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R E P O R T

of the Committee on Transport and Tourism

on the proposal from the Commission to the Council for a regulation amending Regulation (EEC) No 3975/87 laying down the procedure for the application of the rules of competition to undertakings in the air transport sector (COM(90) 167 final - C3-0193/90)

Rapporteur: Miss Anne McINTOSH

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A Series: Reports - B Series: Motions for Resolutions, Oral Questions - C Series: Documents received from other Institutions (e.g. Consultations)

* = Consultation procedure requiring a single reading

**II = Cooperation procedure (second reading) which requires the votes of a majority of the current Members of Parliament for rejection or amendment

**I = Cooperation procedure (first reading)

*** = Parliamentary assent which requires the votes of a majority of the current Members of Parliament

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By letter of 28 June 1990, the Council consulted the European Parliament pursuant to Article 87 of the EEC Treaty, on the Commission 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.

At the sitting of 9 July 1990, the President of Parliament announced that he had referred this proposal to the Committee on Transport and Tourism as the committee responsible and to the Committee on Economic and Monetary Affairs and Industrial Policy for its opinion.

At its meeting of 18 July 1990, the Committee on Transport and Tourism appointed Miss Anne McIntosh rapporteur.

At its meetings of 8 November 1990 and 27 November 1990, it considered the Commission proposal and draft report.

At the latter meeting it was decided unanimously to recommend to Parliament that it approve the Commission proposal subject to the following amendments. The committee then adopted the draft legislative resolution unanimously.

The following were present for the vote: Amaral, Chairman; Topmann and Christensen, Vice-Chairmen; McIntosh, rapporteur; Braun-Moser (for Bourlanges) Coimbra Martins (for Schlechter), McIntosh, Müller, Romera i Alcazar, Sapena Granell, Sarlis, Schodruch, B. Simpson, Siso Cruellas (for Bonetti), Stewart, Visser and van der Waal.

The opinion of the Committee on Economic and Monetary Affairs and Industrial Policy is attached.

The report was tabled on 29 November 1990.

The deadline for tabling amendments will appear on the draft agenda for the part-session at which the report is to be considered.

A

Commission 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

Commission text¹

Amendments

(Amendment No. 1)

Third recital

Whereas it is appropriate to provide for a specific procedure according to which the Commission may apply the competition rules expeditiously in cases where there is an urgent need to prevent or act against such anticompetitive practices;

Whereas it is appropriate to provide for a specific procedure according to which the Commission may take the preventive measures necessary to safeguard the application of the competition rules in cases where there is an urgent need to prevent or act against such anticompetitive practices;

(Amendment No. 2)

fourth recital

Whereas this procedure should provide the undertakings concerned with the opportunity to comment in writing on the matters to which objection is taken;

Whereas this procedure must provide the undertakings concerned with the opportunity to comment in writing on the matters to which objection is taken;

¹ For full text see COM(90) 0167 final - OJ No. C155, 26.6.90, p.7

Commission text

Amendments

(Amendment No. 3)
Article 1.

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

1. The following Article 4a is inserted:

'Article 4a

**Temporary relief against
anticompetitive practices**

1. Without prejudice to Article 4(1), where the Commission has reasons to believe that certain practices are contrary to Article 85 or 86 of the Treaty and have the object or effect of threatening the viability of an air service or of threatening the existence of an air carrier, it may by decision take interim measures to ensure that these practices are not implemented or cease to be implemented and to give such instructions as are necessary to prevent the occurrence of the practices until a decision under Article 4(1) is taken.

2. A decision taken pursuant to paragraph 1 shall apply for a period not exceeding six months. Article 8(3) to (6) shall not apply.

The Commission may renew the initial decision, with or without modification. In such case, Article 8(3) to (6) shall apply.'

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**Temporary relief against
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1. Without prejudice to Article 4(1), where the Commission has good reasons for believing that certain practices are contrary to Article 85 or 86 of the Treaty and have the object or effect of seriously threatening the viability of an air service or of threatening the existence of an air carrier, it may by decision take interim measures to ensure that these practices are not implemented or cease to be implemented and to give such instructions as are necessary to prevent the occurrence of the practices until a decision under Article 4(1) is taken.

2. A decision taken pursuant to paragraph 1 shall apply for a period not exceeding six months. Article 8(3) to (6) shall not apply, but the Commission shall inform the Advisory Committee of every decision taken.

Deleted

DRAFT LEGISLATIVE RESOLUTION

embodying the opinion of the European Parliament
on the proposal from the Commission to the Council for a regulation
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 European Parliament,

- having regard to the proposal from the Commission to the Council (COM(90) 0167 final)¹,
 - having been consulted by the Council pursuant to Article 87 of the EEC Treaty (C3-0193/90),
 - having regard to the report of the Committee on Transport and Tourism and the opinion of the Committee on Economic and Monetary Affairs and Industrial Policy (A3-0331/90),
1. Approves the Commission proposal subject to Parliament's amendments and in accordance with the vote thereon;
 2. Calls on the Commission to amend its proposal accordingly, pursuant to Article 149(3) of the EEC Treaty;
 3. Calls on the Council to notify Parliament should it intend to depart from the text approved by Parliament;
 4. Asks to be consulted again should the Council intend to make substantial modifications to the Commission proposal;
 6. Instructs its President to forward this opinion to the Council and Commission.

¹ OJ No. C 155, 26.6.1990, p.7

EXPLANATORY STATEMENT

REGULATION 3975/87

Regulation 3975/87 was adopted by Council after the European Parliament had given its opinion, the rapporteur for the Committee on Transport being Mr Klinkenborg. The report (Document A 2-193/87) covered four Commission proposals on civil aviation and was adopted by the Committee on 4 November 1987. Proposal 3, for the above-mentioned regulation, was approved, unamended, unanimously.

EARLIER PROPOSAL TO AMEND REGULATION 3975/87

In September 1989 the Commission proposed a modification of this regulation to extend its scope to cover air transport within a Member State and between Member States and third countries. This was one of three proposals dealing with the application of competition rules to air transport (COM(89) 417 - C3-149/89). Miss McIntosh was the rapporteur and her report was adopted by the Committee on Transport and Tourism on 24 April 1990. The report approved the Commission proposal with amendments to ensure further consultation of the European Parliament and to delay its entry into force until agreements had been reached with third countries and other legislation, on tariffs etc, had been implemented. This was adopted in plenary on 15 June 1990.

To date (September 1990), this proposal to amend Regulation 3975/87 has not been discussed in Council; they wish to consider the 'external measures' (agreements on relations with third countries) at the same time. A Commission proposal providing the legal framework for the conclusion of such agreements (COM(90) 17 final - C 3-97/90) was referred to the Committee on Transport and Tourism, and Miss McIntosh drew up a report, adopted in Committee on 18 July 1990 (Doc. A 3-192/90), calling for a change in the legal basis. This was adopted in plenary on 14 September 1990. It does not, of course, constitute Parliament's opinion on the proposal.

CURRENT PROPOSAL TO AMEND REGULATION 3975/87

This proposal to amend the regulation will probably be adopted by Council before the previous one and so will cover only air transport between Member States; when the previous one is adopted the regulation as amended under this current consultation will cover also domestic services and those between the Community and third countries.

The current proposal is to remove the obligation for the Commission to go through the full procedure laid down on Regulation 3975/87 if they need to deal urgently with predatory practices - i.e. strategies designed to eliminate a competitor by means other than competition on merit - which the further proposed liberalization of air transport may increase the opportunities for.

The proposed modification would remove the obligation for the Commission to formally consult the Advisory Committee (of officials from Member States) if

they felt it necessary to tackle speedily a predatory practice which threatened to eliminate a competitor.

As the regulation now stands action to stop a predatory practice would take an absolute minimum of six months and almost certainly considerably longer. Consultation of the Advisory Committee involves convoking officials from all Member States and providing documents in all Community languages - and translation requires time.

If the regulation were amended as proposed, action could be taken in around three months - and therefore within an airline 'season' of six months - preventing an airline perhaps being driven out of business or at least having to cancel a service on a route which might well be of longer-term benefit to consumers.

The Committee on Transport and Tourism is therefore in favour of the proposed modification. This modification would, however, give the Commission more and drastic powers to intervene within the market, powers for which, given the Parliament's current lack of power in the appointment of the Commission, it would in a sense be unaccountable.

Moreover, in its explanatory memorandum, the Commission gives as examples of anticompetitive practices actions which in some cases could be considered to be normal commercial behaviour - e.g. override commissions and frequent flier programmes. The Committee for this reason proposes that the Commission's text should be slightly modified to ensure that it only uses this accelerated procedure where it has good reasons for believing that certain practices are contrary to Articles 85 or 86 of the Treaty and are likely to seriously threaten the viability of an air service or the existence of a carrier.

It is also important to stress that the undertakings concerned should be given full opportunity to comment on the matters to which objection is taken. The Commission in addition must respect its undertakings in the explanatory memorandum to maintain a close and constant liaison with the competent authorities of the Member States concerned.

The Commission also promises in its explanatory memorandum to consult the Advisory Committee before a decision is renewed, and before a final decision is taken.

Regulation 3975/87 already requires consultation of the Advisory Committee before a final decision is taken. The Commission's current proposal would enable it to renew an initial decision, taken under the proposed accelerated procedure, but only after consulting the Advisory Committee.

However, the purpose of this accelerated procedure is to block a practice suspected of being predatory to give the Commission time to fully assess the matter. The six-month period for which an initial decision may apply should provide sufficient time for this. Moreover, it would be unfair to prolong the period of uncertainty faced by the airline affected by the decision. By the end of the six months the Commission should be able to say either 'the practice is indeed predatory and we are now taking a final decision to forbid it' or 'the practice has been found not to be predatory and no further action will therefore be taken'.

The Committee therefore proposes removing from the Commission text the possibility of renewing an initial decision. The Commission will therefore have to use the 'period not exceeding six months' of the initial decision, the period of 'temporary relief', to carry out full investigations in accordance with Regulation 3975/87 and prepare to issue a final decision should its investigations indicate that a practice is truly anticompetitive.

O P I N I O N

(Rule 120 of the Rules of Procedure)

of the Committee on Economic and Monetary Affairs and Industrial Policy
Draftsman: Mr Aymeri de MONTESQUIOU

At its meeting of 17 July 1990 the Committee on Economic and Monetary Affairs and Industrial Policy appointed Mr de Montesquiou draftsman.

At its meetings of 16-17 July, 15-16 October and 5-7 November it considered the draft opinion.

At the last meeting it adopted the draft opinion by 22 votes to 1.

The following took part in the vote: Beumer, chairman, de Montesquiou, draftsman; Barton, Beazley, Cassidy, Cox, De Piccoli, de Donnea, Ernst de la Graete, Friedrich, Fuchs, Herman, Hoppenstedt, Lataillade, Merz, Metten, Patterson, Roumeliotis, von Wogau, Catherwood (for Stevens), Domingo Segarra (for Speciale), Van Hemeldonck (for Tongue), and David Martin (for Colom i Naval pursuant to Rule 111(3)).

1. Scope of the proposal

1. Anticompetitive practices in the air transport sector

An anticompetitive practice can be defined as a practice whereby immediate profit is foregone in order to eliminate competitors or to prevent or delay their entry into the market with the ultimate aim of obtaining higher profits at a later date.

Such practices could prove frequent in the air transport sector, controlled as it is by a relatively small number of operators. In addition, the nature and diversity of the services involved in air transport operations mean that it offers a fairly wide range of opportunities for anticompetitive practices.

As well as the application of tariffs which are considerably lower than costs, these include:

- providing so much capacity or such high frequencies on a route that other airlines are discouraged from using it;
- granting benefits to travel agents, e.g. higher commission;
- granting benefits to air transport users which artificially maintain their loyalty to a specific airline.

2. The mechanism proposed by the Commission

(a) the risks of anticompetitive practices developing

The current market liberalization in the air transport sector, as embodied in the latest package of measures proposed by the Commission² with regard to fixing tariffs, market access and sharing capacity, meets a need. This liberalization should boost the dynamism and competitiveness of the European air transport industry and be in the interests of users. Nevertheless, there may be reason to fear anticompetitive behaviour on the part of some airlines.

(b) the extension of Regulation 3975/87/EEC

In view of this risk, the Commission proposes to add one article (Article 4a) to Regulation 3975/87 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector.

The purpose of this new provision is to enable the Commission to adopt interim measures to ensure that the practices in question are not implemented or cease to be implemented.

These preventive powers will be conferred by decisions taken by the Commission on its own authority without reference to the Advisory Committee. The maximum duration of these powers will be six months (the length of a 'season' in the air transport sector) and the

² Proposals contained in the Communication entitled 'Development of Civil Aviation in the Community' COM(89) 373 final

undertakings concerned will have been given the opportunity to comment in writing.

II. Assessment of the proposal for a directive

1. Is the proposal justified?

The proposal seems useful in principle; it also meets the wish expressed by the Council of Ministers on 6 December 1989.

There is indeed a risk of unfair practices in this sector, where competition in the Community will become more and more fierce. Such practices are to be feared not only from airline companies established in the Member States but also from non-Community airlines.

Third country companies might be tempted to 'cream off' Community traffic by adopting anticompetitive practices in connection with their fifth-freedom traffic. This risk is all the greater since the opportunities for anticompetitive practices are so extensive. As well as the examples given by the Commission, one might mention the opportunities for strategic use offered by computerized reservation systems and the attribution of timetable slots.

The rapid deregulation carried out in the United States after 1985 led to many bankruptcies and a fresh concentration of the sector.³

2. The difficulty of identifying an anticompetitive practice

That the Commission should be able to exercise preventive powers on its own authority in cases of emergency is totally in keeping with effective application of the rules of competition. The European Court of Justice⁴ has explicitly sanctioned these preventive powers, which the Commission possesses pursuant to Article 3 of Regulation No. 17, in order to avoid the exercise of the right of decision provided for in Article 3 from becoming ineffective or even illusory as a result of the actions of some companies.

Nonetheless, protecting the Community's competitive system in this particular area is a difficult undertaking. It is hard to evaluate the anticompetitive nature of a given practice.

The Commission is right to say that each case will be considered individually in the light of the circumstances surrounding it. Attempts to define general criteria which can be automatically applied as a means of assessing the anticompetitive nature of a practice are too unreliable.⁵

How will the Commission proceed when it has to make a quick decision without assistance and there are many ways of looking at a complex situation (for

³ The number of airlines in the USA rose from 36 in 1977 to 123 in 1984. By 1986 only 35 of the 119 new companies were still in business. Today seven groups control approximately 9% of the market.

⁴ Case 792/79 Camera Care, (1980) ECR, p. 119 ff.

⁵ Determination of the anticompetitive nature of a practice by comparison with the reasonable average of Areeda and Turner's costs.

example by comparing tariffs with costs on a given line or with costs per category of passenger)?

The Commission's task will be difficult, since it will have to take such measures as are necessary to prevent the anticompetitive practices from causing irreversible damage (abandonment of the competitor by users, possibly followed by cessation of his activities). However, the Commission will have to be moderate in the use of these powers (it could, for example, order the airline concerned to revert to its former tariffs or flight frequencies) in order not to inhibit normal, essential competition. Finally, to avoid disputes developing in this area, the Commission must, even at this preventive stage, scrupulously respect the rights of companies to defend themselves and not take any decisions until enough evidence to support the presumption of an anticompetitive practice has been amassed. In any case, it would seem essential to consult the Advisory Committee.

Proposed amendments

Commission text

Amendments

(Amendment No. 1)
third recital

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(Amendment No. 2)
fourth recital

Whereas this procedure should provide the undertakings concerned with the opportunity to comment in writing on the matters to which objection is taken;

Whereas this procedure must provide the undertakings concerned with the opportunity to comment in writing on the matters to which objection is taken;

(Amendment No. 3)
Article 4a

1. Without prejudice to Article 4(1), where the Commission has reasons to believe that certain practices are contrary to Article 85 or 86 of the Treaty and have the object or effect of threatening the viability of an air service or of threatening the existence of an air carrier, it may by decision take interim measures to ensure that these practices are not implemented or cease to be implemented and to give such instructions as are necessary to prevent the occurrence of these practices until a decision under Article 4(1) is taken.
2. A decision taken pursuant to paragraph 1 shall apply for a period not exceeding six months. Article 8(3) to (6) shall not apply.

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2. A decision taken pursuant to paragraph 1 shall apply for a period not exceeding six months. Article 8(3) to (6) shall not apply, but the Commission shall inform the Advisory Committee of every decision taken.

Conclusions

1. The liberalization of air transport in the Community, particularly with regard to the fixing of tariffs and market access, is essential to the competitiveness of this sector and to economic integration. It is compatible with the needs of users.
2. Nevertheless, the deregulation which is currently under way must be controlled so that it does not give rise to unfair strategies or anticompetitive practices either between Member State air carriers or on the part of third-country companies tempted by the possibility of 'creaming off' business from the Community market. Such practices go against free competition, destabilize the sector concerned and are harmful to the interests of users and staff, as well as being damaging to the environment.
3. The Commission must therefore be able to take the preventive measures in this area which the Court of Justice has recognized that it is empowered to take by its interpretation of Article 3 of Regulation No. 17, in order to prevent or to arrest practices whose effects could be irreversible, which would render the application of the rules of competition ineffective.
4. Nevertheless, in view of the difficulty in certain cases of identifying an anticompetitive practice with certainty and in order not to inhibit the progress of the essential liberalization of air transport in the Community, these preventive powers granted to the Commission must be applied judiciously, that is to say, only in serious cases where there is every reason to believe that evidence of an anticompetitive practice exists and after the undertakings concerned have had the opportunity to put forward their defence.
5. Subject to the above proposed amendments, which the Committee on Transport and Tourism is asked to take into account, the proposal for a regulation may be approved.

