

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 42/CR/Jul10
015537

In the matter between:

The Competition Commission

Applicant

and

Air France Cargo-KLM Cargo

Respondent

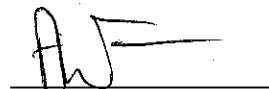
Panel : A Wessels (Presiding Member), M Mokuena (Tribunal Member) and T Madima (Tribunal Member)

Heard on : 17 October 2012

Decided on : 17 October 2012

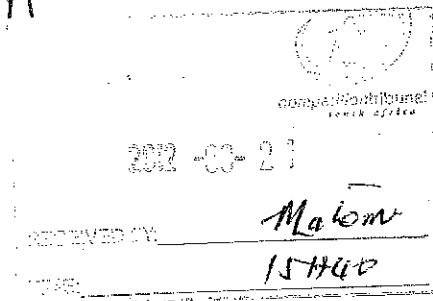
Order

The Tribunal hereby confirms the order as agreed to and proposed by the Competition Commission and the respondent, annexed hereto marked "A".



Presiding Member
A Wessels

Concurring: M Mokuena and T Madima



IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA
HELD AT PRETORIA

CT Case No: 42/CR/JUL10
CC Case No: 2006Mar2215

In the matter between:

The Competition Commission

Applicant

and

AIR FRANCE CARGO-KLM CARGO

Respondent

In re

THE COMPETITION COMMISSION

Applicant

and

LUFTHANSA CARGO

First Respondent

BRITISH AIRWAYS Plc

Second Respondent

SOUTH AFRICAN AIRWAYS CARGO
(PROPRIETARY) LIMITED

Third Respondent

AIR FRANCE CARGO-KLM CARGO

Fourth Respondent

ALITALIA CARGO

Fifth Respondent

CARGOLUX INTERNATIONAL S.A.

Sixth Respondent

SINGAPORE AIRLINES

Seventh Respondent

MARTINAIR CARGO

Eighth Respondent

CONSENT AGREEMENT BETWEEN THE COMPETITION COMMISSION, AIR FRANCE AND
KLM IN REGARD TO THE ALLEGED CONTRAVENTION OF SECTION 4(1)(b)(i) OF THE
COMPETITION ACT, NO. 89 OF 1998 (AS AMENDED)

The Commission, Air France and KLM hereby agree that application be made to the Tribunal for

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confirmation of this *Settlement Agreement* as an order of the *Tribunal* in terms of section 58(1)(b) of the *Competition Act*, on the terms set out more fully below:

1. Definitions

For the purposes of this *Settlement Agreement* the following definitions shall apply:

- 1.1. "*AF-KLM*" means Air France-KLM, a French *société anonyme* duly registered and incorporated under the laws of France, with its principal place of business at Paris-Charles De Gaulle Airport, Tremblay-en-France, France. *AF-KLM* is the holding company of *Air France* and *KLM*;
- 1.2. "*Air France*" means Société Air France, a French *société anonyme* duly registered and incorporated under the laws of France with its principal place of business at Paris-Charles De Gaulle Airport, Tremblay-en-France, France. *Air France* is a wholly owned subsidiary of *AF-KLM*;
- 1.3. "*Air France Cargo*" means the unincorporated division within *Air France*, responsible for its operations in the international air cargo sector;
- 1.4. "*Commission*" means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the *Competition Act* with its principal place of business at 1st Floor, Mulayo Building (Block C), the dli Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.5. "*Commissioner*" means the Commissioner of the *Commission*, appointed in terms of section 22 of the *Competition Act*;
- 1.6. "*Competition Act*" means the Competition Act, No 89 of 1998 (as amended);
- 1.7. "*Complaint*" means the complaint against the *Respondents* initiated by the *Commissioner* on 27 March 2006, in terms of section 49B of the *Competition Act*, under case number 2006Mar2245;
- 1.8. "*Complaint Referral*" means the *Commission's* referral of the *Complaint* to the *Tribunal* on 7 July 2010, under case number 42/CR/Jul10;
- 1.9. "*Days*" means calendar days;

- 1.10. "*KLM*" means KLM N.V, a company duly registered and incorporated under the laws of the Netherlands, with its principal place of business at Schiphol Airport in Amsterdam. *KLM* is a wholly owned subsidiary of its holding company *AF-KLM*;
- 1.11. "*KLM Cargo*" means the unincorporated division within *KLM*, responsible for its operations in the international air cargo sector;
- 1.12. "*Lufthansa*" means Lufthansa Cargo AG, a company duly registered and incorporated under the laws of Germany, with its principal place of business at Frankfurt Airport, Frankfurt, Germany. *Lufthansa* is a wholly owned subsidiary of Deutsche Lufthansa AG;
- 1.13. "*Parties*" means, collectively, the *Commission*, *Air France* and *KLM*;
- 1.14. "*Period*" for the purposes of the *South African Proceedings* only, means the period from February 2000 to November 2005;
- 1.15. "*Prohibited Practices*" mean the practices prohibited by section 4(1)(b)(i) of the *Competition Act* as described in paragraph 3.1 of the *Settlement Agreement*;
- 1.16. "*the South African Proceedings*" means the competition law proceedings in South Africa, initiated under and in terms of the *Competition Act*, in relation to the *Complaint* and the *Complaint Referral*;
- 1.17. "*Settlement Agreement*" means this agreement, duly signed and concluded between the *Parties*;
- 1.18. "*Respondents*" means, collectively, British Airways plc, South African Airways (Proprietary) Limited, *Air France Cargo*, *KLM Cargo*, *Alitalia Cargo*, *Cargolux International S.A.*, *Singapore Airlines*, *Martinair Cargo* and *Lufthansa*, being the First to Eighth Respondents as cited in the *Complaint Referral*; and
- 1.19. "*Tribunal*" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the *Competition Act*, with its principal place of business at 3rd Floor, Mufajo building (Block C), the dti Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. The Complaint

- 2.1. On 27 March 2006, the *Commissioner* initiated the *Complaint* under case number 2006Mar2215 in respect of alleged prohibited practices in contravention of section 4(1)(b)(i) of the *Competition Act* against the *Respondents*.
- 2.2. The *Complaint* was predicated on allegations that the *Respondents*, being airlines involved in, *inter alia*, rendering air cargo services into and from South Africa, engaged in restrictive horizontal practices by directly or indirectly fixing elements of selling prices for cargo services.
- 2.3. The *Complaint* was based, *inter alia*, on the following considerations –
- 2.3.1. it was evident to the *Commission* from interviews conducted and information gathered that it was a common practice amongst airlines providing air freight or cargo services, in various ways, to communicate and align their position on the charging of and/or determination of levels of various surcharges;
- 2.3.2. it was evident to the *Commission* from interviews conducted and information gathered that a number of meetings and other forms of discussion took place where various surcharges were discussed and certain decisions taken which were subsequently implemented in the market.

3. The Commission's findings upon completion of its investigation

- 3.1. Upon completion of its investigation into the *Complaint*, the *Commission* found that *Air France Cargo* and *KLM Cargo* had engaged in *Prohibited Practices* as described below –

Air France Cargo

- 3.1.1 *Air France Cargo*, at headquarters level, by way of telephone calls or e-mails with its competitors, mainly *Lufthansa*, engaged in discussions, and exchanged and confirmed information on the movement of air cargo fuel surcharges, with the purpose of

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confirming and coordinating the application of the fuel surcharges determined under their respective surcharge methodologies. Lufthansa coordinated these discussions and information exchanges on the movement of air cargo fuel surcharges.

3.1.2 The discussions and information exchanges occurred between February 2000 and October 2005 with the exception of the period between December 2001 and April 2002, when Air France Cargo had unilaterally dropped its fuel surcharge.

3.1.3 The discussions and information exchanges were intended to monitor fuel surcharge increases formulated by the air cargo carriers under their respective surcharge methodologies.

KLM Cargo

3.1.5 KLM Cargo, at headquarters level, by way of telephone calls or e-mails with its competitors, mainly Lufthansa, engaged in discussions, and exchanged and confirmed information on the movement of international air cargo fuel surcharges, mostly to confirm and coordinate the application of the fuel surcharges determined under their respective surcharge methodologies. Lufthansa coordinated these discussions and information exchanges on the movement of international air cargo fuel surcharges. The discussions and information exchanges occurred between February 2000 and November 2005.

3.1.6 The discussions and information exchanges were mostly a form of monitoring fuel surcharge increases formulated by the air cargo carriers under their respective surcharge methodologies.

3.2. The Commission concluded that the conduct described above contravened section 4(1)(b)(i) of the Competition Act.

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4. Admission of Liability

For the purposes of these proceedings, *Air France* and *KLM* admit that they engaged in the *Prohibited Practices* in contravention of section 4(1)(b)(i) of the *Competition Act*, as set out in the Commission's findings in paragraph 3 above.

5. Agreement concerning conduct of the Respondent

5.1. *Air France* and *KLM* agree that they shall not engage in the *Prohibited Practices* in contravention of section 4(1)(b)(i) of the *Competition Act*.

5.2. *Air France* and *KLM* have already initiated a competition law compliance program, with corporate governance, designed to ensure that their employees and directors are informed of and comply with their obligations under competition law and the provisions of the *Competition Act* and are monitored in their compliance with such obligations. A copy of this programme shall be submitted to the Commission within 90 days of the confirmation of this agreement as an order of the Tribunal.

6. Future Conduct

6.1. *Air France Cargo* and *KLM Cargo* have already ceased engaging in the *Prohibited Practices* and *Air France* and *KLM* undertake -

6.1.1. to refrain from engaging in conduct that amounts to directly or indirectly fixing a purchase or selling price or any trading condition in contravention of section 4(1)(b)(i) of the *Competition Act*; and

6.1.2. to make all reasonable efforts to co-operate with the Commission in its ongoing investigation of the air cargo services sector and any subsequent prosecution of the other Respondents in the *Complaint Referral*. This co-operation includes, without limitation, the provision of evidence, documentary and oral, pertaining to the contraventions detailed in this *Settlement Agreement* and the provision of witnesses to testify to this conduct in proceedings before the Tribunal arising from the conduct contemplated in the *Complaint* and the *Complaint Referral*.

7. Administrative Penalty

7.1. In terms of sections 58(1)(a)(iii), 59(2) and 59(3) of the *Competition Act*, *Air France* and *KLM* are liable to pay administrative penalties.

7.2. The *Parties* have agreed that *Air France* and *KLM* should, collectively, pay an administrative penalty in the amount of € 1 816 525 (one million eight hundred and sixteen thousand, five hundred and twenty five Euros) at the ruling exchange rate on the date of signature of this *Settlement Agreement* by each of *Air France* and *KLM*.

7.3. The penalty shall be paid into the Commission's bank account, the details of which are as follows:

Name: The Competition Commission Fees Account

Bank: Absa Bank, Pretoria

Account Number: 4050778576

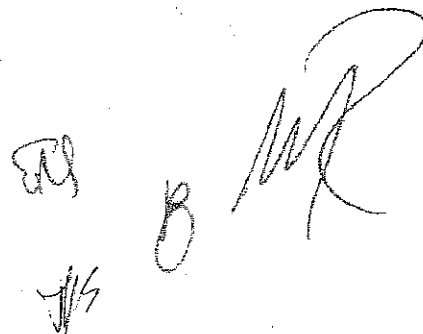
Branch Code: 323 345

7.4. The administrative penalty will be paid by *Air France* and *KLM* within six months of the date of confirmation of this *Settlement Agreement* as an order of the *Tribunal*.

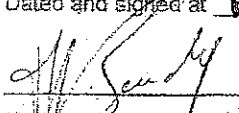
7.5. The *Commission* will pay these sums into the National Revenue Fund in terms of Section 59(4), of the *Competition Act*.

8. Full and Final Settlement

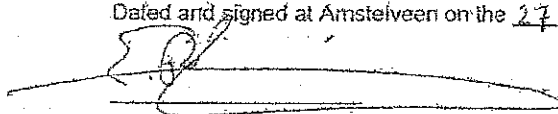
This *Settlement Agreement*, upon confirmation as a consent order by the *Tribunal*, is entered into in full and final settlement and concludes all proceedings between the *Commission* and *Air France Cargo* and *KLM Cargo* relating to any alleged contraventions by *Air France Cargo* and *KLM Cargo* of the *Competition Act* that are the subject of the *Commission's* investigation under case number 2006Mar2215 and its referral to the *Tribunal* under case number 42/CR/Jul10.

Handwritten signatures and initials at the bottom right of the page. There are three distinct marks: a large stylized signature, a smaller signature, and a set of initials.

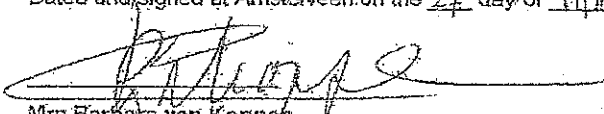
Dated and signed at Romy on the 27 day of April 2012


Mr Jean-Marc Bardy
General Counsel, Air France

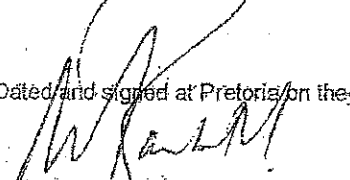
Dated and signed at Amstelveen on the 27 day of April 2012


Mr Eric Sweithelm
Chief Financial Officer, KLM

Dated and signed at Amstelveen on the 27 day of April 2012


Mrs Barbara van Koppen
Company Secretary and General Counsel, KLM

Dated and signed at Pretoria on the 15 day of June 2012


Mr Shan Ramburuth
Commissioner, Competition Commission