

Annulment of the Commission decision in the airfreight cartel case

⑦ Cases T-9/11, T-28/11, T-36/11, T-38/11, T-39/11, T-40/11, T-43/11, T-46/11, T-48/11, T-56/11, T-62/11, T-63/11, T-67/11 of the General Court, *Airfreight*, December 16, 2015

On December 18, 2015, the General Court annulled the Commission's decision in the airfreight cartel case.

As a matter of background, on December 9, 2010, the Commission fined 21 airlines for price fixing on freight services. It argued that the airlines had agreed on fuel surcharge and security charges on routes between the EU/EEA and third-country airports over various periods. The Commission imposed fines of €799 million on the airlines, except for Lufthansa and Swiss, which had obtained full immunity under the Commission's leniency program.

In the decision's grounds, the Commission found the existence of a single, complex and continuous infringement for all the unlawful conducts. This concept allows the Commission to conclude that several individual but related infringements constitute a single infringement when they are part of a "global plan". To the extent the Commission shows that each company is aware of and intends to participate in this global plan, it can hold each company accountable for the entire infringement, even if it has not directly participated in all its components. The Commission may use this power without prejudice of its obligation to adapt the level of the fine to the personal involvement of each company.

The Commission's decision showed some inconsistencies between the operative part and its grounds. Indeed, on the one hand, the Commission retained the existence of four different infringements, incriminating for each of them different air carriers depending on the routes and periods concerned, and on the other hand, imposed a single fine on each carrier for all four offenses.

Therefore, the General Court found that the operative part and the grounds were contradictory and annulled the decision.

It is interesting to note that the successful plea pointing out the decision's internal inconsistencies was raised by the air carriers only at the hearing before the General Court, at a very advanced stage of the proceedings. The General Court admitted this plea and ruled that the inconsistencies prevented it from exercising control over the decision's legality and infringed the plaintiffs' rights of defense.

This judgment underlines the importance of the operative part of the Commission decisions, which is the only part that formally establishes the nature and extent of the infringements as well as the identity of the authors. The

crucial nature of the operative part is particularly significant in the context of the development of actions for damages following competition law infringements. Under Directive 2014/104/EU, which must be transposed in Member States' national laws in 2016, it is indeed the operative part of a decision that plays a central role for damages actions.

Following the judgment, the Commission confirmed officially its intention not to appeal the judgment to the

Court of Justice. This should avoid extending the suspension of the ongoing actions for damages against the airlines. Two options thus remain open: either the Commission adopts a new fining decision taking into account the judgment or it decides to simply drop the case.