



PRESS RELEASE No 21/26

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Judgments of the Court in Cases C-367/22 P | Air Canada, C-369/22 P | Air France and Others

Airfreight cartel: the Court of Justice dismisses the appeals brought by 12 airlines against the judgments of the General Court

By contrast, it reduces the amount of the fine imposed on SAS Cargo Group

On 9 November 2010, the European Commission adopted an initial decision ¹ against multiple airlines operating on the airfreight market which had participated in a pricing cartel between December 1999 and February 2006. They were fined a total of approximately €790 million. The Commission found that the airlines had infringed the provisions of the Treaty on the Functioning of the European Union (TFEU), the Agreement on the European Economic Area (EEA) and the Agreement between the European Community and the Swiss Confederation on Air Transport (EC-Switzerland), which prohibit agreements, decisions and concerted practices that restrict competition. The cartel related to a number of constituent elements of the price of services provided in that market, in particular the introduction of ‘fuel’ and ‘security’ surcharges, as well as the refusal to pay commission to freight forwarders on those surcharges. However, that decision was annulled, in whole or in part, by the General Court of the European Union ² on the grounds of internal contradictions that could undermine the rights of defence of the airlines.

On 17 March 2017, the Commission adopted a fresh decision, ³ in which it amended the defective statement of reasons identified by the General Court and imposed fines on the airlines for a total amount of €776 million.

The airlines requested that the General Court also annul that fresh decision or reduce the amount of the fines imposed. By judgments of 30 March 2022, ⁴ the General Court dismissed the actions brought by Martinair Holland, KLM, Cargolux, Air France-KLM, Air France, Lufthansa and Singapore Airlines. By contrast, it annulled the decision at issue in part and reduced the amount of the fine imposed on the other airlines (see the table in Press Release [No 53/22](#)).

Appeals were lodged against those judgments of the General Court before the Court of Justice.

In a series of thirteen judgments delivered today, **the Court of Justice rejects almost all of the arguments put forward by the airlines. Only the appeal brought by SAS Cargo Group is upheld in part**, on the grounds of errors made by the General Court in calculating the amount of the fine imposed on that airline.

First, the Court of Justice rejects the arguments of the airlines challenging **the Commission’s jurisdiction to penalise the cartel in respect of airfreight services from third countries to the European Union or the EEA** (inbound freight).

It recalls that the Commission may find and penalise conduct adopted outside the territory of the European Union or the EEA, provided that the conduct was implemented in that territory (‘the implementation test’) or that it was foreseeable that it would have immediate and substantial effects there (‘the qualified effects test’).

In that regard, the Court of Justice considers that the General Court did not err in confirming the Commission’s jurisdiction exclusively on the basis of the ‘qualified effects’ test, since the two tests are alternative.

Furthermore, the Court of Justice recalls that, under the qualified effects test, the Commission is required to establish that **the effects of the practices concerned must be ‘foreseeable, immediate and substantial’**. In that regard, it rejects the

various arguments relating to errors of law allegedly made by the General Court in its review of the characterisation of those effects.

Second, the Court of Justice rejects the arguments of the airlines challenging the fact that the various instances of conduct at issue had been **characterised as a ‘single and continuous infringement’**. It recalls that, where an infringement extends over several years, the fact that direct evidence of the implementation of an agreement by an undertaking has not been adduced for certain specific periods does not preclude its participation in that agreement from nevertheless being established in respect of those periods. However, such a finding must be based on objective and consistent indicia. Moreover, the Court of Justice notes that an airline may be held liable even in respect of routes on which it does not operate. It specifies that that is the case where the airline has contributed through its own conduct to the common objectives pursued by all the participants in the cartel and where it was aware of the offending conduct planned or put into effect by the other participants in the cartel at issue in pursuit of the same objectives.

Third, the Court of Justice responds to the line of argument of the airlines that raised before it for the first time, when they had not done so before the General Court, the plea based on the **limitation period for the Commission’s power to impose penalties** in respect of certain conduct. The Court of Justice states that the plea based on the expiry of the limitation period for that power ⁵ cannot be raised by the General Court of its own motion, but must be raised by the party concerned, since it is not a plea involving a matter of public policy.

With regard to SAS Cargo Group, the Court of Justice considers that, in order to ensure purported equal treatment as between the airlines, the General Court had included in the calculation basis turnover generated on internal routes within the same State. According to the Court of Justice, the General Court did not have evidence establishing that the other airlines concerned had had such turnover included in the calculation of the amount of their fines. Without evidence of a difference in treatment, the General Court could not conclude that there had been a breach of the principle of equal treatment or, on that basis, alter the amount of the fine imposed on SAS Cargo Group. The Court of Justice therefore sets aside the General Court’s judgment in so far as it relates to that point and sets the amount of the fine at a lower level (see the table below).

Summary table of fines

(for the other airlines, see Press Release [No 53/22](#))

Airlines	Amount of the fine set by the Commission (€ millions)	Amount of the fine set by the General Court (€ millions)	Amount of the fine set by the Court of Justice (€ millions)
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SAS SAS Cargo Group Scandinavian Airlines System Denmark-Norway-Sweden	5.36 (Scandinavian Airlines System Denmark-Norway-Sweden only)	7.03 (↑) (Scandinavian Airlines System Denmark-Norway-Sweden only)	4.74 (↓) (Scandinavian Airlines System Denmark-Norway-Sweden only)
	4.25 (SAS Cargo Group and Scandinavian Airlines System Denmark-Norway-Sweden, jointly and severally)	5.94 (↑) (SAS Cargo Group and Scandinavian Airlines System Denmark-Norway-Sweden, jointly and severally)	4.07 (↓) (SAS Cargo Group and Scandinavian Airlines System Denmark-Norway-Sweden, jointly and severally)
	5.27 (SAS, SAS Cargo Group and Scandinavian Airlines System Denmark-Norway-Sweden, jointly and severally)	6.31 (↑) (SAS, SAS Cargo Group and Scandinavian Airlines System Denmark-Norway-Sweden, jointly and severally)	4.37 (↓) (SAS, SAS Cargo Group and Scandinavian Airlines System Denmark-Norway-Sweden, jointly and severally)
	32,98 (SAS Cargo Group and SAS, jointly and severally)	29.05 (↓) (SAS Cargo Group and SAS, jointly and severally)	27.7 (↓) (SAS Cargo Group and SAS, jointly and severally)
	22.31 (SAS Cargo Group only)	21.69 (↓) (SAS Cargo Group only)	21.97 (↓) (SAS Cargo Group only)

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which

is bound by the decision given by the Court of Justice on the appeal.

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The full text and, as the case may be, an abstract of the judgments ([C-367/22 P](#), [C-369/22 P](#), [C-370/22 P](#), [C-375/22 P](#), [C-378/22 P](#), [C-379/22 P](#), [C-380/22 P](#), [C-381/22 P](#), [C-382/22 P](#), [C-385/22 P](#), [C-386/22 P](#), [C-401/22 P](#) and [C-403/22 P](#)) is published on the CURIA website on the day of delivery.

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¹ Commission [Decision C\(2010\) 7694 final](#) of 9 November 2010 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39258 – Airfreight) (see also Commission Press Releases [JP/10/1487](#)).

² Judgments of the General Court of 16 December 2015, *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](#), *Latam Airlines Group and Lan Cargo v Commission*, [T-40/11](#), *Singapore Airlines and Singapore Airlines Cargo 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](#), *Martinair Holland v Commission*, [T-67/11](#) (see also Press Release [No 147/15](#)).

³ Commission [Decision C\(2017\) 1742 final](#) of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) (see also Commission Press Releases [JP/17/661](#)).

⁴ Judgments of the General Court of 30 March 2022: *Martinair Holland v Commission*, [T-323/17](#); *SAS Cargo Group and Others v Commission*, [T-324/17](#); *Koninklijke Luchtvaart Maatschappij v Commission*, [T-325/17](#); *Air Canada v Commission*, [T-326/17](#); *Cargolux Airlines v Commission*, [T-334/17](#); *Air France-KLM v Commission*, [T-337/17](#); *Air France v Commission*, [T-338/17](#); *Japan Airlines v Commission*, [T-340/17](#); *British Airways v Commission*, [T-341/17](#); *Deutsche Lufthansa and Others v Commission*, [T-342/17](#); *Cathay Pacific Airways v Commission*, [T-343/17](#); *Latam Airlines Group and Lan Cargo v Commission*, [T-344/17](#); *Singapore Airlines and Singapore Airlines Cargo v Commission*, [T-350/17](#) (see also Press Release [No 53/22](#)).

⁵ That limitation period is provided for in Article 25 of Council [Regulation \(EC\) No 1/2003](#) of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101] and [102 TFEU].