THE GENERAL COURT'S RULINGS IN *AIRFREIGHT*: A COMMENTARY

By Jeremy Robinson [1]

I. BACKGROUND: THE DISCOVERY OF THE AIR CARGO CARTEL AND ITS OUTCOME

The discovery of an international cartel imposing surcharges on the transport of airfreight created shockwaves that are felt still today. Dozens of airlines were implicated; leniency applications were hurriedly prepared; and airlines prepared to defend themselves against worldwide investigations and damages actions. The fines were huge and there have been numerous reports of damages claims settled, presumably for a substantial sum. How one legal department used a compliance program to discover its company's involvement and to take action became an object lesson for practitioners, both in-house and out.

In 2010, five years after the discovery of the cartel, the European Commission imposed fines on 11 airlines totaling almost €800 million. Of those 11 airlines, Lufthansa and its subsidiaries were spared for their part in revealing the cartel's existence. Yet five years later, the decisions – and the fines – relating to all but one of them, were quashed by the General Court.

The Commission investigation began when Lufthansa submitted an application for immunity under the 2002 Leniency Notice. The immunity application covered both Lufthansa and its subsidiaries Lufthansa Cargo AG and Swiss International Air Lines AG. That application stated that there had been anti-competitive contact between a number of undertakings

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operating in the freight market relating to the fuel surcharge which had been introduced to address rising fuel costs, and the security surcharge which had been introduced to address the costs of certain security measures imposed following the terrorist attacks of September 11, 2001. The Commission carried out dawn raids on February 14 and 15, 2006. Several carriers then made applications under the 2002 Leniency Notice. On December 19, 2007, the Commission addressed a statement of objections to 27 carriers, alleging that they had infringed 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 by participating in a worldwide cartel relating to the fuel surcharge, the security surcharge and a refusal to pay commission on surcharges. On November 9, 2010, the Commission adopted a decision addressed to 21 carriers (including the immunity applicants) and withdrew the objections against the remaining carriers.

II. ANALYSIS OF THE GENERAL COURT'S RULING

The General Court's annulment of the *Airfreight* decision in relation to those airlines who appealed was both surprising and controversial. Surprising in part because five years had elapsed from the Commission decision on November 9, 2010 to the judgments on December 16, 2015. Surprising also, because relatively few Commission cartel decisions suffer what appears to be such a significant reversal. Surprising, finally, because of the substantial fines which have now been annulled (approximately €790 million out of €799 million). Controversial because to some, the decision did not suffer the defects alleged of it. There had been plenty of leniency applicants among the airlines (not least the original immunity application by Lufthansa, so that if there is generally no smoke without fire, how could this decision fall? Controversial too, in the view of the author of a post on Chillin' Competition, because the judgments "don't make sense."[2] According to this view, the only reason why the decision was annulled was that the Court saw an incongruence between the grounds and the dispositive parts. The grounds were clear and the alleged problem was that when imposing fines in the operative part, the Commission distinguished the periods for which it had the power to impose those fines. By contrast, the decision was clear and should not have been annulled. And in any case, the Commission can easily amend the error in a new decision.

As the Court summarized the case in its press release, the grounds of the decision described a single and continuous infringement of EU competition rules in the EEA and Switzerland through coordination of behavior as regards the pricing of freight services. The operative part of the decision mentioned four infringements relating to different periods and routes. Whereas some of the infringements were found to have been committed by all the carriers concerned, others were found to have been committed by a more limited group of carriers. The contradiction between the grounds and the operative part of the decision was a common feature in all the appeals lodged by the applicant airlines.

[2] https://chillingcompetition.com/2016/02/24/the-general-courts-annulment-of-the-airfreight-cartel-decision/.

What is also striking is that the Court considered that it did not need to engage with the substantive pleas on competition law, for example, in the *Cargolux* case, as regards: (i) the categorization of the cartel as a restriction by object without demonstrating appreciable anti-competitive effect; (ii) the failure to define with sufficient precision the scope and parameters of the infringements referred to in the contested decision; (iii) the failure to establish a reliable evidential base; (iv) the lack of power to make a finding of infringement regarding certain services; and (v) error of assessment and infringement of the principle of proportionality as regards the setting of the fine. According to the Court, the decision failed to meet basic requirements as regards clarity and consistency, such that – in essence – there was no substance it could review against the claimants' pleas in law.

Not only was this finding puzzling to the author mentioned above, it leads to the prospect that if the Commission retakes its decision, correcting the alleged errors but not addressing the claimants' actual pleas, another round of appellate litigation will begin. That will delay still further any progress in the current court actions for damages brought by the airlines' customers. Already, 10 years have passed since Lufthansa submitted its immunity application. Other carriers rapidly followed suit, suggesting there is at least some substance to the cartel allegations; and according to settled law, it must be open to any individual to claim damages for loss caused by a contract or conduct liable to restrict or distort competition. For how much longer must these customers wait? The question of whether the Court was correct therefore matters greatly.

Of less concern to the Commission, perhaps, was the position of Qantas. After the Commission decision in November 2010, it chose not to appeal. Therefore, whatever alleged defects there may be in the decision relating to it, it is now out of time to appeal and the original decision may stand as the basis of follow-on damages actions.

In the aftermath of the ruling, the Commission had to choose between appealing to the Court of Justice or not; and if not, whether to retake its decision, or drop the case. In favor of appealing to the Court of Justice, the Commission could defend its approach, in particular by noting that the delineation of the infringement into four separate parts did not call into question the existence of a single and continuous infringement. Against appealing, the Commission will have weighed its chances of success against the extra time necessary before a cartel decision could stand and the private damages actions could continue. The Commission chose not to appeal. At the time of writing, it has not, however, issued a new decision or declared firmly that it will do so. Yet it seems more than likely that it will.

If it does, then there is the prospect of further appeals on its new decision. Will the Commission continue to describe the cartel as a single and continuous infringement or rework it more thoroughly as separate infringements? The latter may require more work and possibly additional evidence.

How far the Commission considers that it needs to rework its original decision may determine how far it needs to adjust its original fines. Whatever future debates there may be over that future decision, it seems reasonable to expect that there will be a new decision which describes an infringement of competition law on which follow-on damages claims can

be based. If the Commission were to take the broader view, it might reason that it is better to achieve a final decision at the cost of possibly lower fines in some cases (and possibly higher fines in others) to unlock damages or settlements, and so to ensure that public and private enforcement complement each other effectively.

However, any alteration to the scope of the original decision will entail changes to the ambit of the follow-on litigation. It is often the case that follow-on damages claims seek to cover a cartel scope beyond that of the decision on which they are based, making the claim in part follow-on and in part stand-alone. Thus, a change in scope of the decision means a change in the balance of stand-alone and follow-on elements.

We now turn to the General Court's analysis of what constitutes a valid decision, in order to address whether the analysis is coherent. From its 20-paragraph analysis of the principles it derives from the jurisprudence, it appears that the Commission's decision was possibly more defective than the Court's own press release summary suggested, since the Court considered that it could not engage with the substance of the appeals. The Court ruled that the mere existence of a contradiction between the grounds and the operative part of the decision would not be sufficient to establish that the decision was vitiated by a defective statement of reasons provided that, first, the decision, taken as a whole, enabled the applicants to identify and plead that lack of consistency; second, the wording of the operative part of the decision was sufficiently clear and precise to allow the applicant to ascertain the exact scope of the decision; and third, the evidence relied upon to demonstrate the applicant's participation in the infringements imputed to it in the operative part was clearly identified and examined in the grounds. Yet the Court found that the decision was vitiated by its defective statement of reasons.

The Court established a preliminary threshold in its review of decisions relating to clarity and consistency. In turn, the requirement for clarity and consistency applies to the statement of grounds, the operative part and the relationship between the two. Only if the decision is clear and consistent can it be said that an applicant can understand the case made against it and the Court can exercise its power of review. As noted, the Court considered that the preliminary threshold of clarity and consistency had not been met.

In its description of relevant law, it appears at first sight that the Court viewed the Statement of Reasons as occupying a subsidiary role in understanding the decision. The Court stated that as regards the scope and nature of a competition infringement, it was the operative part and not the statement of reasons which was important. Only where there was a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in the decision. The Court then said that for the purpose of determining the persons to whom a decision finding a breach applied, only the operative part of the decision was to be considered, provided that it was not open to more than one interpretation.

This approach which gives priority to the operative part contradicts other statements in the ruling. According to the Court, an absence of or inadequate statement of reasons constituted a breach of essential procedural requirements for the purposes of article 263

TFEU and was a ground involving a matter of public policy which had to be raised by the EU judicature of its own motion. That being so, the mere finding of an inadequate Statement of Reasons is enough to justify annulment of the decision. As the Court found, the Statement of Reasons required by article 296 (2) TFEU had to disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question, in such a way as to make the person concerned aware of the reasons for the measure and thus enable them to defend their rights and the Court to exercise its power of review.

In short, the Statement of Reasons must clearly and unequivocally set out the facts and considerations which had decisive importance in the context of the decision; it had to be logical and contain no internal consistency that would prevent a proper understanding of the reasons underlying the measure. Yet the Court found that the grounds of the decision were themselves not entirely internally consistent because they contained assessments which were difficult to reconcile with the existence of a single cartel covering all of the routes referred to in the operative part as described in the grounds.

A further inconsistency was this: the Commission has indicated that it had taken as the starting date of participation of each of the carriers at issue in the infringement the first anti-competitive contact in which each carrier had taken part, except in the case of certain carriers which, according to the Commission, were not to be held liable for the infringement as regards routes between airports in the EEA. For those carriers, the Commission took May 1, 2004 as the starting date of the infringement, even though it indicated at the same time that they had participated in the single infringement before that date. However, in the grounds, the Commission claimed to be applying the principles derived from the case law according to which, for a single and continuous infringement, a person may be held liable for the participation of an undertaking in an infringement even though it is established that the undertaking concerned participated directly only in one or some of the constituent elements of that infringement, if it is shown that it knew, or must have known, that the collusion in which had participated was part of an overall plan that included all the constituent elements of the infringement.

It is arguable therefore that a decision which is clear on its face (in terms of the operative part) may still fail if the Statement of Reasons is internally inconsistent; consequently, the Statement of Reasons cannot be said to occupy a subsidiary role to the operative part and is essential to the whole.

Turning to the operative part, plainly this is of the utmost importance. The Court cited Article 6 of the European Convention on Human Rights to argue that the nature of competition breaches and the nature and degree of severity of penalties for competition breaches made those penalties essentially criminal and that consequently where penalties were imposed by decision of an administrative authority, the person concerned had to have an opportunity to challenge any decision made against him before a tribunal that offered the guarantees provided for in Article 6. The Court went on to argue that the principle of effective judicial protection (enshrined in Article 47 of the Charter of Fundamental Rights of the EU, corresponding in EU law to Article 6 (1) of the ECHR) required that the operative part of the

decision adopted by the Commission finding a breach of competition rules had to be particularly clear and precise and that the undertakings held liable and penalized were to be in a position to understand and to contest the imputation of liability and the imposition of penalties.

This raises the question of exactly what the Court found to be unclear. It was argued on appeal that according to the grounds of the contested decision, all of the carriers at issue participated in a single and continuous worldwide infringement irrespective of the fact that different carriers operated different routes. However, Articles 1 to 4 of the decision found four separate infringements each containing a different category of routes in which only some of the carriers at issue participated. The Court found that, if the anti-competitive conduct was regarded as comprising a single and continuous infringement concerning all the routes covered by the cartel and in which all the carriers at issue participated, the carriers mentioned in Article 2 of the contested decision between 2004 - 2006 should also have been included in Articles 1 and 4 of the decision. Since they were not, the Court found that the first four articles of the decision could not support the hypothesis of the single and continuous infringement in relation to all the routes covered by the cartel and in which all the carriers at issue participated. Since several of the carriers at issue were not mentioned in Articles 1, 3 and 4 of the contested decision, then the first four articles of that decision must either mean that the operative part found four separate single and continuous infringement each concerning a different category of routes or that the operative part found one single and continuous infringement liability for which was attributed only to the carriers which – as regards the routes mentioned in each of the first four articles of contested decision – participated directly in the unlawful conduct or were aware of collusion regarding those routes and accepted the risk.

As against that, the Court noted that an overall reading of the Statement of Grounds described a single cartel, constituting a single and continuous infringement in relation to all the routes covered by the cartel and in which all of the carriers at issue participated. This was reinforced where the Commission emphasized that the cartel constituted a single infringement and that, in the circumstances, it would be "artificial to split up" the anti-competitive conduct comprising the single and continuous infringement into separate infringements.

The Commission argued in reply to the Court's measures of organization of procedure that the failure to mention some of the carriers at issue in Articles 1, 3 and 4 of the contested decision could be explained by the fact that those carriers did not operate the route referred to in those articles, and that those articles needed to be interpreted as referring to separate single and continuous infringements. The Court rejected this proposition as contradicting the idea of a single and continuous infringement composed of a complex of anti-competitive conduct for which all the participants are liable, irrespective of the route concerned. The Commission's argument would also lead to a finding that the grounds and the operative part of the decision contradicted each other. Furthermore, the carriers mentioned in the first four articles of the decision were held liable for the entirety of the infringement referred to in each article without distinction in each article between the routes operated by those carriers during

the infringement period and those which were not.

The Court found that – accepting the Commission's interpretation of the decision - the operative part could be supported by two contradictory lines of reasoning. On the one hand, a carrier mentioned in one of the first four articles of the decision was held liable for the anti-competitive conduct in which had participated even if it did not operate all the routes covered by the article in question. On the other hand, the same carrier, which is not mentioned in one of the other articles, avoids all liability for anti-competitive conduct in which it nevertheless allegedly participated if it did not operate any of the routes covered by that article.

The Court found that the internal consistencies of the decision were liable to infringe the applicant's right of defense and prevent the Court from exercising its power of review.

The question now is what the Commission will do next. It has been suggested that the simplest option would be to redraft the operative part of the decision and retain the single and continuous infringement concept, recalculating the individual fines. It has rightly been said that a finding of infringement without levying fines would not be convincing given the penalties levied on carriers in jurisdictions outside the EU, but such a decision would still leave open the prospect of follow-on damages claims.

III. CONCLUSION

In its *Airfreight* rulings, the General Court has measured a Commission decision on a complex set of circumstances against exacting criteria of clarity and consistency, and found the Commission decision wanting. Although an unwelcome ruling for the Commission, it is questionable whether many cartels will present such a complex picture of evidence as that of the airline industry, and it may be doubted whether the Commission may now be at greater risk of falling at the first hurdle on appeal. It serves as a reminder that, even when the existence of a cartel and detailed evidence of its workings have been revealed through immunity and leniency applications, that is only the first stage of a long process to enforce the law.