



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

16 December 2015 *

(Competition — Agreements, decisions and concerted practices — European airfreight market — Agreements and concerted practices in respect of several elements of the pricing of airfreight services (imposition of fuel and security surcharges, refusal to pay commission on surcharges) — Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Agreement between the European Community and Switzerland on Air Transport — Obligation to state reasons)

In Case T-67/11,

Martinair Holland NV, established in Haarlemmermeer (Netherlands), represented by R. Wesseling, lawyer,

applicant,

v

European Commission, represented initially by S. Noë, N. von Lingen and C. Giolito, and subsequently by S. Noë, C. Giolito and A. Dawes, acting as Agents, and by B. Doherty, Barrister,

defendant,

APPLICATION for annulment of Commission 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), in so far as it concerns the applicant, or, at the very least, for annulment of Article 5(b) of that decision, in so far as it imposes a fine on the applicant, or for the reduction of that fine,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen (Rapporteur), President, I. Pelikánová and E. Buttigieg, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written procedure and further to the hearing on 21 May 2015,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

- 1 The applicant, Martinair Holland NV, is an airline operating in the airfreight ('freight') market.
- 2 On 7 December 2005, the Commission of the European Communities received an application for immunity under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3, 'the 2002 Leniency Notice') lodged by Deutsche Lufthansa AG ('Lufthansa') and its subsidiaries, Lufthansa Cargo AG and Swiss International Air Lines AG ('Swiss'). According to that application, anticompetitive contacts existed between a number of undertakings operating in the freight market ('the carriers') with respect, inter alia, to:
 - the fuel surcharge ('the FSC'), which had been introduced to tackle rising fuel costs;
 - the security surcharge ('the SSC'), which had been introduced to address the costs of certain security measures imposed following the terrorist attacks of 11 September 2001.
- 3 On 14 and 15 February 2006, the Commission carried out unannounced inspections pursuant to Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles [101 TFEU] and [102 TFEU] (OJ 2003 L 1, p. 1).
- 4 Following the inspections, a number of carriers, including the applicant, made an application under the 2002 Leniency Notice.
- 5 On 19 December 2007, the Commission addressed a statement of objections to 27 carriers, including the applicant ('the statement of objections'). It stated that those carriers had infringed Article 101 TFEU, Article 53 of the Agreement on the European Economic Area (EEA) and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport ('the Swiss Agreement') by participating in a worldwide cartel relating, inter alia, to the FSC, the SSC and a refusal to pay commission on surcharges ('the refusal to pay commission'). The addressees of that statement of objections submitted written observations in reply. An oral hearing was held from 30 June to 4 July 2008.
- 6 On 9 November 2010, the Commission adopted Decision C(2010) 7694 final relating to a proceeding under Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement (Case COMP/39258 — Airfreight) ('the contested decision'). The contested decision was addressed to the following 21 carriers ('the carriers at issue'):
 - Air Canada;
 - Air France-KLM;
 - Société Air France SA ('Air France');
 - Koninklijke Luchtvaart Maatschappij NV ('KLM');
 - British Airways plc;
 - Cargolux Airlines International SA ('Cargolux');
 - Cathay Pacific Airways Ltd ('CPA');

- Japan Airlines Corp.;
 - Japan Airlines International Co. Ltd ('Japan Airlines');
 - Lan Airlines SA ('LAN');
 - Lan Cargo SA ('LAN Cargo');
 - Lufthansa Cargo;
 - Lufthansa;
 - Swiss;
 - the applicant;
 - Qantas Airways Ltd ('Qantas');
 - SAS AB;
 - SAS Cargo Group A/S ('SAS Cargo');
 - Scandinavian Airlines System Denmark-Norway-Sweden ('Scandinavian Airlines');
 - Singapore Airlines Cargo Pte Ltd ('SAC');
 - Singapore Airlines Ltd.
- 7 The objections raised provisionally against the other addressees of the statement of objections were withdrawn.
- 8 The grounds of the contested decision describe a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement, covering the EEA territory and Switzerland, by which the carriers at issue coordinated their behaviour as regards the pricing of freight services.
- 9 The operative part of the contested decision, in so far as it relates to the applicant, reads as follows:

'Article 1

The following undertakings infringed Article 101 of the TFEU and Article 53 of the EEA Agreement by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for airfreight services on routes between airports within the EEA, for the following periods:

...

- (i) [the applicant] from 22 January 2001 until 14 February 2006;

...

Article 2

The following undertakings infringed Article 101 of the TFEU by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for airfreight services on routes between airports within the European Union and airports outside the EEA, for the following periods:

...

(o) [the applicant] from 1 May 2004 until 14 February 2006;

...

Article 3

The following undertakings infringed Article 53 of the EEA Agreement by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for airfreight services on routes between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and third countries, for the following periods:

...

(m) [the applicant] from 19 May 2005 until 14 February 2006;

...

Article 4

The following undertakings infringed Article 8 of the [Swiss] Agreement ... by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for airfreight services on routes between airports within the European Union and airports in Switzerland, for the following periods:

...

(i) [the applicant] from 1 June 2002 until 14 February 2006;

...

Article 5

For the infringements referred to in Articles 1 to 4, the following fines are imposed:

...

(m) [the applicant]: EUR 29 500 000;

...

Article 6

The undertakings listed in Articles 1 to 4 shall immediately bring to an end the infringements referred to in those Articles, insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Articles 1 to 4, and from any act or conduct having the same or similar object or effect.

Article 7

This Decision is addressed to:

...

[the applicant]

...'

Procedure

- 10 By application lodged at the Court Registry on 24 January 2011, the applicant brought the present action. The Commission lodged its defence on 27 May 2011.
- 11 By decision of 29 June 2011, the Court decided, in accordance with Article 47(1) of its Rules of Procedure of 2 May 1991, not to allow a second exchange of pleadings.
- 12 By decision of the President of the Court of 1 December 2011, one of the judges of the Sixth Chamber of the Court, to which the Judge-Rapporteur was assigned, was replaced by another judge.
- 13 By decision of the President of the Court of 17 January 2013, the Judge-Rapporteur was replaced by another judge and the present case was assigned to a new Judge-Rapporteur sitting in the Sixth Chamber.
- 14 Following a request by the Court in the context of the measures of organisation of procedure provided for in Article 64 of the Rules of Procedure of 2 May 1991, the applicant submitted, by document lodged at the Court Registry on 5 July 2013, observations on the defence. By document lodged at the Court Registry on 27 September 2013, the Commission submitted observations on those observations.
- 15 Following a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the First Chamber, to which the present case was, accordingly, allocated on 2 October 2013.
- 16 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure. In addition, in the context of the measures of organisation of procedure provided for in Article 64 of its Rules of Procedure of 2 May 1991, the Court put written questions to the parties, which replied within the prescribed period.
- 17 On 28 April 2015, the Court requested the applicant to inform it if the report for the hearing contained information that was confidential vis-à-vis the public. By two letters of 4 May 2015, the applicant requested that certain information in the report for the hearing not be made public and submitted some observations on that report, of which the Court took note.
- 18 At the hearing on 21 May 2015, the parties presented oral argument and answered the questions put by the Court.

Forms of order sought

19 The applicant claims that the Court should:

- annul Articles 1 to 7 of the contested decision, in whole or in part, in so far as they concern the applicant;
- or, reduce the amount of the fine imposed in Article 5(m) of the contested decision;
- order the Commission to pay the costs.

20 The Commission contends that the Court should:

- dismiss the action;
- order the applicant to pay the costs.

Law

- 21 In support of its action, the applicant invokes two pleas in law, alleging, first, an infringement of the obligation to state reasons, the right to good administration, the right to an effective remedy and to a fair trial, the presumption of innocence and the rights of the defence and, secondly, a manifest error of assessment in the calculation of the fine and an infringement of Regulation No 1/2003, the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2), the principles of proportionality and equal treatment and the obligation to state reasons.
- 22 The first plea in law comprises two parts, the first alleging an infringement of the obligation to state reasons and the right to good administration and the second alleging an infringement of the right to good administration, the right to an effective remedy and to a fair trial, the presumption of innocence and the rights of the defence.
- 23 In the context of the first part of the first plea in law, the applicant submits, inter alia, that the contested decision does not enable it to determine the nature and scope of the infringement or infringements found against it, since the operative part of the contested decision refers to four infringements committed by different carriers relating to different periods and routes, whereas the grounds refer to a single and continuous worldwide infringement covering all routes. It adds that since, in the contested decision, the Commission assessed the conditions for applying Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement solely in relation to the existence of an alleged worldwide cartel, the finding of four infringements in the operative part could not be based on the assessment of the facts and evidence carried out in the grounds. According to the applicant, the Commission did not examine in the contested decision whether the facts and evidence it had adduced supported the four specific infringements set out in Articles 1 to 4, respectively, of that decision.
- 24 Thus, by the first part of the first plea in law, the applicant argues, in essence, that the contested decision is vitiated by a failure to state reasons, since the grounds and the operative part of that decision are contradictory, which the Commission disputes.
- 25 In that respect, it must be borne in mind that, according to settled case-law, the statement of reasons required by Article 296(2) TFEU must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Court of the European Union to exercise its power of review (see, to that effect, judgments of

25 June 1998 in *British Airways and Others v Commission*, T-371/94 and T-394/94, ECR, EU:T:1998:140, paragraph 89, and 29 June 2012 in *GDF Suez v Commission*, T-370/09, ECR, EU:T:2012:333, paragraph 117). The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (see, to that effect, judgments of 2 April 1998 in *Commission v Sytraval and Brink's France*, C-367/95 P, ECR, EU:C:1998:154, paragraph 63, and 15 March 2000 in *Cimenteries CBR and Others v Commission*, T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95, ECR, EU:T:2000:77, paragraph 469).

- 26 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 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 (see, to that effect, judgment in *Commission v Sytraval and Brink's France*, cited in paragraph 25 above, EU:C:1998:154, paragraph 63, and judgment of 2 February 2012 in *Denki Kagaku Kogyo and Denka Chemicals v Commission*, T-83/08, EU:T:2012:48, paragraph 91).
- 27 Nevertheless, in stating the reasons for a decision which it takes to enforce the rules on competition, the Commission is required under Article 296 TFEU to set out at least the facts and considerations having decisive importance in the context of the decision in order to make clear to the competent court and the persons concerned the circumstances in which it has applied EU law (see, to that effect, judgment in *Denki Kagaku Kogyo and Denka Chemicals v Commission*, cited in paragraph 26 above, EU:T:2012:48, paragraph 91).
- 28 In addition, the statement of the reasons must be logical and, in particular, contain no internal inconsistency that would prevent a proper understanding of the reasons underlying the measure (see, to that effect, judgments of 10 July 2008 in *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, ECR, EU:C:2008:392, paragraph 169, and 29 September 2011 in *Elf Aquitaine v Commission*, C-521/09 P, ECR, EU:C:2011:620, paragraph 151).
- 29 It must be added that, notwithstanding Article 23(5) of Regulation No 1/2003, which states that decisions imposing fines for infringements of the competition rules are not of a criminal law nature, the infringement of Article 101(1) TFEU, of Article 53 of the EEA Agreement and of Article 8 of the Swiss Agreement involves engaging in conduct which is generally regarded as underhand, to the detriment of the public at large, and which entails a clear stigma and a potential fine, for the undertakings responsible, of up to 10% of annual turnover, which is undoubtedly severe (see the Opinion of Advocate General Sharpston in *KME Germany and Others v Commission*, C-272/09 P, ECR, EU:C:2011:63, paragraph 64). Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties (see judgment of 27 March 2014 in *Saint-Gobain Glass France and Others v Commission*, T-56/09 and T-73/09, ECR, EU:T:2014:160, paragraph 78 and the case-law cited), those penalties pertain to criminal matters for the purpose of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), as can be seen, inter alia, from the judgment of the European Court of Human Rights in *A. Menarini Diagnostics S.R.L. v. Italy* (no. 43509/08, §§ 39 to 44, 27 September 2011).
- 30 Moreover, in paragraphs 58 and 59 of its judgment in *A. Menarini Diagnostics S.R.L. v. Italy*, cited in paragraph 29 above, the European Court of Human Rights noted that, if a 'penalty' is imposed by a decision of an administrative authority, the person concerned must have an opportunity to challenge any decision made against him before a tribunal that offers the guarantees provided for in Article 6 of the ECHR (see, to that effect, judgment of 18 July 2013 in *Schindler Holding and Others v Commission*, C-501/11 P, ECR, EU:C:2013:522, paragraph 34).

- 31 The principle of effective judicial protection, a general principle of EU law which is now enshrined in Article 47 of the Charter of Fundamental Rights of the European Union and which corresponds, in EU law, to Article 6(1) of the ECHR (see judgment of 10 July 2014 in *Telefónica and Telefónica de España v Commission*, C-295/12 P, ECR, EU:C:2014:2062, paragraph 57 and the case-law cited), requires that the operative part of a decision adopted by the Commission, finding infringements of the competition rules, must be particularly clear and precise and that the undertakings held liable and penalised must be in a position to understand and to contest that imputation of liability and the imposition of those penalties, as set out in the wording of that operative part.
- 32 It should be borne in mind that it is in the operative part of a decision that the Commission must indicate the nature and extent of the infringements which it penalises. In principle, as regards in particular the scope and nature of the infringements penalised, it is the operative part, and not the statement of reasons, which is important. Only where there is a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in a decision. As the European Union Courts have held, for the purpose of determining the persons to whom a decision finding an infringement applies, only the operative part of the decision must be considered, provided that it is not open to more than one interpretation (judgments of 16 December 1975 in *Suiker Unie and Others v Commission*, 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73, ECR, EU:C:1975:174, paragraph 315, and 11 December 2003 in *Adriatica di Navigazione v Commission*, T-61/99, ECR, EU:T:2003:335, paragraph 43).
- 33 Moreover, it should also be borne in mind that Article 101(1) TFEU produces direct effects in relations between individuals and creates rights for individuals with the result that it must be open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. National courts whose task it is to apply that provision in areas within their jurisdiction must therefore ensure that those rules take full effect and must protect the rights which they confer on individuals (judgment of 6 June 2013 in *Donau Chemie and Others*, C-536/11, ECR, EU:C:2013:366, paragraphs 21 and 22). It follows that any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101(1) TFEU (judgments of 13 July 2006 in *Manfredi and Others*, C-295/04 to C-298/04, ECR, EU:C:2006:461, paragraph 61, and 6 November 2012 in *Otis and Others*, C-199/11, ECR, EU:C:2012:684, paragraph 43).
- 34 In accordance with Article 16(1) of Regulation No 1/2003, when national courts rule on agreements, decisions or practices under Article 101 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to that decision.
- 35 In that respect, it must be considered, contrary to the Commission's assertions at the hearing, that a national court would take a decision contrary to that adopted by the Commission not only if it gave a different legal classification to the anticompetitive conduct examined, but also if its decision differed from that of the Commission as regards the temporal or geographic scope of the conduct examined or as regards the liability or non-liability of persons investigated in relation to the conduct at issue and whose liability was examined in the Commission's decision.
- 36 The national courts are therefore bound by the decision adopted by the Commission, provided that it has not been annulled or invalidated, and consequently the meaning of the operative part of that decision must be unambiguous.
- 37 In particular, clear wording of the operative part of a decision finding an infringement of the competition rules must allow the national courts to understand the scope of that infringement and to identify the persons liable, in order to be able to draw the necessary inferences as regards claims for damages brought by persons harmed by that infringement.

- 38 Lastly, it must be noted that the full effectiveness of Article 101 TFEU would be undermined if a person's right to claim compensation from another person for harm suffered depended, unconditionally, on the existence of a contractual link between those two persons (see, to that effect, judgment of 5 June 2014 in *Kone and Others*, C-557/12, ECR, EU:C:2014:1317, paragraph 33). It cannot therefore be ruled out that a person held liable for an infringement of the competition rules found by the Commission may be required to pay compensation for the damage caused to customers of other persons held liable for the same infringement. In such a case, and where provided for by national law, indemnity proceedings between those parties may be brought before the national courts. In that context, the wording of the operative part of a decision finding an infringement of the competition rules is evidently decisive, since it is such as to establish mutual rights and obligations of the persons concerned.
- 39 The national court may also, if provided for by national law, be required to find that all of the persons held liable for the infringement of the competition rules found by the Commission must jointly and severally make good the damage caused. In that case, the wording of the operative part of a decision finding an infringement of the competition rules may also be decisive as regards the persons concerned.
- 40 In the light of the foregoing, the Court must therefore examine, in the first place, whether, as the applicant submits, there is a contradiction between the grounds and the operative part of the contested decision.
- 41 Articles 1 to 4 of the operative part of the contested decision are worded as follows:

'Article 1

The following undertakings infringed Article 101 of the TFEU and Article 53 of the EEA Agreement by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for airfreight services on routes between airports within the EEA, for the following periods:

- (a) Air France-KLM from 7 December 1999 until 14 February 2006;
- (b) ... Air France from 7 December 1999 until 14 February 2006;
- (c) KLM ... from 21 December 1999 until 14 February 2006;
- (d) British Airways ... from 22 January 2001 until 14 February 2006;
- (e) Cargolux ... from 22 January 2001 until 14 February 2006;
- (f) Lufthansa Cargo ... from 14 December 1999 until 7 December 2005;
- (g) ... Lufthansa ... from 14 December 1999 until 7 December 2005;
- (h) Swiss ... from 2 April 2002 to 7 December 2005;
- (i) [the applicant] from 22 January 2001 until 14 February 2006;
- (j) SAS ... from 17 August 2001 until 14 February 2006;
- (k) SAS Cargo ... from 1 June 2001 until 14 February 2006;
- (l) Scandinavian Airlines ... from 13 December 1999 until 28 December 2003.

Article 2

The following undertakings infringed Article 101 of the TFEU by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for airfreight services on routes between airports within the European Union and airports outside the EEA, for the following periods:

- (a) Air Canada from 1 May 2004 until 14 February 2006;
- (b) Air France-KLM from 1 May 2004 until 14 February 2006;
- (c) ... Air France from 1 May 2004 until 14 February 2006;
- (d) KLM ... from 1 May 2004 until 14 February 2006;
- (e) British Airways ... from 1 May 2004 until 14 February 2006;
- (f) Cargolux ... from 1 May 2004 until 14 February 2006;
- (g) [CPA] from 1 May 2004 until 14 February 2006;
- (h) Japan Airlines [Corp.] from 1 May 2004 until 14 February 2006;
- (i) Japan Airlines ... from 1 May 2004 until 14 February 2006;
- (j) LAN ... from 1 May 2004 until 14 February 2006;
- (k) LAN Cargo ... from 1 May 2004 until 14 February 2006;
- (l) Lufthansa Cargo ... from 1 May 2004 until 7 December 2005;
- (m) ... Lufthansa ... from 1 May 2004 until 7 December 2005;
- (n) Swiss ... from 1 May 2004 until 7 December 2005;
- (o) [the applicant] from 1 May 2004 until 14 February 2006;
- (p) Qantas ... from 1 May 2004 until 14 February 2006;
- (q) SAS ... from 1 May 2004 until 14 February 2006;
- (r) SAS Cargo ... from 1 May 2004 until 14 February 2006;
- (s) [SAC] from 1 May 2004 until 14 February 2006;
- (t) Singapore Airlines ... from 1 May 2004 until 14 February 2006.

Article 3

The following undertakings infringed Article 53 of the EEA Agreement by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for airfreight services on routes between airports in countries that are Contracting Parties of the EEA Agreement but not Member States and third countries, for the following periods:

- (a) Air Canada from 19 May 2005 until 14 February 2006;
- (b) Air France-KLM from 19 May 2005 until 14 February 2006;
- (c) ... Air France from 19 May 2005 until 14 February 2006;
- (d) KLM ... from 19 May 2005 until 14 February 2006;
- (e) British Airways ... from 19 May 2005 until 14 February 2006;
- (f) Cargolux ... from 19 May 2005 until 14 February 2006;
- (g) [CPA] from 19 May 2005 until 14 February 2006;
- (h) Japan Airlines [Corp.] from 19 May 2005 until 14 February 2006;
- (i) Japan Airlines ... from 19 May 2005 until 14 February 2006;
- (j) Lufthansa Cargo ... from 19 May 2005 until 7 December 2005;
- (k) ... Lufthansa ... from 19 May 2005 until 7 December 2005;
- (l) Swiss ... from 19 May 2005 until 7 December 2005;
- (m) [the applicant] from 19 May 2005 until 14 February 2006;
- (n) Qantas ... from 19 May 2005 until 14 February 2006;
- (o) SAS ... from 19 May 2005 until 14 February 2006;
- (p) SAS Cargo ... from 19 May 2005 until 14 February 2006;
- (q) [SAC] from 19 May 2005 until 14 February 2006;
- (r) Singapore Airlines ... from 19 May 2005 until 14 February 2006.

Article 4

The following undertakings infringed Article 8 of the [Swiss] Agreement ... by participating in an infringement that comprised both agreements and concerted practices through which they coordinated various elements of price to be charged for airfreight services on routes between airports within the European Union and airports in Switzerland, for the following periods:

- (a) Air France-KLM from 1 June 2002 until 14 February 2006;
- (b) ... Air France from 1 June 2002 until 14 February 2006;

- (c) KLM ... from 1 June 2002 until 14 February 2006;
- (d) British Airways ... from 1 June 2002 until 14 February 2006;
- (e) Cargolux ... from 1 June 2002 until 14 February 2006;
- (f) Lufthansa Cargo ... from 1 June 2002 until 7 December 2005;
- (g) ... Lufthansa ... from 1 June 2002 until 7 December 2005;
- (h) Swiss ... from 1 June 2002 until 7 December 2005;
- (i) [the applicant] from 1 June 2002 until 14 February 2006;
- (j) SAS ... from 1 June 2002 until 14 February 2006;
- (k) SAS Cargo ... from 1 June 2002 until 14 February 2006;
- (l) Scandinavian Airlines ... from 1 June 2002 until 28 December 2003.'

⁴² The applicant argues, in essence, that a literal reading of Articles 1 to 4 of the contested decision leads to the conclusion that there are four separate single and continuous infringements, each of which relates to a different category of routes, rather than one single and continuous infringement relating to all of the routes covered by the cartel, as described in the grounds of that decision.

⁴³ That is confirmed, according to the applicant, by the wording of Articles 5 and 6 of the contested decision, which provide:

'Article 5

For the infringements referred to in Articles 1 to 4, the following fines are imposed:

...

Article 6

The undertakings listed in Articles 1 to 4 shall immediately bring to an end the infringements referred to in those Articles, insofar as they have not already done so.

...'

⁴⁴ The applicant draws attention to the fact that Articles 5 and 6 of the contested decision refer to 'infringements' in the plural, and not to 'an infringement' in the singular.

⁴⁵ In that respect, it must be pointed out, first of all, that, as the Commission stated in its reply to the measures of organisation of procedure referred to in paragraph 16 above, the division of the operative part of a decision finding infringements of the competition rules into four separate articles does not necessarily imply the existence of four separate infringements.

⁴⁶ That division could be a reflection of the fact that the complex of instances of anticompetitive conduct comprising the single and continuous infringement described in the contested decision infringed three different provisions prohibiting that conduct which have different territorial and temporal scopes.

- 47 Indeed, the Commission indicated, in paragraphs 815 to 817 of the contested decision and in its written submissions to the Court, that, until 1 May 2004, it had implementing powers to apply Article 101 TFEU only with respect to international air transport between Community airports and therefore could not apply Article 101 TFEU to anticompetitive agreements and practices concerning routes between airports within the European Union and airports outside the EEA. Moreover, it explained, in recitals 818 to 821 of the contested decision, that, until 19 May 2005, it was competent to apply Article 53 of the EEA Agreement only to air transport between airports within the EEA and that it was only as from that date that it became competent to apply that provision as regards routes between airports in countries which are contracting parties to the EEA Agreement but which are not Member States and airports in third countries. Furthermore, it can be seen from recitals 822 to 825 of the contested decision that the Commission considered that it was competent to apply Article 8 of the Swiss Agreement to routes between airports in the European Union and airports in Switzerland as from 1 June 2002.
- 48 Accordingly, as the Commission indicated in its reply mentioned in paragraph 16 above and at the hearing, the infringement of the three provisions, namely Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement — each of which set out the Commission's competence as regards their application *ratione temporis* and *ratione loci* — led it to divide the operative part of the contested decision into seven articles, the first four of which are organised as follows:
- Article 1 concerns the Commission's competence to apply Article 101 TFEU and Article 53 of the EEA Agreement as regards routes between airports within the EEA, for the period from 7 December 1999 to 14 February 2006;
 - Article 2 concerns the Commission's competence to apply Article 101 TFEU as regards routes between airports within the European Union and airports outside the EEA, for the period from 1 May 2004 to 14 February 2006;
 - Article 3 concerns the Commission's competence to apply Article 53 of the EEA Agreement as regards routes between airports in countries which are contracting parties to the EEA Agreement but which are not Member States and airports in third countries, for the period from 19 May 2005 to 14 February 2006;
 - Article 4 concerns the Commission's competence to apply Article 8 of the Swiss Agreement as regards routes between airports within the European Union and airports in Switzerland, for the period from 1 June 2002 to 14 February 2006.
- 49 The applicant does not dispute that the scope of the Commission's competence varied depending on the routes concerned, or that the division of the operative part of the contested decision is related to the variable scope of the Commission's competence.
- 50 The applicant submits, however, that, according to the grounds of the contested decision, all of the carriers at issue participated in the anticompetitive conduct comprising the single and continuous worldwide infringement, irrespective of the routes operated, and that Articles 1 to 4 of that decision find four separate infringements, each concerning a different category of routes, in which only some of the carriers at issue participated.
- 51 In that regard, it is apparent from the contested decision that only 11 of the 21 carriers at issue, namely Air France-KLM, Air France, KLM, British Airways, Cargolux, Lufthansa, Lufthansa Cargo, Swiss, the applicant, SAS and SAS Cargo, are mentioned in each of the first four articles. Air Canada, CPA, Japan Airlines Corp., Japan Airlines, Qantas, SAC and Singapore Airlines are mentioned in both Article 2 and Article 3 of the contested decision. Scandinavian Airlines is mentioned in both Article 1 and Article 4. LAN and LAN Cargo are mentioned only in Article 2.

52 It should be noted that the period from 1 May 2004 to 14 February 2006, during which the carriers mentioned in Article 2 of the contested decision are stated to have participated in the anticompetitive conduct, and the period from 19 May 2005 to 14 February 2006, during which the carriers mentioned in Article 3 are stated to have participated in that conduct, are entirely covered by the period referred to in Article 1 of the contested decision, from 7 December 1999 to 14 February 2006, and the period referred to in Article 4 of the contested decision, from 1 June 2002 to 14 February 2006, as can be seen from paragraph 41 above.

53 Consequently, if the anticompetitive conduct was regarded as comprising a single and continuous infringement of Article 101 TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement, concerning all the routes covered by the cartel, and in which all of the carriers at issue participated, the carriers mentioned in Article 2 of the contested decision should also be included in Articles 1 and 4 of that decision. Moreover, all of the carriers which, according to Article 2 of the contested decision, participated in the conduct referred to in that article for a period that extended beyond 19 May 2005 should also be included in Article 3 of that decision.

54 Thus, the first four articles of the contested decision cannot be interpreted as supporting the hypothesis of a single and continuous infringement in relation to all the routes covered by the cartel and in which all of the carriers at issue participated. Rather, given that several of the carriers at issue are not mentioned in Articles 1, 3 and 4 of the contested decision, the first four articles of that decision must necessarily be interpreted as meaning either:

- that the operative part of the contested decision finds four separate single and continuous infringements, each concerning a different category of routes, which might also explain the use of the word ‘infringements,’ in the plural, in Articles 5 and 6 of that decision, as the applicant submits; or
- that the operative part of the contested decision finds one single and continuous infringement, liability for which is attributed only to the carriers which — as regards the routes mentioned in each of the first four articles of the contested decision — participated directly in the unlawful conduct referred to in each of those articles or were aware of collusion regarding those routes and accepted the risk.

55 The latter interpretation may be explained by the fact the Commission is not entitled to attribute liability to an undertaking which participated directly in one or more of the aspects of anticompetitive conduct comprising a single and continuous infringement for the unlawful conduct planned or put into effect by the other participants in which it did not directly participate, unless it has been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other conduct in pursuit of the same objectives or that it could reasonably have foreseen that conduct and was prepared to take the risk (see, to that effect, judgment of 6 December 2012 in *Commission v Verhuizingen Coppens*, C-441/11 P, ECR, EU:C:2012:778, paragraph 44).

56 However, as the parties themselves point out, it is apparent from an overall reading of the grounds of the contested decision and, in particular, of recitals 1, 95 to 97, 100, 101, 855, 856 and 864 to 879 of that decision that the Commission describes a single cartel, constituting a single and continuous infringement of Article 101 TFEU, of Article 53 of the EEA Agreement and of Article 8 of the Swiss Agreement in relation to all of the routes covered by the cartel and in which all of the carriers at issue participated. Those carriers, in the context of a single overall plan and by means of a single network of bilateral and multilateral contacts, allegedly coordinated their behaviour in relation to the development of the FSC and the SSC and the refusal to pay commission. That coordination is said to have taken place at a worldwide level and therefore affected simultaneously all the routes referred to in the contested decision.

- 57 In recital 892 of the contested decision, the Commission even emphasised that the cartel described in paragraph 56 above constituted a single infringement and that, in the circumstances, it would be ‘artificial to split up’ the anticompetitive conduct comprising the single and continuous infringement into separate infringements.
- 58 There is therefore a contradiction between the grounds of the contested decision, which describe a single and continuous infringement in relation to all of the routes covered by the cartel and in which all of the carriers at issue allegedly participated, and the operative part of that decision, which refers to either four separate single and continuous infringements or just one single and continuous infringement, liability for which is attributed only to the carriers which, as regards the routes mentioned in Articles 1 to 4 of the contested decision, participated directly in the unlawful conduct referred to in each of those articles or were aware of the collusion on those routes and accepted the risk.
- 59 That conclusion is not undermined by the Commission’s argument, put forward in the reply to the measures of organisation of procedure mentioned in paragraph 16 above, that the failure to mention some of the carriers at issue in Articles 1, 3 and 4 of the contested decision can be explained by the fact that those carriers did not operate the routes referred to in those articles, and that those articles need not be interpreted as referring to separate single and continuous infringements.
- 60 The Commission’s alternative interpretation of the operative part of the contested decision goes against the very idea of there being a single and continuous infringement composed of a complex of anticompetitive conduct for which all the participants are liable, irrespective of the routes concerned, as can be seen inter alia from the Commission’s observations in recitals 862 and 873 of the contested decision, which show that it wished to apply, in this case, the principles derived from the case-law according to which a person may be held liable for the participation of an undertaking in a single and continuous infringement even though it is established that the undertaking concerned participated directly only in one or some of the constituent elements of that infringement, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the infringement (judgments of 14 May 1998 in *Buchmann v Commission*, T-295/94, ECR, EU:T:1998:88, paragraph 121, and 20 March 2002 in *HFB and Others v Commission*, T-9/99, ECR, EU:T:2002:70, paragraph 231).
- 61 The alternative interpretation of the operative part of the contested decision proposed by the Commission also contradicts certain assertions which it made in that decision, such as the statement in recital 881, according to which, in order to find a single and continuous infringement, it was not necessary for the carriers to be ‘actual or potential competitors of all participants in the cartel or ... actual or potential competitors on any specific route’, or the statement in recital 825, according to which it was not necessary to establish the existence of an infringement as regards a specific route, but rather it sufficed to adduce evidence of the existence of a worldwide cartel, ‘[a]ll the events described in Section 4 [of the contested decision] form[ing] part of the evidence of the worldwide cartel described in [that] Decision’.
- 62 It is therefore clear that the grounds of the contested decision describe a single and continuous infringement not only in relation to the three constituent elements of the infringement, namely the FSC, the SSC and the refusal to pay commission, but also in relation to all the routes operated by the carriers in question.
- 63 Accordingly, the Commission’s alternative interpretation of the operative part of the contested decision would also lead to a finding of a contradiction between the grounds and the operative part of that decision.

- 64 Next, it must be pointed out that, contrary to the Commission's submission (see paragraph 59 above), the carriers mentioned in Articles 1 to 4 of the contested decision are held liable for the entirety of the infringement referred to in each article, and no distinction is made, in each article, between the routes which were operated by those carriers during the infringement period and those which were not.
- 65 In short, reading the operative part of the contested decision in the manner proposed by the Commission results in an operative part based on two contradictory lines of reasoning. On the one hand, a carrier mentioned in one of the first four articles of that decision is held liable for the anticompetitive conduct in which it participated, even if it did not operate all of the routes covered by the article in question. On the other hand, the same carrier, which is not mentioned in one of the other articles, avoids all liability for anticompetitive conduct in which it nevertheless allegedly participated if it did not operate any of the routes covered by that article.
- 66 In addition, it must be noted that, in its reply referred to in paragraph 16 above, the Commission justified the failure to mention some of the carriers at issue in Articles 1, 3 and 4 of the contested decision for the first time on the basis of a 'discretion' allowing it not to attribute liability to some participants in a worldwide cartel for all of the anticompetitive conduct comprising that cartel in which they nevertheless took part, provided that that approach is based on objective and non-discriminatory criteria, while acknowledging that the contested decision could have included all of the carriers in Articles 1, 3 and 4 thereof.
- 67 Not only has the Commission not explained the basis in law for that discretion, but it has also not explained how that discretion is compatible with its intention to apply the principles derived from the case-law cited in recitals 862 and 873 of the contested decision, as mentioned in paragraph 60 above.
- 68 Lastly, it must be noted that the grounds of the contested decision themselves are not entirely internally consistent. Indeed, those grounds contain assessments which are difficult to reconcile with the existence of a single cartel covering all of the routes referred to in the operative part, as described in the grounds (see paragraph 56 above).
- 69 In that respect, as the applicant submits, the Commission indicated in recital 1124 of the contested decision that it had taken — as the starting date of the participation of each of the carriers at issue in the infringement — the first anticompetitive contact in which each carrier had taken part, except in the case of certain carriers which, according to the Commission, were not to be held liable for the infringement as regards routes between airports in the EEA, namely Air Canada, CPA, Japan Airlines, LAN Cargo and SAC. For those carriers, the Commission took 1 May 2004 as the starting date of the infringement, even though it indicated at the same time that they had participated in the single infringement, described in paragraph 56 above, before that date. It justified the choice of that date on the basis that 'it [was] only from 1 May 2004 that Regulation No 1/2003 became applicable to the relevant services and that an infringement [was] found in respect of [the carriers in question]'.
- 70 It has already been noted (see paragraph 60 above) that, in the grounds of the contested decision, the Commission specifically indicated that it was applying the principles derived from the case-law according to which, in the context of a single and continuous infringement, a person may be held liable for the participation of an undertaking in an infringement even though it is established that the undertaking concerned participated directly only in one or some of the constituent elements of that infringement, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan that included all the constituent elements of the infringement.
- 71 Thus, although the grounds of the contested decision describe a single and continuous infringement in relation to all of the routes covered by the cartel, they nevertheless contain significant internal inconsistencies.

- 72 It therefore follows from the foregoing that the contested decision is vitiated by contradictions, first, between the grounds and the operative part and, secondly, within the grounds themselves.
- 73 It is necessary to examine, in the second place, whether, as the applicant argues, the internal inconsistencies of the contested decision infringe its rights of defence, in that they did not allow it to understand the nature and scope of the infringement or infringements found and prevent the Court from exercising its power of review.
- 74 In that respect, it must be borne in mind that the mere existence of a contradiction between the grounds and the operative part of a decision is not sufficient to establish that the decision is vitiated by a defective statement of reasons, provided that, first, the decision, taken as a whole, is such that the applicant is able to identify and plead that lack of consistency, secondly, the wording of the operative part of the decision is sufficiently clear and precise to allow the applicant to ascertain the exact scope of the decision and, thirdly, the evidence relied upon to demonstrate the applicant's participation in the infringements imputed to it in the operative part is clearly identified and examined in the grounds (see, to that effect, judgment in paragraph 32 above, *Adriatica di Navigazione v Commission*, cited in EU:T:2003:335, paragraphs 49 to 52).
- 75 In the present case, neither of the two possible interpretations of the operative part of the contested decision, referred to in paragraph 54 above, is consistent with the grounds of that decision. Accordingly, since the Court cannot favour one of those interpretations without substituting its own assessment for that of the Commission, it suffices to examine, in the context of at least one of those two possible interpretations, whether the internal inconsistencies in the contested decision were liable to infringe the applicant's rights of defence and prevent the Court from exercising its power of review.
- 76 As regards the first interpretation, namely that the operative part of the contested decision finds four separate single and continuous infringements, which, moreover, the applicant argues is the correct interpretation, it must be noted that, although the applicant was able to identify a contradiction, *inter alia* between the grounds and the operative part of the contested decision, and to infer from the wording of the operative part that it found four separate infringements, it was not, however, in a position to understand to what extent the evidence set out in the grounds, relating to the existence of a single and continuous infringement, was liable to establish the existence of four separate infringements found in the operative part, or to contest the sufficiency of that evidence.
- 77 In recitals 692 to 806 of the contested decision, the Commission chose not to treat the evidence adduced as regards each of the carriers at issue differently depending on the routes or categories of routes to which that evidence related. The Commission merely examined whether that evidence was liable to establish the participation of those carriers in the single cartel described in the grounds of that decision, without examining whether the existence of each of the four single and continuous infringements that it found in the operative part of the contested decision was supported by evidence. A distinction was made between the evidence only as regards the coordination affecting, respectively, the FSC, the SSC and the refusal to pay commission.
- 78 Moreover, as the applicant submits, in the context of the first possible interpretation of the operative part, it is unable to understand the line of reasoning that led the Commission to find the applicant liable for an infringement, including in respect of routes which it did not operate within the parameters defined by each article of the contested decision, and, accordingly, to understand whether it had been treated unfairly by comparison with the carriers at issue which were held liable for only two infringements, or even just one, on the ground that they did not operate certain routes.
- 79 In that regard, it must be pointed out that it is not clear from a reading of the contested decision why certain carriers were not included in some articles of the contested decision. The applicant indeed submits that the contested decision does not enable it to understand whether their absence is linked to the fact that those carriers did not operate certain routes. It was only after the measure of

organisation of procedure mentioned in paragraph 16 above that the Commission indicated to the Court that certain carriers were not mentioned in some articles of the contested decision either because those carriers did not operate the routes referred to in those articles or because their turnover generated on those routes was, for 2005, less than EUR 30 000.

- 80 In that respect, it must be borne in mind that, according to settled case-law, the statement of reasons must in principle be notified to the person concerned at the same time as the decision adversely affecting him and a failure to state the reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the proceedings before the Court (judgments of 26 November 1981 in *Michel v Parliament*, 195/80, ECR, EU:C:1981:284, paragraph 22, and 28 June 2005 in *Dansk Rørindustri and Others v Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, ECR, EU:C:2005:408, paragraph 463).
- 81 Otherwise, there is a risk that the obligation to state reasons will not achieve its purpose, which, according to settled case-law, is to provide the person concerned with sufficient information to ascertain whether the decision is well founded or whether it is vitiated by a defect which may permit its legality to be contested and to enable the Court to review the legality of the decision (see, to that effect, judgment in *Dansk Rørindustri and Others v Commission*, cited in paragraph 80 above, EU:C:2005:408, paragraph 462 and the case-law cited).
- 82 In the present case, it was precisely as a result of that late notification of information that the applicant was not able to invoke a breach of the principle of equal treatment between the carriers at issue until the hearing, since it was only at that stage that it was able to find out that, given the turnover it had generated on the routes between airports within the European Union and airports in Switzerland in 2005, it should not have been included in Article 4 of the contested decision.
- 83 In addition, the Court is unable to review the legality of the contested decision, since it is not in a position to assess whether the evidence adduced by the Commission in order to establish the existence of a single and continuous infringement was sufficient to establish the existence of the four infringements found in the operative part of that decision.
- 84 It follows that the contested decision is vitiated by a defective statement of reasons which justifies its annulment.
- 85 In the light of all the foregoing considerations, the first part of the first plea in law must be upheld.
- 86 The contested decision must therefore be annulled in so far as it concerns the applicant, and it is not necessary to examine the other pleas and arguments raised by the applicant.

Costs

- 87 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those of the applicant, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Annuls Commission 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), in so far as it concerns Martinair Holland NV;**
- 2. Orders the European Commission to bear its own costs and to pay those of Martinair Holland.**

Kanninen

Pelikánová

Buttigieg

Delivered in open court in Luxembourg on 16 December 2015.

[Signatures]