

COMMISSION REGULATION (EEC) No 84/91

of 5 December 1990

on the application of Article 85 (3) of the Treaty to certain categories of agreements, decisions and concerted practices concerning joint planning and coordination of capacity, consultations on passenger and cargo tariffs rates on scheduled air services and slot allocation at airports

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) to certain categories of agreements, decisions and concerted practices in the air transport sector⁽¹⁾, as amended by Regulation (EEC) No 2344/90⁽²⁾, and in particular Article 2 thereof,

Having published a draft of this Regulation⁽³⁾,

Having consulted the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas :

- (1) Regulation (EEC) No 3976/87 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions or concerted practices relating directly or indirectly to the provision of air transport services.
- (2) Agreements, decisions or concerted practices concerning joint planning and coordination of capacity, consultations on tariffs and slot allocation at airports are liable to restrict competition and affect trade between Member States.
- (3) Joint planning and coordination of capacity can help ensure the maintenance of services at less busy times of the day, during less busy periods or on less busy routes, and the development of onwards connections thus benefitting air transport

users. However, no air carrier should be bound by the results of such planning and coordination but must be free to change its planned services unilaterally. Nor must the planning and coordination prevent carriers deploying extra capacity. Any clauses concerning extra flights must not require the approval of the other parties or involve financial penalties. These arrangements must also allow parties to withdraw from them at reasonably short notice.

- (4) Consultations on passenger and cargo tariffs may contribute to the generalized acceptance of interlinable fares and rates to the benefit of air carriers as well as air transport users. However, consultations must not exceed the lawful purpose of facilitating interlining. Council Regulation (EEC) No 2342/90 of 24 July 1990 on fares for scheduled air services between Member States⁽⁴⁾ and the proposed Council Regulation on the operation of scheduled air cargo services between Member States⁽⁵⁾ are a step towards the increase of price competition in air transport and restrict the possibility of innovative and competitive passenger fares and cargo rates being blocked. Hence, competition may not be eliminated under these arrangements. Consultations on passenger and cargo tariffs between air carriers may therefore be permitted for the present time, provided that the participation in such consultations is optional, that they do not lead to an agreement in respect of fares, rates or related conditions, that in the interests of transparency the Commission and the Member States concerned can send observers to them, and that air carriers participating in the consultation mechanism are obliged to interline with all other carriers concerned, at their own tariffs for the tariff category being discussed;

Where the air carrier wishing to benefit from the obligation to interline applies different tariffs from the airline which effects carriage, it may for that purpose file matching tariffs under Article 3 (5) of Regulation (EEC) No 2342/90.

⁽¹⁾ OJ No L 374, 31. 12. 1987, p. 9.

⁽²⁾ OJ No L 217, 11. 8. 1990, p. 15.

⁽³⁾ OJ No C 211, 24. 8. 1990, p. 2.

⁽⁴⁾ OJ No L 217, 11. 8. 1990, p. 1.

⁽⁵⁾ OJ No C 88, 6. 4. 1990, p. 7.

- (5) Arrangements on slot allocation at airports and airport scheduling can improve the utilization of airport capacity and airspace, facilitate air traffic control and help spread out the supply of air transport services from the airport. However, for competition not to be eliminated, entry to congested airports must remain possible. In order to provide a satisfactory degree of security and transparency, such arrangements can only be accepted if all the air carriers concerned can participate in the negotiations, and if the allocation is made on a non-discriminatory and transparent basis.
- (6) In accordance with Article 4 of Regulation (EEC) No 3976/87, this Regulation should apply with retroactive effect to agreements, decisions and concerted practices in existence on the date of entry into force of this Regulation provided that they meet the conditions for exemption set out in this Regulation.
- (7) Under Article 7 of Regulation (EEC) No 3976/87, this Regulation should also specify the circumstances in which the Commission may withdraw the block exemption in individual cases.
- (8) No applications under Articles 3 or 5 of Council Regulation (EEC) No 3975/87⁽¹⁾ need be made in respect of agreements automatically exempted by this Regulation. However, when real doubt exists, undertakings may request the Commission to declare whether their arrangements comply with this Regulation.
- (9) This Regulation is without prejudice to the application of Article 86 of the Treaty,

- joint planning and coordination of the capacity to be provided on scheduled international air services between Community airports,
- the holding of consultations on tariffs for the carriage of passengers, with their baggage, and of freight on scheduled international air services between Community airports ; or
- slot allocation and airport scheduling in so far as they concern international air services between airports in the Community.

TITLE II

SPECIAL PROVISIONS

*Article 2***Special provisions for joint planning and coordination of capacity**

The exemption concerning joint planning and coordination of the capacity to be provided on scheduled air services shall apply only if :

- (a) the agreements, decisions and concerted practices do not bind air carriers to the results of the planning and coordination ;
- (b) the planning and coordination are intended to ensure a satisfactory supply of services at less busy times of the day, during less busy periods or on less busy routes, or to establish schedules which will facilitate connections for passengers or freight between services operated by the participants ;
- (c) the agreements, decisions and concerted practices do not include arrangements such as to limit, directly or indirectly, the capacity to be provided by the participants or to share capacity ;
- (d) the agreements, decisions and concerted practices do not prevent carriers taking part in the planning and coordination from changing their planned services, both with respect to capacity and schedules, without incurring penalties and without being required to obtain the approval of the other participants ;
- (e) the agreements, decisions and concerted practices do not prevent carriers from withdrawing from the planning and coordination for future seasons without penalty, on giving notice of not more than three months to that effect ;
- (f) the agreements, decisions and concerted practices do not seek to influence the capacity provided or schedules adopted by carriers not participating in them.

HAS ADOPTED THIS REGULATION :

TITLE I

EXEMPTIONS

Article 1

Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements between undertakings in the air transport sector, decisions by associations of such undertakings and concerted practices between such undertakings which have as their purpose one or more of the following :

⁽¹⁾ OJ No L 374, 31. 12. 1987, p. 1.

*Article 3***Special provisions for consultations on passenger and cargo tariffs**

1. The exemption concerning the holding of consultations on passenger and cargo tariffs shall apply only if :

- (a) the participants only discuss passenger or cargo tariffs to be paid by air transport users directly to a participating air carrier or to its authorized agents, for carriage as passengers or for the airport-to-airport transport of freight on a scheduled service. The consultations shall not extend to the capacity for which such tariffs are to be available ;
- (b) the consultations are intended to arrange interlining, i.e. any air carrier participating in the consultations, in respect of the types of tariffs or rates and of the seasons which were the subject of the consultations, grants other air carriers which in accordance with paragraph (d) are entitled to participate in the consultations, the authority :
 - (i) to issue or complete transportation documents for carriage over its routes within the Community in accordance with its own tariffs and with other applicable provisions, and
 - (ii) to effect changes to its transportation documents for carriage over its routes within the Community in accordance with generally applicable procedures,

provided that an air carrier may refuse to grant this authority for objective and non-discriminatory reasons of a technical or commercial nature, in particular concerned with the creditworthiness of the air carrier to whom this authority is refused of which that carrier must be notified in writing ;

- (c) the passenger or cargo tariffs which are the subject of the consultations are applied by participating air carriers without discrimination on grounds of passengers' nationality or place of residence or on grounds of origin of the freight within the Community ;
- (d) participation in the consultations is voluntary and open to any air carrier who operates or has applied to operate direct or indirect services on the route concerned, including air carriers entitled to exercise fifth-freedom traffic rights in accordance with Article 8 of Council Regulation (EEC) No 2343/90 ⁽¹⁾ ;
- (e) the consultations are not binding on participants, that is to say, following the consultations the participants retain the right to act independently in respect of passenger and cargo tariffs ;

- (f) the consultations do not entail agreement on agents' remuneration or other elements of the tariffs discussed ;
 - (g) in respect of each passenger tariff which was the subject of the consultation, each participant informs the Commission without delay of its submission to the aeronautical authorities of the Member States concerned.
2. (a) The Commission and the Member States concerned shall be entitled to send observers to tariff consultations, whether bilateral or multilateral. For this purpose, air carriers shall give the Member States concerned and the Commission the same notice as is given to participants, but not less than 10 days' notice, of the date, venue and subject-matter of the consultations.
- (b) Such notice shall be given :
 - (i) to the Member States concerned according to procedures to be established by the competent authorities of those Member States ;
 - (ii) to the Commission according to procedures to be published from time to time in the *Official Journal of the European Communities*.
 - (c) A full report on these consultations shall be submitted to the Commission by or on behalf of the air carriers involved at the same time as it is submitted to participants, but not later than six weeks after these consultations were held.

*Article 4***Special provisions for slot allocation and airport scheduling ⁽²⁾**

1. The exemption concerning slot allocation and airport scheduling shall apply only if :

- (a) the consultations on slot allocation and airport scheduling are open to all air carriers having expressed an interest in the slots which are the subject of the consultations ;
- (b) rules of priority are established which neither directly nor indirectly relate to carrier identity or nationality or category of service, take into account constraints or air traffic distribution rules laid down by competent national or international authorities and give due consideration to the needs of the travelling public and of the airport concerned. Such rules of priority may

⁽²⁾ Article 4 will be reconsidered by the Commission in the light of progress in the consideration by the Council of common rules on slot allocation.

⁽¹⁾ OJ No L 217, 11. 8. 1990, p. 8.

take account of rights acquired by air carriers through the use of particular slots in the previous corresponding season;

- (c) the rules of priority established are made available on request to any interested party;
- (d) the rules are applied without discrimination, that is to say that, subject to the rules, each carrier shall have an equal right to slots for its services;
- (e) new entrants have priority in the allocation of at least 50 % of newly created or unused slots; this priority may be limited to a maximum of at least four slots per carrier on any day.

For the purpose of this point, 'new entrant' means an air carrier

- (i) not holding more than three slots on a day at an airport and requesting further slots at that airport for services on intra-Community routes during that day, or
- (ii) not holding more than 30 % of slots held by all carriers on a day at an airport or at other airports in the same airport system, and requesting further slots at that airport during that day to commence a service falling within the sphere of application of Regulation (EEC) No 2343/90 on an intra-Community route on which at most two other air carriers are exercising third- or fourth-freedom traffic rights between the airports concerned during that day

and which does not obtain these slots within three hours of the time requested through the normal allocation process;

- (f) air carriers participating in the consultations have access, at the latest at the time of the consultations, to information relating to:

- historical slots by air carrier and chronologically for all air carriers,
- requested slots (initial submissions) by air carriers and chronologically for all air carriers,
- allocated slots, and outstanding slot requests if different, by air carrier and chronologically for all air carriers,
- remaining slots available,
- comparisons between requested slots and allocated slots by time interval and by carrier,

— full details on the constraints being used in allocation.

If a request for slots is not accepted, the air carrier concerned shall be entitled to a statement of the reasons therefore.

- 2. (a) The Commission and the Member States concerned shall be entitled to send observes to consultations on slot allocation and airport scheduling held in the context of a multilateral meeting in advance of each season. For this purpose, air carriers shall give the Member States concerned and the Commission the same notice as is given to participants, but not less than 10 days' notice, of the date, venue and subject-matter of consultations.

- (b) Such notice shall be given

- (i) to the Member States concerned according to procedures to be established by the competent authorities of those Member States;
- (ii) to the Commission according to procedures to be published from time to time in the *Official Journal of the European Communities*.

TITLE III

MISCELLANEOUS PROVISIONS

Article 5

The Commission may withdraw the benefit of this Regulation, pursuant to Article 7 of Regulation (EEC) No 3976/87, where it finds in a particular case that an agreement, decision or concerted practice exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down by Article 85 (3) or are prohibited by Article 86 of the Treaty, and in particular where:

- (i) tariff consultations lead to the absence of price competition on any route or group of routes;

- (ii) the operation of Article 4 has not enabled new entrants to obtain such slots as may be required at a congested airport in order to establish schedules which enable these carriers to compete effectively with incumbent carriers on any route to and from that airport and competition on those routes is thereby substantially impaired. In such cases the withdrawal of the benefit of this Regulation shall be in respect of the slot allocation at the airport in question.

Article 6

This Regulation shall enter into force on 1 February 1991 and expire on 31 December 1992.

It shall apply with retroactive effect to agreements, decisions and concerted practices in existence when it enters into force, from the time when the conditions of application of this Regulation were fulfilled.

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

Done at Brussels, 5 December 1990.

For the Commission

Leon BRITTAN

Vice-President
