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judgment

AMSTERDAM DISTRICT COURT
Private Law Division

Judgment of 1 May 2019

in the matters with case numbers / cause-list numbers
C/13/562256 / HA ZA 14-348 (SCC I) and
C/13/604492 / HA ZA 16-301 (SCC II) of

STICHTING CARTEL COMPENSATION,
a foundation with its registered office in The Hague, the Netherlands,
claimant,
lawyer J. van den Brande,

versus

1. **KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V.,**
a public limited company with its registered office in Amstelveen, the Netherlands,
lawyer: J.S. Kortmann,
2. **MARTINAIR HOLLAND N.V.,**
a public limited company with its registered office in Haarlemmermeer, the Netherlands,
lawyer: J.S. Kortmann,
3. **DEUTSCHE LUFTHANSA A.G.,**
a legal entity incorporated under foreign law with its registered office in Cologne, Germany,
lawyer: P.N. Malanczuk,
4. **LUFTHANSA CARGO A.G.,**
a legal entity incorporated under foreign law with its registered office in Frankfurt am Main, Germany,
lawyer: P.N. Malanczuk,
5. **BRITISH AIRWAYS PLC.,**
a legal entity incorporated under foreign law with its registered office in Harmondsworth, the United Kingdom,
lawyer: D.J. Beenders,
6. **SOCIETE AIR FRANCE S.A.,**
a legal entity incorporated under foreign law with its registered office in Tremblay en France, France,
lawyer: D.A.M.H.W. Strik,
7. **SINGAPORE AIRLINES LIMITED,**
a legal entity incorporated under foreign law with its registered office in Singapore, Singapore,
lawyer: I.W. VerLoren van Themaat,
8. **SINGAPORE AIRLINES CARGO PTE LTD,**
a legal entity incorporated under foreign law with its registered office in Singapore, Singapore,
lawyer: I.W. VerLoren van Themaat,
defendants,

as well as in the matter with case number / cause-list number: C/13/486440/ HA ZA 11-944 (Equilib I) of

EQUILIB NETHERLANDS B.V.,
a private limited company with its registered office in Amsterdam, the Netherlands,
claimant,
lawyer: M.H.J. van Maanen,

versus

1. **KONINKLIJKE LUCHTVAARTMAATSCHAPPIJ N.V.,**
a public limited company with its registered office in Amstelveen, the Netherlands,
lawyer: J.S. Kortmann,
2. **MARTINAIR HOLLAND N.V.,**
a public limited company with its registered office in Haarlemmermeer, the Netherlands,
lawyer: J.S. Kortmann,
3. **SOCIÉTÉ AIR FRANCE S.A.,**
a legal entity incorporated under foreign law with its registered office in Tremblay en France, France,
lawyer: D.A.M.H.W. Strik,
defendants,

and

4. **SINGAPORE AIRLINES CARGO PTE LTD,**
a company incorporated under foreign law with its registered office in Singapore, Singapore,
lawyer: I.W. VerLoren van Themaat,
5. **SINGAPORE AIRLINES LIMITED,**
a company incorporated under foreign law with its registered office in Singapore, Singapore,
lawyer: I.W. VerLoren van Themaat,
6. **LUFTHANSA CARGO A.G.,**
a legal entity incorporated under foreign law with its registered office in Kelsterbach, Germany,
lawyer: P.N. Malanczuk,
7. **DEUTSCHE LUFTHANSA A.G.,**
a legal entity incorporated under foreign law with its registered office in Cologne, Germany,
lawyer: P.N. Malanczuk,
8. **SWISS INTERNATIONAL AIR LINES A.G.,**
a legal entity incorporated under foreign law with its registered office in Basel, Switzerland,
lawyer: P.N. Malanczuk,
9. **BRITISH AIRWAYS PLC.,**
a legal entity incorporated under foreign law with its registered office in Harmondsworth, the United Kingdom,
lawyer: D.J. Beenders,
10. **AIR CANADA,**
a legal entity incorporated under foreign law with its registered office in Saint Laurent, Canada,

lawyer: K.A.J. Bisschop,
11. **CATHAY PACIFIC AIRWAYS LIMITED,**
a legal entity incorporated under foreign law with its registered office in Hong Kong, China,
lawyer: Ph.W.M. ter Burg,
joined parties,

and in the matter with case number / cause-list number C/13/561169 / HA ZA 14-283 (Equilib II) of

EQUILIB NETHERLANDS B.V.,
a private limited company with its registered office in Amsterdam, the Netherlands,
claimant,
lawyer: M.H.J. van Maanen,

versus

1. **KONINKLIJKE LUCHTVAART MAATSCHAPPIJ N.V.,**
a public limited company with its registered office in Amstelveen, the Netherlands,
lawyer: J.S. Kortmann,
2. **MARTINAIR HOLLAND N.V.,**
a public limited company with its registered office in Haarlemmermeer, the Netherlands,
lawyer: J.S. Kortmann,
3. **SOCIÉTÉ AIR FRANCE S.A.,**
a public limited company incorporated under foreign law with its registered office in Tremblay en France, France,
lawyer: D.A.M.H.W. Strik,
4. **LUFTHANSA CARGO A.G.,**
a legal entity incorporated under foreign law with its registered office in Kelsterbach, Germany,
lawyer: P.N. Malanczuk,
5. **DEUTSCHE LUFTHANSA A.G.,**
a legal entity incorporated under foreign law with its registered office in Cologne, Germany,
lawyer: P.N. Malanczuk,
6. **BRITISH AIRWAYS PLC.,**
a legal entity incorporated under foreign law with its registered office in Harmondsworth, the United Kingdom,
lawyer: D.J. Beenders,
defendants.

The claimants are hereinafter referred to as SCC and Equilib. The defendants (and the joined parties) are hereinafter jointly referred to as the airlines.

1. The proceedings

1.1. The further course of the proceedings is evident from:
- email correspondence between the District Court and the parties regarding the schedule for the hearing of the oral arguments on 27 November 2018;

- the abridged court record of the oral arguments delivered on 27 November 2018, along with the procedural documents referred to in it;
- the email from M.H.J. van Maanen on behalf of Equilib of 24 December 2018, with a response to the court record.

1.2. The court record stipulates that any comments on it can be notified to the court registry by email within fourteen days of its receipt. The court record was sent to the parties by email on 11 December 2018.
The emails of 2 January 2019 from T. Heikens, of 3 January 2019 from M. Portman and of 7 January 2019 from H. Speyart on behalf of the defendants with responses to the court record, date from after this fourteen day period. In view of this those emails will be disregarded, as requested by Th. Verheij on behalf of SCC and Equilib in an email of 10 January 2019.

2. The facts

2.
2.1. Documents from various competition authorities, including those in the European Union (hereinafter: EU), Australia, Brazil, South-Africa and South-Korea, and documents in connection with court proceedings in Australia, Canada and the United States of America, state that the cartel members involved acknowledge their participation in the cartel and that anti-competitive arrangements were made between the cartel members, including (according to SCC and Equilib) the airlines, with regard to freight transport that was carried out by the cartel members around the world in the cartel period, in any event in the period between 2000 and 2006.

2.2. In a press release, the European Commission (hereinafter: the Commission) stated that in its decision of 9 November 2010 (hereinafter: the old decision) it had ruled that, from December 1999 to 14 February 2006, surcharges for fuel and security covering flights from, to and within the European Economic Area ("EEA") and Switzerland had been coordinated by various airlines. That press release stated that the airlines involved had been fined a total of EUR 799,445,000 for participating in an international cartel.

2.3. All the addressees, except for Qantas Airways Limited, filed an appeal against the old decision with the General Court of the European Union (the General Court). In judgments issued on 16 December 2015, the General Court declared the appeals well founded and annulled the Commission's old decision (and annulled it in part with regard to British Airways Plc). The Commission did not appeal these judgments.

2.4. In a judgment of 14 November 2017 the Court of Justice of the European Union (hereinafter: CJEU) denied the appeal lodged by British Airways Plc. against the old decision.

2.5. In a press release, the Commission stated that in its decision of 17 March 2017 (hereinafter: the new decision) relating to proceedings under Article 101 of the Treaty on the Functioning of the European Union (hereinafter: TFEU), Article 53 of the Agreement on the European Economic Area (hereinafter: the EEA Agreement) and Article 8 of the Agreement between the European Community and the Swiss Confederation on Air Transport

(hereinafter: the Civil Aviation Agreement) it had once again ruled that in the period mentioned in para. 2.2 there had been
an international cartel and that the airlines involved had been fined a total of EUR 776,465,000 for participating in that cartel. The majority of the addressees of that new decision filed an appeal against this decision with the General Court. Those proceedings are still pending.

2.6. The following is evident from the provisional non-confidential version dated 17 March 2017 of the new decision (Case AT.39258):
- the decision is directed against 19 legal entities including all the defendants;
- the decision relates to a single and continuing infringement that covered the territory of the EEA and Switzerland and in which the addressees coordinated their pricing policy for the provision of air cargo services from, to and within the EEA with regard to the fuel surcharge, the security surcharge and payment of commission on the surcharges;
- the decision relates to the sale of air cargo services: (i) between airports in the EEA in the period from 7 December 1999 to 14 February 2006; (ii) between airports in the EU and airports in third countries [not being Switzerland, added by this Court] in the period from 1 May 2004 to 14 February 2006; (iii) between airports in the EEA (except for airports in the EU) and airports in third countries in the period from 19 May 2005 to 14 February 2006; and (iv) between airports in the EU and airports in Switzerland in the period from 1 June 2002 to 14 February 2006.
Where relevant here, the decision also found the following:

> **"5.2. Jurisdiction of the Commission**
> *5.2.1. Article 101 of the TFEU*
> (...)
> (823) 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 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.
> (824) Under these circumstances, the Commission will not apply 101 of the TFEU to [conduct] concerning air transport between EU airports and airports in third countries that took place before 1 May 2004.
>
> *5.2.2. Article 53 of the EEA Agreement*
> (...)
> (827) 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.

(828) Under these circumstances, the Commission will not apply Article 53 of the EEA Agreement to [conduct] concerning air transport between airports in the EEA and airports in third countries that took place before 19 May 2005."

2.7. SCC and Equilib submit that the fuel surcharges, security surcharges and the commission paid on those surcharges, as referred to in the new decision, were charged to the consignors of goods that purchased air cargo services (forwarders or shippers, hereinafter: shippers), (usually) through forwarders (or freight forwarders). Nearly all the aviation capacity of the airlines is sold to freight forwarders (for the benefit of shippers/forwarders, the customers of air cargo services that want to have goods transported).

2.8. SCC is a Dutch civil-law foundation that was formed especially to recover damages resulting from infringements of competition law by taking legal action (also referred to as a 'litigation vehicle' or 'claim vehicle'), in this case the claims that a number of shippers consider that they have against the airlines in relation to the cartel in question. SCC was formed by Omni Bridgeway, a company engaged in the funding and guidance of companies reclaiming losses they sustained as a result of illegal pricing arrangements. Omni Bridgeway is also SCC's sole director.

2.9. Since 18 December 2012, Equilib has been the legal successor with universal title of Equilib S.A.R.L. (a legal entity incorporated under French law), following a merger. Equilib is a Dutch company which, in the same way as SCC, tries to recover damages resulting from infringements of competition law.

2.10. SCC and Equilib purchase the claims, pool them and then proceed to collect them in their own name. To this end SCC and Equilib have their 'clients' (in this case the shippers) assign their alleged claims to them.

3. The dispute

3.
3.1. Put briefly, following increase and reduction of claim (or the grounds for claim), SCC is applying for a judgment which, to the extent possible, is immediately enforceable:
I. issuing a declaratory ruling that the airlines acted unlawfully towards the shippers referred to in SCC's Exhibit 56 by introducing, coordinating and applying the fuel and security surcharges in the period between 2000 and 2006;
II. jointly and severally ordering the airlines to pay
EUR 243,932,063.12 and EUR 34,847,437.59 as well as damages to be assessed by the Court and
to be settled according to the law, plus interest and costs.

3.2. Put briefly, following increases and a reduction of claim, Equilib is applying for a judgment which, to the extent possible,
is immediately enforceable:

I. issuing a declaratory ruling that by taking part in the cartel, the airlines are liable under the applicable law because of imputable unlawful acts against the shippers listed in Exhibit 3 to the statement of 9 November 2016;
II. issuing a declaratory ruling that the airlines are jointly and severally liable for the losses sustained by these shippers as a result of the acts referred to in the declaratory ruling referred to sub I;
III. jointly and severally ordering the airlines to pay Equilib full compensation (including statutory interest) for the losses sustained by these shippers as a result of the acts referred to in the declaratory ruling sub I, which compensation is to be assessed later during separate follow-up proceedings;
IV. jointly and severally ordering the airlines to pay the costs of the proceedings.

3.3. Regarding the issue on which this Court will now make a ruling (in all cases), it has been agreed with the parties that the cases (on the cause-list) will be heard jointly.

3.4. Arrangements have been made with the parties with respect to the issue on which this Court
will make a ruling at this stage. In this judgment the question is whether this Court has jurisdiction to apply the cartel prohibition of Article 101(1) TFEU during the cartel period:
(a) before 1 May 2004 to flights between airports in the EU and airports outside the EEA (hereinafter: third countries);
(b) before 19 May 2005 to flights between airports in Iceland, Lichtenstein and Norway and airports in third countries; and
(c) before 1 June 2002 to flights between the EU and Switzerland.

3.5. To summarise, SCC and Equilib submit that the cartel prohibition of the current Article 101(1) TFEU had horizontal effect throughout the entire cartel period, meaning that this Court has the power to apply this prohibition to the flights mentioned earlier in para. 3.4 in the relevant periods. Alternatively, SCC and Equilib submit that under Article 6 of Council Regulation (EC) No 1/2003 (OJ L 1 of 4 January 2003, p. 1) this Court in any event had the power with effect from 1 May 2004 to apply Article 101 TFEU to the extent that such power did not exist previously, and with retroactive effect. In support of their claims, SCC and Equilib refer to the settled case law of the CJEU and the opinion filed on their behalf by Prof. mr. A.W.H. Meij (hereinafter: Meij) of 26 October 2018.

3.6. Regarding the principal claim of SCC and Equilib, the airlines dispute, put briefly, that Article 101(1) TFEU has direct horizontal effect. This Court does not have the power to apply that provision because a prior decision by the Commission or by the national authorities as referred to in Articles 104 and 105 TFEU is lacking in this case. Regarding the alternative claim of SCC and Equilib, the airlines dispute that this Court has the power, on the grounds of Article 6 of Regulation 1/2003, to declare practices (which were not prohibited when they occurred) prohibited with retroactive effect. The conferral of retroactive effect is not evident from the wording, purport or structure of Regulation 1/2003 and would amount to a material change, which according to the airlines is contrary to legal certainty.

3.7. In the English so-called Emerald proceedings, in which the same question was at issue, i.e. the temporal scope of the dispute, regarding the same infringement of Article

101(1) TFEU established by the Commission as in the present proceedings, the High Court (Mrs Justice Rose) issued a judgment on 4 October 2017 (2017 EWHC 2420(Ch)). In short, she reached the conclusion that she had no jurisdiction to rule on the claims based on infringements of Article 101 TFEU or Article 53 EEA Agreement with respect to surcharges for services on flights between airports within the EU and third countries before 1 May 2004 and on flights between airports within the EEA (not being EU Member States) and third countries before 19 May 2005, in the absence of a decision by the competent national authorities or the Commission in which such an infringement is established.

4. The assessment

Relevant European legislation

EEC/TFEU

4.
4.1. Article 85 of the Treaty establishing the European Economic Community (hereinafter: the EEC Treaty) (now and hereinafter referred to as Article 101 TFEU) provides that agreements between undertakings, decisions by associations of undertakings and concerted practices which aim to or do effectively restrict competition, are incompatible with the internal market and shall be prohibited. Article 101(3) TFEU provides for the possibility of the provisions of paragraph 1 of this Article being declared inapplicable. Agreements and decisions in breach of Article 101(1) TFEU are automatically void under Article 101(2).

4.2. Article 86 of the EEC Treaty (now and hereinafter referred to as Article 102 TFEU) provides that any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

4.3. Article 87(1) of the EEC Treaty (now and hereinafter referred to as Article 103 TFEU) provides that the Council is to adopt any implementing rules to give effect to the principles set out in Articles 101 and 102.
Under the second paragraph of this article the implementing rules serve:
a) to ensure compliance with the prohibitions laid down in Article 101(1) and in Article 102 TFEU by making provision for fines and periodic penalty payments;
b) to lay down detailed rules for the application of Article 101(3) TFEU, taking into account the need to ensure effective supervision on the one hand, and to simplify administration to the greatest possible extent on the other;
c) to define, if need be, in the various branches of the economy, the scope of the provisions of Articles 101 and 102 TFEU;
d) to define the respective functions of the Commission and of the CJEU in applying the provisions laid down in this paragraph;
e) to determine the relationship between national laws and the provisions contained in this Section or the implementing rules adopted pursuant to this article.

4.4. Article 88 of the EEC Treaty (now and hereinafter referred to as Article 104 TFEU) provides that until the entry into force of the provisions adopted in pursuance of Article 103,

the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on the abuse of a dominant position in the internal market in accordance with the law of their country and with the provisions of Article 101, particularly paragraph 3, and of Article 102.

4.5. In Article 89 of the EEC Treaty (now and hereinafter referred to as Article 105 TFEU) the Commission, without prejudice to the provisions in Article 104, was entrusted with ensuring the application of the principles set out in Articles 101 and 102 TFEU. It shall, on application by a Member State or on its own initiative, in cooperation with the competent authorities in the Member States which shall give it their assistance, investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate means to bring it to an end.

Regulations

4.6. On 13 March 1962 Council Regulation (EEC) No 17, (OJ 13 of 21 February 1962, p. 204), the first regulation implementing (currently) Articles 101 and 102 TFEU entered into force (hereinafter: Regulation 17). Pursuant to Regulation No 17, the Commission acquired the exclusive competence to declare Article 101(1) TFEU not applicable to agreements that satisfied the conditions set out in Article 101(3) TFEU. Companies that wished to rely on the exception in Article 101(3) TFEU had to apply for an exemption from the Commission beforehand. Agreements that already existed on the date on which Regulation 17 entered into force had to be reported to the Commission before 1 August 1962 and the Commission could then grant an exemption for them with retroactive effect.

4.7. On 13 March 1962 Council Regulation (EEC) No 141 (OJ 124 of 28 November 1962, p. 2751) also entered into force (Regulation 141); Article 1 provides that Regulation 17 does not apply to the transport sector.

4.8. On 1 January 1988 Council Regulation (EEC) No 3975/87 (OJ L 374 of 31 December 1987, p. 1) laying down the procedure for the application of the rules on competition to undertakings in the air transport sector entered into force. Its recitals consider, inter alia, that "the rules on competition form part of the Treaty's general provisions which also apply to air transport (...) that the Commission has no means at present of investigating directly cases of suspected infringement of Articles 85 [101 TFEU] and 86 [102 TFEU] of the [EC] Treaty in air transport; whereas moreover the Commission lacks such powers of its own to take decisions or impose penalties as are necessary for it to bring to an end infringements established by it (...) Whereas it is therefore desirable that rules should be laid down under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for the application of Articles 85 [101 TFEU] and 86 [102 TFEU] of the Treaty to international air transport between Community airports". Article 1 provides that this regulation lays down rules for the application of Articles 85 [101 TFEU] and 86 [102 TFEU] of the Treaty to air transport services. The Commission thus acquired the authority to investigate infringements in the air transport sector of Articles 101 and 102 TFEU, and the exclusive competence to apply Article 101(3) TFEU (including the possibility of granting an exemption with retroactive effect) and to impose sanctions to penalise and terminate infringements. Article 7 provides that the authorities of the Member

States shall retain the power to decide whether any case falls under the provisions of Article 85(1) [101(1) TFEU] or Article 86 [102 TFEU] of the EEC Treaty, until such time as the Commission has initiated a procedure with a view to formulating a decision on the case in question or has sent notification as provided by the first subparagraph of Article 5(3) of this Regulation (application of Article 85(3) [101(3) TFEU], *this Court*). If undertakings rely on Article 85(3) [101(3) TFEU], they must file a request with the Commission.

4.9. On 16 December 2002 Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EEC Treaty (hereinafter: Regulation 1/2003) was adopted. Initially, this Regulation was declared non-applicable to air transport between airports in the EU and third countries. Before the entry into force of Regulation 1/2003 on 1 May 2004 it was amended by Council Regulation (EEC) No 411/2004 of 26 February 2004 (OJ L 68 of 6 March 2004, p. 1.), in which the entire aviation sector was brought under the regime of Regulation 1/2003. The recitals state, inter alia, that the system as introduced by Regulation 17 should be replaced by a directly applicable exception system in which the competition authorities and courts of the Member States have the power to apply not only Article 81(1) [101(1) TFEU] and Article 82 [102 TFEU] of the Treaty, which have direct applicability by virtue of the case law of the CJEU, but also Article 81(3) [101(3) TFEU] of the Treaty. The Commission also acquired full power in respect of air transport between airports in the EU and third countries to apply Articles 101 (including paragraph 3) and 102 TFEU. in addition to the Commission, the national court obtained the power, on the grounds of Article 6 of Regulation 1/2003, to apply Articles 101 (including paragraph 3) and 102 TFEU. Recital (7) states that "national courts have an essential part to play in applying the Community competition rules. When deciding disputes between individuals, they protect the subjective rights under Community law, for example by awarding damages to the victims of infringements. The role of the national courts here complements that of the competition authorities of the Member States. They should therefore be allowed to apply Articles 81 and 82 [101 and 102 TFEU] of the Treaty in full." This power is laid down in Article 6 of Regulation No 1/2003. Article 16 of Regulation 1/2003 provides that it is the duty of national courts not to take decisions that run counter to decisions adopted by the Commission and orders them to avoid decisions that would conflict with a decision contemplated by the Commission.

EEA

4.10. On 1 January 1994 the EEA Agreement (see para. 2.5) entered into force; this currently applies between the EU and its Member States on the one hand and Liechtenstein, Norway and Iceland on the other. The EEA Agreement relates to collaboration of the (then) EU Member States with some of the then Member States of the European Free Trade Association (EFTA) by extending, inter alia, the competition rules of the EU to the participating EFTA Member States.

4.11. Article 6 of the EEA Agreement provides that the provisions of that agreement should be interpreted and applied in conformity with the relevant rulings of the CJEU given to provisions of principal and derived Union law that are identical in substance. Articles 53 and 54 EEA Agreement are the equivalents of Articles 101 and 102 TFEU. Articles 55 and 60 EEA Agreement are the equivalents of Article 103 TFEU (via references). The EEA Agreement does not have an equivalent for Article 104 TFEU. Article 55 EEA Agreement (the equivalent of

Article 105 TFEU) confers the powers of Article 105 TFEU on the Commission and the EFTA Surveillance Authority.
Article 3 Protocol 21 EEA provides that in addition to the Union decisions referred to in Annex XIV EEA Agreement, the decisions referred to in that Article reflect the Commission's powers as regards the application of the EU's competition rules. The list concerned contains a reference to Regulations 17, 141 and 3975/87, as most recently amended by Regulation 1284/91. Annex XIV EEA does not contain a reference to Regulation 17 or any other implementing rule of the EU.

Civil Aviation Agreement

4.12. On 1 June 2002 the Civil Aviation Agreement (see 2.5) entered into force. Articles 8 and 9 of the Civil Aviation Agreement
are the equivalents of Articles 101 and 102 TFEU. Article 1(1) of the Civil Aviation Agreement reads as follows:

> "This Agreement sets out rules for the Contracting Parties in the field of civil aviation. These provisions are without prejudice to those contained in the EC Treaty and in particular to existing Community competences under the competition rules and the regulations of application of such rules, as well as under all relevant Community legislation listed in the Annex to this Agreement."

Relevant CJEU case law

4.13. In the judgment *BRT v Sabam* (CJEU 30 January 1974, ECLI:EU:C:1974:6)
the CJEU found, where relevant here, as follows:

> "(...)
> 14 It must thus be examined whether the national courts, before which the prohibitions contained in Articles 85 and 86 [101 and 102 TFEU] are invoked in a dispute governed by private law, must be considered as 'Authorities of the Member States';
> 15 The competence of those courts to apply the provisions of Community law, particularly in the case of such disputes, derives from the direct effect of those provisions.
> 16 As the prohibitions of Articles 85(1) and 86 [101(1) and 102 TFEU] tend by their very nature to produce direct effects in relations between individuals, these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard.
> 17 To deny, by virtue of the aforementioned Article 9, the national courts' jurisdiction to afford this safeguard,
> would mean depriving individuals of rights which they hold under the Treaty itself.
> (...)
> 20 (...) that the expression 'authorities of the Member States' appearing in Article 9(3) of Regulation No 17 covers such courts cannot exempt a court before which the direct effect of Article 86 [Article 102 TFEU] is pleaded from giving judgment.

21 Nevertheless, if the Commission initiates a procedure in application of Article 3 of Regulation No 17, such a court may, if it considers it necessary for reasons of legal certainty, stay the proceedings before it while awaiting the outcome of the Commission's action.
22 On the other hand, the national court should generally allow proceedings before it to continue when it decides either that the behaviour in dispute is clearly not capable of having any appreciable effect on competition or on trade between Member States, or that there is no doubt of the incompatibility of that behaviour with Article 86 [Article 102 TFEU]
(...)."

4.14. In the Asjes judgment (CJEU 30 April 1986, ECLI:EU:1986:188) the CJEU found, where relevant here, as follows:

"(...)
42 It must therefore be concluded that the rules in the Treaty on competition, in particular Articles 85 to 90 [101 to 105 TFEU] are applicable to transport.
(...)
45 (...) that air transport remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty, including the competition rules.
(...)
49 The Commission, on the other hand, considers that the absence of the implementing measures referred to in Article 87 does not mean that national courts cannot, where the matter arises, be called upon to rule on the compatibility of an agreement or a particular practice with the competition rules since those rules have direct effect.
(...)
63 (...) the fact that an agreement, decision or concerted practice may fall within the ambit of Article 85 does not suffice for it to be immediately considered to be prohibited by Article 85(1) [Article 101(1) TFEU] and consequently automatically void under Article 85 (2) [102 (2) TFEU].
64 Such a conclusion would be contrary to the general principle of legal certainty (...), since it would have the effect of prohibiting and rendering automatically void certain agreements, even before it is possible to ascertain whether Article 85 [101 TFEU] as a whole is applicable to those agreements.
65 However, it must be recognised that, as the Court stated in the *Bosch* judgment of 6 April 1962, until the entry into force of a regulation or directive giving effect to Articles 85 and 86 [101 and 102 TFEU] within the meaning of Article 87 [103 TFEU], agreements and decisions are prohibited under Article 85(1) [101(1) TFEU] and are automatically void under Article 85(2) [101(2) TFEU] only in so far as they have been held by the authorities of the Member States, pursuant to Article 88 [104 TFEU], to fall under Article 85(1) [101(1) TFEU] and not to qualify for exemption from the prohibition under Article 85(3) [101(3) TFEU] or in so far as the Commission has recorded an infringement pursuant to Article 89(2) [105(2) TFEU]. (...)
67. (...) The rules set out in the *Bosch* judgment therefore continue to apply so long as no regulation and no directive provided for in Article 87 [103 TFEU] has been

adopted and consequently no procedure has been set in motion to give effect to Article 85(3) [101(3) TFEU].
68 It must therefore be concluded that in the absence of a decision taken under Article 88 by the competent national authorities ruling that a given concerted action on tariffs taken by airlines is prohibited by Article 85(1) [Article 101(1) TFEU] and cannot be exempted from that prohibition pursuant to Article 85(3) [Article 101(3) TFEU], or in the absence of a decision by the Commission under Article 89(2) [Article 105(2) TFEU] recording that such a concerted practice constitutes an infringement (...), a national court such as that which has referred these cases to the Court does not itself have jurisdiction to hold that the concerted action in question is incompatible with Article 85 (1) [Article 101 (1) TFEU].
69 It should be pointed out, however, that until rules for the sector in question as provided for by Article 87 [Article 103 TFEU] are adopted, if such a ruling or recording has been made, either on the initiative of the national authorities under Article 88 [Article 104 TFEU], or on that of the Commission under Article 89(2) [Article 105(2) TFEU], the national courts must draw all the necessary conclusions therefrom and in particular conclude that the concerted action on tariffs in respect of which such a ruling or recording has been made is automatically void under Article 85(2) [Article 101(2) TFEU].
(...)".

4.15. In the *Ahmed Saeed* judgment (CJEU 11 April 1989, ECLI:EU:1989:140) the CJEU found, where relevant here, as follows:

"(...)
20 However, as the Court held in the judgment of 30 April 1986 [*Asjes*, this Court], (...) price agreements within the meaning of Article 85(1) [101(1) TFEU] are not liable to be automatically void under Article 85(2) [101(2) TFEU] until after the entry into force of Community rules adopted pursuant to Article 87 [103 TFEU] with a view to organising the Commission's powers to grant exemptions under Article 85(3) [101(3) TFEU] (...)
21 As has already been mentioned, the Community rules which have been adopted with regard to air transport apply only to international air transport services between Community airports. It must be inferred from this that (...) transport to and from airports in non-member [third] countries continue to be subject to the transitional provisions laid down in Articles 88 and 89 [104 and 105 TFEU], and that with respect to those air transport services the system described in the judgment of 30 April 1986 [*Asjes*, this Court] still applies.
29 As far as the application of Article 85 of the Treaty [101 TFEU] is concerned, it must therefore be stated in reply to the national court that bilateral or multilateral agreements regarding airline tariffs applicable to scheduled flights are automatically void under Article 85(2) [101(2) TFEU]:
- in the case of tariffs applicable to flights between airports in a given Member State or between such an airport and an airport in a non-member country: where either the authorities of the Member State in which the registered office of one of the airlines concerned is situated or the Commission, acting under Article 88 and Article

89 [104 and 105 TFEU] respectively, have ruled or recorded that the agreement is incompatible with Article 85 [101 TFEU]; (...)
- in the case of tariffs applicable to international flights between airports in the Community: where no application for exemption of the agreement from the prohibition set out in Article 85(1) [101(1) TFEU] has been submitted to the Commission (...)
32 (...) The sole justification for the continued application of the transitional rules set out in Articles 88 and 89 [104 and 105 TFEU] is that the agreements, decisions and concerted practices covered by Article 85(1) [101(1) TFEU] may qualify for exemption under Article 85(3) [101(3) TFEU] and that it is through the decisions, taken by the institutions which have been given jurisdiction, under the implementing rules adopted pursuant to Article 87 [103 TFEU], to grant or refuse such exemption that competition policy develops. In contrast, no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty and it is for the competent national authorities or the Commission, as the case may be, to act on that prohibition within the limits of their powers.
33 It must therefore be concluded that the prohibition laid down in Article 86 of the Treaty [102 TFEU] is fully applicable to the whole of the air transport sector.
(...)
36 In contrast, the typical example of an agreement, decision or concerted practice falling within Article 85 [101 TFEU] is where two undertakings which are economically independent of each other engage, by concerted action, in price-fixing or other restrictions of competition on the relevant market.
(...)
51 Admittedly, in the preamble to Regulation No 3976/87 the Council expressed a desire to increase competition in air transport services between Member States gradually (...) However, that concern can be respected only within the limits laid down by the provisions of the Treaty.
52 (...) the Treaty (...) strictly prohibits them from giving encouragement, in any form whatsoever, to the adoption of agreements or concerted practices with regard to tariffs contrary to Article 85(1) [101(1) TFEU]
(...)"

Powers of the civil court versus administrative powers of enforcement

4.16. Meij's opinion reads, where relevant here, as follows:

"(...)
9. What should also be borne in mind (...) is that the substantive standards in the field of competition ensue directly from the Treaty. The secondary law of implementing regulations in this area may facilitate and even clarify the implementation and application of these standards, but cannot alter the essential substance of the Treaty rules.
(...)
13. To this extent, the statement in Article 6 of Regulation 1/2003 that national courts have the power to apply Articles 101 and 102 TFEU is, above all, a

confirmation of a power to apply Article 101(1) TFEU that was recognised – and even required – in much earlier case law, partly extended to the power to apply the exemption criteria of Article 101(3) TFEU. Since, according to established case law, the nature of the prohibitions of Articles 101(1) and 102 TFEU entails that they are intended to have direct effect in relations between individuals, these provisions directly create rights for the individuals concerned, which the national courts must safeguard. In particular, this is also the case for enterprises that believe that they have suffered damage or loss due to anti-competitive practices in situations where the Commission did not take action against this. It follows from this that not only are rights created in horizontal relationships under private law, but also – by extension – obligations that the court must enforce.
(…)
15 (…) the Treaty does not contain any indication that makes the direct effect of Articles 101 and 102 TFEU and the consequences to be attached to them dependent on the entry into force of implementing provisions. (…) This is because, as the Court of Justice [CJEU, *this Court*] also emphatically held in respect of the competition rules of the Treaty, these are rights that individuals "hold under the Treaty itself". Making direct effect dependent on decisions by administrative authorities is incompatible with the essence of this doctrine. (…) Articles 101 and 102 TFEU cannot be denied the direct effect that characterises these provisions by their nature, not even for the period in which the transitional regime (….) applied for the administrative enforcement of these provisions.
(…)
18. As regards implementation, supervision and enforcement, Articles 104 and 105 TFEU contain a transitional regime in anticipation of implementing provisions pursuant to Article 103 TFEU (…) this transitional regime [relates] in particular to enforcement, including the granting of exemptions, by the administrative authorities of the Member States. The actions of national administrative bodies in this matter are supervised by the national (administrative) courts.
19. This was and is unrelated to the duty of national civil courts to apply EU competition law in disputes between private enterprises.
(…)
21. In *BRT V SABAM*, the Court of Justice ruled that the provision in Regulation 17/62 – that the authorities of the Member States remain competent as long as the Commission does not initiate a procedure in respect of the same facts – only pertains to the 'direct' administrative proceedings referred to here, before national authorities as referred to in Article 104 TFEU, rather than to the 'indirect' tasks of national courts. From the same perspective, the transitional regime provided for in Articles 104 and 105 TFEU exclusively covers 'direct' enforcement under administrative law and not 'indirect' enforcement under private law.
(…)".

The parties' positions based on the European Court of Justice's case law with regard to SCC's and Equilib's principal claim

4.17. To support their principal claim that the

cartel prohibition of Article 101(1) TFEU has direct horizontal effect by its very nature, and can therefore have direct consequences in the legal relationships between individuals and has always applied to the air transport sector, SCC and Equilib refer, inter alia, to the judgments in *BRT v Sabam* and *Asjes*. In the judgments in *BRT v Sabam* and *Asjes*, the CJEU found that a restriction on the power of national courts can only be accepted in the event that an exemption pursuant to Article 101(3) TFEU is still possible, possibly with retroactive effect. This was later explicitly confirmed by the CJEU in *Ahmed Saeed*. In this case the legal certainty rationale underpinning *Asjes* and *Ahmed Saeed* is not at issue, given that there will be no exemption decision from the national authorities, because those authorities are no longer authorised to do so and when they were, the airlines did not apply for an exemption. For that matter, given how the Commission classified the collaboration of the Defendants, i.e. as hardcore cartel conduct, an exemption on the grounds of Article 101(3) TFEU is inconceivable. SCC and Equilib also refer to the *Delimitis* judgment (CJEU 28 February 1991, ECLI:EU:1991:91), in which the CJEU found that the Commission does not have exclusive jurisdiction to apply Articles 101(1) and 102 TFEU. It shares this power with the national courts because these articles have direct effect in relations between individuals and create rights directly for the individuals concerned which the national courts must safeguard. Air transport therefore never was (and is not) exempted from the substantive scope of the competition rules. Only the manner of application – or, in other words, the manner of enforcement – of the competition rules (specifically Article 101(3) TFEU) differed from time to time, still according to SCC and Equilib.
Alternatively, SCC and Equilib submit that the national courts now have the power to rule on an infringement under Article 6 of Regulation 1/2003, also in respect of the period before 1 May 2004 and 19 May 2005, respectively.

4.18. According to the airlines, the CJEU confirmed in the *Bosch*, *Asjes* and *Ahmed Saeed* judgments that the power of the national civil court under the transitional regime depends on a decision by the Commission or a national competition authority (a so-called activational act). It follows from the connection between the provisions that the direct effect of the prohibition of Article 101(1) TFEU is not automatic, but (i) during the transitional regime depends on a prior prohibition decision by a national competition authority or the Commission, and (ii) subsequently depends on the nature of the implementing regulation to be laid down on the grounds of Article 103 TFEU. The national courts could not, nor can they, therefore determine of their own accord that practices or agreements violate Article 101(1) TFEU for the periods in which the transitional regime of 104 and 105 TFEU applied. This applies *mutatis mutandis* to flights carried out between (non-EU) EEA Member States and third countries before 19 May 2005. For the CJEU in *Bosch* and *Asjes* it was the fact that no implementing regulation had yet been laid down that was decisive rather than the risk of irreconcilable judgments on possible exemptions. The fact is that there is still a possibility of conflicting decisions under Regulation 1/2003 since it provides for a shared power, between the Commission and the national courts, to apply Article 101(1) and (3) TFEU, still according to the airlines.
As regards SCC's and Equilib's alternative position, the airlines submit that Article 6 of Regulation 1/2003 is not a procedural provision, but that the substantive effect of Articles 101 and 102 TFEU changed upon the introduction of the Regulation. This rules out retroactive effect, according to the airlines.

Findings of this Court

4.19. In its decision of 17 March 2017, the Commission found that the Commission derives its power to adopt its decision from Regulation 1/2003, which entered into force on 1 May 2004. Before that date the Commission derived its power to implement the manner of application of the competition rules for air transport from Regulation No 3975/87. Air transport between EU airports and airports in third countries was excluded from the effect of this Regulation. As a result, the effect of Article 101(3) TFEU on these flights could only be enforced by the national authorities and the Commission by way of the transitional regime of Articles 104 and 105 TFEU. As evidenced by the decision (see 2.6), this led the Commission to restrict its decision of 17 March 2017 to the period from 1 May 2004 as regards the flights between airports within the EU and airports in third countries. The same applied, *mutatis mutandis*, to flights carried out between EEA airports and airports in third countries for the period before 19 May 2005.

4.20. The key question that is currently before this Court is whether this Court has the power to establish, in civil proceedings between private parties ('individuals'), that European competition rules have been infringed, more specifically an infringement of the prohibition of Article 101 TFEU, and to award damages to injured parties on account of the infringement of this prohibition, for flights that were carried out before 1 May 2004 and 19 May 2005, respectively, in the period that the transitional regime of Article 104 and 105 TFEU applied to these flights.

4.21. For flights between the EU and Switzerland before 1 June 2002, this Court finds, as do the parties, that the provisions of the Civil Aviation Agreement do not apply. It must however be found that in view of Article 1(1) of the Civil Aviation Agreement, the general competition rules laid down in the E(E)C Treaty (and now the TFEU) apply to these flights, since these flights in that period can be classed as flights between the EU and a third country, which means that the same regime applies to these flights as to the flights carried out between airports within the EU and airports outside the EEA before 1 May 2004. This means that the findings made in what follows with respect to this last category of flights also apply to flights carried out between the EU and Switzerland before 1 June 2002.

4.22. It is clear that the question set out in
para. 4.20, can be answered very differently. The airlines and Justice Rose answered the question, on the grounds of the CJEU case law, in the negative, while SCC and Equilib answer it in the affirmative on the grounds of the same case law and supported by Meij's opinion. This Court finds as follows.

4.23. In the *BRT v SABAM* judgment the CJEU established that the
prohibition of Articles 101(1) and 102 TFEU can by their very nature have direct effect in the legal relationships between individuals, and that these articles therefore create direct rights arising from the Treaty for the individuals concerned which the national courts must safeguard. If the exercise of these rights by individuals depended on the exclusive (administrative) enforcement by the authorities of the Member States or the Commission, individuals would be deprived of these rights. This means that a court before which reliance is placed on the direct effect of one of these articles (and therefore to that extent not 'of its

own accord') cannot relieve itself of the obligation to issue a ruling. The CJEU does however find that in proceedings in which reliance is placed on the competition rules, the national courts must exercise restraint if the Commission (or the national authorities) are dealing with the same subject matter. The foregoing implies that Article 101(1) TFEU has direct horizontal effect by its very nature, in relations between individuals. The power of the national courts to apply these provisions of EU law in a dispute between individuals arises from the direct effect of those provisions.

4.24. In the *Asjes* judgment the CJEU found that air transport is subject to the general rules of the Treaty, including competition rules, on the same basis as the other modes of transport. The CJEU did however note that as long as a regulation as referred to in Article 87 EEC Treaty [103 TFEU] did not yet apply, Articles 88 and 89 EEC Treaty [104 and 105 TFEU] would apply. If a regulation does not yet apply or the national authorities or the Commission have not yet issued a ruling on the alleged infringement, but would still be in a position to do so, the national courts may not establish a violation of Article 85 EEC Treaty [101 TFEU] - resulting in automatic voidance - since that would have the effect of prohibiting and rendering automatically void certain agreements, even before it would have been possible to ascertain whether Article 85 [101 TFEU] as a whole is applicable to those agreements. According to the CJEU this would be contrary to the principle of legal certainty.

4.25. This Court infers from the above that the Treaty has conferred an independent power on national civil courts to apply the competition rules in disputes between individuals.

4.26. This power of the national courts outlined above is separate from administrative enforcement by the competent competition authorities as referred to in Articles 104 and 105 TFEU. As Meij also writes in his opinion, that administrative enforcement does not affect the autonomous role that national courts have to apply Article 101 TFEU. The direct horizontal effect of Article 101(1) TFEU cannot be reconciled with its application by national courts depending on decisions of administrative authorities as the airlines submit with reference to the *Asjes* and *Ahmed Saeed* judgments. According to the airlines, these judgments show that first an 'activational act' must be carried out by the administrative authorities before the national courts can apply Article 101 TFEU. This Court finds that, contrary to what the airlines argue, it does not follow from these judgments that the lack of an 'activational act' is the reason why the national courts must exercise restraint, but the possibility that an exemption could still be obtained, whether or not with retroactive effect. The restriction on the role of the national courts is therefore based on the exemption option of Article 101(3) TFEU and the interrelated legal certainty.

4.27. Under Articles 104 and 105 TFEU both administrative enforcement and civil law enforcement is possible, which means that there is, in principle, a risk of irreconcilable decisions. There is however no question of administrative enforcement taking precedence over civil law enforcement. Or, in the words of SCC and Equilib: there are two 'desks' next to each other, on the one hand the 'desk' of the national authorities and on the other hand the 'desk' of the national courts. The CJEU has acknowledged this risk. As found above, this Court reads in the *Asjes* and *Ahmed Saeed* judgments that the CJEU only accepts a restriction on the authority of the national courts in the event that an exemption pursuant to Article 101(3) TFEU is still possible, for which exemption the authorised bodies render decisions by virtue of

implementing provisions. The CJEU found that it would be contrary to the principle of legal certainty if national courts were to establish an infringement with the far-reaching effect of automatic voidance, while the competent authorities could still grant an exemption (in the *Asjes* case with retroactive effect) under the transitional regime. The CJEU confirmed this line in *Ahmed Saeed*. In the same judgment, in conformity with this, the CJEU did not attach any weight to the transitional regime for the application of Article 102 TFEU (which does not provide for the possibility of an exemption and legal certainty is therefore not at stake). The prohibition of Article 102 TFEU applied without restriction to the whole of the air transport sector and could therefore be applied directly by the national courts.

4.28. Accordingly, this Court infers from the aforementioned case law that the national courts can and must assess agreements or practices in the light of Article 101 TFEU if there is no longer any debate about the applicability of Article 101(3) TFEU. This is the case here. The fact is that it is common ground that the airlines did not apply for an exemption from the national authorities or the Commission in the relevant (cartel) period and that they can no longer apply for such exemption from these bodies. This means that in this matter there can no longer be any irreconcilable decisions and therefore no legal uncertainty. In light of the aforementioned CJEU case law, there therefore appears to be no other restrictions on this Court from applying Article 101 TFEU.

4.29. This Court does not concur with the airlines' position i.e. that the fact that no implementing regulation had yet been laid down for flights between EU airports and airports in third countries, and that the transitional regime of Articles 104 and 105 TFEU therefore applied, means that Article 101 TFEU does not substantively apply to these flights in the period before 1 May 2004. This Court finds that the airlines' position, that a prior decision by the national authorities or of Commission is a prerequisite for the application of Article 101(1) TFEU by the national courts, is not supported by the CJEU's findings in the judgments in *BRT v Sabam, Asjes* or *Ahmed Saeed*. The airlines' reasoning would mean that the mere conclusion that such an 'activational act' is lacking means that the national courts would never have the power to apply Article 101 TFEU. This position does not seem to be consistent with the CJEU's case law, as this would mean that there would (or could) never be any legal uncertainty as referred to in the aforesaid judgments.

4.30. As found earlier, it appears to follow from the CJEU's case law that Article 101 TFEU applies to the air transport sector, including in the period before 1 May 2004, that Article 101 TFEU has direct horizontal effect in relations between individuals and that national courts have an independent power as a Union court in disputes between individuals. This would mean that they cannot refuse to apply the provisions on European competition rules, but that they must observe the procedural rules that regulate the powers between the various Union bodies at that point. At the time of the transitional regime, the national courts could only not take decisions with regard to Article 101(3) TFEU as long as there was still a possibility that the Commission or national authorities could grant an exemption. As soon as this possibility lapsed or as soon as a decision was given by the European Commission or the national authorities, the national courts had to take this into consideration in their application of Article 101 TFEU in proceedings between individuals. This Court finds that this means that in the period in which the transitional regime still applied, the national civil courts had no power to take a decision based on Article 101 TFEU as long as there was still a

possibility that national authorities or the Commission could grant an exemption. The restriction on the role of the national courts was therefore due to the fact that there was (still) the possibility of an exemption being granted, not because the national courts were not allowed to apply the rule substantively. The fact is that the direct horizontal effect of Article 101 TFEU was not ruled out for Article 101(3) TFEU, but its application by the national courts was subject to a procedural restriction with a view to legal certainty.

4.31. The Commission and the national authorities are currently no longer authorised to take a decision in this regard since the procedural rules were amended on the introduction of Regulation 1/2003. If the airlines' position were to be followed, the consequence of this would be that there is now no competent authority or national court that could rule on the applicability of the prohibition of Article 101 TFEU with respect to the period before 1 May 2004. This would be a reward for concealing pricing arrangements that may be contrary to the competition rules in that period. It is undisputed that the airlines did not at any time during that period file an application for an exemption with the Commission or the national competition authorities. The situation of possibly conflicting decisions does not arise (or no longer arises) in this case since the Commission declined jurisdiction in its new decision of 17 March 2017 to rule on the period before 1 May 2004 on the grounds of Regulation 1/2003. In this decision the Commission did rule that an infringement had occurred during the period between 1999 and 2006 (see paras. 2.2 and 2.5 above). It did not, however, attach consequences to that ruling as it did not consider itself authorised to do so in view of the procedure laid down in Regulation 1/2003. Accordingly, this does not seem to involve possibly irreconcilable decisions.

4.32. This Court therefore concludes that based on the cited CJEU case law it has jurisdiction to rule - in retrospect - on the arrangements made by the airlines in the periods before 1 May 2004. In that period Article 101 TFEU did apply to the arrangements that have been brought before this Court. The mere fact that the procedure relating to the establishment of an infringement and the granting of an exemption have been amended over time does not alter the substantive application of competition rules in civil proceedings.

4.33. Both the parties' positions and this Court's ruling on flights carried out before 1 May 2004 apply mutatis mutandis to flights carried out between (non-EU) EEA Member States and third countries before 19 May 2005.

4.34. Given that the principal claim of SCC and Equilib seems to have been successful, this Court does not need to assess their alternative claim (that this Court has the power to apply Regulation 1/2003 with retroactive effect and the mutual positions of the parties on this point).

Questions to be referred for a preliminary ruling

4.35. This Court notes that its ruling differs from Justice Rose's ruling in her judgment of 4 October 2017 in the Emerald proceedings. The fact is that Justice Rose concludes that national courts do not have the power to apply Article 101(1) TFEU during the transitional regime (see para. 3.7). In view of the TFEU's objective to safeguard the uniform application of

the TFEU, this Court deems it necessary at this stage of the proceedings to refer questions to the CJEU for a preliminary ruling.

4.36. This Court intends to submit the following questions to the CJEU for a preliminary ruling on the basis of Article 267 TFEU:

1. Did Article 101 TFEU, or in any event Article 53 EEA Agreement, apply to flights that were carried out before 1 May 2004 on routes between airports within the EU and airports outside the EEA, to flights that were carried out before 19 May 2005 on routes between airports in Iceland, Lichtenstein, Norway and third countries and to flights that were carried out before 1 June 2002 between airports within the EU and Switzerland?
2. Do national courts have jurisdiction in a dispute between injured parties and airlines to fully apply Article 101 TFEU, or in any event Article 53 EEA Agreement, with respect to agreements/concerted practices of the airlines with regard to air cargo services on flights that were carried out before 1 May 2004 on routes between airports within the EU and airports outside the EEA, to flights that were carried out before 19 May 2005 on routes between Iceland, Lichtenstein, Norway and airports outside the EEA, and to flights that were carried out before 1 June 2002 between airports within the EU and Switzerland, including in the period that the transitional regime of Articles 104 and 105 applied or does the transitional regime impede this?

4.37. This Court will give the parties the opportunity to make their views known, with reasons given, by filing a statement, on its intention to refer these questions to the CJEU and to comment on the substance of those questions. This Court requests the parties to file a joint statement, where possible.

4.38. This Court also requests the parties to inform it in such statement about the state of affairs with regard to the appeal in the English Emerald proceedings.

4.39. Any further decision will be stayed.

5. The decision

This Court

5.
5.1. refers the case to the cause-list of **29 May 2019** to allow all parties to file the statement referred to in paras. 4.37 and 4.38,

5.2. stays any other decision.

This judgment was delivered by R.A. Dudok van Heel, A.E. de Vos and
M.E.M. James-Pater, judges, assisted by J.P. van der Stouwe, clerk of the court,

pronounced in open court on 1 May 2019.

CERTIFIED AS A TRUE COPY
The Court Registrar of the
Amsterdam District Court