Case C-819/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

6 November 2019

Referring court:

Rechtbank Amsterdam (Netherlands)

Date of the decision to refer:

18 September 2019

Applicants:

Stichting Cartel Compensation

Equilib Netherlands B.V.

Defendants:

Koninklijke Luchtvaart Maatschappij N.V.

Martinair Holland N.V.

Deutsche Lufthansa AG

Lufthansa Cargo AG

British Airways plc

Société Air France SA

Singapore Airlines Ltd

Singapore Airlines Cargo Pte Ltd

Swiss International Air Lines AG

Air Canada

Cathay Pacific Airways Ltd

SAS AB

Scandinavian Airlines System Denmark-Norway-Sweden

SAS Cargo Group A/S

Subject of the action in the main proceedings

The main proceedings concern actions brought before the civil courts against a large number of air carriers ('the defendants') in relation to infringements of the prohibition on cartels. The claims seek, first, rulings that the defendants acted unlawfully and, second, damages.

Subject and legal basis of the request for a preliminary ruling

The request under Article 267 TFEU concerns the competence of the national civil courts to apply Article 101 TFEU directly and thus to establish infringements of European competition rules, even if they occurred before the entry into force of Regulation No 1/2003 in the aviation sector on flights to and from countries outside the EU/EEA. In that period, those infringements could only be investigated on the basis of the transitional regime of Articles 104 and 105 TFEU.

Question referred

In a dispute between injured parties (in the present case shippers, recipients of air cargo services) and air carriers, do the national courts have the power — either because of the direct effect of Article 101 TFEU, or at least of Article 53 EEA, or on the basis of (the direct effect of) Article 6 of Regulation 1/2003 — to fully apply Article 101 TFEU, or at least Article 53 EEA, with regard to agreements/concerted practices of air carriers in respect of freight services on flights operated before 1 May 2004 on routes between airports within the EU and airports outside the EEA, or, before 19 May 2005, on routes between Iceland, Liechtenstein, Norway and airports outside the EEA, or, on flights operated before 1 June 2002, between airports within the EU and Switzerland, also for the period that the transitional regime of Articles 104 and 105 TFEU applied, or does the transitional regime preclude that?

Provisions of Union law cited

Articles 85 to 89 of the EEC Treaty, now Articles 101 to 105 of the TFEU.

Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p.1), in particular, the recitals and Articles 1 and 7.

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 EC Treaty (OJ 2003 L 1, p. 1), in particular the recitals and Articles 6 and 16.

Agreement between the European Community and the Swiss Confederation on Air Transport (OJ 2002 L 114, p. 73), in particular, Articles 1, 8 and 9.

Provisions of national law cited

None

Brief summary of the facts and the procedure in the main proceedings

1 Stichting Cartel Compensation (SCC) and Equilib Netherlands B.V. ('the applicants') are in the business of pursuing claims for damages arising from infringements of competition law. The applicants have their 'clients' assign their claims to them, after which they try to recover those claims.

2 The present cases relate to a worldwide freight transport cartel in the aviation sector between 2000 and 2006. In a decision of 9 November 2010, the Commission imposed a fine on a large number of air carriers due to anti-competitive agreements relating to fuel and security surcharges on flight routes from, to and within EU/EEA countries and Switzerland. By judgments of 16 December 2015,[1] the General Court of the European Union ('the General Court') annulled that decision.

3 On 17 March 2017, the Commission took a new decision and again imposed fines on this aviation cartel. Appeals were again lodged against that decision before the General Court.[2] Those cases are still pending. However, in the case of flights between EU/EEA countries and countries outside that area ('third countries'), the Commission limited itself to the cartel period which it could investigate on the

[1] Judgments in *Air Canada* v *Commission* (T-9/11), *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-28/11), *Japan Airlines* v *Commission* (T-36/11), *Cathay Pacific Airways* v *Commission* (T-38/11), *Cargolux Airlines* v *Commission* (T-39/11), *Lan Airlines and Lan Cargo* v *Commission* (T-40/11), *Singapore Airlines and Singapore Airlines Cargo PTE* v *Commission* (T-43/11), *Deutsche Lufthansa and Others* v *Commission* (T-46/11), *British Airways* v *Commission* (T-48/11), *SAS Cargo Group and Others* v *Commission* (T-56/11), *Air France — KLM* v *Commission* (T-62/11), *Air France* v *Commission* (T-63/11) and *Martinair Holland* v *Commission* (T-67/11).

[2] Cases *Air Canada* v *Commission* (T-326/17), *Koninklijke Luchtvaart Maatschappij* v *Commission* (T-325/17), *Japan Airlines* v *Commission* (T-340/17), *Cathay Pacific Airways* v *Commission* (T-343/17), *Cargolux Airlines* v *Commission* (T-334/17), *Latam Airlines Group and Lan Cargo* v *Commission* (T-344/17), *Singapore Airlines and Singapore Airlines Cargo PTE* v *Commission* (T-350/17), *Deutsche Lufthansa and Others* v *Commission* (T-342/17), *British Airways* v *Commission* (T-341/17), *SAS Cargo Group and Others* v *Commission* (T-324/17), *Air France — KLM* v *Commission* (T-337/17), *Air France* v *Commission* (T-338/17) and *Martinair Holland* v *Commission* (T-323/17).

basis of the procedure established by Regulation No 1/2003. Before the entry into force of that regulation, the Commission investigated competition law infringements on the basis of Regulation No 3975/87, which, however, concerned only international air transport between Community airports. Competition law investigations on flights to and from third countries were then only possible on the basis of the transitional provisions of Articles 104 and 105 TFEU.

4 Regulation No 1/2003 applied to flights between the EU and third countries from its entry into force on 1 May 2004, but to flights between EEA countries and third countries only from 19 May 2005. Since 1 June 2002, the cartel rules set out in Articles 8 and 9 of the Agreement between the European Community and the Swiss Confederation on Air Transport, including the implementing regulations applicable during that period, applied to flights between the EU and Switzerland. In the preceding years, Switzerland was a third country that therefore fell outside the ambit of the Commission's decision.

5 In essence, the applicants seek, first, a ruling that the defendants also acted unlawfully before the aforementioned three dates because of cartel agreements and, second, damages (namely, for the damage suffered by carriers who sold their claims to the applicants). The applicants' claims therefore relate to the entire period from 2000 to 2006. In practice, there are three joined cases — one brought by SCC and two by Equilib — against various air carriers.

Main submissions of the parties to the main proceedings

6 The applicants submit, primarily, that the prohibition on cartels under Article 101 TFEU had direct horizontal effect throughout the cartel period, so that the referring court also has the power to apply that prohibition to flights from and to third countries that took place before the dates referred to in paragraph 4. It is not necessary for the national competition authorities or the Commission to have first taken decisions pursuant to Article 104 TFEU or 105 TFEU. In the alternative, the applicants submit that, under Article 6 of Regulation No 1/2003, the referring court in any case has the power, as of 1 May 2004, to apply Article 101 TFEU, in so far as that power did not previously exist, and indeed with retroactive effect.

7 The defendants dispute that Article 101(1) TFEU has direct horizontal effect. The referring court only has the power to apply that provision if a prior decision of the national authorities or the Commission, as referred to in Articles 104 and 105 TFEU, has been adopted. As regards the applicants' alternative submission, the defendants dispute that the referring court has the power under Article 6 of Regulation No 1/2003 to declare retroactively that conduct that was not prohibited at the time of its occurrence is in fact prohibited. The granting of retroactive effect cannot be inferred from the wording, purpose or scheme of Regulation No 1/2003 and, according to the defendants, is contrary to the principle of legal certainty.

Brief summary of the reasons for the referral

8 The referring court notes that, before the entry into force of Regulation No 1/2003, the competition rules were applied in the aviation sector on the basis of Regulation No 3975/87, which did not, however, apply to air transport from and to third countries. In the case of those flights, the national authorities and the Commission could therefore only rely on Articles 104 or Article 105 TFEU, which contain a transitional regime for the application of competition law. Article 104 TFEU provides that national authorities are to decide on the admissibility of agreements, decisions and concerted practices in accordance with the law of their country and with the provisions of Article 101, in particular paragraph 3. That transitional regime applies until the entry into force of the provisions adopted pursuant to Article 103 TFEU.

9 In the present case the question is therefore whether, during the period of application of the transitional regime of Articles 104 and 105 TFEU, the national courts have jurisdiction to find, in civil proceedings between private parties, that there has been an infringement of European competition rules.

10 Earlier case-law of the Court of Justice of the European Union (‘the Court of Justice’) reflects different views in this regard. The British High Court of Justice of England and Wales ruled on 4 October 2017 in a dispute in which the same question was raised, that it did not have jurisdiction. That judgment was upheld by the Court of Appeal. However, on the basis of the same case-law, the referring court questions whether it should not arrive at the opposite conclusion.

11 The referring court gives the following overview of the earlier case-law of the Court of Justice. It emphasises, first of all, that, according to the judgment of the Court of Justice of 30 January 1974, *BRT* v *SABAM* (Case 127/73, EU:C:1974:6), as the prohibition of Articles 85(1) and 86 of the EEC Treaty [Articles 101(1) and 102 TFEU] tend by their very nature to produce direct effects in relations between individuals, those articles create direct rights in respect of the individuals concerned which the national courts must safeguard (paragraph 16). If the exercise of those rights by individuals depended on administrative enforcement by the authorities of the Member States or the Commission, those rights would be withheld from individuals. The national courts are therefore competent to apply Article 85 of the EEC Treaty [101 TFEU] in a dispute between individuals. However, the Court of Justice did rule in that judgment that, in proceedings in which the competition rules are invoked, the national courts should exercise restraint if the Commission or the national competition authority is also dealing with the same matter (paragraph 21).

12 In the judgment of 30 April 1986 in *Asjes and Others* (Joined Cases 209-213/84, EU:C:1986:188), the Court held that ‘air transport remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty, including the competition rules’ (paragraph 45). Articles 88 and 89 of the EEC Treaty [104 and 105 TFEU] also apply as long as the Commission has not yet adopted any

provisions pursuant to Article 87 of the EEC Treaty [103 TFEU]. It is therefore always possible to identify infringements of competition law and, in particular, to also grant exemptions if necessary, under Article 85(3) of the EEC Treaty [101(3) TFEU].

13 The Court of Justice has held, however, that national courts are not competent to make a finding of infringement of Article 85 of the EEC Treaty [101 TFEU] as long as the national authority or the Commission has not yet given an opinion on the alleged infringement, but still has the possibility of doing so, and can therefore still grant an exemption. Otherwise, certain agreements would already be prohibited and legally void before the possibility existed of determining whether Article 85 of the EEC Treaty [101 TFEU] applies in its entirety to the agreement. That would be contrary to the principle of legal certainty. In its judgment of 11 April 1989, *Ahmed Saeed Flugreisen and Others* v *Zentrale zur Bekämpfung unlauteren Wettbewerbs* (Case 66/86, EU:C:1989:140), the Court of Justice upheld that assessment.

14 The referring court concludes from the foregoing that the Treaty confers on national civil courts powers of their own to apply competition rules in disputes between individuals. Those powers are independent of administrative enforcement by the competent competition authorities. Under Articles 104 and 105 TFEU, both administrative and civil enforcement are possible without the first form of enforcement taking precedence.

15 Because of this concurrence, there is a risk of conflicting decisions and legal uncertainty. It was precisely the prevention of such problems that, according to the referring court, was decisive for the Court of Justice in its aforementioned assessment that a national court could not make a finding of infringement of the competition rules as long as it was still possible for the competent authorities to grant an exemption, whether or not with retroactive effect, under Articles 104 and 105 TFEU. In line with that, the Court of Justice held in the *Ahmed Saeed* judgment cited above that Article 102 TFEU can be applied in full. In the case of that article, which concerns abuse of a dominant position, an exemption is never possible. It is therefore never necessary to take into account a possible exemption decision or breach of the principle of legal certainty. Consequently, according to the Court of Justice, the transitional regime of Articles 104 and 105 TFEU cannot, in that regard, constitute any obstacle to the direct application of Article 102 TFEU.

16 In the light of the foregoing, the referring court considers that in the present case there is nothing to prevent the national court from applying Article 101 TFEU. After all, there is no risk of legal uncertainty, since the defendants did not request an exemption from the national competition authorities or the Commission during the relevant cartel period and can now no longer apply to those authorities for such an exemption.

17 Similarly, the mere fact that, in its 2017 decision, the Commission declared that it did not have jurisdiction to make a ruling in relation to the period prior to the entry into force of Regulation No 1/2003 indicates that the national court must be held to have jurisdiction. Otherwise, there would no longer be a competent authority or national court to rule on the applicability of the prohibition in Article 101 TFEU in relation to that period. That would constitute a reward for concealing price agreements made at the time which might be contrary to the competition rules.

18 The referring court therefore finds that it is competent, on the basis of the case-law cited above, to make a retroactive ruling on the agreements made by the air carriers among themselves in the periods stated in the question referred for a preliminary ruling in respect of flights to and from third countries. Article 101 TFEU was applicable during those periods, while no exemptions were granted at the time and such exemptions can now no longer be granted. The mere fact that the procedure for establishing an infringement and granting an exemption has changed with the entry into force of Regulation No 1/2003 does not affect the application of the competition rules in civil proceedings.

19 Since that ruling deviates from the United Kingdom case-law cited in paragraph 10, it is necessary in the interests of legal uniformity, according to the referring court, to refer a question for a preliminary ruling. In that question, it also asks the Court of Justice to assess the applicants' alternative position (see paragraphs 6 and 7 above) in its answer. Strictly speaking, that is not necessary, since the referring court's opinion is consistent with their primary position. However, at the request of the applicants and in order to ensure that the proceedings are effective, it has nevertheless included that argument in the question referred for a preliminary ruling, although it did not comment on it in the order for reference.