services is relayed to customers is a purely formal issue devoid of any economic or legal significance for the purposes of the present case. It is evident that the imposition of the surcharges led to an increase in the overall price of freight forwarding services and in the specific cases of the CAF and PSS cartels, the infringements even led to a direct increase of the basic freight rate. There is therefore no objective reason, why the value of sales should be calculated only on the basis of the (collected) surcharges, when it is evident that an imposition of a surcharge equals to a standard price increase as in any other service industry. The fact that the freight forwarders labeled this price increase for various reasons as a surcharge does not deprive it of its impact on customers.

(869) Furthermore, the Commission observes that the freight forwarding is a low margin industry, where even a small price increase/surcharge imposition or absence thereof has a direct bearing on viability of the business and equally plays a decisive role in whether the forwarder loses customers, maintains its client base or gains new business opportunities at the expense of its competitors. This is confirmed by the following examples from the evidence on the Commission file:

"*unless you are putting this out into market NOW, we are all going to loose revenue […] Money talks, please explain your corporate office that they loose profit amounting to 2.1% of the total turnover and I am sure they will wholeheartetly support this!!*" (Email by Kuehne & Nagel addressed to its competitors in relation to the CAF conduct)[867]

"*[…] we would be looking at an exchange loss of around US$ 2.500.000 per annum, if none of our customers would accept either a CAF or the conversion of the US$ rates to RMB.*" (Internal Kuehne & Nagel email, referring also to the 12 August 2005 CAF cartel meeting)[868]

"*I wud wager my salary that the likes of k&n will be offering nes FOC[free of charge] and use this as a tool to gain business. in the present enviroment that may gain some successes.*" (Internal DHL email in relation to the NES conduct)[869]

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867 […].
868 […].
869 […].

"*Although KN may say that they will charge from Dec 1, there are always going to be exceptions, and my concern is that NES is being used as a bargaining tool here to enable KN to break into our (lion's) share of the business.*" (Internal DHL email in relation to the NES conduct)[870]

(870) In general, at the stage of setting the fines the Commission identifies in line with the Guidelines on fines business activities of the offenders to which the cartel behaviour directly or indirectly relates. In this case, even though the elements of the service directly affected by the infringements were in particular the NES, AMS, CAF and PSS surcharges or charging mechanisms, the infringements related to the entirety of the market for freight forwarding services, including any ancillary services in accordance with point 13 of the Guidelines on fines[871].

(871) Moreover, it is evident that all the infringements subject to the investigation were hard core cartels and restrictions by object. The extent of the implementation is therefore not relevant when determining the value of sales to be used as basis for setting the basic amount of the fine[872]. Following the Guidelines on fines[873], implementation shall only be viewed as one of the factors determining the gravity of the infringements. Hence, it does not relate to determination of the relevant sales for the purposes of the fines calculation. Furthermore, any issues that the parties had in the limited implementation of the agreements were mainly caused by the reluctance of the customers to accept the new measures and not by the decision of the freight forwarders.[874] It is clear that the intention of the parties was to implement all four arrangements on the whole market.[875]

(872) In relation to the NES and AMS surcharges and the claims raised by Kuehne & Nagel and DB, the Commission notes that it is not required to define in a cartel case the relevant product market in the same manner as it is in a merger procedure or when assessing an abuse of dominant position[876]. There is an obligation to define the market in a decision only where it is impossible, without such a definition, to determine whether the arrangement is capable of affecting trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market[877]. In this case, the Commission duly proved that the parties committed infringements whose object was to restrict competition within the common market (see Section 5.2.1.2) and which were by their nature capable of affecting trade between Member States (see Section 5.2.1.3)[878]. Equally, at the stage of setting the fines the Commission identifies in line with the Guidelines

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870 […].

871 See, to that effect Cases T-204/08 and T-212/08, Team Relocations NV and Others v Commission, not yet reported, paragraph 63.

872 See point 13 of the Guidelines on fines.

873 Point 22 of the Guidelines on fines.

874 See for example […].

875 See for example […].

876 Case T-29/92, *SPO and Others v Commission*, [1995] ECR II-289, paragraph 74 and Joined cases T-104/95 etc., *Cimenteries CBR and Others v Commission ("Cement")*, [2000] ECR II-491, paragraph 1093.

877 Case T-62/98, *Volkswagen v Commission*, [2000] ECR II-2707, paragraph 230 and Case T-38/02, *Groupe Danone v Commission*, [2005] ERC II-4407, paragraph 99.

878 See Case T-62/98, *Volkswagen v Commission*, [2000] ECR II-2707, paragraph 231.

on fines business activities of the offenders to which the cartel behaviour directly or indirectly relates, rather than any product markets. Subsequently revenue generated by the totality of services provided in the pursuit of such business activities (see also Recitals (867) and (868) in this respect) is taken as a basis for the fines calculation. In addition to these observations, the Commission notes that none of the evidence on the file indicates that the discussions within the Gardening Club and at the FFE/FFI was not targeted at the freight forwarding services but at distinct markets with the NES and AMS related services respectively. Such a conclusion is also supported by the fact that the third party providers of the NES and AMS filing were not even mentioned in those discussions as potential or actual competitors of the parties involved in the respective infringements.

(873) For the reasons mentioned in Recitals (867)-(872), contrary to claims of the parties, the fines calculation method applied in the Alloy case is not appropriate in this case. In the Alloy case, the legal and factual context was different from the current case and the policy of setting the fines then in force applied[879], whereas for the purposes of this Decision, the 2006 Guidelines on fines are applicable. In the same vein, the Commission does not take as a starting point for the fines calculation purely the sales relating to shipments for which the fees concerned were applied. Instead, the value of sales is set based on the aggregate value of freight forwarding services provided on the affected route, as this approach most closely reflects the impact of the anti-competitive arrangements on the freight forwarding sector.

(874) Kuehne & Nagel also claims that if the Commission were to decide to calculate the fine based on the aggregate value of freight forwarding services and not only on the aggregate value of the collected surcharges as proposed by Kuehne & Nagel, the Commission should not take into account the turnover attributable to the carriers, namely, the transport rates/charges which are only passed without any value-added through the freight forwarders acting as intermediaries.[880]A similar claim was also raised by Panalpina[881], Kintetsu[882], UPS[883], Agility[884] and DB[885] who submit that freight forwarders operate a brokering service model and therefore engage in a wide range of services provided by third parties. According to the companies, the forwarders have no control over the charges imposed by these third party providers and thus they consider that these payments should be subtracted from the aggregate value of airfreight forwarding services, described by the parties as 'gross revenues'. In conclusion, the addressees[886] suggest that using the 'gross profit', that is the 'gross

879 Namely Article 65 (1) and 65 (5) of the Treaty establishing the European Steel and Coal Community. Furthermore, it is settled case-law that decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (see Cases T-204/08 and T-212/08, *Team Relocations NV and Others v Commission*, not yet reported, paragraph 68, Case C-167/04 P *JCB Service v Commission* [2006] ECR I-8935, paragraphs 201 and 205, and Case C-76/06 P *Britannia Alloys & Chemicals v Commission* [2007] ECR I-4405, paragraph 60).

880 Kuehne & Nagel's reply to the Statement of Objections, page 29-31.

881 Panalpina's replies to the Statement of Objections, page 24, 33-34 and page 55 ([…]).

882 Kintetsu's reply to the Statement of Objections, page 80-81.

883 UPS' reply to the Statement of Objections, page 33.

884 Agility's reply to the Commission Article 18 request dated 20 January 2011, page 2 ([…]).

885 DB's reply to the Statement of Objections, page 80.

886 Such claims were raised by Panalpina in the letter of 5 October 2011 (page 8)([…]), Kuehne & Nagel (slide 8 of their presentation of 15 November 2011), Kintetsu (page 3), UTi (page 1) and Toll (page 2)

revenues' less transportation rates (and other third party service charges and taxes) imposed on forwarders or 'net revenues', would be a more accurate proxy for determining the relevant value of sales for the purposes of calculating the fines.

(875) DB[887], Kuehne & Nagel[888] and Expeditors[889] also refer in this context to the Jurisdictional Notice[890] applicable to merger cases which stipulates that in situations where a service is sold through an intermediary, the turnover of the undertaking acting as the intermediary consists solely of the amount of its commission, even if the intermediary invoices the entire amount to the final customers. Furthermore, DB[891] and Toll[892] argue that in this case the freight forwarders cannot be compared to manufacturers of goods facing certain production costs that were included in the relevant market sales taken as a basis for fines calculation in the *Copper Plumbing tubes*[893] cartel.

(876) While the Commission acknowledges that there are costs inherent in the final freight forwarding service provided, which the forwarders cannot control, nevertheless in line with the established case-law[894] such costs constitute an essential element of the freight forwarding business as a whole and thus cannot be excluded from its turnover when fixing the basic amount of the fine. The fact that the cost of transport constitutes an important part of the final price charged by the forwarders to their customers does not invalidate that conclusion.

(877) As regards the claims that the relevant value of sales and thus also the basic amount of fines should be set by reference to the 'gross profit' and hence profitability of the sector, the Commission finds the use of such approach for the purposes of the competition law enforcement irrelevant[895]. In this respect, the value of sales in combination with the duration of the infringement is considered under the applicable Guidelines on fines[896] as an appropriate criterion reflecting the economic importance of the infringement and the relative weight of each undertaking in the infringement. The economic performance and the magnitude of the added value created by the freight forwarders at the output is, in the Commission's view, not relevant for the purposes of the fines calculation in this case.

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in response to the Fines Letter as well as by Expeditors in the letter to the Commission of 26 July 2011 (pages 3-4) and by Agility in its reply to the Commission Article 18 request dated 20 January 2011 (page 2) ([…]).

887 DB's reply to the Statement of Objections, page 79.

888 Kuehne & Nagel's reply to the Statement of Objections, page 30.

889 Expeditors' letter to the Commission of 26 July 2011, page 3.

890 Specifically, point 159 of that Notice.

891 DB's reply to the Statement of Objections, page 80.

892 Toll's reply to the Statement of Objections, page 21.

893 Commission Decision in the Case C.38.069 — *Copper Plumbing tubes*; see also Case T-127/04, *KME Germany and others v Commission*, [2009] ECR II-01167, paragraph 91 upheld on appeal in case C-272/09 P *KME Germany and others v Commission*, not yet reported, paragraph 53.

894 Case T-127/04, *KME Germany and others v Commission*, [2009] ECR II-01167, paragraph 91 upheld on appeal in case C-272/09 P *KME Germany and others v Commission*, not yet reported, paragraph 53.

895 See, to that effect Case T-127/04, *KME Germany and others v Commission*, [2009] ECR II-01167, paragraph 92 upheld on appeal in case C-272/09 P *KME Germany and others v Commission*, not yet reported, paragraph 53.

896 See Guidelines on fines, point 6.

(878) It is noted that the freight forwarding industry subject to the investigation in this case is predominantly based on the consolidation business model[897], under which the freight forwarders purchase freight capacity on aircrafts wholesale in advance as well as services from other providers and in turn resell such capacity and services to their customers, shippers[898]. Thus the input costs, including the carrier related costs incurred by the forwarders are transformed into an output of higher value (by way of consolidation), such transformation being at the heart of the freight forwarding business model.

(879) While there might be occasionally instances, where third party inputs might not be transformed by the forwarders (for example in case of intermediation), even in those instances added-value service is provided by the freight forwarders, for which a commission is paid. Such a commission is economically comparable to a margin generated by pursuing the consolidation business model. Moreover, such third party input costs may not always constitute part of the forwarder's turnover for freight forwarding services. For example in cases, where forwarders receive solely the commission amount from the principal, while not collecting the third party service price on behalf of the third party service provider. On the other hand, in instances where the forwarders pass on to the customers third party costs they themselves had to pay, the forwarders assume financial risk associated with such costs and thus cannot be treated as agents[899], whose commission would only be considered for the purpose of the fines calculation.

(880) In conclusion, the aggregate turnover figures received from the parties for the purposes of the fines calculation in this case are, in combination with other factors set forth in the Guidelines on fines an adequate and appropriate proxy to be used. Therefore, the arguments submitted by the parties have to be dismissed.

(881) Furthermore, no valid justifiable reason has appeared for drawing a distinction between manufacturing industries and service industries, when considering the cost elements of the cartel participants and their inclusion in the value of sales relevant for fining purposes.

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897 More specifically, the freight forwarders buy certain space (tonnage) in the aircraft and subsequently attempt to fill in this space in the optimal way with the freight from their customers. By mixing accordingly the weight and the size of the forwarded goods, they try to use the available space and tonnage as efficiently as possible and the more efficient they do it the higher their profits are.

898 For example, […] reply to the Statement of Objections […] addresses this matter. […] notes that the vast bulk of the air freight business carried out by the freight forwarders is based on the **consolidation model** (for […] this is over **95%)**. In addition, […] stated in its presentation made during the Oral Hearing, ([…]): "[…] *attempts to make a margin by purchasing capacity on aircraft and services from other transport providers, and in turn reselling such capacity and services to customers, or to a lesser degree, by acting as an agent for airlines*". […] said in its reply to the Statement of Objections ([…]) that freight forwarders are "*purchasing bulk air and ocean freight capacity in advance and pre-financing a variety of other costs on behalf of their customers, only generating revenue to cover those operational costs a long time after they have been incurred*". Furthermore, […] observe […] that "*by way of example, for DHL Global Forwarding, agency shipments accounted for less than 1% of total shipments from lanes originating from the rest of the world to European destinations in 2010.*"

899 See, to that effect case T-66/99 *Minoan Lines SA v Commission of the European Communities*, [2003] ECR II-05515, paragraph 127.

(882) Regarding the Jurisdictional Notice, it is noted that its purpose is to provide solely guidance as to jurisdictional issues in the context of concentrations[900]. It has no bearing on the Commission's approach in calculating fines in cartel cases and thus does not bind the Commission in its considerations regarding fines in this case.

(883) Furthermore, DB claims […][901] that the sales which the Commission intends to take as a starting point in its fines calculation in this case also comprise turnover that formed the basis of the Commission's fine imposed in the Commission Decision of 9 November 2010 in Case No COMP/39.258 – Airfreight ("Airfreight"*)* involving collusive behaviour of the carriers on fuel and security surcharges[902]. According to DB, such a fining approach would result in punishing the cartel participants in this case for infringements relating to the fuel and security surcharges without the forwarders having committed such infringements. DB submits that, as a result the Commission should refrain from using the carrier related elements affected by the Airfreight cartel, namely the fuel and security surcharges for the purposes of the fine calculation in this case. As a minimum, in DB's view, the Commission should disregard the increments of the fuel and security surcharges, resulting from the conspiracy of the carriers in the Airfreight case, when calculating the fines in this case. Similar claims were made by Kuehne & Nagel[903].

(884) As a matter of principle the Commission is not prevented from using and including in the sales relevant for the fines calculation in this case any turnover elements subject to cartel conspiracy in other cases, provided that these are turnover elements to which the infringements in the current case directly or indirectly relate. As regards the increments on certain relevant turnover elements resulting from cartel conspiracy in a different case, the said considerations apply by analogy. In implementing Article 101 of the Treaty and imposing penalties on undertakings under the Guidelines on fines, the Commission takes as a basis for such penalties the relevant value of sales in their entirety. It is for the national courts of law to indemnify any parties for damages suffered as a result of a cartel. The procedure before a national court concerns exclusively private relations and cannot lead directly or indirectly to an adjustment of a penalty imposed by the Commission[904]. The arguments raised by both DB and Kuehne & Nagel have to be therefore rejected.

(885) Furthermore, DB submits[905] that the collusive behaviour subject to the scrutiny in the Airfreight case is likely to have been broader than just the fuel and security surcharges and is likely to have encompassed collusion between carriers on other items (such as AMS and PSS) which in turn might have led to the coordination by the forwarders prosecuted by the present Decision. DB argues that while the carriers were not prosecuted for collusion on other items than the fuel and security surcharges, the forwarders are being punished for conduct instigated by the carriers on these other items, such as AMS and PSS. According to DB, the Commission

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900 Jurisdictional Notice, recital 1.

901 […].

902 See the Commission's press release regarding the Decision in the *Airfeight case* : http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487&format=HTML&aged=0&language=EN&guiLanguage=en

903 Kuehne & Nagel's letter dated 30 November 2011, pages 3-4.

904 See Case C-60/92 Otto BV v Postbank NV, ECR [1993] I-05683, paragraph 16.

905 […].

should take this aspect into account as a mitigating circumstance under the Guidelines on fines.

(886) The Commission observes that DB's claim is merely speculative. It is undeniable that the conduct prosecuted by the Commission decision in the Airfreight case concerns solely fuel and security surcharges[906]. Any considerations of the possible extension of the material scope of the Airfreight cartel beyond the scope set out in the final decision would be mere speculation on unsound legal grounds. In light of the aforesaid, DB's argument has to be dismissed.

(887) In addition to the above arguments, DB also submits[907] that in order for their rights of defence to be fully respected in this case, it should be granted access to the file in the Airfreight case and makes an express request to that effect. Kuehne & Nagel[908] raises a similar claim, while also requesting access to the Commission's file in the Airfreight case. DB submits that the Airfreight case has a direct bearing on the fining methodology in this case, that the two files are inextricably linked and that DB should accordingly be entitled to obtain access to the Commission's file under the applicable legal provisions governing the issue. It further argues that even if the Commission is not inclined to grant access to a parallel case, it must incorporate the relevant materials in the Freight Forwarding case file and grant DB access by these means.

(888) The Commission notes that the term access to file in the context of the Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council regulation (EC) No 139/2004 ("the Access Notice")[909] and under Regulation (EC) 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty ("Regulation 773/2004")[910] is used exclusively to mean the access granted to the persons, to whom the Commission has addressed a statement of objections in a given case and thus it cannot be interpreted as possibly extending to other, even related cases and case files. Since neither DB, nor Kuehne & Nagel were addressees of the statement of objections in the Airfreight case, any request for access to the Airfreight case file under the Access Notice has to be rejected as inadmissible. Furthermore, the Commission observes that none of the documents obtained, produced or assembled during the investigation in the Airfreight investigation were procured for the purposes of the investigation in this case or should for any reason constitute part of the Freight Forwarding case file[911]. Therefore, there are no valid grounds for the inclusion of documents stemming from a separate investigation into the Freight Forwarding case file. In view of the aforesaid, DB's and Kuehne & Nagel's claims have to be dismissed.

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906 See the Commission's press release regarding the Decision in the *Airfeight case* : http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/1487&format=HTML&aged=0&language=EN&guiLanguage=en

907 […].

908 Kuehne & Nagel's letter dated 30 November 2011, page 4.

909 OJ C 325, 22.12.2005, p. 7-15,paragraphs 1,3.

910 OJ L 123, 27.04.2004, p. 18-24, article 15.

911 See paragraph 8 of the Access Notice.

(889) DB claims[912] regarding determination of relevant sales for the PSS infringement that any possible fine cannot take into account turnover generated by BAX in 2006. […].

(890) […][913].[…], at the material time for the calculation of the value of relevant sales in 2006 (the period September 2006 – December 2006), BAX formed part of DB (covering also Schenker). Such a conclusion is also supported by […].[914] In view of the aforesaid, DB's arguments have to be rejected .

8.3.2.1. Gravity

(891) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30%. In order to decide whether the proportion of the value of sales should be at the lower or at the higher end of the scale, the Commission considers a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented[915].

(892) Since all the infringements covered by the present case have common or similar features in terms of the nature, combined market shares and implementation, the assessment of the gravity of the NES, AMS, CAF and PSS infringements will be made in parallel.

8.3.2.1.1. Nature

(893) The addressees of this Decision participated in one or several single, complex and continuous infringements of Article 101 of the Treaty and Article 53 of the EEA Agreement, with the common objective to distort competition for freight forwarding services on the lanes affected by those infringements.

(894) In this case, the collusive arrangements between the parties constituted agreements and/or concerted practices which had as their object to fix, directly or indirectly, prices or other trading conditions. More precisely, the undertakings agreed on the introduction (NES, AMS, CAF, PSS) and level (NES, CAF) or principles of setting (AMS) of a number of surcharges or timing of their introduction (NES, CAF, PSS), fixing of trading conditions (CAF) and exchanged sensitive information on prices (AMS, CAF, PSS).

(895) Horizontal cartels relating to prices, like the practices which are subject to this Decision, are one of the most harmful restrictions of competition, as these practices distort competition with regard to a key parameter of competition. Therefore, in accordance with point 23 of the Guidelines on fines, the proportion of the value of sales taken into account in the case of such infringements will generally be set at the higher end of the scale.

(896) The economic importance of the business sector affected by the cartels subject to this Decision is reflected in the value of sales. As it is this value of affected sales which is

912 […].
913 […].
914 […].
915 Points 21-22 of the Guidelines on Fines.

used as a basis for determining the basic amount of the fine, no further adjustments are necessary.

8.3.2.1.2. Combined market share

(897) In order to estimate the combined presence of the parties in the supply of freight forwarding services on the trade lanes affected by the infringements covered by this Decision, the Commission has made estimates of the market shares by value, on the basis of information obtained from the addressees of this Decision[916].

(898) The overall combined market share of the undertakings participating in the infringements described in this Decision is estimated to be more than 30% with respect to each of the four air freight lanes affected by the infringements[917].

(899) For the lane affected by the NES cartel, the combined market share of the parties accounts for 30-35%, for the lane affected by the AMS cartel 45-55%, for the lane affected by the CAF cartel 40-50% and for the lane affected by the PSS cartel 30-40%.

8.3.2.1.3. Geographic scope

(900) As regards the geographic scope, each of the AMS, CAF and PSS cartels covered the entire European Economic Area.

(901) In relation to the NES infringement, the cartel covered the whole territory of the United Kingdom, while also including services in relation to shipments of goods originating from other EEA countries transiting through the United Kingdom.

8.3.2.1.4. Implementation

(902) As described in Recitals (106)-(111), (158)-(161), (242)-(244), (248)-(250), (253), (257), (262), (321) and (324), in case of all four infringements, the arrangements were in general at least in part implemented and their implementation monitored. After arriving at agreements of illicit nature, cartel members implemented those and shared their experience among themselves as to how the agreed measures were accepted by the market

Arguments by the parties and their assessment by the Commission

NES

(903) DB claims[918] that, when assessing the gravity of the NES conduct, the Commission is precluded from taking into account an alleged agreement regarding the imposition of

916 In view of existing discrepancies in the estimates, the Commission refers to market share ranges accommodating possible deviations, rather than to exact figures.

917 In the Article 18 Request for Information, the Commission requested the parties to provide an estimate of the value of freight forwarding services on the relevant trade lanes as well as the breakdown per individual forwarder. The estimates used by the Commission are based mainly on the submissions made by DB ([…]) and Kuehne & Nagel ([…]), which were the most representative and exhaustive from among all the replies provided by the parties.

918 DB's reply to the Statement of Objections, page 32.

the NES fee prior to the introduction of the system by the UK authorities. The undertaking submits that the Commission did not present sufficient evidence to establish the existence of such an agreement. Furthermore, DB argues[919] that in determining the gravity, the Commission shall take into account of the fact that the NES conduct related to one EEA country only and that the combined market share of the Gardening Club members on the relevant trade lane was rather insignificant. Finally, DB submits[920] that the NES fee was neither implemented by all undertakings concerned, nor implemented towards all customer groups and that the impact of the conduct on UK airfreight forwarding market was insignificant.

(904) CEVA argues[921] that the gravity in terms of potential economic importance of an agreement fixing the NES fee is much lower than that of any hypothetical agreement aimed at shipment prices generally.

(905) Kuehne & Nagel submits[922] that the NES infringement is at most of lower gravity, if any, since the undertaking has at most entered into an agreement on whether the NES fee should be introduced or not. Furthermore, Kuehne & Nagel believes[923]that the agreement targeted countries outside the European Economic Area and that within the European Economic Area solely the territory of the United Kingdom was considered the point of departure. Finally, the undertaking claims the level of implementation of the alleged collusive agreement to be lower than that adduced by the Commission in the SO.

(906) Regarding the arguments made in relation to the material scope of the NES cartel scheme, reference is made in particular to Recitals (443)-(445) and (455)-(457). With respect to the argument relating to the economic importance of the NES cartel agreement, reference is made to Recitals (867)-(870).

(907) It is noted that even if the level of implementation of the NES arrangements was limited, this was not prompted by the undertakings attempting to breach the cartel arrangements, but rather resulted from circumstances beyond the cartel operation, such as a customer resistance. None of the parties have demonstrated sufficiently that they avoided implementing the NES cartel arrangements by adopting competitive conduct on the market.

(908) With respect to the arguments that the parties had a relatively low combined market share and that the geographic scope of the NES collusion was confined to the territory of the United Kingdom, these elements are fully reflected in Recitals (897)-(899), (900)-(901) and (945)

AMS

(909) DB argues[924] that in view of the applicability of the Air Transport Exemption, the Commission would be limited to taking into account conduct that took place between

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919 DB's reply to the Statement of Objections, page 33.
920 DB's reply to the Statement of Objections, page 33-34.
921 CEVA's reply to the Statement of Objections, page 70.
922 Kuehne & Nagel's reply to the Statement of Objections, page 31.
923 Kuehne & Nagel's reply to the Statement of Objections, page 31.
924 DB's reply to the Statement of Objections, page 54, 56-57.

1 May 2004 and 19 August 2004 for the purpose of assessing the gravity of the AMS conduct. Against this background, DB believes that the nature of the AMS conduct has to be classified as being of a low level of gravity. DB also submits[925] that the key parts of the discussions in the FFI/FFE were not implemented in practice.

(910) Panalpina expects[926] that should the Commission decide to impose fines in relation to the AMS conduct, it will consider that the gravity of the alleged conduct is at most "serious". According to Panalpina[927], the alleged AMS collusion cannot be characterised as a hard-core cartel or some form of collusive behaviour that resulted in depriving competitors of their pricing autonomy. Panalpina equally maintains[928] that the AMS conduct could not and did not affect total prices charged to the consumers and did not result in any consumer detriment, on the basis that a substantial fraction of costs would have passed through to customers absent any collusion, while referring to an economic analysis prepared by RBB[929]. Panalpina claims the number of incidents where the AMS surcharge was invoiced to the customers to be very low, as supported by the economic study[930].

(911) K&N submits[931] that there are circumstances showing that the gravity of the alleged AMS infringement is of a lower level. According to the undertaking, the objective of the AMS fee imposition was the pass-on of the increased costs by the freight forwarders. K&N argues that in any case, the revenue generated by the AMS surcharge was very limited in 2004.

(912) ABX claims[932] that the alleged AMS infringement consists merely of an exchange of information on the level of the intended AMS surcharge rather than an agreement to fix the level of the AMS fee. Consequently, this behaviour should warrant a lower gravity multiplier compared to that applied to classic price fixing agreements.

(913) Agility submits[933] that the scope of the AMS infringement was more limited than that alleged by the Commission. […]. Furthermore, according to Agility, in relation to AMS the Commission's file does not demonstrate that the discussions had an effect on pricing. Moreover, Agility claims that no agreement was implemented by Agility during the period of AMS infringement after the introduction of the procedures by the US customs authorities (13 August 2004 – 19 August 2004).

(914) In response to the arguments of the parties referred to in Recitals (909)-(913), the Commission notes that the Air Transport Exemption invoked by DB does not extend to the AMS cartel as further explained in Section 5.2.3. Hence, the gravity of the AMS infringement is assessed for the entirety of its duration rather than just for the period 1 May 2004 – 19 August 2004, which renders the analysis proffered by DB incomplete and inapplicable.

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925 DB's reply to the Statement of Objections, page 58.
926 Panalpina's reply to the Statement of Objections, page 46 ([…]).
927 Panalpina's reply to the Statement of Objections, page 42 ([…]).
928 Panalpina's reply to the Statement of Objections, page 44 ([…].
929 Panalpina's reply to the Statement of Objections, annex 1 ([…].
930 Panalpina's reply to the Statement of Objections, page 45 ([…]), and Section 3.4 of the RBB Economic Analysis Report ([…]).
931 Kuehne & Nagel's reply to the Statement of Objections, page 50.
932 ABX's reply to the Statement of Objections, page 14.
933 Agility's reply to the Statement of Objections, page 31, 33.

(915) With respect to the arguments relating to the implementation of the AMS infringement, while acknowledging that no uniform amount or range of the AMS surcharge was agreed and implemented by the parties, the Commission observes that the agreement to impose the AMS surcharge as well as agreement on the principle of fee-setting, both liable to directly interfere with an essential parameter of competition on the European Economic Area-US trade lane, was at least in part implemented (see Recitals (158)-(161)) and its implementation reinforced by the exchange of intended AMS fees. The Commission considers that even if the level of implementation of the latter arrangements was limited, this was not prompted by the undertakings attempting to breach the cartel arrangements, but rather resulted from circumstances beyond the cartel operation, such as customer resistance. Such a conclusion is supported by the fact that none of the parties have demonstrated sufficiently that they avoided implementing the AMS cartel arrangements by adopting competitive conduct on the market (see also Recitals (472)-(475)).

(916) Regarding the arguments made in relation to the nature of the AMS cartel, reference is made in particular to Recitals (464), (582) and (894). Parties to the infringement engaged in horizontal practices distorting competition on one of the key parameters of competition, namely price. As to the arguments that such activities cannot amount to price fixing, the Commission notes that according to the settled case-law[934], conduct whereby an undertaking discloses to its competitors the conduct which it intends or contemplates to adopt in the market concerning its pricing policy is considered as conduct amounting to price fixing.

(917) With respect to the argument that a substantial fraction of the cost associated with the introduction of the AMS procedure would have been passed on to the customers even in the absence of the collusion and thus that the AMS infringement did not affect total prices, the Commission notes that this eventuality does not have a bearing on the decision as to whether a fine should be imposed on undertakings for their cartel involvement. As a preliminary remark, it is settled case-law that the fact that an agreement having an anti-competitive object is implemented, even if only in part (which appears to be the current case), is sufficient to preclude the possibility that the agreement had no effect on the market[935]. In any event, the implementation of the conduct could be relevant only in setting the fine proportion based on the gravity factor[936] or under point 31 of the Guidelines on fines, which provides for the Commission to increase the fine that would otherwise be applied in order to exceed the amount of "gains improperly made as a result of the infringement". However, the Commission is applying neither the fine increase for implementation under points 22 or 31 of the Guidelines on fines in this Decision. Furthermore, the Commission notes that the fact that the imposition of the AMS surcharge itself might have pursued a legitimate goal of absorbing increased costs for the freight forwarders does not justify collusion with an object of restricting competition.

(918) Regarding the economic study submitted by Panalpina, as RBB has not submitted the data and the code replicating the data cleaning and data management steps, it was not

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934 See for example Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, in particular paragraph 103, upheld on appeal in Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraphs 50 and 51..

935 See, for example, case T-38/02, *Danone v Commission* [2005] ECR II-4407, paragraph 148.

936 Point 22 of the Guidelines on fines.

possible to check the validity of the analysis. In any event, for the reasons set out in Recital (917) above, the study is not relevant for the purposes of the present case.

(919) It should be further noted that even if passing through of the individual price shocks associated with AMS, CAF and PSS would be rational in a competitive industry as the study purports to indicate, individual passing through cannot be equated to a coordinated one with the certainty of several competitors trying such a pass-through. Thus, even if the study had demonstrated (which is not the case) that the infringement would not have had proven effects on the overall price of the services, the Commission does not take into account whether an infringement had effects on prices when assessing its gravity.

(920) Finally, it has to be noted that the 2006 Guidelines on fines do not distinguish between minor infringements, serious infringements and very serious infringements and therefore no classification is made by the Commission in this regard. In any event, in line with Recital (895) the infringement amounted to a horizontal price fixing cartel for which the Guidelines on fines[937] state that they are among the most harmful restrictions of competition and that, as a matter of policy, they will be heavily fined.

CAF

(921) DB maintains[938] that, in line with the Statement of Objections, the implementation of any measures possibly decided during the competitor contacts was, at most, extremely limited, which should be taken into account by the Commission in its determination of the gravity of the infringement.

(922) Panalpina expects[939] that the Commission should classify the gravity of the CAF conduct as "serious" at most. Panalpina equally maintains[940]that the CAF behaviour could not and did not affect total prices charged to the consumers and did not result in any consumer detriment, on the basis that a substantial fraction of costs would have passed through to customers absent any collusion[941]. According to Panalpina[942], a low degree of implementation of CAF arrangements and customer resistance are indicators of the absence of any collusion and existence of competitive conditions prevalent in the freight forwarding industry. Panalpina also claims[943] that the alleged CAF infringement concerned conduct of local entities and local personnel only and was not undertaken or coordinated by the head offices or top management of the relevant undertaking.

(923) K&N submits[944] that in the light of a limited degree of implementation and infringement type, CAF conduct constitutes an infringement of low gravity. According to K&N, the efforts to impose the CAF surcharge pursued the objective of

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937 Point 23 of the Guidelines on fines.

938 DB's reply to the Statement of Objections, page 81.

939 Panalpina's reply to the Statement of Objections, page 35 ([…]).

940 Panalpina's reply to the Statement of Objections, page 33-34 ([…]).

941 RBB Economic Analysis Paper, attached as Annex 1 to the Panalpina's reply to the Statement of Objections; sections 3 and 4 ([…]).

942 Panalpina's reply to the Statement of Objections, page 34 ([…]).

943 Panalpina's reply to the Statement of Objections, page 34 ([…]).

944 Kuehne & Nagel's reply to the Statement of Objections, page 61.

absorbing change of business environment operating to the disadvantage of freight forwarders.

(924) Kintetsu submits[945] that the Commission should take into account the limited size and limited economic power of Kintetsu, when assessing the gravity. Furthermore, Kintetsu claims[946] not to have implemented the CAF surcharge and to have actually explicitly rejected it.

(925) Yusen submits[947]that no hard core infringement was committed by the parties to the CAF collusion. According to Yusen, the currency switch cannot be considered as price-fixing, but rather qualifies as standard-setting.

(926) Concerning the arguments relating to the nature of the cartel, reference is made to the Recitals (489), (636), (637) and (894) of this Decision.

(927) With respect to the arguments made in relation to the implementation of the CAF cartel arrangements, reference is made in particular to Recitals (242)-(244), (248)-(250), (253), (257) and (262). The Commission considers that even if the level of implementation of the said arrangements was limited, this was not prompted by the undertakings attempting to breach the cartel arrangements, but rather resulted from circumstances beyond the cartel operation, such as a customer resistance. None of the parties has demonstrated sufficiently that they avoided implementing the CAF cartel arrangements by adopting competitive conduct on the market.

(928) Regarding the arguments that a substantial part of costs stemming from the regulatory change would have been passed on to customers also absent any collusion and that the CAF cartel did not affect total prices, reference is made to the argument in Recital (917), which applies by analogy.

(929) In relation to the fact that the CAF conduct concerned only local offices and local personnel without coordination from the head offices, the Commission holds that this aspect does not have any impact on the gravity of the infringement. The setting in which cartel arrangements were set up, the formal aspect, is irrelevant for the determination of gravity. It is rather the substance, geographical operation and manifestation of the cartel within the European Economic Area that matter for these purposes. Furthermore, the Commission notes that the localised nature of the infringement, which confines the geographical scope to the trade lane China-European Economic Area, is duly reflected in the value of sales.

(930) With respect to the argument that parties only had a limited size and economic power, this element will be fully reflected in equally limited value of sales and should not be taken into account as an additional factor in setting the percentage of the basic amount of the fine to be imposed.

(931) With respect to the argument of Panalpina that the Commission should conclude that the gravity of the alleged conduct is at most "serious", reference is made to Recital (920).

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945 Kintetsu's reply to the Statement of Objections, page 76-77.

946 Kintetsu's reply to the Statement of Objections, page 70.

947 Yusen's reply to the Statement of Objections, page 35-37.

PSS

(932) Panalpina argues[948]that the alleged PSS collusion cannot be characterised as a hard-core cartel or some form of collusive behaviour that resulted in depriving competitors of their pricing autonomy. According to Panalpina, should the Commission decide to impose fines in relation to the alleged PSS infringement, it should conclude that the gravity of the alleged conduct is at most "serious". Panalpina maintains that the PSS conduct could not and did not affect total prices charged to the consumers and did not result in any consumer detriment as the pass-through would follow even in the absence of any collusion. In Panalpina's view, the absence of collusion and prevalence of the competitive conditions is evidenced by very low level of incidents where PSS surcharges were applied towards customers. Panalpina also claims that the alleged PSS infringement concerned conduct of local entities and local personnel only and was not undertaken or coordinated by the head offices or top management of the relevant undertaking.

(933) K&N claims[949] that in assessing the gravity, the fact that the freight forwarders merely attempted to pass on the cost increases as well as the insignificant degree of implementation should be duly considered.

(934) BALtrans argues[950] that the Commission should not characterise the nature of the alleged PSS infringement as a hard core restriction, namely price fixing. Furthermore, BALtrans maintains that in determining the fine, the Commission should take into account the relatively low combined market share of the alleged participants in the alleged PSS infringement.

(935) Expeditors submits[951] that the PSS arrangements did not constitute a hard core cartel and involved primarily coordination of the timing of the announcements for the PSS. Furthermore, in Expeditors' view, the forwarders would have attempted to recoup some of the increased costs from their customers irrespective of any agreement. It also claims that the PSS applies to only a fraction of the total trades, that there was no negative effect on competition or on consumers, that there is no reason why the forwarders should have to bear the increased cost and finally that the forwarders have no market power.

(936) Agility submits[952] that the scope of the PSS infringement was more limited than that alleged by the Commission. […]. Furthermore, Agility claims that the geographic impact of the alleged cartel was more limited and that the geographic scope of the PSS only included Hong Kong with respect to Agility.

(937) According to DB[953], the Commission should take into account the limited impact/implementation of the PSS conduct in its determination of the gravity of the infringement.

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948 Panalpina's reply to the Statement of Objections, page 63, 65-67 ([…]).
949 Kuehne & Nagel's reply to the Statement of Objections, page 74.
950 Toll's reply to the Statement of Objections, page 22.
951 Expeditors' reply to the Statement of Objections, page 33.
952 Agility's reply to the Statement of Objections, page 69-70.
953 DB's reply to the Statement of Objections, page 91.

(938) Concerning the arguments relating to the nature of the cartel, reference is made to Recitals (524), (533), (894) and (920) of this Decision. Parties to the PSS infringement engaged in horizontal practices distorting competition on one of the key parameters of competition, namely price. As to the arguments that such activities cannot amount to price fixing, the Commission notes that according to case-law[954], conduct whereby an undertaking discloses to its competitors the conduct which it intends or contemplates to adopt in the market concerning its pricing policy is considered as conduct concerning price fixing.

(939) With respect to the argument that the parties had a relatively low combined market share, this element is fully reflected in Recitals (897) - (899) and (945). Furthermore, the Commission notes that while high combined market shares could lead to an increase of the infringement's gravity, low combined market shares are not a reason to reduce the gravity factor.

(940) With respect to the arguments made in relation to the implementation of the PSS cartel, the Commission maintains that the continuing nature of the collusion attests to the generally successful implementation of the PSS arrangements, which is also supported by the evidence on the Commission's file (see Recitals (321) and (324)). Furthermore, one of the main motives for setting up the cartel was to ensure wider implementation of the PSS surcharge, especially considering the rather unsuccessful imposition of the surcharge by the parties in previous years (see Recitals (306) and (311)). Moreover, none of the parties has demonstrated sufficiently that they avoided implementing the PSS cartel arrangements by adopting competitive conduct on the market.

(941) Regarding the arguments that a substantial fraction of costs stemming from the regulatory change would have been passed on to customers absent any collusion and that the PSS cartel did not affect total prices, reference is made to the reasoning set out in the Recital (917), which applies by analogy.

(942) In relation to the fact that the PSS conduct concerned only local offices and local personnel without coordination from the head offices, reference is made to the reasoning set out in the Recital (929), which applies by analogy.

(943) With respect to the argument that the geographic impact of the infringement was limited to Hong Kong, the Commission acknowledges that there might have been variations in terms of the number and location of hubs in South China/ Hong Kong from which individual parties applying the PSS surcharge were operating and providing forwarding services to the European Economic Area. However, those variations are duly reflected in the value of sales taken as a basis for calculation of fines. In relation to Agility, Agility Logistics Limited (Hong Kong) was found to be involved in the PSS infringement and thus the sales of that undertaking will be taken into account in conformity with the methodology set out in Recital (863). Furthermore, the geographic scope, definition of which is material for the purposes of determining the gravity concerns solely the area affected by the cartel within the

954 See for example Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, in particular paragraph 103 upheld on appeal in Case C-359/01 P *British Sugar* v *Commission* [2004] ECR I-4933, paragraphs 50 and 51.

European Economic Area (see Recital (900) for definition of geographic scope in relation to the PSS infringement).

(944) With respect to the argument of Panalpina that the Commission should conclude that the gravity of the alleged conduct is at most "serious", reference is made to Recital (920).

8.3.2.1.5. Conclusion on gravity

(945) Given the specific circumstances of this case, taking into account the criteria discussed in Recitals (893)-(896) on nature, and Recital (900) on geographical scope above, the proportion of the value of sales to be taken into account should be 16% for each of the AMS, CAF and PSS infringements. Taking into account the criteria discussed in Recitals (893)-(896) on nature the proportion of the value of sales to be taken into account should be 15% for the NES infringement.

(946) Panalpina argues[955] that the proportion of the value of sales taken into account should not be set at a level higher than 15% of the value of sales. It claims that any decision to apply a percentage of 16% or above would be inconsistent with past Commission decisions.

(947) The Commission observes that the gravity factor reflected in the proportion of value of sales set out in Recital (945) duly takes into account the nature of the infringements as well as their geographic scope (in relation to AMS, CAF and PSS infringements) and is consistent with the past decisional practice[956].

8.3.2.2. Duration

(948) For each of the infringements, the annual reference amount determined on the basis of the relevant sales made by the undertakings during the respective periods referred to in Recitals (860)-(863) (value of sales) will be multiplied by the number of years or by fractions of the year respectively of the company's participation in the infringement as specified in Recitals (816), (827), (841) and (849), in order to take fully into account the duration of the participation for each undertaking in the infringement individually.[957]

(949) With respect to UTi and its participation in the AMS cartel, whereas two UTi entities were implicated in the infringement at different periods of the cartel lifetime, the Commission notes that on the level of the undertaking, UTi was involved in the collusion for the uninterrupted period of the entire cartel duration.

(950) According to its practice, which is compatible with the principle of equal treatment and operates to the advantage of undertakings concerned[958], the Commission will take into account the actual duration of participation in the infringement of the undertakings involved in this case on a rounded down monthly and *pro rata* basis to

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955 Panalpina's letter of 5 October 2011, page 11 ([…]).

956 For example Commission decision of 12 November 2008 in Case COMP/39.125 – *Carglass* or Commission decision of 7 October 2009 in Case COMP/39.129 – *Power Transformers*.

957 Point 24 of the Guidelines on Fines.

958 See case C-167/04 P JCB/Commission, [2006] ECR I-08935, paragraph 207.

take into account the duration of the participation for each undertaking. Hence, if, for instance, the duration is one year, three months and twenty-five days, the calculation will take into account one year and three months without counting the number of days at all. This leads to the following multipliers in the current case:

Table 6:

NES infringement

Entity	Value of sales	Duration	Multiplier
Schenker Limited (as an economic successor of BAX Global Ltd. (UK))	17 370 770	1 October 2002 until 10 March 2003	0.41
CEVA Freight (UK) Limited and EGL, Inc.	15 237 197	1 October 2002 until 10 March 2003 1 October 2002 until 10 March 2003	0.41 0.41
DHL Global Forwarding (UK) Limited and Deutsche Post AG	71 940 509	1 October 2002 until 10 March 2003 1 October 2002 until 10 March 2003	0.41 0.41
Exel Freight Management (UK) Limited and Exel Limited	71 648 035	1 October 2002 until 10 March 2003 1 October 2002 until 10 March 2003	0.41 0.41
Kuehne + Nagel Ltd. *(UK)* and Kuehne + Nagel International AG	25 155 360	1 October 2002 until 10 March 2003 1 October 2002 until 10 March 2003	0.41 0.41
UPS Supply Chain Solutions, Inc. (as an economic successor of Menlo Worldwide Forwarding, Inc.)	10 705 414	1 October 2002 until 10 March 2003	0.41

Table 7:

AMS infringement

Entity	Value of sales	Duration	Multiplier
DSV Air & Sea SAS	983 161	19 March 2003 until 19 August 2004	1.41
Agility Logistics Limited	8 511 000	19 March 2003 until 19 August 2004	1.41
DHL Management (Schweiz) AG and Deutsche Post AG	135 487 676	19 March 2003 until 19 August 2004 19 March 2003 until 19 August 2004	1.41 1.41
Exel Limited and Exel Freight Management (UK) Limited and Exel Group Holdings (Nederland) B.V.	28 972 631	25 March 2003 until 19 August 2004 25 March 2003 until 19 August 2004 21 October 2003 until 19 August 2004	1.33 1.33 0.75
Kuehne + Nagel Management AG and Kuehne + Nagel International AG	98 408 403	8 April 2003 until 19 August 2004 8 April 2003 until 19 August 2004	1.33 1.33
Panalpina Management AG and Panalpina World Transport (Holding) Ltd	61 331 417	19 March 2003 until 19 August 2004 19 March 2003 until 19 August 2004	1.41 1.41
Schenker AG		25 March 2003 until 19 August	1.33

and Deutsche Bahn AG	75 080 751	2004 25 March 2003 until 19 August 2004	 1.33
UPS Supply Chain Solutions, Inc. and United Parcel Service, Inc.	12 885 938	19 March 2003 until 21 October 2003 19 March 2003 until 21 October 2003	0.58 0.58
UTi Worldwide, Inc. and UTi Nederland B.V. and UTi Worldwide (UK) Ltd	7 956 930	19 March 2003 until 19 August 2004 21 October 2003 until 19 August 2004 19 March 2003 until 21 October 2003	1.41 0.75 0.58

Table 8:

CAF infringement

Entity	Value of sales	Duration	Multiplier
Schenker China Ltd. (as an economic successor of BAX Global (China) Co. Ltd.)	12 084 734	27 July 2005 until 13 March 2006	0.58
Schenker China Ltd. and Deutsche Bahn AG	13 807 627	29 July 2005 until 13 March 2006 29 July 2005 until 13 March 2006	0.58 0.58
Beijing Kintetsu World Express Co., Ltd.	2 467 952	27 July 2005 until 13 March 2006	0.58
CEVA Freight Shanghai Limited and EGL, Inc.	9 356 601	27 July 2005 until 13 March 2006 27 July 2005 until 13 March 2006	0.25 (see Section 8.5.4.1) 0.25(see

			Section 8.5.4.1)
DHL Global Forwarding (China) Co. Ltd.	18 826 209	27 July 2005 until 13 March 2006	0.58
DHL Logistics (China) Co., Ltd.	12 324 545	27 July 2005 until 13 March 2006	0.58
Kuehne + Nagel Ltd. *(Shanghai)* and Kuehne + Nagel International AG	1 784 609	27 July 2005 until 13 March 2006 27 July 2005 until 13 March 2006	0.58 0.58
Nippon Express (China) Co., Ltd.	4 060 396	27 July 2005 until 31 October 2005	0.25
Panalpina China Ltd and Panalpina World Transport (Holding) Ltd	15 278 571	27 July 2005 until 9 December 2005 27 July 2005 until 9 December 2005	0.33 0.33
UPS SCS (China) Ltd. and United Parcel Service, Inc.	14 082 843	27 July 2005 until 13 March 2006 27 July 2005 until 13 March 2006	0.58 0.58
Yusen Shenda Air & Sea Service (Shanghai) Ltd.	1 681 832	27 July 2005 until 31 October 2005	0.25

Table 9:

PSS infringement

Entity	Value of sales	Duration	Multiplier
Agility Logistics Limited (Hong Kong)	8 069 000	9 August 2005 until 21 May 2007	1.75
DHL Global Forwarding (Hong Kong) Limited and Deutsche Post AG	46 178 935	9 August 2005 until 21 May 2007 9 August 2005 until 21 May 2007	1.75 1.75

DHL Supply Chain (Hong Kong) Limited and Exel Limited	52 997 453	9 August 2005 until 13 January 2006 9 August 2005 until 13 January 2006	0.41 0.41
Expeditors Hong Kong Ltd. and Expeditors International of Washington, Inc.	14 786 155	21 September 2005 until 23 June 2006 21 September 2005 until 23 June 2006	0.75 0.75
Hellmann Worldwide Logistics Ltd. Hong Kong and Hellmann Worldwide Logistics GmbH & Co. KG	11 104 098	6 December 2005 until 21 May 2007 6 December 2005 until 21 May 2007	1.41 1.41
Kuehne + Nagel Ltd. *(Hong Kong)* and Kuehne + Nagel International AG	25 494 030	9 August 2005 until 21 May 2007 9 August 2005 until 21 May 2007	1.75 1.75
Panalpina China Ltd and Panalpina World Transport (Holding) Ltd	44 510 119	9 August 2005 until 21 May 2007 9 August 2005 until 21 May 2007	1.75 1.75
Schenker International (H.K.) Ltd. and Deutsche Bahn AG	21 413 940	3 September 2005 until 23 June 2006 3 September 2005 until 23 June 2006	0.41 (see Section 8.5.5.1) 0.41 (see Section 8.5.5.1)
Toll Global Forwarding (Hong Kong) Limited		9 August 2005 until 21 May 2007	1.75

and Toll Global Forwarding Limited	6 632 671	9 August 2005 until 21 May 2007	1.75

(951) With respect to the duration factor, Panalpina submits[959] that the only occasion where the Commission established exchange of pricing information was the FFI Air Freight Committee conference call of 19 August 2004 and thus for the purposes of calculating any fine, the duration of the alleged AMS infringement should be subject to a corresponding adjustment.

(952) As regards the argument submitted by Panalpina, reference is made to Recitals (817)-(818), (563) and (565)-(568) of this Decision relating to the duration of the AMS cartel and the establishment of a single and continuous AMS infringement for the entire duration thereof[960].

8.3.3. The percentage to be applied for the additional amount

(953) In addition, irrespective of the duration of the undertakings' participation in the infringement, the Commission includes in the basic amount a sum of between 15% and 25% of the value of sales in order to deter undertakings from even entering into horizontal price-fixing and market-sharing agreements.[961]

(954) Given the specific circumstances of this case, taking into account the criteria discussed in section 8.3.2.1 above, the percentage to be applied for the additional amount should be 15% for NES cartel and 16% for AMS, CAF and PSS infringements.

(955) Panalpina submits[962] that the nature of the alleged infringements (AMS, CAF and PSS infringement), especially in light of the economic context and its effect on the market, does not justify the inclusion of any additional amount to the basic amount of fine.

(956) With respect to the CAF infringement, Yusen claims[963] that its actions were not guided by intent and it only engaged in behaviour that qualifies as a standard setting, which, at the very least, does not constitute a serious infringement. Furthermore, Yusen seems to refer to point 25 of the Guidelines on fines while submitting that there is no risk of recidivism and that it never breached the Union competition rules before.

(957) Pursuant to point 25 of the Guidelines on fines, the Commission will impose an additional amount for deterrence in cases of horizontal cartels regarding price-fixing. Given the fact that all four infringements constitute price-fixing arrangements, an

959 Panalpina's reply to the Statement of Objections, page 46 ([…]).

960 See, to that effect case T-127/04, KME Germany AG v Comission, [2009] ECR II-01167, paragraph 103 upheld on this point on appeal in case C-272/09 P, not yet reported, paragraphs 62-71.

961 Point 25 of the Guidelines on Fines.

962 Panalpina's reply to the Statement of Objections, page 47 ([…]), page 35 and 67 ([…]).

963 Yusen's reply to the Statement of Objections, page 37.

additional increase specified in Recital (954) has been applied in the current case with respect to all infringements covered by this Decision.

8.3.4. Calculation and conclusion on basic amounts

(958) Based on the criteria explained above, the basic amounts of the fines to be imposed on each undertaking should therefore be as follows:

Table 10: Basic amounts

NES infringement

Entity	Basic amount (EUR)
Schenker Limited (as an economic successor of BAX Global Ltd. (UK))	3 673 000
CEVA Freight (UK) Limited and EGL, Inc.	3 222 000
DHL Global Forwarding (UK) Limited and Deutsche Post AG	15 215 000
Exel Freight Management (UK) Limited and Exel Limited	15 153 000
Kuehne + Nagel Ltd. *(UK)* and Kuehne + Nagel International AG	5 320 000
UPS Supply Chain Solutions, Inc. (as an economic successor of Menlo Worldwide Forwarding, Inc.)	2 264 000

Table 11: Basic amounts

AMS infringement

Entity	Basic amount (EUR)

DSV Air & Sea SAS	379 000
Agility Logistics Limited	3 281 000
DHL Management (Schweiz) AG and Deutsche Post AG	52 244 000
Exel Limited and Exel Freight Management (UK) Limited and Exel Group Holdings (Nederland) B.V.	10 800 000
Kuehne + Nagel Management AG and Kuehne + Nagel International AG	36 686 000
Panalpina Management AG and Panalpina World Transport (Holding) Ltd	23 649 000
Schenker AG and Deutsche Bahn AG	27 990 000
UPS Supply Chain Solutions, Inc. and United Parcel Service, Inc.	3 257 000
UTi Worldwide, Inc. and UTi Nederland B.V. and	3 068 000

UTi Worldwide (UK) Ltd	

Table 12: Basic amounts

CAF infringement

Entity	Basic amount (EUR)
Schenker China Ltd. (as an economic successor of BAX Global (China) Co. Ltd.)	3 055 000
Schenker China Ltd. and Deutsche Bahn AG	3 490 000
Beijing Kintetsu World Express Co., Ltd.	623 000
CEVA Freight Shanghai Limited and EGL, Inc.	1 871 000
DHL Global Forwarding (China) Co. Ltd.	4 759 000
DHL Logistics (China) Co., Ltd.	3 115 000
Kuehne + Nagel Ltd. *(Shanghai)* and Kuehne + Nagel International AG	451 000
Nippon Express (China) Co., Ltd.	812 000
Panalpina China Ltd and Panalpina World Transport (Holding) Ltd	3 251 000
UPS SCS (China) Ltd. and United Parcel Service, Inc.	3 560 000
Yusen Shenda Air & Sea Service (Shanghai)	336 000

Ltd.	

Table 13: Basic amounts

PSS infringement

Entity	Basic amount (EUR)
Agility Logistics Limited (Hong Kong)	3 550 000
DHL Global Forwarding (Hong Kong) Limited and Deutsche Post AG	20 318 000
DHL Supply Chain (Hong Kong) Limited and Exel Limited	11 956 000
Expeditors Hong Kong Ltd. and Expeditors International of Washington, Inc.	4 140 000
Hellmann Worldwide Logistics Ltd. Hong Kong and Hellmann Worldwide Logistics GmbH & Co. KG	4 281 000
Kuehne + Nagel Ltd. *(Hong Kong)* and Kuehne + Nagel International AG	11 217 000
Panalpina China Ltd and Panalpina World Transport (Holding) Ltd	19 584 000
Schenker International (H.K.) Ltd.	

and Deutsche Bahn AG	4 830 000
Toll Global Forwarding (Hong Kong) Limited and Toll Global Forwarding Limited	2 918 000

8.4. Adjustments to the basic amounts of the fine

8.4.1. Aggravating circumstances

(959) No aggravating circumstances have been found.

8.4.2. Mitigating circumstances

8.4.2.1. Termination of the infringement before the inspections

(960) Kuehne & Nagel claims that the Commission should have regard to the fact that the infringements terminated long before the Commission's dawnraids.[964]

(961) It is evident that the infringements terminated, because the undertakings did not see any further reasons to meet after the agreed measures were put into effect on the market and not because the companies would have acknowledged the illegal nature of their contacts. Moreover, the fact that a company terminates the illegal behaviour before any intervention by the Commission does not negate the manifestly illegal nature of the anti-competitive practice and does not merit a reward in the form of a reduction of the fine.[965] Furthermore, the duration of the period of infringement is already considered in the calculation of the fine.[966]

8.4.2.2. Effective co-operation outside the 2006 Leniency Notice

(962) Kuehne & Nagel submits that the company actively cooperated with the Commission by providing detailed responses to the Requests for Information and also by submitting several emails. Moreover, Kuehne & Nagel claims that it provided its response on behalf of the whole group, although it was addressed only to Kuehne & Nagel Ltd. According to Kuehne & Nagel, this cooperation should be assessed as a mitigating circumstance within the meaning of point 29 of the Guidelines on fines.[967] Similar claims regarding cooperation with relation to the various infringements were also provided by DB[968], CEVA[969], Toll[970] and Nippon[971]. Furthermore, DB and DSV

964 Kuehne & Nagel's reply to the Statement of Objections, page 32, 50, 61, 74.

965 See to that effect judgment of 16 November 2011 in Case T-79/06, *Sachsa Verpackung* v *Commission*, not yet reported, paragraph 222.

966 Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai v Commission* [2005] ECR II-10, paragraph 291; Case T-50/00 *Dalmine* v *Commission* [2004] II-2395, paragraphs 328-330.

967 Kuehne & Nagel's reply to the Statement of Objections, page 32-33, 50.

968 DB's reply to the Statement of Objections, page 37-41, 63-65, 85, 94.

969 CEVA's reply to the Statement of Objections, page 84.

claim that they should be granted reduction outside Leniency cooperation for not contesting the facts that specifically relate to BAX, Schenker and ABX respectively as set out in the SO.[972] Finally, DB submits specifically in relation to the NES infringement that it provided the Commission with evidence relating to the period, when BAX was owned by a former parent, for which DB must have undertaken considerable efforts and makes reference to the Power Transformers case[973]. It concludes that not granting it the maximum favourable treatment would undermine the effectiveness of the leniency program, as this would deter other undertakings from providing similar levels of cooperation in the future.

(963) Point 29 of the Guidelines on fines provides that *"the basic amount may be reduced where the Commission finds that mitigating circumstances exist, such as: (…) where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so."*

(964) The Commission has to assess if a reduction of fines was justified, in line with the case-law, with regard to the question whether the co-operation of any of the undertakings concerned enabled the Commission to establish the infringement more easily.[974] That assessment in relation to both CEVA and DB has in fact been carried out in application of the Leniency Notice (see Section 8.5). The Commission considers, taking into account the arguments of the parties and the limited scope and value of their co-operation, that no other circumstances are present that would lead to a reduction of the fines outside the Leniency Notice, which, in secret cartel cases, could in any event only be of an exceptional nature.[975] It is sufficient to recall, in this respect, that, in relation to infringements which fall within the scope of the Leniency Notice, as a rule, an interested party cannot validly complain that the Commission failed to take into account the extent of its cooperation as an attenuating circumstance outside the legal framework of the Leniency Notice.[976]

(965) Also cooperation when answering Requests for Information cannot constitute an attenuating circumstance. The undertakings are required to answer Requests for Information and are subject to penalties in case they provide the Commission with incorrect or misleading answers to a Request for Information.[977] Moreover, none of the parties has in their replies to the Requests for Information gone further than that which it was required to provide under Article 18 (4) of Regulation (EC) No 1/2003. The fact that the Request for Information was addressed to Kuehne & Nagel Ltd was mainly because the company's headquarters were located outside the European Economic Area.

(966) Equally, the fact that DB and DSV, after receiving the Statement of Objections, informed the Commission that they did not substantially contest the facts does not

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970 Toll's reply to the Statement of Objections, page 24.
971 Nippon's reply to the Statement of Objections, page 13.
972 DSV's reply to the Statement of Objections, page 16.
973 Case COMP/39129 Power Transformers, paragraphs 271-272.
974 Case T-48/02 *Brouwerij Haacht v. Commission*, [2005] ECR II-5259 paragraph 104 and the case law cited therein.
975 Commission Decision of 20 October 2005 in Case No COMP/38.281 *Italian Raw Tobacco*, paragraphs 385 ff.
976 Case T-186/06 *Solvay SA v Commission* (not yet published), paragraphs 313-316.
977 Article 20(4) and Article 23(1)(a) and (c) of Regulation (EC) No 1/2003.

constitute an attenuating circumstance. The reward for non-contestation of facts which was provided for in the 1996 Leniency Notice[978] has subsequently been abandoned.

(967) In relation to DB's claim regarding the efforts that had to be undertaken when investigating the NES infringement that took place prior to DB's ownership of BAX and its reference to the Power Transformers case, it has to be mentioned that the circumstances differed in this particular case and no parallels can be therefore drawn in this regard. It is evident that in the current case DB's application was triggered not by the change in the ownership structure as was the case in the Power Transformers but rather by the Commission's unannounced inspections in October 2007. Moreover, DB received a Commission's request for information in parallel with the inspections, which indicated that the discussions within the Gardening Club are one of the fields of interest for the Commission. However, even with this knowledge DB submitted the first information regarding the NES cartel only at the end of May 2008. Finally, in relation to the last claim of DB, the Commission concludes that DB's application concerning the NES infringement was duly assessed by the Commission and it received the same treatment as in case of all other parties.

(968) Taking into account all the facts of this case, the Commission therefore considers that there are no exceptional circumstances present in this case that could justify granting a reduction of the fine for effective cooperation falling outside the Leniency Notice.

8.4.2.3. Negligence

(969) The Courts have consistently held that for an infringement to be regarded as having been committed intentionally it is not necessary for an undertaking to have been aware that it was infringing the competition rules in the Treaty. It is sufficient that it could not have been unaware that the contested conduct had as its object or effect the restriction of competition in the internal market, and affected or might affect trade between Member States.[979]

(970) More generally, the Commission does not accept the argument that participants in very serious infringements such as cartels may not have been aware of the illicit nature of their conduct. This is particularly the case for the four infringements included in this Decision, where a series of meetings/contacts were organised with the single aim to agree on different pricing mechanisms. Such infringements are among the most serious infringements of Article 101 of the Treaty and undertakings must be aware that such conduct is illegal.

NES and AMS

(971) DB submits that FFE/FFI was an official association and it was not the intention of the FFE/FFI to hide their activities. DB further says that the association was managed administratively by a professional organisation and it sought legal advice from a legal council specialized in competition law. The conduct of the FFE/FFI

978 OJ C 207, 18.7.1996, page 4.

979 See Case 19/77, *Miller v Commission* [1978] ECR 131, paragraph 18, and Case C-279/87, *Tipp-Ex v Commission* [1990] ECR I-261.

members was therefore, according to DB, subject to close monitoring for competition law compliance and it was expected that the FFE/FFI secretariat would immediately intervene if a topic of discussion posed the risk of potential competition law concerns. Any such infringement was therefore committed as a result of negligence. Moreover, DB claims in relation to both NES and AMS that both BAX and Schenker could reasonably have expected that the Air Transport Exemption applied.[980]

(972) From the evidence on the file it is evident that the undertakings knew that certain topics discussed at the FFE/FFI meetings did not comply with the respective competition rules. If such discussions took place, these were not recorded in the official minutes of the meetings.[981] The fact that FFE/FFI was managed administratively by a professional organisation and it sought legal advice from a legal council specialized in competition law can not affect the reality of the infringement committed.[982] Moreover, there is no evidence that either Schenker or BAX would have relied on a presumption that the Air Transport Exemption applied also on the freight forwarding sector and the pricing issues could be therefore discussed during the meetings.

CAF and PSS

(973) According to Yusen, the participants at the CAF meetings did not have any concerns about the legal admissibility of their conduct, particularly the Asian companies. Yusen further submits that at that time no competition law was in force in China and Yusen's employees did not believe that the arrangements could have an impact in other areas of the world.[983] A similar claim was also made by Kintetsu[984], who submits that its employees were not familiar with the word anti-trust. The company also points to the specific market conditions in China. Along the same lines, DB claims that the participants were unlikely to have been aware of the full extent of the potential antitrust issues[985].

(974) DB submits that there were no antitrust rules in Hong Kong at the time of the PSS infringement.[986]

(975) As already mentioned in Recitals (969) and (970), the Commission does not accept, for both CAF and PSS, the argument that cartel participants may not have been aware of the illicit nature of their conduct. Freight forwarders participating at the meetings were not local undertakings, but entities with their parents companies in countries with a long tradition of antitrust legislation and their employees should have had sufficient knowledge about the anti-trust laws. Moreover, it must have been more than evident to the undertakings that due to the characteristics of the freight forwarding sector and of the lane concerned, the discussions relate not only to the Chinese/Hong Kong market, but also to markets with normal market conditions and

980 DB's reply to the Statement of Objections, page 61-63.
981 […].
982 Case T-38/07 *Shell Petroleum NV, Shell Nederland BV and Shell Nederland Chemie BV v European Commission* [2011], paragraph 96, not yet published.
983 Yusen's reply to the Statement of Objections, page 38.
984 Kintetsu's reply to the Statement of Objections, page 75-76.
985 DB's reply to the Statement of Objections, page 84.
986 DB's reply to the Statement of Objections, page 94.

that standard antitrust rules therefore apply on these contacts. The undertakings should have therefore ensured that their employees had sufficient knowledge of such rules. Furthermore, as indicated in Recital (258), the issue of antitrust concerns was discussed within the CAF cartel as well and it is therefore evident that the parties must have known about the possible consequences of these discussions in other jurisdictions. The evidence on the file also indicates that the members of the PSS cartel were similarly aware of the applicable anti-trust rules.[987]

(976) Consequently, no attenuating circumstance can be retained on the ground of negligence.

8.4.2.4. Decision making not affected by the cartel

(977) Panalpina submits that it operated independently and in a competitive manner on the market when setting the AMS, CAF and PSS surcharge. Moreover, according to Panalpina, the market remained competitive throughout the duration of the infringement.[988]

(978) As already mentioned in the SO (see also Recital (464) above), in relation to the AMS the undertakings did not reach any agreement on the level of the surcharge. They agreed on the introduction of the surcharge and also set the basic rule that the AMS surcharge should not be subject to competition. This agreement meant that the undertakings should not undercut each other and the level of the surcharge should at least cover the costs of its implementation. In general, the undertakings were therefore free to set the surcharge on their own, the only condition was that they should adhere to this basic rule not to set the surcharge below costs.

(979) In relation to the CAF, the purpose of the meetings was to agree on a common approach towards customers in reaction to the currency issues. The common approach of the undertakings was meant to ensure better implementation of the agreement on the market. Moreover, the fact that they specifically discussed certain customers and their acceptance of the agreed measures does not indicate that the market remained competitive.

(980) In relation to PSS, the participants of the meetings agreed on specific parameters of the PSS, which was then applied on the market. As in the case of CAF and AMS, their common approach should have ensured better implementation of the agreement on the market.

(981) Panalpina's argument can therefore not be accepted.

8.4.2.5. Non-implementation or absence of benefit

(982) It follows from point 29 of the Guidelines on fines that simple non-implementation does not justify a mitigating circumstance. The undertaking must show that it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.[989] Moreover, it is settled case-law that

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987 See for example […];[…].

988 Panalpina's replies to the Statement of Objections, page 50-51, 37.

989 Case T-26/02, *Daiichi v. Commission* [2006] ECR II-497, paragraph 113.

the fact that an undertaking proven to have participated in collusion on prices with its competitors did not behave on the market in the manner agreed with those competitors is not necessarily a matter which must be taken into account as a mitigating circumstance. An undertaking which, despite colluding with its competitors, follows a more or less independent policy in the market may simply be trying to exploit the cartel for its own benefit.[990]

NES

(983) DB claims that the NES pricing was not implemented by BAX and the company did not participate in the monitoring.[991]

AMS

(984) Panalpina claims that the Commission should take into account that the conduct had no effect on the market, as there was significant resistance mainly from major customers to the AMS fee. Moreover, according to Panalpina the AMS fee was charged only infrequently.[992]

CAF

(985) CEVA[993] and Panalpina[994] claim that their participation in the CAF cartel did not have any substantial effect on the price of freight forwarding services and still less on the price of the goods transported. Kintetsu submits that it did not implement the agreement.[995]

PSS

(986) Panalpina claims that the Commission should take into account that the conduct had no effect on the market, as there was significant resistance, mainly from major customers, to the PSS fee. Moreover, according to Panalpina, the PSS fee was charged only infrequently.[996] A similar claim was also raised by Agility, who also says that it had a pre-existing policy regarding the PSS to pass through the increased costs[997] and by Kuehne & Nagel who also submits that this was only a pure passing-on of costs incurred by carriers.[998]

(987) In case of Panalpina, it was not the decision of the undertaking not to implement the surcharge, but, as Panalpina rightly mentions in its response, any non-implementation was mainly due to significant resistance from customers. The same applies in the case of Agility and CEVA. The fact that Agility may have had a

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990 Case T-348/08 *Aragonesas Industrias y Energía/Commission*, judgment of 25 October 2011, not yet reported, paragraph 297 and case-law cited [(Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230, and *Cheil Jedang* v *Commission*, paragraph 277 above, paragraph 190)].

991 DB's reply to the Statement of Objections, page 36.

992 Panalpina's reply to the Statement of Objections, page 51-52.

993 CEVA's reply to the Statement of Objections, page 84.

994 Panalpina's reply to the Statement of Objections, page 38.

995 Kintetsu's reply to the Statement of Objections, page 70.

996 Panalpina's reply to the Statement of Objections, page 51-52.

997 Agility's reply to the Statement of Objections, page 72.

998 Kuehne & Nagel's reply to the Statement of Objections, page 74.

preexisting pricing policy can not be taken into account as a mitigating circumstance, because the company may have been simply trying to exploit the cartel for its own benefit.[999]

(988) Moreover, contrary to CEVA's claim regarding the CAF, an effective increase in price of 2.1% can not be described as unsubstantial. In the case of Kintetsu, the company did not put into effect one part of the agreement, namely the CAF, also only due to specific demands of Japanese customers, who would not have accepted this measure and not due to any unilateral action by Kintetsu. This fact was communicated by the Japanese freight forwarders to the rest of the group.

(989) In relation to DB's arguments, the company did not provide the Commission with any evidence that would indicate that BAX clearly and substantially deviated from putting the NES cartel into effect. On the contrary, the evidence on the file shows that the other Gardening Club members were satisfied with BAX's approach to the NES pricing.[1000]

(990) With respect to the argument of pure passing-on, the absence of benefit cannot lead to any reduction in the fine. In this respect, it suffices to note that for an undertaking to be classified as a perpetrator of an infringement it is not necessary for it to have derived any economic advantage from its participation in the cartel in question.[1001] It follows that the Commission is not required, for the purpose of fixing the amount of fines, to establish that the infringement secured an improper advantage for the undertakings concerned, or to take into consideration, where it applies, the fact that no profit was derived from the infringement in question.[1002] Similarly, the absence of any benefit from the agreements, even if this could be proven by the parties that make this claim, would not be a reason for the Commission to mitigate the level of the fine to be imposed on these undertakings.

(991) This mitigating circumstance is to be rejected.

8.4.2.6. Compliance programs

(992) Panalpina claims that the Commission should take into account as a mitigating factor the significant strengthening of Panalpina's compliance program.[1003] A similar claim was also made by Agility[1004], UPS[1005] and CEVA[1006], who submit that they implemented a comprehensive compliance program.

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999 Case T-348/08 *Aragonesas Industrias y Energía/Commission*, judgment of 25 October 2011, not yet reported, paragraph 297 and case-law cited [(Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230, and *Cheil Jedang* v *Commission*, paragraph 277 above, paragraph 190)].

1000 […].

1001 Case T-304/94, *Europa Carton v Commission*, [1998] ECR II-869, paragraph 141 and Joined Cases T-109/02 and others, *Bolloré v Commission*, [2007[ECR II-947, paragraphs 671-672.

1002 Case T-241/01, *Scandinavian Airlines System AB v Commission* [2005] ECR II-2917, paragraph 146 and Case T-53/03, *BPB v Commission* [2008] ECR II-1201, paragraphs 441-442.

1003 Panalpina's replies to the Statement of Objections, page 52, 39, 70.

1004 Agility's reply to the Statement of Objections, page 34, 36, 73.

1005 UPS' reply to the Statement of Objections, page 35.

1006 CEVA's reply to the Statement of Objections, page 84, 94.

(993) Whilst the Commission welcomes measures taken by undertakings to avoid the recurrence of cartel infringements and to report infringements to the competent authorities, such measures cannot change the reality that infringements occur and need to be appropriately sanctioned[1007]. Compliance programs should not be perceived by the companies as an abstract and formalistic tool for supporting the argument that any fine to be imposed should be reduced if the company is "caught". The purpose of a compliance program should be to avoid an infringement in the first place.

8.4.2.7. Substantially limited, passive and/or minor role

(994) The majority of parties involved invoke the argument that they had a passive and/or minor role and/or had limited participation in the infringement.

(995) The substantially limited role of a company may be taken into account under the Guidelines on fines as a mitigating circumstance, *if the company concerned provides evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market*.[1008] . In addition, the fact that an undertaking has not taken part in all aspects of a cartel arrangement does not normally relieve it from its responsibility for an infringement of Article 101 of the Treaty[1009], nevertheless such individual circumstances can be taken into account in the context of the adjustment to the basic amount to reflect mitigating or aggravating circumstances[1010]

(996) Furthermore, while the Guidelines on fines of 1998[1011] had recognised that the fine could be reduced if the undertaking had taken "an exclusively passive or 'follow-my-leader' role in the infringements", the Guidelines on fines of 2006 that apply in this case, do not have this attenuating circumstance. The exclusion of the passive role as an attenuating circumstance in the Guidelines on fines is based on the consideration that the mere fact that an undertaking takes a passive role should not be rewarded by a reduction in the applicable fine. Even if an undertaking only adopts a passive or 'follow-my-leader' approach, it still participates in the cartel. This means that, on the one hand, it derives its own commercial benefits from its participation in the cartel and, on the other hand, it encourages the other cartelists to participate and to implement the arrangements. Therefore, a passive or 'follow-my-leader' role does not generally constitute a mitigating circumstance.

NES

(997) DB argues that […] of BAX was not a regular member of the Gardening Club and he only attended a single meeting on 1 October 2002 which he left before the NES fee

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1007 Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission* (Tokai Carbon) [2004] ECR II-1181, paragraph 343. See also Case T-76/06 *Plasticos Espanoles (ASPLA)* v *Commission*, nyr, paragraph 131 and case-law cited.

1008 Point 29 of the Guidelines on Fines.

1009 Joined Cases C-204/00 P and others, *Cement II,* [2004] ECR I-123, paragraph 86.

1010 Joined cases T-204/08 and T-212/08 Team Relocations NV (T-204/08) and Amertranseuro International Holdings Ltd, Trans Euro Ltd et Team Relocations Ltd (T-212/08) v European Commission, [2011] ECR , paragraph 86.

1011 1998 OJ C 9/3.

was discussed among the parties. DB further claims that […] was not invited to any further meetings, in particular to the meeting on 5 November 2002. Finally, DB submits that […] played an entirely passive role and he was copied in only a few emails.[1012]

(998) As already explained in Recital (120), there are several factual elements that clearly indicate that […] must have attended the meeting with a clear intention to agree on the NES surcharge. The fact that he did not attend any further meetings is not relevant, as the Commission's evidence relies on the agreement reached at the meeting on 1 October 2002, which […] did attend. As to the alleged passive role of […], in addition to the arguments mentioned in Recital (996), it is evident that […] was not purely passive, as he actively demanded information about further possible agreements reached during the GC meeting.[1013]

AMS

(999) In relation to AMS, DSV submits that ABX played only a limited role in the AMS infringement, as it did not attend the meetings after 24 March 2004. DSV claims that ABX was not involved in two elements of the infringement. Namely that ABX did not exchange the AMS fees and that it did not participate in the implementation and monitoring of the infringement.[1014] According to DSV, ABX only played a passive role being a small freight forwarder in comparison with the major global freight forwarders.[1015] A similar claim was also raised by Agility[1016] and UPS[1017].

(1000) In this case, ABX' involvement cannot be considered substantially limited. It is possible that ABX did not share its own AMS fee, however it participated at the meeting where AMS fees were exchanged. Moreover, it continued to receive the minutes of the meetings and it was therefore aware of the arrangements agreed at the only relevant meeting that it did not attend, including the agreement to monitor the market. Furthermore, the size of the undertaking is not relevant in this regard[1018], as this factor did not affect in any way the participation and involvement of ABX, Geologistics and UPS in the cartel.

CAF

(1001) UPS claims that it only played a minor role in a small fraction of the alleged conduct. The company submits that it did not host any meeting, did not pressure other freight forwarders to follow the agreed measures, participated in the email exchanges only in a limited extent, did not participate at some meetings etc.[1019] Similar claims were

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1012 DB's reply to the Statement of Objections, page 35-36.

1013 […]. See also Case T-348/08 *Aragonesas Industrias y Energía/Commission*, judgment of 25 October 2011, not yet reported, paragraph 290-291.

1014 DSV's reply to the Statement of Objections, page 16.

1015 DSV's reply to the Statement of Objections, page 16.

1016 Agility's reply to the Statement of Objections, page 36.

1017 UPS' reply to the Statement of Objections, page 34.

1018 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 366 and Case T-18/03 *CD-Contact Data* v *Commission* [2009] ECR II-1021, paragraph 115.

1019 UPS' reply to the Statement of Objections, page 34-35.

also made by Yusen[1020] who claims that it was added to the email list without its consent, by Kintetsu and by CEVA[1021]. Kintetsu says in this regard that it attended the meetings out of Chinese politeness, was only a small market player and rejected the CAF agreement[1022]. The same is also claimed by Nippon.[1023]

(1002) As mentioned in Recitals (995) and (996), a purely passive participation can not be considered as a mitigating circumstance. This is even more emphasized by the fact that the parties did not in any way indicate that they objected to the agreed measures or participated in the meetings in a different spirit. The same therefore applies to the claim provided by Yusen, who did not provide any evidence which would have indicated that Yusen objected to being included on the mailing list. On the contrary, Yusen continued with its participation at the next meeting and kept on receiving the updates from the group. Finally, Kintetsu's motivation for attending the meetings was never in any way communicated to the rest of the group and the behaviour of the company did not raise any doubts regarding its adherence to the group. The fact that one part of the agreement, namely the introduction of the CAF, was not acceptable for Japanese customers was a well known fact within the group and it was not understood as a rejection of the cartel. This general understanding of the specific position of the Japanese freight forwarders in relation to their Japanese customers was also the reason why Kintetsu was subsequently invited to the meetings and included in the mailing list. The market share of the undertaking is not relevant in this regard.

PSS

(1003) Hellmann[1024], Agility[1025] and Kuehne & Nagel[1026] claim that they were purely passive during the meetings.

(1004) As mentioned in Recitals (995) and (996), a simply passive participation can not be considered as a mitigating circumstance. This is further underlined by the fact that the parties did not in any way indicate that they object to the agreed measures or participated at the meetings in a different spirit.[1027]

8.4.2.8. No involvement of head office

(1005) According to CEVA, the Commission should take account of the fact that in the case of the NES infringement Eagle's head office was not aware of the conduct in question.[1028] In the case of the CAF infringement, CEVA claims that Eagle's head

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1020 Yusen's reply to the Statement of Objections, page 39.
1021 CEVA's reply to the Statement of Objections, page 84.
1022 Kintetsu's reply to the Statement of Objections, page 71-72.
1023 Nippon's reply to the Statement of Objections, page 7.
1024 Hellmann's reply to the Statement of Objections, page 13-15.
1025 Agility's reply to the Statement of Objections, page 72.
1026 Kuehne & Nagel's reply to the Statement of Objections, page 74.
1027 See, in this sense, Case C-199/92 *P Hüls AG v. Commission*, [1999] ECR I-4287, paragraph 155, Case T-9/99 *HFB Holding für Fernwärmetechnik Beteiligungsgesellschaft mbH & Co. KG and others v Commission*, [2002] ECR II-1487, paragraphs 223-227 and Joined Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc, British Sugar plc and Napier Brown & Co. Ltd v Commission* [2001] ECR II-2035, paragraph 65.
1028 CEVA's reply to the Statement of Objections, page 93.

office issued instructions contrary to the agreement reached within the group. The infringement was only local.[1029] A similar claim was also made by Panalpina, who submits that no individuals from Panalpina's top management were involved in the CAF and PSS infringements.[1030]

(1006) The extent to which the head offices of the undertakings were aware of the contacts regarding the NES pricing, the appreciation of RMB or regarding the imposition of the PSS is not relevant. The companies continued to attend the meetings and did not indicate to the other participants that they did not want to adhere to the agreed measures because of the limited involvement of the head office. The General Court stated in this regard that if the Commission *"does not establish knowledge of the infringement on the part of the managers or owners of an undertaking, the Commission is not required to grant a reduction in the fine imposed on that undertaking."*[1031].

8.4.2.9. New owner

(1007) CEVA submits that the new owners, who had no involvement in the conduct, will bear the economic burden of any fine.[1032] A similar claim is also made by DB[1033], who claims that it could not influence BAX's actions prior to 31 January 2006 and refers to the *Power Transformers* case[1034]. Toll submits similar arguments.[1035]

(1008) For the purposes of the calculation of the fine, the fact that the company has changed owner is not a factor that is taken into account as a mitigating circumstance. It is evident from the evidence on the file that the entities that were subsequently acquired by CEVA and DB participated entirely in the cartel activities and there is therefore no reason to grant them any favourable treatment. Furthermore, the issues connected with the change of the ownership structure are duly reflected in the parental liability part of the Decision. Moreover, no parallels can be drawn between the situation of DB and the specific part of the Power Transformers case, where the reduction was granted on the basis of the effective cooperation outside the Leniency Notice and not because of the change in the ownership of the undertaking. Furthermore, the leniency applicant in the Power Transformers case approached the Commission already prior to the inspections in this case.[1036]

8.4.2.10. Governmental influence

(1009) According to Kintetsu, the Commission should take into account the authorisation and encouragement by SIFFA for the CAF infringement.[1037]

1029 CEVA's reply to the Statement of Objections, page 84.
1030 Panalpina's reply to the Statement of Objections, page 41, 71.
1031 Case T-216/06 *Lucite International and Lucite International UK v Commission*, [2011] ECR , paragraph 101, not yet published.
1032 CEVA's reply to the Statement of Objections, page 85, 94.
1033 DB's reply to the Statement of Objections, page 36, 84.
1034 Case COMP/39129 Power Transformers, paragraph 272.
1035 Toll's reply to the Statement of Objections, page 24.
1036 Case COMP/39129 Power Transformers, paragraph 272.
1037 Kintetsu's reply to the Statement of Objections, page 74,-75.

(1010) It is not true that the agreement was authorised and encouraged by SIFFA. On the contrary, the cartel participants, more specifically Kintetsu, tried to persuade SIFFA to implement the agreed measures as well in order to achieve even wider implementation of the agreement on the market (see also Recitals (225), (282) - (283) and (490)- (491)). This could then be used as an additional argument in the framework of negotiations with customers. Moreover, mere knowledge of anti-competitive conduct on the side of SIFFA does not imply that that conduct was implicitly 'authorised or encouraged'.[1038]

8.4.2.11. Scope of the agreement and/or concerted practise

(1011) Toll claims that in relation to the PSS, the Commission should take into account the fact that the agreement only concerned the timing of the implementation of the surcharge.[1039]

(1012) The evidence on the file indicates that the undertakings not only discussed the timing, but also exchanged information on the proposed levels for the PSS. The fact that the parties did not agree on a specific level of the PSS can not be taken as a mitigating circumstance.

8.4.2.12. Unauthorized conduct

(1013) DB claims that the alleged infringement resulted from isolated and unauthorized conduct by […] who exceeded the actual authority conferred on him by BAX. Moreover, he acted against the explicit instructions of his superior, […].[1040]

(1014) Recital (122) of this Decision clearly explains that it is not true that […] did not have any pricing authority within BAX. Moreover, it is also shown that […] mentioned to the BAX […] that he would discuss the NES pricing with the competitors.[1041] None of […] raised any objections and did not try to prevent […] from attending the meeting.[1042]

8.4.2.13. Investigation in other jurisdictions

(1015) CEVA argues that it would be appropriate to take into account that shipments to the United States and New Zealand were investigated by the respective competition authorities in case of the NES infringement.[1043]

(1016) The Commission bases its calculation of the value of sales purely on the sales to European customers, namely on the so called prepaid business. The jurisdiction of the Commission is clearly established in such cases, as the competition took place within the European Economic Area and there is therefore no need to make any deductions because of the investigations in other jurisdictions.

1038 Joined cases T-204/08 and T-212/08 *Team Relocations NV (T-204/08) and Amertranseuro International Holdings Ltd, Trans Euro Ltd et Team Relocations Ltd (T-212/08) v European Commission*, [2011] ECR , paragraph 86.

1039 Toll's reply to the Statement of Objections, page 24.

1040 DB's reply to the Statement of Objections, page 36-37.

1041 […].

1042 See also in this regard Case T-53/03 *BPB plc v Commission* [2008] ECR II-1333, paragraphs 429-430.

1043 CEVA's reply to the Statement of Objections, page 95.

8.4.2.14. Pressure by competitors

(1017) Kuehne & Nagel submits that the company participated in the NES cartel only because of the pressure from other competitors.[1044]

(1018) The Commission observes that the claim regarding pressure from competitors is not relevant. It is based on one email regarding the implementation of the agreement, nevertheless the email does not indicate that the company was under any significant pressure.[1045] On the contrary, as the Gardening Club was based on good personal relationships[1046], it is rather unlikely that the Gardening Club members would put any such pressure on each other. Moreover, it is evident that […] participated voluntarily at the Gardening Club meeting and he did not raise any objections regarding the agreement on the NES surcharge.

(1019) Furthermore, the General Court has confirmed that pressure exercised by other companies does not constitute a mitigating circumstance. Should the companies have considered themselves as being put under pressure by competitors, they should have brought the issue immediately to the attention of the competition authorities, rather than to start or continue participating in anti-competitive meetings and agreements during several years.[1047]

8.4.3. Conclusion on adjustments of the basic amounts

(1020) Based on the reasons described above in Section 8.4.2, no aggravating or mitigating circumstances will be applied.

8.4.4. Deterrence

(1021) In determining the amount of the fines, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect. To that end, the Commission may increase the fines to be imposed on undertakings which have a particularly large turnover beyond the sales of goods or services to which the infringement relates.[1048]

(1022) In this case, the worldwide turnover of Deutsche Post AG in 2010 was EUR 51.481 billion. Furthermore, the worldwide turnover of Deutsche Bahn AG in 2010 amounted to EUR 34.410 billion. Finally, United Parcel Service, Inc. generated a total turnover of EUR 37.3 billion in 2010.

(1023) It is therefore appropriate, in order to set the amount of the fines at a level which ensures that it has a sufficient deterrent effect, to apply a multiplication factor to the fines to be imposed on DP, DB and UPS.

1044 Kuehne & Nagel's reply to the Statement of Objections, page 31.

1045 […].

1046 […].

1047 Case T-9/89, *Hüls v Commission* [1992] ECR II-499, paragraph 128, Case T-141/89, *Tréfileurope v Commission*, paragraph 51, and T-23/99, *LR AF 1998 v Commission*, [2002] ECR II-1705, paragraphs 142 and 339 and confirmed on appeal in Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 369-370..

1048 Point 30 of the Guidelines on Fines.

(1024) On this basis, it is appropriate to apply a multiplier to the fines to be imposed on (i) DP in relation to the NES (DHL Global Forwarding (UK) Limited, Deutsche Post AG), AMS (DHL Management (Schweiz) AG, Deutsche Post AG) and PSS (DHL Global Forwarding (Hong Kong) Limited, Deutsche Post AG) infringements of 1.2, (ii) DB in relation to the AMS (Schenker AG, Deutsche Bahn AG), CAF (Schenker China Ltd. - for direct involvement in the infringement, Deutsche Bahn AG) and PSS (Schenker International (H.K.) Ltd., Deutsche Bahn AG) infringements of 1.1 and (iii) UPS in relation to the AMS (UPS Supply Chain Solutions, Inc., United Parcel Service, Inc.) and CAF (UPS SCS (China) Ltd., United Parcel Service, Inc.) cartels of 1.1.

8.4.5. Application of the 10% turnover limit

(1025) Article 23(2) of Regulation (EC) No 1/2003 provides that the fine imposed on each undertaking shall not exceed 10% of its total turnover relating to the business year preceding the date of the Commission decision. The adjusted basic amounts set out in Section 8.4.3 do not exceed 10% of the total turnover for any of the undertakings concerned.

8.5. Application of the 2006 Leniency Notice

(1026) According to point 8(a) and subject to the fulfilment of requirements of Section II.A of the Leniency Notice[1049], the Commission will grant immunity from any fine which would have been imposed on an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the first to submit evidence and information which in the Commission's view will enable it to carry out a targeted inspection.

(1027) Under points 23 and 24 of the Leniency Notice undertakings that do not meet the immunity conditions, while disclosing their participation in the cartel may be eligible to benefit from a reduction of the fine that would otherwise be imposed on them, provided that they meet cumulative conditions of point 12 of the Leniency Notice and submit evidence of significant added value with respect to the evidence already in the possession of the Commission.

(1028) In the present proceedings the Commission received applications from six undertakings seeking favourable treatment under the Leniency Notice (DB, Agility, ABX, CEVA, Nippon and Yusen) in addition to the immunity application filed by DP.

(1029) Since each of the NES, AMS, CAF and PSS constitute a separate single and continuous infringement, the Commission examined the applications for reduction of fines under the Leniency Notice submitted by individual undertakings also on an infringement by infringement basis. Assessment of eligibility and qualification for reduction of fines was limited to the infringement(s) in which an applicant was partaking and to which the leniency application related.

[1049] Commission Notice on Immunity from fines and reduction of fines in cartel cases published in the Official Journal of the European Union on 8 December 2006 (2006/C 298/11).

(1030) Regarding the immunity from fines, the Commission examined the applications submitted in light of the eligibility and qualification criteria set out in Section II.A of the Leniency Notice with the focus on the Commission's ability to carry out targeted inspection in the sector and services concerned.

8.5.1. Immunity in relation to NES, AMS, CAF and PSS cartels

(1031) On […], Deutsche Post AG and its subsidiaries and affiliates ("**DP**") submitted an application for marker/immunity from fines pursuant to point 8 of the Leniency Notice. On 24 September 2007, the Commission granted DP conditional immunity with respect to an anti-competitive conduct in the field of international freight forwarding services aiming at fixing or passing on various fees and surcharges. Hence, the conditional immunity fully covered all infringements dealt with in this Decision.

(1032) DP was the first undertaking to come forward and provide information and evidence enabling the Commission to carry out targeted inspections as required by point 8(a) of the Leniency Notice.

(1033) DP cooperated genuinely, fully and on a continuous and expeditious basis throughout the procedure and has complemented its original application by further relevant submissions, […] as it proceeded with its internal investigation. It remained at the disposal of the Commission and readily provided the Commission with explanations and clarifications on numerous occasions.

(1034) There are no indications that DP continued its involvement in any of the cartels following its submission of the immunity application, which is in compliance with point 12(b) of the Leniency Notice.

(1035) Furthermore, no evidence shows or suggests that DP took any steps to coerce other undertakings to participate in any of the infringements.

(1036) On the basis of the foregoing, the Commission concludes that DP should be granted immunity from any fines that would otherwise have been imposed on it for its involvement in NES, AMS, CAF and PSS cartels. Consequently, any fine to be imposed on DP by this Decision should be reduced by 100%.

8.5.2. Reductions of fines in relation to the NES cartel

8.5.2.1. CEVA

(1037) On […], CEVA submitted an application for immunity or, in the alternative, for leniency reduction under the Leniency Notice […]. The application was supplemented by […].

(1038) […].

(1039) In conclusion, CEVA is the only and thus also the first undertaking to meet the significant added value standard in relation to the NES infringement and qualify for reduction of fines to be otherwise imposed on it.

(1040) […][1050].

(1041) In view of the assessment of CEVA's relevant evidentiary submissions as set out in Recital (1040) CEVA should be granted a 35% reduction of the fine that would otherwise have been imposed on it for the NES infringement.

8.5.2.2. DB

(1042) On […], the Commission received from DB an application for immunity or, in the alternative, for leniency reduction under the Leniency Notice.

(1043) Despite the fact that DB was the first undertaking to apply for leniency in this case, […]. The Commission found that at that stage of investigation, it was already able to prove the NES infringement as established in the present Decision.

(1044) In conclusion, DB has not submitted evidence which would represent, within the meaning of points 24 and 25 of the Notice, significant added value with respect to the evidence relating to the NES cartel already in the Commission's possession. Hence, DB should not be granted any reduction in the fine to be imposed on it.

8.5.3. Reductions of fines in relation to the AMS cartel

8.5.3.1. Agility

(1045) Within the framework of its leniency application, Agility provided the Commission […].

(1046) […].

(1047) In view of the foregoing, the Commission finds that Agility was the first undertaking to submit evidence representing significant added value to the requisite legal standard.

(1048) However, following its […] submission of […] Agility provided very limited, if any evidence or further explanatory statements proving or corroborating the main elements of the AMS infringement, which would add further value to the evidence already in the Commission's possession.

(1049) In view of the assessment set out in Recitals (1046) and (1048), Agility should be granted a 30% reduction of the fine that would otherwise have been imposed on it.

8.5.3.2. DB

(1050) Although DB was the first undertaking to submit its leniency application[1051] following the unannounced inspections in the sector, it has supplied the first submission relating to AMS infringement […], that is, after Agility's evidence already qualified for significant added value under point 24 Leniency Notice.

(1051) […].

1050 […].

1051 The date of the leniency application is 5 November 2007.

(1052) […].

(1053) […].

(1054) The Commission considers that DB was the second undertaking to provide significant added value. As DB also met other requirements in accordance with points 23 and 24 of the Leniency Notice, it qualifies for a reduction of fine that would otherwise be imposed.

(1055) DB claims that maximum reduction within the set leniency band should be granted to it. In support of that claim, DB argues that the information provided on […][1052]. It further claims that the fact that DB's submission on AMS pre-dates the said Article 18 request indicates that at the relevant time the Commission was still in the initial stages of its investigation into the AMS conduct[1053].

(1056) Both arguments must be rejected. As it clearly follows from the administrative file, the Commission possessed sufficient information (details on cartel forum and objective, key meetings, participants) regarding AMS to issue the Article 18 request of 12 June 2008 concerning the FFI meetings, regardless of DB's contribution made on […]. Furthermore, the Article 18 request concerned also other conducts investigated in parallel by the Commission and hence the timing of the Article 18 request is in no way indicative of investigatory stage in relation to the AMS infringement.

(1057) […][1054][…].

(1058) In view of the assessment set out in Recitals (1056) and (1057), the Commission considers that DB is entitled to a reduction of 25% of the fine that would otherwise have been imposed on it, within the available range of 20-30%.

8.5.3.3. ABX

(1059) On […], the Commission received from ABX an application for immunity or, in the alternative, for leniency reduction under the Leniency Notice. […].

(1060) […].

(1061) In conclusion, ABX has not submitted evidence which would represent, within the meaning of points 24 and 25 of the Notice, significant added value with respect to the evidence already in the Commission’s possession. Hence, ABX should not be granted any reduction in the fine to be imposed on it.

8.5.4. Reductions of fines in relation to the CAF cartel

8.5.4.1. CEVA

(1062) On […], CEVA submitted an application for immunity or, in the alternative, for leniency reduction under the Leniency Notice […]. In the submission of that date and

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1052 DB's reply to the Statement of Objections, page 66.

1053 DB's reply to the Statement of Objections, page 65.

1054 DB's reply to the Statement of Objections, page 66.

before any other reduction of fines applicant came forward with CAF-related evidence, CEVA provided evidence not in the possession of the Commission.

(1063) […].

(1064) In view of the foregoing, CEVA is the first undertaking to meet the significant added value standard in relation to the CAF infringement and qualify for reduction of fines to be otherwise imposed on it.

(1065) In view of the considerable value of its contribution to proving the CAF cartel, early stage at which the evidence was provided and level of cooperation, CEVA should be granted a 50% reduction of the fine that would otherwise have been imposed on it for the CAF infringement.

(1066) The Commission further considers that the information provided by CEVA (see Recital (1063)) under its leniency application constitutes stand alone evidence in relation to a part of the CAF infringement not requiring further corroboration, hence amounting to the compelling evidence as set out in point 26 of the Leniency Notice.

(1067) Point (26) of the Leniency Notice states, *inter alia*, that:

"If the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence".

(1068) On the basis of the compelling evidence provided by CEVA, the Commission was able to establish facts proving the existence of the CAF cartel […]. As a result, this period will not be taken into account for CEVA for the purpose of determining the fine to be imposed on it.

(1069) In its submission of […], CEVA requests that the Commission considers granting the undertaking full immunity in relation to the CAF infringement. CEVA argues that the Commission decision granting conditional immunity to DP makes no reference to the CAF conduct and that it would appear from the review of the Commission's file that the first evidence in respect to the CAF infringement was submitted by CEVA […]. As a result, CEVA believes that it would be eligible for full immunity from penalty in relation to the CAF infringement under point 8(b) of the Leniency Notice.

(1070) CEVA's request has to be dismissed for the following reasons. Firstly, the Commission decision of 24 September 2007 on conditional immunity covers any and all cartels "*among providers of international freight forwarding services aimed at fixing or passing on various fees and surcharges*", which includes CAF infringement as well. Secondly, immunity for all four infringements described in this Decision was granted to DP under the point 8(a) of the Leniency Notice, that is on the basis that DP has provided the Commission with sufficient information and evidence to enable the latter to conduct targeted inspections in the specific industry sector. Furthermore, in accordance with point 11 Leniency Notice, CEVA could no longer qualify for 8b) immunity, as 8a) conditional immunity was granted to DP.

8.5.4.2. DB

(1071) DB came forward with its first CAF-related submission under the Leniency Notice on […]. However, at the time the Commission was already in possession of a significant amount of documents and statements on the basis of which it was able to prove most of the main elements of the CAF cartel. […].

(1072) […][1055][…].

(1073) In light of the above, DB is the second undertaking to meet the significant added value threshold to the requisite legal standard. Hence DB should be entitled, within the reduction band of 20-30%, to reduction of the fine that would otherwise be imposed on it for the involvement in the CAF infringement.

(1074) DB claims that maximum reduction within the set leniency band should be granted to it. In support of that claim, DB argues that the information provided on […] enabled the Commission to issue a targeted information request on CAF, namely the Article 18 request of 12 June 2008[1056]. It further claims that the fact that DB's submission on CAF pre-dates the Article 18 request of 12 June 2008 indicates that at the relevant time the Commission was still in the initial stages of its investigation into the CAF conduct[1057].

(1075) Both arguments must be rejected. As it clearly follows from the administrative file, the Commission possessed sufficient information on the CAF conduct (details on cartel forum and objective, key meetings, participants) to issue the Article 18 request of 12 June 2008 concerning the CAF meetings, regardless of DB's contribution made on […]. Furthermore, the Article 18 request concerned also other conduct investigated in parallel by the Commission and hence the timing of Article 18 request's release can in no way be indicative of an investigatory stage in relation to the CAF infringement.

(1076) In view of the assessment set out in Recital (1075), the Commission considers that DB is entitled to a 20% reduction of the fine that would otherwise have been imposed on it for the CAF infringement.

8.5.4.3. Yusen

(1077) On […] Yusen filed an application for immunity or, in the alternative, for leniency reduction under the Leniency Notice […].

(1078) […].

(1079) […][1058],[…].

1055 Namely the second and third CAF meeting.

1056 DB's reply to the Statement of Objections, page 85.

1057 DB's reply to the Statement of Objections, page 84.

1058 Yusen clearly explains that its understanding after the first CAF meeting was that any further meetings were to be attended by persons in charge of export matters ([…]). However, in the reply to the Statement of Objections, Yusen suggests that they didn't know why exactly […], in charge of export matters, was sent to the second meeting (ID 4209, page 13). Furthermore, according to the leniency application, at the second CAF meeting, […]said that in his opinion, it would be impossible to introduce

(1080) The Commission considers that Yusen is the third undertaking to satisfy the point 24 of the Leniency Notice. […], the Commission considers that Yusen is entitled to 5% reduction of the fine that would otherwise have been imposed on it for the CAF infringement.

8.5.4.4. Nippon

(1081) On […], Nippon submitted an application for immunity or, in the alternative, for leniency reduction under the Leniency Notice, consisting of a single corporate statement.

(1082) […]. Hence, Nippon failed to meet the significant added value criterion required by the Leniency Notice.

(1083) On the basis of the above, Nippon should not be granted any reduction of the fine to be imposed on it.

8.5.5. Reductions of fines in relation to the PSS cartel

8.5.5.1. DB

(1084) DB came forward with its first relevant PSS-related submission under the Leniency Notice on […].

(1085) […].

(1086) […].

(1087) Therefore, the Commission considers that DB was the first undertaking to submit evidence representing significant added value to the requisite legal standard.

(1088) Considering the value of its contribution to proving the PSS cartel, the extent of cooperation throughout the whole procedure as well as the stage at which added value was brought to the case, DB should be granted a 50% reduction of the fine that would otherwise have been imposed on it.

(1089) […].

(1090) In light of the above, DB's leniency application qualifies for the benefit available under the last paragraph of point 26 of the Leniency Notice […]. Therefore, the period […] will be disregarded for DB for the purpose of determining the fine to be imposed on it.

(1091) DB argues[1059] that it should have obtained full immunity pursuant to point 8b) of the Leniency Notice. According to DB, DP failed to qualify for 8a) immunity in relation to the PSS infringement, since (i) it did not provide evidence which enabed the Commission to carry out a targeted inspection and (ii) it failed to provide a corporate

CAF ([…]), whereas according to the reply to the Statement of Objections, he objected to the introduction of CAF ([…]).

[1059] DB's reply to the Statement of Objections, page 94-103.

statement containing the information required under point 9a) of the Leniency Notice. […].

(1092) DB's arguments must be rejected. Conditional immunity was granted on the basis of information provided by DP covering anti-competitive arrangements related to a broad range of surcharges. Accordingly, the Commission's conditional immunity decision covered all arrangements on surcharges, including those covered in the Statement of Objections and this Decision, that is, also the PSS cartel.

(1093) In accordance with point 11 of the Leniency Notice, DB could no longer qualify for 8b) immunity, since 8a) conditional immunity was already granted.

(1094) DP qualified for 8a) immunity and there are no grounds for withdrawing it for a number of reasons, including the following:

(1) DP enabled the Commission to carry out inspections targeting the freight forwarding industry and more specifically various surcharges that were applied by freight forwarders on different trade lanes (including lanes from Asia) and impacted the European Economic Area, including the PSS. Following the inspections, the Commission received further leniency applications, including that of DB.

(2) Point 9a) of the Leniency Notice sets out a requirement the immunity applicant has to meet to the extent that it has the necessary knowledge about the issues listed therein at the time of the submission. Lack of knowledge about certain aspects of an infringement at the time of the immunity application does not disqualify an applicant from 8a) immunity, insofar as the Commission considers that it is able to carry out a targeted inspection on the basis of the type and quality of the information submitted by the immunity applicant, which was the case here.

(3) It is reasonable to believe that prior to the inspections, DP has brought forward all evidence and information that they have uncovered at that time without jeopardizing the Commission's planned inspections. DP has since been cooperating genuinely, fully, on a continuous basis and expeditiously with the Commission.

(1095) DB further argues[1060] that, in the alternative, "partial immunity" under point 26(3) of the Leniency Notice should be granted to DB for the PSS infringement period […], as it would have submitted compelling evidence enabling the Commission to increase the duration of the infringement by the said period.

(1096) However, such an argument must be dismissed, as the evidence submitted by DB on […] does not disclose sufficiently compelling details on the anti-competitive nature of competitor contacts that the Commission could use to establish additional facts increasing the gravity or the duration of the infringement. Therefore, such evidence does not constitute stand-alone evidence of compelling nature proving the PSS infringement for the entire period claimed by DB.

[1060] DB's reply to the Statement of Objections dated 23 April 2010, page 103.

8.5.5.2. Agility

(1097) In its leniency submission of […].

(1098) Evidence submitted by Agility not only corroborates information already on the Commission's administrative file, but also constitutes additional information […]. Therefore, it strengthened the Commission's ability to establish the PSS infringement.

(1099) […].

(1100) […].

(1101) The Commission therefore considers that Agility was the second undertaking to provide significant added value to the requisite legal standard.

(1102) […].

(1103) In view of the assessment set out in Recital (1102), the Commission considers that Agility should be entitled to 25% reduction of the fine that would otherwise have been imposed on it for the PSS infringement.

8.6. Inability to pay

(1104) The Commission received letters from three undertakings indicating a possible inability to pay in line with point 35 of the Guidelines on fines. However, none of these undertakings pursued this issue further and no additional requests have been submitted in this regard.

8.7. Conclusion: final amount of individual fines

(1105) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as follows:

Table 14: Final amounts

NES infringement

Entity	Final amount (EUR)
Schenker Limited (as an economic successor of BAX Global Ltd. (UK))	3 673 000
CEVA Freight (UK) Limited and EGL, Inc.	2 094 000
DHL Global Forwarding (UK) Limited	

and Deutsche Post AG	0
Exel Freight Management (UK) Limited and Exel Limited	0
Kuehne + Nagel Ltd. *(UK)* and Kuehne + Nagel International AG	5 320 000
UPS Supply Chain Solutions, Inc. (as an economic successor of Menlo Worldwide Forwarding, Inc.)	2 264 000

Table 15: Final amounts

AMS infringement

Entity	**Final amount (EUR)**
DSV Air & Sea SAS	379 000
Agility Logistics Limited	2 296 000
DHL Management (Schweiz) AG and Deutsche Post AG	0
Exel Limited and Exel Freight Management (UK) Limited and Exel Group Holdings (Nederland) B.V.	0
Kuehne + Nagel Management AG and Kuehne + Nagel International AG	36 686 000

Panalpina Management AG and Panalpina World Transport (Holding) Ltd	23 649 000
Schenker AG and Deutsche Bahn AG	23 091 000
UPS Supply Chain Solutions, Inc. and United Parcel Service, Inc.	3 582 000
UTi Worldwide, Inc. and UTi Nederland B.V. and UTi Worldwide (UK) Ltd	3 068 000

Table 16: Final amounts

CAF infringement

Entity	Final amount (EUR)
Schenker China Ltd. (as an economic successor of BAX Global (China) Co. Ltd.)	2 444 000
Schenker China Ltd. and Deutsche Bahn AG	3 071 000
Beijing Kintetsu World Express Co., Ltd.	623 000
CEVA Freight Shanghai Limited and EGL, Inc.	935 000
DHL Global Forwarding (China) Co. Ltd.	0

DHL Logistics (China) Co., Ltd.	0
Kuehne + Nagel Ltd. *(Shanghai)* and Kuehne + Nagel International AG	451 000
Nippon Express (China) Co., Ltd.	812 000
Panalpina China Ltd and Panalpina World Transport (Holding) Ltd	3 251 000
UPS SCS (China) Ltd. and United Parcel Service, Inc.	3 916 000
Yusen Shenda Air & Sea Service (Shanghai) Ltd.	319 000

Table 17: Final amounts

PSS infringement

Entity	**Final amount (EUR)**
Agility Logistics Limited (Hong Kong)	2 662 000
DHL Global Forwarding (Hong Kong) Limited and Deutsche Post AG	0
DHL Supply Chain (Hong Kong) Limited and Exel Limited	0
Expeditors Hong Kong Ltd. and Expeditors International of Washington, Inc.	4 140 000

Hellmann Worldwide Logistics Ltd. Hong Kong and Hellmann Worldwide Logistics GmbH & Co. KG	4 281 000
Kuehne + Nagel Ltd. *(Hong Kong)* and Kuehne + Nagel International AG	11 217 000
Panalpina China Ltd and Panalpina World Transport (Holding) Ltd	19 584 000
Schenker International (H.K.) Ltd. and Deutsche Bahn AG	2 656 000
Toll Global Forwarding (Hong Kong) Limited and Toll Global Forwarding Limited	2 918 000

HAS ADOPTED THIS DECISION

Article 1

(1) In relation to the New Export System (NES), the following undertakings infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement in the air freight forwarding services sector, covering the territory of the United Kingdom which consisted of fixing prices or other trading conditions:

(a) Schenker Limited (as an economic successor of BAX Global Ltd. (UK)) from 1 October 2002 until 10 March 2003

(b) CEVA Freight (UK) Limited, EGL, Inc. from 1 October 2002 until 10 March 2003

(c) DHL Global Forwarding (UK) Limited, Deutsche Post AG from 1 October 2002 until 10 March 2003

(d) Exel Freight Management (UK) Limited, Exel Limited from 1 October 2002 until 10 March 2003

(e) Kuehne + Nagel Ltd.[1061], Kuehne + Nagel International AG from 1 October 2002 until 10 March 2003

(f) UPS Supply Chain Solutions, Inc. (as an economic successor of Menlo Worldwide Forwarding, Inc.) from 1 October 2002 until 10 March 2003

(2) In relation to the Advanced Manifest System (AMS), the following undertakings infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement in the air freight forwarding services sector, covering the whole European Economic Area, which consisted of fixing prices or other trading conditions:

(a) DSV Air & Sea SAS from 19 March 2003 until 19 August 2004

(b) Agility Logistics Limited from 19 March 2003 until 19 August 2004

(c) DHL Management (Schweiz) AG, Deutsche Post AG from 19 March 2003 until 19 August 2004

(d) Exel Freight Management (UK) Limited from 25 March 2003 until 19 August 2004, Exel Group Holdings (Nederland) B.V. from 21 October 2003 until 19 August 2004, Exel Limited from 25 March 2003 until 19 August 2004

(e) Kuehne + Nagel Management AG, Kuehne + Nagel International AG from 8 April 2003 until 19 August 2004

(f) Panalpina Management AG, Panalpina World Transport (Holding) Ltd from 19 March 2003 until 19 August 2004

(g) Schenker AG, Deutsche Bahn AG from 25 March 2003 until 19 August 2004

(h) UPS Supply Chain Solutions, Inc., United Parcel Service, Inc. from 19 March 2003 until 21 October 2003

(i) UTi Worldwide (UK) Ltd from 19 March 2003 until 21 October 2003, UTi Nederland B.V. from 21 October 2003 until 19 August 2004, UTi Worldwide, Inc. from 19 March 2003 until 19 August 2004

(3) In relation to the Currency Adjustment Factor (CAF), the following undertakings infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement in the air freight forwarding services sector, covering the whole European Economic Area, which consisted of fixing prices or other trading conditions:

[1061] Entity based in the United Kingdom.

(a) Schenker China Ltd. (as an economic successor of BAX Global (China) Co. Ltd.) from 27 July 2005 until 13 March 2006

(b) Schenker China Ltd., Deutsche Bahn AG from 29 July 2005 until 13 March 2006

(c) Beijing Kintetsu World Express Co., Ltd. from 27 July 2005 until 13 March 2006

(d) CEVA Freight Shanghai Limited, EGL, Inc. from 27 July 2005 until 13 March 2006

(e) DHL Global Forwarding (China) Co. Ltd. from 27 July 2005 until 13 March 2006

(f) DHL Logistics (China) Co., Ltd. from 27 July 2005 until 13 March 2006

(g) Kuehne + Nagel Ltd.[1062], Kuehne + Nagel International AG from 27 July 2005 until 13 March 2006

(h) Nippon Express (China) Co., Ltd. from 27 July 2005 until 31 October 2005

(i) Panalpina China Ltd, Panalpina World Transport (Holding) Ltd from 27 July 2005 until 9 December 2005

(j) UPS SCS (China) Ltd., United Parcel Service, Inc. from 27 July 2005 until 13 March 2006

(k) Yusen Shenda Air & Sea Service (Shanghai) Ltd. from 27 July 2005 until 31 October 2005

(4) In relation to the Peak Season Surcharge (PSS), the following undertakings infringed Article 101 of the Treaty and Article 53 of the EEA Agreement by participating, during the periods indicated, in a single and continuous infringement in the air freight forwarding services sector, covering the whole European Economic Area, which consisted of fixing prices or other trading conditions:

(a) Agility Logistics Limited (Hong Kong) from 9 August 2005 until 21 May 2007

(b) DHL Global Forwarding (Hong Kong) Limited, Deutsche Post AG from 9 August 2005 until 21 May 2007

(c) DHL Supply Chain (Hong Kong) Limited, Exel Limited from 9 August 2005 until 13 January 2006

(d) Expeditors Hong Kong Ltd., Expeditors International of Washington, Inc. from 21 September 2005 until 23 June 2006

(e) Hellmann Worldwide Logistics Ltd. Hong Kong, Hellmann Worldwide Logistics GmbH & Co. KG from 6 December 2005 until 21 May 2007

[1062] Entity based in Shanghai.

(f) Kuehne + Nagel Ltd.[1063], Kuehne + Nagel International AG from 9 August 2005 until 21 May 2007

(g) Panalpina China Ltd, Panalpina World Transport (Holding) Ltd from 9 August 2005 until 21 May 2007

(h) Schenker International (H.K.) Ltd., Deutsche Bahn AG from 3 September 2005 until 23 June 2006

(i) Toll Global Forwarding (Hong Kong) Limited, Toll Global Forwarding Limited from 9 August 2005 until 21 May 2007

Article 2

(1) For the infringement referred to in Article 1(1), the following fines are imposed:

(a) Schenker Limited (as an economic successor of BAX Global Ltd. (UK)): EUR 3 673 000

(b) CEVA Freight (UK) Limited, and EGL, Inc., jointly and severally liable: EUR 2 094 000

(c) DHL Global Forwarding (UK) Limited and Deutsche Post AG: EUR 0

(d) Exel Freight Management (UK) Limited and Exel Limited: EUR 0

(e) Kuehne + Nagel Ltd.[1064] and Kuehne + Nagel International AG jointly and severally liable: EUR 5 320 000

(f) UPS Supply Chain Solutions, Inc. (as an economic successor of Menlo Worldwide Forwarding, Inc.): EUR 2 264 000

(2) For the infringement referred to in Article 1(2), the following fines are imposed:

(a) DSV Air & Sea SAS: EUR 379 000

(b) Agility Logistics Limited: EUR 2 296 000

(c) DHL Management (Schweiz) AG and Deutsche Post AG: EUR 0

(d) Exel Freight Management (UK) Limited, Exel Group Holdings (Nederland) B.V. and Exel Limited: EUR 0

(e) Kuehne + Nagel Management AG and Kuehne + Nagel International AG jointly and severally liable: EUR 36 686 000

(f) Panalpina Management AG and Panalpina World Transport (Holding) Ltd jointly and severally liable: EUR 23 649 000

1063 Entity based in Hong Kong.

1064 Entity based in United Kingdom.

(g) Schenker AG and Deutsche Bahn AG jointly and severally liable: EUR 23 091 000

(h) UPS Supply Chain Solutions, Inc. and United Parcel Service, Inc. jointly and severally liable: EUR 3 582 000

(i) UTi Worldwide, Inc., UTi Worldwide (UK) Ltd and UTi Nederland B.V. jointly and severally liable: EUR 1 273 000

(j) UTi Worldwide, Inc.: EUR 1 795 000
of which jointly and severally liable with
UTi Worldwide (UK) Ltd: EUR 738 000 and
UTi Nederland B.V.: EUR 954 000

(3) For the infringement referred to in Article 1(3), the following fines are imposed:

(a) Schenker China Ltd. (as an economic successor of BAX Global (China) Co. Ltd.): EUR 2 444 000

(b) Schenker China Ltd. and Deutsche Bahn AG jointly and severally liable: EUR 3 071 000

(c) Beijing Kintetsu World Express Co., Ltd.: EUR 623 000

(d) CEVA Freight Shanghai Limited and EGL, Inc. jointly and severally liable: EUR 935 000

(e) DHL Global Forwarding (China) Co. Ltd.: EUR 0

(f) DHL Logistics (China) Co., Ltd.: EUR 0

(g) Kuehne + Nagel Ltd.[1065] and Kuehne + Nagel International AG jointly and severally liable: EUR 451 000

(h) Nippon Express (China) Co., Ltd.: EUR 812 000

(i) Panalpina China Ltd and Panalpina World Transport (Holding) Ltd jointly and severally liable: EUR 3 251 000

(j) UPS SCS (China) Ltd. and United Parcel Service, Inc. jointly and severally liable: EUR 3 916 000

(k) Yusen Shenda Air & Sea Service (Shanghai) Ltd.: EUR 319 000

(4) For the infringement referred to in Article 1(4), the following fines are imposed:

(a) Agility Logistics Limited (Hong Kong): EUR 2 662 000

(b) DHL Global Forwarding (Hong Kong) Limited and Deutsche Post AG: EUR 0

[1065] Entity based in Shanghai.

(c) DHL Supply Chain (Hong Kong) Limited and Exel Limited: EUR 0

(d) Expeditors Hong Kong Ltd. and Expeditors International of Washington, Inc. jointly and severally liable: EUR 4 140 000

(e) Hellmann Worldwide Logistics Ltd. Hong Kong and Hellmann Worldwide Logistics GmbH & Co. KG jointly and severally liable: EUR 4 281 000

(f) Kuehne + Nagel Ltd.[1066] and Kuehne + Nagel International AG jointly and severally liable: EUR 11 217 000

(g) Panalpina China Ltd and Panalpina World Transport (Holding) Ltd jointly and severally liable: EUR 19 584 000

(h) Schenker International (H.K.) Ltd. and Deutsche Bahn AG jointly and severally liable: EUR 2 656 000

(i) Toll Global Forwarding (Hong Kong) Limited and Toll Global Forwarding Limited jointly and severally liable: EUR 2 918 000

The fines shall be paid in euro within three months of the date of the notification of this Decision to the following account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1–2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000

BIC: BCEELULL

Ref.: European Commission – BUFI / COMP/39462

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 85a(1) of Commission Regulation (EC, Euratom) No 2342/2002.[1067]

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article insofar as they have not already done so.

1066 Entity based in Hong Kong.

1067 OJ C 353, 31.12.2002, page 1.

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

Article 4

This Decision is addressed to:

DSV Air & Sea SAS
8, rue des 2 Cèdres
BP 12439
95707 Roissy CDG Cedex
France

Agility Logistics Limited
Unit 6 North
Radius Park
Faggs Road
Feltham
Middlesex
TW14 ONG
United Kingdom

Agility Logistics Limited (Hong Kong)
Citic Telecom Tower, 22nd floor
93 Kwai Fuk Road
Kwai Chung, N.T
Hong Kong
People's Republic of China

Beijing Kintetsu World Express Co., Ltd.
Room 1401, Hua Mao Centre
No.81 JianGuo Road
Chao yang District
Beijing 100025
People's Republic of China

CEVA Freight (UK) Limited
CEVA House
Excelsior Road
Ashby de la Zouch
Leicestershire
LE65 1NU
United Kingdom

CEVA Freight Shanghai Limited
19/F, Jiang Nan Shipyard Building
No. 600 Luban Road
Shanghai (200023)
People's Republic of China

EGL, Inc.
CEVA Logistics
15350 Vickery Drive
Houston, TX 77032
USA

DHL Global Forwarding (UK) Limited
18-32 London Road
Magna House
Staines, Middlesex
TW18 4BP
United Kingdom

DHL Management (Schweiz) AG
Peter Merian-Straße 88
4052, Basel
Switzerland

DHL Global Forwarding (China) Co., Ltd.
Room 2001 Orient International Finance Plaza
No. 318 South Zhongshan Road
Huangpu District
Shanghai
People's Republic of China

DHL Global Forwarding (Hong Kong) Limited
L23, Tower One
Kowloon Commerce Centre
51 Kwai Cheong Road, Kwai Chung
N.T., Hong Kong
People's Republic of China

Deutsche Post AG
Zentrale Charles-de-Gaulle-Str. 20
53113 Bonn
Germany

Exel Freight Management (UK) Limited
Ocean House, The Ring
Bracknell, Berkshire
RG12 1AN
United Kingdom

Exel Group Holdings (Nederland) B.V.
Huygensweg 10
5466AN Veghel
The Netherlands

DHL Logistics (China) Co., Ltd.

Xing Wang Logistic Center
No.18, Yuncheng Street
Beijing Economic and Technological Development Area
Beijing
People's Republic of China

DHL Supply Chain (Hong Kong) Limited
21/F Global Gateway
168 Yeung UK Road
Tsuen Wan
Hong Kong
People's Republic of China

Exel Limited
Ocean House, The Ring
Bracknell, Berkshire
RG12 1AN
United Kingdom

Expeditors Hong Kong Ltd.
36/F-38/F, Entreprise Square Three
39 Wang Chiu Road
Kowloon Bay, Kowloon
Hong Kong
People's Republic of China

Expeditors International of Washington, Inc.
1015 Third Avenue, 12th Floor
Seattle, WA 98104-1190
USA

Hellmann Worldwide Logistics Ltd. Hong Kong
Unit 2, G F, BLK A
Tonic Industrial Centre
26 Kai Cheung Road
Kowloon Bay
Hong Kong
People's Republic of China

Hellmann Worldwide Logistics GmbH & Co. KG
Elbestraße 1
49090 Osnabrück
Germany

Kuehne + Nagel Ltd.
Florence Way
Rockingham Road
1 Union Business Park
Uxbridge, Middlesex
UB8 2LS

United Kingdom

Kuehne + Nagel Management AG
Dorfstrasse 50
8834 Schindellegi
Switzerland

Kuehne + Nagel Ltd.
Life Hub at Daning
Office Tower, Block 1, 10-16
1868 Gong He Xin Road, Zhabei District
Shanghai 200072
People's Republic of China

Kuehne + Nagel Ltd.
24th Floor
Mass Mutual Tower
38 Gloucester Road,
Wanchai, Hong Kong,
People's Republic of China

Kuehne + Nagel International AG
Dorfstrasse 50
8834 Schindellegi
Switzerland

Nippon Express (China) Co., Ltd.
Room E508-E513
ACLP International Building
NO.566 Shunping Road
Shunyi District
Beijing 101300
People's Republic of China

Panalpina Management AG
Viaduktstrasse 42
4002 Basel
Switzerland

Panalpina China Ltd
Top Floor, ATL Logistics Centre B
Berth 3, Kwai Chung Container Terminal
Hong Kong
People's Republic of China

Panalpina World Transport (Holding) Ltd
Viaduktstrasse 42
4002 Basel
Switzerland

Schenker Limited
Schenker House
Great South West Road
Feltham
Middlesex
TW14 8NT
United Kingdom

Schenker AG
Alfredstr. 81
45130 Essen
Germany

Schenker China Ltd.
No.266 Yiwei Road
Waigaoqiao Free Trade Zone
Shanghai 200131
People's Republic of China

Schenker International (H.K.) Ltd.
35/F., Skyline Tower
39 Wang Kwong Road
Kowloon Bay
Hong Kong
People's Republic of China

Deutsche Bahn AG
Potsdamer Platz 2
10785 Berlin
Germany

Toll Global Forwarding (Hong Kong) Limited
12/F., Tower II, Enterprise Square
9 Sheung Yuet Road
Kowloon Bay
Kowloon,
Hong Kong
People's Republic of China

Toll Global Forwarding Limited
11F, Enterprise Square Three
39 Wang Chiu Road
Kowloon Bay
Kowloon
Hong Kong
People's Republic of China

UPS Supply Chain Solutions, Inc.
12380 Morris Road

Alpharetta GA 30005
United States of America

UPS SCS (China) Ltd.
Unit C, 9th floor Building A
Innotec Tower No.235
Nanjing Road, Tianjin
People's Republic of China

United Parcel Service, Inc.
55 Glenlake Parkway NE
Atlanta GA 30328
United States of America

UTi Worldwide (UK) Ltd
Reading Cargo Centre
Hyperion Way
Rose Kiln Lane
Reading
Berkshire
RG20JS
United Kingdom

UTi Nederland B.V.
Fokkerweg 300, Bldg 3A
1438 AN Oude Meer
The Netherlands

UTi Worldwide, Inc.
9 Colombus Centre
Pelican Drive
Road Town
Tortola
British Virgin Islands

Yusen Shenda Air & Sea Service (Shanghai) Ltd.
Room 305
Shanghai International Trade Centre
2201 Yan An Road (West)
Shanghai 200336
People's Republic of China

This Decision shall be enforceable pursuant to Article 299 of the Treaty on the Functioning of the European Union and Article 110 of the EEA Agreement.

Done at Brussels, 28.3.2012

For the Commission

Joaquin ALMUNIA
Vice-President