Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

11 November 2021 *

(Reference for a preliminary ruling – Articles 81, 84 and 85 EC – Article 53 of the EEA Agreement – Agreements, decisions and concerted practices – Conduct of undertakings in the context of air transport between the European Economic Area (EEA) and third countries that occurred under Articles 84 and 85 EC – Claim for compensation for damage suffered – Jurisdiction of national courts to apply Article 81 EC and Article 53 of the EEA Agreement)

In Case C-819/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands), made by decision of 18 September 2019, received at the Court on 6 November 2019, in the proceedings

Stichting Cartel Compensation,

Equilib Netherlands BV

v

Koninklijke Luchtvaart Maatschappij NV,

Martinair Holland NV,

Deutsche Lufthansa AG,

Lufthansa Cargo AG,

British Airways plc,

Air France SA,

Singapore Airlines Ltd,

Singapore Airlines Cargo Pte Ltd,

Swiss International Air Lines AG,

Air Canada,

* Language of the case: Dutch.

Cathay Pacific Airways Ltd,

Scandinavian Airlines System Denmark-Norway-Sweden,

SAS AB,

SAS Cargo Group A/S,

THE COURT (Second Chamber),

composed of A. Arabadjiev (Rapporteur), President of the First Chamber, acting for the President of the Second Chamber, I. Ziemele, T. von Danwitz, P.G. Xuereb and A. Kumin, Judges,

Advocate General: M. Bobek,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 January 2021,

after considering the observations submitted on behalf of:

– Stichting Cartel Compensation, by J. van den Brande and J.T. Verheij, advocaten,

– Equilib Netherlands BV, by J.W. Fanoy, M.H.J. van Maanen and T. Raats, advocaten,

– Koninklijke Luchtvaart Maatschappij NV, by S.L. Boersen, M. Smeets, J.S. Kortmann, T. Heikens, S. Goldstein and T.M. Welling, advocaten,

– Martinair Holland NV, by S.L. Boersen, M. Smeets, J.S. Kortmann, T. Heikens and S. Goldstein, advocaten,

– Deutsche Lufthansa AG, by P.N. Malanczuk, A. Koeman, J.P. van der Klein and M.J. Schaufeli, advocaten,

– Lufthansa Cargo AG and Swiss International Air Lines AG, by P.N. Malanczuk and J.P. van der Klein, advocaten,

– British Airways plc, Air Canada and Cathay Pacific Airways Ltd, by J.K. de Pree and S.J. The, advocaten,

– Air France SA, by D.A.M.H.W. Strik and T.M. Welling, advocaten,

– Singapore Airlines Ltd and Singapore Airlines Cargo Pte Ltd, by I. VerLoren van Themaat, M. van Heezik, N.T. Dempsey, L.N.M. van Uden and V.E.J. Dijkstra, advocaten,

– Scandinavian Airlines System Denmark-Norway-Sweden, SAS AB and SAS Cargo Group A/S, by E. Pijnacker Hordijk, W. Heemskerk and S.R. Kingma, advocaten,

– the European Commission, by A. Dawes, T. Franchoo, F. van Schaik and C. Zois, acting as Agents,

– the EFTA Surveillance Authority, by C. Simpson, I.O. Vilhjálmsdóttir, C. Zatschler and M. Sánchez Rydelski, acting as Agents,

– the Norwegian Government, by E. Sandaa and H. Kolderup, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2021,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 81, 84 and 85 EC, Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, 'the EEA Agreement') and Article 6 of 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 [EC] (OJ 2003 L 1, p. 1).

2 The request has been made in proceedings between, on the one hand, Stichting Cartel Compensation ('SCC') and Equilib Netherlands BV ('Equilib') and, on the other hand, Koninklijke Luchtvaart Maatschappij NV, Martinair Holland NV, Deutsche Lufthansa AG, Lufthansa Cargo AG, British Airways plc, Air France SA, Singapore Airlines Ltd, Singapore Airlines Cargo Pte Ltd, Swiss International Air Lines AG, Air Canada, Cathay Pacific Airways Ltd, Scandinavian Airlines System Denmark-Norway-Sweden, SAS AB and SAS Cargo Group A/S concerning compensation for damage resulting from an alleged infringement of Article 81 EC by those airlines.

Legal context

Regulations No 17 and No 141

3 Article 5(1) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 and 82 EC] (OJ, English Special Edition 1959-1962, p. 87), provided:

'Agreements, decisions and concerted practices of the kind described in Article [81](1) [EC] which are in existence at the date of entry into force of this Regulation and in respect of which the parties seek application of Article [81](3) [EC] shall be notified to the Commission before 1 August 1962.'

4 According to Article 6 of that regulation:

'1. Whenever the Commission takes a decision pursuant to Article [81](3) [EC], it shall specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification.

2. The second sentence of paragraph 1 shall not apply to agreements, decisions or concerted practices falling within … Article 5(1) which have been notified within the time limit specified in Article 5(1).'

5 Article 1 of Regulation No 141 of the Council of 26 November 1962 exempting transport from the application of Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 291), as amended by Council Regulation No 1002/67/EEC of 14 December 1967 (JO 1967, 306, p. 1) ('Regulation No 141'), provided:

'Regulation No 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor shall it apply to the abuse of a dominant position, within the meaning of Article [82 EC], within the transport market.'

6 Article 3 of that regulation provided:

'Article 1 of this Regulation shall remain in force, as regards transport by rail, road and inland waterway, until 30 June 1968.'

Regulations (EEC) No 3975/87 and No 3976/87

7 Article 1 of 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 (OJ 1987 L 374, p. 1), as amended by Council Regulation (EEC) No 2410/92 of 23 July 1992 (OJ 1992 L 240, p. 18) ('Regulation No 3975/87'), was worded as follows:

'1. This Regulation lays down detailed rules for the application of Articles [81] and [82 EC] to air transport services.

2. This Regulation shall apply only to air transport between [EU] airports.'

8 Article 1 of Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article [81](3) [EC] to certain categories of agreements and concerted practices in the air transport sector (OJ 1987 L 374, p. 9), as amended by Council Regulation (EEC) No 2411/92 of 23 July 1992 (OJ 1992 L 240, p. 19) ('Regulation No 3976/87'), provided:

'This Regulation shall apply to air transport between [EU] airports.'

Regulation No 1/2003

9 Article 6 of Regulation No 1/2003 provides:

'National courts shall have the power to apply Articles 81 and 82 [EC].'

10 Article 16(1) of that regulation provides:

'When national courts rule on agreements, decisions or practices under Article 81 or Article 82 [EC] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. …'

11 Article 32 of that regulation, entitled 'Exclusions', provides:

'This Regulation shall not apply to:

…

(c) air transport between Community airports and third countries.'

12 Article 43(1) and (2) of that regulation provides:

'1. Regulation No 17 is repealed with the exception of Article 8(3) which continues to apply to decisions adopted pursuant to Article 81(3) [EC] prior to the date of application of this Regulation until the date of expiration of those decisions.

2. Regulation No 141 is repealed.'

13 The first and second paragraphs of Article 45 of Regulation No 1/2003 are worded as follows:

'This Regulation shall enter into force on the 20th day following that of its publication in the *Official Journal of the European* [*Union*].

It shall apply from 1 May 2004.'

Regulation (EC) No 411/2004

14 Article 1 of Council Regulation (EC) No 411/2004 of 26 February 2004 repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the [European Union] and third countries (OJ 2004 L 68, p. 1), provides:

'Regulation [No 3975/87] shall be repealed, with the exception of Article 6(3), which shall continue to apply to decisions adopted pursuant to Article 81(3) [EC] prior to the date of application of Regulation (EC) No 1/2003 until the date of expiry of those decisions.'

15 According to Article 2 of Regulation No 411/2004:

'In Article 1 of Regulation [No 3976/87], "between [EU] airports" shall be deleted.'

16 Article 3 of Regulation No 411/2004 provides:

'In Article 32 of Regulation (EC) No 1/2003, point (c) shall be deleted.'

17 The first and second paragraphs of Article 4 of Regulation No 411/2004 read as follows:

'This Regulation shall enter into force on the third day following that of its publication in the *Official Journal of the European Union*.

It shall apply from 1 May 2004.'

The Agreement between the European Community and the Swiss Confederation on Air Transport

18 Article 1(2) of the Agreement between the European Community and the Swiss Confederation on Air Transport, signed on 21 June 1999 in Luxembourg and approved on behalf of the European Community by Decision 2002/309/EC, Euratom of the Council and of the Commission, as regards the Agreement on Scientific and Technological Cooperation, of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1), states:

'For this purpose, the provisions laid down in this Agreement as well as in the regulations and directives specified in the Annex shall apply under the condition set out hereafter. …'

19 The Annex to that agreement was worded as follows:

'For the purposes of this Agreement:

– wherever acts specified in this Annex contain references to Member States of the [European Union], or a requirement for a link with the latter, the references shall, for the purpose of the Agreement, be understood to apply equally to Switzerland or to the requirement of a link with Switzerland;

…

2. Competition rules

Any reference in the following texts to Articles 81 and 82 [EC] shall be understood to mean Articles 8 and 9 of this Agreement.

…

No 3975/87

Council Regulation of 14 December 1987 laying down the procedures for the application of the rules on competition to undertakings in the air transport sector, as amended by Regulations (EEC) No 1284/91 and (EEC) No 2410/92 (see below).

(Articles 1-7, 8(1), 8(2), 9-11, 12(2), 12(4), 12(5), 13(1), 13(2), 14-19)

…

No 3976/87

Council Regulation of 14 December 1987 on the application of Article 81(3) [EC] to certain categories of agreement and concerted practices in the air transport sector, as amended by Regulations (EEC) No 2344/90 and (EEC) No 2411/92 (see below).

(Articles 1-5, 7)

…'

20 In accordance with Article 36(1) thereof and with the Information relating to the entry into force of the seven Agreements with the Swiss Confederation in the sectors free movement of persons, air and land transport, public procurement, scientific and technological cooperation, mutual recognition in relation to conformity assessment, and trade in agricultural products (OJ 2002 L 114, p. 480), the Agreement between the European Community and the Swiss Confederation on Air Transport entered into force on 1 June 2002.

The dispute in the main proceedings and the question referred for a preliminary ruling

21 It is clear from the order for reference that, by Decision C(2010) 7694 final of 9 November 2010 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 COMP/39258 – Airfreight) ('the 2010 Decision'), the European Commission, first, found that 21 legal persons in the air transport sector had infringed Article 101 TFEU and/or Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport by coordinating their pricing relating to airfreight services, so far as concerns the fuel surcharge, the security surcharge and the payment of commission on those surcharges, and, secondly, imposed fines on those legal persons relating to conduct which took place during periods between:

– 7 December 1999 and 14 February 2006, in respect of airfreight services on routes between airports within the European Economic Area (EEA);

– 1 May 2004 and 14 February 2006, in respect of airfreight services on routes between airports within the European Union and airports outside the EEA, the Commission taking the view that, prior to 1 May 2004, Regulation No 3975/87 did not confer on it the power to apply Article 81 EC as regards those services;

– 19 May 2005 and 14 February 2006, in respect of airfreight services on routes between airports in countries that are contracting parties to the EEA Agreement but are not Member States and third countries, the Commission taking the view that, prior to 19 May 2005, Regulation No 1/2003 was not yet applicable for the purposes of implementing the EEA Agreement as regards those services;

– 1 June 2002 and 14 February 2006, in respect of airfreight services on routes between airports within the European Union and airports in Switzerland, the Commission taking the view that, prior to 1 June 2002, Regulation No 3975/87 had not yet been incorporated into the Agreement between the European Community and the Swiss Confederation on Air Transport.

22 By judgments of 16 December 2015, the General Court of the European Union annulled the 2010 Decision on the ground of a procedural defect, in so far as that decision concerned some of the legal persons fined.

23 The Commission resumed the procedure and, by 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) ('the 2017 Decision'), imposed fines on 19 of the 21 legal persons referred to in paragraph 21 of this judgment, including the defendants in the main proceedings.

24 SCC and Equilib, legal persons established in the Netherlands and created for the purpose of obtaining, through the courts, compensation for damage resulting from infringements of competition law, brought actions before the referring court seeking, in essence, first, a declaration that the defendants in the main proceedings, by coordinating, between 1999 and 2006, their pricing relating to airfreight services, acted unlawfully with regard to the shippers that purchased those services and, secondly, an order requiring those airlines jointly and severally to pay full compensation, together with interest, for the harm that those shippers suffered as a result of that conduct, those shippers having in fact assigned their claims for compensation for that harm to SCC and Equilib.

25 The referring court states, in essence, that the cases in the main proceedings raise in particular the question whether it has jurisdiction to apply the prohibition laid down in Article 81(1) EC to the conduct engaged in by the defendants in the main proceedings before 1 May 2004 on routes between airports within the European Union and airports outside the EEA, before 19 May 2005 on routes between airports in countries that are contracting parties to the EEA Agreement but are not Member States and third countries, and before 1 June 2002 on routes between airports within the European Union and airports in Switzerland.

26 Before the referring court, SCC and Equilib argue primarily that that court has jurisdiction to apply Article 81 EC to that conduct, on the ground that, throughout the period of the cartel, that provision had direct horizontal effect. In the alternative, SCC and Equilib argue that, in any event, under Article 6 of Regulation No 1/2003, the referring court, at the time of the entry into force of that regulation, acquired jurisdiction to apply Article 81 EC retroactively to the conduct at issue in the main proceedings.

27 The defendants in the main proceedings, in essence, contest the jurisdiction of the referring court, arguing that Article 81 EC did not have direct effect during the periods in which the conduct at issue in the main proceedings took place and that there is, in the present case, no prior decision of the Commission or of a national competition authority, for the purposes of Articles 84 and 85 EC, relating to that conduct. They take the view that it would be contrary to the principle of legal certainty to give retroactive effect to Article 81 EC and that neither the wording, the purpose nor the general scheme of Regulation No 1/2003 provide any basis for doing so.

28 The referring court considers that it follows from the case-law of the Court that the prohibitions laid down in Articles 81(1) and 82 EC lend themselves, by their very nature, to producing direct effects in relations between individuals and that those provisions therefore directly create rights for individuals which national courts must protect, irrespective of the implementation of those provisions by the authorities of the Member States or by the Commission.

29 Accordingly, in its view, the jurisdiction of national courts to apply Article 81(1) and Article 82 EC in a dispute between individuals follows from the direct effect of those provisions. That jurisdiction is not dependent on the administrative implementation of competition rules, as provided for in Articles 84 and 85 EC, and is not subject to the existence of a prior decision of the national competition authorities or of the Commission concerning the agreement or practice at issue.

30 The referring court considers that the jurisdiction of national courts to apply Article 81 EC is limited only in situations in which it is still possible to grant an exemption under Article 81(3) EC. That limitation is necessary because of the risk to legal certainty which would result from a

decision of a national court declaring void an agreement which could subsequently be the subject of an administrative decision, adopted under Article 81(3) EC, finding that Article 81(1) EC could not be applied to it.

31 It follows that a national court can and must examine agreements or practices under Article 81 EC where the application of Article 81(3) EC is no longer in question. That is the situation in the present case. It is common ground that the defendants in the main proceedings did not, during the period of the cartel, request that the national competition authorities or the Commission apply Article 81(3) EC and that those airlines can no longer do so, since Regulation No 1/2003 does not provide for that possibility. In those circumstances, there is no longer any risk, with respect to that conduct, that a decision of a national court might contradict an administrative decision.

32 The referring court therefore considers that it has jurisdiction to rule, a posteriori, on the conduct at issue in the main proceedings. In its view, to consider otherwise would result in no authority being able to carry out an assessment concerning the application of Article 81 EC to that conduct, which would reward 'non-disclosure' of similar conduct.

33 However, the referring court explains that, in its decision of 4 October 2017, ([2017] EWHC 2420 (Ch)), which was upheld by the Court of Appeal (England and Wales) (United Kingdom), the High Court of Justice (England & Wales), Chancery Division (United Kingdom), ruling on an action for compensation for damage resulting from the cartel at issue in the main proceedings, held that, in the absence of a decision by the competent national authorities or by the Commission finding an infringement, the High Court of Justice did not have jurisdiction to rule on the action in so far as it concerns the conduct at issue in the main proceedings. The referring court considers that, in such a situation, it is necessary, in the light of the objective of ensuring the uniform application of EU law, to make a reference to the Court for a preliminary ruling.

34 In those circumstances, the Rechtbank Amsterdam (District Court, Amsterdam, Netherlands) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In a dispute between injured parties (in the present case shippers, recipients of air cargo services) and air carriers, do the national courts have the power – either because of the direct effect of Article 101 TFEU, or at least of Article 53 [of the EEA Agreement], or on the basis of (the direct effect of) Article 6 of Regulation 1/2003 – to fully apply Article 101 TFEU, or at least Article 53 [of the EEA Agreement], with regard to agreements/concerted practices of air carriers in respect of freight services on flights operated before 1 May 2004 on routes between airports within the [European Union] and airports outside the EEA, or, before 19 May 2005, on routes between Iceland, Liechtenstein, Norway and airports outside the EEA, or, on flights operated before 1 June 2002, between airports within the EU and Switzerland, also for the period that the transitional regime of Articles 104 and 105 TFEU applied, or does the transitional regime preclude that?'

The question referred

35 By its question, the referring court seeks to ascertain, in essence, whether Articles 81, 84 and 85 EC and Article 53 of the EEA Agreement must be interpreted as meaning that a national court, in a dispute governed by private law relating to an action for damages brought before it after the entry into force of Regulation No 1/2003, has jurisdiction to apply Article 81 EC or Article 53 of the EEA Agreement to the conduct of undertakings in the context of air transport between a Member State and a third country other than Switzerland which took place before 1 May 2004, to the conduct of undertakings in the context of air transport between a Member State and Switzerland which took place before 1 June 2002 and to the conduct of undertakings in the context of air transport between an EEA country that is not a Member State and a third country which took place before 19 May 2005, even if no decision under Article 84 EC or Article 85 EC has been adopted by the authorities of the Member States or by the Commission, respectively, concerning that conduct.

36 In that respect, as regards, in the first place, the interpretation of the provisions of the EC Treaty, it should be recalled that, according to Article 87 of the EEC Treaty (now Article 83(1) EC), appropriate regulations or directives to give effect to the principles set out in Articles 81 and 82 are to be laid down by the Council, acting on a proposal from the Commission and after consulting the European Parliament.

37 Under that competence, the Council first of all adopted Regulation No 17 and then, by adopting Regulation No 141, removed from the scope of Regulation No 17 restrictions on competition directly affecting the market for transport services (see, to that effect, judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 18, and of 1 February 2018, *Deutsche Bahn and Others* v *Commission*, C-264/16 P, not published, EU:C:2018:60, paragraphs 25 to 29).

38 Next, although the Council, in adopting Regulations No 3975/87 and No 3976/87, laid down detailed rules for the application of Articles 85 and 86 of the EEC Treaty (now Articles 81 and 82 EC) to activities relating directly to the provision of air transport services, those regulations applied only to air transport between EU airports (see, to that effect, judgment of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro*, 66/86, EU:C:1989:140, paragraph 11).

39 Finally, the Council adopted, on the one hand, Regulation No 1/2003, Article 43 of which, read in conjunction with Article 45 thereof, partially repealed Regulation No 17 and completely repealed Regulation No 141 with effect from 1 May 2004, and, on the other hand, Regulation No 411/2004, Article 1 of which, read in conjunction with Article 4 thereof, partially repealed Regulation No 3975/87 with effect from the same date, and Articles 2 and 3 of which, read in conjunction with Article 4 thereof, had the effect of extending the scope, respectively, of Regulation No 3976/87 and of Regulation No 1/2003 to air transport between airports within the European Union and those in third countries with effect from that date.

40 It follows that, as regards restrictions on competition directly affecting the market for air transport services between airports within the European Union and those in third countries, the provisions adopted pursuant to Article 83(1) EC entered into force only on 1 May 2004.

41 Consequently, in the absence of such provisions, only the arrangements providing for the implementation of competition rules laid down in Articles 84 and 85 EC were applicable to those services before that date (see, to that effect, judgments of 30 April 1986, *Asjes and Others*, 209/84 to 213/84, EU:C:1986:188, paragraph 52, and of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro*, 66/86, EU:C:1989:140, paragraph 21).

42 In the present case, in so far as the conduct at issue in the main proceedings which took place between 1999 and 1 May 2004 directly related to air transport services between airports in the European Union and in third countries and was capable of affecting trade between Member States for the purposes of Article 81(1) EC, which it is for the referring court to verify, that conduct did not fall within the scope of the provisions adopted pursuant to Article 83 EC, but was covered solely by the arrangements providing for the implementation of competition rules laid down in Articles 84 and 85 EC.

43 The same applies in relation to the conduct at issue in the main proceedings which took place between 1999 and the date of entry into force of the Agreement between the European Community and the Swiss Confederation on Air Transport, that is to say 1 June 2002, in so far as that conduct directly related to air transport services between airports in the European Union and those in Switzerland and was capable of affecting trade between Member States, which it is for the referring court to verify. As is apparent from a combined reading of Article 1(2) of that agreement and the Annex thereto, it was following the entry into force of that agreement on the aforementioned date that airports in Swiss territory were regarded as '[EU] airports', for the purposes of Article 1(2) of Regulation No 3975/87 and Article 1 of Regulation No 3976/87, and no longer as airports in third countries.

44 The defendants in the main proceedings argued in essence, both in their written observations submitted to the Court and at the hearing, that the air transport sector was excluded from the application of Article 81 EC until the entry into force of Regulation No 1/2003 on 1 May 2004. Those parties and the Commission also argued that, under Articles 84 and 85 EC, Article 81(1) EC did not in any event have direct effect, since the national courts could not apply the latter provision in the absence of a decision of the competent national authorities or a Commission decision finding an infringement of that provision. Thus, by providing, in Article 6 of Regulation No 1/2003, that the national courts could henceforth apply Articles 81 and 82 EC in full, that regulation established new rules of substantive law, which could not be applied retroactively to conduct, such as that at issue in the main proceedings, which took place before the entry into force of that regulation and governed by Articles 84 and 85 EC.

45 In that regard, it should be recalled, first, that the Court has already ruled that air transport, like other modes of transport, has been subject to the general rules of the Treaties, including those relating to competition, since their entry into force (see, to that effect, judgment of 30 April 1986, *Asjes and Others*, 209/84 to 213/84, EU:C:1986:188, paragraphs 35 to 45).

46 Moreover, as the Advocate General noted, in essence, in points 72 to 77 of his Opinion, the Council has not made use of its competence under Article 83(2)(c) EC to limit the material scope of Article 81 EC in the air transport sector.

47 Secondly, it should be pointed out that, according to settled case-law, just as it imposes burdens on individuals, European Union law is also intended to give rise to rights which become part of their legal heritage. Those rights arise not only where they are expressly granted by the Treaties but also by virtue of obligations which they impose in a clearly defined manner both on

individuals and on the Member States and the EU institutions (judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 19, and of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraph 20).

48 In that context, the Court has already ruled that Article 81(1) EC produces direct legal effects in relations between individuals and directly creates rights for individuals which national courts must protect (see, to that effect, judgments of 12 December 2019, *Otis Gesellschaft and Others*, C-435/18, EU:C:2019:1069, paragraph 21 and the case-law cited, and of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraph 32 and the case-law cited).

49 Any individual can rely on a breach of Article 81(1) EC before a national court and therefore rely on the invalidity of an agreement or practice prohibited under that provision, as laid down in Article 81(2) EC (see, to that effect, judgment of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04 EU:C:2006:461, paragraph 59); that individual may also claim compensation for the harm suffered where there is a causal relationship between that harm and that agreement or practice (judgment of 12 December 2019, *Otis Gesellschaft and Others*, C-435/18, EU:C:2019:1069, paragraph 23 and the case-law cited).

50 Moreover, as regards, more specifically, actions for damages for infringement of EU competition rules brought before the national courts, the Court has held that those actions ensure the full effectiveness of Article 81 EC, in particular the practical effect of the prohibition laid down in paragraph 1 thereof, and thus strengthen the working of the EU competition rules, since they discourage agreements or practices, frequently covert, which are liable to restrict or distort competition (see, to that effect, judgments of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraphs 25, 43 and 44; of 12 December 2019, *Otis Gesellschaft and Others*, C-435/18, EU:C:2019:1069, paragraphs 22, 24 and 26; and of 6 October 2021, *Sumal*, C-882/19, EU:C:2021:800, paragraphs 33 and 35).

51 Accordingly, national courts have jurisdiction to apply Article 81 EC in particular in disputes governed by private law, this jurisdiction deriving from the direct effect of that article (see, to that effect, judgment of 30 January 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs*, 127/73, EU:C:1974:6, paragraph 15).

52 In accordance with settled case-law, the national courts whose task it is to apply the provisions of EU law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (judgment of 6 June 2013, *Donau Chemie and Others*, C-536/11, EU:C:2013:366, paragraph 22 and the case-law cited). It is those courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of EU law (see, to that effect, judgment of 16 December 1976, *Rewe-Zentralfinanz and Rewe-Zentral*, 33/76, EU:C:1976:188, paragraph 5).

53 Thirdly, it is important to point out that, as the Advocate General noted essentially in points 43 and 44 of his Opinion, the jurisdiction of the national courts referred to in paragraph 51 of this judgment is unaffected by the application of Articles 84 and 85 EC, since neither of those provisions, which relate to the administrative implementation of EU competition rules by the authorities of the Member States and by the Commission, respectively, limits the application of Article 81 EC by the national courts, in particular in disputes governed by private law.

54 It follows from the considerations set out in paragraphs 45 to 53 of this judgment that by providing, in Article 6 thereof, that national courts are to have the power to apply Articles 81 and 82 EC, it cannot be concluded that Regulation No 1/2003 established new rules of substantive law applicable to sectors of the economy in which, before the entry into force of that regulation, there were no provisions adopted pursuant to Article 83 EC. Article 6 of Regulation No 1/2003 constitutes merely a reminder of the jurisdiction which those courts enjoy by virtue of the direct effect of Articles 81 and 82 EC.

55 That said, it should be stated that the exercise of the jurisdiction thus conferred on national courts may be limited, inter alia, by the principle of legal certainty, in particular by the need to ensure that those courts and the entities responsible for the administrative implementation of EU competition rules do not adopt conflicting decisions, as well as by the need to preserve the decision-making or legislative powers of the EU institutions responsible for implementing those rules, in particular Article 81(3) EC, and to ensure that their acts have binding force.

56 It is in the light of such considerations that the Court has held, inter alia, that national courts must, when ruling on agreements or practices which may subsequently be the subject of a decision by the Commission, avoid giving decisions which would conflict with a decision contemplated by the Commission in the implementation of Article 81(1) EC, Article 82 EC and Article 81(3) EC (see, to that effect, judgments of 28 February 1991, *Delimitis*, C-234/89, EU:C:1991:91, paragraph 47, and of 14 December 2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689, paragraph 51); the Court has also held that it is even more important that when national courts rule on agreements or practices which are already the subject of a Commission decision they cannot take decisions running counter to that of the Commission (judgment of 14 December 2000, *Masterfoods and HB*, C-344/98, EU:C:2000:689, paragraph 52).

57 That case-law is, moreover, now given legislative expression in Article 16(1) of Regulation No 1/2003 (see, to that effect, judgments of 6 November 2012, *Otis and Others*, C-199/11, EU:C:2012:684, paragraph 50, and of 9 December 2020, *Groupe Canal +* v *Commission*, C-132/19 P, EU:C:2020:1007, paragraph 112).

58 However, since the Commission has, in essence, considered, both in its 2010 Decision and in its 2017 Decision, that it did not have the power to apply Article 81(1) EC to the conduct at issue in the main proceedings, the defendants in the main proceedings cannot rely on the existence of a risk that the referring court might, in the present case, take a decision which would run counter to a decision adopted by the Commission or contemplated by it in proceedings it has initiated, for the purposes of Article 16(1) of Regulation No 1/2003.

59 The considerations set out in paragraph 55 of this judgment have also led the Court to limit the possibility for national courts to declare certain agreements and decisions automatically void under Article 81(2) EC in a situation where those agreements and decisions existed before the entry into force of the provisions referred to in Article 83(1) EC, which subsequently became applicable thereto.

60 The Court has held that agreements which existed before the entry into force of Regulation No 17 and which were notified to the Commission in accordance with the provisions of that regulation enjoyed provisional validity, meaning that national courts could not, where the Commission or the authorities of the Member States had given no decision in accordance with the provisions of that regulation, declare those agreements to be automatically void under Article 81(2) EC (see, to that effect, judgments of 6 April 1962, *de Geus*, 13/61, EU:C:1962:11, p. 105; of 6 February 1973,

Brasserie de Haecht, 48/72, EU:C:1973:11, paragraphs 8 and 9; of 10 July 1980, *Lancôme and Cosparfrance Nederland*, 99/79, EU:C:1980:193, paragraph 16; and of 28 February 1991, *Delimitis*, C-234/89, EU:C:1991:91, paragraph 48).

61 It is important to point out that that provisional validity was made necessary by the fact that Articles 5(1) and 6(2) of Regulation No 17, read in conjunction, allowed the Commission to declare retroactively Article 85(1) of the EEC Treaty (now Article 81(1) EC) inapplicable to those agreements, pursuant to Article 85(3) of the EEC Treaty (now Article 81(3) EC), and that it would have been contrary to the general principle of legal certainty to render those agreements automatically void before it was even possible to determine whether or not Article 85 of the EEC Treaty applied to them (see, to that effect, judgment of 6 April 1962, *de Geus*, 13/61, EU:C:1962:11, p. 104).

62 In the present case, however, considerations such as those referred to in paragraph 55 of this judgment do not make it necessary to limit, by analogy with the case-law referred to in paragraph 60 of this judgment, the possibility for national courts to apply Article 81 EC to the conduct of undertakings which, like that at issue in the main proceedings, took place before the entry into force of Regulation No 1/2003 and under Articles 84 and 85 EC, without prejudice, where appropriate, to the limitation rules applicable.

63 Regulation No 1/2003, which became applicable to the sector in which the conduct at issue in the main proceedings took place, does not contain any provision which would permit the retroactive approval of agreements or practices existing before the entry into force of that regulation. Moreover, Article 34(1) of that regulation provides that notifications of agreements made to the Commission, under, inter alia, Regulation No 17, are to lapse as from 1 May 2004. It is clear from the order for reference that the defendants in the main proceedings had, in any event, given no notification concerning the conduct at issue in the main proceedings.

64 The considerations set out in paragraph 55 of this judgment have also led the Court to limit the possibility for national courts to declare certain agreements void before the entry into force of the provisions, referred to in Article 83(1) EC, which were to become applicable to those agreements. Thus, in the judgments of 30 April 1986, *Asjes and Others* (209/84 to 213/84, EU:C:1986:188, paragraph 68), and of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro* (66/86, EU:C:1989:140, paragraph 20), to which the defendants in the main proceedings and the Commission refer, the Court held in essence that, until the entry into force of the legislation referred to in Article 83(1) EC, the national courts did not themselves have jurisdiction to hold that an agreement or practice was incompatible with Article 81(1) EC and could declare automatically void, under Article 81(2) EC, only agreements and practices held by the authorities of the Member States, pursuant to Article 84 EC, to fall under Article 81(1) EC and not to qualify for exemption from the prohibition under Article 81(3) EC or in respect of which the Commission had recorded an infringement under Article 85(2) EC.

65 However, it is clear from paragraphs 20 and 32 of the judgment of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro* (66/86, EU:C:1989:140), that the sole justification for that limitation of the possibility for national courts to apply Article 81 EC was the need to preserve the power of the institutions which were to be given jurisdiction, under the implementing rules to be adopted pursuant to Article 83 EC, to formulate competition policy by granting or refusing to grant exemptions under Article 81(3) EC. Since the EU legislature, when that judgment was delivered, had not yet exercised its competence under Article 83 EC and Article 85(3) EC in respect of air transport services between airports within the European Union and those in third countries, the

adoption under Article 81(3) EC of an arrangement for retroactively declaring Article 81(1) EC inapplicable to certain agreements, similar to that established by Regulation No 17, could not be ruled out.

66 However, unlike the case-law referred to in paragraph 64 of this judgment, which is concerned with the possibility for national courts to declare certain agreements void before the entry into force of the provisions referred to in Article 83(1) EC, which were to become applicable to those agreements, the cases in the main proceedings are, as is apparent from the order for reference, concerned with the examination, after the entry into force of Regulation No 1/2003, of the compatibility with Article 81(1) EC of conduct which took place before the entry into force of that regulation and under Articles 84 and 85 EC. Accordingly, when the actions at issue in the main proceedings were brought, the EU legislature had, by adopting Regulation No 1/2003 and Regulation No 411/2004, already exercised its competence, referred to in paragraph 65 of this judgment, in respect of air transport services between airports within the European Union and those in third countries, so that there can be no justification for limiting the possibility for the referring court to apply Article 81(1) EC to the conduct at issue in the main proceedings.

67 In those circumstances, the fact, mentioned by the referring court, that no decision under Article 84 or 85 EC has been adopted concerning that conduct does not preclude that court from applying Article 81 EC to that conduct for the purposes of assessing whether there has been an infringement of that latter article and, where appropriate, ordering the payment of compensation in respect of any damage arising therefrom.

68 As regards, in the second place, the interpretation of Article 53 of the EEA Agreement, it should be recalled that that article prohibits, in the same terms as Article 81 EC, agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the contracting parties to that agreement and which have as their object or effect the prevention, restriction or distortion of competition within the EEA.

69 It is important to point out, moreover, that the EEA Agreement is an integral part of EU law (see, to that effect, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 49).

70 That agreement reaffirms the special relationship between the European Union, its Member States and the European Free Trade Association (EFTA) States, which is based on proximity, long-standing common values and European identity. It is in the light of that special relationship that one of the principal objectives of the EEA Agreement must be understood, namely that of extending the internal market established within the European Union to the EFTA States. In that perspective, a number of provisions in the EEA Agreement are intended to ensure that the interpretation of that agreement is as uniform as possible throughout the EEA. It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the FEU Treaty are interpreted uniformly within the Member States (see to that effect, judgment of 2 April 2020, *Ruska Federacija*, C-897/19 PPU, EU:C:2020:262, paragraph 50 and the case-law cited).

71 It follows that, since Article 53 of the EEA Agreement is in essence identical to Article 81 EC, the former must be interpreted in the same way as the latter.

72 Furthermore, Regulation No 1/2003 and Regulation No 411/2004 became applicable under the EEA Agreement following the entry into force on 19 May 2005 of Decision of the EEA Joint Committee No 130/2004 of 24 September 2004 amending Annex XIV (Competition), Protocol 21 (On the implementation of competition rules applicable to undertakings) and Protocol 23 (Concerning the cooperation between the surveillance authorities) to the EEA Agreement (OJ 2005 L 64, p. 57) and Decision of the EEA Joint Committee No 40/2005 of 11 March 2005 amending Annex XIII (Transport) and Protocol 21 (on the implementation of competition rules applicable to undertakings) to the EEA Agreement (OJ 2005 L 198, p. 38).

73 In those circumstances, in so far as the conduct at issue in the main proceedings is capable of affecting trade between the contracting parties to the EEA Agreement, which it is for the referring court to verify, the considerations set out in paragraphs 47 to 67 of this judgment apply *mutatis mutandis* to the interpretation of Article 53 of that agreement in the cases in the main proceedings.

74 In that regard, as has been pointed out, in essence, by the Norwegian Government and the EFTA Surveillance Authority and as the Advocate General stated in point 88 of his Opinion, the absence from the EEA Agreement of a provision equivalent to Article 84 EC is not capable of calling into question that conclusion since, as stated in paragraph 53 of this judgment, that provision does not affect the jurisdiction which national courts enjoy by virtue of the direct effect of Article 81 EC.

75 In the light of all the foregoing considerations, the answer to the question referred is that Articles 81, 84 and 85 EC and Article 53 of the EEA Agreement must be interpreted as meaning that a national court, in a dispute governed by private law relating to an action for damages brought before it after the entry into force of Regulation No 1/2003, has jurisdiction to apply Article 81 EC and Article 53 of the EEA Agreement to the conduct of undertakings in the context of air transport between a Member State and a third country other than Switzerland which took place before 1 May 2004, to the conduct of undertakings in the context of air transport between a Member State and Switzerland which took place before 1 June 2002 and to the conduct of undertakings in the context of air transport between an EEA country that is not a Member State and a third country which took place before 19 May 2005, even if no decision under Article 84 EC or Article 85 EC has been adopted concerning that conduct, in so far as the conduct was capable of affecting, respectively, trade between Member States and trade between the contracting parties to the EEA Agreement.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Articles 81, 84 and 85 EC and Article 53 of the Agreement on the European Economic Area of 2 May 1992 must be interpreted as meaning that a national court, in a dispute governed by private law relating to an action for damages brought before it after the entry into force of 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 [EC], has jurisdiction to apply Article 81 EC and Article 53 of the EEA Agreement to the conduct of undertakings in the

context of air transport between a Member State and a third country other than Switzerland which took place before 1 May 2004, to the conduct of undertakings in the context of air transport between a Member State and Switzerland which took place before 1 June 2002 and to the conduct of undertakings in the context of air transport between a European Economic Area country that is not a Member State and a third country which took place before 19 May 2005, even if no decision under Article 84 EC or Article 85 EC has been adopted concerning that conduct, in so far as the conduct was capable of affecting, respectively, trade between Member States and trade between the contracting parties to the Agreement on the European Economic Area.

[Signatures]