

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(89) 417 final

Brussels, 8 September 1989

Application of the competition rules to air transport

(Memorandum from the Commission)

Proposal for a
COUNCIL REGULATION (EEC)

amending Regulation (EEC) No 3975/87 of 14 December 1987
laying down the procedure for the application of the rules
on competition to undertakings in the air transport sector

Proposal for a
COUNCIL REGULATION (EEC)

amending Regulation (EEC) No 3976/87 on the application
of Article 85(3) of the Treaty to certain categories of agreements
and concerted practices in the air transport sector

Proposal for a
COUNCIL REGULATION (EEC)

on the application of Article 85(3) of the Treaty to certain categories
of agreements and concerted practices in the air transport sector

(presented by the Commission)

MEMORANDUM FROM THE COMMISSION TO THE COUNCIL

Subject: application of the competition rules to air transport

Background

1. In 1981 the Commission made a proposal to the Council for a Regulation laying down the procedures for the application of the competition rules to air transport, and included within the scope of the regulation international air transport with third countries¹. In the course of the discussions of this proposal in the Council it became clear that in order to reach agreement on the Commission's proposal it would be necessary to restrict its scope to international air transport within the Community, a change which was made at the time of Memorandum No 2² and was incorporated in Article 1(2) of Regulation (EEC) No 3975/87³ adopted on 14 December 1987 in the context of the first civil aviation package.
2. In its judgment of 11 April 1989 in Case 66/86 the Court of Justice confirmed its judgment in the "Nouvelles Frontière case"⁴ as regards the application of Article 85 of the Treaty and ruled that Article 86 is directly applicable by national courts, even in the absence of an applicable regulation under Article 87 or of action by a Member State cartel authority or by the Commission (under Article 88 or Article 89 respectively). The Court's judgment means that where a dominant airline succeeds, other by normal competitive means, in eliminating competition, even on a

¹ OJ No C 291, 12.11.1981.

² COM(84) 72 final of 15.3.1984.

³ OJ No L 374, 31.12.1987.

⁴ Judgment of 30 April 1986 in Joined Cases 209-213/84.

domestic or on a Community-third country route, this behaviour is to be considered an abuse. Since there is no block exemption for airlines to discuss, let alone agree, fares on Community-third country routes, the elimination of price competition resulting from such discussions or agreements is liable to be an abuse of the dominant or joint dominant position which in most instances exists on such routes. The Court also ruled that a Member State is in breach of its Treaty obligations if it approves fares which infringe Article 85 or Article 86. Such would be the case for instance where a uniform agreed price structure has resulted from consultations which have not been exempted pursuant to Article 85(3).

3. Since, in respect of both domestic and of EC-third country air transport, the Commission is not in a position to grant exemptions under Article 85(3) nor to use normal procedures to rule on abuses of dominant position under Article 86, there is now a climate of serious uncertainty in which air carriers do not know what practices and arrangements they may legitimately engage in on such routes. If, even by accident, they act unlawfully, they run the risk of actions in national courts leading to the payment of compensation. Moreover, Member States face comparable uncertainties when approving the fares filed by carriers on such routes. In order to establish a framework of certainty, the Council should now give the Commission the necessary powers to clarify how Articles 85 and 86 apply to domestic and to extra-Community air transport.
4. The Commission accordingly proposes that the Council adopt three Regulations.
- 4.1. The first Regulation (Annex I) would modify Council Regulation (EEC) No 3975/87 in two ways:
 - (i) deletion of Article 1(2) which contains the limitation on its scope of application.

The Commission points out that Community competition law would only apply where there is an effect on trade between Member States. Such an effect would have to be determined on a case by case basis.

(ii) addition of an Article providing for consultations and, where necessary, negotiations under Council directives in the event of a conflict between Community competition law and third country legislative or regulatory provisions or with the provisions of air service agreements between Member States and third countries.

4.2. The second Regulation (Annex II) would amend Council Regulation (EEC) No 3976/87 to include within its scope domestic air transport. On the basis of the power granted to it, the Commission would extend the block exemption for slot allocation to cover domestic air transport. The Commission would examine whether and if so how far it was also appropriate to grant block exemptions for other inter-airline cooperative activities in the area of domestic air transport. The duration of such block exemptions would be the same as for the other block exemptions granted pursuant to Regulation No 3976/87.

4.3. The third Regulation (Annex III) would empower the Commission to grant block exemptions for airline agreements, decisions and concerted practices in respect of international air transport between the Community and third countries and concerned with the joint planning and coordination of capacity, revenue pooling, joint preparation of proposals on passenger tariffs and cargo rates and slot allocation at airports.

This third Regulation is similar to Council Regulation 3976/87⁵ but contains in addition a provision (Article 7(4)) to deal with the special situation which may occur where breaches of conditions or obligations or effects incompatible with Article 85(3) are the result of actions or provisions adopted by third countries or of provisions contained in air service agreements between Member States and third countries.

⁵ OJ No L 374, 31.12.1987, p. 9.

5. The Commission recognizes that restrictions of competition on routes between the Community and third countries are likely in general to have less direct distortive effects within the Community than restrictions on routes within the Community. Moreover, in the case of extra-Community routes, the Community is bound to take account of existing international agreements and of the need to seek to settle international differences by consultation and negotiation.

The Commission, therefore, intends to adopt, on the basis of powers to be granted to it by the proposed Council Regulation, an implementing regulation in which the conditions and obligations attached to the exemptions will be less strict and thus afford more scope for cooperation between air carriers than those of Commission Regulation (EEC) No 2671/88 of 26 July 1988⁶, which is the corresponding block exemption regulation applicable in the case of intra-Community international air transport.

⁶ OJ No L 239, 30.8.1988, p. 9.

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amending Regulation (EEC) No 3975/87 of 14 December 1987
laying down the procedure for the application of the rules
on competition to undertakings in the air transport sector

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular to Article 87 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Whereas Council Regulation (EEC) No 3975/87 of 14 December 1987³ formed part of a package of interrelated measures adopted by the Council as a first step towards completing the internal market in transport; whereas its scope was accordingly limited to international air transport between Community airports;

Whereas, therefore, the Commission has no means at present of investigating directly cases of suspected infringement of Articles 85 and 86 of the Treaty in respect of air transport within a Member State

¹OJ No C

²OJ No C

³OJ No L 374, 31.12.1987, p.1.

or between a Community airport and an airport in a third country and lacks such powers to take decisions or impose penalties as are necessary for it to bring to an end infringements established by it;

Whereas practices which affect competition in these areas of air transport may affect trade between Member States; whereas it is therefore desirable that rules should be laid down under which the Commission, acting in close and constant liaison with the competent authorities of the Member States, may take the requisite measures for the application of Articles 85 and 86 of the Treaty to these areas of air transport;

Whereas there is a need to produce a secure and clear legal framework for international air transport between the Community and third countries and for domestic air transport within a Member State, while ensuring a coherent application of the competition rules; whereas therefore the scope of Regulation (EEC) No 3975/87 should be extended to these other areas of air transport;

Whereas, in view of the characteristics of international air transport between the Community and third countries, account should be taken of the fact that the application to such transport of the provisions of Regulation (EEC) No 3975/87 may in some cases result in conflicts with the laws and rules of third countries or with provisions contained in international agreements between Member States and third countries applicable to services on the route or routes concerned; whereas provision should be made for appropriate action to be taken with a view to resolving such conflicts in accordance with Community interests and with Community obligations under international law;

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EEC) No 3975/87 is amended as follows:

1. The second paragraph of Article 1 shall be deleted.
2. The following new Article shall be inserted:

Article 18a

Conflicts of international law

1. Where the application of this Regulation in a particular case is liable to lead to a conflict with provisions laid down by law, regulation or administrative action of a third country, the Commission shall, at the earliest opportunity, hold with the competent authorities of the country concerned consultations aimed at resolving the conflict. The Commission shall inform the Advisory Committee referred to in Article 8 of the outcome of these consultations.
2. Where the Commission finds that the application of this Regulation in a particular case is liable to lead to a conflict with the provisions of an international agreement between a Member State and a third country, it shall, after consulting the Advisory Committee referred to in Article 8, notify the Member State concerned of this finding. The Member State shall, within three months of the receipt of such notification, inform the Commission of the measures it intends to take with a view to resolving the conflict.
3. Where agreements with third countries need to be negotiated by the Community, the Council, acting on a proposal by the Commission, shall authorize the Commission to open the necessary negotiations."

Article 2

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council

Proposal for a
COUNCIL REGULATION (EEC)

amending Regulation (EEC) No 3976/87
on the application of Article 85(3) of the Treaty to certain
categories of agreements and concerted practices
in the air transport sector

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular to Article 87 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Whereas the scope of Council Regulation (EEC) No 3976/87 of 14 December 1987³ was limited to international air transport between Community airports;

Whereas the Commission should be enabled to grant similar block exemptions for agreements between undertakings, decisions by associations of undertakings and concerted practices related to air transport within a Member State;

¹ OJ No C

² OJ No C

³ OJ No L 374, 31.12.1987, p.9.

HAS ADOPTED THIS REGULATION:

Article 1

The word "international" shall be deleted in Article 1 of Regulation (EEC) No 3976/87.

Article 2

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council

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categories of agreements and concerted practices
in the air transport sector

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic
Community, and in particular to Article 87 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

Whereas Council Regulation (EEC) No 3975/87³, as amended by
Regulation No⁴, lays down the procedure for the application of the
rules on competition to undertakings in the air transport sector;

Whereas Article 85(1) of the Treaty may be declared inapplicable to
certain categories of agreements, decisions and concerted practices
which fulfil the conditions contained in Article 85(3);

¹ OJ No C

² OJ No C

³ OJ No L 374, 31.12.1987, p. 1.

⁴ see page ... of this Official Journal.

Whereas common provisions for the application of Article 85(3) should be adopted by way of Regulation pursuant to Article 87; whereas, according to Article 87(2)(b), such a Regulation must 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; whereas, according to Article 87(2)(d), such a Regulation is required to define the respective functions of the Commission and of the Court of Justice;

Whereas international air transport between the Community and third countries is at present governed by a network of international and bilateral agreements between Member States and third countries; whereas many of these agreements encourage or allow air carriers to cooperate in matters of commercial importance; whereas in observing these agreements air carriers should not infringe the Treaty's competition rules, which apply fully to all air transport activities within the scope of Community law; whereas the application of the competition rules must nevertheless take account of obligations under existing international treaties and of the desirability of settling international disputes by consultation and negotiation; whereas air carriers should be enabled to conduct their business within a framework of reasonable certainty in relation to the competition rules;

Whereas the Commission should therefore be enabled to declare by way of Regulation that the provisions of Article 85(1) do not apply to certain categories of agreements between undertakings, decisions by associations of undertakings and concerted practices;

Whereas it is desirable, in particular, that block exemptions be granted for certain categories of agreements, decisions and concerted practices; whereas the Commission, in close liaison with the Member States, should be able to define precisely the scope of these exemptions and the conditions attached to them;

Whereas there can be no exemption if the conditions set out in Article 85(3) are not satisfied; whereas the Commission should therefore have power to take the appropriate measures where an agreement proves to

have effects incompatible with Article 85(3); whereas the Commission should consequently be able first to address recommendations to the parties and then to take decisions;

Whereas this Regulation does not prejudice the application of Article 90 of the Treaty;

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation shall apply to international air transport between the Community and third countries.

Article 2

1. Without prejudice to the application of Regulation (EEC) No 3975/87 and in accordance with Article 85(3) of the Treaty, the Commission may by regulation declare that Article 85(1) shall not apply to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices on international air routes between the Community and one or more third countries.
2. The Commission may, in particular adopt such regulations in respect of agreements, decisions or concerted practices which have as their object any of the following:
 - joint planning and coordination of the capacity on scheduled air services,
 - sharing of revenue from scheduled air services,
 - joint preparation of proposals on tariffs, fares, rates and conditions for the carriage of passengers, baggage and cargo on scheduled services,

- slot allocation at airports and airport scheduling.

3. Without prejudice to paragraph 2, such Commission regulations shall define the categories of agreements, decisions or concerted practices to which they apply and shall specify in particular:

(a) the restrictions or clauses which may, or may not, appear in the agreements, decisions and concerted practices;

(b) the clauses which must be contained in the agreements, decisions and concerted practices, or any other conditions which must be satisfied;

(c) the routes to which they apply.

Article 3

1. A regulation pursuant to Article 2 shall be made for a specified period.

2. It may be repealed or amended where circumstances have changed with respect to any factor which was basic to its being made; in such case, a period shall be fixed for modification of the agreements and concerted practices to which the earlier Regulation applies.

Article 4

Regulations adopted pursuant to Article 2 may include a provision that they apply with retroactive effect to agreements, decisions and concerted practices which were in existence at the date of the entry into force of such Regulations.

Article 5

Before adopting a regulation, the Commission shall publish a draft thereof and invite all persons and organizations concerned to submit their comments within such reasonable time limit, being not less than one month, as the Commission shall fix.

Article 6

The Commission shall consult the Advisory Committee on Agreements and Dominant Positions in Air Transport established by Article 8(3) of Regulation (EEC) No 3975/87 before publishing any such draft Regulation and before adopting any such Regulation.

Article 7

1. Subject to paragraph 4, where the persons concerned are in breach of a condition or obligation which attaches to an exemption granted by a Regulation adopted pursuant to Article 2, the Commission may, in order to put an end to such a breach:

- address recommendations to the persons concerned, and
- in the event of failure by such persons to observe those recommendations, and depending on the gravity of the breach concerned, adopt a decision that either prohibits them from carrying out, or requires them to perform, specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption in accordance with Article 4(2) of Regulation (EEC) No 3975/87 or withdraws the benefit of the block exemption which they enjoyed.

2. Subject to paragraph 4, where the Commission, either on its own initiative or at the request of a Member State or of natural or legal persons claiming a legitimate interest, finds that in any particular case an agreement, decision or concerted practice to which a block exemption granted by a regulation adopted pursuant to

Article 2(2) applies, nevertheless has effects which are incompatible with Article 85(3) or are prohibited by Article 86, it may withdraw the benefit of the block exemption from those agreements, decisions or concerted practices and take, pursuant to Article 13 of Regulation (EEC) No. 3975/87, all appropriate measures for the purpose of bringing these infringements to an end.

3. Before taking a decision under paragraph 2, the Commission may address recommendations for termination of the infringement to the persons concerned.
4. To the extent that the situation referred to in paragraph 1 or in paragraph 2 results from provisions laid down by law, regulation or administrative action of a third country or from the provisions of an air service agreement between a Member State and a third country, the Commission shall, before withdrawing the benefit of the block exemption, take appropriate action as specified in Article 18a of Regulation (EEC) No. 3975/87.

Article 8

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the Council

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