EUROPEAN COMMISSION
DG Competition

CASE AT.39258 – Airfreight

(Only the English text is authentic)

CARTEL PROCEDURE

Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 7 Regulation (EC) 1/2003

Date: 09/11/2010

This is a <u>provisional</u> non-confidential version. The definitive non-confidential version will be published as soon as it is available.

EUROPEAN COMMISSION

Brussels, 9.11.2010
C(2010) 7694 final

COMMISSION DECISION

of 9.11.2010

relating to a proceeding under Article 101 of the Treaty on the Functioning of the European Union

Article 53 of the EEA Agreement

and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union[1],

Having regard to the Agreement on the European Economic Area,

Having regard to the Agreement between the European Community and the Swiss Confederation on Air Transport,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[2], and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of 18 December 2007 to initiate proceedings in this case,

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1 With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty on the Functioning of the European Union ("TFEU"). The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the TFEU should be understood as references to Articles 81 and 82 of the EC Treaty where appropriate.

2 OJ L 1, 4.1.2003, p.1.

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty[3],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions[4],

Having regard to the final report of the hearing officer in this case[5],

Whereas:

1. INTRODUCTION

(1) This Decision relates to a single and continuous infringement of Article 101 of the Treaty on the Functioning of the European Union ('*TFEU*'), Article 53 of the Agreement on the European Economic Area ('the EEA Agreement') and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport ('the Swiss Agreement')[6], covering the EEA[7] territory and Switzerland by which the addressees coordinated their pricing behaviour in the provision of airfreight services [*] with respect to various surcharges and the payment of commission payable on surcharges.

(2) Pricing contacts between airlines providing airfreight services ('carriers') initially started in respect of the fuel surcharge ('FSC'). Carriers contacted each other regarding the introduction of a FSC, the FSC mechanism, disclosure of anticipated increases (or decreases) and commitments to follow increases. These contacts started initially with a smaller group of carriers and spread to include all addressees of this Decision.

(3) Cooperation spread to other areas without affecting the application of the FSC. Accordingly, carriers cooperated in the introduction and application of the security surcharge ('SSC') as well. Like the FSC, the SSC was also an element of the overall price.

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3 OJ L 123, 27.4.2004, p. 18.

4 OJ

5 OJ

6 OJ L 114, 30.04.2002, p.73-90.

7 "EEA" refers to the Member States of the European Union ('EU') and the Contracting Parties of the European Economic Area, such as amended over time. The EEA comprises the Member States together with Iceland, Liechtenstein and Norway. From 1995 to 1 May 2004, the Member States of the EU were Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, United Kingdom, Austria, Sweden and Finland (EU 15). From 1 May 2004, ten countries joined the EU, namely, Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia and formed together EU 25 (EEA 18 until 1 May 2004 and EEA 28 from 1 May 2004 onwards).

(4) The aim of the contacts was to remove pricing uncertainty from the market by ensuring that surcharges were introduced and increases (or decreases) of the surcharge levels were applied in full without exception.

(5) Furthermore, the carriers extended their cooperation to refusing to pay commission to freight forwarders on surcharges. By refusing to pay commission the carriers ensured that surcharges did not become subject to competition through the negotiation of discounts with customers.

(6) The duration of the infringement is from December 1999 to 14 February 2006 (for the duration for specific undertakings see Section 7).

2. THE SECTOR SUBJECT TO THE PROCEEDINGS

2.1. Airfreight transport services

(7) Airlines providing airfreight services primarily offer the transport of cargo usually by air to freight forwarders, who arrange the carriage of these goods including associated services and formalities on behalf of shippers.

(8) There are four different types of air cargo carriers: airlines with only dedicated freighter air planes carrying cargo; airlines with 'belly space' cargo capacity on passenger flights; airlines with both dedicated freighter air planes and 'belly space' cargo capacity (combination airlines); and integrators with dedicated freighters providing both integrated express delivery services and general cargo services (DHL, FEDEX, UPS, etc.).

(9) No airline is able to reach all major cargo destinations in the world with its own network with sufficient frequencies, therefore agreements among carriers to increase their network coverage or improve their schedule are common. Such agreements can take various forms, such as a simple capacity purchase or some degree of costs and revenue sharing. Within the industry, they are often referred to as 'joint ventures' even when they are in reality only capacity purchase agreements. In addition, carriers also form multilateral alliances. An airline alliance is an agreement between two or more airlines to cooperate on a substantial level. Alliances provide a network of connectivity and convenience for international freight transport. The largest cargo alliances are WOW and SkyTeam.

(10) Cargo airlines quote to customers freight rates on a per kilogram basis (either actual weight or 'chargeable weight' according to a formula that accounts for volume of low-density cargo) for their various services to various destinations. Such rates are negotiated with forwarders (and more rarely directly with the shippers) either on a long-term basis (typically one traffic season, namely, six months), or on an ad hoc basis. Pricing complexity is considerable and typically local sales organisations have a certain degree of flexibility in negotiating rates with individual customers depending on supply and demand. To the negotiated rates,

cargo airlines add various surcharges, including at times surcharges to cover the costs of fuel or additional security measures.

(11) Airfreight services are offered from one airport (airport of origin) to another (airport of destination), and are covered by an air waybill. Generally, the transport between the airport of origin and the airport of destination is carried out by air. Where convenient for the carrier all or part of it may be carried out by other means, in particular by road, for example, over relatively short distances or where goods are transferred from the airport of origin to another intermediate airport where they are embarked on an aircraft bound for the airport of destination.

2.2. The undertakings subject to the proceedings

2.2.1. Air Canada ('AC')

(12) Air Canada is a subsidiary of the ACE Aviation Holdings Inc. (or 'ACE'), the holding company of the Air Canada Group. ACE was incorporated on 29 June 2004 and holds 75% controlling ownership of Air Canada[8].

(13) Air Canada is a Canadian registered air carrier offering domestic and international, passenger and freight transportation services. Air Canada provides freight services using the cargo capacity on Air Canada international passenger flights and chartered all freighter aircraft. AC Cargo, a nearly wholly-owned subsidiary of Air Canada, is not active at the international level. AC Cargo manages freight services only on domestic flights and on flights between Canada and the United States[9].

(14) AC's global annual turnover in 2005 was EUR 6 268.9 million of which EUR 414.26 million were generated by air cargo services.[10] Its global annual turnover in 2009 was EUR 6 144.48 million.[11]

2.2.2. Air France-KLM Group

(15) [*]

(16) [*]

(17) Therefore, the Air France-KLM Group comprises a holding company 'Air France-KLM' with two airline operating subsidiaries: 'Société Air France' and 'KLM N.V.' Air France-KLM Group is a member of the

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8 Air Canada's reply of 18 January 2007 to the Commission's request for information of 19 December 2006, file p. 30455.

9 Air Canada's reply of 18 January 2007 to the Commission's request for information of 19 December 2006, file p. 30453.

10 2006 Annual report, Air Canada, p. 72. CAD 9 458 million and CAD 625 million converted into EUR by using average exchange rate (1 EUR = 1, 5087 CAD) of European Central Bank for 2005. http://www.aircanada.com/en/about/investor/documents/2006_ar.pdf

11 Air Canada's reply of 21 September 2010 to the Commission's request for information of 16 September 2010.

SkyTeam alliance[12] and a member of the SkyTeam Cargo alliance[13], both founded in 2000.

(18) Freight transport is operated by the cargo divisions of the two subsidiaries. [*]

(19) The Group's global turnover was EUR 19 078 million in fiscal year 2004-2005.[14] Total revenues from the cargo business amounted to EUR 2 490 million.[15] The Group's worldwide annual turnover in financial year 2009-2010 was EUR 20 994 million.[16]

(20) [*]

2.2.3. Société Air France ('AF')

(21) Société Air France, [*], has three main activities: passenger airline transport, cargo transport and maintenance services. Société Air France operates a network with its principal hub for international operations at Paris Charles de Gaulle airport, France. Between 1995 and 1999, the French State was the majority shareholder of Air France. In 1999, Air France was floated on the Paris stock exchange and this continued until 15 September 2004.

(22) [*]

2.2.4. KLM N.V. ('KL')

(23) KLM N.V. has four main activities: passenger airline transport, cargo transport, maintenance services and the operation of charter and low-cost/low-fare scheduled services by its subsidiary Transavia. KLM N.V. operates a network with its principal hub at Amsterdam Schiphol airport, The Netherlands. KLM N.V. has an agreement with Northwest Airlines covering principally operations on North Atlantic routes and related feeder routes.

(24) Airfreight transportation services are provided by KLM Cargo, which is a division of KLM N.V.

(25) The worldwide annual turnover of KLM N.V. in financial year 2004-2005 was EUR 6 442 million[17] of which EUR 1 358 million were

[12] Members of the SkyTeam alliance are: AeroMexico, Air France, Delta Air Lines, Korean Air, Alitalia and CSA Czech Airlines (since 2001), Continental Airlines, Northwest Airlines and KLM (since September 2004), Aeroflot-Russian Airlines (since April 2006).

[13] Members of the SkyTeam Cargo alliance are: AeroMexico Cargo, Air France Cargo, Alitalia Cargo, CSA Cargo, Delta Air Logistics, KLM Cargo, Korean Air Cargo, Northwest Cargo.

[14] Air France-KLM 2004-2005 Reference document (filed with the French Autorité des marchés financiers), p. 8.

[15] Air France-KLM 2004-2005 Reference document (filed with the French Autorité des marchés financiers), p. 45.

[16] Air France-KLM's reply of 21 September 2010 to the Commission's request for information of 16 September 2010.

[17] KLM: 2005/2006 in Review New Horizon, p. 4.

generated by air cargo services in the six months to 30 September 2005.[18]

2.2.5. British Airways Plc ('BA')

(26) British Airways Plc is the United Kingdom's largest international scheduled airline. The airline's two main operating bases are London's two main airports (Heathrow and Gatwick). The BA group consists of British Airways Plc and a number of subsidiaries, in particular British Airways Holidays Limited and BA Connect Ltd.

(27) Airfreight transportation services are provided by British Airways World Cargo, which is a division of British Airways Plc.

(28) The global annual turnover of BA Group in financial year 2004-2005 was EUR 11 457.69 million, of which EUR 706.84 million were generated by air cargo services[19]. Its global annual turnover in financial year 2009-2010 was EUR 9 025.45 million.[20]

2.2.6. Cargolux Airlines International S.A. ('CV')

(29) Cargolux Airlines International S.A. is registered as a 'société anonyme' under the laws of the Grand Duchy of Luxembourg. The main shareholder is Luxair S.A. with a stake of 34.9%. It was founded in 1970.

(30) CV is an all air-cargo airline and an integrated transportation company. The transportation of freight is the company's main business.

(31) CV's global annual turnover in 2005 was EUR 1 162.28 million[21]. Its global annual turnover in 2009 was EUR 941 873 048.[22]

2.2.7. Cathay Pacific Airways Limited ('CX')

(32) Cathay Pacific Airways Limited is an international airline based in Hong Kong operating scheduled passenger and cargo services to 103 destinations worldwide. It was founded in 1946. Between 1999 and

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18 Air France–KLM report of 23 November 2006 (Turnover from cargo services was not published for the full year).
http://corporate.klm.com/assets/files/Trafficresults/20062311Resultats1ersemestre0607Eng.pdf

19 2004-2005 Annual Report British Airways (2004-2005 Annual Report & Accounts), p. 10. GBP 7.813 billion and GBP 482 million converted into EUR by using average exchange rate (1EUR= 0.6819 GBP) for period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates for this period of the European Central Bank.

20 British Airways' reply of 22 September 2010 to the Commission's request for information of 16 September 2010. GBP 7 994 million converted into EUR by using average exchange rate (1 EUR = 0.88572 GBP) for period 1 April 2009 to 31 March 2010. This average exchange rate is derived from the quarterly exchange rates for this period of the European Central Bank.

21 Cargolux key figures, http://www.cargolux.com/key_figures/index.php# USD 1.446 billion converted into EUR by using average exchange rate of European Central Bank (1 EUR = 1.2441 USD) for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

22 Cargolux's reply of 22 September 2010 to the Commission's request for information of 16 September 2010. USD 1 313 724 527 converted into EUR by using average exchange rate of European Central Bank (1 EUR = 1.3948 USD) for 2009.

2006, the major shareholders were Swire Pacific Ltd and CITIC Pacific[23].

(33) Airfreight transportation services are provided by Cathay Pacific Cargo, which is a division of Cathay Pacific Airways Limited.

(34) The global annual turnover of Cathay Pacific Airways Limited in 2005 was EUR 5 219.59 million[24], of which EUR 1 328.12 million[25] were generated by air cargo services. Its worldwide annual turnover in 2009 was EUR 6 195.13 million.[26]

2.2.8. Japan Airlines International Co., Ltd. ('JL')

(35) Japan Airlines International Co., Ltd. is a 100% subsidiary of Japan Airlines Corporation. It was founded in 1953. It belongs to a group of companies mainly involved in air transportation, airline-related services and travel services. JL's activities concentrate on scheduled and non-scheduled air transport services, aircraft maintenance, and other services relating to air transport and aircraft maintenance.

(36) On 2 October 2002, JL together with Japan Air System Co., Ltd established, via share transfers, Japan Airlines System Corporation, a holding company which, on 26 June 2004, was renamed Japan Airlines Corporation ('JAC') and which currently holds 100% of JL's shares.[27].

(37) Airfreight transportation services are provided by JAL Cargo, which is a division of JL. It serves 74 destinations in 24 countries.

(38) The worldwide annual turnover of the JAC Group in financial year 2004-2005 was EUR 15 753.81 million[28], of which EUR 1 623.75 million[29] were generated by air cargo services. Its global annual turnover in financial year 2009-2010 was EUR [*] million.[30]

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23 Cathay's reply of 26 February 2007 to the Commission's request for information of 1 February 2007, file p. 34940.

24 2006 Annual Report, Cathay Pacific Airways Limited, p. 2. HKD 50 909 million converted into EUR by using average exchange rate of European Central Bank for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

25 2006 Annual Report, Cathay Pacific Airways Limited, p. 55. HKD 12 852 million converted into EUR by using average exchange rate of European Central Bank for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

26 Cathay's reply of 23 September 2010 to the Commission's request for information of 16 September 2010. HKD 66 978 million converted into EUR by using average exchange rate of European Central Bank (1 EUR = 10.8114 HKD) for 2009.

27 JAL's reply of 16 February 2007 to the Commission's request for information of 1 February 2007, file p. 33987.

28 2005 Annual report, Japan Airlines Corporation, p. 2. JPY 2 129 876 million converted into EUR by using average exchange rate (1EUR=135,1975 JPY) for the period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates for this period of the European Central Bank.

29 Annual report 2005, Japan Airlines Corporation, p. 32. Aggregate domestic and international cargo revenues. JPY 219 528 converted into EUR by using average exchange rate (1EUR=135,1975 JPY) for period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates of the European Central Bank.

30 [*].

2.2.9. LAN Cargo S.A. ('LA')

(39) LAN Cargo S.A. (formerly LAN Chile) is a wholly-owned subsidiary of LAN Airlines S.A. (or 'LAN'). It is active in the airfreight business.

(40) LAN Airlines S.A. is an airline holding based in Santiago, Chile. It was incorporated in 1929 and was privatised in 1989. It is a publicly traded corporation listed on the Santiago and New York Stock Exchanges. It is the principal Chilean airline and the second largest in South America, with flights to Latin America, North America, Mexico, the Caribbean, Oceania, and Europe. It is a member of the **one**world airline alliance.

(41) The global annual turnover of the LAN Group in 2005 was EUR 2 014.63 million, of which EUR 731.85 million were generated by air cargo services.[31] Its worldwide annual turnover in 2009 was EUR 2 523.06 million.[32]

2.2.10. Lufthansa Cargo AG ('LH')

(42) Lufthansa Cargo AG is a 100% subsidiary of Deutsche Lufthansa AG and was founded in November 1994. Its head office is at Kelsterbach, Germany.

(43) The Lufthansa Group is active in passenger transport, air transport of cargo and mail, charter operations and other airline related services (aircraft maintenance, repair and overhaul, catering and ground-handling). Its main hub is Frankfurt, Germany. The Lufthansa Group is member of the Star Alliance[33].

(44) In addition to its own cargo services, Lufthansa Cargo AG uses freight capacities on board Lufthansa passenger aircraft. It is a member of the WOW alliance[34]. It operates a network of around 300 destinations worldwide.

(45) Lufthansa Group's worldwide turnover in 2005 was EUR 18 065 million,[35] of which EUR 2 752 million were generated by air cargo services [36]. The global turnover of the Group in 2009 was EUR 22 283 million.[37]

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31 2005 Annual Report, LAN, p. 2. USD 2.506 4 billion and USD 910.5 million converted into EUR by using average exchange rate (1 EUR= 1.2441 USD) of European Central Bank for 2005.

32 LAN's reply of 23 September 2010 to the Commission's request for information of 16 September 2010. USD 3 519 162 000 converted into EUR by using average exchange rate (1 EUR = 1.3948 USD) of European Central Bank for 2009.

33 Members of the Star alliance are (2007): Air Canada, Air New Zealand, ANA, Asia Airlines, Austrian, bmi, LOT Polish Airlines, Lufthansa, Scandinavian Airlines, Singapore Airlines, South Africa Airways, Spanair, SWISS, Tap Portugal, THAI, United, US Airways.

34 Members of the WOW Alliance are (2007): Japan Airlines Cargo, Lufthansa Cargo, SAS Cargo and Singapore Airlines Cargo.

35 Annual Report 2005 Lufthansa, p. 2.

36 Annual Report 2005 Lufthansa Cargo AG, p. 3.

37 Lufthansa's reply of 22 September 2010 to the Commission's request for information of 16 September 2010.

2.2.11. SWISS International Air Lines AG ('LX')

(46) SWISS International Air Lines AG offers scheduled air services to approximately 68 destinations with its principal hub at Zurich, Switzerland. It has also operations in air cargo and charter and to a minor extent in airline related services. LX was created in 2002 on the basis of the existing regional carrier Crossair.

(47) Swiss WorldCargo is the airfreight division of LX and began its activities on 1 April 2002. Swiss WorldCargo's network includes the entire belly-hold capacity of the LX fleet plus third-party capacities of for instance American Airlines and Japan Airlines. The network covers over 150 destinations in more than 80 countries.

(48) On 22 March 2005, Deutsche Lufthansa AG, the holding company of the Lufthansa Group announced the takeover and integration of LX pursuant to which Lufthansa will acquire 100% of the shares of LX. Due to the complex structure of LX and the need to preserve third-country traffic rights, the acquisition was structured in several steps. A Swiss-domiciled holding company (called AirTrust) was established to acquire all shares in Swiss. On 23 March 2005 Lufthansa acquired an 11% stake in AirTrust. Upon approval of the United States and European Union ('EU') Competition authorities,[38] Deutsche Lufthansa AG increased its stake in AirTrust AG to 49% on 27 July 2005. After securing the necessary traffic rights, Lufthansa has now acquired all the remaining shares in Swiss. Since 1 July 2007 Lufthansa owns all the equity in Swiss through the Swiss-domiciled AirTrust company and Swiss has been fully integrated into the Lufthansa group.

(49) The worldwide annual turnover of the SWISS Group in 2005[39] was EUR 2 410.38 million, of which EUR 320.35 million were generated by air cargo services[40].

2.2.12. Martinair Holland N.V. ('MP')

(50) Martinair Holland N.V. is a Dutch-based international freight and passenger airline. It was established in 1958. Around two thirds of its revenues originate from air cargo services. Its European headquarters are at Amsterdam Schiphol Airport, The Netherlands. Since 23 August 2005, A.P. Möller-Maersk (through Nedlloyd Holding B.V.) has shared the equity 50%-50% with KLM.[41] Following approval by the European Commission[42], KLM owns all the equity in Martinair Holland N.V.,

38 See case COMP/M.3770 Lufthansa/SWISS.

39 See media release on the 2005 annual results dated 23 March 2006, www.swiss.com/web/20060323_media_release_e_final.pdf, p. 8.

40 CHF 3 732 and CHF 496 million converted into EUR by using average exchange rate (1 EUR =1.5483 CHF) of European Central Bank for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

41 KLM became full owner of Martinair by acquiring the 50% stake held by Neddloyd Holding B.V. in December 2008.

42 See case COMP/M.5141 KLM/Martinair.

which has been integrated into the Air France-KLM group on 31 December 2008.

(51) [*]

(52) The worldwide annual turnover of the Martinair Group in 2005 was EUR 1 121 million, of which EUR 705 million were generated by air cargo services[43]. Its global turnover in financial year 2009-2010 was EUR [*].[44]

2.2.13. Qantas Airways Limited ('QF')

(53) Qantas Airways Limited is Australia's largest domestic and international airline. QF's main business is the transportation of passengers. In addition, Qantas operates a diverse portfolio of airline-related businesses. Its world headquarters are in Mascot, New South Wales, Australia. Until September 2004, British Airways was the principal shareholder in QF (around 20%).

(54) Qantas Freight is the operating division of Qantas Airways Limited which is responsible for the provision of international airfreight transportation services. Freight has traditionally been carried in the belly space of QF's passenger aircraft. Qantas Freight is member of the **one**world alliance.

(55) The global annual turnover of the Qantas Group in financial year 2004-2005 was EUR 7 481.81 million of which EUR 449.51 million were generated by airfreight services[45]. Its worldwide annual turnover in financial year 2009-2010 was EUR 8 728.19 million.[46]

2.2.14. SAS Cargo Group A/S ('SK')

(56) SAS Cargo Group A/S is an indirectly wholly-owned subsidiary of SAS AB, the holding company of the Scandinavian Airlines System Group. It was founded in 2001. SAS Cargo Group A/S is based in Copenhagen, Denmark. Until 1 June 2001, the airfreight transportation services undertaking, known as SAS Cargo, did not exist as a separate legal entity but formed a business unit within SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden (or 'SAS Consortium'). [*].

(57) [*].

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43 2005 Annual Report, Martinair, p. 28.

44 [*].

45 Annual report 2004-2005, Qantas Airways limited, p. 40. Australian dollars AUD 12.648 billion and AUD 759.9 million converted into EUR by using average exchange rate (1 EUR = 1.8280 AUD) for period 1 July 2004 to 30 June 2005; This average exchange rate for this financial year 2004-2005 was calculated on the basis on the monthly exchange rates of the European Central bank; see http://sdw.ecb.int/quickview.do?SERIES_KEY=120.EXR.M.AUD.EUR.SP00.A.

46 Qantas' reply of 21 September 2010 to the Commission's request for information of 16 September 2010. AUD 13.772 billion converted into EUR by using average exchange rate (1 EUR = 1.577875 AUD) for period 1 July 2009 to 30 June 2010. This average exchange rate was calculated on the basis of the quarterly exchange rates of the European Central Bank.

(58) SAS Cargo Group A/S offers air cargo services primarily for customers exporting or importing to Sweden, Norway and Denmark. SAS Cargo Group A/S uses the cargo capacity of several airlines both within and outside the SAS Group. In addition, SAS Cargo Group A/S has blocked space agreements on freighter aircraft owned by various airlines. SAS Cargo Group A/S serves 200 destinations in 50 countries. SAS Cargo Group A/S is a member of the WOW alliance.

(59) [*].

(60) The worldwide annual turnover of the SAS Group in 2005 was EUR 6 667.27 million[47], of which EUR 356 million were generated by air cargo services.[48] Its global annual turnover in 2009 was EUR 4 229.93 million.[49]

2.2.15. Singapore Airlines Cargo Pte Ltd ('SQ')

(61) Singapore Airlines Cargo Pte Ltd is a wholly-owned subsidiary of Singapore Airlines Limited. It was founded on 1 July 2001. Its world headquarters are in Singapore. For the period from 30 June 1999 until 1 July 2001, the air cargo operations of Singapore Airlines were operated through a cargo division[50].

(62) SQ's only business activity is the provision of airfreight transportation services. SQ serves 68 destinations in 36 countries. SQ is a founding member of the WOW alliance.

(63) The global annual turnover of the Singapore Airlines Group in financial year 2004-2005 was EUR 5 698.99 million[51], of which EUR 1 328.13 million[52] were generated by air cargo services. Its worldwide annual turnover in financial year 2009-2010 was EUR 6 304.87 million.[53]

47 SAS Group Annual Report 2005, p. 2. SEK 61 887 million converted into EUR by using average exchange rate of European Central Bank for 2005 (see ECB Monthly Bulletin, March 2007, p. S68).

48 Financial and sustainability report 2005, SAS Cargo Group, p. 24.

49 SAS' reply dated 23 September 2010 to the Commission's request for information of 16 September 2010. SEK 44 918 million converted into EUR by using average exchange rate of European Central Bank (1 EUR = 10.6191 SEK) for 2009.

50 SIA Cargo's reply dated 10 January 2007 to the Commission's request for information of 19 December 2006, file p. 26383-26384.

51 Annual Report 04/05, Singapore Airlines, p. 2. SGD 12 012, 9 million converted into EUR by using average exchange rate of 1EUR=2.1079 SGD for period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates of the European Central Bank.

52 Annual Report 04/05, Singapore Airlines, p. 55. SGD 2 864, 5 million converted into EUR by using average exchange rate of 1EUR=2.1079 SGD for period 1 April 2004 to 31 March 2005. This average exchange rate is derived from the quarterly exchange rates of the European Central Bank.

53 Annual Report 09/10, Singapore Airlines, p. 2. SGD 12 707,3 million converted into EUR by using average exchange rate of 1 EUR = 2.015475 SGD for period 1 April 2009 to 31 March 2010. This average exchange rate is derived from the quarterly exchange rates of the European Central Bank.

2.3. Description of airfreight services

2.3.1. The supply of airfreight services

(64) Most airfreight service providers operate on a worldwide basis. Air transport is generally carried out over long distance and goods are often transported from continent to continent. Most airfreight service providers operate a route network on which they offer regular services in both directions. Typically, they offer services to or from a number of airports in their home region and a wide range of airports in other parts of the world. Through arrangements with other carriers they may also offer airfreight services to or from other airports which their own aircraft do not serve, or freight for which they do not have available capacity. The term "routes" in this Decision is meant to cover airfreight services provided between two airports regardless of the actual means of transport used.

(65) Airfreight services are offered by the four different types of air cargo carriers mentioned in recital (8).

2.3.2. The demand for airfreight services

(66) Customers of airfreight services are mainly freight forwarders. Freight forwarders generally organise the integrated transportation of goods on behalf of shippers. In doing so they purchase airfreight services inter alia from the carriers. Shippers may be the purchasers or sellers of traded goods or the owners of goods that need to be moved rapidly over relatively long distances. Airfreight services are generally provided 'one way' though exceptionally goods may be transported to an airport of destination and back again. While many goods that are shipped by air could be shipped by sea, airfreight is considerably quicker (days at most instead of typically weeks) and also generally much more expensive.

2.3.3. The geographic scope of the airfreight business

(67) As previously described the airfreight business operates on a world-wide scale and carriers tend to provide airfreight transportation services between airports all over the world typically to and from their home region.

(68) The scope of the service is expanded by the trucking of freight to and from airports in the home region and also through arrangements with other carriers. Furthermore, there is not the same time sensitivity associated with cargo transport as there is with passenger transport. Cargo may be routed with a higher number of stopovers and as a result indirect routes are substitutable for direct routes. Accordingly, through trucking, arrangements with other carriers and the provision of indirect routes, competition exists between many carriers well beyond specific direct routes on which they operate.

(69) In merger decisions the Commission has defined the relevant product market as air cargo and has not sought to subdivide this further by the category or nature of the products transported. The relevant geographic

market has been defined as European-wide for intra-European cargo and on a continent to continent basis for the intercontinental transport of cargo, at least where continents have the sufficiently developed local infrastructure to allow onwards connections[54].

(70) A number of parties have made submissions on the relevant (geographic) market arguing that markets are not worldwide but are local to the country of origin. The Commission does not assert that the relevant market is worldwide [*]. Whilst market definition is a necessary tool in merger analysis this is not the position in cartel cases.

(71) The consistent case-law of the Court of Justice of the European Union[55] confirms the Commission's position that it is under no duty to define the relevant market, given that the agreements or concerted practices in question were liable to affect trade between Member States and had as their object the restriction of competition within the internal market. Rather, it is the subject of the contacts between the companies involved in a cartel which defines the products or services and the geographic scope to which the infringement relates.

2.4. Inter-state trade

(72) Airfreight transportation is a cross border service the aim of which is to convey products that are traded internationally, thus providing one of the essential means for realising the flow of traded goods today.

3. PROCEDURE

3.1. Immunity application

(73) [*]. On 7 December 2005 the Commission services received an application for immunity under the 2002 Commission notice on immunity from fines and reduction of fines in cartel cases[56] ('Leniency Notice') on behalf of Deutsche Lufthansa AG and in particular its controlled subsidiaries Lufthansa Cargo AG and Swiss [*]. [*].

(74) Lufthansa continued to cooperate with the Commission .and provided [*] on [*].

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54 Case COMP/M.5141 – KLM/Martinair; Case COMP/M.3280 – Air France/KLM.

55 See for example, Case T-38/02 *Groupe Danone v Commission*, [2005] ECR II-4407, paragraph 99, and Case T-48/02 *Brouwerij Haacht NV v Commission*, [2005] ECR II-5259, paragraph 58 and the case-law cited in those paragraphs.

56 OJ C45 19.2.2002, p. 3. This 2002 Leniency Notice was replaced by the 2006 Leniency Notice (OJ C 298, 8.12.2006, p. 17). However, according to point 37 of the 2006 Leniency Notice, from the date of its publication in the Official Journal, this notice replaced the 2002 Leniency Notice for all cases in which no undertaking had contacted the Commission in order to take advantage of the favourable treatment set out in that notice. Given that Lufthansa contacted the Commission before that date, the 2002 Leniency Notice applies to this case (except that points 31 to 35 of the 2006 Leniency Notice apply to all pending and new applications for immunity from fines or reduction of fines from the date of publication of the 2006 Leniency Notice).

3.2. Inspections

(75) On 14 and 15 February 2006, the Commission carried out unannounced inspections pursuant to Article 20 of Regulation (EC) No 1/2003 at the premises of a number of providers of airfreight services in the EU, namely: British Airways (United Kingdom), Air France-KLM (France and the Netherlands), Cargolux (Luxembourg and Germany), SAS (Denmark) and at the premises in Frankfurt (Germany) of the following carriers with headquarters outside the EU: [*], Cathay Pacific Airways Limited, Japan Airlines International Co., Ltd., LAN Airlines S.A., Singapore Airlines Limited, [*]. A German consulting firm, [*], which is active notably in the provision of information in the cargo industry in Frankfurt, was also inspected.

3.3. Leniency applications

(76) After the inspections eleven other carriers made applications under the Leniency Notice.

(77) On [*] British Airways Plc applied for leniency [*]. This application was supplemented [*].

(78) On [*] Martinair Holland N.V. applied for leniency [*]. This application was supplemented [*].

(79) On [*] Japan Airlines International Co., Ltd. applied for leniency [*]. This application was supplemented [*].

(80) On [*] Air France-KLM applied for leniency on behalf of itself and its subsidiaries, notably Air France S.A. and KLM N.V., [*]. This application was supplemented [*]

(81) On [*] Cathay Pacific Airways Limited applied for leniency [*]. This application was supplemented.

(82) On [*] LAN Airlines S.A. and LAN Cargo S.A. applied for leniency [*]. This application was supplemented [*].

(83) On [*] SAS Cargo Group A/S and SAS Consortium applied for leniency [*]. This application was supplemented [*] .

(84) On [*] Cargolux Airlines International S.A. applied for leniency [*]. This application was supplemented [*].

(85) On [*] Qantas Airways Limited applied for leniency [*]. This application was supplemented [*].

(86) On [*] Air Canada applied for leniency [*]. This application was supplemented [*].

(87) On [*] [*] and its affiliates applied for leniency by [*]. This application was supplemented [*].

3.4. Requests for information

(88) The Commission sent requests for information under Article 18 (2) of Regulation (EC) No 1/2003 to a number of air cargo carriers.

3.5. Statement of Objections and Oral Hearing

(89) The Commission's Statement of Objections of 18 December 2007 was addressed to:

Air Canada;

Air France-KLM;

Société Air France;

KLM N.V.;

[*];

[*];

[*];

[*];

British Airways Plc;

Cargolux Airlines International S.A.;

Cathay Pacific Airways Limited;

[*];

Japan Airlines International Co., Ltd.; Japan Airlines Corporation;

[*];

LAN Cargo S.A.; LAN Airlines S.A.;

Lufthansa Cargo AG; Deutsche Lufthansa AG;

SWISS International Air Lines AG;

[*];

Martinair Holland N.V.;

[*];

Qantas Airways Limited;

SAS Cargo Group A/S; SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden; [*] SAS AB;

Singapore Airlines Cargo Pte Ltd; Singapore Airlines Limited;

[*];

[*];

[*];

and [*].

(90) It was notified to the addressees on 19 December 2007. The Statement of Objections set out the Commission's preliminary findings in relation to a single and continuous infringement of Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement, covering the EEA territory and Switzerland by which they coordinated their pricing behaviour in the provision of airfreight services [*] with respect to various surcharges, [*] and the payment of commission payable on surcharges.

(91) All the parties to which the Statement of Objections had been addressed submitted written submissions in reply to the objections raised by the Commission.

(92) The addressees had access to the Commission's investigation file in the form of a copy on DVD, except records and [*] of the immunity and leniency applicants and documents relating thereto. With the DVD, the undertakings received a list specifying the documents contained in the investigation file (with consecutive page numbering) and indicating the degree of accessibility of each document. In addition, the undertakings were informed that the DVD gave the parties full access to all the documents obtained by the Commission during the investigation, except for business secrets and other confidential information and internal documents. Access to [*] and documents relating thereto was given at the Commission premises. The addressees of the Statement of Objections raised various points (for example, concerning allegedly illegible pages in the investigation file, claiming access to additional documents) which all were dealt with by DG Competition, and/or the hearing officers.

(93) An Oral Hearing on the case was held from 30 June to 4 July 2008. Almost all undertakings addressed in the Statement of Objections exercised their right to be heard orally. After the Statement of Objections and the Oral Hearing, several parties provided further written submissions in reply to Commission's questions at the Oral Hearing which could not be fully answered on the spot.

3.6. The main evidence relied on

(94) The principal documentary evidence relied on consists of the documents obtained during the inspections and documents submitted by applicants under the Leniency Notice, as well as [*] by them and replies to requests for information. These sources are referred to in Sections 4.2 to 4.5.

4. DESCRIPTION OF THE EVENTS

4.1. Basic principles and structure of the cartel

(95) The investigations of the Commission uncovered a single, complex and multiform infringement that comprised both agreements and concerted practices through numerous and repeated bilateral and multilateral contacts over a long period among competitors regarding the conduct they had decided, intended or contemplated to adopt with regard to various elements of charges for airfreight services. While these contacts took place at various levels in the undertakings concerned, took various forms and in some instances related to various geographical areas they disclose a network of contacts among the parties which had the common aim of co-ordinating pricing behaviour and/or reducing uncertainty with respect to competitors' pricing behaviour.

(96) The various elements of the price covered by the illicit contacts included the FSC, the SSC and the non payment of commission on the surcharges to freight forwarders.

(97) The coordinated application of the FSC had the objective of ensuring that airfreight carriers throughout the world imposed a flat rate surcharge per kilo for all relevant shipments. This surcharge was a transparent element of price identified as a separate item on the air waybill. A complex network of mainly bilateral contacts among carriers was established to coordinate and monitor the application of the surcharge, the precise date of application often being decided at local level usually with the principal local provider of airfreight services taking the lead and others following. This coordinated approach was extended to the SSC. Furthermore, the airlines coordinated their refusal to pay a commission on the surcharges to the forwarders, thus the surcharges became net revenue for them and created an additional incentive for carriers to follow the cartel with respect to surcharges.

(98) Senior management in the head offices of a number of airlines were either directly involved in competitor contacts or regularly informed about them. In the case of the surcharges, responsible head office employees were in contact with each other when a change to the surcharge level was imminent. The refusal to pay a commission on surcharges was also confirmed on a number of occasions during contacts at head office level. There were frequent contacts also in a number of local markets, partly to better implement the instructions received from the head offices and to adapt them to the local market conditions, partly to coordinate and implement local initiatives. In this latter case the head offices generally authorised or were informed of the proposed action.

(99) Airlines contacted each other bilaterally, in small groups and in some instances in large multilateral forums. The local Board of Airline Representatives ('BAR') associations were used in Hong Kong and Switzerland in particular to [*] coordinate surcharges. Meetings of alliances, like WOW, were also used for such purpose. Contacts were

generally maintained via phone calls but also through emails as well as through bilateral or multilateral meetings.

(100) A number of third country carriers have argued that contacts in third countries other than their home country are not relevant to their involvement in the cartel. [*] Nevertheless, the Commission confirms that fines will be based on turnover for services which are inbound to and outbound from the EEA, or for services within the EEA.

(101) The infringement covered airfreight services within the EU/EEA, between the EU and Switzerland and on routes between EU/EEA airports and third countries throughout the world[57], in both directions.

4.2. The cartel contacts

(102) The cartel contacts are discussed in Sections 4.3 to 4.5 with the various elements of the infringement addressed in turn. Accordingly, contacts on the FSC, the SSC and commissioning on surcharges are described.

4.3. The Fuel Surcharge (FSC)

4.3.1. Description of the FSC mechanism

(103) Fuel surcharges for freight services were introduced by airlines in the face of rising fuel costs. Such surcharges were imposed by a number of airlines in the autumn of 1996 when the fuel prices rose considerably between June and October of that year. These were generally withdrawn in March-April 1997 when the fuel prices dropped again. On 12 August 1997 IATA adopted draft resolution 116 ss that would have established a mechanism that linked the application of FSC to a fuel price index. The reference of the index (taken as 100) was the fuel price in June 1996 (USD 0.535 per gallon). Under this mechanism, when the fuel index passed a certain threshold or trigger point set at 130 for two consecutive weeks, a FSC would be applied. Under this resolution, this index mechanism and the resulting surcharges were to be applied by all IATA member airlines for freight services. When the index dropped below level 110 for two consecutive weeks the FSC would be removed. It was furthermore stipulated that IATA would call a meeting if the index passed level 150 for two weeks. The maximum amount of the FSC per country was fixed in an annex to the resolution. The United States Department of Transportation (DoT) disapproved the Resolution on 14 March 2000. The index had nevertheless been published by IATA until the disapproval by the United States DoT and it was the reference for the reintroduction of the FSC by a number of airlines in February 2000.

(104) When IATA discontinued publishing the fuel index, the draft resolution served as a model for airlines to set up their own FSC mechanisms. As a consequence there was little difference between the various FSC mechanisms set up by the airlines and the application of them led to most airlines having index systems providing for similar levels of FSC

[57] The cartel contacts took place on an intercontinental and intra-EEA basis.

with little or no difference as to the timing of the trigger in practice. These FSC index arrangements were generally published on the internet. There are a number of airlines who did not set up their own FSC mechanism but simply relied upon the mechanism published by another airline. Some airlines did not follow any FSC mechanism but adjusted their FSC levels without reference to any index system.

(105) The FSC schemes were generally withdrawn at the end of 2001 due to falling fuel prices and then reintroduced in spring 2002 when fuel prices rose again. Since 2002, index related FSC schemes have been applied by most airlines continuously. There have been a number of changes made to the initial FSC mechanisms in order to follow the fuel price changes more quickly and to introduce further thresholds so that the FSC could be further increased with rising fuel prices.

(106) At least from late 1999 the introduction of FSC, the application of the FSC mechanisms and the introduction of modifications to them have been the subject of coordination between a number of airlines that are addressees of this Decision.

4.3.2. Nature of the illicit contacts between competitors concerning the fuel surcharge

(107) A network of bilateral contacts built up from late 1999/early 2000 onwards involving a number of airlines that allowed information sharing concerning the actions of the participants throughout the network. Carriers contacted each other regularly to discuss any question that came up concerning the FSC, including changes to the mechanism, changes of the FSC level, consequent application of the mechanism, instances when some airlines did not follow the system.

(108) Concerning the implementation of FSC at local level, a system was often applied whereby leading airlines on particular routes or in certain countries would announce the change first, and they would be followed by others. This system was based on contacts among local representatives of carriers concerning their actions and intentions relating to FSC, the object of which was to coordinate the application of FSC at local level. In some areas the local airlines' associations provided multilateral fora to discuss and agree on the FSC.

(109) Anti-competitive coordination concerning the FSC took place mainly in four contexts: concerning the introduction of FSC in early 2000, the reintroduction of a fuel surcharge mechanism after the revocation of the planned IATA mechanism, the introduction of new trigger points (raising the maximum level of FSC) and most frequently at the point where the fuel indices were approaching the level at which an increase or decrease in the FSC would be triggered.

(110) [*][58]. [*][59].

[58] [*].
[59] [*].

(111) The application of a FSC appears to require government approval in certain jurisdictions (including Japan, Hong Kong, Thailand) but the coordination of the implementation between airlines is not compulsory even if it may have been tolerated or encouraged by some regulators. [*].

(112) Contacts relating to the FSC were made mostly on the phone and much less often via email or during meetings.

4.3.3. General description of contacts

(113) [*] states that the core group of contacts that [*], [*] of [*], had involved principally bilateral mobile phone calls between him and his counterparts at other carriers[60]. [*] had approximately 40 telephone calls with each of BA, AF, KL and CV in the time period between the beginning of 2003 and the end of 2005[61].

(114) According to [*] discussions between competitors included exchange of the intentions that various carriers had with respect to changes to the FSC and of re-assurance that the competitor would take the same steps. [*] also states that there appears to have been a general consensus that all of the carriers involved would strictly enforce a policy of not deviating from their respective surcharge policies. Where one carrier deviated from this consensus, one of the others would typically alert it to this fact, and ask it to take some action[62].

(115) [*][63]

(116) [*][64]. [*][65]. [*][66]

(117) [*][67]

(118) [*][68]

(119) [*][69] [*]

(120) [*][70] [*]

(121) [*][71] [*][72]

60 [*].
61 [*].
62 [*].
63 [*].
64 [*].
65 [*].
66 [*].
67 [*].
68 [*].
69 [*].
70 [*].
71 [*].
72 [*]

4.3.4. Contacts between competitors concerning the introduction of the fuel surcharge in 2000

(122) As a result of a substantial increase in fuel prices in 1999 the IATA fuel price index reached the first trigger point where airlines could implement a FSC based on the IATA FSC mechanism. Exchanges of emails show that a number of airlines contacted competitors to discuss whether the FSC should in fact be implemented. There were also understandings under which certain carriers would follow others already at the time of the introduction of the surcharge. This follower system was based on an extensive exchange of sensitive commercial information concerning actual or planned decisions of the leading airlines. Airlines contacted each other as well in order to share information with the aim of coordinating the introduction and implementation of the FSC around December 1999 and January 2000.

4.3.4.1. Head Office involvement (between head offices or between head office and local staff)

(123) The evidence set out in this section shows that the head offices (namely, company headquarters rather than purely local or national offices) of a number of airlines were involved in contacts with competitors to coordinate the introduction of the FSC in 2000.

(124) [*][73]

(125) [*] reported in an internal JL email[74] on 7 December 1999 under the subject 'fuel surcharge' to [*] that 'Today talked with AF regarding above item and their feeling re above as follows: top AF mgmnt very much wish to introduce such surcharge but they know well about difficulties of such introduction from past two previous experiences which were not at all a success… Present situation is Mr [*] rqstd sales dept to check feasibility and if they decide to introduce, tentative date would be sometimes in February.'

(126) In an internal JL email[75] on 20 December 1999 [*] stated that an AF representative in Japan 'received the requirements from the head office in CDG that AF would implement the fuel surcharge program in link with the IATA res 116ss [*]… from 1 Feb 2000. It will be announced in each market on and after 22 Dec…. AF HDQ also contacting with LH HDQ and [*] HDQ to encourage to implement same ways following AF.' Furthermore, some JL employees were requested to 'check and advise the current movement of [*], KL and LH on this matter'.

(127) The Lufthansa Cargo AG ('LCAG') Executive Committee adopted an ad hoc proposal 'Tischvorlage' on 21 December 1999[76]. The proposal[77] refers to the announcement of AF on the previous day and mentions

73 [*].
74 [*].
75 [*].
76 [*].
77 [*] (Orig. DE).

market rumours that KL will follow the same week. The minutes[78] of the Executive Committee meeting referring to discussions on the IATA resolution 116ss note that the resolution will not be mentioned as a ground for the FSC, due to pending regulatory approval, rather the actual cost situation and TACT rules. The press release[79] issued by LH on 28 December 1999 announcing the introduction of the FSC nevertheless makes a clear reference to the IATA fuel index.

(128) [*][80]

(129) In an internal Swissair (SR) email[81] on 21 December 1999 [*] referred to information about AF and KL from Germany. He states that 'as of Feb 1 AF will levy [*] fuel surcharge of EUR 0.10/ USD 0.10 Kg. KLM: will exactly do the same they just wanted that AF came out first. LH is going into the same direction but not confirmed at this minute.'

(130) In an internal SR email[82] on 21 December 1999 [*] ([*]) sent around an update on FSC stating that 'LH/AF/KL are planning to introduce a fuel surcharge taking effect 1.2.2000. Respective press releases, information to the markets is planned these days.'

(131) [*][83] [*][84] [*][85]

(132) [*][86] [*]

(133) SK discussed the implementation of FSC with BA and KL in Finland. Concerning a letter from the Finnish Forwarders Association there was an internal SK email exchange from 5 to 11 January 2000[87]. [*] from the SK head office asked in the email: 'How is it going for LH this time? Suggest you have a close unofficial contact with [*] about this.' Concerning the answer to the forwarders he added: 'feel free to add relevant things in the enclosed letter proposal, however make sure not to refer to other carriers as this can be a problem with anti-trust watching authorities.' In the reply from the local office in Helsinki on 5 January 2000 [*] stated that '[*] is on vacation until 10 January 2000' and added that 'think will now wait until Monday when [*] gets back to see what they will decide before sending our answer to forwarders… Met also mngrs of BA/KL today. BA had no opinion on this as they have still not decided if fuel surcharge will be implemented or not. KL's opinion was that we should all stick to this surcharge.' In the last email in the chain on 11 January 2000 [*] reported that he had 'now spoken to [*]/LH. He confirms me that LH will stick into this fuel surcharge.'

78 [*] (Orig. DE).
79 [*] (Orig. DE).
80 [*].
81 [*].
82 [*].
83 [*].
84 [*].
85 [*].
86 [*].
87 [*].

(134) [*]

4.3.4.2. [*]

(135) [*].

4.3.4.3. [*]

(136) [*]

(137) [*]

(138) [*].

(139) [*]

4.3.4.4. [*]

(140) [*].

(141) [*].

4.3.4.5. [*]

(142) [*].

4.3.5. Discussions between airlines concerning the IATA fuel surcharge mechanism after its disapproval by the United States Department of Transportation (DoT)

(143) The United States Department of Transportation disapproved IATA resolution 116ss on 14 March 2000 and, as a consequence, IATA ceased to publish the fuel price index that formed the basis of the FSC mechanism envisaged by IATA.

(144) The IATA Cargo Committee meeting held in Vancouver on 4 April 2000 discussed the fuel index provided for in resolution 116ss and its disapproval by the United States Department of Transportation. According to the meeting minutes[88] 'As a result of this disapproval IATA's legal advisors had recommended that the publication of the index should be suspended. Members, however, felt that it was an extremely useful industry tool and requested that IATA legal look into the matter further.'

(145) [*][89]

4.3.6. Competitor contacts concerning the increase of the FSC in October 2000

(146) The fuel prices rose further in the summer of 2000. That prompted airlines to start discussions concerning the increase of the FSC or the

[88] [*].
[89] [*].

introduction of it by those who had not yet done so. Such discussions are reflected in the evidence set out in this Section.

4.3.6.1. Head office involvement

(147) [*][90]

(148) [*], QF [*] sent an email[91] to the head office on 20 September 2000 reporting about the FSC [*].'

(149) [*].[92].'

(150) [*][93]

(151) There was an email exchange[94] between [*] (LH [*] Asia & Australia) and [*] (JL) on 27 September 2000 in which LH informed JL that 'Lufthansa Cargo will increase the fuel surcharge to 0,17/kg (USD 0.15) as of Nov 01. This amount will be charged [*]. Pls adv Japan Airlines policy.' To which JL responded the same day 'We are going to increase Fuel Charges not fuel surcharges as of 1st November 2000, Euro 0.17.'

(152) [*][95] [*]

(153) In an internal SR email[96] on 2 October 2000 under the subject 'fuel surcharge second level' [*] ([*] Europe) gave an update on the situation and noted that 'For internal information only, present status in EU: OK for implementation: [*]/B/NL/D/F/UK Open: IT/Nordic countries'. He then gives instructions 'FRAFM, advise status of Nordic countries. LINFN, advise status of IT resp. what is [*] planning to do.'

4.3.6.2. [*]

(154) [*].

4.3.7. Competitor contacts concerning the reduction of the FSC [*] in February-March 2001

(155) As the fuel price decreased in early 2001 LH announced a reduction of the FSC that provoked discussions between airlines whether they should follow or not. [*]. These discussions were reported to the head offices of the respective companies.

90 [*].
91 [*].
92 [*].
93 [*].
94 See in the file on page [*].inspection document taken from [*].
95 [*].
96 [*].

4.3.7.1. Head office involvement

(156) [*][97].

(157) Internal SR email[98] sent from Italy to the head office on 16 January 2001 states that 'rcvd copy of LH sales letter to all agents in Italy informing that fuel surcharge on LHC will be reduced… Reaction of other carriers: AF will follow, CV will follow, KL will follow (to be advised 17.1), [*] sleeping'.

(158) SR faxed its public announcement[99] concerning the maintenance of FSC to AF on 19 January 2001. Handwritten notes on the fax indicate 'KL idem, Cies Asiatiques'.

(159) [*][100]

(160) In an internal AF email chain[101] on 22 January 2001 under the subject 'fuel surcharge' the AF head office asks local AF staff to report on competitors' action in their respective local markets. [*]

(161) [*][102] [*]

(162) [*][103] [*][104] [*]

(163) [*][105]

(164) Another example of [*] discussions on FSC reduction [*] can be found in an internal JL email exchange[106] on 31 January 2001. The local employee from Amsterdam reported that 'have set coffee meeting wiz KL/[*] for next Monday the 5th [*] for Dutch region based on fuel charges.' [*] from the head office replied '[*]. But we are not sure that KL has the same will as [*] because KL decided to keep the same fuel surcharge on and after 1FEB01.' The same local employee then reported in an internal JL email[107] on 6 February 2001 that 'concerning fuel have attached publication announced by KL to the market on 05feb where they go back to eur 0.10 effective 01 March 2001, have so far agreed with [*] that JL and [*] will remain on eur 0.07 as long as they can, [*].'

(165) [*][108] [*]

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97 [*].
98 [*].
99 See in the file [*] inspection document taken from AF (Orig. FR).
100 See in the file [*] inspection document taken from [*]. [*]
101 See in the file [*] inspection document taken from AF (Orig. FR).
102 See in the file [*] inspection document taken from [*].
103 [*].
104 [*].
105 [*].
106 [*].
107 [*].
108 [*].

(166) An email[109] from [*] (AF) to [*] ([*] Cargo Sales Europe) on 21 February 2001 contains a summary of the 'market situation regarding [*] fuel surcharge [*]. Concerning Holland and Belgium it is noted that 'AF fuel surcharge will be reduced from EUR 0.17 to EUR 0.10 as from March 1st according to KL decision to do so.' In the reply of [*][110] on 23 February 2001 it is stated that 'we do not want to drop the surcharge country by country, if at all possible. [*].'

(167) [*] (SR Cargo [*] France) reported[111] to the head office on 26 February 2001 that 'had a meeting last Friday with a few interline colleagues and AF unofficially confessed to me that they regret to have lowered frm 0.17 to 0.10 EUR, as the index seems to raise again.'

(168) [*] (LH) had a meeting with [*] and [*] (AF) on 15 May 2001 in Paris. According to the agenda[112] of [*] the topics included 'JAL's fuel surcharge 16 May of Yen 0.10- EUR0.15.' He also noted[113] that 'AF confirmed that they would strictly maintain the FSC. Where possible they will keep the second level of the FSC, but they do not have a [*] regulation as LCAG.'

(169) [*]

4.3.7.2. [*]

(170) [*]

(171) [*].

4.3.7.3. [*]

(172) [*].

4.3.8. Competitor contacts concerning the cancellation of the FSC in autumn 2001

(173) In the autumn of 2001 the fuel prices dropped again and they reached a level where the fuel price index of LH went below the base line of 110, a point where the FSC was to be suspended. The withdrawal of the FSC in December 2001 was preceded by a number of contacts between airlines at central and local levels.

4.3.8.1. Head office involvement

(174) In an internal LH email[114] on 30 October 2001 [*] reported 'an interesting call from the island' and stated that 'they are watching our index closely and they are worried that we will drop the fuel surcharge and they can not use the argumentation for its existence any more. I

109 See in the file [*] inspection document taken from AF.
110 See in the file [*] inspection document taken from AF.
111 [*].
112 [*].
113 [*].
114 [*] (Orig. DE).

referred to our mechanism and that it is not yet the case. As we can see this competitor is interested in the surcharge and planned it as an important part of its revenue.'

(175) In an internal LH email[115] on 9 November 2001 [*] informed other senior LH employees that 'I have just talked to KLM. KLM looks for an agreement with us on the fuel index topic…'

(176) [*] informed his colleagues in an internal LH email[116] on 15 November 2001 under the subject 'fuel surcharge' that 'received update from Hr [*]/AF. AF agreed with SNAGFA (French forwarders association) that they will continue with the fuel surcharge till the end of 2001 despite the index going below target… Here is the possibility to start harmonisation with AF'.

(177) In an internal LH email[117] on 18 November 2001 [*] reported again a conversation with 'the island' stating that 'I told her not to be nervous, first we have to be below 110 for two weeks then come out with an announcement'

(178) In an internal MP email[118] on 19 November 2001 [*] stated that 'Confidential: on 1 December KLM will kill the fuel surcharge, presently the index is under 100; Will check with BA'

(179) Mr [*] (JL [*] Frankfurt) wrote an internal email[119] on 21 November 2001 stating that 'according to LH information there is no intention to reduce or abolish the current fuel surcharge in Germany for the time being.' [*] (JL [*] Paris) wrote the same day that 'AF should maintain their current FS until the end of Dec. At their invitation we shall have a meeting with them early January to review the situation.'

(180) [*][120]. [*][121] [*]

(181) An internal [*] telex[122] from a local employee to the head office on 28 November 2001 states that 'we hv been approached by LH interline dept with the idea to withdraw the fuel surcharge eff 01dec01'.

(182) In an internal BA email[123] on 28 November 2001 [*] asked [*] to 'call your LH contact to establish the notice period for their customers should they have to remove the fuel surcharge'. On 29 November 2001 [*] reported that '[*] called me last night at home and they are quite convinced that the fuel surcharge will come off. The only point of discussion within LH is around the effective date. They hesitate between

115 [*] (Orig. DE).
116 [*] (Orig. DE).
117 [*] (Orig. DE).
118 [*].
119 [*].
120 [*].
121 [*].
122 [*].
123 See in the file [*] inspection document taken from BA.

20th Dec and 1st Jan. I basically told him that 20th Dec is OK from my point of view as by then the business is done anyway. Next Wed they will make their decision on the date and send out the communication to the customers. I would therefore suggest that we got our communication ready so that we can send it out asap. The bad news for LH is that they budgeted for the fuel surcharge for the whole of next year (extraordinary recoveries) and will be stuck. [*]'[124]

(183) In another internal BA email[125] on 29 November 2001 [*] ([*]) stated that 'from recent comments it looks like LH will remove the surcharge (not sure what date effective yet). We will therefore be discussing BA removing this at our next Commcl Mtg… …' [*]

(184) [*] (SR France, Spain, Portugal, North Africa) reported to the head office in an internal SR email[126] on 5 December 2001 that 'have just been informed that national carrier AF will cancel fuel surcharge of 0.10EUR as of 24 Dec 01'.

(185) [*][127]

(186) [*].[128]… [*].'

(187) In an internal JL email[129] on 6 December 2001 the Frankfurt office reported that 'contacted Lufthansa Cargo AG. LH will terminate fuel charge [*] effective 20 Dec 2001.' [*] (JL [*]) replied[130] the same day that 'just received info from AF that they will cancel F/S as from Dec 24th 01. [*] .'

(188) The minutes of an internal meeting[131] of SR on 4 December 2001 indicate under 'market info, Europe', that 'pressure on fuel surcharge is up again, rumours say that LH will cancel it on the 17.12'.

4.3.8.2. Germany

(189) A copy[132] of the agenda of the meeting of the Board of Airline Representatives in Germany (BARIG) CSC on 23 November 2001 [*], contain the following handwritten notes: 'Verkommisoning x DC – news about FSC? Charges are net and should stay net. ([*])'.

4.3.8.3. Italy

(190) [*] [*][133] [*].

124 See in the file [*] inspection document taken from BA.
125 See in the file [*] inspection document taken from BA.
126 [*].
127 [*].
128 [*].
129 [*].
130 [*].
131 [*].
132 [*].
133 [*].

4.3.8.4. [*]

(191) [*].'

(192) [*]

(193) [*].

4.3.8.5. [*]

(194) [*].

(195) [*].

(196) [*]'

(197) [*].'

4.3.9. Competitor contacts concerning the modification of the fuel index and of the reintroduction of the FSC in spring 2002

(198) [*][134]

(199) [*][135].

4.3.9.1. Head office involvement

(200) In 2002 a number of companies appear to have entered into contacts about the implementation of a [*] FSC.

(201) In an internal LH email[136] chain on 6 December 2001 [*] stated that 'I have had in the last days various conversations with KLM and AF about the FSC topic. Both carriers indicated great readiness to harmonise the FSC index.' As a reaction to this email [*] wrote[137] to [*] the same day that 'I find the harmonisation of the indexes (and from this would surely follow the methodology) extremely problematic on the basis of cartel law.' [*][138] [*]

(202) [*] [*] published the index on 15 March 2002.[139]

(203) In an internal LH email on 15 January 2002 Mr [*] sent the new FSC mechanism of LH to Mr [*] and asked him to send signals to Paris and Amsterdam that this was the path LH would take and that they (AF and KL) could easily take a similar path. He also stated that he had already

134 [*].
135 [*].
136 [*].
137 [*] (Orig. DE).
138 [*] (Orig. DE).
139 [*].

talked to [*] and his former employer (BA) about it and that he would contact [*][140].

(204) In another internal LH email[141] on 24 January 2002 [*] reported to [*] under the subject 'fuel surcharge methodik' a 'feedback of my talks with AF'.

(205) The diary[142] of [*] (LH) contains the notes 'AF- [*] 31.1.02; 15.2 meeting with Forwarder; non commissionable'. This is explained by [*] as a reference to an agreement between himself and Mr [*] of AF that neither AF nor LH would allow a commissioning of the surcharges[143].

(206) [*][144]

(207) [*][145]

(208) [*] reported[146] in an internal JL email on 26 March 2002 that 'just heard from AF that they are considering to resume a F/S as from Apr 15th… They have already approached the Cargo Forwarders Syndicate to that end. It seems also that LH have started communicating 'unofficially' on the same subject in Germany.' Then on 27 March 2002 Mr [*] sent another internal JL email[147] stating that 'received confirmation this morning from LH/CDG that LH will implement a F/S of EUR 0.05 on actual wgt as from Apr 15th'. Then he described in detail the FSC mechanism of AF.

(209) Mr [*] (LH) forwarded an email[148] to [*] on 27 March 2002 containing information on the date of introduction of the FSC by LH. The information was published on 28 March 2002[149].

(210) [*][150] [*]

(211) Mr [*] sent another internal BA email[151] on 3 April 2002 concerning the fuel index containing a list of public announcements of competitors. A copy of this email also contains handwritten notes indicating 'KLM 1/5, AF 22/4'.

(212) [*][152] [*][153]

140 [*] (Orig. DE).
141 [*] (Orig. DE)
142 [*] (Orig. DE)
143 [*].
144 [*].
145 [*].
146 [*].
147 [*].
148 [*].
149 [*].
150 [*].
151 See in the file [*] inspection document taken from BA.
152 [*].
153 [*].

(213) In an internal MP email on 2 April 2002 with the topic FSC, [*] stated that 'BA phoned and indicated they are deeply considering'. He also wrote that he 'will check with AF/[*] and rest of market and provide feedback'.[154]

(214) In an internal MP email chain on 2 and 3 April 2002 [*] asked MP staff to 'advise activities for reintroducing FSC'. As a response [*] wrote that 'AF will start per 22/4 (0.05 Euro) based on chargeable weight. We expect today similar announcements from CV and BA. KL will consider same per 1 May, will be decided tomorrow'. Then [*] responded that 'both LH/AF NBO have confirmed this info. KL cgo mgr abroad, so no cfrm frm their side. [*] have made no announcements as yet but will most likely follow suit. Awaiting info from charter operators like [*], etc'. [*] wrote the last email in the chain adding that 'CV & BA are likely doing it. I have not heard back from AF/ [*][155].

(215) [*] (LX) sent an internal email[156] on 2 April 2002 asking LX employees whether they had any news from their 'local home carriers' with regard to the FSC.

(216) An internal LX email sent on 3 April 2002[157] asked local LX employees to send competitor information regarding the FSC implementation. It noted that partner/competition contacts were taking place in parallel.

(217) [*] (LX [*] for the United Kingdom & Ireland) sent an internal email[158] on 3 April 2002 as a response to [*] in the head office stating that 'AF will introduce FSC as of April 22; 0.03GBP. KL no news yet, BA no intention yet'.

(218) [*]

(219) In an internal email[159] on 5 April 2002 [*] (LX [*] for Benelux) informed the head office that 'as per May 1st KL will introduce Euro 0.05 FSC'.

(220) [*][160]

(221) [*][161] [*]

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(222) In an internal BA email[162] on 16 April 2002 [*] reported that 'the all airline cargo committee called a meeting yesterday regarding a fuel surcharge. [*]

(223) [*]. [*].

4.3.9.2. [*]

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4.3.9.3. [*]

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(227) [*].

(228) [*].'

(229) [*].

(230) [*]

(231) [*].

4.3.9.4. [*]

(232) [*].

4.3.9.5. [*]

(233) [*].'

4.3.10. Competitor contacts concerning the increase of the FSC in autumn 2002

(234) As the fuel prices rose in August and September 2002 the fuel index reached the next trigger points prompting airlines to contact each other in order discuss the timing of the FSC increase. The evidence listed in this section describes these contacts. LH announced the increase of the FSC on 5 September 2002 with effect from 23 September 2002.

4.3.10.1. Head office involvement

(235) An internal BA document titled 'competitor fuel indices' dated 9 September 2002 refers to the increase of FSC by Cargolux that was made public on 10 September 2002[163].

(236) In an internal AF email[164] on 4 September 2002 [an] AF employee [*] reports an informal meeting with LH that took place 'from time to time'

162 [*].

163 [*],inspection document taken from BA.

164 See in the file [*] inspection document taken from AF (Orig. FR).

between them. Among the points discussed appears also 'Surcharge fuel: the LH head office seriously considers implementing [*] a fuel surcharge of USD 0.10/kg iso USD 0.05/kg actual, and this is from 23 Sep 02.'

(237) In an internal LX email[165] on 4 September 2002 [*], [*] Switzerland, stated that [*]. Market will be informed within 48 hrs. Pls treat this info very confidential.' Mr [*] then on 5 September 2002 internally forwarded an email[166] that he had received from LH on 4 September 2002 that contains the preliminary announcement of the adjustment of LH's FSC. Still on 5 September 2002, in another internal LX email,[167] Mr [*] stated that 'we will wait for the next index which is due on September 9th [*].

(238) [*][168] [*][169]

(239) An internal LX email on 11 September 2002 announces that 'after bi-lateral talks on the issue and general support in all markets, we decide to implement the 2nd level of the fuel surcharge [*], in line with the officially communicated model. (see internet – fuel surcharge) by Monday 30 September (date of AWB[170] issuance)…For your information, we have confirmation of implementation by following carriers at the moment: LH 23.9/ BA 23.9/ KLM 1.10/ CV 21.9/ [*]23.9'.

(240) [*][171] [*]

(241) An email[172] written by AF on 6 September 2002 explains the AF FSC mechanism and states that 'AF, in accordance with its commitment to the industry, must wait until Sep 30 to determine the monthly average. Should the 135 threshold be activated, then AF will announce an increase in its fuel surcharge, from 5 to 10 cents, effective October 15.' This email was forwarded[173] to [*] and [*] on 9 September 2002 with the line 'we would like to ask you to inform us your plan.'

(242) An internal AF email[174] on 13 September 2002 under the subject 'last compilation – fuel – what are they doing' summarises information concerning the FSC plans of [*], JL, BA, [*], KL, LH. It states that '[*] and KLM Cargo said they will increase their fuel surcharge from the present rate of five cents a kilo to 10 cents, effective Oct. 01.'

(243) In an internal LH email[175] on 16 October 2002 [*] reports a meeting with [*] where various topics were discussed. It is noted that 'fuel and security surcharge will be applied largely following our example'.

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166 [*].
167 [*].
168 [*].
169 [*].
170 = Air Waybill.
171 [*].
172 See in the file [*] inspection document taken from AF.
173 See in the [*] inspection document taken from AF.
174 See in the file [*] inspection document taken from AF.
175 [*] (Orig. DE).

4.3.10.2. [*]

(244) [*][176] [*][177] [*][178] [*][179] [*][180] [*][181]

4.3.10.3. [*]

(245) [*]'

(246) [*].'

4.3.11. Competitor contacts concerning the FSC increases in March 2003

(247) As the fuel prices rose further in early 2003 due to the expectations concerning the possible hostilities in Iraq, the fuel index reached the next trigger point and the airlines started contacting each other again concerning the increase of the FSC. As a result of the steep increase of the fuel price the FSC was raised by many airlines twice in a row in March 2003 and new trigger points were introduced to the FSC mechanism.

(248) The evidence in this Section also reflects that the contact networks between airlines further developed during this period. [*] states that the change in [*]'s FSC in February 2003 was discussed at least with BA, KL, [*] and [*] in order to ascertain that all companies would implement the relevant increase[182].

(249) [*] states that competitor contacts included the introduction of new trigger points to the fuel index in March 2003 which was discussed at least between [*] and BA and KL. AF participated in such discussions with [*] at least from May 2004.[183]

4.3.11.1. Head office involvement

(250) [*][184]

(251) [*] (MP) sent instructions to MP Regional Managers of Europe in an internal email[185] on 16 January 2003 stating that 'please keep a close eye to your respective market and let me know the plans of home carriers like KLM, LH, AF, CV, BA, etc.'

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185 [*].
186 [*].

(253) [*][187]

(254) [*]'s (LH) mobile phone records show that he spoke to [*] (BA) or [*] (BA) on 5 February 2003. Mr [*] recalls that at this time he spoke to Mr [*], then BA's [*] [188].

(255) The minutes[189] of a KLM Cargo Management Meeting on 11 February 2003 show that one of the points discussed was 'impact fuel surcharge'[190]. The minutes note under this point that 'All participate no impact; be not first mover, get allies within one week. Implement with LH'.

(256) [*] states in an internal MP email[191] on 11 February 2003 that 'we plan to increase fuel surcharge per 1 March 2003. … Have spoken with other carriers and they have same plan.'

(257) [*][192]. [*][193] [*][194]

(258) [*] (MP [*]) wrote in an internal MP email[195] on 13 February 2003 reacting to the news that MP plans to increase the FSC that [*]

(259) In an internal LH email[196] [*] reported that he has spoken to more airlines and listed the topics FSC, [*]. Under FSC he noted: 'BA wants to increase on 02.03.03. […] KL also wants to go up on 01.03.03 or 03.03.03 [*] also goes in the direction, implementation: 03.03.03 [*] only wants to increase on 10.03.03.'

(260) In an internal LH email[197] on 12 February 2003, Mr [*] stated that he had just spoken with KLM, who had told him they were planning to come out with an increase of their FSC effective from 1 or 3 March 2003, but that they were not sure. He added that '[*] and [*] would also follow'[198].

(261) [*][199] [*][200]

(262) [*][201]

(263) [*][202] [*]

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196 [*] (Orig. DE).
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198 [*].
199 [*].
200 [*].
201 [*].

(264) [*].[203] [*][204] [*].[205][*].'[206] [*][207] [*].'

(265) In an internal LH email[208] on 4 March 2003 [*] reported that he spoke to BA and KL and he made it clear that if the 190 limit was passed the next level of the FSC would be implemented. To be announced on 10 March 2003 and implemented on 24 March 2003, 14 days later.

(266) In an email[209] on 10 March 2003 [*] (BA) makes reference to discussions concerning the FSC with KL and LH.

(267) On 10 March 2003 [*] ([*]) sent the announcement of [*] on the increase of the FSC to [*] (KL)[210]. Mr [*] recalls[211] that he was called by Mr [*] who asked him not to send him any more emails, even though the press release was public information.

(268) [*][212] [*]

(269) [*] reports in an internal LH email[213] on 11 March 2003 that the 'colleagues from the Island' asked whether LH would introduce more trigger points and that BA appeared keen to do so[214]. [*] He also notes that BA will probably increase the FSC on 30 March 2003 and KL probably on 25/26 March 2003. He then wrote another internal email[215] the same day adding 'update from KL'… 'from 24 March 2003 they also take 20 cent fuel'.

(270) Mr [*] sent an internal LH email[216] on 14 March 2003 to which he attached a BA press release issued on 13 March 2003 announcing that BA added two new trigger points to its mechanism. In the same email Mr [*] mentions that he had left a voicemail with [*] and explained to him LH's position as follower and asked him to lobby[217].

(271) In an internal LX email[218] on 13 March 2003 it is stated that '[*] is currently meeting competitors at the IATA meeting and will have opportunities to hear what others plan also.' [*] replied[219] on 16 March 2003 that 'I have had the possibility to talk (unofficially) wit many major airlines last Friday. Most airlines (LH, BA, KL, AF) plan to introduce

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202 [*].
203 [*].
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209 [*] (Orig. DE).
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211 [*].
212 [*].
213 [*].
214 [*].
215 [*] (orig. DE).
216 [*] (orig. DE).
217 [*].
218 [*].
219 [*].

the 4th level on the 24th Mar … also [*] told me on Friday that they plan to follow the same day'.

(272) [*][220]

4.3.11.2. [*]

(273) [*].

4.3.11.3. Switzerland

(274) [*][221] [*]

(275) [*][222] [*][223]

(276) [*][224] [*][225] [*][226] [*][227] [*]

(277) [*][228] [*][229]

(278) [*][230] [*]

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4.3.11.4. [*]

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(281) [*].

4.3.11.5. [*]

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(283) [*].'

4.3.11.6. [*]

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(285) [*].'

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(287) [*]

4.3.11.8. [*]

(288) [*].

(289) [*]'

4.3.12. Competitor contacts concerning the FSC decrease in April 2003

(290) The fuel price started to drop again in April 2003 and the fuel index shrank to a lower level that inspired airlines to exchange information concerning plans to reduce the FSC.

4.3.12.1. Head office involvement

(291) [*][232] [*][233] [*]

(292) [*][234]

(293) On 11 April 2003 [*] sent an internal LH email[235] forwarding a BA announcement that BA was decreasing its FSC effective from 24 April 2003. Mr [*] noted that it was finally an example of a carrier 'doing the right thing' and that 'it' probably referring to discussion with BA 'appears to be bearing fruit'[236].

4.3.12.2. Switzerland

(294) [*][237] [*][238] [*][239] [*]

4.3.12.3. [*]

(295) [*]'

4.3.13. Competitor contacts concerning the FSC increase in December 2003

(296) The fuel prices remained stable throughout the summer and autumn of 2003 and started to rise again only in late November. The renewed increase in fuel prices brought with it the renewal of intensive contacts between the airlines.

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233 [*].
234 [*].
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238 [*].
239 [*].

4.3.13.1. Head office involvement

(297) [*][240]

(298) [*][241]

(299) [*] (MP) sent an internal MP email[242] on 25 November 2003 stating that 'KL will decide end of this week regarding increase of FSC.'

(300) An LX employee sent an internal email[243] on 26 November 2003 in which he stated that he had 'talked to the German [high-ranking executives] of BA, AF, KL and LH. None of them increases the fuel surcharge yet, they wait till next week.'

(301) [*][244].

(302) [*][245] [*][246] [*][247]

(303) [*][248].'

(304) [*][249] [*]

(305) [*][250]

(306) [*][251]

(307) [*][252]

(308) In an internal LH email[253] on 4 December 2003 [*] summarized information on the competitors' intentions: 'BA will also come out today; JL has confirmed; [*] and [*] are on board; [*] no problem; KL I have initiated (strong consideration, confirmation tonight); Cargolux (with whom I also have a direct contact as a result of meetings) apparently also wants to follow.'[254] Mr [*]'s phone records show that prior to sending this email he had placed several calls to BA, [*], KL and [*] during the period 1-4 December 2003[255].

240 [*].
241 [*].
242 [*].
243 [*] (orig. DE).
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245 [*].
246 [*].
247 [*].
248 [*].
249 [*].
250 [*].
251 [*].
252 [*].
253 [*] (Orig. DE).
254 [*].
255 [*].

(309) In an internal LX email[256] on 4 December 2003 it is stated that 'just spoke to LH. They are discussing but no decision is taken yet. They will call me once they made a decision. All others like BA, KL, AF and others are waiting what LH is doing.'

(310) [*] (MP) sent an internal MP email[257] on 4 December 2003 in which he forwarded the announcement of [*] concerning the increase of the FSC and added that 'KLM and LH will take a decision in coming days.'

(311) [*][258] [*][259]

(312) [*][260] [*]

(313) [*] (KL) sent an email[261] to [*] (MP) on 5 December 2003 and concerning the FSC he mentioned that the KL fuel index had not passed the trigger point for enough time yet.

4.3.13.2. [*]

(314) [*].

4.3.13.3. Switzerland

(315) In an internal LX email[262] on 4 December 2003 it is stated under the subject 'fuel surcharge' that 'have spoken today also to [*]/AF and [*] LH but no decision/news so far.'

(316) [*][263] [*]

(317) [*][264] [*]

(318) [*][265] [*][266]

(319) [*][267] [*]

(320) [*][268] [*][269] [*][270] [*][271] [*]

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267 [*].
268 [*].
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270 [*].
271 [*].

4.3.13.4. [*]

(321) [*].

4.3.13.5. [*]

(322) [*].

4.3.13.6. [*]

(323) [*].'

4.3.14. Competitor contacts concerning the introduction of new trigger points to the fuel index and the FSC increase in May 2004

(324) The further increase of the fuel prices made it necessary for airlines to introduce further trigger points to the FSC mechanism to make further FSC increases possible. Discussion between airlines went on in parallel concerning the introduction of new trigger points and the increase of the FSC in late spring 2004. [*] states that the introduction of new trigger points to the fuel index in May/June 2004 was discussed at least between LH and BA, AF and KL.[272]

4.3.14.1. Head office involvement

(325) [*][273]. For example, around [*]'s decision to suspend the FSC increase, which was announced on 15 September 2005; in October 2005 when [*] increased FSC to levels 11 and 12 and announced them on 6 and 13 October 2005 respectively; and when [*] increased FSC to level 10 of its index on 2 February 2006. [*][274].

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(331) [*][280] [*][281] [*]

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(332) [*][282] [*][283] [*][284]

(333) There was an internal LX email chain[285] between 23 April 2004 and 26 April 2004 concerning the update of the fuel index on the internet site of LX. In one of the emails[286] it is stated that 'I've had rumours from the market that LH and BA are strongly reflecting on an increase of the fuel surcharge and refer to their respective indexes. Therefore forwarders and competitors in Switzerland are start asking about our position.'

(334) In an internal QF email[287] on 26 April 2004 it is stated that 'I have spoken with BA and LH in the UK and they are both stating they are proposing to increase their fuel surcharges sometime between 10-14 May.'

(335) [*][288] [*]

(336) [*][289].

(337) In an internal LX email[290] on 27 April 2004 [*] states that he will discuss the implementation of the FSC with [*] (LH) at the IATA Tariff Coordination Conference on 12-14 May 2004.

(338) An internal MP email chain[291] on 27 April 2004 contains feedback to the head office from local markets concerning the update of the fuel index. In one of the emails[292] it is stated that 'asked [*] about their position last night but no action from their side.' Another email[293] states that 'according to DLH [*] they are already sitting @ EUR 0.15 per actual kg and have not had any indication of an increase yet… [*] is not answering today.' [*] ([*] Asia-Pacific of Martinair [*]) announced by email to [*] his intention to obtain information from home carriers [*] on the announcements of the FSC, as he stated 'to play it by ear'[294].

(339) In an internal LX email[295] on 29 April 2004 concerning the decision to increase the FSC competitor action is summarised. The following information was noted: 'BA decision taken at next commercial meeting next Wednesday; [*] stand by, no decision taken; [*] not decided yet (just rumours to go up according LH); KL will decide Wednesday,

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287 [*].
288 [*].
289 See in the file [*] inspection document taken from [*].
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291 [*].
292 [*].
293 [*].
294 [*].
295 [*].

5.5.04; JL will wait until home carrier decide; CV increase to 0.20EUR start 11.05; [*] increase to 0.20 USD start 20.05.'

(340) [*] (LH) forwarded[296] the announcement of LH to add new thresholds to the FSC mechanism to AF on 14 May 2004 noting that 'as per our discussion in NYC next trigger will be 215'. Mr [*] sent the same email the same day with the same comment but still separately[297] also to [*] (KL). [*][298]

(341) An internal LA email[299] on 13 May 2004 contains comments on the news concerning the announcement of AF regarding the increase of the FSC the same day. An LA employee stated that he found the increase strange, as he had talked to AF the same morning at an IATA Cargo Accounts Settlement Systems ('CASS') meeting and it was confirmed that AF would maintain the FSC till the end of May.

(342) There was an exchange of emails[300] between LA and LH on 13-14 May 2004 under the subject 'fuel surcharge'. On 13 May 2004 LA asked[301] LH to 'keep us informed of your new developments on the index. We need to make something coherent between our indexes since ours is very closely related to yours.' As a response LH specified[302] that it 'will issue a press release tomorrow which announces the extension of its existing fuel surcharge methodology'. The changes were then described in detail. In a further email[303] on 14 May 2004 LH asked LA: 'please let me know how you want to proceed'.

(343) In an internal MP email[304] on 18 May 2004 concerning the MP fuel index reference is made to the position of competitors as follows: 'next week LH might increase again FSC with 0.05 Euro. KLM-AF, CV all considering same update'.

(344) [*] LH sent an email[305] to SQ on 19 May 2004 to give a 'pre-warning' stating that 'we will most likely increase the fuel surcharge again according to the new rules on Monday w.e.f. 07.06.04 to 0.25 cents.'

(345) [*] states in an internal LH email[306] on 19 May 2004 under the subject 'fuel surcharge trigger points' that 'on the list we have BA, [*] and [*]. In the meantime I have brought them on board. I also told [*] that the next point probably comes on Monday. I am working on KL.'

296 See in the file [*] inspection document taken from AF.
297 [*].
298 [*].
299 See in the file [*] inspection document taken from [*].
300 [*].
301 [*].
302 [*].
303 [*].
304 [*].
305 [*].
306 [*] (Orig. DE).

(346) In an internal AF email on 24 May 2004 [*] wrote that 'following a phone call from [*] today, LH announces a new level of FSC of 25 cents/kg applicable from 07 June. [*]'[307]

(347) On 24 May 2004, LH [*] emailed [*] (AC) attaching LH FSC increase announcement [*] effective from 7 June 2004[308].

(348) LX sent an email[309] on 25 May 2004 to LH asking whether the information that LH was increasing the FSC on 7 June 2004 to 0.25 EUR was true, in which case LX would immediately follow. LH confirmed in the reply that the information was correct.

(349) In an internal [*] email[310] on 27 May 2004 [*] asked [*] to 'check BA's plan to increase fuel surcharge as well.' He added that 'So far only LH, CV, [*] announced it. I am checking with KLM, AF and SQ.' [*][311] [*]. [*] responded[312] the same day that 'I was talking with QF just now – they have meetings planned for today with BA and fuel is expected to be on the agenda so they will let me know…'

(350) In an internal MP email[313] on 27 May 2004 [*] sent [*] a draft press release for the upcoming FSC adjustment. He furthermore informed her that LH, CV, BA, [*] and [*] had already communicated the increase. He also mentioned that he had spoken to SQ which also expected a signal before the weekend from Singapore. He finally added that 'KLM/AF stay the slow deciders'.

(351) In an internal BA email[314] on 29 May 2004 the BA [*] [*] states that 'we have yet another increase' and instructed the local staff to 'pls chk with your OAL (eg European carriers and flag carrier) what their plan is'. A chain of emails[315] followed in which the local staff reported the results of contacts.

(352) [*][316]

4.3.14.2. Switzerland

(353) [*][317] [*][318] [*][319] [*][320] [*][321] [*][322] [*][323] [*][324] [*][325] [*][326] [*][327]

307 See in the file [*] inspection document taken from AF (Orig FR).
308 [*].
309 [*].
310 [*].
311 [*].
312 [*].
313 [*] (Orig. NL).
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315 [*].
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321 [*].

(354) [*][328] [*][329] [*][330] [*][331]

(355) [*][332].

(356) [*].

4.3.14.3. [*]

(357) [*]

(358) [*].

(359) [*].

4.3.14.4. [*]

(360) [*].

4.3.15. Competitor contacts concerning the introduction of new trigger points to the fuel index and the FSC increase in summer 2004

(361) Discussions between airlines concerning the introduction of new trigger points to the FSC mechanism continued during the summer. Airlines also discussed the further increase of the fuel prices and the increase of the FSC.

4.3.15.1. Head office involvement

(362) [*][333]

(363) In an email[334] on 7 June 2004, [*] (CV) forwarded to BA information about FSC adjustment made by all major carriers in June 2004.

(364) As a follow up of the email chain on 13-14 May 2004 between LH and LA concerning the FSC LH sent an email[335] to LA on 4 June 2004 asking for an 'update as to where LAN Chile is at regarding the new trigger points'. LA answered the same day[336] stating that 'we have

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created two additional trigger points and our fuel surcharge is going up on Jun 8th and extra USD 0.05 per kilo.'

(365) [*] (LH) sent an email[337] to [*] on 11 June 2004 asking him how [*] made its decisions on the FSC[338]. [*] replied[339] on 19 June 2004 stating that [*] follows the LH index.

(366) [*][340] [*][341] [*]

(367) In an internal BA email[342] on 16 June 2004 [*] reports that LH did not implement a FSC rise [*] and notes that [*] might 'wish to share this with his opposite number at LH'.

(368) In another internal BA email[343] on 17 June 2004, as a follow up to the email of 16 June, [*] forwarded to [*] emails reporting competitors' actions concerning the FSC [*]. He notes in the email that '…Lufthansa were wavering on implementation of level 5 FSC. [*] suggested you may find some detail useful, as this was contrary to the recent position taken by your contact at LH.' Further down in the email chain the plans of competitors (LH, [*] and KL/AF) are reported. It is noted in the email from [*][344] that 'As per a discussion with one of their senior manager early last week – [*] was adopting the wait and watch situation…'

(369) [*] (LH) sent an internal email[345] on 22 June 2004 in which he stated that he received a call from BA who wanted to check where LH's index stood[346].

(370) SQ sent an email[347] to LH on 24 June 2004 noting that: 'looks like we are heading for another round of increase of fuel surcharge Mon next? If you can send me a note when LH has decided to proceed. We'll likely be sending out same guidance to our field.'

(371) In an internal LH email[348] on 26 June 2004 [*] attached the press release of KL announcing that new trigger points had been added, and indicated that it had been worthwhile to 'lobby' KLM in this respect. He also noted that AF had switched to the same FSC method and the 'continuous contact' was worthwhile.[349]

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(372) [*][350]

(373) LH sent an email[351] to JL on 27 July 2004 stating that LH 'has implemented the 5th stage of the fuel surcharge (EUR0.25/kg) [*]' and asked whether 'the process of application of filing the surcharges [*] with the government' had started yet. JL replied[352] the same day explaining that [*] the procedure was longer as the shippers had to be convinced to accept the increase and no sudden changes were possible. As he put it: 'shipper and forwarders they hates the way of Pearl Harbour'. [*]. He finally added that 'I would like to keep contact with you for further benefits'.

(374) CX head office sent internal emails[353] on 20 July 2004 and 29 July 2004 to local CX staff asking 'for those who have not decided the implementation of 5th round FSC, pls do your best to lobby national carriers, so that we can follow.'

(375) [*][354]

(376) In an internal [*] email[355] on 23 August 2004 [*] stated that the following Thursday he would have an informal meeting with the [*] of LH/CV/BA/KL and they would have things going. [*][356] [*].

4.3.15.2. Switzerland

(377) [*][357] [*][358] [*][359] [*][360] [*][361] [*][362] [*][363]

(378) In an internal BA email[364] on 7 June 2004 [*] proposed to follow LX in Switzerland in changing the FSC calculation from EUR to USD, considering also that other carriers were also following LX.

(379) [*][365]

4.3.15.3. [*]

(380) [*].'

(381) [*]…'

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365 [*].

4.3.15.4. [*]

(382) [*]

(383) [*].

4.3.15.5. [*]

(384) [*].

4.3.15.6. [*]

(385) [*]'

4.3.15.7. [*]

(386) [*]

4.3.16. Competitor contacts concerning the increase of the FSC in September-October 2004

(387) The fuel price index of LH reached the next trigger point to increase the FSC in the week ending on 27 August 2004. However LH did not announce an increase as LH thought that the fuel price might quickly drop again and was unsure whether other airlines would follow the increase[366]. The postponement of the increase in the FSC was discussed among airlines. The discussions continued concerning the FSC increase when the fuel price remained above the next trigger point and the airlines finally decided to announce the increase. As the fuel price continued to rise in September and October 2004, a second increase was announced by many airlines within a month. The evidence in this Section includes discussions concerning all these events.

4.3.16.1. Head office involvement

(388) [*] (LH) called [*] (AF) on 30 August 2004 and [*] (KL) on 31 August 2004. According to Mr [*] (LH) LH thought that it was important that AF/KL would make the first move[367].

(389) Handwritten notes[368] prepared by [*] (LH) on 1 September 2004 state that [*] was to contact AF before noon that day. It also refers to [*] and Mr [*] communicating that LH would exceptionally delay the increase of the FSC, that it would closely monitor the situation, that it would reserve the right to increase in light of volatile fuel prices, that this was an exceptional situation and that LH would as a general matter further stick to its published index[369].

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369 [*].

(390) LH sent an email[370] to SK and SQ on 1 September 2004 explaining that LH has not yet published the fuel price index (FPI) as 'the FPI was above 240 for the second week in a row, we have seen dramatic drops in Jet kerosene prices during the last days'. Therefore the management decided to wait and see the trend of the prices before implementing the increase.

(391) In an internal MP email[371] on 2 September 2004, as a reaction to the news that LH suspended the FSC increase [*] (MP) stated that the 'decision of LH is not good since in practice it means that carriers like SQ, SAS, JL, etc will not increase as well. We will check with KLM but I have serious doubts whether KL-AF will really be the first one, keep you posted.'

(392) In an internal QF email[372] on 7 September 2004, referring to the LH decision to suspend the FSC increase, the QF head office asked the local staff to 'check and advise what the national carriers in your area are doing.' In a reply the same day it is stated that 'SQ and AF have indicated that they have no intention to increase their FS. They are both waiting for LH'.

(393) [*][373] [*][374]

(394) In an internal AF email[375] on 14 September 2004 it is stated that '[*] confirmed to me that CV envisages to increase the FSC from 0.25 to 0.30 but they are waiting for the decision of LH or AF.'

(395) In an internal AF email[376] on 20 September 2004 it is stated that 'we just got the info that LH will increase the FSC to 0.30 Euros on Oct 4th. I guess SK will follow very quickly so we adjust ourselves to the SK level.'

(396) In an internal AF email[377] on 17 September 2004 local AF staff is asked to report on the position of other carriers concerning the increase of the FSC as 'on the basis of the answers [*] will decide to align to us or not.'

(397) AF sent an email[378] to [*] on 20 September 2004 announcing that 'AF and KL decided to increase their fuel surcharge by 0.05 Euros as of Sep 29' and asking 'pls advise asap if you wish to go along AF'. [*] replied[379] on 23 September 2004 that they 'confirm that [*] will join AF/KL and increase the fuel surcharge effective 29 Sep by 0.05 Euro/kg.'

370 See in the file [*] inspection document taken from [*].
371 [*].
372 [*].
373 [*].
374 [*].
375 See in the file [*] inspection document taken from AF.
376 See in the [*] inspection document taken from AF.
377 See in the file [*] inspection document taken from AF.
378 See in the file [*] inspection document taken from AF.
379 See in the file [*] inspection document taken from AF.

(398) On 21 September 2004 the CX [*] in Belgium internally forwarded[380] [*] the LH announcement to increase the FSC on 4 October 2004 and commented that 'we have a final discussion this afternoon with the "industry" and decide the Belgian kick off date'.

(399) LH sent an email[381] to LA on 20 September 2004 stating that the decision to increase the FSC has not been made yet. Then, on 21 September 2004 LH sent another email to LA stating that 'the decision has been made we increase from 4 October to 0.30 EUR. I send you this afternoon our press release.'[382]

(400) LH has forwarded[383] on 22 September 2004 its announcement to increase the FSC to AF, [*], CV, CX, [*], [*], SQ, JL, SK, AC, [*], [*], KL, [*], [*], [*].

(401) [*] sent an email[384] to LH on 23 September 2004 announcing under the subject 'fuel surcharge' that 'we are increasing to $0.24, effective 6 October.'

(402) In an internal LH email[385] on 23 September 2004 the local LH employee in the United Kingdom stated that 'I have spoken to [*] this morning about this… [*] policy is that they will increase generally in most markets [*] but clearly UK is a big problem and local GM will not raise until BA move.'

(403) In an internal CX email[386] on 24 September 2004 the local CX [*] in Belgium reported, referring to the FSC, that 'most freighter operators in BRU decided to increase as of 01st Oct 04.' Then, on the same day, in the reply to a question concerning the increase he stated that 'in BRU we start as of 01 Oct along with [*]. SQ claimed initially they would to but then were recalled by hq to go for 04 Oct.'

(404) AF sent an email[387] to KL on 23 September 2004 and under the subject 'fuel surcharge Denmark' they asked: 'were you able to fix the issue on KL alignment on AF, LH, SK'.

(405) In an internal [*] email on 28 September 2004 in response to the local [*] employee in Switzerland, who is 'more than reluctant to increase the fuel surcharge' it is clarified that 'the HQ prefers to have all stations apply the fuel surcharge as well as the security surcharge in line with the majority of the local key players or the national carrier.'[388].

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380 [*].
381 [*].
382 [*].
383 See in the file [*] inspection document taken from [*].
384 [*].
385 [*].
386 [*].
387 [*].
388 See in the file on page [*].

(406) LH sent an email[389] to JL on 7 October 2004 explaining the FSC increases and asking: 'what is your position on that on an area basis and especially in Asia?' JL, in the reply on 8 October 2004, explained the procedure of government approval [*] and clarified that 'we don't have any idea to increase FS in this year.'

(407) [*][390]

(408) On 11 October 2004 [*] (KL) called [*] (CV) to discuss the CV announcement of the following day concerning the FSC increase and the upcoming KL announcement.[391]

(409) LH forwarded an upcoming press release concerning the FSC increase to LA on 11 October 2004[392].

(410) In an internal MP email[393] on 11 October 2004 it is stated that 'AF/KLM will announce tomorrow to increase FSC to next level: 0.35 Euro. LH will do probably same. CV wants to follow immediately.'

(411) In an email[394] to KL on 12 October 2004 to which the KL announcement to increase the FSC and adjust the mechanism is attached CX asked KL to discuss it.

(412) In an internal MP email[395] on 14 October 2004 [*] reported that their client, [*], was asking MP to cap the surcharges claiming that 3 major carriers had already agreed to it. [*] (MP) replied[396] the same day that 'we don't want to follow. I will contact my KLM source to keep them in same boat as well.'

4.3.16.2. France

(413) [*] (CX) sent an email[397] to AF and JL on 27 September 2004 concerning the Beaujolais nouveau shipments and stated that following the discussion with [*] he confirmed to the freight forwarder [*] that the FSC will be EUR 0.30 and asked AF and JL to let him know if they change their mind.

4.3.16.3. Germany

(414) The minutes of a meeting[398] of the Cargo Committee of the Board of Airline Representatives in Germany (BARIG) on 3 September 2004 with the participation of AF, [*], JL, KL, [*], QF, [*], SK, LH, [*] show that LH informed the participants about topics such as FSC.

389 [*].
390 [*].
391 [*].
392 See in the file [*] inspection document taken from [*].
393 [*].
394 [*].
395 [*].
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397 [*].
398 [*].

4.3.16.4. Switzerland

(415) [*][399] [*]

(416) [*][400] [*][401] [*][402] [*][403] [*][404] [*][405] [*] [406] [*][407]

(417) [*][408] [*][409] [*][410] [*][411] [*][412]

(418) [*][413] [*][414]

4.3.16.5. [*]

(419) [*]'

(420) [*].

4.3.17. Competitor contacts concerning the suspension of the increase of the FSC in November 2004 and the decrease in December 2004

(421) The fuel price continued to rise in late October 2004 but with a high degree of volatility. This prompted airlines to discuss the situation and to finally suspend the increase of the FSC that was due in early November based on the fuel index. The fuel prices then started to decline in November and December 2004 and airlines discussed the reduction of the FSC.

4.3.17.1. Head office involvement

(422) [*] called BA on 27, 28 October and 1 November 2004, AF and KL on 29 October 2004 and CV and [*] on 1 November 2004. Mr [*] states that on such occasions he discussed with his competitors the movement of the various fuel price indices[415].

(423) LH sent an email[416] on 1 November 2004 to SK and SQ stating: 'we have two consecutive weeks with a full week index >290 but a decision

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415 [*].
416 See in the file [*] inspection document taken from [*].

on how LCAG will react has still not been made… I'll be back as soon as a decision has been taken.'

(424) In an internal KL email[417] [*] indicates to local KL staff [*] that he would check with LH their complaint concerning the discount that LH gives on the FSC.[418] [*][419].

(425) [*][420].

(426) [*][421].

(427) [*] sent an internal MP email[422] on 15 December 2004 stating: 'confidential: tomorrow, KLM will send out press statement to go back to 0.30 euro per 1 Jan 2005. Please delete message.'

(428) In an email[423] on 23 December 2004 [*] (AF) informs AF and KL staff that '[*] has decided to follow AF and KL in decreasing the FSC. The chosen date is 4 January 2005. Please inform your clients that from this date the global surcharge will be reduced by 0.05EUR/kg.'

4.3.17.2. Switzerland

(429) [*][424] [*][425]

(430) [*][426] [*]

(431) [*][427]

(432) [*][428] [*][429]

4.3.17.3. [*]

(433) [*]

4.3.18. Competitor contacts concerning the increases of the FSC in spring 2005

(434) The fuel prices rose sharply again in early 2005 that triggered two consecutive FSC increases in March and April 2005, the introduction of new trigger points to the FSC mechanism and renewed discussions between airlines.

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417 [*].
418 [*].
419 [*].
420 [*].
421 [*].
422 [*].
423 See in the file [*] inspection document taken from AF.
424 [*].
425 [*].
426 [*].
427 [*] (Orig. DE).
428 [*].
429 [*].

4.3.18.1. Head office involvement

(435) LH sent an email[430] on 7 March 2005 to LA, [*], CX, [*], SQ, JL, SK, AC, [*] to inform them that 'Lufthansa Cargo announced today that we will increase the fuel surcharge with effect from 21.Mar.05 from EUR0.30 to EUR0.35'.

(436) [*][431].

(437) [*][432] [*][433] [*].

(438) [*] (LH) sent an email[434] to the local LH employee [*] on 16 March 2005 in which he stated that he had talked to JL at the IATA Cargo Tariff Conference the week before about filing the application for an FSC increase [*]. Mr [*] inquired about what was happening in that regard.

(439) On 21 March 2005, [*] (LH [*]) informed [*], CX, [*], SQ, JL, SK, AC, [*] by email that LH would raise its FSC on 4 April 2005[435].

(440) [*][436].

(441) [*][437].

(442) LH forwarded its press release concerning the increase of the FSC to LA on 22 March 2005[438].

(443) In an internal MP email[439] on 22 March 2005 it is stated that 'LH will increase FSC with 0.05 Euro per 4st April. CV will announce today to increase per 5th April. KL-AF will announce today as well. Probably 5th April is set date as well.'

(444) [*] (LA) sent an email[440] to [*] (LH) on 29 March 2005, asking whether LH made any exceptions with regard to the application of its FSC to certain routes. Ms [*] responded the same day stating that this was not the case.

(445) In an email[441] on 3 April 2005 LH asked SQ why are they charging only 0.20 EUR FSC in Italy. SQ replied[442] on 4 April 2005 stating that 'our key competitors in Italy have not revised their surcharges. That is why

430 See in the file [*] inspection document taken from [*].
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442 [*].

we've not too.' LH then replied[443] the same day that 'my guys report the following: [*].35, CX .35, [*].40, JL .40, [*].40, [*].40…This is for your information.'

(446) On 7 April 2005 in an internal LA email[444] [*] (LA [*]) asked [*] whether he could get in touch with Ms [*] directly in order to discuss the fuel price index.

(447) LA sent an email[445] to LH on 8 April 2005 in which they wrote: 'with regard to pricing issues we would like to set up a link between our… We are analyzing the extension of the fuel surcharge scale to 0.45, are you thinking about it in LH?' LH replied[446] on 11 April 2005 stating that 'we are interested in a general exchange of pricing related topics.' The current situation concerning the LH FSC mechanism is then described in detail.

(448) [*] states that there were several meetings between representatives of [*]'s European headquarters and [*] in different European countries to discuss and agree [*] on the level of FSC. One of these meetings was held in Berlin in May 2005.[447]

4.3.18.2. Switzerland

(449) [*][448] [*]

(450) [*][449] [*][450]

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(452) [*][452] [*][453]

4.3.18.3. [*]

(453) [*].

4.3.18.4. [*]

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4.3.18.5. [*]

(457) [*]

4.3.19. Competitor contacts concerning the increases of the FSC in summer 2005

(458) The fuel prices increased further during the summer of 2005 triggering two further FSC increases by many airlines and the introduction of new trigger points. Besides the regular phone and email contacts LH, AF, KL and CV engaged in personal bilateral and trilateral meetings to discuss the yield decline of the industry including the application of surcharges.

4.3.19.1. Head office involvement

(459) [*][454].

(460) [*][455]. [*][456].

(461) [*][457].

(462) The [*] head office sent an internal email[458] to local staff on 16 June 2005 to instruct them to 'apply fuel [*] surcharges at the same or higher level of your local flag carrier'.

(463) In an internal LA email[459] on 22 June 2005 [*] suggested to 'talk to LH and [*] to ask them what they think about [*] in order for fuel rate to be in a more reasonable measure.' In an internal LA email[460] on 30 June 2005 [*] states that he discussed the issue with [*] of Lufthansa but he rejected the proposed solution to the problem of high surcharges. [*] .

(464) The minutes of the meeting of the Business Synchronization Team of KL and AF on 23 June 2005 state under the heading 'fuel surcharge' that 'LH, Cargolux, [*] and [*] will increase the fuel surcharge but with different timings. While LH will implement the increase on July 11th, Cargolux will be a follower. AF & KL will stick to the current mechanism and implement the new fuel surcharge as per July 7th.'[461]

(465) [*] (MP) stated in an internal MP email[462] on 24 June 2005 that 'KLM will go next FSC level of 0.45 Euro per kg per 7th July. In principle we will follow but first I would like to know what CV and LH is going to do. I expect more info later today. Please let me know what actions are visible in your markets.'

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455 [*]; [*]; [*].
456 [*]; [*].
457 [*]; [*].
458 [*].
459 [*].
460 [*].
461 See in the file [*] inspection document taken from AF.
462 [*].

(466) The LX local [*] sent an internal email[463] to the LX head office on 27 June 2005 to inform them that 'it appears that AF and [*] will introduce level 9 on 07 JUL while LH and [*] will wait until 11 JUL. No word from other competitors yet.'

(467) In an internal QF email[464] on 27 June 2005, as a response to the request of the QF head office to provide information on what national and European carriers were doing concerning the FSC, a local QF employee in Singapore reported that 'so far KLM/AF has already confirmed at SGD 0.94 with effective 07 Jul 2005. LH/CV will likely follow the same as KLM/AF as they are talking to each other.'

(468) [*][465]

(469) AF sent an email[466] to [*] on 22 June 2005 stating that 'AF&KL will announce on Thursday, June 23 an increase of 0.05 EUR/kg to be implemented as of July 07. Please confirm if [*] will follow in the same pattern.' [*] replied[467] the same day to 'confirm that [*] will follow AF/KL in the fuel surcharge increase'.

(470) As a reaction to the announcement of KL on 23 June 2005 to increase the FSC, an exchange of emails[468] took place between AF and KL. In an email on 24 June 2005 from KL to AF it is stated that 'I expect LH and SK to follow and I think we should align with them as well.'[469] In another email[470] on 27 June 2005 KL notes that 'process should be to check and align, then communicate to the market.'

(471) LH sent an email[471] on 27 June 2005 informing the 'Dear partners' ([*], CX, AC, SQ, JL, SK, [*]) that LH published the announcement of the FSC increase. [*] replied the same day that 'we have instructed our offices to implement the increase accordingly'.[472]

(472) In an internal [*] email[473] on 27 June 2005 it is stated that 'we have received various newsflashes from other airlines increasing their fuel surcharge within the past days and I have just received confirmation from Lufthansa that they are going to increase their FSC effective 11 July as well.'

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463 [*].
464 [*].
465 [*].
466 See in the file [*] inspection document taken from AF.
467 See in the file [*] inspection document taken from AF.
468 See in the file [*] inspection document taken from AF.
469 See in the file on [*] inspection document taken from AF.
470 See in the file [*] inspection document taken from AF.
471 [*].
472 [*].
473 [*].

(473) LH sent an email[474] to SK, SQ and the sales agent of JL on 27 June 2005 to inform them that '…the fuel surcharge will be increased to 0.45 euro per kg actual weight as of Monday 11 July 2005.'

(474) The local manager of [*] in Belgium sent an email[475] to CX asking 'are you planning to raise your fuel surcharge to 0.45/kg?' CX replied on 30 June 2005: 'pls find attached the CX BRU history'.

(475) LH sent the press release concerning the increase of the FSC to LA on 28 June 2005.[476]

(476) In an internal LA email[477] on 4 July 2005 [*] reported a conversation with [*] (LH). Mr [*] told him that LH had considered [*] decreasing the FSC but rejected the idea [*]. Mr [*] also said that 'with the increase of the FSC from EUR 0.35 to 0.40 they calculated that they had left EUR 0.03 of the additional 0.05 in the pocket, [*]. He finally noted that LH had resisted pressure from freight forwarders to pay a commission on the FSC.

(477) In an internal SK email[478] on 17 July 2005 responding to the request of the SK head office to confirm that the new FSC level was implemented, the local SK employee in Japan stated that 'SAS cannot be the first or only carrier introducing the increase. Will talk with JL, LH and SQ next week about this.'

(478) In an internal MP email[479] on 21 July 2005 it is stated that 'had a small chat with KLM…he will never touch surcharges because breaking corporate policy might be subject to be fired.'

(479) In an internal SK email[480] on 21 July 2005 the head office was informed by the local SK [*] in the United States that 'WOW in the US are harmonised in our approach to the fuel surcharge (except of course JAL).'

(480) The local SK [*] in Japan informed the SK head office in an internal email[481] on 22 July 2005 that 'for Japan we will follow [*] and [*]. They will increase from today's 36 yen to 42 yen, effective 01 Sep. Many other carriers will do the same, however JAL will increase first 16 Sep. We will file our request to the authorities next week.'

(481) [*] manager [*] sent an email[482] on 22 July 2005 to LH, CV, [*], AC, SQ, [*], MP and LA referring to an advertisement on inforwarding.com of a small airline that does not charge any FSC. This triggered a chain of

474 See in the file [*] inspection document taken from JL.
475 [*].
476 [*].
477 [*].
478 See in the file [*] inspection document taken from [*].
479 [*].
480 See in the file [*] inspection document taken from SK.
481 See in the file [*] inspection document taken from SK.
482 [*] (Orig. DE).

emails[483] where airlines condemn 'misuse' of inforwarding.com. [*] stated in its reply[484] that it called the small airline but was sent away.

(482) LA sent an email[485] to LH on 17 August 2005 offering to 'exchange views' concerning the application of FSC on actual or on chargeable weight. LH replied[486] the same day that he is ready to discuss it.

(483) LH sent an email[487] on 22 August 2005 to SK, SQ and the sales agent of JL informing them that 'the fuel surcharge will be increased to 0.50 euro per kg actual weight as of Monday 05 September 2005.'

(484) LH sent an email[488] on 22 August 2005 informing the 'Dear partners' (SK, AC, [*], CX, [*], JL, [*], SQ, [*] and LA) that LH published the announcement of the FSC increase.

(485) In an internal email[489] on 22 August 2005 the SK [*] in the United States informs the SK head office that he 'will check with WOW partners prior to launching an increase to ensure we act together – we are facing very intense pressure on the ever rising FSC here in the US.'

(486) In an internal JL email[490] on 22 August 2005 [*] (JL [*]) reported that 'just now, Lufthansa [*] called us and informed that Lufthansa will increase the fuel surcharge EUR 0.05/kgs with effect from 05 Sep 05… This information is not yet official disclosed from Lufthansa but please keep on eyes this matter.' On 23 August 2005 [*] replied[491] to the email stating that JL would implement the increase one day after LH. He also stated that 'with regard to Scandinavia region, as [*] already informed yesterday, they will increase from September 5th together with SK and LH.'

(487) In an internal [*] email[492] on 23 August 2005 it is stated that 'we have received various newsflashes from other airlines increasing their fuel surcharge and we have also received confirmation from Lufthansa that they are going to increase their FSC effective 5 September 2005 as well.'

4.3.19.2. Switzerland

(488) [*][493] [*][494]

(489) In an internal LX email[495] on 28 June 2005 it is stated that 'have been informed that LH/AF/KL goes all to CHF 0.65. Info rcvd by Mr [*] LH'.

483 [*] (Orig. DE).
484 [*] (Orig. DE).
485 [*].
486 [*].
487 See in the file [*] inspection document taken from JL.
488 See in the file [*] inspection document taken from SK.
489 See in the file [*] inspection document taken from SK.
490 See in the file [*] inspection document taken from JL.
491 See in the file [*] inspection document taken from JL.
492 [*].
493 [*].
494 [*].

(490) [*][496] [*][497] [*][498] [*][499] [*][500] [*][501] [*][502] [*][503] [*][504] [*][505] [*][506]

(491) [*][507] [*][508] [*][509] [*][510] [*][511] [*][512] [*][513] [*][514]

4.3.19.3. Hong Kong

(492) The minutes[515] of the BAR CSC meeting on 11 July 2005 where the participants were AF, [*], [*],BA, [*], [*],CV, CX, [*], JL, [*], [*],KL, [*], [*],LH, LX, MP, [*], [*], [*], [*], [*], [*], [*],SQ, [*], [*], [*], [*], [*], [*] and [*] report that members discussed the raising of the FSC level and the adding of new trigger points to the mechanism. Members also discussed the claim of forwarders to pay a 5% commission on the surcharges.

(493) [*] (CV, [*] Asia&Pacific) sent an email[516] on 29 July 2005 to MP, BA, LH, KL and AF stating that 'to follow up last European carrier meeting, we agreed to have get together function on 3 Aug 2005 to update the view on current fuel surcharge.' Mr [*] then invited all addressees to a lunch meeting.

(494) The minutes of a BAR CSC ExCom meeting[517], held on 23 August 2005 with the participation of CX, LH, SQ, [*] and MP, report that as agreed during the last meeting the BAR CSC chairman should informally seek an opinion from CAD concerning the operation of the increase of the FSC against fuel index levels. However, priority should be given to the extension of the FSC mechanism to level 11 and 12 by adding two new trigger points. Concerning the request of the Hong Kong Association of Freight Forwarding and Logistics ('HAFFA') to pay a 5% commission on the surcharges the BAR CSC agreed to suggest to HAFFA to talk to individual airlines as the remuneration was subject to an agreement reached between the individual carriers and agents.

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4.3.19.4. Thailand

(495) In an internal QF email[518] on 27 June 2005 as a response to the request of the QF head office to provide information on what national and European carriers were doing concerning the FSC, a local QF employee in Thailand reported that '[*] still not announce any change on the above. I checked with AF, KL, LH, LX, [*], SK and SQ they have to follow [*] as per DOA[519] instruction.'

4.3.19.5. Indonesia

(496) The local LH [*] in Indonesia sent the FSC update of LH by email[520] on 21 June 2005 to JL, [*], CV, [*], KL, [*], SQ, [*], QF and [*].

(497) [*] sent an email[521] to all ACRB (Air Cargo Representative Board) members on 22 July 2005 informing them that '[*] will adjust MY/SC[522] as follows'; then the details of the surcharge increase are described and finally it is noted: 'please be informed all members to adjust as on the attachment MY/SC completely with terms and conditions.'

4.3.20. Competitor contacts concerning the increases of the FSC in September-October 2005

(498) Fuel prices continued to rise in September and October 2005 and reached the highest level ever. This prompted AF and KL to cap the FSC level on intra European flights. The discussions between the airlines during this period concerned the increase of the FSC, the suspension of the increase and the capping of the FSC.

4.3.20.1. Head office involvement

(499) [*][523] [*][524]

(500) The LH fuel price index reached the next trigger point on 9 September 2005 but LH did not announce an increase. Mr [*] called BA, KL and [*] the same day.[525]

(501) LH sent an email[526] on 12 September 2005 to SQ, SK and JL's sales agent informing them that even though the next trigger point had been reached LH 'has decided to postpone the increase.'

(502) KL announced that it would cap the FSC on intra European routes from 26 September 2005. LX commented in an email[527] sent internally and to

518 [*].
519 Department of Aviation of Thailand.
520 [*].
521 [*].
522 MY = Fuel Surcharge; SC = Security Surcharge.
523 [*].
524 [*].
525 [*].
526 See in the file [*] inspection document taken from [*].

LH on 16 September 2005 that it would have a negative impact. Then in a further email[528] LX asked AF whether it would be implemented on all routes, to which AF responded that it would not be implemented in Switzerland.

(503) [*][529].

(504) [*][530]. [*].

(505) In a meeting[531] between [*] and [*] of LH and [*] and [*] of LA on 21 September 2005 in the Dorint Sofitel Bayerpost in Munich the discussions included the subject of [*] reducing the FSC and the application of a FSC to chargeable weight as opposed to actual weight. As regards [*] reducing the FSC, LH was not interested in such a solution because this would make a larger proportion [*] subject to a commission or, in the alternative, become subject to a negotiated discount. Reference was also made to the fact that CV was trying to promote the idea of reducing the FSC for short haul flights and applying the regular surcharge only to long haul flights. LH did not agree with this concept either, because it would unnecessarily complicate the FSC and render it less transparent.

(506) SK sent an email[532] to LH, SQ and JL on 3 October 2005 in which it is stated, referring to the WOW Global Sales Board, that the surcharge 'issue has been discussed 'slightly' during the last meeting but no comments are made in to the MoM (antitrust!). It was mentioned WOW will use LH model within 'neutral markets'; US, Europe.'

(507) In an internal AF-KL email chain[533] on 4 October 2005 concerning the instruction from the head office to increase the FSC it is stated that 'fuel surcharge will increase to 0.55 cents of EUR that is to say 29 inr as from 17th October 09h00. (We checked with LH and they will apply same rate of exchange same time.)'

(508) [*][534].

(509) In an internal LX email chain[535] on 5 October 2005 the local LX [*] in the United Kingdom reported to the head office that 'I have spoken with LH this morning and that will publish the new rate (GBP 0.37?) as soon as British Airways do. I also spoke to BA this morning and they will be making a decision at 1pm today.' In a following email in the chain the same day the same person then stated that he 'just spoke to British Airways and they have advised that they will announce to the market

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528 [*].
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530 [*].
531 [*].
532 [*].
533 See in the file [*] inspection document taken from AF.
534 [*].
535 [*].

tomorrow fuel surcharge increase to GBP 0.37/ EUR 0.55 with effect from 20th October 2005'.

(510) In an internal [*] email[536] on 5 October 2005 it is stated that 'we have received various newsflashes from other airlines increasing their fuel surcharge and we have also received confirmation from Lufthansa that they are going to increase their FSC effective 17 October 2005 as well.'

(511) The LH fuel price indicated that an announcement to increase the FSC was due on 10 October 2005. However LH decided to postpone the increase as AF/KL would not give a commitment to follow an LH increase[537].

(512) [*][538] [*][539] [*][540]

(513) [*][541].

(514) On 13 and 14 October 2005 [*] (LH) made six calls to AF, three to KL, five to CV and seven to BA. Mr [*] (LH) also called Mr [*] (CV) twice.

(515) In an internal LH email[542] on 14 October 2005 it is stated that 'I have spoken to SAS/[*], they will 'follow what LH is doing' in short words. Then I spoke to JAL GSA in CPH. All he has is an information from his principals in LON (dating from last night) stating that BA is increasing FS on Oct 27.'

(516) [*][543] [*].

(517) In an internal [*] email[544] on 14 October 2005 the LH announcement of the same day concerning the FSC increase was forwarded. It was added that 'I also received newsflashes from other airlines as well.'

(518) In an internal BA email[545] on 14 October 2005 [*] informed BA staff that LH was going to increase the FSC and asked them to send him information about their respective local competition. He added that 'please do not use this email further, do not re-send it, we could have a problem with antitrust, if you did that.'

(519) There was a meeting on 19 October 2005 between LH and AF in Paris in the Novotel at Charles De Gaulle airport to discuss surcharges. The parties assured each other of the consistent application of the surcharges, agreed that no further unilateral measures, such as the capping of the FSC by AF, would be repeated and that the forwarders should not

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receive a commission on the surcharges.[546] A follow-up meeting was arranged for the 22 November 2005. In the diary of [*] (LH) this meeting was listed at 4:30pm on 22 November 2005 by an entry '[*] arrival Lufthansa 4221[547] at 16:30 – arrival in Frankfurt'.[548] [*][549]

(520) In an internal SK email[550] on 21 October 2005 it is stated that surcharges were discussed during a WOW meeting.

4.3.20.2. Czech Republic

(521) In an internal BA email[551] exchange between [*] (BA [*], Czech Republic) and [*] on 10 October 2005 reference is made to discussions on FSC plans with [*] of LH.

(522) [*] of LH sent an email[552] on 11 October 2005 to BA, KL, LX, [*] stating that 'according to the latest information the fuel surcharge will be increased to CZK 16/kg as follows: [*]/KL/AF/LH on October 17th; BA on October 20th'.

4.3.20.3. Switzerland

(523) [*][553] [*][554] [*][555] [*][556] [*][557] [*][558] [*][559] [*][560] [*][561]

(524) [*][562] [*][563] [*][564] [*][565] [*][566] [*][567]

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546 [*].
547 The relevant Lufthansa flight
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4.3.20.4. Brazil

(527) LA sent an email[570] to LH on 6 September 2005 under the subject 'FSC Brazil' stating that 'On September 16 we will raise it to $0.50. Hope to hear from you.'

(528) LH sent an email[571] on 8 September 2005 to AF, KL, [*] and [*] informing them that after the authorisation by DAC to use the FSC index, LH will raise the FSC to USD 0.50 from 1 October 2005 and will from then on follow the worldwide FSC policy of LH in Brazil as well. AF replied[572] on 9 September 2005 that they would apply USD 0.50/kg from 1 October 2005. The email chain was forwarded[573] internally in LH on 9 September 2005 noting that 'we plan to implement the USD 0.50 as of Oct 01. AF, KL, LX, [*] and [*] confirmed they will start on the same date as us.'

4.3.20.5. Hong Kong

(529) In an internal CV email[574] on 13 September 2005 it is reported that 'Hong Kong BAR has approved the next level of FSC and it looks like CX is going to implement it at HKD 4.40 eff fm 27 Sep.'

(530) It is reported in an internal LX email[575] on 14 October 2005 that 'HKG BAR Cargo subcommittee has announced today that the 12th level FSC will be implemented as of 28 Oct 05… The new level for HKG-TC1/2 will be HKD 4.80/kg'.

4.3.20.6. Indonesia

(531) [*] LH employee in Indonesia sent an email[576] to [*] QF employee on 12 October 2005 asking 'as per last ACRB meeting QF FSC for TC ½ USD 0.45/kg. Does it remain the same or there is a new FSC?' QF replied that 'yes, at the moment due still waiting for the instruction from HQ'.

4.3.20.7. India

(532) [*][577]

4.3.21. Competitor contacts concerning the decreases of the FSC in November-December 2005

(533) The fuel prices started to drop at the end of October 2005 and lowered considerably during November and December 2005. A number of

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571 [*].
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573 [*].
574 See in the file [*] inspection document taken from CV.
575 [*].
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airlines decreased the FSC three times in a row during this period and continued to discuss their actions and plans concerning various aspects of the FSC.

4.3.21.1. Head office involvement

(534) [*][578].

(535) In an internal SK email[579] exchange from 2 to 4 November 2005 it is noted that as a consequence of the FSC decrease by KL/AF, SK communicated to SQ that they would wait until they received the index and that SK expected SQ to follow[580].

(536) In an internal KL email[581] on 5 November 2005 the local KL employee in Italy asks the KL head office whether they can influence the fact that [*] seems to give a discount for the FSC in Italy.

(537) LH forwarded its FSC announcement to LA on 7 November 2005[582].

(538) In an internal LX email[583] on 7 November 2005 a meeting with [*] in Bangkok is reported. It is stated that 'I raised the question of the FSC in Europe and informed him about our concern that [*] is not following other airlines in regards to the levels. He confirmed that [*] is suffering from the high oil prices like any other carrier and their position is clear: they follow the national carrier. If you get me a list with all European countries where [*] is not following that practice I will inform [*] about it.'

(539) [*][584]. [*][585].

(540) An internal BA email[586] on 14 November 2005 headed 'level 10 fuel surcharge triggered' contains a list of carriers with the date of implementation of level 11 and level 10 of the FSC. Concerning [*] 18 November 2005 is indicated on the list as the effective date for implementing level 11 of the FSC. However, a public announcement of this increase by [*] is dated 16 November 2005[587].

(541) On 14 October 2005 LH announced a further reduction of the FSC. [*] LH made several calls the same day to contact KL, AF, CV and BA.

578 [*].
579 [*].
580 [*].
581 [*].
582 See in the file [*] inspection document taken from [*].
583 [*].
584 [*].
585 [*].
586 See in the file [*] inspection document taken from BA.
587 [*].

(542) LH forwarded its press release concerning the lowering of the FSC to LA on 15 November 2005.[588]

(543) AF sent an email[589] to JL on 15 November 2005 under the subject 'FS in Europe – 10 Nov' confirming 0.50 EUR chargeable weight from 28 November.

(544) In an internal LX email[590] on 18 November 2005 the local LX [*] in Canada reports to the LX head office that 'effective 28 Nov all origins in CU will go to USD 0.50 and CAD 0.60. In Canada LH and AC will go to CAD 0.61 … AC says they will make any necessary corrections by 01 JAN so we should all be on the same page by then.'

(545) LH forwarded its press release to lower the FSC to LA just before it was made public on 21 November 2005[591]. The same day [*] (LH) made a series of phone calls to AF, [*] and CV[592].

(546) In an internal BA email[593] on 24 November 2005 [*] quoted an internal LH memo concerning the surcharges that states that 'one of the fundamental cornerstones of the Lufthansa Cargo Group is the firm and steady implementation of the fuel surcharge under every circumstance… we should not extend the competition inhouse – LCAG and their associated companies – surcharges should also not be used as a competitive edge over another company. Please pass on this information to your staff accordingly.' He also noted that '[*] – as per my info, no dealings with surcharges either'.

(547) LH sent an email[594] to LA on 30 November 2005 informing them that the 'FPI will be published on the Internet tomorrow morning. Sorry for the delay.'

4.3.21.2. Germany

(548) The minutes of a meeting[595] of the Cargo Committee of BARIG on 17 November 2005 with the participation of [*], BA, SK, LH, [*] show that LH announced that the FSC would be decreased by 28 November.

4.3.21.3. Italy

(549) There were regular meetings in Italy in the framework of the so called BLACKS initiative (from the names of BA, LH, AF, CV, KL and Swiss) the purported purpose of which was to discuss security issues. However, further topics were discussed during these meetings that included the consistent application of the FSC mechanism and agreement between the

588 [*].
589 [*] (Orig. FR).
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593 See in the file [*] inspection document taken from BA.
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participants to refuse the demand of the Italian forwarder association, ANAMA, to pay a commission on the surcharges.[596]

4.3.21.4. Switzerland

(550) [*][597] [*][598] [*][599] [*][600] [*][601]

(551) [*][602] [*][603]

(552) [*][604] [*][605] [*][606] [*][607] [*][608] [*][609]

4.3.21.5. Canada

(553) [*], [*] LH [*] in Canada, as a response to the news that LH would decrease the FSC the following Monday, sent an internal email[610] on 4 November 2005 stating that 'AC methodology says their level will be 67 cents but I have a call in to them to see if they'll be sticking with that or 'adjusting' to the AF/KL level.' In a further email on 7 November 2005 Mr [*] indicated that he had received confirmation that AC would follow its methodology until the end of 2005. Mr [*] recalls that he spoke to [*] of AC on this point.[611]

4.3.22. Competitor contacts concerning the increase of the FSC in 2006

(554) The fuel prices started to increase again in January 2006 and the airlines continued their FSC related discussions until the inspection of the Commission on 14 February 2006.

4.3.22.1. Head office involvement

(555) In an internal JL email[612] on 11 January 2006 [*] (JL [*]) wrote in response to a question concerning plans of competitors with regard to the FSC that 'just kept in touch with [*] and [*] and they have no news about that.'

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(556) [*] (BA) left a message on [*]'s phone (LH) on 26 January 2006 in which he informed LH that BA would announce level 10 FSC the following day and wished to know 'where LH is looking'[613].

(557) In an internal LA email on 30 January 2006 a phone conversation with LH concerning the FSC mechanism is reported[614].

(558) In an internal MP email[615] on 30 January 2006 concerning the meeting with KL on 31 January 2006 it is suggested that the next level of FSC is discussed. Then, in an internal MP email exchange on 31 January 2006, [*] reported that KL would announce the increase of the FSC the following day, to be applied as of 14 February 2006. [*] replied that he had also spoken to CV who had confirmed that they would follow KL[616].

(559) In the minutes[617] of the BA weekly breakthrough meeting on 1 February 2006 it is noted that '[*] and [*] have also announced L10 and LH are showing 1 week, it is anticipated that they will announce next week.' [*] [*][618]. [*] in fact announced the increase only two days later.[619]

(560) [*] (BA) called [*] (LH) on 1 February 2006 to inform him that BA would announce the increase of the FSC the following day with an effective date of 16 February 2006 and to ask him about LH's position[620].

(561) In an internal CX email[621] on 8 February 2006 the CX head office instructed the local staff [*].'

4.3.22.2. Switzerland

(562) [*][622] [*][623]

(563) [*][624] [*][625] [*][626] [*][627] [*][628] [*][629]

4.3.22.3. Canada

(564) In an email on 3 February 2006 [*] (LH) indicated that AC would be updating their methodology the following week. This email reflects

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knowledge that Mr [*] had obtained through his discussions with Mr [*] (AC) about AC's methodology, this time pointing out that AC was above the other airlines. In response, AC only changed one level of its methodology.[630]

4.3.22.4. Singapore

(565) [*][631] [*].

4.4. The security surcharge (SSC)

4.4.1. General remarks

(566) The SSC, also known as Exceptional Handling Charge (EHC) in BA, or Insurance, Risk, Crisis surcharge in AF was introduced by airlines following the terrorist attacks in New York on 11 September 2001. Airlines justified the introduction of the surcharge by cost increases for airlines that was the result of higher insurance premiums, increased security costs and operational inefficiencies, such as the rerouting of certain flights.

(567) The SSC was calculated by most airlines on a per kilogram basis [*].

(568) A number of airlines that are the addressees of this Decision discussed, among others issues, their plans whether or not to introduce a SSC and if so whether it should be calculated on a per air waybill or on a per kilogram basis. Moreover, the amount of the surcharge and the timing of the introduction were also discussed. Airlines furthermore shared with each other ideas concerning the justification to be given to their customers. Ad hoc contacts concerning the implementation of the SSC continued throughout the years 2002-2006. The illicit coordination took place both at head office and local level.

(569) [*][632]

4.4.2. Description of competitor contacts

4.4.2.1. Competitor contacts concerning the introduction of the SSC in October 2001 – head office involvement

(570) [*][633] [*][634]

(571) The [*] SR [*] sent an email to the head office on 24 September 2001 reporting that 'I received a call from [*] at [*] DFW. It seems that they are considering assessing a 'security fee' on each AWB ($ 25 or ??). They want to know if we join them in a joint implementation.'

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(572) An internal SR presentation[635] on 25 September 2001 titled 'Possibilities of [*] and security surcharges in SRC' reference is made to plans of BA and LH and it is noted that 'AF/[*] not reached yet'[636]. [*][637].

(573) [*][638] [*]

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(575) [*][640] [*]

(576) [*]

(577) [*][641] [*]

(578) There was a meeting in Zurich in the second half of September between KL, LH and SR to discuss the effects of September 11. [*][642].

(579) In an internal BA email[643] on 27 September 2001 titled 'Insurance premiums' it is stated that 'the LH approach, of course is strictly AT and illegal, so we must be careful that any action we take is unilateral. We cannot signal but we can match.'

(580) In an internal [*] email[644] on 27 September 2001 it was reported under the subject [*] that 'spoke to several carriers' then results of talks with [*], [*], [*], [*], [*] and [*] were described. Concerning [*] it was noted that 'nobody prepared to comment'.

(581) [*][645] [*]

(582) In an internal LH email[646] on 28 September 2001 [*] reported that BA was moving towards LH's approach that is to charge the SSC per kg not per air waybill.

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643 See in the file on page [*] inspection document taken from BA.
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(586) [*][650] [*][651]

(587) [*] (KL) sent an email[652] to [*] (LH) on 2 October 2001 forwarding an LH email announcing a surcharge. He added that '[*], herewith the message we talked about yesterday.'

(588) [*] (LH) forwarded the KL surcharge announcement, which was very similar to that of LH's, in an internal LH email[653] on 2 October 2001 noting that the similarity is 'not accidentally'.

(589) [*][654]

(590) [*][655] [*]

(591) AF sent an email[656] to [*] on 3 October 2001 advising [*] that 'Air France Cargo will inform officially today or tomorrow the latest this decision: AFC will implement an ISC: Insurance, Security, Crisis.' [*] replied the same day by sending the LH announcement concerning the SSC.

(592) [*][657] [*]

(593) [*] reported in an internal LH email[658] on 4 October 2001 that he talked to JL concerning the SSC. JL was looking for some assistance in supporting the argument that it was facing increased costs as a result of security measures.

(594) [*] (LH) met [*] (AF) and Mr [*] the [*] of the forwarder association Freight Forwarding Europe on 4 October 2001. Mr [*] told [*] and Mr [*] that carriers should try to develop a uniform SSC policy as it creates administrative difficulties for forwarders when airlines apply different surcharge policies[659].

(595) In an internal LH email[660] on 5 October 2001 the AF press release concerning the SSC introduction is forwarded and it is noted that it would be preferable to convince AF to adjust their level to the LH level. [*] is reasonably sure but not certain that he did talk to [*] about the SSC level. AF did eventually move to EUR 0.15/kg effective 15 November 2001, [*][661].

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656 See in the file [*] inspection document taken from AF.
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661 [*].

(596) On 5 October 2001 [*] reported a meeting with the freight forwarder [*] in an internal LH email. In that meeting [*] pushed for a harmonised approach of at least the European airlines regarding surcharges. [*] reasoned that their customers sometimes require them to change carriers because of minor differences in the various surcharge levels[662].

(597) In an email[663] on 8 October 2001 [*] (BA) informed LH that BA would introduce an 'exceptional handling fee' of 0.15 EUR worldwide.

(598) [*][664] [*]

(599) In an internal LH email[665] on 11 October 2001 [*] reported that [*] had introduced a SSC of 500 yen per air waybill. He found that too low and asked [*] to speak to [*].

(600) [*][666] [*][667] [*][668] [*]

(601) In a BA document[669] titled 'European Feedback on the proposed new charges' the content of a number of internal BA emails are collected reporting about competitors' plans and actions concerning the SSC. In an email the BA [*] in Hungary reports that 'we had an AOC Cargo subcommittee meeting yesterday afternoon. As you know it is working really well in Hungary and we always try to introduce new things and charges in one time and uniformly (like fuel surcharge, CCA, POD, etc charges). LH, KL, [*], SR, AF and [*] will introduce 0.15 EUR/kg SSC from 8th Oct under SCC code.' In another email from the BA [*] in Germany, [*], addressed to [*] it is stated that 'just talked to [*] who confirm they too will implement a SSC effective 08 Oct of Euro 0.15/kg. Heard that also KL will implement a surcharge effective 15 Oct same amount as [*] and LH.' In a further email the BA [*] in Italy, [*] reports that LH, SR and CV announced the introduction of a SSC and he adds that '[*] and AF have no plan to follow this initiative.' In the last email in the document [*] ([*], DE) reports that 'I received definite confirmation this afternoon from LH that they will implement a SSC effective 08 Oct 01 of Euro 0.15/kg actual weight.'

4.4.2.2. Competitor contacts concerning the introduction of the SSC in October 2001 – France

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(603) [*][671]. [*][672]. [*][673] [*].[674] [*][675] [*].

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669 See in the file [*] inspection document taken from [*].
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671 [*].

(604) [*][676] [*][677] [*]

(605) [*][678] [*]

4.4.2.3. [*]

(606) [*]

4.4.2.4. Competitor contacts concerning the SSC between 2002-2006 – Head Office involvement

(607) [*][679]

(608) [*][680] [*]

(609) [*][681] [*][682]

(610) Mr [*] states that he exchanged information and discussed the capping of surcharges with Ms [*], a [*] [*] for AF/SkyTeam in 2003. In this context Ms [*] told Mr [*] that AF would not be capping surcharges, and Mr [*] told her that [*] would not cap either. Mr [*] met three or four times with Ms [*] in his or her office[683]. An internal [*] email[684] by Mr [*] on 24 January 2004 makes reference to these discussions, but gives no date of a conversation or meeting.

(611) [*], LX [*] sent an internal email[685] on 20 January 2004 as a response to the news from [*]'

(612) In an internal LH email on 18 May 2004, Mr [*] mentioned that he was contacted by KL and asked why LH did not charge a higher SSC for unchecked cargo in Spain as the other airlines did locally[686].

(613) On 20 May 2004 [*] sent an internal email[687] to [*] in which he informed her that he had a talk with 'a good friend' who is responsible for KLM Cargo West Europe. This friend informed him that the freight forwarder [*] was also pressing KLM to cap the SSC. [*][688] [*][689]

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(614) Referring to the news that, [*] (LH) asked in an internal LH email[690] dated 15 June 2004 whether LH had on a senior management level contact to [*] to find out more about their intention regarding the SSC. One day later, on 16 June 2004, [*] forwarded this email[691] to Mr [*], then the LH [*] in Dubai to contact [*] directly. Four days later, on 20 June 2004, Mr [*] stated[692] that he had met Mr [*] in calendar week 24 and mentioned surcharges in a general way. Mr [*] then mentioned that he organised meetings for 28 June 2004 with the directly responsible employees of [*] and hoped to discuss the issue then in a more extensive fashion. On the same day, 20 June 2004, [*] (LH) mentioned in an internal LH email[693] that [*].

(615) In an email[694] on 26 April 2005, Mr [*] of JL informed Mr [*] (LH) of his idea to introduce [*] In a further email[695] dated 27 April 2005, Mr [*] clarified his request for information. In his email[696] of the same date, Mr [*] answered these questions and commented that 'it was a brilliant idea' to introduce a SSC [*]. In an email[697] of 24 May 2005, Mr [*] asked Mr [*] whether he had been active on the issue in the meantime.

(616) [*] sent an email[698] to [*] (QF [*]) on 11 May 2005 asking her about 'the possibility of raising the security surcharge'. He notes 'collusion never hurts does it?' Ms [*] replied[699] on 12 May 2005 stating that she 'has not heard any rumour about raising the Security surcharge.' She then asked 'are you guys doing it?' In his reply the same day[700], Mr [*] explained the new procedure and noted that 'I am thinking about convincing Tokyo to raise the security surcharge'. Ms [*] forwarded[701] the whole email chain internally to [*] and [*] asking 'do we have any intention of raising the security surcharge?'

(617) In an email[702] on 29 August 2005 concerning a meeting on 31 August 2005 [*] (LH) requested [*] (SK) to 'deliver proof of the SQ's surcharge policy to [*] for next meeting for escalation purpose'. Following the meeting, on 1 September 2005, Mr [*] replied[703] that he had already escalated the security surcharge issue with SQ. In addition he noted that 'the SQ management will urge them to follow us'.

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(618) [*] (SK) sent an email[704] to [*] (SQ) on 12 October 2005 stating that 'thanks for yesterday's meeting I herewith confirm that we charge 1.10 Danish krona or 15 eurocent in sec. surcharge. Would appreciate if we could harmonize accordingly.' SQ replied[705] on 13 October 2005 that 'we will harmonize.'

(619) In an internal SK email[706] on 21 October 2005 it is stated that 'at our WOW meeting for Europe we agreed that we would impose surcharges. Must realise that it is not as easy as we thought, or hoped. I now hear that SQ is reluctant. As you know JL shall consider the latest increase. [*] says that SQ must harmonize security to the same level as we and LH have. [*] is not quite so sure, says that he must be on a level with [*] etc. Good if you would put pressure on [*] also. If everybody goes in different direction it will take only a couple of days before we get the worst deal. I shall put pressure on Steering Committee here. We have to decide in WOW if we wish to continue as previously or prefer a split up like KL/AF.'

(620) In an internal SK email[707] on 1 November 2005 under the subject 'SQ Cargo news: insurance & security surcharge increase wef 14 November 2005' the 'newsletter SCC increase 31 October 2005' is forwarded with the comment that SQ is finally harmonising the surcharge.

(621) In an internal SK email[708] on 23 November 2005 concerning the increase of the SSC charged by SQ in the framework of a Block Space Agreement, reference is made to the fact that earlier SK and LH convinced SQ to raise the SSC to customers. It is stated that 'it is us, WOW, ie. LH+SK who have been bickering with SQ now for ever to raise their SSC to 0.13 from 0.10…'

(622) In an internal JL email[709] on 10 January 2006 [*] asks his colleagues to 'advise if you have heard any rumour that airlines are planning to raise security surcharge in the near future'. [*] replied on 11 January 2006 that 'just kept in touch with [*] and [*] and they have no news about that'.

(623) [*] (Germany) forwarded an [*] newsflash to [*] (LA) on 10 February 2006[710]. Mr [*] then forwarded the email[711] internally on 11 February 2006 stating that the [*] newsletter concerning the SSC following LH was attached. He added that there would be a meeting on Monday with [*], AC, [*], etc in the office of [*].

704 [*].
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706 [*] (Orig. SE).
707 [*].
708 See in the file [*] inspection document taken from [*].
709 See in the file [*] inspection document taken from JL.
710 See in the file [*] inspection document taken from [*].
711 See in the file [*] inspection document taken from [*].

4.4.2.5. Competitor contacts concerning the SSC – United Kingdom

(624) In an internal LH email[712] on 1 October 2001, Mr [*], LH's [*] United Kingdom and Ireland noted that 'Martinair revealed this morning in discussions with us on the new surcharge that they had a record tonnage in September ex the UK.'

(625) [*][713] [*]

4.4.2.6. Competitor contacts concerning the SSC – France

(626) [*][714] [*]

(627) [*], [*] for France, Benelux and Switzerland [*], recollects that he participated in a meeting with AF on the SSC. The participants for AF were [*], and [*]. According to Mr [*], this meeting must have taken place in late 2001/early 2002 in Frankfurt. The topic of this meeting were surcharges and in particular the capping of the surcharges by AF.[715]

(628) [*] [*] for France, Switzerland and the Benelux [*] remembers having met with Mr [*] (AF/KL) regarding the capping of the SSC.[716]

4.4.2.7. Competitor contacts concerning the SSC – Italy

(629) In an internal LH email on 28 September 2004, [*], LH [*] for Italy and Malta, informed colleagues that in Italy he had founded a subgroup of 'Blacks' with BA, AF, CV, KL and Swiss to coordinate security measures. As he wrote, another aim was 'of course, to also streamline our surcharge policy'[717].

4.4.2.8. – [*]

(630) [*].'

4.4.2.9. Competitor contacts concerning the introduction of the SSC in 2001 – [*]

(631) [*].

4.4.2.10. C – [*]

(632) [*].

(633) [*].'

(634) [*].'

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(636) [*]

4.4.2.11. Competitor contacts concerning the SSC – [*]

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4.4.2.12. Competitor contacts concerning the SSC – [*]

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4.4.2.13. Competitor contacts concerning the SSC – [*]

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4.4.2.14. Competitor contacts concerning the SSC – [*]

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4.4.2.16. – [*]

(661) [*]

(662) [*].

4.4.2.17. Competitor contacts concerning the SSC – [*]

(663) [*].

4.5. Discussions concerning commission on surcharges

(664) Forwarders claimed that they incurred costs linked to the collection of the surcharges from the shippers that they perform on behalf of the airlines, however they did not receive any remuneration (commission) from the airlines for this service. The forwarders asked the International Federation of Freight Forwarders Associations ('FIATA') for advice. FIATA wrote a letter[718] to its member associations on 27 December 2004 advising them to try and solve the issue bilaterally with airlines as it could not be discussed in a multilateral forum since 'remuneration of services is a matter which can only be agreed bilaterally between the concerned parties'. FIATA also advised that failing a negotiated agreement, individual forwarders can invoice their costs to the airlines.

(665) The airlines continued to refuse commission on the surcharges and confirmed their relevant intentions to each other in the framework of numerous contacts.

(666) Following the advice of FIATA in 2005 a number of forwarders tried to settle the issue with the airlines and issued invoices for their services in collecting the surcharges.

4.5.1.1. Head office involvement

(667) [*] sent an email[719] on 14 January 2005 to [*] (BA [*]) attaching the FIATA letter concerning the remuneration of forwarders and suggested to discuss it during the Cargo Executive Committee conference call on 28 January 2005. [*] forwarded[720] the email internally to [*] (BA) on 17 January 2005 stating that 'sounds anti comp to me' and asked for legal advice. Mr [*] replied that 'this is a definite no go'.

718 [*].

719 See in the file [*] inspection document taken from BA.

720 See in the file [*] inspection document taken from BA.

(668) [*] (LX [*]) sent an internal email[721] on 19 May 2005 concerning commission on the fuel and SSC in which he instructs the area managers to 'participate wherever relevant in local BAR meetings'.

(669) In an internal SK email[722] dated 9 June 2005 it is noted, concerning a letter from the forwarders claiming commission on the FSC, that 'the whole question is exceptionally sensitive from a competition point of view, and it is important that WOW does not respond collectively and that individual WOW-members do not give a 'collective' reply. The best course of action would be that CASS – like in Switzerland – would advice about the consequences.' In the reply[723] sent on 14 June 2005 it is confirmed that 'we cannot discuss this in WOW but have to deal with it in each company separately.'

(670) [*] (LA) sent an email[724] on 17 June 2005 to [*] ([*]) asking him whether [*] 'have received some kind of pressure or information from freight forwarders to make surcharges commissionable. Some of the FF we work with have insisted on this.' Mr [*] replied[725] on 20 June 2005 confirming that [*] received similar claims from forwarders and rejected them. He noted that 'we see no advantage or need to break ranks on this matter.' Mr [*] forwarded the email[726] internally in LA making also reference to the position of LH concerning this issue.

(671) [*] sent an email[727] on 6 July 2005 to [*] (LH) under the subject 'remuneration for collection of surcharges' and asked LH whether they are 'getting the same type of mails/communiqués from customers'. [*] replied[728] on 15 July 2005 stating that 'In case somebody deduct 5% of the surcharges we could think of stop working with this customer immediately.'

(672) In an internal CX memo titled 'handling requests for commission on surcharges' sent to cargo sales managers on 8 July 2005 it is stated that 'as long as local conditions allow CX should adopt a common approach and response to the issue. CX should therefore consider following any rejection of such request or claim for commission and other related actions that may be coordinated by your local airlines associations.'

(673) [*] ([*]) forwarded[729] an email on 8 July 2005 to [*] (LH) and [*] (AC) from [*]'s Italian sales agent [*] concerning the claim of forwarders to pay a commission on the surcharges.

(674) An email chain[730] concerning [*] commission on the surcharges was forwarded to [*] (BA) who forwarded it internally in BA on 21

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722 [*].
723 [*].
724 See in the file [*] inspection document taken from [*].
725 See in the file [*] inspection document taken from [*].
726 See in the file [*] inspection document taken from [*].
727 [*].
728 [*].
729 [*].

December 2005 commenting that 'This shows that what you do in one part of the world does get feedback to the UK.' [*] (BA) forwarded[731] the whole email chain on 23 December 2005 to [*] (QF) stating that this was 'an example of one hand not talking to the other!' [*] replied[732] the same day stating that the information is misleading and that they 'have no intention of paying commission on any surcharges'.

(675) [*] (SQ [*] for the United Kingdom & Ireland) sent an email[733] on 28 December 2005 to LH, CX, [*], JL, BA, SK, [*] asking them whether they also received a communiqué from [*] in Germany announcing that [*] was going to collect a charge for the collection of the surcharges from 1 January 2006. The email was forwarded internally in [*] and [*] ([*] Germany, Nordic Countries, Eastern Europe) replied[734] on 3 January 2006 that 'I am meeting up with MP on Thursday and she will be giving me a letter their legal dept sent. I also spoke to LH last week who will not answer officially to the QCS letter but have said that they will not accept any such invoices. AC by the way have received something from [*] here locally. I will fax you their letter just now.'

(676) [*] (CX) sent an internal email[735] on 4 January 2006 concerning letters from forwarders announcing the intention to invoice the carriers for the collection of the surcharges. He stated in the email that 'most managers of other carriers are still on leave as I write, although I have spoken with SQ and AC. SQ has chosen to ignore the letters. AC have forwarded on to HO. Next week LH management returns from leave and I will find out what their intention is.' In a following email[736] on 9 January 2006 [*] states that 'have now spoken with LH who are also not responding to the letters for the moment.'

(677) [*][737] [*]

4.5.1.2. Switzerland

(678) [*][738] [*][739] [*]

(679) [*][740] [*]

(680) In an internal LX email[741] on 1 March 2005 [*] (LX [*]) stated concerning the surcharge commissioning that 'the topic will be discussed unofficially at the meeting in Malaga'.

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(681) [*][742] [*][743] [*][744] [*][745] [*][746] [*][747] [*]

(682) [*][748] [*][749] [*]

4.5.1.3. Italy

(683) An email[750] was sent from the Italian Board of Airline Representatives ('IBAR') on 30 March 2005 to JL, KL, AF, BA, [*], CX and [*] forwarding a draft reply to the letter sent by ANAMA, the Italian forwarders association concerning commission on the surcharges. The IBAR called on the airlines to 'use the draft reply quoted here below with maximum care, each carrier must use the gist of the draft and not just copy as it is.'

(684) In an internal LX email[751] on 19 May 2005 [*] (LX [*] Italy) wrote the following: 'Strictly confidential especially for antitrust reasons. On 12 May following carriers decided to meet at LH Cargo Italy: [*], LH, LX, AF, KL, CV and JL (more than 50% of the market). We all confirmed that we will not accept any FS/SS remuneration. BA could not join the meeting but is of the same opinion… It goes without saying that carriers meetings have to be treated in a very confidential way. We are not allowed to write in the name of a carrier group/association and to state officially that all carriers have replied with a no.'

(685) In an internal CX email[752] dated 14 July 2005 [*] (CX [*] Italy) reported that: 'Yesterday afternoon a meeting has been held in MIL among the most important carriers, namely AF, [*], CV, CX, KL, LH, [*], SQ, JL, LX. Regardless the individual way every carrier will adopt to reject the invoices that we'll receive from the agents (…) everyone reconfirmed the firm intention not to accept any negotiation in granting this commission.'

(686) In an internal CX email[753] on 14 October 2005 concerning the letter of the forwarders asking for a commission on the surcharges, [*] (CX [*] Italy) stated that 'on real confidential basis I succeeded to get the text of LH's HDQ reply to this letter' then she quoted the letter of LH. She furthermore added that 'the majority of the airlines excluded the first group of four carriers (LH, AF, KL, [*]) that have received the letter above won't answer this letter.'

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751 [*].
752 [*].
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(687) In an internal LX email chain[754] concerning the accounting of the invoices issued by forwarders in Italy for paying a commission on the surcharges, [*] (LX [*] Italy) stated[755] on 13 October 2005 that 'We are not going to pay these commissions, this is for sure, but we are forced to register the invoices, this according to instructions received by [*] Italy (pax). Therefore we need a transitional cost account where to place these registered invoices, even if we don't pay a penny, in case one day we would have to pay.[*] are all doing the same'.

4.5.1.4. [*]

(688) [*][756] [*][757] [*]

4.5.1.5. Spain

(689) [*] (CV) sent an internal email[758] to the CV head office on 5 July 2005 under the subject 'commission fuel surcharge and security surcharge' stating that 'tdy we had a meeting on this subject with all a/l operating at BCN airpt and it was a general opinion that we shld not pay any comm on surcharges.' He also attached the minutes of the meeting.

4.5.1.6. [*]

(690) [*].

4.5.1.7. New York

(691) Mr [*] states[759] that in May 2004, representatives of AF, KL, [*], LX, LH and possibly other carriers visited the 'Oak Bar' in New York City after the initial meeting for a bid by [*]. The participants discussed commission on surcharges, especially whether they would offer a commission to [*] on surcharges. LH, AF and KL said that they would not do so. They also discussed the fact that the WOW carriers had been invited to participate in a joint bid for [*].

4.6. Assessment of factual evidence

4.6.1. Evidence relating to the cartel as a whole

(692) As demonstrated in the description of facts in Sections 4.1 to 4.5 the anti-competitive conduct regarding pricing coordination took place from at least [*] to 14 February 2006 (the first day of the Commission inspections). During this period the addressees removed price uncertainty from the market by cooperating on various elements of price for airfreight services.

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759 [*].

(693) The cooperation took the form of repeated bilateral contacts and also multilateral contacts. These contacts took place often by telephone but also by email, fax and in meetings. This network of contacts operated within the undertakings both at a senior level with head office involvement and also at a local level.

(694) The overall network of coordination of pricing matters had various elements. The addressees cooperated in respect of the FSC, the SSC and the non payment of commission on the surcharges to freight forwarders.

(695) The evidence in Section 4.3. demonstrates that cooperation took place in relation to the FSC from [*] until February 2006. The addressees contacted each other on various matters concerning the FSC including changes to the mechanism, application of the mechanism, changes to the FSC level, disclosure of anticipated increases and announcement dates, commitments to follow increases and instances where some airlines did not follow the system. This network of frequent contacts was aimed at ensuring that discipline was maintained in the market and that increases arising from the fuel indices would be applied in full and in a coordinated way.

(696) The evidence in Section 4.4. demonstrates that cooperation took place in relation to the SSC from [*] to February 2006. Contacts between airlines and discussions related in particular to [*], the appropriate level of the surcharge, [*].

(697) The evidence in Section 4.5. demonstrates that cooperation took place in relation to commission on surcharges from January 2005 to February 2006. Contacts were made between airlines with a view to aligning their conduct in refusing to pay commission to forwarders on surcharges.

(698) A number of carriers have made submissions that certain contacts contain public information, factual errors, are inconclusive or have been misinterpreted by the Commission.

(699) BA dismisses many contacts as inconclusive or related to publicly available material.

(700) CV states that the Statement of Objections ('SO') contains many inaccuracies and unsubstantiated allegations against it which do not meet the requisite standard of proof.

(701) CX claims that many incidents described in the SO are capable of innocent explanation.

(702) The Commission has carefully considered the submissions of BA, CV, AF and CX on inconclusive or publicly available material and the submissions offering explanations for various contacts and a number of specific contacts have been modified or are no longer relied upon.

However, the Commission's evidence must be assessed as a body[760]. Accordingly, many contacts which do not amount to decisive evidence of an infringement in themselves are nevertheless relevant, when assessed with other contacts, to establishing the single and continuous infringement.

(703) Finally, the Commission wishes to point out that whilst the exchange of publicly available material is in itself not problematic it must nevertheless be seen in the wider context of the cartel. By directly communicating with competitors on price such contacts may cause certain carriers to alter their conduct, maintain ongoing pricing contacts between competitors and may operate as a form of monitoring mechanism. Accordingly, in the context of this cartel, which involves numerous bilateral and multilateral contacts about pricing matters, the Commission nevertheless considers relevant certain contacts which relate to the exchange of recently announced pricing information. Such disclosure is particularly relevant when other undertakings have yet to take pricing decisions. However, the Commission recognises that such contacts carry less evidential weight than exchanges of non public pricing information.

4.6.2. The evidence in relation to each addressee.

(704) The involvement of the addressees in the aspects presented in Section 4.6.1, namely FSC, SSC and commission on the surcharges are detailed in Sections 4.6.2.1 to 4.6.2.14 by undertaking. The Commission relies on the evidence presented in Sections 4.1 to 4.5 but outlines the specific evidence in relation to each undertaking by way of summary of the evidence in relation to the aspects outlined in Section 4.6.1 taking also into consideration the parties' responses to the SO.

(705) The Commission does not necessarily hold every recital which reference is made to and every single item of evidence therein to be of equal value. Rather, the recitals to which reference is made form part of the overall body of evidence the Commission will rely on and have to be evaluated in this context.

4.6.2.1. Evidence concerning AC

Summary of Commission's case

(706) Evidence regarding Air Canada ranges from [*] until 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails, telephone calls and meetings.

760 Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg and others v Commission*, [2004] ECR I-123, paragraphs 53-57 and joined cases T-44/02 OP, T-54/02 OP, T-56/02 OP and T-61/02 OP *Dresdner Bank AG and Others v Commission* [2006] ECR II-3567, paragraphs 59-67.

(707) AC was involved in the following aspects: FSC and SSC.

FSC

(708) In respect of the FSC cont acts included in particular: repeated exchange of pricing information by email[761]; repeated telephone discussions[762]; bilateral discussions with other carriers, in particular LH[763]; [*][764]; and [*] new trigger points within BAR CSC meetings in Hong Kong[765].

SSC

(709) In respect of the SSC, contacts included in particular bilateral information exchanges with [*][766], [*][767] [*] [*][768], [*] and in Germany[769].

4.6.2.2. Evidence concerning AF

Summary of evidence against carrier

(710) Evidence regarding Air France ranges from 7 December 1999 to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, the SSC, and commission on surcharges in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(711) AF head office participated in the coordination of the [*] implementation of FSC increases based on the FSC mechanisms of the carriers involved and the introduction of new trigger points to the said FSC mechanisms involving senior management between at least February 2000 and February 2006, in particular through regular telephone discussions between LH and AF[770] (principally between [*] and [*]) and less regularly between AF and other carriers like CV[771] and MP[772]. [*][773]. There was, furthermore, a bilateral meeting between [*] (LH) and [*] and [*] (both AF) in Paris on 15 May 2001 at which AF gave a commitment to strictly maintain the FSC[774].

761 See the following recitals of this Decision: ([*]) (481)
762 See the following recitals of this Decision: (553) (564)
763 See the following recitals of this Decision: [*] [*] (347) (400) (435) (439) (471) (484) (544) (553) (564)
764 See the following recitals of this Decision: [*]
765 See the following recitals of this Decision: [*] (492)
766 See the following recitals of this Decision: ([*])
767 See the following recitals of this Decision: [*] ([*])
768 See the following recitals of this Decision: [*]
769 See the following recitals of this Decision: (623)
770 See the following recitals of this Decision: (176) (198) (201) (204) (324) (346) (371) (388) (389) (458) (504) (507) (511) (514) (541) (545) [*]
771 See the following recitals of this Decision: (394) [*]
772 See the following recitals of this Decision: (180)
773 See the following recitals of this Decision: [*]
774 See the following recitals of this Decision: (168)

(712) AF local staff was involved in contacts with competitors concerning the FSC implementation in the EEA between February 2000 and February 2006, in Switzerland between 2002 and February 2006 [*].

(713) The contacts with competitors on local level included: repeated exchanges of information concerning the timing and the amount of the FSC movements and the introduction of new trigger points to the FSC mechanism by email, phone and personal contacts bilaterally[775] and multilaterally[776]; [*][777], European carrier meetings in Hong Kong [778]; a trilateral meeting between KL, [*] and LH on 06 June 2005 in Frankfurt [*][779]; [*][780]; a meeting with LH at the Novotel Hotel of Paris CDG airport on 19 October 2005 at which both parties provided assurances about the consistent application of the FSC and AF made a commitment not to cap the FSC again[781]; AF sent and received emails to and from competitors disclosing their intended action and future announcements[782]; [*] [783]; there were discussions and agreements about raising the FSC level and new trigger points within BAR CSC (at least in Hong Kong[784], [*][785] [*][786]); and AF participated in the so called BLACKS initiative in Italy where implementation of the FSC was monitored[787]. Some evidence indicates further contacts concerning the FSC.[788]

SSC

(714) The contacts concerning SSC included in particular: discussions concerning the introduction of the SSC[789]; exchanges of information concerning the implementation of the SSC by email[790] and during bilateral meetings[791]; discussions between [*] (AF) and [*] (LH) including a meeting between them and Freight Forwarding Europe on 4 October 2001[792]; a meeting with [*] in late 2001/early 2002 in Frankfurt[793]; [*][794]; multilateral meetings at which the SSC was discussed including in [*]; participation in discussions concerning the

775 See the following recitals of this Decision: (125) (126) (129) (130) (131) (156) (158) (159) (160) (166) (179) (184) [*] (187) (199) (200) (208) (210) (211) (213) (214) (217) (236) (241) (242) (251) (271) [*] (300) (309) (315) (340) (341) (349) (392) (393) (395) (396) (410) (443) (466) (469) (502) (543)

776 See the following recitals of this Decision: (167) [*] (400) (404) (414) (458) (467) (489) (495) [*]

777 See the following recitals of this Decision: [*]

778 See the following recitals of this Decision: [*] (493)

779 See the following recitals of this Decision: [*]

780 See the following recitals of this Decision: [*]

781 See the following recitals of this Decision: (519)

782 See the following recitals of this Decision: [*] [*] (397) (413) (528)

783 See the following recitals of this Decision: [*].

784 See the following recitals of this Decision: [*] (492)

785 See the following recitals of this Decision: [*] [*] [*]

786 See the following recitals of this Decision: [*]

787 See the following recitals of this Decision: (549)

788 See the following recitals of this Decision: (309) [*] (343) (368) (464) (470)

789 See the following recitals of this Decision: [*] [*] (572) [*] [*] [*]

790 See the following recitals of this Decision: [*] (591) [*]

791 See the following recitals of this Decision: (610) (628) [*]

792 See the following recitals of this Decision: (594) (595)

793 See the following recitals of this Decision: (627)

794 See the following recitals of this Decision: [*]

implementation of SSC in the framework of the BLACKS initiative in Italy[795]; and discussions between [*] concerning the implementation of SSC[796]. Some evidence indicates further contacts concerning the SSC.[797]

Commission on surcharges

(715) Concerning the refusal to pay commission on surcharges to forwarders, contacts included in particular: confirmation of mutual intention of carriers not to pay commission at multilateral meetings, for example, at the Hong Kong BAR CSC meeting on 11 July 2005[798], and at the meeting with other carriers in May 2004 at the 'Oak Bar' in New York City after the [*] bid[799]; [*][800]; meetings on 12 May 2005 at LH cargo Italy[801] and on 13 July 2005 in Milan[802] with local carriers; bilaterally with LH[803]; meetings and other contacts[804] in the framework of BLACKS in Italy[805], [*][806].

AF specific arguments and Commission response

Specific arguments on FSC

(716) AF states that it was not involved in discussions concerning the introduction of new trigger points from March 2003 as LH states [*] but was involved only from May 2004.

(717) AF argues that the reference to the switch by AF to the same FSC mechanism, referred to in recital (371), means that AF changed to the same mechanism as KL after the integration of the two companies. However, the Commission notes that Mr [*] (LH) stated in this same email that *'somit sind wir jetzt alle auf bei der gleichen Methode'* that is '*with this we all have the same method now*'.

Specific arguments on SSC

(718) AF denies the involvement of its head office in SSC discussions after its implementation as there is no relevant evidence. In this regard the Commission points to [*] and then in March 2003 she thanked [*] for his help with AF[807]. Furthermore, AF local staff were clearly involved in SSC discussions even after the implementation, acts for which the company as a whole is responsible.

795 See the following recitals of this Decision: (629)
796 See the following recitals of this Decision: [*]
797 See the following recitals of this Decision: [*]
798 See the following recitals of this Decision: (492)
799 See the following recitals of this Decision: (691)
800 See the following recitals of this Decision: [*]
801 See the following recitals of this Decision: (684)
802 See the following recitals of this Decision: (685)
803 See the following recitals of this Decision: (205)
804 See the following recitals of this Decision: (683) (687)
805 See the following recitals of this Decision: (549)
806 See the following recitals of this Decision: [*]
807 See in the file [*]

(719) Concerning an LH email referring to the aim of the BLACKS group in Italy AF argues that SSC was not discussed in the group, as the wording of the email refers to *'Sicherheitsmassnahmen' 'security measures'* that is wider than SSC. The Commission does not accept this argument, as the same email also states that another aim is '*of course, to also streamline our surcharge policy*' that in fact is a clear reference to SSC discussions.[808]

4.6.2.3. Evidence concerning KL

Summary of evidence against carrier

(720) Evidence regarding KLM ranges from 21 December 1999 to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, SSC and the commission on surcharges in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(721) KL head office participated in the coordination of the [*] implementation of FSC increases based on the FSC mechanisms of the carriers involved and the introduction of new trigger points to the said FSC mechanisms involving senior management between at least 2001 and February 2006 in particular through repeated telephone discussions between KL and LH[809] [*] [810] but subsequently and mainly between [*] (KL) and [*] (LH)[811]) [*][812]. [*][813].

(722) KL local staff was involved in contacts with competitors concerning the FSC implementation in Denmark, Finland, Germany, Italy, the Netherlands, Norway, Sweden, the United Kingdom, Switzerland, Brazil, Hong Kong, India, Indonesia, Iran and Singapore between 2000 and 2006.

(723) Such contacts included: repeated exchanges of information concerning the timing and the amount of the FSC movements and the introduction of new trigger points to the FSC mechanism by email, phone and personal contacts bilaterally[814] and multilaterally[815]; [*] [816], "European Carrier Drinks" in Hong Kong [817], on 23 August 2004 in Amsterdam involving the [*]' of KL, LH, CV and BA[818]; [*][819]; [*][820]; discussions

808 See in the file [*]
809 See the following recitals of this Decision: [*] (255) (324) (340) (345) (371) (458) (500) (507) (511) (514) (541) [*]
810 See the following recitals of this Decision: [*]
811 See the following recitals of this Decision: (257) (259) (260) (265) (269) (291) [*]
812 See the following recitals of this Decision: [*] [*] [*] [*] [*] [*] [*] [*] [*] [*] [*]
813 See the following recitals of this Decision: [*] [*] [*] [*] [*] [*] [*] [*] [*] [*] [*] [*] [*] [*] [*]
814 See the following recitals of this Decision: (126) (133) (156) (160) (175) (217) (239) (242) [*] (266) (271) [*] (300) (313) (343) (393) (411) (428) (470) (478) (495) (558)
815 See the following recitals of this Decision: (164) [*] (400) (404) (414) (496) (522) (528)
816 See the following recitals of this Decision: [*]
817 See the following recitals of this Decision: [*] (493)
818 See the following recitals of this Decision: (376)

and agreements about raising the FSC level and new trigger points within BAR CSC (at least in Hong Kong[821], [*] and [*]); and participation in the so called BLACKS initiative in Italy where implementation of the FSC was monitored[822]. Some evidence indicates further contacts concerning the FSC.[823]

SSC

(724) The contacts concerning SSC included: discussions concerning the introduction of the SSC[824]; exchanges of information concerning the implementation of SSC by email[825] and during bilateral meetings[826]; [*][827] and LH[828]; multilateral meetings at which the SSC was discussed [*][829], in [*]; participation in discussion concerning the implementation of SSC in the framework of the BLACKS initiative in Italy[830]; discussions between BAR CSC members in Hong Kong concerning the implementation of SSC[831]. [*].[832]

Commission on surcharges

(725) Concerning the refusal to pay commission on surcharges to forwarders, contacts included: confirmation of mutual intention of carriers not to pay commission at multilateral meetings, for example, at the Hong Kong BAR CSC meeting on 11 July 2005[833], and at the meeting with other carriers in May 2004 at the 'Oak Bar' in New York City after the [*] bid[834]; [*][835]; meetings on 12 May 2005 at LH cargo Italy[836] and on 13 July 2005 in Milan[837] and in other contacts[838] with local carriers; bilateral discussions with [*][839]; meetings and other contacts in the framework of BLACKS in Italy[840] and [*][841].

KL specific arguments and Commission response

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819 See the following recitals of this Decision: [*] [*]
820 See the following recitals of this Decision: [*]
821 See the following recitals of this Decision: [*] (492)
822 See the following recitals of this Decision: (549)
823 See the following recitals of this Decision: (127) (129) (130) (158) (161) [*] [*] (211) (219) [*] (309) [*] (339) (410) (443) (464) (467) (512) (536) (553)
824 See the following recitals of this Decision: [*]
825 See the following recitals of this Decision: [*]
826 See the following recitals of this Decision: (628) [*]
827 See the following recitals of this Decision: [*]
828 See the following recitals of this Decision: (587) (588) (612) [*]
829 See the following recitals of this Decision: [*]
830 See the following recitals of this Decision: (629)
831 See the following recitals of this Decision: [*] [*]
832 See the following recitals of this Decision: [*]
833 See the following recitals of this Decision: (492)
834 See the following recitals of this Decision: (691)
835 See the following recitals of this Decision: [*]
836 See the following recitals of this Decision: (684)
837 See the following recitals of this Decision: (685)
838 See the following recitals of this Decision: (683) (687)
839 See the following recitals of this Decision: [*]
840 See the following recitals of this Decision: (549)
841 See the following recitals of this Decision: [*]

Commission of surcharges

(726) Concerning the commission on surcharges KL states that there is only one instance when this topic was discussed at headquarters' level, during the contacts between AF, KL and LH in 2005. KL argues that there are civil proceedings under national law concerning the commission, which was commenced by organisations of agents against a collective of airlines operating from Italy. KL also argues that undertakings in legal proceedings who are joint defendants are allowed to coordinate their legal defence and take a joint position.

(727) The Commission rejects these arguments as KL staff was involved in discussions concerning commission on surcharges in numerous places worldwide, as described in [*]. During these discussions the participants assured each other that they would not pay commission to the forwarders. Such mutual assurances can not be regarded as legitimate contacts linked to the litigation in Italy.

4.6.2.4. Evidence concerning BA

Summary of Commission's case

(728) The evidence concerning British Airways ranges from 22 January 2001 until 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(729) BA was involved in the following aspects: FSC, SSC and commission on surcharges.

FSC

(730) BA head office participated in the coordination of the [*] implementation of FSC increases between at least 2001 and 2006 with also local contacts on implementation. Such contacts included in particular: repeated exchange of pricing information by email[842]; repeated telephone discussions between BA, notably, [*], [*] and [*], with [*] of LH[843]; bilateral discussions with other carriers including LH, SK, MP, [*], [*] and LX[844]; participation in multilateral meetings involving numerous carriers[845], [*] a meeting of [*] of LH, CV, BA, KL and [*] in Amsterdam in August 2004[846]; participation in 'European Carrier Drink' in Hong Kong of 12 July 2004[847]; participation in the so

842 See the following recitals of this Decision: [*] (273)

843 See the following recitals of this Decision: (116) (174) (177) (182) (183) [*] (203) (254) (259) (265) (266) (269) (270) (293) (308) (324) (345) (367) (368) (369) (500) (514) (518) (521) (522) (541) (546) (556) (559) (560) [*]

844 See the following recitals of this Decision: (133) (178) (213) (217) [*] (271) (300) (339) (363) (509) [*]

845 See the following recitals of this Decision: (222) (548)

846 See the following recitals of this Decision: (376)

847 See the following recitals of this Decision: [*]

called BLACKS initiative in Italy, (BA, LH, AF, CV, KL and Swiss)[848]; [*][849]; discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings at least in Hong Kong[850] and India[851] [*]; and other contacts with competitors[852].

SSC

(731) In respect of the SSC bilateral discussions took place with other carriers including at least LH and [*][853]. BA participated in multilateral meetings where SSC was discussed [*]; in meetings of the so called BLACKS initiative in Italy[854]; [*]; email exchanges with competitors[855]; and other anticompetitive contacts[856].

Commission on surcharges

(732) In respect of not paying a commission on surcharges, BA was involved in discussions concerning the refusal of paying a commission multilaterally; [*][857] [*] IBAR members in Italy[858]; in confirming not to accept payment of commission in Italy[859] and other contacts[860].

BA specific arguments and Commission response

(733) BA argues the Commission has misunderstood BA's surcharge policy by conflating an agreement on the global surcharge with agreements at the local level on implementation or exceptions to that surcharge.

(734) The Commission understands BA's policy was to set the surcharge centrally and to implement it locally. However, it is clear from evidence presented that contacts took place at both head office and local level. Local contacts on implementation or to allow exceptions to the surcharge are relevant pricing contacts. Furthermore, it is established that information relating to local contacts was fed back to BA's head office (see recitals (885)- [*]).

(735) BA suggests it is disingenuous for the Commission to rely on contacts BA had with other carriers who were not also addressees of the SO.

(736) The Commission is entitled to rely on pricing contacts BA had with any other carriers irrespective of whether or not they are addressees of the Decision. In establishing which carriers are addressees of the Statement of Objections or the Decision the Commission assesses the body of

848 See the following recitals of this Decision: (549)
849 See the following recitals of this Decision: [*]
850 See the following recitals of this Decision: [*] (492) (493)
851 See the following recitals of this Decision: [*] (386) (532)
852 See the following recitals of this Decision: [*] (211) (235) (309) (349) (351) (540)
853 See the following recitals of this Decision: (582) (597) [*]
854 See the following recitals of this Decision: (629)
855 See the following recitals of this Decision: [*]
856 See the following recitals of this Decision: (572) [*]
857 See the following recitals of this Decision: [*]
858 See the following recitals of this Decision: (683)
859 See the following recitals of this Decision: (684)
860 See the following recitals of this Decision: (675) (674)

evidence against the individual carriers concerned. The fact that the Commission does not consider that the body of evidence against certain carriers is sufficient to address to them an infringement decision does not mean that BA's contacts with such carriers are legitimised or rendered irrelevant.

4.6.2.5. Evidence concerning CV

Summary of Commission's case

(737) Evidence regarding Cargolux ranges from 22 January 2001 to 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price of the surcharge increases in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(738) CV was involved in the following aspects: FSC, SSC and commission on surcharges.

FSC

(739) In respect of the FSC these contacts included in particular: repeated exchanges of information concerning the timing and the amount of the FSC movements and the introduction of new trigger points to the FSC mechanism by email, phone and personal contacts multilaterally[861]; [*][862]; attending a meeting of [*] of LH, CV, BA, KL and [*] in Amsterdam in August 2004[863]; participation in "European Carrier Drinks" in Hong Kong [864]; discussions concerning the FSC implementation in the BAR CSC and BAR CSC Executive Committee meetings in Hong Kong[865] [*]; involvement in the so-called BLACKS initiative in Italy (BA, LH, AF, CV, KL and Swiss) which included the consistent application of the FSC[866].

(740) Bilateral contacts included in particular: bilateral contacts with LX[867], MP[868], BA[869], AF[870], LH[871] and KL[872] concerning changes in FSC mechanisms and in upcoming FSC levels; [*][873]; a meeting with Mr [*]

861 See the following recitals of this Decision: [*] (400) (481) (496)
862 See the following recitals of this Decision: [*]
863 See the following recitals of this Decision: (376)
864 See the following recitals of this Decision: (382) (493) (529)
865 See the following recitals of this Decision: (357) (358) (383) (492)
866 See the following recitals of this Decision: (549)
867 See the following recitals of this Decision: (239)
868 See the following recitals of this Decision: (180) (199) (465) (558) [*]
869 See the following recitals of this Decision: (363)
870 See the following recitals of this Decision: (394) [*]
871 See the following recitals of this Decision: (499) (508) (514) (541)(545) [*]
872 See the following recitals of this Decision: (252) (305) (327) (329) (362) (408) (441) (459) (513) [*]
873 See the following recitals of this Decision: [*] [*]

of [*][874], where the main purpose was to convince LH to agree to the introduction of a distance based element to the FSC system.

(741) Some evidence indicates further contacts concerning the FSC.[875]

SSC

(742) In respect of the SSC contacts included: exchanges of information concerning the implementation of SSC by email[876]; participation in multilateral meetings where the SSC was discussed involving numerous carriers, [*] and in meetings of the BAR CSC and of the BAR CSC Executive Committee in Hong Kong[877]; [*][878]; involvement in the so called BLACKS initiative in Italy which included SSC discussions[879]. Some evidence indicates further contacts concerning the SSC.[880]

Commission on surcharges

(743) Concerning the refusal to grant commission on surcharges to forwarders, contacts include: confirmation of mutual intention of carriers not to pay commission at multilateral meetings, for example, at the Hong Kong BAR CSC meeting on 11 July 2005[881]; meetings on 12 May 2005 at LH cargo Italy[882] and on 13 July 2005 in Milan[883] and in other contacts with local carriers[884]; a meeting on 5 July 2005 in Barcelona with all airlines operating at this airport[885]; [*][886]; participation in the BLACKS meetings in Italy where the participants agreed to reject the demand of the Italian forwarder association on commission surcharges[887] [*][888];.

4.6.2.6. Evidence concerning CX

Summary of Commission's case

(744) Evidence regarding Cathay Pacific ranges from [*] to 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(745) CX was involved in the following aspects: FSC, SSC and commission on surcharges.

874 See the following recitals of this Decision: [*]
875 See the following recitals of this Decision: (131) (156) (160) (214) (235) (339) (343) (410) (443) (467)
876 See the following recitals of this Decision: [*]
877 See the following recitals of this Decision: [*] [*]
878 See the following recitals of this Decision: [*]
879 See the following recitals of this Decision: (629)
880 See the following recitals of this Decision: (653)
881 See the following recitals of this Decision: (492)
882 See the following recitals of this Decision: (684)
883 See the following recitals of this Decision: (685)
884 See the following recitals of this Decision: (687)
885 See the following recitals of this Decision: (689)
886 See the following recitals of this Decision: [*]
887 See the following recitals of this Decision: (549)
888 See the following recitals of this Decision: [*] [*]

FSC

(746) In respect of the FSC, contacts included in particular: repeated exchanges of price information by email[889]; [*] [890]; [*], on 21 September 2004 in Belgium[891] and on 23 August 2005 (BAR CSC Ex Com)[892]; colluding with JL and AF about the application of the FSC to shipments of Beaujolais nouveau[893]; sending, receiving, soliciting and coordinating exchanges of information regarding the FSC within BAR CSC (Hong Kong) including discussions and agreements about raising the FSC level and new trigger points[894]; [*][895]; [*][896]; and other contacts[897].

SSC

(747) In respect of the SSC contacts included in particular: [*] [898]; [*][899]; [*] ([*][900]; [*][901]; and other contacts[902].

Commissioning on surcharges

(748) Concerning the refusal to pay commission on surcharges to forwarders, contacts included in particular: bilateral contacts at least with LH and - as confirmed in an internal CX email on 4 January 2006 - with SQ and AC[903]; multilateral contacts and meetings with numerous carriers, for example, in a meeting in Milan on 14 July 2005 with AF, [*], CV, [*], KL, LH, SQ, JL and LX[904], [*] [*][905] and with IBAR members in Italy[906]. In an internal CX memo dated 8 July 2005 it is suggested that CX should follow the rejection of the claim for commission and other related actions that may be coordinated by local airlines associations[907].

4.6.2.7. Evidence concerning JL

Summary of Commission's case

889 See the following recitals of this Decision: [*] (400) (435) (439) (471) (484)
890 See the following recitals of this Decision: [*] (411) (474)
891 See the following recitals of this Decision: (398)
892 See the following recitals of this Decision: (494)
893 See the following recitals of this Decision: (413)
894 See the following recitals of this Decision: [*] (492) (494) (529)
895 See the following recitals of this Decision: [*]
896 See the following recitals of this Decision: [*]
897 See the following recitals of this Decision: (160) [*] (374) (403) [*] (561) [*]
898 See the following recitals of this Decision: [*]
899 See the following recitals of this Decision: [*]
900 See the following recitals of this Decision: ([*])
901 See the following recitals of this Decision: [*]
902 See the following recitals of this Decision: [*] [*]
903 See the following recitals of this Decision: (676) (686)
904 See the following recitals of this Decision: (675) (685)
905 See the following recitals of this Decision: [*]
906 See the following recitals of this Decision: (683)
907 See the following recitals of this Decision: (672)

(749) Evidence regarding Japan Airlines ranges from [*] until 14 February 2006. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(750) JL was involved in the following aspects: FSC, SSC, and commissioning on surcharges.

FSC

(751) In respect of the FSC contacts included in particular: repeated exchange of pricing information by email[908]; repeated telephone discussions; bilateral discussions with other carriers including at least AF and LH[909]; participation in [*] illicit discussions concerning the FSC with the WOW partners (LH, SK and SQ)[910]; [*][911]; and discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings in Hong Kong[912] and [*]; [*] and other contacts[913].

SSC

(752) In respect of the SSC contacts included in particular: repeated exchange of pricing information by email; repeated telephone discussions; bilateral discussions with other carriers including at least LH, [*] and [*][914]; participation in multilateral meetings involving numerous carriers notably illicit discussions concerning the SSC with the WOW partners (LH, SK and SQ)[915], [*].

Commissioning on surcharges

(753) JL was involved in discussions concerning the refusal to pay a commission on the surcharges: in email exchanges between [*][916]; IBAR members in Italy[917]; in a meeting in Italy on 12 May 2005 with LH, LX, AF, KL, CV and JL[918]; in another meeting in Italy on 14 July 2005 with AF, CV, CX, KL, LH, [*], SQ, JL and LX[919] and in other contacts[920].

JL specific arguments and Commission response

Facts [*]

908 See the following recitals of this Decision: [*] (400) (435) (439) (471) (473) (483) (484) (496)
909 See the following recitals of this Decision: [*] (373) (406) (413) (477) (486) (515) (543) (555)
910 See the following recitals of this Decision: (501) (506)
911 See the following recitals of this Decision: [*].
912 See the following recitals of this Decision: (383) (492)
913 See the following recitals of this Decision: (159) (161) (168) (164) [*] (381) (414) (438) [*]
914 See the following recitals of this Decision: [*] (615) (622) [*]
915 See the following recitals of this Decision: (619)
916 See the following recitals of this Decision: [*]
917 See the following recitals of this Decision: (683)
918 See the following recitals of this Decision: (684)
919 See the following recitals of this Decision: (685)
920 See the following recitals of this Decision: (675)

(754) [*] Arguments in respect of limited role, no single and continuous infringement, market definition, local regulatory regimes, insignificant effects and authority to fine are dealt with in the relevant sections of this Decision.

4.6.2.8. Evidence concerning LA

Summary of evidence against carrier

(755) Evidence regarding LAN Cargo ranges from [*] to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(756) [*][921]; [*][922], [*][923] [*][924]; [*][925]; [*][926].[*].[927] [*][928] and AF[929]. [*][930] and [*] [931].

LA specific arguments and Commission response

(757) [*] LA states that its participation in the infringement is minor and limited. It is attributable to the Capacity Sharing Agreement with LH. The regular contacts with LH required to ensure the functioning of the agreement gradually extended to issues that went beyond the intended pro-competitive objectives of the agreement. These discussions were limited in scope and were exclusively with LH.

(758) The arguments of LA are duly considered at the stage of the calculation of the fine.

Specific arguments on FSC

(759) [*].

(760) [*] [932] [*].

(761) [*].

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921 See the following recitals of this Decision: ([*])

922 See the following recitals of this Decision: (342) (364) (399) (409) (444) (446) (447) (463) (482) (527) (545) (547)

923 See the following recitals of this Decision: (476) (557)

924 See the following recitals of this Decision: (505)

925 See the following recitals of this Decision: [*] (435) (442) (475) (484) (537) (542)

926 See the following recitals of this Decision: ([*])

927 See the following recitals of this Decision: (481)

928 See the following recitals of this Decision: ([*])

929 See the following recitals of this Decision: (341)

930 See the following recitals of this Decision: (623)

931 See the following recitals of this Decision: (476) (670)

932 Case C-338/00 *Volkswagen v Commission* [2003] ECR I-9189 paragraph 90

4.6.2.9. Evidence concerning LH

Summary of Commission's case

(762) Evidence concerning Lufthansa ranges from 14 December 1999 to 7 December 2005. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(763) LH was involved in the following aspects: FSC, SSC and commissioning on surcharges.

FSC

(764) In respect of the FSC, contacts included: repeated discussions with competitors[933]; repeated exchanges of price information by email;[934] repeated bilateral telephone discussions between [*] (LH) and key contacts at AF ([*])[935], [*][936], [*][937]; [*][938]; a bilateral meeting between [*] (LH) and [*][939] and [*] (both AF) in Paris on 15 May 2001[940]; [*][941][*][942]; [*][943], [*][944],[*] and on 23 August 2004 in Amsterdam involving the [*] of KL, LH, CV and BA[945]; [*] ([*][946]); [*][947]; [*][948] [*][949] [*]; BARIG meetings on 3 September 2004[950] and on 17 November 2005[951]; a meeting between [*] and [*] of LH and [*] and [*] of LA on 21 September 2005;[952] a meeting with AF in the Novotel Hotel of Paris CDG airport on 19 October 2005 at which both parties provided assurances about the consistent application of the FSC;[953] sending emails to competitors disclosing LH's intended action and future announcements;[954] receiving emails disclosing competitors' intended action and future announcements[955]; repeated sending of LH

933 See the following recitals of this Decision: (324) (389) [*] (458) (511) [*] [*]
934 See the following recitals of this Decision: (151) [*] (447)
935 See the following recitals of this Decision: (388) (514) (541)
936 See the following recitals of this Decision: (253) (257) (291) (304) (307) (326) (328) (352) (372) (375) (388) (407) (425) (440) (468) (500) (503) (504) (514) (534) (539) (541) [*]
937 See the following recitals of this Decision: (254) (500) (514) (541) (556) (560) [*]
938 See the following recitals of this Decision: [*] [*] [*] [*] [*] [*] [*]
939 See the following recitals of this Decision: (205)
940 See the following recitals of this Decision: (168)
941 See the following recitals of this Decision: ([*])
942 See the following recitals of this Decision: ([*])
943 See the following recitals of this Decision: [*]
944 See the following recitals of this Decision: [*]
945 See the following recitals of this Decision: (376)
946 See the following recitals of this Decision: [*][*][*]
947 See the following recitals of this Decision: [*]
948 See the following recitals of this Decision: [*]
949 See the following recitals of this Decision: [*]
950 See the following recitals of this Decision: (414)
951 See the following recitals of this Decision: (548)
952 See the following recitals of this Decision: (505)
953 See the following recitals of this Decision: (519)
954 See the following recitals of this Decision: (209) [*] [*] [*] [*] [*] [*] [*] (348) (390) (399) (423) (439) (471) (473) (475) (483) (484) (496) (501) (522) (528) (547) [*]
955 See the following recitals of this Decision: [*] (273) [*] (342) (370) [*] (401) (502) (527)

announcements directly to competitors;[956] soliciting information on competitors' FSC plans;[957] [*] Hong Kong[958] and [*] and involvement in the BLACKS initiative in Italy which included the consistent application of the FSC[959]. Further contacts are documented in numerous internal emails of LH and of other carriers[960], minutes of internal meetings[961], meetings of other carriers[962], [*][963].

SSC

(765) In respect of the SSC, contacts included in particular: exchanges of pricing information by email; discussions between [*] (LH) and [*] (AF) including a meeting between them and Freight Forwarding Europe on 4 October 2001[964]; a meeting with [*][965]; [*][966]; [*][967], [*][968] with AF, BA, and KL on 26 January 2004; [*] (LH) sending out a standard letter to the [senior managers] of 11 cargo divisions to encourage other carriers to emulate LCAG SSC model; participation in the BLACKS initiative in Italy which included SSC discussions[969]; discussions within WOW; general discussions within BAR CSC in Hong Kong[970] [*]; a meeting of airline representatives in the 'Oak Bar' in New York City in May 2004[971]; bilateral discussions between carriers[972]; [*][973] and email exchanges between carriers[974]. Further contacts are documented in an internal SR presentation on 25 September 2001[975] and in internal emails[976].

Commissioning on surcharges

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956 See the following recitals of this Decision: [*] [*] [*] (340) (347) (400) (409) (435) (442) (537) (542) (545)

957 See the following recitals of this Decision: [*] (364) (365) (373) (406) (445) (531)

958 See the following recitals of this Decision: [*] (492) (493) (494)

959 See the following recitals of this Decision: (549)

960 See the following recitals of this Decision: (126) [*] [*] (129) (130) (131) (133) [*] [*] [*] (160) (161) [*] (174) (175) (176) (177) (179) (180) (181) (182) (183) (187) [*] [*] (203) (204) (208) [*] [*] (214) [*] [*] (236) (237) (239) [*] [*] (243) (252) (258) (259) (260) [*] [*] (265) (266) (269) (270) (271) [*] (293) [*] (300) (308) (309) (310) (315) [*] [*] (334) (337) (339) (343) (345) (346) (349) (367) (369) (371) (395) (398) (402) (404) (410) (424) (437) (438) (443) (444) [*] (463) (465) (466) (467) (470) (472) (476) (477) (481) (482) (486) (487) (489) (495) (506) (507) (509) (510) (515) (517) (518) (521) (544) (553) (557) (564) [*]

961 See the following recitals of this Decision: (188) (255) (559) (127)

962 See the following recitals of this Decision: (464)

963 See the following recitals of this Decision: [*]

964 See the following recitals of this Decision: (594)

965 See the following recitals of this Decision: [*]

966 See the following recitals of this Decision: [*]

967 See the following recitals of this Decision: [*]

968 See the following recitals of this Decision: [*]

969 See the following recitals of this Decision: (629)

970 See the following recitals of this Decision: [*] [*]

971 See the following recitals of this Decision: (691)

972 See the following recitals of this Decision: [*]

973 See the following recitals of this Decision: [*]

974 See the following recitals of this Decision: [*] (579) [*] [*] (582) [*] [*] (587) (588) [*] (591) (597) [*] (615) (617) [*]

975 See the following recitals of this Decision: (572)

976 See the following recitals of this Decision: (593) (595) (596) (599) [*] (612) (614) (619) (621) (624) [*] [*] [*]

(766) Concerning the refusal to pay commission on surcharges to forwarders contacts included: multilateral meetings with numerous carriers, for example, the Hong Kong BAR CSC meeting on 11 July 2005 where discussions on commissioning on surcharges took place, and on 12 May 2005[977]; [*][978]; [*]; meetings on 12 February 2005 at LH Cargo Italy and on 13 July 2005 in Milan with local carriers[979]; meeting with other carriers in May 2004 at the 'Oak Bar' in New York City after the [*] bid[980]; [*][981]. Further contacts are documented in email exchanges between airlines[982] and in internal emails[983].

LH specific arguments and Commission response

[*] *involvement*

(767) [*] Arguments in respect of the applicability of Article 101(1) of the TFEU and the applicability of Article 101(3) of the TFEU are dealt with in the relevant sections.

4.6.2.10. Evidence concerning LX

Summary of Commission's case

(768) Evidence regarding Swiss ranges from 2 April 2002 to 7 December 2005. It entered into numerous contacts with competitors aimed at coordinating price in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

(769) LX was involved in the following aspects: FSC, SSC and commission on surcharges.

FSC

(770) In respect of the FSC, contacts included : repeated exchange of pricing information by email[984]; repeated telephone discussions; bilateral discussions and email exchanges with other carriers including at least LH[985], [*][986] and AF[987]; participation in multilateral meetings involving numerous carriers[988]; in the margin of an IATA meeting in March 2003 LX discussed FSC with LH, BA, KL, AF and [*][989]; in a meeting in Switzerland on 21 February 2003 where LX, [*] and LH convinced [*]

977 See the following recitals of this Decision: (684)
978 See the following recitals of this Decision: [*]
979 See the following recitals of this Decision: (685)
980 See the following recitals of this Decision: (691)
981 See the following recitals of this Decision: [*]
982 See the following recitals of this Decision: (670) (671) (673) (675) [*]
983 See the following recitals of this Decision: (676) (686)
984 See the following recitals of this Decision: [*] (301) [*] (348) [*] (522) (528)
985 See the following recitals of this Decision: (239) (300) (309) (315) [*] (502) (509)
986 See the following recitals of this Decision: [*]
987 See the following recitals of this Decision: (300) (315) (502)
988 See the following recitals of this Decision: [*]
989 See the following recitals of this Decision: (271)

to implement FSC in line with other carriers[990]; [*][991]; participation in the so called BLACKS initiative in Italy, (BA, LH, AF, CV, KL and Swiss)[992]; discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings at least in Hong Kong[993] [*]. Further contacts are documented in email exchanges between carriers[994] and internal emails[995].

SSC

(771) In respect of the SSC, contacts included bilateral information exchanges with LH and multilateral email exchanges and meetings[996]; discussions in the BLACKS initiative in Italy[997] [*].

Commissioning on surcharges

(772) In respect of the refusal of paying a commission on the surcharges LX was involved in bilateral and multilateral discussions[998], at least during BAR CSC meetings in Hong Kong; [*][999]; in a meeting in Italy on 19 May 2005 with [*], LH, AF, KL, CV and JL[1000]; in another meeting in Italy on 14 July 2005 with AF, CV, CX, KL, LH, [*], SQ, JL and [*][1001]; and in a meeting in May 2004 with AF, KL, [*], LH and possibly other carriers in the 'Oak Bar' in New York City[1002]. Further contacts are documented in internal emails[1003].

LX specific arguments and Commission response

[*] *involvement*

(773) [*] Arguments in respect of the applicability of Article 101(1) of the TFEU and the applicability of Article 101(3) of the TFEU are dealt with in the relevant sections.

4.6.2.11. Evidence concerning MP

Summary of evidence against carrier

(774) Evidence concerning Martinair ranges from 22 January 2001 to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, SSC and commission on surcharges in the airfreight sector. These contacts were both bilateral and multilateral and

990 See the following recitals of this Decision: [*]
991 See the following recitals of this Decision: [*]
992 See the following recitals of this Decision: (549)
993 See the following recitals of this Decision: (492) (530)
994 See the following recitals of this Decision: (237)
995 See the following recitals of this Decision: (215) (216) (217) [*] (219) [*] (333) (337) (339) [*] (466) (495) (538) (544)
996 See the following recitals of this Decision: (611)
997 See the following recitals of this Decision: (629)
998 See the following recitals of this Decision: (668)
999 See the following recitals of this Decision: [*]
1000 See the following recitals of this Decision: (684)
1001 See the following recitals of this Decision: (685)
1002 See the following recitals of this Decision: (691)
1003 See the following recitals of this Decision: (680) (687)

were in the form of emails (both sent and received), telephone calls and meetings. Such contacts were often reported in internal emails sent by [*].

FSC

(775) The contacts concerning FSC included : repeated exchanges of pricing information by email[1004]; mutual understandings on FSC implementation between [*] (MP) and [*] (CV)[1005]; repeated bilateral telephone discussions between [*] (MP) and [*], [*] and [*] (all KL)[1006]; bilateral discussions with other carriers including at least LH, AF, [*], SR, KL, CV, BA, SQ and [*][1007]; participation in multilateral meetings involving numerous carriers[1008] [*][1009]; [*][1010]; [*] [1011]; discussions and agreements about raising the FSC level and new trigger points within BAR CSC meetings at least in Hong Kong[1012]; and further evidence relating to contacts with competitors[1013].

SSC

(776) The contacts concerning SSC included : [*] [1014]; bilateral discussions with other carriers including at least [*][1015]; [*] [1016]; [*][1017]; [*] [1018] [*][1019]; [*]

Commissioning on surcharges

(777) The contacts concerning the refusal to pay commission on surcharges to forwarders included : a Hong Kong BAR CSC meeting on 11 July 2005 which included discussions on commissioning on surcharges[1020]; a bilateral meeting in January 2006 with [*][1021]; [*] [1022].

MP specific arguments and Commission response

[*]

1004 See the following recitals of this Decision: (330) (481) [*]
1005 See the following recitals of this Decision: [*]
1006 See the following recitals of this Decision: (306) (426) [*]
1007 See the following recitals of this Decision: (178) (180) (199) (213) (214) [*] (251) (256) (258) (299) [*] (310) [*] (313) (331) (338) (343) (349) (350) (391) (410) (412) (427) (443) (465) (478) (516) (558) [*]
1008 See the following recitals of this Decision: [*] [*]
1009 See the following recitals of this Decision: [*]
1010 See the following recitals of this Decision: [*]
1011 See the following recitals of this Decision: [*] [*]
1012 See the following recitals of this Decision: [*] (492) (493) (494)
1013 See the following recitals of this Decision: (336)
1014 See the following recitals of this Decision: [*]
1015 See the following recitals of this Decision: [*]
1016 See the following recitals of this Decision: [*]
1017 See the following recitals of this Decision: [*] [*]
1018 See the following recitals of this Decision: [*] [*]
1019 See the following recitals of this Decision: [*]
1020 See the following recitals of this Decision: (492)
1021 See the following recitals of this Decision: (675)
1022 See the following recitals of this Decision: [*]

(778) Concerning communications [*], MP notes that in the majority of the cases it provided info that was already public. The Commission's position in respect of public information is set out at recital (1183) and the Commission notes that even on the basis of MP's argument a significant number of contacts related to information that was not public. [*][1023].

4.6.2.12. Evidence concerning QF

Summary of evidence against carrier

(779) Evidence concerning Qantas ranges from [*] to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC and SSC in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(780) The FSC contacts included : bilateral discussions with other carriers[1024] including at least MP[1025], AF[1026], [*][1027], SQ[1028], [*][1029], [*][1030] and LH[1031]; [*][1032] [*][1033], in [*][1034] in Singapore[1035], [*][1036], Indonesia[1037] and in Thailand[1038]; and further evidence relating to contacts with competitors[1039]

SSC

(781) The SSC contacts include: [*][1040], [*][1041] [*][1042]; [*][1043] [*] [1044].

QF arguments concerning the SO and Commission response

1023 See the following recitals of this Decision: [*]
1024 See the following recitals of this Decision: ((131))
1025 See the following recitals of this Decision: (349)
1026 See the following recitals of this Decision: (392)
1027 See the following recitals of this Decision: [*]
1028 See the following recitals of this Decision: ([*]) (392)
1029 See the following recitals of this Decision: [*]
1030 See the following recitals of this Decision: ([*])
1031 See the following recitals of this Decision: ((334))
1032 See the following recitals of this Decision: [*]
1033 See the following recitals of this Decision: [*]
1034 See the following recitals of this Decision: ([*])
1035 See the following recitals of this Decision: ([*]) (467)
1036 See the following recitals of this Decision: [*]
1037 See the following recitals of this Decision: (496) (531)
1038 See the following recitals of this Decision: ([*]) (495)
1039 See the following recitals of this Decision: [*] (414)
1040 See the following recitals of this Decision: ([*])
1041 See the following recitals of this Decision: (616)
1042 See the following recitals of this Decision: ([*])
1043 See the following recitals of this Decision: [*]
1044 See the following recitals of this Decision: ([*])

(782) Subject to factual clarifications Qantas [*] the involvement of its freight division in the conduct set out in Sections 4.1-4.5.

4.6.2.13. Evidence concerning SK

[*]

(783) Evidence concerning SK ranges from [*] to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, and SSC in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and [*].

FSC

(784) SK aligned its FSC policy to that of LH under the exempted alliance and evidence shows that SK knew or at least it should have known that LH coordinated the FSC implementation with other carriers[1045]. Moreover, SK was in direct contact with other carriers concerning the FSC implementation and therefore was aware that a wider cartel existed as shown by the following evidence: SK initiated the coordination of the introduction of FSC [*];[1046] SK also had contacts with competitors in Finland concerning the FSC introduction[1047]; the implementation of the FSC was furthermore discussed between LH, SK, SQ and JL members of the WOW alliance[1048];[*][1049]; [*]; [*][1050] and there is some further evidence relating to contacts with competitors[1051].

SSC

(785) SK [*][1052] [*]. This is shown by the evidence establishing that SK coordinated the SSC level with members of WOW[1053] [*][1054]. There is some further evidence relating to contacts with competitors[1055].

SK specific arguments and Commission response

(786) [*].

(787) [*].

Specific arguments on FSC

1045 See the following recitals of this Decision: [*] (400) (435) (439) (471) (484)
1046 See the following recitals of this Decision: [*]
1047 See the following recitals of this Decision: (133)
1048 See the following recitals of this Decision: [*] (390) (423) (473) (477) (479) (483) (485) (486) (501) (506) (520) (535)
1049 See the following recitals of this Decision: [*]
1050 See the following recitals of this Decision: [*] [*]
1051 See the following recitals of this Decision: [*] (395) (404) (414) (480) (495) (548)
1052 See the following recitals of this Decision: [*]
1053 See the following recitals of this Decision: [*] (617) (618) (619) (620) (621)
1054 See the following recitals of this Decision: [*]
1055 See the following recitals of this Decision: [*]

(788) [*][1056] [*]

(789) [*] [1057] [*]

(790) [*].

Specific arguments on SSC

(791) [*].

(792) [*].

(793) [*].[1058]

(794) [*]

(795) [*].

4.6.2.14. Evidence concerning SQ

Summary of evidence against carrier

(796) Evidence concerning Singapore Airlines ranges from [*] to 14 February 2006. It entered into contacts with competitors concerning the implementation of the FSC, SSC and commissioning on surcharges in the airfreight sector. These contacts were both bilateral and multilateral and were in the form of emails (both sent and received), telephone calls and meetings.

FSC

(797) [*][1059] [*][1060] [*][1061] [*][1062] [*][1063] [*][1064] [*][1065] [*][1066] [*][1067]

SSC

(798) The contacts concerning SSC included [*][1068], [*][1069] [*][1070]; exchanges of information with WOW members in meetings, phone contacts and via email[1071]; [*]. [*][1072].

1056 [*]
1057 See in the file [*]
1058 See in the file [*]
1059 See the following recitals of this Decision: [*] (370) (390) (391) (423) (445) (473) (477) (483) (501) (506) (535)
1060 See the following recitals of this Decision: [*] (392) (495)
1061 See the following recitals of this Decision: (349) (350)
1062 See the following recitals of this Decision: [*]
1063 See the following recitals of this Decision: (403)
1064 See the following recitals of this Decision: [*]
1065 See the following recitals of this Decision: [*] (357) (358) (383) (420) (492) (494)
1066 See the following recitals of this Decision: [*] [*]
1067 See the following recitals of this Decision: [*] (400) (435) (439) (471) (481) (484) (495) (496)
1068 See the following recitals of this Decision: [*]
1069 See the following recitals of this Decision: ([*])
1070 See the following recitals of this Decision: ([*])
1071 See the following recitals of this Decision: [*] (617) (618) (619) (620) (621) (663)
1072 See the following recitals of this Decision: [*]

Commissioning on surcharges

(799) SQ was involved in discussions concerning the refusal of paying a commission on the surcharges bilaterally at least with CX[1073] and multilaterally during BAR CSC meetings in Hong Kong; [*] [1074]; in a meeting in Italy on 14 July 2005 with AF, CV, CX, KL, LH, [*], JL and LX[1075]; and in an email on 28 December 2005 sent to LH, CX, [*], JL, BA, SK, [*][1076].

SQ specific arguments and Commission response

Sources of information

(800) SQ claims that the SO does not give attention to the sources of allegedly confidential information described in the documents. The information is disseminated quickly in the airline industry through legitimate channels. Thus it can not be presumed that internal airline documents describing plans of competitors indicate a direct contact between the airlines concerned.

(801) Although the source of information may not be concretely defined in the contemporaneous emails or other documents the wording in the majority of the cases points to direct contacts with competitors. Furthermore, the Commission's evidence must be assessed as a body.

Specific arguments on FSC

(802) [*]. As regards the arguments on WOW and the regulatory regime see the Commission's position in Sections 5.3.4 and 5.3.5 respectively.

Specific arguments on commission on surcharges

(803) SQ argues that the discussions concerning commission were legitimate as forwarder associations initiated them and also because the issue raised common legal questions for the airlines regarding the interpretation of IATA resolutions as well as national legal issues. The Commission can not accept these arguments which do not justify an agreement between carriers not to pay a commission. Furthermore, the carriers themselves rejected the discussions with forwarders referring to antitrust concerns thus they were clearly aware that such discussions are not permitted.

(804) Concerning an email sent by the SQ [*] in the United Kingdom (recital (675)) SQ states that it was just requesting clarification on an IATA resolution and as it did not state SQ's position it does not amount to a concerted practice. The Commission does not share SQ's view as the email's purpose was to coordinate action, as is proven by the triggered reactions.

(805) An internal CX email reports contacts with SQ concerning letters from forwarders announcing the invoicing of commission (recital (676)). SQ

1073 See the following recitals of this Decision: (676)
1074 See the following recitals of this Decision: [*]
1075 See the following recitals of this Decision: (685)
1076 See the following recitals of this Decision: (675)

claims that there was no coordination involved, SQ simply communicated its position to CX. The Commission considers this direct contact with a competitor to be relevant in the context of a coordinated action to refuse to pay commission to forwarders and it forms part of the body of evidence on which the Commission relies.

(806) SQ argues that a meeting in Italy it participated in (recital (685)) was legitimate as it was a response to the letter of the forwarders association. The Commission rejects this argument, as an agreement to reject the payment of the commission, like the one that was clearly reached at the meeting, is not legitimate, not even as a response to a claim from the forwarder association.

5. THE APPLICATION OF THE RELEVANT COMPETITION RULES

5.1. The relevant competition rules

5.1.1. Article 101 of the TFEU

(807) Article 101(1) of the TFEU prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

(808) Article 101(3) of the TFEU provides that Article 101(1) may be declared inapplicable in the case of agreements, decisions of undertakings or concerted practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and which does not impose indispensable restrictions or makes it possible to eliminate competition.

5.1.2. Article 53 EEA Agreement

(809) Article 53(1) of the EEA Agreement prohibits as incompatible with the functioning of that agreement all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the EEA Agreement.

(810) Article 53(3) of the EEA Agreement provides that Article 53(1) may be declared inapplicable in the case of agreements, decisions of undertakings or concerted practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting

benefit, and which does not impose indispensable restrictions or makes it possible to eliminate competition.

(811) The EEA Agreement came into force on 1 January 1994.

5.1.3. Agreement between the European Community and the Swiss Confederation on Air Transport

(812) Article 8 of the Swiss Agreement prohibits as incompatible with that agreement all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between the Contracting Parties and which have as their object or effect the prevention, restriction or distortion of competition within the territory covered by the Swiss Agreement.

(813) Article 8(3) of the Swiss Agreement provides that Article 8(1) may be declared inapplicable in the case of agreements, decisions of undertakings or concerted practices that contribute to improving the production or distribution of goods or to promoting technical or economic progress while allowing consumers a fair share of the resulting benefit, and which does not impose indispensable restrictions or makes it possible to eliminate competition.

(814) The Swiss Agreement entered into force on 1 June 2002.

5.2. Jurisdiction of the Commission

5.2.1. Article 101 of the TFEU

(815) Regulation (EC) No 1/2003 grants the Commission implementing powers to apply Article 101 of the TFEU . This regulation applies since 1 May 2004 and applies to all air transport services.

(816) Before 1 May 2004, 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[1077] granted the Commission implementing powers to apply Article 101 of the TFEU with respect to air transport between EU airports. Air transport between EU airports and airports in third countries was, however, excluded from the scope of that regulation. Consequently, Article 101 of the TFEU could only be enforced by the authorities of the Member States and the Commission on the basis of the transitional regime set out in Articles 104 and 105 of the TFEU.

(817) Under these circumstances, the Commission will not apply Article 101 of the TFEU to anti-competitive agreements and practices concerning air transport between EU airports and airports in third countries that took place before 1 May 2004.

[1077] OJ L 374, 31.12.1987, p. 1.

5.2.2. Article 53 of the EEA Agreement

(818) Under Article 56 of the EEA Agreement, the Commission shall decide on cases falling under Article 53 of the EEA Agreement where trade between Member States is affected.

(819) Regulation (EC) No 1/2003 became applicable to the implementation of the EEA Agreement by virtue of the Decision of the EEA Joint Committee No 130/2004[1078] and the Decision of the EEA Joint Committee No 40/2005[1079] which removed the exclusion of air transport between EEA airports and third countries from the scope of the provisions for the implementation of the EEA Agreement, in particular by amending Protocol 21. Decision No 130/2004 and Decision No 40/2005 entered into force on 19 May 2005 and from that date Council Regulation (EC) No 411/2004[1080] and Regulation (EC) No 1/2003 became applicable in the framework of the EEA Agreement.

(820) Before 19 May 2005, Regulation (EEC) No 3975/87 provided implementing rules for the application of Article 53 of the EEA Agreement with respect to air transport between EEA airports. Air transport between airports in the EEA and airports in third countries was, however, not covered. Consequently, Article 53 of the EEA Agreement could only be enforced on the basis of the transitional regime set out in Article 55 of the EEA Agreement.

(821) Under these circumstances, the Commission will not apply Article 53 of the EEA Agreement to anti-competitive agreements and practices concerning air transport between airports in the EEA and airports in third countries that took place before 19 May 2005.

5.2.3. Article 8 of the Swiss Agreement

(822) Under Article 11(1) of the Swiss Agreement, Article 8 shall be applied by the EU institutions in accordance with EU legislation as set out in the Annex to the agreement, taking into account the need for close cooperation between the EU institutions and the Swiss authorities. Under Article 11(2) of the Swiss Agreement, the Swiss authorities shall rule, in accordance with Article 8, on the admissibility of agreements, decisions and concerted practices concerning routes between Switzerland and third countries.

(823) Regulation (EC) No 1/2003 became applicable for the application of the Swiss Agreement by virtue of Decision No 1/2007 of the Joint Community/Switzerland Air Transport Committee[1081] which incorporated the regulation into the annex to the agreement with effect

[1078] OJ L 64, 10.3.2005, p. 57

[1079] OJ L 198, 28.07.2005, p. 38.

[1080] OJ L 68, 6.3.2004, p. 1–2.

[1081] Decision No 1/2007 of the Joint Community/Switzerland Air Transport Committee set up under the Agreement between the European Community and the Swiss Confederation on Air Transport of 5 December 2007 replacing the Annex to the Agreement between the European Community and the Swiss Confederation on Air Transport (OJ L 34, 8.2.2008, p. 19).

from 5 December 2007. Prior to such incorporation of Regulation (EC) No 1/2003, the applicable implementing regulation was Regulation (EEC) No 3975/87, which had been incorporated into the annex of the agreement since its entry into force on 1 June 2002.

(824) CX and SQ submit that the Commission has no jurisdiction to find an infringement of the Swiss Agreement in relation to their conduct in Switzerland. CX argues that it does not provide air freight services between Switzerland and the EU.

(825) This Decision does not purport to find an infringement of Article 8 of the Swiss Agreement concerning freight services on routes between Switzerland and third countries. [*]

5.3. Application of Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement

5.3.1. Agreements and concerted practices

5.3.1.1. Principles

(826) Article 101(1) of the TFEU [1082] prohibits *agreements* between undertakings, *decisions of associations of undertakings* and *concerted practices*.

(827) An *agreement* can be said to exist when the parties adhere to a common plan which limits or is likely to limit their individual commercial conduct by determining the lines of their mutual action or abstention from action in the market. It does not have to be made in writing; no formalities are necessary, and no contractual sanctions or enforcement measures are required. The fact of agreement may be express or implicit in the behaviour of the parties. Furthermore, it is not necessary, in order for there to be an infringement of Article 101 of the TFEU, for the participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 101(1) of the TFEU would apply to the inchoate understandings and partial and conditional agreements in the bargaining process which lead up to the definitive agreement.

(828) In its judgment in the PVC II case[1083], the General Court of the Court of Justice of the European Union ('General Court') stated that 'it is well established in the case-law that for there to be an agreement within the meaning of Article [101 of the TFEU] it is sufficient for the

[1082] Article 101 of the TFEU is referred to in the text but should also be read as incorporating Article 53 EEA of the EEA Agreement and Article 8 of the Swiss Agreement as these provisions apply mutadis mutandis unless expressly stated otherwise.

[1083] Joined Cases T-305/94 etc. *Limburgse Vinyl Maatschappij N.V. and others v Commission (PVC II)* [1999] ECR II-931, paragraph 715.

undertakings to have expressed their joint intention to behave on the market in a certain way'[1084].

(829) Also, if an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed[1085]. It is well established case-law that 'the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings'[1086]. Such distancing should take the form of an announcement by the company, for instance, that it would take no further part in the meetings (and therefore did not wish to be invited to them).

(830) Although Article 101 of the TFEU draws a distinction between the concept of *'concerted practices*' and *'agreements between undertakings'*, the object is to bring within the prohibition of these Articles a form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition[1087].

(831) The criteria of coordination and cooperation laid down by the case-law of the Court of Justice of the European Union, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the TFEU relating to competition, according to which each economic operator must determine independently the commercial policy which he intends to adopt in the internal market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market[1088].

(832) Thus, conduct may fall under Article 101 of the TFEU as a concerted practice even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or

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1084 The case-law of the Court of Justice of the European Union in relation to the interpretation of Article 101 TFEU applies equally to Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement. See Article 6 of the EEA Agreement, Article 3(2) of the EEA Surveillance and Court Agreement, Article 1 of the Swiss Agreement. References in this text to Article 101 of the TFEU therefore apply also to Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement.

1085 Case T-334/94 *Sarrió v Commission* [1998] ECR II-1439, paragraph 118.

1086 Ibidem. See also Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791, paragraph 85; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 232; and Case T-25/95 *Cimenteries CBR v Commission ('Cement')* [2000] ECR II-491, paragraph 1389.

1087 Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, paragraph 64.

1088 Joined Cases 40-48/73 etc. *Suiker Unie and others v Commission* [1975] ECR 1663, paragraph 174.

adhere to collusive devices which facilitate the coordination of their commercial behaviour[1089]. Furthermore, the process of negotiation and preparation culminating effectively in the adoption of an overall plan to regulate the market may well also (depending on the circumstances) be correctly characterised as a concerted practice.

(833) Although in terms of Article 101 of the TFEU the concept of a concerted practice requires not only concertation but also conduct on the market resulting from the concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such a concertation and remaining active in the market will take account of the information exchanged with competitors in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period[1090]. Such a concerted practice is caught by Article 101 of the TFEU even in the absence of anti-competitive effects on the market[1091].

(834) Moreover, it is established case-law that the exchange, between undertakings, in pursuance of a cartel falling under Article 101 of the TFEU, of information concerning their respective deliveries, which not only covers deliveries already made but is intended to facilitate constant monitoring of current deliveries in order to ensure that the cartel is sufficiently effective, constitutes a concerted practice within the meaning of that article[1092].

(835) It is not necessary, particularly in the case of a complex infringement, for the Commission to characterise the conduct as exclusively one or other of these forms of illegal behaviour. The concepts of *agreement* and *concerted practice* are fluid and may overlap. The anti-competitive behaviour may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one rather than the other. It would however be artificial analytically to sub-divide what is clearly a continuing common enterprise having one and the same overall objective into several different forms of infringement. A cartel may therefore be an agreement and a concerted practice at the same time. Article 101 of the TFEU lays down no specific category for a complex infringement of the present type[1093].

(836) In its PVC II judgment[1094], the General Court stated that '[i]n the context of a complex infringement which involves many producers seeking over

1089 Case T-7/89 *Hercules* [1991] ECR II-1711, paragraph 256.

1090 Case C-8/08 *T-Mobile Netherlands BV and others*, judgment of 4 June 2009, paragraphs 44-53.

1091 Case C-199/92 P *Hüls v Commission* [1999] ECR I-4287, paragraphs 158-166.

1092 See, in this sense, Cases T-147/89, T-148/89 and T-151/89 *Société Métallurgique de Normandie v Commission* [1995] ECR II-1057, *Trefilunion v Commission* [1995] ECR II-1063 *and Société des treillis et panneaux soudés v Commission* [1995] ECR II-1191, respectively, paragraph 72.

1093 Case T-7/89 *Hercules* [1991] ECR II-1711, paragraph 264.

1094 Joined Cases T-305/94 etc. *PVC II* [1999] ECR II-931, paragraph 696.

a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as in any event both those forms of infringement are covered by Article [101 of the TFEU]'.

(837) An agreement for the purposes of Article 101 of the TFEU does not require the same certainty as would be necessary for the enforcement of a commercial contract at civil law. Moreover, in the case of a complex cartel of long duration, the term 'agreement' can properly be applied not only to any overall plan or to the terms expressly agreed but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose. As the Court of Justice, upholding the judgment of the General Court, pointed out in *Commission v Anic Partecipazioni SpA*[1095] it follows from the express terms of Article 101 of the TFEU that an agreement may consist not only in an isolated act but also in a series of acts or a course of conduct[1096].

(838) According to the case-law, the Commission must show precise and consistent evidence to establish the existence of an infringement of Article 101 of the TFEU. It is however not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the Commission, viewed as a whole, meets that requirement. It is in fact normal that agreements and practices prohibited by Article 101 of the TFEU assume a clandestine character and that associated documentation is fragmentary and sparse. In most cases therefore, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules[1097].

5.3.1.2. Application in the present case

(839) As it emerges from the facts described in Sections 4.1-4.5., addressees of this Decision entered into bilateral and multilateral contacts by which they coordinated their conduct and/or influenced price setting, ultimately amounting to price fixing with regard to;

- the fuel surcharge;
- the security surcharge; and
- the payment of commission to forwarders on surcharges.

FSC

(840) The addressees of this Decision had contacts with a view to coordinating the implementation of the FSC mainly in four contexts:

1095 Case C-49/92 P *Commission v Anic Partecipazioni SpA* [1999] ECR I - 4125, at paragraph 81.

1096 Case C-49/92 P *Anic Partecipazioni SpA*, [1999] ECR I-4125, paragraph 81.

1097 Joined cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, *Aalborg*, [2004] ECR I-123, paragraphs 53-57 and joined cases T-44/02 OP, T-54/02 OP, T-56/02 OP and T-61/02 OP *Dresdner Bank* [2006] ECR II-3567, paragraphs 59-67.

(i) [*]

(ii) [*]

(iii) The introduction of new trigger points in [*], 2004 and 2005 (raising the maximum level of FSC) (see Sections [*], 4.3.15, 4.3.16, 4.3.18 and 4.3.19).

(iv) Most frequently, at the point where the fuel indices were approaching the level at which an increase or decrease in the FSC would be triggered. This practice continued throughout the period [*] and 2006 (see, by way of example, recitals (116)(117)(118) and (119)).

(841) [*][1098].

(842) The coordination was conducted through a system of bilateral and multilateral contacts concerning the implementation of the FSC. Contacts relating to the FSC were made mostly on the phone (see for example recitals (113)(116)(117)(174)(180)) and much less often via email (see for example recitals [*] [*] [*] [*]) or during meetings (see for example recitals (121) [*] [*] [*] [*]). The object and/or effect of these contacts was either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market (see for example recital (116)). Such contacts are in contradiction with the requirement that each economic operator must determine independently the commercial policy which they intend to adopt in the internal market. Consequently, these contacts fulfil the criteria - laid down by the case-law of the Court of Justice of the European Union - of prohibited coordination and cooperation that amounts to an agreement or a concerted practice. The contact network is a complex system that can be characterised partly as agreement ([*]), partly as concerted practices in an overlapping manner.

(843) SK states it never entered into any agreements with other carriers regarding the FSC. They argue that one-off, isolated contacts at local level happened but staff involved had no decision making power on FSC. Such contacts did not influence SK's FSC policy. The Commission can not accept SK's arguments, as SK staff was involved in regular contacts concerning the FSC with other WOW members. See for example recitals [*], (479), (485), (506) and (520).

(844) [*]

(845) SK states that based on the notes of Mr [*] (SK) there was no agreement reached on the FSC at the 'Market Analysis Meeting' of 22 January 2001 (see [*] [*]), and that this event did not form part of the single and continuous infringement. The Commission notes that while it might be true that the airlines did not reach an agreement on a common FSC level,

[1098] [*].

the relevant discussions were clearly anticompetitive and formed part of the infringement.

(846) QF states that the evidence cited in [*] does not in itself establish QF's participation in the infringement. However, the Commission maintains that it is an important piece of the overall body of evidence that describes and proves the concerted practice of the carriers involved. Furthermore, QF, as the home carrier in Sydney, was among the carriers that [*] expressly intended to contact.

(847) QF states that its participation at the BARIG meeting in September 2004 (see recital (414)) does not establish its participation in discussions that infringe Article 101 of the TFEU. The Commission notes that due to the fact the FSC was discussed during the meeting in question it forms part of the network of discussions constituting the infringement.

(848) [*] The Commission rejects the argument and notes that the burden on the Commission is to prove the infringement to the requisite standard rather than to prove each individual contact to the requisite standard. The contacts presented in the factual part must be assessed as a body of evidence.

(849) SQ claims that the phone contacts with MP in May 2004 described in recitals (349)-(350) did not amount to a concerted practice as there is no proof that MP gave information to SQ and it is not clear that the contact influenced the decision making in MP. The Commission rejects the argument as the contact had a clearly anti-competitive object and as such forms part of the evidence of the infringement.

(850) Internal CX emails dated 24 September 2004 (recital (403)) describe the result of contacts with competitors, among them SQ, concerning the FSC increase. SQ contends that it is not proven that the information came directly from its employees as SQ had announced the FSC increase prior to the date of the email. SQ claims alternatively that even if this exchange of information took place, it did not influence SQ's conduct, since that was modified by the headquarters, nor did it influence the conduct of the other carriers that maintained the planned date of implementation. Thus, this exchange does not amount to a concerted practice. The Commission believes that the wording of the evidence in recital (403) proves that SQ was involved in the illicit coordination of the FSC increase and the fact that SQ postponed the date of implementation - thus gaining a competitive advantage - does not mean that they did not participate. The fact that the email was sent after SQ had announced the FSC increase is not relevant as the illicit discussions referred to in the email took place before that date as well. The Commission reiterates that it is not each piece of evidence individually but the body of evidence in its entirety which is necessary to prove the infringement.

SSC

(851) The introduction of the SSC was discussed [*] between a number of airlines that are addressees of this Decision (See Section 4.4.2). The aim of the discussions was to ensure joint implementation (see for example, in recitals (571) [*]), a uniform method (see for example recital (582)) and to coordinate the timing (see [*]). Furthermore ideas concerning the justification to be given to the customers were also shared ([*]). During these discussions the carriers expressed their joint intention to behave on the market in a certain way that fulfils the criteria of an agreement or of a concerted practice within the meaning of Article 101 of the TFEU (see recital (836)).

(852) Carriers continued ad hoc discussions between [*] and 2006 concerning the SSC aimed at stabilising its level ([*]) and ensuring continued implementation (see for example, in recitals (611) and (614)) and uniform application (see for example, in recitals [*] (610)(612)(613) and (618)). As the carriers remained in contact with each other whenever it was necessary to maintain the implementation of the SSC, they continued to adhere to collusive devices which facilitated the coordination of their commercial behaviour and that amounts to an agreement or a concerted practice confirmed by the case law (see recital (832)).

Payment of commission on the surcharges

(853) A number of carriers confirmed their intention to each other in bilateral contacts (see, for example recitals (670), (676) and (677)) and multilateral contacts (see, for example recitals (668), (672) and (675)) not to pay a commission on the surcharges to the forwarders. The mutual assurances revealing the intended action of the carriers amount to an agreement or a concerted practice in the sense of Article 101 of the TFEU (see recital (831)).

BLACKS

(854) BA argued that evidence relating to the BLACKS initiative (see recitals (549) and (629)) is not conclusive of unlawful activity. The Commission rejects BA's denial that it participated in anti-competitive discussions within the BLACKS meetings. It is clear that pricing discussions took place within BLACKS relating to the FSC and commissioning on surcharges. It is not necessary for BA to have actively concluded an agreement with other parties. Given that BA remained active on the market, it is sufficient that BA was present and did not distance itself from the anticompetitive exchanges within BLACKS.

Conclusion

(855) The Commission considers, in accordance with the case-law referred to in this section , that the body of evidence as a whole proves the existence of the overall scheme described in recitals (839)-(854) that qualifies as an agreement and/or concerted practice between undertakings within the meaning of Article 101 of the TFEU. The air cargo service providers concerned coordinated their behaviour to remove uncertainty between

them in relation to various elements of price in the airfreight sector. The repeated contacts, often of a bilateral nature but also including multilateral meetings, over a significant period of time and covering the aspects described in Sections 4.1 to 4.5 bear the hallmark elements of a complex infringement.

(856) Based on the elements set out in recitals (839) to (854), the different elements of behaviour of the addressees in this Decision can be considered to form part of an overall scheme to coordinate the pricing behaviour for airfreight services. The Commission considers that the behaviour of the undertakings concerned constitutes a complex infringement consisting of various actions which can be either classified as an agreement or concerted practice, within which the competitors knowingly substituted practical cooperation between them for the risks of competition. Furthermore, in the absence of proof to the contrary, the Commission considers, based on the judgment of the Court of Justice in Hüls[1099] that the participating undertakings in such concertation have taken account of the information exchanged with competitors in determining their own conduct on the market, in particular as the concertation occurred regularly. The Commission therefore considers that the complex of arrangements in this case as described in Section 4 of this Decision presents all the characteristics of an agreement and/or a concerted practice within the meaning of Article 101 of the TFEU.

5.3.2. Single and continuous infringement

5.3.2.1. Principles

(857) A complex cartel may properly be viewed as a *single and continuous infringement* for the time frame in which it existed. The General Court pointed out in *Cement* that the concept of 'single agreement' or 'single infringement' presupposes a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim[1100]. The agreement may well be varied from time to time, or its mechanisms adapted or strengthened to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 101 of the TFEU.

(858) It would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively would manifest itself in both agreements and concerted practices.

(859) Although a cartel is a joint enterprise, each participant in the arrangement may play its own particular role. One or more may exercise a dominant role as ringleader(s). Internal conflicts and rivalries, or even

[1099] Case C-199/92 P *Hüls* [1999] ECR I-4287, paragraphs 161-162.
[1100] Joined Cases T-25/95 and others *Cement* [2000] ECR II-491, paragraph 3699.

cheating may occur, but will not however prevent the arrangement from constituting an agreement/concerted practice for the purposes of Article 101 of the TFEU where there is a single common and continuing objective.

(860) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants but which share the same unlawful purpose and the same anti-competitive effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realisation of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants pursuant to the same infringement. This is the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen or been aware of them and was prepared to take the risk[1101].

(861) As the Court of Justice stated in *Commission v Anic Partecipazioni*[1102], the agreements and concerted practices referred to in Article 101(1) of the TFEU necessarily result from collaboration by several undertakings, who are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows, as recently reiterated by the Court of Justice in the *Cement* cases, that an infringement of Article 101 of the TFEU may result not only from an isolated act but also from a series of acts or from a form of continuous conduct. That interpretation cannot be challenged on the ground that one or several elements of that series of acts or continuous conduct could also constitute in themselves and taken in isolation an infringement of Article 101 of the TFEU. When the different actions form part of an 'overall plan', because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole[1103].

(862) Although Article 101(1) of the TFEU does not refer explicitly to the concept of single and continuous infringement, it is constant case-law of the Court of Justice of the European Union that 'an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the

1101 Case C-49/92 *Anic Partecipazioni SpA* [1999] ECR I-4125, at paragraph 83.

1102 Case C-49/92 *Anic Partecipazioni SpA* [1999] ECR I-4125.

1103 Joined cases C-204/00 and others, *Aalborg Portland et al. v Commission* [2004] ECR I-123, paragraph 258. See also Case C-49/92 *Anic Partecipazioni SpA* [1999] ECR I-4125, paragraphs 78-81, 83-85 and 203.

collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel'[1104].

(863) The fact that an undertaking concerned did not participate directly in all the constituent elements of the overall cartel cannot relieve it of responsibility for the infringement of Article 101(1) of the TFEU. Such a circumstance may nevertheless be taken into account when assessing the seriousness of the infringement which it is found to have committed. Such a conclusion is not at odds with the principle that responsibility for such infringements is personal in nature, nor does it neglect individual analysis of the evidence adduced, in disregard of the applicable rules of evidence, or infringe the rights of defence of the undertakings involved.

5.3.2.2. Application in the present case

(864) In the present case, the Commission considers that the conduct in question constitutes a single and continuous infringement of Article 101 of the TFEU.

(865) For the period [*] to the Commission inspections on 14 February 2006 the evidence referred to in the Decision shows the existence of a single and continuous infringement in the airfreight sector.

(866) Although the collusive arrangements related to several elements of airfreight pricing, the evidence in the Commission's possession shows that they constituted elements of a single and continuous complex infringement with the aim of coordinating pricing behaviour. Also, whilst certain meetings, contacts or exchanges between competitors could be regarded as infringements in themselves they are relied upon to establish the existence of a single overall infringement. Equally, other meetings, contacts or exchanges which may not constitute an infringement in themselves were nevertheless integral to the coordination of elements of price or at least the removal of price uncertainty in the airfreight sector, particularly in view of the frequency of the interaction between competitors.

Single anticompetitive aim

(867) The collusion of the parties was in pursuit of a single anti-competitive aim of distorting competition in the airfreight sector in the EEA by coordinating their pricing behaviour with respect to the provision of airfreight services, in particular by eliminating competition concerning the charging, amount and timing of fuel and security surcharges and in respect of the non payment of commission to forwarders on surcharges.

[1104] Cases T-147/89 *Société Métallurgique de Normandie* [1995] ECR II-1057, T-295/94 *Buchmann v Commission* [1998] ECR II-813, paragraph 121, T-304/94 *Europa Carton v Commission* [1998] ECR II-869, paragraph 76, T-310/94 *Gruber + Weber v Commission*[1998] ECR II-1043, paragraph 140, T-311/94 *Kartonfabriek de Eendracht v Commission*[1998] ECR II-1129, paragraph 237, T-334/94 *Sarrió* [1998] ECR II-1439, paragraph 169, T-348/94 *Enso Española v Commission*[1998] ECR II-1875, paragraph 223. See also Case T-9/99 *HFB Holding and Isoplus Fernwärmetechnik v Commission*[2002]ECR II-1487, paragraph 231.

(868) The aim of the parties is evidenced by repeated contacts which took place over a long period of time as set out in Section 4. The nature of the evidence presented in Section 4 is of a significant number of largely bilateral contacts, often via telephone. In this respect, and in such a cartel, it is unsurprising that there was no initial multilateral meeting which laid down the particular purpose of the cartel. Rather, the aim is evidenced by the parties' actions as set out in Section 4 and to a certain extent also by their own submissions.

(869) The parties actions show a network of contacts which ensured that discipline was maintained in the market and that increases arising from the fuel indices were be applied in full and in a coordinated way thus removing pricing uncertainty. This action was extended to the SSC where the parties again sought to remove pricing uncertainty with respect to the application and level of the surcharge. This was reinforced by refusing to pay commission on surcharges which ensured that pricing uncertainty, which could have arisen from competition on commission payments, remained suppressed.

(870) Amongst the parties submissions, [*] recognises that the contacts were designed to ensure the competitors took the same steps, [*] recognises that there was a 'general consensus' that all parties should not deviate from their respective surcharge policies[1105], various parties describe the system of 'comfort calls' to ensure full implementation[1106] [*][1107].

(871) While in some cases coordination of surcharges took place at local level and may have given rise to local variations regarding the amount and timing of surcharges, the object remained the same, namely to eliminate competition among carriers with respect to the surcharges (see for example, recitals [*]

Single product/service

(872) The arrangements concern the provision of airfreight services and the pricing thereof.

Same undertakings

(873) The same undertakings are involved in the arrangements, notably with the addressees involved in multiple elements of the infringement. All the addressees were involved in communications and concertation regarding the FSC with many participating with regard to SSC and the non-payment of commission on surcharges. It is not necessary for categorisation as a single and continuous infringement that all the undertakings must take part in every element of the infringement. Neither is this conclusion affected by the fact that the particularities and intensity of the exchanges may have varied over time.

1105 [*]
1106 [*]
1107 [*]

Single nature of the infringement

(874) The infringement is concerned with price coordination. Fundamentally, all of the various elements are concerned with pricing matters, more particularly surcharges. As set out in Section 4 pricing contacts between carriers initially started in respect of the FSC and spread to the introduction and application of the SSC with the aim of eliminating competition with respect to the application and level of these surcharges. As the surcharges were kept as a discrete element of the overall price, distinct from rates, carriers were able to further cooperate in refusing to pay commission on surcharges, which would otherwise have been payable if part of rates. This ensured that surcharges did not become subject to competition through the negotiation of commission (in fact discounts on the surcharges) with customers. Therefore both the contacts concerning the fuel and security surcharges and the contacts concerning the refusal to grant discounts on surcharges directly concerned the level of surcharges payable by customers.

Elements discussed in parallel

(875) The various surcharges and commission payable were frequently discussed side by side in the same competitor contact. There are numerous instances of this in the Commission's file including:

- an e-mail from [*] (MP) to AF, LH, CV, KL, BA on 13 July 2004, referring to the European Carrier Drink (ECD) meeting the previous evening, in which Mr [*] addressed both the FSC and the SSC;

- a meeting between the [*] of LH, CV, BA, KL and MP in Amsterdam on 23 August 2004 at which they discussed surcharges in general terms;

- [*];

- a meeting between AF and LH in Paris at the Novotel at Charles de Gaulle airport at which the parties discussed surcharges generally, gave assurances about the consistent application of the various surcharges and agreed that forwarders should not receive a commission on surcharges[1108]; and

- discussions within the BLACKS initiative in Italy (BA, LH, AF, CV, KL, Swiss) covered the FSC, SSC and, in a wider group, refusal to pay commission to forwarders[1109].

Involvement in elements

(876) The majority of the parties (AF, KL, BA, CV, CX, JL, LH, MP, SQ) were involved in all three elements of the infringement namely the FSC, SSC and commissioning on surcharges.

[1108] See recital (519)
[1109] See recital (549) (629) (684) (686)

(877) AC, SK and QF were involved in two of the three elements (FSC and SSC). Nevertheless given their involvement in the other elements of the infringement they could have reasonably foreseen exchanges between the parties on such a related matter as commissioning on surcharges and were prepared to take the risk. There is also evidence that AC was aware of the discussions on commissioning on surcharges[1110].

(878) LA was involved in one element (FSC) but evidence on the file demonstrates it was aware of discussions among carriers on SSC[1111] and commission on surcharges[1112].

Continuous infringement

(879) From the file, it is clear that the frequency of the contacts between the carriers varied over time. For example, in relation to the FSC, contacts were particularly frequent where the fuel indices approached a level at which an increase or decrease would be triggered but may have been less frequent at other times. However, these different levels of intensity are expected in a long running infringement and do not affect its continuity.

Arguments of the parties

(880) BA asserts the Commission should prove to the requisite standard each element of the infringement it identifies. However, the Commission alleges a single and continuous infringement and it is therefore incumbent on the Commission to prove to the requisite standard the existence of such an infringement.

(881) Certain parties such as BA have questioned the relevance of contacts in third countries. The Commission maintains that all contacts, including [*], are relevant to establishing the existence of the infringement given [*]. Equally, surcharges are measures of general application which are not route specific as is the case with rates. Accordingly, to make a finding of a single and continuous infringement in respect of coordination of surcharges or commissioning on surcharges it is not necessary that the carriers are actual or potential competitors of all participants in the cartel or are actual or potential competitors on any specific route.

(882) SK argues that the communications with competitors in Finland in January 2000 concerning a complaint from the Finnish Forwarders Association about FSC (recital (133)) did not lead to the coordinated introduction of the FSC in Finland. It was a separate, one-off local event that was not linked to the single and continuous infringement. SK followed LH in line with the decision of the headquarters. The Commission believes that the argument that SK introduced the FSC

1110 See recital (673) (675) (676)
1111 See recital (623)
1112 See recital (476) (670)

following only LH does not legitimise exchanges of relevant information with other competitors. Furthermore, these contacts were reported to the SK headquarters that gave relevant instructions. Therefore, it can not be regarded as an isolated local event that had no link to central decision making.

(883) [*]

(884) [*] also argued that throughout the investigated period it was never informed or aware that LH was directly communicating on a regular basis with numerous other airlines about FSC. The Commission cannot accept this argument as it is [*] itself who contradicts this argument in paragraph 34 of its reply to the SO. It makes reference to an internal [*] email[1113] dated 22 August 2005 in which Mr [*] ([*]) stated that he talked to Mr [*] (LH) about the FSC implementation on the phone and Mr [*] referred to his conversations with other carriers. In paragraph 34 of the reply to the SO, [*] also confirmed that in the autumn of 2005 Mr [*] (LH)told Mr [*] that LH had regular contacts on FSC levels with KLM.

(885) [*] argues its collusive behaviour was restricted, at least with respect to the FSC, to contacts with LH, which [*] admits. [*] claims it was not aware of a wider conspiracy and there is no evidence to suggest that contacts at a local level were fed back to head office. AC also argues no overall plan has been demonstrated and there is no evidence that AC was aware or should have been aware of any global plan.

(886) The Commission has outlined the overall plan in recitals (867)-(871). The Commission is required to show that an undertaking in question was aware of the behaviour of other participants or could reasonably have foreseen or been aware of them and was prepared to take the risk[1114] in order to hold that undertaking responsible for the infringement as a whole. It is clear from the evidence in [*] that both BA and that [*] were discussing pricing matters with numerous parties and were aware that pricing matters were being discussed between carriers. Accordingly, both were aware of the behaviour of other participants or could reasonably have foreseen or been aware of them and were prepared to take the risk.

(887) [*][1115];[*][1116]; [*][1117]; [*][1118]; [*][1119]; [*][1120]; [*][1121]; [*][1122]; [*][1123]; [*][1124]; [*][1125] ; [*][1126]; [*][1127].

1113 [*].
1114 Case C-49/92 *Anic Partecipaizioni SpA* [1999] ECR I-4125, paragraph 83.
1115 See recital [*]
1116 See recital [*]
1117 See recital (213)
1118 See recital [*]
1119 See recital (266)
1120 See recital [*]
1121 See recital (300)

(888) In respect of [*] the Commission relies on the following evidence already adduced in Section 4: numerous pricing contacts with LH and other carriers[1128]; [*][1129]; [*][1130]; [*][1131]; contacts within the [*] concerning the FSC[1132]; bilateral and multilateral discussions on the SSC[1133].

(889) According to [*] the majority of its contacts with respect to the FSC were isolated regional discussions relating to currency conversion or were based on a perceived need to obtain local regulatory approval. The Commission considers that the evidence shows a mix of head office and local contacts on the FSC[1134]. The fact that some discussions may relate to currency conversion or a perceived need to obtain local regulatory approval does not mean that these are not relevant pricing contacts. The Commission's position on regulatory regimes is set out in Section 5.3.3.

5.3.2.3. Conclusion

(890) All the anti-competitive activities involving each of the participants fit within an overall aim, namely to agree on pricing or at least to remove pricing uncertainty in the airfreight sector, in particular in respect of surcharges. Coordination took place in a similar fashion across the surcharges with the introduction, level and timing of the surcharges being discussed. This was reinforced by refusing to pay commission on surcharges which ensured the removal of pricing uncertainty was not undermined.

(891) Furthermore, various additional factors such as the single nature of the service, the involvement of the same undertakings and individuals, the single nature of the (pricing) infringement, and the fact that the various elements of the infringement were discussed in parallel all point to a single and continuous infringement.

(892) It would be artificial to split up such continuous inter-related conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when it involved a single complex and continuous infringement for the services concerned which progressively manifested itself in both agreements and concerted practices.

(893) However, in light of the arguments put forward, the Commission no longer maintains that the element presented in the SO relating to [*],

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1122 See recital (382)
1123 See recital (522)
1124 See recital (719)
1125 See recital ([*]) ([*])
1126 See the following recitals of this Decision: [*]
1127 See recital [*]
1128 See recital [*] (347) (400) (435) (439) (471) (484) (553) (564)
1129 See recital ([*])
1130 See recital ([*])
1131 See recital [*]
1132 See recital (383) (492)
1133 See recital [*]
1134 See recital [*]

which applies to particular routes rather than applying generally, falls within the single and continuous infringement. The Commission also no longer pursues its objections in relation to the [*] and [*] which involved a limited number of addressees.

5.3.3. Restriction of competition

(894) The anti-competitive behaviour in the present case had the object of restricting competition at least in the EU, the EEA, and Switzerland.

(895) The addressees of this Decision concerted on price in respect of the FSC, SSC and commission on surcharges.

(896) In respect of the FSC pricing coordination took place [*] to February 2006 (see Section 4.3). The addressees contacted each other on various pricing matters concerning the FSC including changes to the mechanism, application of the mechanism, changes to the FSC level, disclosure of anticipated increases and announcement dates, commitments to follow increases and instances where some airlines did not follow the system.

(897) In respect of the SSC pricing cooperation took [*] to February 2006 (see Section 4.4.). Contacts between airlines and discussions related in particular to whether to introduce a SSC, the manner in which it should be calculated, the appropriate level of the surcharge, the timing of introduction and justifications to be given to customers.

(898) In respect of commission on surcharges pricing coordination took place from January 2005 to February 2006 (see Section 4.5). Contacts were made between airlines with a view to aligning their conduct in refusing to pay commission to forwarders on surcharges.

(899) Accordingly the addressees have coordinated their pricing behaviour amounting to price fixing which is prohibited by Article 101 of the TFEU. Article 101 expressly includes as restrictive of competition agreements and concerted practices which directly or indirectly fix selling prices or any other trading conditions[1135]. More specifically, the parties agreed to coordinate their pricing behaviour in respect of surcharges, not to depart from the surcharge mechanism and they exchanged pricing information. Previous Commission decisions have found that agreements on the amount and introduction of surcharges[1136] and agreements not to make deviations from published prices[1137] infringe Article 101 of the TFEU. The General Court has confirmed that

[1135] The list is not exhaustive.

[1136] Commission Decision of 30 October 1996 in Case IV/34.503 (Ferry Operators) OJ L 26 of 29.01.1997, p. 23.

[1137] Commission Decision of 15 May 1974 in Case IV/400 (Agreements between manufacturers of glass containers) OJ L 160 of 17.06.1974 p. 1 and Commission Decision of 15 July 1975 in Case IV/27.000 (IFTRA rules for producers of virgin aluminium) OJ L 228 of 29.08.1975 p. 3

price fixing agreements on surcharges[1138] or agreements which fix part of the final price are prohibited by the competition rules[1139]. Furthermore, it is long established that exchanges of information between competitors in respect of pricing matters can only be explained by the desire to replace the risks of pricing competition with practical cooperation[1140].

(900) Price being the main instrument of competition, arrangements between competitors directed at the coordination of their behaviour in order to remove uncertainty in the market in respect of pricing matters, as described in this section in relation to the FSC, SSC, and discounts on those surcharges will by their very nature prevent, restrict or distort competition within the meaning of Article 101(1) of the TFEU.

(901) These kinds of arrangements have as their object the prevention, restriction or distortion of competition within the meaning of Article 101(1) of the TFEU.

(902) AF, KL, CV, CX, JL and MP argued that the alleged cartel had limited effects.

(903) AF presented a study prepared by its economic consultants, which concludes there was no effective pricing coordination for three main reasons: the lack of transparency in pricing makes coordination impossible in the absence of a monitoring mechanism; the prices were scattered; and route by route there is no concentration around the bottom of the statistical distribution of tariffs.

(904) JL stated that the various elements of the infringement produced no, or only insignificant, anticompetitive effects. The FSC methodology was worked out with the Japanese Civil Aviation Bureau (JCAB) therefore contacts with LH produced no effect. The SSC was set unilaterally so relevant contacts produced no impact.

(905) MP stated that it followed the market in the implementation and adjustments of the FSC. The coordination with other airlines was limited to the timing of adjustments and MP considers that it did not have a considerable impact on the market.

(906) CX argued that surcharges did not affect the overall price and did not lead to a loss of pricing uncertainty.

(907) The Commission considers that surcharges represent a constituent element of the overall price and collusion with competitors on such an element is clearly contrary to Article 101 of the TFEU [1141]. On the basis

[1138] Case T-48/98 *Acerinox v Commission* [e imposed in this, paragraph 55.

[1139] Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, paragraph 146.

[1140] Joined Cases 56 and 58-64 *Consten and Grundig v Commission* [1966] ECR 429 and Joined Cases T-25, 26, 30-32, 34-39, 42-46, 48, 50-65, 68-71, 87, 88, 103 and 104/95 *Cement* [2000] ECR II-491, paragraphs 1120 and 1170.

[1141] Commission Decision of 30 October 1996 in Case IV/34.503 (Ferry Operators) OJ L 26 of 29.01.1997, p. 23.

of the facts presented in Section 4, the Commission finds that the aim of such contacts was to remove pricing uncertainty in the airfreight market. This network of contacts ensured that discipline was maintained in the market and that increases arising from the fuel indices were be applied in full and in a coordinated way thus removing pricing uncertainty.

(908) Concerning the arguments in recitals (902) to (906) on the (lack of) impact of the cartel the Commission reiterates that its case is based on the anti-competitive object of the conduct in question. It makes no assessment of anti-competitive effects. It is settled case-law that for the purpose of application of Article 101(1) of the TFEU there is no need to take into account the actual effects of an agreement when it has as its object the prevention, restriction or distortion of competition within the internal market. Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved[1142]. The same applies to concerted practices.

(909) KL argued that the surcharges were not profit making tools but served to recover specific costs, as illustrated by extracts from relevant documents.

(910) KL stated that the communications on the trigger points of the FSC mechanism confirm that these contacts concerned the cost of fuel as they aimed to establish the extent to which fuel cost increases required adding new trigger points to the FSC mechanism. Likewise communications on other surcharges also confirm that surcharges were means of recovering specific costs and not of increasing overall prices or yields.

(911) It is irrelevant for the characterisation of the contacts between competitors concerning the surcharges as an infringement of Article 101 of the TFEU whether the companies involved consider these surcharges as cost recovery tools or as profit making tools. Surcharges constitute an element of the final selling price paid by the customers and fixing of a part of the price is just another form of price fixing, as confirmed by the General Court in *Alloy surcharge*[1143].

(912) [*]

(913) QF argued that the conversation between MP and QF, concerning a meeting between BA and QF later that day cited in recital (349), was legitimate in the framework of the BA-QF joint venture. The Commission can not accept this argument, as the evidence cited refers to contacts between QF and MP that are not legitimised by the joint venture with BA thus it forms part of the evidence of the infringement found in this Decision.

1142 Case T-62/98 *Volkswagen AG v Commission* [2000] ECR II-2707, paragraph 178 and case T-38/02, *Danone* [2005] ECR II-4407, paragraph 150.

1143 Joined Cases T-45/98 and T-47/98: *Krupp Thyssens Stainless GmbH et Acciai speciali Terni SpA v European Commission* [2001] ECR II-3757, paragraph 157.

5.3.4. The WOW Alliance

5.3.4.1. Introduction

(914) The Commission wishes to clarify from the outset that this Decision does not concern the compatibility of the WOW alliance or any other alliance with Article 101 of the TFEU. The WOW alliance is analysed in detail as some of its members made arguments in that regard that the Commission can not agree with. This section assesses contacts between carriers alleged by some members of the WOW alliance to be legitimate by virtue of that alliance.

(915) In order to establish such participation the contacts between WOW members are considered to be relevant in so far as they go beyond what was provided for in the alliance agreement and do not fit in the context of the cooperation that was effectively implemented within the framework of the alliance.

(916) It can not be permitted that an alliance framework is also used as a cover for a broader anticompetitive cooperation than that which has been put in place through the implementation of the terms of the alliance agreement. In particular, where price coordination among the parties is provided for in the context of certain forms of coordination under the alliance, the price coordination cannot go beyond the scope of the (pro-competitive) cooperation and may only take place within the context of the implementation of the relevant cooperation as foreseen in the alliance agreement. So an alliance agreement may make legitimate the cooperation among its members only to the extent that the forms of cooperation for which the coordination of prices is envisaged in the agreement are implemented, and not otherwise.

(917) Thus, in order to be able to establish to what extent the contacts between WOW members may have been justified by the alliance, it is necessary to consider the extent to which the forms of cooperation which include price coordination are provided for under the alliance and to what extent they have been implemented. For that purpose, in Sections 5.3.4.2 and 5.3.4.3 the Commission analyses the scope of the WOW agreement and its implementation.

(918) The Commission has also taken into consideration the extent to which the alliance members were aware of the conduct of other participants or could reasonably have foreseen or been aware of them and were prepared to take the risk[1144].

(919) The parties put forward a number of arguments with regard to the contacts in the framework of WOW that are discussed in Section 5.3.4.4.

[1144] Case C-49/92 *Anic Partecipaizioni SpA* [1999] ECR I-4125, parapgraph 83.

5.3.4.2. Analysis of the WOW alliance - scope of WOW according to the WOW Alliance Agreement

(920) The WOW alliance was established in 2000 by SK Cargo, LH Cargo and SQ Cargo[1145]. On 5 July 2002 JL Cargo joined the alliance[1146]. The alliance was at first named New Global Alliance (NGC) and then renamed into WOW when JL joined.

(921) [*]

(922) [*]

(923) [*]

5.3.4.3. Analysis of the WOW alliance - implementation of the Alliance Agreement

(924) SQ states that WOW was designed to be a full cooperation alliance.[1147] The integration was to be achieved through three milestones, namely [*].[1148] SQ also states that the WOW partners made genuine efforts.

(925) According to LH the WOW partners have [*] and undertook joint efforts such as [*].[1149] Moreover, LH states that the alliance is now dormant and it is no longer possible to refer to the fact that [*].[1150]

(926) [*]

(927) SK describes the implementation measures in more details, [*]. These issues are addressed in turn in Sections 5.3.4.4 to 5.3.4.10.

5.3.4.4. [*]

(928) [*]

(929) [*]

5.3.4.5. [*]

(930) [*]

(931) [*]

(932) [*]

5.3.4.6. [*]

(933) [*]

1145 [*].
1146 [*].
1147 [*].
1148 [*].
1149 [*].
1150 [*].

5.3.4.7. [*]

(934) [*]

5.3.4.8. [*]

(935) [*]

5.3.4.9. [*]

(936) [*]

(937) [*]

5.3.4.10. Price coordination

(938) SK claims that price coordination is ancillary to various initiatives within an alliance.[1151] In WOW price coordination is linked to the following initiatives: [*]

5.3.4.11. Assessment

(939) The Commission considers that none of the initiatives claimed to have been taken in the context of the WOW alliance justifies general price coordination within WOW, in particular the general coordination of surcharges.

(940) The WOW Alliance Agreement was only implemented to a limited degree. The cooperation between the members has never become close to a fully-fledged joint venture with integrated sales and pricing policy. The joint activities were limited to, for example, [*]. However, none of the joint activities required the general coordination of surcharges among WOW members and the alliance agreement did not provide for general price coordination measures in the context of such activities. Furthermore, none of the WOW members denies that the coordination that took place with respect to surcharges and the refusal to pay a commission on surcharges was a general price coordination that was not limited to particular joint initiatives.

(941) The fact that only a limited degree of integration was reached through the WOW alliance was already argued by the parties in the Lufthansa/Swissair merger case: 'WOW is only a loose alliance which facilitates interlining among its members, so they can expand their respective networks. The parties do not sell their products jointly nor do they coordinate on prices, schedules or capacity.'[1152]

1151 [*].

1152 Decision of the Commission dated 4 July 2005 in Case COMP/M.3770 – Lufthansa / Swiss, paragraph 177.

(942) In particular WOW did not harmonise the sales and pricing policy of the members and no common FSC system was created within WOW. Consequently the contacts which took place among WOW carriers on general surcharge levels can not be considered as part of the implementation of the alliance agreement. The parties even tried to hide such discussions when references to them were deleted from the minutes of WOW meetings[1153].

(943) This conclusion is also substantiated by an example referred to by SK[1154] concerning an Integration Board meeting in December 2004 where [*] (SK) proposed [*]. [*] This discussion demonstrates that WOW carriers had individual surcharge policies - that in fact were coordinated in the cartel with other carriers - and they were not prepared to deviate from it for the purposes of WOW.

(944) The independent surcharge policy of the WOW members in the absence of general coordination, found in this Decision, is demonstrated by the following examples:

- Mr [*] (LH) asked Mr [*] (LH) on 4 November 2004 to draft a reply to an email of Singapore Airlines, in which Mr [*] was asked about Lufthansa's plans in relation to surcharges reductions. Mr [*] asked Mr [*] to include in the draft that LH would try to get the WOW partners on its track ('unsere WOW Partner dazu auf unsere Schiene zu ziehen').[1155]
- [*]
- [*]
- [*]
- In an email on 8 October 2004 Mr [*] (LH)asked a colleague to send an email to JL, explaining to JL what the Lufthansa position on the fuel surcharge was ('um die JAL hier mal unsere Position näherzubringen').[1156]

5.3.4.12. General arguments of the parties and the Commission's relevant position

(945) SK and SQ state that all of their contacts with other WOW members were legitimate under the WOW alliance. The objective of the WOW alliance, which is an expansion of the LH-SK alliance to SQ and then to JAL, was to achieve the benefits of a 'full cooperation' type of alliance in the air cargo sector. The alliance was to create an integrated cargo system that would ultimately combine the cargo business of the parties, including integrated network, sales integration and revenue and cost sharing. SK argues that price coordination was necessary for the success

1153 See recital (506)
1154 [*].
1155 See in the file [*].
1156 See in the file [*].

of the alliance as it was ancillary to various initiatives within it. Such initiatives are: [*].

(946) SQ argues that documents describing discussions between WOW partners are not relevant in establishing its participation in an infringement of Article 101 of the TFEU. The discussions between WOW partners did not have the object of restricting price competition and they did not share a common anti-competitive object with the conduct associated with the single and continuous infringement, so evidence related to WOW contacts can not be probative of participation in such an infringement.

(947) SK states that communications with WOW partners on the FSC were understood to be legitimate, were mostly local and did not influence SK's central FSC policy of following LH.

(948) JL does not share the views put forward by SQ and SK and it recognises that not all contacts between the alliance members were legitimate.[1157]

(949) [*][1158]

(950) The Commission considers that the general coordination of surcharges that took place among members of the WOW alliance did not form part of the implementation of the WOW alliance, as it is demonstrated by the analysis in Section 5.3.4.3.

(951) SQ also argues that it is not necessary to achieve full integration at the outset of such joint ventures or create specific structures in order to be in compliance with Article 101 of the TFEU. The type of integration provided for in the Integrated Development Plan of WOW, including price cooperation, is considered by SQ to be compliant with Article 101 of the TFEU, regardless of whether the parties to the alliance are ultimately able to achieve their integration objectives and plans at a commercial level.[1159]

(952) The Commission cannot accept this reasoning, as it would imply that the conclusion of an alliance agreement could give a carte blanche to implement anti-competitive elements of cooperation outside the context of the beneficial, pro-competitive cooperation that the alliance agreement may envisage to develop.

(953) SQ furthermore argues that all contacts between WOW carriers concerning SSC formed part of the legitimate alliance cooperation. Concerning the contacts between LH-SK and SQ in November 2005[1160] aiming at convincing SQ to raise the SSC, SQ claims that these were necessary for the alliance in Scandinavia. SK, however, refers to the same contacts as necessary for the SK-SQ joint freighter service that the two companies operate from Copenhagen to Chicago.

1157 [*].
1158 [*].
1159 [*].
1160 See recitals (617)-(621)

(954) The Commission notes that in reality the SSC increase discussed concerned not only the routes mentioned in recital (953) but all routes, and that it was implemented generally thus the argument concerning the alliance framework does not hold.

(955) SK and SQ argue that the contacts between WOW members do not form part of a broader cartel as they had no knowledge about the coordination of surcharges between other carriers. SK states it was not aware that LH had illicit contacts with other carriers. Since SK followed LH on the basis of the exempted cooperation, it was not necessary for LH to inform SK about the broader contacts it had with other carriers.

(956) The Commission rejects this claim as there is ample evidence that clearly demonstrates that SQ and SK were aware of wider coordination involving other carriers not members of WOW. On the basis of the evidence listed in recitals [*] (959) the Commission considers that both SQ and SK were aware of the broader coordination of surcharges or at least could reasonably have foreseen or been aware of it and were prepared to take the risk.

(957) SQ participated in numerous contacts with non WOW carriers where FSC or SSC was discussed as shown by the following evidence:

[*] [1161];

in the framework of contacts between BAR CSC members in Hong Kong[1162];

in Singapore in the framework of contacts between BAR CSC members and in contacts with QF[1163];

[*][1164];

in [*],[*[1165];

in Belgium carriers were in contact concerning the FSC[1166];

in the Netherlands in contacts with MP on FSC increase[1167];

[*][1168];

in Thailand in a contact with QF[1169];

in [*][1170];

[1161] See recital [*].
[1162] See recital [*] (492) (494) [*].
[1163] See recital [*] (392).
[1164] See recital [*]
[1165] See recital [*] (481) [*]
[1166] See recital (403)
[1167] See recital (349) (350)
[1168] See recital [*]
[1169] See recital (495)

in [*][1171];

in [*][1172];

in [*][1173];

[*][1174].

(958) [*]:

[*][1175];

[*][1176];

[*][1177];

[*][1178];

[*][1179];

[*][1180];

[*][1181];

[*][1182];

[*][1183];

[*][1184];

[*][1185];

[*]'[1186]

[*].*[1187]*

1170 See recital [*]
1171 See recital [*]
1172 See recital [*]
1173 See recital [*]
1174 See recital [*]
1175 See recital [*] [*] [*] [*] [*]
1176 See recital (495)
1177 See recital [*]
1178 See recital [*]
1179 See recital (480)
1180 See recital (133)
1181 See recital [*]
1182 See recital [*] [*] (414) (548)
1183 See recital [*]
1184 See recital [*]
1185 See recital [*] (400) (435) (439) (471) (484)
1186 See in the file [*]
1187 See in the file [*]

(959) The involvement of WOW carriers in the infringement is further demonstrated by the following evidence:

Concerning the suspension of an FSC increase by LH in September 2004, MP noted that LH's decision meant that JL, SK and SQ would do the same[1188];

[*][1189];

The WOW members were aware of the fact that the general coordination of surcharges is illegitimate within WOW as it is demonstrated by the efforts made to hide such discussions.[1190]

(960) SQ and SK argue that their position concerning the legitimacy of the alliance was confirmed by a Commission official, during an informal meeting on 30 July 2002. SK and SQ allege that the Commission official stated that coordination of marketing and pricing between WOW partners would not be something DG Comp would investigate on the basis of what the WOW partners explained to him, unless there were complaints. SQ argues that this meeting raised a legitimate expectation on their part, as a Commission representative, acting in his official capacity, has provided guidance indicating that a certain conduct is compatible with Article 101 of the TFEU.

(961) The Commission rejects these arguments. First, statements given by officials in informal meetings do not reflect the official position of the Commission and they are not binding on the Commission.[1191]. Second, the right to rely on the principle of legitimate expectations extends to an individual only where the EU institutions give precise assurances[1192]. General statements are not such as to give rise to any valid expectation[1193]. In the present circumstances no precise assurances capable of giving rise to a legitimate expectation were given.

(962) In any event, the statements made during the meeting could not have led SK and LH to believe that coordinating surcharges with other carriers was allowed. The discussion was general and theoretical, based on oral information only, as it is noted in an email from LH to SK preparing for the meeting: 'We will leave nothing written. And no other traces. So bring your camouflage cape.'[1194] Moreover, price coordination between members was mentioned as a future possibility only, without details, in a theoretical way. According to the LH meeting report '*Mention was also made of the fact that the carriers envision common pricing in the future*'[1195]. Finally, the Commission official involved did not exclude a future investigation by the Commission, but simply stated that based on

1188 See recital (391)
1189 See recital [*]
1190 See recital (506)
1191 Case T-158/00 *ARD v Commission* [2003] ECR II-3825, paragraph 296.
1192 Case T-534/93 *Gryberg and Hall* v *Commission* [1994] ECR-SC II-595, paragraph 51.
1193 Case T-571/93 *Lefebvre and others* v *Commission* [1995] ECR II-2379, paragraph 72.
1194 See in the file on page 14896.
1195 [*].

the actual legal situation, when the Commission's competence was limited concerning air transport with third countries, it was not a priority for the Commission to investigate such a cooperation if it did not receive any complaints. According to the LH report '*the Commission's reaction was as expected. It did not see a reason for it to intervene, while expressly excluding Article 85 EC Treaty (opening of a proceeding for NON EU-affairs).'*

5.3.4.13. Conclusion

(963) Having regard to the WOW Alliance Agreement and its implementation the Commission finds that the coordination of the surcharges between the WOW members was conducted outside the legitimate framework of the alliance that does not justify it. The members were in fact aware that such coordination is illegitimate. Furthermore, they were aware that the coordination of surcharges involved a number of airlines not participating in WOW. Consequently, the Commission finds that the evidence concerning contacts between WOW members, described in Sections 4.1 to 4.5, constitutes evidence of their participation in the infringement of Article 101 of the TFEU as described in this decision.

5.3.5. Regulation of airfreight services

5.3.5.1. Introduction

(964) In certain countries, charges for airfreight services are regulated. In some cases undertakings may be encouraged to agree charges (rates and/or surcharges). Air Service Agreements (ASA) are bilateral agreements between states which establish one or more air routes between their respective countries. In some cases, ASAs contain clauses which provide for the joint setting of charges by airlines designated to operate on the relevant route. These agreements are made between states but their provisions are not implemented by the contracting parties in many cases and in no case is there a legally binding obligation for carriers to agree charges laid down in any country to or from which routes covered by this decision are operated.

(965) For Article 101(1) of the TFEU to apply it is necessary that undertakings engage in anticompetitive behaviour on their own initiative[1196]. It follows that where regulatory or other measures leave the undertakings concerned with no scope for autonomous action Article 101(1) of the TFEU is not applicable. If a national law merely encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 101 of the TFEU and may incur penalties[1197]. Furthermore, the state compulsion defence has been applied restrictively by the General Court[1198].

[1196] Joined Cases C-359/97 P and C-379/97 P *Tiercé Ladbroke v Commission* [1997] ECR-I 6265.

[1197] Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garantie della Concorrenza e del Mercato* [2003] ECR I-8055, paragraph 56.

[1198] Case T-513/93 *Consiglio Nazionale delgi Spedizionieri Doganali (CNSD) v Commission*, [2000] ECR II-1807, Case T-66/99 *Mionoan Lines SA v Commission* [2003] ECR 5515. These cases relate

(966) A number of carriers have argued that in certain jurisdictions, in particular Hong Kong and Japan, they were required to agree certain charges. In relation to these two jurisdictions an assessment is carried out in recitals (968) to (1005).

(967) Firstly, the parties' arguments are set out. Secondly, the relevant legal provisions are addressed, in particular the applicable Air Service Agreements (ASAs) and relevant implementing measures. Thirdly, the administrative practices of the relevant national authorities are considered. Other jurisdictions are assessed subsequently in a more limited manner.

5.3.5.2. Hong Kong

Carriers' Arguments

(968) A number of carriers have stated that they were required to obtain approval of the local aviation authority, the CAD, for the imposition of surcharges on shipments from Hong Kong. Furthermore, they argue that they were required to concert with other carriers on surcharges.

(969) CX argues that it had to agree with other carriers on surcharges, because the CAD only accepted collective applications of the carriers. It therefore had to discuss surcharges with the other carriers before each application. However, CX's statements are in themselves contradictory. At various points CX argues that CAD required collective applications[1199]. However, CX reports a meeting on 29 September 2006 between it and CAD at which CAD indicated its 'preference' (not requirement) for collective applications.[1200] According to CX CAD also stated at the meeting that whilst it would not approve individual applications for an FSC index it would accept individual applications for a fixed amount of FSC. CX also draws a distinction between the FSC and other surcharges

(970) BA admits that it was legally possible for the carriers to apply separately. In its reply to the SO BA describes that the CAD only refused to countenance the prospect of each airline setting up its own FSC indices and would only accept individual applications for a fixed amount of FSC.[1201] However, according to BA individual applications were in practice not possible.

(971) CV states that the CAD encouraged a collective FSC mechanism[1202], but admits that the CAD was, in relation to the FSC, in theory willing to accept individual applications and that CAD only indicated that the

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to a state compulsion defence in the context of Member States' regulations. The principle is however equally applicable to third country regulations.

1199 [*].

1200 [*].

1201 [*].

1202 [*].

approval process for individual applications would be more difficult.[1203]. Furthermore CV recognises that CAD did not expressly favour a collective application with regard to SSC[1204]. It argues, however, that it is sufficient for Article 101(1) of the TFEU not to apply if a foreign authority explicitly encourages anti-competitive behaviour.[1205]

(972) Also MP states that the CAD encouraged the concept of a collective mechanism for the FSC so that the air carriers were expected to submit a collective surcharge application.[1206]

(973) QF states that it was the decision of the carriers to collectively approach the CAD in relation to the FSC and the SSC.[1207] It was not necessary for the carriers to collectively approach the CAD. This is demonstrated by the fact that QF obtained individual approval for its rates and the SSC.[1208] It should also be noted that in October 2006 QF sought individual approval from CAD for withdrawing from the collective FSC application.

Relevant Legal Provisions

(974) Hong Kong has signed numerous ASAs[1209]

(975) Most of the ASAs require tariffs charged by the designated airlines of the contracting countries to be approved by the aeronautical authorities[1210]. In Hong Kong the relevant authority is the Civil Aviation Department (CAD). However, the requirement of approval of tariffs by CAD is not at issue. The issue is whether there is a requirement to discuss tariffs with competitors before submitting to the approval of CAD.

(976) Although some of the ASAs state that airlines may agree on surcharges before applying for CAD approval, none of the ASAs impose a discussion between the airlines or require a consensus among them. A clause that can be found in almost identical wording in several ASAs is the following;

'The tariffs referred to in paragraph (1) of this Article may be agreed by the designated airlines of the Contracting Parties seeking approval of the tariffs, which may consult other airlines operating over the whole or part of the same route, before proposing such tariffs. However, a designated airline shall not be precluded from proposing, nor the aeronautical authorities of

1203 [*].
1204 [*].
1205 [*].
1206 [*].
1207 [*]
1208 [*].
1209 See http://www.legislation.gov.hk/table1ti htm
1210 Such an obligation is, for example, set up in: Article 8(1) ASA between Austria and HK; Article 7(2) ASA between Belgium and HK; Article 8(2) ASA between Denmark and HK; Article 8(1) ASA between France and HK; Article 9(1) ASA between Hungary and HK; Article 7(2) ASA between Italy and HK; Article 7(2) between Luxemburg and HK; Article 7(2) ASA between the Netherlands and HK; Article 8(1) ASA between Sweden and HK.

the Contracting Parties from approving, any tariff, if that airline shall have failed to obtain the agreement of the other designated airlines to such tariff, or because no other designated airline is operating on the same route.'[1211]

(977) Whilst this clause allows price consultations between designated airlines it imposes no requirement on parties to discuss tariffs and specifically provides for carriers to propose tariff increases without reaching prior agreement with other airlines.

(978) The wording of other ASAs is even clearer regarding the absence of any requirement on parties. For example, the ASA between the Czech Republic and Hong Kong states that no country will require airlines to discuss tariffs[1212].

(979) Furthermore, in respect of ASAs it must be noted that references to tariff discussions only apply to the airlines designated to operate between the two states which are parties to the agreement. They do not extend to tariff discussions between carriers operating between two different country pairs.

Administrative Practice

(980) A requirement to discuss tariffs and apply collectively to the CAD for approval cannot be derived from administrative practices of the CAD. No pre-existing document has been submitted which states that CAD required such concertation. Rather the possible existence of a requirement arises essentially from the assertions of some of the parties outlined in this section. Other parties dispute the possible existence of a requirement with some arguing that CAD encouraged rather than required concertation. The relevant documents are discussed in recital (981).

(981) In respect of documents submitted by the parties, as indicated in recital (980) none of the carriers has provided evidence which establishes that the CAD explicitly required collective applications. Various documents that have been submitted are assessed in this recital.

a) The contemporaneous letters from the CAD that are submitted as evidence only state whether approval has been granted[1213]. Although, some of them approve a collective application, none requires such a collective application. In these letters, the CAD even expressly

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1211 Article 8(2) ASA between Austria and HK; Article 7(3) ASA between Belgium and HK; Article 8(3) ASA between Denmark and HK; Article 8(2) ASA between France and HK; Article 9(2) ASA between Hungary and HK; Article 7(3) ASA between Italy and HK; Article 7(3) between Luxemburg and HK; Article 7(3) ASA between the Netherlands and HK; Article 8(2) ASA between Sweden and HK.

1212 Article 8(3) ASA between Czech Republic and Hong Kong.

1213 Cf. the approval dated 1 June 2005, Annex 135 to the legal opinion of Charles Haddon-Cave, approval dated 8 September 2005, Annex 141 to the legal opinion of Charles Haddon-Cave, approval dated 1 November 2005, Annex 148 to the legal opinion of Charles Haddon-Cave, approval dated 21 June 2006, Annex 167 to the legal opinion of Charles Haddon-Cave, approval dated 29 September 2006, Annex 185 to the legal opinion of Charles Haddon-Cave.

pointed out that if changes in the list of airlines submitted to them occurred, a separate application would have to be made.[1214]

b) The BAR CSC's letter of September 2006 which says '[i]n accordance with your prior direction to collectively apply for review and approval for the ex Hong Kong air cargo FSC, BAR has endeavoured to create an index that is consistent, transparent and predictable'[1215] does not constitute evidence that CAD actually required a collective application. This letter does not originate from the CAD itself, but rather from the BAR CSC. Furthermore, it should be taken into account that at the time this letter was written the Commission's investigation had already commenced and may have been drafted with this in mind.

c) A letter dated 5 September 2008 that was sent by the CAD to the President of the Commission at the request of Cathay Pacific does not constitute evidence that the CAD required all carriers to apply collectively. First, the CAD does not state that it required carriers to apply collectively. It states only that it 'required […] all carriers wishing to impose any surcharge on air cargo originating in Hong Kong to receive prior approval'[1216]. The fact that prior approval was needed is consistent with the ASAs and, as indicated in this section , is not at issue. Nor does the remainder of the letter demonstrate that the CAD required concertation between carriers. It only states that collective application was an efficient manner by which to apply for, review and approve surcharges[1217] and that the CAD considers this form of application to be lawful in Hong Kong[1218].

d) LH's rejected individual application of September 2006[1219] is not evidence that the CAD required collective applications. The CAD did not reject this application because it was an individual application, but rather because it rejected the FSC mechanism proposed by LH.[1220]

e) A letter dated 23 December 2003 from the HK Office of the Commission to CAD is not evidence that the Commission has in any way approved the practices under consideration. The Commission's letter was simply sent in response to a suggestion from CAD that insurance and security surcharges should be included in rates. In an earlier unsigned and unsent draft dated 27 November the Commission equally does not approve the practices[1221].

1214 Cf. the approval dated 1 June 2005, Annex 135 to the legal opinion of Charles Haddon-Cave, approval dated 21 June 2006, Annex 167 to the legal opinion of Charles Haddon-Cave, approval dated 29 September 2006, Annex 185 to the legal opinion of Charles Haddon-Cave.

1215 [*].

1216 CAD letter of 5 September 2008, p. 1.

1217 CAD letter of 5 September 2008, p. 1.

1218 CAD letter of 5 September 2008, p. 2.

1219 [*].

1220 [*].

1221 [*].

(982) On the basis of the evidence assessed in this section the Commission is not persuaded that a requirement to concert is made out. It appears that individual applications could be and were made in respect of both FSC and SSC.

Conclusion on Hong Kong

(983) It follows that Commission does not consider that a requirement to discuss tariffs was imposed on the carriers in Hong Kong.

(984) From a legal perspective whilst the ASAs refer to discussions on tariffs there is no requirement of concertation or collective approval which flows from them. ASAs could not in any event have given rise to any justification for airlines designated on routes to different countries to have concerted on surcharges.

(985) Equally, whilst the administrative practice of the CAD may have encouraged collective applications it is clear that individual applications could be made. In this respect it is necessary to distinguish between the FSC and other surcharges. For other surcharges it has not been argued by the parties that collective applications were required by CAD in the same way as the FSC. For the FSC even if CAD was not prepared to accept individual applications for an FSC mechanism it is clear that CAD was prepared to accept individual applications for a fixed amount FSC. The fact that such an individual process might have been more difficult or less practical does not amount to a requirement to make a collective application following concertation on the FSC.

(986) It accordingly follows that Article 101 of the TFEU remains applicable.

5.3.5.3. Japan

Arguments of parties

(987) JL and a number of other parties[1222] have argued that the Commission must take into account the applicable regulatory regime in Japan. JL in particular argues that the JCAB, in accordance with the applicable ASAs, requires Japanese airlines to coordinate their rates and surcharges with other airlines. [*] The FSC ex Japan is a particular issue where JL claims it understood that it was following JCAB directions by coordinating with other Japanese carriers[1223]

Relevant Legal Provisions

ASAs

(988) The ASAs which govern routes between Japan and the EU are negotiated individually with Member States but all ASAs are very

[1222] For example CX, SK, AC, AF, KLM, AC, SQ, MP.

[1223] [*].

similar. A specific Article (usually A11) addresses tariffs. Article 11 of the Japan – Netherlands ASA states;

'agreement on tariffs shall, wherever possible be reached by the designated airlines though the rate fixing machinery of IATA. When this is not possible, tariffs in respect of each of the specified routes shall be agreed by the designated airlines'

(989) If the carriers are not able to agree the authorities will set the fares. JL argues on the basis of this wording that the ASAs require, rather than permit, price fixing agreements.

(990) Similar tariff provisions appear in the ASA between Japan and the following Member States: France, Italy, and Germany. However, it should also be noted that the United Kingdom – Japan ASA was amended on 22 September 2000 by the United Kingdom and Japan entering into a Memorandum of Understanding (MoU). The MoU amended the ASA so that the designated airlines of the United Kingdom and Japan will not be required to consult each other on proposed tariffs prior to submitting them.[1224]

Relevant provisions of Japanese Civil Aviation Law

(991) The key provisions of the Japanese Civil Aviation Law are set out in recitals (992) to (994).

(992) Article 105 (for Japanese carriers) and Article 129.2 (for non –Japanese carriers) provide for the JCAB to approve all fares, rates and surcharges to and from Japan.

(993) Article 111 provides that when an agreement is concluded between Japanese airlines carriers are also required to apply for approval under Article 111 (as well as under Article 105). If JCAB gives its approval under Article 111 and no opposition is forthcoming from the Japanese Fair Trade Commission (JFTC - the relevant anti-trust authority) within 30 days the notifying carriers are 'entitled' to immunity from Japanese anti-trust laws.

(994) Article 157 provides that a failure to comply with Article 105 means carriers may be subject to penalties including criminal sanctions.

Administrative Practice

(995) JL claims a JCAB direction required that an application under Article 105 must include a statement that the applicant has obtained the agreement of the designated carriers as stipulated by the applicable ASA.

(996) [*] in contrast claims up until 2006, the Ministry of Land, Infrastructure and Transport (MLIT) of which the JCAB is an administrative department required FSC applications under Article 111 to make a reference to IATA ("as if" there were an IATA agreement on FSC). Only

[1224] [*].

in 2006 was MLIT's requirement changed and instead it was required to refer to agreements with airlines designated under ASAs.[1225]

(997) In general the Japanese carriers argue that JCAB directed and controlled the FSC process including stipulating that the FSC should be jointly coordinated. CX recognises that collective applications were not required but argues that the JCAB 'implicitly' required airlines to follow the lead of national carriers.[1226] SK argues the administrative practice gave rise to an obligation, perceived or actual, that the agreement of JL had to be obtained on the FSC to gain approval.

Analysis of the Japanese Regulatory System

(998) The standard wording of the Japanese-EEA ASAs states that carriers shall agree on tariffs. This is only however if agreement within IATA is not possible. In this respect [*] has asserted that FSC applications merely had to make reference to IATA and only in 2006 were references to discussions with other carriers required. Equally, if the parties are unable to agree for whatever reason, the authorities will set the fares.

(999) Not all ASAs are identical. It should also be borne in mind that the provisions relating to tariff discussions were specifically removed from the Japan- United Kingdom ASA in September 2000. JL itself has recognised that there is no requirement by the JCAB to coordinate in respect of flights between Japan and the United Kingdom [1227].

(1000) Most importantly the clauses relating to tariff discussions within the ASA are strictly limited to the *designated* carriers on *specified* routes. In no way do they cover general tariff discussions among multiple carriers flying to different destination countries of the type described in Section 4. This applies to all tariff discussions including the FSC where particular arguments of a requirement of coordination have been made.

(1001) It is also worth recognising that the tariff provisions of such ASAs are generally redundant in the EU with no party claiming that they are applied. This is despite the fact that the ASA agreement legally applies to both Japanese and EEA parties equally. Accordingly, this suggests any obligation must arise not directly from the wording of the ASA but rather from the domestic legal or administrative provisions in force in Japan. This is further supported by the fact that the parties claimed that coordination was required in respect of the FSC but not in respect of the SSC.

(1002) The relevant domestic provisions are found in Japanese Civil Aviation Law. Article 105 (for Japanese carriers) and Article 129.2 (for non Japanese carriers) provide an obligation to notify tariffs for approval to the JCAB. Neither Article, or any other Article referred to in submissions, requires coordination of tariffs by carriers. Applications are also made on an individual rather than collective basis. There is

1225 [*].
1226 [*].
1227 [*].

accordingly no legal requirement of coordination capable of leading to the disapplication of Article 101 of the TFEU.

(1003) Equally, the fact that Article 111 provides for immunity from Japanese anti-trust law does not lead to immunity from EU competition law and the disapplication of Article 101 of the TFEU.

(1004) JL and other carriers further argue that the administrative practices of the JCAB required concertation ex Japan in respect of the FSC. Notably JL does not claim the regulatory environment in which it operates justifies conduct in relation to surcharges in the EEA.[1228] Nor does it claim that the administrative 'direction' of the JCAB extended beyond the FSC.[1229] Furthermore, the parties have provided no written agreement, guidance, memorandum or email from any authority which records this position. No satisfactory contemporaneous documentary evidence has been submitted to substantiate the claim that JCAB required coordination of the carriers' FSC implementation. It is based rather on simple assertions of the parties which is not sufficient to substantiate a defence of state compulsion.

Conclusion on Japan

(1005) Having regard to recitals (991) to (1004) the Commission does not consider that a defence of state compulsion has been substantiated. This is on the basis that firstly, and most significantly, the EU -Japan ASAs restrict tariff discussions to the designated airlines under the specific ASA. Under any reading the ASAs did not extend to multilateral tariff discussions. On this basis alone the defence of state compulsion fails. Secondly, domestic Japanese law as described in recitals (992) to (994) does not impose a legal obligation of concertation. Thirdly, no satisfactory evidence has been submitted which points to an administrative requirement to concert. Fourthly, it is not claimed that the parties were required to concert on the SSC or commissioning on surcharges.

5.3.5.4. Other regulatory regimes

(1006) Various parties put forward arguments in respect of regulatory schemes in other locations. These include India, Thailand, Singapore, Korea and Brazil.

(1007) India is a party to ASAs which contain tariff provisions with the following Member States; Belgium, France, Germany, Italy and Sweden. Typically the ASAs containing tariff provisions state that tariffs …'shall, if possible, be agreed between the designated airlines in respect of each of the specific routes between the designated airlines concerned'. Parties are required to file tariffs with the Directorate for Civil Aviation under the Aircraft Act and the Aircraft Rules.

1228 [*].
1229 [*].

(1008) Thailand is party to a number of ASAs with EEA countries. The ASAs typically provide that tariffs 'shall, if possible, be agreed in respect of each of the specified routes between the designated airlines concerned.' The ASAs also provide that if the designated airlines cannot agree tariffs or if for some other reason tariffs cannot be agreed the Contracting Parties shall try to reach agreement. The relevant regulatory bodies are the Department of Civil Aviation and the Civil Aviation Board to which tariffs should be filed.

(1009) Singapore is also party to a number of ASAs with EEA countries. These ASAs typically contain wording identical to the Thai ASAs cited in recital (1008) including the provision that the Contracting Parties shall try to reach agreement if it is not possible for the designated airlines or for some other reason. The Civil Aviation Authority of Singapore is the relevant authority.

(1010) Korea is party to ASAs but these do not contain tariff clauses which encourage coordination between designated airlines. Rather there is simply a requirement for notification for approval of tariffs to the aeronautical authorities which in Korea is the Ministry of Construction and Transport.

(1011) Brazil is also party to ASAs with EEA countries with the National Civil Aviation Authority being the relevant regulatory body.

(1012) Following the reasoning outlined in this section in detail in respect of Hong Kong and Japan the Commission does not consider that a defence of state compulsion is substantiated in regard to India, Thailand, Singapore, Korea and Brazil. Firstly, to the extent that there are tariff provisions in the ASAs these are limited to the designated airlines on specified routes and do not extend to general tariff discussions between multiple operators providing services to multiple country destinations. Secondly, the applicable domestic legal and administrative provisions have not been shown to require tariff coordination.

5.3.5.5. Conclusion on regulation

(1013) As set out in Sections 5.3.5.1 to 5.3.5.4 the Commission does not consider that a defence of state compulsion has been substantiated which would lead to the disapplication of Article 101 of the TFEU.

(1014) Nevertheless the Commission has regard to the fact that a national framework which encourages anticompetitive conduct may be considered as a mitigating factor when the level of the penalty is set.[1230] Point 29 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003[1231] ('the Guidelines on fines') specifically provides for a mitigating circumstance 'when the

[1230] Joined Cases 40/73 to 48/73, 50/73, 54/73, 111/73, 113/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 620.

[1231] OJ C 210, 1.9.2006, p. 2.

anticompetitive conduct of the undertaking has been authorized or encouraged by public authorities or legislation'.

5.3.6. Conflict of laws

(1015) SQ contends that regulatory requirements for carriers to coordinate pricing in third countries should be taken into consideration and even if EEA implementation had been involved the Commission should refrain from taking action that could create potential conflict with third countries. SQ claims that the contacts between competitors in Singapore in the BAR CSC framework were lawful under Singaporean law. SQ also contends that the airfreight transport services originating from Singapore fall under the exclusive jurisdiction of Singapore as there were no EEA customers of airfreight services from Singapore to the EEA between 1 May 2004 and February 2006. SQ concludes that the Commission should avoid extra-territorial application of Article 101 of the TFEU that would infringe the right of Singapore to freely determine its economic and competition policies.

(1016) Concerning SQ's arguments about the conflict of laws the Commission reiterates that it is established case-law that if a national law merely allows, encourages, or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 101 of the TFEU and may incur penalties[1232]. In such cases the relevant laws are not in conflict with each other as they do not provide for conflicting obligations. In case of Singapore the parties were not obliged to coordinate surcharges by the Singapore legislation or administration, thus it is clear that there is no conflict between the application of Article 101 of the TFEU and the laws of Singapore.[1233]

5.3.7. Effect upon trade between Member States, between EEA Contracting Parties and between the contracting parties of the Swiss Agreement

(1017) Article 101 of the TFEU is aimed at agreements which might harm the attainment of a single market between the Member States, whether by partitioning national markets or by affecting the structure of competition within the internal market. Similarly, Article 53 of the EEA Agreement is directed at agreements that undermine the achievement of a homogeneous European Economic Area. Equally, Article 8 of the Swiss Agreement is aimed at agreements in the field of civil aviation which may harm trade between the EU and Switzerland.

(1018) Article 101 of the TFEU does not require that agreements referred to in that provision have actually affected trade between Member States; it is

[1232] Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garantie della Concorrenza e del Mercato* [2003] ECR I-8055, paragraph 56.

[1233] Joined cases C-89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström and others v. Commission* [1988] ECR 5193, paragraph 20.

sufficient that the agreements 'are capable of having that effect'.[1234] According to the case-law, 'for an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States; [m]oreover, that influence must not be insignificant.'[1235]

(1019) It is not necessary, in order for Article 101 of the TFEU to apply, to show that the individual conduct of each participant, as opposed to the cartel as a whole, affected trade between Member States[1236].

(1020) The 'Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty',[1237] (notice on the effect on trade) in paragraph 61 stipulate that agreements and practices covering or implemented in several Member States are in almost all cases by their very nature capable of affecting trade between Member States; in paragraph 62 stipulate that agreements between undertakings in two or more Member States that concern imports and exports are by their very nature capable of affecting trade between Member States; in paragraph 64 stipulate that cartel agreements such as those involving price fixing and market sharing covering several Member States are by their very nature capable of affecting trade between Member States.

(1021) The coordination of the surcharges was in fact implemented in all Member States and also in third countries. The diminished price competition between carriers was likely to reduce the advantages which would otherwise accrue to the more efficient of them. This was likely to affect in turn the normal pattern of losses and gains of market share which would have been expected in the absence of the coordination. This restriction of competition between carriers operating in many Member States was consequently likely to influence and alter trade flows in transport services within the internal market, which would have been different in the absence of the coordination.

(1022) In addition, such a price fixing cartel in the airfreight sector could lead to a diversion to other modes of freight transport, or reduce the total level imports and/or exports and thus have an effect on trade between Member States also in that way.

(1023) In the present case, the cartel arrangements covered the whole EEA area as well as Switzerland. The existence of pricing contacts in respect of

1234 Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 16 and 17; see also Case T-374/94 *European Night Services* [1998] ECR II-3141, paragraph 136 and Case C-238/05 *Asnef-Equifax* [2006] ECR I-11125, paragraph 43.

1235 Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619 paragraph 42; Case 56/65 *Société Technique Minière* [1966] ECR 282, paragraph 7; Case 42/84 *Remia and Others* [1985] ECR 2545, paragraph 22 and Joined Cases T-25/95 and others, *Cement* [2002] ECR II-491.

1236 Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304.

1237 OJ C 101, 27.4.2004, p.81.

fuel and security surcharges across the EEA and Switzerland as well as coordinated behaviour in respect of the commission to be paid to third parties on the surcharges had their object of restricting competition (see Section 5.3.3) between the carriers in respect of routes within the EEA, between the Contracting Parties to the Swiss Agreement and also between the EEA and third countries. Based on the case law, such concerted practices are capable in themselves of affecting trade between Member States.[1238]

(1024) Furthermore, the concerted practices described were capable of having an effect on the trade in goods between Member States, in so far as the transport prices fixed by them represented a proportion of the end selling price of the goods transported. Airfreight services form a significant cost element of the goods transported that has an impact on their sale.[1239]

(1025) Airfreight services between EEA airports and third countries frequently involve transport via "hubs" operated by carriers in different EEA countries since many airports in the EEA are not well served by flights carrying freight to or from third countries, and even less served by the carrier that is providing the service from the third country. Consequently restrictions of competition among the carriers offering airfreight services to or from third countries were liable to affect the pattern of airfreight services within the EEA between airports of origin or destination in the EEA and intermediate freight hubs established by the carriers in various EEA countries.

(1026) Finally, the Commission notes that Regulation (EC) No 411/2004 gave competence to the Commission to impose fines for infringements of Article 101 of the TFEU on routes between the EU and third countries. Recital 3 of this regulation stipulates that anti-competitive practices in air transport between the EU and third countries may affect trade between Member States.

(1027) CX argued that inbound traffic to the EEA had no appreciable effect on trade between Member States, as the sale of airfreight services in the EEA was not affected by pricing coordination in Hong Kong. In particular it refers to Section 3.3 of the notice on the effect on trade and the criteria that if one or more parties are located outside the EU than the agreement or practice has to be either implemented inside the EU or produce effects inside the EU. The Commission does not accept CX's arguments, because, as explained in Section 5.3.7, airfreight services inbound to the EEA are in part performed in the EEA, are implemented in the EEA and are producing effects inside the EEA.

(1028) The Commission therefore considers that the single and continuous infringement by the airfreight service providers as described in this Decision may appreciably affect trade between Member States, between

1238 Case T-213/00 *CMA CGM and Others v Commission*, [2003] ECR II-913, paragraphs 219-220.

1239 Case T-395/94 *Atlantic Container Line AB and Others v Commission* (TAA judgment), [2002] ECR II-875, paragraph 82.

Contracting Parties to the EEA Agreement and between Contracting Parties to the Swiss Agreement.

5.3.8. The applicability of Article 101 of the TFEU and Article 53 of the EEA Agreement to inbound routes

(1029) CV, SK and SQ argue that Article 101 of the TFEU and Article 53 of the EEA Agreement do not apply to routes inbound to the EU /EEA. Referring to the judgment of the Court of Justice in Woodpulp[1240] they note that in order to be subject to Article 101 of the TFEU, agreements, decisions or concerted practices have to be implemented within the EU /EEA.

(1030) The parties state that based on the judgment of the General Court in Gencor[1241] the place of implementation is the place of the affected sales and in that regard the location of the customer is of importance.

(1031) The parties furthermore argue that in the case of air freight transportation services the place of implementation is the country of departure for the following reasons:

a) Customers that purchase air freight transport services from air cargo carriers are, in general, established within the country of departure;

b) All sales of these air freight transport services are made by local personnel or a local general sales agent within the country of departure;

c) Prices for air freight transport services are, in general, expressed in the currency of the country of departure;

d) Sales of air freight transport services, including surcharges are, in general, regulated by the authorities in the country of departure in accordance with the applicable ASAs.

(1032) Concerning the place of implementation with regard to the transport of goods, SK also quotes paragraph 201 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings[1242]: "Cases concerning the transport of goods are different as the customer, to whom those services are provided, does not travel, but the transport service is provided to the customer at its location. Those cases fall into the third category and the location of the customer is the relevant criterion for the allocation of the turnover."

(1033) The parties argue that concerning inbound routes the place of implementation is outside the EU /EEA. Consequently, Article 101 of the TFEU is not applicable.

1240 Joined cases C-89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström and others v. Commission* [1988] ECR 5193.

1241 Case T-102/96 *Gencor v Commission* [1999] ECR II-753, p. 87.

1242 OJ C 95 of 16.4.2008, p. 1.

(1034) The Commission rejects the arguments of the parties. Article 101 of the TFEU is applicable to anti-competitive practices in air transport between the EU airports and third countries in both directions. This is envisaged by recitals 2 and 3 of Regulation (EC) No 411/2004.

(1035) With respect to the extra-territorial application of Article 101 of the TFEU and Article 53 of the EEA Agreement these provisions are applicable to arrangements that are either implemented within the EU (implementation theory) or that have immediate, substantial and foreseeable effects within the EU (effects theory). As the Court of Justice stated in the Woodpulp case[1243], an infringement of Article 101 of the TFEU '*consists of conduct made up of two elements, the formation of the agreement, decision or concerted practice and the implementation thereof. If the applicability of the prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.'* In the Gencor case,[1244] the General Court held that as the effect in the EU of the examined merger was *'immediate, substantial and foreseeable'*, the Commission was competent to examine it, even if the merging parties had their registered office and main activities in a third country.

(1036) In the case of airfreight services from third countries to airports of destination within the EEA, Article 101 of the TFEU and Article 53 of the EEA Agreement are applicable because the service itself that is the subject of the price fixing infringement is to be performed and is indeed performed, in part, within the territory of the EEA. Moreover, many contacts by which the addressees coordinated surcharges and the non-payment of commission took place in the EEA[1245] or involved participants in the EEA.

(1037) Contrary to what SK states, the example given in the Consolidated Jurisdictional Notice, referred to in recital (1032) is not relevant here. The Notice relates to the geographic allocation of turnover of undertakings for the purpose of establishing whether the turnover thresholds of Article 1 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation)[1246] are met.

(1038) In addition, anticompetitive practices in third countries with regard to air freight transportation to the EU /EEA are liable to have immediate, substantial and foreseeable effects within the EU /EEA, as the increased

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1243 Joined cases C-89, 104, 114, 116, 117 and 125 to 129/85, *Ahlström and others v. Commission* [1988] ECR 5193

1244 Case T-102/96 *Gencor*[1999] ECR II-753, p. 87

1245 See for example recitals (113) (116) (117) (121) (176) (178) (180) (198) (199) (201) (204) (206) (214) (248) (249) (252) (253) (255) (257) (259) (260) (265) (267) (269) (291) (299) (304) (305) (306) (307) (308) (310) (324) (326) (327) (328) (329) (331) (340) (345) (346) (349) (352) (362) (371) (372) (375) (388) (389) (391) (394) (407) (408) (412) (422) (424) (425) (426) (427) (440) (441) (458) (459) (465) (468) (500) (503) (504) (507) (511) (513) (514) (534) (539) (541) (545)

1246 OJ L 24, 29.1.2004, p. 1

costs of air transport to the EEA, and consequently higher prices of imported goods, are by their very nature liable to have effects on consumers in the EEA. In this case the anticompetitive practices eliminating competition between carriers offering airfreight services from third countries to EEA airports were liable to have such effects also on the provision of airfreight services by other carriers within the EEA, between the different hub airports used by carriers from third countries in the EEA and airports of destination of those shipments in the EEA to which the carrier from the third country does not fly.

(1039) [*].

5.3.9. Application of Article 101(3) of the TFEU

(1040) The provisions of Article 101(1) of the TFEU may be declared inapplicable pursuant to Article 101(3) of the TFEU where an agreement or concerted practice contributes to improving the production or distribution of goods or services or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

(1041) Article 1(2) of Regulation (EC) 1/2003 provides that agreements and concerted practices caught by Article 101(1) of the TFEU which satisfy the conditions of Article 101(3) of the TFEU shall not be prohibited, no prior decision to that effect being required. Moreover, Article 2 of Regulation (EC) No 1/2003 stipulates that the undertaking claiming the benefit of Article 101(3) of the TFEU shall bear the burden of proving that the conditions of that paragraph are fulfilled.

(1042) Prevention, restriction or distortion of competition being the sole object of the price arrangements which are the subject of this decision, there is no indication that the agreements and concerted practices between the airfreight service providers entailed any efficiency benefits or otherwise promoted technical or economic progress. Hardcore cartels, like the one which is the subject of this decision, are, by definition, the most detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers.

(1043) In addition, other arrangements between competitors which may otherwise fall within Article 101(3) of the TFEU (for example in the context of code-sharing arrangements or alliances) cannot legitimise coordinated behaviour in respect of a wider single and continuous, complex pricing agreement/concerted practice.

(1044) Furthermore, Commission Regulation (EEC) No 1617/93 of 25 June 1993 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot

allocation at airports[1247] was amended by Regulation (EC) No 1523/96[1248] to the effect that consultations on cargo tariffs were removed from the Block Exemption. In any event, Regulation (EEC) No 1617/93 would not have been applicable to the arrangements described in this section given its requirement (amongst others) that consultations on cargo tariffs must be limited to conduct strictly necessary to facilitate interlining and must not exceed this lawful purpose.

(1045) The Commission has had regard to the fact that the parties were engaged in hard core cartel conduct. Furthermore, none of the addressees has made arguments to the standard required by Article 2 of Council Regulation (EC) No 1/2003. Accordingly, the conditions of Article 101(3) of the TFEU are not satisfied.

6. ADDRESSEES OF THE PRESENT DECISION

6.1. Principles

(1046) The subjects of the relevant rules of EU competition law are *undertakings*, a concept which is not identical with that of corporate legal personality for the purposes of commercial or fiscal national law. The undertaking that participated in the infringement is therefore not necessarily the same entity as the legal entity within the group of companies whose representatives actually took part in the cartel meetings. The term 'undertaking' is not defined in the TFEU. It may refer to any entity engaged in commercial activities. The case-law has confirmed that Article 101 of the TFEU is aimed at economic units that consist of a unitary organisation of personal, tangible and intangible elements that pursue a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision[1249].

(1047) Despite the fact that Article 101 of the TFEU is applicable to undertakings and that the concept of 'undertaking' has an economic meaning, only entities with legal personality can be liable for infringement of Article 101 of the TFEU [1250]. Measures enforcing EU competition rules must thus be addressed to a legal entity.

(1048) Accordingly, it is necessary to identify the undertaking that will be held accountable for the infringement of Article 101 of the TFEU by identifying one or more legal persons that represent the undertaking. According to case-law, 'Community competition law recognises that

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1247 OJ L155, 26.6.1993, p. 18.

1248 OJ L190, 31.7.1996, p. 11.

1249 See the judgement of the General Court in case T-11/89 *Shell International Chemical Company v. Commission* [1992] ECR II-757, paragraph 311. See also Case T-352/94 *Mo och Domsjö AB v. Commission* [1998] ECR II-1989, paragraphs 87-96.

1250 Although an 'undertaking' within the meaning of Article 81 is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal or natural personality to be the addressee of the measure. Case T-305/94 *PVC* [1999] ECR II-931, paragraph 978.

different companies belonging to the same *group form an economic unit and therefore an undertaking within the meaning of Articles 81 EC and 82 EC if the companies concerned do not determine independently their own conduct on the market*'[1251]. If a subsidiary does not determine its conduct on the market independently, the company that directed its market strategy forms a single economic entity with the subsidiary and may thus be held liable for an infringement on the grounds that it forms part of the same undertaking.

(1049) According to settled case-law of the Court of Justice of the European Union, the Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power[1252]. However, the parent company can rebut this presumption by producing evidence that '*the subsidiary does not, in essence, comply with the instructions which it issues and, as a consequence, acts autonomously on the market*'[1253]. This position was recently confirmed by the Court of Justice in its finding that 'it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume the parent company exercises a decisive influence over the commercial policy of the subsidiary. The Commission will be able to regard the parent company as jointly and severally liable for the payment of the fine on its subsidiary, unless the parent company, which has the burden of rebutting the presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market'[1254].

(1050) Where an infringement of Article 101 of the TFEU is found to have been committed, it is necessary to identify a natural or a legal person who was responsible for the operation of the undertaking at the time when the infringement was committed so that it can answer for it.

(1051) When an undertaking that has infringed Article 101 of the TFEU subsequently disposes of the assets which contributed to the activity related to the infringement, the undertaking continues to be answerable for the infringement if it has not ceased to exist.[1255] If the undertaking which has acquired the assets continues the infringement, liability should be apportioned between the seller and the acquirer of the assets, each undertaking being responsible for the period in which it participated in

1251 See the judgement of the General Court in Case T-203/01 *Michelin v Commission* [2003] ECR II-4371, at paragraph 290.

1252 Case T-112/05, *Akzo Nobel NV v. Commission* [2007] ECR II 5049, paragraph 62; Joined Cases T-71/03 etc. *Tokai Carbon and Others v Commission* [2005] ECR II-10, paragraph 60; Case T-354/94 *Stora Kopparbergs Bergslags v Commission* [1998] ECR II-2111, paragraph 80, upheld by Court of Justice in case C-286/98P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925, paragraphs 27, 28 and 29; and Court of Justice in Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 50.

1253 Case T-112/05, *Akzo Nobel NV v. Commission*, 12 December 2007, paragraph 62; Joined cases T-71/03 etc. *Tokai Carbon and Others v Commission* [2005] ECR II-10, paragraph 61.

1254 Case C-97/08 P *Akzo Nobel v Commission* (not yet reported), paragraph 61.

1255 Case T-6/89 *Enichem Anic v Commission (Polypropylene),* [1991] ECR II-1623; Case C-49/92P *Commission v Anic Partecipazioni*, [1999] ECR I-3125, paragraphs 47-49.

the cartel. However, if the legal person initially answerable for the infringement ceases to exist, being purely and simply taken over by another legal entity, that latter entity must be held answerable for the whole period of the infringement and thus liable for the activities of the entity that was taken over.[1256] The fact that the legal entity responsible for the operation of the undertaking had ceased to exist does not allow the undertaking itself to evade liability.[1257] Liability for a fine may thus pass to a successor where the corporate entity that committed the violation has ceased to exist in law.

(1052) Different conclusions may be reached, however, when a business is transferred from one company to another, in cases where transferor and transferee are linked by economic ties, that is to say, where they belong to the same undertaking. In such cases, liability for the transferor's past behaviour may pass to the transferee, regardless of whether the transferor remains a separate legal entity.[1258]

6.2. Application to this case

(1053) In application of the principles set out in recitals (1046)-(1052), and as explained in this Section in more detail, this Decision should be addressed not only to the legal entities whose direct involvement in the infringement emerges from the evidence presented in section 4, but also to the ultimate parent companies of those legal entities, which are presumed to have exercised decisive influence over the conduct of their subsidiaries and, therefore, which are presumed to be part of the same undertaking for the purposes of the application of Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement.

Air Canada

(1054) The evidence described in section 4 reveals that from 1 May 2004 until 14 February 2006, participation in the infringement took place via employees of Air Canada. Air Canada should be held liable for its direct participation in the infringement.

(1055) This decision should therefore be addressed to Air Canada.

Société Air France, Air France-KLM

(1056) From 7 December 1999 until 15 September 2004 participation in the infringement took place via employees of Société Air France. As

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1256 Case C-279/98 P *Cascades* v *Commission,* [2000] ECR I-9693, paragraphs 78-79: *'It falls, in principle, to the natural or legal person managing the undertaking in question when the infringement was committed to answer for that infringement, even if, when the Decision finding the infringement was adopted, another person had assumed responsibility for operating the undertaking ... Moreover, those companies were not purely and simply absorbed by the appellant but continued their activities as its subsidiaries. They must, therefore, answer themselves for their unlawful activity prior to their acquisition by the appellant, which cannot be held responsible for it'*.

1257 Case T-305/94 *PVC II,* [1999] ECR II-931, paragraph 953.

1258 Joined Cases C-204/00 P (and other), *Aalborg Portland A/S a.o. v Commission* [2004] ECR I, 267, paragraphs 354-360, as confirmed in Case T-43/02 *Jungbunzlauer AG v Commission*, [2006] ECR II, p. 3435, paragraphs 132-133.

explained in section 2.2, on 15 September 2004, Société Air France was transformed into a holding company (Air France-KLM) and the air transportation activities were transferred to its subsidiary 'Air France Compagnie Aerienne' that has since become 'Société Air France' Therefore, Air France-KLM and the present Société Air France are, respectively, the legal and economic successors of the former Société Air France as it existed prior to 15 September 2004. For that reason, both Air France-KLM and the present Société Air France should be held jointly liable for Air France's participation in the infringement during the period from 7 December 1999 until 15 September 2004.

(1057) From 15 September 2004 until 14 February 2006 participation in the infringement took place via employees of the present Société Air France.

(1058) However, during the same period, Air France-KLM owned 100% of the economic and voting rights in the present Société Air France.[1259]

(1059) In line with the case-law referred to in section 6.1, it is therefore presumed that, during that period, Air France-KLM exercised decisive influence over the present Société Air France. Air France-KLM has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over Société Air France. Consequently, Air France-KLM and the present Société Air France form part of the same undertaking that committed the infringement from 15 September 2004 until 14 February 2006 for the purposes of the application of Article 101 of the TFEU, Article of the 53 EEA Agreement, and Article 8 of the Swiss Agreement.

(1060) In addition to full ownership, there are further elements that demonstrate that, during that period, Air France-KLM exercised decisive influence over the present Société Air France or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to Air France-KLM).

(1061) For all the above reasons, this Decision should therefore be addressed to Société Air France and Air France-KLM which should be held jointly and severally liable for participation in the infringement from 7 December 1999 until 14 February 2006.

KLM N.V.

(1062) Throughout the period of infringement from 21 December 1999 until 14 February 2006, participation in the infringement took place via employees of KLM N.V. (KLM). KLM should be held liable for its direct participation in the infringement.

(1063) As explained in section 2.2., on 5 May 2004 Air France acquired control of KLM. [*]

[1259] See in the file [*].

(1064) For the reasons outlined in the confidential annex accessible only to Air France-KLM, the Commission considers that, as from 5 May 2004, Air France-KLM exercised decisive influence over KLM N.V.

(1065) For all the reasons cited in recitals (1062)-(1064), this Decision should be addressed to KLM for its direct participation in the infringement during the period from 21 December 1999 to 14 February 2006. For the period between 5 May 2004 and 14 February 2006, Air France-KLM should be held jointly and severally liable with KLM, for the latter's direct participation in the infringement.

British Airways Plc

(1066) The evidence described in Section 4 shows that from 5 January 2000 until 14 February 2006, participation in the infringement took place via employees of British World Cargo, a division of British Airways Plc. British Airways Plc should be held liable for the participation of its division in the infringement.

(1067) This Decision should therefore be addressed to British Airways Plc.

Cargolux Airlines International S.A.

(1068) The evidence described in Section 4 shows that from 22 January 2001 until 14 February 2006, participation in the infringement took place via employees of Cargolux Airlines International S.A. Cargolux Airlines International S.A. should therefore be held liable for its direct participation in the infringement.

(1069) This Decision should therefore be addressed to Cargolux Airlines International S.A..

Cathay Pacific Airways Limited

(1070) The evidence described in Section 4 shows that from 1 May 2004 until 14 February 2006, participation in the infringement took place via employees of Cathay Pacific Cargo, a division of Cathay Pacific Airways Limited. Cathay Pacific Airways Limited should therefore be held liable for the direct participation of its division in the infringement.

(1071) This Decision should therefore be addressed to Cathay Pacific Airways Limited

Japan Airlines International Co., Ltd., Japan Airlines Corporation

(1072) Throughout the period of infringement from 1 May 2004 until 14 February 2006, participation in the infringement took place via employees of Japan Airlines International Co., Ltd. (JL). JL should therefore be held liable for its direct participation in the infringement.

(1073) From 2 October 2002, when Japan Airlines Corporation (JAC) was founded[1260] by means of share transfer from JL (and Japan Air System

[1260] JAC was founded under the name Japan Airlines System Corporation but was renamed as JAC on June 2004.

Co. Ltd), until 14 February 2006, JAC owned 100% of the share capital in JL.

(1074) In line with the case-law referred to in Section 6.1, it is presumed that JAC exercised decisive influence over JL for that period. JAC has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over JL. Consequently, JL and JAC form part of the same undertaking that committed the infringement.

(1075) In addition to full ownership, there are further elements that demonstrate that JAC exercised decisive influence over JL or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to Japan Airlines International Co., Ltd. and Japan Airlines Corporation).

(1076) Accordingly, JAC should be held jointly and severally liable with JL from 1 May 2004 until 14 February 2006.

(1077) This Decision should therefore be addressed to Japan Airlines International Co., Ltd. and Japan Airlines Corporation.

LAN Cargo S.A., LAN Airlines S.A.

(1078) Throughout the period of infringement from 1 May 2004 until 14 February 2006, participation in the infringement took place via employees of LAN Cargo S.A. (LA). LA should therefore be held liable for its direct participation in the infringement.

(1079) Throughout the period from 1 May 2004 until 14 February 2006 LAN Airlines S.A. owned 99.9% of LAN Cargo S.A.

(1080) In line with the case-law referred to in Section 6.1, a presumption therefore exists that LAN Airlines S.A. exercised decisive influence over LAN Cargo S.A. LAN Airlines S.A. has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over LAN Cargo S.A. Consequently, LAN Cargo S.A. and LAN Airlines S.A. form part of the same undertaking that committed the infringement.

(1081) In addition to the almost full ownership, there are further elements that demonstrate that LAN Airlines S.A. exercised decisive influence over LAN Cargo S.A. or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to LAN Cargo S.A and LAN Airlines S.A.).

(1082) Accordingly LAN Airlines S.A. should be held jointly and severally liable with LAN Cargo S.A. for the whole infringement period.

(1083) This Decision should therefore be addressed to LAN Cargo S.A. and LAN Airlines S.A.

Lufthansa Cargo AG, Deutsche Lufthansa AG

(1084) Throughout the period of infringement from 14 December 1999 until 7 December 2005, participation in the collusive contacts took place via

different employees of Lufthansa Cargo AG Accordingly, Lufthansa Cargo AG should be held liable for its direct participation in the infringement.

(1085) Throughout the period of the infringement Deutsche Lufthansa AG owned 100% of the voting rights in Lufthansa Cargo AG.

(1086) In accordance with the case-law referred to in section 6.1 there is a presumption that Deutsche Lufthansa AG exercised decisive influence over Lufthansa Cargo AG. Deutsche Lufthansa AG has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over Lufthansa Cargo AG. Consequently, Lufthansa Cargo AG and Deutsche Lufthansa AG form part of the undertaking that committed the infringement.

(1087) In addition to the full ownership, further elements demonstrate that Deutsche Lufthansa AG exercised decisive influence over Lufthansa Cargo's conduct on the market or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to Lufthansa Cargo AG, Deutsche Lufthansa AG and Swiss).

(1088) Moreover, Lufthansa Cargo AG includes the label 'Lufthansa' in its business name and is a consolidated company of the Lufthansa Group. Furthermore, [*][1261] .

(1089) Therefore, Deutsche Lufthansa AG should be held jointly and severally liable for the participation of its 100% subsidiary Lufthansa Cargo AG for the whole period of the infringement. This Decision should therefore be addressed to Lufthansa Cargo AG and Deutsche Lufthansa AG.

SWISS International Air Lines AG

(1090) The evidence described in Section 4 shows that from 1 June 2002 until 7 December 2005, the infringement was carried on by SWISS (LX), through its division SwissWorldCargo.

(1091) As explained in Section 2.2, Deutsche Lufthansa AG announced the takeover and integration of SWISS on 22 March 2005, which took place in several stages.

(1092) [*] After securing the necessary traffic rights, Lufthansa acquired 100% of Swiss through AirTrust on 1 July 2007 and thus it fully integrated Swiss into the Lufthansa Group.

(1093) For the reasons explained in the confidential annex accessible only to Lufthansa Cargo AG, Deutsche Lufthansa AG and Swiss, the Commission considers that Deutsche Lufthansa AG exercised decisive influence over SWISS from 27 July 2005.

(1094) Therefore Deutsche Lufthansa AG should be held jointly and severally liable with SWISS from 27 July 2005 to 7 December 2005. This decision

[1261] [*]

should therefore be addressed to SWISS International Air Lines AG and Deutsche Lufthansa AG.

Martinair Holland N.V.

(1095) The evidence described in Section 4 shows that from 22 January 2001 until 14 February 2006, participation in the infringement took place via employees of Martinair Holland N.V. Martinair should therefore be held liable for its direct participation in the infringement.

(1096) This Decision should therefore be addressed to Martinair Holland N.V.

Qantas Airways Limited

(1097) The evidence described in Section 4 shows that from 1 May 2004 until 14 February 2006, participation in the infringement took place via employees of Qantas Freight, a division of Qantas Airways Limited. Qantas Airways Limited should be held liable for the direct participation of its division in the infringement.

(1098) This Decision should therefore be addressed to Qantas Airways Limited.

SAS Cargo Group A/S, SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden, SAS AB

(1099) The evidence described in Section 4 shows that from 13 December 1999 until 31 May 2001, participation in the infringement took place via employees of SAS Cargo which, during this period, was simply a business unit of SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden (SAS Consortium). SAS Consortium should therefore be held liable for its direct participation in the infringement during that period.

(1100) From 1 June 2001 until 14 February 2006 participation in the infringement took place via employees of SAS Cargo Group A/S, which was incorporated as a separate legal entity on 1 June 2001. SAS Cargo Group A/S should therefore be held liable for its direct participation in the infringement for that period.

(1101) From 1 June 2001 until 28 December 2003, SAS Consortium owned 100% of the capital of SAS Cargo Group A/S via Nordair A/S. In accordance with the case-law referred to in Section 6.1, there is a presumption that SAS Consortium, exercised decisive influence over SAS Cargo Group A/S through Nordair A/S during that period.

(1102) In addition to the full ownership, there are further elements that demonstrate that SAS Consortium exercised decisive influence over SAS Cargo Group A/S via Nordair A/S or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to SAS Cargo Group A/S, SAS Consortium, SAS AB.)

(1103) SAS Consortium argued that it did not exercise its decisive influence over SAS Cargo Group A/S between 1 June 2001 and 28 December 2003 even though it held 100% of SAS Cargo Group A/S during that period. SAS Consortium has not denied the links with SAS Cargo Group A/S described in this section but has simply stated that although it was capable of exercising decisive influence over SAS Cargo Group A/S it did not do so. The arguments put forward by SAS Consortium are contradictory: on the one hand they state that SAS Cargo Group A/S is a large and independent undertaking with an annual turnover of EUR several hundred million and, on the other, they state that SAS Cargo Group A/S could only make independent financial decisions of up to [*]. It is concluded that the presumption that full ownership gives rise to the exercise of decisive influence has not been rebutted in this case as SAS Consortium did not support its claims by any credible evidence.

(1104) Consequently, during the period from 1 June 2001 to 28 December 2003, SAS Consortium and SAS Cargo Group A/S formed part of a single undertaking that committed the infringement.

(1105) Accordingly, SAS Consortium should be held jointly and severally liable for the infringement with SAS Cargo Group A/S for the period from 1 June 2001 to 28 December 2003.

(1106) From 29 December 2003 until 14 February 2006, SAS AB, owned 100% of the capital of SAS Cargo Group A/S, via Nordair A/S. In accordance with the case-law referred to in Section 6.1, there is a presumption that, during that period, SAS AB exercised decisive influence over SAS Cargo Group A/S, via Nordair A/S.

(1107) In addition to that presumption, there are further elements that demonstrate that SAS AB exercised decisive influence over SAS Cargo Group A/S, via Nordair A/S, or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to SAS Cargo Group A/S, SAS Consortium, SAS AB)

(1108) SAS AB argues that it did not exercise its decisive influence over SAS Cargo Group A/S between 17 August 2001 and 14 February 2006 even though it held 100% of SAS Cargo Group A/S during that period. SAS AB has not denied the links with SAS Cargo Group A/S described in this Section but has simply stated that although it was capable of exercising decisive influence over SAS Cargo Group A/S it did not do so. The arguments put forward by SAS AB are contradictory: on the one hand they state that SAS Cargo Group A/S is a large and independent undertaking with an annual turnover of EUR several hundred million and, on the other, they state that SAS Cargo Group A/S could only make independent financial decisions of up to [*]. It is concluded that the presumption that full ownership gives rise to the exercise of decisive influence has not been rebutted in this case as the SAS AB did not support its statements by any credible facts.

(1109) Consequently, from 29 December 2003 until 14 February 2006 SAS AB and SAS Cargo Group A/S formed part of a single undertaking that committed the infringement.

(1110) Accordingly, SAS AB should be held jointly and severally liable for the infringement with SAS Cargo Group A/S for the period from 29 December 2003 to 14 February 2006.

(1111) As described in Section 2.2, on 17 August 2001 SAS AB acquired 97.8%, 99.1% and 99.9% of the three parent companies together owning 100% of SAS Consortium. From that date onwards there is a presumption that SAS AB exercised decisive influence over SAS Consortium and, indirectly, over SAS Cargo Group A/S. SAS AB has not submitted sufficient evidence to rebut the presumption that it exercised decisive influence over SAS Consortium and, indirectly, over SAS Cargo Group A/S.

(1112) In addition, there are further elements that demonstrate that, from 17 August 2001, SAS AB exercised decisive influence over SAS Consortium and SAS Cargo Group A/S or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to SAS Cargo Group A/S, SAS Consortium, SAS AB).

(1113) Consequently, during that period, SAS AB, SAS Consortium and SAS Cargo Group A/S formed part of a single undertaking that committed the infringement.

(1114) Accordingly, SAS AB should be held jointly and severally liable for the infringement with SAS Consortium and SAS Cargo Group A/S for the period from 17 August 2001 until 28 December 2003, and with SAS Cargo Group A/S from 29 December 2003 to 14 February 2006.

(1115) This Decision should therefore be addressed to SAS Cargo Group A/S, SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden and SAS AB.

Singapore Airlines Cargo Pte Ltd., Singapore Airlines Limited

(1116) From 1 May 2004 until 14 February 2006, participation in the infringement took place via employees of Singapore Airlines Cargo Pte Ltd.

(1117) Throughout the period from 1 May 2004 to 14 February 2006 Singapore Airlines Cargo Pte Ltd was a wholly owned subsidiary of Singapore Airlines Limited. In accordance with the case-law referred to in Section 6.1, there is a presumption that Singapore Airlines Limited exercised decisive influence over Singapore Airlines Cargo Pte Ltd.

(1118) In addition to that presumption, there are further elements that demonstrate that Singapore Airlines Limited exercised decisive influence over Singapore Airlines Cargo Pte Ltd or, at least, that corroborate the presumption to that effect (see confidential annex accessible only to Singapore Airlines Cargo Pte Ltd, Singapore Airlines

Limited). Consequently, Singapore Airlines Cargo Pte Ltd and Singapore Airlines Limited formed part of a single undertaking that committed the infringement.

(1119) Singapore Airlines contests the imputation of liability for the actions of Singapore Airlines Cargo Pte Ltd. Singapore Airlines Limited argues that Singapore Airlines Cargo Pte Ltd is a separate business entity and that not all of the members of the managing Board of Directors of Singapore Airlines Cargo Pte Ltd are employees of Singapore Airlines. The contractual relationship between the two entities is on an 'arms-length' basis and where the employees of Singapore Airlines Limited work for Singapore Airlines Cargo Pte Ltd on cargo related matters, they report to and are managed solely by Singapore Airlines Cargo Pte Ltd.

(1120) The arguments of Singapore Airlines concerning the independence of Singapore Airlines Cargo Pte Ltd are insufficient to rebut the presumption that the 100% ownership gives rise to the exercise of decisive influence, in this case. Arguments such as the fact that the management of Singapore Airlines Cargo Pte Ltd comprises some employees of Singapore Airlines Limited actually demonstrate the exercise of decisive influence, rather than the reverse.

(1121) Accordingly, Singapore Airlines Limited should be held jointly and severally liable for the infringement with Singapore Airlines Cargo Pte Ltd for the period from 1 May 2004 to 14 February 2006.

(1122) This Decision should therefore be addressed to Singapore Airlines Cargo Pte Ltd and Singapore Airlines Limited.

7. DURATION OF THE INFRINGEMENT

7.1. Introduction

(1123) The anti-competitive arrangements described in Section 4 started [*] and lasted until 14 February 2006. For Deutsche Lufthansa AG and its controlled subsidiaries Lufthansa Cargo AG and SWISS International Air Lines AG the infringement ended on the date of the immunity application, namely 7 December 2005. In accordance with its powers as described in Section 5.2, the Commission considers that those arrangements infringe Article 101 of the TFEU, Article 53 of the EEA Agreement and Article 8 of the Swiss Agreement as follows:

Article 101 of the TFEU from 7 December 1999 to 14 February 2006 as regards air transport between airports in the EU;

Article 101 of the TFEU from 1 May 2004 to 14 February 2006 as regards air transport between airports within the EU and airports in third countries[1262];

[1262] Third countries here do not include EEA **C**ontracting Parties and Switzerland.

Article 53 of the EEA Agreement from 7 December 1999 to 14 February 2006 as regards air transport between airports within the EEA;

Article 53 of the EEA Agreement from 19 May 2005 to 14 February 2006 as regards air transport between airports in countries that are Contracting Parties to the EEA Agreement but not Member States and third countries.

Article 8 of the Swiss Agreement from 1 June 2002 to 14 February 2006 as regards routes between airports within the EU and airports in Switzerland;

(1124) For the purposes of establishing the duration of the infringement to be taken into account for each of the undertakings involved, the Commission has taken the first anti-competitive contact as the starting date. [*] There is no evidence on the file that the collusive arrangements ceased prior to the inspections (except in the case of LH and LX). Similarly, there is no evidence that the collusive arrangements continued after the first day of the inspections.

(1125) For the purposes of determining the duration of the infringement with respect to routes within the EEA, the first anti-competitive contacts are considered to be as follows:

Air France-KLM and Société Air France.
A conversation on 7 December 1999 between AF and Japan Airlines regarding FSC, reported in an internal JL e-mail of the same date (see recital **(125)**)

KLM.
Internal Swiss emails of 21 December 1999 reporting FSC coordination involving KLM (see recitals **(129)(130)**)

British Airways.
An internal Martinair memorandum reporting on a meeting on 22 January 2001 where BA discussed FSC (see recital [*])

Cargolux.
An internal Martinair memorandum reporting on a meeting on 22 January 2001 where Cargolux discussed FSC (see recital [*])

Lufthansa.
An e-mail of 13 December 1999 from SK and a reply from Lufthansa of 14 December 1999 regarding FSC (see recital [*] [*])

SWISS
An internal LX email on 2 April 2002 asking LX employees whether they had any news from their 'local home carriers' with regard to the FSC (see recital (215))

Martinair.
An internal Martinair memorandum reporting on a meeting with competitors on 22 January 2001 where FSC was discussed (see recital [*])

SAS.
[*]

(1126) The starting date of the infringement for the remaining carriers is as follows :

Air Canada
1 May 2004 ([*])

Cathay Pacific
1 May 2004 (see recitals **(744)**- [*]) [*]

Japan Airlines
1 May 2004 (see recitals **(749)**- [*] [*])

LAN Chile
1 May 2004 (see recitals **(755)**-**(756)**)

Singapore Airlines
1 May 2004 (see recitals **(796)**- [*])

Qantas
1 May 2004 (see recitals **(779)**-**(781)**)

7.2. Arguments of the parties concerning duration

7.2.1. AF

(1127) AF argues that the first anti-competitive contacts between AF and its competitors took place in January 2001. The evidence before that date, namely the internal [*] emails of 7 and 20 December 1999 reporting exchanges of information between AF and [*], do not prove the coordinated introduction of the FSC. AF furthermore argues that the Commission should have due regard to the "special circumstances" on the market in 1999-2000 before the revocation of the IATA mechanism that was characterised by a "legal uncertainty".

(1128) Concerning the termination of the infringement AF argues that the Commission should consider the last clearly established anti-competitive contact as the date of termination of the infringement.

(1129) The argument concerning the starting date of the infringement cannot be accepted as the emails referred to in recitals **(125)** and **(126)** are contemporaneous written evidence that make clear reference to direct

talks between competitors concerning the introduction of the FSC. Furthermore, the argument that AF made an individual decision when introducing the FSC does not change the fact that such a decision was discussed with its competitors during the relevant decision making procedure. As for the "special circumstances" the Commission notes that such circumstances did not legitimise the pricing contacts referred to in this recital.

(1130) Furthermore, as explained in Section 4.3.2, the evidence in the Commission's file shows that the starting date of the infringement can not be linked to a single common event for all participants but, rather that the infringement developed over time through a series of contacts. Those contacts are part of the body of evidence that as a whole proves the infringement adequately for the whole period indicated in this Section.

(1131) The Commission does not accept the argumentation concerning the termination of the infringement either and considers that the infringement was terminated only on the date of the inspections. As the Court of Justice ruled in *Marlines SA v Commission*, a cartel participant can only avoid infringing Article 101 of the TFEU by *'openly and unequivocally distancing itself from the cartel'*[1263]. AF did not distance itself from the cartel in such a manner, thus its arguments concerning the termination of the infringement cannot be accepted.

(1132) Furthermore, AF staff were involved in contacts concerning the FSC level in February 2006 in Switzerland.

7.2.2. KL

(1133) As regards the duration of the infringement KL states that the first documentary evidence for coordination at headquarters' level are dated sometime after '9/11' and the contacts before 11 September 2001 did not seem to have involved an agreement in the sense of Article 101 of the TFEU.

(1134) The reasoning that the contacts concerning FSC at headquarters' level started around 11 September 2001 does not change the fact that KL staff at least at local level participated in the infringement from an earlier date. The document referred to in recital **(129)** provides evidence that KL revealed its intention to follow AF in introducing a fuel surcharge and knew beforehand that AF planned to do so.

7.2.3. BA

(1135) BA submits that its participation in the infringement only started around October 2001, which coincides with initial discussions with LH.

(1136) It is true that the contacts in 2000 may not be sufficient to determine the starting point of the infringement. However, it is clear that BA

[1263] Case T-56/99, *Marlines SA v Commission* [2003] ECR II-5225, para. 56.

participated in a coffee round on 22 January 2001 at which surcharges were discussed[1264]. Accordingly, it participated in the infringement at least from 22 January 2001.

7.2.4. CV

(1137) CV claims there is limited evidence [*] against CV prior to 2003 and in 2006. The concept of single and continuous infringement is interpreted too broadly in respect of CV and the Commission should properly focus on the infringement by CV between 2003 and 2005 with the FSC being the main factual link between the events.

(1138) In respect of the particular arguments advanced by CV, the assertion that there is insufficient evidence to maintain that there was a single and continuous infringement including the period from 2001 to 2002 and 2006 must be rejected. [*]

(1139) [*]

(1140) [*][1265]. [*][1266]. [*]

(1141) [*]

(1142) There is also evidence of bilateral contacts with other carriers during the period between 2001 and 2003 on the application of surcharges [*][1267].

(1143) [*][1268].

(1144) [*][1269] [*][1270]

(1145) Contacts with other carriers continued in 2006 for the short period until the end of the infringement in mid February 2006 (for example, discussions with MP[1271]).

(1146) Although the evidence described in this subsection demonstrates that contacts took place in the period from 2001 to 2003 and in 2006, the Court of Justice of the European Union has, in any event, consistently held that gaps in a cartel member's contacts with the rest of the cartel do not prevent the Commission from concluding that an undertaking participated in the cartel for that period[1272].

1264 See recital [*]
1265 See recital [*]
1266 [*].
1267 See recital [*]
1268 See recital [*]
1269 [*].
1270 See recital [*]
1271 See recital (558)
1272 Case T-62/02 *Union Pigments AS v Commission* [2005] ECR II-5057, paragraphs 37, 38 and 39.

7.3. Duration by each undertaking

(1147) The duration of the infringement to be taken into account for each undertaking involved is therefore as follows:

Air Canada
from 1 May 2004 until 14 February 2006
Air France-KLM and Société Air France
from 7 December 1999 until 14 February 2006
KLM
from 21 December 1999 until 14 February 2006
British Airways
from 22 January 2001 until 14 February 2006
Cargolux
from 22 January 2001 until 14 February 2006
Cathay Pacific
from 1 May 2004 until 14 February 2006
Japan Airlines
from 1 May 2004 until 14 February 2006
LAN Chile
from 1 May 2004 until 14 February 2006
Lufthansa
from 14 December 1999 until 7 December 2005
SWISS
from 2 April 2002 until 7 December 2005
Martinair
from 22 January 2001 until 14 February 2006
Qantas
from 1 May 2004 until 14 February 2006
SAS
from 13 December 1999 until 14 February 2006
Singapore Airlines
from 1 May 2004 until 14 February 2006

8. REMEDIES AND FINES

8.1. Article 7 of Regulation (EC) No 1/2003

(1148) Where the Commission finds that there is an infringement of Article 101 of the TFEU, Article 53 of the EEA Agreement or Article 8 of the Swiss Agreement, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.

(1149) Given the manner in which the cartel arrangements were carried out, it is not possible to declare with absolute certainty that the infringement has ceased. It is therefore appropriate to require the addressees of this Decision to immediately bring the infringement to an end, to the extent they have not already done so, and henceforth to refrain from any

agreement, concerted practice or decision of an association which has the same or a similar object or effect.

8.2. Article 23(2) of Regulation (EC) No 1/2003

(1150) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 101 of the TFEU. For each undertaking participating in the infringement, the fine must not exceed 10% of its total turnover in the preceding business year. Article 12(2) of Regulation No 3975/87[1273] contained a similar rule.

(1151) Prior to 1 May 2004, when Regulation (EC) No 1/2003 became applicable, the Commission was competent to impose fines for infringements of Article 101 of the TFEU on the basis of Article 12(2) of Regulation (EEC) No 3975/87 only in relation to air transport between EU airports. From 1 May 2004 the Commission also became competent to impose fines for infringements of Article 101 of the TFEU in relation to air transport between EU airports and airports in third countries.

(1152) On the basis of Protocol 21 to the EEA Agreement, the Commission has been competent to impose fines for a violation of Article 53 EEA Agreement with respect to air transport between airports within the EEA from the beginning of the infringement and also in relation to air transport between airports of Contracting Parties to the EEA Agreement that are not Member States and airports in third countries in accordance with Regulation (EC) No 1/2003 since 19 May 2005 based on the Decision of the EEA Joint Committee No 130/2004 and Decision of the EEA Joint Committee No 40/2005. Before that date the Commission was competent to impose fines in relation to air transport between EEA airports in accordance with Regulation (EEC) No 3975/87.

(1153) The Commission is competent to impose fines for a breach of Article 8 of the Swiss Agreement, with respect to air transport on routes between airports of the Contracting Parties, from its entry into force on 1 June 2002. This competence is derived from Regulation (EC) No 1/2003 as incorporated in Part 2 of the Annex to the Swiss Agreement.

(1154) Prior to the incorporation of Regulation (EC) No 1/2003 in the annex to the Swiss agreement, the competence of the Commission to impose fines with respect to air transport between airports of the Contracting Parties was based on Article 12(2) of Regulation (EEC) No 3975/87, as then incorporated in Annex 2 of the Swiss Agreement. The provisions with regard to the power of the Commission to impose fines are similar in the two Regulations.

[1273] Under Article 5 of Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements of implementing the Agreement on the European Economic Area 'the Community rules giving effect to the principles set out in Articles 85 and 86 of the Treaty […] shall apply mutatis mutandis'. (OJ L 305/6 of 30 November 1994).

(1155) In this case, the Commission considers that, based on the facts and the assessment set out in this Decision, the infringement was committed intentionally or negligently. The infringement described in Section 4 consists in agreements and/or concerted practices on prices.

(1156) In fixing the amount of any fine, pursuant to Article 23(3) of Regulation (EC) No 1/2003 and Article 12(2) of Regulation (EEC) No 3975/87, regard must be had both to the gravity and to the duration of the infringement. In setting the fines to be imposed, the Commission will refer to the principles laid down in the Guidelines on fines.

(1157) In assessing the fine to be imposed on each undertaking, the Commission will also take account of the respective duration of its participation in the infringement.

(1158) In relation to each undertaking, the Commission will reflect in the fine imposed for each infringement any aggravating or mitigating circumstances, such as those set out in the non-exhaustive lists in points 28 and 29 of the Guidelines on fines.

(1159) The Commission sets fines at a level sufficient to ensure deterrence.

8.3. The basic amount of the fines

8.3.1. Determination of the value of sales

(1160) The basic amount of the fine to be imposed on the undertakings concerned should be set by reference to the value of sales.

(1161) According to the Guidelines on fines, the basic amount of the fine consists of a proportion of up to 30% of the undertaking's relevant sales, depending on the degree of gravity of the infringement, multiplied by the number of years of its participation in the infringement, and an additional amount of between 15% and 25% of the value of those sales.

(1162) In determining the basic amount of the fine to be imposed, the Guidelines on fines provide that the Commission starts from the value of the undertaking's sales of the goods or services to which the infringement directly or indirectly relates in the relevant geographic area within the EEA.

(1163) The infringement in this case relates to airfreight services provided between airports in the territory of the EEA, between airports in the Member States and Switzerland, and between airports in the EEA and third countries. Thus, the Commission has taken into account, at this first stage, the sales related to those services.

(1164) The Guidelines on fines provide that the Commission will normally take the sales made by the undertaking during the last full business year of its participation in the infringement.

(1165) In this case the last full business year before the end of the infringement was 2005.[1274]

(1166) Certain carriers have argued that the Commission should only take into account the surcharge revenues as the relevant value of sales for calculating the basic amount. However, this argument runs counter to the Commission's practice of determining the fines as set out in the Guidelines on fines. When determining the basic amount of the fine to be imposed, the Commission takes the value of the undertaking's sales of goods or services to which the infringement *directly* or *indirectly* relates in the relevant geographic area. It is the entire amount of the relevant sales that is taken into account without splitting this into component elements. The General Court has also confirmed the Commission's practice[1275]. Equally arguments that surcharges should be the basis of the calculation as there was no impact on the overall price as increases in surcharges were compensated by decreases in other component elements of the price (waterbed effect) are rejected. Such arguments also run counter to Commission practice and go to the issue of a lack of effect when the Commission's case is based purely on a restriction by object.

(1167) Several carriers have argued that only the turnover originating from the services provided on routes outbound from the EEA should be taken into account for the calculation of the fine. Carriers argue that sales on inbound routes are made predominantly outside the EEA and as such should not be taken into account as EEA sales.

(1168) [*]

(1169) AF also argues that the Commission should only take into account turnover from routes affected by the practices, that not all of the routes were affected for the entire period; and that in application of the principle of proportionality, the Commission should only take into account the turnover from its standard "product".

(1170) Those arguments cannot be accepted. It should be recognised that the application of the concept of EEA sales in the present case should take into account the specificities of transport services provided between the EEA and third countries. It is appropriate to take into account, in principle, both inbound and outbound services when determining the value of sales, since the infringement established by this Decision relates to both services. Moreover, the anti-competitive arrangements are likely to have a negative impact on the internal market in respect of both inbound and outbound services. Nevertheless, given that the services are performed in part outside the EEA and that part of the harm resulting from the cartel is likely to fall outside the EEA, it is appropriate to apply

[1274] Except for LH and LX; their infringement lasted until 7 December 2005. The Commission decided not to calculate their fines on the basis of 2004 figures , but on the basis of the 2005 figures, in view of the particular circumstances of this case, including in particular that the Commission gained the power to apply Article 101 TFEU with respect to air transport between EU airports and airports in third countries only on 1 May 2004.

[1275] Case T-127/04, *KME Germany and others v Commission*, [2009] ECR II-1167, paragraph 91.

in this case a specific reduction to the basic amount calculated on the basis of inbound and outbound sales on EEA - third country routes, except routes between the EU and Switzerland (see recital (1217)).

(1171) KL and MP stated that taking into account inbound turnover would run contrary to the precedents applied in merger control and would give rise to issues pursuant to the principles of ne bis in idem and proportionality, as other jurisdictions are also imposing fines in respect of the same conduct.

(1172) The definition of turnover under Regulation (EC) No 139/2004 is not determinant or relevant for the concept of 'sales directly or indirectly related to the infringement' within the meaning of the Guidelines on fines and is accordingly not applicable to the issue of the inclusion of inbound turnover in this case. Furthermore, the principle *of ne bis in idem* is not relevant in this case. It is settled case law[1276] that that principle does not apply in the EU to situations in which the legal systems and competition authorities of third countries bring proceedings under their legislation. The legal interests protected are not identical, which precludes application of the principle[1277].

(1173) In conclusion, the value of sales is determined by adding together the 2005 inbound and outbound turnover for each of the geographic services, namely services between airports in the EEA, between airports in countries within the EU and outside the EEA (except Switzerland), between airports in the EU and Switzerland, and between airports in the EEA Contracting Parties not being Member States and countries outside the EEA as set out in Tables 1-4 below. The Commission has also taken into account the accession of new Member States to the EU in 2004. For the assessment of the fine for the infringement on intra EEA routes before 1 May 2004, only the turnover within the then 18 Contracting Parties to the EEA agreement is taken into account. From 1 May 2004 until the end of the infringement the turnover for services within the then 28 Contracting Parties to the EEA agreement is taken into account. For the calculation of the fine for the infringement on routes between the EU and Switzerland for the period until 1 May 2004 only the turnover on routes between the then 15 Member States and Switzerland is taken into account. After 1 May 2004 the turnover on routes between the then 25 Member States and Switzerland is taken into account.

8.3.2. Gravity

(1174) As a general rule, the proportion of the value of sales taken into account will be set at a level of up to 30%. In order to decide whether the proportion of the value of sales to be considered in a given case should be at the lower or at the higher end of that scale, the Commission has regard to a number of factors, such as the nature of the infringement, the combined market share of all the undertakings concerned, the

[1276] Case C-289/04 P *Showa Denko v Commission* [2006] ECR I-5859, paragraph 56

[1277] Joined Cases C-204, 205,211, 213, 217, and 219/00 P *Aalborg Portland a.o. v Commission*, [2004] ECR I-123, paragraph 338

geographic scope of the infringement and whether or not the infringement has been implemented.

(a) Nature

(1175) Horizontal practices relating to prices are by their very nature among the most harmful restrictions of competition, as they distort competition on a key parameter of competition.[1278] The agreements and/or concerted practices to which this Decision relates concerned the fixing of various elements of the price. The cartel arrangements permeated the whole industry for airfreight. Senior management in the head offices of a number of airlines conceived, directed and encouraged them. They operated to the benefit of the participating airfreight service providers and to the detriment of their customers and ultimately the general public.

(1176) The fact that the arrangements did not cover the entire price for the services in question is immaterial.

(1177) AF argued that the infringement is less serious than it was alleged in the Statement of Objections for the reasons set out in recitals (1178) to (1180):

(1178) The alleged practices do not constitute a well structured, coherent and controlled system but are in fact heterogenic, dispersed and multiform.

(1179) The 'comfort' contacts with competitors concerning the changes in the FSC level had as their object the coordination of the application date and not the level of the FSC itself.

(1180) The exchange of public information is not anti-competitive and should not be taken into consideration when assessing the gravity of the infringement.

(1181) CV submits that its activities [*] were considerably less frequent and less serious than those of other carriers. CV states that it did not attend a number of meetings and was involved only in a very limited number of incidents which might be qualified as [*], which took place between 2003 and 2005 and occurred mostly at local level.

(1182) AC submits that, in determining the amount of the fine to be imposed, the Commission should conclude, by reference to all the relevant facts, that the infringement or infringements should be regarded as “serious” but not “very serious” and that the Commission’s starting figure should be adjusted downwards to reflect Air Canada’s peripheral and often passive role in the infringement or infringements.

(1183) The Commission does not allege that all the contacts referred to in Section 4 were centrally controlled and that each of the contacts is

[1278] See for example, Joined Cases T-202/98 etc. *Tate & Lyle v Commission* [2001] ECR II-2035, paragraph 103 and 135 and Case T-213/00 *CMA CGM and Others v Commission*, [2003] ECR II-913, paragraph 100, 261 and 262; Case T-395/94 *Atlantic Container Line AB and Others v Commission* (TAA judgment), [2002] ECR II-875, paragraph 164.

sufficient to prove an infringement in itself, if taken separately. The contacts presented in Section 4 constitute a body of evidence that proves the infringement as a whole. This includes pricing exchanges between competitors of information which may already have been made public, although the evidential weight of such exchanges is less than in the case of non-public information. The Commission has regard to all the evidence underlying the infringement in assessing its seriousness. The evidence in Section 4 shows that the aim of the parties was to remove uncertainty from the market, including by the use of 'comfort calls', in respect of matters of price.

(1184) The fixing of various elements of the price, including particular surcharges, constitutes one of the most harmful restrictions of competition. The Guidelines on fines no longer draw a distinction between 'serious' and 'very serious' infringements. It is however clear that all horizontal price fixing agreements merit a percentage 'at the higher end of the scale'[1279]. The fact that certain carriers may have played a minor or passive role is assessed as a mitigating circumstance in Section 8.4.2.1.

(b) Combined market share

(1185) The combined worldwide market share of the undertakings to which this Decision is addressed is estimated to have been at around 34% in 2005 based on data published by an independent magazine Air Cargo World on the ranking of the world's largest cargo airlines based on the total freight tonne –kilometres flown[1280]. Given the nature of the sector the combined market share of the addressees of the Decision varies from route to route. It may be high on certain routes and low on others. It is noted that the combined market share of the addressees of this Decision in air freight services provided on intra EEA routes and on routes between the EEA and third countries is at least as high as their market share in the worldwide market.

(c) Geographic scope

(1186) [*]. For the purposes of establishing the gravity of the infringement, this means that the cartel arrangements covered the whole of the EEA and Switzerland. That includes airfreight services provided on routes in both directions between airports within the EEA, on routes between the EU and Switzerland and on routes between the EEA and third countries.

(d) Implementation

(1187) As described in Section 4 the arrangements were in general implemented.

[1279] Point 23 of the Guidelines on fines

[1280] See *Air cargo world – international edition*, September 2006 issue, http://www.aircargoworld.com

8.3.3. Conclusion on the percentage to be applied for the proportion of the value of sales

(1188) Given the specific circumstances of this case, and taking into account the criteria discussed in Section 8.3.2, and in particular the nature and geographic scope of the infringement, the proportion of sales to be taken into account should be 16%.

8.3.4. Duration

(1189) Point 24 of the Guidelines on fines provides that in order to take fully into account the duration of the participation of each undertaking in the infringement, the amount determined on the basis of the value of sales will be multiplied by the number of years of participation in the infringement. The Commission also takes into account complete months of participation when determining the multiplication factor.

(1190) The duration in respect of the infringement concerning air transport **between airports in the EEA** and the multiplication factors to be applied for each undertaking are as follows:

Table 1

	Period of Involvement	**Number of years and months**	**Multiplication factor**
Air France-KLM	From 7 December 1999 until 14 February 2006	6 years and 2 months	6 2/12
Société Air France	From 7 December 1999 until 14 February 2006	6 years and 2 months	6 2/12
KLM N.V.	From 21 December 1999 until 14 February 2006	6 years and 1 month	6 1/12
Air France-KLM	From 5 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
British Airways Plc	From 22 January 2001 until 14 February 2006	5 years	5
Cargolux Airlines International S.A.	From 22 January 2001 until 14	5 years	5

	February 2006		
Lufthansa Cargo AG	From 14 December 1999 until 7 December 2005	5 years and 11 months	5 11/12
Deutsche Lufthansa AG	From 14 December 1999 until 7 December 2005	5 years and 11 months	5 11/12
SWISS International Air Lines AG	From 2 April 2002 until 7 December 2005	3 years and 8 months	3 8/12
Deutsche Lufthansa AG	From 27 July 2005 until 7 December 2005	4 months	4/12
Martinair Holland N.V.	From 22 January 2001 until 14 February 2006	5 years	5
SAS AB	From 17 August 2001 until 14 February 2006	4 years and 5 months	4 5/12
SAS Cargo Group A/S	From 1 June 2001 until 14 February 2006	4 years and 8 months	4 8/12
SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	From 13 December 1999 until 28 December 2003	4 years	4

(1191) The duration in respect of the infringement concerning air transport **between airports in the EU and airports in countries outside the EEA** (except Switzerland) and the multiplication factors to be applied for each undertaking are as follows:

Table 2

	Period of	**Number of years**	**Multiplication**

	Involvement	**and months**	**factor**
Air Canada	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Air France-KLM	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Société Air France	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
KLM N.V.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Air France-KLM	From 5 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
British Airways Plc	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Cargolux Airlines International S.A.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Cathay Pacific Airways Limited	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Japan Airlines	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
LAN Airlines S.A.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
LAN Cargo S.A.	From 1 May 2004 until 14 February	1 year and 9 months	1 9/12

	2006		
Lufthansa Cargo AG	From 1 May 2004 until 7 December 2005	1 year and 7 months	1 7/12
Deutsche Lufthansa AG	From 1 May 2004 until 7 December 2005	1 year and 7 months	1 7/12
SWISS International Air Lines AG	From 1 May 2004 until 7 December 2005	1 year and 7 months	1 7/12
Deutsche Lufthansa AG	From 27 July 2005 until 7 December 2005	4 months	4/12
Martinair Holland N.V.	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Qantas Airways Limited	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
SAS AB	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
SAS Cargo Group A/S	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Singapore Airlines Cargo Pte Ltd	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
Singapore Airlines Limited	From 1 May 2004 until 14 February 2006	1 year and 9 months	1 9/12

(1192) The duration in respect of the infringement concerning routes **between airports in the EU and Switzerland** and the multiplication factors to be applied for each addressee are as follows:

Table 3

	Period of Involvement	**Number of years and months**	**Multiplication factor**
Air France-KLM	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Société Air France	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
KLM N.V.	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Air France-KLM	From 5 May 2004 until 14 February 2006	1 year and 9 months	1 9/12
British Airways Plc	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Cargolux Airlines International S.A.	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
Lufthansa Cargo AG	From 1 June 2002 until 7 December 2005	3 years and 6 months	3 6/12
Deutsche Lufthansa AG	From 1 June 2002 until 7 December 2005	3 years and 6 months	3 6/12
SWISS International Air Lines AG	From 1 June 2002 until 7 December 2005	3 years and 6 months	3 6/12
Deutsche	From 27 July 2005 until 7 December	4 months	4/12

Lufthansa AG	2005		
Martinair Holland N.V.	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
SAS AB	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
SAS Cargo Group A/S	From 1 June 2002 until 14 February 2006	3 years and 8 months	3 8/12
SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	From 1 June 2002 until 28 December 2003	1 years and 6 months	1 6/12

(1193) The duration of the infringement in respect of air transport **between airports in Contracting Parties to the EEA Agreement not being Member States and countries outside the EEA** and the multiplication factors to be applied for each undertaking are as follows:

Table 4

	Period of Involvement	**Number of years and months**	**Multiplication factor**
Air Canada	From 19 May 2005 until 14 February 2006	8 months	8/12
Air France-KLM	From 19 May 2005 until 14 February 2006	8 months	8/12
Société Air France	From 19 May 2005 until 14 February 2006	8 months	8/12
KLM N.V.	From 19 May 2005 until 14 February 2006	8 months	8/12

Air France-KLM	From 19 May 2005 until 14 February 2006	8 months	8/12
British Airways Plc	From 19 May 2005 until 14 February 2006	8 months	8/12
Cargolux Airlines International S.A.	From 19 May 2005 until 14 February 2006	8 months	8/12
Cathay Pacific Airways Limited	From 19 May 2005 until 14 February 2006	8 months	8/12
Japan Airlines Corporation	From 19 May 2005 until 14 February 2006	8 months	8/12
Japan Airlines International Co., Ltd.	From 19 May 2005 until 14 February 2006	8 months	8/12
Lufthansa Cargo AG	From 19 May 2005 until 7 December 2005	6 months	6/12
Deutsche Lufthansa AG	From 19 May 2005 until 7 December 2005	6 months	6/12
SWISS International Air Lines AG	From 19 May 2005 until 7 December 2005	6 months	6/12
Deutsche Lufthansa AG	From 27 July 2005 until 7 December 2005	4 months	4/12
Martinair Holland N.V.	From 19 May 2005 until 14 February 2006	8 months	8/12

Qantas Airways Limited	From 19 May 2005 until 14 February 2006	8 months	8/12
SAS AB	From 19 May 2005 until 14 February 2006	8 months	8/12
SAS Cargo Group A/S	From 19 May 2005 until 14 February 2006	8 months	8/12
Singapore Airlines Cargo Pte Ltd	From 19 May 2005 until 14 February 2006	8 months	8/12
Singapore Airlines Limited	From 19 May 2005 until 14 February 2006	8 months	8/12

8.3.5. Additional amount

(1194) Point 25 of the Guidelines on fines provides that irrespective of the duration of the undertaking's participation in the infringement, the Commission will include in the basic amount a sum of between 15% and 25% of the value of sales in order to deter undertakings from even entering into horizontal price-fixing, market-sharing and output limitation agreements.

(1195) Given the specific circumstances of the case, and taking into account the criteria discussed in Section 8.3.2, the percentage to be applied for the additional amount should be 16 %.

(1196) The additional amount applies in its entirety to each legal entity which has committed the infringement irrespective of its duration. When a number of legal entities within an undertaking have committed an infringement they are liable for the additional amount jointly and severally.

(1197) For SK a separate calculation of the additional amount is required. This is due to the fact that two legal entities within the undertaking SAS, SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden (SAS Consortium) and SAS Cargo Group A/S, are liable for their direct participation in the infringement during successive periods. Apportionment of the element of the fine calculated on the basis of Sections 8.1 to 8.3 (proportion of value of sales multiplied by duration - see recital (1161) - referred to hereafter as the 'variable amount') is

therefore necessary to reflect the duration of the direct participation of each legal entity in the infringement.

(1198) Moreover, SAS Consortium ended its participation in the infringement on 28 December 2003, before the EU enlargement of 2004 and before the Commission acquired jurisdiction on routes between the EU and third countries as well as routes between Iceland, Norway and Liechtenstein and countries outside the EEA. For the calculation of the variable amount of SAS Consortium, only routes within the EEA of 18 countries and routes between the EU of 15 Member States and Switzerland are therefore taken into account.

(1199) The additional amount is set for the SAS undertaking as a whole. SAS Consortium is only liable for a part of this additional amount. This part is calculated on the basis of intra-EEA routes of 18 countries and routes between the EU of 15 Member States and Switzerland. SAS Cargo Group A/S and SAS AB are liable for the remainder of the additional amount.

(1200) In order to reflect the fact that from 13 December 1999 to 31 May 2001, SAS Consortium was the only legal entity directly involved in the cartel, it is appropriate to hold SAS Consortium alone liable for a portion of the additional amount to be imposed on it. It is however necessary to ensure that this does not increase the total additional amount for which the undertaking as a whole is liable. Moreover, it is important that SAS is treated in an equivalent way to other undertakings as regards the use of rounded figures for the basic amount. As a result, the method set out in recitals (1201) to (1204) is followed for the calculation of the fines imposed on SAS Consortium and SAS Cargo Group A/S.

(1201) The variable amount and the additional amount are first calculated for SAS Consortium. The basic amount of the fine for SAS Consortium is then calculated and rounded off. This amount is featured in Table 5.

(1202) In order to establish the amounts of the parental liability of the fine imposed on the SAS undertaking (see recitals (1216) to (1218)), the fine of SAS Consortium must be split into three parts corresponding to successive periods. SAS Consortium is held solely liable for the first period from 13 December 1999 to 31 May 2001, SAS Consortium and SAS Cargo Group A/S are held jointly and severally liable for the second period from 01 June 2001 to 16 August 2001 and SAS Consortium, SAS Cargo Group A/S and SAS AB are held jointly and severally liable for the third period from 17 August 2001 to 28 December 2003. The rounded basic amount of SAS Consortium is therefore apportioned into three parts in accordance with the respective ratios of the duration of each of these three periods over the overall duration of involvement of SAS Consortium in the infringement.

(1203) A separate apportionment of the additional amount of SAS Consortium between these periods is also made for calculation purposes only.

(1204) In a separate calculation, the variable amount and the additional amount for SAS Cargo Group A/S are calculated. The additional amount imposed on SAS Consortium in the fine corresponding to the first period (13 December 1999 to 31 May 2001) – as set out in recital (1203) - is subtracted from the additional amount for SAS Cargo Group A/S. The basic amount of the fine for SAS Cargo Group A/S is then calculated and rounded off. This amount is set out in Table 5.

(1205) In a distinct calculation, the variable amount for SAS AB is calculated. SAS AB is also liable for an additional amount which is calculated on the basis of the additional amount imposed on SAS Cargo Group A/S as set out in recital (1204) from which the additional amount imposed on SAS Consortium for the second period (01 June 2001 to 16 August 2001) as described in recital (1203) is subtracted. The basic amount of the fine for SAS AB is then calculated and rounded off. This amount is set out in Table 5.

(1206) The adjustments and leniency reductions are applied to each of the three SAS legal entities in Tables 6 and 7 with the final amount appearing in Table 8.

(1207) However, the increase of the fine of SAS for recidivism is not applied to SAS AB (see recital (1221)). This fact is taken into account when the parental liability is calculated. For the period from 17/08/2001 to 28/12/2003 for which SAS Cargo Group A/S, SAS Consortium and SAS AB are jointly and severally liable, the recidivism increase is not applied but the corresponding amount is rather added to the fine for which SAS Consortium and SAS Cargo Group A/S are held jointly and severally liable. Similarly, for the period from 28/12/2003 to 14/02/2006 only SAS Cargo Group A/S is held liable for recidivism and the amount is therefore not included in the joint fine.

(1208) The amounts of parental liability are calculated in the following way. The amount for which SAS AB, SAS Consortium and SAS Cargo Group A/S are held jointly and severally liable is established by taking the basic amount set out in recital (1202) and following the method described in recital (1207) so as not to hold SAS AB liable for recidivism.

(1209) The amount for which SAS Consortium and SAS Cargo Group A/S are held jointly and severally liable is calculated from the basic amount set out in recital (1202) and adding the adjustment for recidivism set out in recital (1207).

(1210) The amount for which SAS AB and SAS Cargo Group A/S are held jointly and severally liable is calculated by taking SAS AB's basic amount for its total fine as set out in recital (1205) and subtracting the basic amount for the third period as set out in recital (1202). The recidivism increase is not applied to this fine. Instead, SAS Cargo Group A/S is held solely liable for the remainder of its total fine as set out in recital (1204).

(1211) For Air France-KLM in its capacity as parent of KLM a separate calculation of the additional amount is also required. This is due to the fact that Air France-KLM is liable as parent only for part of the direct infringement by KLM but is liable for the entire additional amount.

(1212) The amount of parental liability for the variable amount for Air France-KLM is calculated on the basis of the duration of its involvement in the infringement as parent as set out in Tables 1 to 4. The additional amount for Air France-KLM as parent (and for KLM) is calculated from the proportion of sales of KLM.

(1213) The figure in Table 8 for Air France as parent of KLM is the sum of the amount for parental liability for the variable amount plus the additional amount.

(1214) As in the previous case, for Deutsche Lufthansa AG in its capacity as parent of SWISS International Air Lines AG a separate calculation of the additional amount is required. This is due to the fact that Deutsche Lufthansa AG is liable as parent only for part of the direct infringement by SWISS but is liable for the entire additional amount.

(1215) The amount of parental liability for the variable amount for Deutsche Lufthansa AG is calculated on the basis of the duration of its involvement in the infringement as parent of SWISS as set out in Tables 1 to 4. The additional amount for Deutsche Lufthansa AG as parent (and for Swiss) is calculated from the proportion of sales of SWISS.

8.3.6. Conclusion on the basic amount

(1216) The basic amounts of the fines to be imposed on each undertaking are therefore, at this first stage, as set out in Table 5. The figures indicated in tables 5-8 are the amounts for which each legal entity is cumulatively liable on a sole basis and on a joint and several basis[1281]. In determining the basic amount of the fine the Commission uses rounded figures[1282].

Table 5

All amounts are in EUR

Air Canada	66 000 000
Air France-KLM Société Air France	[400 000 000-600 000 000] [400 000 000-600 000 000]
KLM NV	[300 000 000-500 000 000]

[1281] The basis and periods for which legal entities are found to be solely liable and/or jointly and severally liable are set out in detail in Section 6.2. On the basis of Section 6.2, Article 5 of this Decision delineates the amounts of sole and of joint and several liability of each legal entity.

[1282] Paragraph 26, Guidelines on fines.

Air France-KLM	[300 000 000-500 000 000]
British Airways Plc	260 000 000
Cargolux Airlines International S.A.	[300 000 000-500 000 000]
Cathay Pacific Airways Limited	[100 000 000-300 000 000]
Japan Airlines Corporation Japan Airlines International Co., Ltd.	113 000 000 113 000 000
LAN Airlines S.A. LAN Cargo S.A.	[10 000 000-50 000 000] [10 000 000-50 000 000]
Lufthansa Cargo AG Deutsche Lufthansa AG	730 000 000 730 000 000
SWISS International Air Lines AG Deutsche Lufthansa AG	15 600 000 5 100 000
Martinair Holland N.V.	[100 000 000-300 000 000]
Qantas Airways Limited	29 700 000
SAS AB SAS Cargo Group A/S SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	[50 000 000-250 000 000] [50 000 000-250 000 000] [10 000 000-50 000 000]
Singapore Airlines Cargo Pte Ltd Singapore Airlines Limited	[100 000 000-300 000 000] [100 000 000-300 000 000]

(1217) It was stated in Section 8.3.1 that both inbound and outbound turnover should be taken into account for the determination of the value of sales on third country routes. However, it must be recognised in this particular case that for both incoming and outgoing services part of the services are performed outside the EEA, and that part of the harm resulting from the cartel in respect of those EEA – third country routes is likely to fall outside the EEA[1283]. A reduction of 50% in the basic amount appears justified to reflect these considerations for EEA - third country routes, except routes between the EU and Switzerland where the Commission is acting under the Swiss Agreement.[1284]

(1218) Accordingly, having taken into account that reduction in respect of third country routes, the basic amounts of the fines to be imposed are as follows:

Table 6

All amounts are in EUR

Air Canada	33 000 000
Air France-KLM Société Air France	[200 000 000-300 000 000] [200 000 000-300 000 000]
KLM NV Air France-KLM	[150 000 000-250 000 000] [150 000 000-250 000 000]
British Airways Plc	136 000 000
Cargolux Airlines International S.A.	[150 000 000-250 000 000]
Cathay Pacific Airways Limited	[50 000 000-150 000 000]
Japan Airlines Corporation Japan Airlines International Co., Ltd.	56 000 000 56 000 000
LAN Airlines S.A. LAN Cargo S.A.	[5 000 000-25 000 000] [5 000 000-25 000 000]

1283 This issue does not arise as concerns Switzerland where the Commission acts under the Swiss Agreement on behalf of both parties so all harm from the cartel on those routes is relevant.

1284 See point 37 of the Guidelines on Fines.

Lufthansa Cargo AG	398 000 000
Deutsche Lufthansa AG	398 000 000
SWISS International Air Lines AG	14 500 000
Deutsche Lufthansa AG	4 500 000
Martinair Holland N.V.	[50 000 000-150 000 000]
Qantas Airways Limited	14 800 000
SAS AB	[25 000 000-125 000 000]
SAS Cargo Group A/S	[25 000 000-125 000 000]
SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	[5 000 000-25 000 000]
Singapore Airlines Cargo Pte Ltd	[50 000 000-150 000 000]
Singapore Airlines Limited	[50 000 000-150 000 000]

8.4. Adjustments to the basic amount

8.4.1. Aggravating circumstances

8.4.1.1. Recidivism

(1219) Point 28 of the Guidelines on fines provides that the basic amount may be increased where an undertaking continues or repeats the same or similar infringement. After the Commission or a national competition authority has made a finding that the undertaking infringed Article 101 or 102 of the TFEU, the basic amount may be increased by up to 100% for each such infringement established.

(1220) SK was the addressee of a previous Commission decision in July 2001 holding it liable for earlier cartel activities[1285]while the current infringement was ongoing. It accordingly continued a similar infringement for almost five years after the Commission had found SK

[1285] See Commission Decision 2001/716/EC of 18 July 2001 relating to a proceeding under Article 81 of the Treaty and Article 53 of the EEA Agreement (SAS Maersk Air and Sun Air versus SAS and Maersk Air), (OJ L 265, 05.10.2001 p.15) where SAS was found to have participated in the cartel.

had infringed Article 101 of the TFEU. SK argues on the basis of *Thyssen Stahl v Commission*[1286] that any increase for recidivism can only be applied from the date on which the previous infringement was established (therefore from 18 July 2001 for SK). The Commission rejects this argument. The facts in *Thyssen Stahl* are materially different from the case in hand. In *Thyssen Stahl* the General Court was dealing with a situation where there were multiple separate infringements, the majority of which had terminated prior to the date of the previous infringement decision and to which no increase for recidivism could be applied. In addition Thyssen had only continued the infringement for a few months after the previous infringement decision. In the present case it is evident that the present infringement continued for almost five years after the previous infringement decision and an appropriate increase for recidivism should be applied[1287]. The Guidelines on fines are clear that the increase applies without distinction to continued infringements, which may already be in existence or to repeated infringements, which may arise subsequently to the previous decision. The Court of Justice of the European Union has clarified that in cases such as the present one no pro rata increase is to be applied as of the date of the previous decision, rather the increase applies to the entire duration of the infringement[1288]. The fact that SK has repeated the same type of conduct in its business activities shows that the first penalty did not prompt it to change its conduct. This constitutes an aggravating circumstance which justifies an increase of 50% of the basic amount of the fine (as featured in Table 6) to be imposed on it.

(1221) SK submits that the facts of this case do not warrant an increase on the grounds of recidivism, making reference to the purpose of such an increase. SK asserts that it is not the case that the previous sanction was not sufficiently deterrent, stating that its conduct in this case is justified by the WOW alliance and did not constitute an infringement of Article 101 of the TFEU. As discussed in Section 5.3.4 the Commission does not consider that the conduct of SK to which this Decision relates was justified by the WOW alliance or that it falls outside the scope of Article 101 of the TFEU. That argument must therefore be rejected. However, since SAS AB was not held liable for the previous infringement, nor could it have been given its creation only in 2003, the Commission imposes the increase for recidivism on SAS Consortium as the addressee of the previous decision and SAS Cargo, which formed a business unit within SAS Consortium during the period of the previous infringement and had become SAS Consortium's wholly owned subsidiary at the time of the infringement decision.

1286 Case T-141/94 – *Thyssen Stahl v Commission*, [1999] ECR decision.paragraphs 617-618.

1287 As confirmed recently by the General Court, Case T-54/03, *Lafarge v Commission*, [2008] ECR II-120, paragraph 727.

1288 Case T-53/03, *BPB v Commission* [2008] ECR II-1333, paragraph 391-396.

8.4.2. Mitigating circumstances

8.4.2.1. Passive and/or minor role and/or limited participation

(1222) The majority of carriers involved invoke the argument that they had a passive and/or minor role and/or had limited participation in the cartel as a mitigating factor.

(1223) Point 29 of the Guidelines on fines provides that the basic amount of the fine may be reduced where the undertaking provides evidence that its involvement in the infringement is substantially limited. The 2006 Guidelines on fines do not, in contrast to the 1998 Guidelines on fines, provide for a reduction on the basis of a passive or minor role. Thus, the Commission no longer considers that a passive role constitutes a mitigating circumstance that justifies a reduction in fines, whereas a minor role can only constitute a mitigating circumstance if the involvement of the undertaking in the infringement is substantially limited. In any event, as set out in recitals (1224) to (1234), none of the parties has played a passive role within the meaning of case-law of the Court of Justice of the European Union that would justify a reduction in fines[1289].

(1224) AF argued that it had had a secondary role in the infringement compared to LH who had a leading role and that should be taken into consideration.

(1225) That argument must be rejected, as AF participated in many aspects of the infringement, had significant contacts with numerous carriers and was involved at senior management level which is not consistent with a secondary role and with the case law cited in (1223).

(1226) Although the Commission relies on a significant amount of evidence submitted by LH this is common in cases involving immunity applicants. Furthermore, despite allegations that LH played an instigating or leading role there is no evidence that suggests LH coerced other undertakings to participate in the infringement or that it took retaliatory measures against other undertakings with a view to enforcing the practices constituting the infringement.

(1227) CV, KL, MP, JL, QF and SK claim that they adopted a passive role in the cartel. SK, MP and JL claim that they attended meetings sporadically and were absent from some key meetings. They claim to have been left out of meetings and thus to have been unaware of aspects of the infringement. SK, CV and KL state that they had a policy of passively following LH as the leader.

(1228) BA, QF, LA and AC assert that they played a minor role in the infringement. That argument is also made by MP and SK in addition to claiming they acted passively. LA, AC, QF, MP and SK state that their

[1289] Case T 73/04 *Carbone-Lorraine v Commission* not yet reported, paragraphs 163-164, and cited case-law.

involvement in the infringement generally and awareness of its scope was limited. LA does not contest that its activities in relation to fuel surcharges resulted in an infringement of Article 101 of the TFEU but it states that its participation in the infringement is minor and limited. It is attributable to the Capacity Sharing Agreement with LH. The regular contacts with LH required to ensure the functioning of the agreement gradually extended to issues that went beyond the intended pro-competitive objectives of the agreement. These discussions were limited in scope and were exclusively with LH. LA asserts it played a peripheral role as it was involved in only two aspects of the infringement as set out in the SO. SK describes its small market share and the size disparity between it and other carriers to support its assertion that it played a minor role.

(1229) With respect to CV, MP, JL and KL, the Commission rejects the argument that they played a passive role in the infringement. Their attempt to portray themselves as passive players and irregular participants in the cartel are not convincing. The evidence in the file points to consistent, regular and active participation in the infringement. The frequency and nature of their contacts with the other carriers throughout the entire period of the infringement, as described in Section 4[1290], is incompatible with a passive or irregular role.

(1230) Furthermore, CV, MP, JL and KL did not put forward any evidence to establish that their participation in the infringement was without any anti-competitive intention by demonstrating that they had indicated to their competitors that they were participating in a different spirit. It must therefore be concluded that by attending multilateral meetings and entering into contacts with other carriers regarding pricing, they demonstrated a degree of active participation in the cartel which is clearly incompatible with that required in order to claim that the level of their participation constituted a mitigating circumstance. The fact that several of the carriers argue that they followed LH which they assert was the leader of the cartel does not equate to the adoption of a purely passive stance. Therefore, the arguments put forward by CV, MP, JL and KL that they played passive roles are not substantiated.

(1231) It cannot be accepted that BA and MP played a limited role in the infringement. BA cannot be said to have had a minor role in the cartel given the high level of its involvement in almost all aspects of the infringement. Concerning MP's arguments that its participation in communications between the cartel members was limited because it participated in them on infrequent occasions, the Commission finds that the communications formed an established and consistent pattern and that they took place over a long period of time[1291]. Therefore the argument that they participated in group communications only infrequently cannot be accepted.

1290 For CV see paragraphs (739)-(743), for MP see paragraphs [*], for JL see paragraphs [*], for KL see paragraphs (721)- [*].

1291 [*].

(1232) SQ claims that it played a minor role in the infringement, asserting that its contacts within the WOW alliance fell outside Article 101(1) of the TFEU, and thus it only participated in two of the instances of contacts mentioned in the SO. As discussed in Section 5.3.4, the Commission considers that contacts among members of the WOW alliance formed part of the infringement and accordingly, rejects the argument that SQ played a minor role in the infringement.

(1233) In summary, the Commission concludes that there is no evidence that the involvement in the infringement of AF, BA, MP, JL, CV, KL and SQ was substantially limited or that any of these undertakings played a passive or minor role in the infringement.

(1234) With respect to QF, AC, LA and SK, the Commission is not prepared to accept as a mitigating circumstance the fact that those carriers played a passive role in the infringement. As indicated at recital (1223) this no longer constitutes a mitigating circumstance under the Guidelines on fines. The Commission is however prepared to accept that QF, AC, LA and SK had a limited participation in the infringement. This is due to the fact that these participants operated on the periphery of the cartel, entered into a limited number of contacts with other carriers, and they did not participate in all elements of the infringement.

(1235) QF, AC, LA and SK should accordingly be granted a reduction of 10% of the basic amount (as featured in Table 6) of the fine to be imposed on them.

8.4.2.2. Regulatory regimes

(1236) AF, AC, CX, QF, BA, CV, JL, SK and MP submit that it should be taken into account as a mitigating circumstance that in respect of the contacts mentioned in Section 4, there were regulatory regimes in place in several jurisdictions under which coordination between carriers on prices and surcharges was encouraged.

(1237) Several of the carriers mentioned in recital (1236) submit that in particular in Hong Kong and Japan the authorities required tariff consultations to take place before surcharge adjustments could be approved. CX and JL note that many bilateral ASAs provide that tariffs are to be collectively agreed by designated airlines. Several other carriers submit that, while not an obligation, coordination was strongly encouraged and that in practice it was not possible to obtain approval in any other way. Qantas states that in Thailand the government intervened in the setting of FSCs.

(1238) The airlines claim that a conflict between the operation of local regimes and the requirements of EU competition law gave rise to uncertainty as to the legality of their actions. They submit that even if the Commission considers their coordination within the applicable frameworks to be a violation of competition law, in the light of this uncertainty and local encouragement the Commission should regard the regulatory regimes as a mitigating circumstance.

(1239) In respect of the contacts mentioned in Section 4, the Commission does not consider that the operation of the regulatory regimes invoked by the parties render Article 101(1) of the TFEU inapplicable. The Commission does not accept that a requirement to discuss tariffs was imposed on the carriers operating in the relevant jurisdictions. Accordingly, the Commission considers that the carriers were not prevented from acting autonomously. If a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Article 101 of the TFEU.[1292]

(1240) The Commission however notes that in accordance with point 29 of the Guidelines on fines it may take into account as a mitigating circumstance the fact that the anti-competitive conduct has been '*authorised or encouraged by public authorities or by legislation*'.

(1241) The Commission recognizes that some regulatory regimes have encouraged certain elements of the anti-competitive conduct. It has had regard to the terms of the ASAs that govern air services between EEA countries and third countries which in most cases provide for prices to be agreed or discussed between designated airlines as well as to the approach of regulatory authorities. The Commission accepts that the anti-competitive conduct in this case was encouraged by the regulatory regime and in some cases the application of it and accordingly grants all addressees of this Decision a reduction of 15% of the basic amount (as featured in Table 6) of the fine to be imposed on them.

8.4.2.3. Legitimate expectation that the Commission would not penalise the conduct

(1242) CV and CX submit that that the Commission's conduct with regard to the regulatory regime for aviation in place in Hong Kong gave rise to a legitimate expectation that the Commission would not pursue infringement proceedings.

(1243) CX states that the Commission was aware of the special characteristics of the aviation sector yet did not issue guidelines to explain how airlines were supposed to conduct themselves so as to comply with changed EU competition rules after 1 May 2004. CX submits that this gave rise to a legitimate expectation that the Commission would not initiate infringement proceedings, which provides the basis for mitigation of fines. CV submits that the Commission Delegation in Hong Kong sent a letter to CAD in Hong Kong encouraging carriers to co-ordinate on the SSC and claims that this gave rise to a legitimate expectation that the Commission would not object to coordination under Article 101(1) of the TFEU.

(1244) SK refers to the decision of the Danish Competition Council in 2002 concerning a complaint with regard to price fixing for air freight services on routes from Denmark to Hong Kong and Manila. SK states that the rejection of the complaint creates legitimate expectations as in the

[1292] Case C-198/01 *Consorzio Industrie Fiammiferi (CIF)* v *Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-8055, paragraph 56.

reasoning of the decision it is stated that the European Commission was competent concerning intra EU routes only, and not on routes between the Member States and third countries.

(1245) The Commission does not accept that legitimate expectations constitute a mitigating circumstance in this case. The Commission is under no obligation to produce guidelines to inform carriers of the changes resulting from Regulation (EC) No 1/2003. It is incumbent on carriers themselves with the assistance of their legal advisors to ensure they comply with applicable laws from their entry into force. In addition, it is settled law that the principle of the protection of legitimate expectations may not be relied upon by a person who has committed a manifest infringement of the rules in force.[1293] Accordingly, an undertaking which deliberately engages in anti-competitive conduct may not rely upon a breach of that principle on the pretext that the Commission did not clearly inform it that its conduct constituted an infringement.[1294]

(1246) Concerning the letter of the Hong Kong Office of the Commission, as set out in recital (981) above the Commission in no way approved coordination on the SSC by carriers in Hong Kong. Based on the case law the right to rely on the principle of the protection of legitimate expectations extends to any individual in a situation where the EU authorities have caused him to entertain legitimate expectations. A person may not plead infringement of the principle unless he has been given precise assurances by the administration[1295]. The letter of the Hong Kong Office of the Commission did not contain any reference to the non-application of EU competition law, let alone a precise assurance. On the contrary, the letter concerned only the question whether carriers would be authorized by the government to charge a SSC, rather than adjusting rates. Moreover, the Commission service that is primarily responsible for the application of EU competition law applying to undertakings is DG Competition, and not the Hong Kong Office. Accordingly, the statements emanating from the Hong Kong Office cannot give rise to legitimate expectations in respect of EU competition law. Consequently, the argument of CV is rejected.

(1247) Concerning the decision of the Danish Competition Council, it took the view in 2002 that the coordination of freight prices on routes between non Member States and Member States was not prohibited. This was not the case after the entry into force of Regulation (EC) No 1/2003. Since the relevant legal rules have changed since the decision of the Danish authorities, a position based on a previous legal situation cannot create legitimate expectations. Therefore, the argument of SK is rejected.

1293 Case C-96/89 *Commission* v *Netherlands* [1991] ECR I-2461, paragraph 30.

1294 Joined Cases C-65/02 P and C-73/02 P, *ThyssenKrupp Stainless GmbH and Others v Commission* [2005] ECR I-6773, paragraph 41.

1295 Case T-13/03 *Nintendo and Nintendo of Europe v Commission*[2009] ECR II-975, paragraph 203 and the case-law cited.

8.4.2.4. Non-implementation/ lack of effect

(1248) SK, QF, LA and MP claim that the amount of the fines to be imposed on them should be reduced because they either did not implement or did not fully implement the anti-competitive agreements. They claim that they continued to compete with other carriers throughout the duration of the infringement although they do not dispute that the relevant surcharges were applied.

(1249) As a preliminary point it should be recognized that the Guidelines on fines no longer feature a mitigating circumstance of non-implementation. The Commission has nevertheless assessed these claims having regard to established case-law. According to such case law an undertaking seeking to rely on such a mitigating circumstance must demonstrate that, during the period in which it was party to the offending agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, that it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation.[1296]

(1250) None of the undertakings mentioned in recital (1248) provided indications that they demonstrated any desire, or undertook any action, to deliberately abstain from implementing the agreements or practices during the period in which they were engaged in them.[1297] A difference in the degree to which they implemented the agreements cannot be regarded as a real failure to implement them.[1298] Furthermore, the adoption by a participant undertaking of competitive conduct on the market, contrary to the manner agreed, is not a matter which must be always taken into account as a mitigating circumstance when determining the amount of the fine to be imposed. An undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit.[1299] In addition, none of the parties has demonstrated that they clearly and substantially failed to implement the cartel to the point of disrupting its very operation or avoided giving the appearance of adhering to the agreements or practises retained in this Decision thus inciting other undertakings not to implement the cartel. They did not clearly distance themselves from the agreements or practices that took place during the anti-competitive contacts in which they participated.

(1251) BA, SK and CX submit that, to the extent to which the agreements were implemented, they caused only minor damage to the market. JL and MP

1296 T-26/02, *Daichii v Commission*, paragraph 113. See also point 29 of the 2006 Guidelines on fines.

1297 Joined Cases T-25/95 and others, *Cement*, ECR [2000] II-491, paragraphs 4872 to 4874.

1298 Case T-220/00 *Cheil Jedang v Commission* [2003] ECR II-02473, paragraphs 194-199.

1299 See judgment of the General Court in *Cascades SA* v *Commission*, cited above, at paragraph 230; judgment of the General Court in Joined Cases T-71/03 etc., *Tokai Carbon and others* v *Commission*, [2005] ECR II-00010, at paragraph 297; judgment of the General Court in Case T-44/00, *Mannesmannröhren-Werke AG* v *Commission*, [2004] ECR II-729 at paragraphs 277-278, and judgment of the General Court in Case T-327/94, *SCA Holding* v *Commission*, [1998] ECR II-1373, at paragraph 142.

submit that their contributions to the infringement were so small as to have had a negligible effect on the market.

(1252) AF states that the bilateral contacts between AF and LH between 2001 and 2004 referred to by LH [*] were not regular, but were limited to three meetings between 2001 and 2003. Furthermore, AF argues that such contacts had weak effect on the competition, [*].

(1253) The Commission notes that in assessing circumstances which may reduce the amount of the fine to be imposed, the actual effects of the conduct on the market are not relevant. This decision finds a restriction of competition by object.

(1254) Similarly, the actual effects of the conduct on the cartel participants are not material when assessing mitigating circumstances. MP states that it derived no economic advantage from its participation in the coordination of several elements of price, and claims that fact should constitute a mitigating circumstance. MP's argument is rejected, as it is settled law that the fact that an undertaking has derived no profit from the infringement cannot prevent it from being fined.[1300] The Commission is not required to establish that the infringement secured an improper advantage for the undertaking, nor to take into consideration, where applicable, the fact that no profit was derived from the infringement in question. Moreover, point 31 of the Guidelines on fines provides for the Commission to increase the fine that would otherwise be applied in order to exceed the amount of 'gains improperly made as a result of the infringement'. Analysis of the impact of a cartel properly falls under aggravating circumstances.

(1255) In summary, the claim of the carriers mentioned in recitals (1248), (1251) and (1252) regarding the limited implementation of the infringement, the alleged limited effect of the cartel on the market and a lack of economic benefit from participation are not accepted as mitigating circumstances in the instant case.

8.4.2.5. Non-authorised personnel

(1256) QF and BA argue that their personnel acted contrary to advice in carrying out acts constituting cartel participation and that this should be regarded as an attenuating circumstance. QF submits that senior management in QF freight was on a 'frolic of its own', acting contrary to the advice of its legal team, and without the knowledge of the executive management. BA states that its involvement in the infringement was limited to a few 'rogue' junior employees who acted without the knowledge of senior personnel and contrary to clear and specific managerial and legal advice.

[1300] Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paras 46-47, Case T-229/94 *Deutsche Bahn* [1997] ECR-II-1689, para 217 and Case T-241/01 *Scandinavian Airlines System v Commission* [2005] ECR II-29177, para 146.

(1257) The Commission does not accept BA's and QF's arguments in this regard. It is settled law that an infringement of competition law by a natural person is imputable to an undertaking if the person is authorised to act on behalf of the undertaking.[1301] An undertaking remains liable for the acts of its employees even if the employee was acting contrary to instructions, as asserted by BA and QF.[1302] Furthermore, the contacts took place over a significant period of time and involved a number of employees. Accordingly, an alleged lack of authorisation on the part of senior management is not accepted as a mitigating circumstance.

8.4.2.6. Market situation

(1258) CV, KL, MP and QF submit that the situation on the market at the time of the cartel infringement should be regarded as a mitigating circumstance.

(1259) KL, MP and QF make general submissions regarding the difficult economic situation in the sector. KL notes that the period following 9/11 was one of great uncertainty for the future of the aviation industry. MP and QF state that the unprecedented increase in fuel prices during the period of infringement was a factor placing the sector in economic difficulties. CV submits that freight forwarders took advantage of their market power and exerted strong pressure on carriers to develop a common approach regarding surcharge mechanisms.

(1260) The Commission does not accept these arguments. The poor economic state of the sector concerned is not accepted as an attenuating circumstance. In attempting to cope with difficult market conditions or falls in demand, undertakings must only use means that are consistent with competition rules.[1303] This does not give rise to a mitigating circumstance in the present case.

(1261) Furthermore the Commission does not accept as a mitigating circumstance the fact that customers do not oppose and even encourage a practice which is contrary to competition rules. CV asserts that its customers, the freight forwarders, put pressure on it to pursue anti-competitive conduct. CX submits that its customers preferred a system of uniform surcharges, and that this system increased transparency and avoided complexity. These arguments are rejected, as encouragement of an infringement by customers does not change the fact of the

1301 Case C-100/80 *Musique Diffusion Francaise v Commission* [1983] ECR 1825, Case T-77/*92 Parker Pen v Commission* [1994] ECR II-549, Joined Cases T-71/03, *Tokai Carbon v Commission* [2005] ECR II-10, C-338/00 *Volkswagen v Commission* [2003] ECR I-9189 and Case T- 338/97 *Finnboard v Commission* [1998] ECR II-1617.

1302 Case T-56/99 *Marlines v Commission*, [2003] ECR – II 5225, paragraphs 14 and 70, and Case T-77/*92 Parker Pen v Commission* [1994] ECR II-549..

1303 Case T-16/99 *Logstor Ror v Commission* [2002] ECR II-1633, paras 319-320 and Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and others v Commission* [2004] ECR II-1181, paragraph 345.

infringement or its anti-competitive nature and does not give rise to a mitigating circumstance in this case. [1304]

8.4.2.7. Cooperation with the Commission

(1262) BA submits that it has effectively co-operated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so. Extensive cooperation with the Commission is a mitigating circumstance of which the Commission may take account, listed under point 29 of the Guidelines on fines.

(1263) BA notes that it was the first leniency applicant to submit [*] and that it provided [*] to the Commission. It argues that these covered all of the elements of the infringement for which BA could be fined and provided further corroborating evidence to that specifically relied upon by the Commission in the SO. BA notes that [*].

(1264) To the extent that BA's cooperation merits a reduction, this is considered when applying the Leniency Notice.[1305] The Commission considers that there are no exceptional circumstances present in this case that could justify granting a reduction for effective cooperation falling outside the scope of the Leniency Notice, and does not consider that BA has co-operated with the Commission beyond its legal obligation to do so.[1306] The Commission therefore considers that regarding BA's cooperation point 29 of the Guidelines on fines is not applicable.

8.4.2.8. Compliance programme

(1265) CV, LA, QF and CX claim that the existence of compliance programmes should be accepted as an attenuating circumstance. CV explains that an extensive programme was introduced following the Commission's investigations comprising internal training courses and follow-up seminars. CX details the establishment of a programme under the auspices of a Competition Compliance Steering Committee. A new 'Antitrust Policy and Guidelines' have been adopted and training sessions and workshops have been introduced. LA and QF detail the expansion of its compliance programme to include mandatory seminars.

(1266) While the Commission welcomes the existence of compliance programmes and policies, it considers compliance with the law as a natural obligation of each company and does not consider such compliance, or a programme ensuring such compliance, as going beyond what is expected. It does not alter the fact of the infringement found in the present case.[1307] The existence of a compliance programme or the

1304 Case T-127/04 *KME v Commission* [2009] ECR II-1167, paragraphs 114-115.

1305 Case T-15/02 BASF v Commission, [2006] ECR II-497, at paragraph 586.

1306 Joined Cases C-189/02 P, C-202/02 P, C-205/02 P, C-208/02 P and C-213/02 P *Dansk Rorindustri and Others v Commission* [2005] ECR I-5425 paragraphs 380-382 and Case T-15/02 *BASF v Commission* [2006] ECR II-497, paragraphs 585-586.

1307 Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, para. 357. Joined cases T-109/02, T-122/02, T-125/02, T-126/02, T132-02, T-136/02 *Bollore SA and others v Commission* [2007] ECR II-947, paragraph 653.

adoption of new programmes cannot, therefore, be accepted as an attenuating circumstance.

8.4.3. Specific increase for deterrence

(1267) Point 30 of the Guidelines on fines provides that '[t]he Commission will pay particular attention to the need to ensure that fines have a sufficiently deterrent effect; to that end, it may increase the fine to be imposed on undertakings which have a particular large turnover beyond the sales of goods or services to which the infringement relates'.

(1268) The Commission does not apply any specific increase for deterrence in this case to any of the addressees.

8.4.4. Conclusion on the adjusted basic amounts

(1269) The adjusted basic amounts of fines to be imposed on the undertakings involved are as follows:

Table 7

All amounts are in EUR

Air Canada	24 750 000
Air France-KLM	228 650 000
Société Air France	228 650 000
KLM NV	158 950 000
Air France-KLM	155 550 000
British Airways Plc	115 600 000
Cargolux Airlines International S.A.	[115 000 000-200 000 000]
Cathay Pacific Airways Limited	71 400 000
Japan Airlines Corporation	47 600 000
Japan Airlines International Co., Ltd.	47 600 000
LAN Airlines S.A.	10 275 000
LAN Cargo S.A.	10 275 000

Lufthansa Cargo AG	338 300 000
Deutsche Lufthansa AG	338 300 000
SWISS International Air Lines AG	12 325 000
Deutsche Lufthansa AG	3 825 000
Martinair Holland N.V.	[40 000 000-125 000 000]
Qantas Airways Limited	11 100 000
SAS AB	45 000 000
SAS Cargo Group A/S	76 250 000
SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	17 500 000
Singapore Airlines Cargo Pte Ltd	74 800 000
Singapore Airlines Limited	74 800 000

8.5. Application of the 10% of turnover limit

(1270) The second subparagraph of Article 23(2) of Regulation (EC) No 1/2003 provides that for each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year. Accordingly, a reduction is required when the adjusted basic amount of the fine is above 10% of 2009 world wide turnover.

(1271) Cargolux's total turnover in 2009 was EUR 942 million. Thus, the adjusted basic amount of its fine should be reduced to EUR 94 million.

(1272) Martinair's total turnover in 2009 was EUR [*]. Thus, the adjusted basic amount of its fine should be reduced to EUR 59 million.

8.6. Application of the 2002 Leniency Notice

(1273) As indicated in Section 3, the investigation in this case was initiated after information was brought to the attention of the Commission by LH, which applied for immunity under the terms of the Leniency Notice.

(1274) KL argued that [*] should be analysed with restraint especially with regard to three circumstances: first, LH's leading role also implies that its stated intention with regard to its initiatives vis-à-vis other carriers are not representative of the intentions of the other undertakings involved. Second, as evidence relating to events that occurred after 1 May 2004 have more leniency value, applicants might overstate such relevant evidence. Third, evidence provided by carriers with headquarters outside the EEA concerning coordination in their home market does not prove [*].

(1275) The Commission has evaluated the evidence in the file, including [*] by applicants under the Leniency Notice, taking into account the relevant standards set by the Court of Justice of the European Union.

(1276) As explained in Section 4.1 of this Decision the cartel involves a complex multi-level structure of bilateral and multilateral contacts which took place in various places in the world. In order to establish the participation of undertakings in the infringement, it is necessary to present sufficient evidence relating to cartel contacts involving them. The leniency submissions of many applicants represent significant added value because these submissions allowed the Commission to have sufficient evidence to hold certain addressees (including the leniency applicants themselves) liable for the infringement. Moreover, the inspections conducted in Europe could not uncover all the evidence of this [*] cartel.

8.6.1. Lufthansa

(1277) LH was the first undertaking to inform the Commission about a secret cartel concerning airfreight services. LH applied for immunity on 7 December 2005 under the terms of the Leniency Notice. In the course of the Commission's investigation LH provided [*] and a number of documents.

(1278) Prior to the application, the Commission had not undertaken any investigation into the alleged cartel nor did it have in its possession any evidence on the basis of which to carry out an inspection. As the information provided by LH enabled the Commission to adopt a decision to carry out inspections pursuant to Article 20(4) of Regulation No 1/2003, LH was granted conditional immunity from fines pursuant to point 8(a) of the Leniency Notice. The inspections took place on 14 February 2006.

(1279) In order to qualify for immunity from a fine, the Leniency Notice requires applicants for immunity pursuant to point 8(a) to meet the cumulative conditions set out in point 11 of the Leniency Notice, in addition to the conditions entitling them to benefit from conditional immunity under point 8(a). Point 11(a) of the Leniency Notice lays down the obligation for the applicant for immunity to cooperate fully, on a continuous basis and expeditiously throughout the administrative procedure, and to provide all evidence that comes into its possession or that is available to it. Point 11(b) and (c) require the applicant for

immunity to end its involvement in the suspected infringement no later than the time at which it submits evidence under point 8 and not to have taken any steps to coerce other undertakings to participate in the infringement.

(1280) According to the evidence in the Commission's possession, LH terminated its involvement in the infringement at the latest at the time at which it first submitted evidence to the Commission. Furthermore there is no evidence that LH exerted pressure on other addressees to join the cartel arrangements. Finally the Commission is of the opinion that LH has fulfilled the requirements of point 11(a) of the Leniency Notice. In their replies to the Statement of Objections, AF and BA argued that LH continued to have anticompetitive contacts after it submitted its application for immunity. The Commission is aware of these contacts and, given the particular circumstances of this case, does not see a reason to withdraw immunity.

(1281) In conclusion LH should be granted immunity from any fines that would otherwise have been imposed on it with regard to this case.

8.6.2. Martinair

(1282) MP submitted an application under the Leniency Notice on [*] consisting of [*] the submission of documents.

(1283) None of the documents submitted were in the Commission's possession before. [*] .

(1284) MP made further [*] on. [*].

(1285) Throughout the investigation, MP has answered the Commission’s requests for information, without, however, exceeding its obligations under Article 18 and 23 of Regulation (EC) No 1/2003.

(1286) The evidence submitted by MP in its submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission’s ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

MP provided [*] which made it possible to establish its presence in particular at a number of meetings and exchanges, which would not otherwise have been possible.

MP gave a detailed overview of [*].

The evidence provided in a timely manner by MP [*] that was corroborated by other evidence helped the Commission [*] the investigation.

MP provided information on [*].

Also, [*].

MP furthermore provided [*] which was previously unknown to the Commission.

(1287) In conclusion, by [*], MP enabled the Commission to prove [*] in the cartel and [*] and its submissions corroborated [*] provided by other applicants.

(1288) There is no evidence that MP had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1289) MP is therefore the first undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, MP's fine is reduced by 50%.

8.6.3. Japan Airlines

(1290) JL submitted an application under the Leniency Notice on [*] consisting of [*].

(1291) In its submissions of [*] JL provided evidence of [*]. It also corroborated certain information already in the Commission's possession which it had received either through inspections or through provision by the applicant for immunity.

(1292) JL's application was supported by [*]

(1293) Throughout the investigation, JL has answered the Commission’s requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation No 1/2003.

(1294) The evidence submitted by JL in its submissions constitutes significant added value in the sense of the Leniency Notice as it strengthens the Commission’s ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

JL provided [*] information which made it possible to [*], which would not otherwise have been possible.

JL provided [*] which was not previously in the Commission's possession.

JL [*] provide [*].

JL has also provided evidence [*].

(1295) In conclusion, JL provided significant evidence which was not already in the Commission's possession. Although it helped the Commission establish the infringement, the evidence provided also covered issues outside the scope of the infringement described in this decision and it

focussed on issues in Japan. It was of limited scope concerning the infringement itself and JL's participation in it.

(1296) There is no evidence that JL had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1297) JL has argued that it should be regarded as being the first undertaking to submit evidence of significant added value in relation to an infringement on the routes between the EEA and Japan. However, as set out at Section 5.3.1.2 the Commission maintains its position that the infringement is characterised as single and continuous and rejects JL's arguments about multiple infringements in separate markets.

(1298) JL is therefore the second undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, JL's fine is reduced by 25%.

8.6.4. Air France-KLM

(1299) Air France-KLM submitted an application under the Leniency Notice on [*] consisting of [*].

(1300) [*]. No contemporary documents were submitted at this point in time.

(1301) Further submissions consisting of [*] were made on [*].

(1302) Throughout the investigation, Air France-KLM has answered the Commission's requests for information, without, however, exceeding its obligations under Article 18 and 23 of Regulation No 1/2003.

(1303) The evidence submitted by Air France-KLM in the above mentioned submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

[*] that the Commission already had some knowledge of through information provided by LH as well as some documents found in the inspection on 14 February 2006[1308]. The submission [*], thus enabling the Commission to prove one instance of the infringement in more detail.

[*].

The evidence provided enables the Commission to prove the infringement [*].

[1308] [*]

(1304) In conclusion, Air France-KLM provided additional evidence in relation to [*] and its submissions corroborated the statements and evidence provided by other applicants.

(1305) There is no evidence that Air France-KLM had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1306) Air France-KLM is therefore the third undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, Air France-KLM's fine is reduced by 20%.

8.6.5. Cathay Pacific

(1307) CX submitted an application under the Leniency Notice on [*] consisting of [*].

(1308) [*] The [*] submitted provide new evidence of [*].

(1309) CX submitted further [*] on [*]. These submissions concerned [*].

(1310) Throughout the investigation, CX has answered the Commission's requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation No 1/2003.

(1311) The evidence submitted by Cathay Pacific in its submissions constitutes significant added value within the meaning of the Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

[*].

[*]. However, CX argued in its response to the SO that the FSC in Hong Kong was coordinated in full compliance with obligations under local legislation and administrative practices, and as such it does not constitute an infringement of Article 101 of the TFEU.

CX provided [*] that show [*]. CX also provided evidence concerning [*].

CX provided evidence concerning [*].

CX provided evidence concerning [*].

The information provided in the submissions enables the Commission to prove the infringement [*]. The application also provided a better understanding of and context for the contemporaneous documentary evidence by [*].

(1312) In conclusion, CX provided additional evidence in relation to [*] and its submissions corroborated the statements and evidence provided by other applicants that helped the Commission to establish the infringement more in detail and to broaden its scope.

(1313) There is no evidence that CX had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1314) CX is therefore the fourth undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, CX's fine is reduced by 20%.

8.6.6. LAN Airlines S.A.

(1315) LA submitted an application under the Leniency Notice on [*].

(1316) In its submission, LA gave [*], and included instances of the infringement of which the Commission had no previous knowledge. It also [*]. The documents provided consisted mainly of information [*].

(1317) Further submissions were made on [*].

(1318) Throughout the investigation, LA has answered the Commission's requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation (EC) No 1/2003.

(1319) The evidence submitted by LA in the above mentioned submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

LA provided [*].

LA provided new information on [*].

LA provided evidence that corroborated the [*] and evidence gained from inspections. Its submission corroborated [*].

(1320) In conclusion, LA provided additional evidence in relation to [*] and its submissions corroborated [*].

(1321) There is no evidence that LA had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1322) LA is therefore the fifth undertaking to satisfy point 21 of the Leniency Notice. Having regard to the considerable value of its contribution to this case, the stage at which it provided this contribution and the extent of its cooperation following its submissions, LA's fine is reduced by 20%.

8.6.7. SAS Group

(1323) SK submitted an application under the Leniency Notice on [*] consisting respectively of [*].

(1324) [*].

(1325) Further [*] were made on [*] and were accompanied by the submission of [*].

(1326) Throughout the investigation, SK has answered the Commission's requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation No 1/2003.

(1327) The evidence submitted by SK in the above mentioned submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

Concerning the [*].

(1328) In conclusion, SK provided additional evidence in relation to [*] and its submissions corroborated [*].

(1329) There is no evidence that SK had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1330) SK is therefore the sixth undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the relatively late stage at which it provided this contribution and the extent of its cooperation following its submissions, SK's fine is reduced by 15%.

8.6.8. Cargolux Airlines International S.A.

(1331) CV submitted an application under the Leniency Notice on [*].

(1332) In its submission, CV [*] concerning various aspects of the cartel. [*] but the documentation provided in the submission was more detailed than the evidence already in the Commission's possession.

(1333) Further submissions were made on [*]. [*].

(1334) Throughout the investigation, CV has answered the Commission's requests for information, without, however, exceeding its obligations under Article 18 and 23 of Regulation No 1/2003.

(1335) The evidence submitted by CV in the submissions mentioned in recitals (1331) and (1333) constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to

prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

CV provided [*].

CV provided [*].

CV submitted information which corroborated [*] and evidence gained from inspections. Its submission on [*] corroborated evidence about [*].

Information submitted by CV corroborated [*].

(1336) In conclusion, CV provided additional evidence in relation to [*] and its submissions corroborated [*].

(1337) There is no evidence that CV had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1338) CV is therefore the seventh undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the relatively late stage at which it provided this contribution and the extent of its cooperation following its submissions, CV's fine is reduced by 15%.

8.6.9. Qantas Airways Limited.

(1339) QF submitted an application under the Leniency Notice [*].

(1340) In its submission, QF provides [*] of which the Commission had no previous knowledge, especially regarding the [*].

(1341) Further submissions were made [*].

(1342) Throughout the investigation, QF has answered the Commission’s requests for information, without, however, exceeding its obligations under Article 18 and 23 of Regulation No 1/2003.

(1343) The evidence submitted by QF in the above mentioned submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission’s ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

QF provided [*].

QF provided [*].

QF provided information that corroborated [*] and evidence gained from inspections. Its submission corroborated [*]. It also corroborated the [*].

QF provided information on [*] which was not previously in the Commission's possession. Details were provided on [*]. QF provided evidence [*]

QF provided [*].

Information provided by QF [*].

QF's [*] accelerated the Commission's investigation.

(1344) In conclusion, QF provided additional evidence in relation to [*] and its submissions corroborated [*].

(1345) There is no evidence that QF had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1346) QF is therefore the eighth undertaking to satisfy point 21 of the Leniency Notice. Having regard to the considerable value of its contribution to this case, notwithstanding the relatively late stage at which it provided this contribution and the high level of its cooperation following its submissions, QF's fine is reduced by 20%.

8.6.10. British Airways

(1347) BA submitted an application under the Leniency Notice on [*].

(1348) This submission of [*] is composed of [*] that were already known to the Commission from inspections, a few new documents of limited value to the Commission and [*] that is evasive and unclear in respect of the cartel and BA's participation in it.

(1349) This submission does therefore not provide significant added value as neither the [*] submitted on [*] provide the Commission with significant relevant additional evidence of the alleged infringement.

(1350) The [*] were known to the Commission through earlier submissions by LH as well as through information gained via the inspection at BA premises on 14 February 2006. First, [*]. This was not previously known to the Commission. However, BA also states that no relevant anti-competitive behaviour occurred at these meetings. BA [*] This complements information already provided by LH[1309]. The [*] was already known to the Commission and calls are simply listed without any description of the content. Third, the [*] are described in a general manner, without the provision of relevant details[1310]. With reference to [*] BA states that his contacts with [*] consisted usually of business conversations about industry matters and that they did not represent illicit behaviour. Accordingly the Commission does not consider that BA provided significant added value in respect of [*] of BA given such

1309 [*]
1310 [*]

information was in the Commission's possession already, and is not sufficiently detailed evidence and does not substantiate the infringement.

(1351) Significant added value is not provided [*], which covers other contacts which do not relate to the alleged infringement. Subsequently reference is made to [*] and BA does not state the source of this information.

(1352) The remainder of the leniency [*]. BA does not make it clear whether or not illicit competitor contacts on these matters occurred. Furthermore, [*] do not form part of the infringement described in this decision.

(1353) Finally, information on the compliance program run by BA cannot be considered to strengthen the Commission's ability to prove an infringement.

(1354) The other [*] submitted on [*] do not provide significant added value either. Certain [*] provide general information about BA and its fuel surcharge system but no relevant information on the alleged infringement. Many documents submitted were already known to the Commission as they had been found during the inspection of BA premises on 14 February 2006[1311]. Another [*] refers to [*] of which the Commission had prior knowledge.[1312] Other [*] submitted include [1313] copies of press releases that were and are publicly accessible, and some of the documents submitted[1314] do not relate to the alleged infringement.

(1355) BA's submission on [*] does therefore not meet the requirements for BA to qualify for a reduction of fines under point 26 of the Leniency Notice.

(1356) On [*] BA made [*] and submitted further [*].

(1357) [*] submitted provide no evidence on illegal competitor contacts but deal solely with WorldACD (World Air Cargo Daily). WorldACD is an independent information aggregator serving individuals and companies involved in the airfreight sector with general information and specific data. BA did not identify any anti-competitive conduct on its part, or on the part of other airlines or of WorldACD.

(1358) Hence the evidence provided by BA on [*] does not represent significant added value with regard to the Commission's ability to prove the existence of the alleged cartel. BA's submission on [*] does therefore not meet the requirements set for BA to qualify for a reduction of fines under point 26 of the Leniency Notice.

(1359) BA [*] submitted [*]. The submission concerned events [*] which do not form part of this decision and as such does not constitute significant added value.

(1360) BA submitted further on [*].

1311 See in the file [*]

1312 [*].

1313 [*].

1314 [*]

(1361) Throughout the investigation, BA has answered the Commission's requests for information, although not exceeding its obligations under Article 18 and 23 of Regulation No 1/2003.

(1362) The evidence submitted by BA in its submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine

BA provided evidence on which the Commission has relied in respect of various jurisdictions namely [*].

BA has also provided evidence of [*] although as outlined in this Section the majority of the evidence was already in the Commission's possession and its nature is moreover corroborative.

(1363) In conclusion, BA provided some evidence which was not already in the Commission's possession and also submitted evidence which was corroborative in nature.

(1364) There is no evidence that BA had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1365) BA is therefore the ninth undertaking to satisfy point 21 of the Leniency Notice. Considering the value of its contribution to this case, the relatively late stage at which it provided this contribution and the extent of its cooperation following its submissions, BA's fine is reduced by 10%.

8.6.11. Air Canada

(1366) AC submitted an application under the Leniency Notice on [*].

(1367) [*]

(1368) Further [*] were made on [*] and were [*] relating to various matters [*].

(1369) Throughout the investigation, AC has answered the Commission's requests for information, without, however, exceeding its obligations under Articles 18 and 23 of Regulation No 1/2003.

(1370) The evidence submitted by AC in the above mentioned submissions constitutes significant added value within the meaning of the Leniency Notice as it strengthens the Commission's ability to prove the facts pertaining to this cartel in respect of the following aspects, therefore giving rise to a reduction of the fine:

[*].

AC provided [*], which was not previously in the Commission's possession.

AC also provided [*] which was not previously in the Commission's possession.

AC provided [*] which were not previously in the Commission's possession.

[*].

(1371) In conclusion, AC provided additional evidence [*].

(1372) There is no evidence that AC had not terminated its involvement in the suspected infringement before or at the latest at the time at which it submitted the evidence (point 21 of the Leniency Notice).

(1373) AC is therefore the tenth undertaking to satisfy point 21 of the 2002 Leniency Notice. Having regard to the considerable value of its contribution to this case, the late stage at which it provided this contribution and the extent of its cooperation following its submissions, AC's fine is reduced by 15%.

8.7. Ability to pay

(1374) According to point 35 of the 2006 Guidelines on fines, *'In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that the imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.'*

(1375) In exercising its discretion under point 35 of the 2006 Guidelines on fines, the Commission carries out an overall assessment of the undertaking's financial situation, with the primary focus on the undertaking's capacity to pay the fine in a specific social and economic context.

(1376) Among the undertakings addressed by this Decision, [*] have made applications claiming inability to pay the fine in accordance with paragraph 35 of the Guidelines on fines. The Commission has considered those claims and carefully analysed the available financial data on those undertakings. All undertakings concerned received Article 18 requests asking them to submit details about their individual financial situation and the specific social and economic context they are in.

(1377) Insofar as the undertakings argue that the estimated fine would have a negative impact on their financial situation, without adducing credible evidence demonstrating their inability to pay the expected fine, the

Commission points to settled case law according to which the Commission is not required, when determining the amount of the fine to be imposed, to take into account the poor financial situation of an undertaking, since recognition of such an obligation would be tantamount to giving unjustified competitive advantages to undertakings least well adapted to the conditions of the market.[1315]

(1378) Accordingly, in [*], the individual financial position of each of the undertakings concerned and the impact of the fine is assessed in the respective specific social and economic context for those undertakings that have provided more detailed information and data. The respective financial situation of the undertakings concerned is assessed at the time the Decision is adopted and on the basis of the financial data and information submitted by the undertakings.

(1379) In assessing the undertakings' financial situation, the Commission considers the financial statements (annual reports, consisting of a balance sheet, an income statement, a statement of changes in equity, a cash-flow statement and notes) of the last (usually five) financial years, as well as their projections for 2010 to 2012. The Commission takes into account and relies upon a number of financial ratios measuring the solidity (in this case, the proportion which the expected fine would represent of the undertakings' equity and assets), their profitability, solvency and liquidity, all of which are commonly used when evaluating risks of bankruptcy. In addition, the Commission takes into account relations with outside financial partners such as banks, on the basis of copies of contracts concluded with those partners in order to assess the undertakings' access to finance and, in particular, the scope of any undrawn credit facilities they may have. The Commission also includes in its analysis the relations with shareholders in order to assess their confidence in the undertakings' economic viability (shareholder relations may be illustrated by recent dividend payments and other outflows of cash paid to the shareholders), as well as the ability of those shareholders to assist the undertakings concerned financially.[1316] Attention is paid both to the equity and profitability of the undertakings and, above all, to their solvency, liquidity and cash flow. The analysis is in other words both prospective and retrospective but with a focus on the present and immediate future of the undertaking. The analysis is not purely static but rather dynamic, whilst taking into account consistency over time of the submitted projections. The analysis takes into account possible restructuring plans and their state of implementation.

1315 See Joined Cases 96/82 to 102/82, 104/82, 105/82, 108/82 and 110/82, *IAZ International Belgium and Others* v Commission [1983] ECR 3369, paragraphs 54 and 55, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 327, and Case C-308/04 P, *SGL Carbon AG* v *Commission* [2006] ECR I-5977, paragraph 105.

1316 By analogy to the assessment of "*serious and irreparable harm*" in the context of interim measures, the Commission bases its assessment of the undertaking's ability to pay on the financial situation of the undertaking as a whole, including its shareholders, irrespective of the finding of liability (Case C-335/99 P (R), *HFB* v. *Commission*, [1999] ECR I-8705; Case C-7/01 P(R), *FEG* v. *Commission*, [2001] ECR I-2559), and Case T-410/09 R *Almamet* v. *Commission* (not yet reported), at paragraphs 47 *et seq.*

(1380) The Commission also assesses the specific social and economic context for each undertaking whose financial situation is found to be sufficiently critical following the analysis described in recital (1379).

8.7.1. [*]

(1381) [*]

(1382) [*]

(1383) [*]

(1384) [*]

(1385) [*]

8.7.2. [*]

(1386) [*]

(1387) [*]

8.7.3. [*]

(1388) [*].

(1389) [*]

(1390) [*]

(1391) [*]

8.7.4. [*]

(1392) [*].

(1393) [*]

(1394) [*]

8.7.5. [*]

(1395) [*]

(1396) [*].

(1397) [*]

(1398) [*]

(1399) [*]

8.8. The amounts of the fines to be imposed in this decision.

(1400) The fines to be imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003 should therefore be as set out by legal entity in Table 8 below. These figures are the amounts for which each legal entity is cumulatively liable on a sole and on a joint and several basis. The basis and periods for which legal entities are found to be solely liable and/or jointly and severally liable are set out in detail in Section 6.2. On the basis of Section 6.2, the liabilities of the legal entities within the undertaking for such fines are set out in Article 5 of the Decision where the Commission has apportioned, as necessary, the amount of the fine in order to reflect the duration of the liability of the legal entities for the infringement.

Table 8

All amounts are in EUR

Air Canada	21 037 500
Air France-KLM Société Air France	182 920 000 182 920 000
KLM NV Air France-KLM	127 160 000 124 440 000
British Airways Plc	104 040 000
Cargolux Airlines International S.A.	79 900 000
Cathay Pacific Airways Limited	57 120 000
Japan Airlines Corporation Japan Airlines International Co., Ltd.	35 700 000 35 700 000
LAN Airlines S.A. LAN Cargo S.A.	8 220 000 8 220 000
Lufthansa Cargo AG	0

Deutsche Lufthansa AG	0
SWISS International Air Lines AG Deutsche Lufthansa AG	0 0
Martinair Holland N.V.	29 500 000
Qantas Airways Limited	8 880 000
SAS AB SAS Cargo Group A/S SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden	38 250 000 64 812 500 14 875 000
Singapore Airlines Cargo Pte Ltd Singapore Airlines Limited	74 800 000 74 800 000

HAS ADOPTED THIS DECISION:

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) Société Air France from 7 December 1999 until 14 February 2006;

c) KLM N.V. from 21 December 1999 until 14 February 2006;

d) British Airways Plc from 22 January 2001 until 14 February 2006;

e) Cargolux Airlines International S.A. from 22 January 2001 until 14 February 2006;

f) Lufthansa Cargo AG from 14 December 1999 until 7 December 2005;

g) Deutsche Lufthansa AG from 14 December 1999 until 7 December 2005;

h) SWISS International Air Lines AG from 2 April 2002 to 7 December 2005;

i) Martinair Holland N.V. from 22 January 2001 until 14 February 2006;

j) SAS AB from 17 August 2001 until 14 February 2006;

k) SAS Cargo Group A/S from 1 June 2001 until 14 February 2006;

l) SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden 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) Société Air France from 1 May 2004 until 14 February 2006;

d) KLM N.V. from 1 May 2004 until 14 February 2006;

e) British Airways Plc from 1 May 2004 until 14 February 2006;

f) Cargolux Airlines International S.A. from 1 May 2004 until 14 February 2006;

g) Cathay Pacific Airways Limited from 1 May 2004 until 14 February 2006;

h) Japan Airlines Corporation from 1 May 2004 until 14 February 2006;

i) Japan Airlines International Co., Ltd. from 1 May 2004 until 14 February 2006;

j) LAN Airlines S.A. from 1 May 2004 until 14 February 2006

k) LAN Cargo S.A. from 1 May 2004 until 14 February 2006

l) Lufthansa Cargo AG from 1 May 2004 until 7 December 2005;

m) Deutsche Lufthansa AG from 1 May 2004 until 7 December 2005;

n) SWISS International Air Lines AG from 1 May 2004 until 7 December 2005;

o) Martinair Holland N.V. from 1 May 2004 until 14 February 2006;

p) Qantas Airways Limited from 1 May 2004 until 14 February 2006;

q) SAS AB from 1 May 2004 until 14 February 2006;

r) SAS Cargo Group A/S from 1 May 2004 until 14 February 2006;

s) Singapore Airlines Cargo Pte Ltd from 1 May 2004 until 14 February 2006;

t) Singapore Airlines Limited 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) Société Air France from 19 May 2005 until 14 February 2006;

d) KLM N.V. from 19 May 2005 until 14 February 2006;

e) British Airways Plc from 19 May 2005 until 14 February 2006;

f) Cargolux Airlines International S.A. from 19 May 2005 until 14 February 2006;

g) Cathay Pacific Airways Limited from 19 May 2005 until 14 February 2006;

h) Japan Airlines Corporation from 19 May 2005 until 14 February 2006;

i) Japan Airlines International Co., Ltd. from 19 May 2005 until 14 February 2006;

j) Lufthansa Cargo AG from 19 May 2005 until 7 December 2005;

k) Deutsche Lufthansa AG from 19 May 2005 until 7 December 2005;

l) SWISS International Air Lines AG from 19 May 2005 until 7 December 2005;

m) Martinair Holland N.V. from 19 May 2005 until 14 February 2006;

n) Qantas Airways Limited from 19 May 2005 until 14 February 2006;

o) SAS AB from 19 May 2005 until 14 February 2006;

p) SAS Cargo Group A/S from 19 May 2005 until 14 February 2006;

q) Singapore Airlines Cargo Pte Ltd from 19 May 2005 until 14 February 2006;

r) Singapore Airlines Limited from 19 May 2005 until 14 February 2006;

Article 4

The following undertakings infringed Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport 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) Société Air France from 1 June 2002 until 14 February 2006;

c) KLM N.V. from 1 June 2002 until 14 February 2006;

d) British Airways Plc from 1 June 2002 until 14 February 2006;

e) Cargolux Airlines International S.A. from 1 June 2002 until 14 February 2006;

f) Lufthansa Cargo AG from 1 June 2002 until 7 December 2005;

g) Deutsche Lufthansa AG from 1 June 2002 until 7 December 2005;

h) SWISS International Air Lines AG from 1 June 2002 until 7 December 2005;

i) Martinair Holland N.V. from 1 June 2002 until 14 February 2006;

j) SAS AB from 1 June 2002 until 14 February 2006;

k) SAS Cargo Group A/S from 1 June 2002 until 14 February 2006;

l) SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden from 1 June 2002 until 28 December 2003;

Article 5

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

a) Air Canada: EUR 21 037 500;

b) Air France-KLM and Société Air France jointly and severally: EUR 182 920 000;

c) KLM N.V.: EUR 2 720 000;

d) KLM N.V. and Air France-KLM jointly and severally: EUR 124 440 000;

e) British Airways Plc: EUR 104 040 000;

f) Cargolux Airlines International S.A.: EUR 79 900 000;

g) Cathay Pacific Airways Ltd: EUR 57 120 000;

h) Japan Airlines Corporation, and Japan Airlines International Co., Ltd. jointly and severally: EUR 35 700 000;

i) LAN Airlines S.A. and LAN Cargo S.A. jointly and severally: EUR 8 220 000;

j) Lufthansa Cargo AG and Deutsche Lufthansa AG jointly and severally: EUR 0;

k) SWISS International Air Lines AG: EUR 0;

l) SWISS International Air Lines AG and Deutsche Lufthansa AG jointly and severally: EUR 0;

m) Martinair Holland N.V.: EUR 29 500 000;

n) Qantas Airways Limited: EUR 8 880 000;

o) SCANDINAVIAN AIRLINE SYSTEM Denmark – Norway - Sweden: EUR 5 355 000;

p) SAS Cargo Group A/S and SCANDINAVIAN AIRLINE SYSTEM Denmark – Norway - Sweden jointly and severally: EUR 4 254 250;

q) SAS Cargo Group A/S, SCANDINAVIAN AIRLINE SYSTEM Denmark – Norway - Sweden and SAS AB jointly and severally: EUR 5 265 750

r) SAS Cargo Group A/S and SAS AB jointly and severally: EUR 32 984 250

s) SAS Cargo Group A/S: 22 308 250

t) Singapore Airlines Cargo Pte Ltd and Singapore Airlines Limited jointly and severally: EUR 74 800 000.

The fines shall be paid in euro, within three months of the date of the notification of this decision to the bank account held in the name of the European Commission with:

BANQUE ET CAISSE D'EPARGNE DE L'ETAT
1-2, Place de Metz
L-1930 Luxembourg

IBAN: LU02 0019 3155 9887 1000
SWIFT: BCEELULL

Ref.: "European Commission - BUFI / COMP/39258"

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an undertaking referred to in Article 1 lodges an appeal, that undertaking shall cover the fine by the due date by either providing an acceptable bank guarantee or making a provisional payment of the fine in accordance with Article 85a(1) of Commission Regulation (EC, Euratom) No 2342/2002[1317].

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:

Air Canada
7373 Cote-Vertu Blvd. West – Zip 1276
Saint-Laurent (Quebec) H4S 1Z3
Canada

Air France-KLM
2, rue Robert Esnault Pelterie
75007 Paris
France

Société Air France
45, rue de Paris

[1317] OJ L 357, 31.12.2002, p. 1.

95747 Roissy Charles-de-Gaulle CEDEX
France

KLM N.V.
Amsterdamseweg 55
1182 GP Amstelveen
Nederland

British Airways Plc
Waterside
Speedbird Way
Harmondsworth
West Drayton
UB7 0GB
England

Cargolux Airlines International S.A.
Luxembourg Airport
2990 Sandweiler
Luxembourg

Cathay Pacific Airways Limited
35/F Two Pacific Place
88 Queensway
Hong Kong

Japan Airlines Corporation
4-11, Higashi-shinagawa 2-chome,
Shinagawa-ku
Tokyo 140-8637
Japan

Japan Airlines International Co., Ltd.
4-11, Higashi-shinagawa 2-chome
Shinagawa-ku
Tokyo 140-8637
Japan

LAN Airlines S.A.
Avenida Presidente Riesco 5711 – Piso 20
Las Condes
Santiago
Chile

LAN Cargo S.A.
6500 N.W. 22 Street
Miami, Florida 33156
USA

Lufthansa Cargo AG
Am Grünen Weg 1

65451 Kelsterbach
Deutschland

Deutsche Lufthansa AG
Von-Gablenz-Straße 2-6
50679 Köln
Deutschland

SWISS International Air Lines AG
Malzgasse 15
4052 Basel
Switzerland

Martinair Holland N.V.
Piet Guilonardweg 17
1117 EE Schiphol Oost
Nederland

Qantas Airways Limited
Qantas Centre
Level 9, Building A
203 Coward Street
Mascot, NSW 2020
Australia

SAS AB
Frösundaviks Allé 1
Solna
195 87 Stockholm
Sverige

SAS Cargo Group A/S
Kystvejen 40
2770 Kastrup
Denmark

SCANDINAVIAN AIRLINES SYSTEM Denmark - Norway - Sweden
Frösundaviks Allé 1
Solna
195 87 Stockholm
Sverige

Singapore Airlines Cargo Pte Ltd
09-D Airline House
25 Airline Road
Singapore 819829

Singapore Airlines Limited
08-D Airline House
25 Airline Road
Singapore 819829

This Decision shall be enforceable pursuant to Article 299 TFEU and Article 110 of the EEA agreement.

Done at Brussels, 9.11.2010

For the Commission