competitiontribunal
south africa

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 020180

In the matter between:

The Competition Commission **Applicant**

And

Cargolux International S. A. **Respondent**

Panel	:	Y Carrim (Presiding Member) M Mokuena (Tribunal Member) A Ndoni (Tribunal Member)
Heard on	:	18 December 2014
Decided on	:	18 December 2014

Order

The Tribunal hereby confirms the settlement agreement as agreed to and proposed by the Competition Commission and Cargolux International SA, annexed hereto marked "A".

Presiding Member
Ms. Y Carrim

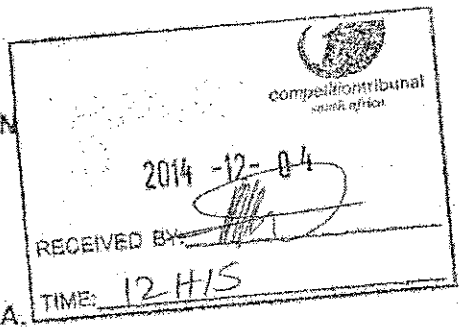
18 December 2014
Date

Concurring: Ms. M Mokuena and Ms. A Ndoni

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case no.: 42/CR/Jul10
CC Case no.: 2006Mar2215

In the matter between:



THE COMPETITION COMMISSION	Applicant
and	
CARGOLUX INTERNATIONAL S.A.	Respondent

In re:

THE COMPETITION COMMISSION	Applicant
and	
BRITISH AIRWAYS PLC	First Respondent
SOUTH AFRICAN AIRWAYS (PTY) LTD	Second Respondent
AIR FRANCE CARGO-KLM CARGO	Third Respondent
ALITALIA CARGO	Fourth Respondent
CARGOLUX INTERNATIONAL S.A.	Fifth Respondent
SINGAPORE AIRLINES	Sixth Respondent
MARTINAIR CARGO	Seventh Respondent
LUFTHANSA CARGO AG	Eighth Respondent

SETTLEMENT AGREEMENT

The Competition Commission and Cargolux International S.A. hereby agree that application be made to the Competition Tribunal in the above matter to have this

settlement agreement confirmed as an order as provided for in terms of section 27(1)(d) as read with section 58(1)(a)(iii) of the Act.

1. **Definitions**

1.1. For the purposes of this settlement agreement the following definitions should apply:

1.1.1. "***Act***" means the Competition Act, No. 89 of 1998, as amended.

1.1.2. "***Agreement***" means the settlement agreement set out herein, duly signed by the Commissioner and Cargolux.

1.1.3. "***Cargolux***" means Cargolux Airlines International SA, an airline cargo carrier incorporated in accordance with the laws of Luxembourg, whose registered place of business is at Cargolux Airlines International S.A, Luxembourg Airport,L-2990 Luxembourg, and with its South African office situated at Office EE5,units 31-32, Foreign Airlines Cargo Terminal, OR Tambo International Airport.

1.1.4. "***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 DTI campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

1.1.5. "***Commissioner***" means the Competition Commissioner of South Africa, the Chief Executive Officer of the Commission appointed by the Minister of Trade and Industry in terms of section 22 of the Competition Act.

1.1.6. "***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 2006Mar2215.

1.1.7. "***Days***" means calendar days.

1.1.8. "***Parties***" means collectively the Commission and Cargolux;

1.1.9. "***Republic***" means the Republic of South Africa;

1.1.10. "***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 Cargo AG, being the First to Eighth respondents as cited in the Complaint.

1.1.11. "***South African proceedings***" means the competition law proceedings in South Africa, under and in terms of the Competition Act, in relation to the Complaint.

1.1.12. "***Tribunal***" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Competition Act.

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 common practice amongst airlines providing air freight or cargo services, in various ways, to communicate and align their position on the changing or and/or determination of levels of various surcharges, specifically fuel 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 discussions took place where various surcharges were discussed and certain decisions taken which were subsequently implemented in the market.

2.4. The complaint was referred to the Tribunal for adjudication on 28 July 2010 under case number 42/CR/Jul10.

2.5. Subsequent to the referral of the complaint to the Tribunal, Cargolux and the Commission entered into settlement negotiations which have culminated in this Agreement.

3. **Commission's Findings**

3.1. Upon completion of its investigation into the complaint, the Commission found that Cargolux agreed and/or engaged in a concerted practice with its competitors (the Respondents) to fix prices in respect of fuel surcharges as described below:–

3.1.1. Cargolux engaged in discussions and exchanged and confirmed information on the movement of air cargo fuel surcharges by way of telephone calls and / or emails with its competitors with the purpose of confirming and coordinating the application of the fuel surcharges determined under their respective surcharge methodologies.

3.1.2. These discussions and exchanges occurred in the period from February 2002 to 2006.

3.1.3. The above-mentioned conduct constituted a contravention of section 4(1)(b)(i) of the Act.

4. **Admission of Liability**

Cargolux, for the purposes of these proceedings, admits that it, together with other air cargo carriers agreed and/or participated in a concerted practice to fix the fuel surcharge (a component of the price charged for air cargo services) levied on

certain routes in contravention of section 4(1)(b)(i) of the Competition Act. The conduct occurred during the period February 2002 to 2006.

5. **Agreement concerning future conduct**

5.1. Cargolux undertakes to refrain from engaging in the conduct that is the subject of the Complaint and which may constitute a contravention of section 4(1)(b)(i) of the Competition Act.

5.2. Cargolux undertakes to develop and implement a compliance programme designed to ensure that their employees, management and directors do not engage in any conduct which constitutes a contravention of the Act, a copy of which shall be submitted to the Commission within 60 days of the date of confirmation of this consent agreement as an order of the Tribunal

6. **Administrative Penalty**

6.1. In terms of section 58(1)(a)(iii) of the Competition Act read with sections 59(1)(a), 59(2) and (3) of the Competition Act, Cargolux agrees to pay an administrative penalty in the amount of U$D 941,561(Nine hundred and forty one thousand five hundred and sixty one dollars) at the prevailing exchange rate on the date of the Tribunals Order.

6.2. The above amount does not exceed 10% of Cargolux's annual turnover in, into or from the Republic during the 2009 financial year.

6.3. Cargolux will pay the amount set out in paragraph 6.1 above to the Commission within 30 Days from the date of confirmation of this Agreement by the Tribunal.

6.4. The said amount will be paid into the Commission's bank account. The Commission's banking details are as follows:

Bank:	**ABSA Bank**
Name of Account:	**The Competition Commission Fees Account**
Branch Name:	**Pretoria**

Branch Code:	323345
Account Number:	4050778576
Reference:	2006Mar2215(Cargolux)

6.5. The Commission will pay the penalty amount into the National Revenue Fund in compliance with section 59(4) of the Competition Act.

7. **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 Cargolux relating to any alleged contraventions by Cargolux 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.

For Cargolux

Dated at LUXEMBOURG on this 21 day of NOVEMBER 2014.

Dirk Reich
PRESIDENT & CEO
Cargolux Airlines Int'l S.A.

A person duly authorised to sign on behalf of Cargolux Airlines International SA

Name:

Capacity:

Henning zur Hausen
SENIOR VICE-PRESIDENT
HR, LEGAL & COMPLIANCE
Cargolux Airlines Int'l S.A.

For the Commission

Dated at PRETORIA on this 3rd day of December 2014.

Tembinkosi Bonakele

Commissioner

Competition Commission of South Africa