

COMMISSION OF THE EUROPEAN COMMUNITIES

VERSION PROVISOIRE

COM(86) 328 final

Brussels, 3 July 1986

AMENDMENTS TO PROPOSAL FOR A COUNCIL REGULATION (EEC)

laying down the procedure for the rules on competition
applying to undertakings in the air transport sector

AMENDMENTS TO 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

(submitted to the Council pursuant to Article
149 (2) of the EEC Treaty)

PROPOSED AMENDMENTS TO COUNCIL REGULATION (EEC) N° 2821/71

OF 20 DECEMBER 1971

on application of Article 85 (3) of the Treaty to categories
of agreements, decisions and concerted practices

((submitted to the Council by the Commission))

COM(86) 328 final

EXPLANATORY MEMORANDUM

1. The Commission in 1981 first proposed to the Council pursuant to Article 87 a draft regulation on the application of Articles 85 and 86 to air transport. Certain limited corrections to these proposals were made in 1982 which were subsequently modified in 1984. However, the Council has not yet adopted an implementing regulation for Articles 85 and 86. Indeed Regulation 17/62 was rendered, by virtue of Regulation 141 of 26 November 1962, inapplicable to the air transport sector. Now that the Court of Justice has again drawn attention to the need to ensure that competition in the air transport sector shall not be distorted in the common market, it is more than ever necessary for the Council to adopt these proposals and thus provide for a uniform and balanced application of Articles 85 and 86 throughout the common market.
2. The discussions in the Council have brought to light that two additional categories of commercial agreements, which are not of a purely technical nature, could be granted group exemptions by the Commission subject to specific conditions; these categories relate to :
 - (a) slot allocation at airports and airport scheduling arrangements, and
 - (b) arrangements between airlines as to the common purchase, operation of or access to computer systems relating to time tabling, reservations and ticketing.
 - (c) arrangements in respect of technical and operational ground handling at airports such as push-back, refuelling, cleaning and security;
 - (d) arrangements in respect of passenger, mail and baggage handling at airports;
 - (e) arrangements in respect of airline catering services at airports.
3. Some of these agreements fall, however, not within the scope of Art. 1 of Regulation 141/62 of the Council. They are therefore already covered by Regulation 17/62 of the Council. A group exemption for these categories of agreements should accordingly be proposed as an amendment to the existing Regulation 2821/71 of the Council on the application of Article 85 (3) of the Treaty to categories of agreements, decisions and concerted practices.
4. Such categories of agreements should be subject to specific conditions including that they are made on a normal commercial basis and that they shall include no discrimination against any air transport undertaking concerned.

5. In addition, the discussions in the Council have identified additional technical agreements which do not prevent, restrict or distort competition within the common market. It is therefore necessary that the list of technical agreements incorporated in Article 2 of the Commission's proposal of 1982 be extended and modified in order to take account of these technical agreements. The Commission should be empowered to review such a list in response to new or changing technical developments and to make appropriate proposals to the Council to amend the list.
6. An amended proposal along these lines should enable the Council to complete the negotiations while respecting the requirements by Article 85 (3).
7. Accordingly the Commission transmits the present communication to the Council withdrawing Annex III (A, B and C) of Memorandum N° 2 and replacing it by a new amended proposal to be made under Article 149 of the EEC-Treaty.
8. Regulations adopted under Article 87 of the Treaty are required to define the respective functions of the Commission and of the Court of Justice (paragraph 2 (d)) and 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 (paragraph 2 (b)). The Commission has always taken the view that it should have the sole power to grant Article 85 (3) exemptions, either by individual decision or group exemption regulations. According to Article 155 the Commission should exercise the power conferred on it by the Council for the implementation of the rules laid down by the latter.
9. The deadlines established in the Commission's White Paper on completion of the internal market (paragraphs 109 - 111) indicate the priority to be attached to air transport liberalisation. The Commission has at all times sought to facilitate the discussions in the Council on application of the EEC competition rules to air transport. It has in particular sought to take account of the legitimate concerns of Member States in its amendments to its original proposal of 1981, presented in 1984 (Memorandum N° 2) and again in its present communication.
10. The Commission, however, is obliged to state clearly its concern to maintain the proper functioning of the competition rules of the Treaty. In this respect only the Commission is entitled to make a proposal under Article 87 of the EEC Treaty. Member States may submit amendments, but it is not possible, even by unanimity, to incorporate in a regulation or a directive, provisions or exemptions which do not conform with the specific criteria set out in Article 85 (3) or the other principles of competition law derived from the EEC Treaty. Pursuant to Article 149 alinea 2, alterations of the Commission's original proposal may only be submitted by the Commission. The proposal thus altered forms in its turn the sole basis of Council action, subject only to the possibility of unanimous amendment by the Council referred to above.
11. Consequently, in accordance with the spirit of Article 149 of the EEC-Treaty, the Commission requests the Council to act on the proposals from the Commission. The Commission will not hesitate to withdraw a proposal if it considers that its content has been too watered down, or if it notes a refusal, express or implied, to debate it.

Amendments to Proposal for a Council Regulation (EEC) laying down the procedure for the rules on competition applying to undertakings in the air transport sector .

(Transmitted to the Council pursuant to Article 149(2) of the EEC Treaty)

1. The sixth recital is replaced by:

"Whereas to remedy this situation, implementing rules are needed which are analogous to the regulations covering other forms of transport and other sectors of the economy;"

2. New seventh and eight recitals are added:

"Whereas the air transport industry is characterized by special features which are peculiar to this sector; whereas, furthermore, international air transport is regulated by a network of bilateral agreements between States which define the conditions under which airlines designated by the parties to the agreements may operate routes between the two territories;

Whereas practices which may affect competition relating to international air transport between Member States may have a substantial effect on trade between Member States; whereas it is desirable therefore that the rules laid down in this Regulation for the application of Articles 85 and 86 of the EEC Treaty apply, as a first stage, to international air transport within the common market;"

3. Article 1(2) reads as follows:

"2. It shall apply only to international air transport between Community airports."

4. Article 2 reads as follows:

"Exceptions for certain technical agreements"

1. The prohibition laid down in Article 85(1) of the Treaty shall not apply to agreements, decisions and concerted practices, whose sole object and effect is to apply technical improvements or to achieve technical cooperation by means of:

1 O.J. No. C 317, 3.12.1982, p.3.

- (a) the establishment or uniform application of mandatory or recommended technical standards for aircraft, aircraft parts, equipment and aircraft supplies, where such standards are set by an organisation normally accorded international recognition, or by an aircraft or equipment manufacturer;
 - (b) the establishment or uniform application of technical standards for fixed installations for aircraft, where such standards are set by an organisation normally accorded international recognition;
 - (c) the exchange, leasing pooling or maintenance of aircraft, aircraft parts, equipment or fixed installations, provided that such arrangements are made on a non discriminatory basis;
 - (d) the establishment, operation and maintenance of technical communication networks, provided that such arrangements are made on a non discriminatory basis;
 - (e) the exchange, pooling or training of personnel for technical or operational purposes;
 - (f) the organisation and execution of substitute transport operations for passengers, mail and baggage, in the event of breakdown/delay of aircraft, either under charter or by provision of substitute aircraft under contractual arrangements;
 - (g) the organisation and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations;
 - (h) the grouping of single consignments;
 - (i) the establishment or application of uniform rules as to the structure of transport tariffs and their conditions of application, provided that such rules do not directly or indirectly fix transport rates and conditions;
 - (j) arrangements as to the sale, endorsement and acceptance of tickets between airlines (interlining) as well as the refund, prorating and accounting schemes established for such purposes;
 - (k) the clearing and settling of accounts between airlines by means of a clearing house, including such services as may be necessary or incidental thereto; the clearing and settling of accounts between airlines and their appointed agents by means of a centralised and automated settlement plan or system, including such services as may be necessary or incidental thereto;
2. The Commission shall, where appropriate, submit proposals to the Council with a view to amending, extending or reducing the list in paragraph 1."

AMENDMENTS TO 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

(Transmitted to the Council pursuant to Article 149 (2) of the EEC Treaty)

The Council of the European Economic Community,

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

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament¹;

Having regard to the opinion of the Economic and Social Committee²

Whereas Council Regulation (EEC) No. lays down the procedure for the
rules on competition applying to undertakings in the air transport
sector;

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

Whereas common provisions for the application of Article 85(3) must 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 has to define the respective functions of the
Commission and of the Court of Justice;

Whereas the air transport sector has to date been governed by a network
of international agreements, bilateral agreements between States and
bilateral and multilateral agreements between airlines; whereas the
changes required to this international regulatory system to ensure the
introduction of competition in the air transport sector, should be
effected gradually so as to avoid disruption to the air transport

1

2

industry; whereas such disruption may prejudice the provision of continued and regular services to the consumer; whereas the avoidance of such disruption benefits the consumer;

Whereas it is desirable that, in order to bring about changes to the system gradually and thus to avoid major disruption in the air transport industry, group exemptions for certain categories of agreements should be granted; whereas these exemptions should first be granted for a transitional period, during which airlines can adapt to a more competitive environment;

Whereas in order to achieve these benefits it is desirable that the Commission should be enabled to declare by way of Regulation that the provisions of Article 85(1) do not apply to certain categories of agreements, decisions by associations of undertakings and concerted practices;

Whereas it should be laid down under what specific conditions the Commission, in close and constant liaison with the competent authorities of the Member States, may exercise such powers; whereas it is necessary to define categories of such practices in respect of which the conditions of Article 85(3) may be considered as being fulfilled;

Whereas, since there can be no exemption if the conditions set out in Article 85(3) are not satisfied, the Commission must have power to lay down by Decision the conditions that must be satisfied by an agreement, decision or concerted practice which in certain circumstances have effects which are incompatible with Article 85(3);

Whereas the implementation of the common transport policy on bilateral agreements, arrangements and memoranda of understanding between Member States relating to air transport will mean an end to the capacity sharing regime whereby Member States in their bilateral agreements essentially provide for a 50/50 sharing of the capacity offered on the routes between the two States concerned;

Whereas Member States may no longer require their airlines to enter into capacity-sharing agreements; whereas Member States may no longer refuse capacity increases or impose capacity reductions on the designated airlines of the other Member States, unless certain conditions are met; whereas the liberalisation of this restrictive capacity-sharing régime should be achieved gradually and there should therefore be a transitional period during which the airlines should be allowed to adjust;

Whereas agreements between airlines on the capacity to be offered on a particular route have certain merits to the extent that they help to ensure provision of services during the less profitable periods and on the less profitable routes; whereas the continued provision of such services and the co-ordination of schedules and capacity will contribute to economic progress and benefit the consumer; whereas such agreements should not contain other restrictions on competition which are ancillary to the agreement on capacity and which are therefore not indispensable to the achievement of economic progress and consumer benefit; whereas the possibility to eliminate competition for a substantial part of the market is therefore not allowed;

Whereas certain revenue-pooling agreements may lead to an improvement in the air transport service provided by the parties to the agreement in so far as they compensate an airline for the disadvantage involved in operating services during the less profitable periods;

Whereas the provision of such compensation and the consequent equalisation of the burden involved in providing services during the less profitable periods provides an incentive for the airlines to continue to provide such services; whereas the provision of such services contributes to economic progress and provides benefit to the consumer; whereas without financial incentive the provision of such services would not continue; whereas the limitation of pooling to 1% of the poolable revenue earned by the transferring partner means that the competitiveness of the more efficient airline is largely unaffected by the decision to pool; whereas competition is therefore not eliminated and the incentive toward greater efficiency is therefore not affected;

Whereas under the above-mentioned international regulatory system air tariffs and fares have to date been approved by Member States following submissions agreed between the airline companies; whereas concerted tariffs have been applied by all airlines serving a given route; whereas as a result competition in regard to price in the air transport sector has been significantly restricted or eliminated;

Whereas hitherto airlines were required to obtain the approval of the government of origin and destination for the tariffs and fares they proposed; whereas it was possible therefore for one Member State to block innovative and competitive proposals by an airline from other Member States; whereas the possibility of blocking such proposals must be strictly limited so that competition is therefore not distorted or eliminated for a substantial part of the market;

Whereas airlines should be allowed to consult with a view to the common preparation of proposals on tariffs, fares and conditions in view of the variety and complexity of these tariffs and fares and the conditions attached thereto; whereas the resulting transparency on air fares should benefit the consumer;

Whereas beneficial effects flow from slot allocation arrangements at airports and airport scheduling arrangements which promote a better utilisation of airport capacity as well as the better use of air space or operation of air traffic control and constitutes a response to demands by passengers for a spread of services; whereas such arrangements may however include no discrimination against any air transport undertaking and should be made on a normal commercial basis;

Whereas the present 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 Community airports.

Article 2

1. Without prejudice to the application of Regulation (EEC) No. (3) 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 which, in the sector of scheduled air transport and, for a given route, have as their object any of the following:
 - (a) capacity sharing;
 - (b) revenue pooling;
 - (c) consultation over tariffs, fares and conditions;
 - (d) slot allocation at airports and airport scheduling;

2. The Regulation shall define the categories of agreements to which it applies 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 the other conditions which must be satisfied.

Article 3

A Regulation pursuant to Article 2 shall be made for a limited period.

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, decisions and concerted practices to which the earlier Regulation applies.

Article 4

A Regulation pursuant to Article 3 may stipulate that it shall apply with retroactive effect to agreements and concerted practices to which, at the date of entry into force of that Regulation, a Decision issued with retroactive effect in pursuance of Article 85/3 would have applied.

Article 5

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

Article 6

1. The Commission shall consult the Advisory Committee on Restrictive Practices and Dominant Positions in the Transport Industry
 - (a) before publishing a draft Regulation
 - (b) before adopting a Regulation
2. Article 8.4. of Regulation EEC relating to consultation with the Advisory Committee shall apply, it being understood that joint meetings with the Commission shall take place not earlier than one month after dispatch of the notice concerning them.

Article 7

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 agreements, decisions or concerted practices to which a Regulation adopted pursuant to Article 2 of this Regulation applies, have nevertheless certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, it may, in order to put an end to those effects,

- address Recommendations to the persons concerned; and
- in the event of failure to observe such Recommendations and depending upon the gravity of the effects observed, adopt a Decision that either:
 - . will prohibit them from carrying out or require them to perform specific acts and impose fines; or
 - . while withdrawing the benefit of the block exemption which they were enjoying will grant them an individual exemption subject to specific conditions or obligations; or
 - . will withdraw the benefit of the block exemption which they were enjoying.

Article 8

This Regulation shall enter into force on
This Regulation shall be binding in its entirety and directly applicable
in all Member States.

Proposed amendments to Council Regulation (EEC) n° 2821/71 of 20 December 1971
on application of Article 85 (3) of the Treaty to categories of agreements,
decisions and concerted practices

1. New fifth and sixth recitals are added :

"Whereas agreements, decisions and concerted practices between airlines as to the common purchase, operation of or access to computer systems relating to time tabling, reservations and ticketing also can result in beneficial effects and may be exempted under certain conditions; Whereas such conditions should in particular ensure that they include no discrimination against any air transport undertaking which uses or desires to use the computer systems concerned and that they are made on a normal commercial basis;

Whereas the same is true for arrangements in respect of technical and operational ground handling at airports such as push-back, refuelling, cleaning and security as well as arrangements in respect of passenger, mail and arrangements in respect of baggage handling at airports and airline catering services at airports; Whereas they accordingly also may be exempted under certain conditions;"

2. Article 1 (1) to be completed as follows :

"(d) the common purchase, operation of or access to computer systems relating to time tabling, reservations and ticketing by air transport undertakings;

(e) the technical and operational ground handling at airports, such as push-back, refuelling, cleaning and security;

(f) the handling of passenger, mail and baggage at airports;

(g) catering services at airports;"

Annex I

Content of an intended Commission Regulation (EEC) exempting certain commercial agreements and concerted practices in the air transport sector

Subject to the enabling Regulation being adopted by the Council and subject to agreement on the overall package of proposals made by the Commission

it would be the Commission's intention, taking account of the normal consultative procedures, to adopt a group exemption Regulation along the following lines:

Agreements, decisions and concerted practices by airlines relating to air transport between Member States shall be exempted from the prohibition set out in Article 85(1) of the Treaty for a first period of at least three years if they have any of the following objectives:

- joint planning and coordination of the capacity to be provided on a scheduled air service, on condition that any party can withdraw without penalty on giving 3 months notice and that such agreements help ensure a spread of services at the less busy times of day or during less busy periods, and in some cases on the less busy routes.
- sharing of revenue from scheduled services on condition that the transfer does not exceed 1% 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;
- consultations on tariffs, fares and conditions for common preparation of proposals on condition that any airline is free to introduce individual proposals, remains free to implement them and on condition that the Commission and the Member States may participate as observers in such consultations.
- slot allocation at airports and airport scheduling provided they shall include no discrimination against any air transport undertaking which uses or desires to use the airport concerned, they are made on a normal commercial basis, and they promote a better utilisation of airport capacity as well as the better use of air space or operation of air traffic control and constitute a response to demands by passengers for a spread of services;

As regards agreements which are in existence when the Commission's Regulation comes into force, the exemption shall have retroactive effect from the time when the conditions of application of this Regulation were fulfilled. As regards all other agreements the exemption shall have effect from the time when the conditions of application of the Commission's Regulation are fulfilled.

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 agreements or concerted practices which receive the benefit of the group exemption have nevertheless certain effects which are incompatible with the conditions laid down in Article 85(3) of the Treaty, it may in order to put an end to those effects take action in conformity with Article 7 of Council Regulation No.