

3. Third plea in law, alleging a manifest error of assessment since the Commission failed to establish a reliable evidential basis for its conclusions or to prove the facts on which it bases its findings to the required legal standard. In this regard, the applicant submits that:

— none of the errors contained in the statement of objections and brought to the Commission's attention at the time have been corrected in the decision;

— the Commission has abused the concept of the single continuous infringement by insisting that entirely innocent conduct can form part of the illegal enterprise and has used the label of a 'global cartel' as an excuse to bring in entirely prejudicial and irrelevant evidence.

4. Fourth plea in law, alleging that the Commission erred in law by wrongly asserting jurisdiction over supposed anti-competitive coordination in relation to flights from third country airports to airports inside the EEA ('inbound flights'). In the applicant's submissions such activities are outside of the territorial scope of Article 101 TFEU and Article 53 of the EEA Agreement.

5. Fifth plea in law, put forward as regards to the review of the fine under the unlimited jurisdiction of the Court, alleging a manifest error of assessment and breach of principle of proportionality. In this regard the applicant submits that:

— the 2006 Fine Guidelines are not compatible with the requirement of Article 23(2) of Regulation 1/2003 <sup>(1)</sup> to base the fine on gravity and duration;

— the Commission grossly overstated the overall gravity of the alleged infringement. Neither the percentage level (16 % of the value of sales), nor the additional amount are warranted in the present case;

— in relation to the applicant, the Commission wrongly assessed the duration of the infringements, mistakenly rejected mitigating factors and failed to take account of all relevant circumstances including the overall fairness of the sanctions and the economic situation of the applicant.

<sup>(1)</sup> 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, OJ 2003 L 1, p. 1

## Action brought on 24 January 2011 — Lan Airlines and Lan Cargo v Commission

(Case T-40/11)

(2011/C 80/52)

*Language of the case: English*

### Parties

*Applicants:* Lan Airlines SA and Lan Cargo SA (Santiago, Chile) (represented by: B. Hartnett, Barrister, and O. Geiss, lawyer)

*Defendant:* European Commission

### Form of order sought

— Annul the contested decision insofar as it relates to the applicants;

— In the alternative, reduce the fine imposed on the applicants; and

— Order the defendant to pay the costs of the proceedings.

### Pleas in law and main arguments

By means of their application, the applicants seek, pursuant to Article 263 TFEU, the annulment of the Commission Decision of 9 November 2010 relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union ('TFEU'), Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case COMP/39.258 — Airfreight), insofar as it relates to the applicants.

In support of the action, the applicants rely on six pleas in law.

1. First plea in law, alleging that the Commission failed to establish, to the requisite legal standards, that the applicants participated in a single and continuous infringement and, as a result, committed an error in law and in fact when applying Article 101 TFEU, as:

— The Commission did not establish that Lan Cargo was aware or ought to have been aware of the existence of a common anti-competitive plan;

— The Commission did not establish that Lan Cargo intended by its own conduct to contribute to such common anti-competitive plan; and

— The Commission did not establish that Lan Cargo was aware of an infringement in relation to the security surcharge or commissioning on surcharges.

2. Second plea in law, alleging that the Commission breached the applicants' rights of defence, as:
- The Commission breached the applicants' rights of defence by relying on evidence that was not referred to in the Statement of Objections;
  - The Commission breached the applicants' rights of defence by relying on an interpretation of evidence that was not clearly set out in the Statement of Objections;
  - The Commission breached the applicants' rights of defence by raising objections in the contested decision on which the applicants had not had an opportunity to comment.
3. Third plea in law, alleging that the Commission breached the principles of equal treatment, individual liability and proportionality when determining the basic amount of the fine imposed on the applicants, as:
- The Commission's determination of the duration of the infringement did not correspond to the finding of both knowledge of and intent to participate in the alleged common anti-competitive plan;
  - The Commission erred when calculating the basic amount;
  - The Commission's calculation of the basic element of the fine failed to reflect the Applicants' limited participation in the alleged infringement; and
  - The Commission's calculation of the basic element of the fine failed to reflect that the alleged infringement did not cover the entire price of the relevant services.
4. Fourth plea in law, alleging that the Commission breached the principle of equal treatment and failed to state reasons when adjusting the basic fine amount for mitigating circumstances, as:
- The Commission failed to account for the very significant differences between the applicants' level of participation and the much greater participation of other airlines; and
  - The Commission failed to objectively justify its identical treatment of different airlines despite their significantly different situations.
5. Fifth plea in law, alleging that the Commission failed to state the reasons for its exclusion of eleven addressees of the Statement of Objections in the contested decision, for its finding that the applicants engaged in a single and continuous infringement, and for its calculation of the fine imposed as:
- The Commission failed to state its reasons for omitting from the contested decision eleven carriers that were addressed by its Statement of Objections;
  - The Commission failed to state its reasoning in relation to the constituent elements required by the Court to find that the applicant engaged in a single and continuous infringement; and
  - The Commission failed to state the reasoning that underlies its calculation of the fine imposed on the applicants under Article 5 of the contested decision.
6. Sixth plea in law, alleging that the Commission breached the applicants' right to a fair trial and, as a result, breached Article 47 of the Charter of Fundamental Rights of the European Union and Article 6 of the European Convention on Human Rights, as:
- The applicants were denied the opportunity to examine or cross-examine witnesses;
  - The applicants were denied the opportunity to comment on the calculation of the fine imposed on them;
  - The fine was imposed following an oral hearing that was not public and which the decision-maker did not attend; and
  - The contested decision was adopted by an administrative body, and no judicial body has full jurisdiction to review all aspects of it.

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**Action brought on 19 January 2011 — Universal v Commission**

**(Case T-42/11)**

(2011/C 80/53)

*Language of the case: English*

**Parties**

*Applicant:* Universal Corp. (Richmond, United States) (represented by: C.R.A. Swaak, lawyer)

*Defendant:* European Commission

**Form of order sought**

- Annul the contested decision set out in the letters of 12 and 30 November 2010; and/or
- Declare that the applicant cannot be held liable to pay for any part or all of the fine imposed in this case until a definitive judgment in case T-12/06 Deltafina v Commission or any follow-on proceedings is issued; and