EUROPEAN COMMISSION
Competition DG

CASE AT.39258 - Airfreight

(Only the Dutch, English and French texts are authentic)

CARTEL PROCEDURE

Council Regulation (EC) 1/2003

Article 7 Regulation (EC) 1/2003

Date: 17/03/2017

EUROPEAN
COMMISSION

Brussels, 17.3.2017
C(2017) 1742 final

COMMISSION DECISION

of 17.3.2017

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

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TABLE OF CONTENTS

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to the Agreement on the European Economic Area,

Having regard to the Agreement between the European Community and the Swiss Confederation on Air Transport,

Having regard to 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 Treaty[1], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 18 December 2007 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty[2],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions[3],

Having regard to the final report of the hearing officer in this case[4],

Whereas:

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1 OJ L 1, 4.1.2003, p.1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ('TFEU'). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The TFEU also introduced certain changes in terminology, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'.

2 OJ L 123, 27.4.2004, p. 18.

3 OJ

4 OJ

1. INTRODUCTION

(1) This Decision relates to a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union ('TFEU'), Article 53 of the Agreement on the European Economic Area ('the EEA Agreement') and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport ('the Swiss Agreement')[5] by which the addressees coordinated their pricing behaviour in the provision of airfreight services on a global basis with respect to the fuel surcharge, the security surcharge and the payment of commission payable on surcharges.

(2) Pricing contacts between airlines providing airfreight services ('carriers') initially started in respect of the fuel surcharge ('FSC'). Carriers contacted each other regarding the introduction of an FSC, the FSC mechanism, disclosure of anticipated increases (or decreases) and commitments to follow increases. These contacts started initially with a smaller group of carriers and spread to include all addressees of this Decision.

(3) 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, the SSC was also an element of the overall price.

(4) The aim of the contacts was to remove pricing uncertainty from the market by ensuring that surcharges were introduced and increases (or decreases) of the surcharge levels were applied in full without exception.

(5) Furthermore, the carriers extended their cooperation to refusing to pay commission to 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.

(6) The overall duration of the infringement is from 7 December 1999 to 14 February 2006 (for the duration for specific undertakings see Section 7).

(7) On 9 November 2010, the Commission adopted Decision C(2010) 7694 final relating to proceedings pursuant to Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement ('the 2010 Decision'). The 2010 Decision was addressed to Air Canada, Air France-KLM, Société Air France, KLM NV, British Airways Plc, Cargolux Airlines International S.A, Cathay Pacific Airways Limited, Japan Airlines, Japan Airlines International Co., Ltd., LAN Airlines S.A., LAN Cargo S.A., Lufthansa Cargo AG, Deutsche Lufthansa AG, SWISS International Air Lines AG, Martinair Holland N.V., Qantas.Airways Limited, SAS AB, SAS Cargo Group A/S, SCANDINAVIAN AIRLINES SYSTEM Denmark – Norway – Sweden, Singapore Airlines Cargo Pte Ltd and Singapore Airlines Limited.

(8) All addressees of the 2010 Decision, apart from Qantas Airways Limited, lodged an application for full or partial annulment before the General Court[6].

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[5] OJ L 114, 30.04.2002, p.73-90.

[6] Case T-9/11 *Air Canada v Commission*, ECLI:EU:T:2015:994; Case T-28/11 *Koninklijke Luchtvaart Maatschappij v Commission*, ECLI:EU:T:2015:995; Case T-36/11 *Japan Airlines v Commission*,

(9) The General Court in its judgments dated 16 December 2015, ('the 2015 Judgments') established that the 2010 Decision was vitiated by a defective statement of reasons and it annulled the 2010 Decision within the limits of the form of order set out in the various applications:

(a) it annulled the 2010 Decision in full in so far as it concerned Air Canada, Air France-KLM, Société Air France, KLM NV, Cargolux Airlines International S.A, Cathay Pacific Airways Limited, Japan Airlines, Japan Airlines International Co., Ltd., LAN Airlines S.A., LAN Cargo S.A., Martinair Holland N.V., SAS AB, SAS Cargo Group A/S, SCANDINAVIAN AIRLINES SYSTEM Denmark – Norway – Sweden, Singapore Airlines Cargo Pte Ltd and Singapore Airlines Limited;

(b) it annulled the 2010 Decision in part in so far as, the Commission had found firstly that British Airways plc participated in the refusal to pay commission, infringed Article 101 of the TFEU, Article 53 of the Agreement on the European Economic Area (EEA) and Article 8 of the Swiss Agreement between 22 January 2001 and 1 October 2001, and participated in infringements of those provisions for freight services performed from Hong Kong (China), Japan, India, Thailand, Singapore, South Korea and Brazil, and, secondly, imposed a fine on it; and

(c) it annulled the 2010 Decision in part in so far as Articles 1 to 4 of the 2010 Decision concerned Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Air Lines AG.

(10) Having regard to the procedural nature of the annulments of the 2010 Decision by the 2015 Judgments (which do not enter into examination of the facts), this Decision will again be based on the evidence presented in the Statement of Objections of 18 December 2007. It will also take into account the findings of the General Court in its 2015 Judgments as regards the defective statement of reasons in the 2010 Decision and the developments since the 2010 Decision in respect of the restructuring of certain undertakings who are the addressees of this Decision.

(11) As only certain aspects of the 2010 Decision were annulled by the General Court in its judgment in Case T-48/11 insofar as they concerned British Airways Plc, this Decision is addressed to British Airways Plc only to the extent that British Airways Plc firstly participated in the refusal to pay commission, infringed Article 101 of the TFEU, Article 53 of the Agreement on the European Economic Area (EEA) and Article 8 of the Swiss Agreement between 22 January 2001 and 1 October 2001, and participated in infringements of those provisions in respect of freight services performed from Hong Kong (China), Japan, India, Thailand, Singapore, South Korea and Brazil, and, secondly, where a fine was imposed on it.

ECLI:EU:T:2015:992; Case T-38/11 *Cathay Pacific v Commission*, ECLI:EU:T:2015:985; Case T-39/11 *Cargolux Airlines v Commission*, ECLI:EU:T:2015:991; Case T-40/11 *Latam Airlines Group and Lan Cargo v Commission*, ECLI:EU:T:2015:986; Case T-43/11 *Singapore Airlines and Singapore Airlines Cargo v Commission*, ECLI:EU:T:2015:989; Case T-46/11 *Deutsche Lufthansa and Others v Commission*, ECLI:EU:T:2015:987; Case T-48/11 *British Airways v Commission*, ECLI:EU:T:2015:988; Case T-56/11 *SAS Cargo Group and Others v Commission*, ECLI:EU:T:2015:990; Case T-62/11 *Air France-KLM v Commission*, ECLI:EU:T:2015:996; Case T-63/11 *Air France v Commission*, ECLI:EU:T:2015:993; and Case T-67/11 *Martinair Holland v Commission*, ECLI:EU:T:2015:984.

(12) Although Articles 5(j), (k) and (l) of the 2010 Decision have become final in so far as they concern Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Air Lines AG, the fines imposed in those articles were based exclusively on the infringement(s) referred to in Articles 1 to 4 of the 2010 Decision which were annulled by the General Court in its judgment in Case T-46/11. In light of the above, the Commission will in this Decision, repeal Articles 5(j), (k) and (l) of the 2010 Decision and impose on Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Air Lines AG the same fines as those imposed in the 2010 Decision for the single and continuous infringement established by this Decision.

(13) As the 2010 Decision has become final in so far as it concerns Qantas Airways Limited, this Decision is not addressed to it. The references to Qantas Airways Limited therefore in this Decision are intended solely to clarify the relevant facts in respect of the parties to which this Decision is addressed and it in no way constitutes a new finding of infringement by Qantas Airways Limited.

2. THE INDUSTRY SUBJECT TO THE PROCEEDINGS

2.1. Airfreight transport services

(14) Airlines providing airfreight services primarily offer the transport of cargo usually by air to freight forwarders, who arrange the carriage of these goods including associated services and formalities on behalf of shippers.

(15) There are four different types of air cargo carriers: airlines with only dedicated freighter air planes carrying cargo; airlines with 'belly space' cargo capacity on passenger flights; airlines with both dedicated freighter air planes and 'belly space' cargo capacity (combination airlines); and integrators with dedicated freighters providing both integrated express delivery services and general cargo services (DHL, FEDEX, UPS, etc.).

(16) No airline is able to reach all major cargo destinations in the world with its own network with sufficient frequencies, therefore agreements among carriers to increase their network coverage or improve their schedule are common. Such agreements can take various forms, such as a simple capacity purchase or some degree of costs and revenue sharing. Within the industry, they are often referred to as 'joint ventures' even when they are in reality only capacity purchase agreements. In addition, carriers also form multilateral alliances. An airline alliance is an agreement between two or more airlines to cooperate on a substantial level. Alliances provide a network of connectivity and convenience for international freight transport. The largest cargo alliances are WOW and SkyTeam.

(17) Cargo airlines quote to customers freight rates on a per kilogram basis (either actual weight or 'chargeable weight' according to a formula that accounts for volume of low-density cargo) for their various services to various destinations. Such rates are negotiated with forwarders (and more rarely directly with the shippers) either on a long-term basis (typically one traffic season, namely, six months), or on an ad hoc basis. Pricing complexity is considerable and typically local sales organisations have a certain degree of flexibility in negotiating rates with individual customers depending on supply and demand. To the negotiated rates, cargo airlines add various surcharges, including at times surcharges to cover the costs of fuel or additional security measures.

(18) Airfreight services are offered from one airport (airport of origin) to another (airport of destination), and are covered by an air waybill. Generally, the transport between the airport of origin and the airport of destination is carried out by air. Where convenient for the carrier all or part of it may be carried out by other means, in particular by road, for example, over relatively short distances or where goods are transferred from the airport of origin to another intermediate airport where they are embarked on an aircraft bound for the airport of destination.

2.2. The undertakings subject to the proceedings

2.2.1. Air Canada ('AC')

(19) Air Canada is a subsidiary of the ACE Aviation Holdings Inc. ('ACE'), the holding company of the Air Canada Group. ACE was incorporated on 29 June 2004 and holds 75% controlling ownership of Air Canada[7].

(20) Air Canada is a Canadian registered air carrier offering domestic and international, passenger and freight transportation services. Air Canada provides freight services using the cargo capacity on Air Canada international passenger flights and chartered all freighter aircraft. AC Cargo, a nearly wholly-owned subsidiary of Air Canada, is not active at the international level. AC Cargo manages freight services only on domestic flights and on flights between Canada and the United States[8].

(21) AC's global annual turnover in 2005 was EUR 6 268.9 million of which EUR 414.26 million were generated by air cargo services.[9] Its global annual turnover in 2009 was EUR 6 144.48 million[10] and its global annual turnover in 2016 was EUR 10 019.99 million[11].

2.2.2. Air France-KLM Group

(22) On 5 May 2004 Société Air France ('Air France') acquired sole control of Koninklijke Luchtvaartmaatschappij N.V. (hereafter also referred to as 'KLM') by the way of a public offer of exchange by Air France on the shares of KLM. Since that date Air France and KLM form part of the group Air France-KLM. On 15 September 2004 Air France was transformed into a holding company and renamed Air France-KLM, while the air transportation activities of Air France were transferred to a subsidiary named 'Air France Compagnie Aerienne' that has been renamed 'Société Air France' [12].

(23) Air France-KLM holds 100% of the economic and voting rights in Société Air France[13] and 93.63% of the economic rights and 49% of the voting rights in KLM. Dutch foundations hold 44.63% of the voting rights in KLM. The state of the Netherlands has the A-cumulative preference shares, which represent 5.92% of the

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9 2006 Annual report, Air Canada, p. 72. CAD 9 458 million and CAD 625 million converted into EUR by using average exchange rate (1 EUR = 1, 5087 CAD) of European Central Bank for 2005. http://www.aircanada.com/en/about/investor/documents/2006_ar.pdf

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voting rights. Other shareholders have 0.45% of the voting rights and 0.6% of the economic rights.[14]

(24) Therefore, the Air France-KLM Group comprises a holding company 'Air France-KLM' with two airline operating subsidiaries: 'Société Air France' and ' Koninklijke Luchtvaartmaatschappij N.V.' Air France-KLM Group is a member of the SkyTeam alliance[15] and a member of the SkyTeam Cargo alliance[16], both founded in 2000.

(25) Freight transport is operated by the cargo divisions of the two subsidiaries. The Group operates a network of about 400 freight destinations with more than 150 customer offices worldwide.

(26) The Group's global turnover was EUR 19 078 million in the fiscal year 2004-2005.[17] Total revenues from the cargo business amounted to EUR 2 490 million.[18] The Group's worldwide annual turnover in the financial year 2009-2010 was EUR 20 994 million[19] and its worldwide annual turnover in the financial year 2016 was EUR 24 844 million[20].

(27) On 1 October 2005, the commercial activities carried out by KLM Cargo were integrated with the same activities at Air France Cargo. Around 2 200 people work in the combined commercial organisation. The 'Joint Cargo Management Committee' steers the joint commercial activities and coordinates operational activities.[21]

2.2.3. Société Air France ('AF')

(28) Société Air France, which, as explained in recital (22), is the economic successor of Air France, has three main activities: passenger airline transport, cargo transport and maintenance services. Société Air France operates a network with its principal hub for international operations at Paris Charles de Gaulle airport, France. Between 1995 and 1999, the French State was the majority shareholder of Air France. In 1999, Air France was floated on the Paris stock exchange and this continued until 15 September 2004.

(29) Within Société Air France,[*}.

2.2.4. Koninklijke Luchtvaartmaatschappij N.V. ('KL')

(30) Koninklijke Luchtvaartmaatschappij N.V. has four main activities: passenger airline transport, cargo transport, maintenance services and the operation of charter and low-cost/low-fare scheduled services by its subsidiary Transavia. KL operates a network with its principal hub at Amsterdam Schiphol airport, in the Netherlands. KL has an agreement with Northwest Airlines covering principally operations on North Atlantic routes and related feeder routes.

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15 Members of the SkyTeam alliance are: AeroMexico, Air France, Delta Air Lines, Korean Air, Alitalia and CSA Czech Airlines (since 2001), Continental Airlines, Northwest Airlines and KLM (since September 2004), Aeroflot-Russian Airlines (since April 2006).

16 Members of the SkyTeam Cargo alliance are: AeroMexico Cargo, Air France Cargo, Alitalia Cargo, CSA Cargo, Delta Air Logistics, KLM Cargo, Korean Air Cargo, Northwest Cargo.

17 Air France-KLM 2004-2005 Reference document (filed with the French Autorité des marchés financiers), p. 8.

18 Air France-KLM 2004-2005 Reference document (filed with the French Autorité des marchés financiers), p. 45.

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21 KLM: 2005/2006 in Review New Horizon, p. 38.

(31) Airfreight transportation services are provided by KLM Cargo, which is a division of KL.

(32) The worldwide annual turnover of KL in the financial year 2004-2005 was EUR 6 442 million[22] of which EUR 1 358 million were generated by air cargo services in the six months to 30 September 2005.[23]

2.2.5. British Airways Plc ('BA')

(33) British Airways Plc is the United Kingdom's largest international scheduled airline. The airline's two main operating bases are London's two main airports (Heathrow and Gatwick). The BA group consists of British Airways Plc and a number of subsidiaries, in particular British Airways Holidays Limited and BA Connect Ltd. Since 2011 British Airways Plc has been a subsidiary of International Consolidated Airlines Group S.A. ('IAG') which was formed following a merger of British Airways Plc and Iberia.[24]

(34) Airfreight transportation services are provided by British Airways World Cargo, which is a division of British Airways Plc.

(35) The global annual turnover of BA Group in the financial year 2004-2005 was EUR 11 457.69 million, of which EUR 706.84 million were generated by air cargo services[25]. Its global annual turnover in the financial year 2009-2010 was EUR 9 025.45 million[26] and its global annual turnover in the financial year 2016 was EUR 13 964 million[27].

2.2.6. Cargolux Airlines International S.A. ('CV')

(36) Cargolux Airlines International S.A. is registered as a 'société anonyme' under the laws of the Grand Duchy of Luxembourg. The main shareholder is Luxair S.A. with a stake of 34.9%. It was founded in 1970.

(37) CV is an all air-cargo airline and an integrated transportation company. The transportation of freight is the company's main business.

(38) CV's global annual turnover in 2005 was EUR 1 162.28 million[28]. Its global annual turnover in 2009 was EUR 941 873 048[29] and its global annual turnover in 2016 was EUR [1 500 – 2 000] million[30].

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22 KLM: 2005/2006 in Review New Horizon, p. 4.

23 Air France–KLM report of 23 November 2006 (Turnover from cargo services was not published for the full year). http://corporate.klm.com/assets/files/Trafficresults/20062311Resultats1ersemestre0607Eng.pdf

24 [*]

25 2004-2005 Annual Report British Airways (2004-2005 Annual Report & Accounts), p. 10. GBP 7.813 billion and GBP 482 million converted into EUR by using average exchange rate (1EUR= 0.6819 GBP) for period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates for this period of the European Central Bank.

26 [*] GBP 7 994 million converted into EUR by using average exchange rate (1 EUR = 0.88572 GBP) for period 1 April 2009 to 31 March 2010. This average exchange rate is derived from the quarterly exchange rates for this period of the European Central Bank.

27 [*]

28 Cargolux key figures, http://www.cargolux.com/key_figures/index.php# USD 1.446 billion converted into EUR by using average exchange rate of European Central Bank (1 EUR = 1.2441 USD) for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

29 [*] USD 1 313 724 527 converted into EUR by using average exchange rate of European Central Bank (1 EUR = 1.3948 USD) for 2009.

2.2.7. Cathay Pacific Airways Limited ('CX')

(39) Cathay Pacific Airways Limited is an international airline based in Hong Kong operating scheduled passenger and cargo services to 103 destinations worldwide. It was founded in 1946. Between 1999 and 2006, the major shareholders were Swire Pacific Ltd and CITIC Pacific[31].

(40) Airfreight transportation services are provided by Cathay Pacific Cargo, which is a division of Cathay Pacific Airways Limited.

(41) The global annual turnover of Cathay Pacific Airways Limited in 2005 was EUR 5 219.59 million[32], of which EUR 1 328.12 million[33] were generated by air cargo services. Its worldwide annual turnover in 2009 was EUR 6 195.13 million[34] and its worldwide annual turnover in 2016 was EUR 10 795 million[35].

2.2.8. Japan Airlines Co., Ltd. ('JL')

(42) Japan Airlines Co., Ltd. (formerly Japan Airlines International Co., Ltd.) was founded in 1953. It is involved in air transportation, airline-related services and travel services. JL's activities concentrate on scheduled and non-scheduled air transport services, aircraft maintenance, and other services relating to air transport and aircraft maintenance.

(43) On 2 October 2002, JL together with Japan Air System Co., Ltd established, via share transfers, Japan Airlines System Corporation, a holding company which, on 26 June 2004, was renamed Japan Airlines Corporation ('JAC') and which held 100% of JL's shares.[36] On 1 December 2010, JAC was merged into JL by way of absorption. As a result of this merger, JL became the legal successor of JAC which ceased to exist.[37]

(44) Airfreight transportation services are provided by JAL Cargo, which is a division of JL. It serves 74 destinations in 24 countries.

(45) The worldwide annual turnover of the JAC Group in the financial year 2004-2005 was EUR 15 753.81 million[38], of which EUR 1 623.75 million[39] were generated by air cargo services. Its global annual turnover in the financial year 2009-2010 was

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32 2006 Annual Report, Cathay Pacific Airways Limited, p. 2. HKD 50 909 million converted into EUR by using average exchange rate of European Central Bank for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

33 2006 Annual Report, Cathay Pacific Airways Limited, p. 55. HKD 12 852 million converted into EUR by using average exchange rate of European Central Bank for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

34 [*] HKD 66 978 million converted into EUR by using average exchange rate of European Central Bank (1 EUR = 10.8114 HKD) for 2009.

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37 [*]

38 2005 Annual report, Japan Airlines Corporation, p. 2. JPY 2 129 876 million converted into EUR by using average exchange rate (1EUR=135,1975 JPY) for the period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates for this period of the European Central Bank.

39 Annual report 2005, Japan Airlines Corporation, p. 32. Aggregate domestic and international cargo revenues. JPY 219 528 converted into EUR by using average exchange rate (1EUR=135,1975 JPY) for period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates of the European Central Bank.

EUR 11 398.35 million[40]. The global annual turnover of JL in the financial year 2015-2016 was EUR 10 081 million[41].

2.2.9. LAN Cargo S.A. ('LA')

(46) LAN Cargo S.A. (formerly LAN Chile) is a wholly-owned subsidiary of Latam Airlines Group, S.A. (or 'LAN'), formerly LAN Airlines S.A. It is active in the airfreight business.

(47) Latam Airlines Group, S.A. is an airline holding based in Santiago, Chile. It was incorporated in 1929 and was privatised in 1989. It is a publicly traded corporation listed on the Santiago and New York Stock Exchanges. It is the principal Chilean airline and the second largest in South America, with flights to Latin America, North America, Mexico, the Caribbean, Oceania, and Europe. It is a member of the **one**world airline alliance.

(48) The global annual turnover of the LAN Group in 2005 was EUR 2 014.63 million, of which EUR 731.85 million were generated by air cargo services.[42] Its worldwide annual turnover in 2009 was EUR 2 523.06 million[43] and its worldwide annual turnover in 2016 was EUR [8 000 – 9 000] million[44].

2.2.10. Lufthansa Cargo AG ('LH')

(49) Lufthansa Cargo AG is a 100% subsidiary of Deutsche Lufthansa AG and was founded in November 1994. Its head office is at Kelsterbach, Germany.

(50) The Lufthansa Group is active in passenger transport, air transport of cargo and mail, charter operations and other airline related services (aircraft maintenance, repair and overhaul, catering and ground-handling). Its main hub is Frankfurt, Germany. The Lufthansa Group is member of the Star Alliance[45].

(51) In addition to its own cargo services, Lufthansa Cargo AG uses freight capacities on board Lufthansa passenger aircraft. It is a member of the WOW alliance[46]. It operates a network of around 300 destinations worldwide.

(52) Lufthansa Group's worldwide turnover in 2005 was EUR 18 065 million,[47] of which EUR 2 752 million were generated by air cargo services [48]. The global turnover of the Group in 2009 was EUR 22 283 million[49] and its worldwide annual turnover in 2016 was EUR 31 660 million.

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40 [*] JPY 1 494 836 140 797 converted into EUR by using average exchange rate (1 EUR = 131.145 JPY) for the period 1 April 2009 to 31 March 2010. This average exchange rate is derived from the quarterly exchange rates for this period of the European Central Bank.

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42 2005 Annual Report, LAN, p. 2. USD 2.506 4 billion and USD 910.5 million converted into EUR by using average exchange rate (1 EUR= 1.2441 USD) of European Central Bank for 2005.

43 [*] USD 3 519 162 000 converted into EUR by using average exchange rate (1 EUR = 1.3948 USD) of European Central Bank for 2009.

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45 Members of the Star alliance are (2007): Air Canada, Air New Zealand, ANA, Asia Airlines, Austrian, bmi, LOT Polish Airlines, Lufthansa, Scandinavian Airlines, Singapore Airlines, South Africa Airways, Spanair, SWISS, Tap Portugal, THAI, United, US Airways.

46 Members of the WOW Alliance are (2007): Japan Airlines Cargo, Lufthansa Cargo, SAS Cargo and Singapore Airlines Cargo.

47 Annual Report 2005 Lufthansa, p. 2.

48 Annual Report 2005 Lufthansa Cargo AG, p. 3.

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2.2.11. SWISS International Air Lines AG ('LX')

(53) SWISS International Air Lines AG offers scheduled air services to approximately 68 destinations with its principal hub at Zurich, Switzerland. It has also operations in air cargo and charter and to a minor extent in airline related services. LX was created in 2002 on the basis of the existing regional carrier Crossair.

(54) Swiss WorldCargo is the airfreight division of LX and began its activities on 1 April 2002. Swiss WorldCargo's network includes the entire belly-hold capacity of the LX fleet plus third-party capacities of for instance American Airlines and Japan Airlines. The network covers over 150 destinations in more than 80 countries.

(55) On 22 March 2005, Deutsche Lufthansa AG, the holding company of the Lufthansa Group announced the takeover and integration of LX pursuant to which Lufthansa will acquire 100% of the shares of LX. Due to the complex structure of LX and the need to preserve third-country traffic rights, the acquisition was structured in several steps. A Swiss-domiciled holding company (called AirTrust) was established to acquire all shares in Swiss. On 23 March 2005 Lufthansa acquired an 11% stake in AirTrust. Upon approval of the United States and European Union ('EU') Competition authorities,[50] Deutsche Lufthansa AG increased its stake in AirTrust AG to 49% on 27 July 2005. After securing the necessary traffic rights, Lufthansa has now acquired all the remaining shares in Swiss. Since 1 July 2007 Lufthansa owns all the equity in Swiss through the Swiss-domiciled AirTrust company and Swiss has been fully integrated into the Lufthansa group.

(56) The worldwide annual turnover of the SWISS Group in 2005[51] was EUR 2 410.38 million, of which EUR 320.35 million were generated by air cargo services[52].

2.2.12. Martinair Holland N.V. ('MP')

(57) Martinair Holland N.V. is a Dutch-based international freight and passenger airline. It was established in 1958. Around two thirds of its revenues originate from air cargo services. Its European headquarters are at Amsterdam Schiphol Airport, in the Netherlands. Since 23 August 2005, A.P. Möller-Maersk (through Nedlloyd Holding B.V.) has shared the equity 50%-50% with Koninklijke Luchtvaartmaatschappij N.V..[53] Following approval by the European Commission[54], Koninklijke Luchtvaartmaatschappij N.V. owns all the equity in Martinair Holland N.V., which has been integrated into the Air France-KLM group on 31 December 2008.

(58) Airfreight transportation services have been provided since 1994 by a separate cargo business unit. This unit does not constitute a separate legal entity[55].

(59) The worldwide annual turnover of the Martinair Group in 2005 was EUR 1 121 million, of which EUR 705 million were generated by air cargo services[56]. Its global

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50 See case COMP/M.3770 Lufthansa/SWISS.

51 See media release on the 2005 annual results dated 23 March 2006, www.swiss.com/web/20060323_media_release_e_final.pdf, p. 8.

52 CHF 3 732 and CHF 496 million converted into EUR by using average exchange rate (1 EUR =1.5483 CHF) of European Central Bank for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

53 Koninklijke Luchtvaartmaatschappij N.V. became full owner of Martinair by acquiring the 50% stake held by Neddloyd Holding B.V. in December 2008.

54 See case COMP/M.5141 KLM/Martinair.

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56 2005 Annual Report, Martinair, p. 28.

turnover in the financial year 2009-2010 was EUR 597 600 000[57] and its global turnover in the financial year 2016 was EUR 308.9 million[58].

2.2.13. SAS Cargo Group A/S ('SK')

(60) SAS Cargo Group A/S is an indirectly wholly-owned subsidiary of SAS AB, the holding company of the Scandinavian Airlines System Group. It was founded in 2001. SAS Cargo Group A/S is based in Copenhagen, Denmark. Until 1 June 2001, the airfreight transportation services undertaking, known as SAS Cargo, did not exist as a separate legal entity but formed a business unit within SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden (or 'SAS Consortium'). [*].

(61) [*].

(62) SAS Cargo Group A/S offers air cargo services primarily for customers exporting or importing to Sweden, Norway and Denmark. SAS Cargo Group A/S uses the cargo capacity of several airlines both within and outside the SAS Group. In addition, SAS Cargo Group A/S has blocked space agreements on freighter aircraft owned by various airlines. SAS Cargo Group A/S serves 200 destinations in 50 countries. SAS Cargo Group A/S is a member of the WOW alliance.

(63) [*].

(64) The worldwide annual turnover of the SAS Group in 2005 was EUR 6 667.27 million[59], of which EUR 356 million were generated by air cargo services.[60] Its global annual turnover in 2009 was EUR 4 229.93 million[61] and its global annual turnover in 2015-2016 was EUR 4 206 million[62].

2.2.14. Singapore Airlines Cargo Pte Ltd ('SQ')

(65) Singapore Airlines Cargo Pte Ltd is a wholly-owned subsidiary of Singapore Airlines Limited. It was founded on 1 July 2001. Its world headquarters are in Singapore. For the period from 30 June 1999 until 1 July 2001, the air cargo operations of Singapore Airlines were operated through a cargo division[63].

(66) SQ's only business activity is the provision of airfreight transportation services. SQ serves 68 destinations in 36 countries. SQ is a founding member of the WOW alliance.

(67) The global annual turnover of the Singapore Airlines Group in the financial year 2004-2005 was EUR 5 698.99 million[64], of which EUR 1 328.13 million[65] were generated by air cargo services. Its worldwide annual turnover in the financial year

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59 SAS Group Annual Report 2005, p. 2. SEK 61 887 million converted into EUR by using average exchange rate of European Central Bank for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

60 Financial and sustainability report 2005, SAS Cargo Group, p. 24.

61 [*] SEK 44 918 million converted into EUR by using average exchange rate of European Central Bank (1 EUR = 10.6191 SEK) for 2009.

62 [*]

63 [*]

64 Annual Report 04/05, Singapore Airlines, p. 2. SGD 12 012, 9 million converted into EUR by using average exchange rate of 1EUR=2.1079 SGD for period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates of the European Central Bank.

65 Annual Report 04/05, Singapore Airlines, p. 55. SGD 2 864, 5 million converted into EUR by using average exchange rate of 1EUR=2.1079 SGD for period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates of the European Central Bank.

2009-2010 was EUR 6 304.87 million[66] and its worldwide annual turnover in the financial year 2015-2016 was EUR 9 959.2 million[67].

2.3. Description of airfreight services

2.3.1. The supply of airfreight services

(68) Most airfreight service providers operate on a worldwide basis. Air transport is generally carried out over long distance and goods are often transported from continent to continent. Most airfreight service providers operate a route network on which they offer regular services in both directions. Typically, they offer services to or from a number of airports in their home region and a wide range of airports in other parts of the world. Through arrangements with other carriers they may also offer airfreight services to or from other airports which their own aircraft do not serve, or freight for which they do not have available capacity. The term "routes" in this Decision is meant to cover airfreight services provided between two airports regardless of the actual means of transport used.

(69) Airfreight services are offered by the four different types of air cargo carriers mentioned in recital (15).

2.3.2. The demand for airfreight services

(70) Customers of airfreight services are mainly freight forwarders. Freight forwarders generally organise the integrated transportation of goods on behalf of shippers. In doing so they purchase airfreight services inter alia from the carriers. Shippers may be the purchasers or sellers of traded goods or the owners of goods that need to be moved rapidly over relatively long distances. Airfreight services are generally provided 'one way' though exceptionally goods may be transported to an airport of destination and back again. While many goods that are shipped by air could be shipped by sea, airfreight is considerably quicker (days at most instead of typically weeks) and also generally much more expensive.

2.3.3. The geographic scope of the airfreight business

(71) As previously described the airfreight business operates on a world-wide scale and carriers tend to provide airfreight transportation services between airports all over the world typically to and from their home region.

(72) The scope of the service is expanded by the trucking of freight to and from airports in the home region and also through arrangements with other carriers. Furthermore, there is not the same time sensitivity associated with cargo transport as there is with passenger transport. Cargo may be routed with a higher number of stopovers and as a result indirect routes are substitutable for direct routes. Accordingly, through trucking, arrangements with other carriers and the provision of indirect routes, competition exists between many carriers well beyond specific direct routes on which they operate.

(73) In merger decisions the Commission has defined the relevant product market as air cargo and has not sought to subdivide this further by the category or nature of the products transported. The relevant geographic market has been defined as European-

[66] Annual Report 09/10, Singapore Airlines, p. 2. SGD 12 707,3 million converted into EUR by using average exchange rate of 1 EUR = 2.015475 SGD for period 1 April 2009 to 31 March 2010. This average exchange rate is derived from the quarterly exchange rates of the European Central Bank.

[67] [*]

wide for intra-European cargo and on a continent to continent basis for the intercontinental transport of cargo, at least where continents have the sufficiently developed local infrastructure to allow onwards connections[68].

(74) A number of parties have made submissions on the relevant (geographic) market arguing that markets are not worldwide but are local to the country of origin. The Commission does not assert that the relevant market is worldwide, rather it finds that a worldwide cartel exists. Whilst market definition is a necessary tool in merger analysis this is not the position in cartel cases.

(75) The consistent case-law of the Court of Justice of the European Union[69] confirms the Commission's position that it is under no duty to define the relevant market, given that the agreements or concerted practices in question were liable to affect trade between Member States and had as their object the restriction of competition within the internal market. Rather, it is the subject of the contacts between the companies involved in a cartel which defines the products or services and the geographic scope to which the infringement relates.

2.4. Inter-state trade

(76) Airfreight transportation is a cross border service the aim of which is to convey products that are traded internationally, thus providing one of the essential means for realising the flow of traded goods today.

3. PROCEDURE

3.1. Immunity application

(77) At a meeting on 7 December 2005 the Commission services received an application for immunity under the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases[70] ('Leniency Notice') on behalf of Deutsche Lufthansa AG and in particular its controlled subsidiaries Lufthansa Cargo AG and Swiss [*]. [*].

(78) Lufthansa continued to cooperate with the Commission and provided [*] on [*].

3.2. Inspections

(79) On 14 and 15 February 2006, the Commission carried out unannounced inspections pursuant to Article 20 of Regulation (EC) No 1/2003 at the premises of a number of providers of airfreight services in the EU, namely: British Airways (United Kingdom), Air France-KLM (France and the Netherlands), Cargolux (Luxembourg and Germany), SAS (Denmark) and at the premises in Frankfurt (Germany) of the

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68 Case COMP/M.5141 – KLM/Martinair; Case COMP/M.3280 – Air France/KLM.

69 See for example, Case T-38/02 *Groupe Danone v Commission*, ECLI:EU:T:2005:367 , paragraph 99, and Case T-48/02 *Brouwerij Haacht NV v Commission*, ECLI:EU:T:2005:436 , paragraph 58 and the case-law cited in those paragraphs.

70 OJ C45 19.2.2002, p. 3. This 2002 Leniency Notice was replaced by the 2006 Leniency Notice (OJ C 298, 8.12.2006, p. 17). However, according to point 37 of the 2006 Leniency Notice, from the date of its publication in the Official Journal, this notice replaced the 2002 Leniency Notice for all cases in which no undertaking had contacted the Commission in order to take advantage of the favourable treatment set out in that notice. Given that Lufthansa contacted the Commission before that date, the 2002 Leniency Notice applies to this case (except that points 31 to 35 of the 2006 Leniency Notice apply to all pending and new applications for immunity from fines or reduction of fines from the date of publication of the 2006 Leniency Notice)

following carriers with headquarters outside the EU: [*], Cathay Pacific Airways Limited, Japan Airlines International Co., Ltd., LAN Airlines S.A., Singapore Airlines Limited, [*], [*], [*]. A German consulting firm, [*], which is active notably in the provision of information in the cargo industry in Frankfurt, was also inspected.

3.3. Leniency applications

(80) After the inspections eleven other carriers made applications under the Leniency Notice.

(81) On 27 February 2006 British Airways Plc applied for leniency [*]. This application was supplemented [*].

(82) On 3 March 2006 Martinair Holland N.V. applied for leniency [*]. This application was supplemented [*].

(83) On 10 March 2006 Japan Airlines International Co., Ltd. applied for leniency [*]. This application was supplemented [*].

(84) On 24 March 2006 Air France-KLM applied for leniency on behalf of itself and its subsidiaries, notably Air France S.A. and KLM N.V., [*]. This application was supplemented [*].

(85) On 27 March 2006 Cathay Pacific Airways Limited applied for leniency [*]. This application was supplemented [*].

(86) On 10 April 2006 LAN Airlines S.A. and LAN Cargo S.A. applied for leniency [*]. This application was supplemented [*].

(87) On 30 May 2006 SAS Cargo Group A/S and SAS Consortium applied for leniency [*]. This application was supplemented [*].

(88) On 6 June 2006 Cargolux Airlines International S.A. applied for leniency [*]. This application was supplemented [*].

(89) On 4 August 2006 Qantas Airways Limited applied for leniency [*]. This application was supplemented [*].

(90) On 26 June 2007 Air Canada applied for leniency [*]. This application was supplemented [*].

(91) On 3 December 2007 [*] and its affiliates applied for leniency [*]. This application was supplemented [*].

3.4. Requests for information

(92) The Commission sent requests for information under Article 18 (2) of Regulation (EC) No 1/2003 to a number of air cargo carriers.

3.5. Statement of Objections and Oral Hearing

(93) The Commission's Statement of Objections of 18 December 2007 was addressed to:

Air Canada;

Air France-KLM;

Société Air France;

KLM N.V.;

[*];

[*];

[*];

[*];

British Airways Plc;

Cargolux Airlines International S.A.;

Cathay Pacific Airways Limited;

[*];

Japan Airlines International Co., Ltd.; Japan Airlines Corporation;

[*];

LAN Cargo S.A.; LAN Airlines S.A.;

Lufthansa Cargo AG; Deutsche Lufthansa AG;

SWISS International Air Lines AG;

[*];

Martinair Holland N.V.;

[*];

Qantas Airways Limited;

SAS Cargo Group A/S; SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden; [*]; SAS AB;

Singapore Airlines Cargo Pte Ltd; Singapore Airlines Limited;

[*];

[*];

[*]; and

[*].

(94) It was notified to the addressees on 19 December 2007. The Statement of Objections set out the Commission's preliminary findings in relation to a single and continuous infringement of Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement, covering the EEA territory[71] and Switzerland by which they coordinated their pricing behaviour in the provision of airfreight services on a global basis with respect to various surcharges, [*] and the payment of commission payable on surcharges.

(95) All the parties to which the Statement of Objections had been addressed submitted written submissions in reply to the objections raised by the Commission.

(96) The addressees had access to the Commission's investigation file in the form of a copy on DVD, except records and transcripts of oral corporate statements of the

[71] 'EEA' refers to the Member States of the European Union ('EU') and the Contracting Parties of the European Economic Area, such as amended over time. The EEA comprises the Member States together with Iceland, Liechtenstein and Norway. From 1995 to 1 May 2004, the Member States of the EU were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom, Austria, Sweden and Finland (EU 15). From 1 May 2004, ten countries joined the EU, namely, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia and formed together EU 25 (EEA 18 until 1 May 2004 and EEA 28 from 1 May 2004 onwards).

immunity and leniency applicants and documents relating thereto. With the DVD, the undertakings received a list specifying the documents contained in the investigation file (with consecutive page numbering) and indicating the degree of accessibility of each document. In addition, the undertakings were informed that the DVD gave the parties full access to all the documents obtained by the Commission during the investigation, except for business secrets and other confidential information and internal documents. Access to oral and written corporate statements and transcripts and documents relating thereto was given at the Commission premises. The addressees of the Statement of Objections raised various points (for example, concerning allegedly illegible pages in the investigation file, claiming access to additional documents) which all were dealt with by DG Competition, and/or the hearing officers.

(97) An Oral Hearing on the case was held from 30 June to 4 July 2008. Almost all undertakings addressed in the Statement of Objections exercised their right to be heard orally. After the Statement of Objections and the Oral Hearing, several parties provided further written submissions in reply to Commission's questions at the Oral Hearing which could not be fully answered on the spot.

3.6. Developments post-2015 Judgments

(98) On 20 May 2016, the Commission sent a letter ('Letter of 20 May 2016') to the addressees of the 2010 Decision that had challenged that decision before the General Court. The Letter of 20 May 2016 informed those undertakings that DG Competition intended to propose to the Commission to adopt a new decision in which it would find that they participated in a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement in relation to all of the routes referred to in the 2010 Decision, such a fresh decision would require some adaptation of the recitals and the operative part of the 2010 Decision, and this new decision would not lead to any new objections nor alter the substance of the objections in the Statement of Objections adopted on 18 December 2007.

(99) The recipients of the Letter of 20 May 2016 were invited to make known their views on DG Competition´s intended decision within one month. All recipients made use of that possibility.

(100) On 7 February 2017, Air Canada sent the Commission a letter indicating that it was withdrawing with immediate effect its application under the Leniency Notice [*]. Air Canada also requested the Commission to remove from the investigation file [*].

(101) On 10 February 2017, the Commission sent a letter to Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Air Lines AG informing them that contrary to what was indicated in the Letter of 20 May 2016, that DG Competition intended to propose that a new decision that would firstly repeal Articles 5(j), (k) and (l) of the 2010 Decision and secondly impose on Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Air Lines AG the same fines as those imposed in the 2010 Decision for the single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement in relation to all of the routes referred to in the 2010 Decision.

(102) Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Air Lines AG were invited to make known their views on DG Competition´s intended decision

within two weeks. Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International Air Lines AG did not make use of that possibility.

(103) On 14 February 2017, Air Canada sent the Commission a letter indicating that it was withdrawing " *[*] "[*]*." Air Canada also claimed that the withdrawal of its alleged "*[*]*" in its Reply to the Statement of Objections was due to "*[*]*" that Article 101 TFEU and Article 53 of the EEA Agreement were applicable throughout the whole infringement period to routes between airports within the European Union and airports outside the EEA and between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and airports in third countries.

(104) On 22 February 2017, the Commission replied to Air Canada's letters of 7 and 14 February 2017 and indicated that it could not accede to Air Canada's request to remove from the investigation file, [*] and documents submitted as part of Air Canada's leniency application on the one hand, and Air Canada's reply to the Statement of Objections and [*] it made during the oral hearing on the other hand. The reasons for the Commission's position are the following: (i) under the Leniency Notice or other provisions of Union law, a leniency applicant does not have the right to remove a leniency application, including the accompanying [*] and documents, from the investigation. Moreover, if an undertaking were entitled to remove a leniency application, including the [*] and documents, from the investigation file, this would run counter to the objective of the Leniency notice, namely to obtain the termination of the infringement by those committing it, in order to end it quickly and completely[72]. Furthermore, an undertaking that voluntarily decides to submit a leniency application, including [*] and accompanying documents, is aware that it will form part of the file and may be used in evidence, including against its author, regardless of whether, at the end, the Commission decides to reduce any fine imposed[73]; (ii) under Union law, an undertaking does not have the right to remove a reply to the Statement of Objections and statements made during an oral hearing. An undertaking that freely decides to submit a reply to a statement of objections and/or make [*] during an oral hearing[74] is aware of the fact that they will form part of the file and may be used in evidence, including against its author[75]; and (iii) in any event, the procedure was at an advanced stage when Air Canada's request was made and the adoption of this Decision would have risked being delayed considerably if Air Canada's request had been granted [76].

(105) On 23 February 2017, Air Canada sent the Commission a further letter in which it responded to the Commission's letter of 22 February 2017. It sent further letters on 7 March 2017.

3.7. The main evidence relied on

(106) The principal documentary evidence relied on consists of the documents obtained during the inspections and documents submitted by applicants under the Leniency

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72 Case C-617/13 P *Repsol Lubricantes y Especialidades and Others v Commission*, ECLI:EU:C:2016:416, paragraph 68.

73 Case T-352/09 *Nováckе chemické závody v Commission*, ECLI:EU:T:2012:673, paragraph 111.

74 Case T-384/06 *IBP and International Building Products France v Commission*, ECLI:EU:T:2011:113 paragraph 111.

75 See by analogy Case T-352/09 *Nováckе chemické závody v Commission*, ECLI:EU:T:2011:113, paragraph 111.

76 See by analogy Case T-286/09 *Intel v Commission*, ECLI:EU:T:2011:113, paragraph 430.

Notice, as well as [*] and replies to requests for information. These sources are referred to in Sections 4.2 to 4.5.

4. DESCRIPTION OF THE EVENTS

4.1. Basic principles and structure of the cartel

(107) The investigations of the Commission uncovered a worldwide cartel based on a network of bilateral and multilateral contacts over a long period among competitors regarding the conduct they had decided, intended or contemplated to adopt with regard to various elements of charges for airfreight services. While these contacts took place at various levels in the undertakings concerned, took various forms and in some instances related to various geographical areas they disclose a network of contacts among the parties which had the common aim of co-ordinating pricing behaviour and/or reducing uncertainty with respect to competitors' pricing behaviour.

(108) The various elements of the price covered by the illicit contacts included the FSC, the SSC and the non payment of commission on the surcharges to freight forwarders.

(109) The coordinated application of the FSC had the objective of ensuring that airfreight carriers throughout the world imposed a flat rate surcharge per kilo for all relevant shipments. This surcharge was a transparent element of price identified as a separate item on the air waybill. A complex network of mainly bilateral contacts among carriers was established to coordinate and monitor the application of the surcharge, the precise date of application often being decided at local level usually with the principal local provider of airfreight services taking the lead and others following. This coordinated approach was extended to the SSC. Furthermore, the airlines coordinated their refusal to pay a commission on the surcharges to the forwarders, thus the surcharges became net revenue for them and created an additional incentive for carriers to follow the cartel with respect to surcharges.

(110) Senior management in the head offices of a number of airlines were either directly involved in competitor contacts or regularly informed about them. In the case of the surcharges, responsible head office employees were in contact with each other when a change to the surcharge level was imminent. The refusal to pay a commission on surcharges was also confirmed on a number of occasions during contacts at head office level. There were frequent contacts also in a number of local markets, partly to better implement the instructions received from the head offices and to adapt them to the local market conditions, partly to coordinate and implement local initiatives. In this latter case the head offices generally authorised or were informed of the proposed action.

(111) Airlines contacted each other bilaterally, in small groups and in some instances in large multilateral forums. The local Board of Airline Representatives ('BAR') associations were used in Hong Kong and Switzerland in particular to discuss yield improvement measures and coordinate surcharges. Meetings of alliances, like WOW, were also used for such purpose. Contacts were generally maintained via phone calls but also through emails as well as through bilateral or multilateral meetings.

(112) A number of third country carriers have argued that contacts in third countries other than their home country are not relevant to their involvement in the worldwide cartel. However, for the reasons set out in recitals (888)-(890), the Commission considers that all contacts are relevant to establishing the existence of the worldwide cartel.

4.2. The cartel contacts

(113) The cartel contacts are discussed in Sections 4.3 to 4.5 with the various elements of the infringement addressed in turn. Accordingly, contacts on the FSC, the SSC and commissioning on surcharges are described.

4.3. The Fuel Surcharge (FSC)

4.3.1. Description of the FSC mechanism

(114) Fuel surcharges for freight services were introduced by airlines in the face of rising fuel costs. Such surcharges were imposed by a number of airlines in the autumn of 1996 when the fuel prices rose considerably between June and October of that year. These were generally withdrawn in March-April 1997 when the fuel prices dropped again. On 12 August 1997 IATA adopted draft resolution 116 ss that would have established a mechanism that linked the application of FSC to a fuel price index. The reference of the index (taken as 100) was the fuel price in June 1996 (USD 0.535 per gallon). Under this mechanism, when the fuel index passed a certain threshold or trigger point set at 130 for two consecutive weeks, a FSC would be applied. Under this resolution, this index mechanism and the resulting surcharges were to be applied by all IATA member airlines for freight services. When the index dropped below level 110 for two consecutive weeks the FSC would be removed. It was furthermore stipulated that IATA would call a meeting if the index passed level 150 for two weeks. The maximum amount of the FSC per country was fixed in an annex to the resolution. The United States Department of Transportation (DoT) disapproved the Resolution on 14 March 2000. The index had nevertheless been published by IATA until the disapproval by the United States DoT and it was the reference for the reintroduction of the FSC by a number of airlines in February 2000.

(115) When IATA discontinued publishing the fuel index, the draft resolution served as a model for airlines to set up their own FSC mechanisms. As a consequence there was little difference between the various FSC mechanisms set up by the airlines and the application of them led to most airlines having index systems providing for similar levels of FSC with little or no difference as to the timing of the trigger in practice. These FSC index arrangements were generally published on the internet. There are a number of airlines who did not set up their own FSC mechanism but simply relied upon the mechanism published by another airline. Some airlines did not follow any FSC mechanism but adjusted their FSC levels without reference to any index system.

(116) The FSC schemes were generally withdrawn at the end of 2001 due to falling fuel prices and then reintroduced in spring 2002 when fuel prices rose again. Since 2002, index related FSC schemes have been applied by most airlines continuously. There have been a number of changes made to the initial FSC mechanisms in order to follow the fuel price changes more quickly and to introduce further thresholds so that the FSC could be further increased with rising fuel prices.

(117) At least from late 1999 the introduction of FSC, the application of the FSC mechanisms and the introduction of modifications to them have been the subject of coordination between a number of airlines that are addressees of this Decision.

4.3.2. Nature of the illicit contacts between competitors concerning the fuel surcharge

(118) A network of bilateral contacts built up from late 1999/early 2000 onwards involving a number of airlines that allowed information sharing concerning the actions of the participants throughout the network. Carriers contacted each other regularly to discuss any question that came up concerning the FSC, including changes to the

mechanism, changes of the FSC level, consequent application of the mechanism, instances when some airlines did not follow the system.

(119) Concerning the implementation of FSC at local level, a system was often applied whereby leading airlines on particular routes or in certain countries would announce the change first, and they would be followed by others. This system was based on contacts among local representatives of carriers concerning their actions and intentions relating to FSC, the object of which was to coordinate the application of FSC at local level. In some areas the local airlines' associations provided multilateral fora to discuss and agree on the FSC.

(120) Anti-competitive coordination concerning the FSC took place mainly in four contexts: concerning the introduction of FSC in early 2000, the reintroduction of a fuel surcharge mechanism after the revocation of the planned IATA mechanism, the introduction of new trigger points (raising the maximum level of FSC) and most frequently at the point where the fuel indices were approaching the level at which an increase or decrease in the FSC would be triggered.

(121) The purpose of the contacts concerning changes in the level of surcharges was to ensure that competitors would take the same steps, discipline would be maintained and that the increase (decrease) resulting from the published method would be applied in full and in a coordinated way[77]. For example, [*] stated that in 2005 there were constant fears that a major European carrier would 'break out' and charge lower FSC than the others[78].

(122) The application of a FSC appears to require government approval in certain jurisdictions (including Japan, Hong Kong, Thailand) but the coordination of the implementation between airlines is not compulsory even if it may have been tolerated or encouraged by some regulators. The local airlines' association coordinated the setting of the FSC level in Switzerland as well.

(123) Contacts relating to the FSC were made mostly on the phone and much less often via email or during meetings.

4.3.3. General description of contacts

(124) [*] states that [*][79]. [*] had approximately 40 telephone calls with each of BA, AF, KL and CV in the time period between the beginning of 2003 and the end of 2005[80].

(125) According to [*]. [*] also states that [*][81].

(126) [*] states that [*][82].

(127) [*] states that they had contacts with LH and CV referred to as 'comfort calls' between February 2000 and early 2006[83]. The subject of these calls was to determine what the competitors were planning to do in practice when the trigger points were reached. These contacts were aimed to ensure a few days in advance that the increase or decrease of the FSC would in practice be implemented and to establish timing.

77 [*]
78 [*]
79 [*]
80 [*]
81 [*]
82 [*]
83 [*]

The introduction of new trigger points was also discussed between mid 2004 and October 2005[84]. LH collected information from a number of airlines and shared it with competitors. For example, LH informed [*] on the position of BA.[85]

(128) [*] states that telephone conversations occurred before announcements of changes to the FSC level and before the implementation of the announcements between employees of [*] and LH between 2000 and 2005 and between [*] and CV in the period 2003-2005. These 'comfort calls' were intended to confirm that the competitors would follow their own FSC mechanism. In 2004 the addition of new trigger points was also discussed between [*], LH and CV[86].

(129) [*] states that [*].[87]

(130) [*] states[88] that [*].

(131) [*] states[89] that [*].

(132) [*] states[90] that the FSC was sometimes discussed during the regular bilateral meetings between [*] and KL, when a meeting date happened to coincide with possible movements in the surcharge. On some of such occasions, [*] recalled discussions regarding intentions and timing.[91]

4.3.4. Contacts between competitors concerning the introduction of the fuel surcharge in 2000

(133) As a result of a substantial increase in fuel prices in 1999 the IATA fuel price index reached the first trigger point where airlines could implement a FSC based on the IATA FSC mechanism. Exchanges of emails show that a number of airlines contacted competitors to discuss whether the FSC should in fact be implemented. There were also understandings under which certain carriers would follow others already at the time of the introduction of the surcharge. This follower system was based on an extensive exchange of sensitive commercial information concerning actual or planned decisions of the leading airlines. Airlines contacted each other as well in order to share information with the aim of coordinating the introduction and implementation of the FSC around December 1999 and January 2000.

4.3.4.1. Head Office involvement (between head offices or between head office and local staff)

(134) The evidence set out in this Section shows that the head offices (namely, company headquarters rather than purely local or national offices) of a number of airlines were involved in contacts with competitors to coordinate the introduction of the FSC in 2000.

(135) [*] (SK) sent an email on 13 December 1999 to Air Canada ('AC'), [*], LH, [*] and [*] asking whether they 'would be considering adding a fuel surcharge to their price now, that the IATA index has passed the magic limit of 130'. He noted that SK Cargo was somewhat hesitant. He received a reply on the same date from [*] stating that

84 [*]
85 [*]
86 [*]
87 [*]
88 [*]
89 [*]
90 [*]
91 [*]

they fully agreed with the SK position. He received a reply from LH on 14 December 1999 stating that 'we are also reluctant to take the initiative this time. If other, big competitors of ours were to go for it, we would follow…'[92]

(136) [*] reported in an internal JL email[93] on 7 December 1999 under the subject 'fuel surcharge' to [*] that 'Today talked with AF regarding above item and their feeling re above as follows: top AF mgmnt very much wish to introduce such surcharge but they know well about difficulties of such introduction from past two previous experiences which were not at all a success… Present situation is [*] rqstd sales dept to check feasibility and if they decide to introduce, tentative date would be sometimes in February.'

(137) In an internal JL email[94] on 20 December 1999 [*] stated that an AF representative in Japan 'received the requirements from the head office in CDG that AF would implement the fuel surcharge program in link with the IATA res 116ss all over the world … from 1 Feb 2000. It will be announced in each market on and after 22 Dec…. AF HDQalso contacting with LH HDQ and [*] HDQ to encourage to implement same ways following AF.' Furthermore, some JL employees were requested to 'check and advise the current movement of [*], KL and LH on this matter'.

(138) The Lufthansa Cargo AG ('LCAG') Executive Committee adopted an ad hoc proposal 'Tischvorlage' on 21 December 1999[95]. The proposal[96] refers to the announcement of AF on the previous day and mentions market rumours that KL will follow the same week. The minutes[97] of the Executive Committee meeting referring to discussions on the IATA resolution 116ss note that the resolution will not be mentioned as a ground for the FSC, due to pending regulatory approval, rather the actual cost situation and TACT rules. The press release[98] issued by LH on 28 December 1999 announcing the introduction of the FSC nevertheless makes a clear reference to the IATA fuel index.

(139) The [*] of LH in the United Kingdom, [*], sent an internal email[99] to the head office on 4 January 2000 stating that 'today we are informed by Cathay Pacific/Singapore and [*] that none of these airlines will introduce FSC ex the UK for the time being'. He added that 'ex UK so far introduced AF, [*], [*][100], [*][101], SK. BA, [*][102], [*][103], all British carriers not introducing'. He finally asked to be advised on 'corporate action on above carriers'.

(140) In an internal Swissair ('SR') email[104] on 21 December 1999 [*] referred to information about AF and KL from Germany. He states that 'as of Feb 1 AF will levy worldwide fuel surcharge of EUR 0.10/ USD 0.10 Kg. KLM: will exactly do the

92 [*]
93 [*]
94 [*]
95 [*]
96 [*] (Orig. DE).
97 [*] (Orig. DE).
98 [*] (Orig. DE).
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same they just wanted that AF came out first. LH is going into the same direction but not confirmed at this minute.'

(141) In an internal SR email[105] on 21 December 1999 [*] ([*]) sent around an update on FSC stating that 'LH/AF/KL are planning to introduce a fuel surcharge taking effect 1.2.2000. Respective press releases, information to the markets is planned these days.'

(142) [*] (QF [*]) sent an email[106] to the QF head office on 3 January 2000 that started a chain of responses, stating that most airlines including LH/AF/[*]/[*]/SK/CV/etc will introduce a FSC ex Europe and he asked permission to follow suit. [*] responded on 4 January 2000[107] that he suggested to 'go for it' and added that '[we] must ensure we get each home carrier to be the leader in their market, in Aust we should move only after we ensure support from the 'major' carriers in our market place, after ensuring we give them support in theirs.' [*] then reported in an email[108] on 5 January 2000 that 'I have spoken with BA and they are not going with a fuel surcharge ex UK. Other carriers I spoke to have said that they will follow BA's lead.'

(143) In an internal QF email[109] on 6 January 2000 [*] summarised 'numerous exchanges of emails regarding the implementation of the surcharge' and makes suggestions for implementation or not on a region by region basis, in light of competitors' actions.

(144) SK discussed the implementation of FSC with BA and KL in Finland. Concerning a letter from the Finnish Forwarders Association there was an internal SK email exchange from 5 to 11 January 2000[110]. [*] from the SK head office asked in the email: 'How is it going for LH this time? Suggest you have a close unofficial contact with [*] about this.' Concerning the answer to the forwarders he added: 'feel free to add relevant things in the enclosed letter proposal, however make sure not to refer to other carriers as this can be a problem with anti-trust watching authorities.' In the reply from the local office in Helsinki on 5 January 2000 [*] stated that '[*] is on vacation until 10 January 2000' and added that 'think will now wait until Monday when [*] gets back to see what they will decide before sending our answer to forwarders… Met also mngrs of BA/KL today. BA had no opinion on this as they have still not decided if fuel surcharge will be implemented or not. KL's opinion was that we should all stick to this surcharge.' In the last email in the chain on 11 January 2000 [*] reported that he had 'now spoken to [*]/LH. He confirms me that LH will stick into this fuel surcharge.'

(145) In an email on 10 January 2000[111] [*] (SR) reported under the subject Air Cargo Council Switzerland ('ACCS') meeting that 'In Switzerland [*] carriers agreed to apply same policy as SRC[112] including [*] (adapting from actual to chargeable (as SRC)'. The position of other airlines including LH, KL, [*], CX, SK and AC is also noted in the email concerning the use of actual or chargeable weight for the calculation of the FSC (AC, SK and LH maintained actual weight).

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4.3.4.2. Singapore

(146) The minutes[113] of a BAR Cargo Subcommittee ('CSC') meeting held on 3 February 2000 report discussions on the implementation of FSC. 'Chairman said that at the moment, SIA has no plans to levy a fuel surcharge, but is monitoring the fuel price index closely. SIA has served notice to all its appointed agents on the [*] effective 01 March 2000. … Chairman urged member carriers [*] they have adopted a fuel surcharge policy.' The chairman was [*] of SQ. Members of BAR CSC attending the meeting included SQ, AF, [*], CX, [*], [*], KL, LH, [*], [*], [*], [*], [*], [*], SK, [*], [*].

4.3.4.3. Hong Kong

(147) [*] (QF) sent an internal email on 10 January 2000[114] reporting that in the BAR CSC meeting held on 8 January 2000 there were different opinions on FSC. He then stated that 'CX will not officially file HK CAD[115] for increase. CX will use market flexibility to adjust. However should any airline wish to file with HK CAD officially they are free to do so. A meeting will be held on Jan 12 to discuss the matter further.' In a further email on 11 January 2000[116] he reported that 'several major carriers approached me and indicated their wish to urge BAR to file application for fuel surcharge to HK CAD.' He then wrote an email on 13 January 2000 in which he reported that 'The meeting finished with majority voted to file officially to HK CAD. CX will push through BAR to file.'

(148) In an internal QF memo[117] on FSC on 13 January 2000 [*] (sales [*] freight, Hong Kong) summarised the situation in Hong Kong and stated that 'in the special meeting on 12 Jan 2000, … [*] members (except [*]) had expressed no objection for the application of the fuel surcharge ex HKG.'

(149) The [*] (CX) sent an invitation[118] to [*] BAR CSC members to a special meeting on 19 January 2000 to discuss further details of FSC.

(150) In an internal QF email[119] on 9 February 2000 [*] stated that 'Have reconfirm with CX cargo manager. CX corporate management has changed stand. They will not implement surcharge unless govt approval is obtained.'

4.3.4.4. India

(151) [*] states[120] that [*].

(152) [*] states[121] [*].

4.3.4.5. Sri Lanka

(153) [*] states[122] that [*].

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114 [*]
115 Hong Kong Civil Aviation Department.
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4.3.5. Discussions between airlines concerning the IATA fuel surcharge mechanism after its disapproval by the United States Department of Transportation (DoT)

(154) The United States Department of Transportation disapproved IATA resolution 116ss on 14 March 2000 and, as a consequence, IATA ceased to publish the fuel price index that formed the basis of the FSC mechanism envisaged by IATA.

(155) The IATA Cargo Committee meeting held in Vancouver on 4 April 2000 discussed the fuel index provided for in resolution 116ss and its disapproval by the United States Department of Transportation. According to the meeting minutes[123] 'As a result of this disapproval IATA's legal advisors had recommended that the publication of the index should be suspended. Members, however, felt that it was an extremely useful industry tool and requested that IATA legal look into the matter further.'

(156) One airline, [*], has provided the Commission with a [*][124] based upon the declarations of an employee who participated at the IATA meeting in Vancouver and who stated that [*].

4.3.6. Competitor contacts concerning the increase of the FSC in October 2000

(157) The fuel prices rose further in the summer of 2000. That prompted airlines to start discussions concerning the increase of the FSC or the introduction of it by those who had not yet done so. Such discussions are reflected in the evidence set out in this Section.

4.3.6.1. Head office involvement

(158) [*] (QF employee in the United Kingdom) sent an internal email[125] to the head office on 13 September 2000 in which he reported that 'I have spoken with other carriers and they are not willing to commit to imposing a fuel surcharge at this time but will be consulting their head offices. Carriers I have spoken to are SQ, [*], [*], CX and [*] at BAWC who is to speak with his UK [*] over the next 24 hrs and will advise on their position.'

(159) [*], QF's [*] in Canada sent an email[126] to the head office on 20 September 2000 reporting about the FSC in Canada. He noted that 'There has been talk by most carriers here about increasing the fuel surcharge but nothing has happened. It's widely known there are increases coming in the US.'

(160) Under the subject 'fuel surcharge ex UK' [*] (CX) sent an internal email[127] on 20 September 2000 stating that 'as discussed although I have not been able to speak to BA sales (the official line is they are all off sick!) from their flyer I think their reasoning for 7 p is that it equates US cents 0.10. So we will be going for the same flyer going out today for effective date 15OCT00.'

(161) From [*] emails of 21 and 25 September 2000 it appears that AC contacted LH to inquire about LH's plans for FSC increase[128].

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128 [*]

(162) There was an email exchange[129] between [*] (LH [*] Asia & Australia) and [*] (JL [*]) on 27 September 2000 in which LH informed JL that 'Lufthansa Cargo will increase the fuel surcharge to 0,17/kg (USD 0.15) as of Nov 01. This amount will be charged worldwide. Pls adv Japan Airlines policy.' To which JL responded the same day 'We are going to increase Fuel Charges not fuel surcharges as of 1st November 2000, Euro 0.17.'

(163) [*] (SR) wrote an internal email[130] on 2 October 2000 under the subject 'increase of fuel surcharge' and reported about an Executive Committee ('EC') of ACCS meeting that had been held the same day with the participation of KL/[*]/LH/[*]/SQ/SR. He noted the position of all participants concerning the FSC increase then summarised the positions as 'Majority of 'relevant' carriers approve increase of FS. The fact that SQ will not introduce FS again [*] is very dangerous since [*] will be a fact'. Concerning the mechanism itself he noted that 'LH would abolish second FS once index has reached 150 and first surcharge would be eliminated when index 110 reached. This would be contrary to Swisscargo where 2nd FS abolished once ind 130 reached.' He then noted in the summary that 'abolishment of FS increase (150 LH vs 130 SRC) must be carefully studied'.

(164) In an internal SR email[131] on 2 October 2000 under the subject 'fuel surcharge second level' [*] ([*] Europe) gave an update on the situation and noted that 'For internal information only, present status in EU: OK for implementation: CH/B/NL/D/F/UK Open: IT/Nordic countries'. He then gives instructions 'FRAFM, advise status of Nordic countries. LINFN, advise status of IT resp. what is [*] planning to do.'

4.3.6.2. Hong Kong

(165) CX sent a fax[132] on 13 October 2000 to QF, containing a copy of the letter to the Hong Kong Civil Aviation Department ('CAD') written by the BAR CSC chairman asking for approval of the FSC increase. The letter refers to the decision of BAR CSC to commonly apply for fixed FSC levels for given destination areas, from 1 November 2000.

4.3.7. Competitor contacts concerning the reduction of the FSC [*] in February-March 2001

(166) As the fuel price decreased in early 2001 LH announced a reduction of the FSC that provoked discussions between airlines whether they should follow or not. Furthermore discussions were held between local representatives concerning [*]. These discussions were reported to the head offices of the respective companies.

4.3.7.1. Head office involvement

(167) [*] stated that between 2001 and 2004 also on headquarter level bilateral contacts existed with AF, KL and CV. [*][133].

(168) Internal SR email[134] sent from Italy to the head office on 16 January 2001 states that 'rcvd copy of LH sales letter to all agents in Italy informing that fuel surcharge on

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133 [*]
134 [*]

LHC will be reduced… Reaction of other carriers: AF will follow, CV will follow, KL will follow (to be advised 17.1), [*] sleeping'.

(169) SR faxed its public announcement[135] concerning the maintenance of FSC to AF on 19 January 2001. Handwritten notes on the fax indicate 'KL idem, Cies Asiatiques'.

(170) In an internal JL email[136] on 19 January 2001 under the subject 'movement of fuel surcharge by other airlines' [*] noted that 'LH/SK/LH already announced…; AF/[*] now under consideration…; BA … would keep the same level…; SR now discussing the matter with other airlines/ZRH and all airlines; [*] … shall maintain the same amount'.

(171) In an internal AF email chain[137] on 22 January 2001 under the subject 'fuel surcharge' the AF head office asks local AF staff to report on competitors' action in their respective local markets. In the reply from [*] (AF, [*]) it is noted that 'it is impossible to have confirmation from LH as their representative returns to BKK only on 27.' In the reply from [*][138] it is stated that 'LH confirmed that from 1 February 2001 the FSC will be reduced to USD 0.10/kg. SR and [*] stay at USD 0.15/kg'. [*] replied[139] that 'until today, and it is confirmed again, only LH announced the return to the first level FSC from February. SR and CV have the same instructions from their centre as us…' In the reply from [*][140] it is stated that 'the national company CX expressed its opinion at the 'Board of Airlines' indicating that they are in favour of reducing the FSC.' [*] reported[141] from China that 'KL and [*] told us that they will follow LH but it true that till today no announce has been made. SR no news. [*] and [*] wait as usual.' [*] reported from Turkey[142] that '[*] announced that it maintains the FSC, LH confirmed the decision of its head office but confirmed that in Turkey they will follow [*].' In another email[143] [*] stated that 'KLM has just confirmed to me that they are waiting for the reaction of another big company like AF'. [*][144] reported that 'the other competitors, the national carrier included do not seem to be in a hurry, they would like to push the decision to reduce till the end of March 2001.' [*] reported[145] that 'the situation in PRG is that SR reduces to 0.13 USD/kg a/c 01.Feb, [*] is waiting for our action, also KL, while LH reduces to 0.1USD/kg'.

(172) In an internal JL email[146] on 23 January 2001 [*] instructed JL employees at local markets to [*] referring to the reduction of the FSC. It is noted that 'our revenue point of view, we would like to maintain/enjoy this revenue for as long moment as possible. So we would like [*]. In Germany JL/LH/[*]/[*]/KL already decided to [*]… In addition to the above intention in FRA, [*] basically agreed with JL to [*]. This coffee meeting with them was useful for us to implement the Spcl charge [*]. So would like to keep the positive stance with them continuously.'

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136 [*]
137 [*] (Orig. FR).
138 [*] (Orig. FR).
139 [*] (Orig. FR).
140 [*] (Orig. FR).
141 [*] (Orig. FR).
142 [*] (Orig. FR).
143 [*] (Orig. FR).
144 [*] (Orig. FR).
145 [*] (Orig. FR).
146 [*]

(173) [*]. [*] (LH [*] Asia and Australia) sent an invitation[147] on 11 December 2000 to KL, [*], SK, AF, [*], CX, SQ, MP, [*], AC, [*], CV, [*] and [*] for a meeting on 22 January 2001 to discuss the market. An internal SK email[148] on 24 January 2001 reports that 'During a Market Analyze Meeting with LCG, SAS and other major carriers a possible yield increase was under discussion effective Apr.01. This meeting took place at LCAG premises 22.JAN.01.'

(174) [*] (MP [*] Germany) prepared an internal MP memorandum[149] titled 'Coffee round 22.01.01' in which [*] reported that with the participation of LH, AF, BA, KL, CV, SK, SR, [*], JL, [*], [*], [*], AC, [*], MP [*] [*]. During the same meeting the FSC was discussed, LH was going to decrease the FSC level on 1 February 2001 while CV, SR, [*], KL, BA maintained the FSC level.

(175) Another example of [*] discussions on FSC reduction [*] can be found in an internal JL email exchange[150] on 31 January 2001. The local employee from Amsterdam reported that 'have set coffee meeting wiz KL/[*] for next Monday the 5th and discuss mutual actions [*] and policy for Dutch region based on fuel charges.' [*] from the head office replied that '[*] has strong will to [*]. But we are not sure that KL has the same will as [*] because KL decided to keep the same fuel surcharge on and after 1FEB01.' The same local employee then reported in an internal JL email[151] on 6 February 2001 that 'concerning fuel have attached publication announced by KL to the market on 05feb where they go back to eur 0.10 effective 01 March 2001, have so far agreed with [*] that JL and [*] will remain on eur 0.07 as long as they can, [*] cause the market now only looks to the fuel surcharge and they see that we only have eur 0.07 so still less than KL.'

(176) In an internal SR email[152] on 15 February 2001 [*] reported that 'we had unofficial airline meeting sponsored by [*] on February 14th with following participating carriers: [*]/KL/CX/SQ/LH/[*]. Topic: fuel surcharge development [*]…'

(177) An email[153] from [*] (AF) to [*] ([*] Cargo Sales Europe) on 21 February 2001 contains a summary of the 'market situation regarding [*] and fuel surcharge ex Europe'. Concerning Holland and Belgium it is noted that 'AF fuel surcharge will be reduced from EUR 0.17 to EUR 0.10 as from March 1st according to KL decision to do so.' In the reply of [*][154] on 23 February 2001 it is stated that 'we do not want to drop the surcharge country by country, if at all possible. [*] with the intention that fuel surcharge would drop off in the early months ahead.'

(178) [*] (SR Cargo [*] France) reported[155] to the head office on 26 February 2001 that 'had a meeting last Friday with a few interline colleagues and AF unofficially confessed to me that they regret to have lowered frm 0.17 to 0.10 EUR, as the index seems to raise again.'

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151 [*]
152 [*]
153 [*]
154 [*]
155 [*]

(179) [*] (LH) had a meeting with [*] and [*] (AF) on 15 May 2001 in Paris. According to the agenda[156] of [*] the topics included 'JAL's fuel surcharge 16 May of yen 0.10 = EUR0.15.' He also noted[157] that [*].

(180) An internal LH email[158] on 30 May 2001 contains the information that 'SQ will start charging fuel surcharge on 15 June 01 from Japan, but not to Japan.'

4.3.7.2. Switzerland

(181) The members of the Airline Cargo Council of Switzerland (ACCS), (which according to its website (www.accs.ch) has approximately 60 air cargo companies as its members) included [*], AF, [*], [*], LX, JL, [*], MP, LH, AC, [*], KL, BA, [*], SQ, [*], [*] who were addressees of email exchanges referred to in the subsections concerning Switzerland in Sections 4.3 to4.5. ACCS was used as an information channel through these exchanges which were often initiated by ACCS's chairman. ACCS gathered and coordinated the information regarding FSC for the benefit of its members. Concerning the FSC the first evidence of coordination is linked to the decrease of the fuel price in early 2001.

(182) The minutes[159] of the ACCS meeting on 17 January 2001 report under any other business that '[*] confirms that as from 01.Feb.2001 LH decreases the fuelcharge to CHF 0.15 due to the new index of 150. The President asked [*] members to consult their HQ and to let CASS[160] know in order to have a new list published.' The following airlines were present at the meeting: [*], [*], [*], [*], AF, [*], [*], AC, SR, [*], [*], [*], [*], [*], [*], SQ, [*], KL, [*], [*], [*], LH, [*], [*], [*].

4.3.7.3. Japan

(183) [*] states[161] that [*].

4.3.8. Competitor contacts concerning the cancellation of the FSC in autumn 2001

(184) In the autumn of 2001 the fuel prices dropped again and they reached a level where the fuel price index of LH went below the base line of 110, a point where the FSC was to be suspended. The withdrawal of the FSC in December 2001 was preceded by a number of contacts between airlines at central and local levels.

4.3.8.1. Head office involvement

(185) In an internal LH email[162] on 30 October 2001 [*] reported 'an interesting call from the island' and stated that 'they are watching our index closely and they are worried that we will drop the fuel surcharge and they can not use the argumentation for its existence any more. I referred to our mechanism and that it is not yet the case. As we can see this competitor is interested in the surcharge and planned it as an important part of its revenue.'

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157 [*]
158 [*]
159 [*]
160 IATA Cargo Accounts Settlement Systems
161 [*]
162 [*] (Orig. DE).

(186) In an internal LH email[163] on 9 November 2001 [*] informed other senior LH employees that 'I have just talked to KLM. KLM looks for an agreement with us on the fuel index topic…'

(187) [*] informed his colleagues in an internal LH email[164] on 15 November 2001 under the subject 'fuel surcharge' that 'received update from [*]/AF. AF agreed with SNAGFA (French forwarders association) that they will continue with the fuel surcharge till the end of 2001 despite the index going below target… Here is the possibility to start harmonisation with AF'.

(188) In an internal LH email[165] on 18 November 2001 [*] reported again a conversation with 'the island' stating that 'I told her not to be nervous, first we have to be below 110 for two weeks then come out with an announcement'

(189) In an internal MP email[166] on 19 November 2001 [*] stated that 'Confidential: on 1 December KLM will kill the fuel surcharge, presently the index is under 100; Will check with BA'

(190) [*] (JL [*] Frankfurt) wrote an internal email[167] on 21 November 2001 stating that 'according to LH information there is no intention to reduce or abolish the current fuel surcharge in Germany for the time being.' [*] (JL [*] Paris) wrote the same day that 'AF should maintain their current FS until the end of Dec. At their invitation we shall have a meeting with them early January to review the situation.'

(191) [*][168]. In an internal MP email[169] on 26 November 2001 under the subject 'LH fuel index' [*] stated that 'KLM/[*]: cancel FSC per 1 Dec; BA: from 0.10 GBP to 0.06 GBP per 18 Nov (!!??) ex UK; [*]: from 0.10 USD to 0.05 USD per 1 JAN; LH/AF/[*]/CV/SR: quick call learned no changes yet'.

(192) An internal [*] telex[170] from a local employee to the head office on 28 November 2001 states that 'we hv been approached by LH interline dept with the idea to withdraw the fuel surcharge eff 01dec01'.

(193) In an internal BA email[171] on 28 November 2001 [*] asked [*] to 'call your LH contact to establish the notice period for their customers should they have to remove the fuel surcharge'. On 29 November 2001 [*] reported that '[*] called me last night at home and they are quite convinced that the fuel surcharge will come off. The only point of discussion within LH is around the effective date. They hesitate between 20th Dec and 1st Jan. I basically told him that 20th Dec is OK from my point of view as by then the business is done anyway. Next Wed they will make their decision on the date and send out the communication to the customers. I would therefore suggest that we got our communication ready so that we can send it out asap. The bad news for LH is that they budgeted for the fuel surcharge for the whole of next year (extraordinary recoveries) and will be stuck. Their plan is therefore to [*]. [*]'[172]

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163 [*] (Orig. DE).
164 [*] (Orig. DE).
165 [*] (Orig. DE).
166 [*] (Orig. NL).
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(194) In another internal BA email[173] on 29 November 2001 [*] ([*]) stated that 'from recent comments it looks like LH will remove the surcharge (not sure what date effective yet). We will therefore be discussing BA removing this at our next Commcl Mtg… On a separate but related note, flights are currently fairly full and [*]…'

(195) [*] (SR [*] France, Spain, Portugal, North Africa) reported to the head office in an internal SR email[174] on 5 December 2001 that 'have just been informed that national carrier AF will cancel fuel surcharge of 0.10EUR as of 24 Dec 01'.

(196) The file[175] 'FSC summary 06 Dec 01', found on the laptop of [*] (CX) contains a table titled 'FSC removal by country' that lists in the column 'carrier-date' 'LH Dec 20, BA Dec 23, [*] Dec 24, KL Dec 01, AF Dec 24, [*] Jan 01, SK Dec 20'. In the column 'official notice in hand' the word 'pending' is written in each row.

(197) There was an internal CX exchange of emails[176] on 6 December 2001 concerning the competitors' plans to remove the FSC. [*] (CX employee in France) stated in his email that 'the last news I have obtained from AF is that fsc shd survive till 25th maybe 26th Dec … [*].'

(198) In an internal JL email[177] on 6 December 2001 the Frankfurt office reported that 'contacted Lufthansa Cargo AG. LH will terminate fuel charge worldwide effective 20 Dec 2001.' [*] (JL [*] Paris) replied[178] the same day that 'just received info from AF that they will cancel F/S as from Dec 24th 01. [*].'

(199) The minutes of an internal meeting[179] of SR on 4 December 2001 indicate under 'market info, Europe', that 'pressure on fuel surcharge is up again, rumours say that LH will cancel it on the 17.12'.

4.3.8.2. Germany

(200) A copy[180] of the agenda of the meeting of the Board of Airline Representatives in Germany (BARIG) CSC on 23 November 2001 [*], contain the following handwritten notes: 'Verkommisoning x DC – news about FSC? Charges are net and should stay net. ([*])'.

4.3.8.3. Italy

(201) [*] (CX [*] in Italy) sent a fax[181] to [*] on 6 December 2001 summarising the information on the position of airlines concerning the withdrawal of the FSC and added that 'we would also like to know the position of the national carrier'.

4.3.8.4. Switzerland

(202) [*] ACCS sent an email[182] to [*] ACCS members on 21 November 2001 informing them that KL is suspending the FSC from 1 December 2001. He complained that he had received such information from other parties and requested to be informed

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181 [*]
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concerning such steps. He also noted that 'our organisation is a big question mark if we not stick together.' Then he added that he 'would urge you not to follow KLM decision and keep the fuel surcharge at least until the end of the year. But this is my personal opinion only.' [*] (LX) replied[183] on 22 November 2001 and [*] replied[184] on 23 November 2001 that they maintain the FSC. [*] replied[185] on 23 November 2001 that '[*] will maintain 0.15 and [*] will maintain 0.25 CHF fuel surcharge at least until end of 2001.'

(203) [*] ACCS [*] sent an email[186] on 4 December 2001 to [*] members of ACCS informing them that [*] would drop the FSC from 15 December 2001 on the Asian market, and he wrote to competitors that he 'would like to know the newest update from your airline.' [*] (JL) replied[187] the same day that 'JAL Switzerland will keep fuel surcharge of CHF 0.15p kg …' [*] also replied[188] the same day stating '[*] no decision yet. Do not recommend to drop.' [*] replied[189] still the same day that 'we still study in regards with this matter. Please publish which airlines will follow…' [*][190], [*][191], [*][192] and MP[193] also replied the same day.

(204) [*] (SK) sent an email[194] on 6 December 2001 to [*] ACCS members informing them that 'SAS Cargo will terminate the fuel surcharge'. MP[195], AF[196] and JL[197] also informed [*] ACCS members in emails sent on 7 December 2001 that they would cancel the FSC.

4.3.8.5. Hong Kong

(205) In an internal QF email[198] on 26 October 2001 [*] stated that 'during the interline business lunch held a couple days ago, all airline executives expressed that we would not initiate cancellation of this surcharge even if it falls below 110 until HK CAD takes action'.

(206) The BAR CSC [*] (CX) sent a letter[199] to [*] BAR CSC members on 19 November 2001 on the FSC subject. Members were informed that 'it is likely that the fuel index will go below 110 very soon. When it happens BAR CSC will have to apply to CAD to withdraw the current surcharge.' Members were then requested to 'advise me if your head offices have any plan to reduce or withdraw the fuel surcharge in overseas markets'.

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(207) In an internal QF email exchange[200] on 20 November 2001 concerning the fuel index [*] asked 'should we voluntarily remove the fuel surcharge before decision of the BAR Cargo Subcommittee[?] The general consensus in the industry is trying to keep the sleeping dog alive for a while.'

(208) The BAR CSC [*] (CX) sent a letter[201] to the Hong Kong CAD on 7 December 2001 informing them that the 'BAR CSC held a meeting today and decided to remove the current fuel surcharge effective from December 11, 2001.'

4.3.9. Competitor contacts concerning the modification of the fuel index and of the reintroduction of the FSC in spring 2002

(209) LH decided to modify the FSC methodology after the suspension of the FSC in December 2001. The new LH methodology was published on 23 January 2002 and it was preceded by contacts and discussions between airlines. LH announced the reintroduction of the FSC on the basis of the new mechanism on 28 March 2002 with effect from 15 April 2002 then they postponed it to 25 April 2002. AF announced the reintroduction on 2 April 2002 with effect from 22 April 2002, KL announced it on 4 April 2002 with effect from 1 May 2002, [*] announced it on 4 April 2002 with effect from 15 April 2002 and BA announced it on 18 April 2002 with effect from 22 April 2002. The details of the reintroduction were also the subject of exchanges between competitors. [*] states that [*][202].

(210) [*] states that [*][203].

4.3.9.1. Head office involvement

(211) In 2002 a number of companies appear to have entered into contacts about the implementation of a worldwide FSC.

(212) In an internal LH email[204] chain on 6 December 2001 [*] stated that 'I have had in the last days various conversations with KLM and AF about the FSC topic. Both carriers indicated great readiness to harmonise the FSC index.' As a reaction to this email [*] wrote[205] to [*] the same day that 'I find the harmonisation of the indexes (and from this would surely follow the methodology) extremely problematic on the basis of cartel law.' On 25 January 2002 [*] forwarded the same email again[206] to [*] adding another comment including that 'I have taken over BA/SK and SQ.'

(213) [*] states that he prepared the [*] fuel index in January-March 2002 on the basis of the new LH fuel index that was published on the Internet on 23 January 2002. [*] states that [*]. [*] states [*].[207]

(214) In an internal LH email on 15 January 2002 [*] sent the new FSC mechanism of LH to [*] and asked him to send signals to Paris and Amsterdam that this was the path LH would take and that they (AF and KL) could easily take a similar path. He also

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201 [*]
202 [*]
203 [*]
204 [*]
205 [*] (Orig. DE).
206 [*] (Orig. DE).
207 [*]

stated that he had already talked to SK and his former employer (BA) about it and that he would contact [*][208].

(215) In another internal LH email[209] on 24 January 2002 [*] reported to [*] under the subject 'fuel surcharge methodik' a 'feedback of my talks with AF'.

(216) The diary[210] of [*] (LH) contains the notes 'AF- [*] 31.1.02; 15.2 meeting with Forwarder; non commissionable'. This is explained by [*] as a reference to an agreement between himself and [*] of AF [*][211].

(217) According to [*][212] 'comfort calls' took place between LH and KL before the reinstatement of FSC by KL on 1 May 2002.

(218) From [*] emails of 22 March 2002 it appears that AC was in contact with LH regarding LH's plans for FSC increase[213].

(219) [*] (JL [*] Paris) reported[214] in an internal JL email on 26 March 2002 that 'just heard from AF that they are considering to resume a F/S as from Apr 15th… They have already approached the Cargo Forwarders Syndicate to that end. It seems also that LH have started communicating 'unofficially' on the same subject in Germany.' Then on 27 March 2002 [*] sent another internal JL email[215] stating that 'received confirmation this morning from LH/CDG that LH will implement a F/S of EUR 0.05 on actual wgt as from Apr 15th'. Then he described in detail the FSC mechanism of AF.

(220) [*] (LH) forwarded an email[216] to [*] on 27 March 2002 containing information on the date of introduction of the FSC by LH. The information was published on 28 March 2002[217].

(221) [*] (BA) sent an internal email[218] on 27 March 2002 in advance of the BA commercial meeting the same day in which he indicated the BA fuel index movements and noted that 'under the fuel index methodology BA will impose a GBP 0.03/kg FSC when the index exceeds 125 for two weeks, ie, now'. Under the line 'factors to consider at the commercial meeting' he mentioned competitor action. Furthermore, handwritten notes next to the line 'competitor action' state: 'LH, KLM, SQ 15/4, AF 22/4'. KL introduced FSC on 15 April 2002, SQ announced the FSC on 15 April and introduced it on 1 May 2002 and AF introduced FSC on 22 April 2002. LH announced on 28 March 2002 that it would introduce FSC on 15 April 2002 but then they postponed it to 25 April 2002.

(222) [*] sent another internal BA email[219] on 3 April 2002 concerning the fuel index containing a list of public announcements of competitors. A copy of this email also contains handwritten notes indicating 'KLM 1/5, AF 22/4'.

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209 [*] (Orig. DE).
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(223) In an internal LH email[220] on 3 April 2002 [*] referred to a phone call where he discussed the reintroduction of FSC with SQ. He reported that SQ intended [*] not to introduce FSC. In a reply[221] to this email on 11 April 2002 [*] complained that if so simple things as the surcharge do not work with WOW partner SQ [*]. In comparison he referred to the good cooperation with SK.

(224) In an internal MP email on 2 April 2002 with the topic FSC, [*] stated that 'BA phoned and indicated they are deeply considering'. He also wrote that he 'will check with AF/[*] and rest of market and provide feedback'.[222]

(225) In an internal MP email chain on 2 and 3 April 2002 [*] asked MP staff to 'advise activities for reintroducing FSC'. As a response [*] wrote that 'AF will start per 22/4 (0.05 Euro) based on chargeable weight. We expect today similar announcements from CV and BA. KL will consider same per 1 May, will be decided tomorrow'. Then [*] responded that 'both LH/AF NBO have confirmed this info. KL cgo mgr abroad, so no cfrm frm their side. [*] have made no announcements as yet but will most likely follow suit. Awaiting info from charter operators like [*], etc'. [*] wrote the last email in the chain adding that 'CV & BA are likely doing it. I have not heard back from AF/[*]'[223].

(226) [*] (LX) sent an internal email[224] on 2 April 2002 asking LX employees whether they had any news from their 'local home carriers' with regard to the FSC.

(227) An internal LX email sent on 3 April 2002[225] asked local LX employees to send competitor information regarding the FSC implementation. It noted that partner/competition contacts were taking place in parallel.

(228) [*] (LX [*] for the United Kingdom & Ireland) sent an internal email[226] on 3 April 2002 as a response to [*] in the head office stating that 'AF will introduce FSC as of April 22; 0.03GBP. KL no news yet, BA no intention yet'.

(229) An internal LX email[227] on 3 April 2002 concerning the subject fuel surcharge states that the ACCS[228] in CH is collecting all data from [*] airlines.

(230) In an internal email[229] on 5 April 2002 [*] (LX [*] for Benelux) informed the head office that 'as per May 1st KL will introduce Euro 0.05 FSC'.

(231) On 5 April 2002, [*] emailed AC [*] attaching [*] FSC sales announcement effective from 19 April 2002[230].

(232) An internal CX email chain on 27 March 2002[231] [*] instructed local CX employees to actively discuss with national carriers and interlines (wherever legally allowed) to push for FSC. [*] (CX) forwarded the email to QF on 4 April 2002 and asked

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224 [*]
225 [*]
226 [*]
227 [*]
228 Airline Cargo Council of Switzerland.
229 [*]
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whether QF Cargo HO had given any indication of any possible action on this subject.

(233) In an internal BA email[232] on 16 April 2002 [*] reported that 'the all airline cargo committee called a meeting yesterday regarding a fuel surcharge. It was decided that all carriers operating out of BAH are to levy a uniform fuel surcharge of BHD 0.020p/k charged on the actual weight. This is effective 01May02… Pls adv if it is OK with you to go ahead with the FS as BHD 0.020p/k.' This email was forwarded to [*] in the head office, who authorised the local deviation.[233]

(234) Towards the end of April 2002 [*] circulated internally a 'Competitive Surcharge Matrix'. The surcharge matrix appears to have been originally circulated by [*] at BA to a number of air cargo carriers including [*], [*], LH, AF, JL, CX, KL, AC and [*]. The matrix contains details of security, fuel surcharges[234].

4.3.9.2. Switzerland

(235) [*] (MP) wrote an email[235] on 9 April 2002 to the ACCS [*] and [*] ACCS members informing them that 'Martinair will introduce a fuel surcharge of CHF 0.10 p.k.'

4.3.9.3. Hong Kong

(236) In an internal QF email[236] on 3 April 2002 [*] reported to the head office about a BAR CSC meeting where 40 major carriers discussed which FSC mechanism should be used.

(237) In an internal QF email[237] on 9 April 2002 [*] reported under the subject 'fuel surcharge' that almost every carrier in HK indicated intention to follow CX's track. LH, SK, BA, AF, SQ, QF expressed that they had to seek head office's instruction before following CX. It is stated that 'SQ will not have fuel charge [*]fuel surcharge.'

(238) The [*] of BAR CSC, [*] (CX) sent a questionnaire to [*] members concerning FSC on 10 May 2002[238] in order to prepare discussion at the BAR CSC meeting on 16 May 2002.

(239) In an internal QF email[239] on 13 May 2002 [*] stated that 'BAR CSC was originally aimed at to implement FSC when the index reaches 130. However there is no indication that the index will reach 130 in the near future. Therefore BAR CSC is calling for airlines opinion whether the industry should take another appropriate move.'

(240) [*] (QF) reported in an internal email[240] on 16 May 2002 that he attended the BAR CSC meeting where airlines agreed to use LH's current mechanism as the benchmark with the benefits of a lower trigger point and a higher amount.

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(241) In an internal BA email[241] on 6 June 2002 [*] reported that 'after a joint lobbying together with CX and LH', CAD agreed to implement a new FSC mechanism for 60 companies, including BA, starting from 19 June 2002.

(242) In an internal QF email[242] on 12 July 2002 a BAR CSC lunch meeting is reported where [*] informed [*] members that 'CAD will most likely approve our application for a fuel surcharge under the new mechanism with a lower trigger point….Remark: fuel index of LH will be used as benchmark for different levels of fuel surcharge in HKG'.

4.3.9.4. Singapore

(243) The minutes[243] of a BAR-CSC meeting held on 25 April 2002 report an agreement on FSC: 'Due to escalating jet fuel prices, most carriers will be implementing fuel surcharge in May 2002'.

4.3.9.5. Japan

(244) In an internal CX email chain[244] on 11 April 2002 CX's [*] in Japan stated that 'I know well, it would be very hard to implement FSC alone, I'm now talking with interlines, not only Japanese carriers but also major foreign airlines such as [*], LH, BA and SQ, and as far as I know [*] and LH are now tackling with JCAB[245] and they intend to implement FSC wef. 22 Apr 02 if it was approved by JCAB. Please discuss with interlines at your port too and urge them to introduce FSC asap.'

4.3.10. Competitor contacts concerning the increase of the FSC in autumn 2002

(245) As the fuel prices rose in August and September 2002 the fuel index reached the next trigger points prompting airlines to contact each other in order discuss the timing of the FSC increase. The evidence listed in this Section describes these contacts. LH announced the increase of the FSC on 5 September 2002 with effect from 23 September 2002.

4.3.10.1. Head office involvement

(246) An internal BA document titled 'competitor fuel indices' dated 9 September 2002 refers to the increase of FSC by Cargolux that was made public on 10 September 2002[246].

(247) In an internal AF email[247] on 4 September 2002 [an] AF employee in Russia reports an informal meeting with LH that took place 'from time to time' between them. Among the points discussed appears also 'Surcharge fuel: the LH head office seriously considers implementing worldwide a fuel surcharge of USD 0.10/kg iso USD 0.05/kg actual, and this is from 23 Sep 02.'

(248) In an internal LX email[248] on 4 September 2002 [*], [*] Switzerland, stated that he 'understand from my LH counterpart that they will increase the FS by 0.05 SFR as per 23.9.2002. Market will be informed within 48 hrs. Pls treat this info very

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245 Japanese Civil Aviation Bureau.
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247 [*] (Orig. FR).
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confidential.' [*] then on 5 September 2002 internally forwarded an email[249] that he had received from LH on 4 September 2002 that contains the preliminary announcement of the adjustment of LH's FSC. Still on 5 September 2002, in another internal LX email,[250] [*] stated that 'we will wait for the next index which is due on September 9th and will then check with the markets what next steps will be taken.'

(249) According to the minutes[251] of a meeting between AC and LH on 5 September 2002 where a possible cooperation was discussed, LH 'informed Air Canada that they will levy a fuel surcharge of USD 0.10/kg (CAD 0.16/kg) on actual weight effective Sept 23rd, 2002. Air Canada's fuel index has also risen above the threshold of 135 for two consecutive weeks, and they expect an increase shortly.' This meeting was also confirmed by [*].[252]

(250) An internal LX email on 11 September 2002 announces that 'after bi-lateral talks on the issue and general support in all markets, we decide to implement the 2nd level of the fuel surcharge worldwide, in line with the officially communicated model. (see internet – fuel surcharge) by Monday 30 September (date of AWB[253] issuance)…For your information, we have confirmation of implementation by following carriers at the moment: LH 23.9/ BA 23.9/ KLM 1.10/ CV 21.9/ [*] 23.9'.

(251) The QF employee in Germany reports in an internal QF email[254] on 7 September 2002 that 'I have managed to get confirmation from the following airlines re fuel increase'. Then the following information is listed in a table format under the headings 'airline', 'effective date' and 'cost': '[*], 16 Sept 2002, EUR 0.10; Singapore, 01 Oct 2002, EUR 0.10; Lufthansa, 23 Sept 2002, EUR 0.10; Cathay Pacific, 23 Sept 2002, EUR 0.10; [*], 23 Sept 2002, EUR 0.10; [*], 23 Sept 2002, EUR 0.10; [*], 23 Sept 2002, EUR 0.10; British Airways still waiting for the final decision ex LHR; Martinair will confirm early next week as to effective date and at what level.'

(252) An email[255] written by AF on 6 September 2002 explains the AF FSC mechanism and states that 'AF, in accordance with its commitment to the industry, must wait until Sep 30 to determine the monthly average. Should the 135 threshold be activated, then AF will announce an increase in its fuel surcharge, from 5 to 10 cents, effective October 15.' This email was forwarded[256] to [*] and [*] on 9 September 2002 with the line 'we would like to ask you to inform us your plan.'

(253) An internal AF email[257] on 13 September 2002 under the subject 'last compilation – fuel – what are they doing' summarises information concerning the FSC plans of [*], [*], JL, BA, [*], KL, LH. It states that '[*] and KLM Cargo said they will increase their fuel surcharge from the present rate of five cents a kilo to 10 cents, effective Oct. 01.'

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253 = Air Waybill.
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256 [*]
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(254) In an internal LH email[258] on 16 October 2002 [*] reports a meeting with [*] where various topics were discussed. It is noted that 'fuel and security surcharge will be applied largely following our example'.

4.3.10.2. Switzerland

(255) The ACCS [*] wrote an email[259] to [*] ACCS members on 12 September 2002 that 'in order to prepare an updated fuel surcharge list kindly ask you to advise till Friday 13th September 2002 your latest increase incl. implement date, actual or chargeable weight.' This triggered a chain of emails. The AC employee answered[260] the same day that 'just learnt that AC will increase fuel surcharge eff Oct 01 from 0.10 to 0.15 chf.' The SQ employee replied[261] also the same day that 'SQ has decided to increase the FSC from CHF 0.10 to 0.15 with effective 01 October.' [*] replied[262] that '[*] will increase FSC to CHF 0.15/kg on actual weight effective Oct 01, 2002.' [*] replied[263] on 13 September 2002 that '[*] will implement the 0.15 fuel surcharge on actual weight as of 1st October 2002.' MP replied[264] on 13 September 2002 that 'No decision made at MP-SPL yet'.

4.3.10.3. Japan

(256) An internal LH email[265] on 30 September 2002 reports that 'representatives of 8 major TC2 airlines (LH/JL/AF/[*]/BA/KL/[*]/[*]) met confidentially this afternoon to exchange their status, plans and views regarding FSC'. The position of the airlines is then reported in detail. In the summary it is stated that 'participants left the meeting with the following common understanding: all 8 airlines will introduce FSC with no exceptions in origin markets (TYO/OSA/NGO), destination areas (TC 1/2/3), forwarders and shippers. Allowing one exception will defeat the whole industrial movement. [*].'

(257) An internal QF email[266] on 30 September 2002 states that 'OAA meeting 26 Sep, Fuel surcharge JL/[*]/[*] – Will be effective on 16Oct; CX/SQ – trying to let it be effective on 16Oct to 01Nov; [*]/[*]/[*]/[*] etc no will at this stage. According to JL/[*] who have already contacted agents on F/S most of agents have shown refusal attitude.'

4.3.11. Competitor contacts concerning the FSC increases in March 2003

(258) As the fuel prices rose further in early 2003 due to the expectations concerning the possible hostilities in Iraq, the fuel index reached the next trigger point and the airlines started contacting each other again concerning the increase of the FSC. As a result of the steep increase of the fuel price the FSC was raised by many airlines twice in a row in March 2003 and new trigger points were introduced to the FSC mechanism.

258 [*] (Orig. DE).
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(259) The evidence in this Section also reflects that the contact networks between airlines further developed during this period. [*] states that [*][267].

(260) [*] states that competitor contacts included the introduction of new trigger points to the fuel index in March 2003 which was discussed at least between LH and BA and KL. AF participated in such discussions with LH at least from May 2004.[268]

4.3.11.1. Head office involvement

(261) [*] states that [*][269].

(262) [*] (MP) sent instructions to MP Regional Managers of Europe in an internal email[270] on 16 January 2003 stating that 'please keep a close eye to your respective market and let me know the plans of home carriers like KLM, LH, AF, CV, BA, etc.'

(263) [*] (KL) called [*] (CV) a number of times between 21 January 2003 and 11 February 2003 to inquire whether CV was planning to go to the next trigger of the FSC[271].

(264) [*].[272]

(265) [*][273].

(266) The minutes[274] of a KLM Cargo Management Meeting on 11 February 2003 show that one of the points discussed was 'impact fuel surcharge'[275]. The minutes note under this point that 'All participate no impact; be not first mover, get allies within one week. Implement with LH'.

(267) [*] states in an internal MP email[276] on 11 February 2003 that 'we plan to increase fuel surcharge per 1 March 2003. … Have spoken with other carriers and they have same plan.'

(268) The phone records of [*] (KL) show that he contacted [*] (LH) on 12 February 2003 to inform him that [*] would be his contact at KL for any questions on changes to the FSC of KL[277]. The phone records show that [*] called [*] on 3 March 2003 to take contact[278] and that [*] called [*] again on 11 March 2003 to discuss the FSC announcements of the same day[279].

(269) [*] (MP [*] Americas) wrote in an internal MP email[280] on 13 February 2003 reacting to the news that MP plans to increase the FSC that 'here in UIO and BOG mention that all carriers are likely to do it but just waiting for one carrier to make an announcement then all else will follow.' [*] (MP [*] North America) replied[281] the

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same day that 'I placed several call this week regarding fuel surcharge but have only heard back from Lufthansa.'

(270) In an internal LH email[282] [*] reported that he has spoken to more airlines and listed the topics FSC, [*]. Under FSC he noted: 'BA wants to increase on 02.03.03. […] KL also wants to go up on 01.03.03 or 03.03.03 [*] also goes in the direction, implementation: 03.03.03 SAS only wants to increase on 10.03.03.'

(271) In an internal LH email[283] on 12 February 2003, [*] stated that [*]. He added that [*][284].

(272) From the agenda dated 13 February 2003 of a further follow-up meeting between LH and AC at the Montreal airport it appears that also FSC were discussed. Next to this item [*] had written 'letter coming out'[285] but [*] has stated that [*][286].

(273) An internal QF email[287] on 17 February 2003 sent to the head office from the United Kingdom states that 'the following carriers in UK have indicated they will be increasing the FSC from GBP 0.06/kg to GBP 0.09/kg: BA LH KL SK [*] SQ CX [*]. Germany LH are expected to announce an increase from EUR 0.10/kg to EUR 0.15/kg tomorrow.'

(274) On 17 February 2003 LH forwarded[288] its announcement to increase the FSC to its competitors [*], [*], AC, AF, CV, CX, JL, [*], KL, LA, [*], [*], [*], SQ, SK and [*].

(275) In an email on 25 February 2003 [*] sent to [*] (LA) the names of [*] and [*] to be contacted at LH.[289] [*] sent an email[290] to [*] and [*] the same day stating that 'I have the task of looking into developing LAN Chile's fuel index. …I thought that maybe you could help by giving me information as to how the LH index is built (methodology).' [*] asked [*] (LH) on 28 February 2003 to contact [*].[291] [*] sent an email to [*] the same day to explain the LH methodology and added that 'you could take the same method like we do and just copy the results from our Internetpage… If you take same trigger points and calculation method everything is fine like this.'[292] [*] sent another email[293] on 11 March 2003 to LH stating that 'we have looked at your fuel index and have decided that would like to do something very similar to what you are doing today.'

(276) In an internal LH email[294] on 4 March 2003 [*] reported that he spoke to BA and KL and he made it clear that if the 190 limit was passed the next level of the FSC would be implemented. To be announced on 10 March 2003 and implemented on 24 March 2003, 14 days later.

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282 [*] (Orig. DE).
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(277) In an email[295] on 10 March 2003 [*] (BA) makes reference to discussions concerning the FSC with KL and LH.

(278) On 10 March 2003 [*] (LH) sent the announcement of LH on the increase of the FSC to [*] (KL)[296]. [*] recalls[297] that [*].

(279) LH forwarded[298] the press release concerning its FSC increase to a number of competitors ([*], [*], AC, AF, CV, CX, JL, [*], KL, LA, MP, [*], [*], [*], SQ, SK, [*]) on 10 March 2003.

(280) [*] reports in an internal LH email[299] on 11 March 2003 that the 'colleagues from the Island' asked [*][300]. He also reports that LAN Chile contacted him as they wanted to introduce a fuel price index. He also notes that BA will probably increase the FSC on 30 March 2003 and KL probably on 25/26 March 2003. He then wrote another internal email[301] the same day adding 'update from KL'… 'from 24 March 2003 they also take 20 cent fuel'.

(281) [*] sent an internal LH email[302] on 14 March 2003 to which he attached a BA press release issued on 13 March 2003 announcing that BA added two new trigger points to its mechanism. [*][303].

(282) In an internal LX email[304] on 13 March 2003 it is stated that '[*] is currently meeting competitors at the IATA meeting and will have opportunities to hear what others plan also.' [*] replied[305] on 16 March 2003 that 'I have had the possibility to talk (unofficially) wit many major airlines last Friday. Most airlines (LH, BA, KL, AF) plan to introduce the 4th level on the 24th Mar … also [*] told me on Friday that they plan to follow the same day'.

(283) On 17 March 2003, [*] emailed [*] (AC) attaching [*] FSC Fees Announcement effective from 1 April 2003[306].

4.3.11.2. Czech Republic

(284) AF started an email chain[307] on 13 February 2003 by asking BA, LH, KL, [*], LX 'do you have some news concerning on increasing of FS? Should we meet briefly to discuss this issue when info collected?' LH replied to all[308] the same day noting that 'I'ld appreciate, if we could have a brief meeting to agree on a common amount in CZK'. Then BA replied to all[309] still the same day stating that 'we have already received an official request fm HQ to increase it eff. 2 Mar to 0.15 EUR or 0.09 GBP – so I am more than happy to meet and discuss that issue with you.' The whole email

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301 [*] (orig. DE).
302 [*] (orig. DE).
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307 [*]
308 [*]
309 [*]

chain was forwarded[310] by the local LX employee to the LX head office asking for information on plans of LX.

4.3.11.3. Switzerland

(285) LX sent an email[311] on 18 February 2003 to the ACCS [*] stating that 'ab 3.3.2003 sfr 0.22 per kilo auf dem actual weight is confirmed. Our customers will be officially informed on feb 19th in the morning.'

(286) The ACCS [*] sent an email[312] to [*] members on 18 February 2003 stating that 'Heavy discussion started in regard to fuel surcharge… Due to this we would like to recommend to follow our home carrier as well as some main carriers as per following details: new fuel surcharge: sfr 0.22/kgs; effective date: 03.03.03'. JL replied to all[313] the same day that they 'will increase this surcharge by March 3, 2003 (date of uplift) from actually CHF 0.15 to CHF 0.22 p. kg chargeable weight.'

(287) LX sent an email[314] to the local representative of [*] and copied the ACCS [*] and LH on 21 February 2003 to invite him to a meeting to discuss the FSC implementation in Switzerland as [*]'s reluctance to follow the other airlines caused confusion. [*] accepted the invitation in its reply[315] the same day. The result of the meeting was then reported in an internal LX email[316] on 21 February 2003 stating that 'the local representative could be convinced that he would take up the matter again with [*] head office and recommend a partial introduction of some 0.10-0.15sfr.' [*] then announced on 25 February 2003 in an email[317] to LX, LH and the ACCS [*] that after consultation with the [*] would introduce a FSC of 15 SFR from 10 March 2003.

(288) In an email[318] on 11 March 2003 referring to 'rumours that a further increase is in sight' LX asked LH and the ACCS [*] 'what steps we take in the ACCS?' LH replied[319] the same day that 'as from 24th March LH will implement a fuel surcharge of EUR 0.20/kg actual weight. This will be then CHF 0.30/kg and not CHF 0.29/kg, do you agree?'

(289) An internal LX email[320] on 17 March 2003 states that 'as already confirmed on several occasions Switzerland will start on March 24th, 2003 in agreement with the Executive Board of ACCS and VTR Air.'

(290) The minutes of the ACCS meeting[321] on 2 April 2003 indicate that 'in February '03 came the big hysteria of the fuel surcharge. The [*] thanks [*] members for the active part in agreeing on the same amount.'

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310 [*]

311 [*] The English translation of the text is: 'from 3.3.2003 CHF 0.22 per kilogramm on the actual weight…'

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314 [*] (Orig. DE).

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4.3.11.4. Canada

(291) The LH local [*] in Canada sent an email to AC on 17 February 2003 forwarding the FSC announcement of LH. He then asked in a further email on 24 February 2003 whether there was 'any news on what AC has decided in this regard'. AC replied that 'yes, same thing, except we are charging 24 CDN cents ex Canada.'[322]

(292) An LH local [*] in Canada sent an email[323] on 2 April 2003 in which he reported a meeting with AF, AC, CX, BA, [*], [*], JL, [*], KL where 'the main topic was to ascertain who charges what and if schedules have been affected by the war'.

4.3.11.5. Hong Kong

(293) In an internal QF email[324] on 6 January 2003 it is explained that 'every time when the index increases to the trigger point, BAR-CSC [*] will call for a meeting to discuss the effective date as CAD requests carriers to give enough time to the agents to adapt for the increase.'

(294) An internal QF email[325] on 11 February 2003 states that 'have checked with CX and been advised that LH still has not released the fuel index ending week Feb 07, 03.'

4.3.11.6. Singapore

(295) The minutes[326] of a BAR CSC meeting held on 23 January 2003 indicate that 'member carriers commented that the fuel index has increased, but they have not received any instruction from their head offices to increase the fuel surcharge'. Attendees at the meeting were SQ, AF, [*], [*], CX, CV, [*], [*], JL, [*], [*], [*], [*], [*], [*], [*], [*], [*], SK, [*].

(296) In an internal QF email[327] on 18 February 2003 it is reported that 'SQ will run with increase F/S SGD 0.25 per kg from 01 Mar. AF are following SQ from same date. KL/LH introducing same level but from 03 Mar. BA have introduced GBP 0.09 per kg in Europe… Other airlines yet to confirm but no doubt we will hear more today.'

4.3.11.7. Thailand

(297) In an internal QF email[328] on 13 February 2003 as a response to a request for information on competitors' action the QF employee in Thailand wrote that he 'checked with LH, [*] AF KL [*] LX [*] JL [*] and [*] still remains no movement at this stage.'

(298) The [*] of Airline Cargo Business Association ('ACBA') in Thailand wrote a letter[329] to [*] ACBA members on 17 February 2003 in which he asked that 'in order to avoid confusion among freight forwarders and shippers, we would like to request those members who intend to impose the fuel surcharge having the same practice locally.' The letter was forwarded to [*] members by email[330].

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4.3.11.8. India

(299) The minutes of the meeting[331] of BAR (India) Cargo held on 3 March 2003 record an agreement to increase the FSC on all general cargo ex India from 16 March 2003. Furthermore it was agreed that a sub-committee, comprising representatives from LH, LX, [*], [*] and [*] was also revived to discuss the FSC index and report to members. In respect of perishable cargo, the minutes record that the status quo on the FSC would be maintained for the Gulf.

(300) In an internal BA email[332] on 4 March 2003 [*] reported under the subject 'BAR India meeting 3 Mar' concerning the FSC on perishable goods that 'it was agreed that FSC will remain RS 2.25/kg as at present [*].'

4.3.12. Competitor contacts concerning the FSC decrease in April 2003

(301) The fuel price started to drop again in April 2003 and the fuel index shrank to a lower level that inspired airlines to exchange information concerning plans to reduce the FSC.

4.3.12.1. Head office involvement

(302) On 3 April 2003 [*] (KL) called[333] [*] (LH) to inform him that KL [*] would probably reduce the FSC as the fuel price was decreasing. [*] called[334] [*] again on 7 April 2003 to discuss the FSC announcements of KL and LH of the same day.

(303) On 7 April 2003, LH [*] emailed to (undisclosed recipients amongst whom) AC attaching LH's FSC decrease to USD 0.15 (CAD 0.23) effective from 21 April 2003[335]. In a reply of the same day AC [*] asked LH [*] if he could check the CAD equivalent because AC charged CAD 0.24 and would like to keep it on this level as the Canadian dollar was declining[336].

(304) [*][337] [*]. [*][338].

4.3.12.2. Switzerland

(305) The ACCS [*] sent an email[339] to [*] ACCS members on 25 April 2003 stating that 'have just been officially informed by home carrier LX that they will reduce the fuel surcharge from CHF 0.22/kgs to new CHF 0.15/kgs eff 5.5.03. Please note due to this [*] will follow.' [*] replied[340] the same day stating that '[*] will follow with decrease of fuel surcharge to CHF 0.15 effective 05.05.2003'. [*] also replied[341] the same day that '[*] will reduce to CHF 0.15/kgs, effective 07 May 03.'

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4.3.12.3. Thailand

(306) In an internal QF email[342] on 25 April 2003 under the subject fuel surcharge it is reported that 'we have checked with [*] JL LH [*] [*] [*] [*] they have no action and no plan on this yet.'

4.3.13. Competitor contacts concerning the FSC increase in December 2003

(307) The fuel prices remained stable throughout the summer and autumn of 2003 and started to rise again only in late November. The renewed increase in fuel prices brought with it the renewal of intensive contacts between the airlines.

4.3.13.1. Head office involvement

(308) [*] ([*]) states[343] that [*]. [*] confirms they spoke about the index and FSC.

(309) [*] ([*]) states[344] that [*]. [*] states that [*].

(310) [*] (MP) sent an internal MP email[345] on 25 November 2003 stating that 'KL will decide end of this week regarding increase of FSC.'

(311) An LX employee sent an internal email[346] on 26 November 2003 in which he stated that he had 'talked to the German [high-ranking executives] of BA, AF, KL and LH. None of them increases the fuel surcharge yet, they wait till next week.'

(312) [*] forwarded its press release concerning the increase of the FSC on 3 December 2003 to LA and LX the same day[347].

(313) On 4 December 2003 at 7.18 am the LH sales department for Germany sent an email headed 'important information of LH Cargo regarding increase of FSC' (German original) to a number of carriers in Germany (AC, AF, CV, CX, JL, [*], KL, LA, MP, [*], [*], SK, SQ, [*], [*]) containing the press release of the same day stating that Lufthansa Cargo was raising the FSC to EUR 0.15/kg of actual weight, effective 18 December 2003[348]. This email was forwarded to AC Canada who replied that an internal note was sent 'as to a recommended approach'[349]. [*] it appears that AC already had information regarding the future FSC positions of [*], [*], BA and [*]. AC did not see a possibility to follow LH's move[350].

(314) In an internal CX email[351] on 4 December 2003 it is stated that 'a rumour however is that KLM/Martinair will increase the fuel the following week.'

(315) [*][352] [*].

(316) [*][353].

(317) [*][354].

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(318) On 16 December 2003 [*] (KL) called [*] (LH) to discuss the upcoming FSC changes[355]

(319) In an internal LH email[356] on 4 December 2003 [*] summarized information on the competitors' intentions: [*].[357] [*][358].

(320) In an internal LX email[359] on 4 December 2003 it is stated that 'just spoke to LH. They are discussing but no decision is taken yet. They will call me once they made a decision. All others like BA, KL, AF and others are waiting what LH is doing.'

(321) [*] (MP) sent an internal MP email[360] on 4 December 2003 in which he forwarded the announcement of [*] concerning the increase of the FSC and added that 'KLM and LH will take a decision in coming days.'

(322) In an internal QF email[361] on 5 December 2003 it is stated that '[*]/CX/[*] plan to increase will announce effective date and amount on Monday 08 Dec 2003. MP are waiting to see how KLM/AF react and will also announce the outcome early next week.' In the reply[362] the same day it is stated that 'SQ have confirmed in UK they will increase from 18 Dec 2003.'

(323) In another internal QF email[363] on 5 December 2003 it is stated that 'so far BA, [*], LH, SQ, JL have confirmed increases of EUR 0.05/kg to EUR 0.15/kg and an increase in UK of GBP 0.03 to GBP 0.09/kg effective 18 Dec 03. Carriers expected to announce on Monday are AF, KL, [*], MH, MP and CX.'

(324) [*] (KL) sent an email[364] to [*] (MP) on 5 December 2003 and concerning the FSC he mentioned that the KL fuel index had not passed the trigger point for enough time yet.

4.3.13.2. Czech Republic

(325) LH local employee sent an email[365] on 4 December 2003 to [*], LX, KL, AF informing them that 'was just informed that Lufthansa Cargo is raising the fuel surcharge to EUR 0.15/kg of actual weight, effective 18 December 2003. What are your plans?' [*] replied[366] on 9 December 2003 that '[*] will not increase F/S till the end of year 2003. If will be some changes validation could be during Jan 2004.' KL also replied[367] on 9 December 2003 that 'also KLM remains on status quo regarding the fuel surcharge for the time being.' LH responded[368] that 'the FSC seems not to be the industry standard any more'.

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4.3.13.3. Switzerland

(326) In an internal LX email[369] on 4 December 2003 it is stated under the subject 'fuel surcharge' that 'have spoken today also to [*]/AF and [*] LH but no decision/news so far.'

(327) In an internal LX email[370] on 6 December 2003 it is suggested to 'call for a meeting with [*]/LH/[*]/SQ/AF/KL on Monday 8.12'

(328) LX sent[371] the announcement concerning the FSC increase to the ACCS [*] on 5 December 2003 before sending it to customers.

(329) In an internal LX email[372] on 6 December 2003 [*] suggested not to communicate the increase of FSC yet, as he wanted to talk to ACCS the following Monday so that they issue a recommendation. [*] replied[373] on 8 December 2003 that the recommendation was accepted so the increase of the FSC could be communicated.

(330) On 6 December 2003 LX resent[374] the email of the previous day concerning the FSC increase to the ACCS [*] and asked him to issue a recommendation.

(331) The ACCS [*] sent an email[375] to [*] members on 8 December 2003 stating that 'the ACCS would appreciate that all carriers who introduce the fuel surcharge set the date to 15.12.03.' [*] (MP) replied[376] on 9 December 2003 that 'MP will increase the FSC'. [*] replied[377] on 9 December 2003 that 'our head office in [*] has decided. [*] maintains status quo.' LX then sent an email[378] to LH on 17 December 2003 asking LH to call him to discuss how to react to [*]'s email.

4.3.13.4. Hong Kong

(332) The BAR CSC [*] wrote a letter[379] to [*] members on 5 December 2003 informing them that the fuel index reached the next trigger points and that according to the FSC mechanism BAR CSC airlines would levy a higher FSC.

4.3.13.5. Singapore

(333) According to the minutes[380] of an extraordinary BAR CSC meeting on 8 December 2003 carriers discussed plans regarding the FSC in the light of the latest increases in fuel prices. Airlines tried to determine the optimal level of FSC that would be sustainable for the market. It was agreed that following the meeting the BAR CSC would 'survey' [*] members to see the implementation dates and amount of their FSC and to disseminate the information.

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4.3.13.6. India

(334) In an email[381] on 8 December 2003 [*], the [*] of BAR (I) Cargo announced to [*] members that 'the applicable FSC will be Rs 8/kg…This will be effective on 01 Jan 2004. Please confirm your airlines' implementation of same for our records.'

4.3.14. Competitor contacts concerning the introduction of new trigger points to the fuel index and the FSC increase in May 2004

(335) The further increase of the fuel prices made it necessary for airlines to introduce further trigger points to the FSC mechanism to make further FSC increases possible. Discussion between airlines went on in parallel concerning the introduction of new trigger points and the increase of the FSC in late spring 2004. [*] states that the introduction of new trigger points to the fuel index in May/June 2004 was discussed at least between LH and BA, AF and KL.[382]

4.3.14.1. Head office involvement

(336) [*] states that [*] and [*] (LH) had regular telephone contacts from 2004 to February 2006. [*] also states that most of these contacts occurred when the fuel indices were approaching or had reached trigger points or when plans to introduce new trigger points were being envisaged. A substantial number of calls from [*] to [*] between September 2005 and February 2006 were made before or around the time of changes to the surcharge index[383]. [*]. [*] states that [*][384].

(337) [*][385].

(338) [*][386].

(339) [*][387].

(340) On 11 May 2004 [*] (KL) called [*] (CV) to discuss the next FSC increase, involving the introduction of new trigger points[388].

(341) [*] states that [*][389].

(342) [*] sent an internal email[390] on 20 April 2004 stating that the 'fuel index has exceeded the 190 mark during two weeks. I am already in contact with a few airlines to check their actions. Please keep a close eye to your markets and let me know if your national carriers are considering an increase to next level.' [*] states[391] that [*].

(343) SQ sent an email[392] to LH on 26 April 2004 asking: 'Is LH planning to increase the fuel surcharge to EUR/USD 0.20/kg? When would be the effective date?' LH replied[393] the same day stating that 'we will announce today and we will increase the

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fuel surcharge with effect from 10.05.04 to 0.20 euro.' Still in the same email chain LH and SQ agreed to stay in touch on FSC issues[394].

(344) There was an internal LX email chain[395] between 23 April 2004 and 26 April 2004 concerning the update of the fuel index on the internet site of LX. In one of the emails[396] it is stated that 'I've had rumours from the market that LH and BA are strongly reflecting on an increase of the fuel surcharge and refer to their respective indexes. Therefore forwarders and competitors in Switzerland are start asking about our position.'

(345) In an internal QF email[397] on 26 April 2004 it is stated that 'I have spoken with BA and LH in the UK and they are both stating they are proposing to increase their fuel surcharges sometime between 10-14 May.'

(346) LH forwarded[398] its announcement to increase the FSC on 27 April 2004 to its competitors AC, AF, [*], [*], CV, CX, JL, [*], KL, LA, MP, [*], [*], [*], SK, SQ, [*], [*].

(347) In an internal LA email[399] on 27 April 2004 concerning the increase of the FSC it is stated that 'MP is considering'.

(348) In an internal LX email[400] on 27 April 2004 [*] states that he will discuss the implementation of the FSC with [*] (LH) at the IATA Tariff Coordination Conference on 12-14 May 2004.

(349) An internal MP email chain[401] on 27 April 2004 contains feedback to the head office from local markets concerning the update of the fuel index. In one of the emails[402] it is stated that 'asked [*] about their position last night but no action from their side.' Another email[403] states that 'according to DLH [*] they are already sitting @ EUR 0.15 per actual kg and have not had any indication of an increase yet… [*] is not answering today.' [*] ([*] Asia-Pacific of Martinair [*]) announced by email to [*] his intention to obtain information from home carriers in Bangkok, Sydney and Shanghai on the announcements of the FSC, as he stated 'to play it by ear'[404].

(350) In an internal LX email[405] on 29 April 2004 concerning the decision to increase the FSC competitor action is summarised. The following information was noted: 'BA decision taken at next commercial meeting next Wednesday; [*] stand by, no decision taken; [*] not decided yet (just rumours to go up according LH); KL will decide Wednesday, 5.5.04; JL will wait until home carrier decide; CV increase to 0.20EUR start 11.05; [*] increase to 0.20 USD start 20.05.'

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(351) [*] (LH) forwarded[406] the announcement of LH to add new thresholds to the FSC mechanism to AF on 14 May 2004 noting that 'as per our discussion in NYC next trigger will be 215'. [*] sent the same email the same day with the same comment but still separately[407] also to [*] (KL). [*].[408]

(352) An internal LA email[409] on 13 May 2004 contains comments on the news concerning the announcement of AF regarding the increase of the FSC the same day. An LA employee stated that he found the increase strange, as he had talked to AF the same morning at an IATA Cargo Accounts Settlement Systems ('CASS') meeting and it was confirmed that AF would maintain the FSC till the end of May.

(353) There was an exchange of emails[410] between LA and LH on 13-14 May 2004 under the subject 'fuel surcharge'. On 13 May 2004 LA asked[411] LH to 'keep us informed of your new developments on the index. We need to make something coherent between our indexes since ours is very closely related to yours.' As a response LH specified[412] that it 'will issue a press release tomorrow which announces the extension of its existing fuel surcharge methodology'. The changes were then described in detail. In a further email[413] on 14 May 2004 LH asked LA: 'please let me know how you want to proceed'.

(354) In an internal MP email[414] on 18 May 2004 concerning the MP fuel index reference is made to the position of competitors as follows: 'next week LH might increase again FSC with 0.05 Euro. KLM-AF, CV all considering same update'.

(355) As a follow up to the email exchange between SQ and LH on 26 April 2004 LH sent an email[415] to SQ on 19 May 2004 to give a 'pre-warning' stating that 'we will most likely increase the fuel surcharge again according to the new rules on Monday w.e.f. 07.06.04 to 0.25 cents.'

(356) [*] states in an internal LH email[416] on 19 May 2004 under the subject 'fuel surcharge trigger points' that 'on the list we have BA, [*], [*] and our partner SAS. In the meantime I have brought them on board. I also told SAS that the next point probably comes on Monday. I am working on KL.'

(357) In an internal AF email on 24 May 2004 [*] wrote that 'following a phone call from [*] today, LH announces a new level of FSC of 25 cents/kg applicable from 07 June. [*].'[417]

(358) On 24 May 2004, LH Americas emailed [*] (AC) attaching LH FSC increase announcement for Northern America effective from 7 June 2004[418].

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(359) LX sent an email[419] on 25 May 2004 to LH asking whether the information that LH was increasing the FSC on 7 June 2004 to 0.25 EUR was true, in which case LX would immediately follow. LH confirmed in the reply that the information was correct.

(360) In an internal MP email[420] on 27 May 2004 [*] asked [*] to 'check BA's plan to increase fuel surcharge as well.' He added that 'So far only LH, CV, [*] announced it. I am checking with KLM, AF and SQ.' [*] states[421] that [*]. [*] responded[422] the same day that 'I was talking with QF just now – they have meetings planned for today with BA and fuel is expected to be on the agenda so they will let me know…'

(361) In an internal MP email[423] on 27 May 2004 [*] sent [*] a draft press release for the upcoming FSC adjustment. He furthermore informed her that LH, CV, BA, [*] and [*] had already communicated the increase. He also mentioned that he had spoken to SQ which also expected a signal before the weekend from Singapore. He finally added that 'KLM/AF stay the slow deciders'.

(362) In an internal BA email[424] on 29 May 2004 the BA [*] for Gulf, Iran, Saudi Arabia and Kuwait states that 'we have yet another increase' and instructed the local staff to 'pls chk with your OAL (eg European carriers and flag carrier) what their plan is'. A chain of emails[425] followed in which the local staff reported the results of contacts.

(363) [*][426].

4.3.14.2. Switzerland

(364) The new ACCS [*] (SQ) sent an email[427] on 27 April 2004 to [*] members referring to rumours about a FSC increase and asked for feedback. He stated that 'I am aware that it would be again a difficult task that all of us could agree to the same condition. But it would be at least pleasing for our customers to see that most of us could co-ordinate for the same introduction date.' LX replied[428] the same day that they 'will decide on this subject on Thu 29 Apr 04'. JL also replied[429] the same day that 'since LH Germany already announced increase JL followed immediately… JL Switzerland will follow the national carrier as usual'. [*] replied[430] on 29 April 2004 stating that '[*] has decided to increase to EUR 0.20 as from May 10th'. [*] replied[431] on 30 April 2004 that it 'will follow LX'. AF also replied[432] on 30 April 2004 that its index had not reached the trigger point yet, so that it would maintain the actual level of FSC. KL also replied[433] on 30 April 2004 that they would follow but only on 15 May 2004. [*] replied[434] on 30 April 2004 that '[*] will go CHF 0.31 effective 10 May'.

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MP replied[435] on 3 May 2004 that they 'will also increase the FSC'. [*] replied[436] on 4 May 2004 that 'will apply CHF 0.31 with effect from May 15th 2004'. Finally [*] replied[437] on 6 May 2004 that it 'will introduce FSC of CHF -.08/kg actual weight with effect from 20 May 2004.

(365) The ACCS [*] sent an email[438] on 28 April 2004 to LX, [*], KL, [*], [*] and [*] stating that the next round of the FSC was coming and invited the competitors to discuss it 'in the pizzeria' on 30 April 2004. LX replied[439] the same day that [*] (LH) should also attend the meeting. The result of the meeting was then reported in an internal LH email on 30 April 2004[440]. [*] also reported[441] the result of the meeting in an internal email, stating that 'participants of meeting agreed and understand that [*] would not introduce full MYC of 0.31… They would however appreciate if we could introduce MYC at the level of the difference now published, namely, CHF 0.08'

(366) In an email dated 30 April 2004, [*] provided ACCS members with some of the information that had been sent to him, including the intended surcharge levels and timing of several carriers, and asked again for the relevant information from carriers that had not yet provided it. ATC Aviation Services replied to the ACCS [*] and ACCS members that 'most airlines represented through us will follow with the increase'. The list of 20 airlines indicates this increase to 0.31CHF/kg by 10 May 2004 for 15 airlines and 3 unchanged and for 2 the information would follow[442].

(367) AF sent an email on 19 May 2004 to the ACCS [*] and ACCS members stating that 'Air France Cargo has decided to increase the fuel surcharge as per 1st of June to 0.31CHF/kg'.

4.3.14.3. Hong Kong

(368) [*] (MP) wrote an email[443] to the BAR CSC Executive Committee ('ExCom'), SQ, [*], LH, [*], [*], CV and CX on 12 May 2004 and concerning the FSC he stated that 'since our highest level (190) has been reached we are considering to introduce a 5th level (220 points). We expect other carriers to consider same increase. Is there any movement at LH &CX to introduce a 5th level of USD/EUR 0.25/kg?'

(369) The minutes of a BAR CSC ExCom meeting[444] on 17 May 2004 with the participation of CV, CX, [*], [*] and SQ reflect discussions concerning the FSC. A new application to CAD was agreed including the adding of two new levels to the mechanism based on the LH model. The minutes furthermore report that 'although BAR CSC will not be involved in coordinating the introduction of SSCs, major carriers reported on their current plans'.

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(370) On 20 May 2004 CX forwarded[445] to [*] members of BAR CSC a letter to CAD asking permission to change the current mechanism to determine FSC by introducing additional trigger levels.

4.3.14.4. India

(371) In an email[446] on 28 April 2004 [*], the [*] of BAR (India) Cargo announced to [*] members the new FSC level and asked [*] airlines to confirm the implementation.

4.3.15. Competitor contacts concerning the introduction of new trigger points to the fuel index and the FSC increase in summer 2004

(372) Discussions between airlines concerning the introduction of new trigger points to the FSC mechanism continued during the summer. Airlines also discussed the further increase of the fuel prices and the increase of the FSC.

4.3.15.1. Head office involvement

(373) On 3 June 2004 [*] (KL) called [*] (CV) to discuss the fuel price and the effects of the respective FSC mechanisms[447].

(374) In an email[448] on 7 June 2004, [*] (CV) forwarded to BA information about FSC adjustment made by all major carriers in June 2004.

(375) As a follow up of the email chain on 13-14 May 2004 between LH and LA concerning the FSC LH sent an email[449] to LA on 4 June 2004 asking for an 'update as to where LAN Chile is at regarding the new trigger points'. LA answered the same day[450] stating that 'we have created two additional trigger points and our fuel surcharge is going up on Jun 8th and extra USD 0.05 per kilo.'

(376) [*] (LH) sent an email[451] to [*] on 11 June 2004 asking him how [*] made its decisions on the FSC[452]. [*] replied[453] on 19 June 2004 stating that [*] follows the LH index.

(377) [*] states[454] that [*] remembers a conversation with [*] of LH on the margins of a [*][455] Board meeting on 15 June 2004. [*] states that LH had shortly before announced an increase of the FSC to level 5 and [*] asked [*] if it was applied globally, to which [*] said yes.

(378) In an internal BA email[456] on 16 June 2004 [*] reports that LH did not implement a FSC rise in Bangladesh, Pakistan, Dubai and Sri Lanka and notes that [*] might 'wish to share this with his opposite number at LH'.

(379) In another internal BA email[457] on 17 June 2004, as a follow up to the email of 16 June, [*] forwarded to [*] emails reporting competitors' actions concerning the FSC

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in the Middle-East region. He notes in the email that '…Lufthansa were wavering on implementation of level 5 FSC. [*] suggested you may find some detail useful, as this was contrary to the recent position taken by your contact at LH.' Further down in the email chain the plans of competitors (LH, [*] and KL/AF) are reported. It is noted in the email from [*][458] that 'As per a discussion with one of their senior manager early last week – [*] was adopting the wait and watch situation…'

(380) [*] (LH) sent an internal email[459] on 22 June 2004 in which he stated that [*][460].

(381) SQ sent an email[461] to LH on 24 June 2004 noting that: 'looks like we are heading for another round of increase of fuel surcharge Mon next? If you can send me a note when LH has decided to proceed. We'll likely be sending out same guidance to our field.'

(382) In an internal LH email[462] on 26 June 2004 [*] attached the press release of KL announcing that new trigger points had been added, and indicated that [*].[463]

(383) [*][464].

(384) LH sent an email[465] to JL on 27 July 2004 stating that LH 'has implemented the 5th stage of the fuel surcharge (EUR0.25/kg) in most parts of the world' and asked whether 'the process of application of filing the surcharges in Japan with the government' had started yet. JL replied[466] the same day explaining that in Japan the procedure was longer as the shippers had to be convinced to accept the increase and no sudden changes were possible. As he put it: 'shipper and forwarders they hates the way of Pearl Harbour'. He noted that 'of course from oversea station such as Euro we definitely follow your policy as soon as possible'. He finally added that 'I would like to keep contact with you for further benefits'.

(385) CX head office sent internal emails[467] on 20 July 2004 and 29 July 2004 to local CX staff asking 'for those who have not decided the implementation of 5th round FSC, pls do your best to lobby national carriers, so that we can follow.'

(386) [*][468].

(387) In an internal MP email[469] on 23 August 2004 [*] stated that the following Thursday he would have an informal meeting with the [*] of LH/CV/BA/KL and they would have things going. [*] states[470] that LH/BA/KL/MP met in a restaurant in Amsterdam (CV's attendance is not confirmed or denied), [*].

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4.3.15.2. Switzerland

(388) The ACCS [*] (SQ) sent an email[471] to [*] members on 3 June 2004 asking them about their plans to increase the FSC. The same day [*][472], [*][473], [*][474], [*][475], [*][476] and JL[477] sent replies to all, stating their stance.

(389) In an internal BA email[478] on 7 June 2004 [*] proposed to follow LX in Switzerland in changing the FSC calculation from EUR to USD, considering also that other carriers were also following LX.

(390) The CX local manager reported in an internal email[479] on 8 August 2004 under the point 'FSC update' that 'have met with SQ cargo manager today and seems he faces similar problems. We agreed that he will contact [*]. Whilst [*] already agreed to act in line with Asian carriers…'

4.3.15.3. Japan

(391) In an internal LX email[480] on 14 May 2004 concerning the increase of the FSC the LX employee in Japan states that 'I was at interline meeting yesterday and everyone knows (carriers) that fuel price is raising and hving severe problem for operation. We here in JP, if carrier goes together to the market with we will raise FSC it will be kind of antitrust and SHPR will shout abt that! Every carrier is looking at each other who will announce first.'

(392) The LX [*] in Japan sent an internal email on 10 June 2004 to the head office announcing that the FSC will be increased ex Japan. He states that 'very sry that it had not been implemented due fact that national carrier did not make action and other carriers were also waiting someone to start. We European carrier had talked with JL but they were not making moves! Now JL had announced to market and after that every one started the action. We hv filed to MOT with increase…'

4.3.15.4. Hong Kong

(393) [*] (MP) wrote an email[481] to AF, LH, CV, KL, BA on 13 July 2004 titled 'European Carrier Drink (ECD) evaluation' concerning a get together of carriers the previous evening. He stated that 'we all agreed that having a small informal session on a regular basis is very useful.' Concerning the FSC he pasted the latest index from Lufthansa and noted that 'if the index next week is >215 than we can increase the surcharge with USD 0.05 /HKD 0.40.' He also noted in the same email concerning the security surcharge that 'in principle the European carriers will increase to HKD 1.20 per 1st October. Details on external communication and exact name of the (sur)charge will be discussed next meeting.'

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(394) The BAR Cargo [*] (CX) sent a letter[482] to [*] members on 21 July 2004 announcing that the fuel index reached the next trigger point and according to the mechanism in such case 'BAR CSC airlines will levy a higher fuel surcharge'. Members involved in this and subsequent exchanges referred to in Section 4.3.16.5 include [*], [*], AC, AF, BA, CV, CX, LH, [*], [*], MP, JL, KL, [*], SR, [*], QF, SK, SQ, [*], [*].

4.3.15.5. Singapore

(395) According to the minutes[483] of the BAR-CSC meeting held on 23 July 2004 the chairman (SQ), asked other airlines concerning the FSC surveys to 'exercise some level of cooperation for future exercises, in view of the need for greater transparency with regard to these surcharges'.

4.3.15.6. Thailand

(396) LX sent an email[484] to LH on 11 August 2004 stating that they wanted to increase the FSC in Thailand. LH replied on 13 August 2004 that the 'Thai Department of Aviation has to give approval for an increase and has basically not done so far… Some carriers (AF, LH, [*], MP, etc) met and decided to jointly increase the FSC to 10 THB eff 23 AUG. The Thai DOA has not reacted yet, we hope that the joint approach is successful.'

4.3.15.7. India

(397) In an internal BA email[485] on 2 June 2004 [*] reports the decision of BAR Cargo India to postpone the increase of FSC and asks BA permission to do the same.

4.3.16. Competitor contacts concerning the increase of the FSC in September-October 2004

(398) The fuel price index of LH reached the next trigger point to increase the FSC in the week ending on 27 August 2004. However LH did not announce an increase as LH thought that the fuel price might quickly drop again and was unsure whether other airlines would follow the increase[486]. The postponement of the increase in the FSC was discussed among airlines. The discussions continued concerning the FSC increase when the fuel price remained above the next trigger point and the airlines finally decided to announce the increase. As the fuel price continued to rise in September and October 2004, a second increase was announced by many airlines within a month. The evidence in this Section includes discussions concerning all these events.

4.3.16.1. Head office involvement

(399) [*] (LH) called [*] (AF) on 30 August 2004 and [*] (KL) on 31 August 2004. According to [*][487].

(400) Handwritten notes[488] prepared by [*] (LH) on 1 September 2004 state that [*] was to contact AF before noon that day. [*][489].

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(401) LH sent an email[490] to SK and SQ on 1 September 2004 explaining that LH has not yet published the fuel price index (FPI) as 'the FPI was above 240 for the second week in a row, we have seen dramatic drops in Jet kerosene prices during the last days'. Therefore the management decided to wait and see the trend of the prices before implementing the increase.

(402) In an internal MP email[491] on 2 September 2004, as a reaction to the news that LH suspended the FSC increase [*] (MP) stated that the 'decision of LH is not good since in practice it means that carriers like SQ, SAS, JL, etc will not increase as well. We will check with KLM but I have serious doubts whether KL-AF will really be the first one, keep you posted.'

(403) In an internal QF email[492] on 7 September 2004, referring to the LH decision to suspend the FSC increase, the QF head office asked the local staff to 'check and advise what the national carriers in your area are doing.' In a reply the same day it is stated that 'SQ and AF have indicated that they have no intention to increase their FS. They are both waiting for LH'.

(404) In an email[493] from [*] (KL) to [*] (KL) [*] (AF) and [*] (AF) on 12 September 2004 [*] states as a reaction to the suggestion of [*].[494]

(405) In an internal AF email[495] on 14 September 2004 it is stated that '[*] confirmed to me that CV envisages to increase the FSC from 0.25 to 0.30 but they are waiting for the decision of LH or AF.'

(406) In an internal AF email[496] on 20 September 2004 it is stated that 'we just got the info that LH will increase the FSC to 0.30 Euros on Oct 4th. I guess SK will follow very quickly so we adjust ourselves to the SK level.'

(407) In an internal AF email[497] on 17 September 2004 local AF staff is asked to report on the position of other carriers concerning the increase of the FSC as 'on the basis of the answers [*] will decide to align to us or not.'

(408) AF sent an email[498] to [*] on 20 September 2004 announcing that 'AF and KL decided to increase their fuel surcharge by 0.05 Euros as of Sep 29' and asking 'pls advise asap if you wish to go along AF'. [*] replied[499] on 23 September 2004 that they 'confirm that [*] will join AF/KL and increase the fuel surcharge effective 29 Sep by 0.05 Euro/kg.'

(409) On 21 September 2004 the CX [*] in Belgium internally forwarded[500] to the CX head office the LH announcement to increase the FSC on 4 October 2004 and commented that 'we have a final discussion this afternoon with the "industry" and decide the Belgian kick off date'.

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(410) LH sent an email[501] to LA on 20 September 2004 stating that the decision to increase the FSC has not been made yet. Then, on 21 September 2004 LH sent another email to LA stating that 'the decision has been made we increase from 4 October to 0.30 EUR. I send you this afternoon our press release.'[502]

(411) LH has forwarded[503] on 22 September 2004 its announcement to increase the FSC to AF, [*], CV, CX, [*],[*], SQ, JL, SK, AC, [*],[*], KL, [*],[*] and [*].

(412) [*] sent an email[504] to LH on 23 September 2004 announcing under the subject 'fuel surcharge' that 'we are increasing to $0.24, effective 6 October.'

(413) In an internal LH email[505] on 23 September 2004 the local LH employee in the United Kingdom stated that 'I have spoken to [*] this morning about this… [*] policy is that they will increase generally in most markets worldwide but clearly UK is a big problem and local GM will not raise until BA move.'

(414) In an internal CX email[506] on 24 September 2004 the local CX [*] in Belgium reported, referring to the FSC, that 'most freighter operators in BRU decided to increase as of 01st Oct 04.' Then, on the same day, in the reply to a question concerning the increase he stated that 'in BRU we start as of 01 Oct along with [*]. SQ claimed initially they would to but then were recalled by hq to go for 04 Oct.'

(415) AF sent an email[507] to KL on 23 September 2004 and under the subject 'fuel surcharge Denmark' they asked: 'were you able to fix the issue on KL alignment on AF, LH, SK'.

(416) In an internal [*] email on 28 September 2004 in response to the local [*] employee in Switzerland, who is 'more than reluctant to increase the fuel surcharge' it is clarified that 'the HQ prefers to have all stations apply the fuel surcharge as well as the security surcharge in line with the majority of the local key players or the national carrier.'[508].

(417) LH sent an email[509] to JL on 7 October 2004 explaining the FSC increases and asking: 'what is your position on that on an area basis and especially in Asia?' JL, in the reply on 8 October 2004, explained the procedure of government approval in Japan and clarified that 'we don't have any idea to increase FS in this year.'

(418) [*][510].

(419) On 11 October 2004 [*] (KL) called [*] (CV) to discuss the CV announcement of the following day concerning the FSC increase and the upcoming KL announcement.[511]

(420) LH forwarded an upcoming press release concerning the FSC increase to LA on 11 October 2004[512].

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(421) In an internal MP email[513] on 11 October 2004 it is stated that 'AF/KLM will announce tomorrow to increase FSC to next level: 0.35 Euro. LH will do probably same. CV wants to follow immediately.'

(422) In an email[514] to KL on 12 October 2004 to which the KL announcement to increase the FSC and adjust the mechanism is attached CX asked KL to discuss it.

(423) In an internal MP email[515] on 14 October 2004 [*] reported that their client, [*], was asking MP to cap the surcharges claiming that 3 major carriers had already agreed to it. [*] (MP) replied[516] the same day that 'we don't want to follow. I will contact my KLM source to keep them in same boat as well.'

4.3.16.2. France

(424) [*] (CX) sent an email[517] to AF and JL on 27 September 2004 concerning the Beaujolais nouveau shipments and stated that following the discussion with [*] he confirmed to the freight forwarder [*] that the FSC will be EUR 0.30 and asked AF and JL to let him know if they change their mind.

4.3.16.3. Germany

(425) The minutes of a meeting[518] of the Cargo Committee of the Board of Airline Representatives in Germany (BARIG) on 3 September 2004 with the participation of AF, [*], JL, KL, [*], QF, [*], SK, LH, [*] and [*] show that LH informed the participants about topics such as FSC.

4.3.16.4. Switzerland

(426) The CX [*] in Switzerland reported in an internal email[519] on 23 September 2004 under the point 'fuel surcharge update' that 'we will increase FSC… we have no evidence if national LX will follow at same date or same levels…we have the support from SQ/JL for the same level while [*] decided to follow at level CHF 0.15/kg. [*] unk at this stage we expect [*] most likely to follow to CHF 0.38/kg.'

(427) The ACCS [*] (SQ) sent an email[520] on 24 September 2004 to [*] ACCS members announcing that 'LX has decided to raise the fuel surcharge from chf 0.31 to 0.38 effective from 4.10.04. CX and SQ will follow the same date. Please let me know about your plans'. The same day [*][521], AF[522], LH[523], [*][524] and KL[525] replied. BA replied on 27 September 2004[526]. [*] from [*] replied[527] that '[*], [*], [*], [*], [*], LA follow LX eff 04.10.04. K4 0.45/kg eff 04.10.'

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(428) The ACCS [*] announced in an email[528] on 12 October 2004 to [*] members that 'LX will establish the next increase of the fuel surcharge effective from 25 October 2004 to CHF 0.44. SQ will follow… Please let me know your plans'. The same day KL[529]and BA[530] replied, LH replied on 13 October 2004[531] and [*][532] on 18 October 2004.

(429) The ACCS [*] sent an email[533] to [*] members on 2 November 2004 to announce that 'LX will introduce as from 15 November 2004 level 8 of the fuel surcharge. The amount will be CHF 0.49/kg actual weight. Please let me know what your actions will be.' [*] replied on 4 November 2004[534].

4.3.16.5. Hong Kong

(430) The BAR CSC [*], [*] (CX), wrote an email[535] to [*] members on 2 September 2004 informing them that the latest fuel index levels had exceeded the next trigger point for two weeks and reminded the carriers that 'according to the fuel surcharge mechanism when the index level exceeds the trigger point 240 or above for two consecutive weeks a higher fuel surcharge will be levied…'

(431) The minutes of the BAR CSC ExCom meeting[536] on 21 September 2004 with the participation of CX, [*], LH, MP, SQ, [*] and IATA guests reflect discussions concerning the FSC. It was noted that 'LH HQ would implement the delayed 6th level of the FSC on 4 October 2004 and has added two additional trigger levels to the existing LH fuel index mechanism'. Due to various factors the ExCom decided not to file to CAD to add the two additional levels to the FSC mechanism immediately but to revisit the topic in October.

4.3.17. Competitor contacts concerning the suspension of the increase of the FSC in November 2004 and the decrease in December 2004

(432) The fuel price continued to rise in late October 2004 but with a high degree of volatility. This prompted airlines to discuss the situation and to finally suspend the increase of the FSC that was due in early November based on the fuel index. The fuel prices then started to decline in November and December 2004 and airlines discussed the reduction of the FSC.

4.3.17.1. Head office involvement

(433) [*] called BA on 27, 28 October and 1 November 2004, AF and KL on 29 October 2004 and CV and SK on 1 November 2004. [*] states that on such occasions he discussed with his competitors the movement of the various fuel price indices[537].

(434) LH sent an email[538] on 1 November 2004 to SK and SQ stating: 'we have two consecutive weeks with a full week index >290 but a decision on how LCAG will react has still not been made… I'll be back as soon as a decision has been taken.'

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(435) In an internal KL email[539] [*] indicates to local KL staff in Tehran that he would check with LH their complaint concerning the discount that LH gives on the FSC.[540] [*][541].

(436) [*][542].

(437) [*] (KL) called [*] (MP) on 15 December 2004 to inform him about the upcoming FSC announcement of KL[543].

(438) [*] sent an internal MP email[544] on 15 December 2004 stating: 'confidential: tomorrow, KLM will send out press statement to go back to 0.30 euro per 1 Jan 2005. Please delete message.'

(439) In an email[545] on 23 December 2004 [*] (AF) informs AF and KL staff that '[*] has decided to follow AF and KL in decreasing the FSC. The chosen date is 4 January 2005. Please inform your clients that from this date the global surcharge will be reduced by 0.05EUR/kg.'

4.3.17.2. Switzerland

(440) The ACCS [*] (SQ) informed [*] members in an email[546] on 25 November 2004 that 'LX plans to readjust back to level 7, which will CHF 0.43 with effective from 6.13.04[sic!]… SQ follows the national carrier. I would appreciate to know your plans, in order to inform the industry.' BA replied on 26 November 2004[547].

(441) LX sent an email[548] to CX on 27 December 2004 to inform them about the LX decision to decrease the FSC to level 6 on 10 January 2005.

(442) Replying to an email from [*] on 27 December 2004, LX stated that 'Swiss World Cargo goes to level 6, CHF 0.35/kg per 10.1.2005.'[549]

(443) The ACCS [*] (SQ) informed [*] members in an email[550] on 27 December 2004 that 'from 10 January LX will be adjusting its fuel surcharge from CHF 0.43 to 0.35 per kg. SQ will follow at the same level from same date. As usual I would like to learn about your own situation'. BA replied the same day.[551]

4.3.17.3. India

(444) On 18 November 2004, [*], India [*] of [*], sent an internal email informing the recipients that 'all carriers have agreed to an increase of fuel surcharge from Rs 13/kg to Rs 17/kg with effect from 01 Dec 04'[552]. [*] states[553] that [*].

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4.3.18. Competitor contacts concerning the increases of the FSC in spring 2005

(445) The fuel prices rose sharply again in early 2005 that triggered two consecutive FSC increases in March and April 2005, the introduction of new trigger points to the FSC mechanism and renewed discussions between airlines.

4.3.18.1. Head office involvement

(446) LH sent an email[554] on 7 March 2005 to LA, [*], CX, [*], [*], SQ, JL, SK, AC, [*] and [*] to inform them that 'Lufthansa Cargo announced today that we will increase the fuel surcharge with effect from 21.Mar.05 from EUR0.30 to EUR0.35'.

(447) [*] states that [*][555].

(448) On 7 March 2005, [*] wrote an internal [*] email[556], stating: 'Via several sources we are getting updates about the Fuel Surcharges. We expect today that Lufthansa will increase with 0.05 Euro. Tomorrow, we expect Cargolux and KLM –Air France to go in same direction.' [*] states[557] that [*].

(449) [*] (LH) sent an email[558] to the local LH employee in Japan on 16 March 2005 in which he stated that he had talked to JL at the IATA Cargo Tariff Conference the week before about filing the application for an FSC increase in Japan. [*] inquired about what was happening in that regard.

(450) On 21 March 2005, [*] (LH [*]) informed [*], CX, [*], SQ, JL, SK, AC, [*], [*] and [*] by email that LH would raise its FSC on 4 April 2005[559].

(451) [*][560].

(452) [*][561].

(453) LH forwarded its press release concerning the increase of the FSC to LA on 22 March 2005[562].

(454) In an internal MP email[563] on 22 March 2005 it is stated that 'LH will increase FSC with 0.05 Euro per 4st April. CV will announce today to increase per 5th April. KL-AF will announce today as well. Probably 5th April is set date as well.'

(455) [*] (LA) sent an email[564] to [*] (LH) on 29 March 2005, asking whether LH made any exceptions with regard to the application of its FSC to certain routes. [*] responded the same day stating that this was not the case.

(456) In an email[565] on 3 April 2005 LH asked SQ why are they charging only 0.20 EUR FSC in Italy. SQ replied[566] on 4 April 2005 stating that 'our key competitors in Italy

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have not revised their surcharges. That is why we've not too.' LH then replied[567] the same day that 'my guys report the following: [*] .35, CX .35, [*] .40, JL .40, [*] .40, [*] .40…This is for your information.'

(457) On 7 April 2005 in an internal LA email[568] [*] (LA [*]) asked [*] whether he could get in touch with [*] directly in order to discuss the fuel price index.

(458) LA sent an email[569] to LH on 8 April 2005 in which they wrote: 'with regard to pricing issues we would like to set up a link between our… We are analyzing the extension of the fuel surcharge scale to 0.45, are you thinking about it in LH?' LH replied[570] on 11 April 2005 stating that 'we are interested in a general exchange of pricing related topics.' The current situation concerning the LH FSC mechanism is then described in detail.

(459) [*] states that [*].[571]

4.3.18.2. Switzerland

(460) LX sent an email[572] to the ACCS [*] (SQ) on 10 March 2005 to inform him that 'Swiss World Cargo will increase the fuel surcharge to level 4, CHF 0.42, as per 21 March 2005.'

(461) The ACCS [*] (SQ) sent an email[573] to [*] members on 14 March 2005 to inform them that 'the market has again moved pertaining to higher fuel surcharges.' He refers to information from [*], [*], LX, SQ, [*], LH and AF and asks 'I would appreciate, if the remaining member could inform me about their plans too.' [*] replied on 15 March 2005.[574]

(462) LX sent an email[575] on 22 March 2005 to the ACCS [*] (SQ) to inform him that 'Swiss World Cargo will introduce level 8 of the fuel surcharge, CHF 0.48/kg as from 04 April 2005. The forwarders have been informed accordingly.'

(463) The ACCS [*] then sent an email[576] to [*] members on 22 March 2005 to inform them that 'another round is going to be due so far for following carriers: LX, CX and SQ. New level CHF 0.48 with effective from 4.4.05'. LH replied[577] the same day that 'LH will increase its fuel surcharge to CHF 0.60/kg awt effective 04Apr05.'

4.3.18.3. Thailand

(464) In an internal LX email[578] on 10 January 2005 [*] LX employee in Thailand reported that the 'Department of Civil Aviation issued an instruction last month for procedure of increasing/reducing fuel surcharge based on fuel price index… [*] had already announced their fuel surcharge according to government instruction. All other carriers are now discussing of the issue'.

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4.3.18.4. Philippines

(465) [*] states[579] that [*].

(466) In an internal CX email[580] on 23 March 2005 it is reported that 'we have notified Phil CAB for an increase of fuel surcharge to USD 0.35/kg except TC3, which remains to be USD 0.20/kg. This is in line with [*] move. Together with [*], [*], LH and [*], we are strongly asking other major competitors, Asian (JL, [*], [*]) as well as Middle East carriers to increase their FSC, too'.

(467) [*] states[581] that [*].

4.3.18.5. Sri Lanka

(468) [*] sent an email[582] to 'all cargo sales personnel' in Sri Lanka on 28 March 2005 to announce the increase of the FSC to USD 0.40/kg from 4 April 2005.

4.3.19. Competitor contacts concerning the increases of the FSC in summer 2005

(469) The fuel prices increased further during the summer of 2005 triggering two further FSC increases by many airlines and the introduction of new trigger points. Besides the regular phone and email contacts LH, AF, KL and CV engaged in personal bilateral and trilateral meetings to discuss the yield decline of the industry including the application of surcharges.

4.3.19.1. Head office involvement

(470) [*][583].

(471) There was a meeting in Frankfurt on 6 June 2005 between [*] and [*] (LH), [*] (AF) and [*] (KL). The main topic of the meeting was to stop the yield decline and the participants agreed that [*][584]. Follow up meetings were held on 7 July 2005 between AF, KL and LH in Amsterdam and on 25 July 2005 between AF and LH in Paris[585].

(472) There were two meetings in Paris between AF and CV on 10 June 2005 and on 26 July 2005 as a follow up to the meetings between LH, KL and AF, where AF informed CV about the topics discussed with LH and KL[586].

(473) The [*] head office sent an internal email[587] to local staff on 16 June 2005 to instruct them to 'apply fuel [*] surcharges at the same or higher level of your local flag carrier'.

(474) In an internal LA email[588] on 22 June 2005 [*] suggested to 'talk to LH and [*] to ask them what they think about [*] in order for fuel rate to be in a more reasonable measure.' In an internal LA email[589] on 30 June 2005 [*] states that he discussed the issue with [*] of Lufthansa but he rejected the proposed solution to the problem of

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high surcharges. [*] said that the problem with [*] lowering the FSC was that [*] the FSC was not.

(475) The minutes of the meeting of the Business Synchronization Team of KL and AF on 23 June 2005 state under the heading 'fuel surcharge' that 'LH, Cargolux, [*] and [*] will increase the fuel surcharge but with different timings. While LH will implement the increase on July 11th, Cargolux will be a follower. AF & KL will stick to the current mechanism and implement the new fuel surcharge as per July 7th.'[590]

(476) [*] (MP) stated in an internal MP email[591] on 24 June 2005 that 'KLM will go next FSC level of 0.45 Euro per kg per 7th July. In principle we will follow but first I would like to know what CV and LH is going to do. I expect more info later today. Please let me know what actions are visible in your markets.'

(477) The LX local [*] sent an internal email[592] to the LX head office on 27 June 2005 to inform them that 'it appears that AF and [*] will introduce level 9 on 07 JUL while LH and [*] will wait until 11 JUL. No word from other competitors yet.'

(478) In an internal QF email[593] on 27 June 2005, as a response to the request of the QF head office to provide information on what national and European carriers were doing concerning the FSC, a local QF employee in Singapore reported that 'so far KLM/AF has already confirmed at SGD 0.94 with effective 07 Jul 2005. LH/CV will likely follow the same as KLM/AF as they are talking to each other.'

(479) [*].[594]

(480) AF sent an email[595] to [*] on 22 June 2005 stating that 'AF&KL will announce on Thursday, June 23 an increase of 0.05 EUR/kg to be implemented as of July 07. Please confirm if [*] will follow in the same pattern.' [*] replied[596] the same day to 'confirm that [*] will follow AF/KL in the fuel surcharge increase'.

(481) As a reaction to the announcement of KL on 23 June 2005 to increase the FSC, an exchange of emails[597] took place between AF and KL. In an email on 24 June 2005 from KL to AF it is stated that 'I expect LH and SK to follow and I think we should align with them as well.'[598] In another email[599] on 27 June 2005 KL notes that 'process should be to check and align, then communicate to the market.'

(482) LH sent an email[600] on 27 June 2005 informing the 'Dear partners' ([*], CX, AC, SQ, JL, SK, [*], [*], [*], [*], [*]) that LH published the announcement of the FSC increase. [*] replied the same day that 'we have instructed our offices to implement the increase accordingly'.[601]

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(483) In an internal [*] email[602] on 27 June 2005 it is stated that 'we have received various newsflashes from other airlines increasing their fuel surcharge within the past days and I have just received confirmation from Lufthansa that they are going to increase their FSC effective 11 July as well.'

(484) LH sent an email[603] to SK, SQ and the sales agent of JL on 27 June 2005 to inform them that '…the fuel surcharge will be increased to 0.45 euro per kg actual weight as of Monday 11 July 2005.'

(485) The local manager of [*] in Belgium sent an email[604] to CX asking 'are you planning to raise your fuel surcharge to 0.45/kg?' CX replied on 30 June 2005: 'pls find attached the CX BRU history'.

(486) LH sent the press release concerning the increase of the FSC to LA on 28 June 2005.[605]

(487) In an internal LA email[606] on 4 July 2005 [*] reported a conversation with [*] (LH). [*] told him that LH had considered [*] decreasing the FSC but rejected the idea [*] the market understands and accepts that the FSC is not negotiable. [*] also said that 'with the increase of the FSC from EUR 0.35 to 0.40 they calculated that they had left EUR 0.03 of the additional 0.05 in the pocket, [*]'. He finally noted that LH had resisted pressure from freight forwarders to pay a commission on the FSC.

(488) In an internal SK email[607] on 17 July 2005 responding to the request of the SK head office to confirm that the new FSC level was implemented, the local SK employee in Japan stated that 'SAS cannot be the first or only carrier introducing the increase. Will talk with JL, LH and SQ next week about this.'

(489) In an internal MP email[608] on 21 July 2005 it is stated that 'had a small chat with KLM…he will never touch surcharges because breaking corporate policy might be subject to be fired.'

(490) In an internal SK email[609] on 21 July 2005 the head office was informed by the local SK [*] in the United States that 'WOW in the US are harmonised in our approach to the fuel surcharge (except of course JAL).'

(491) The local SK [*] in Japan informed the SK head office in an internal email[610] on 22 July 2005 that 'for Japan we will follow [*] and [*]. They will increase from today's 36 yen to 42 yen, effective 01 Sep. Many other carriers will do the same, however JAL will increase first 16 Sep. We will file our request to the authorities next week.'

(492) [*] manager [*] sent an email[611] on 22 July 2005 to LH, CV, [*], AC, SQ, [*], MP and LA referring to an advertisement on inforwarding.com of a small airline that does not charge any FSC. This triggered a chain of emails[612] where airlines condemn

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'misuse' of inforwarding.com. [*] stated in its reply[613] that it called the small airline but was sent away.

(493) LA sent an email[614] to LH on 17 August 2005 offering to 'exchange views' concerning the application of FSC on actual or on chargeable weight. LH replied[615] the same day that he is ready to discuss it.

(494) LH sent an email[616] on 22 August 2005 to SK, SQ and the sales agent of JL informing them that 'the fuel surcharge will be increased to 0.50 euro per kg actual weight as of Monday 05 September 2005.'

(495) LH sent an email[617] on 22 August 2005 informing the 'Dear partners' (SK, AC, [*], CX, [*], JL, [*], [*], [*], SQ, [*] and LA) that LH published the announcement of the FSC increase.

(496) In an internal email[618] on 22 August 2005 the SK [*] in the United States informs the SK head office that he 'will check with WOW partners prior to launching an increase to ensure we act together – we are facing very intense pressure on the ever rising FSC here in the US.'

(497) In an internal JL email[619] on 22 August 2005 [*] (JL [*]) reported that 'just now, Lufthansa [*] called us and informed that Lufthansa will increase the fuel surcharge EUR 0.05/kgs with effect from 05 Sep 05… This information is not yet official disclosed from Lufthansa but please keep on eyes this matter.' On 23 August 2005 [*] replied[620] to the email stating that JL would implement the increase one day after LH. He also stated that 'with regard to Scandinavia region, as [*] already informed yesterday, they will increase from September 5th together with SK and LH.'

(498) In an internal [*] email[621] on 23 August 2005 it is stated that 'we have received various newsflashes from other airlines increasing their fuel surcharge and we have also received confirmation from Lufthansa that they are going to increase their FSC effective 5 September 2005 as well.'

4.3.19.2. Switzerland

(499) The ACCS [*] (SQ) sent an email[622] to LH, LX and CX on 23 June 2005 forwarding a KL announcement to increase FSC and stating that 'as per CX there is KL, which is intending to raise the FSC to EUR 0.45 with effective from 7.7.05. Any developments from your side. Please let me know for the benefit of other carriers.' LX replied[623] on 24 June 2005 that 'decision is taken next Tuesday at the management board and we probably will go for level 9 on Monday 11th of June.'

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(500) In an internal LX email[624] on 28 June 2005 it is stated that 'have been informed that LH/AF/KL goes all to CHF 0.65. Info rcvd by [*] LH'.

(501) The ACCS [*] (SQ) sent an email[625] on 30 June 2005 to [*] members stating that 'it is time again to exchange information… LX and SQ will be charging new CHF 0.57 with effective from 11 July 2005.' On the same day BA[626], LH[627], [*][628], [*][629], [*][630], AC[631] replied; [*][632], CX[633], AF[634], MP[635] replied on 1 July 2005

(502) The ACCS [*] sent an email[636] on 24 August 2005 to [*] ACCS members informing them that 'with effective from 5 September 2005 LX and SQ will raise the fuel surcharge to CHF 0.65 per kg. KL, LH and AF will be at the level of 0.70 with effective from the same date. As in the past please let me know your plans regarding the above.' [*][637], JL[638], AC[639], [*][640] and CX[641] replied same day. BA replied on 26 August 2005[642] and [*] replied[643] on 1 September 2005.

4.3.19.3. Hong Kong

(503) The minutes[644] of the BAR CSC meeting on 11 July 2005 where the participants were AF, [*], [*], BA, [*], [*], CV, CX, [*], JL, [*], [*], KL, [*], [*], LH, LX, MP, [*], [*], [*], [*], [*], [*], [*], [*], SQ, [*], [*], [*], [*], [*], [*] and [*] report that members discussed the raising of the FSC level and the adding of new trigger points to the mechanism. Members also discussed the claim of forwarders to pay a 5% commission on the surcharges.

(504) [*] (CV, [*] Asia&Pacific) sent an email[645] on 29 July 2005 to MP, BA, LH, KL and AF stating that 'to follow up last European carrier meeting, we agreed to have get together function on 3 Aug 2005 to update the view on current fuel surcharge.' [*] then invited all addressees to a lunch meeting.

(505) The minutes of a BAR CSC ExCom meeting[646], held on 23 August 2005 with the participation of CX, LH, SQ, [*] and MP, report that as agreed during the last meeting the BAR CSC chairman should informally seek an opinion from CAD concerning the operation of the increase of the FSC against fuel index levels.

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However, priority should be given to the extension of the FSC mechanism to level 11 and 12 by adding two new trigger points. Concerning the request of the Hong Kong Association of Freight Forwarding and Logistics ('HAFFA') to pay a 5% commission on the surcharges the BAR CSC agreed to suggest to HAFFA to talk to individual airlines as the remuneration was subject to an agreement reached between the individual carriers and agents.

4.3.19.4. Thailand

(506) In an internal QF email[647] on 27 June 2005 as a response to the request of the QF head office to provide information on what national and European carriers were doing concerning the FSC, a local QF employee in Thailand reported that '[*] still not announce any change on the above. I checked with AF, KL, LH, LX, [*], SK and SQ they have to follow [*] as per DOA[648] instruction.'

4.3.19.5. Indonesia

(507) The local LH [*] in Indonesia sent the FSC update of LH by email[649] on 21 June 2005 to JL, [*], CV, [*], [*], KL, [*], SQ, [*], [*], [*], QF and [*].

(508) [*] sent an email[650] to all ACRB (Air Cargo Representative Board) members on 22 July 2005 informing them that '[*] will adjust MY/SC[651] as follows'; then the details of the surcharge increase are described and finally it is noted: 'please be informed all members to adjust as on the attachment MY/SC completely with terms and conditions.'

4.3.20. Competitor contacts concerning the increases of the FSC in September-October 2005

(509) Fuel prices continued to rise in September and October 2005 and reached the highest level ever. This prompted AF and KL to cap the FSC level on intra European flights. The discussions between the airlines during this period concerned the increase of the FSC, the suspension of the increase and the capping of the FSC.

4.3.20.1. Head office involvement

(510) [*] (CV) called [*] (LH) from August to November 2005 21 times[652]. [*][653]. During the calls [*] made [*].

(511) The LH fuel price index reached the next trigger point on 9 September 2005 but LH did not announce an increase. [*] called BA, KL and [*] the same day.[654]

(512) LH sent an email[655] on 12 September 2005 to SQ, SK and JL's sales agent informing them that even though the next trigger point had been reached LH 'has decided to postpone the increase.'

(513) KL announced that it would cap the FSC on intra European routes from 26 September 2005. LX commented in an email[656] sent internally and to LH on 16

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648 Department of Aviation of Thailand.
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651 MY = Fuel Surcharge; SC = Security Surcharge.
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September 2005 that it would have a negative impact. Then in a further email[657] LX asked AF whether it would be implemented on all routes, to which AF responded that it would not be implemented in Switzerland.

(514) [*][658].

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(516) In a meeting[660] between [*] and [*] of LH and [*] and [*] of LA on 21 September 2005 in the Dorint Sofitel Bayerpost in Munich the discussions included [*].

(517) SK sent an email[661] to LH, SQ and JL on 3 October 2005 in which it is stated, referring to the WOW Global Sales Board, that the surcharge 'issue has been discussed 'slightly' during the last meeting but no comments are made in to the MoM (antitrust!). It was mentioned WOW will use LH model within 'neutral markets'; US, Europe.'

(518) In an internal AF-KL email chain[662] on 4 October 2005 concerning the instruction from the head office to increase the FSC it is stated that 'fuel surcharge will increase to 0.55 cents of EUR that is to say 29 inr as from 17th October 09h00. (We checked with LH and they will apply same rate of exchange same time.)'

(519) On 4 and 5 October 2005 [*] (CV) called [*] (LH) three times to discuss possible changes to the FSC mechanism[663].

(520) In an internal LX email chain[664] on 5 October 2005 the local LX [*] in the United Kingdom reported to the head office that 'I have spoken with LH this morning and that will publish the new rate (GBP 0.37?) as soon as British Airways do. I also spoke to BA this morning and they will be making a decision at 1pm today.' In a following email in the chain the same day the same person then stated that he 'just spoke to British Airways and they have advised that they will announce to the market tomorrow fuel surcharge increase to GBP 0.37/ EUR 0.55 with effect from 20th October 2005'.

(521) In an internal [*] email[665] on 5 October 2005 it is stated that 'we have received various newsflashes from other airlines increasing their fuel surcharge and we have also received confirmation from Lufthansa that they are going to increase their FSC effective 17 October 2005 as well.'

(522) The LH fuel price indicated that an announcement to increase the FSC was due on 10 October 2005. However LH decided to postpone the increase as AF/KL would not give a commitment to follow an LH increase[666].

(523) There was a meeting between [*] and [*] of [*] and [*] and [*] of LH on 12 October 2005 at the Schlosshotel Rettershof in Kelkheim. According to [*]. Furthermore the

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parties agreed to involve KL and AF in order to ensure that they would increase their FSC as well. [*] was to approach KL and LH was to talk to AF. Furthermore, the parties assured each other that they would not pay any commission to forwarders on surcharges.[667] According to [*].[668] The meeting is noted in the agenda of [*] () as 'mtg [*]'.[669]

(524) [*][670].

(525) On 13 and 14 October 2005 [*] (LH) made six calls to AF, three to KL, five to CV and seven to BA. [*] (LH) also called [*] (CV) twice.

(526) In an internal LH email[671] on 14 October 2005 it is stated that 'I have spoken to SAS/[*], they will 'follow what LH is doing' in short words. Then I spoke to JAL GSA in CPH. All he has is an information from his principals in LON (dating from last night) stating that BA is increasing FS on Oct 27.'

(527) In an internal MP email[672] on 14 October 2005 reference is made to the intention of contacting BA to verify the geographic scope of the FSC increase from 27 October 2005.

(528) In an internal [*] email[673] on 14 October 2005 the LH announcement of the same day concerning the FSC increase was forwarded. It was added that 'I also received newsflashes from other airlines as well.'

(529) In an internal BA email[674] on 14 October 2005 [*] informed BA staff that LH was going to increase the FSC and asked them to send him information about their respective local competition. He added that 'please do not use this email further, do not re-send it, we could have a problem with antitrust, if you did that.'

(530) There was a meeting on 19 October 2005 between LH and AF in Paris in the Novotel at Charles De Gaulle airport to discuss surcharges. The parties assured each other of the consistent application of the surcharges, agreed that no further unilateral measures, such as the capping of the FSC by AF, would be repeated and that the forwarders should not receive a commission on the surcharges.[675] A follow-up meeting was arranged for the 22 November 2005. [*][676] [*].[677] The meeting was cancelled by AF and a follow up call was made instead between [*] (AF) and [*] (LH) a few days later.[678]

(531) In an internal SK email[679] on 21 October 2005 it is stated that surcharges were discussed during a WOW meeting.

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4.3.20.2. Czech Republic

(532) In an internal BA email[680] exchange between [*] (BA [*], Czech Republic) and [*] on 10 October 2005 reference is made to discussions on FSC plans with [*] of LH.

(533) [*] of LH sent an email[681] on 11 October 2005 to BA, KL, LX, [*] and [*] stating that 'according to the latest information the fuel surcharge will be increased to CZK 16/kg as follows: [*]/KL/AF/LH on October 17th; BA on October 20th'.

4.3.20.3. Switzerland

(534) The ACCS [*] (SQ) sent an email[682] on 5 October 2005 to [*] members informing them that 'LX and SQ have decided to increase with effective from 17.10.05 to CHF 0.72. I have also heard fro LH, AF&KL that their surcharge will be CHF 0.77 and also with effective from 17.10.05. I would appreciate your feedbacks.' JL replied the same day[683]. [*][684], LH[685], AF[686] and BA[687] replied on 6 October 2005. AC[688], MP[689] and [*][690] replied on 7 October 2005.

(535) The ACCS [*] sent an email[691] to [*] members on 18 October 2005 stating that 'the next round is already around the corner. Please let me have your feedbacks again. So far I have received the following information. BA CHF 0.79 effective 27.10/ LX CHF 0.77 effective 27.10/ SQ CHF 0.77 effective 27.10/ CX CHF 0.77 effective 27.10/ LH CHF 0.84 effective 24.10/ KL CHF 0.84 effective 28.10/ AF CHF 0.84 effective 28.10'. On the same day [*][692], [*][693], MP[694], JL[695] and AC[696] responded.

(536) The ACCS [*] emailed ACCS members on 18 November 2005 to inform them that SR and SQ had decided to decrease the FSC to CHF 0.66 effective from 28 November 2005. He did not ask for feedback[697].

(537) The ACCS [*] emailed ACCS members on 28 November 2005 to inform them that SR and SQ had decided to decrease the FSC to CHF 0.60 effective from 5 December 2005. He asked for the plans of the other members[698].

4.3.20.4. Brazil

(538) LA sent an email[699] to LH on 6 September 2005 under the subject 'FSC Brazil' stating that 'On September 16 we will raise it to $0.50. Hope to hear from you.'

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(539) LH sent an email[700] on 8 September 2005 to AF, KL, [*] and [*] informing them that after the authorisation by DAC to use the FSC index, LH will raise the FSC to USD 0.50 from 1 October 2005 and will from then on follow the worldwide FSC policy of LH in Brazil as well. AF replied[701] on 9 September 2005 that they would apply USD 0.50/kg from 1 October 2005. The email chain was forwarded[702] internally in LH on 9 September 2005 noting that 'we plan to implement the USD 0.50 as of Oct 01. AF, KL, LX, [*] and [*] confirmed they will start on the same date as us.'

4.3.20.5. Hong Kong

(540) In an internal CV email[703] on 13 September 2005 it is reported that 'Hong Kong BAR has approved the next level of FSC and it looks like CX is going to implement it at HKD 4.40 eff fm 27 Sep.'

(541) It is reported in an internal LX email[704] on 14 October 2005 that 'HKG BAR Cargo subcommittee has announced today that the 12th level FSC will be implemented as of 28 Oct 05… The new level for HKG-TC1/2 will be HKD 4.80/kg'.

4.3.20.6. Indonesia

(542) [*] local LH employee in Indonesia sent an email[705] to [*] local QF employee on 12 October 2005 asking 'as per last ACRB meeting QF FSC for TC ½ USD 0.45/kg. Does it remain the same or there is a new FSC?' QF replied that 'yes, at the moment due still waiting for the instruction from HQ'.

4.3.20.7. India

(543) [*] states[706] that [*].

4.3.21. Competitor contacts concerning the decreases of the FSC in November-December 2005

(544) The fuel prices started to drop at the end of October 2005 and lowered considerably during November and December 2005. A number of airlines decreased the FSC three times in a row during this period and continued to discuss their actions and plans concerning various aspects of the FSC.

4.3.21.1. Head office involvement

(545) In a phone call on 1 November 2005 [*] (LH) and [*] (KL) discussed the upcoming FSC announcement of the following day[707].

(546) In an internal SK email[708] exchange from 2 to 4 November 2005 it is noted that as a consequence of the FSC decrease by KL/AF, SK communicated to SQ that they would wait until they received the index and that SK expected SQ to follow[709].

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(547) In an internal KL email[710] on 5 November 2005 the local KL employee in Italy asks the KL head office whether they can influence the fact that [*] seems to give a discount for the FSC in Italy.

(548) LH forwarded its FSC announcement to LA on 7 November 2005[711].

(549) In an internal LX email[712] on 7 November 2005 a meeting with [*] in Bangkok is reported. It is stated that 'I raised the question of the FSC in Europe and informed him about our concern that [*] is not following other airlines in regards to the levels. He confirmed that [*] is suffering from the high oil prices like any other carrier and their position is clear: they follow the national carrier. If you get me a list with all European countries where [*] is not following that practice I will inform [*] about it.'

(550) [*][713]. [*] called [*] again on 14 November 2005 to confirm that KL would announce the change on that date[714].

(551) An internal BA email[715] on 14 November 2005 headed 'level 10 fuel surcharge triggered' contains a list of carriers with the date of implementation of level 11 and level 10 of the FSC. Concerning [*] 18 November 2005 is indicated on the list as the effective date for implementing level 11 of the FSC. However, a public announcement of this increase by [*] is dated 16 November 2005[716].

(552) On 14 October 2005 LH announced a further reduction of the FSC. [*] made several calls the same day to contact KL, AF, CV and BA.

(553) LH forwarded its press release concerning the lowering of the FSC to LA on 15 November 2005.[717]

(554) AF sent an email[718] to JL on 15 November 2005 under the subject 'FS in Europe – 10 Nov' confirming 0.50 EUR chargeable weight from 28 November.

(555) In an internal LX email[719] on 18 November 2005 the local LX [*] in Canada reports to the LX head office that 'effective 28 Nov all origins in CU will go to USD 0.50 and CAD 0.60. In Canada LH and AC will go to CAD 0.61 … AC says they will make any necessary corrections by 01 JAN so we should all be on the same page by then.'

(556) LH forwarded its press release to lower the FSC to LA just before it was made public on 21 November 2005[720]. [*][721].

(557) In an internal BA email[722] on 24 November 2005 [*] quoted an internal LH memo concerning the surcharges that states that 'one of the fundamental cornerstones of the Lufthansa Cargo Group is the firm and steady implementation of the fuel surcharge

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under every circumstance… we should not extend the competition inhouse – LCAG and their associated companies – surcharges should also not be used as a competitive edge over another company. Please pass on this information to your staff accordingly.' He also noted that '[*] – as per my info, no dealings with surcharges either'.

(558) LH sent an email[723] to LA on 30 November 2005 informing them that the 'FPI will be published on the Internet tomorrow morning. Sorry for the delay.'

4.3.21.2. Germany

(559) The minutes of a meeting[724] of the Cargo Committee of BARIG on 17 November 2005 with the participation of [*], BA, SK, LH, [*], [*], [*], [*], [*], [*] and [*] show that LH announced that the FSC would be decreased by 28 November.

4.3.21.3. Italy

(560) There were regular meetings in Italy in the framework of the so called BLACKS initiative (from the names of BA, LH, AF, CV, KL and Swiss) the purported purpose of which was to discuss security issues. However, further topics were discussed during these meetings that included the consistent application of the FSC mechanism and agreement between the participants to refuse the demand of the Italian forwarder association, ANAMA, to pay a commission on the surcharges.[725]

4.3.21.4. Switzerland

(561) The ACCS [*] (SQ) sent an email[726] to [*] members on 10 November 2005, informing them that 'LX and SQ will decrease to CHF 0.72 and go back to level 11 with effective from 21 November 2005. Please let me know about your own plans.' [*][727], BA[728] and JL[729] replied the same day. AC replied[730] on 11 November 2005.

(562) The ACCS [*] (SQ) sent an email[731] to [*] members on 18 November 2005 stating that 'LX will lower the surcharge to CHF 0.66 with effective from 28.11.05 and SQ will do likewise.' AC replied[732] on 22 November 2005.

(563) The ACCS [*] SQ sent an email[733] to [*] members on 28 November 2005 informing them that 'LX will decrease to CHF 0.60 with effective 5.12.05 and SQ will follow. AF/KL replied the same day.[734] [*][735] and BA[736] replied on 29 November 2005. CX[737] replied on 30 November 2005. MP[738] replied on 1 December 2005.

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4.3.21.5. Canada

(564) [*], [*] LH [*] in Canada, as a response to the news that LH would decrease the FSC the following Monday, sent an internal email[739] on 4 November 2005 stating that 'AC methodology says their level will be 67 cents but I have a call in to them to see if they'll be sticking with that or 'adjusting' to the AF/KL level.' [*].[740]

4.3.22. Competitor contacts concerning the increase of the FSC in 2006

(565) The fuel prices started to increase again in January 2006 and the airlines continued their FSC related discussions until the inspection of the Commission on 14 February 2006.

4.3.22.1. Head office involvement

(566) In an internal JL email[741] on 11 January 2006 [*] (JL [*]) wrote in response to a question concerning plans of competitors with regard to the FSC that 'just kept in touch with [*] and [*] and they have no news about that.'

(567) [*] (BA) left a message on [*]'s phone (LH) on 26 January 2006 in which he informed LH that BA would announce level 10 FSC the following day and wished to know 'where LH is looking'[742].

(568) In an internal LA email on 30 January 2006 a phone conversation with LH concerning the FSC mechanism is reported[743].

(569) In an internal MP email[744] on 30 January 2006 concerning the meeting with KL on 31 January 2006 it is suggested that the next level of FSC is discussed. Then, in an internal MP email exchange on 31 January 2006, [*] reported that KL would announce the increase of the FSC the following day, to be applied as of 14 February 2006. [*] replied that he had also spoken to CV who had confirmed that they would follow KL[745].

(570) In the minutes[746] of the [*] weekly breakthrough meeting on 1 February 2006 it is noted that '[*] and [*] have also announced L10 and LH are showing 1 week, it is anticipated that they will announce next week.' [*] states that the information on [*] and [*] were related to [*] ([*]) by [*] (LH) during a phone conversation[747]. [*] in fact announced the increase only two days later.[748]

(571) [*] (BA) called [*] (LH) on 1 February 2006 to inform him that BA would announce the increase of the FSC the following day with an effective date of 16 February 2006 and to ask him about LH's position[749].

(572) In an internal CX email[750] on 8 February 2006 the CX head office instructed the local staff to 'check and advise the plan of your national carrier and major competitor.'

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4.3.22.2. Switzerland

(573) The ACCS [*] (SQ) sent an email[751] to LH, LX, KL and BA on 2 February 2006 forwarding them the messages he had received earlier from BA and KL announcing the increase of the FSC and asked 'have you got anything planned in the Swiss market?' KL replied on 3 February 2006. [752]

(574) The ACCS [*] (SQ) sent an email[753] to [*] members again on 6 February 2006 stating that 'LX and SQ is going to the level of CHF 0.65 with effective from 20.2.06. KL and AF will be at level CHF 0.70 with effective from 17.02.06. LH at CHF 0.70 with effective from 20.02.06. Please let me know your plans.' BA[754], [*][755], [*][756] and JL[757] replied the same day. [*][758] replied on 7 February 2006.

4.3.22.3. Canada

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4.3.22.4. Singapore

(576) [*] states[760] that [*].

4.4. The security surcharge (SSC)

4.4.1. General remarks

(577) The SSC, also known as Exceptional Handling Charge (EHC) in BA, or Insurance, Risk, Crisis surcharge in AF was introduced by airlines following the terrorist attacks in New York on 11 September 2001. Airlines justified the introduction of the surcharge by cost increases for airlines that was the result of higher insurance premiums, increased security costs and operational inefficiencies, such as the rerouting of certain flights.

(578) The SSC was calculated by most airlines on a per kilogram basis and is applied worldwide.

(579) A number of airlines that are the addressees of this Decision discussed, among others issues, their plans whether or not to introduce a SSC and if so whether it should be calculated on a per air waybill or on a per kilogram basis. Moreover, the amount of the surcharge and the timing of the introduction were also discussed. Airlines furthermore shared with each other ideas concerning the justification to be given to their customers. Ad hoc contacts concerning the implementation of the SSC continued throughout the years 2002-2006. The illicit coordination took place both at head office and local level.

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4.4.2. Description of competitor contacts

4.4.2.1. Competitor contacts concerning the introduction of the SSC in October 2001 – head office involvement

(581) [*] states[762] that [*] ([*]) wrote the document entitled 'Surcharge due to security checks Terrorismus New York 11.09.2001' to summarise his findings following telephone calls to various airlines in Germany including: [*] from LH, [*] from CV, [*] from CX, [*] or [*] from KL, [*] from SQ, [*], or [*], [*] or [*] from AF.[763]

(582) The local SR [*] in the United States sent an email to the head office on 24 September 2001 reporting that 'I received a call from [*] at [*] DFW. It seems that they are considering assessing a 'security fee' on each AWB ($ 25 or ??). They want to know if we join them in a joint implementation.'

(583) An internal SR presentation[764] on 25 September 2001 titled 'Possibilities of [*] security surcharges in SRC' reference is made to plans of BA and LH and it is noted that 'AF/[*] not reached yet'[765]. [*][766].

(584) A local SQ employee in Scandinavia sent an email[767] to SK on 25 September 2001 in which he forwards the plans of competitors ([*], AF, [*], [*], LH) that all are considering the introduction of an SSC but would prefer SK to move first. He mentions that he sent the same information to the SQ head office.

(585) [*] (MP's [*] in France) sent an email[768] on 26 September 2001 to CX, AC, AF, BA, LH, [*], [*], [*], [*], KL, SQ, [*], [*] and [*] in which he asked 'anything we can do in France /Europe?' and cut and pasted parts of an internal MP email that reports a BAR CSC meeting in Hong Kong to 'discuss the amount of IS to be implemented & when'. Concerning the application for approval to the authorities it is mentioned that 'Majority prefer collective which more logical & effective…QF advised they wl apply to CAD on their own.'

(586) In an internal LH email[769] on 26 September 2001 the local LH [*] in Taiwan informs the head office that she heard from CX that [*] (LH) told them that LH would introduce a surcharge of '0.10'. Then she indicated that after consultations with other airlines the surcharge should possibly be higher, maybe as high as 0.50 USD and that CX had called a meeting with other airlines.

(587) The same BAR CSC meeting discussing the details of introducing the SSC is reported in an internal SK email on 26 September 2001 that also adds that 'BAR CSC would like to seek all airlines headquarter opinion towards this issue'[770].

(588) [*][771].

(589) There was a meeting in Zurich in the second half of September between KL, LH and SR to discuss the effects of September 11. The introduction of a SSC was discussed.

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LH told KL that they were in contact with other airlines that were not present at the meeting[772].

(590) In an internal BA email[773] on 27 September 2001 titled 'Insurance premiums' it is stated that 'the LH approach, of course is strictly AT and illegal, so we must be careful that any action we take is unilateral. We cannot signal but we can match.'

(591) [*][774].

(592) In an internal LH email[775] on 28 September 2001 it is reported that 'rumours from SQ tell us that SQ plans to introduce 0.10USD/kg eff 08 Oct.'

(593) In an internal LH email[776] on 28 September 2001 [*] reported that BA was moving towards LH's approach that is to charge the SSC per kg not per air waybill.

(594) The CX [*] in France, [*], sent an email[777] on 28 September 2001 to AC, BA, CV, LH, [*], [*], [*], MP, KL, SQ, [*] and [*] in which he wrote that recent messages showed that 'SQ is thinking about it (about 0.10USD/kg), MP (0.15USD/KG), QF (to define)' then he asked the airlines whether they had received instructions from the respective headquarters. KL replied the same day stating that their standpoint had not changed, they had no intention [*] to introduce a surcharge.

(595) The LH [*] for South-East Asia, [*] sent an email under the subject 'surcharge update' on 28 September 2001 to AF, CV, KL, BA, and SR in order to 'do a quick and informal email check with all of you to see where you and your HQ directive are so far.' CV replied on 1 October 2001 to all addressees plus SK, giving their position. AF forwarded the mail to the head office asking about the AF position.[778]

(596) SQ sent an email[779] to LH and SK on 1 October 2001 with the subject line 'SQ Security Surcharge' in which SQ reported that they would impose an insurance and security surcharge on 8 October 2001.

(597) The local LH [*] in Japan sent an email[780] to the head office on 2 October 2001 reporting that senior JL managers would be going to Europe the following days. He asked [*] (LH) to 'by all means, take this opportunity to talk to them re Security Surcharge with the target to convince JL to implement the same in Japan.' He furthermore reported the position of SK, SQ, AF and SR in Japan concerning the SSC. [*] then forwarded this email internally stating that he would talk to JL on 4 October 2001[781].

(598) [*] (KL) sent an email[782] to [*] (LH) on 2 October 2001 forwarding an LH email announcing a surcharge. He added that '[*], herewith the message we talked about yesterday.'

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(599) [*] (LH) forwarded the KL surcharge announcement, which was very similar to that of LH's, in an internal LH email[783] on 2 October 2001 noting that the similarity is 'not accidentally'.

(600) In an internal LH email on 2 October 2001 [*] makes a reference to a conversation with [*] of SQ concerning the justifications of the underlying costs of the SSC. [*].[784]

(601) In an internal QF email[785] on 2 October 2001 it is reported that 'SQ have confirmed they will introduce a surcharge from next Mon 8 Oct at this stage. They have been told it will be AUD 0.20/kg'.

(602) AF sent an email[786] to [*] on 3 October 2001 advising [*] that 'Air France Cargo will inform officially today or tomorrow the latest this decision: AFC will implement an ISC: Insurance, Security, Crisis.' [*] replied the same day by sending the LH announcement concerning the SSC.

(603) In an internal MP email[787] on 3 October 2001 [*], the local MP [*] in Hong Kong reported to the head office a BAR CSC meeting where SSC was discussed that 'final decision by majority vote (69%) is HKD 0.50 (USD 0.064/kg) effective 11 Oct.' [*] replied the same day that 'we will check our sources with KLM on this issue'.

(604) [*] reported in an internal LH email[788] on 4 October 2001 that he talked to JL concerning the SSC. JL was looking for some assistance in supporting the argument that it was facing increased costs as a result of security measures.

(605) [*] (LH) met [*] (AF) and [*] the [*] of the forwarder association Freight Forwarding Europe on 4 October 2001. [*][789].

(606) In an internal LH email[790] on 5 October 2001 the AF press release concerning the SSC introduction is forwarded and it is noted that it would be preferable to convince AF to adjust their level to the LH level. [*][791].

(607) On 5 October 2001 [*] reported a meeting with the freight forwarder [*] in an internal LH email. [*][792].

(608) In an email[793] on 8 October 2001 [*] (BA) informed LH that BA would introduce an 'exceptional handling fee' of 0.15 EUR worldwide.

(609) The CX local [*] in France sent an email[794] on 11 October 2001 to CV, AC, AF, BA, LH, [*], [*], [*], [*], MP, KL, SQ, [*], [*] and [*] stating that he was instructed by the head office to follow the national carrier concerning the SSC. Then, referring to the fact that there was no agreement on the substance, he informed the competitors on the implementation plans of CX and [*].

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(610) In an internal LH email[795] on 11 October 2001 [*] reported that JL had introduced a SSC of 500 yen per air waybill. He found that too low and asked [*] to speak to JL.

(611) [*][796]. The letter describes the SSC and gives the reasons that had led LH to impose its SSC. An example of these letters is the one sent to [*] of JL dated 12 October 2001[797]. [*] replied by email[798] dated 17 October 2001 (Exhibit SSC JP 3). He gave explanations and added that it is 'needless to say, JAL is of the same opinion as LCAG that the charges need to be adjusted accordingly if the political situation will escalate'.

(612) In a BA document[799] titled 'European Feedback on the proposed new charges' the content of a number of internal BA emails are collected reporting about competitors' plans and actions concerning the SSC. In an email the BA [*] in Hungary reports that 'we had an AOC Cargo subcommittee meeting yesterday afternoon. As you know it is working really well in Hungary and we always try to introduce new things and charges in one time and uniformly (like fuel surcharge, [*], etc charges). LH, KL, [*], SR, AF and [*] will introduce 0.15 EUR/kg SSC from 8th Oct under SCC code.' In another email from the BA [*] in Germany, [*], addressed to [*] it is stated that 'just talked to AC who confirm they too will implement a SSC effective 08 Oct of Euro 0.15/kg. Heard that also KL will implement a surcharge effective 15 Oct same amount as AC and LH.' In a further email the BA [*] in Italy, [*] reports that LH, SR and CV announced the introduction of a SSC and he adds that '[*] and AF have no plan to follow this initiative.' In the last email in the document [*] (LH, DE) reports that 'I received definite confirmation this afternoon from LH that they will implement a SSC effective 08 Oct 01 of Euro 0.15/kg actual weight.'

4.4.2.2. Competitor contacts concerning the introduction of the SSC in October 2001 – France

(613) [*] states[800] that members of SYCAFF, the French cargo association, coordinated the implementation of the SSC as proven by a number of emails.

(614) On 1 October 2001, two emails from [*], of CV were forwarded by [*] in [*] internally. The first email stated in French: 'Many emails have crossed since Saturday. CV's position is as follows: we will apply an insurance surcharge of 0.10 Euro starting October 8 on all destinations in our network. Therefore act'[801]. The second email stated in French: '[*] cpyxx all. Thank you for correcting the amount as 0.15 Euro instead of 0.10 Euro. Regards, [*]'[802]. [*] states[803] that [*]. [*] forwarded this second email to others at [*] and stated that 'CV just advised they will charge euro 0.15 kg instead of 0.10kg as advised earlier today'.[804] [*] states[805] that [*].

(615) An email chain on 5 October 2001 contains an email from a sales manager of MP, [*], who worked for [*] in France. The email states: 'As advised by phone, the

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SYCAFF (airlines union trade FR[sic]) not happy about the AF decision (since AF decided alone with agents & not with other airlines). A SYCAFF meeting will be organised early next week to revise if needed their position regarding this surcharge. Will await their decision and will let you know asap the results of the French jury'.[806] [*] states[807] that [*].

(616) On 10 October 2001, [*] (MP) internally forwarded an email from SYCAFF's [*] of CX containing a chart listing individual airlines' intended actions with respect to the SSC. It is stated in the email that the list was being provided to SNAGFA, the professional organisation for agents in France.[808] In the attached document reference was made to another meeting of SYCAFF at the end of the month to make a first evaluation.

4.4.2.3. Competitor contacts concerning the introduction of the SSC in October 2001 –India

(617) [*] states[809] that [*].

4.4.2.4. Competitor contacts concerning the SSC between 2002-2006 – Head Office involvement

(618) In an email[810] on 26 November 2002 CX informed LH that CX would apply to CAD for a lower 'insurance surcharge' and that CX would call a board of airline representatives (BAR) meeting 'to see who will join Cathay for the CAD filing and who won't'. [*] (LH local [*] in Hong Kong) forwarded this message internally and made an alternative proposal and added that she could 'also try to convince my European airline colleagues to join in (AF/CV/BA/KL…)'[811] Two weeks later, on 5 December 2002, [*] reported[812] the outcome of the meeting of the Hong Kong BAR CSC, stating that the majority of all airlines would follow CX except BA, LH, MP, [*], QF, CV and [*]. She also asked [*] to talk on his level in particular to SK, AF and JL if they would change their mind and follow LH's example of not lowering the surcharge. Furthermore, she asked for his support in persuading SQ and KL as both airlines had not yet decided whether to change their SSC. She suggested to do so in the framework of the following week's [*] meeting.

(619) On 13 January 2003, [*] stated in an internal LH email[813] that LH was in contact with other carriers to stabilize the SSC levels in Hong Kong, and that lowering of the surcharge was not foreseeable. He also wrote that the WOW coordinators at LH had spoken to their alliance partners. They also signalled no intentions of changing the SSC.

(620) In an internal LH email[814] on 5 March 2003, [*] (LH) wrote to [*] (LH) that 'his efforts regarding SSC with the WOW partners' were fruitful and she informed him about updates she had received from SK and SQ regarding their application of a SSC. She also mentioned that she could not reach AF. On 10 March 2003, in a

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further email[815], [*] thanked [*] for his help regarding the introduction of the SSC by AF in Hong Kong.

(621) [*] states that [*][816]. An internal LH email[817] by [*] on 24 January 2004 makes reference to these discussions, but gives no date of a conversation or meeting.

(622) [*], LX [*] sent an internal email[818] on 20 January 2004 as a response to the news from Hong Kong that the SSC cannot be applied any longer as the Hong Kong CAD refused to extend the permission. [*] notes that he would like to avoid it and asks 'can we team up with other European carriers in HKG?'

(623) In an internal LH email on 18 May 2004, [*] mentioned that he was contacted by KL and asked why LH did not charge a higher SSC for unchecked cargo in Spain as the other airlines did locally[819].

(624) On 20 May 2004 [*] sent an internal email[820] to [*] in which he informed her that he had a talk with 'a good friend' who is responsible for KLM Cargo West Europe. This friend informed him that the freight forwarder [*] was also pressing KLM to cap the SSC. [*] states[821] that [*]. [*] states that in response to this, he called [*] at KL to find out whether KL was capping its surcharge as the freight forwarder [*] pushed [*] to cap its SSC. [*].[822]

(625) Referring to the news that [*] announced that it was withdrawing the SSC in Hong Kong, [*] (LH) asked in an internal LH email[823] dated 15 June 2004 whether LH had on a senior management level contact to [*] to find out more about their intention regarding the SSC. One day later, on 16 June 2004, [*] forwarded this email[824] to [*], then the LH [*] in Dubai to contact [*] directly. Four days later, on 20 June 2004, [*] stated[825] that he had met [*] in calendar week 24 and mentioned surcharges in a general way. [*] then mentioned that he organised meetings for 28 June 2004 with the directly responsible employees of [*] and hoped to discuss the issue then in a more extensive fashion. On the same day, 20 June 2004, [*] (LH) mentioned in an internal LH email[826] that [*] would re-implement a SSC ex Hong Kong effective from 21 June 2004.

(626) In an email[827] on 26 April 2005, [*] of JL informed [*] (LH) of his idea to introduce a SSC for the shipment ex Japan in conjunction with the new security measures involving x-ray checks ordered by the Japanese authorities. In a further email[828] dated 27 April 2005, [*] clarified his request for information. In his email[829] of the same date, [*] answered these questions and commented that 'it was a brilliant idea'

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to introduce a SSC in Japan. In an email[830] of 24 May 2005, [*] asked [*] whether he had been active on the issue in the meantime.

(627) [*] sent an email[831] to [*] (QF [*] Eastern USA) on 11 May 2005 asking her about 'the possibility of raising the security surcharge'. He notes 'collusion never hurts does it?' [*] replied[832] on 12 May 2005 stating that she 'has not heard any rumour about raising the Security surcharge.' She then asked 'are you guys doing it?' In his reply the same day[833], [*] explained the new procedure and noted that 'I am thinking about convincing Tokyo to raise the security surcharge'. [*] forwarded[834] the whole email chain internally to [*] and [*] asking 'do we have any intention of raising the security surcharge?'

(628) In an email[835] on 29 August 2005 concerning a meeting on 31 August 2005 [*] (LH) requested [*] (SK) to 'deliver proof of the SQ's surcharge policy to [*] for next meeting for escalation purpose'. Following the meeting, on 1 September 2005, [*] replied[836] that he had already escalated the security surcharge issue with SQ. In addition he noted that 'the SQ management will urge them to follow us'.

(629) [*] (SK) sent an email[837] to [*] (SQ) on 12 October 2005 stating that 'thanks for yesterday's meeting I herewith confirm that we charge 1.10 Danish krona or 15 eurocent in sec. surcharge. Would appreciate if we could harmonize accordingly.' SQ replied[838] on 13 October 2005 that 'we will harmonize.'

(630) In an internal SK email[839] on 21 October 2005 it is stated that 'at our WOW meeting for Europe we agreed that we would impose surcharges. Must realise that it is not as easy as we thought, or hoped. I now hear that SQ is reluctant. As you know JL shall consider the latest increase. [*] says that SQ must harmonize security to the same level as we and LH have. [*] is not quite so sure, says that he must be on a level with [*] etc. Good if you would put pressure on [*] also. If everybody goes in different direction it will take only a couple of days before we get the worst deal. I shall put pressure on Steering Committee here. We have to decide in WOW if we wish to continue as previously or prefer a split up like KL/AF.'

(631) In an internal SK email[840] on 1 November 2005 under the subject 'SQ Cargo news: insurance & security surcharge increase wef 14 November 2005' the 'newsletter SCC increase 31 October 2005' is forwarded with the comment that SQ is finally harmonising the surcharge.

(632) In an internal SK email[841] on 23 November 2005 concerning the increase of the SSC charged by SQ in the framework of a Block Space Agreement, reference is made to the fact that earlier SK and LH convinced SQ to raise the SSC to customers. It is

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839 [*] (Orig. SE).
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stated that 'it is us, WOW, ie. LH+SK who have been bickering with SQ now for ever to raise their SSC to 0.13 from 0.10…'

(633) In an internal JL email[842] on 10 January 2006 [*] asks his colleagues to 'advise if you have heard any rumour that airlines are planning to raise security surcharge in the near future'. [*] replied on 11 January 2006 that 'just kept in touch with [*] and [*] and they have no news about that'.

(634) [*] ([*] Germany) forwarded an [*] newsflash to [*] (LA) on 10 February 2006[843]. [*] then forwarded the email[844] internally on 11 February 2006 stating that the [*] newsletter concerning the SSC following LH was attached. He added that there would be a meeting on Monday with [*], AC, [*], etc in the office of [*].

4.4.2.5. Competitor contacts concerning the SSC – United Kingdom

(635) In an internal LH email[845] on 1 October 2001, [*], LH's [*] United Kingdom and Ireland noted that 'Martinair revealed this morning in discussions with us on the new surcharge that they had a record tonnage in September ex the UK.'

(636) In an internal [*] email[846] on 1 October 2001 the plans concerning the implementation of SSC in the United Kingdom by LH, SQ, BA, AC and CV are reported and reference is made to conversations with SQ and AC.

4.4.2.6. Competitor contacts concerning the SSC – France

(637) [*] states[847] that CX, [*], approached a number of companies concerning the SSC, [*] in September 2001.

(638) [*]. According to [*].[848]

(639) [*].[849]

4.4.2.7. Competitor contacts concerning the SSC – Italy

(640) In an internal LH email on 28 September 2004, [*], LH [*] for Italy and Malta, informed colleagues that in Italy he had founded a subgroup of 'Blacks' with BA, AF, CV, KL and Swiss to coordinate security measures. As he wrote, another aim was 'of course, to also streamline our surcharge policy'[850].

4.4.2.8. Competitor contacts concerning the SSC – Switzerland

(641) [*] (MP [*] Southern Germany, Switzerland) sent an email[851] to [*] ([*] of ACCS) and [*] ACCS members on 4 October 2001 stating that 'our insurance surcharge fee will also be CHF 0.25 p.k. actual weight effective Oct 15th 2001.'

4.4.2.9. Competitor contacts concerning the introduction of the SSC in 2001 – Turkey

(642) There was internal LH email exchange[852] from 3 to 5 October 2001 between [*], a member of LH's sales office in Vienna and [*] concerning the implementation of the

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SSC. [*] asked for an exception from the centrally defined SSC policy because, as he explained, the local LH [*] '[*] contacted all airlines in Istanbul' and as a result 'our competitors agreed to charge USD 0.15/kg chargeable weight and in order to honour our position and name in the market [*] was obliged to agree with them.'[853]. In response to these arguments, [*] approved the change.

4.4.2.10. Competitor contacts concerning the SSC – South Africa

(643) In an internal LH email[854] on 29 September 2001 under the subject 'security surcharge' it is noted that 'Got the information from secret channel… There is a meeting with [*] airlines in JNB'. An email is attached from a customer in South Africa who complains about the surcharge that LH plans to introduce.

(644) In an internal LH email[855] exchange on 1 October 2001 it is noted concerning the SSC that 'there is an industry meeting at [*] tomorrow with all the airlines regarding this.'

(645) The local QF employee[856] in South Africa reported in an internal email on 3 October 2001 that 'today [*] airlines in JNB met with [*] to discuss the proposed implementation of insurance/security surcharge ex South Africa.'

(646) In an internal LH email[857] on 4 October 2001 the implementation prospects of the SSC in Africa are reported to the head office by [*], the [*]. He stated in the email that the proposal was 'based on long discussions with [*] local carriers and OAL.'[858] He added that 'our friends [*] did not respond yet, even so they promised to inform the market'. Furthermore, three tables are attached that list the amount and date of introduction of the SSC of [*], AF, BA, KL, [*], SR, MP, CV, [*], [*], [*], [*], [*], [*], [*] and [*]. The comment added to the first table states that 'the listed security charges are the outcome of the all airline meeting in JNB.' The comment to the second table states that 'all AL meeting in CAI outcome: All carriers (LH, AF, BA, [*], KL, SR) agreed on suggesting an implementation of EUR 0.15/kg for GenCo Eur 0.026/kg for PER at their HQ's.' The comment to the third table states that 'All AL meeting NBO outcome: agreed to suggest level of EUR 0.09/kg as of 15.10.01.'

(647) Still on 4 October 2001 [*] (LH) forwarded internally a press release by [*] adding that 'after two emails and three phone call they finally had the balls to inform the market.'[859] [*][860].

4.4.2.11. Competitor contacts concerning the SSC – Other African countries

(648) In an internal LH email[861] on 28 September 2001, after having received the news from LH headquarters about the decision to introduce the SSC of EUR 0.15 per kg as of 8 October 2001 on a worldwide basis, [*] (LH) asked his colleagues in LH's African offices to inform their local market and to 'talk to your local carrier and top competitor if they follow'. In his same day reply [*], LH's [*] East Africa in Nairobi,

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857 [*]
858 Other airlines.
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861 [*]

reported back that he had 'got info that [*] will implement SSC as of 1 October 2001 at US$ 0.10/kg'[862].

(649) In an internal LH email[863] on 2 October 2001, [*] (LH) mentioned a meeting that had taken place in Nairobi on the previous day and in which all carriers operating from Nairobi had been present (AF, [*], BA, SR/[*], KL, MP, [*], CV, [*], [*], [*] and [*]). Detailed information about whether and how the airlines were about to implement SSC (level of surcharge and implementing date) had been exchanged. It is noted that 'it was suggested by the majority of the participants present that a proposed surcharge of US$ 0.08/kg as of 15.01.01 on all commodities would be more appropriate with the existing situation in Kenya'

(650) [*] of [*] ([*] of KL, MP and [*] in Kenya) sent an email[864] on 2 October 2001 to the head offices of MP and KL reporting that 'In a meeting yesterday with [*] cargo carriers operating from Nairobi it became clear that the majority of the competition here will not implement a surcharge of US $ 0.10-0.12.' He mentions that '[*], [*], Cargolux, [*] and [*] will not implement a surcharge at all or are going for a maximum of around USD 0.05. It appeared that the airlines during said meeting are all willing to jointly implement a surcharge of maximum USD 0.05.' A table is attached to the email titled 'Surcharge overview Nairobi cargo competition' and contains data concerning AF, BA, [*], CV, [*], [*], [*], KL, MP, LH, [*] and SR. It is noted in the table that 'all European carriers give outstations freedom of implementation due to local market situation…'

(651) In an internal LH email[865] on 3 October 2001, the LH [*] Johannesburg circulated detailed proposals for SSC levels for specific areas in Africa (Cairo, Nairobi, Johannesburg, Dakar and Lagos). It was noted that the actions proposed for Cairo are 'in agreement with almost all airlines except [*]'.

(652) In an internal LH email on 4 October 2001, the local LH [*] in Nairobi, [*] stated 'another cargo airline committee has been called' that morning to discuss the implementation of the SSC, and that he would give further details later[866].

(653) In an internal LH email chain[867] on 8 and 9 October 2001, [*] was asking his colleague in the LH sales office in Mauritius about what [*] was doing regarding the SSC. [*] wrote that he had spoken to [*], [*] of AF, who had said that AF also wanted to introduce the surcharge but had been waiting for a decision from [*]. [*]'s colleague responded by listing a number of airlines that would implement the surcharge and stated that several airlines, including [*], were not willing to tell when they would implement a SSC. He suggested to [*] to address the matter directly with the board of airline representatives. [*] was then seeking advice from [*] who suggested he could talk to [*].

4.4.2.12. Competitor contacts concerning the SSC – Thailand

(654) In an email[868] on 2 October 2001, [*] (LH's Bangkok [*]) asked [*]'s authorisation to go along with [*]'s 'proposal' of US$ 0.10/kg based on chargeable weight. [*] stated,

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866 [*]
867 [*]
868 [*]

'discussions with other airlines clearly demonstrate that cooperation is to be expected as other are also discussing the issue'. [*] mentioned that in ACBA a meeting was scheduled to discuss the issue for 5 October 2001, 10am, but that he would have liked to discuss the issue with 'parties' prior to this date. In the reply of the same day[869], [*] refused to grant any derogation.

4.4.2.13. Competitor contacts concerning the SSC – Korea

(655) On 22 October 2001 [*] (LH) forwarded internally an email from [*], mentioning that he had discussed the surcharge issue during his last meeting with [*], and that the forwarded email was the answer from Seoul. The [*] email states that the Korean Civil Aviation Authority had approved [*]'s application of USD 0.10/kg effective from 22 October 2001.

(656) [*], BA's [*] of Japan/Korea, forwarded an internal email[870] to [*] in the BA head office on 12 May 2003 concerning the withdrawal of the government permission to apply a SSC in Korea. The email states that 'major carriers such as [*], [*], KL, AF and [*] others including BA are definitely opposed to KCAB's[871] short decision and will have a meeting on 15 May 03 to protest against KCAB's decision.'

4.4.2.14. Competitor contacts concerning the SSC – Hong Kong

(657) The [*] of the BAR CSC sent a letter[872] to [*] members on 10 December 2002 concerning the application to CAD to renew the insurance surcharge. He calls on members who do not wish to follow CX to apply to CAD individually.

(658) In an internal LH email[873] on 5 September 2003, [*] (LH) mentioned that she had met with CX and that CX had been planning to [*] the surcharges [*]. She also stated that she had received information from AF who would go for a new application of the SSC.

(659) [*], a QF employee in Hong Kong sent an internal email[874] to [*] on 19 December 2003 informing him that the BAR CSC will apply to the CAD for an extension of the SSC. He asked permission to join the BAR CSC application.

(660) The minutes of a BAR CSC meeting[875] held on 14 January 2004 with the participation of AC, AF, [*], [*], BA, [*], [*], [*], CV, CX, [*], [*], KL, [*], LH, LX, [*], [*], QF, SK, SQ and [*] report that it was decided to adopt a collective approach to lobbying the CAD to approve the concept of SSC.

(661) In an email[876] on 19 January 2004 CX sent to [*] BAR CSC members the letters of Hong Kong CAD concerning the approval to continue to implement a FSC and the refusal to collect an insurance surcharge.

(662) The Hong Kong Shippers Council sent a letter[877] to the Hong Kong CAD on 29 January 2004 to complain about surcharges and they stated that 'carriers

869 [*]
870 [*]
871 Korean Civil Aviation Bureau.
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873 [*]
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875 [*]
876 [*]
877 [*]

collaborating among themselves and announcing a single charge item at the very high level', saying that 'this kind of collective pricing (..) should be forbidden'.

(663) CX sent an email[878] to [*] BAR CSC members on 26 February 2004 informing them that the CAD allowed BA to levy a SSC called Exceptional Handling Charge. [*] (MP) replied the same day that CAD approved the SSC of LH, KL, CV, and MP following individual applications and that two other European airlines were 'still in process with their individual application'. He suggested, 'as lobbying is effective (…) to hold a BAR meeting next week to discuss further steps with other carriers on how to achieve all airlines charge the same SSC in the market'.

(664) A meeting of AF, BA, KL, LH, MP and a representative of the Dutch consulate general is reported in an internal LH email[879] dated 26 January 2004. The airlines discussed their position concerning the SSC. It is noted that 'KL also talked to CV casually that they might [*]… However they want to keep the dialogue with us and still want to be with us.'

(665) The minutes of a BAR CSC meeting[880] on 15 March 2004 with the participation of AC, AF, [*], [*], BA, [*], [*], CV, CX, [*], [*], JL, [*], [*], KL, LH, LX, [*], [*], MP, [*], [*], QF, [*], SK, SQ, [*], [*] and [*] reports concerning the SSC that '- it was proposed that the ExCom[881] would push for a joint SC application on behalf of [*] members… MP/[*] commented that when they met with the CAD along with the EC the CAD gave the message that they were surprised at airlines filing applications for surcharge approval as only tariffs needed to be approved… It was agreed that BAR CSC should still file for application rather than to bypass the CAD and just levy the surcharge… It was agreed that carriers must charge SC ex Hkg because of the big revenue impact.'

(666) The minutes[882] of a BAR CSC ExCom meeting on 30 March 2004 with the participation of CX, [*], LH, MP, SQ and [*] reports concerning the SSC that 'CAD in an unofficial meeting indicated that they did not want to get involved in the SSC issue if the 'security charge' is part of airline/agent's 'contract rate' even as a separate item; ExCom agreed that CX as the home carrier will take the lead to implement the security charge and it will be up to the other carriers as to whether or not they will follow; The security charge amount will be based on the worldwide benchmark; ExCom has agreed the target starting date for SC announcement to be 01 May 04'.

(667) [*] (MP) wrote an email[883] to the BAR CSC Executive Committee, SQ, [*], LH, [*], [*], CV and CX on 12 May 2004 and he stated concerning the SSC that 'last meeting you said CX/[*] would introduce security surcharges in HKG with different prices for Europe, USA & Asia. Can you please advise the status as I am eager to increase the security surcharge to HKD 1.15 or 1.20 but I prefer not to do this alone as MP.'

(668) The minutes of a BAR CSC ExCom meeting[884] on 17 May 2004 with the participation of CV, CX, [*], [*] and SQ reflect discussions concerning the SSC. 'Although BAR CSC will not be involved in coordinating the introduction of security

878 [*]
879 [*]
880 [*]
881 Executive Committee.
882 [*]
883 [*]
884 [*]

charges major carriers reported on their current plans; CX as Hong Kong's home carrier will announce to agents that the security charge will be levied with an effective date of 1 June 2004... SQ will follow the home carrier. [*] has indicated that they would follow the home carrier…'

(669) [*] (MP) wrote an email[885] to AF, [*], BA, CV, KL and LH on 17 May 2004 stating that 'I heard today from [*] that CX will introduce a security surcharge of HKD 1.00 per kg per 1st June… Since we have cleared the problems here with CAD we are free to charge whatever we want. Therefore I am quite eager to increase the security surcharge to HKD 1.20. However if MP does this alone than it could be difficult. Via this email I am seeking more European carriers who want to increase. Is anyone of you interested in following and increase the surcharge to HKD 1.20 by 15 June or 1 July?' [*] (LH [*] South China) replied[886] on 24 May 2004 that 'LH Cargo for the time being would like to wait and overcome the slack season and then adjust in Aug/Sep 04.'

(670) The minutes of the BAR CSC ExCom meeting[887] on 21 September 2004 with the participation of CX, [*], LH, MP, SQ, [*] and IATA guests reflect concerning the SSC that 'the ExCom was informed that ERP carriers currently charging a SSC of HKD 1.0/kg have decided that they would not reapply to CAD for the extension of the existing SSC and would start charging a SC of HKD 1.2/kg.'

4.4.2.15. Competitor contacts concerning the SSC – Singapore

(671) According to the minutes[888] of a BAR-CSC meeting held on 23 January 2003 member airlines discussed a request from the freight forwarders 'to lowering insurance and security surcharges to ensure that Singapore remains a competitive hub…Member airlines agreed that there would be no reduction to the ISS charge'.

4.4.2.16. Competitor contacts concerning the SSC – Japan

(672) [*] states that [*][889].

(673) In an internal LH email[890] on 30 October 2001, [*], in (LH [*]), informed [*] that LH had 'missed the train' because it had failed to take the lead by filing with the Japanese authorities in due time. Consequently, AF, KL, BA and SK ('European heavy weights') all filed with the MLIT for Japanese YEN 500 to 600 per airway bill similar to JL and [*]. [*] suggested that LH followed JL. [*] forwarded the email[891] on the same day suggesting that LH should still file an application for EUR 0.15 per kg actual weight with the Japanese authorities. He commented: 'I am sure that the other European carriers will follow, when we signal that we will lead'.

4.4.2.17. Competitor contacts concerning the SSC – United States

(674) [*].[892] [*].

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4.5. Discussions concerning commission on surcharges

(675) Forwarders claimed that they incurred costs linked to the collection of the surcharges from the shippers that they perform on behalf of the airlines, however they did not receive any remuneration (commission) from the airlines for this service. The forwarders asked the International Federation of Freight Forwarders Associations ('FIATA') for advice. FIATA wrote a letter[893] to its member associations on 27 December 2004 advising them to try and solve the issue bilaterally with airlines as it could not be discussed in a multilateral forum since 'remuneration of services is a matter which can only be agreed bilaterally between the concerned parties'. FIATA also advised that failing a negotiated agreement, individual forwarders can invoice their costs to the airlines.

(676) The airlines continued to refuse commission on the surcharges and confirmed their relevant intentions to each other in the framework of numerous contacts.

(677) Following the advice of FIATA in 2005 a number of forwarders tried to settle the issue with the airlines and issued invoices for their services in collecting the surcharges.

4.5.1.1. Head office involvement

(678) [*] ([*]) sent an email[894] on 14 January 2005 to [*] (BA [*]) attaching the FIATA letter concerning the remuneration of forwarders and suggested to discuss it during the Cargo Executive Committee conference call on 28 January 2005. [*] forwarded[895] the email internally to [*] (BA) on 17 January 2005 stating that 'sounds anti comp to me' and asked for legal advice. [*] replied that 'this is a definite no go'.

(679) [*] (LX [*]) sent an internal email[896] on 19 May 2005 concerning commission on the fuel and SSC in which he instructs the area managers to 'participate wherever relevant in local BAR meetings'.

(680) In an internal SK email[897] dated 9 June 2005 it is noted, concerning a letter from the forwarders claiming commission on the FSC, that 'the whole question is exceptionally sensitive from a competition point of view, and it is important that WOW does not respond collectively and that individual WOW-members do not give a 'collective' reply. The best course of action would be that CASS – like in Switzerland – would advise about the consequences.' In the reply[898] sent on 14 June 2005 it is confirmed that 'we cannot discuss this in WOW but have to deal with it in each company separately.'

(681) [*] (LA) sent an email[899] on 17 June 2005 to [*] ([*]) asking him whether [*] 'have received some kind of pressure or information from freight forwarders to make surcharges commissionable. Some of the FF we work with have insisted on this.' [*] replied[900] on 20 June 2005 confirming that [*] received similar claims from forwarders and rejected them. He noted that 'we see no advantage or need to break

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ranks on this matter.' [*] forwarded the email[901] internally in LA making also reference to the position of LH concerning this issue.

(682) [*] ([*]) sent an email[902] on 6 July 2005 to [*] (LH) under the subject 'remuneration for collection of surcharges' and asked LH whether they are 'getting the same type of mails/communiqués from customers'. [*] replied[903] on 15 July 2005 stating that 'In case somebody deduct 5% of the surcharges we could think of stop working with this customer immediately.'

(683) In an internal CX memo titled 'handling requests for commission on surcharges' sent to cargo sales managers on 8 July 2005 it is stated that 'as long as local conditions allow CX should adopt a common approach and response to the issue. CX should therefore consider following any rejection of such request or claim for commission and other related actions that may be coordinated by your local airlines associations.'

(684) [*] ([*]) forwarded[904] an email on 8 July 2005 to [*] (LH) and [*] (AC) from [*]'s Italian sales agent [*] concerning the claim of forwarders to pay a commission on the surcharges.

(685) An email chain[905] concerning [*] of QF and commission on the surcharges was forwarded to [*] (BA) who forwarded it internally in BA on 21 December 2005 commenting that 'This shows that what you do in one part of the world does get feedback to the UK.' [*] (BA) forwarded[906] the whole email chain on 23 December 2005 to [*] (QF) stating that this was 'an example of one hand not talking to the other!' [*] replied[907] the same day stating that the information is misleading and that they 'have no intention of paying commission on any surcharges'.

(686) [*] (SQ [*] for the United Kingdom & Ireland) sent an email[908] on 28 December 2005 to LH, CX, [*], [*], [*], [*], JL, BA, SK, [*] and [*] asking them whether they also received a communiqué from [*] in Germany announcing that [*] was going to collect a charge for the collection of the surcharges from 1 January 2006. The email was forwarded internally in [*] and [*] ([*] Germany, Nordic Countries, Eastern Europe) replied[909] on 3 January 2006 that 'I am meeting up with MP on Thursday and she will be giving me a letter their legal dept sent. I also spoke to LH last week who will not answer officially to the QCS letter but have said that they will not accept any such invoices. AC by the way have received something from [*] here locally. I will fax you their letter just now.'

(687) [*] (CX) sent an internal email[910] on 4 January 2006 concerning letters from forwarders announcing the intention to invoice the carriers for the collection of the surcharges. He stated in the email that 'most managers of other carriers are still on leave as I write, although I have spoken with SQ and AC. SQ has chosen to ignore the letters. AC have forwarded on to [*]. Next week LH management returns from

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leave and I will find out what their intention is.' In a following email[911] on 9 January 2006 [*] states that 'have now spoken with LH who are also not responding to the letters for the moment.'

(688) [*] (LH) called[912] [*] (AF) on 9 February 2006 and asked him whether the position of AF remained unchanged concerning the refusal of paying a commission on the surcharges to the forwarders.

4.5.1.2. Switzerland

(689) [*] ([*], forwarder) sent an email[913] to LH, LX, KL and SQ on 13 January 2005 with an attached letter from the forwarder association FIATA, inviting them to a meeting to discuss the remuneration of forwarders by giving them a commission on the security and fuel surcharges. [*] (LH [*] Switzerland) replied[914] on 14 January 2005 that he could not participate at the meeting on the proposed dates and that the matter was discussed internally in LH for the time being.

(690) [*] (SQ) sent an email[915] on 17 January 2005 to LH, LX, [*], KL, CX in which he enclosed the draft reply of SQ to the email of [*] sent on 13 January 2005 concerning commission on the surcharges.

(691) In an internal LX email[916] on 1 March 2005 [*] (LX [*]) stated concerning the surcharge commissioning that 'the topic will be discussed unofficially at the meeting in Malaga'.

(692) On 5 June 2005 ACCS [*] (SQ) sent an email[917] to ACCS members ([*], [*], AF, LX, LH, BA, [*], CX, [*], KL, JL, MP, [*], [*], [*], [*], [*], [*], [*]) and proposed to meet at the visitor centre at Cargologic on 17 June 2005 to informally discuss the letter of Spedlogswiss, the Swiss forwarder association that was sent to most of the airlines on 30 May 2005. [*] ([*]) replied[918] on 6 June 2005 stating that ACCS should reply to the letter of Spedlogswiss on behalf of the member airlines. [*] replied[919] the same day that it might be considered as price discussion by the competition authority and would like to talk to IATA about it first. [*] ([*] Switzerland) replied[920] on 7 June 2005 supporting the request of [*] for a common response. [*] (KL)[921] and [*] (CX [*] Switzerland) replied[922] on 8 June 2005 also supporting a common reply to the forwarders.

(693) On 13 June 2005 the ACCS [*] sent an email[923] to [*] ACCS members ([*], [*], AF, LX, LH, BA, [*], CX, [*], KL, JL, MP, [*], [*], [*], [*], [*], [*], [*]) and referring to the Spedlogwiss letter he presented a draft common reply in the name of ACCS for comments to the airlines, rejecting the forwarders claims. He furthermore advised airlines that 'you might be still contacted directly again at a later stage on a bilateral

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923 [*]

basis. It is therefore still a necessity to discuss our further steps as scheduled in our meeting dated 17 June 05.' The final letter[924] in the name of ACCS was sent to Spedlogswiss on 14 June 2005.

4.5.1.3. Italy

(694) An email[925] was sent from the Italian Board of Airline Representatives ('IBAR') on 30 March 2005 to JL, KL, AF, BA, [*], CX and [*] forwarding a draft reply to the letter sent by ANAMA, the Italian forwarders association concerning commission on the surcharges. The IBAR called on the airlines to 'use the draft reply quoted here below with maximum care, each carrier must use the gist of the draft and not just copy as it is.'

(695) In an internal LX email[926] on 19 May 2005 [*] (LX [*] Italy) wrote the following: 'Strictly confidential especially for antitrust reasons. On 12 May following carriers decided to meet at LH Cargo Italy: [*], LH, LX, AF, KL, CV and JL (more than 50% of the market). We all confirmed that we will not accept any FS/SS remuneration. BA could not join the meeting but is of the same opinion… It goes without saying that carriers meetings have to be treated in a very confidential way. We are not allowed to write in the name of a carrier group/association and to state officially that all carriers have replied with a no.'

(696) In an internal CX email[927] dated 14 July 2005 [*] (CX [*] Italy) reported that: 'Yesterday afternoon a meeting has been held in MIL among the most important carriers, namely AF, [*], CV, CX, KL, LH, [*], SQ, JL, LX. Regardless the individual way every carrier will adopt to reject the invoices that we'll receive from the agents (…) everyone reconfirmed the firm intention not to accept any negotiation in granting this commission.'

(697) In an internal CX email[928] on 14 October 2005 concerning the letter of the forwarders asking for a commission on the surcharges, [*] (CX [*] Italy) stated that 'on real confidential basis I succeeded to get the text of LH's HDQ reply to this letter' then she quoted the letter of LH. She furthermore added that 'the majority of the airlines excluded the first group of four carriers (LH, AF, KL, [*]) that have received the letter above won't answer this letter.'

(698) In an internal LX email chain[929] concerning the accounting of the invoices issued by forwarders in Italy for paying a commission on the surcharges, [*] (LX [*] Italy) stated[930] on 13 October 2005 that 'We are not going to pay these commissions, this is for sure, but we are forced to register the invoices, this according to instructions received by [*] Italy (pax). Therefore we need a transitional cost account where to place these registered invoices, even if we don't pay a penny, in case one day we would have to pay. CV, AF, KL, [*] are all doing the same'.

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4.5.1.4. France

(699) In an internal [*] email[931] on 6 July 2005 concerning the 'remuneration for collection of surcharges' it is reported that 'this topic has been touched upon during our recent SYCAFF (local cargo airline association) in CDG and our national carrier Air France confirmed that they have strongly rejected such idea and recommended all carriers to also refuse any remuneration asked by the intermediaries.' In a following email[932] on 11 August 2005 it is stated that 'the topic is under discussion with national carrier Air France and our local airline association (SYCAFF) and for the time being the idea is to let each carrier take individual decision.'

4.5.1.5. Spain

(700) [*] (CV) sent an internal email[933] to the CV head office on 5 July 2005 under the subject 'commission fuel surcharge and security surcharge' stating that 'tdy we had a meeting on this subject with [*] a/l operating at BCN airpt and it was a general opinion that we shld not pay any comm on surcharges.' He also attached the minutes of the meeting.

4.5.1.6. India

(701) In an email[934] to [*] members of the Indian BAR on 12 May 2003 CX raised the question of commission on surcharges, suggesting that members should be asked to stand together and decline commission on operating costs. [*] ([*]), the [*] of BAR (I) Cargo sent an email[935] to [*] members on 12 May 2003 stating that that topic was scheduled for discussion at a meeting of airlines on 19 May 2003 in Delhi. He sent another email[936] on 20 May 2003 announcing a meeting on 22 May 2003 where members of the Air Cargo Agents Association of India were invited. It appears from subsequent emails[937] that BAR (I) Cargo turned down the agents' request for 5% commission on behalf of all airlines except [*] and triggered a strike among agents. The matter was turned over to IATA.

4.5.1.7. New York

(702) [*] states[938] that in May 2004, representatives of AF, KL, [*], LX, LH and possibly other carriers visited the 'Oak Bar' in New York City after the initial meeting for a bid by [*]. The participants discussed commission on surcharges, especially whether they would offer a commission to [*] on surcharges. LH, AF and KL said that they would not do so. They also discussed the fact that the WOW carriers had been invited to participate in a joint bid for [*].

4.6. Assessment of factual evidence

4.6.1. Evidence relating to the cartel as a whole

(703) As demonstrated in the description of facts in Sections 4.1 to 4.5 the anti-competitive conduct regarding pricing coordination took place from at least 7 December 1999 to 14 February 2006 (the first day of the Commission inspections). During this period

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the addressees removed price uncertainty from the market by cooperating on various elements of price for airfreight services.

(704) The cooperation took the form of repeated bilateral contacts and also multilateral contacts. These contacts took place often by telephone but also by email, fax and in meetings. This network of contacts operated within the undertakings both at a senior level with head office involvement and also at a local level.

(705) The overall network of coordination of pricing matters had various elements. The addressees cooperated in respect of the FSC, the SSC and the non payment of commission on the surcharges to freight forwarders.

(706) The evidence in Section 4.3 demonstrates that cooperation took place in relation to the FSC from December 1999 until February 2006. The addressees contacted each other on various matters concerning the FSC including changes to the mechanism, application of the mechanism, changes to the FSC level, disclosure of anticipated increases and announcement dates, commitments to follow increases and instances where some airlines did not follow the system. This network of frequent contacts was aimed at ensuring that discipline was maintained in the market and that increases arising from the fuel indices would be applied in full and in a coordinated way.

(707) The evidence in Section 4.4 demonstrates that cooperation took place in relation to the SSC from September 2001 to February 2006. Contacts between airlines and discussions related in particular to whether to introduce an SSC, the manner in which it should be calculated, the appropriate level of the surcharge, the timing of introduction and justifications to be given to customers.

(708) The evidence in Section 4.5 demonstrates that cooperation took place in relation to commission on surcharges from January 2005 to February 2006. Contacts were made between airlines with a view to aligning their conduct in refusing to pay commission to forwarders on surcharges.

(709) A number of carriers have made submissions that certain contacts contain public information, factual errors, are inconclusive or have been misinterpreted by the Commission.

(710) BA dismisses many contacts as inconclusive or related to publicly available material.

(711) CV states that the Statement of Objections ('SO') contains many inaccuracies and unsubstantiated allegations against it which do not meet the requisite standard of proof.

(712) CX claims that many incidents described in the SO are capable of innocent explanation.

(713) The Commission has carefully considered the submissions of BA, CV, AF and CX on inconclusive or publicly available material and the submissions offering explanations for various contacts and a number of specific contacts have been modified or are no longer relied upon. However, the Commission's evidence must be assessed as a body[939]. Accordingly, many contacts which do not amount to decisive

[939] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission*, ECLI:EU:C:2004:6 , paragraphs 53-57 and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP and T-61/02 OP *Dresdner Bank AG and Others v Commission,* ECLI:EU:T:2006:271, paragraphs 59-67.

evidence of an infringement in themselves are nevertheless relevant, when assessed with other contacts, to establishing the single and continuous infringement.

(714) Finally, the Commission wishes to point out that whilst the exchange of publicly available material is in itself not problematic it must nevertheless be seen in the wider context of the cartel. By directly communicating with competitors on price such contacts may cause certain carriers to alter their conduct, maintain ongoing pricing contacts between competitors and may operate as a form of monitoring mechanism. Accordingly, in the context of this cartel, which involves numerous bilateral and multilateral contacts about pricing matters, the Commission nevertheless considers relevant certain contacts which relate to the exchange of recently announced pricing information. Such disclosure is particularly relevant when other undertakings have yet to take pricing decisions. However, the Commission recognises that such contacts carry less evidential weight than exchanges of non public pricing information.

4.6.2. The evidence in relation to each addressee

(715) The involvement of the addressees in the aspects presented in Section 4.6.1, namely FSC, SSC and commission on the surcharges are detailed in Sections 4.6.2.1 to 4.6.2.14 by undertaking. The Commission relies on the evidence presented in Sections 4.1 to 4.5 but outlines the specific evidence in relation to each undertaking by way of summary of the evidence in relation to the aspects outlined in Section 4.6.1 taking also into consideration the parties' responses to the SO.

(716) The Commission does not necessarily hold every recital which reference is made to and every single item of evidence therein to be of equal value. Rather, the recitals to which reference is made form part of the overall body of evidence the Commission will rely on and have to be evaluated in this context.

4.6.2.1. Evidence concerning AC

Summary of Commission's case

(717) Evidence regarding Air Canada ranges from 21 September 2000 until 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails, telephone calls and meetings.

(718) AC was involved in the following aspects: FSC and SSC.

FSC

(719) In respect of the FSC contacts included in particular: repeated exchange of pricing information by email[940]; repeated telephone discussions[941]; bilateral discussions with other carriers, in particular LH[942]; participation in multilateral meetings involving numerous carriers notably on 22 January 2001 at LH's premises in Germany where carriers discussed [*] the FSC withdrawal [*][943]; in a meeting in Canada on 2 April 2003 with AF, CX, BA, [*], [*], JL, [*], KL and LH[944]; participation in the email

[940] See the following recitals of this Decision: [*] (492)
[941] See the following recitals of this Decision: (564) [*]
[942] See the following recitals of this Decision: (161) (218) (231) (249) (272) [*](283) (291) (303) (346) (358) (411) (446) (450) (482) (495) (555) (564) [*]
[943] See the following recitals of this Decision: [*]
[944] See the following recitals of this Decision: [*]

correspondence concerning ACCS members' intended action and future announcements concerning the FSC[945]; and discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings in Hong Kong[946].

SSC

(720) In respect of the SSC, contacts included in particular bilateral information exchanges with BA[947], [*][948] and multilateral email exchanges[949]; multilateral meetings, for example, BAR CSC meetings in Hong Kong[950] and in Germany[951].

4.6.2.2. Evidence concerning AF

Summary of evidence against carrier

(721) Evidence regarding Air France ranges from 7 December 1999 to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, the SSC, and commission on surcharges in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(722) AF head office participated in the coordination of the world wide implementation of FSC increases based on the FSC mechanisms of the carriers involved and the introduction of new trigger points to the said FSC mechanisms involving senior management between at least December 1999 (recital (134) and February 2006, in particular through regular telephone discussions between LH and AF[952] (principally between [*] and [*]) and less regularly between AF and other carriers like CV[953] and MP[954]. During the contacts between LH and AF information related to the FSC of other carriers was also exchanged[955]. There was, furthermore, a bilateral meeting between [*] (LH) and [*] and [*] (both AF) in Paris on 15 May 2001 at which AF gave a commitment to strictly maintain the FSC[956].

(723) AF local staff was involved in contacts with competitors concerning the FSC implementation in the EEA between February 2000 and February 2006, in Switzerland between 2002 and February 2006 and in Hong Kong, India, Thailand and Singapore.

(724) The contacts with competitors on local level included: repeated exchanges of information concerning the timing and the amount of the FSC movements and the introduction of new trigger points to the FSC mechanism by email, phone and

945 See the following recitals of this Decision: [*]
946 See the following recital of this Decision: (394) (503)
947 See the following recitals of this Decision: (612)
948 See the following recitals of this Decision: [*] (636)
949 See the following recitals of this Decision: (585) (594) (609)
950 See the following recitals of this Decision: (660) (665)
951 See the following recitals of this Decision: (634)
952 See the following recitals of this Decision: [*] (187) (209) (212) (215) (260) (335) (357) (382) (399) (400) [*] (469) [*] (518) (522) (525) (552) (556)
953 See the following recitals of this Decision: [*] (405)
954 See the following recitals of this Decision: (191)
955 See the following recitals of this Decision: [*]
956 See the following recitals of this Decision: (179)

personal contacts bilaterally[957] and multilaterally[958]; participation in multilateral meetings involving numerous carriers, notably on 22 January 2001 at LCAG premises in Germany[959], European carrier meetings in Hong Kong [960]; a trilateral meeting between KL, AF and LH on 06 June 2005 in Frankfurt regarding the consistent application of the FSC (with a follow up meeting involving KL, AF, LH on 07 July 2005 in Amsterdam and on 25 July 2005 between AF and LH in Paris) [961]; meetings between AF and CV in Paris on 10 June 2005 and 26 July 2005 aiming to inform CV of the matters discussed at the Frankfurt, Amsterdam and Paris meetings with LH and KL[962]; a meeting with LH at the Novotel Hotel of Paris CDG airport on 19 October 2005 at which both parties provided assurances about the consistent application of the FSC and AF made a commitment not to cap the FSC again[963]; AF sent and received emails to and from competitors disclosing their intended action and future announcements[964]; AF participated in the exchange of information concerning the FSC movements in Switzerland organised by ACCS via emails that included disclosure of intended action and future announcements of its members as well as communication of published FSC levels that allowed members to control the consistent implementation of the FSC[965]; there were discussions and agreements about raising the FSC level and new trigger points within BAR CSC (at least in Hong Kong[966], Singapore[967] and India[968]); and AF participated in the so called BLACKS initiative in Italy where implementation of the FSC was monitored[969]. Some evidence indicates further contacts concerning the FSC.[970]

SSC

(725) The contacts concerning SSC included in particular: discussions concerning the introduction of the SSC[971]; exchanges of information concerning the implementation of the SSC by email[972] and during bilateral meetings[973]; discussions between [*] (AF) and [*] (LH) including a meeting between them and Freight Forwarding Europe on 4 October 2001[974]; a meeting with LH in late 2001/early 2002 in Frankfurt[975]; coordination of the SSC implementation by [*][976]; multilateral meetings at which the

957 See the following recitals of this Decision: (136) (137) (140) (141) (142) (167) (169) (170) (171) (177) (190) (195) (196) (197) (198) [*] (211) (219) (221) (222) (224) (225) (228) (247) (252) (253) (262) (282) (296) (297) (311) (320) (326) (351) (352) (360) (403) (404) (406) (407) (421) (454) (477) (480) (513) (554)

958 See the following recitals of this Decision: (178) (256) [*] (327) (346) (396) (411) (415) (425) (469) (478) (500) (506) [*]

959 See the following recitals of this Decision: [*]

960 See the following recitals of this Decision: (393) (504)

961 See the following recitals of this Decision: (471)

962 See the following recitals of this Decision: (472)

963 See the following recitals of this Decision: (530)

964 See the following recitals of this Decision: [*] (284) (325) (408) (424) (539)

965 See the following recitals of this Decision: [*] (204) (364) (367) (427) (461) [*] (563) (574)

966 See the following recitals of this Decision: [*] (394) (503)

967 See the following recitals of this Decision: (146) (295)

968 See the following recitals of this Decision: [*]

969 See the following recitals of this Decision: (560)

970 See the following recitals of this Decision: (320) (322) (323) (354) (379) (475) (481)

971 See the following recitals of this Decision: [*] (583) (585) (612) (653)

972 See the following recitals of this Decision: (595) (602) (609)

973 See the following recitals of this Decision: (621) [*] (656)

974 See the following recitals of this Decision: (605) (606)

975 See the following recitals of this Decision: [*]

976 See the following recitals of this Decision: [*]

SSC was discussed including in Johannesburg[977], Nairobi[978], Cairo[979] in October 2001 and with KL, BA, and LH on 26 January 2004 in Hong Kong[980]; participation in discussions concerning the implementation of SSC in the framework of the BLACKS initiative in Italy[981]; and discussions between BAR CSC members in Hong Kong concerning the implementation of SSC[982]. Some evidence indicates further contacts concerning the SSC.[983]

Commission on surcharges

(726) Concerning the refusal to pay commission on surcharges to forwarders, contacts included in particular: confirmation of mutual intention of carriers not to pay commission at multilateral meetings, for example, at the Hong Kong BAR CSC meeting on 11 July 2005[984], and at the meeting with other carriers in May 2004 at the 'Oak Bar' in New York City after the [*] bid[985]; trilateral meeting with LH and KL, notably on 6 June 2005 where, besides FSC issues, the participants agreed that forwarders should continue not to receive commission on collected surcharges[986]; meetings on 12 May 2005 at LH cargo Italy[987] and on 13 July 2005 in Milan[988] with local carriers; bilaterally with LH[989]; meetings and other contacts[990] in the framework of BLACKS in Italy[991], ACCS in Switzerland[992] and SYCAFF in France[993].

AF specific arguments and Commission response

Specific arguments on FSC

(727) AF states that it was not involved in discussions concerning the introduction of new trigger points from March 2003 as LH states [*] but was involved only from May 2004.

(728) AF argues that the reference to the switch by AF to the same FSC mechanism, referred to in recital (382), means that AF changed to the same mechanism as KL after the integration of the two companies. However, the Commission notes that [*] (LH) stated in this same email that *'somit sind wir jetzt alle auf bei der gleichen Methode'* that is '*with this we all have the same method now*'.

977 See the following recitals of this Decision: (646)
978 See the following recitals of this Decision: (646) (649) (650)
979 See the following recitals of this Decision: (646)
980 See the following recitals of this Decision: (664)
981 See the following recitals of this Decision: (640)
982 See the following recitals of this Decision: [*] (620) (658) (660) (665) (669)
983 See the following recitals of this Decision: (584) (597) [*] (673)
984 See the following recitals of this Decision: (503)
985 See the following recitals of this Decision: (702)
986 See the following recitals of this Decision: (471)
987 See the following recitals of this Decision: (695)
988 See the following recitals of this Decision: (696)
989 See the following recitals of this Decision: (216)
990 See the following recitals of this Decision: (694) (698)
991 See the following recitals of this Decision: (560)
992 See the following recitals of this Decision: (692) (693)
993 See the following recitals of this Decision: (699)

Specific arguments on SSC

(729) AF denies the involvement of its head office in SSC discussions after its implementation as there is no relevant evidence. In this regard the Commission points to the email of [*] (LH Hong Kong) in which she asked [*] to talk on his level to AF concerning the SSC in Hong Kong in December 2002[994] and then in March 2003 she thanked [*] for his help with AF[995]. Furthermore, AF local staff were clearly involved in SSC discussions even after the implementation, acts for which the company as a whole is responsible.

(730) Concerning an LH email referring to the aim of the BLACKS group in Italy AF argues that SSC was not discussed in the group, as the wording of the email refers to *'Sicherheitsmassnahmen' 'security measures'* that is wider than SSC. The Commission does not accept this argument, as the same email also states that another aim is '*of course, to also streamline our surcharge policy*' that in fact is a clear reference to SSC discussions.[996]

4.6.2.3. Evidence concerning KL

Summary of evidence against carrier

(731) Evidence regarding KLM ranges from 21 December 1999 to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, SSC and the commission on surcharges in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(732) KL head office participated in the coordination of the world wide implementation of FSC increases based on the FSC mechanisms of the carriers involved and the introduction of new trigger points to the said FSC mechanisms involving senior management between at least December 1999 (recital (140)) and February 2006 in particular through repeated telephone discussions between KL and LH[997] (initially between [*] (KL) and [*] (LH) and/or [*] (LH)[998] but subsequently and mainly between [*] (KL) and [*] (LH)[999]) and between 2003 and February 2006 between [*] (KL) and [*] (CV)[1000]. [*] and [*] (KL) also had discussions about the implementation and timing of changes in the FSC with [*] (MP)[1001].

(733) KL local staff was involved in contacts with competitors concerning the FSC implementation in Denmark, Finland, Germany, Italy, the Netherlands, Norway, Sweden, the United Kingdom, Switzerland, Brazil, Hong Kong, India, Indonesia, Iran and Singapore between 2000 and 2006.

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997 See the following recitals of this Decision: [*] (209) (212) (217) [*] (260) (266) (335) (351) (356) (382) [*] (469) [*] (518) (522) (525) (552)
998 See the following recitals of this Decision: [*]
999 See the following recitals of this Decision: (268) (270) (271) (276) [*] (280) (302) [*] (318) (319) [*] (399) [*] (435) [*] (545) (550)
1000 See the following recitals of this Decision: [*] (263) [*] (340) (373) (419) [*]
1001 See the following recitals of this Decision: [*] (189) [*] (225) (310) [*] (321) [*] (360) (402) (423) (437) (438) (476)

(734) Such contacts included: repeated exchanges of information concerning the timing and the amount of the FSC movements and the introduction of new trigger points to the FSC mechanism by email, phone and personal contacts bilaterally[1002] and multilaterally[1003]; participation in multilateral meetings involving numerous carriers notably on 22 January 2001 at LCAG premises in Germany[1004], "European Carrier Drinks" in Hong Kong [1005], on 23 August 2004 in Amsterdam involving the [*] of KL, LH, CV and BA[1006]; a trilateral meeting between KL, AF and LH on 6 June 2005 in Frankfurt regarding the consistent application of the FSC (with a follow up meeting involving KL, AF, LH on 7 July 2005 in Amsterdam)[1007]; participation in the exchange of information concerning the FSC movements in Switzerland organised by ACCS via emails that included disclosure of intended action and future announcements of its members as well as communication of published FSC levels that allowed members to control the consistent implementation of the FSC[1008]; discussions and agreements about raising the FSC level and new trigger points within BAR CSC (at least in Hong Kong[1009], Singapore[1010] and India[1011]); and participation in the so called BLACKS initiative in Italy where implementation of the FSC was monitored[1012]. Some evidence indicates further contacts concerning the FSC.[1013]

SSC

(735) The contacts concerning SSC included: discussions concerning the introduction of the SSC[1014]; exchanges of information concerning the implementation of SSC by email[1015] and during bilateral meetings[1016]; bilateral discussions with MP[1017] and LH[1018]; multilateral meetings at which the SSC was discussed including in Zurich with LH and SR in the second half of September 2001[1019], in Johannesburg, Nairobi and Cairo in October 2001[1020] and with AF, BA, and LH on 26 January 2004 in Hong Kong[1021]; participation in discussion concerning the implementation of SSC in the framework of the BLACKS initiative in Italy[1022]; discussions between BAR CSC

1002 See the following recitals of this Decision: (137) (144) (167) (171) (186) (228) (250) (253) (273) (277) (282) (297) (311) (324) (354) (404) (422) (439) (481) (489) (506) (569)

1003 See the following recitals of this Decision: (175) (176) [*] (256) [*] (284) [*] (325) (327) (346) (411) (415) (425) (507) (533) (539)

1004 See the following recitals of this Decision: [*]

1005 See the following recitals of this Decision: (393) (504)

1006 See the following recitals of this Decision: (387)

1007 See the following recitals of this Decision: (471) (472)

1008 See the following recitals of this Decision:[*] (202) (364) (365) (427) (428) (499) (500) [*] (563) (573) (574)

1009 See the following recitals of this Decision: (394) (503)

1010 See the following recitals of this Decision: (146)

1011 See the following recitals of this Decision: [*]

1012 See the following recitals of this Decision: (560)

1013 See the following recitals of this Decision: (138) (140) (141) (169) (172) (196) (221) (222) (230) (296) (314) (320) (322) (323) (350) (421) (454) (475) (478) (523) (547) (564)

1014 See the following recitals of this Decision: [*] (585) (612)

1015 See the following recitals of this Decision: (594) (595) (609)

1016 See the following recitals of this Decision: [*] (656)

1017 See the following recitals of this Decision: (603)

1018 See the following recitals of this Decision: (598) (599) (623) [*]

1019 See the following recitals of this Decision: (589)

1020 See the following recitals of this Decision: (646) (649) (650)

1021 See the following recitals of this Decision: (664)

1022 See the following recitals of this Decision: (640)

members in Hong Kong concerning the implementation of SSC[1023]. Some evidence indicates further contacts concerning the SSC.[1024]

Commission on surcharges

(736) Concerning the refusal to pay commission on surcharges to forwarders, contacts included: confirmation of mutual intention of carriers not to pay commission at multilateral meetings, for example, at the Hong Kong BAR CSC meeting on 11 July 2005[1025], and at the meeting with other carriers in May 2004 at the 'Oak Bar' in New York City after the [*] bid[1026]; trilateral meeting with LH and AF, notably on 6 June 2005 where besides FSC issues, the participants agreed that forwarders should continue not to receive commission on collected surcharges[1027]; meetings on 12 May 2005 at LH cargo Italy[1028] and on 13 July 2005 in Milan[1029] and in other contacts[1030] with local carriers; bilateral discussions with CV following the Kelkheim meeting[1031]; meetings and other contacts in the framework of BLACKS in Italy[1032] and ACCS in Switzerland[1033].

KL specific arguments and Commission response

Commission of surcharges

(737) Concerning the commission on surcharges KL states that there is only one instance when this topic was discussed at headquarters' level, during the contacts between AF, KL and LH in 2005. KL argues that there are civil proceedings under national law concerning the commission, which was commenced by organisations of agents against a collective of airlines operating from Italy. KL also argues that undertakings in legal proceedings who are joint defendants are allowed to coordinate their legal defence and take a joint position.

(738) The Commission rejects these arguments as KL staff was involved in discussions concerning commission on surcharges in numerous places worldwide, as described in recital (736). During these discussions the participants assured each other that they would not pay commission to the forwarders. Such mutual assurances cannot be regarded as legitimate contacts linked to the litigation in Italy.

4.6.2.4. Evidence concerning BA

Summary of Commission's case

(739) The evidence concerning British Airways ranges from 22 January 2001 until 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and

1023 See the following recitals of this Decision: [*] (660) (663) (665) (669)
1024 See the following recitals of this Decision: [*] (673)
1025 See the following recitals of this Decision: (503)
1026 See the following recitals of this Decision: (702)
1027 See the following recitals of this Decision: (471)
1028 See the following recitals of this Decision: (695)
1029 See the following recitals of this Decision: (696)
1030 See the following recitals of this Decision: (694) (698)
1031 See the following recitals of this Decision: [*]
1032 See the following recitals of this Decision: (560)
1033 See the following recitals of this Decision: (690) (692) (693)

multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(740) BA was involved in the following aspects: FSC, SSC and commission on surcharges.

FSC

(741) BA head office participated in the coordination of the world wide implementation of FSC increases between at least 2001 and 2006 with also local contacts on implementation. Such contacts included in particular: repeated exchange of pricing information by email[1034]; repeated telephone discussions between BA, notably, [*], [*] and [*], with [*] of LH[1035]; bilateral discussions with other carriers including LH, SK, MP, [*], CX and LX[1036]; participation in multilateral meetings involving numerous carriers[1037], notably in a coffee round in Germany on 22 January 2001 where FSC [*] discussed[1038]; a meeting of 8 carriers in Japan on 30 September 2002[1039]; a meeting in Canada on 2 April 2003 where carriers discussed surcharges[1040]; a meeting of [*] of LH, CV, BA, KL and MP in Amsterdam in August 2004[1041]; participation in 'European Carrier Drink' in Hong Kong of 12 July 2004[1042]; participation in the so called BLACKS initiative in Italy, (BA, LH, AF, CV, KL and Swiss)[1043]; emails from ACCS and its members disclosing their intended action and future announcements as well as emails to ACCS and its members disclosing BA's intended action[1044]; discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings at least in Hong Kong[1045] and India[1046] and in [*] contacts in the framework of the ACBA in Thailand; and other contacts with competitors[1047].

SSC

(742) In respect of the SSC bilateral discussions took place with other carriers including at least LH and [*][1048]. BA participated in multilateral meetings where SSC was discussed for example, in '[*] airline meetings' in October 2001 in Cairo, Nairobi and Johannesburg where the introduction of SSC was agreed[1049]; a meeting of AF, BA, KL, LH, and MP in Hong Kong on 26 January 2004[1050]; in meetings of the so called BLACKS initiative in Italy[1051]; meetings and email exchanges of BAR CSC in Hong

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1034 See the following recitals of this Decision: [*] (284)

1035 See the following recitals of this Decision: [*] (185) (188) (193) (194) (209) (212) [*](214) [*] (260) [*] (270) (276) (277) (280) (281) [*] (319) (335) [*] (356) [*] (378) (379) (380) [*] (525) (529) (532) (533) (552) (557) (567) [*] (571)

1036 See the following recitals of this Decision: (144) (189) (224) (228) (244) (282) (311) (350) (374) (520) (527)

1037 See the following recitals of this Decision: (233) (559)

1038 See the following recitals of this Decision: [*]

1039 See the following recitals of this Decision: (256)

1040 See the following recitals of this Decision: [*]

1041 See the following recitals of this Decision: (387)

1042 See the following recitals of this Decision: (393)

1043 See the following recitals of this Decision: (560)

1044 See the following recitals of this Decision: (427) (428) (440) (443) [*] (563) (573) (574)

1045 See the following recitals of this Decision: [*] (241) (503) (504)

1046 See the following recitals of this Decision: [*] (299) (300) (397) [*]

1047 See the following recitals of this Decision: (196) (221) (222) (246) (320) (360) (362) (551)

1048 See the following recitals of this Decision: [*] (593) (608) (649)

1049 See the following recitals of this Decision: (646) (649) (650)

1050 See the following recitals of this Decision: (664)

1051 See the following recitals of this Decision: (640)

Kong where the implementation of SSC was discussed[1052]; email exchanges with competitors[1053]; and other anticompetitive contacts[1054].

Commission on surcharges

(743) In respect of not paying a commission on surcharges, BA was involved in discussions concerning the refusal of paying a commission multilaterally; in email exchanges between ACCS members in Switzerland[1055] and IBAR members in Italy[1056]; in confirming not to accept payment of commission in Italy[1057] and other contacts[1058].

BA specific arguments and Commission response

(744) BA argues the Commission has misunderstood BA's surcharge policy by conflating an agreement on the global surcharge with agreements at the local level on implementation or exceptions to that surcharge.

(745) The Commission understands BA's policy was to set the surcharge centrally and to implement it locally. However, it is clear from evidence presented that contacts took place at both head office and local level. Local contacts on implementation or to allow exceptions to the surcharge are relevant pricing contacts. Furthermore, it is established that information relating to local contacts was fed back to BA's head office (see recitals (894)-(896)).

(746) BA suggests it is disingenuous for the Commission to rely on contacts BA had with other carriers who were not also addressees of the SO.

(747) The Commission is entitled to rely on pricing contacts BA had with any other carriers irrespective of whether or not they are addressees of this Decision. In establishing which carriers are addressees of the Statement of Objections or this Decision the Commission assesses the body of evidence against the individual carriers concerned. The fact that the Commission does not consider that the body of evidence against certain carriers is sufficient to address to them an infringement decision does not mean that BA's contacts with such carriers are legitimised or rendered irrelevant.

4.6.2.5. Evidence concerning CV

Summary of Commission's case

(748) Evidence regarding Cargolux ranges from 22 January 2001 to 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price of the surcharge increases in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(749) CV was involved in the following aspects: FSC, SSC and commission on surcharges.

1052 See the following recitals of this Decision: (660) (665)
1053 See the following recitals of this Decision: (585) (594) (595) (609) [*] (669)
1054 See the following recitals of this Decision: (583) (612) [*] (656) (673)
1055 See the following recitals of this Decision: (692)
1056 See the following recitals of this Decision: (694)
1057 See the following recitals of this Decision: (695)
1058 See the following recitals of this Decision: (686) (685)

FSC

(750) In respect of the FSC these contacts included in particular: repeated exchanges of information concerning the timing and the amount of the FSC movements and the introduction of new trigger points to the FSC mechanism by email, phone and personal contacts multilaterally[1059]; participation in multilateral meetings involving numerous carriers, notably in a 'coffee round' in Germany on 22 January 2001 where the FSC was discussed [*][1060]; attending a meeting of [*] of LH, CV, BA, KL and MP in Amsterdam in August 2004[1061]; participation in "European Carrier Drinks" in Hong Kong [1062]; discussions concerning the FSC implementation in the BAR CSC and BAR CSC Executive Committee meetings in Hong Kong[1063] and in Singapore[1064]; involvement in the so-called BLACKS initiative in Italy (BA, LH, AF, CV, KL and Swiss) which included the consistent application of the FSC[1065].

(751) Bilateral contacts included in particular: bilateral contacts with LX[1066], MP[1067], BA[1068], AF[1069], LH[1070] and KL[1071] concerning changes in FSC mechanisms and in upcoming FSC levels; two meetings with AF in Paris (on 10 June 2005 and on 26 July 2005) as a follow-up to the meetings between AF, KL, and LH[1072]; a meeting with [*] of LH on 12 October 2005 in Kelkheim[1073], where the main purpose was to convince LH to agree to the introduction of a distance based element to the FSC system.

(752) Some evidence indicates further contacts concerning the FSC.[1074]

SSC

(753) In respect of the SSC contacts included: exchanges of information concerning the implementation of SSC by email[1075]; participation in multilateral meetings where the SSC was discussed involving numerous carriers, notably in Johannesburg, Nairobi and Cairo in October 2001[1076] and in meetings of the BAR CSC and of the BAR CSC Executive Committee in Hong Kong[1077]; participation in SSC discussions among members of SYCAFF[1078]; involvement in the so called BLACKS initiative in

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1059 See the following recitals of this Decision: [*](346) (411) (492) (507)
1060 See the following recitals of this Decision: [*]
1061 See the following recitals of this Decision: (387)
1062 See the following recitals of this Decision: (393) (504) (540)
1063 See the following recitals of this Decision: (368) (369) (394) (503)
1064 See the following recitals of this Decision: (295)
1065 See the following recitals of this Decision: (560)
1066 See the following recitals of this Decision: (250)
1067 See the following recitals of this Decision: [*] (191) [*] (476) (569)
1068 See the following recitals of this Decision: (374)
1069 See the following recitals of this Decision: [*](405)
1070 See the following recitals of this Decision: [*] (510) (519) (525) (552)(556)
1071 See the following recitals of this Decision: [*]) (263) [*] (340) (373) (419) [*]
1072 See the following recitals of this Decision: (471) (472)
1073 See the following recitals of this Decision: [*]
1074 See the following recitals of this Decision: (142) (167) (171) (225) (246) (350) (354) (421) (454) (478)
1075 See the following recitals of this Decision: (594) (595) (609)
1076 See the following recitals of this Decision: (646) (649) (650)
1077 See the following recitals of this Decision: [*] (660) (665) (667) (668) (669)
1078 See the following recitals of this Decision: [*]

Italy which included SSC discussions[1079]. Some evidence indicates further contacts concerning the SSC.[1080]

Commission on surcharges

(754) Concerning the refusal to grant commission on surcharges to forwarders, contacts include: confirmation of mutual intention of carriers not to pay commission at multilateral meetings, for example, at the Hong Kong BAR CSC meeting on 11 July 2005[1081]; meetings on 12 May 2005 at LH cargo Italy[1082] and on 13 July 2005 in Milan[1083] and in other contacts with local carriers[1084]; a meeting on 5 July 2005 in Barcelona with all airlines operating at this airport[1085]; [*][1086]; participation in the BLACKS meetings in Italy where the participants agreed to reject the demand of the Italian forwarder association on commission surcharges[1087] and information received as a follow up to the trilateral meeting between KL, LH and AF, notably on 6 June 2005 where besides FSC issues, the participants agreed that forwarders should continue not to receive commission on collected surcharges[1088].

4.6.2.6. Evidence concerning CX

Summary of Commission's case

(755) Evidence regarding Cathay Pacific ranges from 4 January 2000 to 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(756) CX was involved in the following aspects: FSC, SSC and commission on surcharges.

FSC

(757) In respect of the FSC, contacts included in particular: repeated exchanges of price information by email[1089]; bilateral discussions with other carriers including at least AF, [*], QF, [*], SQ and KL[1090]; participation in multilateral meetings involving numerous carriers notably on 22 January 2001 ('market analyze' meeting) at LCAG premises[1091], 14 February 2001, [1092]on 2 April 2003 in Canada[1093], on 21 September 2004 in Belgium[1094] and on 23 August 2005 (BAR CSC Ex Com)[1095]; colluding with JL and AF about the application of the FSC to shipments of Beaujolais nouveau[1096]; sending, receiving, soliciting and coordinating exchanges of information regarding

[1079] See the following recitals of this Decision: (640)
[1080] See the following recitals of this Decision: (664)
[1081] See the following recitals of this Decision: (503)
[1082] See the following recitals of this Decision: (695)
[1083] See the following recitals of this Decision: (696)
[1084] See the following recitals of this Decision: (698)
[1085] See the following recitals of this Decision: (700)
[1086] See the following recitals of this Decision: [*]
[1087] See the following recitals of this Decision: (560)
[1088] See the following recitals of this Decision: (471) (472)
[1089] See the following recitals of this Decision: (273) [*] (346) (411) (446) (450) (482) (495)
[1090] See the following recitals of this Decision: (139) (158) (197) (232) (390) (422) (485)
[1091] See the following recitals of this Decision: [*]
[1092] See the following recitals of this Decision: (176)
[1093] See the following recitals of this Decision: [*]
[1094] See the following recitals of this Decision: (409)
[1095] See the following recitals of this Decision: (505)
[1096] See the following recitals of this Decision: (424)

the FSC within BAR CSC (Hong Kong) including discussions and agreements about raising the FSC level and new trigger points[1097]; participation in FSC related discussions and decisions in the BAR India CSC[1098]; emails from ACCS and its members disclosing their intended action and future announcements as well as emails to ACCS and its members disclosing CX's intended action[1099]; and other contacts[1100].

SSC

(758) In respect of the SSC contacts included in particular: exchanges of pricing information by email[1101]; bilateral discussions[1102]; mulilateral SSC discussions and meetings (for example on 14 January 2004, on 15 March 2004, on 30 March 2004 and on 17 May 2004) within BAR CSC in Hong Kong including an agreement that an SSC must be implemented ex Hong Kong[1103]; disclosure of CX's future conduct, leading the implementation and collective approach to CAD in HK[1104]; approaching a number of airlines about the SSC including the CX [*] for France directly emailing AC, BA, CV, LH, [*], [*], [*], MP, KL, SQ, [*], [*] to establish what instructions had been received from head offices regarding the SSC and subsequently disclosing instructions from the CX head office[1105]; and other contacts[1106].

Commissioning on surcharges

(759) Concerning the refusal to pay commission on surcharges to forwarders, contacts included in particular: bilateral contacts at least with LH and - as confirmed in an internal CX email on 4 January 2006 - with SQ and AC[1107]; multilateral contacts and meetings with numerous carriers, for example, in a meeting in Milan on 14 July 2005 with AF, [*], CV, [*], KL, LH, SQ, JL and LX[1108], during BAR CSC meetings in India[1109]; email exchanges in the framework of ACCS in Switzerland[1110] and with IBAR members in Italy[1111]. In an internal CX memo dated 8 July 2005 it is suggested that CX should follow the rejection of the claim for commission and other related actions that may be coordinated by local airlines associations[1112].

4.6.2.7. Evidence concerning JL

Summary of Commission's case

1097 See the following recitals of this Decision: (147) (149) (150) (165) (206) (208) (238) (241) (294) (368) (369) (370) (394) (430) (431) (503) (505) (540)

1098 See the following recitals of this Decision: [*]

1099 See the following recitals of this Decision: (426) (427) (441) (463) (499) [*] (563)

1100 See the following recitals of this Decision: [*] (171) (196) (201) [*] (244) (257) (295) (322) (385) (414) [*] (466) (572) [*]

1101 See the following recitals of this Decision: [*]

1102 See the following recitals of this Decision: [*](586) (658)

1103 See the following recitals of this Decision: (660) (665) (666) (668) (670)

1104 See the following recitals of this Decision: [*]

1105 See the following recitals of this Decision: (609)

1106 See the following recitals of this Decision: [*] (616) [*](663) (667) (669)

1107 See the following recitals of this Decision: (687) (697)

1108 See the following recitals of this Decision: (686) (696)

1109 See the following recitals of this Decision: (701)

1110 See the following recitals of this Decision: (690) (692) (693)

1111 See the following recitals of this Decision: (694)

1112 See the following recitals of this Decision: (683)

(760) Evidence regarding Japan Airlines ranges from 7 December 1999 until 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(761) JL was involved in the following aspects: FSC, SSC, and commissioning on surcharges.

FSC

(762) In respect of the FSC contacts included in particular: repeated exchange of pricing information by email[1113]; repeated telephone discussions; bilateral discussions with other carriers including at least AF and LH[1114]; participation in multilateral meetings involving numerous carriers notably in a 'coffee meeting' on 22 January 2001 at LH's premises in Germany where the FSC was discussed [*][1115]; in a meeting on 30 September 2002 in Japan, where JL and 7 other major airlines (LH, AF, [*], BA, KL, [*] and [*]) reached a common understanding on their approach to the introduction of the FSC[1116]; a meeting in Canada on 2 April 2003 where carriers discussed surcharges[1117]; illicit discussions concerning the FSC with the WOW partners (LH, SK and SQ)[1118]; emails from ACCS and its members disclosing their intended action and future announcements as well as emails to ACCS and its members disclosing JL's intended action[1119]; and discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings in Hong Kong[1120] and Singapore[1121]; [*] contacts in the framework of the ACBA in Thailand[1122] and other contacts[1123].

SSC

(763) In respect of the SSC contacts included in particular: repeated exchange of pricing information by email; repeated telephone discussions; bilateral discussions with other carriers including at least LH, [*] and [*][1124]; participation in multilateral meetings involving numerous carriers notably illicit discussions concerning the SSC with the WOW partners (LH, SK and SQ)[1125], discussions about SSC within BAR CSC meetings in Hong Kong[1126] and in contacts within Japan[1127].

Commissioning on surcharges

1113 See the following recitals of this Decision: [*] (411) (446) (450) (482) (484) (494) (495) (507)
1114 See the following recitals of this Decision: (136) (137) (162) (198) (219) (319) (384) (417) (424) (488) (497) (526) (554) (566)
1115 See the following recitals of this Decision: [*]
1116 See the following recitals of this Decision: (256)
1117 See the following recitals of this Decision: [*]
1118 See the following recitals of this Decision: (512) (517)
1119 See the following recitals of this Decision: (203) (204) (286) (364) (388) (426) [*] (574)
1120 See the following recitals of this Decision: (394) (503)
1121 See the following recitals of this Decision: (295)
1122 See the following recitals of this Decision: (297)
1123 See the following recitals of this Decision: (170) [*] (179) (175) [*] (306) (257) (392) (425) (449) [*]
1124 See the following recitals of this Decision: [*] (597) (604) (610) [*] (626) (633)
1125 See the following recitals of this Decision: (630)
1126 See the following recitals of this Decision: (665)
1127 See the following recitals of this Decision: (673)

(764) JL was involved in discussions concerning the refusal to pay a commission on the surcharges: in email exchanges between ACCS members in Switzerland[1128]; IBAR members in Italy[1129]; in a meeting in Italy on 12 May 2005 with LH, LX, AF, KL, CV and JL[1130]; in another meeting in Italy on 14 July 2005 with AF, CV, CX, KL, LH, [*], SQ, JL and LX[1131] and in other contacts[1132].

JL specific arguments and Commission response

Facts [*]

(765) [*]. Arguments in respect of limited role, no single and continuous infringement, market definition, local regulatory regimes, insignificant effects and authority to fine are dealt with in the relevant Sections of this Decision.

4.6.2.8. Evidence concerning LA

Summary of evidence against carrier

(766) Evidence regarding LAN Cargo ranges from 25 February 2003 to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(767) In respect of the FSC, contacts took place above all with LH notably in February 2003 when LA decided to introduce an index similar to the LH fuel price index[1133]; LH and LA exchanged information concerning the trigger points and calculation method of the FSC index by email[1134], phone calls[1135] and in a meeting[1136]; LH regularly sent its announcements concerning the FSC movements to LA by email[1137]; LA also sent emails to LX and LH and received email from [*][1138] concerning FSC changes. LA was involved in a multilateral email exchange concerning the implementation of FSC.[1139] Internal LA emails indicate discussions with MP[1140] and AF[1141]. LA was also aware of discussion among carriers concerning the SSC[1142] and commission on the surcharges[1143].

1128 See the following recitals of this Decision: (692) (693)
1129 See the following recitals of this Decision: (694)
1130 See the following recitals of this Decision: (695)
1131 See the following recitals of this Decision: (696)
1132 See the following recitals of this Decision: (686)
1133 See the following recitals of this Decision: (275) (280)
1134 See the following recitals of this Decision: (353) (375) (410) (420) (455) (457) (458) (474) (493) (538) (556) (558)
1135 See the following recitals of this Decision: (487) (568)
1136 See the following recitals of this Decision: (516)
1137 See the following recitals of this Decision: [*] (346) (446) (453) (486) (495) (548) (553)
1138 See the following recitals of this Decision: (312)
1139 See the following recitals of this Decision: (492)
1140 See the following recitals of this Decision: (347)
1141 See the following recitals of this Decision: (352)
1142 See the following recitals of this Decision: (634)
1143 See the following recitals of this Decision: (487) (681)

LA specific arguments and Commission response

(768) [*]. LA states that its participation in the infringement is minor and limited. It is attributable to the Capacity Sharing Agreement with LH. The regular contacts with LH required to ensure the functioning of the agreement gradually extended to issues that went beyond the intended pro-competitive objectives of the agreement. These discussions were limited in scope and were exclusively with LH.

(769) The arguments of LA are duly considered at the stage of the calculation of the fine.

Specific arguments on FSC

(770) LA noted concerning the press release forwarded by [*] simultaneously to LX and LA (recital (312)), that there was no direct contact between LA and LX. The Commission takes note of LA's comment, however it notes that the evidence proves that LA was aware of contacts between [*] and LX concerning the FSC level.

(771) Concerning a reference to MP's FSC plans in an internal LA email (recital (347)) and to discussions with AF (recital (352)) LA argues that the employees involved in the communication are local employees in Europe and they do not take part in the decision making in LA concerning FSC. The Commission cannot accept LA's arguments, as the company is responsible for the acts of its employees[1144] and the contacts referred to in recital (767) were related to the infringement.

(772) LA contacted LH in February 2003 concerning the FSC methodology (recital (275)). LA states that the decision to introduce an FSC mechanism was made unilaterally and during the contacts LA received little information from LH that it could not have otherwise obtained from LH's website. The Commission takes note of LA's comments, however it upholds that the contacts referred to are relevant for the infringement.

4.6.2.9. Evidence concerning LH

Summary of Commission's case

(773) Evidence concerning Lufthansa ranges from 14 December 1999 to 7 December 2005. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(774) LH was involved in the following aspects: FSC, SSC and commissioning on surcharges.

FSC

(775) In respect of the FSC, contacts included: repeated discussions with competitors[1145]; repeated exchanges of price information by email;[1146] repeated bilateral telephone discussions between [*] (LH) and key contacts at AF ([*])[1147], KL ([*] and [*])[1148],

[1144] Case C-338/00 *Volkswagen v Commission,* ECLI:EU:C:2003:473, paragraph 90.
[1145] See the following recitals of this Decision: [*] (335) (400) [*] (469) (522) [*]
[1146] See the following recitals of this Decision: (162) (368) (394) (458)
[1147] See the following recitals of this Decision: (399) (525) (552)

BA ([*])[1149]; bilateral discussions with other carriers including at least CV, LX, LA and [*][1150]; a bilateral meeting between [*] (LH) and [*][1151] and [*] (both AF) in Paris on 15 May 2001[1152]; a bilateral meeting with AC on 05 September 2002[1153] and 13 February 2003[1154] to discuss FSC cooperation; participation in multilateral meetings involving numerous carriers notably on 5 January 2000, 17 January 2001 (ACCS meeting)[1155], 22 January 2001 (coffee round including FSC discussion)[1156], 14 February 2001 ('unofficial' airline meeting sponsored by [*])[1157], on 30 September 2002 where AF and 7 other major airlines (AF, JL, [*], BA, KL, [*] and [*]) reached a common understanding on their approach to the introduction of the FSC[1158], on 13 July 2004[1159] (European Carrier Drink (ECD) evaluation) and on 23 August 2004 in Amsterdam involving the [*] of KL, LH, CV and BA[1160]; participation in multilateral meetings in the context of ACCS (on 10 January 2000, 2 October 2000 and 30 April 2004[1161]); email exchanges in the context of ACCS[1162]; a trilateral meeting between LH, AF and KL on 6 June 2005 in Frankfurt regarding the consistent application of the FSC[1163] (follow up meetings took place on 7 July 2005 in Amsterdam (LH, KL, AF) and on 25 July 2005 in Paris (LH, AF)[1164]); BARIG meetings on 3 September 2004[1165] and on 17 November 2005[1166]; a meeting between [*] and [*] of LH and [*] and [*] of LA on 21 September 2005;[1167] a meeting with AF in the Novotel Hotel of Paris CDG airport on 19 October 2005 at which both parties provided assurances about the consistent application of the FSC;[1168] sending emails to competitors disclosing LH's intended action and future announcements;[1169] receiving emails disclosing competitors' intended action and future announcements[1170]; repeated sending of LH announcements directly to competitors;[1171] soliciting information on competitors' FSC plans;[1172] participation in FSC related discussions and decisions in

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1148 See the following recitals of this Decision: (217) [*] (268) (302) [*] (318) [*] (399) [*] (525) (545) (550) (552)
1149 See the following recitals of this Decision: [*](525) (552) (567) (571)
1150 See the following recitals of this Decision: [*] (209) (275) (510) (519) (525) (552) (211)
1151 See the following recitals of this Decision: (216)
1152 See the following recitals of this Decision: (179)
1153 See the following recitals of this Decision: (249)
1154 See the following recitals of this Decision: (272)
1155 See the following recitals of this Decision: [*]
1156 See the following recitals of this Decision: [*]
1157 See the following recitals of this Decision: (176)
1158 See the following recitals of this Decision: (256)
1159 See the following recitals of this Decision: (393)
1160 See the following recitals of this Decision: (387)
1161 See the following recitals of this Decision: [*] (365)
1162 See the following recitals of this Decision: (331) (364) (427) (428) (461) (463) (499) (574)
1163 See the following recitals of this Decision: (471)
1164 See the following recitals of this Decision: (472)
1165 See the following recitals of this Decision: (425)
1166 See the following recitals of this Decision: (559)
1167 See the following recitals of this Decision: (516)
1168 See the following recitals of this Decision: (530)
1169 See the following recitals of this Decision: (220) [*] (288) (303) (325) (343) (355) (359) (401) (410) (434) (450) (482) (484) (486) (494) (495) (507) (512) (533) (539) (558)
1170 See the following recitals of this Decision: (135) (284) (287) (353) (381) (396) (412) (513) (538)
1171 See the following recitals of this Decision: [*] (291) (346) (351) (358) (411) (420) (446) (453) (548) (553) (556)
1172 See the following recitals of this Decision: (291) (325) (375) (376) (384) (417) (456) (542)

the BAR CSC meetings at least in Singapore[1173], Hong Kong[1174] and India[1175]; and involvement in the BLACKS initiative in Italy which included the consistent application of the FSC[1176]. Further contacts are documented in numerous internal emails of LH and of other carriers[1177], minutes of internal meetings[1178], meetings of other carriers[1179], and internal documents[1180].

SSC

(776) In respect of the SSC, contacts included in particular: exchanges of pricing information by email; discussions between [*] (LH) and [*] (AF) including a meeting between them and Freight Forwarding Europe on 4 October 2001[1181]; a meeting with AF in late 2001/early 2002 in Frankfurt[1182]; a meeting in Zurich in the second half of September between KL, LH and SR[1183]; participation in multilateral meetings to discuss the SSC in Johannesburg[1184], Nairobi[1185] and Cairo in October 2001 and in Hong Kong[1186] with AF, BA, and KL on 26 January 2004; [*] (LH) sending out a standard letter to the [senior managers] of 11 cargo divisions to encourage other carriers to emulate LCAG SSC model; participation in the BLACKS initiative in Italy which included SSC discussions[1187]; discussions within WOW; general discussions within BAR CSC in Hong Kong[1188] including an agreement that an SSC must be implemented ex Hong Kong; a meeting of airline representatives in the 'Oak Bar' in New York City in May 2004[1189]; bilateral discussions between carriers[1190]; and informal telephone contacts[1191] and email exchanges between carriers[1192]. Further contacts are documented in an internal SR presentation on 25 September 2001[1193] and in internal emails[1194].

1173 See the following recitals of this Decision: (146)
1174 See the following recitals of this Decision: (431) (503) (504) (505)
1175 See the following recitals of this Decision: [*]
1176 See the following recitals of this Decision: (560)
1177 See the following recitals of this Decision: (137) (139) (140) (141) (142) (144) [*] (161) [*] [*] (171) [*] (180) (185) (186) (187) (188) (190) (191) (192) (193) (194) (198) (212) (214) (215) (219) (221) (223) (225) [*] (241) (242) (244) (247) (248) (250) [*] (254) (263) (269) (270) (271) (273) (276) (277) (280) (281) (282) [*] (296) (297) [*] (306) (311) (319) (320) (321) (326) (327) (345) (348) (350) (354) (356) (357) (360) (378) (380) (382) (406) (409) (413) (415) (421) (435) (448) (449) (454) (455) (466) (474) (476) (477) (478) (481) (483) (487) (488) (492) (493) (497) (498) (500) (506) (517) (518) (520) (521) (526) (528) (529) (532) (555) (564) (568) [*]
1178 See the following recitals of this Decision: (199) (266) (570) (138)
1179 See the following recitals of this Decision: (475)
1180 See the following recitals of this Decision: (196)
1181 See the following recitals of this Decision: (605)
1182 See the following recitals of this Decision: [*]
1183 See the following recitals of this Decision: (589)
1184 See the following recitals of this Decision: [*]
1185 See the following recitals of this Decision: (650)
1186 See the following recitals of this Decision: [*]
1187 See the following recitals of this Decision: (640)
1188 See the following recitals of this Decision: (585) (660) (665) (666) (667) (670)
1189 See the following recitals of this Decision: (702)
1190 See the following recitals of this Decision: (621) [*]
1191 See the following recitals of this Decision: [*]
1192 See the following recitals of this Decision: (584) (586) (590) [*] (592) (593) (594) (595) (596) (597) (598) (599) (600) (602) (608) (609) [*] (626) (628) (654) (655) (669) [*]
1193 See the following recitals of this Decision: (583)
1194 See the following recitals of this Decision: (604) (606) (607) (610) [*] (612) (619) (620) (623) (625) (630) (632) (635) (642) (643) (644) (646) [*] (648) (649) (651) (652) (653) (658) (664) (673)

Commissioning on surcharges

(777) Concerning the refusal to pay commission on surcharges to forwarders contacts included: multilateral meetings with numerous carriers, for example, the Hong Kong BAR CSC meeting on 11 July 2005 where discussions on commissioning on surcharges took place, and on 12 May 2005[1195]; trilateral meeting with AF and KL, notably on 6 June 2005 where besides discussions on FSC issues, the participants agreed that forwarders should continue not to receive commission on collected surcharges; bilateral discussions with AF ([*])[1196]; bilateral meeting with AF on 19 October 2005 in Paris Novotel CDG; bilateral meeting on 12 October 2005 with CV in Kelkheim at Schlosshotel Rettershof; meetings on 12 February 2005 at LH Cargo Italy and on 13 July 2005 in Milan with local carriers[1197]; meeting with other carriers in May 2004 at the 'Oak Bar' in New York City after the [*] bid[1198]; meetings and other contacts in the framework of ACCS in Switzerland[1199]. Further contacts are documented in email exchanges between airlines[1200] and in internal emails[1201].

LH specific arguments and Commission response

[*] involvement

(778) [*]. Arguments in respect of the applicability of Article 101(1) of the TFEU and the applicability of Article 101(3) of the TFEU are dealt with in the relevant Sections.

4.6.2.10. Evidence concerning LX

Summary of Commission's case

(779) Evidence regarding Swiss ranges from 2 April 2002 to 7 December 2005. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(780) LX was involved in the following aspects: FSC, SSC and commission on surcharges.

FSC

(781) In respect of the FSC, contacts included : repeated exchange of pricing information by email[1202]; repeated telephone discussions; bilateral discussions and email exchanges with other carriers including at least LH[1203], QF[1204] and AF[1205]; participation in multilateral meetings involving numerous carriers[1206]; in the margin

[1195] See the following recitals of this Decision: (695)
[1196] See the following recitals of this Decision: (688)
[1197] See the following recitals of this Decision: (696)
[1198] See the following recitals of this Decision: (702)
[1199] See the following recitals of this Decision: (692) (693)
[1200] See the following recitals of this Decision: (681) (682) (684) (686) (689) (690)
[1201] See the following recitals of this Decision: (687) (697)
[1202] See the following recitals of this Decision: (284) (285) (288) (305) (312) (325) (359) (427) (428) (429) (440) (441) (442) (443) (533) (539)
[1203] See the following recitals of this Decision: (250) (311) (320) (326) (396) (513) (520)
[1204] See the following recitals of this Decision: (297)
[1205] See the following recitals of this Decision: (311) (326) (513)
[1206] See the following recitals of this Decision: (327)

of an IATA meeting in March 2003 LX discussed FSC with LH, BA, KL, AF and [*][1207]; in a meeting in Switzerland on 21 February 2003 where LX, [*] and LH convinced [*] to implement FSC in line with other carriers[1208]; participation in the Executive Committee of ACCS where FSC implementation was discussed and participation in the email correspondence concerning ACCS members' intended action and future announcements concerning the FSC[1209]; participation in the so called BLACKS initiative in Italy, (BA, LH, AF, CV, KL and Swiss)[1210]; discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings at least in Hong Kong[1211] and India[1212]. Further contacts are documented in email exchanges between carriers[1213] and internal emails[1214].

SSC

(782) In respect of the SSC, contacts included bilateral information exchanges with LH and multilateral email exchanges and meetings[1215]; discussions in the BLACKS initiative in Italy[1216] and BAR CSC meetings in Hong Kong[1217].

Commissioning on surcharges

(783) In respect of the refusal of paying a commission on the surcharges LX was involved in bilateral and multilateral discussions[1218], at least during BAR CSC meetings in Hong Kong; in email exchanges between ACCS members in Switzerland[1219]; in a meeting in Italy on 19 May 2005 with [*], LH, AF, KL, CV and JL[1220]; in another meeting in Italy on 14 July 2005 with AF, CV, CX, KL, LH, [*], SQ, JL and [*][1221]; and in a meeting in May 2004 with AF, KL, [*], LH and possibly other carriers in the 'Oak Bar' in New York City[1222]. Further contacts are documented in internal emails[1223].

LX specific arguments and Commission response

[*] involvement

(784) [*]. Arguments in respect of the applicability of Article 101(1) of the TFEU and the applicability of Article 101(3) of the TFEU are dealt with in the relevant Sections.

1207 See the following recitals of this Decision: (282)
1208 See the following recitals of this Decision: (287)
1209 See the following recitals of this Decision: (328) (329) (330) (331) (364) (365) (460) (461) (462) (463) (499) (500) [*] (563) (573) (574)
1210 See the following recitals of this Decision: (560)
1211 See the following recitals of this Decision: (503) (541)
1212 See the following recitals of this Decision: (299)
1213 See the following recitals of this Decision: (248)
1214 See the following recitals of this Decision: (226) (227) (228) (229) (230) (289) (344) (348) (350) (391) (392) (464) (477) (506) (549) (555)
1215 See the following recitals of this Decision: (622)
1216 See the following recitals of this Decision: (640)
1217 See the following recitals of this Decision: (665)
1218 See the following recitals of this Decision: (679)
1219 See the following recitals of this Decision: (689) (690) (692) (693)
1220 See the following recitals of this Decision: (695)
1221 See the following recitals of this Decision: (696)
1222 See the following recitals of this Decision: (702)
1223 See the following recitals of this Decision: (691) (698)

4.6.2.11. Evidence concerning MP

Summary of evidence against carrier

(785) Evidence concerning Martinair ranges from 22 January 2001 to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, SSC and commission on surcharges in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings. Such contacts were often reported in internal emails sent by [*].

FSC

(786) The contacts concerning FSC included : repeated exchanges of pricing information by email[1224]; mutual understandings on FSC implementation between [*] (MP) and [*] (CV)[1225]; repeated bilateral telephone discussions between [*] (MP) and [*], [*] and [*] (all KL)[1226]; bilateral discussions with other carriers including at least LH, AF, [*], SR, KL, CV, BA, SQ and QF[1227]; participation in multilateral meetings involving numerous carriers[1228] notably on 22 January 2001 at LCAG premises to discuss FSC levels[1229]; emails from LH announcing changes in FSC level[1230]; emails from ACCS and its members disclosing their intended action and future announcements as well as emails to ACCS and its members disclosing Martinair's intended action[1231]; discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings at least in Hong Kong[1232]; and further evidence relating to contacts with competitors[1233].

SSC

(787) The contacts concerning SSC included : exchanges of pricing information by email[1234]; bilateral discussions with other carriers including at least LH, AF, KL, CV, CX and SQ[1235]; an attempt by Martinair to initiate a coordinated approach in the amount and timing of the introduction of a SSC in France/Europe[1236]; coordination of the SSC implementation by SYCAFF members in France[1237]; general discussions between BAR CSC members in Hong Kong[1238] including an agreement that an SSC must be implemented ex Hong Kong[1239]; participation in multilateral meetings to

1224 See the following recitals of this Decision: [*] (492)
1225 See the following recitals of this Decision: [*]
1226 See the following recitals of this Decision: [*] (437) [*]
1227 See the following recitals of this Decision: [*] (189) (191) [*] (224) (225) [*],[*] (262) (267) (269) (310) (314) (321) (322) (323) (324) [*] (349) (354) (360) (361) (402) (421) (423) (438) (454) (476) (489) (527) (569)
1228 See the following recitals of this Decision: (387) (396)
1229 See the following recitals of this Decision: [*]
1230 See the following recitals of this Decision: [*] (346)
1231 See the following recitals of this Decision: (203) (204) (235) [*] (331) (364) [*] (563)
1232 See the following recitals of this Decision: (368) (393) (394) (431) (503) (504) (505)
1233 See the following recitals of this Decision: (347)
1234 See the following recitals of this Decision: (594) (609)
1235 See the following recitals of this Decision: [*] [*]
1236 See the following recitals of this Decision: (585)
1237 See the following recitals of this Decision: [*] (616)
1238 See the following recitals of this Decision: [*] (663) (665) (666) (667) (669) (670)
1239 See the following recitals of this Decision: (603)

discuss the SSC in Johannesburg[1240] and Nairobi[1241] and in a meeting with AF, BA, KL, and LH on 26 January 2004 in Hong Kong[1242]; and disclosure of Martinair's SSC pricing intentions to ACCS members in Switzerland[1243].

Commissioning on surcharges

(788) The contacts concerning the refusal to pay commission on surcharges to forwarders included: a Hong Kong BAR CSC meeting on 11 July 2005 which included discussions on commissioning on surcharges[1244]; a bilateral meeting in January 2006 with [*][1245]; meetings and other contacts in the framework of ACCS in Switzerland[1246].

MP specific arguments and Commission response

(789) Concerning communications in the ACCS, MP notes that in the majority of the cases it provided info that was already public. The Commission's position in respect of public information is set out at recital (1207) and the Commission notes that even on the basis of MP's argument a significant number of contacts related to information that was not public. The Commission accordingly maintains that the evidence shows that MP participated in the exchange of information concerning the surcharges in Switzerland[1247].

4.6.2.12. Evidence concerning SK

Summary of evidence against carrier

(790) Evidence concerning SK ranges from 13 December 1999 to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, and SSC in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(791) SK aligned its FSC policy to that of LH under the exempted alliance and evidence shows that SK knew or at least it should have known that LH coordinated the FSC implementation with other carriers[1248]. Moreover, SK was in direct contact with other carriers concerning the FSC implementation and therefore was aware that a wider cartel existed as shown by the following evidence: SK initiated the coordination of the introduction of FSC in 1999 by an email to competitors;[1249] SK also had contacts with competitors in Finland concerning the FSC introduction[1250]; the implementation of the FSC was furthermore discussed between LH, SK, SQ and

[1240] See the following recitals of this Decision: (646)
[1241] See the following recitals of this Decision: (646) (649) (650)
[1242] See the following recitals of this Decision: (664)
[1243] See the following recitals of this Decision: (641)
[1244] See the following recitals of this Decision: (503)
[1245] See the following recitals of this Decision: (686)
[1246] See the following recitals of this Decision: (692) (693)
[1247] See the following recitals of this Decision: (203) (204) (235) (255) (331) (364) [*] (563)
[1248] See the following recitals of this Decision: [*] (346) (411) (446) (450) (482) (495)
[1249] See the following recitals of this Decision: (135)
[1250] See the following recitals of this Decision: (144)

JL members of the WOW alliance[1251]; SK also participated in the market analysis meeting involving numerous carriers on 22 January 2001 at LH's premises in Germany[1252]; and in discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings in Hong Kong[1253] and in Singapore[1254]; SK exchanged emails with ACCS members disclosing their intended action and future announcements[1255] and there is some further evidence relating to contacts with competitors[1256].

SSC

(792) SK discussed the introduction of the SSC bilaterally with LH under the exempted alliance but had knowledge of the wider coordination of the SSC[1257] as they had direct contact with competitors concerning the implementation of the SSC. This is shown by the evidence establishing that SK coordinated the SSC level with members of WOW[1258] and participated in the coordination of SSC implementation at the BAR CSC in Hong Kong[1259]. There is some further evidence relating to contacts with competitors[1260].

SK specific arguments and Commission response

(793) SK argues that the SO falsely equates communication concerning the global level FSC decisions, made at head office level and communication concerning the local level implementation at some instances.

(794) Concerning the distinction between communication at head office and local level, the Commission points to the headings of Section 4 that do make such a differentiation. As for contacts described under the heading 'head office involvement' it is indicated in Section 4.3.4.1 that such contacts include contacts between head offices and between a head office and local staff. All contacts where the head office of at least one of the parties was involved either directly or indirectly is described under these headings. Although contacts took place at both the head office and local level, the object remained the same namely to eliminate competition among carriers with respect to surcharges.

Specific arguments on FSC

(795) SK denies that direct contact took place between QF and SK as suggested by the internal QF email on 17 February 2003 reporting FSC plans of other carriers'[1261], among them SK's. SK argues that its plans could have been predicted from its usual policy of following LH. The Commission believes that the wording of the email '*the*

[1251] See the following recitals of this Decision: (223) (401) (434) (484) (488) (490) (494) (496) (497) (512) (517) (531) (546)
[1252] See the following recitals of this Decision: [*]
[1253] See the following recitals of this Decision: [*] (394)
[1254] See the following recitals of this Decision: (146) (295)
[1255] See the following recitals of this Decision: (145) (204) (443)
[1256] See the following recitals of this Decision: (196) (273) (406) (415) (425) (491) (506) (559)
[1257] See the following recitals of this Decision: [*]
[1258] See the following recitals of this Decision: (584) (596) [*] (620) (628) (629) (630) (631) (632)
[1259] See the following recitals of this Decision: (587) (660) (665)
[1260] See the following recitals of this Decision: (595) (673)
[1261] See the following recitals of this Decision: (273)

following carriers have indicated they will be increasing the FSC' does in fact reflect an anticompetitive exchange of pricing information.

(796) Concerning an email from AF to KL dated 23 September 2004 (recital (415)) SK argues that the relevant email exchanges[1262] demonstrate that SK was not in contact with AF and KL. The Commission does not agree with such a conclusion, as the email of 23 September 2004 confirms that AF and KL found it important to align their surcharge policy with that of LH and SK.

(797) LH regularly forwarded its FSC announcements to other carriers, among them to SK in Germany. SK states that this practice did not influence its decision making at head office level. However the Commission notes that such emails demonstrate that concerning the FSC, LH was in contact with other carriers as well and that SK knew about it.

Specific arguments on SSC

(798) Concerning the introduction of the SSC, SK states that it acted unilaterally and it did not engage in relevant discussions with competitors except for exempted communications with LH and following local regulatory regimes in Hong Kong and Japan that obliged SK to follow the local system of coordination. The Commission considers that the evidence shows that SK exchanged information with LH and that it was also aware of the wider coordination of the implementation of SSC.

(799) Recital [*] describes communications between SK and LH concerning the implementation of the SSC. SK argues that these were strictly bilateral communications, covered by the antitrust exemption and that SK had no knowledge of LH's wider contacts. Furthermore, these contacts did not influence SK's plans regarding the SSC. The Commission cannot agree with this explanation as there is evidence that proves contacts between LH and SK before the decision was made (see recital (584)), and there is evidence that SK was aware of wider contacts between carriers (see recitals (584), (587), (595), (596) and (597)).

(800) Concerning the email from SQ to SK reported in recital (584), SK argues that this email had no effect on SK's decision making and it was unsolicited and was not replied to. The Commission notes that the internal SK email exchanges that the SQ email triggered show that it did have an effect on SK. In the emails it was suggested to introduce the SSC immediately and reference was made to planned contacts at least with LH concerning the level of the surcharge. [*] asked whether SK had *'indication from LH or others and on what level. Propose 15 October for implementation'*.[1263]

(801) Concerning the lowering of the SSC in Hong Kong in 2003 (recital (619)) describes coordination efforts within WOW to maintain the previous level that SK finds to be in contradiction with the fact that SK did in fact lower the SSC. The Commission however believes that the fact that SK did not follow the agreement in practice does not make its participation in the coordination irrelevant.

(802) SK states that the contacts between SQ and SK concerning the SSC level (referred to in recitals ((628)-(632)) related only to Denmark and were necessary and legitimate in the framework of the joint freighter service which the two companies have been

1262 [*]
1263 [*]

operating from Copenhagen to Chicago since 2005. SK argues that the lower SSC level of SQ made SK less competitive and that caused concern within SK and prompted the relevant discussions. The Commission believes that engaging in discussions with a competitor is not a legitimate response to price competition. Furthermore SK's argumentation is unacceptable as after the discussions SQ raised the SSC on a worldwide basis and not only in Denmark.

4.6.2.13. Evidence concerning SQ

Summary of evidence against carrier

(803) Evidence concerning Singapore Airlines ranges from 4 January 2000 to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, SSC and commissioning on surcharges in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(804) SQ participated in the coordination of the FSC implementation through direct coordination with members of the WOW alliance: LH, SK and JL[1264]. SQ had knowledge about the wider contacts between other carriers concerning the FSC. SQ had bilateral contacts on FSC implementation with QF[1265] and MP[1266]. SQ also participated in the Executive Committee of ACCS where FSC implementation was discussed. SQ, as president of ACCS from 2004, coordinated email exchanges concerning ACCS members' intended action and future announcements concerning the FSC[1267]. It was involved in discussions and agreements about raising the FSC level and new trigger points in Belgium[1268], Japan[1269] and with members of BAR CSC and also BAR CSC Executive Committee meetings in Hong Kong[1270], India[1271] and Singapore[1272]. There is some further evidence relating to contacts with competitors[1273].

SSC

(805) The contacts concerning SSC included bilateral information exchanges with MP[1274], QF[1275] and [*][1276]; exchanges of information with WOW members in meetings, phone contacts and via email[1277]; BAR CSC and BAR CSC Executive Committee

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1264 See the following recitals of this Decision: (209) (212) (223) (343) (355) (381) (401) (402) (434) (456) (484) (488) (494) (512) (517) (546)

1265 See the following recitals of this Decision: (158) [*] (403) (506)

1266 See the following recitals of this Decision: (360) (361)

1267 See the following recitals of this Decision: [*] (327) (364) (365) (366) (367) (388) (390) (426) (427) (428) (429) (440) (443) (460) (461) (462) (463) (499) [*] (536) (537) [*] (563) (573) (574)

1268 See the following recitals of this Decision: (414)

1269 See the following recitals of this Decision: (257)

1270 See the following recitals of this Decision: [*] (368) (369) (394) (431) (503) (505)

1271 See the following recitals of this Decision: [*]

1272 See the following recitals of this Decision: (146) (296) (395)

1273 See the following recitals of this Decision: (139) [*] (176) (180) (221) [*] (346) (411) (446) (450) (482) (492) (495) (506) (507)

1274 See the following recitals of this Decision: [*]

1275 See the following recitals of this Decision: (601)

1276 See the following recitals of this Decision: [*] (636)

1277 See the following recitals of this Decision: (584) (592) (596) (600) [*] (620) (628) (629) (630) (631) (632) [*]

meetings in Hong Kong[1278]. There is some further evidence relating to contacts with competitors[1279].

Commissioning on surcharges

(806) SQ was involved in discussions concerning the refusal of paying a commission on the surcharges bilaterally at least with CX[1280] and multilaterally during BAR CSC meetings in Hong Kong; in email exchanges between ACCS members in Switzerland[1281]; in a meeting in Italy on 14 July 2005 with AF, CV, CX, KL, LH, [*], JL and LX[1282]; and in an email on 28 December 2005 sent to LH, CX, [*], [*], [*], [*], JL, BA, SK, [*] and [*][1283].

SQ specific arguments and Commission response

Sources of information

(807) SQ claims that the SO does not give attention to the sources of allegedly confidential information described in the documents. The information is disseminated quickly in the airline industry through legitimate channels. Thus it cannot be presumed that internal airline documents describing plans of competitors indicate a direct contact between the airlines concerned.

(808) Although the source of information may not be concretely defined in the contemporaneous emails or other documents the wording in the majority of the cases points to direct contacts with competitors. Furthermore, the Commission's evidence must be assessed as a body.

Specific arguments on FSC

(809) Concerning an internal LH email dated 30 May 2001 (recital (180)) referring to SQ's FSC plans in Japan, SQ states that it only relates to Japan, where a special application system was in place for FSC; the contact was legitimate in the WOW framework; the information concerning SQ's filing to the authorities was known in the market and in any case it did not influence LH which had already filed its own application to the authorities. The Commission does not accept SQ's reasoning as the evidence shows that SQ and LH were involved in an anticompetitive exchange of information. As regards the arguments on WOW and the regulatory regime see the Commission's position in Sections 5.3.4 and 5.3.5 respectively.

Specific arguments on commission on surcharges

(810) SQ argues that the discussions concerning commission were legitimate as forwarder associations initiated them and also because the issue raised common legal questions for the airlines regarding the interpretation of IATA resolutions as well as national legal issues. The Commission cannot accept these arguments which do not justify an agreement between carriers not to pay a commission. Furthermore, the carriers themselves rejected the discussions with forwarders referring to antitrust concerns thus they were clearly aware that such discussions are not permitted.

1278 See the following recitals of this Decision: (660) (665) (666) (667) (668) (670)
1279 See the following recitals of this Decision: (585) (594) (609) [*]
1280 See the following recitals of this Decision: (687)
1281 See the following recitals of this Decision: (689) (690) (692) (693)
1282 See the following recitals of this Decision: (696)
1283 See the following recitals of this Decision: (686)

(811) Concerning an email sent by the SQ [*] in the United Kingdom (recital (686)) SQ states that it was just requesting clarification on an IATA resolution and as it did not state SQ's position it does not amount to a concerted practice. The Commission does not share SQ's view as the email's purpose was to coordinate action, as is proven by the triggered reactions.

(812) An internal CX email reports contacts with SQ concerning letters from forwarders announcing the invoicing of commission (recital (687)). SQ claims that there was no coordination involved, SQ simply communicated its position to CX. The Commission considers this direct contact with a competitor to be relevant in the context of a coordinated action to refuse to pay commission to forwarders and it forms part of the body of evidence on which the Commission relies.

(813) SQ argues that a meeting in Italy it participated in (recital (696)) was legitimate as it was a response to the letter of the forwarders association. The Commission rejects this argument, as an agreement to reject the payment of the commission, like the one that was clearly reached at the meeting, is not legitimate, not even as a response to a claim from the forwarder association.

5. THE APPLICATION OF THE RELEVANT COMPETITION RULES

5.1. The relevant competition rules

5.1.1. Article 101 of the TFEU

(814) Article 101(1) of the TFEU prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

(815) Article 101(3) of the TFEU provides that Article 101(1) may be declared inapplicable in the case of agreements, decisions of undertakings or concerted practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and which does not impose indispensable restrictions or makes it possible to eliminate competition.

5.1.2. Article 53 EEA Agreement

(816) Article 53(1) of the EEA Agreement prohibits as incompatible with the functioning of that agreement all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

(817) Article 53(3) of the EEA Agreement provides that Article 53(1) may be declared inapplicable in the case of agreements, decisions of undertakings or concerted practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and which does not impose indispensable restrictions or makes it possible to eliminate competition.

(818) The EEA Agreement came into force on 1 January 1994.

5.1.3. Agreement between the European Community and the Swiss Confederation on Air Transport

(819) Article 8 of the Swiss Agreement prohibits as incompatible with that agreement all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the Swiss Agreement.

(820) Article 8(3) of the Swiss Agreement provides that Article 8(1) may be declared inapplicable in the case of agreements, decisions of undertakings or concerted practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and which does not impose indispensable restrictions or makes it possible to eliminate competition.

(821) The Swiss Agreement entered into force on 1 June 2002.

5.2. Jurisdiction of the Commission

5.2.1. Article 101 of the TFEU

(822) Regulation (EC) No 1/2003 grants the Commission implementing powers to apply Article 101 of the TFEU. This regulation applies since 1 May 2004 and applies to all air transport services.

(823) 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[1284] 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. Consequently, Article 101 of the TFEU could only be enforced by the authorities of the Member States and the Commission on the basis of the transitional regime set out in Articles 104 and 105 of the TFEU.

(824) Under these circumstances, the Commission will not apply Article 101 of the TFEU to [conduct] concerning air transport between EU airports and airports in third countries that took place before 1 May 2004.

5.2.2. Article 53 of the EEA Agreement

(825) Under Article 56 of the EEA Agreement, the Commission shall decide on cases falling under Article 53 of the EEA Agreement where trade between Member States is affected.

(826) Regulation (EC) No 1/2003 became applicable to the implementation of the EEA Agreement by virtue of the Decision of the EEA Joint Committee No 130/2004[1285] and the Decision of the EEA Joint Committee No 40/2005[1286] 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

[1284] OJ L 374, 31.12.1987, p. 1.
[1285] OJ L 64, 10.3.2005, p. 57
[1286] OJ L 198, 28.07.2005, p. 38.

force on 19 May 2005 and from that date Council Regulation (EC) No 411/2004[1287] and Regulation (EC) No 1/2003 became applicable in the framework of the EEA Agreement.

(827) Before 19 May 2005, Regulation (EEC) No 3975/87 provided implementing rules for the application of Article 53 of the EEA Agreement with respect to air transport between EEA airports. Air transport between airports in the EEA and airports in third countries was, however, not covered. Consequently, Article 53 of the EEA Agreement could only be enforced on the basis of the transitional regime set out in Article 55 of the EEA Agreement.

(828) Under these circumstances, the Commission will not apply Article 53 of the EEA Agreement to [conduct] concerning air transport between airports in the EEA and airports in third countries that took place before 19 May 2005.

5.2.3. Article 8 of the Swiss Agreement

(829) Under Article 11(1) of the Swiss Agreement, Article 8 shall be applied by the EU institutions in accordance with EU legislation as set out in the Annex to the agreement, taking into account the need for close cooperation between the EU institutions and the Swiss authorities. Under Article 11(2) of the Swiss Agreement, the Swiss authorities shall rule, in accordance with Article 8, on the admissibility of agreements, decisions and concerted practices concerning routes between Switzerland and third countries.

(830) 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[1288] 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.

(831) CX and SQ submit that the Commission has no jurisdiction to find an infringement of the Swiss Agreement in relation to their conduct in Switzerland. CX argues that it does not provide air freight services between Switzerland and the EU.

(832) This Decision does not purport to find an infringement of Article 8 of the Swiss Agreement concerning freight services on routes between Switzerland and third countries. However, the Commission is entitled to adduce evidence of the existence of the cartel in this case, which operated on a worldwide basis. All the events described in Section 4 form part of the evidence of the worldwide cartel described in this Decision.

[1287] OJ L 68, 6.3.2004, p. 1–2.

[1288] 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).

5.3. Application of Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement

5.3.1. Agreements and concerted practices

5.3.1.1. Principles

(833) Article 101(1) of the TFEU [1289] prohibits *agreements* between undertakings, *decisions of associations of undertakings* and *concerted practices*.

(834) An *agreement* can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 101 of the TFEU, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 101(1) of the TFEU would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(835) In its judgment in the PVC II case[1290], the General Court of the Court of Justice of the European Union ('General Court') stated that 'it is well established in the case-law that for there to be an agreement within the meaning of Article [101 of the TFEU] it is sufficient for the undertakings to have expressed their joint intention to behave on the market in a certain way'[1291].

(836) Also, if an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed[1292]. It is well established case-law that 'the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings'[1293]. Such distancing should take the form of an announcement by the company, for instance, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

(837) Although Article 101 of the TFEU draws a distinction between the concept of *'concerted practices*' and *'agreements between undertakings'*, the object is to bring within the prohibition of these Articles a form of coordination between undertakings

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1289 Article 101 of the TFEU is referred to in the text but should also be read as incorporating Article 53 EEA of the EEA Agreement and Article 8 of the Swiss Agreement as these provisions apply mutadis mutandis unless expressly stated otherwise.

1290 Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II),* ECLI:EU:T:1999:80, paragraph 715.

1291 The case-law of the Court of Justice of the European Union in relation to the interpretation of Article 101 TFEU applies equally to Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement. See Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, Article 1 of the Swiss Agreement. References in this text to Article 101 of the TFEU therefore apply also to Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement.

1292 Case T-334/94 *Sarrió v Commission,* ECLI:EU:T:1998:97, paragraph 118.

1293 Ibidem. See also Case T-141/89 *Tréfileurope Sales v Commission,* ECLI:EU:T:1995:62, paragraph 85; Case T-7/89 *Hercules Chemicals v Commission,* ECLI:EU:T:1991:75, paragraph 232; and Case T-25/95 *Cimenteries CBR v Commission ('Cement'),* ECLI:EU:T:2000:77, paragraph 1389.

by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition[1294].

(838) The criteria of coordination and cooperation laid down by the case-law of the Court of Justice of the European Union, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the TFEU relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the internal market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market[1295].

(839) Thus, conduct may fall under Article 101 of the TFEU as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the coordination of their commercial behaviour[1296]. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

(840) Although in terms of Article 101 of the TFEU the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period[1297]. Such a concerted practice is caught by Article 101 of the TFEU even in the absence of anti-competitive effects on the market[1298].

(841) Moreover, it is established case-law that the exchange, between undertakings, in pursuance of a cartel falling under Article 101 of the TFEU, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article[1299].

(842) It is not necessary, particularly in the case of a complex infringement, for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of *agreement* and *concerted practice* are fluid and

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1294 Case 48/69 *Imperial Chemical Industries v Commission,* ECLI:EU:C:1972:70, paragraph 64.

1295 Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission,* ECLI:EU:C:1975:174, paragraph 174.

1296 Case T-7/89 *Hercules,* ECLI:EU:T:1991:75, paragraph 256.

1297 Case C-8/08 *T-Mobile Netherlands BV and others*, ECLI:EU:C:2009:343, paragraphs 44-53.

1298 Case C-199/92 P *Hüls v Commission* ECLI:EU:C:1999:358, paragraphs 158-166.

1299 See, in this sense, Cases T-147/89, T-148/89 and T-151/89 *Société Métallurgique de Normandie v Commission,* ECLI:EU:T:1995:67, *Trefilunion v Commission,* ECLI:EU:T:1995:68, and *Société des treillis et panneaux soudés v Commission,* ECLI:EU:T:1995:71, respectively, paragraph 72.

may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 101 of the TFEU lays down no specific category for a complex infringement of the present type[1300].

(843) In its PVC II judgment[1301], the General Court stated that '[i]n the context of a complex infringement which involves many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101 of the TFEU]'.

(844) An agreement for the purposes of Article 101 of the TFEU does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice, upholding the judgment of the General Court, pointed out in *Commission v Anic Partecipazioni SpA*[1302] it follows from the express terms of Article 101 of the TFEU that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct[1303].

(845) According to the case-law, the Commission must show precise and consistent evidence to establish the existence of an infringement of Article 101 of the TFEU. It is however not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement. It is in fact normal that agreements and practices prohibited by Article 101 of the TFEU assume a clandestine character and that associated documentation is fragmentary and sparse. In most cases therefore, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules[1304].

5.3.1.2. Application in the present case

(846) As it emerges from the facts described in Sections 4.1-4.5., addressees of this Decision entered into bilateral and multilateral contacts by which they coordinated

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1300 Case T-7/89 *Hercules,* ECLI:EU:T:1991:75, paragraph 264.

1301 Joined Cases T-305/94 etc. *PVC II,* ECLI:EU:T:1999:80, paragraph 696.

1302 Case C-49/92 P *Commission v Anic Partecipazioni SpA,* ECLI:EU:C:1999:356, paragraph 81.

1303 Case C-49/92 P *Anic Partecipazioni SpA,* ECLI:EU:C:1999:356, paragraph 81.

1304 Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v Commission*, ECLI:EU:C:2004:6 , paragraphs 53-57 and Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP and T-61/02 OP *Dresdner Bank,* ECLI:EU:T:2006:271, paragraphs 59-67.

their conduct and/or influenced price setting, ultimately amounting to price fixing with regard to;

- the fuel surcharge;
- the security surcharge; and
- the payment of commission to forwarders on surcharges.

FSC

(847) The addressees of this Decision had contacts with a view to coordinating the implementation of the FSC mainly in four contexts:

(i) Concerning the introduction of FSC in early 2000 (see Section 4.3.4).

(ii) The reintroduction of a FSC mechanism in 2002 after the revocation of the planned IATA mechanism (see Section 4.3.9).

(iii) The introduction of new trigger points in 2003, 2004 and 2005 (raising the maximum level of FSC) (see Sections 4.3.11, 4.3.14, 4.3.15, 4.3.16, 4.3.18 and 4.3.19).

(iv) Most frequently, at the point where the fuel indices were approaching the level at which an increase or decrease in the FSC would be triggered. This practice continued throughout the period between 1999 and 2006 (see, by way of example, recitals [*](128) [*] and [*]).

(848) The purpose of the contacts concerning changes in the level of surcharges was to ensure that competitors would take the same steps, discipline would be maintained and that the increase (decrease) resulting from the published method would be applied in full and in a coordinated way[1305].

(849) The coordination was conducted through a system of bilateral and multilateral contacts concerning the implementation of the FSC. Contacts relating to the FSC were made mostly on the phone (see for example recitals (124) [*] (128)(185)(191)) and much less often via email (see for example recitals (135)(162)(202)) or during meetings (see for example recitals (132)(146)(147)(149)[*](163)). The object and/or effect of these contacts was either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (see for example recital[*]). Such contacts are in contradiction with the requirement that each economic operator must determine independently the commercial policy which they intend to adopt in the internal market. Consequently, these contacts fulfil the criteria - laid down by the case-law of the Court of Justice of the European Union - of prohibited coordination and cooperation that amounts to an agreement or a concerted practice. The contact network is a complex system that can be characterised partly as agreement (see, for example, in [*]), partly as concerted practices in an overlapping manner.

(850) SK states it never entered into any agreements with other carriers regarding the FSC. They argue that one-off, isolated contacts at local level happened but staff involved had no decision making power on FSC. Such contacts did not influence SK's FSC policy. The Commission cannot accept SK's arguments, as SK staff was involved in

1305 [*]

regular contacts concerning the FSC with other WOW members. See for example recitals (223), (490), (496), (517) and (531).

(851) SR made an internal report on 10 January 2000 stating that in Switzerland [*] carriers agreed to apply the same policy as SR Cargo, except LH (see recital (145)). Since SK followed LH in Switzerland as well, it argues that it did not participate in any agreement infringing Article 101 of the TFEU. The Commission considers that the evidence in recital (145) demonstrates that LH and SK did in fact participate in the agreement but decided not to implement it at that stage.

(852) SK states that based on the notes of [*] (SK) there was no agreement reached on the FSC at the 'Market Analysis Meeting' of 22 January 2001 (see recital (174)), and that this event did not form part of the single and continuous infringement. The Commission notes that while it might be true that the airlines did not reach an agreement on a common FSC level, the relevant discussions were clearly anticompetitive and formed part of the infringement.

(853) An internal QF email dated 7 September 2002 contains information on the FSC plans of a number of carriers, among them SQ (see recital [*]). SQ states that even if it disclosed information concerning its FSC plans it does not meet the legal requirements for establishing a concerted practice, as first, there is no evidence that QF also shared information with SQ, second, the information probably did not influence QF decision making. The Commission rejects the argument and notes that the burden on the Commission is to prove the infringement to the requisite standard rather than to prove each individual contact to the requisite standard. The contacts presented in the factual part must be assessed as a body of evidence.

(854) SQ claims that the phone contacts with MP in May 2004 described in recitals (360)-(361) did not amount to a concerted practice as there is no proof that MP gave information to SQ and it is not clear that the contact influenced the decision making in MP. The Commission rejects the argument as the contact had a clearly anti-competitive object and as such forms part of the evidence of the infringement.

(855) Internal CX emails dated 24 September 2004 (recital (414)) describe the result of contacts with competitors, among them SQ, concerning the FSC increase. SQ contends that it is not proven that the information came directly from its employees as SQ had announced the FSC increase prior to the date of the email. SQ claims alternatively that even if this exchange of information took place, it did not influence SQ's conduct, since that was modified by the headquarters, nor did it influence the conduct of the other carriers that maintained the planned date of implementation. Thus, this exchange does not amount to a concerted practice. The Commission believes that the wording of the evidence in recital (414) proves that SQ was involved in the illicit coordination of the FSC increase and the fact that SQ postponed the date of implementation - thus gaining a competitive advantage - does not mean that they did not participate. The fact that the email was sent after SQ had announced the FSC increase is not relevant as the illicit discussions referred to in the email took place before that date as well. The Commission reiterates that it is not each piece of evidence individually but the body of evidence in its entirety which is necessary to prove the infringement.

SSC

(856) The introduction of the SSC was discussed in September and October 2001 between a number of airlines that are addressees of this Decision (See Section 4.4.2). The aim

of the discussions was to ensure joint implementation (see for example, in recitals (582) and (584)), a uniform method (see for example recital (593)) and to coordinate the timing (see for example recital (603)). Furthermore ideas concerning the justification to be given to the customers were also shared (see for example recital (600)). During these discussions the carriers expressed their joint intention to behave on the market in a certain way that fulfils the criteria of an agreement or of a concerted practice within the meaning of Article 101 of the TFEU (see recital (843)).

(857) Carriers continued ad hoc discussions between 2002 and 2006 concerning the SSC aimed at stabilising its level (see for example, in recitals [*] and (619)) and ensuring continued implementation (see for example, in recitals (622) and (625)) and uniform application (see for example, in recitals (620)(621)(623)(624) and (629)). As the carriers remained in contact with each other whenever it was necessary to maintain the implementation of the SSC, they continued to adhere to collusive devices which facilitated the coordination of their commercial behaviour and that amounts to an agreement or a concerted practice confirmed by the case law (see recital (839)).

Payment of commission on the surcharges

(858) A number of carriers confirmed their intention to each other in bilateral contacts (see, for example recitals (681), (687) and (688)) and multilateral contacts (see, for example recitals (679), (683) and (686)) not to pay a commission on the surcharges to the forwarders. The mutual assurances revealing the intended action of the carriers amount to an agreement or a concerted practice in the sense of Article 101 of the TFEU (see recital (838)).

BLACKS

(859) BA argued that evidence relating to the BLACKS initiative (see recitals (560) and (640)) is not conclusive of unlawful activity. The Commission rejects BA's denial that it participated in anti-competitive discussions within the BLACKS meetings. It is clear that pricing discussions took place within BLACKS relating to the FSC and commissioning on surcharges. It is not necessary for BA to have actively concluded an agreement with other parties. Given that BA remained active on the market, it is sufficient that BA was present and did not distance itself from the anticompetitive exchanges within BLACKS.

Conclusion

(860) The Commission considers, in accordance with the case-law referred to in this Section, that the body of evidence as a whole proves the existence of the overall scheme described in recitals (846)-(859) that qualifies as an agreement and/or concerted practice between undertakings within the meaning of Article 101 of the TFEU. The air cargo service providers concerned coordinated their behaviour to remove uncertainty between them in relation to various elements of price in the airfreight sector. The repeated contacts, often of a bilateral nature but also including multilateral meetings, over a significant period of time and covering the aspects described in Sections 4.1 to 4.5 bear the hallmark elements of a complex infringement.

(861) Based on the elements set out in recitals (846) to (859), the different elements of behaviour of the addressees in this Decision can be considered to form part of an overall scheme to coordinate the pricing behaviour for airfreight services. The Commission considers that the behaviour of the undertakings concerned constitutes a complex infringement consisting of various actions which can be either classified as

an agreement or concerted practice, within which the competitors knowingly substituted practical cooperation between them for the risks of competition. Furthermore, in the absence of proof to the contrary, the Commission considers, based on the judgment of the Court of Justice in Hüls[1306] that the participating undertakings in such concertation have taken account of the information exchanged with competitors in determining their own conduct on the market, in particular as the concertation occurred regularly. The Commission therefore considers that the complex of arrangements in this case as described in Section 4 of this Decision presents all the characteristics of an agreement and/or a concerted practice within the meaning of Article 101 of the TFEU.

5.3.2. Single and continuous infringement

5.3.2.1. Principles

(862) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The General Court pointed out in *Cement* that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim[1307]. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 101 of the TFEU.

(863) It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.

(864) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 101 of the TFEU where there is a single common and continuing objective.

(865) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk[1308].

1306 Case C-199/92 P *Hüls,* ECLI:EU:C:1999:358, paragraphs 161-162.

1307 Joined Cases T-25/95 and others *Cement,* ECLI:EU:T:2000:77, paragraph 3699.

1308 Case C-49/92 *Anic Partecipazioni SpA,* ECLI:EU:C:1999:356, paragraph 83.

(866) As the Court of Justice stated in *Commission v Anic Partecipazioni*[1309], the agreements and concerted practices referred to in Article 101(1) of the TFEU necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, as reiterated by the Court of Justice in the *Cement* cases, that an infringement of Article 101 of the TFEU may result not only from an isolated act but also from a series of acts or from a form of continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of Article 101 of the TFEU. When the different actions form part of an 'overall plan', because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole[1310].

(867) Although Article 101(1) of the TFEU does not refer explicitly to the concept of single and continuous infringement, it is constant case-law of the Court of Justice of the European Union that 'an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel'[1311].

(868) The fact that an undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 101(1) of the TFEU. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed. Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.

5.3.2.2. Application in the present case

(869) In the present case, the Commission considers that the conduct in question constitutes a single and continuous infringement of Article 101 of the TFEU.

1309 Case C-49/92 *Anic Partecipazioni SpA*, ECLI:EU:C:1999:356.

1310 Joined Cases C-204/00 P and others, *Aalborg Portland and Others v Commission*, ECLI:EU:C:2004:6, paragraph 258. See also Case C-49/92 P *Anic Partecipazioni SpA*, ECLI:EU:C:1999:356, paragraphs 78-81, 83-85 and 203.

1311 Cases T-147/89 *Société Métallurgique de Normandie,* ECLI:EU:T:1995:67, T-295/94 *Buchmann v Commission,* ECLI:EU:T:1998:88, paragraph 121, T-304/94 *Europa Carton v Commission,* ECLI:EU:T:1998:89, paragraph 76, T-310/94 *Gruber + Weber v Commission,* ECLI:EU:T:1998:92, paragraph 140, T-311/94 *Kartonfabriek de Eendracht v Commission,* ECLI:EU:T:1998:93, paragraph 237, T-334/94 *Sarrió,* ECLI:EU:T:1998:97, paragraph 169, T-348/94 *Enso Española v Commission,* ECLI:EU:T:1998:102, paragraph 223. See also Case T-9/99 *HFB Holding and Isoplus Fernwärmetechnik v Commission,* ECLI:EU:T:2002:70, paragraph 231, Case C-441/11 P *Commission v Verhuizingen Coppens NV*, ECLI:EU:C:2012:778, paragraph 43 and Case C-293/13 P, *Del Monte* v *Commission*, ECLI:EU:C:2015:416, paragraph 158-159.

(870) For the period from December 1999 to the Commission inspections on 14 February 2006 the evidence referred to in this Decision shows the existence of a single and continuous infringement in the airfreight sector.

(871) Although the collusive arrangements related to several elements of airfreight pricing, the evidence in the Commission's possession shows that they constituted elements of a single and continuous complex infringement with the aim of coordinating pricing behaviour. Also, whilst certain meetings, contacts or exchanges between competitors could be regarded as infringements in themselves they are relied upon to establish the existence of a single overall infringement. Equally, other meetings, contacts or exchanges which may not constitute an infringement in themselves were nevertheless integral to the coordination of elements of price or at least the removal of price uncertainty in the airfreight sector, particularly in view of the frequency of the interaction between competitors.

Single anticompetitive aim

(872) The collusion of the parties was in pursuit of a single anti-competitive aim of distorting competition in the airfreight sector in the EEA by coordinating their pricing behaviour with respect to the provision of airfreight services by eliminating competition concerning the charging, amount and timing of the FSC, the SSC and the non payment of commission to forwarders on surcharges.

(873) The aim of the parties is evidenced by repeated contacts which took place over a long period of time as set out in Section 4. The nature of the evidence presented in Section 4 is of a significant number of largely bilateral contacts, often via telephone. In this respect, and in such a cartel, it is unsurprising that there was no initial multilateral meeting which laid down the particular purpose of the cartel. Rather, the aim is evidenced by the parties' actions as set out in Section 4 and to a certain extent also by their own submissions.

(874) The parties actions show a network of contacts which ensured that discipline was maintained in the market and that increases arising from the fuel indices were to be applied in full and in a coordinated way thus removing pricing uncertainty. This action was extended to the SSC where the parties again sought to remove pricing uncertainty with respect to the application and level of the surcharge. This was reinforced by refusing to pay commission on surcharges which ensured that pricing uncertainty, which could have arisen from competition on commission payments, remained suppressed.

(875) [*] recognises that the contacts were designed to ensure the competitors took the same steps, [*] recognises that there was a 'general consensus' that all parties should not deviate from their respective surcharge policies[1312], various parties describe the system of 'comfort calls' to ensure full implementation[1313] and [*] recognises that LH's initial contacts were designed to discuss the introduction of the FSC and the ongoing application of surcharges[1314].

(876) While in some cases coordination of the FSC and the SSC took place at local level and may have given rise to local variations regarding the amount and timing of surcharges, the object remained the same, namely to eliminate competition among

[1312] [*]
[1313] [*]
[1314] [*]

carriers with respect to those surcharges (see for example, recitals (284) (Czech Republic), [*] (Sri Lanka), [*] (India)).

Single product/service

(877) The arrangements concern the provision of airfreight services and the pricing thereof.

Same undertakings

(878) The same undertakings are involved in the arrangements, notably with the addressees involved in multiple elements of the infringement. All the addressees were involved in communications and concertation regarding the FSC with many participating with regard to SSC and the non-payment of commission on surcharges. It is not necessary for categorisation as a single and continuous infringement that all the undertakings must take part in every element of the infringement. Neither is this conclusion affected by the fact that the particularities and intensity of the exchanges may have varied over time.

Single nature of the infringement

(879) The infringement is concerned with price coordination. Fundamentally, all of the various elements are concerned with pricing matters, more particularly surcharges. As set out in Section 4 pricing contacts between carriers initially started in respect of the FSC and spread to the introduction and application of the SSC with the aim of eliminating competition with respect to the application and level of these surcharges. As the FSC and SSC were kept as a discrete element of the overall price, distinct from rates, carriers were able to further cooperate in refusing to pay commission on surcharges, which would otherwise have been payable if part of rates. This ensured that surcharges did not become subject to competition through the negotiation of commission (in fact discounts on the surcharges) with customers. The contacts concerning the FSC, the SSC and the refusal to pay commission on surcharges therefore displayed a link of complementarity, in that each of them was intended to deal with one or more consequences of the normal pattern of competition, and, through that interaction, contribute to the attainment of the single objective desired by those responsible, within the framework of an overall plan. The anticompetitive contacts directly concerned the level of surcharges and ultimately the level of the final price payable by customers.

Elements discussed in parallel

(880) The FSC, SSC and the refusal to pay commission on surcharges were frequently discussed side by side in the same competitor contact. There are numerous instances of this in the Commission's file including:

- an e-mail from [*] (MP) to AF, LH, CV, KL, BA on 13 July 2004, referring to the European Carrier Drink (ECD) meeting the previous evening, in which [*] addressed both the FSC and the SSC; [1315]
- a meeting between the [*] of LH, CV, BA, KL and MP in Amsterdam on 23 August 2004 at which they discussed surcharges in general terms; [1316]

[1315] See recital (393)
[1316] See recital (387)

- the minutes of the BAR CSC meeting on 11 July 2005 where the participants were AF, BA, CV, CX, JL, KL, LH, LX, MP, SQ and 17 other carriers, show that [*] members discussed the FSC and whether to pay commission to forwarders on surcharges; [1317]
- a meeting between AF and LH in Paris at the Novotel at Charles de Gaulle airport at which the parties discussed surcharges generally, gave assurances about the consistent application of the various surcharges and agreed that forwarders should not receive a commission on surcharges[1318]; and
- discussions within the BLACKS initiative in Italy (BA, LH, AF, CV, KL, Swiss) covered the FSC, SSC and, in a wider group, refusal to pay commission to forwarders[1319].

Involvement in elements

(881) The majority of the parties (AF, KL, BA, CV, CX, JL, LH, MP, SQ) were involved in all three elements of the infringement namely the FSC, SSC and commissioning on surcharges.

(882) AC and SK were involved in two of the three elements (FSC and SSC). Nevertheless given their involvement in the other elements of the infringement they could have reasonably foreseen exchanges between the parties on such a related matter as commissioning on surcharges and were prepared to take the risk. There is also evidence that AC was aware of the discussions on commissioning on surcharges[1320].

(883) LA was involved in one element (FSC) but evidence on the file demonstrates it was aware of discussions among carriers on SSC[1321] and commission on surcharges[1322].

Continuous infringement

(884) From the file, it is clear that the frequency of the contacts between the carriers varied over time. For example, in relation to the FSC, contacts were particularly frequent where the fuel indices approached a level at which an increase or decrease would be triggered but may have been less frequent at other times. However, these different levels of intensity are expected in a long running infringement and do not affect its continuity.

Arguments of the parties

(885) BA asserts the Commission should prove to the requisite standard each element of the infringement it identifies. However, the Commission alleges a single and continuous infringement and it is therefore incumbent on the Commission to prove to the requisite standard the existence of such an infringement.

(886) Certain parties such as BA have questioned the relevance of contacts in third countries and the relevance of contacts concerning routes which they never operated or which they could not legally have operated.

1317 See recital (503)
1318 See recital (530)
1319 See recital (560) (640) (695) (697)
1320 See recital (684) (686) (687)
1321 See recital (634)
1322 See recital (487) (681)

(887) The Commission maintains that given the worldwide nature of the cartel, those contacts are relevant to establishing the existence of the single and continuous infringement.

(888) Firstly, all of the contacts were concerned with surcharges (see recital (879)), those contacts were held in parallel (see recital (880)) and involved largely the same carriers (see recitals (881)-(883)).

(889) Secondly, surcharges are measures of general application that are not route specific. The FSC and SSC were intended to be applied on all routes, on a worldwide basis, including routes to and from the EEA and Switzerland.[1323] The refusal to pay commission on surcharges was equally general in nature.[1324]

(890) Thirdly, contacts concerning routes that carriers never operated or which they could not legally have operated are relevant to establishing the existence of the single and continuous infringement as there were no insurmountable barriers to the provision by the parties of airfreight services on those routes.[1325] For example, each carrier could have overcome any legal or technical barriers to the provision of airfreight services on routes on which it did not operate or which it could not legally have operated through arrangements with other carriers (see recitals (16), (68) and (72)). Such arrangements include interlining[1326] (see recitals (178), (192), (205), (232), (244) and (391)), block spacing[1327] (see recital (632)) and capacity sharing[1328] (see recitals (16) and (768)) Indeed, the fact that the carriers coordinated their pricing behaviour in relation to the FSC, the SSC and commission on surcharges on all routes throughout the world is a strong indication that there were no insurmountable barriers to the provision of airfreight services on any route.

(891) SK argues that the communications with competitors in Finland in January 2000 concerning a complaint from the Finnish Forwarders Association about FSC (recital (144)) did not lead to the coordinated introduction of the FSC in Finland. It was a separate, one-off local event that was not linked to the single and continuous infringement. SK followed LH in line with the decision of the headquarters. The Commission believes that the argument that SK introduced the FSC following only LH does not legitimise exchanges of relevant information with other competitors. Furthermore, these contacts were reported to the SK headquarters that gave relevant instructions. Therefore, it cannot be regarded as an isolated local event that had no link to central decision making.

(892) SQ argues that the allegations concerning the introduction of the SSC concern concerted practices in the form of an information exchange in 2001 and that they

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1323 Announcements of the increase or decrease of the FSC or SSC by various carriers referred to a worldwide application of the surcharge that was not limited to a specific route (see for example recitals (140) (162) [*] (250) (279) (281) (608) (666)). Decisions with regard to the FSC and SSC were usually taken on the headquarters level of the respective carriers because of their worldwide application and implemented locally (see for example (110) (119) (171) (226) (233) (284). Some differences in the level of the FSC and SSC rates also existed and were discussed separately due to the local market conditions or regulations (see for example Sections 4.3.9.3, 4.3.10.3, 4.3.14.2., 4.3.18.4, 4.4.2.6 or 4.4.2.11).

1324 See for example recital (675) (676)

1325 Case T-519/09 *Toshiba v Commission,* ECLI:EU:T:2014:263, paragraphs 230-235, upheld on appeal in Case C-373/14 P, ECLI:EU:C:2016:26, paragraphs 29-34.

1326 Interlining allows the transport of cargo by two carriers under the same master airway bill.

1327 Block spacing allows a carrier to purchase capacity from another carrier and offer to its customers as if it were its own capacity.

1328 Capacity sharing allows carriers to exchange capacity between them.

cannot be regarded as continuing once the SSC was implemented. The only allegation against SQ concerning SSC after 2001 relates to contacts with WOW partners in 2005. The extensive temporal gap means that the allegation concerning the 2005 events cannot be regarded as part of a continuous infringement involving the SSC. The Commission does not accept this argument as SQ continued to participate in the single and continuous infringement, which comprises a number of elements, between 2001 and 2005 with extensive evidence of contacts with other carriers.

(893) [*] also argued that throughout the investigated period it was never informed or aware that LH was directly communicating on a regular basis with numerous other airlines about FSC. The Commission cannot accept this argument as it is LA itself who contradicts this argument in paragraph 34 of its reply to the SO. It makes reference to an internal LA email[1329] dated 22 August 2005 in which [*] (LA) stated that he talked to [*] (LH) about the FSC implementation on the phone and [*] referred to his conversations with other carriers. In paragraph 34 of the reply to the SO, LA also confirmed that in the autumn of 2005 [*] told [*] that LH had regular contacts on FSC levels with KLM.

(894) [*] argues its collusive behaviour was restricted, at least with respect to the FSC, to contacts with LH, which [*] admits. [*] claims it was not aware of a wider conspiracy and there is no evidence to suggest that contacts at a local level were fed back to head office. AC also argues no overall plan has been demonstrated and there is no evidence that AC was aware or should have been aware of any global plan.

(895) The Commission has outlined the overall plan in recitals (872)-(876). The Commission is required to show that an undertaking in question was aware of the behaviour of other participants or could reasonably have foreseen or been aware of them and was prepared to take the risk[1330] in order to hold that undertaking responsible for the infringement as a whole. It is clear from the evidence in recital (896) that both BA and that AC were discussing pricing matters with numerous parties and were aware that pricing matters were being discussed between carriers. Accordingly, both were aware of the behaviour of other participants or could reasonably have foreseen or been aware of them and were prepared to take the risk.

(896) In respect of BA the Commission relies on the following evidence already adduced in Sections 4.1 to 4.5: an internal MP memo titled 'Coffee round 22.01.01' at which FSC was discussed. It was attended by BA and 15 other carriers including LH which specifically stated it was going to decrease its FSC level[1331]; an email from LH on 28 September 2001 to AF, CV, KL, BA and SQ and the reply from CV to all plus SK concerning the introduction of an SSC[1332]; an internal MP email shows that on 2 April 2002 BA phoned MP to discuss the FSC[1333]; BA met with 7 other carriers, including Lufthansa, at the TC2 meeting on 30 September 2002 in Japan at which surcharges were discussed[1334]; BA email of 10 March 2003 refers to contact with KL as well as LH on the FSC[1335]; [*][1336]; internal LX email stating that LX had talked to

1329 [*]
1330 Case C-49/92 P *Anic Partecipaizioni SpA v Commission,* ECLI:EU:C:1999:356, paragraph 83.
1331 See recital [*]
1332 See recital (595)
1333 See recital (224)
1334 See recital (256)
1335 See recital (277)

the German [*] of BA[1337]; MP email of 13 July 2004 to major European carriers in Hong Kong, including BA (and LH), which mentions the European Carrier Drink (ECD) the previous evening and referring to the FSC and SSC[1338]; LH email of 11 October 2005 to BA and other carriers in the Czech Republic disclosing information on the FSC[1339]; discussions in the BLACKS group in Italy[1340]; emails sent from CX to BA and others[1341] ; e-mail contacts within ACCS in Switzerland with numerous carriers including LH[1342]; contacts with various carriers in Africa[1343].

(897) In respect of AC the Commission relies on the following evidence already adduced in Section 4: numerous pricing contacts with LH and other carriers[1344]; attending a meeting on 21 January 2001 with numerous carriers at which pricing matters were discussed[1345]; attending a meeting in Canada on 2 April 2003 at which pricing matters were discussed[1346]; contacts concerning the FSC within ACCS which involved numerous carriers[1347]; contacts within the HK BAR association concerning the FSC[1348]; bilateral and multilateral discussions on the SSC[1349].

(898) According to [*] the majority of its contacts with respect to the FSC were isolated regional discussions relating to currency conversion or were based on a perceived need to obtain local regulatory approval. The Commission considers that the evidence shows a mix of head office and local contacts on the FSC[1350]. The fact that some discussions may relate to currency conversion or a perceived need to obtain local regulatory approval does not mean that these are not relevant pricing contacts. The Commission's position on regulatory regimes is set out in Section 5.3.5.

5.3.2.3. Conclusion

(899) All the anti-competitive activities involving each of the participants fit within an overall aim, namely to agree on pricing or at least to remove pricing uncertainty in the airfreight sector in respect of the FSC, the SSC and the refusal to pay commission on surcharges. Coordination took place in a similar fashion regarding the introduction, level and timing of the FSC and the SSC. This was reinforced by refusing to pay commission on surcharges which ensured that the removal of pricing uncertainty was not undermined.

(900) Furthermore, various additional factors such as the single nature of the service, the involvement of the same undertakings and individuals, the single nature of the (pricing) infringement, and the fact that the various elements of the infringement were discussed in parallel all point to a single and continuous infringement.

1336 See recital [*]
1337 See recital (311)
1338 See recital (393)
1339 See recital (533)
1340 See recital (730)
1341 See recital (594) (609)
1342 See the following recitals of this Decision: (427) (428) (440) (443) [*] (563) (573) (574)
1343 See recital (646) (649) (650)
1344 See recital (161) (218) (231) (249) (272) [*](283) (291) (303) (346) (358) (411) (446) (450) (482) (495) (564) [*]
1345 See recital [*]
1346 See recital [*]
1347 See recital [*]
1348 See recital (394) (503)
1349 See recital (585) [*] (594) (609) (612) (634) (636) (660) (665)
1350 See recital (741)

(901) It would be artificial to split up such continuous inter-related conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when it involved a single complex and continuous infringement for the services concerned which progressively manifested itself in both agreements and concerted practices.

(902) However, in light of the arguments put forward, the Commission no longer maintains that the element presented in the SO relating to [*], which applies to particular routes rather than applying generally, falls within the single and continuous infringement. The Commission also no longer pursues its objections in relation to the [*] and [*] which involved a limited number of addressees.

5.3.3. Restriction of competition

(903) The anti-competitive behaviour in the present case had the object of restricting competition at least in the EU, the EEA, and Switzerland.

(904) The addressees of this Decision concerted on price in respect of the FSC, SSC and commission on surcharges.

(905) In respect of the FSC pricing coordination took place from December 1999 to February 2006 (see Section 4.3). The addressees contacted each other on various pricing matters concerning the FSC including changes to the mechanism, application of the mechanism, changes to the FSC level, disclosure of anticipated increases and announcement dates, commitments to follow increases and instances where some airlines did not follow the system.

(906) In respect of the SSC pricing cooperation took place from September 2001 to February 2006 (see Section 4.4.). Contacts between airlines and discussions related in particular to whether to introduce a SSC, the manner in which it should be calculated, the appropriate level of the surcharge, the timing of introduction and justifications to be given to customers.

(907) In respect of commission on surcharges pricing coordination took place from January 2005 to February 2006 (see Section 4.5). Contacts were made between airlines with a view to aligning their conduct in refusing to pay commission to forwarders on surcharges.

(908) Accordingly the addressees have coordinated their pricing behaviour amounting to price fixing which is prohibited by Article 101 of the TFEU. Article 101 expressly includes as restrictive of competition agreements and concerted practices which directly or indirectly fix selling prices or any other trading conditions[1351]. More specifically, the parties agreed to coordinate their pricing behaviour in respect of surcharges, not to depart from the surcharge mechanism and they exchanged pricing information. Previous Commission decisions have found that agreements on the amount and introduction of surcharges[1352] and agreements not to make deviations from published prices[1353] infringe Article 101 of the TFEU. The General Court has

[1351] The list is not exhaustive.

[1352] Commission Decision of 30 October 1996 in Case IV/34.503 (Ferry Operators) OJ L 26 of 29.01.1997, p. 23.

[1353] Commission Decision of 15 May 1974 in Case IV/400 (Agreements between manufacturers of glass containers) OJ L 160 of 17.06.1974 p. 1 and Commission Decision of 15 July 1975 in Case IV/27.000 (IFTRA rules for producers of virgin aluminium) OJ L 228 of 29.08.1975 p. 3

confirmed that price fixing agreements on surcharges[1354] or agreements which fix part of the final price are prohibited by the competition rules[1355]. Furthermore, it is long established that exchanges of information between competitors in respect of pricing matters can only be explained by the desire to replace the risks of pricing competition with practical cooperation[1356].

(909) Price being the main instrument of competition, arrangements between competitors directed at the coordination of their behaviour in order to remove uncertainty in the market in respect of pricing matters, as described in this Section in relation to the FSC, SSC, and discounts on those surcharges will by their very nature prevent, restrict or distort competition within the meaning of Article 101(1) of the TFEU.

(910) These kinds of arrangements have as their object the prevention, restriction or distortion of competition within the meaning of Article 101(1) of the TFEU.

(911) AF, KL, CV, CX, JL and MP argued that the alleged cartel had limited effects.

(912) AF presented a study prepared by its economic consultants, which concludes there was no effective pricing coordination for three main reasons: the lack of transparency in pricing makes coordination impossible in the absence of a monitoring mechanism; the prices were scattered; and route by route there is no concentration around the bottom of the statistical distribution of tariffs.

(913) JL stated that the various elements of the infringement produced no, or only insignificant, anticompetitive effects. The FSC methodology was worked out with the Japanese Civil Aviation Bureau (JCAB) therefore contacts with LH produced no effect. The SSC was set unilaterally so relevant contacts produced no impact.

(914) MP stated that it followed the market in the implementation and adjustments of the FSC. The coordination with other airlines was limited to the timing of adjustments and MP considers that it did not have a considerable impact on the market.

(915) CX argued that surcharges did not affect the overall price and did not lead to a loss of pricing uncertainty.

(916) The Commission considers that surcharges represent a constituent element of the overall price and collusion with competitors on such an element is clearly contrary to Article 101 of the TFEU[1357]. On the basis of the facts presented in Section 4, the Commission finds that the aim of such contacts was to remove pricing uncertainty in the airfreight market. This network of contacts ensured that discipline was maintained in the market and that increases arising from the fuel indices were be applied in full and in a coordinated way thus removing pricing uncertainty.

(917) Concerning the arguments in recitals (911) to (915) on the (lack of) impact of the cartel the Commission reiterates that its case is based on the anti-competitive object of the conduct in question. It makes no assessment of anti-competitive effects. It is settled case-law that for the purpose of application of Article 101(1) of the TFEU there is no need to take into account the actual effects of an agreement when it has as

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1354 Case T-48/98 *Acerinox v Commission,* ECLI:EU:T:2001:289, paragraph 55.

1355 Case T-29/92 *SPO and Others v Commission,* ECLI:EU:T:1995:34, paragraph 146.

1356 Joined Cases 56 and 58-64 *Consten and Grundig v Commission,* ECLI:EU:C:1966:41 and Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103 and 104/95 *Cement,* ECLI:EU:T:2000:77, paragraphs 1120 and 1170.

1357 Commission Decision of 30 October 1996 in Case IV/34.503 (Ferry Operators) OJ L 26 of 29.01.1997, p. 23.

its object the prevention, restriction or distortion of competition within the internal market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved[1358]. The same applies to concerted practices.

(918) KL argued that the surcharges were not profit making tools but served to recover specific costs, as illustrated by extracts from relevant documents.

(919) KL stated that the communications on the trigger points of the FSC mechanism confirm that these contacts concerned the cost of fuel as they aimed to establish the extent to which fuel cost increases required adding new trigger points to the FSC mechanism. Likewise communications on other surcharges also confirm that surcharges were means of recovering specific costs and not of increasing overall prices or yields.

(920) It is irrelevant for the characterisation of the contacts between competitors concerning the surcharges as an infringement of Article 101 of the TFEU whether the companies involved consider these surcharges as cost recovery tools or as profit making tools. Surcharges constitute an element of the final selling price paid by the customers and fixing of a part of the price is just another form of price fixing, as confirmed by the General Court in *Alloy surcharge*[1359].

(921) SK argued that the communications on 13 and 14 December 1999 between Star Alliance carriers (see recital (135)) were not an infringement of Article 101 of the TFEU as communications between LH and SK were covered by the exempted alliance and the rest of the carriers involved did not fly intra-EEA routes. Furthermore, the communications did not lead to price fixing. The Commission does not agree with SK's arguments. The Commission does not allege that this contact itself gave rise to an infringement. Also, the relevant evidence in recital (135) demonstrates anti-competitive conduct between carriers that had not established a functioning alliance that could have justified it. Since the exchange was multilateral, the exchange cannot be covered by the LH-SK exempted bilateral cooperation. This exchange forms part of the evidence of the infringement found in this Decision.

5.3.4. The WOW Alliance

5.3.4.1. Introduction

(922) The Commission wishes to clarify from the outset that this Decision does not concern the compatibility of the WOW alliance or any other alliance with Article 101 of the TFEU. The WOW alliance is analysed in detail as some of its members made arguments in that regard that the Commission cannot agree with. This Section assesses contacts between carriers alleged by some members of the WOW alliance to be legitimate by virtue of that alliance.

(923) In order to establish such participation the contacts between WOW members are considered to be relevant in so far as they go beyond what was provided for in the alliance agreement and do not fit in the context of the cooperation that was effectively implemented within the framework of the alliance.

[1358] Case T-62/98 *Volkswagen AG v Commission,* ECLI:EU:T:2000:180, paragraph 178 and case T-38/02, *Danone,* ECLI:EU:T:2005:367, paragraph 150.

[1359] Joined Cases T-45/98 and T-47/98: *Krupp Thyssens Stainless GmbH et Acciai speciali Terni SpA v European Commission,* ECLI:EU:T:2001:288, paragraph 157.

(924) It cannot be permitted that an alliance framework is also used as a cover for a broader anticompetitive cooperation than that which has been put in place through the implementation of the terms of the alliance agreement. In particular, where price coordination among the parties is provided for in the context of certain forms of coordination under the alliance, the price coordination cannot go beyond the scope of the (pro-competitive) cooperation and may only take place within the context of the implementation of the relevant cooperation as foreseen in the alliance agreement. So an alliance agreement may make legitimate the cooperation among its members only to the extent that the forms of cooperation for which the coordination of prices is envisaged in the agreement are implemented, and not otherwise.

(925) Thus, in order to be able to establish to what extent the contacts between WOW members may have been justified by the alliance, it is necessary to consider the extent to which the forms of cooperation which include price coordination are provided for under the alliance and to what extent they have been implemented. For that purpose, in Sections 5.3.4.2 and 5.3.4.3 the Commission analyses the scope of the WOW agreement and its implementation.

(926) The Commission has also taken into consideration the extent to which the alliance members were aware of the conduct of other participants or could reasonably have foreseen or been aware of them and were prepared to take the risk[1360].

(927) The parties put forward a number of arguments with regard to the contacts in the framework of WOW that are discussed in Section 5.3.4.4.

5.3.4.2. Analysis of the WOW alliance - scope of WOW according to the WOW Alliance Agreement

(928) The WOW alliance was established in 2000 by SK Cargo, LH Cargo and SQ Cargo[1361]. On 5 July 2002 JL Cargo joined the alliance[1362]. The alliance was at first named New Global Alliance (NGC) and then renamed into WOW when JL joined.

(929) [*]

(930) [*]

(931) [*][1363]

5.3.4.3. Analysis of the WOW alliance - implementation of the Alliance Agreement

(932) SQ states that WOW was designed to be a full cooperation alliance.[1364] The integration was to be achieved through three milestones, namely [*].[1365] SQ also states that the WOW partners made genuine efforts.

(933) [*] and undertook joint efforts such as [*].[1366] Moreover, LH states that the alliance is now dormant and it is no longer possible to refer to the fact that [*].[1367]

(934) [*][1368]

1360 Case C-49/92 *Anic Partecipaizioni SpA*, ECLI:EU:C:1999:35, parapgraph 83.

1361 Integration Agreement between SQ, LH and SK of 20 April 2000.

1362 Paragraph 1 Side letter to the integration agreement.

1363 [*]

1364 [*]

1365 SQ Airlines Cargo Presentation WOW p. 14.

1366 [*]

1367 [*]

(935) SK describes the implementation measures in more details, [*]. These issues are addressed in turn in Sections 5.3.4.4 to 5.3.4.10.

5.3.4.4. [*]

(936) [*].[1369] [*].

(937) [*][1370]

5.3.4.5. [*]

(938) [*][1371] [*].[1372]

(939) [*][1373]. [*].[1374]

(940) [*].[1375]

5.3.4.6. [*]

(941) [*].

5.3.4.7. [*]

(942) [*][1376]. [*].[1377]

5.3.4.8. [*]

(943) [*].[1378]

5.3.4.9. [*]

(944) [*].

(945) [*][1379]. [*][1380].

5.3.4.10. Price coordination

(946) SK claims that price coordination is ancillary to various initiatives within an alliance.[1381] In WOW price coordination is linked to the following initiatives:

- [*][1382].
- [*].[1383]
- [*].[1384]
- [*].[1385]

1368 [*]
1369 [*]
1370 [*]
1371 [*]
1372 [*]
1373 [*]
1374 [*]
1375 [*]
1376 [*]
1377 [*]
1378 [*]
1379 [*]
1380 [*]
1381 [*]
1382 See recital (702)
1383 [*]
1384 [*]

- [*].

5.3.4.11. Assessment

(947) The Commission considers that none of the initiatives claimed to have been taken in the context of the WOW alliance justifies general price coordination within WOW, in particular the general coordination of surcharges.

(948) The WOW Alliance Agreement was only implemented to a limited degree. The cooperation between the members has never become close to a fully-fledged joint venture with integrated sales and pricing policy. The joint activities were limited to, for example, [*]. However, none of the joint activities required the general coordination of surcharges among WOW members and the alliance agreement did not provide for general price coordination measures in the context of such activities. Furthermore, none of the WOW members denies that the coordination that took place with respect to surcharges and the refusal to pay a commission on surcharges was a general price coordination that was not limited to particular joint initiatives.

(949) The fact that only a limited degree of integration was reached through the WOW alliance was already argued by the parties in the Lufthansa/Swissair merger case: 'WOW is only a loose alliance which facilitates interlining among its members, so they can expand their respective networks. The parties do not sell their products jointly nor do they coordinate on prices, schedules or capacity.'[1386]

(950) In particular WOW did not harmonise the sales and pricing policy of the members and no common FSC system was created within WOW. Consequently the contacts which took place among WOW carriers on general surcharge levels can not be considered as part of the implementation of the alliance agreement. The parties even tried to hide such discussions when references to them were deleted from the minutes of WOW meetings[1387].

(951) This conclusion is also substantiated by an example referred to by SK[1388] concerning an Integration Board meeting in December 2004 where [*] (SK) proposed to [*]. However, LH and SQ refused to do that stating they could not deviate from their individual policies. SK claimed that [*] was referring to WOW products only, while LH and SQ referred to individual products. This discussion demonstrates that WOW carriers had individual surcharge policies - that in fact were coordinated in the cartel with other carriers - and they were not prepared to deviate from it for the purposes of WOW.

(952) The independent surcharge policy of the WOW members in the absence of general coordination, found in this Decision, is demonstrated by the following examples:

- [*] (LH) asked [*] (LH) on 4 November 2004 to draft a reply to an email of Singapore Airlines, in which [*] was asked about Lufthansa's plans in relation to surcharges reductions. [*] asked [*] to include in the draft that LH would try to get the WOW partners on its track ('unsere WOW Partner dazu auf unsere Schiene zu ziehen').[1389]

1385 [*]

1386 Decision of the Commission dated 4 July 2005 in Case COMP/M.3770 – Lufthansa / Swiss, paragraph 177.

1387 See recital (517)

1388 [*]

1389 [*]

- [*][1390].
- [*].[1391]
- [*].[1392]
- In an email on 8 October 2004 [*] asked a colleague to send an email to JL, explaining to JL what the Lufthansa position on the fuel surcharge was ('um die JAL hier mal unsere Position näherzubringen').[1393]

5.3.4.12. General arguments of the parties and the Commission's relevant position

(953) SK and SQ state that all of their contacts with other WOW members were legitimate under the WOW alliance. The objective of the WOW alliance, which is an expansion of the LH-SK alliance to SQ and then to JAL, was to achieve the benefits of a 'full cooperation' type of alliance in the air cargo sector. The alliance was to create an integrated cargo system that would ultimately combine the cargo business of the parties, including integrated network, sales integration and revenue and cost sharing. SK argues that price coordination was necessary for the success of the alliance as it was ancillary to various initiatives within it. Such initiatives are: [*].

(954) SQ argues that documents describing discussions between WOW partners are not relevant in establishing its participation in an infringement of Article 101 of the TFEU. The discussions between WOW partners did not have the object of restricting price competition and they did not share a common anti-competitive object with the conduct associated with the single and continuous infringement, so evidence related to WOW contacts cannot be probative of participation in such an infringement.

(955) SK states that communications with WOW partners on the FSC were understood to be legitimate, were mostly local and did not influence SK's central FSC policy of following LH.

(956) [*][1394]

(957) With regard to the arguments of SQ and SK summarised in recitals (953) to (955) the Commission notes that legal advice in the possession of SK itself from the WOW Legal Team states that in the absence of implemented cooperation the WOW partners may not discuss or exchange pricing information and that the WOW Integration Agreement is insufficient to justify such information exchange.[1395]

(958) The Commission considers that the general coordination of surcharges that took place among members of the WOW alliance did not form part of the implementation of the WOW alliance, as it is demonstrated by the analysis in Section 5.3.4.3.

(959) SQ also argues that it is not necessary to achieve full integration at the outset of such joint ventures or create specific structures in order to be in compliance with Article 101 of the TFEU. The type of integration provided for in the Integrated Development Plan of WOW, including price cooperation, is considered by SQ to be compliant with Article 101 of the TFEU, regardless of whether the parties to the alliance are

1390 [*]
1391 [*]
1392 [*]
1393 [*]
1394 [*]
1395 [*]

ultimately able to achieve their integration objectives and plans at a commercial level.[1396]

(960) The Commission cannot accept this reasoning, as it would imply that the conclusion of an alliance agreement could give a carte blanche to implement anti-competitive elements of cooperation outside the context of the beneficial, pro-competitive cooperation that the alliance agreement may envisage to develop.

(961) SQ furthermore argues that all contacts between WOW carriers concerning SSC formed part of the legitimate alliance cooperation. Concerning the contacts between LH-SK and SQ in November 2005[1397] aiming at convincing SQ to raise the SSC, SQ claims that these were necessary for the alliance in Scandinavia. SK, however, refers to the same contacts as necessary for the SK-SQ joint freighter service that the two companies operate from Copenhagen to Chicago.

(962) The Commission notes that in reality the SSC increase discussed concerned not only the routes mentioned in recital (961) but all routes, and that it was implemented generally thus the argument concerning the alliance framework does not hold.

(963) SK and SQ argue that the contacts between WOW members do not form part of a broader cartel as they had no knowledge about the coordination of surcharges between other carriers. SK states it was not aware that LH had illicit contacts with other carriers. Since SK followed LH on the basis of the exempted cooperation, it was not necessary for LH to inform SK about the broader contacts it had with other carriers.

(964) The Commission rejects this claim as there is ample evidence that clearly demonstrates that SQ and SK were aware of wider coordination involving other carriers not members of WOW. On the basis of the evidence listed in recitals (965) to (967) the Commission considers that both SQ and SK were aware of the broader coordination of surcharges or at least could reasonably have foreseen or been aware of it and were prepared to take the risk.

(965) SQ participated in numerous contacts with non-WOW carriers where FSC or SSC was discussed as shown by the following evidence:

in the framework of meetings and exchanges of emails between ACCS (Air Cargo Council Switzerland) members in Switzerland[1398];

in the framework of contacts between BAR CSC members in Hong Kong[1399];

in Singapore in the framework of contacts between BAR CSC members and in contacts with QF[1400];

in meetings with other carriers in India[1401];

in Germany in a coffee meeting, in telephone contacts between carriers, a letter sent by LH to [senior managers] of numerous other carriers on SSC[1402];

1396 [*]

1397 See recitals (628)-(632)

1398 See recital [*] (176) [*] (255) (364)-(367) (388) (390) (426)-(429) (440) (443) (460)-(463) (499) [*] (573) (574).

1399 See recital [*] (368) (369) (394) (431) (503) (505) [*]-(668) (670).

1400 See recital (146) (243) (295) (296) (395) (403).

1401 See recital [*].

1402 See recital [*] (492) [*].

in Belgium carriers were in contact concerning the FSC[1403];

in the Netherlands in contacts with MP on FSC increase[1404];

in Japan in a multilateral meeting and phone contact[1405];

in Thailand in a contact with QF[1406];

in Scandinavia in contacts with competitors concerning the introduction of SSC[1407];

in France in contacts with competitors concerning the introduction of SSC[1408];

in Australia discussions on SSC introduction with QF[1409];

in the United Kingdom contacts with competitors concerning the introduction of the FSC and the SSC[1410];

[*][1411].

(966) The following evidence shows that SK participated in contacts with non WOW carriers where FSC or SSC was discussed:

in the framework of contacts between BAR CSC members in Hong Kong[1412];

in Thailand in a contact with QF[1413];

in the framework of contacts between BAR CSC members in Singapore[1414];

information exchange with ACCS members in Switzerland[1415];

coordination of the FSC level with other carriers in Japan[1416];

coordination on defending the FSC in Finland with BA, KL and LH[1417];

exchange of information with Star Alliance members concerning the introduction of the FSC[1418];

FSC was discussed in Germany in a coffee meeting in Frankfurt, and in BARIG meetings[1419];

SQ's efforts to convince SK in Scandinavia in September 2001 to introduce the SSC, referring to plans of competitors that wait for SK[1420];

1403 See recital (414)
1404 See recital (360) (361)
1405 See recital (244) (257)
1406 See recital (506)
1407 See recital (584)
1408 See recital (585) (594) (609)
1409 See recital (601)
1410 See recital (158) (636).
1411 See recital [*]
1412 See recital [*] (394) (660) (665)
1413 See recital (506)
1414 See recital (146) (295)
1415 See recital (204)
1416 See recital (491)
1417 See recital (144)
1418 See recital (135)
1419 See recital [*] (425) (559)
1420 See recital (584)

LH sent an email on 28 September 2001 to AF, CV, KL, BA [*] and then CV replied to all plus SK concerning the introduction of an SSC[1421];

LH sent its FSC announcements regularly via email to numerous carriers, among them SQ and SK[1422];

LH ([*]) email dated 17 February 2003 to SK head office ([*]) stating concerning the FSC increase that: '*As I have seen BA, KL, [*] are out as well. Heard that CV, [*] and others to follow as well.*'[1423]

AF sent an email to SK dated 27 June 2005 stating in Danish: '*We have 'agreed' DKK 3.30 AF/KL as per 7 July 2005'.*[1424]

(967) The involvement of WOW carriers in the infringement is further demonstrated by the following evidence:

Concerning the suspension of an FSC increase by LH in September 2004, MP noted that LH's decision meant that JL, SK and SQ would do the same[1425];

LH used the WOW meeting to coordinate the SSC level in Hong Kong[1426];

The WOW members were aware of the fact that the general coordination of surcharges is illegitimate within WOW as it is demonstrated by the efforts made to hide such discussions.[1427]

(968) SQ and SK argue that their position concerning the legitimacy of the alliance was confirmed by a Commission official, during an informal meeting on 30 July 2002. SK and SQ allege that the Commission official stated that coordination of marketing and pricing between WOW partners would not be something DG Comp would investigate on the basis of what the WOW partners explained to him, unless there were complaints. SQ argues that this meeting raised a legitimate expectation on their part, as a Commission representative, acting in his official capacity, has provided guidance indicating that a certain conduct is compatible with Article 101 of the TFEU.

(969) The Commission rejects these arguments. First, statements given by officials in informal meetings do not reflect the official position of the Commission and they are not binding on the Commission.[1428]. Second, the right to rely on the principle of legitimate expectations extends to an individual only where the EU institutions give precise assurances[1429]. General statements are not such as to give rise to any valid expectation[1430]. In the present circumstances no precise assurances capable of giving rise to a legitimate expectation were given.

(970) In any event, the statements made during the meeting could not have led SK and LH to believe that coordinating surcharges with other carriers was allowed. The discussion was general and theoretical, based on oral information only, as it is noted

1421 See recital (595)
1422 See recital [*] (313) (346) (411) (446) (450) (482) (495)
1423 [*]
1424 [*]
1425 See recital (402)
1426 See recital [*] (620)
1427 See recital (517)
1428 Case T-158/00 *ARD v Commission,* ECLI:EU:T:2003:246, paragraph 296.
1429 Case T-534/93 *Gryberg and Hall* v *Commission,* ECLI:EU:T:1994:86, paragraph 51.
1430 Case T-571/93 *Lefebvre and others* v *Commission,* ECLI:EU:T:1995:163, paragraph 72.

in an email from LH to SK preparing for the meeting: 'We will leave nothing written. And no other traces. So bring your camouflage cape.'[1431] Moreover, price coordination between members was mentioned as a future possibility only, without details, in a theoretical way. According to the LH meeting report '*Mention was also made of the fact that the carriers envision common pricing in the future*'[1432]. Finally, the Commission official involved did not exclude a future investigation by the Commission, but simply stated that based on the actual legal situation, when the Commission's competence was limited concerning air transport with third countries, it was not a priority for the Commission to investigate such a cooperation if it did not receive any complaints. According to the LH report '*the Commission's reaction was as expected. It did not see a reason for it to intervene, while expressly excluding Article 85 EC Treaty (opening of a proceeding for NON EU-affairs).'*

5.3.4.13. Conclusion

(971) Having regard to the WOW Alliance Agreement and its implementation the Commission finds that the coordination of the surcharges between the WOW members was conducted outside the legitimate framework of the alliance that does not justify it. The members were in fact aware that such coordination is illegitimate. Furthermore, they were aware that the coordination of surcharges involved a number of airlines not participating in WOW. Consequently, the Commission finds that the evidence concerning contacts between WOW members, described in Sections 4.1 to 4.5, constitutes evidence of their participation in the infringement of Article 101 of the TFEU as described in this Decision.

5.3.5. Regulation of airfreight services

5.3.5.1. Introduction

(972) In certain countries, charges for airfreight services are regulated. In some cases undertakings may be encouraged to agree charges ([*] and/or surcharges). Air Service Agreements (ASA) are bilateral agreements between states which establish one or more air routes between their respective countries. In some cases, ASAs contain clauses which provide for the joint setting of charges by airlines designated to operate on the relevant route. These agreements are made between states but their provisions are not implemented by the contracting parties in many cases and in no case is there a legally binding obligation for carriers to agree charges laid down in any country to or from which routes covered by this Decision are operated.

(973) For Article 101(1) of the TFEU to apply it is necessary that undertakings engage in anticompetitive behaviour on their own initiative[1433]. It follows that where regulatory or other measures leave the undertakings concerned with no scope for autonomous action Article 101(1) of the TFEU is not applicable. If a national law merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 101 of the TFEU

1431 [*]
1432 [*]
1433 Joined Cases C-359/95 P and C-379/95 P *Tiercé Ladbroke v Commission,* ECLI:EU:C:1997:531.

and may incur penalties[1434]. Furthermore, the state compulsion defence has been applied restrictively by the General Court[1435].

(974) A number of carriers have argued that in certain jurisdictions, in particular Hong Kong and Japan, they were required to agree certain charges. In relation to these two jurisdictions an assessment is carried out in recitals (976) to (1012).

(975) Firstly, the parties' arguments are set out. Secondly, the relevant legal provisions are addressed, in particular the applicable Air Service Agreements (ASAs) and relevant implementing measures. Thirdly, the administrative practices of the relevant national authorities are considered. Other jurisdictions are assessed subsequently in a more limited manner.

5.3.5.2. Hong Kong

Carriers' Arguments

(976) A number of carriers have stated that they were required to obtain approval of the local aviation authority, the CAD, for the imposition of surcharges on shipments from Hong Kong. Furthermore, they argue that they were required to concert with other carriers on surcharges.

(977) CX argues that it had to agree with other carriers on surcharges, because the CAD only accepted collective applications of the carriers. It therefore had to discuss surcharges with the other carriers before each application. However, CX's statements are in themselves contradictory. At various points CX argues that CAD required collective applications[1436]. However, CX reports a meeting on 29 September 2006 between it and CAD at which CAD indicated its 'preference' (not requirement) for collective applications.[1437] According to CX CAD also stated at the meeting that whilst it would not approve individual applications for an FSC index it would accept individual applications for a fixed amount of FSC. CX also draws a distinction between the FSC and other surcharges

(978) BA admits that it was legally possible for the carriers to apply separately. In its reply to the SO BA describes that the CAD only refused to countenance the prospect of each airline setting up its own FSC indices and would only accept individual applications for a fixed amount of FSC.[1438] However, according to BA individual applications were in practice not possible.

(979) [*] states that the CAD encouraged a collective FSC mechanism[1439], but admits that the CAD was, in relation to the FSC, in theory willing to accept individual applications and that CAD only indicated that the approval process for individual applications would be more difficult.[1440]. Furthermore [*] recognises that CAD did

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1434 Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garantie della Concorrenza e del Mercato,* ECLI:EU:C:2003:430, paragraph 56.

1435 Case T-513/93 *Consiglio Nazionale delgi Spedizionieri Doganali (CNSD) v Commission*, ECLI:EU:T:2000:91, Case T-66/99 *Mionoan Lines SA v Commission,* ECLI:EU:T:2003:337. These cases relate to a state compulsion defence in the context of Member States' regulations. The principle is however equally applicable to third country regulations.

1436 [*]

1437 [*]

1438 [*]

1439 [*]

1440 [*]

not expressly favour a collective application with regard to SSC[1441]. It argues, however, that it is sufficient for Article 101(1) of the TFEU not to apply if a foreign authority explicitly encourages anti-competitive behaviour.[1442]

(980) Also MP states that the CAD encouraged the concept of a collective mechanism for the FSC so that the air carriers were expected to submit a collective surcharge application.[1443]

Relevant Legal Provisions

(981) Hong Kong has signed numerous ASAs[1444].

(982) Most of the ASAs require tariffs charged by the designated airlines of the contracting countries to be approved by the aeronautical authorities[1445]. In Hong Kong the relevant authority is the Civil Aviation Department (CAD). However, the requirement of approval of tariffs by CAD is not at issue. The issue is whether there is a requirement to discuss tariffs with competitors before submitting to the approval of CAD.

(983) Although some of the ASAs state that airlines may agree on surcharges before applying for CAD approval, none of the ASAs impose a discussion between the airlines or require a consensus among them. A clause that can be found in almost identical wording in several ASAs is the following;

'The tariffs referred to in paragraph (1) of this Article may be agreed by the designated airlines of the Contracting Parties seeking approval of the tariffs, which may consult other airlines operating over the whole or part of the same route, before proposing such tariffs. However, a designated airline shall not be precluded from proposing, nor the aeronautical authorities of the Contracting Parties from approving, any tariff, if that airline shall have failed to obtain the agreement of the other designated airlines to such tariff, or because no other designated airline is operating on the same route.'[1446]

(984) Whilst this clause allows price consultations between designated airlines it imposes no requirement on parties to discuss tariffs and specifically provides for carriers to propose tariff increases without reaching prior agreement with other airlines.

(985) The wording of other ASAs is even clearer regarding the absence of any requirement on parties. For example, the ASA between the Czech Republic and Hong Kong states that no country will require airlines to discuss tariffs[1447].

1441 [*]

1442 [*]

1443 [*]

1444 See http://www.legislation.gov hk/table1ti htm

1445 Such an obligation is, for example, set up in: Article 8(1) ASA between Austria and HK; Article 7(2) ASA between Belgium and HK; Article 8(2) ASA between Denmark and HK; Article 8(1) ASA between France and HK; Article 9(1) ASA between Hungary and HK; Article 7(2) ASA between Italy and HK; Article 7(2) between Luxemburg and HK; Article 7(2) ASA between the Netherlands and HK; Article 8(1) ASA between Sweden and HK.

1446 Article 8(2) ASA between Austria and HK; Article 7(3) ASA between Belgium and HK; Article 8(3) ASA between Denmark and HK; Article 8(2) ASA between France and HK; Article 9(2) ASA between Hungary and HK; Article 7(3) ASA between Italy and HK; Article 7(3) between Luxemburg and HK; Article 7(3) ASA between the Netherlands and HK; Article 8(2) ASA between Sweden and HK.

1447 Article 8(3) ASA between Czech Republic and Hong Kong.

(986) Furthermore, in respect of ASAs it must be noted that references to tariff discussions only apply to the airlines designated to operate between the two states which are parties to the agreement. They do not extend to tariff discussions between carriers operating between two different country pairs.

Administrative Practice

(987) A requirement to discuss tariffs and apply collectively to the CAD for approval cannot be derived from administrative practices of the CAD. No pre-existing document has been submitted which states that CAD required such concertation. Rather the possible existence of a requirement arises essentially from the assertions of some of the parties outlined in this Section. Other parties dispute the possible existence of a requirement with some arguing that CAD encouraged rather than required concertation. The relevant documents are discussed in recital (988).

(988) In respect of documents submitted by the parties, as indicated in recital (987) none of the carriers has provided evidence which establishes that the CAD explicitly required collective applications. Various documents that have been submitted are assessed in this recital.

a) The contemporaneous letters from the CAD that are submitted as evidence only state whether approval has been granted[1448]. Although, some of them approve a collective application, none requires such a collective application. In these letters, the CAD even expressly pointed out that if changes in the list of airlines submitted to them occurred, a separate application would have to be made.[1449]

b) The BAR CSC's letter of September 2006 which says '[i]n accordance with your prior direction to collectively apply for review and approval for the ex Hong Kong air cargo FSC, BAR has endeavoured to create an index that is consistent, transparent and predictable'[1450] does not constitute evidence that CAD actually required a collective application. This letter does not originate from the CAD itself, but rather from the BAR CSC. Furthermore, it should be taken into account that at the time this letter was written the Commission's investigation had already commenced and may have been drafted with this in mind.

c) A letter dated 5 September 2008 that was sent by the CAD to the President of the Commission at the request of Cathay Pacific does not constitute evidence that the CAD required all carriers to apply collectively. First, the CAD does not state that it required carriers to apply collectively. It states only that it 'required […] all carriers wishing to impose any surcharge on air cargo originating in Hong Kong to receive prior approval'[1451]. The fact that prior approval was needed is consistent with the

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1448 Cf. the approval dated 1 June 2005, Annex 135 to the legal opinion of Charles Haddon-Cave, approval dated 8 September 2005, Annex 141 to the legal opinion of Charles Haddon-Cave, approval dated 1 November 2005, Annex 148 to the legal opinion of Charles Haddon-Cave, approval dated 21 June 2006, Annex 167 to the legal opinion of Charles Haddon-Cave, approval dated 29 September 2006, Annex 185 to the legal opinion of Charles Haddon-Cave.

1449 Cf. the approval dated 1 June 2005, Annex 135 to the legal opinion of Charles Haddon-Cave, approval dated 21 June 2006, Annex 167 to the legal opinion of Charles Haddon-Cave, approval dated 29 September 2006, Annex 185 to the legal opinion of Charles Haddon-Cave.

1450 [*]

1451 CAD letter of 5 September 2008, p. 1.

ASAs and, as indicated in this Section, is not at issue. Nor does the remainder of the letter demonstrate that the CAD required concertation between carriers. It only states that collective application was an efficient manner by which to apply for, review and approve surcharges[1452] and that the CAD considers this form of application to be lawful in Hong Kong[1453].

d) LH's rejected individual application of September 2006[1454] is not evidence that the CAD required collective applications. The CAD did not reject this application because it was an individual application, but rather because it rejected the FSC mechanism proposed by LH.[1455]

e) A letter dated 23 December 2003 from the HK Office of the Commission to CAD is not evidence that the Commission has in any way approved the practices under consideration. The Commission's letter was simply sent in response to a suggestion from CAD that insurance and security surcharges should be included in rates. In an earlier unsigned and unsent draft dated 27 November the Commission equally does not approve the practices[1456].

(989) On the basis of the evidence assessed in this Section the Commission is not persuaded that a requirement to concert is made out. It appears that individual applications could be and were made in respect of both FSC and SSC.

Conclusion on Hong Kong

(990) It follows that Commission does not consider that a requirement to discuss tariffs was imposed on the carriers in Hong Kong.

(991) From a legal perspective whilst the ASAs refer to discussions on tariffs there is no requirement of concertation or collective approval which flows from them. ASAs could not in any event have given rise to any justification for airlines designated on routes to different countries to have concerted on surcharges.

(992) Equally, whilst the administrative practice of the CAD may have encouraged collective applications it is clear that individual applications could be made. In this respect it is necessary to distinguish between the FSC and other surcharges. For other surcharges it has not been argued by the parties that collective applications were required by CAD in the same way as the FSC. For the FSC even if CAD was not prepared to accept individual applications for an FSC mechanism it is clear that CAD was prepared to accept individual applications for a fixed amount FSC. The fact that such an individual process might have been more difficult or less practical does not amount to a requirement to make a collective application following concertation on the FSC.

(993) It accordingly follows that Article 101 of the TFEU remains applicable.

1452 CAD letter of 5 September 2008, p. 1.
1453 CAD letter of 5 September 2008, p. 2.
1454 [*]
1455 [*]
1456 [*]

5.3.5.3. Japan

Arguments of parties

(994) JL and a number of other parties[1457] have argued that the Commission must take into account the applicable regulatory regime in Japan. JL in particular argues that the JCAB, in accordance with the applicable ASAs, requires Japanese airlines to coordinate their [*] and surcharges with other airlines. [*]. The FSC ex Japan is a particular issue where JL claims it understood that it was following JCAB directions by coordinating with other Japanese carriers[1458]

Relevant Legal Provisions

ASAs

(995) The ASAs which govern routes between Japan and the EU are negotiated individually with Member States but all ASAs are very similar. A specific Article (usually A11) addresses tariffs. Article 11 of the Japan – Netherlands ASA states;

'agreement on tariffs shall, wherever possible be reached by the designated airlines though the rate fixing machinery of IATA. When this is not possible, tariffs in respect of each of the specified routes shall be agreed by the designated airlines'

(996) If the carriers are not able to agree the authorities will set the fares. JL argues on the basis of this wording that the ASAs require, rather than permit, price fixing agreements.

(997) Similar tariff provisions appear in the ASA between Japan and the following Member States: France, Italy, and Germany. However, it should also be noted that the United Kingdom – Japan ASA was amended on 22 September 2000 by the United Kingdom and Japan entering into a Memorandum of Understanding (MoU). The MoU amended the ASA so that the designated airlines of the United Kingdom and Japan will not be required to consult each other on proposed tariffs prior to submitting them.[1459]

Relevant provisions of Japanese Civil Aviation Law

(998) The key provisions of the Japanese Civil Aviation Law are set out in recitals (999) to (1001).

(999) Article 105 (for Japanese carriers) and Article 129.2 (for non –Japanese carriers) provide for the JCAB to approve all fares, rates and surcharges to and from Japan.

(1000) Article 111 provides that when an agreement is concluded between Japanese airlines carriers are also required to apply for approval under Article 111 (as well as under Article 105). If JCAB gives its approval under Article 111 and no opposition is forthcoming from the Japanese Fair Trade Commission (JFTC - the relevant anti-trust authority) within 30 days the notifying carriers are 'entitled' to immunity from Japanese anti-trust laws.

(1001) Article 157 provides that a failure to comply with Article 105 means carriers may be subject to penalties including criminal sanctions.

1457 For example CX, SK, AC, AF, KLM, AC, SQ, MP.

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Administrative Practice

(1002) JL claims a JCAB direction required that an application under Article 105 must include a statement that the applicant has obtained the agreement of the designated carriers as stipulated by the applicable ASA.

(1003) [*] in contrast claims up until 2006, the Ministry of Land, Infrastructure and Transport (MLIT) of which the JCAB is an administrative department required FSC applications under Article 111 to make a reference to IATA ("as if" there were an IATA agreement on FSC). Only in 2006 was MLIT's requirement changed and instead it was required to refer to agreements with airlines designated under ASAs.[1460]

(1004) In general the Japanese carriers argue that JCAB directed and controlled the FSC process including stipulating that the FSC should be jointly coordinated. CX recognises that collective applications were not required but argues that the JCAB 'implicitly' required airlines to follow the lead of national carriers.[1461] SK argues the administrative practice gave rise to an obligation, perceived or actual, that the agreement of JL had to be obtained on the FSC to gain approval.

Analysis of the Japanese Regulatory System

(1005) The standard wording of the Japanese-EEA ASAs states that carriers shall agree on tariffs. This is only however if agreement within IATA is not possible. In this respect [*] has asserted that FSC applications merely had to make reference to IATA and only in 2006 were references to discussions with other carriers required. Equally, if the parties are unable to agree for whatever reason, the authorities will set the fares.

(1006) Not all ASAs are identical. It should also be borne in mind that the provisions relating to tariff discussions were specifically removed from the Japan- United Kingdom ASA in September 2000. JL itself has recognised that there is no requirement by the JCAB to coordinate in respect of flights between Japan and the United Kingdom[1462].

(1007) Most importantly the clauses relating to tariff discussions within the ASA are strictly limited to the *designated* carriers on *specified* routes. In no way do they cover general tariff discussions among multiple carriers flying to different destination countries of the type described in Section 4. This applies to all tariff discussions including the FSC where particular arguments of a requirement of coordination have been made.

(1008) It is also worth recognising that the tariff provisions of such ASAs are generally redundant in the EU with no party claiming that they are applied. This is despite the fact that the ASA agreement legally applies to both Japanese and EEA parties equally. Accordingly, this suggests any obligation must arise not directly from the wording of the ASA but rather from the domestic legal or administrative provisions in force in Japan. This is further supported by the fact that the parties claimed that coordination was required in respect of the FSC but not in respect of the SSC.

(1009) The relevant domestic provisions are found in Japanese Civil Aviation Law. Article 105 (for Japanese carriers) and Article 129.2 (for non Japanese carriers) provide an

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obligation to notify tariffs for approval to the JCAB. Neither Article, or any other Article referred to in submissions, requires coordination of tariffs by carriers. Applications are also made on an individual rather than collective basis. There is accordingly no legal requirement of coordination capable of leading to the disapplication of Article 101 of the TFEU.

(1010) Equally, the fact that Article 111 provides for immunity from Japanese anti-trust law does not lead to immunity from EU competition law and the disapplication of Article 101 of the TFEU.

(1011) JL and other carriers further argue that the administrative practices of the JCAB required concertation ex Japan in respect of the FSC. […][1463] [*][1464] Furthermore, the parties have provided no written agreement, guidance, memorandum or email from any authority which records this position. No satisfactory contemporaneous documentary evidence has been submitted to substantiate the claim that JCAB required coordination of the carriers' FSC implementation. It is based rather on simple assertions of the parties which is not sufficient to substantiate a defence of state compulsion.

Conclusion on Japan

(1012) Having regard to recitals (998) to (1011) the Commission does not consider that a defence of state compulsion has been substantiated. This is on the basis that firstly, and most significantly, the EU-Japan ASAs restrict tariff discussions to the designated airlines under the specific ASA. Under any reading the ASAs did not extend to multilateral tariff discussions. On this basis alone the defence of state compulsion fails. Secondly, domestic Japanese law as described in recitals (999) to (1001) does not impose a legal obligation of concertation. Thirdly, no satisfactory evidence has been submitted which points to an administrative requirement to concert. Fourthly, it is not claimed that the parties were required to concert on the SSC or commissioning on surcharges.

5.3.5.4. Other regulatory regimes

(1013) Various parties put forward arguments in respect of regulatory schemes in other locations. These include India, Thailand, Singapore, Korea and Brazil.

(1014) India is a party to ASAs which contain tariff provisions with the following Member States; Belgium, France, Germany, Italy and Sweden. Typically the ASAs containing tariff provisions state that tariffs …'shall, if possible, be agreed between the designated airlines in respect of each of the specific routes between the designated airlines concerned'. Parties are required to file tariffs with the Directorate for Civil Aviation under the Aircraft Act and the Aircraft Rules.

(1015) Thailand is party to a number of ASAs with EEA countries. The ASAs typically provide that tariffs 'shall, if possible, be agreed in respect of each of the specified routes between the designated airlines concerned.' The ASAs also provide that if the designated airlines cannot agree tariffs or if for some other reason tariffs cannot be agreed the Contracting Parties shall try to reach agreement. The relevant regulatory bodies are the Department of Civil Aviation and the Civil Aviation Board to which tariffs should be filed.

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(1016) Singapore is also party to a number of ASAs with EEA countries. These ASAs typically contain wording identical to the Thai ASAs cited in recital (1015) including the provision that the Contracting Parties shall try to reach agreement if it is not possible for the designated airlines or for some other reason. The Civil Aviation Authority of Singapore is the relevant authority.

(1017) Korea is party to ASAs but these do not contain tariff clauses which encourage coordination between designated airlines. Rather there is simply a requirement for notification for approval of tariffs to the aeronautical authorities which in Korea is the Ministry of Construction and Transport.

(1018) Brazil is also party to ASAs with EEA countries with the National Civil Aviation Authority being the relevant regulatory body.

(1019) Following the reasoning outlined in this Section in detail in respect of Hong Kong and Japan the Commission does not consider that a defence of state compulsion is substantiated in regard to India, Thailand, Singapore, Korea and Brazil. Firstly, to the extent that there are tariff provisions in the ASAs these are limited to the designated airlines on specified routes and do not extend to general tariff discussions between multiple operators providing services to multiple country destinations. Secondly, the applicable domestic legal and administrative provisions have not been shown to require tariff coordination.

5.3.5.5. Conclusion on regulation

(1020) As set out in Sections 5.3.5.1 to 5.3.5.4 the Commission does not consider that a defence of state compulsion has been substantiated which would lead to the disapplication of Article 101 of the TFEU.

(1021) Nevertheless the Commission has regard to the fact that a national framework which encourages anticompetitive conduct may be considered as a mitigating factor when the level of the penalty is set.[1465] Point 29 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003[1466] ('the Guidelines on fines') specifically provides for a mitigating circumstance 'when the anticompetitive conduct of the undertaking has been authorized or encouraged by public authorities or legislation'.

5.3.6. Conflict of laws

(1022) SQ contends that regulatory requirements for carriers to coordinate pricing in third countries should be taken into consideration and even if EEA implementation had been involved the Commission should refrain from taking action that could create potential conflict with third countries. SQ claims that the contacts between competitors in Singapore in the BAR CSC framework were lawful under Singaporean law. SQ also contends that the airfreight transport services originating from Singapore fall under the exclusive jurisdiction of Singapore as there were no EEA customers of airfreight services from Singapore to the EEA between 1 May 2004 and February 2006. SQ concludes that the Commission should avoid extra-territorial application of Article 101 of the TFEU that would infringe the right of Singapore to freely determine its economic and competition policies.

[1465] Joined Cases 40/73 to 48/73, 50/73, 54/73, 111/73, 113/73 *Suiker Unie and Others* v *Commission,* ECLI:EU:C:1975:174, paragraph 620.

[1466] OJ C 210, 1.9.2006, p. 2.

(1023) Concerning SQ's arguments about the conflict of laws the Commission reiterates that it is established case-law that if a national law merely allows, encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 101 of the TFEU and may incur penalties[1467]. In such cases the relevant laws are not in conflict with each other as they do not provide for conflicting obligations. In case of Singapore the parties were not obliged to coordinate surcharges by the Singapore legislation or administration, thus it is clear that there is no conflict between the application of Article 101 of the TFEU and the laws of Singapore.[1468]

5.3.7. Effect upon trade between Member States, between EEA Contracting Parties and between the contracting parties of the Swiss Agreement

(1024) Article 101 of the TFEU is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market. Similarly, Article 53 of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area. Equally, Article 8 of the Swiss Agreement is aimed at agreements in the field of civil aviation which may harm trade between the EU and Switzerland.

(1025) Article 101 of the TFEU does not require that agreements referred to in that provision have actually affected trade between Member States; it is sufficient that the agreements 'are capable of having that effect'.[1469] According to the case-law, 'for an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States; [m]oreover, that influence must not be insignificant.'[1470]

(1026) It is not necessary, in order for Article 101 of the TFEU to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States[1471].

(1027) The 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty',[1472] (notice on the effect on trade) in paragraph 61 stipulate that agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States; in

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1467 Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garantie della Concorrenza e del Mercato,* ECLI:EU:C:2003:430, paragraph 56.

1468 Joined cases C-89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström and others v. Commission,* ECLI:EU:C:1988:44, paragraph 20.

1469 Case C-306/96 *Javico,* ECLI:EU:C:1998:173, paragraphs 16 and 17; see also Case T-374/94 *European Night Services,* ECLI:EU:T:1998:198, paragraph 136 and Case C-238/05 *Asnef-Equifax,* ECLI:EU:C:2006:734, paragraph 43.

1470 Joined Cases C-295/04 to C-298/04 *Manfredi,* ECLI:EU:C:2006:461, paragraph 42; Case 56/65 *Société Technique Minière,* ECLI:EU:C:1966:38, paragraph 7; Case 42/84 *Remia and Others,* ECLI:EU:C:1985:327, paragraph 22 and Joined Cases T-25/95 and others, *Cement,* ECLI:EU:T:2000:77.

1471 Case T-13/89 *Imperial Chemical Industries v Commission,* ECLI:EU:T:1992:35, paragraph 304.

1472 OJ C 101, 27.4.2004, p.81.

paragraph 62 stipulate that agreements between undertakings in two or more Member States that concern imports and exports are by their very nature capable of affecting trade between Member States; in paragraph 64 stipulate that cartel agreements such as those involving price fixing and market sharing covering several Member States are by their very nature capable of affecting trade between Member States.

(1028) The coordination of the surcharges was in fact implemented in all Member States and also in third countries. The diminished price competition between carriers was likely to reduce the advantages which would otherwise accrue to the more efficient of them. This was likely to affect in turn the normal pattern of losses and gains of market share which would have been expected in the absence of the coordination. This restriction of competition between carriers operating in many Member States was consequently likely to influence and alter trade flows in transport services within the internal market, which would have been different in the absence of the coordination.

(1029) In addition, such a price fixing cartel in the airfreight sector could lead to a diversion to other modes of freight transport, or reduce the total level imports and/or exports and thus have an effect on trade between Member States also in that way.

(1030) In the present case, the cartel arrangements covered the whole EEA area as well as Switzerland. The existence of pricing contacts in respect of fuel and security surcharges across the EEA and Switzerland as well as coordinated behaviour in respect of the commission to be paid to third parties on the surcharges had their object of restricting competition (see Section 5.3.3) between the carriers in respect of routes within the EEA, between the Contracting Parties to the Swiss Agreement and also between the EEA and third countries. Based on the case law, such concerted practices are capable in themselves of affecting trade between Member States.[1473]

(1031) Furthermore, the concerted practices described were capable of having an effect on the trade in goods between Member States, in so far as the transport prices fixed by them represented a proportion of the end selling price of the goods transported. Airfreight services form a significant cost element of the goods transported that has an impact on their sale.[1474]

(1032) Airfreight services between EEA airports and third countries frequently involve transport via "hubs" operated by carriers in different EEA countries since many airports in the EEA are not well served by flights carrying freight to or from third countries, and even less served by the carrier that is providing the service from the third country. Consequently restrictions of competition among the carriers offering airfreight services to or from third countries were liable to affect the pattern of airfreight services within the EEA between airports of origin or destination in the EEA and intermediate freight hubs established by the carriers in various EEA countries.

(1033) Finally, the Commission notes that Regulation (EC) No 411/2004 gave competence to the Commission to impose fines for infringements of Article 101 of the TFEU on routes between the EU and third countries. Recital 3 of this regulation stipulates that

[1473] Case T-213/00 *CMA CGM and Others v Commission*, ECLI:EU:T:2003:76, paragraphs 219-220.

[1474] Case T-395/94 *Atlantic Container Line AB and Others v Commission* (TAA judgment), ECLI:EU:T:2002:49, paragraph 82.

anti-competitive practices in air transport between the EU and third countries may affect trade between Member States.

(1034) CX argued that inbound traffic to the EEA had no appreciable effect on trade between Member States, as the sale of airfreight services in the EEA was not affected by pricing coordination in Hong Kong. In particular it refers to Section 3.3 of the notice on the effect on trade and the criteria that if one or more parties are located outside the EU than the agreement or practice has to be either implemented inside the EU or produce effects inside the EU. The Commission does not accept CX's arguments, because, as explained in Section 5.3.8, airfreight services inbound to the EEA are in part performed in the EEA, are implemented in the EEA and are producing effects inside the EEA.

(1035) The Commission therefore considers that the single and continuous infringement by the airfreight service providers as described in this Decision may appreciably affect trade between Member States, between Contracting Parties to the EEA Agreement and between Contracting Parties to the Swiss Agreement.

5.3.8. The applicability of Article 101 of the TFEU and Article 53 of the EEA Agreement to inbound routes

(1036) CV, SK and SQ argue that Article 101 of the TFEU and Article 53 of the EEA Agreement do not apply to routes inbound to the EU /EEA. Referring to the judgment of the Court of Justice in Woodpulp[1475] they note that in order to be subject to Article 101 of the TFEU, agreements, decisions or concerted practices have to be implemented within the EU /EEA.

(1037) The parties state that based on the judgment of the General Court in Gencor[1476] the place of implementation is the place of the affected sales and in that regard the location of the customer is of importance.

(1038) The parties furthermore argue that in the case of air freight transportation services the place of implementation is the country of departure for the following reasons:

a) Customers that purchase air freight transport services from air cargo carriers are, in general, established within the country of departure;

b) All sales of these air freight transport services are made by local personnel or a local general sales agent within the country of departure;

c) Prices for air freight transport services are, in general, expressed in the currency of the country of departure;

d) Sales of air freight transport services, including surcharges are, in general, regulated by the authorities in the country of departure in accordance with the applicable ASAs.

(1039) Concerning the place of implementation with regard to the transport of goods, SK also quotes paragraph 201 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings[1477]: "Cases concerning the transport of goods are different as

[1475] Joined Cases C-89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström and others v. Commission,* ECLI:EU:C:1988:447.

[1476] Case T-102/96 *Gencor v Commission,* ECLI:EU:T:1999:65, paragraph 87.

[1477] OJ C 95 of 16.4.2008, p. 1.

the customer, to whom those services are provided, does not travel, but the transport service is provided to the customer at its location. Those cases fall into the third category and the location of the customer is the relevant criterion for the allocation of the turnover."

(1040) The parties argue that concerning inbound routes the place of implementation is outside the EU/EEA. Consequently, Article 101 of the TFEU is not applicable.

(1041) The Commission rejects the arguments of the parties. Article 101 of the TFEU is applicable to anti-competitive practices in air transport between the EU airports and third countries in both directions. This is envisaged by recitals 2 and 3 of Regulation (EC) No 411/2004.

(1042) With respect to the extra-territorial application of Article 101 of the TFEU and Article 53 of the EEA Agreement these provisions are applicable to arrangements that are either implemented within the EU (implementation theory) or that have immediate, substantial and foreseeable effects within the EU (effects theory). As the Court of Justice stated in the Woodpulp case[1478], an infringement of Article 101 of the TFEU '*consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of the prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.*' In the Gencor case,[1479] the General Court held that as the effect in the EU of the examined merger was *'immediate, substantial and foreseeable',* the Commission was competent to examine it, even if the merging parties had their registered office and main activities in a third country.

(1043) In the case of airfreight services from third countries to airports of destination within the EEA, Article 101 of the TFEU and Article 53 of the EEA Agreement are applicable because the service itself that is the subject of the price fixing infringement is to be performed and is indeed performed, in part, within the territory of the EEA. Moreover, many contacts by which the addressees coordinated surcharges and the non-payment of commission took place in the EEA[1480] or involved participants in the EEA.

(1044) Contrary to what SK states, the example given in the Consolidated Jurisdictional Notice, referred to in recital (1039) is not relevant here. The Notice relates to the geographic allocation of turnover of undertakings for the purpose of establishing whether the turnover thresholds of Article 1 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[1481] are met.

1478 Joined Cases C-89, 104, 114, 116, 117 and 125 to 129/85, *Ahlström and others v. Commission,* ECLI:EU:C:1988:447.

1479 Case T-102/96 *Gencor,* ECLI:EU:T:1999:65, paragraph 87.

1480 See for example recitals (124) [*] (128) (132) (187) (189) (191) (209) [*] (212) (215) (217) (225) [*] (260) (263) [*] (266) (268) (270) (271) (276) [*] (280) (302) (310) [*] (318) (319) (321) (335) [*] (340) (342) (351) (356) (357) (360) [*] (373) (382) [*] (399) (400) (402) (405) [*] (419) (423) (433) (435) [*] (437) (438) [*] (469) [*] (476) [*] (511) [*] (518) (522) [*] (525) (545) (550) (552) (556)

1481 OJ L 24, 29.1.2004, p. 1

(1045) In addition, anticompetitive practices in third countries with regard to air freight transportation to the EU /EEA are liable to have immediate, substantial and foreseeable effects within the EU /EEA, as the increased costs of air transport to the EEA, and consequently higher prices of imported goods, are by their very nature liable to have effects on consumers in the EEA. In this case the anticompetitive practices eliminating competition between carriers offering airfreight services from third countries to EEA airports were liable to have such effects also on the provision of airfreight services by other carriers within the EEA, between the different hub airports used by carriers from third countries in the EEA and airports of destination of those shipments in the EEA to which the carrier from the third country does not fly.

(1046) Finally, it has to be underlined that the Commission has found a world-wide cartel. The cartel was implemented globally and the cartel arrangements concerning inbound routes formed an integral part of the single and continuous infringement of Article 101 of the TFEU and Article 53 of the EEA Agreement. The cartel arrangements were in many cases organised centrally and the local personnel were merely implementing them. The uniform application of the surcharges on a world wide scale was a key element of the cartel.

5.3.9. Application of Article 101(3) of the TFEU

(1047) The provisions of Article 101(1) of the TFEU may be declared inapplicable pursuant to Article 101(3) of the TFEU where an agreement or concerted practice contributes to improving the production or distribution of goods or services or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(1048) Article 1(2) of Regulation (EC) 1/2003 provides that agreements and concerted practices caught by Article 101(1) of the TFEU which satisfy the conditions of Article 101(3) of the TFEU shall not be prohibited, no prior decision to that effect being required. Moreover, Article 2 of Regulation (EC) No 1/2003 stipulates that the undertaking claiming the benefit of Article 101(3) of the TFEU shall bear the burden of proving that the conditions of that paragraph are fulfilled.

(1049) Prevention, restriction or distortion of competition being the sole object of the price arrangements which are the subject of this Decision, there is no indication that the agreements and concerted practices between the airfreight service providers entailed any efficiency benefits or otherwise promoted technical or economic progress. Hardcore cartels, like the one which is the subject of this Decision, are, by definition, the most detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers.

(1050) In addition, other arrangements between competitors which may otherwise fall within Article 101(3) of the TFEU (for example in the context of code-sharing arrangements or alliances) cannot legitimise coordinated behaviour in respect of a wider single and continuous, complex pricing agreement/concerted practice.

(1051) Furthermore, Commission Regulation (EEC) No 1617/93 of 25 June 1993 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint

operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports[1482] was amended by Regulation (EC) No 1523/96[1483] to the effect that consultations on cargo tariffs were removed from the Block Exemption. In any event, Regulation (EEC) No 1617/93 would not have been applicable to the arrangements described in this Section given its requirement (amongst others) that consultations on cargo tariffs must be limited to conduct strictly necessary to facilitate interlining and must not exceed this lawful purpose.

(1052) The Commission has had regard to the fact that the parties were engaged in hard core cartel conduct. Furthermore, none of the addressees has made arguments to the standard required by Article 2 of Council Regulation (EC) No 1/2003. Accordingly, the conditions of Article 101(3) of the TFEU are not satisfied.

5.4. The legal consequences of the 2015 Judgments and the views of the recipients of the Letter of 20 May 2016

(1053) The 2015 Judgments annulled the 2010 Decision in full or in part, depending on the form of order sought by each of the addressees who challenged that decision. The General Court found that the 2010 Decision was vitiated due to a defective statement of reasons, which amounted to a breach of an essential procedural requirement.

(1054) The legal consequences flowing from the annulments of the 2010 Decision by the General Court on foot of a breach of procedure are as follows.

(1055) Firstly, the annulments did not automatically settle all the points of fact and law raised by each of the addressees who had challenged the 2010 Decision.[1484]

(1056) Secondly, the annulments cannot be regarded as a final acquittal within the meaning of Article 50 of the Charter of Fundamental Rights.[1485]

(1057) Thirdly, the annulments did not affect the preparatory acts preceding the 2010 Decision, with the result that the Commission is entitled to resume the procedure at the very point at which the illegality occurred in other words the adoption of the 2010 Decision.[1486]

(1058) Fourthly, the annulments do not require the Commission to adopt a fresh Statement of Objections[1487] or arrange a new administrative hearing[1488] in order to allow the undertakings to submit observations on:

1482 OJ L155, 26.6.1993, p. 18.

1483 OJ L190, 31.7.1996, p. 11.

1484 Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij (LVM) and Others v Commission*, EU:C:2002:582 ('*PVC II*'), paragraphs 44-53.

1485 *PVC II*, paragraphs 59-63; Case T-24/07 *ThyssenKrupp Stainless v Commission*, EU:T:2009:236, paragraph 190.

1486 *PVC II*, paragraph 73; Cases T-472/09 and T-55/10 *SP v Commission*, EU:T:2014:1040, paragraph 277; Cases T-489/09, T-490/09 and T-56/10 *Leali and Acciaierie e Ferriere Leali Luigi v Commission*, EU:T:2014:1039, paragraph 280; Case T-69/10 IRO v Commission, EU:T:2014:1030, paragraph 128; Case T-70/10 Feralpi v Commission, EU:T:2014:1034, paragraph 133; Case T-83/10 Riva Fire v Commission, EU:T:2014:1034, paragraph 114; Case T-85/10 Alfa Acciai v Commission, EU:T:2014:1037, paragraph 140; Case T-90/10 *Ferriere Nord v Commission*, EU:T:2014:1035, paragraph 118; Case T-92/10 *Ferriera Valsabbia and Valsabbia Investimenti v Commission*, paragraph 140.

1487 *PVC II*, paragraphs 72-76 and 80-82; Case T-66/01 *Imperial Chemical Industries v Commission*, EU:T:2010:255, paragraph 236.

1488 *PVC II*, paragraphs 85-88; Case T-66/01 *Imperial Chemical Industries v Commission*, EU:T:2010:255, paragraph 236.

(a) the need for, and the expediency of, the adoption of a second decision;[1489]

(b) the developments in the case-law or in the economic context subsequent to the adoption of the 2010 Decision;[1490] or

(c) the differences between the operative parts of the 2010 Decision and a new decision due to the 2010 Decision having become final, in whole or in part, in so far as it concerns certain addressees.[1491]

(1059) Fifthly, the annulments do not prevent the Commission from imposing fines in a new decision, provided that it does so within the period of five or ten year limitations periods provided for by Article 25 of Regulation (EC) 1/2003:

(a) the five-year limitation period expires if the Commission has not imposed a fine within five years from the date on which that period began to run where, during that period, no interruptive action is taken; and

(b) the ten-year limitation period expires if the Commission has not imposed a fine at the latest, within ten years from the date on which the period began to run where interruptive action has been taken.[1492]

(1060) Pursuant to Article 25(6) of Regulation (EC) 1/2003, both the five and ten-year limitation periods were suspended by the initiation of annulment proceedings against the 2010 Decision and pending delivery of judgment by the General Court in respect of those actions.[1493] Consequently, once the 2015 Judgments were delivered, the suspended five and ten-year limitation periods started to run again, without the period of suspension being taken into account.[1494]

(1061) None of the arguments put forward by the recipients of the Letter of 20 May 2016[1495] lead to a different conclusion.

(1062) Firstly, as set out in recitals (9) and (98), the 2015 Judgments annulled the 2010 Decision in full or in part, depending on the form of order sought by of each of the addressees that had challenged that decision, for procedural reasons, without ruling on any of the substantive pleas raised. The procedural nature of the annulments of the 2010 Decision is confirmed by the fact that in a number of the 2015 Judgments, the General Court raised of its own motion the issue of the defective statement of reasons in the 2010 Decision.[1496]

1489 *PVC II*, paragraph 91.

1490 *PVC II*, paragraph 92; Case T-69/10 IRO v Commission, EU:T:2014:1030, paragraph 141.

1491 *PVC II*, paragraphs 96-100; Case T-276/04 *Compagnie Maritime Belge SA v Commission*, EU:T:2008:237, paragraphs 59-60.

1492 *PVC II*, paragraph 140.

1493 *PVC II*, paragraph 147.

1494 *PVC II*, paragraph 148.

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1496 Case T-36/11 *Japan Airlines v Commission*, ECLI:EU:T:2015:992, paragraph 27; Case T-38/11 *Cathay Pacific v Commission*, ECLI:EU:T:2015:985, paragraph 31; Case T-39/11 *Cargolux Airlines v Commission*, ECLI:EU:T:2015:991, paragraph 27; Case T-40/11 *Latam Airlines Group and Lan Cargo v Commission*, ECLI:EU:T:2015:986, paragraph 37; Case T-46/11 *Deutsche Lufthansa and Others v Commission*, ECLI:EU:T:2015:987, paragraph 29; Case T-48/11 *British Airways v Commission*, ECLI:EU:T:2015:988, paragraph 29; Case T-56/11 *SAS Cargo Group and Others v Commission*, ECLI:EU:T:2015:990, paragraph 34; and Case T-63/11 *Air France v Commission*, ECLI:EU:T:2015:993, paragraph 32.

(1063) Secondly, the operative part of the 2010 Decision did not finally acquit certain addressees of the 2010 Decision of an infringement with respect to routes between airports within the EEA, between airports in countries that are contracting parties to the EEA Agreement but that are not Member States and airports in third countries and routes between airports within the European Union and airports in Switzerland.

(1064) No provision of Regulation No 1/2003 requires the Commission to find and sanction all anti-competitive conduct,[1497] with the result that the silence of the operative part of the 2010 Decision regarding the liability of certain addressees of the 2010 Decision for conduct on certain routes does not mean that the 2010 Decision acquitted them of liability for such conduct.

(1065) This conclusion is not affected by the wording of recital 1124 of the 2010 Decision according to which certain addressees of the 2010 Decision were "*not to be held liable for the infringement as regards routes within the EEA*". The General Court noted in the 2015 Judgments that the recitals of the 2010 Decision were not "internally consistent" on this point. Thus, while recital 1124 of the 2010 Decision suggested that the Commission did not intend to hold certain addressees of the 2010 Decision liable for the infringement as regards routes between airports within the EEA, recitals 1, 95-97, 100, 101, 825, 855, 856 and 862, 864-879, 881, 892 of the 2010 Decision suggested that the Commission intended to hold all addressees of the 2010 Decision liable for all the routes covered by that decision, including routes between airports within the EEA

(1066) Thirdly, the Commission is not required to adopt a fresh Statement of Objections before adopting a fresh decision. In the first place, the full or partial annulment of the 2010 Decision did not affect the legality of the preparatory acts to the 2010 Decision, including the Statement of Objections adopted on 18 December 2007.

(1067) In the second place, possible development of the case-law and the Commission's decisional practice since the Statement of Objections adopted on 18 December 2007 and the 2010 Decision does not alter the fact that a fresh decision relates to the same objections as those in respect of which the addressees of the 2010 Decision had already submitted observations in their reply to the Statement of Objections and at the hearing that took place from 30 June to 4 July 2008.

(1068) Fourthly, given that the Commission is not required to adopt a fresh Statement Objections, it is also not required to organise a fresh administrative hearing.[1498] [*].[1499]

(1069) Fifthly, any difference between the 2010 Decision and this Decision with respect to Qantas is merely the result of the scheme of legal remedies available against a

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1497 Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon v Commission*, EU:T:2005:220, paragraph 369; Case T-85/06 *General Química and Others v Commission*, EU:T:2008:598, paragraph 118; Joined Cases T-379/10 and T-381/10 *Keramag Keramische Werke and Others v Commission*, EU:T:2013:457, paragraph 211; Case T-91/11 *InnoLux v Commission*, EU:T:2014:92, paragraph 88; Case T-128/11 *LG Display and LG Display Taiwan v Commission*, EU:T:2014:88, paragraph 223; Case T-84/13 *Samsung SDI and Others v Commission*, EU:T:2015:611, paragraph 163; Case T-91/13 *LG Electronics v Commission*, EU:T:2015:609, paragraph 158; Case T-92/13 *Philips v Commission*, EU:T:2015:605, paragraph 112.

1498 Case T-69/10 *IRO v Commission*, EU:T:2014:1030, paragraph 137; Case T-90/10 *Ferriere Nord v Commission*, EU:T:2014:1035, paragraphs 141 and 148.

1499 Case T-69/10 *IRO v Commission*, EU:T:2014:1030, paragraph 145; Case T-85/10 *Alfa Acciai v Commission*, EU:T:2014:1037, paragraph 147.

decision adopted in a competition matter with respect to several undertakings. Qantas did not bring an action against the 2010 Decision, with the result that it can no longer be an addressee of this Decision because the 2010 Decision had become final in relation to it. Nevertheless, to the extent that Qantas was involved in the objections raised with respect to all the undertakings initially implicated, its role can be taken into account by the Commission in this Decision in so far as it related to the objections raised against the addressees of this Decision for the purposes of establishing the infringements found to have been committed by those addressees, each within the limits of their own liability (see recital (13)).

6. ADDRESSEES OF THIS DECISION

6.1. Principles

(1070) The subjects of the relevant rules of EU competition law are *undertakings*, a concept which is not identical with that of corporate legal personality for the purposes of commercial or fiscal national law. The undertaking that participated in the infringement is therefore not necessarily the same entity as the legal entity within the group of companies whose representatives actually took part in the cartel meetings. The term 'undertaking' is not defined in the TFEU. It may refer to any entity engaged in commercial activities. The case-law has confirmed that Article 101 of the TFEU is aimed at economic units that consist of a unitary organisation of personal, tangible and intangible elements that pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision[1500].

(1071) Despite the fact that Article 101 of the TFEU is applicable to undertakings and that the concept of 'undertaking' has an economic meaning, only entities with legal personality can be liable for an infringement of Article 101 of the TFEU[1501]. Measures enforcing EU competition rules must thus be addressed to a legal entity.

(1072) Accordingly, it is necessary to identify the undertaking that will be held accountable for the infringement of Article 101 of the TFEU by identifying one or more legal persons that represent the undertaking. According to case-law, 'Community competition law recognises that different companies belonging to the same *group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market*'[1502]. If a subsidiary does not determine its conduct on the market independently, the company that directed its market strategy forms a single economic entity with the subsidiary and may thus be held liable for an infringement on the grounds that it forms part of the same undertaking.

(1073) According to settled case-law of the Court of Justice of the European Union, the Commission can generally assume that a wholly-owned subsidiary essentially

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1500 See the judgement of the General Court in case T-11/89 *Shell International Chemical Company v. Commission,* ECLI:EU:T:1992:33, paragraph 311. See also Case T-352/94 *Mo och Domsjö AB v. Commission,* ECLI:EU:T:1998:103, paragraphs 87-96.

1501 Although an 'undertaking' within the meaning of Article 81 is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal personality to be the addressee of the measure. Case T-305/94 *PVC,* ECLI:EU:T:1999:80, paragraph 978.

1502 See the judgement of the General Court in Case T-203/01 *Michelin v Commission,* ECLI:EU:T:2003:250, paragraph 290.

follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power[1503]. However, the parent company can rebut this presumption by producing evidence that '*the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market*'[1504]. This position was confirmed by the Court of Justice in its finding that 'it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume the parent company exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine on its subsidiary, unless the parent company, which has the burden of rebutting the presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market'[1505].

(1074) Where an infringement of Article 101 of the TFEU is found to have been committed, it is necessary to identify a natural or a legal person who was responsible for the operation of the undertaking at the time when the infringement was committed so that it can answer for it.

(1075) When an undertaking that has infringed Article 101 of the TFEU subsequently disposes of the assets which contributed to the activity related to the infringement, the undertaking continues to be answerable for the infringement if it has not ceased to exist.[1506] If the undertaking which has acquired the assets continues the infringement, liability should be apportioned between the seller and the acquirer of the assets, each undertaking being responsible for the period in which it participated in the cartel. However, if the legal person initially answerable for the infringement ceases to exist, being purely and simply taken over by another legal entity, that latter entity must be held answerable for the whole period of the infringement and thus liable for the activities of the entity that was taken over.[1507] The fact that the legal entity responsible for the operation of the undertaking had ceased to exist does not allow the undertaking itself to evade liability.[1508] Liability for a fine may thus pass to a successor where the corporate entity that committed the violation has ceased to exist in law.

1503 Case T-112/05, *Akzo Nobel NV v. Commission,* ECLI:EU:T:2007:381, paragraph 62; Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission,* ECLI:EU:T:2005:220, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v Commission,* ECLI:EU:T:1998:104, paragraph 80, upheld by Court of Justice in case C-286/98P *Stora Kopparbergs Bergslags v Commission,* ECLI:EU:C:2000:630, paragraphs 27, 28 and 29; and Court of Justice in Case 107/82 *AEG v Commission,* ECLI:EU:C:1983:293, paragraph 50.

1504 Case T-112/05, *Akzo Nobel NV v. Commission*, ECLI:EU:T:2007:381, paragraph 62; Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission,* ECLI:EU:T:2005:220, paragraph 61.

1505 Case C-97/08 P *Akzo Nobel v Commission,* ECLI:EU:C:2009:536, paragraph 61.

1506 Case T-6/89 *Enichem Anic v Commission (Polypropylene),* ECLI:EU:T:1991:74; Case C-49/92P *Commission v Anic Partecipazioni,* ECLI:EU:C:1999:356, paragraphs 47-49.

1507 Case C-279/98 P *Cascades* v *Commission,* ECLI:EU:C:2000:626 , paragraphs 78-79: *'It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking… Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it'.*

1508 Case T-305/94 *PVC II,* ECLI:EU:T:1999:80 , paragraph 953.

(1076) Different conclusions may be reached, however, when a business is transferred from one company to another, in cases where transferor and transferee are linked by economic ties, that is to say, where they belong to the same undertaking. In such cases, liability for the transferor's past behaviour may pass to the transferee, regardless of whether the transferor remains a separate legal entity.[1509]

6.2. Application to this case

(1077) In application of the principles set out in recitals (1070)-(1076), and as explained in this Section in more detail, this Decision should be addressed not only to the legal entities whose direct involvement in the infringement emerges from the evidence presented in Section 4, but also to the ultimate parent companies of those legal entities, which are presumed to have exercised decisive influence over the conduct of their subsidiaries and, therefore, which are presumed to be part of the same undertaking for the purposes of the application of Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement.

Air Canada

(1078) The evidence described in Section 4 reveals that from 21 September 2000 until 14 February 2006, participation in the infringement took place via employees of Air Canada. Air Canada should be held liable for its direct participation in the infringement.

(1079) This Decision should therefore be addressed to Air Canada.

Société Air France, Air France-KLM

(1080) From 7 December 1999 until 15 September 2004 participation in the infringement took place via employees of Société Air France. As explained in Section 2.2, on 15 September 2004, Société Air France was transformed into a holding company (Air France-KLM) and the air transportation activities were transferred to its subsidiary 'Air France Compagnie Aerienne' that has since become 'Société Air France' Therefore, Air France-KLM and the present Société Air France are, respectively, the legal and economic successors of the former Société Air France as it existed prior to 15 September 2004. For that reason, both Air France-KLM and the present Société Air France should be held jointly liable for Air France's participation in the infringement during the period from 7 December 1999 until 15 September 2004.

(1081) From 15 September 2004 until 14 February 2006 participation in the infringement took place via employees of the present Société Air France.

(1082) However, during the same period, Air France-KLM owned 100% of the economic and voting rights in the present Société Air France.[1510]

(1083) In line with the case-law referred to in Section 6.1, it is therefore presumed that, during that period, Air France-KLM exercised decisive influence over the present Société Air France. Air France-KLM has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over Société Air France.

[1509] Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg Portland and Others v Commission,* ECLI:EU:C:2004:6, paragraphs 354-360, as confirmed in Case T-43/02 *Jungbunzlauer AG v Commission*, ECLI:EU:T:2006:270, paragraphs 132-133.

[1510] [*]

Consequently, Air France-KLM and the present Société Air France form part of the same undertaking that committed the infringement from 15 September 2004 until 14 February 2006 for the purposes of the application of Article 101 of the TFEU, Article of the 53 EEA Agreement, and Article 8 of the Swiss Agreement.

(1084) In addition to full ownership, there are further elements that demonstrate that, during that period, Air France-KLM exercised decisive influence over the present Société Air France or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to Air France-KLM).

(1085) For all the above reasons, this Decision should therefore be addressed to Société Air France and Air France-KLM which should be held jointly and severally liable for participation in the infringement from 7 December 1999 until 14 February 2006.

Koninklijke Luchtvaartmaatschappij N.V.

(1086) Throughout the period of infringement from 21 December 1999 until 14 February 2006, participation in the infringement took place via employees of Koninklijke Luchtvaartmaatschappij N.V. ('KLM'). KLM should be held liable for its direct participation in the infringement.

(1087) As explained in Section 2.2., on 5 May 2004 Air France acquired control of KLM. Air France-KLM has held 97.5% of the economic rights and 49% of the voting rights in KLM since 5 May 2004.

(1088) For the reasons outlined in the confidential annex accessible only to Air France-KLM, the Commission considers that, as from 5 May 2004, Air France-KLM exercised decisive influence over KLM.

(1089) For all the reasons cited in recitals (1086)-(1088), this Decision should be addressed to KLM for its direct participation in the infringement during the period from 21 December 1999 to 14 February 2006. For the period between 5 May 2004 and 14 February 2006, Air France-KLM should be held jointly and severally liable with KLM, for the latter's direct participation in the infringement.

British Airways Plc

(1090) The evidence described in Section 4 shows that from 22 January 2001 until 14 February 2006, participation in the infringement took place via employees of British World Cargo, a division of British Airways Plc. British Airways Plc should be held liable for the participation of its division in the infringement.

(1091) At the same time, certain aspects of the 2010 Decision have become final in so far as they concern British Airways Plc (see recital (9)).

(1092) Consequently, this Decision should be addressed to British Airways Plc only for its participation in the following aspects of the infringement:

- as regards routes between airports within the EEA: (i) until 1 October 2001 with respect to the fuel surcharge and the security surcharge; and (ii) until 14 February 2006 with respect to the payment of commission payable on surcharges;
- as regards routes between airports within the European Union and airports outside the EEA until 14 February 2006 with respect to: (i) the fuel surcharge

and the security surcharge for freight services performed from Hong Kong (China), Japan, India, Thailand, Singapore, South Korea and Brazil; and (ii) the payment of commission payable on surcharges;

- as regards routes between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and airports in third countries until 14 February 2006 with respect to: (i) the fuel surcharge and the security surcharge for freight services performed from Hong Kong (China), Japan, India, Thailand, Singapore, South Korea and Brazil; and (ii) the payment of commission payable on surcharges; and
- as regards routes between airports within the European Union and airports in Switzerland, until 14 February 2006 with respect to the payment of commission payable on surcharges.

Cargolux Airlines International S.A.

(1093) The evidence described in Section 4 shows that from 22 January 2001 until 14 February 2006, participation in the infringement took place via employees of Cargolux Airlines International S.A. Cargolux Airlines International S.A. should therefore be held liable for its direct participation in the infringement.

(1094) This Decision should therefore be addressed to Cargolux Airlines International S.A.

Cathay Pacific Airways Limited

(1095) The evidence described in Section 4 shows that from 4 January 2000 until 14 February 2006, participation in the infringement took place via employees of Cathay Pacific Cargo, a division of Cathay Pacific Airways Limited. Cathay Pacific Airways Limited should therefore be held liable for the direct participation of its division in the infringement.

(1096) This Decision should therefore be addressed to Cathay Pacific Airways Limited.

Japan Airlines Co., Ltd.

(1097) Throughout the period of infringement from 7 December 1999 until 14 February 2006, participation in the infringement took place via employees of Japan Airlines Co., Ltd. (JL) (formerly Japan Airlines International Co., Ltd.). JL should therefore be held liable for its direct participation in the infringement.

(1098) From 2 October 2002, when Japan Airlines Corporation (JAC) was founded[1511] by means of share transfer from JL (and Japan Air System Co. Ltd), until 14 February 2006, JAC owned 100% of the share capital in JL.

(1099) In line with the case-law referred to in Section 6.1, it is presumed that JAC exercised decisive influence over JL for that period. JAC has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over JL. Consequently, JL and JAC formed part of the same undertaking that committed the infringement.

[1511] JAC was founded under the name Japan Airlines System Corporation but was renamed as JAC on June 2004.

(1100) In addition to full ownership, there are further elements that demonstrate that JAC exercised decisive influence over JL or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to Japan Airlines Co., Ltd.).

(1101) On 1 December 2010, JAC was merged into JL by way of absorption. As a result of this merger, JL became the legal successor of JAC which ceased to exist.[1512]

(1102) This Decision should therefore be addressed to Japan Airlines Co., Ltd.

LAN Cargo S.A., Latam Airlines Group, S.A.

(1103) Throughout the period of infringement from 25 February 2003 until 14 February 2006, participation in the infringement took place via employees of LAN Cargo S.A. (LA). LA should therefore be held liable for its direct participation in the infringement.

(1104) Throughout the period from 25 February 2003 until 14 February 2006 Latam Airlines Group, S.A. (formerly LAN Airlines S.A.) owned 99.9% of LAN Cargo S.A.

(1105) In line with the case-law referred to in Section 6.1, a presumption therefore exists that Latam Airlines Group, S.A. exercised decisive influence over LAN Cargo S.A. Latam Airlines Group, S.A. has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over LAN Cargo S.A. Consequently, LAN Cargo S.A. and Latam Airlines Group, S.A. form part of the same undertaking that committed the infringement.

(1106) In addition to the almost full ownership, there are further elements that demonstrate that Latam Airlines Group, S.A. exercised decisive influence over LAN Cargo S.A. or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to LAN Cargo S.A and Latam Airlines Group, S.A.).

(1107) Accordingly Latam Airlines Group, S.A. should be held jointly and severally liable with LAN Cargo S.A. for the whole infringement period.

(1108) This Decision should therefore be addressed to LAN Cargo S.A. and Latam Airlines Group, S.A.

Lufthansa Cargo AG, Deutsche Lufthansa AG

(1109) Throughout the period of infringement from 14 December 1999 until 7 December 2005, participation in the collusive contacts took place via different employees of Lufthansa Cargo AG Accordingly, Lufthansa Cargo AG should be held liable for its direct participation in the infringement.

(1110) Throughout the period of the infringement Deutsche Lufthansa AG owned 100% of the voting rights in Lufthansa Cargo AG.

(1111) In accordance with the case-law referred to in Section 6.1 there is a presumption that Deutsche Lufthansa AG exercised decisive influence over Lufthansa Cargo AG. Deutsche Lufthansa AG has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over Lufthansa Cargo AG.

[1512] [*]

Consequently, Lufthansa Cargo AG and Deutsche Lufthansa AG form part of the undertaking that committed the infringement.

(1112) In addition to the full ownership, further elements demonstrate that Deutsche Lufthansa AG exercised decisive influence over Lufthansa Cargo's conduct on the market or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to Lufthansa Cargo AG, Deutsche Lufthansa AG and Swiss).

(1113) Moreover, Lufthansa Cargo AG includes the label 'Lufthansa' in its business name and is a consolidated company of the Lufthansa Group. [*][1513].

(1114) Therefore, Deutsche Lufthansa AG should be held jointly and severally liable for the participation of its 100% subsidiary Lufthansa Cargo AG for the whole period of the infringement. This Decision should therefore be addressed to Lufthansa Cargo AG and Deutsche Lufthansa AG.

SWISS International Air Lines AG

(1115) The evidence described in Section 4 shows that from 2 April 2002 until 7 December 2005, the infringement was carried on by SWISS (LX), through its division SwissWorldCargo.

(1116) As explained in Section 2.2, Deutsche Lufthansa AG announced the takeover and integration of SWISS on 22 March 2005, which took place in several stages.

(1117) On 27 July 2005 Deutsche Lufthansa AG acquired 49% of AirTrust, which in turn held 100% of SWISS. After securing the necessary traffic rights, Lufthansa acquired 100% of Swiss through AirTrust on 1 July 2007 and thus it fully integrated Swiss into the Lufthansa Group.

(1118) For the reasons explained in the confidential annex accessible only to Lufthansa Cargo AG, Deutsche Lufthansa AG and Swiss, the Commission considers that Deutsche Lufthansa AG exercised decisive influence over SWISS from 27 July 2005.

(1119) Therefore Deutsche Lufthansa AG should be held jointly and severally liable with SWISS from 27 July 2005 to 7 December 2005. This Decision should therefore be addressed to SWISS International Air Lines AG and Deutsche Lufthansa AG.

Martinair Holland N.V.

(1120) The evidence described in Section 4 shows that from 22 January 2001 until 14 February 2006, participation in the infringement took place via employees of Martinair Holland N.V. Martinair should therefore be held liable for its direct participation in the infringement.

(1121) This Decision should therefore be addressed to Martinair Holland N.V.

[1513] [*].

SAS Cargo Group A/S, SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden, SAS AB

(1122) The evidence described in Section 4 shows that from 13 December 1999 until 31 May 2001, participation in the infringement took place via employees of SAS Cargo which, during this period, was simply a business unit of SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden (SAS Consortium). SAS Consortium should therefore be held liable for its direct participation in the infringement during that period.

(1123) From 1 June 2001 until 14 February 2006 participation in the infringement took place via employees of SAS Cargo Group A/S, which was incorporated as a separate legal entity on 1 June 2001. SAS Cargo Group A/S should therefore be held liable for its direct participation in the infringement for that period.

(1124) From 1 June 2001 until 28 December 2003, SAS Consortium owned 100% of the capital of SAS Cargo Group A/S via Nordair A/S. In accordance with the case-law referred to in Section 6.1, there is a presumption that SAS Consortium, exercised decisive influence over SAS Cargo Group A/S through Nordair A/S during that period.

(1125) In addition to the full ownership, there are further elements that demonstrate that SAS Consortium exercised decisive influence over SAS Cargo Group A/S via Nordair A/S or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to SAS Cargo Group A/S, SAS Consortium, SAS AB.)

(1126) SAS Consortium argued that it did not exercise its decisive influence over SAS Cargo Group A/S between 1 June 2001 and 28 December 2003 even though it held 100% of SAS Cargo Group A/S during that period. SAS Consortium has not denied the links with SAS Cargo Group A/S described in this Section but has simply stated that although it was capable of exercising decisive influence over SAS Cargo Group A/S it did not do so. The arguments put forward by SAS Consortium are contradictory: on the one hand they state that SAS Cargo Group A/S is a large and independent undertaking with an annual turnover of EUR several hundred million and, on the other, they state that SAS Cargo Group A/S could only make independent financial decisions of up to EUR 25 million. It is concluded that the presumption that full ownership gives rise to the exercise of decisive influence has not been rebutted in this case as SAS Consortium did not support its claims by any credible evidence.

(1127) Consequently, during the period from 1 June 2001 to 28 December 2003, SAS Consortium and SAS Cargo Group A/S formed part of a single undertaking that committed the infringement.

(1128) Accordingly, SAS Consortium should be held jointly and severally liable for the infringement with SAS Cargo Group A/S for the period from 1 June 2001 to 28 December 2003.

(1129) From 29 December 2003 until 14 February 2006, SAS AB, owned 100% of the capital of SAS Cargo Group A/S, via Nordair A/S. In accordance with the case-law referred to in Section 6.1, there is a presumption that, during that period, SAS AB exercised decisive influence over SAS Cargo Group A/S, via Nordair A/S.

(1130) In addition to that presumption, there are further elements that demonstrate that SAS AB exercised decisive influence over SAS Cargo Group A/S, via Nordair A/S, or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to SAS Cargo Group A/S, SAS Consortium, SAS AB)

(1131) SAS AB argues that it did not exercise its decisive influence over SAS Cargo Group A/S between 17 August 2001 and 14 February 2006 even though it held 100% of SAS Cargo Group A/S during that period. SAS AB has not denied the links with SAS Cargo Group A/S described in this Section but has simply stated that although it was capable of exercising decisive influence over SAS Cargo Group A/S it did not do so. The arguments put forward by SAS AB are contradictory: on the one hand they state that SAS Cargo Group A/S is a large and independent undertaking with an annual turnover of EUR several hundred million and, on the other, they state that SAS Cargo Group A/S could only make independent financial decisions of up to EUR 25 million. It is concluded that the presumption that full ownership gives rise to the exercise of decisive influence has not been rebutted in this case as the SAS AB did not support its statements by any credible facts.

(1132) Consequently, from 29 December 2003 until 14 February 2006 SAS AB and SAS Cargo Group A/S formed part of a single undertaking that committed the infringement.

(1133) Accordingly, SAS AB should be held jointly and severally liable for the infringement with SAS Cargo Group A/S for the period from 29 December 2003 to 14 February 2006.

(1134) As described in Section 2.2, on 17 August 2001 SAS AB acquired 97.8%, 99.1% and 99.9% of the three parent companies together owning 100% of SAS Consortium. From that date onwards there is a presumption that SAS AB exercised decisive influence over SAS Consortium and, indirectly, over SAS Cargo Group A/S. SAS AB has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over SAS Consortium and, indirectly, over SAS Cargo Group A/S.

(1135) In addition, there are further elements that demonstrate that, from 17 August 2001, SAS AB exercised decisive influence over SAS Consortium and SAS Cargo Group A/S or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to SAS Cargo Group A/S, SAS Consortium, SAS AB).

(1136) Consequently, during that period, SAS AB, SAS Consortium and SAS Cargo Group A/S formed part of a single undertaking that committed the infringement.

(1137) Accordingly, SAS AB should be held jointly and severally liable for the infringement with SAS Consortium and SAS Cargo Group A/S for the period from 17 August 2001 until 28 December 2003, and with SAS Cargo Group A/S from 29 December 2003 to 14 February 2006.

(1138) This Decision should therefore be addressed to SAS Cargo Group A/S, SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden and SAS AB.

Singapore Airlines Cargo Pte Ltd., Singapore Airlines Limited

(1139) From 4 January 2000 until 14 February 2006, participation in the infringement took place via employees of Singapore Airlines Cargo Pte Ltd.

(1140) Throughout the period from 1 July 2001 to 14 February 2006 Singapore Airlines Cargo Pte Ltd was a wholly owned subsidiary of Singapore Airlines Limited. In accordance with the case-law referred to in Section 6.1, there is a presumption that Singapore Airlines Limited exercised decisive influence over Singapore Airlines Cargo Pte Ltd.

(1141) In addition to that presumption, there are further elements that demonstrate that Singapore Airlines Limited exercised decisive influence over Singapore Airlines Cargo Pte Ltd or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to Singapore Airlines Cargo Pte Ltd, Singapore Airlines Limited). Consequently, Singapore Airlines Cargo Pte Ltd and Singapore Airlines Limited formed part of a single undertaking that committed the infringement.

(1142) Singapore Airlines contests the imputation of liability for the actions of Singapore Airlines Cargo Pte Ltd. Singapore Airlines Limited argues that Singapore Airlines Cargo Pte Ltd is a separate business entity and that not all of the members of the managing Board of Directors of Singapore Airlines Cargo Pte Ltd are employees of Singapore Airlines. The contractual relationship between the two entities is on an 'arms-length' basis and where the employees of Singapore Airlines Limited work for Singapore Airlines Cargo Pte Ltd on cargo related matters, they report to and are managed solely by Singapore Airlines Cargo Pte Ltd.

(1143) The arguments of Singapore Airlines concerning the independence of Singapore Airlines Cargo Pte Ltd are insufficient to rebut the presumption that the 100% ownership gives rise to the exercise of decisive influence, in this case. Arguments such as the fact that the management of Singapore Airlines Cargo Pte Ltd comprises some employees of Singapore Airlines Limited actually demonstrate the exercise of decisive influence, rather than the reverse.

(1144) Accordingly, Singapore Airlines Limited should be held jointly and severally liable for the infringement with Singapore Airlines Cargo Pte Ltd for the period from 1 July 2001 to 14 February 2006.

(1145) This Decision should therefore be addressed to Singapore Airlines Cargo Pte Ltd and Singapore Airlines Limited.

7. DURATION OF THE INFRINGEMENT

7.1. Introduction

(1146) The anti-competitive arrangements described in Section 4 started on 7 December 1999 and lasted until 14 February 2006. For Deutsche Lufthansa AG and its controlled subsidiaries Lufthansa Cargo AG and SWISS International Air Lines AG the infringement ended on the date of the immunity application, namely 7 December 2005. In accordance with its powers as described in Section 5.2, the Commission considers that those arrangements infringe Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement as follows:

Article 101 of the TFEU from 7 December 1999 to 14 February 2006 as regards air transport between airports in the EU;

Article 101 of the TFEU from 1 May 2004 to 14 February 2006 as regards air transport between airports within the EU and airports outside the EEA[1514];

Article 53 of the EEA Agreement from 7 December 1999 to 14 February 2006 as regards air transport between airports within the EEA;

Article 53 of the EEA Agreement from 19 May 2005 to 14 February 2006 as regards air transport between airports in countries that are Contracting Parties to the EEA Agreement but not Member States and airports in third countries.

Article 8 of the Swiss Agreement from 1 June 2002 to 14 February 2006 as regards routes between airports within the EU and airports in Switzerland;

(1147) For the purposes of establishing the duration of the infringement to be taken into account for each of the undertakings involved, the Commission has taken the first anti-competitive contact as the starting date. There is no evidence on the file that the collusive arrangements ceased prior to the inspections (except in the case of LH and LX). Similarly, there is no evidence that the collusive arrangements continued after the first day of the inspections.

(1148) For the purposes of determining the duration of the single and continuous infringement, the first anti-competitive contacts are considered to be as follows:

Air Canada

An [*] email of 21 September 2000 indicating that AC contacted LH to inquire about LH´s plans for FSC increase (see recitals (161) and (717)-(720))

Air France-KLM and Société Air France

A conversation on 7 December 1999 between AF and Japan Airlines regarding FSC, reported in an internal JL e-mail of the same date (see recitals (136) and (721)-(726))

KLM

Internal Swiss emails of 21 December 1999 reporting FSC coordination involving KLM (see recitals (140)-(141) and (731)-(738))

British Airways

An internal Martinair memorandum reporting on a meeting on 22 January 2001 where BA discussed FSC (see recital [*] and (739)-(743))

Cargolux

An internal Martinair memorandum reporting on a meeting on 22 January 2001 where Cargolux discussed FSC (see recitals [*] and (748)-(754))

Cathay Pacific

[1514] For the purpose of this Decision, "airports outside the EEA" include airports in countries other than in Switzerland and in Contracting Parties to the EEA Agreement.

An internal LH email to the head office dated 4 January 2000 stating that 'today we are informed by Cathay Pacific/Singapore and South African that none of these airlines will introduce FSC ex the UK for the time being' (see recitals (139) and (755)-(759))

Japan Airlines

A conversation on 7 December 1999 between AF and Japan Airlines regarding FSC, reported in an internal JL e-mail of the same date (see recitals (136) and (760)-(764))

LAN Chile

An e-mail of 25 February 2003 from LA to LH concerning concerning the calculation method of LH´s FSC index (see recitals (275) and (766)-(767))

Lufthansa

An e-mail of 13 December 1999 from SK and a reply from Lufthansa of 14 December 1999 regarding FSC (see recitals (135) and (773)-(777))

SWISS

An internal LX email on 2 April 2002 asking LX employees whether they had any news from their 'local home carriers' with regard to the FSC (see recitals (226) and (779)-(783))

Martinair

An internal Martinair memorandum reporting on a meeting with competitors on 22 January 2001 where FSC was discussed (see recitals [*] and (785)-(788))

SAS

An e-mail of 13 December 1999 from SK to competitors regarding FSC (see recitals (135) and (790)-(792))

Singapore Airlines

An internal LH email to the head office dated 4 January 2000 stating that 'today we are informed by Cathay Pacific/Singapore and South African that none of these airlines will introduce FSC ex the UK for the time being' (see recitals (139) and (803)-(806))

7.2. Arguments of the parties concerning duration

7.2.1. AF

(1149) AF argues that the first anti-competitive contacts between AF and its competitors took place in January 2001. The evidence before that date, namely the internal [*]

emails of 7 and 20 December 1999 reporting exchanges of information between AF and JL, do not prove the coordinated introduction of the FSC. AF furthermore argues that the Commission should have due regard to the "special circumstances" on the market in 1999-2000 before the revocation of the IATA mechanism that was characterised by a "legal uncertainty".

(1150) Concerning the termination of the infringement AF argues that the Commission should consider the last clearly established anti-competitive contact as the date of termination of the infringement.

(1151) The argument concerning the starting date of the infringement cannot be accepted as the emails referred to in recitals (136) and (137) are contemporaneous written evidence that make clear reference to direct talks between competitors concerning the introduction of the FSC. Furthermore, the argument that AF made an individual decision when introducing the FSC does not change the fact that such a decision was discussed with its competitors during the relevant decision making procedure. As for the "special circumstances" the Commission notes that such circumstances did not legitimise the pricing contacts referred to in this recital.

(1152) Furthermore, as explained in Section 4.3.2, the evidence in the Commission's file shows that the starting date of the infringement cannot be linked to a single common event for all participants but, rather that the infringement developed over time through a series of contacts. Those contacts are part of the body of evidence that as a whole proves the infringement adequately for the whole period indicated in this Section.

(1153) The Commission does not accept the argumentation concerning the termination of the infringement either and considers that the infringement was terminated only on the date of the inspections. As the Court of Justice ruled in Marlines SA v Commission, a cartel participant can only avoid infringing Article 101 of the TFEU by 'openly and unequivocally distancing itself from the cartel'[1515]. AF did not distance itself from the cartel in such a manner, thus its arguments concerning the termination of the infringement cannot be accepted.

(1154) Furthermore, AF staff were involved in contacts concerning the FSC level in February 2006 in Switzerland.

7.2.2. KL

(1155) As regards the duration of the infringement KL states that the first documentary evidence for coordination at headquarters' level are dated sometime after '9/11' and the contacts before 11 September 2001 did not seem to have involved an agreement in the sense of Article 101 of the TFEU.

(1156) The reasoning that the contacts concerning FSC at headquarters' level started around 11 September 2001 does not change the fact that KL staff at least at local level participated in the infringement from an earlier date. The document referred to in recital (140) provides evidence that KL revealed its intention to follow AF in introducing a fuel surcharge and knew beforehand that AF planned to do so.

[1515] Case T-56/99, *Marlines SA v Commission,* ECLI:EU:T:2003:333, para. 56.

7.2.3. BA

(1157) BA submits that its participation in the infringement only started around October 2001, which coincides with initial discussions with LH.

(1158) It is true that the contacts in 2000 may not be sufficient to determine the starting point of the infringement. However, it is clear that BA participated in a coffee round on 22 January 2001 at which surcharges were discussed[1516]. Accordingly, it participated in the infringement at least from 22 January 2001.

7.2.4. CV

(1159) CV claims there is limited evidence of [*] against CV prior to 2003 and in 2006. The concept of single and continuous infringement is interpreted too broadly in respect of CV and the Commission should properly focus on the infringement by CV between 2003 and 2005 with the FSC being the main factual link between the events.

(1160) In respect of the particular arguments advanced by CV, the assertion that there is insufficient evidence to maintain that there was a single and continuous infringement including the period from 2001 to 2002 and 2006 must be rejected. [*].

(1161) The starting point of CV's participation in the infringement is 22 January 2001, from the date of the German coffee round meeting. The evidence clearly demonstrates that CV and a number of other carriers discussed the FSC policy of individual carriers. The Commission rejects CVs argument that that meeting should not be taken into account due to the fact that there was no single and continuous infringement and therefore the limitation period has expired. There was a single and continuous infringement (see Section 5.3.2) and there is evidence of anti-competitive conduct from the date of the meeting on 22 January 2001 until February 2006.

(1162) [*] states that bilateral contacts on pricing matters took place between LH ([*]) and CV ([*]) between 2001 and 2004[1517]. Despite CVs arguments to the contrary the Commission considers it is legitimate to have regard to that statement and rejects the argument that it was a meeting with 'not even an indication of dates, participants or topics'[1518]. Firstly, although precise dates are not given the meetings are indicated to have taken place once or twice a year prior to the change of flight schedule with effect from 1 April and 1 October. Secondly, the participants are clearly named and information is also provided on the background to their relationship ([*]). Thirdly, the content of the meetings is described namely as presentation of internally gathered information (at least in the case of LH), accusations of price dumping and discussions about inconsistent application of surcharges. It is appropriate to rely on that evidence given the existence of other evidence of anti-competitive contacts in the period from 2001 to 2003 (see recitals (1163) to (1167)) and, in addition, because it is used simply as one of the links between the clearly anti-competitive meeting in 2001 and the accepted anti-competitive contacts in 2003.

(1163) [*] and [*] met on 25 July 2001 in Luxembourg and discussed a number of issues including market situation, strategy, cooperation and notably pricing. This is a specific example of the types of meetings referred to in recital (1162).

1516 See recital [*]
1517 See recital [*]
1518 [*]

(1164) There is also evidence of bilateral contacts with other carriers during the period between 2001 and 2003 on the application of surcharges (for example, MP calling CV around 26 November 2001)[1519].

(1165) [*] states that it participated in 'comfort calls' with CV from February 2000 (until early 2006). Again, it is appropriate to rely on that evidence taking into account the other evidence available and, in addition, the fact that it is used simply to establish the continuity of the infringement between 2001 and 2003[1520].

(1166) [*] of CV emailed members of SYCAFF on 1 October 2001 regarding CVs introduction of the SSC. Contrary to CVs assertions[1521] the Commission does consider the use of 'donc acte' (translated as 'therefore act') as an attempt at coordination of the SSC. [*]'s suggestion that 'donc acte' was mistyped and should have read 'dont acte' (CV suggested translation 'so, its done') is not credible[1522].

(1167) Contacts with other carriers continued in 2006 for the short period until the end of the infringement in mid February 2006 (for example, discussions with MP[1523]).

(1168) Although the evidence described in this subsection demonstrates that contacts took place in the period from 2001 to 2003 and in 2006, the Court of Justice of the European Union has, in any event, consistently held that gaps in a cartel member's contacts with the rest of the cartel do not prevent the Commission from concluding that an undertaking participated in the cartel for that period[1524].

7.3. Duration by each undertaking

(1169) The duration of the infringement to be taken into account for each undertaking involved is therefore as follows:

Air Canada
from 21 September 2000 until 14 February 2006

Air France-KLM and Société Air France
from 7 December 1999 until 14 February 2006

KLM
from 21 December 1999 until 14 February 2006

British Airways
from 22 January 2001 until 14 February 2006

Cargolux
from 22 January 2001 until 14 February 2006

Cathay Pacific
from 4 January 2000 until 14 February 2006

Japan Airlines
from 7 December 1999 until 14 February 2006

1519 See recital (191)
1520 See recital [*]
1521 [*]
1522 See recital [*]
1523 See recital (569)
1524 Case T-62/02 *Union Pigments AS v Commission,* ECLI:EU:T:2005:430, paragraphs 37, 38 and 39.

LAN Chile
from 25 February 2003 until 14 February 2006

Lufthansa
from 14 December 1999 until 7 December 2005

SWISS
from 2 April 2002 until 7 December 2005

Martinair
from 22 January 2001 until 14 February 2006

SAS
from 13 December 1999 until 14 February 2006

Singapore Airlines
from 4 January 2000 until 14 February 2006

8. REMEDIES AND FINES

8.1. Article 7 of Regulation (EC) No 1/2003

(1170) Where the Commission finds that there is an infringement of Article 101 of the TFEU, Article 53 of the EEA Agreement or Article 8 of the Swiss Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

(1171) Given the manner in which the cartel arrangements were carried out, it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore appropriate to require the addressees of this Decision to immediately bring the infringement to an end, to the extent they have not already done so, and henceforth to refrain from any agreement, concerted practice or decision of an association which has the same or a similar object or effect.

8.2. Article 23(2) of Regulation (EC) No 1/2003

(1172) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by a decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 101 of the TFEU. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year. Article 12(2) of Regulation No 3975/87[1525] contained a similar rule.

(1173) Prior to 1 May 2004, when Regulation (EC) No 1/2003 became applicable, the Commission was competent to impose fines for infringements of Article 101 of the TFEU on the basis of Article 12(2) of Regulation (EEC) No 3975/87 only in relation to air transport between EU airports. From 1 May 2004 the Commission also became competent to impose fines for infringements of Article 101 of the TFEU in relation to air transport between EU airports and airports in third countries.

[1525] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area 'the Community rules giving effect to the principles set out in Articles 85 and 86 of the Treaty […] shall apply mutatis mutandis'. (OJ L 305/6 of 30 November 1994).

(1174) On the basis of Protocol 21 to the EEA Agreement, the Commission has been competent to impose fines for a violation of Article 53 EEA Agreement with respect to air transport between airports within the EEA from the beginning of the infringement and also in relation to air transport between airports of Contracting Parties to the EEA Agreement that are not Member States and airports in third countries in accordance with Regulation (EC) No 1/2003 since 19 May 2005 based on the Decision of the EEA Joint Committee No 130/2004 and Decision of the EEA Joint Committee No 40/2005. Before that date the Commission was competent to impose fines in relation to air transport between EEA airports in accordance with Regulation (EEC) No 3975/87.

(1175) The Commission is competent to impose fines for a breach of Article 8 of the Swiss Agreement, with respect to air transport on routes between airports of the Contracting Parties, from its entry into force on 1 June 2002. This competence is derived from Regulation (EC) No 1/2003 as incorporated in Part 2 of the Annex to the Swiss Agreement.

(1176) Prior to the incorporation of Regulation (EC) No 1/2003 in the annex to the Swiss agreement, the competence of the Commission to impose fines with respect to air transport between airports of the Contracting Parties was based on Article 12(2) of Regulation (EEC) No 3975/87, as then incorporated in Annex 2 of the Swiss Agreement. The provisions with regard to the power of the Commission to impose fines are similar in the two Regulations.

(1177) In this case, the Commission considers that, based on the facts and the assessment set out in this Decision, the infringement was committed intentionally or negligently. The infringement described in Section 4 consists in agreements and/or concerted practices on prices.

(1178) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation (EC) No 1/2003 and Article 12(2) of Regulation (EEC) No 3975/87, regard must be had both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission will refer to the principles laid down in the Guidelines on fines.

(1179) In assessing the fine to be imposed on each undertaking, the Commission will also take account of the respective duration of its participation in the infringement.

(1180) In relation to each undertaking, the Commission will reflect in the fine imposed for each infringement any aggravating or mitigating circumstances, such as those set out in the non-exhaustive lists in points 28 and 29 of the Guidelines on fines.

(1181) The Commission sets fines at a level sufficient to ensure deterrence.

(1182) Regarding British Airways, the Commission also has regard to the aspects of the 2010 Decision that have become final.

(1183) Regarding Lufthansa, the Commission also has regard to the fact that the fines imposed on Deutsche Lufthansa AG, Lufthansa Cargo AG and Swiss International, Airlines AG by the 2010 Decision were based exclusively on the infringement(s) referred to in Articles 1 to 4 of the 2010 Decision and annulled by the General Court in its judgment in Case T-46/11.

8.3. The basic amount of the fines

8.3.1. Determination of the value of sales

(1184) The basic amount of the fine to be imposed on the undertakings concerned should be set by reference to the value of sales.

(1185) According to the Guidelines on fines, the basic amount of the fine consists of a proportion of up to 30% of the undertaking's relevant sales, depending on the degree of gravity of the infringement, multiplied by the number of years of its participation in the infringement, and an additional amount of between 15% and 25% of the value of those sales.

(1186) In determining the basic amount of the fine to be imposed, the Guidelines on fines provide that the Commission starts from the value of the undertaking's sales of the goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.

(1187) The single and continuous infringement in this case relates to airfreight services provided between airports in the territory of the EEA, between airports in countries within the EU and airports outside the EEA, between airports in the Member States and Switzerland, and between airports in the EEA Contracting Parties not being Member States and airports in third countries. Thus, the Commission has taken into account, at this first stage, the sales related to those services.

(1188) The Guidelines on fines provide that the Commission will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.

(1189) In this case the last full business year before the end of the infringement was 2005.[1526]

(1190) Certain carriers have argued that the Commission should only take into account the surcharge revenues as the relevant value of sales for calculating the basic amount. However, this argument runs counter to the Commission's practice of determining the fines as set out in the Guidelines on fines. When determining the basic amount of the fine to be imposed, the Commission takes the value of the undertaking's sales of goods or services to which the infringement *directly* or *indirectly* relates in the relevant geographic area. It is the entire amount of the relevant sales that is taken into account without splitting this into component elements. The General Court has also confirmed the Commission's practice[1527]. Equally arguments that surcharges should be the basis of the calculation as there was no impact on the overall price as increases in surcharges were compensated by decreases in other component elements of the price (waterbed effect) are rejected. Such arguments also run counter to Commission practice and go to the issue of a lack of effect when the Commission's case is based purely on a restriction by object.

(1191) Several carriers have argued that only the turnover originating from the services provided on routes outbound from the EEA should be taken into account for the

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[1526] Except for LH and LX; their infringement lasted until 7 December 2005. The Commission decided not to calculate their fines on the basis of 2004 figures, but on the basis of the 2005 figures, in view of the particular circumstances of this case, including in particular that the Commission gained the power to apply Article 101 TFEU with respect to air transport between EU airports and airports in third countries only on 1 May 2004.

[1527] Case T-127/04, *KME Germany and others v Commission*, ECLI:EU:T:2009:142, paragraph 91.

calculation of the fine. Carriers argue that sales on inbound routes are made predominantly outside the EEA and as such should not be taken into account as EEA sales.

(1192) [*]

(1193) AF also argues that the Commission should only take into account turnover from routes affected by the practices, that not all of the routes were affected for the entire period; and that in application of the principle of proportionality, the Commission should only take into account the turnover from its standard "product".

(1194) Those arguments cannot be accepted. It should be recognised that the application of the concept of EEA sales in the present case should take into account the specificities of transport services provided between the EEA and third countries. It is appropriate to take into account, in principle, both inbound and outbound services when determining the value of sales, since the infringement established by this Decision relates to both services. Moreover, the anti-competitive arrangements are likely to have a negative impact on the internal market in respect of both inbound and outbound services (see recitals (1041)-(1046)). Nevertheless, given that the services are performed in part outside the EEA and that part of the harm resulting from the cartel is likely to fall outside the EEA, it is appropriate to apply in this case a specific reduction to the basic amount calculated on the basis of inbound and outbound sales on EEA - third country routes, except routes between the EU and Switzerland (see recital (1241)).

(1195) KL and MP stated that taking into account inbound turnover would run contrary to the precedents applied in merger control and would give rise to issues pursuant to the principles of *ne bis in idem* and *proportionality*, as other jurisdictions are also imposing fines in respect of the same conduct.

(1196) The definition of turnover under Regulation (EC) No 139/2004 is not determinant or relevant for the concept of 'sales directly or indirectly related to the infringement' within the meaning of the Guidelines on fines and is accordingly not applicable to the issue of the inclusion of inbound turnover in this case. Furthermore, the principle of *ne bis in idem* is not relevant in this case. It is settled case law[1528] that that principle does not apply in the EU to situations in which the legal systems and competition authorities of third countries bring proceedings under their legislation. The legal interests protected are not identical, which precludes application of the principle[1529].

(1197) In conclusion, the value of sales is determined by adding together the 2005 inbound and outbound turnover for each of the geographic services, namely services between airports in the EEA, between airports in countries within the EU and airports outside the EEA, between airports in the EU and Switzerland, and between airports in the EEA Contracting Parties not being Member States and airports in third countries as set out in Tables 1-4 below. The Commission has also taken into account the accession of new Member States to the EU in 2004. For the assessment of the fine for the infringement on intra EEA routes before 1 May 2004, only the turnover within the then 18 Contracting Parties to the EEA agreement is taken into account.

[1528] Case C-289/04 P *Showa Denko v Commission,* ECLI:EU:C:2006:431, paragraph 56.

[1529] Joined Cases C-204, 205,211, 213, 217, and 219/00 P *Aalborg Portland and Others v Commission*, ECLI:EU:C:2004:6, paragraph 338.

From 1 May 2004 until the end of the infringement the turnover for services within the then 28 Contracting Parties to the EEA agreement is taken into account. For the calculation of the fine for the infringement on routes between the EU and Switzerland for the period until 1 May 2004 only the turnover on routes between the then 15 Member States and Switzerland is taken into account. After 1 May 2004 the turnover on routes between the then 25 Member States and Switzerland is taken into account.

8.3.2. Gravity

(1198) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30%. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower or at the higher end of that scale, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

(a) Nature

(1199) Horizontal practices relating to prices are by their very nature among the most harmful restrictions of competition, as they distort competition on a key parameter of competition.[1530] The agreements and/or concerted practices to which this Decision relates concerned the fixing of various elements of the price. The cartel arrangements permeated the whole industry for airfreight. Senior management in the head offices of a number of airlines conceived, directed and encouraged them. They operated to the benefit of the participating airfreight service providers and to the detriment of their customers and ultimately the general public.

(1200) The fact that the arrangements did not cover the entire price for the services in question is immaterial.

(1201) AF argued that the infringement is less serious than it was alleged in the Statement of Objections for the reasons set out in recitals (1202) to (1204):

(1202) The alleged practices do not constitute a well-structured, coherent and controlled system but are in fact heterogenic, dispersed and multiform.

(1203) The 'comfort' contacts with competitors concerning the changes in the FSC level had as their object the coordination of the application date and not the level of the FSC itself.

(1204) The exchange of public information is not anti-competitive and should not be taken into consideration when assessing the gravity of the infringement.

(1205) CV submits that [*] were considerably less frequent and less serious than those of other carriers. CV states that it did not attend a number of meetings and was involved only in a very limited number of incidents which might be qualified as [*], which took place between 2003 and 2005 and occurred mostly at local level.

[1530] See for example, Joined Cases T-202/98 etc. *Tate & Lyle v Commission,* ECLI:EU:T:2001:185, paragraph 103 and 135 and Case T-213/00 *CMA CGM and Others v Commission*, ECLI:EU:T:2003:76, paragraph 100, 261 and 262; Case T-395/94 *Atlantic Container Line AB and Others v Commission* (TAA judgment), ECLI:EU:T:2002:49, paragraph 164.

(1206) AC submits that, in determining the amount of the fine to be imposed, the Commission should conclude, by reference to all the relevant facts, that the infringement or infringements should be regarded as "serious" but not "very serious" and that the Commission's starting figure should be adjusted downwards to reflect Air Canada's peripheral and often passive role in the infringement or infringements.

(1207) The Commission does not allege that all the contacts referred to in Section 4 were centrally controlled and that each of the contacts is sufficient to prove an infringement in itself, if taken separately. The contacts presented in Section 4 constitute a body of evidence that proves the infringement as a whole. This includes pricing exchanges between competitors of information which may already have been made public, although the evidential weight of such exchanges is less than in the case of non-public information. The Commission has regard to all the evidence underlying the infringement in assessing its seriousness. The evidence in Section 4 shows that the aim of the parties was to remove uncertainty from the market, including by the use of 'comfort calls', in respect of matters of price.

(1208) The fixing of various elements of the price, including particular surcharges, constitutes one of the most harmful restrictions of competition. The Guidelines on fines no longer draw a distinction between 'serious' and 'very serious' infringements. It is however clear that all horizontal price fixing agreements merit a percentage 'at the higher end of the scale'[1531]. The fact that certain carriers may have played a minor or passive role is assessed as a mitigating circumstance in Section 8.4.2.1.

(b) Combined market share

(1209) The combined worldwide market share of the undertakings to which this Decision is addressed is estimated to have been at around 34% in 2005 based on data published by an independent magazine Air Cargo World on the ranking of the world's largest cargo airlines based on the total freight tonne –kilometres flown[1532]. Given the nature of the sector the combined market share of the addressees of this Decision varies from route to route. It may be high on certain routes and low on others. It is noted that the combined market share of the addressees of this Decision in air freight services provided on intra EEA routes and on routes between the EEA and third countries is at least as high as their market share in the worldwide market.

(c) Geographic scope

(1210) [*]. For the purposes of establishing the gravity of the infringement, this means that the cartel arrangements covered the whole of the EEA and Switzerland. That includes airfreight services provided on routes in both directions between airports within the EEA, on routes between airports in countries within the EU and airports outside the EEA, on routes between airports in the EU and airports in Switzerland and on routes between airports in the EEA Contracting Parties not being Member States and airports in third countries.

(d) Implementation

(1211) As described in Section 4 the arrangements were in general implemented.

[1531] Point 23 of the Guidelines on fines

[1532] See *Air cargo world – international edition*, September 2006 issue, http://www.aircargoworld.com

8.3.3. Conclusion on the percentage to be applied for the proportion of the value of sales

(1212) Given the specific circumstances of this case, and taking into account the criteria discussed in Section 8.3.2, and in particular the nature and geographic scope of the infringement, the proportion of sales to be taken into account should be 16%.

8.3.4. Duration

(1213) Point 24 of the Guidelines on fines provides that in order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement. The Commission also takes into account complete months of participation when determining the multiplication factor.

(1214) The duration in respect of the infringement concerning air transport **between airports in the EEA** and the multiplication factors to be applied for each undertaking are as follows:

Table 1

	Period of Involvement	**Number of years and months**	**Multiplication factor**
Air Canada	From 21 September 2000 until 14 February 2006	5 years and 4 months	5 4/12
Air France-KLM	From 7 December 1999 until 14 February 2006	6 years and 2 months	6 2/12
Société Air France	From 7 December 1999 until 14 February 2006	6 years and 2 months	6 2/12
Koninklijke Luchtvaartmaatschappij N.V.	From 21 December 1999 until 14 February 2006	6 years and 1 month	6 1/12
Air France-KLM	From 5 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
British Airways Plc	From 22 January 2001 until 14 February 2006	5 years	5
Cargolux Airlines International S.A.	From 22 January 2001 until 14 February 2006	5 years	5

Cathay Pacific Airways Limited	From 4 January 2000 until 14 February 2006	6 years and 1 month	6 1/12
Japan Airlines Co., Ltd.	From 7 December 1999 until 14 February 2006	6 years and 2 months	6 2/12
Latam Airlines Group, S.A. LAN Cargo S.A.	From 25 February 2003 until 14 February 2006 From 25 February 2003 until 14 February 2006	2 years and 11 months 2 years and 11 months	2 11/12 2 11/12
Lufthansa Cargo AG Deutsche Lufthansa AG	From 14 December 1999 until 7 December 2005 From 14 December 1999 until 7 December 2005	5 years and 11 months 5 years and 11 months	5 11/12 5 11/12
Swiss International Airlines AG Deutsche Lufthansa AG	From 2 April 2002 until 7 December 2005 From 27 July 2005 until 7 December 2005	3 years and 8 months 4 months	3 8/12 4/12
Martinair Holland N.V.	From 22 January 2001 until 14 February 2006	5 years	5
SAS AB SAS Cargo Group A/S SCANDINAVIAN AIRLINES SYSTEM	From 17 August 2001 until 14 February 2006 From 1 June 2001 until 14 February 2006 From 13 December	4 years and 5 months 4 years and 8 months	4 5/12 4 8/12

Denmark - Norway - Sweden	1999 until 28 December 2003	4 years	4
Singapore Airlines Cargo Pte Ltd	From 1 July 2001 to 14 February 2006	4 years and 7 months	4 7/12
Singapore Airlines Limited	From 4 January 2000 to 14 February 2006	6 years and 1 month	6 1/12

(1215) The duration in respect of the infringement concerning air transport **between airports in the EU and airports in countries outside the EEA** (except Switzerland) and the multiplication factors to be applied for each undertaking are as follows:

Table 2

	Period of Involvement	**Number of years and months**	**Multiplication factor**
Air Canada	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Air France-KLM	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Société Air France	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Koninklijke Luchtvaartmaatschappij N.V.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Air France- KLM	From 5 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
British Airways Plc	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12

Cargolux Airlines International S.A.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Cathay Pacific Airways Limited	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Japan Airlines Co., Ltd.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Latam Airlines Group, S.A.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
LAN Cargo S.A.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Lufthansa Cargo AG	From 1 May 2004 until 7 December 2005	1 year and 7 months	1 7/12
Deutsche Lufthansa AG	From 1 May 2004 until 7 December 2005	1 year and 7 months	1 7/12
Swiss International Airlines AG	From 1 May 2004 until 7 December 2005	1 year and 7 months	1 7/12
Deutsche Lufthansa AG	From 27 July 2005 until 7 December 2005	4 months	4/12
Martinair Holland N.V.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
SAS AB	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
SAS Cargo Group A/S	From 1 May 2004 until 14 February	1 year and 9 months	1 9/12

	2006		
Singapore Airlines Cargo Pte Ltd	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Singapore Airlines Limited	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12

(1216) The duration in respect of the infringement concerning routes **between airports in the EU and Switzerland** and the multiplication factors to be applied for each addressee are as follows:

Table 3

	Period of Involvement	**Number of years and months**	**Multiplication factor**
Air Canada	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Air France-KLM	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Société Air France	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Koninklijke Luchtvaartmaatschappij N.V.	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Air France-KLM	From 5 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
British Airways Plc	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Cargolux Airlines	From 1 June 2002 until 14 February	3 years and 8	3 8/12

International S.A.	2006	months	
Cathay Pacific Airways	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Japan Airlines Co., Ltd.	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Latam Airlines Group, S.A. LAN Cargo S.A.	From 25 February 2003 until 14 February 2006 From 25 February 2003 until 14 February 2006	2 years and 11 months 2 years and 11 months	2 11/12 2 11/12
Lufthansa Cargo AG Deutsche Lufthansa AG	From 1 June 2002 until 7 December 2005 From 1 June 2002 until 7 December 2005	3 years and 6 months 3 years and 6 months	3 6/12 3 6/12
Swiss International Airlines AG Deutsche Lufthansa AG	From 1 June 2002 until 7 December 2005 From 27 July 2005 until 7 December 2005	3 years and 6 months 4 months	3 6/12 4/12
Martinair Holland N.V.	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
SAS AB SAS Cargo Group A/S SCANDINAVIAN	From 1 June 2002 until 14 February 2006 From 1 June 2002 until 14 February 2006	3 years and 8 months 3 years and 8 months	3 8/12 3 8/12

AIRLINES SYSTEM Denmark - Norway - Sweden	From 1 June 2002 until 28 December 2003	1 years and 6 months	1 6/12
Singapore Airlines Cargo Pte Ltd	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Singapore Airlines Limited	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12

(1217) The duration of the infringement in respect of air transport **between airports in Contracting Parties to the EEA Agreement not being Member States and airports in third countries** and the multiplication factors to be applied for each undertaking are as follows:

Table 4

	Period of Involvement	**Number of years and months**	**Multiplication factor**
Air Canada	From 19 May 2005 until 14 February 2006	8 months	8/12
Air France-KLM	From 19 May 2005 until 14 February 2006	8 months	8/12
Société Air France	From 19 May 2005 until 14 February 2006	8 months	8/12
Koninklijke Luchtvaartmaatschappij N.V.	From 19 May 2005 until 14 February 2006	8 months	8/12
Air France-KLM	From 19 May 2005 until 14 February 2006	8 months	8/12
British Airways Plc	From 19 May 2005 until 14 February 2006	8 months	8/12
Cargolux Airlines	From 19 May 2005 until 14 February	8 months	8/12

International S.A.	2006		
Cathay Pacific Airways Limited	From 19 May 2005 until 14 February 2006	8 months	8/12
Japan Airlines Co., Ltd.	From 19 May 2005 until 14 February 2006	8 months	8/12
Latam Airlines Group, S.A.	From 19 May 2005 until 14 February 2006	8 months	8/12
LAN Cargo S.A.	From 19 May 2005 until 14 February 2006	8 months	8/12
Lufthansa Cargo AG	From 19 May 2005 until 7 December 2005	6 months	6/12
Deutsche Lufthansa AG	From 19 May 2005 until 7 December 2005	6 months	6/12
Swiss International Airlines AG	From 19 May 2005 until 7 December 2005	6 months	6/12
Deutsche Lufthansa AG	From 27 July 2005 until 7 December 2005	4 months	4/12
Martinair Holland N.V.	From 19 May 2005 until 14 February 2006	8 months	8/12
SAS AB	From 19 May 2005 until 14 February 2006	8 months	8/12
SAS Cargo Group A/S	From 19 May 2005 until 14 February 2006	8 months	8/12

Singapore Airlines Cargo Pte Ltd	From 19 May 2005 until 14 February 2006	8 months	8/12
Singapore Airlines Limited	From 19 May 2005 until 14 February 2006	8 months	8/12

8.3.5. Additional amount

(1218) Point 25 of the Guidelines on fines provides that irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output limitation agreements.

(1219) Given the specific circumstances of the case, and taking into account the criteria discussed in Section 8.3.2, the percentage to be applied for the additional amount should be 16%.

(1220) The additional amount applies in its entirety to each legal entity which has committed the infringement irrespective of its duration. When a number of legal entities within an undertaking have committed an infringement they are liable for the additional amount jointly and severally.

(1221) For SK a separate calculation of the additional amount is required. This is due to the fact that two legal entities within the undertaking SAS, SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden (SAS Consortium) and SAS Cargo Group A/S, are liable for their direct participation in the infringement during successive periods. Apportionment of the element of the fine calculated on the basis of Sections 8.1 to 8.3 (proportion of value of sales multiplied by duration - see recital (1185) - referred to hereafter as the 'variable amount') is therefore necessary to reflect the duration of the direct participation of each legal entity in the infringement.

(1222) Moreover, SAS Consortium ended its participation in the infringement on 28 December 2003, before the EU enlargement of 2004 and before the Commission acquired jurisdiction on routes between the EU and third countries as well as routes between Iceland, Norway and Liechtenstein and countries outside the EEA. For the calculation of the variable amount of SAS Consortium, only routes within the EEA of 18 countries and routes between the EU of 15 Member States and Switzerland are therefore taken into account.

(1223) The additional amount is set for the SAS undertaking as a whole. SAS Consortium is only liable for a part of this additional amount. This part is calculated on the basis of intra-EEA routes of 18 countries and routes between the EU of 15 Member States and Switzerland. SAS Cargo Group A/S and SAS AB are liable for the remainder of the additional amount.

(1224) In order to reflect the fact that from 13 December 1999 to 31 May 2001, SAS Consortium was the only legal entity directly involved in the cartel, it is appropriate to hold SAS Consortium alone liable for a portion of the additional amount to be imposed on it. It is however necessary to ensure that this does not increase the total additional amount for which the undertaking as a whole is liable. Moreover, it is important that SAS is treated in an equivalent way to other undertakings as regards

the use of rounded figures for the basic amount. As a result, the method set out in recitals (1225) to (1228) is followed for the calculation of the fines imposed on SAS Consortium and SAS Cargo Group A/S.

(1225) The variable amount and the additional amount are first calculated for SAS Consortium. The basic amount of the fine for SAS Consortium is then calculated and rounded off. This amount is featured in Table 5.

(1226) In order to establish the amounts of the parental liability of the fine imposed on the SAS undertaking (see recitals (1240) to (1242)), the fine of SAS Consortium must be split into three parts corresponding to successive periods. SAS Consortium is held solely liable for the first period from 13 December 1999 to 31 May 2001, SAS Consortium and SAS Cargo Group A/S are held jointly and severally liable for the second period from 01 June 2001 to 16 August 2001 and SAS Consortium, SAS Cargo Group A/S and SAS AB are held jointly and severally liable for the third period from 17 August 2001 to 28 December 2003. The rounded basic amount of SAS Consortium is therefore apportioned into three parts in accordance with the respective ratios of the duration of each of these three periods over the overall duration of involvement of SAS Consortium in the infringement.

(1227) A separate apportionment of the additional amount of SAS Consortium between these periods is also made for calculation purposes only.

(1228) In a separate calculation, the variable amount and the additional amount for SAS Cargo Group A/S are calculated. The additional amount imposed on SAS Consortium in the fine corresponding to the first period (13 December 1999 to 31 May 2001) – as set out in recital (1227) - is subtracted from the additional amount for SAS Cargo Group A/S. The basic amount of the fine for SAS Cargo Group A/S is then calculated and rounded off. This amount is set out in Table 5.

(1229) In a distinct calculation, the variable amount for SAS AB is calculated. SAS AB is also liable for an additional amount which is calculated on the basis of the additional amount imposed on SAS Cargo Group A/S as set out in recital (1228) from which the additional amount imposed on SAS Consortium for the second period (01 June 2001 to 16 August 2001) as described in recital (1227) is subtracted. The basic amount of the fine for SAS AB is then calculated and rounded off. This amount is set out in Table 5.

(1230) The adjustments and leniency reductions are applied to each of the three SAS legal entities in Tables 6 and 7 with the final amount appearing in Table 8.

(1231) However, the increase of the fine of SAS for recidivism is not applied to SAS AB (see recital (1245)). This fact is taken into account when the parental liability is calculated. For the period from 17/08/2001 to 28/12/2003 for which SAS Cargo Group A/S, SAS Consortium and SAS AB are jointly and severally liable, the recidivism increase is not applied but the corresponding amount is rather added to the fine for which SAS Consortium and SAS Cargo Group A/S are held jointly and severally liable. Similarly, for the period from 28/12/2003 to 14/02/2006 only SAS Cargo Group A/S is held liable for recidivism and the amount is therefore not included in the joint fine.

(1232) The amounts of parental liability are calculated in the following way. The amount for which SAS AB, SAS Consortium and SAS Cargo Group A/S are held jointly and severally liable is established by taking the basic amount set out in recital (1226) and

following the method described in recital (1231) so as not to hold SAS AB liable for recidivism.

(1233) The amount for which SAS Consortium and SAS Cargo Group A/S are held jointly and severally liable is calculated from the basic amount set out in recital (1226) and adding the adjustment for recidivism set out in recital (1231).

(1234) The amount for which SAS AB and SAS Cargo Group A/S are held jointly and severally liable is calculated by taking SAS AB's basic amount for its total fine as set out in recital (1229) and subtracting the basic amount for the third period as set out in recital (1226). The recidivism increase is not applied to this fine. Instead, SAS Cargo Group A/S is held solely liable for the remainder of its total fine as set out in recital (1228).

(1235) For Air France-KLM in its capacity as parent of KLM a separate calculation of the additional amount is also required. This is due to the fact that Air France-KLM is liable as parent only for part of the direct infringement by KLM but is liable for the entire additional amount.

(1236) The amount of parental liability for the variable amount for Air France-KLM is calculated on the basis of the duration of its involvement in the infringement as parent as set out in Tables 1 to 4. The additional amount for Air France-KLM as parent (and for KLM) is calculated from the proportion of sales of KLM.

(1237) The figure in Table 8 for Air France as parent of KLM is the sum of the amount for parental liability for the variable amount plus the additional amount.

(1238) As in the previous case, for Deutsche Lufthansa AG in its capacity as parent of SWISS International Air Lines AG a separate calculation of the additional amount is required. This is due to the fact that Deutsche Lufthansa AG is liable as parent only for part of the direct infringement by SWISS but is liable for the entire additional amount.

(1239) The amount of parental liability for the variable amount for Deutsche Lufthansa AG is calculated on the basis of the duration of its involvement in the infringement as parent of SWISS as set out in Tables 1 to 4. The additional amount for Deutsche Lufthansa AG as parent (and for Swiss) is calculated from the proportion of sales of SWISS.

8.3.6. Conclusion on the basic amount

(1240) The basic amounts of the fines to be imposed on each undertaking are therefore, at this first stage, as set out in Table 5. The figures indicated in tables 5-8 are the amounts for which each legal entity is cumulatively liable on a sole basis and on a joint and several basis[1533]. In determining the basic amount of the fine the Commission uses rounded figures[1534].

Table 5

All amounts are in EUR

[1533] The basis and periods for which legal entities are found to be solely liable and/or jointly and severally liable are set out in detail in Section 6.2. On the basis of Section 6.2, Article 5 of this Decision delineates the amounts of sole and of joint and several liability of each legal entity.

[1534] Paragraph 26, Guidelines on fines.

Air Canada	66 000 000
Air France-KLM Société Air France	510 000 000510 000 000
Koninklijke Luchtvaartmaatschappij N.V. Air France-KLM	368 000 000 360 000 000
British Airways Plc	260 000 000
Cargolux Airlines International S.A.	408 000 000
Cathay Pacific Airways Limited	169 000 000
Japan Airlines Co., Ltd.	113 000 000
Latam Airlines Group, S.A. LAN Cargo S.A.	27 000 000 27 000 000
Lufthansa Cargo AG Deutsche Lufthansa AG	730 000 000 730 000 000
SWISS International Air Lines AG Deutsche Lufthansa AG	15 600 000 5 100 000
Martinair Holland N.V.	229 000 000
SAS AB SAS Cargo Group A/S SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	106 000 000 108 000 000 14 000 000
Singapore Airlines Cargo Pte Ltd Singapore Airlines Limited	177 000 000 177 000 000

(1241) It was stated in Section 8.3.1 that both inbound and outbound turnover should be taken into account for the determination of the value of sales on third country routes.

However, it must be recognised in this particular case that for both incoming and outgoing services part of the services are performed outside the EEA, and that part of the harm resulting from the cartel in respect of those EEA – third country routes is likely to fall outside the EEA[1535]. A reduction of 50% in the basic amount appears justified to reflect these considerations for EEA - third country routes, except routes between the EU and Switzerland where the Commission is acting under the Swiss Agreement.[1536]

(1242) Accordingly, having taken into account that reduction in respect of third country routes, the basic amounts of the fines to be imposed are as follows:

Table 6

All amounts are in EUR

Air Canada	33 000 000
Air France-KLM Société Air France	269 000 000 269 000 000
Koninklijke Luchtvaartmaatschappij N.V. Air France-KLM	187 000 000 183 000 000
British Airways Plc	136 000 000
Cargolux Airlines International S.A.	204 000 000
Cathay Pacific Airways Limited	84 000 000
Japan Airlines Co., Ltd.	56 000 000
Latam Airlines Group, S.A. LAN Cargo S.A.	13 700 000 13 700 000
Lufthansa Cargo AG Deutsche Lufthansa AG	398 000 000 398 000 000
SWISS International Air Lines AG Deutsche Lufthansa AG	14 500 000 4 500 000

[1535] 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.

[1536] See point 37 of the Guidelines on Fines.

Martinair Holland N.V.	115 000 000
SAS AB SAS Cargo Group A/S SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	60 000 000 61 000 000 14 000 000
Singapore Airlines Cargo Pte Ltd Singapore Airlines Limited	88 000 000 88 000 000

8.4. Adjustments to the basic amount

8.4.1. Aggravating circumstances

8.4.1.1. Recidivism

(1243) Point 28 of the Guidelines on fines provides that the basic amount may be increased where an undertaking continues or repeats the same or similar infringement. After the Commission or a national competition authority has made a finding that the undertaking infringed Article 101 or 102 of the TFEU, the basic amount may be increased by up to 100% for each such infringement established.

(1244) SK was the addressee of a previous Commission decision in July 2001 holding it liable for earlier cartel activities[1537] while the current infringement was ongoing. It accordingly continued a similar infringement for almost five years after the Commission had found SK had infringed Article 101 of the TFEU. SK argues on the basis of *Thyssen Stahl v Commission*[1538] that any increase for recidivism can only be applied from the date on which the previous infringement was established (therefore from 18 July 2001 for SK). The Commission rejects this argument. The facts in *Thyssen Stahl* are materially different from the case in hand. In *Thyssen Stahl* the General Court was dealing with a situation where there were multiple separate infringements, the majority of which had terminated prior to the date of the previous infringement decision and to which no increase for recidivism could be applied. In addition Thyssen had only continued the infringement for a few months after the previous infringement decision. In the present case it is evident that the present infringement continued for almost five years after the previous infringement decision and an appropriate increase for recidivism should be applied[1539]. The Guidelines on fines are clear that the increase applies without distinction to continued infringements, which may already be in existence or to repeated infringements, which may arise subsequently to the previous decision. The Court of Justice of the European Union has clarified that in cases such as the present one no pro rata

[1537] See Commission Decision 2001/716/EC of 18 July 2001 relating to a proceeding under Article 81 of the Treaty and Article 53 of the EEA Agreement (SAS Maersk Air and Sun Air versus SAS and Maersk Air), (OJ L 265, 05.10.2001 p.15) where SAS was found to have participated in the cartel.

[1538] Case T-141/94 – *Thyssen Stahl v Commission*, ECLI:EU:T:1999:48, paragraphs 617-618.

[1539] Case T-54/03, *Lafarge v Commission*, ECLI:EU:T:2008:255, paragraph 727.

increase is to be applied as of the date of the previous decision, rather the increase applies to the entire duration of the infringement[1540]. The fact that SK has repeated the same type of conduct in its business activities shows that the first penalty did not prompt it to change its conduct. This constitutes an aggravating circumstance which justifies an increase of 50% of the basic amount of the fine (as featured in Table 6) to be imposed on it.

(1245) SK submits that the facts of this case do not warrant an increase on the grounds of recidivism, making reference to the purpose of such an increase. SK asserts that it is not the case that the previous sanction was not sufficiently deterrent, stating that its conduct in this case is justified by the WOW alliance and did not constitute an infringement of Article 101 of the TFEU. As discussed in Section 5.3.4 the Commission does not consider that the conduct of SK to which this Decision relates was justified by the WOW alliance or that it falls outside the scope of Article 101 of the TFEU. That argument must therefore be rejected. However, since SAS AB was not held liable for the previous infringement, nor could it have been given its creation only in 2003, the Commission imposes the increase for recidivism on SAS Consortium as the addressee of the previous decision and SAS Cargo, which formed a business unit within SAS Consortium during the period of the previous infringement and had become SAS Consortium's wholly owned subsidiary at the time of the infringement decision.

8.4.2. Mitigating circumstances

8.4.2.1. Passive and/or minor role and/or limited participation

(1246) The majority of carriers involved invoke the argument that they had a passive and/or minor role and/or had limited participation in the cartel as a mitigating factor.

(1247) Point 29 of the Guidelines on fines provides that the basic amount of the fine may be reduced where the undertaking provides evidence that its involvement in the infringement is substantially limited. The 2006 Guidelines on fines do not, in contrast to the 1998 Guidelines on fines, provide for a reduction on the basis of a passive or minor role. Thus, the Commission no longer considers that a passive role constitutes a mitigating circumstance that justifies a reduction in fines, whereas a minor role can only constitute a mitigating circumstance if the involvement of the undertaking in the infringement is substantially limited. In any event, as set out in recitals (1248) to (1258), none of the parties has played a passive role within the meaning of case-law of the Court of Justice of the European Union that would justify a reduction in fines[1541].

(1248) AF argued that it had had a secondary role in the infringement compared to LH who had a leading role and that should be taken into consideration.

(1249) That argument must be rejected, as AF participated in many aspects of the infringement, had significant contacts with numerous carriers and was involved at senior management level which is not consistent with a secondary role and with the case law cited in (1247).

(1250) Although the Commission relies on a significant amount of evidence submitted by LH this is common in cases involving immunity applicants. Furthermore, despite

[1540] Case T-53/03, *BPB v Commission,* ECLI:EU:T:2008:254, paragraphs 391-396.

[1541] Case T-73/04 *Carbone-Lorraine v Commission,* ECLI:EU:T:2008:416, paragraphs 163-164, and cited case-law.

allegations that LH played an instigating or leading role there is no evidence that suggests LH coerced other undertakings to participate in the infringement or that it took retaliatory measures against other undertakings with a view to enforcing the practices constituting the infringement.

(1251) CV, KL, MP, JL and SK claim that they adopted a passive role in the cartel. SK, MP and JL claim that they attended meetings sporadically and were absent from some key meetings. They claim to have been left out of meetings and thus to have been unaware of aspects of the infringement. SK, CV and KL state that they had a policy of passively following LH as the leader.

(1252) BA, LA and AC assert that they played a minor role in the infringement. That argument is also made by MP and SK in addition to claiming they acted passively. LA, AC, MP and SK state that their involvement in the infringement generally and awareness of its scope was limited. LA does not contest that its activities in relation to fuel surcharges resulted in an infringement of Article 101 of the TFEU but it states that its participation in the infringement is minor and limited. It is attributable to the Capacity Sharing Agreement with LH. The regular contacts with LH required to ensure the functioning of the agreement gradually extended to issues that went beyond the intended pro-competitive objectives of the agreement. These discussions were limited in scope and were exclusively with LH. LA asserts it played a peripheral role as it was involved in only two aspects of the infringement as set out in the SO. SK describes its small market share and the size disparity between it and other carriers to support its assertion that it played a minor role.

(1253) With respect to CV, MP, JL and KL, the Commission rejects the argument that they played a passive role in the infringement. Their attempt to portray themselves as passive players and irregular participants in the cartel are not convincing. The evidence in the file points to consistent, regular and active participation in the infringement. The frequency and nature of their contacts with the other carriers throughout the entire period of the infringement, as described in Section 4[1542], is incompatible with a passive or irregular role.

(1254) Furthermore, CV, MP, JL and KL did not put forward any evidence to establish that their participation in the infringement was without any anti-competitive intention by demonstrating that they had indicated to their competitors that they were participating in a different spirit. It must therefore be concluded that by attending multilateral meetings and entering into contacts with other carriers regarding pricing, they demonstrated a degree of active participation in the cartel which is clearly incompatible with that required in order to claim that the level of their participation constituted a mitigating circumstance. The fact that several of the carriers argue that they followed LH which they assert was the leader of the cartel does not equate to the adoption of a purely passive stance. Therefore, the arguments put forward by CV, MP, JL and KL that they played passive roles are not substantiated.

(1255) It cannot be accepted that BA and MP played a limited role in the infringement. BA cannot be said to have had a minor role in the cartel given the high level of its involvement in almost all aspects of the infringement. Concerning MP's arguments that its participation in communications between the cartel members was limited because it participated in them on infrequent occasions, the Commission finds that

[1542] For CV see recitals (750)-(754), for MP see recitals (786)-(788), for JL see recitals (762)-(764), for KL see recitals (732)-(736).

the communications formed an established and consistent pattern and that they took place over a long period of time[1543]. Therefore the argument that they participated in group communications only infrequently cannot be accepted.

(1256) SQ claims that it played a minor role in the infringement, asserting that its contacts within the WOW alliance fell outside Article 101(1) of the TFEU, and thus it only participated in two of the instances of contacts mentioned in the SO. As discussed in Section 5.3.4, the Commission considers that contacts among members of the WOW alliance formed part of the infringement and accordingly, rejects the argument that SQ played a minor role in the infringement.

(1257) In summary, the Commission concludes that there is no evidence that the involvement in the infringement of AF, BA, MP, JL, CV, KL and SQ was substantially limited or that any of these undertakings played a passive or minor role in the infringement.

(1258) With respect to AC, LA and SK, the Commission is not prepared to accept as a mitigating circumstance the fact that those carriers played a passive role in the infringement. As indicated at recital (1247) this no longer constitutes a mitigating circumstance under the Guidelines on fines. The Commission is however prepared to accept that AC, LA and SK had a limited participation in the infringement. 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 they did not participate in all elements of the infringement.

(1259) AC, LA and SK should accordingly be granted a reduction of 10% of the basic amount (as featured in Table 6) of the fine to be imposed on them.

8.4.2.2. Regulatory regimes

(1260) AF, AC, CX, BA, CV, JL, SK and MP submit that it should be taken into account as a mitigating circumstance that in respect of the contacts mentioned in Section 4, there were regulatory regimes in place in several jurisdictions under which coordination between carriers on prices and surcharges was encouraged.

(1261) Several of the carriers mentioned in recital (1260) submit that in particular in Hong Kong and Japan the authorities required tariff consultations to take place before surcharge adjustments could be approved. CX and JL note that many bilateral ASAs provide that tariffs are to be collectively agreed by designated airlines. Several other carriers submit that, while not an obligation, coordination was strongly encouraged and that in practice it was not possible to obtain approval in any other way.

(1262) The airlines claim that a conflict between the operation of local regimes and the requirements of EU competition law gave rise to uncertainty as to the legality of their actions. They submit that even if the Commission considers their coordination within the applicable frameworks to be a violation of competition law, in the light of this uncertainty and local encouragement the Commission should regard the regulatory regimes as a mitigating circumstance.

(1263) In respect of the contacts mentioned in Section 4, the Commission does not consider that the operation of the regulatory regimes invoked by the parties render Article 101(1) of the TFEU inapplicable. The Commission does not accept that a requirement to discuss tariffs was imposed on the carriers operating in the relevant

[1543] See recitals (786)-(788).

jurisdictions. Accordingly, the Commission considers that the carriers were not prevented from acting autonomously. If a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 101 of the TFEU.[1544]

(1264) The Commission however notes that in accordance with point 29 of the Guidelines on fines it may take into account as a mitigating circumstance the fact that the anti-competitive conduct has been '*authorised or encouraged by public authorities or by legislation*'.

(1265) The Commission recognizes that some regulatory regimes have encouraged certain elements of the anti-competitive conduct. It has had regard to the terms of the ASAs that govern air services between EEA countries and third countries which in most cases provide for prices to be agreed or discussed between designated airlines as well as to the approach of regulatory authorities. The Commission accepts that the anti-competitive conduct in this case was encouraged by the regulatory regime and in some cases the application of it and accordingly grants all addressees of this Decision a reduction of 15% of the basic amount (as featured in Table 6) of the fine to be imposed on them.

8.4.2.3. Legitimate expectation that the Commission would not penalise the conduct

(1266) CV and CX submit that that the Commission's conduct with regard to the regulatory regime for aviation in place in Hong Kong gave rise to a legitimate expectation that the Commission would not pursue infringement proceedings.

(1267) CX states that the Commission was aware of the special characteristics of the aviation sector yet did not issue guidelines to explain how airlines were supposed to conduct themselves so as to comply with changed EU competition rules after 1 May 2004. CX submits that this gave rise to a legitimate expectation that the Commission would not initiate infringement proceedings, which provides the basis for mitigation of fines. CV submits that the Commission Delegation in Hong Kong sent a letter to CAD in Hong Kong encouraging carriers to co-ordinate on the SSC and claims that this gave rise to a legitimate expectation that the Commission would not object to coordination under Article 101(1) of the TFEU.

(1268) SK refers to the decision of the Danish Competition Council in 2002 concerning a complaint with regard to price fixing for air freight services on routes from Denmark to Hong Kong and Manila. SK states that the rejection of the complaint creates legitimate expectations as in the reasoning of the decision it is stated that the European Commission was competent concerning intra EU routes only, and not on routes between the Member States and third countries.

(1269) The Commission does not accept that legitimate expectations constitute a mitigating circumstance in this case. The Commission is under no obligation to produce guidelines to inform carriers of the changes resulting from Regulation (EC) No 1/2003. It is incumbent on carriers themselves with the assistance of their legal advisors to ensure they comply with applicable laws from their entry into force. In addition, it is settled law that the principle of the protection of legitimate expectations may not be relied upon by a person who has committed a manifest

[1544] Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* v *Autorità Garante della Concorrenza e del Mercato,* ECLI:EU:C:2003:430, paragraph 56.

infringement of the rules in force.[1545] Accordingly, an undertaking which deliberately engages in anti-competitive conduct may not rely upon a breach of that principle on the pretext that the Commission did not clearly inform it that its conduct constituted an infringement.[1546]

(1270) Concerning the letter of the Hong Kong Office of the Commission, as set out in recital (988) above the Commission in no way approved coordination on the SSC by carriers in Hong Kong. Based on the case law the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the EU authorities have caused him to entertain legitimate expectations. A person may not plead infringement of the principle unless he has been given precise assurances by the administration[1547]. The letter of the Hong Kong Office of the Commission did not contain any reference to the non-application of EU competition law, let alone a precise assurance. On the contrary, the letter concerned only the question whether carriers would be authorized by the government to charge a SSC, rather than adjusting rates. Moreover, the Commission service that is primarily responsible for the application of EU competition law applying to undertakings is DG Competition, and not the Hong Kong Office. Accordingly, the statements emanating from the Hong Kong Office cannot give rise to legitimate expectations in respect of EU competition law. Consequently, the argument of CV is rejected.

(1271) Concerning the decision of the Danish Competition Council, it took the view in 2002 that the coordination of freight prices on routes between non Member States and Member States was not prohibited. This was not the case after the entry into force of Regulation (EC) No 1/2003. Since the relevant legal rules have changed since the decision of the Danish authorities, a position based on a previous legal situation cannot create legitimate expectations. Therefore, the argument of SK is rejected.

8.4.2.4. Non-implementation/ lack of effect

(1272) SK, LA and MP claim that the amount of the fines to be imposed on them should be reduced because they either did not implement or did not fully implement the anti-competitive agreements. They claim that they continued to compete with other carriers throughout the duration of the infringement although they do not dispute that the relevant surcharges were applied.

(1273) As a preliminary point it should be recognized that the Guidelines on fines no longer feature a mitigating circumstance of non-implementation. The Commission has nevertheless assessed these claims having regard to established case-law. According to such case law an undertaking seeking to rely on such a mitigating circumstance must demonstrate that, during the period in which it was party to the offending agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, that it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.[1548]

[1545] Case C-96/89 *Commission* v *Netherlands,* ECLI:EU:C:1991:213, paragraph 30.

[1546] Joined Cases C-65/02 P and C-73/02 P, *ThyssenKrupp Stainless GmbH and Others v Commission,* ECLI:EU:C:2005:454, paragraph 41.

[1547] Case T-13/03 *Nintendo and Nintendo of Europe v Commission,* ECLI:EU:T:2009:131, paragraph 203 and the case-law cited.

[1548] T-26/02, *Daichii v Commission*, ECLI:EU:T:2006:75, paragraph 113. See also point 29 of the 2006 Guidelines on fines.

(1274) None of the undertakings mentioned in recital (1272) provided indications that they demonstrated any desire, or undertook any action, to deliberately abstain from implementing the agreements or practices during the period in which they were engaged in them.[1549] A difference in the degree to which they implemented the agreements cannot be regarded as a real failure to implement them.[1550] Furthermore, the adoption by a participant undertaking of competitive conduct on the market, contrary to the manner agreed, is not a matter which must be always taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.[1551] In addition, none of the parties has demonstrated that they clearly and substantially failed to implement the cartel to the point of disrupting its very operation or avoided giving the appearance of adhering to the agreements or practises retained in this Decision thus inciting other undertakings not to implement the cartel. They did not clearly distance themselves from the agreements or practices that took place during the anti-competitive contacts in which they participated.

(1275) BA, SK and CX submit that, to the extent to which the agreements were implemented, they caused only minor damage to the market. JL and MP submit that their contributions to the infringement were so small as to have had a negligible effect on the market.

(1276) AF states that the bilateral contacts between AF and LH between 2001 and 2004 referred to by LH [*] were not regular, but were limited to three meetings between 2001 and 2003. Furthermore, AF argues that such contacts had weak effect on the competition, as proven by the mutual accusations of price dumping during these meetings. The Commission notes that the mutual accusations of price dumping in fact prove the anti-competitive aim of the discussions.

(1277) The Commission notes that in assessing circumstances which may reduce the amount of the fine to be imposed, the actual effects of the conduct on the market are not relevant. This Decision finds a restriction of competition by object.

(1278) Similarly, the actual effects of the conduct on the cartel participants are not material when assessing mitigating circumstances. MP states that it derived no economic advantage from its participation in the coordination of several elements of price, and claims that fact should constitute a mitigating circumstance. MP's argument is rejected, as it is settled law that the fact that an undertaking has derived no profit from the infringement cannot prevent it from being fined.[1552] The Commission is not required to establish that the infringement secured an improper advantage for the undertaking, nor to take into consideration, where applicable, the fact that no profit was derived from the infringement in question. Moreover, point 31 of the Guidelines on fines provides for the Commission to increase the fine that would otherwise be

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1549 Joined Cases T-25/95 and others, *Cement*, ECLI:EU:T:2000:77, paragraphs 4872 to 4874.

1550 Case T-220/00 *Cheil Jedang v Commission,* ECLI:EU:T:2003:193, paragraphs 194-199.

1551 Case T-308/94 *Cascades SA* v *Commission*, ECLI:EU:T:1998:90, paragraph 230; Joined Cases T-71/03 etc., *Tokai Carbon and others* v *Commission*, ECLI:EU:T:2005:220 , paragraph 297; Case T-44/00, *Mannesmannröhren-Werke AG* v *Commission*, ECLI:EU:T:2004:218, paragraphs 277-278, Case T-327/94, *SCA Holding* v *Commission,* ECLI:EU:T:1998:96, paragraph 142.

1552 Case C-219/95 P *Ferriere Nord v Commission,* ECLI:EU:C:1997:375, paragraphs 46-47, Case T-229/94 *Deutsche Bahn,* ECLI:EU:T:1997:155, paragraph 217 and Case T-241/01 *Scandinavian Airlines System v Commission,* ECLI:EU:T:2005:296, paragraph 146.

applied in order to exceed the amount of 'gains improperly made as a result of the infringement'. Analysis of the impact of a cartel properly falls under aggravating circumstances.

(1279) In summary, the claim of the carriers mentioned in recitals (1272), (1275) and (1276) regarding the limited implementation of the infringement, the alleged limited effect of the cartel on the market and a lack of economic benefit from participation are not accepted as mitigating circumstances in the instant case.

8.4.2.5. Non-authorised personnel

(1280) BA argues that their personnel acted contrary to advice in carrying out acts constituting cartel participation and that this should be regarded as an attenuating circumstance. BA states that its involvement in the infringement was limited to a few 'rogue' junior employees who acted without the knowledge of senior personnel and contrary to clear and specific managerial and legal advice.

(1281) The Commission does not accept BA's arguments in this regard. It is settled law that an infringement of competition law by a natural person is imputable to an undertaking if the person is authorised to act on behalf of the undertaking.[1553] An undertaking remains liable for the acts of its employees even if the employee was acting contrary to instructions, as asserted by BA.[1554] Furthermore, the contacts took place over a significant period of time and involved a number of employees. Accordingly, an alleged lack of authorisation on the part of senior management is not accepted as a mitigating circumstance.

8.4.2.6. Market situation

(1282) CV, KL and MP submit that the situation on the market at the time of the cartel infringement should be regarded as a mitigating circumstance.

(1283) KL and MP make general submissions regarding the difficult economic situation in the sector. KL notes that the period following 9/11 was one of great uncertainty for the future of the aviation industry. MP states that the unprecedented increase in fuel prices during the period of infringement was a factor placing the sector in economic difficulties. CV submits that freight forwarders took advantage of their market power and exerted strong pressure on carriers to develop a common approach regarding surcharge mechanisms.

(1284) The Commission does not accept these arguments. The poor economic state of the sector concerned is not accepted as an attenuating circumstance. In attempting to cope with difficult market conditions or falls in demand, undertakings must only use means that are consistent with competition rules.[1555] This does not give rise to a mitigating circumstance in the present case.

1553 Case C-100/80 *Musique Diffusion Francaise v Commission,* ECLI:EU:C:1983:158, Case T-77/*92 Parker Pen v Commission,* ECLI:EU:T:1994:85, Joined Cases T-71/03, *Tokai Carbon v Commission,* ECLI:EU:T:2005:220, C-338/00 *Volkswagen v Commission,* ECLI:EU:C:2003:473 and Case T- 338/94 *Finnboard v Commission,* ECLI:EU:T:1998:99

1554 Case T-56/99 *Marlines v Commission*, ECLI:EU:T:2003:333, paragraphs 14 and 70, and Case T-77/*92 Parker Pen v Commission,* ECLI:EU:T:1994:85.

1555 Case T-16/99 *Logstor Ror v Commission,* ECLI:EU:T:2002:72, paragraphs 319-320 and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and others v Commission,* ECLI:EU:T:2004:118, paragraph 345.

(1285) Furthermore the Commission does not accept as a mitigating circumstance the fact that customers do not oppose and even encourage a practice which is contrary to competition rules. CV asserts that its customers, the freight forwarders, put pressure on it to pursue anti-competitive conduct. CX submits that its customers preferred a system of uniform surcharges, and that this system increased transparency and avoided complexity. These arguments are rejected, as encouragement of an infringement by customers does not change the fact of the infringement or its anti-competitive nature and does not give rise to a mitigating circumstance in this case. [1556]

8.4.2.7. Cooperation with the Commission

(1286) BA submits that it has effectively co-operated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so. Extensive cooperation with the Commission is a mitigating circumstance of which the Commission may take account, listed under point 29 of the Guidelines on fines.

(1287) BA notes that it was the first leniency applicant to submit [*] and that it provided [*] to the Commission. It argues that these covered all of the elements of the infringement for which BA could be fined and provided further corroborating evidence to that specifically relied upon by the Commission in the SO. BA notes that [*].

(1288) To the extent that BA's cooperation merits a reduction, this is considered when applying the Leniency Notice.[1557] The Commission considers that there are no exceptional circumstances present in this case that could justify granting a reduction for effective cooperation falling outside the scope of the Leniency Notice, and does not consider that BA has co-operated with the Commission beyond its legal obligation to do so.[1558] The Commission therefore considers that regarding BA's cooperation point 29 of the Guidelines on fines is not applicable.

8.4.2.8. Compliance programme

(1289) CV, LA and CX claim that the existence of compliance programmes should be accepted as an attenuating circumstance. CV explains that an extensive programme was introduced following the Commission's investigations comprising internal training courses and follow-up seminars. CX details the establishment of a programme under the auspices of a Competition Compliance Steering Committee. A new 'Antitrust Policy and Guidelines' have been adopted and training sessions and workshops have been introduced. LA details the expansion of its compliance programme to include mandatory seminars.

(1290) While the Commission welcomes the existence of compliance programmes and policies, it considers compliance with the law as a natural obligation of each company and does not consider such compliance, or a programme ensuring such compliance, as going beyond what is expected. It does not alter the fact of the

[1556] Case T-127/04 *KME v Commission,* ECLI:EU:T:2004:118, paragraphs 114-115.
[1557] Case T-15/02 BASF v Commission, ECLI:EU:T:2006:74 , paragraph 586.
[1558] Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rorindustri and Others v Commission,* ECLI:EU:C:2005:408, paragraphs 380-382 and Case T-15/02 *BASF v Commission,* ECLI:EU:T:2006:74, paragraphs 585-586.

infringement found in the present case.[1559] The existence of a compliance programme or the adoption of new programmes cannot, therefore, be accepted as an attenuating circumstance.

8.4.3. Specific increase for deterrence

(1291) Point 30 of the Guidelines on fines provides that '[t]he Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particular large turnover beyond the sales of goods or services to which the infringement relates'.

(1292) The Commission does not apply any specific increase for deterrence in this case to any of the addressees.

8.4.4. Conclusion on the adjusted basic amounts

(1293) The adjusted basic amounts of fines to be imposed on the undertakings involved are as follows:

Table 7

All amounts are in EUR

Air Canada	24 750 000
Air France-KLM Société Air France	228 650 000 228 650 000
Koninklijke Luchtvaartmaatschappij N.V. Air France-KLM	158 950 000 155 550 000
British Airways Plc	115 600 000
Cargolux Airlines International S.A.	173 400 000
Cathay Pacific Airways Limited	71 400 000
Japan Airlines Co., Ltd.	47 600 000
Latam Airlines Group, S.A. LAN Cargo S.A.	10 275 000 10 275 000
Lufthansa Cargo AG	338 300 000

[1559] Case T-7/89 *Hercules Chemicals v Commission,* ECLI:EU:T:2006:74, paragraph 357. Joined Cases T-109/02, T-122/02, T-125/02, T-126/02, T132-02, T-136/02 *Bollore SA and others v Commission,* ECLI:EU:T:2007:115, paragraph 653.

Deutsche Lufthansa AG	338 300 000
SWISS International Air Lines AG Deutsche Lufthansa AG	12 325 000 3 825 000
Martinair Holland N.V.	97 750 000
SAS AB SAS Cargo Group A/S SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	45 000 000 76 250 000 17 500 000
Singapore Airlines Cargo Pte Ltd Singapore Airlines Limited	74 800 000 74 800 000

8.5. Application of the 10% of turnover limit

(1294) The second subparagraph of Article 23(2) of Regulation (EC) No 1/2003 provides that for each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year. Accordingly, a reduction is required when the adjusted basic amount of the fine is above 10% of the worldwide turnover in 2016. Moreover, having regard to the procedural nature of the annulments of the 2010 Decision by the 2015 Judgments (see recitals (9) - (10)), a reduction is necessary when the adjusted basic amount of the fine is above 10% of the worldwide turnover in 2009 so that none of the addressees receive a higher fine compared to the 2010 Decision[1560]. Thus, the Commission considers it fair to use its discretion and reduce the adjusted basic amount of the fine to 10% of the worldwide turnover in 2009 when the worldwide turnover of an addressee in 2016 was higher than the worldwide turnover of an addressee in 2009.

(1295) Cargolux's total turnover was 942 million in 2009 and EUR [1 500 – 2 000] million in 2016. Thus, the adjusted basic amount of its fine should be reduced to EUR 94 million.

(1296) Martinair's total turnover was [*]. Thus, the adjusted basic amount of its fine should be reduced to EUR 30.8 million.

8.6. Application of the 2002 Leniency Notice

(1297) As indicated in Section 3, the investigation in this case was initiated after information was brought to the attention of the Commission by LH, which applied for immunity under the terms of the Leniency Notice.

[1560] See also Cargolux White Paper of 10 January 2017.

(1298) KL argued that [*] should be analysed with restraint especially with regard to three circumstances: first, LH's leading role also implies that its stated intention with regard to its initiatives vis-à-vis other carriers are not representative of the intentions of the other undertakings involved. Second, as evidence relating to events that occurred after 1 May 2004 have more leniency value, applicants might overstate such relevant evidence. Third, evidence provided by carriers with headquarters outside the EEA concerning coordination in their home market does not prove a global attempt to coordinate [*].

(1299) The Commission has evaluated the evidence in the file, including [*] by applicants under the Leniency Notice, taking into account the relevant standards set by the Court of Justice of the European Union.

(1300) As explained in Section 4.1 of this Decision the cartel involves a complex multi-level structure of bilateral and multilateral contacts which took place in various places in the world. In order to establish the participation of undertakings in the infringement, it is necessary to present sufficient evidence relating to cartel contacts involving them. The leniency submissions of many applicants represent significant added value because these submissions allowed the Commission to have sufficient evidence to hold certain addressees (including the leniency applicants themselves) liable for the infringement. Moreover, the inspections conducted in Europe could not uncover all the evidence of this worldwide cartel.

8.6.1. Lufthansa

(1301) LH was the first undertaking to inform the Commission about a secret cartel concerning airfreight services. LH applied for immunity on 7 December 2005 under the terms of the Leniency Notice. In the course of the Commission's investigation LH provided [*] and a number of documents.

(1302) Prior to the application, the Commission had not undertaken any investigation into the alleged cartel nor did it have in its possession any evidence on the basis of which to carry out an inspection. As the information provided by LH enabled the Commission to adopt a decision to carry out inspections pursuant to Article 20(4) of Regulation No 1/2003, LH was granted conditional immunity from fines pursuant to point 8(a) of the Leniency Notice. The inspections took place on 14 February 2006.

(1303) In order to qualify for immunity from a fine, the Leniency Notice requires applicants for immunity pursuant to point 8(a) to meet the cumulative conditions set out in point 11 of the Leniency Notice, in addition to the conditions entitling them to benefit from conditional immunity under point 8(a). Point 11(a) of the Leniency Notice lays down the obligation for the applicant for immunity to cooperate fully, on a continuous basis and expeditiously throughout the administrative procedure, and to provide all evidence that comes into its possession or that is available to it. Point 11(b) and (c) require the applicant for immunity to end its involvement in the suspected infringement no later than the time at which it submits evidence under point 8 and not to have taken any steps to coerce other undertakings to participate in the infringement.

(1304) According to the evidence in the Commission's possession, LH terminated its involvement in the infringement at the latest at the time at which it first submitted evidence to the Commission. Furthermore there is no evidence that LH exerted pressure on other addressees to join the cartel arrangements. Finally the Commission is of the opinion that LH has fulfilled the requirements of point 11(a) of the Leniency

Notice. In their replies to the Statement of Objections, AF and BA argued that LH continued to have anticompetitive contacts after it submitted its application for immunity. The Commission is aware of these contacts and, given the particular circumstances of this case, does not see a reason to withdraw immunity.

(1305) In conclusion LH should be granted immunity from any fines that would otherwise have been imposed on it with regard to this case.

8.6.2. Martinair

(1306) MP submitted an application under the Leniency Notice on [*] consisting of [*] and the submission of documents.

(1307) None of the documents submitted were in the Commission's possession before. [*].

(1308) MP made further [*] on [*].

(1309) Throughout the investigation, MP has answered the Commission's requests for information, without, however, exceeding its obligations under Article 18 and 23 of Regulation (EC) No 1/2003.

(1310) The evidence submitted by MP in its submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

MP provided [*] which made it possible to establish its presence in particular at a number of meetings and exchanges, which would not otherwise have been possible.

MP gave a detailed overview of [*].

The evidence provided in a timely manner by MP [*] that was corroborated by other evidence helped the Commission [*] the investigation.

MP provided information on [*].

Also, [*].

MP furthermore provided [*] which was previously unknown to the Commission.

(1311) In conclusion, [*], MP enabled the Commission to prove [*] in the cartel and [*] and its submissions corroborated [*] provided by other applicants.

(1312) There is no evidence that MP had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1313) MP is therefore the first undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, MP's fine is reduced by 50%.

8.6.3. Japan Airlines

(1314) JL submitted an application under the Leniency Notice on [*] consisting of [*].

(1315) In its submissions of [*] JL provided evidence of [*]. [*]. It also corroborated certain information already in the Commission's possession which it had received either through inspections or through provision by the applicant for immunity.

(1316) JL's application was supported by [*].

(1317) Throughout the investigation, JL has answered the Commission's requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation No 1/2003.

(1318) The evidence submitted by JL in its submissions constitutes significant added value in the sense of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

JL provided [*] information which made it possible to [*], which would not otherwise have been possible.

JL provided [*] which was not previously in the Commission's possession.

JL [*] provide [*].

JL has also provided evidence [*].

(1319) In conclusion, JL provided significant evidence which was not already in the Commission's possession. Although it helped the Commission establish the infringement, the evidence provided also covered issues outside the scope of the infringement described in this Decision and it focussed on issues in Japan. It was of limited scope concerning the infringement itself and JL's participation in it.

(1320) There is no evidence that JL had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1321) JL has argued that it should be regarded as being the first undertaking to submit evidence of significant added value in relation to an infringement on the routes between the EEA and Japan. However, as set out at Section 5.3.2 the Commission maintains its position that the infringement is characterised as single and continuous and rejects JL's arguments about multiple infringements in separate markets.

(1322) JL is therefore the second undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, JL's fine is reduced by 25%.

8.6.4. Air France-KLM

(1323) Air France-KLM submitted an application under the Leniency Notice on [*] consisting of [*].

(1324) [*]. No contemporary documents were submitted at this point in time.

(1325) Further submissions consisting of [*] were made on [*].

(1326) Throughout the investigation, Air France-KLM has answered the Commission's requests for information, without, however, exceeding its obligations under Article 18 and 23 of Regulation No 1/2003.

(1327) The evidence submitted by Air France-KLM in the above mentioned submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

[*][1561] that the Commission already had some knowledge of through information provided by LH as well as some documents found in the inspection on 14 February 2006[1562]. The submission [*], thus enabling the Commission to prove one instance of the infringement in more detail.

[*].

The evidence provided enables the Commission to prove the infringement [*].

(1328) In conclusion, Air France-KLM provided additional evidence in relation to [*] and its submissions corroborated the [*] provided by other applicants.

(1329) There is no evidence that Air France-KLM had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1330) Air France-KLM is therefore the third undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, Air France-KLM's fine is reduced by 20%.

8.6.5. Cathay Pacific

(1331) CX submitted an application under the Leniency Notice on [*] consisting of [*].

(1332) [*]. The [*] submitted provide new evidence of [*].

(1333) CX submitted further [*] on [*]. These submissions [*].

(1334) Throughout the investigation, CX has answered the Commission's requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation No 1/2003.

(1335) The evidence submitted by Cathay Pacific in its submissions constitutes significant added value within the meaning of the Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

[*].

[*]. However, CX argued in its response to the SO that the FSC in Hong Kong was coordinated in full compliance with obligations under local legislation and administrative practices, and as such it does not constitute an infringement of Article 101 of the TFEU.

CX provided [*] that show [*]. CX also provided evidence concerning [*].

CX provided evidence concerning [*].

CX provided evidence concerning [*].

The information provided in the submissions enables the Commission to prove the infringement [*]. The application also provided a better understanding of and context for the contemporaneous documentary evidence by [*].

[1561] [*]
[1562] [*]

(1336) In conclusion, CX provided additional evidence in relation to [*] and its submissions corroborated the [*] provided by other applicants that helped the Commission to establish the infringement more in detail and to broaden its scope.

(1337) There is no evidence that CX had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1338) CX is therefore the fourth undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, CX's fine is reduced by 20%.

8.6.6. Latam Airlines Group, S.A.

(1339) LA submitted an application under the Leniency Notice on [*].

(1340) In its submission, LA gave [*], and included instances of the infringement of which the Commission had no previous knowledge. It also [*]. The documents provided consisted mainly of information [*].

(1341) Further submissions were made on [*].

(1342) Throughout the investigation, LA has answered the Commission's requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation (EC) No 1/2003.

(1343) The evidence submitted by LA in the above mentioned submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

LA provided [*].

LA provided new information on [*].

LA provided evidence that corroborated [*] and evidence gained from inspections. Its submission corroborated [*].

(1344) In conclusion, LA provided additional evidence in relation to [*] and its submissions corroborated [*].

(1345) There is no evidence that LA had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1346) LA is therefore the fifth undertaking to satisfy point 21 of the Leniency Notice. Having regard to the considerable value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, LA's fine is reduced by 20%.

8.6.7. SAS Group

(1347) SK submitted an application under the Leniency Notice on [*] consisting respectively of [*].

(1348) [*].

(1349) Further [*] were made on [*] and were accompanied by the submission of [*].

(1350) Throughout the investigation, SK has answered the Commission's requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation No 1/2003.

(1351) The evidence submitted by SK in the above mentioned submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

Concerning the FSC, [*][1563] [*][1564].

[*][1565].

(1352) In conclusion, SK provided additional evidence in relation to [*] and its submissions corroborated [*].

(1353) There is no evidence that SK had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1354) SK is therefore the sixth undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the relatively late stage at which it provided this contribution and the extent of its cooperation following its submissions, SK's fine is reduced by 15%.

8.6.8. Cargolux Airlines International S.A.

(1355) CV submitted an application under the Leniency Notice on [*] consisting of [*].

(1356) In its submission, CV [*] concerning various aspects of the cartel. [*] but the documentation provided in the submission was more detailed than the evidence already in the Commission's possession.

(1357) Further submissions were made on [*].

(1358) Throughout the investigation, CV has answered the Commission's requests for information, without, however, exceeding its obligations under Article 18 and 23 of Regulation No 1/2003.

(1359) The evidence submitted by CV in the submissions mentioned in recitals (1355) and (1357) constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

CV provided [*].

CV provided [*].

CV submitted information which corroborated [*] and evidence gained from inspections. Its submission on [*] corroborated evidence about [*].

Information submitted by CV corroborated [*].

(1360) In conclusion, CV provided additional evidence in relation to [*], and its submissions corroborated [*].

1563 [*]
1564 [*]
1565 [*]

(1361) There is no evidence that CV had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1362) CV is therefore the seventh undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the relatively late stage at which it provided this contribution and the extent of its cooperation following its submissions, CV's fine is reduced by 15%.

8.6.9. British Airways

(1363) BA submitted an application under the Leniency Notice on [*] consisting of [*].

(1364) This submission of [*] is composed of [*] that were already known to the Commission from inspections, a few new documents of limited value to the Commission and [*] that is evasive and unclear in respect of the cartel and BA's participation in it.

(1365) This submission does therefore not provide significant added value as neither the [*] made nor the [*] submitted on [*] provide the Commission with significant relevant additional evidence of the alleged infringement.

(1366) [*][1566][*]. Those [*] were known to the Commission through earlier submissions by LH as well as through information gained via the inspection at BA premises on 14 February 2006. First, [*]. [*][1567].[*][1568] [*][1569]. [*][1570], [*]. This was not previously known to the Commission. However, BA also states that no relevant anti-competitive behaviour occurred at these meetings. BA [*][1571]. This complements information already provided by LH[1572]. The [*] was already known to the Commission and calls are simply listed without any description of the content. Third, the [*] are described in a general manner, without the provision of relevant details[1573]. With reference to [*] BA states that his contacts with [*] consisted usually of business conversations about industry matters and that they did not represent illicit behaviour. Accordingly the Commission does not consider that BA provided significant added value in respect of [*] of BA given such information was in the Commission's possession already, and is not sufficiently detailed evidence and does not substantiate the infringement.

(1367) Significant added value is not provided [*], which covers other contacts which do not relate to the alleged infringement. Subsequently reference is made to [*][1574]. [*][1575] and BA does not state the source of this information.

(1368) The remainder of the [*]. BA does not make it clear whether or not illicit competitor contacts on these matters occurred. Furthermore, the [*] do not form part of the infringement described in this Decision.

1566 [*]
1567 [*]
1568 [*]
1569 [*]
1570 [*]
1571 [*]
1572 [*]
1573 [*]
1574 [*]
1575 [*]

(1369) Finally, information on the compliance program run by BA cannot be considered to strengthen the Commission's ability to prove an infringement.

(1370) The other [*] submitted on [*] do not provide significant added value either. Certain [*][1576] provide general information about BA and its fuel surcharge system but no relevant information on the alleged infringement. Many documents submitted were already known to the Commission as they had been found during the inspection of BA premises on 14 February 2006[1577]. Another [*][1578] refers to [*] of which the Commission had prior knowledge.[1579] Other [*] submitted include [1580] copies of press releases that were and are publicly accessible, and some of the documents submitted[1581] do not relate to the alleged infringement.

(1371) BA's submission on [*] does therefore not meet the requirements for BA to qualify for a reduction of fines under point 26 of the Leniency Notice.

(1372) On [*] BA made [*] and submitted further [*].

(1373) [*] submitted provide no evidence on illegal competitor contacts but deal solely with WorldACD (World Air Cargo Daily). WorldACD is an independent information aggregator serving individuals and companies involved in the airfreight sector with general information and specific data. BA did not identify any anti-competitive conduct on its part, or on the part of other airlines or of WorldACD.

(1374) Hence the evidence provided by BA on [*] does not represent significant added value with regard to the Commission's ability to prove the existence of the alleged cartel. BA's submission on [*] does therefore not meet the requirements set for BA to qualify for a reduction of fines under point 26 of the Leniency Notice.

(1375) BA [*] submitted [*]. The submission concerned events in Dubai which do not form part of this Decision and as such does not constitute significant added value.

(1376) BA submitted further [*].

(1377) Throughout the investigation, BA has answered the Commission’s requests for information, although not exceeding its obligations under Article 18 and 23 of Regulation No 1/2003.

(1378) The evidence submitted by BA in its submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission’s ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine

BA provided evidence on which the Commission has relied in respect of various jurisdictions around the world namely [*].

BA has also provided evidence of [*] although as outlined in this Section the majority of the evidence was already in the Commission's possession and its nature is moreover corroborative.

1576 [*]
1577 [*]
1578 [*]
1579 [*]
1580 [*]
1581 [*]

(1379) In conclusion, BA provided some evidence which was not already in the Commission's possession and also submitted evidence which was corroborative in nature.

(1380) There is no evidence that BA had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1381) BA is therefore the ninth undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the relatively late stage at which it provided this contribution and the extent of its cooperation following its submissions, BA's fine is reduced by 10%.

8.6.10. Air Canada

(1382) AC submitted an application under the Leniency Notice on [*].

(1383) [*] AC provides an overview of a wide range of topics relating to the alleged cartel, ranging from [*].

(1384) Further [*] were made on [*] and were [*] relating to various matters [*].

(1385) Throughout the investigation, AC has answered the Commission's requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation (EC) No 1/2003.

(1386) The evidence submitted by AC in the above mentioned submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

AC provided [*].

AC provided [*], which was not previously in the Commission's possession.

AC also provided [*] which was not previously in the Commission's possession.

AC provided [*] which were not previously in the Commission's possession.

AC's application also corroborates information already provided by other applicants for example, in relation to [*].

(1387) In conclusion, AC provided additional evidence in relation to [*] and its submissions corroborated the [*].

(1388) There is no evidence that AC had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1389) AC is therefore the tenth undertaking to satisfy point 21 of the 2002 Leniency Notice. Having regard to the considerable value of its contribution to this case, the late stage at which it provided this contribution, the extent of its cooperation following its submissions, and notwithstanding its letters of 7 and 14 February and 7 March 2017 (see recital (100) and (103)), AC's fine is reduced by 15%.

8.7. Ability to pay

(1390) According to point 35 of the 2006 Guidelines on fines, *'In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial*

situation. A reduction could be granted solely on the basis of objective evidence that the imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'

(1391) In exercising its discretion under point 35 of the 2006 Guidelines on fines, the Commission carries out an overall assessment of the undertaking's financial situation, with the primary focus on the undertaking's capacity to pay the fine in a specific social and economic context.

(1392) [*]

(1393) [*]

(1394) [*]

(1395) [*][1582]

(1396) [*]

(1397) [*][1583]

(1398) [*]

(1399) [*]

(1400) [*]

(1401) [*]

(1402) [*].

(1403) [*]

8.8. The amounts of the fines to be imposed in this Decision

(1404) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as set out by legal entity in Table 8 below. These figures are the amounts for which each legal entity is cumulatively liable on a sole and on a joint and several basis. The basis and periods for which legal entities are found to be solely liable and/or jointly and severally liable are set out in detail in Section 6.2. On the basis of Section 6.2, the liabilities of the legal entities within the undertaking for such fines are set out in Article 5 of this Decision where the Commission has apportioned, as necessary, the amount of the fine in order to reflect the duration of the liability of the legal entities for the infringement.

Table 8

All amounts are in EUR

[1582] See Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, *IAZ International Belgium and Others* v Commission, ECLI:EU:C:1983:310, paragraphs 54 and 55, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others* v *Commission,* ECLI:EU:C:2005:408, paragraph 327, and Case C-308/04 P, *SGL Carbon AG* v *Commission,* ECLI:EU:C:2006:433, paragraph 105.

[1583] By analogy to the assessment of "*serious and irreparable harm*" in the context of interim measures, the Commission bases its assessment of the undertaking's ability to pay on the financial situation of the undertaking as a whole, including its shareholders, irrespective of the finding of liability (Case C-335/99 P (R), *HFB* v. *Commission,* ECLI:EU:C:1999:608; Case C-7/01 P(R), *FEG* v. *Commission*, ECLI:EU:C:2001:183), and Case T-410/09 R *Almamet* v. *Commission,* ECLI:EU:T:2010:179, paragraphs 47 *et seq.*

Air Canada	21 037 500
Air France-KLM Société Air France	182 920 000 182 920 000
Koninklijke Luchtvaartmaatschappij N.V. Air France-KLM	127 160 000 124 440 000
British Airways Plc	104 040 000
Cargolux Airlines International S.A.	79 900 000
Cathay Pacific Airways Limited	57 120 000
Japan Airlines Co., Ltd.	35 700 000
Latam Airlines Group, S.A. LAN Cargo S.A.	8 220 000 8 220 000
Lufthansa Cargo AG Deutsche Lufthansa AG	0 0
SWISS International Air Lines AG Deutsche Lufthansa AG	0 0
Martinair Holland N.V.	15 400 000
SAS AB SAS Cargo Group A/S SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	38 250 000 64 812 500 14 875 000
Singapore Airlines Cargo Pte Ltd Singapore Airlines Limited	74 800 000 74 800 000

HAS ADOPTED THIS DECISION:

Article 1

By coordinating their pricing behaviour in the provision of airfreight services on a global basis with respect to the fuel surcharge, the security surcharge and the payment of commission payable on surcharges, the following undertakings have committed the following single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union ('TFEU'), Article 53 of the Agreement on the European Economic Area ('EEA Agreement') and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport as regards the following routes and for the following periods.

(1) The following undertakings have infringed Article 101 of the TFEU and Article 53 of EEA Agreement as regards routes between airports within the EEA, for the following periods:

(a) Air Canada from 21 September 2000 until 14 February 2006;

(b) Air France-KLM from 7 December 1999 until 14 February 2006;

(c) Société Air France from 7 December 1999 until 14 February 2006;

(d) Koninklijke Luchtvaartmaatschappij N.V. from 21 December 1999 until 14 February 2006;

(e) British Airways Plc from 22 January 2001 until 14 February 2006 excluding the period from 2 October 2001 to 14 February 2006 in relation to the fuel surcharge and the security surcharge;

(f) Cargolux Airlines International S.A. from 22 January 2001 until 14 February 2006;

(g) Cathay Pacific Airways Limited from 4 January 2000 until 14 February 2006;

(h) Japan Airlines Co., Ltd. from 7 December 1999 until 14 February 2006;

(i) Latam Airlines Group, S.A. from 25 February 2003 until 14 February 2006;

(j) LAN Cargo S.A. from 25 February 2003 until 14 February 2006;

(k) Lufthansa Cargo AG from 14 December 1999 until 7 December 2005;

(l) Deutsche Lufthansa AG from 14 December 1999 until 7 December 2005;

(m) SWISS International Air Lines AG from 2 April 2002 until 7 December 2005;

(n) Martinair Holland N.V. from 22 January 2001 until 14 February 2006;

(o) SAS AB from 17 August 2001 until 14 February 2006;

(p) SAS Cargo Group A/S from 1 June 2001 until 14 February 2006;

(q) SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden from 13 December 1999 until 28 December 2003;

(r) Singapore Airlines Cargo Pte Ltd from 1 July 2001 until 14 February 2006;

(s) Singapore Airlines Limited from 4 January 2000 until 14 February 2006.

(2) The following undertakings infringed Article 101 of the TFEU as regards routes between airports within the European Union and airports outside the EEA, for the following periods:

(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) Koninklijke Luchtvaartmaatschappij N.V. from 1 May 2004 until 14 February 2006;

(e) British Airways Plc from 1 May 2004 until 14 February 2006 excluding freight services performed other than from Hong Kong (China), Japan, India, Thailand, Singapore, South Korea and Brazil in relation to the fuel surcharge and the security surcharge;

(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 Co., Ltd. from 1 May 2004 until 14 February 2006;

(i) Latam Airlines Group, S.A. from 1 May 2004 until 14 February 2006

(j) LAN Cargo S.A. from 1 May 2004 until 14 February 2006

(k) Lufthansa Cargo AG from 1 May 2004 until 7 December 2005;

(l) Deutsche Lufthansa AG from 1 May 2004 until 7 December 2005;

(m) SWISS International Air Lines AG from 1 May 2004 until 7 December 2005;

(n) Martinair Holland N.V. from 1 May 2004 until 14 February 2006;

(o) SAS AB from 1 May 2004 until 14 February 2006;

(p) SAS Cargo Group A/S from 1 May 2004 until 14 February 2006;

(q) Singapore Airlines Cargo Pte Ltd from 1 May 2004 until 14 February 2006;

(r) Singapore Airlines Limited from 1 May 2004 until 14 February 2006.

(3) The following undertakings infringed Article 53 of the EEA Agreement as regards routes between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and airports in third countries, for the following periods:

(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) Koninklijke Luchtvaartmaatschappij N.V. from 19 May 2005 until 14 February 2006;

(e) British Airways Plc from 19 May 2005 until 14 February 2006 excluding freight services performed other than from Hong Kong (China), Japan, India, Thailand, Singapore, South Korea and Brazil in relation to the fuel surcharge and the security surcharge;

(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 Co., Ltd. from 19 May 2005 until 14 February 2006;

(i) Latam Airlines Group, S.A. from 19 May 2005 until 14 February 2006;

(j) LAN Cargo S.A. from 19 May 2005 until 14 February 2006;

(k) Lufthansa Cargo AG from 19 May 2005 until 7 December 2005;

(l) Deutsche Lufthansa AG from 19 May 2005 until 7 December 2005;

(m) SWISS International Air Lines AG from 19 May 2005 until 7 December 2005;

(n) Martinair Holland N.V. 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.

(4) The following undertakings infringed Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport as regards routes between airports within the European Union and airports in Switzerland, for the following periods:

(a) Air Canada from 1 June 2002 until 14 February 2006;

(b) Air France-KLM from 1 June 2002 until 14 February 2006;

(c) Société Air France from 1 June 2002 until 14 February 2006;

(d) Koninklijke Luchtvaartmaatschappij N.V. from 1 June 2002 until 14 February 2006;

(e) British Airways Plc from 1 June 2002 until 14 February 2006 except in relation to the fuel surcharge and the security surcharge;

(f) Cargolux Airlines International S.A. from 1 June 2002 until 14 February 2006;

(g) Cathay Pacific Airways Limited from 1 June 2002 until 14 February 2006;

(h) Japan Airlines Co., Ltd. from 1 June 2002 until 14 February 2006;

(i) Latam Airlines Group, S.A. from 25 February 2003 until 14 February 2006;

(j) LAN Cargo S.A. from 25 February 2003 until 14 February 2006;

(k) Lufthansa Cargo AG from 1 June 2002 until 7 December 2005;

(l) Deutsche Lufthansa AG from 1 June 2002 until 7 December 2005;

(m) SWISS International Air Lines AG from 1 June 2002 until 7 December 2005;

(n) Martinair Holland N.V. from 1 June 2002 until 14 February 2006;

(o) SAS AB from 1 June 2002 until 14 February 2006;

(p) SAS Cargo Group A/S from 1 June 2002 until 14 February 2006;

(q) SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden from 1 June 2002 until 28 December 2003;

(r) Singapore Airlines Cargo Pte Ltd from 1 June 2002 until 14 February 2006;

(s) Singapore Airlines Limited from 1 June 2002 until 14 February 2006.

Article 2

Decision C(2010)7694 final of 9 November 2010 is amended as follows:

In Article 5, points (j), (k) and (l) are repealed.

Article 3

For the single and continuous infringement referred to in Article 1 (and as regards British Airways Plc also for the aspects of Articles 1 to 4 of Decision C(2010) 7694 final of 9 November 2010 that have become final), the following fines are imposed:

(a) Air Canada: EUR 21 037 500;

(b) Air France-KLM and Société Air France jointly and severally: EUR 182 920 000;

(c) Koninklijke Luchtvaartmaatschappij N.V.: EUR 2 720 000;

(d) Koninklijke Luchtvaartmaatschappij 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 Co., Ltd.: EUR 35 700 000;

(i) Latam Airlines Group, 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 15 400 000;

(n) SCANDINAVIAN AIRLINE SYSTEM Denmark – Norway - Sweden: EUR 5 355 000;

(o) SAS Cargo Group A/S and SCANDINAVIAN AIRLINE SYSTEM Denmark – Norway - Sweden jointly and severally: EUR 4 254 250;

(p) SAS Cargo Group A/S, SCANDINAVIAN AIRLINE SYSTEM Denmark – Norway - Sweden and SAS AB jointly and severally: EUR 5 265 750 EUR;

(q) SAS Cargo Group A/S and SAS AB jointly and severally: EUR 32 984 250;

(r) SAS Cargo Group A/S: 22 308 250;

(s) Singapore Airlines Cargo Pte Ltd and Singapore Airlines Limited jointly and severally: EUR 74 800 000.

The fines shall be credited in euros, within three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
BIC: BCEELULL
Ref.: European Commission – BUFI/AT.39258

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date, either by providing an acceptable financial guarantee or making a provisional payment of the fine in accordance with Article 90 of Commission Delegated Regulation (EU) No 1268/2012[1584].

Article 4

The undertakings listed in Article 1 shall immediately bring to an end the single and continuous infringement referred to in that Article insofar as they have not already done so.

They shall also refrain from repeating any act or conduct having the same or similar object or effect.

Article 5

This Decision is addressed to

[1584] OJ L 362, 31.12.2012, p. 1.

Air Canada
7373 Cote Vertu Road West
Saint-Laurent (Quebec) H4S 1Z3
Canada

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Koninklijke Luchtvaartmaatschappij N.V.
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United Kingdom

Cargolux Airlines International SA
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SCANDINAVIAN AIRLINES SYSTEM Denmark-Norway-Sweden
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SE-195 87 Stockholm
Sverige

Singapore Airlines Cargo Pte Ltd
09-D Airline House
25 Airline Road
Singapore 819829

Singapore Airlines Limited
08-D Airline House
25 Airline Road
Singapore 819829

This Decision shall be enforceable pursuant to Article 299 of the Treaty and Article 110 of the EEA Agreement.

Done at Brussels, 17.3.2017

For the Commission
Margrethe VESTAGER
Member of the Commission