

COMMISSION OF THE EUROPEAN COMMUNITIES

COM(81) 396 final/3

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Amended Version

COUNCIL REGULATION (EEC)

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

(submitted to the Council by the Commission)

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Proposal for a
COUNCIL REGULATION (EEC)

laying down the procedure for the rules on competition applying
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,

Having regard to the Opinion of the European Parliament,

Having regard to the Opinion of the Economic and Social Committee,

Whereas the rules on competition form part of the Treaty's general provisions which also apply to air transport;

Whereas the rules for applying these provisions are either specified in the chapter on competition or fall to be determined by the procedures laid down therein;

Whereas Article 1 of Council Regulation No 141⁽¹⁾, as last amended by Regulation (EEC) No 1002/67⁽²⁾, lays down that Council Regulation No 17 does not apply to air transport;

Whereas the procedural rules laid down in Council Regulation (EEC) No 1017/68⁽³⁾ apply to surface transport only;

Whereas at present the Commission therefore has no direct means of investigating cases of suspected infringement of Articles 85 or 86 of the Treaty in the field of air transport and likewise has no powers to take Decisions and impose penalties to secure the removal of infringements;

Whereas, to remedy this situation, a Regulation applying the rules of competition to air transport should be adopted, analogous to the regulations covering other forms of transport and other sectors of the economy;

Whereas such Regulation must provide for appropriate procedures, decision-making powers and penalties to ensure compliance with the prohibitions laid down in Article 85(1) and in Article 86 of the Treaty, together with detailed rules for the application of Article 85(3);

Whereas, for this purpose, account should be taken of the provisions laid down by Regulation (EEC) No 1017/68 as regards surface transport, reflecting certain specific features of the transport industry taken as a whole;

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(1) OJ No 124, 28.11.1962, p. 2751/62.

(2) OJ No 306, 16.12.1967, p.1.

(3) OJ No L 175, 23.7.1968, p.1.

Whereas, given the peculiar features of air transport, it will in the first instance be for undertakings themselves to see that their agreements, decisions and concerted practices comply with the competition rules, and notification to the Commission need not be compulsory;

Whereas, in certain cases, undertakings may wish to apply to the Commission for confirmation that their agreements, decisions and concerted practices are compatible with the existing provisions, and a simplified procedure should be laid down for such cases;

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

HAS ADOPTED THIS REGULATION :

Article 1

Scope

1. This Regulation lays down detailed rules for applying Articles 85 and 86 of the Treaty to air transport.
2. It shall apply only to international air transport from or to one or more Community airports.

Article 2

Exception for technical agreements

1. The prohibition laid down in Article 85(1) of the Treaty shall not apply to agreements, decisions or concerted practices the sole object or effect of which is to apply technical improvements or to achieve technical cooperation by means of:
 - (a) the establishment or application of standards or types for aircraft, equipment, supplies or fixed installations;
 - (b) the exchange, pooling or joint maintenance of aircraft, parts, equipment or fixed installations and the exchange or pooling of personnel;

- (c) the organization and execution of successive, complementary, substitute or combined transport operations, and the fixing and application of inclusive rates and conditions for such operations;
- (d) the coordination of timetables with the aim of meeting passengers' needs more closely;
- (e) the grouping of single consignments;
- (f) 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;
- (g) the issue of tickets accepted by different airlines and the consequent provision of a common refund scheme.

Article 3

Procedure: on complaint or on the Commission's own initiative

Acting on receipt of a complaint or on its own initiative, the Commission shall initiate procedures to terminate any infringement of the provisions of Articles 85(1) or 86 of the Treaty.

Complaints may be submitted by:

- a) Member States;
- b) natural or legal persons who claim a legitimate interest.

Article 4

Result of procedures on complaint or on the Commission's own initiative

1. Where the Commission finds that there has been an infringement of Articles 85(1) or 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under the preceding subparagraph, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

2. If the Commission, acting on a complaint received, concludes that on the evidence before it there are no grounds for intervention under Articles 85(1) or 86 of the Treaty in respect of any agreement, decision or practice, it shall take a decision rejecting the complaint as unfounded.

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3. If the Commission, whether acting on a complaint received or on its own initiative, concludes that an agreement, decision or concerted practice satisfies the provisions both of Article 85(1) and of Article 85(3) of the Treaty, it shall take a decision applying paragraph 3 of the said Article. Such decision shall indicate the date from which it is to take effect. This date may be prior to that of the decision.

Article 5

Application of Article 85(3) of the Treaty - objections

1. Undertakings and associations of undertakings which seek application of Article 85(3) of the Treaty in respect of agreements, decisions and concerted practices falling within the provisions of paragraph 1 of the said Article to which they are parties may submit applications to the Commission.
2. If the Commission judges an application admissible and is in possession of all the available evidence, and no action under Article 3 has been taken against the agreement, decision or concerted practice in question, then it shall publish as soon as possible in the Official Journal of the European Communities a summary of the application and invite all interested third parties to submit their comments to the Commission within thirty days. Such publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.
3. Unless the Commission notifies applicants, within ninety days from the date of such publication in the Official Journal of the European Communities, that there are serious doubts as to the applicability of Article 85(3) of the Treaty, the agreement, decision or concerted practice shall be deemed exempt, in so far as it conforms with the description given in the application, from the prohibition for the time already elapsed and for a maximum of three years from the date of publication in the Official Journal of the European Communities.

If the Commission finds, after expiry of the ... period, but before expiry of the three-year period, that the conditions for applying Article 85(3) of the Treaty are not satisfied, it shall take a decision declaring that the prohibition in Article 85(1) of the Treaty is applicable. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse the exemption provided for in the said Article 85(3).

4. If, within the ninety-day period referred to in paragraph 3, the Commission notifies the undertakings or associations of undertakings which have made an application as referred to in the first subparagraph of paragraph 3, it shall examine whether the conditions for application of Article 85(1) of the Treaty are satisfied.

If it finds that the said conditions for application are satisfied it shall take a decision applying Article 85(3) of the Treaty. The decision shall indicate the date from which it is to take effect. This date may be prior to that of the application.

Article 6

Duration and revocation of decisions applying Article 85(3)

1. Any decision applying Article 85(3) of the Treaty adopted under Articles 4 or 5 shall indicate the period for which it is to be valid; normally such period shall not be less than six years. Conditions and obligations may be attached to the decision.
2. The decision may be renewed if the conditions for applying Article 85(3) of the Treaty continue to be satisfied.
3. The Commission may revoke or amend its decision or prohibit specific acts by the parties:
 - (a) where there has been a change in any of the facts which were basic to the making of the decision; or
 - (b) where the parties commit a breach of any obligation attached to the decision; or
 - (c) where the decision is based on incorrect information or was induced by deceit; or
 - (d) where the parties abuse the exemption from the provisions of Article 85(1) of the Treaty granted to them by the decision.

In cases falling within (b), (c) or (d), the decision may be revoked with retroactive effect.

Article 7

Powers

Subject to review of its decision by the Court of Justice, the Commission shall have sole power to issue decisions pursuant to Article 85(3) of the Treaty.

The authorities of the Member States shall retain the power to decide whether any case falls within the conditions for application of Article 85(1) or Article 86 of the Treaty until such time as the Commission has initiated a procedure with a view to formulating a decision in the case in question or has sent notification as provided for in the first subparagraph of Article 5(3).

Article 8

Liaison with the authorities of the Member States

1. The Commission shall carry out the procedures provided for in this Regulation in close and constant liaison with the competent authorities of the Member States; these authorities shall have the right to express their views on such procedures.
2. The Commission shall immediately forward to the competent authorities of the Member States copies of the complaints and applications, and of the most important documents sent to it or which it sends out in the course of such procedures.
3. The Advisory Committee on Restrictive Practices and Dominant Positions in the Transport Industry established by Article 16(3) of Regulation (EEC) No 1017/68 shall be consulted prior to the taking of any decision following upon a procedure under Article 3 or of any decision under the second subparagraph of Article 5(3), or under the second subparagraph of paragraph 4 of the same Article. The Advisory Committee shall also be consulted prior to adoption of the implementing provisions provided for in Article 21.
4. Consultation shall take place and the Committee shall deliver its opinion in accordance with the rules laid down in Article 16(5) and (6) of Regulation (EEC) No 1017/68.

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Article 9

Consideration by the Council of questions of principle concerning the common transport policy raised in specific cases

1. The Commission shall not take a decision in respect of which consultation as laid down in Article 8 is compulsory until after the expiry of twenty days from the date on which the Advisory Committee has delivered its Opinion.
2. Before expiry of the period specified in paragraph 1, any Member State may request that the Council be convened to examine with the Commission any question of principle concerning the common transport policy which such Member State considers to be involved in a particular case.

The Council shall meet within thirty days from the request by the Member State concerned for the sole purpose of considering such questions of principle.

The Commission shall not take its decision until after the Council meeting.

3. Further, the Council may at any time, at the request of a Member State or of the Commission, consider general questions raised by the implementation of the competition policy in the air transport sector.
4. In all cases where the Council is asked to meet to consider, under paragraph 2, questions of principle or, under paragraph 3, general questions, the Commission shall, for the purposes of this Regulation, take into account the policy guidelines which emerge from that meeting.

Article 10

Inquiries into air transport sectors

1. If trends in transport, fluctuations in or inflexibility of transport rates, or other circumstances, suggest that competition in air transport is being restricted or distorted within the common market in a specific geographical area, or over one or more transport links, or in respect of the carriage of passengers or goods belonging to one or more specific categories, the Commission may decide to conduct a general inquiry into the sector concerned, in the course of which it may request transport undertakings in that sector to supply the information and documentation necessary for giving effect to the principles formulated in Articles 85 and 86 of the Treaty.
2. When making inquiries pursuant to paragraph 1, the Commission shall also request undertakings or groups of undertakings whose size suggests that they occupy a dominant position within the common market or a substantial part thereof to supply such particulars of the structure of the undertakings and of their behaviour as are requisite to an appraisal of their position in the light of the provisions of Article 86 of the Treaty.
3. Article 8(2) to (4) and Articles 9, 11, 12 and 13 shall apply.

Article 11

Requests for information

1. In carrying out the duties assigned to it by this Regulation, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.
2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.
3. In its request, the Commission shall state the legal basis and the purpose of the request, and also the penalties provided for in Article 14(1)(b) for supplying incorrect information:
4. The owners of the undertakings or their representatives and, in the case of legal persons, or companies, firms or associations having no legal personality, the person authorized to represent them by law or by their constitution, shall be bound to supply the information requested.
5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 14(1)(b) and Article 15(1)(c), and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

Article 12

Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 13(1), or which it has ordered by decision adopted pursuant to Article 13(3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorization in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorization shall specify the subject matter and purpose of the investigation.
2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, the officials of the Commission may assist the officials of such authority in carrying out their duties.

Article 13

Investigating powers of the Commission

1. In carrying out the duties assigned to it by this Regulation, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorized by the Commission are empowered:
 - (a) to examine the books and other business records;
 - (b) to take copies of or extracts from the books and business records;
 - (c) to ask for oral explanations on the spot;
 - (d) to enter any premises, land and vehicles of undertakings.

2. The officials of the Commission authorized for the purpose of these investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties provided for in Article 14(1)(c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorized officials.
3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 14(1)(c) and Article 15(1)(d) and the right to have the decision reviewed by the Court of Justice.
4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.
5. Officials of the competent authority of the Member State in whose territory the investigation is to be made, may at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.
6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorized by the Commission to enable them to make their investigation. To this end, Member States shall apply, mutatis mutandis, the measures provided for in Article 21(6) of Regulation (EEC) No 1017/68.

Article 14

Fines

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from one hundred to five thousand ECU where, intentionally or negligently:

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- (a) they supply incorrect or misleading information in connection with an application pursuant to Article 5; or
 - (b) they supply incorrect information in response to a request made pursuant to Article 10 or to Article 11(3) or (5), or do not supply information within the time limit fixed by a decision adopted under Article 11(5); or
 - (c) they produce the required books or other business records in incomplete form during investigations under Article 12 or Article 13, or refuse to submit to an investigation ordered by decision issued in implementation of Article 13(3).
2. The Commission may by decision impose on undertakings or associations of undertakings fines of from one thousand to one million ECU, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement, where either intentionally or negligently:
- (a) they infringe Article 85 or Article 86 of the Treaty;
 - (b) they commit a breach of any obligation imposed pursuant to Article 6(1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 8(3) and (4) and Article 9 shall apply.
4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of criminal law nature.

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Article 15

Periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from fifty to one thousand ECU per day, calculated from the date appointed by the decision, in order to compel them:
 - (a) to put an end to an infringement of Article 85(1) or Article 86 of the Treaty the termination of which it has ordered pursuant to Article 4;
 - (b) to refrain from any act prohibited under Article 6(3);
 - (c) to supply complete and correct information which it has requested by decision adopted pursuant to Article 11(5);
 - (d) to submit to an investigation which it has ordered by decision taken pursuant to Article 13(3).
2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.
3. Article 8(3) and (4) and Article 9 shall apply.

Article 16

Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

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Article 17

Unit of account

For the purpose of applying Articles 14 to 16 the ECU shall be the unit adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 18

Hearing of the parties and of third persons

1. Before taking decisions as provided for in Articles 4, 5(3), second subparagraph, and 5(4), 6(3), 14 and 15, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.
2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons where they show a sufficient interest shall be granted.
3. Where the Commission intends to take a decision pursuant to Article 85(3) of the Treaty, it shall publish, in the Official Journal of the European Communities, a summary of the relevant agreement, decision or concerted practice and invite all interested third parties to submit their observations within a period which it shall fix, such period to be not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 19

Professional secrecy

1. Information acquired as a result of the application of Articles 10 to 13 shall be used only for the purpose of the relevant request or investigation.
2. Without prejudice to the provisions of Articles 18 and 20, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.

3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 20

Publication of decisions

1. The Commission shall publish the decisions which it adopts pursuant to Articles 4, 5(3), second subparagraph, 5(4) and 6(3).
2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 21

Implementing provisions

The Commission shall have the power to adopt implementing provisions concerning the form, content and other details of complaints pursuant to Article 3, applications pursuant to Article 5 and the hearing provided for in Article 18(1) and (2).

Article 22

Entry into force

This Regulation shall enter into force on

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