



EUROPEAN COMMISSION  
DG Competition

## ***CASE AT.39258 - AIRFREIGHT***

(Only the English text is authentic)

### **CARTEL PROCEDURE**

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

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Article 7 Regulation (EC) 1/2003

Date: 09/11/2010

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**Case COMP/39258 – Airfreight**

**SUMMARY OF COMMISSION DECISION**

**of 9 November 2010**

**RELATING TO A PROCEEDING UNDER ARTICLE 101 OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, 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)**

*(NOTIFIED UNDER DOCUMENT NUMBER C(2010)7694)*

**(ONLY THE DUTCH, ENGLISH AND FRENCH VERSIONS ARE AUTHENTIC)**

(Text with EEA relevance)

(YYYY/C XX/YY) - [OPOEU inserts the OJ references]

*On 9 November 2010, the Commission adopted a decision relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union. In accordance with the provisions of Article 30 of Council Regulation (EC) No 1/2003<sup>1</sup>, the Commission herewith publishes the names of the parties and the main content of the decision, including any penalties imposed, having regard to the legitimate interest of undertakings in the protection of their business secrets.*

**1. INTRODUCTION**

- (1) The Decision is addressed to 21 legal entities belonging to 14 undertakings for infringing one or more of Article 101 of the Treaty, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air transport (hereafter 'the Swiss Agreement'). The overall duration of the infringement was from 7 December 1999 until 14 February 2006 (date of the Commission's inspection) and consisted of the coordination of pricing behaviour for airfreight services from, to and, in the case of some carriers, within the EEA with

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<sup>1</sup> OJ L 1, 4.1.2003, p. 1. Regulation as amended by Regulation (EC) No 411/2004 (OJ L 68, 6.3.2004, p. 1).

respect to fuel surcharges, security surcharges and the refusal to pay commission on surcharges.

## **2. CASE DESCRIPTION**

### **2.1. Procedure**

- (2) The case was opened on the basis of an immunity application on behalf of Deutsche Lufthansa AG and its controlled subsidiaries Lufthansa Cargo AG and Swiss on 7 December 2005.
- (3) The Commission obtained further evidence from the inspections that took place on 14 and 15 February 2006 at a number of premises of air freight providers throughout the EU.
- (4) Between 3 March 2006 and 27 June 2007 the Commission received eleven further applications under the 2002 Leniency Notice. The Commission also received an application from an undertaking which is not an addressee of the Decision due to lack of sufficient evidence.
- (5) The Statement of Objections was adopted on 18 December 2007, following which all undertakings involved were given the possibility to receive access to the file and defend themselves against the preliminary view of the Commission in writing and during an Oral Hearing that took place on 30 June – 4 July 2008.
- (6) The Advisory Committee on restrictive practices and dominant positions issued favourable opinions on 4 September 2009 and 5 November 2010.
- (7) The Commission adopted the Decision on 9 November 2010.

### **2.2. Summary of the infringement**

- (8) This decision relates to a single and continuous infringement of Article 101 of the Treaty, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement, covering the EEA territory and Switzerland by which the addressees (to the extent described more specifically at paragraph 18 below) coordinated their pricing behaviour in the provision of airfreight services from, to, and, in the case of some carriers, within the EEA with respect to various surcharges and the payment of commission on surcharges.
- (9) Pricing contacts between airlines providing airfreight services ('carriers') initially started in respect of the introduction of a fuel surcharge (FSC). Carriers then contacted each other regarding the application of the FSC mechanism, the introduction of new trigger points raising the level of FSC and regarding anticipated increases (or decreases) in FSC levels. These contacts started initially with a smaller group of carriers and spread to include all addressees of the Decision. They aimed to ensure that the airfreight carriers imposed a flat rate surcharge per kilo for all shipments and that increases (or decreases) were applied in full and in a coordinated way.

- (10) Cooperation spread to other areas without affecting the application of the FSC. Accordingly, carriers cooperated in the introduction and application of the security surcharge (SSC) as well. Like the FSC, SSC was an element of the overall price.
- (11) Carriers extended their cooperation to refusing to pay commission to their customers (freight forwarders) on surcharges. By refusing to pay commission the carriers ensured that surcharges did not become subject to competition through the negotiation of discounts with customers.
- (12) The contacts were held in particular via bilateral phone calls. They also included bilateral and multilateral meetings and exchanges of emails. In some instances, meetings of the local Board of Airline Representatives associations were used to coordinate surcharges. Contacts occurred at both head office and local levels.

### **2.3. Legal assessment, addressees and duration of participation in the infringement**

- (13) Although there is only one cartel the conduct infringed three legal bases, Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement<sup>2</sup>. The Commission finds the infringement and imposes fines for different time periods with regard to different routes.
- (14) For airfreight services on routes within the EEA, the Commission is competent to find an infringement and impose fines for the whole period of 1999-2006.
- (15) Before 1 May 2004, 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<sup>3</sup> granted the Commission implementing powers to apply Article 101 of the TFEU with respect to air transport between EU airports. Air transport between EU airports and airports in third countries was, however, excluded from the scope of that regulation. Under these circumstances, the Commission did not find an infringement or impose fines for anti-competitive agreements and practices concerning air transport between EU airports and airports in third countries before 1 May 2004.
- (16) Regulation (EC) No 1/2003 became applicable for the implementation of the EEA Agreement by virtue of the Decision of the EEA Joint Committee No 130/2004<sup>4</sup> and the Decision of the EEA Joint Committee No 40/2005<sup>5</sup> which removed the exclusion of air transport between EEA airports and third countries from the scope of the provisions for the implementation of the EEA Agreement, in particular by amending Protocol 21. Decision No 130/2004 and Decision No 40/2005 entered into force on 19 May 2005 and from that date Council Regulation (EC) No 411/2004<sup>6</sup> and Regulation (EC) No 1/2003 became applicable in the framework of the EEA Agreement. Under these circumstances the Commission did not find an infringement or impose fines for

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<sup>2</sup> Agreement between the European Community and the Swiss Confederation on Air Transport.

<sup>3</sup> OJ L 374, 31.12.1987, p. 1.

<sup>4</sup> OJ L 64, 10.3.2005, p. 57

<sup>5</sup> OJ L 198, 28.07.2005, p. 38.

<sup>6</sup> OJ L 68, 6.3.2004, p. 1-2.

anti-competitive agreements and practices concerning routes between EEA countries that are not Member States of the EU and third countries before 19 May 2005.

(17) Regulation (EC) No 1/2003 became applicable for the application of the Swiss Agreement by virtue of Decision No 1/2007 of the Joint Community/Switzerland Air Transport Committee<sup>7</sup> which incorporated the regulation into the annex to the agreement with effect from 5 December 2007. Prior to such incorporation of Regulation (EC) No 1/2003, the applicable implementing regulation was Regulation (EEC) No 3975/87, which had been incorporated into the annex of the agreement since its entry into force on 1 June 2002. Under these circumstances the Commission did not find an infringement or impose fines for anti-competitive agreements and practices concerning routes between the EU and Switzerland before 1 June 2002. The Decision does not purport to find an infringement of Article 8 of the Swiss Agreement concerning airfreight services on routes between Switzerland and third countries.

(18) As regards the duration of each addressee's participation, the infringement covered the following periods:

I). For airfreight services on routes between airports within the EEA:

- a) Air France-KLM from 7 December 1999 until 14 February 2006;
- b) Société Air France from 7 December 1999 until 14 February 2006;
- c) KLM N.V. from 21 December 1999 until 14 February 2006;
- d) British Airways Plc from 22 January 2001 until 14 February 2006;
- e) Cargolux Airlines International S.A. from 22 January 2001 until 14 February 2006;
- f) Lufthansa Cargo AG from 14 December 1999 until 7 December 2005;
- g) Deutsche Lufthansa AG from 14 December 1999 until 7 December 2005;
- h) SWISS International Air Lines AG from 2 April 2002 to 7 December 2005;
- i) Martinair Holland N.V. from 22 January 2001 until 14 February 2006;
- j) SAS AB from 17 August 2001 until 14 February 2006;
- k) SAS Cargo Group A/S from 1 June 2001 until 14 February 2006;
- l) SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden from 13 December 1999 until 28 December 2003.

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<sup>7</sup> Decision No 1/2007 of the Joint Community/Switzerland Air Transport Committee set up under the Agreement between the European Community and the Swiss Confederation on Air Transport of 5 December 2007 replacing the Annex to the Agreement between the European Community and the Swiss Confederation on Air Transport (OJ L 34, 8.2.2008, p. 19).

II). For airfreight services on routes between airports within the European Union and airports outside the EEA:

- a) Air Canada from 1 May 2004 until 14 February 2006;
- b) Air France-KLM from 1 May 2004 until 14 February 2006;
- c) Société Air France from 1 May 2004 until 14 February 2006;
- d) KLM N.V. from 1 May 2004 until 14 February 2006;
- e) British Airways Plc from 1 May 2004 until 14 February 2006;
- f) Cargolux Airlines International S.A. from 1 May 2004 until 14 February 2006;
- g) Cathay Pacific Airways Limited from 1 May 2004 until 14 February 2006;
- h) Japan Airlines Corporation from 1 May 2004 until 14 February 2006;
- i) Japan Airlines International Co., Ltd. from 1 May 2004 until 14 February 2006;
- j) LAN Airlines S.A. from 1 May 2004 until 14 February 2006
- k) LAN Cargo S.A. from 1 May 2004 until 14 February 2006
- l) Lufthansa Cargo AG from 1 May 2004 until 7 December 2005;
- m) Deutsche Lufthansa AG from 1 May 2004 until 7 December 2005;
- n) SWISS International Air Lines AG from 1 May 2004 until 7 December 2005;
- o) Martinair Holland N.V. from 1 May 2004 until 14 February 2006;
- p) Qantas Airways Limited from 1 May 2004 until 14 February 2006;
- q) SAS AB from 1 May 2004 until 14 February 2006;
- r) SAS Cargo Group A/S from 1 May 2004 until 14 February 2006;
- s) Singapore Airlines Cargo Pte Ltd from 1 May 2004 until 14 February 2006;
- t) Singapore Airlines Limited from 1 May 2004 until 14 February 2006.

III). For airfreight services on routes between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and third countries:

- a) Air Canada from 19 May 2005 until 14 February 2006;
- b) Air France-KLM from 19 May 2005 until 14 February 2006;
- c) Société Air France from 19 May 2005 until 14 February 2006;
- d) KLM N.V. from 19 May 2005 until 14 February 2006;

- e) British Airways Plc from 19 May 2005 until 14 February 2006;
- f) Cargolux Airlines International S.A. from 19 May 2005 until 14 February 2006;
- g) Cathay Pacific Airways Limited from 19 May 2005 until 14 February 2006;
- h) Japan Airlines Corporation from 19 May 2005 until 14 February 2006;
- i) Japan Airlines International Co., Ltd. from 19 May 2005 until 14 February 2006;
- j) Lufthansa Cargo AG from 19 May 2005 until 7 December 2005;
- k) Deutsche Lufthansa AG from 19 May 2005 until 7 December 2005;
- l) SWISS International Air Lines AG from 19 May 2005 until 7 December 2005;
- m) Martinair Holland N.V. from 19 May 2005 until 14 February 2006;
- n) Qantas Airways Limited from 19 May 2005 until 14 February 2006;
- o) SAS AB from 19 May 2005 until 14 February 2006;
- p) SAS Cargo Group A/S from 19 May 2005 until 14 February 2006;
- q) Singapore Airlines Cargo Pte Ltd from 19 May 2005 until 14 February 2006;
- r) Singapore Airlines Limited from 19 May 2005 until 14 February 2006;

IV). For airfreight services on routes between airports within the European Union and airports in Switzerland:

- a) Air France-KLM from 1 June 2002 until 14 February 2006;
- b) Société Air France from 1 June 2002 until 14 February 2006;
- c) KLM N.V. from 1 June 2002 until 14 February 2006;
- d) British Airways Plc from 1 June 2002 until 14 February 2006;
- e) Cargolux Airlines International S.A. from 1 June 2002 until 14 February 2006;
- f) Lufthansa Cargo AG from 1 June 2002 until 7 December 2005;
- g) Deutsche Lufthansa AG from 1 June 2002 until 7 December 2005;
- h) SWISS International Air Lines AG from 1 June 2002 until 7 December 2005;
- i) Martinair Holland N.V. from 1 June 2002 until 14 February 2006;
- j) SAS AB from 1 June 2002 until 14 February 2006;

- k) SAS Cargo Group A/S from 1 June 2002 until 14 February 2006;
- l) SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden from 1 June 2002 until 28 December 2003;

## 2.4. Remedies

### 2.4.1. *Basic Amount of the fine*

- (19) The basic amount of the fine was determined as a proportion of the value of the sales of air freight services made by each undertaking in the relevant geographic area during 2005, the last full year prior to the end of the cartel, multiplied by the number of years of involvement of each undertaking in the infringement (variable amount), plus an additional amount, also calculated as a proportion of the value of sales, in order to deter undertakings from engaging in cartel conduct.
- (20) In order to calculate this basic amount, the Commission took into account the sales to which the infringement directly or indirectly relates, namely of airfreight services (i) between EEA airports, (ii) between airports in the EU and airports in third countries<sup>8</sup>, (iii) between airports in the EEA (excluding EU airports) and airports in third countries and (iv) between airports in the EU and airports in Switzerland.
- (21) In respect of services provided between the EEA and third countries (points (ii) and (iii) above), whilst both inbound and outbound routes are relevant for calculating the value of sales it must be recognised for the purpose of determining the basic amount that part of the harm resulting from the cartel in respect of these EEA – third country routes (both inbound and outbound) is likely to fall outside the EEA<sup>9</sup>. Therefore, an ad hoc reduction of 50% to the basic amount of the fine with respect to these third country routes was applied in the Decision.
- (22) Taking into account in particular the nature of the infringement, which consisted of price-fixing agreements and practices, as well as the EEA-wide geographic scope of the cartel, both the variable amount and the additional amount were set at 16%.

### 2.4.2. *Adjustments to the basic amount*

#### 2.4.2.1. Aggravating circumstance

- (23) The Commission increased the fines for SAS by 50% because this undertaking had already been fined once for prior cartel involvement<sup>10</sup>.

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<sup>8</sup> References in this summary to 'third country' or 'third countries' should be taken to exclude Switzerland.

<sup>9</sup> This issue does not arise as concerns Switzerland where the Commission acts under the Swiss Agreement on behalf of both parties so all harm from the cartel on those routes is relevant.

<sup>10</sup> Commission Decision 2001/716/EC of 18 July 2001 (OJ L 265, 05.10.2001 p.15). The increase for recidivism was not applied to the parent company SAS AB as it was not in control of the infringing entity, Scandinavian Airlines System Denmark – Norway – Sweden, at the time of the preceding infringement.



#### 2.4.2.2. Mitigating circumstances

- (24) The Decision concludes that the carriers were authorised or encouraged to concert on prices with their direct competitors on certain routes by the regulatory approach of certain third country jurisdictions as well as the provisions of certain bilateral Air Service Agreements. This regulatory environment constitutes a mitigating circumstance which justifies a 15% reduction for all addressees of the Decision.
- (25) The Decision also concludes that four undertakings, namely Qantas, Air Canada, LAN Chile and SAS, participated in the infringement to a limited degree. This is due to the fact that these participants operated on the periphery of the cartel, entered into a limited number of contacts with other carriers and were involved in fewer aspects of the cartel. A reduction of 10% was applied to these four undertakings.

#### 2.4.3. *Application of the 10% turnover limit*

- (26) The fines on two undertakings would have exceeded the legal maximum of 10% of their 2009 worldwide turnover, and were therefore reduced accordingly.

#### 2.4.4. *Application of the 2002 Leniency Notice: reduction of fines*

- (27) The Commission granted full immunity from the fine to Deutsche Lufthansa AG and its subsidiaries Lufthansa Cargo and SWISS and a reduction of the fine for cooperation under the 2002 Leniency Notice to Martinair (50%), Japan Airlines (25%), Air France and KLM (20%), Cathay Pacific (20%), Lan Chile (20%), Qantas (20%), Air Canada (15%), Cargolux (15%), SAS (15%) and British Airways (10%).

#### 2.4.5. *Ability to pay*

- (28) Finally, the Commission rejected five requests for inability to pay the fine received under the Commission's 2006 Guidelines on the setting of Fines. None of the undertakings concerned met the conditions for a reduction.

### **3. FINES**

- (29) The following fines were imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003:
- a) Air Canada: EUR 21 037 500;
  - b) Air France-KLM and Société Air France jointly and severally: EUR 182 920 000;
  - c) KLM N.V.: EUR 2 720 000;
  - d) KLM N.V. and Air France-KLM jointly and severally: EUR 124 440 000;
  - e) British Airways Plc: EUR 104 040 000;
  - f) Cargolux Airlines International S.A.: EUR 79 900 000;

- g) Cathay Pacific Airways Ltd: EUR 57 120 000;
- h) Japan Airlines Corporation, and Japan Airlines International Co., Ltd. jointly and severally: EUR 35 700 000;
- i) LAN Airlines S.A. and LAN Cargo S.A. jointly and severally: EUR 8 220 000;
- j) Lufthansa Cargo AG and Deutsche Lufthansa AG jointly and severally: EUR 0;
- k) SWISS International Air Lines AG: EUR 0;
- l) SWISS International Air Lines AG and Deutsche Lufthansa AG jointly and severally: EUR 0;
- m) Martinair Holland N.V.: EUR 29 500 000;
- n) Qantas Airways Limited: EUR 8 880 000;
- o) SCANDINAVIAN AIRLINE SYSTEM Denmark – Norway - Sweden: EUR 5 355 000;
- p) SAS Cargo Group A/S and SCANDINAVIAN AIRLINE SYSTEM Denmark – Norway - Sweden jointly and severally: EUR 4 254 250;
- q) SAS Cargo Group A/S, SCANDINAVIAN AIRLINE SYSTEM Denmark – Norway - Sweden and SAS AB jointly and severally: EUR 5 265 750;
- r) SAS Cargo Group A/S and SAS AB jointly and severally: EUR 32 984 250;
- s) SAS Cargo Group A/S: EUR 22 308 250;
- t) Singapore Airlines Cargo Pte Ltd and Singapore Airlines Limited jointly and severally: EUR 74 800 000.