

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(91) 272 final

Brussels, 7 August 1991

**Proposal for a
COUNCIL REGULATION (EEC)**

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

and

**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**

(presented by the Commission)

A. AMENDMENT TO REGULATION (EEC) No 3975/87 ON PROCEDURE FOR THE APPLICATION OF COMPETITION RULES

1. The Commission's powers to enforce the competition rules in the air transport sector by means of fact-finding, imposing orders and sanctions and granting individual exemptions is limited, by Council Regulation (EEC) No 3975/87⁽¹⁾, to international transport between Member States. The Commission's powers do not extend to either domestic transport nor to transport between a Member State and a third country.

2. In its Judgment of 11 April 1989 in the "Ahmed Saeed" case (1) the Court of Justice confirmed its Judgment in the "Nouvelles Frontières case"⁽²⁾ 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 implementing 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 than by normal competitive means, in eliminating competition, even on a domestic or on a Community-third country route, this behaviour is an abuse contrary to Article 86. 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 many 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).

(1) OJ No L 374, 31.12.1987.

(2) Judgment of 11 April 1989 in Case 66/86, [1989] ECR

3. Since, in respect of both domestic and of EC-third country air transport, the Commission has no power 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 serious uncertainty in which air carriers can not know what practices and arrangements they may legitimately engage in on such routes. If, even inadvertently, 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 proposed⁽³⁾ that the Council adopt regulations extending the scope of its powers to enforce the competition rules in respect of domestic and third-country air transport. The Council has however not yet acted on that proposal.
5. Since the Council has committed itself, in the framework of the third package of air transport liberalisation measures, to lay down rules on cabotage it will be necessary to adopt at the same time measures enabling the Commission to enforce the competition rules to transport within a Member State.
6. Therefore the Commission now withdraws its earlier proposal insofar as it applied to domestic transport, and makes a new proposal (Annex I) consisting in a regulation to delete the limitation to international transport within the Community, so that domestic transport entirely within a single Member State is also covered by Regulation (EEC) No 3975/87. (Annex I).

(3) COM(417) final, 8.9.1989.

B. AMENDMENT TO REGULATION (EEC) No 3976/87 ON GROUP EXEMPTIONS

7. The Commission's powers to adopt group exemptions is limited, by Council Regulation (EEC) No 3976/87⁽⁴⁾, to international transport between Member States. For similar reasons to those set forth above, these powers should now be extended to domestic transport entirely within a Member State.
8. As part of the second package of liberalisation measures in the air transport sector the Council extended the validity of Regulation (EEC) No 3976/87 empowering the Commission to adopt for a limited period a number of group exemptions to the competition rules so that air carriers could adapt progressively to a more competitive environment.

The Commission on that basis adopted three Regulations⁽⁵⁾:

- Regulation (EEC) No 82/91 of 26 July 1988 concerning ground handling services;
 - Regulation (EEC) No 83/91 relating to computer reservation systems for air transport services; and
 - Regulation (EEC) No 84/91 concerning joint planning and coordination of capacity, consultations on tariffs on scheduled air services and slot allocation at airports.
9. The Commission's general experience with these group exemptions is that they satisfy a genuine need for legal certainty among air carriers and other market operators, while providing an incentive to abandon previous more restrictive agreements.
 10. In view of the further liberalisation now proposed, the Commission is of the opinion that the same objectives can be pursued after 31 December 1992. This would imply that, subject to the circumstances as they appear at the time, in particular the terms

(4) OJ No L 374, 31.12.1987.

(5) OJ No L 10, 15.1.1991.

of the third package adopted by the Council, the group exemptions will be substantially renewed subject to some tightening of conditions (as set out below) which is made desirable by progress attained in creating a more competitive environment. The possibilities for cooperation to be left to airlines will depend on the extent to which the new regulatory framework creates room for increased competition.

11. The Commission intends to make the following changes to the existing regulations :

- replacement of the exemption for capacity discussions by an exemption for binding schedule coordination (the exemption for non-binding schedule consultations will be maintained);
- (if appropriate) alignment of the exemption for slot allocation discussions on the results of discussions by the Council on common rules for slot allocation (subject to the need to ensure compatibility of the outcome of the discussions with Article 85(3) of the EEC Treaty).

The exemptions for computer reservation systems and ground handling agreements can be renewed without significant changes, except for changes necessary to take account of alterations in the arrangements of the computer reservation systems. The exemption for tariff consultations, including the obligations to interline, will be renewed with some minor changes which will not affect the substance of air carriers' obligations but will clarify the conditions in practice.

The Commission considers it useful to have power to adopt a group exemption in favour of joint operations on new routes with relatively few passengers for limited periods, in line with the practice which was developed in individual cases during the past few years.

12. In order to secure adoption of the new group exemptions by the time the present exemptions expire, on 31 December 1992, the extension of Regulation (EEC) No 3976/87 in order to enable the Commission to adopt these new group exemptions, should be in place by 30 June 1992.

The Commission will then follow the normal procedure provided by Regulation (EEC) No 3976/87, i.e. it will invite comments by third parties and consult the Advisory Committee on Restrictive Practices and Dominant Positions in Air Transport.

13. The Commission accordingly proposes that the Council adopt a regulation modifying Regulation (EEC) No 3976/87 in the following ways (Annex II):

- (I) the Regulation would also apply to domestic transport entirely within a single Member State;
- (II) the Regulation is given an indefinite validity;
- (III) the possibility of an exemption for joint operations between airlines will be provided for;
- (IV) the conditions contained in Article 2(2) of the Regulations are deleted, as is appropriate in a regulation of indefinite duration; and
- (V) a standard clause (new Article 3) is included on the duration and review of the Commission's implementing regulations.

C. CHANGES TO EARLIER PROPOSAL TO ENFORCE THE COMPETITION RULES IN RESPECT OF DOMESTIC AND THIRD-COUNTRY TRANSPORT

14. In view of the inclusion of domestic air transport in the proposals for a third air transport package, the Commission now limits its earlier proposal to enforce the competition rules in respect of domestic and third-country transport, to transport to third countries .

As a result, Annex II of the earlier proposal (COM(89) 417 final, OJ No C 248 of 29 September 1989, p. 9) is withdrawn.

ANNEX I

Proposal for a
COUNCIL REGULATION (EEC)

amending Regulation (EEC) No 3975/87
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, Article 87 thereof;

Having regard to the proposal from the Commission⁽¹⁾..

Having regard to the opinion of the European Parliament⁽²⁾,

Having regard to the opinion of the Economic and Social Committee⁽³⁾,

Whereas Regulation (EEC) No 3975/87⁽⁴⁾ 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 Article 85 and 86 of the Treaty in respect of air transport within a Member State and lacks such powers to take decisions or impose penalties as are necessary for it to authorise agreements under Article 85(3) and to

(1) OJ No C

(2) OJ No C

(3) OJ No C

(4) OJ No L 374, 31.12.1987, p.1.

bring to an end infringements established by it in relation to transport within a Member State;

Whereas air transport entirely within a Member State now also is subject to Community liberalisation measures; 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 this area of air transport, in situations where trade between Member States may be affected;

Whereas there is a need to produce a secure and clear legal framework 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 this area of air transport,

HAS ADOPTED THIS REGULATION :

Article 1

The word "international" is hereby deleted in Article 1(2) of Regulation (EEC) No 3975/87.

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

The President

ANNEX II

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 Article 87 thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the European Parliament⁽²⁾,

Having regard to the opinion of the Economic and Social Committee⁽³⁾,

Whereas in accordance with Council Regulation (EEC) No 3975/87⁽⁴⁾, as
amended by Regulation (EEC) No ...,⁽⁵⁾ the Commission has power
to implement the competition rules in respect of air transport within a
Member State; whereas it is therefore desirable to provide for the
possibility of adopting block exemptions applicable to that area of
transport;

(1) OJ No C

(2) OJ No C

(3) OJ No C

(4) OJ No L 374, 31.12.1987, p. 1

(5) OJ No

Whereas Council Regulation (EEC) No 3976/87⁽⁶⁾, as amended by Regulation (EEC) No 2344/90⁽⁷⁾, empowers the Commission 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 the power to adopt these block exemptions has been granted for a limited period, expiring on 31 December 1992, during which air carriers can adapt to the more competitive environment introduced by changes in the regulatory systems applicable to intra-Community international air transport;

Whereas a continuation of block exemptions after that date is justified by the further measures to liberalize the air transport sector adopted by the Community; whereas the scope of these block exemptions and the conditions attached to them should be defined by the Commission, in close liaison with the Member States, taking into account changes to the competitive environment achieved since the entry into force of Regulation (EEC) No 3976/87,

HAS ADOPTED THIS REGULATION :

Article 1

Regulation (EEC) No 3976/87 is hereby amended as follows:

1. The word "international" is deleted in Article 1.

2. Article 2(2) is replaced by the following:

"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:

(6) OJ No L 374, 31.12.1987, p. 9.

(7) OJ No L 217, 11.8.1990, p. 15.

- joint planning and coordination of airline schedules;
- consultations on tariffs for the carriage of passengers and baggage and of freight on scheduled air services;
- joint operations on new scheduled air services;
- slot allocation at airports and airport scheduling;
- common purchase, development and operation of computer reservation systems relating to timetabling, reservations and ticketing by air transport undertakings;
- technical and operational ground handling at airports, such as aircraft push back, refuelling, cleaning and security;
- handling of passengers, mail, freight and baggage at airports;
- services for the provision of in-flight catering."

3. Article 3 is replaced by the following:

"Article 3

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

It may be repealed or amended where circumstance 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."

4. Article 8 is deleted.

Article 2

This Regulation shall enter into force on 1 July 1992.

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

Done at Brussels,

For the Council

The President

Fiche d'impact sur les PME et l'emploi

1. OBLIGATIONS ADMINISTRATIVES DECOULANT DE L'APPLICATION DE LA LEGISLATION POUR LES ENTREPRISES

Les compagnies aériennes devront suivre certaines procédures en vue de respecter les règles de concurrence.

2. AVANTAGES POUR L'ENTREPRISE

L'environnement plus concurrentiel devrait bénéficier tous les opérateurs économiques, y compris les PME. En outre les règles de concurrence protègent des petites compagnies aériennes contre des pratiques abusives éventuelles de la part de concurrents en position dominante.

Les exemptions par catégorie envisagées par la proposition augmenteront la sécurité juridique des compagnies qui participent à des accords compatibles avec l'article 85 § 3 du Traité CEE.

3. INCONVENIENTS POUR L'ENTREPRISE (Coût supplémentaire)

Non

4. EFFETS SUR L'EMPLOI

Non

5. Y A-T-IL EU CONCERTATION PREALABLE AVEC LES PARTENAIRES SOCIAUX ?

Non

6. Y A-T-IL UNE ALTERNATIVE MOINS CONTRAIGNANTE ?

Non