Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

30 March 2022 *

(Competition – Agreements, decisions and concerted practices – Market for airfreight – Decision finding an infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport – Coordination of elements of the price of air freight services (fuel surcharge, security surcharge, payment of commission on surcharges) – Exchange of information – Territorial jurisdiction of the Commission – Obligation to state reasons – Article 266 TFEU – State coercion – Single and continuous infringement – Amount of the fine – Value of sales – Duration of participation in the infringement – Mitigating circumstances – Encouragement of anticompetitive conduct by public authorities – Unlimited jurisdiction)

In Case T-341/17,

British Airways plc, established in Harmondsworth (United Kingdom), represented by J. Turner, R. O'Donoghue QC, and A. Lyle-Smythe, Solicitor,

applicant,

v

European Commission, represented by N. Khan and A. Dawes, acting as Agents, and A. Bates, Barrister,

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) in so far as it relates to the applicant and, in the alternative, for cancellation of the fine imposed on the applicant or for a reduction in the amount thereof,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of H. Kanninen (Rapporteur), President, J. Schwarcz, C. Iliopoulos, D. Spielmann and I. Reine, Judges,

Registrar: E. Artemiou, Administrator,

* Language of the case: English.

having regard to the written part of the procedure and further to the hearing on 13 September 2019,

gives the following

Judgment[1]

…

II. Procedure and forms of order sought

59 By application lodged at the General Court Registry on 31 May 2017, the applicant brought the present action.

60 The Commission lodged its defence at the Court Registry on 29 September 2017.

61 The applicant lodged its reply at the Court Registry on 31 January 2018.

62 The Commission lodged its rejoinder at the Court Registry on 12 March 2018.

63 On 24 April 2019, on a proposal from the Fourth Chamber, the General Court decided, pursuant to Article 28 of its Rules of Procedure, to assign the present case to a chamber sitting in extended composition.

64 On 16 August 2019, in the context of the measures of organisation of procedure laid down in Article 89 of the Rules of Procedure, the General Court put written questions to the parties. The parties replied within the prescribed period.

65 At the hearing on 13 September 2019, the parties presented oral argument and answered the questions put by the General Court.

66 By order of 31 July 2020, the General Court (Fourth Chamber, Extended Composition), considering that it lacked sufficient information and that it was necessary to invite the parties to submit their observations concerning an argument which had not been debated between them, ordered the reopening of the oral part of the procedure pursuant to Article 113 of the Rules of Procedure.

67 The parties replied within the prescribed period to a series of questions put by the General Court on 4 August 2020, and then submitted observations on their respective replies.

68 By decision of 6 November 2020, the General Court again closed the oral part of the procedure.

69 By order of 28 January 2021, the General Court (Fourth Chamber, Extended Composition), again considering that it lacked sufficient information and that it was necessary to invite the parties to submit their observations on an argument which had not been debated between them, ordered the reopening of the oral part of the procedure pursuant to Article 113 of the Rules of Procedure.

[1] Only the paragraphs of the present judgment which the Court considers it appropriate to publish are reproduced here.

70 The Commission replied within the prescribed period to a series of questions put by the General Court on 29 January and 16 March 2021. Then, at the request of the General Court, the applicant submitted observations on those replies.

71 By decision of 25 May 2021, the General Court again closed the oral part of the procedure.

72 The applicant claims that the Court should:

– annul the contested decision in whole or in part in so far as it concerns it;

– further or alternatively, cancel or reduce the fine imposed on it in the contested decision;

– order the Commission to pay the costs.

73 The Commission contends, in essence, that the Court should:

– dismiss the action;

– modify the amount of the fine imposed on the applicant by withdrawing from it the benefit of the general 15% reduction should the Court conclude that turnover from the sale of inbound freight services cannot be included in the value of sales;

– order the applicant to pay the costs.

III. Law

…

A. The claim for annulment

…

3. The first plea, alleging an error or an inadequate statement of reasons, in so far as the contested decision is based on a legal assessment that is incompatible with the Decision of 9 November 2010, which it treats as final

201 The applicant argues that the contested decision is vitiated by an error or, in the alternative, by an inadequate statement of reasons, in so far as the infringement described in the reasoning of the contested decision and found in the operative part of that decision is incompatible with the infringement found in the Decision of 9 November 2010 – an infringement which is treated as final in the contested decision – in particular in the light of the number and identities of the co-perpetrators. It follows that neither national courts concerned with a consequential action in damages, nor the incriminated carriers are able to draw the consequences of the contested decision for damage claims.

202 The Commission disputes the applicant's arguments.

203 As a preliminary point, it should be noted that the applicant claims, principally, that there is an error which it presents as an error of law. However, the arguments underlying that claim relate entirely to the existence of alleged inconsistencies or contradictions arising from the Commission's decision to combine the findings made in the Decision of 9 November 2010 and in the contested decision. It must therefore be stated that the applicant's arguments in fact allege contradictory reasoning, as is apparent, moreover, from its assertion, made in support of its submission as to the existence of an alleged error of law, that 'the result of the Commission maintaining in place two contradictory infringement Decisions against the same party is to cause confusion in the [EU] legal order', running counter to the requirement that 'the national courts applying EU law … must be able to rely on clear definitive findings of the Commission'. It follows that the present plea must be regarded as alleging solely an infringement of the obligation to state reasons.

204 In that regard, it must be borne in mind that the statement of the reasons for a measure must be logical and contain no internal inconsistency that would prevent a proper understanding of the reasons underlying that measure (see, to that effect, judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 151).

205 According to the case-law, a contradiction in the statement of the reasons for a decision will, however, be such as to affect its validity only if the addressee of the measure is not in a position to ascertain, wholly or in part, the real reasons for the decision and, as a result, the operative part of the decision is, wholly or in part, devoid of any legal justification (judgments of 24 January 1995, *Tremblay and Others* v *Commission*, T-5/93, EU:T:1995:12, paragraph 42, and of 30 March 2000, *Kish Glass* v *Commission*, T-65/96, EU:T:2000:93, paragraph 85).

206 In the present case, as is apparent from recitals 9, 11, 1091 and 1092 of the contested decision, the findings of infringement made against the applicant in the operative part are limited to the aspects of the Decision of 9 November 2010 which were annulled by the General Court in its judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988). The other aspects of that decision, in so far as they had not been disputed by the applicant, became final.

207 Thus, the Commission duly explained in the contested decision why it took account of the operative part of the Decision of 9 November 2010 in so far as it concerned the applicant and why it, as a consequence, limited the scope of the new findings of infringement made against it.

208 It is true that, as the applicant notes, the approach adopted by the Commission leads to the co-existence of findings of infringements made against it which differ, in particular, because their co-perpetrators are not strictly the same. Thus, the components of the single and continuous infringement relating to intra-EEA routes, non-EU EEA-third country routes and EU-Switzerland routes are attributed in the contested decision to a number of carriers to which that conduct was not attributed in the Decision of 9 November 2010.

209 However, this does not result in inconsistency that would prevent a proper understanding of the contested decision. The situation in question is merely the result of the scheme of legal remedies, in the context of which the General Court reviewing the legality of an act cannot, without running the risk of ruling *ultra petita*, grant an annulment which goes beyond that sought by the applicant, and of the fact that the applicant sought only a partial annulment of the Decision of 9 November 2010.

210 In so far as the applicant submits that, notwithstanding the fact that the Decision of 9 November 2010 was only annulled in part in so far as it concerns it, the Commission was required to give due effect to the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), by withdrawing that decision, it must be held that its argument is indissociable from that put forward in support of its second plea. That argument will therefore be examined in conjunction with that plea.

211 In the light of the foregoing, the present plea must be rejected.

4. The second plea, alleging infringement of Article 266 TFEU

212 The applicant maintains that the Commission infringed its duty under Article 266 TFEU to draw the necessary inferences from an earlier judicial decision, and that, consequently, the contested decision, or at least Article 3(e) of the operative part thereof, should be annulled.

213 The applicant complains, inter alia, that the Commission relies on the findings of the Decision of 9 November 2010 in order to impose a fine on it, even though the General Court stated in the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), that those findings were fundamentally flawed.

214 The Commission disputes the applicant's arguments.

215 Pursuant to Article 266 TFEU, the institution whose act has been declared void is required to take the necessary measures to comply with the judgment annulling its act. That obligation involves only taking the necessary measures to comply with the judgment annulling its act (judgment of 29 November 2007, *Italy* v *Commission*, C-417/06 P, not published, EU:C:2007:733, paragraph 52).

216 According to settled case-law, in order to comply with a judgment annulling a measure and to implement it fully, the institution is required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part (judgments of 26 April 1988, *Asteris and Others* v *Commission*, 97/86, 99/86, 193/86 and 215/86, EU:C:1988:199, paragraph 27, and of 6 March 2003, *Interporc* v *Commission*, C-41/00 P, EU:C:2003:125, paragraph 29).

217 In that regard, it should be borne in mind that, as is already apparent from paragraph 184 above, the only purpose of considering the grounds of the judgment which set out the precise reasons for the illegality found by the EU judicature is to determine the exact meaning of the ruling made in the operative part of the judgment (judgment of 14 September 1999, *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 55).

218 Consequently, the authority of a ground of a judgment annulling a measure cannot apply to the situation of persons who were not parties to the proceedings and with regard to whom the judgment cannot therefore have decided anything whatever (judgment of 14 September 1999, *Commission* v *AssiDomän Kraft Products and Others*, C-310/97 P, EU:C:1999:407, paragraph 55). The same applies to those parts of an act, concerning a person, which have not been challenged before the courts of the EU judicature and which cannot therefore be annulled by the latter, and which therefore become final as regards that person (see, to that effect, judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861, paragraph 85).

219 In the present case, the General Court held, in paragraphs 88 and 89 of its judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), that the applicant's action against the Decision of 9 November 2010 sought only the partial annulment thereof and that, on pain of ruling *ultra petita*, the scope of the annulment which it pronounced could not go further than that sought by the applicant. Consequently, the General Court decided to annul the contested decision within the limits of the form of order sought by the applicant. The Court of Justice dismissed the appeal brought against the judgment in question, thus upholding, in essence, the finding and the conclusions drawn in that regard by the General Court (judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861).

220 Thus, while it is true that the grounds of the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), resulted in a finding of an illegality vitiating the Decision of 9 November 2010 in its entirety, in so far as it concerned the applicant (see paragraph 16 above), the scope of the operative part thereof was nevertheless duly circumscribed in accordance with the limits of the dispute set by the applicant in the form of order sought (see, to that effect, judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861, paragraphs 91 and 92).

221 In accordance with the case-law referred to in paragraph 218 above, the authority that attached to the grounds and that the Commission was required, where appropriate, to take into account when giving effect to the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), did not apply to those parts of the Decision of 9 November 2010 which had not been challenged before the General Court and, therefore, were not capable of being covered by the operative part of that judgment.

222 It follows that the Commission was entitled to rely in the contested decision, without infringing Article 266 TFEU, on the findings of infringement of the Decision of 9 November 2010 which were not called into question by the operative part of the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), and which therefore became final.

223 Accordingly, the present plea must be rejected.

5. The third plea, alleging an error of law and/or infringement of an essential procedural requirement in connection with an inadequate statement of reasons for the amount of the fine and/or a lack of jurisdiction on the part of the Commission to impose a fine that does not relate exclusively to the findings of infringement made in the contested decision

224 The applicant submits that the Commission has made an error, infringed an essential procedural requirement and exceeded the limits of its jurisdiction by imposing on it a fine of the same amount as that imposed by the Decision of 9 November 2010. The Commission relied on the fact that the new fine relates not only to the limited aspects of the single and continuous infringement in which the applicant took part (identified in Article 1 of the contested decision), but is also based on the aspects set out in the Decision of 9 November 2010 'that have become final' (Article 3 of the contested decision).

225 First, that applicant submits that, on the date of adoption of the contested decision, no findings in the Decision of 9 November 2010 had 'become final' in respect of it in that an appeal against the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), was still pending.

226 Second, the General Court annulled the fine imposed on the applicant in the Decision of 9 November 2010 because it took the view that there were fundamental contradictions within that decision. That meant that all of the findings of the Decision of 9 November 2010 should have been annulled had the General Court not considered itself bound by the *ultra petita* principle. Therefore, in the applicant's view, the fact that the General Court did not annul Articles 1 to 4 of the Decision of 9 November 2010 in their entirety in respect of the applicant does not mean that the Commission could rely on those provisions in order subsequently to impose the same fine without providing an additional statement of reasons to justify the findings in those provisions.

227 Third, the applicant maintains that the Commission's approach prevented it from understanding the basis for the amount of the fine in the contested decision given the uncertainty surrounding the scope of the infringement attributed to it.

228 Fourth, the Commission was not competent to impose a fine in the contested decision which did not relate exclusively to the findings of infringement made in that decision.

229 The Commission disputes the applicant's arguments.

230 It should be noted that the present plea consists of four complaints, which it is appropriate to examine in turn.

231 First, as regards the alleged error made by the Commission in that it regarded as final, at the time it adopted the contested decision, the findings in the Decision of 9 November 2010 on which it relies in order to impose a fine on the applicant, it must be noted that, even if it was proved, that error would have no effect on the lawfulness of the contested decision since it vitiates a ground included in that decision for the sake of completeness.

232 Measures of the EU institutions are in principle presumed to be lawful and accordingly produce legal effects until such time as they are withdrawn, annulled in an action for annulment or declared invalid following a reference for a preliminary ruling or a plea of illegality (judgment of 5 October 2004, *Commission* v *Greece*, C-475/01, EU:C:2004:585, paragraph 18).

233 The findings at issue in the Decision of 9 November 2010 were not, at the time of the adoption of the contested decision, either annulled, withdrawn or declared invalid. Accordingly, they produced legal effects to which the Commission could usefully refer, irrespective of whether they were also final.

234 In addition, it should be noted that, in accordance with the first paragraph of Article 60 of the Statute of the Court of Justice of the European Union, an appeal against a judgment of the General Court does not in principle have suspensory effect (order of 7 July 2016, *Commission* v *Bilbaína de Alquitranes and Others*, C-691/15 P-R, not published, EU:C:2016:597, paragraph 16). Thus, the fact that the applicant brought an appeal did not prevent the Commission from giving effect to the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), in accordance with Article 266 TFEU.

235 In any event, the appeal that the applicant brought against the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), was not capable of broadening the scope of the claims for partial annulment which the applicant submitted before the General Court given that, in accordance with Article 170(1) of the Rules of Procedure of the Court of Justice, 'an appeal shall seek … the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order'.

236 Since they were not challenged before the General Court, and could not be challenged only at the appeal stage, the findings at issue of the Decision of 9 November 2010 therefore became definitive as against the applicant on the date when the period for bringing proceedings laid down in Article 263 TFEU expired (see, to that effect, judgment of 14 November 2017, *British Airways* v *Commission*, C-122/16 P, EU:C:2017:861, paragraph 98). That date is substantially earlier than the date of adoption of the contested decision.

237 Second, as regards the allegedly wrongful omission on the part of the Commission to state the reasons for its reliance on the uncontested findings of the Decision of 9 November 2010 in the contested decision, it must be noted that that complaint has no factual basis, as is apparent from paragraphs 206 and 207 above.

238 Even if the applicant intends by that complaint to challenge the legality of the actual reference in the contested decision to the uncontested findings of the Decision of 9 November 2010 in the light of the findings of the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), it must be rejected as unfounded in that it is based on a failure to have regard to the authority of the grounds of that judgment in relation to findings which did not form part of the subject matter of the dispute, in accordance with what has been held in paragraph 221 above.

239 Third, as regards the complaint alleging an inadequate statement of reasons for the fine imposed on the applicant in the light of the uncertainties with regard to the scope of the infringement attributed to it, the General Court has already noted, in paragraph 209 above, that those alleged uncertainties are the result of the scheme of legal remedies and of the fact that the applicant sought only a partial annulment of the Decision of 9 November 2010. That justification is set out in the contested decision (see paragraphs 206 and 207 above).

240 Furthermore, it should be borne in mind that the statement of reasons must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its jurisdiction to review legality (see, to that effect, judgment of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 147).

241 Observance of the obligation to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of concern within the meaning of the fourth paragraph of Article 263 TFEU, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU and of Article 41(2)(c) of the Charter must be assessed with regard not only to its wording

but also to its context and to all the legal rules governing the matter in question (judgments of 29 September 2011, *Elf Aquitaine* v *Commission*, C-521/09 P, EU:C:2011:620, paragraph 150, and of 13 December 2016, *Printeos and Others* v *Commission*, T-95/15, EU:T:2016:722, paragraph 45).

242 It must be noted that, in the present case, the mere fact that the contested decision attributes liability for certain components of the infringement to a greater number of participants than did the Decision of 9 November 2010 with regard to the same unlawful conduct is not, contrary to what the applicant submits, such as to call for additional explanations, since it is not a factor which the Commission took into account for the purposes of calculating the fine.

243 In that regard, it must indeed be noted, as the applicant submits, that the Commission examined, in recital 1209 of the contested decision, the combined worldwide market share of the incriminated carriers among other relevant factors for determining the gravity of the single and continuous infringement. Moreover, contrary to what the Commission claims, it is not apparent from recital 1212 of the contested decision that it did not have regard to that market share. The Commission merely stated in that recital that it took into account 'in particular the nature and geographic scope of the infringement'.

244 However, it is apparent from all of the arguments relating to the gravity of the single and continuous infringement, set out in recitals 1198 to 1212 of the contested decision, that, in accordance with the case-law of the Court of Justice (see, to that effect, judgment of 26 January 2017, *Roca* v *Commission*, C-638/13 P, EU:C:2017:53, paragraph 67), the Commission carried out an overall assessment of the various relevant factors, without consideration of any specific aspects of certain material or geographic components of the single and continuous infringement or, at that stage, of the varying degree of involvement of the incriminated carriers. The additional amount was also determined on the basis of that overall assessment, as is apparent from recital 1219 of the contested decision. In the context of that overall assessment, the differences referred to in paragraph 242 above were not such as to require the Commission to set out additional reasoning for a proper understanding of the fine imposed on the applicant.

245 As regards the applicant's argument, put forward in response to a written question from the General Court, that, in general, the lower number of participants in some of the unlawful conduct found against the applicant in the Decision of 9 November 2010 as against that found in the contested decision justified it benefiting from a reduction in the fine, it should be noted that that argument relates to the substantive legality of the contested decision and not to an inadequate statement of reasons. Moreover, that claim is not substantiated in any way.

246 It follows from the foregoing that the reference in the contested decision to the findings of infringement of the Decision of 9 November 2010 which were not contested by the applicant did not oblige the Commission, at the stage of justifying the amount of the fine, to provide an additional statement of reasons.

247 Fourth, the complaint alleging lack of jurisdiction on the part of the Commission to impose a fine which does not relate exclusively to the findings of infringement made in the contested decision also cannot succeed.

248 Pursuant to Article 23(2)(a) of Regulation No 1/2003, the Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 101 or 102 TFEU.

249 Moreover, the Courts of the European Union have already held that the Commission's power to adopt a particular act necessarily also includes the power to amend that act, on condition that the provisions on the relevant power and the formal requirements and the procedures laid down in that regard are complied with (judgment of 9 December 2014, *Lucchini* v *Commission*, T-91/10, EU:T:2014:1033, paragraph 108). In the specific case in which a particular act has been annulled in part, that power must include the power to adopt a new decision which, where appropriate, supplements the parts of the act which have become final.

250 In the present case, first of all, it must be noted that the findings of infringement at issue, set out in the Decision of 9 November 2010, were made in the same procedure as that which led to the contested decision and following the same Statement of Objections.

251 Next, it should be noted that the Commission took care in the contested decision to explain why it took account of the operative part of the Decision of 9 November 2010 in so far as it concerns the applicant and why it accordingly limited the scope of the new findings of infringement made against it (see paragraphs 206 and 207 above).

252 Lastly, as is stated in recitals 9 and 11 of the contested decision, the judgment of 16 December 2015, *British Airways* v *Commission* (T-48/11, not published, EU:T:2015:988), annulled the Decision of 9 November 2010 in so far as, inter alia, that decision imposes a fine on the applicant, which led the Commission, in order to give effect to that judgment, again to adopt in the contested decision a provision by which it imposed a fine on the applicant for its participation in the single and continuous infringement.

253 In the light of the foregoing, it must be held that the Commission acted within the limits of its competence.

…

9. The eighth plea, alleging errors made by the Commission in the calculation of the reduction granted to the applicant under the leniency programme

407 In the eighth plea, first, the applicant submits that the Commission erred in law by taking the view that its leniency application of 27 February 2006 did not constitute 'significant added value' on the ground that it supported information that the Commission had already obtained from Lufthansa.

408 Second, the applicant submits that it provided new evidence that there were arrangements involving a number of other carriers, evidence which was used by the Commission in the contested decision, but the importance of which it seeks to downplay by wrongly claiming that it was already public.

409 Third, the applicant states that it provided evidence which, at the very least, enabled the extent and duration of the infringement found to be proved.

410 Fourth, the applicant submits that the Commission's assessment that the statements that it made in the context of its leniency application were evasive or unclear is both irrelevant and wrong.

411 Fifth, the applicant submits that it was treated unfairly in relation to other leniency applicants which benefited from greater reductions, even though some were the subject of the same criticism in the contested decision as the applicant concerning the evidential value of their statements and others, such as Air Canada, showed an uncooperative attitude.

412 The Commission disputes the applicant's arguments.

413 In accordance with point 20 of the 2002 Leniency Notice, 'undertakings that do not meet the conditions [to obtain immunity from fines] may be eligible to benefit from a reduction of any fine that would otherwise have been imposed'.

414 Point 21 of the 2002 Leniency Notice provides that, 'in order to qualify [for a reduction of its fine under point 20 of the notice] an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence'.

415 Point 22 of the 2002 Leniency Notice defines the concept of added value as follows:

'The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.'

416 The first subparagraph of point 23(b) of the 2002 Leniency Notice provides for three fine-reduction bands. The first undertaking to meet the condition laid down in point 21 of that notice is entitled to receive a reduction of between 30 and 50% in the amount of the fine, the second undertaking to a reduction of between 20 and 30%, and subsequent undertakings to a reduction of up to 20%.

417 The Commission enjoys a wide discretion in assessing the quality and usefulness of the cooperation provided by an undertaking, in particular by reference to the contributions made by other undertakings (judgments of 10 May 2007, *SGL Carbon* v *Commission*, C-328/05 P, EU:C:2007:277, paragraph 88, and of 20 May 2015, *Timab Industries and CFPR* v *Commission*, T-456/10, EU:T:2015:296, paragraph 177).

418 Furthermore, the fact that the Commission makes use of all the evidence available to it, and thus also of the information provided by the applicant in its leniency application, does not establish that the applicant's information represented significant added value with respect to the evidence already in the Commission's possession (see, to that effect, judgment of 13 July 2011, *ThyssenKrupp Liften Ascenseurs* v *Commission*, T-144/07, T-147/07 to T-150/07 and T-154/07, EU:T:2011:364, paragraph 398).

419 Lastly, a statement which merely corroborates to a certain degree a statement which the Commission already had at its disposal does not facilitate the Commission's task significantly (see judgment of 17 May 2011, *Elf Aquitaine* v *Commission*, T-299/08, EU:T:2011:217, paragraph 343 and the case-law cited).

420 In recitals 1363 to 1371 of the contested decision, the Commission considered that the evidence provided by the applicant when it submitted its leniency application on 27 February 2006 did not represent 'significant added value', thus precluding it from being regarded as the first undertaking to meet the condition laid down in point 21 of the 2002 Leniency Notice. It was only at a later stage of the administrative procedure that the Commission concluded, on the basis of evidence submitted subsequently by the applicant, that the applicant was the ninth undertaking to satisfy the condition laid down in point 21 of that notice (see recital 1381 of the contested decision).

421 Thus, the Commission noted, in recital 1364 of the contested decision, that the evidence provided by the applicant on 27 February 2006 was 'composed of many documents that were already known to the Commission from inspections, a few new documents of limited value to the Commission and a corporate statement that is evasive and unclear in respect of the cartel and [the applicant's] participation in it'.

422 The Commission concluded from this, in recital 1365 to the contested decision, that that evidence '[did] therefore not provide significant added value as neither the leniency statement made nor the documents submitted on 27 February 2006 [provided] the Commission with significant relevant additional evidence of the alleged infringement'.

423 First, it should be noted that, contrary to what the applicant submits, the Commission did not rule out the possibility that the evidence submitted by the applicant on 27 February 2006 has 'significant added value' on the sole ground that it merely supported information already in its possession. Thus, the Commission found, inter alia, that many documents submitted by the applicant were already in its possession, in particular because they had been found during an inspection carried out at its premises (recital 1370 of the contested decision). The Commission also stated that certain documents provided by the applicant did not relate to the single and continuous infringement (recitals 1367 and 1370 of that decision) or that they did not substantiate the existence of that infringement (recital 1367 of that decision).

424 Second, as regards the evidence adduced by the applicant and deemed, in its view, to prove that there were the arrangements referred to in paragraph 408 above, it consists of [*confidential*].[2] That evidence was used by the Commission [*confidential*]. However, the Commission stated in recital 1370 of the contested decision, [*confidential*] and without being contradicted by the applicant, that it had prior knowledge of that contact [*confidential*].

425 Third, as regards the evidence which, in the applicant's view, enabled the extent and duration of the single and continuous infringement to be expanded, that evidence consists of [*confidential*]. That evidence was used [*confidential*].

426 Recital 126 of the contested decision reads as follows:

[*confidential*]

427 However, it is apparent from recitals 124 and 125 of the contested decision that, [*confidential*], the Commission already had information on the contacts [*confidential*].

[2] Confidential information redacted.

428 In addition, it is apparent from recital 193 of the contested decision that, thanks to the documents obtained during the inspection carried out at the applicant's premises, the Commission already had evidence [*confidential*].

429 Thus, an internal email [*confidential*].

430 As regards, next, recital 336 of the contested decision, it reads as follows:

[*confidential*]

431 The applicant's statements, as summarised in recital 336 of the contested decision, support the information provided in that regard by Lufthansa at the time of its leniency application and summarised in recitals 124 and 125 of the contested decision. [*confidential*]. It must nevertheless be noted that the evidence provided by the applicant and summarised in recital 336 consisted of statements made after the facts at issue in the procedure initiated by the Commission or of indirect evidence [*confidential*].

432 Fourth, as regards the Commission's assessment of [*confidential*], according to which the applicant is 'evasive and unclear as regards the cartel [at issue] and the participation of [the applicant] in that cartel' (recital 1364 of the contested decision), it must be noted that the applicant does not dispute that it did not expressly admit, [*confidential*], the anticompetitive nature of its exchanges with Lufthansa relating to the FSC. The fact that it does not acknowledge that it participated in anticompetitive conduct is not irrelevant when it comes to assessing the added value of its oral statement.

433 In the light of all the foregoing, the view must be taken that the Commission did not err in concluding, in the light of the evidence already available to it and the content of the applicant's leniency application of 27 February 2006, that that leniency application did not represent significant added value within the meaning of point 21 of the 2002 Leniency Notice.

…

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. **Annuls Article 1(1)(e), (2)(e) and (3)(e) of Commission Decision C(2017) 1742 final of 17 March 2017 relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport (Case AT.39258 – Airfreight) in so far as it finds that British Airways plc participated in the component of the single and continuous infringement relating to the refusal to pay commission on surcharges;**

2. **Annuls Article 1(4)(e) of Decision C(2017) 1742 final;**

3. **Sets the amount of the fine imposed on British Airways under Article 3(e) of Decision C(2017) 1742 final at EUR 84 456 000;**

4. Dismisses the action as to the remainder;

5. Orders the European Commission to bear its own costs and to pay one third of the costs incurred by British Airways;

6. Orders British Airways to bear two thirds of its own costs.

Kanninen Schwarcz Iliopoulos

Spielmann Reine

Delivered in open court in Luxembourg on 30 March 2022.

[Signatures]