

Voided Air Cargo Fines Highlight Risks For EU Antitrust Suits

By **Melissa Lipman**

Law360, New York (December 21, 2015, 10:37 PM ET) -- A European Union court's decision last week to overturn €790 million (\$865 million) worth of price-fixing fines against some of the world's biggest airlines underscores a significant risk for companies bringing follow-on lawsuits based on enforcement decisions, attorneys say.

Follow-on suits that build on decisions made by the European Commission or national competition watchdogs are far more common than stand-alone antitrust allegations and for good reason: EU law makes an enforcer's finding that a group of companies orchestrated a cartel binding on national courts. As a result, claimants only have to prove that they suffered damages and how much.

But there's a catch: National courts can't hand out damages judgments until the EC decision that underpins the private cases becomes final either because the companies fined don't contest the decision or because the case has survived all appeals.

And the EU General Court's ruling on Wednesday overturning a 2010 decision fining British Airways PLC, Air France-KLM and several other carriers for fixing air cargo rates highlights the possibility that claimants could see the finding on which they've based their case evaporate — at least temporarily, if not forever — and their own claims dropped or delayed.

"In a way, it just shows very clearly the risk that claimants always take because unfortunately in Europe the appeals process takes a very long time," said Cooley LLP partner Becket McGrath. "That means until that appeals process is worked through, you don't know for sure the decision on which you're basing your entire case is definitely there."

With the exception of companies who settle with the EC and receive a discount on their penalties for agreeing not to challenge a penalty, appeals are almost a foregone conclusion in competition cases.

For example in this case, the watchdog fined 11 airlines over the air cargo cartel, and all but Qantas Airways Ltd. appealed the decision.

The General Court and the European Court of Justice frequently adjust fines on appeal — concluding, for example, that the EC didn't have enough evidence to show a company participated in the cartel for the entire time period the watchdog fined it for — but wholesale losses like Wednesday's ruling are unusual.

In this case, the General Court tossed the EC's decision because it found that the bulk of the findings

described one continuous, overarching cartel covering all of the air cargo routes the watchdog looked at in the case, whereas the operative part of the decision outlines either four separate plots or one plot in which only four carriers participated.

That kind of contradiction is a problem when national courts are required to apply the decision to private cases, according to the court, something the EC has been trying to promote through new legislation designed to make it easier for those who overpaid because of cartels to pursue damages claims.

As the commission itself has pointed out, the rulings tossing the fines were based on procedural issues rather than substantive problems with the agency's case. In that kind of situation, the EC can simply reissue its decision to correct the flaws or it can appeal the matter to the ECJ first.

But either way, private plaintiffs who are pursuing damages against the carriers in U.K. litigation over the plot could face further delays to their claims, attorneys said.

"It will be for judge in proceedings here to decide does she stay the proceedings ... or does she proceed with discussions of economic evidence," McGrath said. "This clearly creates a major challenge for the claimants. Their best-case scenario would be the commission would go back and fix its error in the decision [but] it's a question of how quickly could that defect be fixed."

Even if the U.K. judge doesn't pause the case, the mere fact of there being a delay in the EU proceedings could have a more subtle impact on the litigation and any settlement talks that might have been underway. And it is a blow to the claimants' ability to get the ideal result of a quick, high-value settlement, according to Covington & Burling LLP's Kenny Henderson.

"Every twist and turn in litigation arguably has an effect on the existing settlement dynamic, so this is a good development for defendants, a bad development for claimants," Henderson said. "If you're the defendants, if you were thinking of making an offer, now you're saying, 'Maybe we'll hold on.'"

While the ruling doesn't mean that the case won't settle eventually, it could affect how much latitude the claimants can now get from the court on an assortment of procedural issues while those talks continue to play out, Henderson said.

"It is nice as a defendant to be able to say from now until who knows how long to be able to say, 'There is no commission decision that can color how the court approaches these things in terms of disclosure,'" Henderson said.

--Editing by Katherine Rautenberg and Kelly Duncan.
