Introduction

1. On 16 December 2015, the EU General Court (the “General Court”) annulled the decision of the European Commission (the “Commission”) dated 9 November 2010 relating to the cartel in the airfreight sector (case AT.39258 - Airfreight) (the “Decision”). The Decision was overturned vis-à-vis the 13 air carrier addressees of the Decision, among which were Air France and Air France-KLM, that had appealed the Decision.¹

2. The 13 judgments of the General Court (the “Judgments”) concern one of the largest international cartel investigations initiated in February 2006 by co-ordinated dawn raids carried out by the Commission, the US and Korean competition authorities at air carriers’ premises.²

3. The outcome of the Judgments is unprecedented since, for the first time, an EU cartel decision was annulled vis-à-vis all the appellant companies on the basis of an inconsistency between the grounds of such decision (by which the carriers would have participated in a “single and continuous infringement”) and its operative part (which found not one but four distinct infringements). The Judgments may further weaken the concept of “single and continuous infringement” itself upon which the Commission’s cartel decisions are quasi systematically based.

4. The full text of the Air France judgment (the “Air France Judgment”) and of the Air France-KLM judgment can be found here and here.


² The investigations have since been settled with the US, Canadian, Brazilian, Australian and South African competition authorities. Air carriers have also been fined in Korea in 2010 (on appeal, the fine against Air France was confirmed but the KFTC’s decisions were annulled entirely vis-à-vis Air France-KLM) as well as in Switzerland in December 2013 where the carriers’ appeals against the Swiss decision are still pending.
5. The Decision imposed fines amounting to 799 million euros on eleven groups of air carriers – including 340 million euros on Air France-KLM – accused of having co-ordinated their behaviour as regards the pricing of airfreight services. Lufthansa and its subsidiaries, which denounced the practices within the framework of the Commission leniency programme, were granted immunity from fines. In the Decision, the Commission found that the co-ordination concerned two price components, the fuel surcharge which was introduced to address the carriers’ increased fuel costs and the security surcharge addressing the costs of security measures imposed following the terrorist attacks of 11 September 2001. The coordination further comprised the air carriers’ refusal to pay commissions to freight forwarders (the carriers’ direct customers) on these two surcharges.

1. An unprecedented annulment of a cartel decision

6. In this unparalleled case, the General Court ruled that the Decision was vitiated by a contradiction between its grounds and its operative part which justified its annulment vis-à-vis the appellant carriers.

7. The General Court pointed out that the grounds of the Decision referred to “a single cartel, constituting a single and continuous infringement of Article 101 TFEU, of Article 53 of the EEA Agreement and of Article 8 of the [Agreement between the European Community and the Swiss Confederation on Air Transport (the “EU-Swiss Agreement”)] in relation to all of the routes covered by the cartel and in which all of the carriers at issue participated. [...] That coordination is said to have taken place at a worldwide level and therefore affected simultaneously all the routes referred to in the contested decision” (Air France Judgment, pt. 61).

8. In contrast, the operative part of the Decision no longer referred to any “single and continuous infringement” but was made up of four articles referring to four separate infringements, relating to different periods and routes and involving different carriers. Whereas the European carriers were found to have committed all four infringements, non-European carriers were found to have committed only one or two of them. According to the General Court, this breakdown could not be reconciled with the “single and continuous infringement” approach held in the grounds of the Decision (Air France Judgment, pt. 63).

9. Aside from the contradiction between the grounds and the operative part, the General Court further ruled that the grounds of the Decision themselves were not internally consistent, regarding in particular the addressees of the Decision involved in the practices and the periods for which these addressees were held liable. The General Court stressed that those grounds contained assessments which were difficult to reconcile with the existence of a single cartel covering all of the routes referred to in the operative part, as described in those grounds.

10. For the General Court, these internal contradictions prevented carriers from understanding whether they may have been treated unfairly vis-à-vis other non-European carriers which were held liable for only two, or even only one,
infringement and therefore whether these former carriers may have suffered discrimination vis-à-vis the non-European carriers.

2 Weakening of the overarching “single and continuous infringement” concept

11. On a more general standpoint, the Judgments are likely to weaken the concept of “single and continuous infringement” which is quasi automatically used by the Commission to extend the liability of companies involved in anticompetitive agreements by significantly alleviating the Commission’s burden of proof and the seriousness of cartel infringements. It is interesting to note that the Judgments follow the recent trend of the European Court of Justice case law which narrowed down the scope of the other favourite tool the Commission has recourse to in order to expand companies’ antitrust liability, the concept of “infringement by object”.  

12. In the present case, the concept of single and continuous infringement revealed its fragility. Indeed, for the General Court, the Commission had been unable to reflect in the operative part of its Decision any finding of one single infringement upon which the grounds of the Decision were based.

13. In this regard, the General Court recalled that “it is in the operative part of a decision that the Commission must indicate the nature and extent of the infringements which it penalises. In principle, as regards in particular the scope and nature of the infringements penalised, it is the operative part, and not the statement of reasons, which is important” (Air France Judgment, pt. 40).

14. For this reason, the General Court emphasised that “The principle of effective judicial protection [enshrined in Article 6 of the European Convention on Human Rights and Article 47 of the Charter of Fundamental Rights of the European Union] requires that the operative part of a decision [...] must be particularly clear and precise and that the undertakings held liable and penalised must be in a position to understand and to contest that imputation of liability and the imposition of those penalties, as set out in the wording of that operative part” (Air France Judgment, pt. 39 (emphasis added)).

15. The Judgments are, in this respect, a further significant and welcome step in the strengthening of the EU courts’ control over the Commission’s cartel decisions and requirement for more robustly reasoned decisions.

16. The General Court also justified the need for better reasoned decisions by the follow-on civil proceedings. Since national judges are bound by the Commission decisions upon which the follow-on civil suits are based, these decisions have to be clearly and sufficiently reasoned. In particular, their operative part must be understood unequivocally by national courts to allow them to determine the temporal and geographic scopes of the infringement and to identify the liable companies, in order to be able to draw the necessary inferences as regards claims for damages brought by persons harmed by that infringement (Air France Judgment, pts. 41-45).

4 Case C-67/13 P, ECJ judgment of 11 September 2014, Groupement des cartes bancaires (CB) v. Commission; Case C-345/14, ECJ judgment of 26 November 2015, SIA ‘Maxima Latvija’.
3 Next steps?

17. Whether the Commission will challenge the Judgments before the European Court of Justice and/or re-adopt a decision which iron out the inconsistencies denounced by the General Court remains uncertain to date. All options have their pros and cons and this will be clarified to a certain extent at the expiration of the appeal filing period set at the beginning of March.

Approximately only 25% of the General Court judgments annulling a cartel decision are appealed by the Commission.