

# **IBC Conference: Competition Law in the Transport Sector**

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## **Air Cargo Case – A Categoric Review**

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# The Air Cargo Cartel

- Public Enforcement – Background
- Public Enforcement – Current Situation
- Impact of Public Enforcement on Private Enforcement
- Private Enforcement
- US/EU Comparison: what can we learn?

# Public Enforcement - Background

- **9 November 2010** - The European Commission issued an infringement decision for the fixing of the fuel and security surcharge elements in their supply of air cargo services on routes worldwide (the “**Infringement Decision**”). Cumulative fines of €790 million were imposed.
- **January 2011** - Addressees lodged their application to appeal the Infringement Decision. British Airways only appealed the Infringement Decision in part and Qantas did not appeal.
- **May 2015** – The redacted non-confidential version of the Infringement Decision was published. A series of hearings took place before the General Court regarding the air carriers' appeals against the Infringement Decision.
- **16 December 2015** - The General Court handed down a series of simultaneous judgments, allowing the airlines' appeals and annulling the Infringement Decision in full (except for British Airways and Qantas).

# Public Enforcement - General Court

- Contradiction between the grounds of the decision and its operative part:

*" In accordance with Article 16(1) of Regulation No 1/2003, when national courts rule on agreements, decisions or practices under Article 101 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to that decision.*

*In that respect, it must be considered ... that a national court would take a decision contrary to that adopted by the Commission not only if it gave a different legal classification to the anticompetitive conduct examined, but also **if its decision differed from that of the Commission as regards the temporal or geographic scope of the conduct examined or as regards the liability or non-liability of persons investigated in relation to the conduct at issue and whose liability was examined in the Commission's decision.**"*

# Public Enforcement – Current situation

- The Commission:
  - Intends to release a fresh decision infringement decision against the air carriers
  - The parameters and timing of this fresh infringement decision are not clear
- The Air Carriers:
  - British Airways has lodged an appeal against the General Court's Decision for a full annulment of the Infringement Decision to the Court of Justice
  - Qantas?

# Impact of Public Enforcement on Private Enforcement (1)

EU private damages claims being pursued re the Air Cargo cartel, include:

- **United Kingdom**
  - The *Emerald* Proceedings
  - The *Allston* Proceedings
  - The *La Gaitana* Proceedings
  - The *Hyundai* Proceedings
- **Netherlands**
  - The SCC Main Proceedings
  - The *Equilib* I and II Proceedings
  - *KLM and others v DB Schenker and others* Proceedings
  - *East West Debt v Airlines* Proceedings
- **Germany**
  - The *DB Barnsdale AG* Proceedings

# Impact of Public Enforcement on Private Enforcement (2)

- Slow process of the Public Enforcement Procedure:
  - Delay in releasing a public non-confidential version of the Decision
  - The Judgment of the General Court:
    - English court - Claimants ordered to re-plead
    - Dutch court – Application for a stay
  - Fresh infringement decision against the airlines
- The revised infringement decision will also be subject to appeals from the airlines.
- "*Masterfoods*" stay?

# Private Enforcement (1)

Further complications impacting the private enforcement include:

- Claimant disclosure requirements (English and Dutch Proceedings)
  - Claimant obligations in proving VoC and pass-on
- Change in the Assigned Judge in the English proceedings
  - Change of case-management approach i.e. approach to claimants' disclosure and order to re-plead
- Use of claims vehicles in Dutch proceedings
  - Assignment issues



# Private Enforcement (2)

- The English Court of Appeal Hearings
  - *Newson and Pergan* Appeals
  - Novel causes of action in competition law
    - Traditionally – claims were breach of statutory duty
    - Unlawful means conspiracy – English Court a "one stop " for worldwide claims by bringing an English tort claim for breach of foreign competition laws
- Direct claims for breach of foreign competition law
  - Principle of private international law that Courts will not enforce foreign penal or "other public law"
  - Issues of public policy/international comity
  - Limitation within foreign laws – e.g. Sherman Act provides that claims under it can only be brought in the US

# US/EU Comparison: what can we learn?

Overview	United States	Europe
<b>Legal Culture</b>	<ul style="list-style-type: none"> <li>The US legislation and its application bear many particularities, reflective of American legal, social and economic culture.</li> <li>The success of collective redress in the US is due to its 'litigation culture'.</li> <li>Other contributing factors and important features of the US legal system are class actions, contingency fee arrangements, treble damages, discovery procedures, one-way fee shifting and jury trials.</li> </ul>	<ul style="list-style-type: none"> <li>All these are not common in European proceedings.</li> <li>The EU has the objective of building an enforcement culture, and not a litigation culture. Characteristic for Europe is the tendency towards using preventive administrative regulation.</li> <li>Collective redress regime in UK, but only since October 2015.</li> </ul>
<b>Public v. Private Enforcement</b>	<ul style="list-style-type: none"> <li>Collective redress played a major role in the development of US antitrust jurisprudence.</li> </ul>	<ul style="list-style-type: none"> <li>In Europe, there is a much stronger tradition supporting public enforcement than private enforcement.</li> </ul>
<b>Objective behind Damages</b>	<ul style="list-style-type: none"> <li>In the US, treble damages are designed to deter illegal conduct, deprive antitrust violators of the 'fruits of their illegal activities' and provide compensation for victims.</li> <li>Deterrence is considered as extremely important in the US system.</li> <li>Trebling of damages is a feature specific to only antitrust cases.</li> <li>The reward in the leniency programme in the US includes avoiding a treble damages award in private suits.</li> </ul>	<ul style="list-style-type: none"> <li>In Europe, damages primarily serve a compensatory role.</li> <li>Legal traditions are strongly opposed to the possibility of punitive damages.</li> <li>Article 24 of the Rome II Regulation prohibits punitive.</li> <li>Damages in private enforcement aim at protecting private interests, whereas damages in public enforcement are supposed to protect the functioning of the market in abstract.</li> <li>EU Damages Directive</li> </ul>