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CIVIL AVIATION

(Communication from the Commission to the Council)

COM(86) 338 final/2

CIVIL AVIATION

1. In March 1984 the Commission proposed new arrangements for capacity, tariffs and competition in its Civil Aviation Memorandum No 2, Progress towards the Development of a Community Air Transport Policy.

In January 1986 it set out objectives for current negotiations in its communication to the Council, Discussions in the European Civil Aviation Conference (ECAC) on tariff and capacity arrangements.² These objectives take account of Civil Aviation Memorandum No 2, the guidelines on aviation policy endorsed by the Council in December 1984, developments in the Council since then, and the opinions of the European Parliament and the Economic and Social Committee.

2. As it stated in its White Paper of 14 June 1983,³ Completing the Internal Market, the Commission considers it necessary to give fresh impetus to the work of the Council in order to provide by 1987 greater freedom in air transport services between Member States. As was also stated in the White Paper (Paragraph 111): "If the Council fails to make progress towards the adoption of proposed Regulations concerning the application of the competition rules to air transport, the Commission intends to take decisions recording existing infringements ... according to Article 89 of the Treaty".

The judgment of the European Court of Justice of 30 April 1986 in the "Nouvelles Frontières" case, which confirms in particular that Articles 85 and 86 of the Treaty are applicable to civil aviation, makes it more imperative than ever to expedite the work of the Council.

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3. The Commission considers that an overall agreement can be reached, at the next Council meeting, on arrangements for fares and capacity and the application of the competition rules. The framework set out below provides the basis for this, with the Commission taking the view (a) that exemptions from the competition rules can be allowed only if there is sufficient flexibility in the capacity and tariff arrangements and (b) that regard must be had to a number of factors such as adequate protection for user and airline interests, the

¹COM(84)72 final.

²COM(86)37 final.

³COM(85)310 final.

fulfilment by the sector of any public service obligations incumbent upon it, preservation of the advantages of the present bilateral system and the safeguarding of safety standards and employment.

This agreement would apply for a trial period, after which the outcome of the tariff and capacity agreements would be assessed, as would the application of the competition rules and the possibility of subsequent further liberalization of the system.

FARES

4. Airlines shall be allowed to file tariffs unilaterally and charge such fares as seem to them to be in line with the market, provided that such fares and tariffs are reasonably related to the costs and the resulting revenue covers its direct operating costs on the particular route.

5. Airlines shall not be obliged to enter into consultations or agreements on tariffs.

6. Zones in which fares are automatically approved shall be established for discount and deep discount fares and applied throughout the Community. Zone I for discount fares shall extend from 90% to 60% of the reference fare, and Zone II for deep discount fares from 60% to 40% of the reference fare. The reference fare for the definition of Zones I and II shall be the lowest fully flexible fare on the route in question.

When fares below the lower limit of Zone II are in effect, Zone II will extend to cover the applicable fares on that route, with an additional margin of 10% of the lowest fare.

7. Conditions shall apply to the zones for automatic approval. There shall be a list of conditions, by category, of not less than x optional categories. Annex I provides an example of such a list of conditions.

The mandatory number of conditions applicable to the zones may be reduced for a particular route by agreement between the two governments concerned.

Where any country wants to add a further optional condition to the list of conditions, any resulting dispute between Member States shall be settled by an arbitration procedure.

8. Fares outside the zones for discount and deep discount fares will require the approval of both governments concerned. Disputes will be settled by an arbitration procedure according only to the criteria set out in paragraph 4.

CAPACITY

9. The capacity control system must not impair the flexibility built into the arrangements for the setting of fares.

10. Airlines shall not be obliged to enter into interairline capacity arrangements but will be free to increase capacity within limits designed to enable them to meet market demand.

11. A government may intervene in capacity sharing arrangements when the capacity share of its airline(s) falls below 25% of the total capacity on a country pair basis. Below 45% - or the market share of its airline(s) in 1986, whichever is the lower - it may intervene in the event of a sharp annual reduction in the capacity share of its airline(s)¹ the objective still being 25% at the end of the trial period.

12. Member States may reach agreements to apply greater restrictions on their right to intervene in capacity sharing arrangements.

ARBITRATION

13. A Community arbitration procedure shall apply to the settlement of disputes between governments on the approval of fares for which there is no automatic approval, disputes concerning the choice of optional conditions applicable within the zones of automatic approval, and disputes concerning capacity sharing. The arbitration procedure shall have the following characteristics: it shall be within a Community framework; it shall permit the Commission to decide on the legality of the arbitration award; it may be unilaterally triggered; it shall be binding on both parties; and the period between the triggering of the procedure and the final decision shall not extend beyond eight weeks.

The procedure is described in Annex II. The Commission will put concrete proposals to the Council on this basis.

¹ "Sharp reduction" means e.g. 5% (cumulative) a year.

COMPETITION

14. If there is effective competition on fares and capacity the Commission will have sufficient grounds based on the provisions of Article 85 (3) to grant group or individual exemptions in respect of certain practices normally prohibited by Article 85(1).

15. Article 87 shall be the sole legal basis for a Council regulation applying the competition rules to air transport. Group exemptions shall be granted solely by the Commission.

16. Airlines shall be free to file tariff proposals individually and shall not be obliged to enter into consultations or agreements on tariffs, fares or conditions.

17. Airlines shall be free to set tariffs, fares and conditions according to their commercial judgment of market demand. Increased flexibility shall be introduced into the setting of discount and deep discount fares.

18. A group exemption for consultations on tariffs, fares and conditions would include the common preparation of proposals on tariffs, fares and conditions, provided any airline is free to put up individual proposals and is free to implement them, and that the Commission and the Member States may participate as observers in such consultations.

19. Agreements or concerted practices to determine the level or the conditions of tariffs or fares shall not be included in a group exemption.

20. Airlines shall not be obliged to enter into revenue sharing or capacity sharing agreements.

21. Airlines shall be free to increase capacity (measured in numbers of seats) according to their commercial judgment of market demand.

22. A group exemption might include revenue sharing agreements as follows: sharing of poolable revenue for scheduled services on condition that the transfer does not exceed 1 per cent of the poolable revenue earned on a particular route by the transferring partner, no costs are shared or accepted by the transferring partner, and the transfer is made

in compensation for the loss incurred by the transferring partner in scheduling flights at less busy times of day or during less busy periods.

23. Capacity sharing agreements might be included in a group exemption as follows: joint planning of the capacity to be provided on a scheduled air service, on condition that any party can withdraw without penalty on giving three months' notice and that such agreements help to ensure a spread of services at the less busy times of day or during less busy periods.

24. Slot allocation arrangements at airports and airport scheduling arrangements might be included in a group exemption provided that they include no discrimination against any transport undertaking, they are made on a normal commercial basis and they promote better utilization of airport capacity, as well as better use of airspace or operations of air traffic control and constitute a response to demands by passengers for a spread of services.

25. Agreements between airlines for the common purchase, operation of, or access to computer systems relating to timetabling, reservations and ticketing might be included in a group exemption provided they shall include no discrimination against any air transport undertaking and they are made on a normal commercial basis.

26. Subject to specific conditions a group exemption might also include the following: Arrangements in respect of technical and operational ground handling at airports, such as push-back, refuelling, cleaning and security; arrangements in respect of handling of passengers, mail and baggage at airports; and arrangements in respect of catering services at airports.

27. Other commercial agreements shall be such that they do not distort competition and do not eliminate the flexibility introduced elsewhere in tariff and capacity arrangements. No other commercial agreement may be included in a group exemption.

28. Technical agreements which do not fall under Article 85(1) would be excepted in the Council Regulation as proposed by the Commission. The Commission shall review the list of such agreements and be empowered to make proposals to the Council for amending it.

TRIAL PERIOD

29. These revised arrangements for fares, capacity and competition shall apply for a trial period of not more than four years.

30. Group exemptions from the competition rules under Article 85(3) shall apply initially during the trial period.

31. One year before the end of the trial operation period the Commission will submit to the Council a report on the operation of the new arrangements including their effect on the level and range of fares, accompanied by appropriate proposals for future arrangements in the civil aviation sector.

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CONDITIONS TO BE APPLIED TO A-ZONE SCHEME(WITH AUTOMATIC GOVERNMENT APPROVAL)

To qualify for automatic government approval two conditions from different categories should be applied to air fares falling within a discount zone and three conditions from different categories for air fares falling within a deep discount zone.

<u>Category</u>	<u>Condition</u>
1. Length of stay	<ul style="list-style-type: none"> - maximum stay of 6 months; - minimum stay of 6 days; - minimum stay of 1 day and must include Saturday or Sunday;
2. Booking limitations	<ul style="list-style-type: none"> - 15 days in advance with payment in full at same time and cancellation fee of 20% of ticket price; - reservation with payment in full at same time and cancellation fee of 20% of ticket price;
3. Availability of fare	<ul style="list-style-type: none"> - off peak;¹ - standby with booking possibility not more than 24 hours in advance;²
4. Eligibility	<ul style="list-style-type: none"> - Youth; - Old age;
5. Other	<ul style="list-style-type: none"> - minimum group size: 6; - 20% refund fee at "No Show".

¹ This condition alone qualifies the fare for inclusion in the discount zone.

² This condition alone qualifies the fare for inclusion in the deep discount zone.

ARTICLE X

1. When one of the States concerned (hereinafter called the "first State") decides in accordance with the relevant criteria not to approve a fare outside one of the zones of flexibility, it shall within three weeks of submission inform the other State concerned (hereinafter called the "second State") in writing stating its reasons having regard in particular to the relevant criteria.
2. If in accordance with the relevant criteria the second State accepts the decision of the first State, the fare shall not come into effect.
3. If the second State disagrees with the decision of the first State it shall so notify the first State within one week of being informed and shall request consultations. The first State shall designate representatives for such consultations without delay. For these consultations the States concerned shall supply all relevant information to each other. This information shall include the data on which each State relies for determining whether the relevant criteria are met. At the consultations the States concerned shall endeavour to reach agreement on the fare. One of the States concerned may request the Commission to be present at the consultations.
- 4.(1) If the disagreement persists, one week after the date of refusal of the fare the matter shall be submitted to arbitration at the request of one of the States concerned.

(2) The two States in dispute may decide to go to arbitration without prior consultation.
5. Arbitration shall be carried out by a panel of three arbitrators unless the States concerned agree on a single arbitrator. Each State concerned shall within one week of the request for arbitration designate one member of the panel and agree on the third member (who shall be a national of a third Member State and shall act as panel chairman) or designate the single arbitrator. The decisions of the panel shall be reached by majority vote.

6. Should either State fail to designate a member of the panel or to agree on the appointment of a third member, the Commission shall be informed forthwith and shall immediately complete the panel from the contingency list of arbitrators drawn up according to article Y.

7. The arbitration procedure shall be completed within a period of three weeks from completion of the panel or the designation of the single arbitrator. The Commission shall have the right to attend as an observer.

8. If the relevant criteria are met by the proposed fare the award shall be given in favour of the second State. It shall be for the first State to prove that the relevant criteria are not met.

9. The arbitration award shall be notified forthwith to the Commission. It shall become binding on the States concerned two weeks after notification unless the Commission decides before the expiry of this period that the arbitration award is incompatible with Community law. However, the Commission may assess the situation resulting from economic facts or circumstances in the light of which the award was made where the panel is suspected of having misused its powers or of having failed to observe the provisions of the EEC Treaty or of any rule of law relating to its application.

10. Should the Commission reach an adverse decision, the States concerned shall endeavour to resolve the dispute on the basis of the existing proposal or a fresh proposal from the airline concerned.

11. If an application is made to the Court of Justice for review of an adverse decision of the Commission, the latter shall immediately ask the panel of arbitrators to set without delay an interim fare which takes account of the decision of the Commission. The interim fare shall apply until a definitive fare can be fixed in accordance with the judgment of the Court.

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12.(1) In this article "week" means a period including at least five working days and references to two or more weeks shall be construed accordingly.

(2) The States in dispute may agree to extend any of the periods referred to in this Article if extension will in their opinion facilitate a settlement.