Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

18 June 2015*

(Appeals — Competition — Rail transport and ancillary services sector — Abuse of dominant position — Regulation (EC) No 1/2003 — Articles 20 and 28(1) — Administrative procedure — Decision ordering an inspection — Commission's powers of inspection — Fundamental right to the inviolability of the home — No prior judicial authorisation — Effective judicial review — Fortuitous discovery)

In Case C-583/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 15 November 2013,

Deutsche Bahn AG, established in Berlin (Germany),

DB Mobility Logistics AG, established in Berlin,

DB Energie GmbH, established in Frankfurt am Main (Germany),

DB Netz AG, established in Frankfurt am Main,

Deutsche Umschlaggesellschaft Schiene-Straße (DUSS) mbH, established in Bodenheim (Germany),

DB Schenker Rail GmbH, established in Mainz (Germany),

DB Schenker Rail Deutschland AG, established in Mainz,

represented by W. Deselaers, E. Venot and J. Brückner, Rechtsanwälte,

appellants,

the other parties to the proceedings being:

European Commission, represented by L. Malferrari and R. Sauer, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Kingdom of Spain, represented by A. Rubio González and L. Banciella Rodríguez-Miñón, acting as Agents,

intervener at first instance,

* Language of the case: German.

EFTA Surveillance Authority, represented by M. Schneider, and X. Lewis and by M. Moustakali, acting as Agents,

intervener at first instance,

Council of the European Union,

intervener at first instance,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.-C. Bonichot, A. Arabadjiev (Rapporteur), J.L. da Cruz Vilaça and C. Lycourgos, Judges,

Advocate General: N. Wahl,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 4 December 2014,

after hearing the Opinion of the Advocate General at the sitting on 12 February 2015,

gives the following

Judgment

1 By their appeal, Deutsche Bahn AG, and its subsidiaries DB Mobility Logistics AG, DB Energie GmbH, DB Netz AG, Deutsche Umschlaggesellschaft Schiene-Straße (DUSS) mbH, DB Schenker Rail GmbHb and DB Schenker Rail Deutschland AG ('Deutsche Bahn') seek to have set aside the judgment of the General Court of the European Union in *Deutsche Bahn and Others* v *Commission* (T-289/11, T-290/11 and T-521/11, EU:T:2013:404) ('the judgment under appeal'), by which it dismissed their action for annulment of Commission Decisions C(2011) 1774 of 14 March 2011, C(2011) 2365 of 30 March 2011 and C(2011) 5230 of 14 July 2011, ordering, in accordance with Article 20(4) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1, inspections of Deutsche Bahn AG and all of its subsidiaries (Cases COMP/39.678 and COMP/39.731).

Legal context

2 Article 20 of Regulation No 1/2003 ('The Commission's powers of inspection') provides:

'1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

(a) to enter any premises, land and means of transport of undertakings and associations of undertakings;

(b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;

(c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject matter and purpose of the inspection and to record the answers.

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

5. Officials of as well as those authorised or appointed by the competition authority of the Member State in whose territory the inspection is to be conducted shall, at the request of that authority or of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To that end, they shall enjoy the powers set out in paragraph 2.

6. Where the officials and other accompanying persons authorised by the Commission find that an undertaking opposes an inspection ordered pursuant to this Article, the Member State concerned shall afford them the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable them to conduct their inspection.

7. If the assistance provided for in paragraph 6 requires authorisation from a judicial authority according to national rules, such authorisation shall be applied for. Such authorisation may also be applied for as a precautionary measure.

8. Where authorisation as referred to in paragraph 7 is applied for, the national judicial authority shall control that the Commission decision is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject-matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the Commission, directly or through the Member State competition authority, for detailed explanations in particular on the grounds the Commission has for suspecting infringement of Articles [101 TFEU and 102 TFEU], as well as on the seriousness of the suspected infringement and on the nature of the involvement of the undertaking concerned. However, the national judicial authority may not call into question the necessity for the inspection nor demand that it be provided with the information in the Commission's file. The lawfulness of the Commission decision shall be subject to review only by the Court of Justice.'

3 Article 28(1) of Regulation No 1/2003 states that, without prejudice to Articles 12 and 15 thereof, pertaining to exchanges of information between the Commission and the national competition authorities and cooperation with national courts, respectively, information collected by virtue of the Commission's powers of inspection is to be used only for the purpose for which it was acquired.

Background to the dispute

4 Deutsche Bahn is an undertaking pursuing its activities in the national and international rail transport sector for goods and passengers, logistics and the provision of ancillary services.

5 On 14 March 2011 the Commission adopted an initial decision ordering Deutsche Bahn to submit to an inspection due to potentially unjustified preferential treatment given by DB Energie GmbH to other subsidiaries within the group, inter alia in the form of a rebate system for the supply of electric traction energy ('the first inspection decision'). That first inspection took place from 29 to 31 March 2011.

6 On 30 March 2011 the Commission adopted a second inspection decision concerning Deutsche Bahn and potential practices implemented by DUSS in order to gain an advantage over the group's competitors operating in Germany by making terminal access more difficult for them or otherwise discriminating against them ('the second inspection decision'). That second inspection took place on 30 March and 1 April 2011.

7 On 14 July 2011 the Commission adopted a third inspection decision in respect of Deutsche Bahn due to the establishment of a potentially anti-competitive system of strategic use of the infrastructure managed by companies within the group aimed at preventing, complicating or increasing the costs of the activities of the group's competitors in the area of rail transport, for which access to the DUSS terminals is essential ('the third inspection decision'). The third inspection took place on 26 July 2011.

8 Deutsche Bahn, in the presence of its lawyers during the three inspections, did not raise objections or complain about the lack of prior judicial authorisation. Nor did it oppose the inspections pursuant to Article 20(6) of Regulation No 1/2003.

Proceedings before the General Court and the judgment under appeal

9 By its applications lodged on 10 June and 5 October 2011, Deutsche Bahn brought three actions before the General Court, which were joined, seeking annulment of the contested decisions and annulment of the measures taken by the Commission under those inspections and seeking to have the Commission ordered to return all the copies of documents made during the inspections.

10 Deutsche Bahn put forward five pleas in law in support of its actions, alleging, in essence: infringement of the fundamental right to the inviolability of private premises as protected by Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter') and by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), by reason of the lack of prior judicial authorisation; infringement of the fundamental right to an effective legal remedy as guaranteed by Article 47 of the Charter and by Article 6 of the ECHR; a number of infringements of the rights of the defence; and infringement of the principle of proportionality.

11 The General Court dismissed Deutsche Bahn's actions in their entirety.

Forms of order sought by the parties before the Court of Justice

12 Deutsche Post claims that the Court should:

— set aside the judgment under appeal;

— annul the contested decisions;

— order the Commission to pay the costs in relation to all proceedings.

13 The Commission contends that the Court of Justice should:

— dismiss the appeal;

— order Deutsche Post to pay the costs.

The appeal

First ground of appeal: misinterpretation and misapplication of the fundamental right to the inviolability of the home provided for in Articles 7 of the Charter and Article 8 of the ECHR

Arguments of Deutsche Bahn

14 Deutsche Bahn begins by criticising the General Court for having disregarded the judgment of the European Court of Human Rights ('the EctHR') in *Société Colas Est and Others v. France* (no. 37971/97, ECHR 2002-III) and for having failed to consider the judgments of that court in *Société Métallurgique Liotard Frères v. France* (no. 29598/08, 5 May 2011) and *Société Canal Plus and Others v. France* (no. 29408/08, 21 December 2010), in holding, in paragraph 72 of the judgment under appeal, that the absence of a prior judicial authorisation is only one of the factors borne in mind by the ECtHR when deciding whether Article 8 of the ECHR has been infringed.

15 Next, Deutsche Bahn criticises the General Court for having erred in law in holding, in paragraph 66 of the judgment under appeal, on the basis of the judgments of the EctHR in *Harju v. Finland* (no. 56716/09, 15 February 2011) and *Heino v. Finland* (no. 56720/09, 15 February 2011) that there is a general principle under which the absence of prior judicial authorisation may be counterbalanced by a comprehensive post-inspection review.

16 Deutsche Bahn submits, lastly, that the five types of guarantee set out by the General Court in paragraphs 74 to 101 of the judgment under appeal do not ensure sufficient protection of its rights of defence against interference with its fundamental right to the inviolability of private premises caused by the inspections conducted by the Commission on its premises.

17 The Commission, supported by the EFTA Surveillance Authority and the Kingdom of Spain, dispute that line of argument.

Findings of the Court

18 By its first ground of appeal, Deutsche Bahn seeks, in essence, to establish that the judgment under appeal is vitiated by errors of law in that the General Court, in disregard of Articles 7 of the Charter and 8 of the ECHR, held that the lack of prior judicial authorisation did not affect the lawfulness of the contested decisions.

19 It should be noted in that regard that the fundamental right to the inviolability of the home is a general principle of EU law (see, to that effect, judgments in *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 19; *Dow Benelux* v *Commission*, 85/87, EU:C:1989:379, paragraph 30; and *Dow Chemical Ibérica and Others* v *Commission*, 97/87 to 99/87, EU:C:1989:380, paragraph 16) as now expressed in Article 7 of the Charter, which corresponds to Article 8 of the ECHR.

20 Furthermore, although it is apparent from the case-law of the ECtHR that the protection provided for in Article 8 of the ECHR may extend to certain commercial premises, the fact remains that that court did hold that interference by a public authority could go further for professional or commercial premises or activities than in other cases (ECtHR, judgments in *Niemietz v. Germany*, 16 December 1992, Series A No 251-B, and *Bernh Larsen Holding AS and Others v. Norway*, no. 24117/08, 14 March 2013).

21 In the present case, first of all, as observed by the Advocate General in point 33 of his Opinion, the General Court cannot be criticised for having failed to take account of the judgments of the ECtHR in *Société Métallurgique Liotard Frères v. France* and *Société Canal Plus and Others v. France* as they did not concern an infringement of Article 8 of the ECHR, but rather Article 6.

22 Moreover, in paragraph 72 of the judgment under appeal the General Court observed, correctly and with reference to paragraph 49 of the judgment in *Colas Est and Others v. France*, that the lack of prior judicial authorisation is only one of the factors borne in mind in the determination of whether Article 8 of the ECHR has been infringed. In the same paragraph the General Court further observed that the ECtHR took into account the extent of the powers held by the national competition authority, the circumstances of the interference and the fact that the system in place at the material time provided for only a limited number of safeguards, all of which differs from the situation under EU law.

23 It must be pointed out in that regard that the Commission's investigative powers under Article 20(2) of Regulation No 1/2003 are restricted to the Commission's agents having the power, inter alia, to enter premises of their choosing, to have access to documents they request and make copies thereof, and to have shown to them the contents of pieces of furniture they indicate (see, to that effect, judgment in *Hoechst* v *Commission*, 46/87 and 227/88, EU:C:1989:337, paragraph 31).

24 It must also be remembered that, under Article 20(6) and (7) of Regulation No 1/2003, authorisation must be sought from a judicial authority where, when the undertaking concerned opposes an inspection, the Member State concerned provides the necessary assistance, requesting where appropriate the assistance of the police or of an equivalent enforcement authority, so as to enable the inspection to be conducted and where such authorisation is required under national law. Authorisation may also be applied for as a precautionary measure. Article 20(8) further provides that although the national judicial authority is to control, inter alia, that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject-matter of the inspection, it may not call into question the necessity for the inspection, and that the decision is subject to review only by the Court of Justice.

25 Consequently, the General Court did not err in law in holding in paragraph 67 of the judgment under appeal that, in the light of the ECtHR's case-law, the lack of prior judicial authorisation was not capable, in itself, of rendering the inspection measure unlawful.

26 Turning, next, to Deutsche Bahn's argument that the General Court erred in law in basing itself, in paragraph 66 of the judgment under appeal, on the judgments of the ECtHR in *Harju v. Finland* and *Heino v. Finland*, the ECtHR stated expressly that the absence of prior judicial authorisation may be counterbalanced by a post-inspection review covering both questions of fact and questions of law.

27 It follows that Deutsche Bahn's argument as summarised in paragraphs 15 and 26 of this judgment is entirely unfounded.

28 Lastly, it is clear that the General Court, after observing in paragraph 73 of the judgment under appeal that, according to the ECtHR's case-law, the protection against arbitrary interference by public authorities requires a legal framework and strict limit, set out and considered, in paragraphs 74 to 100

of the judgment under appeal, five categories of safeguards which must form the framework for the inspection decision. The General Court went on to conclude, in paragraph 100 of the judgment under appeal, that all of those safeguards were guaranteed in the case before it.

29 The detailed examination conducted by the General Court satisfies both the requirements of the ECtHR, as is apparent from the preceding paragraph herein, and the letter of Regulation No 1/2003 and the Court of Justice's case-law.

30 On the one hand, it is apparent from Article 20(4) of Regulation No 1/2003 that the inspection decision must specify the subject-matter and purpose of the inspection, indicate the penalties incurred by the undertaking concerned and the undertaking's right to have the decision reviewed by the Court of Justice.

31 On the other hand, it is settled case-law that the Commission's powers of investigation are strictly defined, encompassing inter alia the exclusion of non-business documents from the scope of the investigation, the right to legal assistance, the preservation of the confidentiality of correspondence between legal counsel and clients, the obligation to state reasons for the inspection decision and the option of bringing proceedings before the EU courts (see, to that effect, judgment in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraphs 44 to 50).

32 Moreover, as observed by the Advocate General in point 38 of his Opinion and as stated in paragraph 26 of this judgment, the presence of a post-inspection judicial review is considered by the ECtHR as capable of offsetting the lack of prior judicial authorisation and thus capable of constituting a fundamental guarantee in order to ensure the compatibility of the inspection measure in question with Article 8 of the ECHR (see inter alia ECtHR, judgment in *Delta Pekárny a.s. v. the Czech Republic*, no. 97/11, paragraphs 83, 87 and 92, 2 October 2014).

33 That is precisely the case under the system put in place in the European Union, as Article 20(8) of Regulation No 1/2003 states expressly that the lawfulness of the Commission decision is to be subject to review by the Court of Justice.

34 The review provided for by the Treaties means that the European Union courts carry out an in-depth review of the law and of the facts on the basis of the evidence adduced by the applicant in support of the pleas in law put forward (see, to that effect, judgments in *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 62, and *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 44).

35 It follows that the General Court was correct in holding that the fundamental right to the inviolability of private premises, as protected by Article 8 of the ECHR, is not disregarded by there being no prior judicial authorisation.

36 Accordingly, it must also be concluded that no infringement of Article 7 of the Charter has been established.

37 In those circumstances, the first ground of appeal must be rejected as being unfounded.

Second ground of appeal: misinterpretation and misapplication of the right to effective judicial protection provided for in Article 47 of the Charter and Article 6(1) of the ECHR

Arguments of Deutsche Bahn

38 Deutsche Bahn submits that the General Court erred in law in holding that, in the light of the existence in EU law of a post-inspection judicial review, the contested decisions did not disregard the fundamental right to effective judicial protection.

39 In particular, Deutsche Bahn criticises the General Court for having based its reasoning on the judgments of the EctHR in *Société Métallurgique Liotard Frères v. France* and *Société Canal Plus and Others v. France* although the facts were not comparable, as in those cases the French competition authority had obtained prior judicial authorisation.

40 The Commission, supported by the EFTA Surveillance Authority and the Kingdom of Spain, disputes that line of argument.

Findings of the Court

41 First of all, it should be noted that in paragraphs 109 and 110 of the judgment under appeal the General Court held, correctly, that it is apparent from the judgments of the EctHR in *Société Métallurgique Liotard Frères v. France* and *Société Canal Plus and Others v. France* that the key issue is the intensity of the review covering all matters of fact and law and providing an appropriate remedy if an activity found to be unlawful has taken place and not the point in time when it was carried out.

42 Furthermore, the General Court observed in paragraph 112 of the judgment under appeal that the European Union Courts, ruling on an action for annulment brought against an inspection decision, conduct both a legal and factual review and have the power to evaluate the evidence and annul the contested decision.

43 It is clear that that analysis is also in keeping with the Court's case-law as referred to in paragraph 34 of this judgment. The General Court's assessment in paragraphs 109 to 112 of the judgment under appeal is therefore not vitiated by any error of law.

44 Moreover, contrary to Deutsche Bahn's assertions, it is open to undertakings that have undergone an inspection to challenge before the EU Courts the lawfulness of the inspection decision and, as pointed out by the Advocate General in point 46 of his Opinion, such judicial proceedings can be initiated immediately after the company has been notified of the Commission decision, meaning that there is no need to wait until the Commission has adopted the final decision on the suspected infringement of the EU competition rules in order to bring an action for annulment before the European Union Courts.

45 Lastly, in paragraph 113 of the judgment under appeal, the General Court referred, in relation to the safeguards provided for under EU law in order to ensure observance of the right to an effective legal remedy, to the Court's case-law to the effect that if the Community judicature annuls the inspection decision or holds that there has been an irregularity in the conduct of the investigation, the Commission will be prevented from using, for the purposes of infringement proceedings, any documents or evidence which it might have obtained in the course of that investigation (judgment in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 49).

46 It follows from the foregoing that the General Court was correct in holding that the fundamental right to effective judicial protection, as guaranteed by Article 6(1) of the ECHR, is not disregarded by there being no prior judicial review.

47 It must be remembered in that regard that that fundamental right constitutes a general principle of EU law, as currently expressed in Article 47 of the Charter, which is the equivalent under EU law of Article 6(1) of the ECHR (see, to that effect, inter alia, judgments in *Chalkor* v *Commission*, C-386/10 P, EU:C:2011:815, paragraph 52 and the case-law cited; *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 40; and *CB* v *Commission*, C-67/13 P, EU:C:2014:2204, paragraph 43).

48 For the reasons set out above, it must also be held that no infringement of Article 47 of the Charter has been established.

49 In consequence, the second ground of appeal must be rejected.

The third ground of appeal: infringement of the rights of the defence due to irregularities vitiating the conduct of the first inspection

Arguments of Deutsche Bahn

50 Deutsche Bahn criticises the General Court for having held, in paragraph 162 of the judgment under appeal, that the Commission had had valid reasons for telling its officials about the existence of suspicions concerning DUSS before the first inspection decision.

51 By its conduct, the Commission knowingly created a risk that the information communicated to its agents concerning the DUSS file would lead them to direct their attention specifically to the documents pertaining to DUSS, even though they did not relate to the subject-matter of the first inspection. Consequently, and contrary to what the General Court held, the exception to the prohibition on using documents unrelated to the subject-matter of the inspection, which was allowed by the Court in its judgment in *Dow Benelux* v *Commission* (85/87, EU:C:1989:379), was not applicable.

52 Deutsche Bahn further submits that supplying the Commission's agents with that information about DUSS beforehand was not necessary for an effective implementation of the competition rules.

53 The Commission disputes the admissibility of the argument put forward by Deutsche Bahn concerning the error in law made by the General Court in allowing fortuitous discoveries on the ground that it pertains to findings of fact which may not be reviewed on appeal.

Findings of the Court

54 Regarding the admissibility of this ground of appeal, which the Commission disputes, it must be observed at the outset that Deutsche Bahn is not only asking the Court to proceed with a fresh examination of the facts, but is arguing that the General Court erred in law by holding that the Commission had valid reasons for telling its officials about the existence of suspicions concerning DUSS before the first inspection by way of general background information on the case.

55 The third ground of appeal is accordingly admissible.

56 As to the merits, it must be borne in mind that Article 20(4) of Regulation No 1/2003 requires the Commission to state reasons for the decision ordering an investigation by specifying its subject-matter and purpose. As the Court has held, this is a fundamental requirement, designed not merely to show that the proposed entry onto the premises of the undertakings concerned is justified but also to enable those undertakings to assess the scope of their duty to cooperate whilst at the same time safeguarding their rights of defence (judgments in *Roquette Frères*, C-94/00, EU:C:2002:603, paragraph 47, and *Nexans and Nexans France* v *Commission*, C-37/13 P, EU:C:2014:2030, paragraph 34).

57 Moreover, under Article 28(1) of Regulation No 1/2003, information obtained during investigations must not be used for purposes other than those indicated in the inspection warrant or decision (see, to that effect, judgment in *Dow Benelux* v *Commission*, 85/87, EU:C:1989:379, paragraph 17).

58 The Court stated in that regard that such a requirement is aimed at preserving, in addition to business secrecy, expressly referred to in Article 28, undertakings' rights of defence, which Article 20(4) is intended to safeguard. Those rights would be seriously endangered if the Commission were able to rely on evidence against undertakings which was obtained during an investigation but was not related to the subject-matter or purpose thereof (see, to that effect, judgment in *Dow Benelux* v *Commission*, 85/87, EU:C:1989:379, paragraph 18).

59 On the other hand, it cannot be concluded therefrom that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Such a bar would go beyond what is required to safeguard professional secrecy and the rights of the defence and would thus constitute an unjustified hindrance to the Commission in the accomplishment of its task of ensuring compliance with the competition rules in the common market and identifying infringements of Articles 101 TFEU and 102 TFEU (see, to that effect, judgment in *Dow Benelux* v *Commission*, 85/87, EU:C:1989:379, paragraph 19).

60 It follows from the foregoing that, on the one hand, the Commission is required to state reasons for its decision ordering an inspection. On the other hand, if the statement of reasons for that decision circumscribes the powers conferred on the Commission's agents, a search may be made only for those documents coming within the scope of the subject-matter of the inspection.

61 In the present case, it is apparent from both paragraph 162 of the judgment under appeal and the Commission's statements at the hearing that it informed its agents immediately, before the first inspection was conducted, that there was another complaint against Deutsche Bahn concerning its subsidiary DUSS.

62 It must be observed in that regard that, as the Advocate General observed in 69 of his Opinion, although the efficacy of an inspection requires the Commission to have provided the agents responsible for the inspection with all the information that could be useful to them for understanding the nature and scope of the possible infringement of the competition rules as well as information relating to the logistics of the inspection, all that information must nevertheless relate solely to the subject-matter of the inspection ordered by decision.

63 However, whilst the General Court observed, correctly, in paragraph 75 of the judgment under appeal, that the Commission's inspection decision had to include a statement of reasons, it is clear that it did not take the view that if the Commission informed its agents that there was an additional complaint about the undertaking in question prior to the first inspection being carried out, the subject-matter of that inspection as set out in that decision also had to include the particulars of that additional complaint.

64 That prior information, which was not part of the general background information on the case but rather pertained to the existence of a separate complaint, is unrelated to the subject-matter of the first inspection decision. Accordingly, the lack of reference to that complaint in the description of the subject-matter of that inspection decision infringes the obligation to state reasons and the rights of defence of the undertaking concerned.

65 Moreover, in paragraph 134 of the judgment under appeal, the General Court stated expressly that the fact that the second inspection decision was adopted whilst the first inspection was underway demonstrates the importance of the information gathered during that inspection in triggering the second inspection and that the third inspection was unambiguously based, in part, on information gathered during the first two inspections. It concluded that the conditions under which the information concerning DUSS was gathered during the first inspection is capable of affecting the legality of the second and third inspection decisions.

66 Therefore, the first inspection was vitiated by irregularity since the Commission's agents, being previously in possession of information unrelated to the subject-matter of that inspection, proceeded to seize documents falling outside the scope of the inspection as circumscribed by the first contested decision.

67 It follows from all the foregoing that the General Court erred in law in holding, in paragraph 162 of the judgment under appeal, that the fact that the Commission told its officials about the existence of the complaint about DUSS before the first inspection decision was based on valid reasons for providing the officials with general background information on the case, without, moreover, providing reasons, when it is manifestly clear that such provision of information does not fall within the subject-matter of the first inspection decision and therefore disregards the safeguards forming the framework for the Commission's powers of inspection.

68 In those circumstances, the third ground of appeal must be upheld.

69 Consequently, the judgment under appeal must be set aside, without its being necessary to consider the fourth ground relied on by Deutsche Bahn in support of its appeal, alleging that the General Court disregarded the rules on burden of proof and seeking annulment of the second and third inspection decisions as well.

The action before the General Court

70 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits. That is so in the present case.

71 It follows from paragraphs 56 to 67 of the present judgment that the third plea in law put forward at first instance is well founded and that the second and third inspection decisions should be set aside on grounds of infringement of the rights of the defence.

Costs

72 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

73 Under Article 138(1) of those rules, applicable to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

74 Under Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the parties are to be ordered to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

75 Since Deutsche Bahn's appeal has been upheld in part, it is appropriate to order the Commission to bear half of its own costs relating to the present appeal proceedings and to pay half of those incurred by Deutsche Bahn in relation to the appeal proceedings. Deutsche Bahn must bear half of its own costs relating to the present appeal proceedings and pay half of those incurred by the Commission in relation to the appeal proceedings.

76 As regards the costs at first instance, the Commission should pay the costs relating to Cases T-290/11 and T-521/11, while Deutsche Bahn should pay the costs relating to Case T-289/11.

77 Under Article 140(1) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. In application of that provision, the Kingdom of Spain must bear its own costs both at first instance and on appeal.

78 Under Article 140(2) of the Rules of Procedure, the EFTA Surveillance Authority is to bear its own costs when it intervenes in proceedings. Accordingly, the EFTA Surveillance Authority must bear its own costs in the proceedings at first instance and on appeal.

On those grounds, the Court (Second Chamber) hereby:

1. Sets aside the judgment of the General Court of the European Union in *Deutsche Bahn and Others* v *Commission* (T-289/11, T-290/11 and T-521/11, EU:T:2013:404) in so far as it dismissed the actions brought against the second and third inspection decisions C(2011) 2365 of 30 March 2011 and C(2011) 5230 of 14 July 2011;

2. Annuls the decisions of the European Commission C(2011) 2365 of 30 March 2011 and C(2011) 5230 of 14 July 2011;

3. Dismisses the appeal as to the remainder;

4. Orders Deutsche Bahn AG, DB Mobility Logistics AG, DB Energie GmbH, DB Netz AG, Deutsche Umschlaggesellschaft Schiene-Straße (DUSS) mbH, DB Schenker Rail GmbH and DB Schenker Rail Deutschland AG to bear half of their own costs relating to the present appeal and to pay half of those incurred by the European Commission in the present proceedings;

5. Orders the European Commission to bear half of its costs relating to the present appeal and to pay half of those incurred by Deutsche Bahn AG, DB Mobility Logistics AG, DB Energie GmbH, DB Netz AG, Deutsche Umschlaggesellschaft Schiene-Straße (DUSS) mbH, DB Schenker Rail GmbH and DB Schenker Rail Deutschland AG in the present proceedings;

6. Orders Deutsche Bahn AG, DB Mobility Logistics AG, DB Energie GmbH, DB Netz AG, Deutsche Umschlaggesellschaft Schiene-Straße (DUSS) mbH, DB Schenker Rail GmbH and DB Schenker Rail Deutschland AG to pay the costs relating to Case T-289/11;

7. Orders the European Commission to pay the costs relating to Cases T-290/11 and T-521/11;

8. Orders the Kingdom of Spain to bear its own costs;

9. Orders the EFTA Surveillance Authority to bear its own costs.

[Signatures]