IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-8355

	BETWEEN	COMMERCE COMMISION Plaintiff
	AND	CARGOLUX AIRLINES INTERNATIONAL S.A. Defendant

Hearing: 18 March 2011

Counsel: B Brown QC, J Dixon and F Cuncannon for Plaintiff
P R Jagose for Defendant

Judgment: 5 April 2011

JUDGMENT OF POTTER J

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 2.30 p.m. on 5 April 2011.

Solicitors: Meredith Connell, P O Box 2213, Auckland 1140
Chapman Tripp, P O Box 993, Wellington 6140

Introduction

[1] The defendant, Cargolux Airlines International SA (Cargolux), has admitted breaching Part 2 of the Commerce Act 1986 (the Act), in that it entered into and gave effect to price fixing arrangements contrary to s 27 (via s 30) of the Act. The Court is asked to impose a pecuniary penalty of $6 million, agreed to by Cargolux and the Commerce Commission, and to approve a proposed payment of $25,000 by Cargolux towards the Commission's costs.

Agreed facts

[2] The defendant has filed admissions to the agreed statement of facts dated 4 March 2011 on the 5th, 6th, 29th and 30th causes of action.

[3] Cargolux is a dedicated cargo airline providing a range of air cargo services to customers, including the physical transport of air cargo from origin to destination. It is registered as an overseas company in New Zealand under the Companies Act 1993. Although Cargolux is a large player globally in the provision of air cargo services, it is a relatively small player in the New Zealand market. It estimates that it carried approximately 1.31 per cent of all air cargo to and from New Zealand during the period relevant to these proceedings.

[4] The international air freight industry involves all facets of the movement of goods by air from origin to destination. Air cargo is transported in passenger aircraft using available belly space capacity, and on dedicated air freighters using both belly space and main deck capacity. Air cargo carriers typically contract with freight forwarders to provide international cargo services; freight forwarders then organise the integrated transport of goods on behalf of a range of shippers. The cost of air cargo services is thus generally passed on to shippers by freight forwarders.

[5] At all times material to this proceeding, the Commission considers, and Cargolux accepts (for the purpose of these proceedings only), that there were markets in New Zealand for the provision of both in-bound and out-bound air cargo

services between New Zealand and individual regions throughout the world. During that time, Cargolux participated in those markets in providing air cargo services in competition with other international air carriers.

[6] The Commission's case is that, together with certain other international air cargo carriers, and in particular Deutsche Lufthansa AG (Lufthansa), Cargolux entered into a cartel arrangement relating to the imposition of fuel and security surcharges. These were ostensibly to cover increased costs from escalating aviation fuel prices and the imposition of additional security measures following the September 11, 2001 terrorist attacks in the United States.

The 'fuel surcharge' understanding

[7] The International Airport Transport Association (IATA) is a non-governmental international trade association of air carriers that operate scheduled international air services in the transport of passengers, mail and cargo.

[8] In August 1997, members of IATA, including Cargolux, passed Resolution 116ss which provided that IATA would develop and publish a fuel price index for its members. This provided for the application of fuel surcharges in accordance with a specified methodology: when the fuel price index reached a certain threshold, airlines would impose a fuel surcharge of USD$0.10 (or equivalent) per kilogram of air cargo carried. The surcharge would be removed when the index fell below a certain level. Although Resolution 116ss was to be effective on or about 1 October 1997, it was stated to be subject to regulatory approval by governmental agencies. Members were thus advised that fuel surcharges were not to be applied until such approval had been obtained.

[9] In November 1999, the level triggering imposition of a fuel surcharge was reached for the first time. IATA sought regulatory approval from the United States Department of Transportation to implement Resolution 116ss, but this was declined. Shortly after, in April 2000, IATA ceased publishing the fuel price index, having been advised that IATA members could be exposed to antitrust liability if it continued to do so. In a memorandum dated 14 November 2000, IATA informed

members that if carriers were to coordinate pricing by reference to the index, that could be regarded as an illegal conspiracy in violation of applicable competition laws. It also cautioned that carriers should refrain from approaching any third party to publish the index.

[10] Notwithstanding these warnings, Lufthansa commenced publishing its own fuel price index on its website at around the time IATA ceased doing so. Lufthansa's fuel price index mirrored IATA's. Lufthansa also published a methodology stating that a surcharge of €0.10 (or equivalent) per kilogram of air cargo carried would be imposed when the fuel price index reached a certain threshold. The Commission has ascertained that Lufthansa's methodology was essentially the same as that in Resolution 116ss. Although Lufthansa subsequently revised and fine-tuned its methodology, it operated on generally the same basis.

[11] In September 2001, Cargolux arrived at an understanding with Lufthansa and other competing air cargo carriers to:

a) exchange information in order to facilitate and co-ordinate the imposition of fuel surcharges; and

b) impose fuel surcharges over their worldwide networks in accordance with the relevant level of Lufthansa's index and methodology (except where local conditions prevented their application, or full application).

[12] From September 2001 to February 2006, Cargolux gave effect to the fuel surcharge understanding by imposing fuel surcharges at the stipulated level in accordance with Lufthansa's index and methodology. The surcharges were included in its air waybills on the carriage of air cargo. Where local conditions prevented the imposition or full imposition of the fuel surcharge, Cargolux took steps to impose the surcharge to the extent possible. Cargolux employees also communicated with employees from other airlines to give and receive assurances regarding the imposition of these standardised fuel surcharges. It was understood that Lufthansa was collecting and dispensing similar information to other airlines.

The 'security surcharge' understanding

[13] Following the terrorist attacks in the United States on 11 September 2001, international air carriers ostensibly faced increased costs from insurance premiums and security costs such as those involved in the x-raying of cargo. The Commission alleges that, in September or October 2001, Cargolux arrived at an understanding with Lufthansa and other competing airlines to impose a security surcharge on cargo carried internationally by air across their respective global networks.

[14] The security surcharge understanding provided that:

(a) Cargolux and other airlines would follow Lufthansa's approach, imposing an equivalent security surcharge subject to regional variation where this was necessary; and

(b) Cargolux would communicate with Lufthansa to confirm and ensure that the airlines imposed security surcharges in the same amount at approximately the same time.

[15] Between October 2001 and February 2006, Cargolux gave effect to the security surcharge understanding by imposing and maintaining security surcharges largely equivalent to that of Lufthansa's on air cargo transported on routes to and from New Zealand.

Commercial gain

[16] The commercial gain arising from Cargolux's conduct cannot be readily ascertained, and the parties have different estimates of the likely commercial gain. Nonetheless, the parties agree that the commercial gain from both the fuel and security surcharge understandings would have been at least several million dollars.

Legislation

[17] Cargolux admits that it acted in breach of s 27 by arriving at understandings with other international air carriers in relation to the imposition of fuel and security surcharges. Section 27 relevantly provides:

> **27 Contracts, arrangements, or understandings substantially lessening competition prohibited**
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> (1) No person shall enter into a contract or arrangement, or arrive at an understanding, containing a provision that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> (2) No person shall give effect to a provision of a contract, arrangement, or understanding that has the purpose, or has or is likely to have the effect, of substantially lessening competition in a market.
>
> ...

[18] Pecuniary penalties for breaches of Part 2 of the Act are provided for by s 80. This provides:

> **80 Pecuniary penalties**
>
> (1) If the Court is satisfied on the application of the Commission that a person—
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> (a) Has contravened any of the provisions of Part 2 of this Act; or
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> ...
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> the Court may order the person to pay to the Crown such pecuniary penalty as the Court determines to be appropriate ....
>
> (2) The Court must order an individual who has engaged in any conduct referred to in subsection (1) to pay a pecuniary penalty, unless the Court considers that there is good reason for not making that order.
>
> (2A) In determining an appropriate penalty under this section, the Court must have regard to all relevant matters, in particular,—
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> (a) any exemplary damages awarded under section 82A; and
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> (b) in the case of a body corporate, the nature and extent of any commercial gain.
>
> (2B) The amount of any pecuniary penalty must not, in respect of each act or omission, exceed,—

(a) in the case of an individual, $500,000; or

(b) in the case of a body corporate, the greater of—

(i) $10,000,000; or

(ii) either—

(A) if it can be readily ascertained and if the Court is satisfied that the contravention occurred in the course of producing a commercial gain, 3 times the value of any commercial gain resulting from the contravention; or

(B) if the commercial gain cannot be readily ascertained, 10% of the turnover of the body corporate and all of its interconnected bodies corporate (if any).

...

(6) Where conduct by any person constitutes a contravention of 2 or more provisions of Part 2 of this Act, proceedings may be instituted under this Act against that person in relation to the contravention of any one or more of the provisions; but no person shall be liable to more than one pecuniary penalty under this section in respect of the same conduct.

[19] Section 80(2A) requires the Court, in determining an appropriate penalty, to have regard to all relevant matters and specifically identifies, in the case of a body corporate, the nature and extent of any commercial gain. If it can be readily ascertained, the commercial gain arising will also determine the maximum penalty: s 80(2B)(b)(ii)(A).

[20] The parties accept that the precise amount of commercial gain arising here is not readily ascertainable, although they are agreed that it would be in the realm of "several million dollars". It is not possible to determine whether three times the value of that figure would be higher than the $10 million stipulated in s 80(2B)(b)(i). It is also common ground that 10 per cent of Cargolux's turnover measured over any of the potentially relevant periods is less than $10 million: s 80(2B)(b)(ii)(B). As a result the parties are agreed that the maximum penalty for each breach is $10 million.

[21] Pursuant to s 80(6) of the Act, no person shall be liable to more than one pecuniary penalty in respect of the same conduct. Here it is accepted that there are four relevant breaches — namely, entering into each of the fuel surcharge and security understandings, and giving effect to each. The Commission submits that the two separate surcharge understandings are "plainly different conduct", and that entering into and giving effect to these understandings are distinct offences under s 27(1) and (2) of the Act and should be treated as such. This suggests a maximum penalty of $40 million.

[22] For reasons of convenience, the Commission accepts that the contravening behaviour in relation to each of the fuel and security surcharge understandings can be viewed as a single related course of conduct. It accepts that it is appropriate to proceed from a single starting point for the conduct relating to each understanding, before determining if that penalty properly reflects the totality of Cargolux's overall conduct. The Commission emphasised, however, that this did not affect the maximum available penalty of $40 million. I agree with that approach.

Approach to imposition of penalty

[23] In *Commerce Commission v Alstom Holdings SA*,[1] Rodney Hansen J confirmed that criminal sentencing principles provide an appropriate framework for the determination of a pecuniary penalty under s 80. His Honour said:[2]

> The parties invite me to consider the proposed penalty, broadly by reference to orthodox sentencing principles. That requires assessing the seriousness of the offending, identifying relevant aggravating and mitigating factors to determine an appropriate starting point and, finally, having regard to any factors specific to the defendant that may warrant an uplift in, or reduction from, the starting point. I accept that approach is appropriate. It is consistent with the statute and is endorsed by practice in New Zealand and other jurisdictions.

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1 *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC).
2 At [14].

[24] That approach has been confirmed in a number of cases.[3] In *Commerce Commission v EGL Inc*, however, Rodney Hansen J noted that while the analogy with sentencing in the ordinary criminal jurisdiction provides a broad framework, the analogy must be viewed with caution as the two jurisdictions serve markedly different ends.[4] The primary purpose of pecuniary penalties for anti-competitive conduct is deterrence, whereas deterrence is only one of the many competing considerations involved in criminal sentencing.

[25] The importance of deterrence in this area is well established.[5] The aim of imposing pecuniary penalties for anti-competitive conduct is to send the message to persons in the commercial community contemplating engaging in such activity that they will be penalised. This is reflected in the Select Committee Report on the Commerce Amendment Bill 2001, where it was stated:[6]

> The dominant reason for penalties under competition law is the forward looking aim of promoting general deterrence. To promote deterrence, illegal conduct must be profitless, which means that the expected penalty should be linked to the expected illegal gain. The courts should severely penalize today's offender to discourage others from committing similar acts.

[26] As Rodney Hansen J observed in *EGL Inc*, the factors that are considered in fixing pecuniary penalties and the weight they are given must be informed by the unique character and consequences of anti-competitive conduct and the overarching objectives of the pecuniary penalty regime.

[27] Mr Jagose for Cargolux further highlighted that, unlike the criminal law which provides specific penalties for specific crimes, the penalties prescribed by s 80 cover the full range of offending under Part 2 of the Act. Thus the size of the maximum penalty is designed to allow flexibility to cover the wide variations

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3 *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [12]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [18]; see also *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [15].

4 At [13]–[14]. See also *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [19].

5 *New Zealand Bus Ltd v Commerce Commission* [2008] 3 NZLR 433 (CA) at [197]; *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (2006) 11 TCLR 581 at [30]; *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [15].

6 Commerce Amendment Bill (No 2) 2001 (1-32) (Select Committee Report) at 30.

between individual cases,[7] rather than being a reflection of the seriousness of all price-fixing conduct. It is the nature and extent of any commercial gain that is of particular concern.

[28] Mr Jagose then suggested that the approach to penalties described by Miller J in *Commerce Commission v New Zealand Bus Ltd (No 2)*[8] should apply here. In particular, he referred to the statement that "from an economic perspective general deterrence is achieved, regardless of means, if the acquirer's intended gains are first adjusted for the risk of enforcement and then eliminated".[9]

[29] That case, however, concerned a breach of the business acquisitions provisions, and pecuniary penalties were imposed under s 83 rather than s 80. Miller J had referred to s 80 in discussing the objective of deterrence,[10] but the general principles his Honour enunciated were no different from the ones I have set out so far. Moreover, the commercial gain in this case cannot be ascertained and the parties have agreed that the $10 million ceiling under s 80 applies for each breach. Accordingly, I do not consider *New Zealand Bus Ltd* to be of particular relevance to this case.

Starting point

[30] The Commission has identified the following matters as being relevant to the determination of an appropriate penalty under s 80(2A):

(a) the nature and seriousness of the contravening conduct;

(b) whether the conduct was deliberate;

(c) the seniority of the employees or officers involved;

(d) the duration of the contravening conduct;

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7 See *Commerce Commission v BP Oil New Zealand Ltd* [1992] 1 NZLR 377 (HC) at 381.
8 *Commerce Commission v New Zealand Bus Ltd (No 2)* (2006) 3 NZCCLR 854 (HC).
9 At [21].
10 At [17]–[19].

(e) the extent of any loss or damage caused by the contravening conduct; and

(f) the extent of any benefit derived from the contravening conduct (that is, the nature and extent of any commercial gain).

[31] Because the factors relevant to each of the fuel and security surcharge understandings are essentially the same, I deal with them together.

[32] I accept the submission of counsel for the Commision, Mr Brown QC, that the nature and scale of the operations were at the serious end of the spectrum. They involved arrangements between numerous key market competitors to implement standardised fuel and security surcharges as widely as possible across the participating airlines' global networks, to eliminate competition between cartel members on those aspects of the prices charged. It is true that the surcharges were only part of the total charges to customers for air cargo services, and in some cases were not imposed when prevented by market conditions. In this sense the conduct was less egregious than in cases such as *Koppers* and *Alstom* which involved overarching agreements to maintain market share and control prices. Nonetheless, when combined, the surcharges would have been significant components of the total price. The conduct would also have adversely affected both price competition and the competitive dynamics in the air cargo services industry, with a corresponding reduction in efficiency incentives for members of the cartel.

[33] Factors further aggravating the conduct are that it was a sustained course of conduct, operating for a substantial period of time. Although Cargolux was not the ring-leader, the conduct involved covert communications between senior Cargolux and Lufthansa employees. Importantly, Cargolux was aware that the United States Department of Transportation had rejected the conduct as being anti-competitive and had been warned by the IATA to refrain from such conduct. It acted deliberately in contravention of that advice.

[34] The Court is required to pay particular attention to the commercial gain resulting from the conduct. Here, the actual commercial gain cannot be readily

ascertained, but it is agreed that this is likely to be a figure in the millions — the fuel and security surcharges generated revenue of approximately $12.5 million in total in the period in issue. Cargolux also accepts that its conduct, together with other members of the cartel, enabled participants to impose surcharges without the need to consider the likely commercial response of competitors.

[35] Mr Brown referred by way of comparison to the *Alstom*, *Koppers*, and *Geologistics* cases. In *Alstom*, despite there being no commercial gain, this Court approved a penalty of $1.05 million, together with costs of $50,000. The maximum penalty applicable was $5 million, because the conduct occurred prior to the 2001 amendment to s 80 increasing the maximum to $10 million. The lack of commercial gain was because there had not been tenders for the product at the relevant time.

[36] *Alstom* involved a cartel arrangement for the provision of a system of circuit-breakers known as gas-insulated switchgear. The offending conduct was at the most serious end of the spectrum, being a price-fixing and market sharing arrangement involving all participants in the market, operating worldwide. The defendant's role was, however, limited, and the impact on the New Zealand market was negligible. A starting point of $1.25 to $1.75 million was selected. This was then reduced for the defendant's admission of liability, full cooperation with the Commission, and the implementation of a competition law compliance programme. The deterrent effect of a penalty imposed by the European Commission and the impact of adverse international publicity was also taken into account.

[37] In *Koppers*, a starting point of $5.7 million was adopted for a covert, overarching agreement in the wood preservative chemicals market to maintain market share and control prices over about four years. The maximum penalty applicable was a combination of $5 million and $10 million, as the relevant periods of cartel conduct straddled the penalty increase in 2001. As in this case, it was difficult to ascertain accurately the extent of any commercial gain. The starting point was reduced by half to recognise mitigating factors as the defendant had admitted liability, cooperated in full with the Commission, and implemented a compliance regime.

[38] In *Geologistics*, Allan J considered the recommended starting point range of $3.75 to $4.25 million appropriate in all the circumstances. There, a number of freight forwarders had colluded to charge a fee for cargo shipped to and from New Zealand via the United States of America over a period of approximately four years. Again, the extent of commercial gain could not be ascertained with precision, but it was acknowledged to be substantial. After discounting for the defendant's admission of liability at the earliest opportunity and a degree of cooperation with the Commission, a final penalty of $2.5 million was reached and approved.

[39] Mr Brown submitted that a higher starting point was required in this case because:

(a) All of Cargolux's contravening conduct occurred while the new penalty regime (with the $10 million maximum penalty) was operative;

(b) The market affected by Cargolux's conduct was much larger and more significant than in the *Alstom*, *Koppers* and *Geologistics* cases, such that the potential for gain and harm was much greater than in those cases; and

(c) Cargolux's actual commercial gain is likely to be greater than in those three cases, as indicated by the revenue generated by the fuel and security surcharges.

[40] The starting point must also recognise that Cargolux entered into *two* separate price-fixing understandings, albeit by the same personnel at or around the same time and given effect to over the same period.

[41] The Commission has proposed starting point ranges of $5 to $8 million, and $5.5 to $8.5 million, for the fuel and security surcharge understandings respectively. This results in a total range of $10.5 to $16.5 million, but it is acknowledged that the totality principle requires these starting points to be reduced. The Commission thus

proposes a starting point of $8.5 to $14.5 million to reflect the totality of Cargolux's conduct.

[42] In my view, the fact situation in *Geologistics* is the most analogous to the present case. The price-fixing arrangements in both cases related only to a component of the price of the service provided, the relevant markets were similar (being essentially different service aspects of the air freight industry), the commercial gain was unquantifiable, and all of the relevant conduct occurred while the new penalty regime was operative. However, only one price-fixing agreement was involved in *Geologistics* and there was a bigger market in this case, being all in-bound and out-bound air cargo services provided to and from New Zealand, compared to just those shipped via the United States. On a broad-brush approach, I consider a starting point of roughly double that adopted in *Geologistics* is appropriate. Nonetheless, I bear in mind that precedents are of limited value when setting pecuniary penalties, because the principle of deterrence calls for different penalties in different markets.

[43] Having regard to all aspects of Cargolux's conduct, and the principal object of deterring like behaviour, I accept the proposed starting point of $8.5 to $14.5 million. I consider it to be consistent with previous authority and within the properly available range.

Mitigating factors

[44] The parties accept that Cargolux admitted liability at the first opportunity, having always envisaged that an agreement as to penalty could be reached. A degree of remorse can also be inferred from Cargolux's ready acceptance of responsibility, to the extent that remorse or contrition can be attributed to a corporation.

[45] Cargolux has also cooperated with the Commission throughout the investigation, including providing information over and above that required of it under s 98 of the Act. However, unlike in *EGL Inc*, it has not entered into a cooperation agreement with the Commission by which it would be obliged to provide future cooperation. I agree with Mr Brown that a modest discount should be

given to reflect Cargolux's past cooperation, but this cannot be at the level allowed in *Koppers* or *EGL Inc* for very substantial cooperation.

[46] Cargolux has not previously contravened the Act; neither has it been warned in respect of conduct likely to breach the Act. It is also entitled to appropriate credit for implementing an internal competition law compliance programme, though the Commission submits that this ought to fall within the discount for admission of liability and cooperation. Some allowance should also be given for the deterrent effect of significant penalties that have been imposed on Cargolux in other jurisdictions in respect of related conduct and harm.[11] I accept, however, that any such discount must be limited as the penalty currently sought is for deterrence in New Zealand.

[47] Counsel are agreed that a total discount of 33 per cent is appropriate. A similar discount was allowed in *Geologistics*, where assistance to the Commission was initially provided but was discontinued after some months. Admission of liability there had also occurred at the earliest opportunity, but, unlike this case, there was no suggestion that the defendant there had instituted a compliance programme. In both *Koppers* and *EGL Inc* a 50 per cent discount was given, but this was for very early admissions of liability and where substantial and valuable cooperation with the Commission had occurred.

[48] In *Commerce Commission v New Zealand Diagnostic Group Ltd*,[12] Allan J had regard to the discounts available for liability admissions in the criminal context, while cautioning that a strict application of the *Hessell* tariff may not be appropriate in Commerce Act cases. In *R v Hessell*,[13] the Court of Appeal had said that a discount of 33 per cent was appropriate where a defendant pleads guilty at the first reasonable opportunity.[14] Where a defendant has additionally rendered, or promised

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[11] See *Commerce Commission v Alstom Holdings SA* [2009] NZCCLR 22 (HC) at [31], where this was a mitigating factor.

[12] *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [28].

[13] *R v Hessell* [2010] 2 NZLR 298 (CA).

[14] At [15].

to render, considerable assistance to the police with respect to co-offenders, a discount of up to 60 per cent was contemplated.[15]

[49] *R v Hessell* has subsequently been reviewed in the Supreme Court in *Hessell v R*.[16] The Supreme Court has indicated that a more flexible and less prescriptive approach is preferable when determining discounts for an admission of guilt and cooperation in criminal sentencing. It also indicated that the reduction for a guilty plea component should not exceed 25 per cent.

[50] As noted above, the analogy with criminal sentencing cannot be taken too far. In *EGL Inc*, Rodney Hansen J noted that the public benefits derived from cooperation by a defendant in an investigation into anti-competitive conduct are of a scale and nature seldom encountered in the criminal jurisdiction.[17] His Honour quoted the following passage from the Commission's Cartel Leniency Policy:[18]

> Commission investigations can derive considerable assistance from the input of individuals and companies. Cooperation can consist of providing evidence and/or information, or admitting to the cartel conduct, or both. The Commission seeks to encourage such cooperation. Cooperation can be particularly valuable for the investigation of cartels, as their secretive nature may present major challenges. It allows the Commission to make more effective use of the resources available to it for the investigation of cartels.

[51] His Honour then noted that it is in the public interest that substantial discounts be made for a high level of cooperation, for the purpose of recognising the savings achieved and providing appropriate incentives to those who have engaged in anti-competitive conduct, to provide assistance to the Commission.[19]

[52] Here, where cooperation is not to the fullest extent possible, the level of discount must correspondingly be lower. I accept that a one-third reduction for mitigating factors in this case, is in line with the authorities discussed.

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[15] At [23].
[16] *Hessell v R* [2010] NZSC 135.
[17] *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [24].
[18] Commerce Commission "Cartel Leniency Policy and Process Guidelines" (1 March 2010) at [4.01].
[19] At [25].

[53] This would reduce the appropriate penalty to a final range of $5.7 to $9.7 million. While the agreed penalty of $6 million is at the lower end of the range, the Commission is content with this penalty in light of Cargolux's prompt acknowledgment of liability.

Conclusion

[54] Ultimately, it is the final figure of $6 million that the Court is asked to approve. The general approach of the Court is to accept and impose the penalty that the parties have agreed on, as long as it is within the permissible range.[20] As was said in the *Alstom* case:[21]

> ... there is a significant public benefit when corporations acknowledge wrongdoing, thereby avoiding time-consuming and costly investigation and litigation. The Court should play its part in promoting such resolutions by accepting a penalty within the proposed range. A defendant should not be deterred from a negotiated resolution by fears that a settlement will be rejected on insubstantial grounds or because the proposed penalty does not precisely coincide with the penalty the Court might have imposed.

[55] Having considered all the relevant factors, I am satisfied that the proposed penalty is within the available range. The parties have made careful and detailed submissions on the process by which they have reached their recommendation, with helpful reference to relevant facts and precedents.

[56] Mr Jagose has indicated that Cargolux is in a position to pay the recommended sum, but Cargolux has sought an order that the payment of the penalty should be in two equal instalments of $3 million each, one year apart. Although the Act does not specifically provide for such arrangements, Mr Jagose pointed to the general discretion the Court has under s 80(1) to impose "such pecuniary penalty as the Court determines to be appropriate". This payment plan would allow Cargolux to better meet the penalties it is paying in other jurisdictions, and the Commission

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[20] See *Australian Competition & Consumer Commission v ABB Power Transmission Pty Ltd* (2004) ATPR 48,848 at 48,855 (FCA); *NW Frozen Foods v Australian Competition & Consumer Commission* (1996) 71 FCR 285 (FCA); *Commerce Commission v New Zealand Diagnostic Group Ltd* HC Auckland CIV-2008-404-4321, 19 July 2010 at [45]; *Commerce Commission v EGL Inc* HC Auckland CIV-2010-404-5474, 16 December 2010 at [27]; *Commerce Commission v Geologistics International (Bermuda) Ltd* HC Auckland CIV-2010-404-5490, 22 December 2010 at [37]–[38].

[21] At [18].

agrees to such an order being made. I am satisfied that payment by instalments is appropriate in this situation.

Result

[57] The pecuniary penalty agreed to between Cargolux and the Commission is approved. There will be an order directing Cargolux to pay a pecuniary penalty of $6 million in two instalments: the first to be made within 30 days of this judgment, and the second in one year's time. No interest is payable. Cargolux is further ordered to pay costs of $25,000 to the Commission.

Position of defending airlines

[58] The Commerce Commission has also filed proceedings against several other international airlines that it alleges are involved in the cartel. These proceedings are ongoing. Counsel for Air New Zealand, Singapore Airlines, Cathay Pacific, Thai Airways, Emirates, Korean Airlines, Malaysian Airlines and Japan Airlines filed a memorandum outlining their position.

[59] It is only the existence of an agreed statement of facts that makes it possible to deal with Cargolux's position at the present time. The facts that will ultimately be determined at trial against other defendants can be expected to differ to greater or lesser degree from those appearing in the agreed statement.[22]

[60] The Commerce Commission agrees that any admissions as to facts are binding only for the purpose of the particular case in which they are made.

[61] To make the position clear, I record that any assertions in the agreed statement of facts involving any or all of the defending airlines have been considered as part of the narrative against Cargolux only and involve no findings of liability against the defending airlines.

Judith Potter, J.

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22 *Commerce Commission v Koppers Arch Wood Protection* (2006) 11 TCLR 581 (HC). See also *Australian Competition & Consumer Commission v ABB Transmission and Distribution Ltd (No 2)* (2002) ATPR 41-872 (FCA) at 44-953 at [55]-[56].