

Dutch court refers air cargo follow-on claim to ECJ

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A Dutch court has asked the European Court of Justice to clarify whether claimants can seek compensation for alleged anticompetitive conduct that took place before new EU competition rules came into effect in 2004.

The District Court of Amsterdam [requested](#) a preliminary ruling for guidance on a follow-on damages claim against airlines involved in the air cargo cartel, after it made a preliminary ruling that diverged from a UK court. The Dutch court asked whether national courts have the power to apply EU rules prohibiting anticompetitive agreements in follow-on damage claims against cartels that operated before 2004.

The referral was made in November but published in the EU's official journal on Monday.

The court also asked whether it can apply EU competition law to flight routes between Iceland, Liechtenstein, Norway and airports outside the European Economic Area before May 2005. It also asked if competition rules apply to

flights between airports within the EU and Switzerland before June 2002, or during the period where transitional rules applied before the new rules came into effect.

Under the transitional rules, a national court could only award follow-on damages when either a national competition authority or the European Commission had found an infringement.

In 2017, the European Commission **fined** 11 airlines €776 million for colluding to fix the price of air cargo surcharges on global flights between 1999 and 2006. The commission initially **imposed** the fines in 2010, but the EU's General Court largely quashed its decision in 2015, due to a procedural error. Dutch claims vehicles Stichting Cartel Compensation and Equilib Netherlands have filed separate claims against the cartel.

Stichting Cartel Compensation is seeking €243.9 million in damages, as well as an additional €34.8 million for the state. Equilib Netherlands is seeking an undisclosed amount in damages for shippers who used the airlines' services and were affected by the cartel.

EU Directive 1/2003, which gave national courts the power to apply EU rules against anticompetitive agreements, entered into force in May 2004.

The claim vehicles argued that the cartel had a “direct horizontal effect” between 1999 and 2006, so the District Court of Amsterdam has jurisdiction to apply EU competition law. However, the airlines argue that the court does not have the power to retroactively prohibit conduct that was not prohibited at the time.

The court found that article 101 does apply to the cartel agreements made before May 2004. “The mere fact that the procedure for establishing an infringement and granting an exemption has changed over time does not alter the substantive application of the competition rules in civil proceedings,” the court said.

However, the Court of Appeal of England and Wales last year **ruled** that claimants seeking follow-on damages as a result of the air cargo cartel cannot claim for collusion that affected certain flight routes before the new EU competition rules came into force.

The District Court of Amsterdam said its ruling differs from the UK court, so it is “necessary” to refer preliminary questions to the ECJ to “ensure uniform application” of EU competition law.

Bas Braeken, a partner at bureau Brandeis in Amsterdam, said the District Court of Amsterdam “seeks to determine the temporal scope of Article 101 in relation to damages resulting from cartels” before EU competition law came into force.

He said the decision could “greatly impact the amount of damages shippers can claim from airlines that participated in the air cargo cartel”.

“If the Court of Justice answers the question in the affirmative, the useful effect of EU competition law will be extended in the area of cartel damages cases,” Braeken said.

Miguel Sousa Ferro, a partner at Sousa Ferro & Associados in Lisbon, said the European Court of Justice might give “some useful clarifications on the temporal and geographical scope of EU competition law”.

However, “not enough details have been made public to really understand the underlying facts of the case and to foresee what may or may not come from this referral”, he said.