Neutral Citation Number: [2017] EWHC 2420 (Ch)

Case No: HC-2008-000002,
HC-2013-000328,
HC-2013-000329,
HC-2013-000330,
HC-2016-003194

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
The Rolls Building,
London, WC2A 2LL

Date: 04/10/2017

Before :

MRS JUSTICE ROSE

- -

Between :

Emerald Supplies Limited & Others	**Claimants 1**
- and -	
British Airways PLC	**Defendant**
Allston Landing II LLC & Others	**Claimants 2**
- and -	
British Airways PLC	**Defendant**
La Gaitana Farms SA & Others	**Claimants 3**
- and -	
British Airways PLC	**Defendant**
Hyundai Heavy Industries & Others	**Claimants 4**
-and-	
British Airways PLC	**Defendant**
Kodak Limited & Others	**Claimants 5**
-and-	
British Airways PLC	**Defendant**
British Airways PLC	**Part 20 Claimant** (***Emerald, Allston and La Gaitana Proceedings***)
-and-	
Air Canada and others	**Part 20 Defendants**

- -
- -

MR. PHILIP MOSER Q.C., MR. BEN RAYMENT and MR. CONOR McCARTHY (instructed by Hausfeld & Co. LLP and DAC Beachcroft LLP) for the Emerald, Hyundai, Kodak and Allston Claimants.

MR. JON TURNER Q.C., MR. CONALL PATTON, MR. GIDEON COHEN and MR. MICHAEL ARMITAGE (instructed by Slaughter and May) for the Defendant.

MR. DANIEL BEARD Q.C. and MR. THOMAS SEBASTIAN (instructed by Latham & Watkins (London) LLP, Hogan Lovells International LLP, Squire Patton Boggs (UK) LLP, Linklaters LLP, O'Melveny & Myers, Shearman & Sterling (London) LLP, Steptoe & Johnson UK LLP, Wilmer Cutler Pickering Hale and Dorr LLP, Macfarlanes LLP, Shepherd and Wedderburn LLP and Gowling WLG (UK) LLP) for the Part 20 Defendants.

MR. FERGUS RANDOLPH Q.C. instructed by Edwin Coe LLP for the La Gaitana Claimants.

Hearing dates: 10 and 11 July 2017

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Approved Judgment (Temporal Scope of Claim)

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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ROSE J

Mrs Justice Rose:

1. A preliminary issue about the temporal scope of the Claimants' right to damages under what is now Article 101 of the Treaty on the Functioning of the European Union has arisen in this action brought by a number of air freight shippers against British Airways. The Claimants assert that they were overcharged for freight services by British Airways and other airlines because those airlines were parties to a covert cartel whereby they agreed with each other about the level of certain surcharges to be applied to charges for the carriage of freight. The Claimants seek damages for loss arising from those alleged overcharges in respect of freight carried not only between destinations within the European Union but also on flights between an airport within the European Union and an airport in a third country in Asia, South America or the USA.

2. The losses claimed in these proceedings date from 2001 onwards. The Defendant, British Airways, together with the other airlines who are defendants to British Airways' Part 20 claim, (together, 'the Airlines') contend that as a matter of law there can be no claim for damages arising from the cartel insofar as it affected freight charges between the EU and third countries on flights before 1 May 2004. That was the date on which air transport between the EU and third countries was brought within the regime implementing the EU competition rules set out in Regulation 1/2003 (Official Journal 4.1.2003 L 1 p. 1). Before that date, the Airlines say, the competition rules could only be applied to air transport between the EU and third countries in accordance with the transitional implementing provisions set out in the Treaty itself. The only bodies with jurisdiction to take a decision on the compatibility of an agreement or concerted practice with what is now Article 101 were the European Commission or the national authority designated by a Member State to carry out such an investigation. The High Court of England and Wales was not an authority designated by the United Kingdom for the purpose of making such a decision. Moreover, the Airlines contend, the case law of the Court of Justice of the European Union ('the European Court') establishes that prior to the enactment by the Council of implementing provisions for the competition rules, the prohibition on anti-competitive agreements did not have direct effect. It could not therefore have been relied on by the Claimants in a claim before the national court before 1 May 2004. Any attempt to rely on the implementation regime for air transport contained in Regulation 1/2003 in respect of the period before that Regulation came into effect would be a retrospective change to the substantive law for which there is no justification.

3. The Claimants submit that throughout the transitional period before Regulation 1/2003 came into effect, the national court had jurisdiction to consider and rule on infringements of what are now Articles 101 and 102 in private damages claims, including in respect of air transport between the EU and third countries. That jurisdiction arose, they argue, because the High Court was one of the authorities that had the task of making findings of infringement under the transitional provisions in the Treaty. Their second argument is that at least in a case such as this, where there is no real issue as to the application of Article 101(3), the Treaty article does have direct effect and must be enforced by the court. Thirdly, they argue even if they could not have brought this claim prior to 1 May 2004, they can now rely on Regulation 1/2003 because the relevant provisions of the Regulation extending its scope to air transport between the EU and third countries are procedural in nature and not substantive and

may therefore apply retrospectively. The Claimants submit that the law is clearly in their favour. However, if I am not satisfied that that is the case, they argue that I should refer this preliminary issue to the European Court for a ruling under Article 267 TFEU.

4. A similar preliminary issue arises in relation to flights between airports in countries which are Member States of the European Economic Area but not of the EU and airports in third countries. There the corresponding date on which implementing provisions were extended to agreements relating to such flights is 19 May 2005. The parties agree that the answer to the preliminary issue in relation to flights between the EEA and third countries will be the same as the answer to the issue in relation to flights between the EU and third countries. No separate arguments were therefore addressed to me as regards flights between the EEA and third countries. There was until recently an issue between the parties as to freight charges on flights between destinations both of which are in non-EU/EEA countries but where the flight had a stopover within the EU or EEA. However, the claim in relation to alleged freight overcharges on those flights has been settled by the parties and that issue is no longer in dispute in these proceedings.

The Treaty provisions

5. The EU competition provisions started life as Articles 85 and 86 of the EEC Treaty. They were renumbered in 2002 to be Articles 81 and 82 of the Treaty Establishing the European Community as amended by the Treaty of Amsterdam and are now Articles 101 and 102 of the TFEU.

6. The wording of Article 85 has remained constant throughout its history. It comprises three paragraphs. Paragraph (1) describes the kinds of agreements, decisions by associations of undertakings and concerted practices which are prohibited; paragraph (2) provides that any agreements or decisions so prohibited "shall be automatically void"; and paragraph (3) sets out the circumstances in which the provisions of paragraph 1 may be declared inapplicable in respect of an agreement, decision or concerted practice falling within paragraph (1), broadly, if the arrangements are pro-competitive overall. Article 86 prohibits conduct which is an abuse of an undertaking's dominant position. Article 86 is not relevant to this preliminary issue since there is no allegation in these proceedings that the conduct described in the claim was contrary to Article 86.

7. The initial implementing provisions for the competition prohibitions were set out in Articles 87, 88 and 89 EEC.

8. Article 87 EEC provided in its original form that within three years of the entry into force of the EEC Treaty, the Council must adopt appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86. According to paragraph 2 of Article 87, those regulations or directives should be designed in particular:

    i) to ensure compliance with the prohibitions by making provision for fines and periodic penalty payments;

ii) to lay down detailed rules for the application of Article 85(3) "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";

iii) to define, if need be, in various branches of the economy the scope of the provisions of Articles 85 and 86;

iv) to define the respective functions of the Commission and of the Court of Justice in applying the provisions; and

v) to determine the relationship between national laws and the provisions contained in the competition rules or adopted pursuant to Article 87.

9. The amendments made to Article 87 by the Treaty of Amsterdam, aside from renumbering it as Article 83, replaced the reference to the three-year deadline for implementation with a reference to the duty of the Council to lay down appropriate regulations or directives to give effect to the principles set out in what were then Articles 81 and 82. The aims of those regulations or directives were the same as those expressed in the original Article 87.

10. Article 88 EEC provided:

> "Until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86."

11. This provision was unchanged in substance when it became Article 84 of the renumbered Treaty after the Treaty of Amsterdam.

12. One of the issues in this application is whether the High Court of England and Wales is one of "the authorities in Member States" entitled to rule on the admissibility of agreements, decisions and concerted practices for the purposes of Article 88.

13. Article 89 EEC provided:

> "1. Without prejudice to Article 88, the Commission shall, [as soon as it takes up its duties,] ensure the application of the principles laid down in Articles 85 and 86. On application by a Member State or on its own initiative, and in co-operation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end.
>
> 2. If the infringement is not brought to an end, the Commission shall record such infringement of the principles in a reasoned

> decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation."

14. That provision was unchanged, except for the omission of the words I have put in square brackets, when it became Article 85 of the renumbered Treaty.

15. The first regulation implementing Articles 85 and 86 was Regulation 17 (Official Journal 21.2.62, 204 p 62) which came into effect on 13 March 1962 and remained in place until 1 May 2004. The legal basis for Regulation 17 was Article 87 EEC. Article 1 of Regulation 17 set out the 'Basic provision' which was that, without prejudice to later articles of the Regulation, agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty "shall be prohibited, no prior decision to that effect being required.". There was then provision for the Commission to determine, in respect of such arrangements, that:

    i) there were no grounds for action on its part, if the parties applied for 'negative clearance' pursuant to Article 2;

    ii) there was an infringement of Article 85 or 86, pursuant to Article 3; or

    iii) Article 85(3) applied to the arrangement, pursuant to Article 6.

16. Articles 4 to 9 of Regulation 17 set up a scheme whereby undertakings could notify their agreements, decisions or concerted practices to the Commission seeking an indication that there were no grounds for action on the Commission's part under Article 2 and/or seeking a decision disapplying Article 85(1) pursuant to Article 85(3). Notification was, for most arrangements, a precondition of the application of Article 85(3) and any exemption granted by the Commission could only be backdated to the date of notification. This provided an incentive to undertakings to notify their agreements promptly. Some categories of agreements did not have to be notified in order to be granted exemption so that if the Commission decided that Article 85(3) was satisfied, exemption could be backdated to the start of the agreement.

17. Article 9 of Regulation 17 provided that the Commission shall have sole power to declare Article 85(1) inapplicable pursuant to Article 85(3). Article 9(3) provided for the inter-relation between the powers of the Commission and of the Member States' authorities. It stated that as long as the Commission has not initiated any procedure under Article 2, 3 or 6 of Regulation 17, the authorities of the Member States remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty.

18. Other provisions of Regulation 17 conferred on the Commission investigatory powers, an obligation to hear representations from the undertakings concerned before taking a decision and powers to impose fines and periodic penalties.

19. Regulation 17 did not cover air transport. Council Regulation 141 (Official Journal 28.11.1962, 124, p. 2751) came into force on the same day as Regulation 17 and provided in Article 1 that Regulation 17 shall not apply to agreements, decisions or concerted practices in the transport sector which have as their object or effect the

fixing of transport rates and conditions, the limitation or control of the supply of transport or the sharing of transport markets; nor did it apply to the abuse of a dominant position within the transport market. The reason for the exclusion was explained in the recital to Regulation 141. This referred to the "distinctive features of the transport sector" which meant that "it may prove necessary to lay down rules governing competition different from those laid down or to be laid down for other sectors of the economy".

20. This blanket exclusion of air transport from Regulation 17 was modified in 1987 by the adoption of Council Regulation (EEC) No 3975/87 (Official Journal 31.12.1987, L 374, p. 1–8). Regulation 3975/87 set out a bespoke regime, different from the regime in Regulation 17, for the application of the rules on competition to undertakings in the air transport sector. The recitals to Regulation 3975/87 noted that air transport "is characterized by features which are specific to this sector" and that "international air transport is regulated by a network of bilateral agreements between States which define the conditions under which air carriers designated by the parties to the agreements may operate routes between their territories". Article 1 of Regulation 3975/87 provided that it only applied to international air transport between Community airports; it did not therefore apply either to flights between the EEC and third countries or to domestic flights within the same Member State. In 1992, the scope of Regulation 3975/87 was extended by Regulation 2410/92 (Official Journal 24.8.92 L 240 p. 18) to cover domestic flights entirely within one Member State. The Council also adopted Regulation 3976/87 (Official Journal 31.12.87 L374 p 9) which empowered the Commission to grant block exemption to certain agreements relating to international air transport between Community airports. The Commission exercised that power in 1993, adopting Regulation 1617/93 (Official Journal 26.6.93 L 155 p. 18) in June 1993 conferring block exemption on certain kinds of air transport sector agreements.

21. The regime established by Regulation 17 was repealed by Regulation 1/2003 which was adopted on 16 December 2002 and came into effect on 1 May 2004. Regulation 1/2003 abolished the system for the notification of agreements to the Commission for the disapplication of Article 85(1) pursuant to Article 85(3) and gave the national competition authorities and national courts power, alongside the Commission, to apply Article 85(3). By this time, Articles 85 and 86 had been renumbered to be Articles 81 and 82 EEC. Article 1(1) and (2) of Regulation 1/2003 provided:

> "1. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which do not satisfy the conditions of Article 81(3) of the Treaty shall be prohibited, no prior decision to that effect being required.
>
> 2. Agreements, decisions and concerted practices caught by Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) of the Treaty shall not be prohibited, no prior decision to that effect being required."

22. Further, Article 6 of Regulation 1/2003 provided that "National courts shall have the power to apply Articles 81 and 82 of the Treaty".

23. As regards the transport sector, Article 32 of Regulation 1/2003 as originally adopted in December 2002 exempted certain kinds of maritime transport and, in Article 31(c), air transport between Community airports and third countries. However, between the date when Regulation 1/2003 was adopted and the date when it came into force, it was amended by Council Regulation 411/2004 (Official Journal 6.3.2004, L 68, p. 1). Regulation 411/2004 which applies from 1 May 2004 deleted the exclusion for international air transport from Article 31(c) of Regulation 1/2003 and repealed Regulation 3975/87. The justification for finally removing the last remnant of the exclusion of air transport from the general scheme for implementing the competition rules was explained in the recitals to Regulation 411/2004:

> "(3) Anti-competitive practices in air transport between the Community and third countries may affect trade between Member States. Since the mechanisms enshrined in Regulation (EC) No 1/2003, the function of which is to implement the rules on competition under Articles 81 and 82 of the Treaty, are equally appropriate for applying the competition rules to air transport between the Community and third countries, the scope of that regulation should be extended to cover such transport.
>
> (4) When Articles 81 and 82 of the Treaty are applied in proceedings on the basis of Regulation (EC) No 1/2003 and in accordance with the case-law of the Court of Justice, air services agreements concluded between the Member States and/or the European Community on the one hand and third countries on the other hand should be duly considered, in particular for the purpose of assessing the degree of competition in the relevant air transport markets. This Regulation does, however, not affect the rights and obligations of the Member States under the Treaty with respect to the conclusion and application of such agreements."

The EU case law

24. The issue of how the competition rules apply either to agreements in existence before Regulation 17 came into effect or in sectors excluded from its scope has been considered by the European Court in a number of cases to which the parties referred me. The relevant case law starts with the early decision of the European Court in Case 13/61 *Bosch v van Rijn* [1962] ECR 47 ('*Bosch*'). That case concerned a distribution agreement dating back to 1906 whereby Bosch appointed van Rijn to be its exclusive distributor of Bosch refrigerators in the Netherlands. The agreement contained an export ban preventing van Rijn from exporting the appliances directly or indirectly without Bosch's permission. Bosch's agreements with its exclusive distributors in other countries imposed the same ban but the German distributor started selling its supplies of Bosch fridges in the Netherlands. Bosch and van Rijn brought an action in the Netherlands against the German distributor seeking a declaration that the sales were illegal. The German defendant relied on Article 85(2) to argue that the ban imposed on it by its distribution agreement with Bosch was void. The appliance sales in question had taken place before Regulation 17 came into effect.

25. The European Court in *Bosch* interpreted the Dutch referring court's question as being whether Article 85 has been applicable from the time of entry into force of the Treaty. The Court held that the answer "must in principle be in the affirmative". Articles 88 and 89 EEC, which confer powers on the national authorities and on the Commission for the application of Article 85, presuppose its applicability from the time of entry into force of the Treaty. But the European Court went on (page 51):

> "Articles 88 and 89 are, however, not of such a nature as to ensure a complete and consistent application of Article 85 so that their mere existence would permit the assumption that Article 85 had been fully effective from the date of entry into force of the Treaty and in particular that the annulment envisaged by Article 85(2) would have taken effect in all those cases falling under the definition of Article 85(1) and in respect of which a declaration under Article 85(3) had not yet been made.
>
> In fact, Article 88 envisages a decision by the authorities of Member States on the admissibility of agreements only when the latter are submitted for their approval within the framework of the laws relating to competition in their respective countries. Article 89, while conferring on the Commission a general power of surveillance and control, enables it to take note only of possible violations of Article 85 and 86 without clothing the Commission with power to grant declarations in the sense of Article 85(3). …
>
> It follows that the authors of [Regulation 17] seem to have envisaged also that at the date of its entry into force there would be subsisting agreements to which Article 85(1) applied but in respect of which decisions under Article 85(3) had not yet been taken, without such agreements thereby being automatically void.
>
> The opposite interpretation would lead to the inadmissible result that some agreements would already have been automatically void for several years without having been so declared by any authority, and even though they might ultimately be validated subsequently with retroactive effect. In general it would be contrary to the general principle of legal certainty — a rule of law to be upheld in the application of the Treaty — to render agreements automatically void before it is even possible to tell which are the agreements to which Article 85 as a whole applies. Moreover, in accordance with the text of Article 85(2), which in referring to agreements or decisions 'prohibited pursuant to this Article' seems to regard Articles 85(1) and (3) as forming an indivisible whole, this Court is bound to admit that up to the time of entry into force of [Regulation 17], the nullifying provisions had operated only in respect of agreements and decisions which the authorities of the Member States, on the basis of Article 88, have expressly held

> to fall under Article 85 (1), and not to qualify for exemption under 85(3), or in respect of which the Commission has taken the decision envisaged by Article 89(2)."

26. The European Court then considered what would be the position after the coming into effect of Regulation 17. Agreements existing at that time were, under the Regulation, granted provisional validity if they had been notified for exemption under Article 85(3) or if they were excluded from the notification requirement. The Regulation therefore "can be understood only on the basis that agreements and decisions shall not be automatically void as long as the Commission has not reached a decision with regard to them, or unless the authorities of Member States have decided that Article 85 is applicable." Beyond that, the Court was not able to give guidance since it had not been provided with the text of the distribution agreement.

27. As Mr Moser QC, appearing for the Claimants, pointed out, *Bosch* was the first reference under what was then Article 177 EEC to reach the European Court in Luxembourg. It was decided before the European Court first propounded the direct effect of certain provisions of EEC law in the national legal systems of the Member States. In Case 26/62 *Van Gend en Loos* [1963] ECR 1 ('*Van Gend en Loos*') the Court stated that the Community constitutes a new legal order of international law intended to confer upon individuals in the Member States rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community. *Van Gend en Loos* concerned Article 12 EEC which provided that Member States must not introduce any new customs duties on imports or exports or any charges having equivalent effect. The European Court held that the wording of Article 12 contained a clear and unconditional prohibition. The obligation was not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition, the Court held, "made it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects". Individuals could therefore rely on a directly effective right conferred on them by the Treaty and enforce that right in the national courts to challenge customs duties imposed on them in breach of Article 12.

28. The question whether and to what extent Articles 85 and 86 had direct effect came before the European Court in Case 127/73 *BRT v SABAM* [1974] ECR 52. There the Brussels Tribunal de première instance referred a number of questions to the European Court in proceedings relating to the enforceability of contracts entered into between an authors' royalties collecting society and its members who had assigned their copyrights to the society. It was alleged that the contracts imposed unfair trading conditions contrary to Article 86. A preliminary point arose because the Commission had initiated a procedure against SABAM under Regulation 17 and argued that the operation of Article 9(3) of Regulation 17 (which provides that "the authorities of the Member States" lose their competence to apply Articles 85(1) and 86 in accordance with Article 88 once the Commission initiates proceedings under Regulation 17) meant that the national court was no longer competent to consider the application of Article 86. The European Court rejected this argument:

> "14. It must thus be examined whether the national courts, before which the prohibitions contained in Articles 85 and 86 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 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.
>
> 18 The fact that Article 9(3) refers to 'the authorities of the Member States' competent to apply the provisions of Articles 85(1) and 86 'in accordance with Article 88' indicates that it refers solely to those national authorities whose competence derives from Article 88.
>
> 19 Under that Article the authorities of the Member States — including in certain Member States courts especially entrusted with the task of applying domestic legislation on competition or that of ensuring the legality of that application by the administrative authorities — are also rendered competent to apply the provisions of Articles 85 and 86 of the Treaty.
>
> 20 The fact 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 is pleaded from giving judgment."

29. The European Court in *BRT v SABAM* immediately recognised the potential for a clash between the jurisdiction of the national court to enforce directly effective competition rules and the power of the Commission under Regulation 17 to conduct its own investigation. The Court said that a national court in the position of the Belgian court in that case could, if it considered it necessary for reasons of legal certainty, stay the proceedings before it to await the outcome of the Commission's procedures. But the national court should generally allow proceedings before it to continue if the conduct in question was clearly not caught by Article 86 or conversely if it was clearly incompatible with Article 86.

30. The judgment of the European Court in *BRT v SABAM* holding that Article 86 had direct effect and must be applied by national courts in parallel with enforcement mechanisms derived from Article 88 and from Regulation 17 raised two important

questions that are key to the determination of the preliminary issue in this case. Those questions were (a) how could Article 85 be given direct effect, in light of the exclusive jurisdiction conferred on the Commission by Regulation 17 to apply Article 85(3)? and (b) how did the doctrine of direct effect operate in areas not covered by any implementing measures adopted under Article 87?

31. The first of those questions was explored by the European Court in later cases giving guidance about what the national court should do when called upon to apply Article 85(1) in various situations, for example where the disputed agreement falls within or almost falls within a block exemption; or where the agreement challenged in the national proceedings has been condemned in a Commission infringement decision which is being appealed to the General Court: see Case 234/89 *Delimitis v Henninger Bräu* [1991] ECR I-997 paragraphs 43 onwards and the cases cited there and Case C-344/98 *Masterfoods Ltd v HB Ice Cream Ltd* [2000] ECR I-11412, paras 45 onwards. Much of this case law was then codified in Regulation 1/2003 which introduced, in Article 16, the obligation of the national courts not to take "decisions running counter" to the Commission's view.

32. The second of those questions was explored in two cases on which the Airlines rely in this application. The first is the judgment in Cases 209-213/84 *Ministère public v Lucas Asjes* [1986] ECR 1457 ('*Asjes*'). In that case the tribunal de police de Paris sought a preliminary ruling from the European Court in criminal proceedings against the executives of airlines and travel agencies. The defendants had been charged with infringing the French Civil Aviation Code when selling air tickets by applying tariffs that were different from the approved tariffs. According to the French Code, all airlines had to submit their tariffs to the Government for approval. The Ministry's decision approving the tariff proposed by an airline rendered that tariff binding on all traders. The tribunal de police asked the European Court whether such a system was incompatible with the competition provisions of the Treaty.

33. The European Court held that the question referred must be understood as asking whether it is contrary to the Member States' obligations under the Treaty to enforce approved tariffs if those tariffs are the result of an agreement, a decision or a concerted practice between the airlines contrary to Article 85. The Court referred to the context of international agreements concerning civil aviation and the Chicago Convention on International Civil Aviation that re-affirms the principle of each State's sovereignty over the airspace above its territory. The Court noted that, based on that principle of sovereignty, a network of bilateral agreements has been set up whereby States have authorised the establishment of one or more air routes between their respective territories. Those bilateral agreements follow a standard model which provides, amongst other things, that the tariffs for air services will be fixed by the companies that are authorized to operate the routes envisaged by each agreement. Those tariffs, which are often negotiated under the auspices of the International Air Transport Association (IATA), are then subject to the approval of the authorities of the signatory States. However, the French Government accepted that the bilateral agreements to which they were a signatory did not require them to ignore EU competition rules when approving tariffs.

34. Under the heading "Consequences in the air transport sector of the absence of rules implementing Articles 85 and 86", the European Court in *Asjes* recorded the views expressed by the parties, including the Commission, that the absence of implementing

measures made under Article 87 did not prevent national courts from deciding whether an agreement is compatible with the competition rules because those rules have direct effect. The Court referred back to *BRT v SABAM* which held that the term 'authorities in Member States' in Article 88 refers to either the administrative authorities entrusted in most Member States with the task of applying domestic legislation on competition, or else the courts to which, in other Member States, that task has been especially entrusted. These authorities did not, the European Court considered, include the criminal courts whose task is to punish breaches of the law (see paragraph 56 of the judgment). Could such a court nevertheless have jurisdiction to rule that the tariff practices between airlines are contrary to Article 85 even though no decision had been taken pursuant to Article 88 or Article 89 regarding those concerted practices?

35. The European Court held it could not. In light of the structure created by Articles 88 and 89, the fact that an agreement may fall within the ambit of Article 85 does not, the Court held, suffice for it to be immediately prohibited by Article 85(1) and so automatically void under Article 85(2). Such a conclusion would be contrary to the general principle of legal certainty which is a rule of law that must be upheld in the application of the Treaty. It would have the effect of prohibiting and rendering automatically void certain agreements, even before it is possible to ascertain whether Article 85 as a whole is applicable to those agreements. Thus, the Court held, until the entry into force of implementing measures under Article 87, agreements are prohibited under Article 85(1) and are automatically void under Article 85(2) only in so far as they have been held by the authorities of the Member States, pursuant to Article 88, to fall under Article 85(1) and not to qualify for exemption from the prohibition under Article 85(3) or in so far as the Commission has recorded an infringement pursuant to Article 89(2).

36. The Commission argued before the Court in *Asjes* that *Bosch* was distinguishable because there was no equivalent in the air transport sector to the provisional validity conferred by Regulation 17 on the distribution agreement between Bosch and van Rijn. The Court disagreed, stating that the rules set out in *Bosch* continue to apply so long as no regulation and no directive provided for in Article 87 has been adopted and consequently no procedure has been set in motion to give effect to Article 85(3). The Court went on:

> "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) and cannot be exempted from that prohibition pursuant to Article 85(3), or in the absence of a decision by the Commission under Article 89(2) recording that such a concerted practice constitutes an infringement of Article 85(1), 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)."

37. The judgment in *Asjes* was handed down at a time when the European Court was considering a similar issue in Case 66/86 *Ahmed Saeed Flugreisen v Zentrale zur Bekämpfung unlauteren Wettbewerbs* [1989] ECR 838 ('*Ahmed Saeed*'). In that case

all 13 judges of the Court sat *en banc*. That case also concerned the enforcement of government approved airline tariffs which were being evaded by travel agents who bought air tickets between two airports both outside Germany with the passenger boarding the plane during its stopover at a German airport. It was further alleged that their conduct constituted unfair competition because the prices of the airline tickets they sold undercut the approved tariffs applied by their competitors. The Bundesgerichtshof referred questions to the European Court raising the compatibility of the agreement on tariffs not only under Article 85 but also under Article 86. The European Court in *Ahmed Saeed* recognised that the tariff agreements at issue in the proceedings might have a serious anti-competitive effect: they may even have the effect of completely eliminating price competition on the routes to which they relate. But the Court held that the principles established in *Asjes* continued to apply to domestic air transport and air transport between the EEC and third countries since those sectors were still not covered by implementing regulations made under Article 87: see paragraph 21 of the judgment. The Court drew a distinction between these flights and intra-Community flights because the Council and Commission had by this time enacted implementing measures for the latter.

38. Turning to the application of Article 86, the European Court in *Ahmed Saeed* recorded that the Commission and the UK Government argued that a national court could only apply Article 86 in the air transport sector outside the scope of the implementing measures if there had been a prior decision taken under Article 88 or 89. That view was based on the wording of Articles 88 and 89 which drew no distinction between Articles 85 and 86, and on the fact that the nature of the assessments which are to be made of undertakings' anti-competitive behaviour are substantially similar in both cases. The Court rejected this argument and held that the position under Article 86 was different from the position under Article 85 as established in *Asjes*. Article 86 could be enforced by the national court in respect of the conduct even though no implementing measures had been adopted and no prior infringement decision had been taken under Article 88 or 89. The European Court explained how it arrived at a different answer for Article 86 in the following way:

> "32. … The sole justification for the continued application of the transitional rules set out in Articles 88 and 89 is that the agreements, decisions and concerted practices covered by Article 85(1) may qualify for exemption under Article 85(3) 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, 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 is fully applicable to the whole of the air transport sector."

39. The Airlines submit that the ruling of the European Court in *Asjes* is determinative of the preliminary issue in this case in their favour. That judgment makes it clear that even though Article 85 EEC (now Article 101 TFEU) has direct effect, the national court is not thereby empowered to rule on the compatibility of an agreement or concerted practice unless and until the sector in which that agreement or concerted practice operates has been brought within an implementing measure adopted pursuant to Article 87 EEC (now Article 103 TFEU). Such an arrangement can only be condemned by the Commission under Article 89 EEC (now Article 105 TFEU) or by the authorities of Member States under Article 88 EEC (now Article 104 TFEU). The Commission has taken no such decision and neither has any relevant authority of the United Kingdom.

40. The Claimants submit that the High Court does have power in these proceedings to decide the compatibility of the cartel agreement with Article 85 in so far as it relates to flights between the EU and third countries because:

    i) the High Court had power to rule on the compatibility of the cartel prior to 1 May 2004 pursuant to Article 88 EEC because it was "a national authority" within the meaning of Article 88;

    ii) the doctrine of direct effect conferred jurisdiction on the High Court prior to 1 May 2004 to award damages to the Claimants in respect of the carriage of goods on such flights even in the absence of jurisdiction derived from Article 88 because of the nature of the cartel alleged in this case; and

    iii) Regulation 1/2003 operates to allow the High Court, after 1 May 2004, to award damages in respect of such flights because of the retrospective application of the procedural provisions of that Regulation.

(1) Jurisdiction under Article 88 EEC (now Article 104 TFEU)

41. The Claimants say that the High Court is one of the national authorities referred to in Article 88 EEC and that the court is still empowered under Article 88 to make a finding of infringement pursuant to that Article when determining this claim. They argue that the reference to the authorities of the Member States that have the power to apply Articles 85 and 86 EEC included courts with general jurisdiction in competition law. If a national authority like the High Court is seized with a case raising an issue about the application of Article 85, that Court may adopt a decision on the application of the prohibition in the course of determining the dispute between the parties.

42. I cannot accept that submission. Article 88 EEC states that the authorities of the Member States may rule on the application of Article 85 "in accordance with the law of their country". An examination of the way in which the United Kingdom implemented its obligations under Article 88 shows that it was never intended that the High Court should be able to exercise the powers derived from Article 88.

43. The United Kingdom joined the European Community on 1 January 1973 but there was no domestic provision made for implementation of Articles 85 and 86 pursuant to Articles 88 until 1996. The EC Competition Law (Articles 88 and 89) Enforcement Regulations 1996 (SI 1996/2199) came into force on 28 August 1996 ('the UK 1996 Regulations'). The Explanatory Note states that the Regulations make provision for

the investigation of, and the making and enforcement of decisions in respect of, agreements or practices on which it appears to the Secretary of State that the United Kingdom has a duty to rule under Article 88 EEC.

44. The mechanism set up by the UK 1996 Regulations reflected the framework and institutions then in place for the enforcement of domestic competition law in this jurisdiction. The description of that mechanism which follows focuses on the provisions as they relate to Article 85; there were also, of course, provisions relating to the investigation of infringements of Article 86. Regulation 3 provided that if it appeared to the Secretary of State that the United Kingdom might have a duty under Article 88 to rule on the question whether or not there was or had been in existence an agreement prohibited by Article 85, he could ask the Director General of Fair Trading to carry out a preliminary investigation and to advise the Secretary of State of the outcome. If, following that preliminary investigation, it appeared to the Secretary of State that there was or had been an agreement and that the United Kingdom had a duty under Article 88 to rule on whether it was prohibited by Article 85, the Secretary of State could take a number of different actions pursuant to regulation 4. If it appeared to him that the agreement fell within Article 85(1) but that the conditions for the application of Article 85(3) were met, he could declare the provisions of Article 85(1) inapplicable. If he could not decide either that the agreement did not fall within Article 85 (1) or that Article 85(3) applied, then the Secretary of State could refer the agreement to the Monopolies and Mergers Commission ('MMC') for investigation and report.

45. Regulation 10 set out the functions of the MMC on the reference of an agreement by the Secretary of State. Its main tasks were to investigate and report on whether the agreement existed or had existed; whether any undertaking based in the United Kingdom was or had been a party to it; whether the agreement fell within Article 85(1); whether the agreement affected or had affected competition within the United Kingdom and if so what were those effects; and whether if the agreement did fall within Article 85(1) it benefited from Article 85(3). When the MMC reported on its conclusions, it could make recommendations as to what action should be taken by the Secretary of State or other public authority.

46. The UK 1996 Regulations were revoked by the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 (S.I. 2001/2916) ('the UK 2001 Regulations'). The UK 2001 Regulations came into effect on 17 August 2001 during the currency of the post-Treaty of Amsterdam numbering of the EC Treaty. The Explanatory Note to these Regulations referred to the fact that no implementing regulations had been made under Article 83 (formerly Article 87) in respect of air transport services between the EU and third countries. The UK 2001 Regulations were modelled on the procedures and institutions established by the Competition Act 1998 and, broadly speaking, conferred on the Director General of Fair Trading the functions previously carried out by the Secretary of State and the MMC and gave him powers similar to those conferred on him for investigating breaches of domestic competition provisions.

47. The UK 2001 Regulations were revoked by the EC Competition Law (Articles 84 and 85) Enforcement (Revocation) Regulations 2007 (S.I. 2007/1846) with effect from 20 July 2007. The Explanatory Note to these revoking Regulations stated that Article 88 had required Member States to make domestic enforcement provisions for areas to which Regulation 1/2003 did not initially apply, including aviation to third countries

and that the UK 2001 Regulations "constituted the domestic enforcement provisions for the United Kingdom". It then referred to the extension of the scope of Regulation 1/2003 to all sectors previously excluded so that the UK 2001 Regulations were no longer required.

48. In my judgment no United Kingdom national court could before 1 May 2004 have purported to exercise a jurisdiction derived from Article 88 EEC. The 1996 UK Regulations and the 2001 UK Regulations set out exhaustively on which institutions the United Kingdom had decided to confer that function and how those institutions were required to go about exercising that function. That did not include any role for the national courts with general jurisdiction over competition law matters.

49. Further, the case law of the European Court draws a distinction for this purpose between the authorities of Member States referred to in Article 88 and the national courts which are required to apply directly effective EU law. That was the distinction that the Court drew in *BRT v SABAM* when deciding that Article 9(3) of Regulation 17 prevented the national authorities from proceeding with an investigation where the Commission had initiated its own proceedings, but did not also prevent the national court from applying directly effective law. It is also the distinction drawn in *Asjes* where the European Court confirmed that the existence of direct effect according to *BRT v SABAM* did not negate the ruling in *Bosch* so that national courts were still precluded from applying directly effective provisions where no implementing measures had been adopted and where there was no prior decision under Article 88 or 89 EEC.

50. The effect of Mr Moser's argument is that every court which might be called upon to enforce the directly effective competition rules is to be treated as an authority of the Member State for the purposes of Article 88. He therefore has to interpret *Asjes* as finding that the Tribunal de police de Paris was not for some reason a court before which directly effective provisions of the EEC Treaty could be enforced. That, he submits, contrasts with the position of the High Court of England and Wales which clearly is a court by which those provisions are enforced. He pointed out that there may have been a policy consideration at work here, prompting the European Court to shy away from a finding that a magistrates' court would be able to apply Article 85(3). In any event, he submits that *Asjes* must be confined to its particular facts and is not authority for the broad proposition for which the Airlines contend.

51. I do not accept that the European Court's decision in *Asjes* was so confined. The European Court was not suggesting that the Tribunal de police de Paris had some particular characteristic that meant that it could not apply directly effective law and that that was why it did not count as an authority of a Member State, unlike every other national court which does apply directly effective EU law. It was saying, more simply, that France had not entrusted the task of exercising the jurisdiction derived from Article 88 to the Tribunal de police de Paris so that unless and until there was a decision by an authority which was so tasked, the Tribunal de Paris could not entertain a dispute over an alleged infringement of the competition rules.

52. I therefore reject the submission that the High Court could prior to 1 May 2004, in the course of a claim for damages from breach of Article 85, have taken a decision pursuant to Article 88 EEC (now Article 104 TFEU) that an agreement relating to air

transport between the EU and a third country was an infringement of Article 85 EEC (now Article 101 TFEU).

(2) Jurisdiction deriving from the direct effect of Article 85

53. I have described how the European Court held in 1989 in *Ahmed Saeed* that the doctrine of direct effect applied differently in relation to Articles 85 and 86 EEC so that the national court was able to condemn conduct in respect of air transport between the EU and third countries as abusive even though there were no implementing measures in place pursuant to Article 87 and even though there had been no decision to that effect under Article 88 or 89. The Claimants submit that the distinction drawn in *Ahmed Saeed* is not between Article 85 and Article 86 but between those cases where there is potential for the application of Article 85(3) and those cases where there is no real possibility of Article 85(3) being satisfied. The European Court stated in *Ahmed Saeed* that the sole justification for the continuing application of the transitional rules set out in Articles 88 and 89 was that agreements, decisions and concerted practices may qualify for exemption under Article 85(3). Mr Moser submits that in a case where there is no issue about the application of Article 85(3), the national court may proceed to make findings even in sectors not covered by Regulation 17 because there is no risk of conflict between the court's analysis of the conduct and the analysis of the Commission.

54. As to why the Claimants say that the potential application of Article 85(3) should not prevent the national court from applying Article 85 even to an agreement not covered by Regulation 17, Mr Moser's first argument is that since 1 May 2004 the national court is empowered anyway under Regulation 1/2003 to disapply Article 85(1) pursuant to Article 85(3). The procedural difficulties arising from the former exclusive competence of the Commission in applying Article 85(3) should no longer impede the national court from applying Article 85 to agreements outside the scope of Regulation 17. Regulation 1/2003 recognises that national courts and competition authorities are now equally capable of carrying out the economic assessment that is required for deciding whether the criteria in Article 85(3) are satisfied. To an extent, this submission raises the issue of the retrospective application of Regulation 1/2003 discussed below.

55. In my view, the procedural difficulties in applying Article 85(3) EEC could not have been the reason the European Court decided *Asjes* and *Ahmed Saeed* in the way it did as regards anti-competitive agreements outside the scope of Regulation 17. Those same procedural difficulties arise as much if not more in relation to agreements which do fall within the scope of Regulation 17. That did not stop the European Court from holding in *BRT v SABAM* and many subsequent cases that Article 85 must be enforced in the national courts in relation to those agreements. That parallel jurisdiction created the uncomfortable relationship to which I have referred in paragraph 31 above, between the national court applying Article 85(1) and (2) and the exclusive competence of the Commission to apply Article 85(3). The risk of conflicting decisions was, as those cases make clear, overridden by the benefit of direct effect, a benefit which the European Court later described in Case C-453/99 *Courage v Crehan* [2001] ECR I-6297 as a right which strengthens the working of the competition rules and "can make a significant contribution to the maintenance of effective competition in the Community": see paragraph 27 of that judgment.

56. If the European Court had simply been concerned about the possibility of conflicting decisions, the Court could still have decided that the doctrine of direct effect meant that national courts, in parallel with the national authorities under Article 88 and the Commission under Article 89, must apply Article 85 to agreements relating to air transport with third countries. The Court could have given similar guidance as to managing the potential conflict between the direct effect jurisdiction of the national court and the competence of the national authorities and Commission under Articles 88 and 89 respectively as it later gave to managing the potential conflict between the direct jurisdiction of the national court and the competence of the Commission under Regulation 17. But the Court decided in *Asjes* that there was no such parallel jurisdiction and confirmed that decision as regards Article 85 in *Ahmed Saeed*.

57. Secondly, Mr Moser argues that this is the kind of concerted practice which is very unlikely to benefit from the application of Article 101(3) TFEU. The cartel alleged is, he argues, a hardcore, price-fixing cartel of the kind routinely condemned by the Commission and the national competition authorities. There are two answers, in my judgment, to this point. The first is that, as Mr Beard QC and Mr Turner QC pointed out on behalf of the Airlines, the General Court has consistently held that there are no anti-competitive agreements which are excluded from the possible application of Article 101(3). In Case T-17/93 *Matra Hachette SA v Commission* [1994] ECR II-598, the General Court rejected a submission to the contrary:

> "85. The Court observes that such reasoning presumes that there are adverse effects on competition which, by their nature cannot qualify for an exemption under Article 85(3). In other words, as the Commission rightly points out, such reasoning presumes acceptance of the view that there are infringements which are inherently incapable of qualifying for an exemption - but Community competition law, the applicability of which is subject to the existence of a practice which is anti-competitive in intent or has an anti-competitive effect on a given market, certainly does not embody that principle. On the contrary, the Court considers that, in principle, no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article 85(3) of the Treaty are satisfied and the practice in question has been properly notified to the Commission."

58. Counsel for the Airlines also argued that if it were the case that hardcore restrictions could be condemned by national courts applying directly effective Article 85(1) even in the absence of implementing measures under Article 87, the decisions in both *Bosch* and *Asjes* would have been different. As I have described, *Bosch* concerned an export ban imposed by a manufacturer on its network of national distributors. The European Court was emphatic in its early case law that such agreements could be condemned as having as their object the restriction of competition. It held in Cases 56 & 58/64 *Consten and Grundig v Commission* [1966] ECR 429 that the restrictive nature of the absolute territorial protection conferred by such bans on direct and indirect imports "is obvious". In *Bosch* itself Advocate General Lagrange and the Court referred to the fact that Article 4 of Regulation 17 excluded from the class of

agreements that did not have to be notified to the Commission for exemption under Article 85(3) any agreements which relate to imports or exports between Member States. This signalled that, from the first, the competition rules regarded restrictions on exports as being particularly problematic. Similarly, in *Asjes* Advocate General Lenz noted that the agreement in issue was a tariff fixing agreement. It could not, he said, be ruled out in advance that Article 85(3) may be applicable. But, he said, "it must be borne in mind that under Article 85(3)(b) an exemption cannot be granted if it is possible for competition to be eliminated in respect of a substantial part of the services in question". He recognised that given that there were other provisions of the Treaty that limited the freedom of undertakings to provide air transport services, the extent of competition remaining in the market "may be so limited that an exemption is out of the question": see page 1448 of the opinion. In *Ahmed Saeed* the Court reaffirmed the conclusion that a tariff fixing agreement could not be condemned at that time under Article 85 even though the Court contemplated the same agreement amounting to an abuse of a dominant position. This was all the more striking given that the issue arose in national proceedings where travel agents were being subject to criminal penalties for failing to implement the price fixing agreements.

59. I consider, therefore, that the decisions in *Bosch* and *Asjes* apply even in a case where there is very little possibility of the agreement or concerted practice in question benefiting from the application of Article 85(3). There is no suggestion to the contrary in those cases. I do not accept that the case law should not be followed because competition law has moved on or become more sophisticated in its understanding of the anti-competitive effect of such agreements.

60. Thirdly, Mr Moser argues that the inapplicability of Article 101(3) is demonstrated by the decision that the Commission has in fact taken on the air freight cartel on which the present claim is based. The Commission considered the application of Article 101(3) at paragraphs 1040 onwards of the Decision.[1] The Commission said:

> "(1042) Prevention, restriction or distortion of competition being the sole object of the price arrangements which are the subject of this decision, there is no indication that the agreements and concerted practices between the airfreight service providers entailed any efficiency benefits or otherwise promoted technical or economic progress. Hardcore cartels, like the one which is the subject of this Decision, are, by definition, the most detrimental restrictions of competition, as they benefit only the participating suppliers but not consumers."

61. That finding in the *Air Freight* decision cannot justify this court departing from the European Court's ruling in *Bosch* and *Asjes*. The Commission's decision expressly does not apply to air freight charges on flights between the EU and third countries before 1 May 2004. In the section of the decision dealing with the Commission's jurisdiction, the Commission noted that before 1 May 2004, Regulation 3975/87 did

[1] The paragraphs of the Decision referred to in this judgment refer to the Decision adopted on 9 November 2010 and annulled by the General Court in December 2015. It is assumed that the relevant paragraphs also appear in the re-issued decision adopted on 17 March 2017. The non-confidential version of the new Decision had not been published by the Commission at time of writing.

not apply to such flights: "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." (see paragraph 816). Under these circumstances, the Commission said it would not apply Article 101 to anti-competitive agreements and practices concerning air transport between EU airports and airports in third countries that took place before 1 May 2004. The Commission arrived at a similar conclusion in respect of air transport between airports in the EEA and airports in third countries that took place before 19 May 2005: see paragraph 821.

62. I do not accept the Claimants' submission that the fact that the Commission found that the cartel was "a single complex and continuous infringement for the services concerned" (paragraph 892 of the decision) entitles or requires this court to assume that the same answer under Article 101(3) would apply to the cartel as it operated in relation to third country flights before 1 May 2004. The dispositif of the decision deals in separate articles with surcharges for air freight services on routes between airports within the EEA and other air freight services. The decision in relation to intra-EEA transport condemns the cartel as from dates going back to December 1999 for some of the airlines (article 1). For the article relating to routes between airports within the EU and airports outside the EEA, the earliest date for the start of the infringement is 1 May 2004 (article 2) and on routes between airports that are in the EEA but not in the EU and third countries, the earliest date for the start of the infringement is 19 May 2005 (article 3). Mr Moser rightly accepted that in respect of the air freight charges for periods outside the dispositif, this claim proceeds as a stand-alone claim, not a 'follow on' claim relying on the Commission's infringement decision as being binding on this court as to the existence of an infringement.

63. I hold that the principle established by the European Court in *Bosch*, *Asjes* and *Ahmed Saeed* remains good law and that the doctrine of direct effect did not, before 1 May 2004, confer on a national court jurisdiction to rule on the compatibility of an agreement with Article 85(1) in the absence of either implementing measures adopted under Article 87 or a prior decision taken under the transitional regime in Article 88 or 89. The national court was not empowered by the doctrine of direct effect at that time to consider the application of Article 85(3) because that function was conferred only on the Commission or on the relevant national authority. In the case of the United Kingdom the national authority was the Secretary of State and MMC under the UK 1996 Regulations and the Director General of Fair Trading under the UK 2001 Regulations.

(3) The retrospective application of Regulation 1/2003

64. Does the coming into force of Regulation 1/2003 change that position? The Claimants submit that even if no claim could have been made in respect of airfreight charges on flights between the EU and third countries in proceedings brought before 1 May 2004, the effect of Regulation 1/2003 is that such a claim can be brought now in respect of losses incurred before the Regulation came into force.

65. Mr Turner QC, who argued this part of the application on behalf of the Airlines, referred to the judgment of Lewison LJ in *O'Brien v Ministry of Justice* [2015] EWCA Civ 1000. That case concerned the possible retrospective application of the Part Time Workers Directive 97/81/EC when calculating the pension entitlement of a

part time Recorder. The learned judge described the "no retroactivity" principle of EU law as being "that EU legislation does not have retroactive effect unless, exceptionally, it is clear from its terms or general scheme that the legislator intended such an effect, that the purpose to be achieved so requires and that the legitimate expectations of those concerned are duly respected." (see paragraph 5 of his judgment). The Court of Appeal held in that case that the Part Time Workers Directive did not apply retrospectively so as to bring periods of service performed before the directive came into effect into the calculation of the claimant's pension entitlement.

66. A distinction between how the principle of non-retroactivity applies to procedural and substantive rules was considered by the European Court in Cases 212-217/80 *Salumi* [1981] ECR 2736. That was a reference from the Italian Supreme Court of Cassation in proceedings seeking to require Mr Salumi and others to pay additional sums as levies on imports of agricultural products, on the basis that the earlier lower levy had been applied in error. Subsequently an EU regulation was enacted and the European Court interpreted the Italian court's question as asking in substance whether that regulation applied to payments of duties made before the date the regulation came into force. The European Court stated:

> "9. Although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, this is not the case with substantive rules. On the contrary, the latter are usually interpreted as applying to situations existing before the entry into force only insofar as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them.
>
> 10. This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectation, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it. The Court has repeatedly emphasised the importance of those principles … that in general the principle of legal certainty precludes a Community measure from taking effect from the point in time before its publication and that it may be otherwise only exceptionally, where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."

67. The Court determined that the regulation in question contained both procedural and substantive rules which formed an indivisible whole. The individual provisions should not be considered in isolation with regard to the time at which they take effect. The regulation could not therefore be accorded retroactive effect unless sufficiently clear indications led to such a conclusion. The Court held that both the wording and the general scheme of the regulation led to the conclusion that the regulation provided only for the future.

68. The Claimants cannot point to anything express in Regulation 1/2003 stating that it has the effect for which they contend. Rather they argue that their claim can succeed without any substantive retrospective application of the Regulation. Mr Moser

submits that the Airlines' submissions are unsustainable because at base they are asserting that covert cargo cartels were perfectly lawful until 1 May 2004. The Airlines' case, he argues, depends on there having been no infringement of Article 85 in the period before 1 May 2004. That cannot be right, because Article 85 EEC contains a legal norm that cannot be abrogated by procedural provisions put in place from time to time. Article 85(1) was fully "switched on" from the day that the Treaty of Rome came into force – it did not need to be switched on by any prior decision under Article 88 or 89.

69. As regards whether the implementation of the competition rules provided by Regulation 1/2003 should be characterised as procedural or substantive, Mr Moser describes Regulation 17 and Regulation 1/2003 as simply mechanisms to ensure compliance with the prohibitions, not as giving effect to the prohibitions. He also argues that Regulation 17 and Regulation 1/2003 were primarily focused on the arrangements for applying the exception in Article 85(3) and not about applying the prohibition in paragraph (1). The general position is that the prohibition is in place; what these Regulations are dealing with is the application of the exception. The Claimants say that their interpretation of Regulation 1/2003 is supported by the fact that Article 6 of Regulation 1/2003 provides that "National courts shall have the power to apply Articles 81 and 82 of the Treaty".

70. In my judgment, Regulation 1/2003 is different from the regulation considered in *Salumi* because some of its provisions could be described as purely procedural and do apply retrospectively. For example, the Commission exercises the investigatory power conferred by Regulation 1/2003 even where it is investigating a cartel which came into existence when Regulation 17 was in force. But it is not right to say that because Articles 85 and 86 were 'in force' from the date that the Treaty came into force, any regulations dealing with their implementation are enforcement mechanisms which do not create substantive rights.

71. The confusion arises because of the protean extent of the enforceability of Articles 85 and 86. That is not an issue that generally arises in our domestic law. A prohibition may be enacted as a section in a UK statute but it has no effect at all until a commencement provision either in the statute itself or in a subsequent statutory instrument brings it into force, or switches it on, to adopt Mr Moser's metaphor. That will only happen once everything needed is in place for it to be enforceable. I agree that Articles 85 and 86 did not need to be switched on in the same way; they became effective on the day the Treaty of Rome came into force. But, to pursue the metaphor a little further, their enforceability is controlled not by a simple dolly switch but by a dimmer switch. The EU legislature has, over the years, enacted the legislation that I have described, thereby turning the dimmer switch so that the light of the competition rules has shone more brightly in some areas than in others. The European Court has in its careful jurisprudence explained what is illuminated and what remains in shadow at various times.

72. Those changes in the intensity of the beams of Articles 85 and 86 are substantive changes and not merely procedural changes. Regulation 1/2003 has the effect that, for the first time, the compatibility of agreements relating to flights between the EU and third countries with Article 101 can be determined in the national court, can be held to be invalid pursuant to Article 85(2) and can be the subject of claims for damages. I do not agree that the limitations on the temporal scope of the Commission's infringement

decision were only a self-denying ordinance to reduce the number of controversial issues raised by the decision. Those limitations were a recognition that Regulation 1/2003 did not empower the Commission to condemn earlier agreements by sweeping away, retrospectively, the very different enforcement mechanism established by Article 89 EEC (now Article 105 TFEU).

73. The Claimants' position is not improved, as Mr Moser suggested, as a result of the implementation of the Damages Directive (Directive 2014/104/EU adopted on 26 November 2014). That Directive aims to ensure that claimants receive full compensation for loss arising from infringements which give rise to a right to claim damages but it does not expand the kinds of conduct that do give rise to such a claim.

74. The Airlines also rely on the judgment of the European Court in Case C-17/10 *Toshiba Corporation v Czech Competition Authority*, judgment of 14 February 2012 ('*Toshiba*'). That case concerned an international cartel on the market for gas insulated switchgear ('GIS') in which a number of European and Japanese undertakings in the electrical engineering sector participated for different periods between 1988 and 2004. On 30 September 2004 the Commission wrote to the Czech competition authority that it intended to initiate a proceeding concerning the cartel. The Commission said in that letter that the anti-competitive conduct under examination had taken place, in large part, before 1 May 2004, the date on which the Czech Republic acceded to the EU. The Commission's procedure would concern only the activities of that cartel carried out in the territory of the European Union before enlargement on 1 May 2004. It was thus unlikely that the Commission would initiate a proceeding concerning the Czech Republic. The Commission's subsequent infringement decision did not penalise the effects of the collusive conduct on Czech territory before 1 May 2004.

75. The Czech competition authority then carried out its own investigation into the operation of the cartel in its territory and found that there had been an infringement. The Czech appellate court, reviewing the national decision, found that the cartel penalised by the domestic authority had continued until 11 May 2004. The Czech court held that since the Commission had already initiated a proceeding under Article 81 against the cartel of 'worldwide scope' and imposed penalties, the domestic proceeding infringed the double jeopardy principle. On further appeal by the competition authority, the Czech higher court referred questions to the European Court. The European Court considered whether Regulation 1/2003 could be applied retrospectively to conduct on the Czech market prior to date of accession: (citation of authority omitted)

> "47 According to settled case-law, procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, whereas substantive rules are usually interpreted as not applying, in principle, to situations existing before their entry into force (…)
>
> 48 Regulation No 1/2003 contains procedural and substantive rules.
>
> 49 As the Advocate General has pointed out in point 43 of her Opinion, the said regulation, like Article 81 EC, contains

> substantive provisions which govern the assessment by the competition authorities of agreements between undertakings and therefore constitute substantive rules of EU law.
>
> 50 Such substantive rules cannot in principle be applied retroactively, irrespective of whether such application might produce favourable or unfavourable effects for the persons concerned. The principle of legal certainty requires that any factual situation should normally, in the absence of any express contrary provision, be examined in the light of the legal rules existing at the time when the situation obtained (…).
>
> 51 According to settled case-law, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, the substantive rules of Community law must be interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them (…).
>
> 52 However, in the present case, neither the wording, nor the purpose, nor the general system of Article 81 EC, Article 3 of Regulation No 1/2003 and the Act of Accession contain any clear indications that those two provisions should be applied retroactively."

76. The European Court therefore held that the provisions of Article 81 and Article 3 of Regulation 1/2003 must be interpreted as meaning that in the context of a proceeding initiated after 1 May 2004, they do not apply to a cartel which produced effects in the territory of a Member State which acceded to the Union on 1 May 2004, during periods prior to that date.

77. The European Court in *Toshiba* distinguished the earlier case of Cases 97-99/87 *Dow Chemical Ibérica and Others* v *Commission* [1989] ECR 3165 where the Court had held that the Commission's powers of investigation, after the date of Spain's accession to the EU, into the conduct of undertakings established in Spain could not be limited solely to conduct subsequent to accession and could concern conduct prior to that date. The Court held that *Dow Chemical* "did not concern the application of substantive rules but only the application of procedural rules, in that case the application of provisions concerning Commission searches on the premises of undertakings".

78. I recognise that there is a difference between *Toshiba* and the present case because Article 81 was not 'switched on' to any extent in Czech territory in relation to a purely Czech infringement before the Czech Republic joined the Union on 1 May 2004. However, I agree with the Airlines' submission that the European Court in *Toshiba* treated the scope of the jurisdiction conferred by Regulation 1/2003 as a substantive matter and not a procedural matter. I hold that the Claimants cannot rely on any retrospective effect of Regulation 1/2003 to confer on this court jurisdiction to condemn an infringement which it could not have condemned before 1 May 2004.

A reference under Article 267 TFEU

79. Mr Moser, supported by Mr Randolph QC for the La Gaitana claimants, submitted that if I was not convinced by their arguments, I should conclude that the matter was not beyond doubt and should therefore ask the European Court to give a ruling on the issues raised in this preliminary issue. Following the conclusion of the hearing, they wrote to me pointing out that the appeals brought by some of the Airlines challenging the infringement decision re-adopted by the Commission on 17 March 2017 raise similar issues of the retrospectivity of Regulation 1/2003.

80. I have reminded myself of the test to be applied by the court when considering whether to make a reference to the European Court under Article 267 TFEU as set out by Sir Thomas Bingham MR in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland Ltd ex parte Else (1982) Ltd and another* [1993] QB 534, 545 and by the Court of Appeal in *Trinity Mirror plc (formerly Mirror Group Newspapers Ltd) v Customs and Excise Commissioners* [2001] EWCA Civ 65.

81. I have concluded that it is not appropriate to make a reference to the European Court. That Court has had an opportunity to examine the relationship between the transitional provisions of the Treaty and the powers of national authorities and national courts in the case law that I have described. Nothing material has occurred since those cases to suggest that the Court may give a different answer if asked the same question again. The prospective appeals against the re-adopted decision cannot raise the same issue because the Commission did not purport to condemn an infringement in respect of air transport between the EU and third countries at any earlier date than 1 May 2004.

Conclusion

82. I therefore answer the preliminary issues in the following way (using the abbreviations used in the directions order of 18 May 2017):

> The Emerald, Allston, La Gaitana and Kodak Claimants have no reasonable grounds for bringing a claim, and/or no real prospect of succeeding on a claim, based on an alleged infringement of Article 101 TFEU / Article 53 EEA as pleaded in the relevant Particulars of Claim in relation to, respectively:
>
> i) the charges for air freight services provided by parties to a cartel to which BA was a party on routes between the European Union and third countries for transactions entered into prior to 1 May 2004; or
>
> ii) the charges for air freight services provided by parties to a cartel to which BA was a party on routes between countries within the European Economic Area (but which are not member states of the European Union) and third countries for transactions entered into prior to 19 May 2005.