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I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EEC) No 3975/87

of 14 December 1987

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 opinions of the European Parliament ⁽²⁾,

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

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, according to Council Regulation No 141 ⁽⁴⁾, Council Regulation No 17 ⁽⁵⁾ does not apply to transport services; whereas Council Regulation (EEC) No 1017/68 ⁽⁶⁾ applies only to inland transport; whereas Council Regulation (EEC) No 4056/86 ⁽⁷⁾ applies only to maritime transport; whereas consequently the Commission has no means at present of investigating directly cases of suspected infringement of Articles 85 and 86 of the Treaty in air transport; whereas moreover the Commission lacks such powers of its own to take decisions or impose

penalties as are necessary for it to bring to an end infringements established by it;

Whereas air transport is characterized by features which are specific to this sector; whereas, furthermore, international air transport is regulated by a network of bilateral agreements between States which define the conditions under which air carriers designated by the parties to the agreements may operate routes between their territories;

Whereas practices which affect competition relating to air transport between Member States may have a substantial effect on trade between Member States; 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 international air transport between Community airports;

Whereas such a regulation should provide for appropriate procedures, decision-making powers and penalties to ensure compliance with the prohibitions laid down in Articles 85 (1) and 86 of the Treaty; whereas account should be taken in this respect of the procedural provisions of Regulation (EEC) No 1017/68 applicable to inland transport operations, which takes account of certain distinctive features of transport operations viewed as a whole;

Whereas undertakings concerned must be accorded the right to be heard by the Commission, third parties whose interests may be affected by a decision must be given the opportunity of submitting their comments beforehand and it must be ensured that wide publicity is given to decisions taken;

Whereas all decisions taken by the Commission under this Regulation are subject to review by the Court of Justice under the conditions specified in the Treaty; whereas it is moreover desirable, pursuant to Article 172 of the Treaty,

⁽¹⁾ OJ No C 182, 9. 7. 1984, p. 2.

⁽²⁾ OJ No C 182, 19. 7. 1982, p. 120 and OJ No C 345 21. 12. 1987.

⁽³⁾ OJ No C 77, 21. 3. 1983, p. 20.

⁽⁴⁾ OJ No 124, 28. 11. 1962, p. 2751/62.

⁽⁵⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽⁶⁾ OJ No L 175, 23. 7. 1968, p. 1.

⁽⁷⁾ OJ No L 378, 31. 12. 1986, p. 4.

to confer upon the Court of Justice unlimited jurisdiction in respect of decisions under which the Commission imposes fines or periodic penalty payments;

Whereas it is appropriate to except certain agreements, decisions and concerted practices from the prohibition laid down in Article 85 (1) of the Treaty, insofar as their sole object and effect is to achieve technical improvements or cooperation;

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

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

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

HAS ADOPTED THIS REGULATION:

Article 1

Scope

1. This Regulation lays down detailed rules for the application of Articles 85 and 86 of the Treaty to air transport services.
2. This Regulation shall apply only to international air transport between Community airports.

Article 2

Exceptions for certain technical agreements

1. The prohibition laid down in Article 85 (1) of the Treaty shall not apply to the agreements, decisions and concerted practices listed in the Annex, in so far as their sole object and effect is to achieve technical improvements or cooperation. This list is not exhaustive.
2. If necessary, the Commission shall submit proposals to the Council for the amendment of the list in the Annex.

Article 3

Procedures on complaint or on the Commission's own initiative

1. 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.

2. Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85 (1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or concerted practice.

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 an infringement to an end.

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

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 concerted practice, it shall take a decision rejecting the complaint as unfounded.

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 of both Article 85 (1) and 85 (3) of the Treaty, it shall take a decision applying paragraph 3 of the said Article. Such a 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 wish to 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 shall 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 and the Member States to submit their comments to the Commission within 30 days. Such publications shall have regard to the legitimate interest of undertakings in the protection of their business secrets.
 3. Unless the Commission notifies applicants, within 90 days of 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 six years from the date of publication in the *Official Journal of the European Communities*.
- If the Commission finds, after expiry of the 90-day time limit, but before expiry of the six-year period, that the conditions for applying Article 85 (3) of the Treaty are not satisfied, it shall issue a decision declaring that the prohibition in Article 85 (1) applies. Such decision may be retroactive where the parties concerned have given inaccurate information or where they abuse an exemption from the provisions of Article 85 (1) or have contravened Article 86.
4. The Commission may notify applicants as referred to in the first subparagraph of paragraph 3; it shall do so if requested by a Member State within 45 days of the forwarding to the Member State of the application in accordance with Article 8 (2). This request must be justified on the basis of considerations relating to the competition rules of the Treaty.

If it finds that the conditions of Article 85 (1) and (3) of the Treaty are satisfied, the Commission shall issue a decision applying Article 85 (3). 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 of this Regulation 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 under subparagraphs (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 under the provisions 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 on the case in question or has sent notification as provided by the first subparagraph of Article 5 (3) of this Regulation.

*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. An Advisory Committee on Agreements and Dominant Positions in Air Transport 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 or under Article 6. The Advisory Committee shall also be consulted prior to adoption of the implementing provisions provided for in Article 19.

4. The Advisory Committee shall be composed of officials competent in the sphere of air transport and agreements and dominant positions. Each Member State shall nominate two officials to represent it, each of whom may be replaced, in the event of his being prevented from attending, by another official.

5. Consultation shall take place at a joint meeting convened by the Commission; such a meeting shall be held not earlier than 14 days after dispatch of the notice convening it. In respect of each case to be examined, this notice shall be accompanied by a summary of the case, together with an indication of the most important documents, and a preliminary draft decision.

6. The advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 9

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 forward a copy of the request at the same time to the competent authority of the Member State in whose territory the head office of the undertaking or association of undertakings is situated.

3. In its request, the Commission shall state the legal basis and purpose of the request and also the penalties for supplying incorrect information provided for in Article 12 (1) (b).

4. The owners of the undertakings or their representatives and, in the case of legal persons or of companies, firms or associations having no legal personality, the person authorized to represent them by law or by their rules shall be bound to supply the information requested.

5. When 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 12 (1) (b) and Article 13 (1) (c), as well as the right to have the decision reviewed by the Court of Justice.

6. At the same time the Commission shall send a copy of its decision to the competent authority of the Member State in whose territory the head office of the undertaking or association of undertakings is situated.

Article 10

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 11 (1) or which it has ordered by decision adopted pursuant to Article 11 (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 an 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, Commission officials of the competent authority in carrying out their duties.

Article 11

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 shall be 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 used by undertakings or associations of undertakings.

2. The authorized officials of the Commission 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 12 (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 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 Articles 12 (1) (c) and 13 (1) (d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take the decisions mentioned 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 assist the Commission officials in carrying out their duties, at the request of such authority or of the Commission.

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 take the necessary measures after consultation of the Commission by 31 July 1989.

Article 12

Fines

1. The Commission may, by decision, impose fines on undertakings or associations of undertakings of from 100 to 5 000 ECU where, intentionally or negligently:

- (a) they supply incorrect or misleading information in connection with an application pursuant to Article 3 (2) or Article 5; or
- (b) they supply incorrect information in response to a request made pursuant to Article 9 (3) or (5), or do not supply information within the time limit fixed by a decision adopted under Article 9 (5); or
- (c) they produce the required books or other business records in complete form during investigations under Article 10 or Article 11, or refuse to submit to an investigation ordered by decision taken pursuant to Article 11 (3).

2. The Commission may, by decision, impose fines on undertakings or associations of undertakings of from 1 000 to 1 000 000 ECU, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of the undertakings participating in the infringement, where either intentionally or negligently they:

- (a) infringe Article 85 (1) or Article 86 of the Treaty; or
- (b) commit a breach of any obligation imposed pursuant to Article 6 (1) of this Regulation.

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 shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a penal nature.

5. The fines provided for in paragraph 2 (a) shall not be imposed in respect of acts taking place after notification to the Commission and before its decision in application of Article 85 (3) of the Treaty, provided they fall within the limits of the activity described in the notification.

However, this provision shall not have effect where the Commission has informed the undertakings or associations of undertakings concerned that, after preliminary examination, it is of the opinion that Article 85 (1) of the Treaty applies and that application of Article 85 (3) is not justified.

Article 13

Periodic penalty payments

1. By decision, the Commission may impose periodic penalty payments on undertakings or associations of undertakings of from 50 ECU to 1 000 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 has been ordered pursuant to Article 4 of this Regulation;
- (b) to refrain from any act prohibited under Article 6 (3);
- (c) to supply complete and correct information which has been requested by decision, taken pursuant to Article 9 (5);
- (d) to submit to an investigation which has been ordered by decision taken pursuant to Article 11 (3).

2. When 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 result from the original decision.

3. Article 8 shall apply.

Article 14

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.

Article 15

Unit of account

For the purpose of applying Articles 12 to 14, the ECU shall be adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 16

Hearing of the parties and of third persons

1. Before refusing the certificate mentioned in Article 3 (2), or taking decisions as provided for in Articles 4, 5 (3)

second subparagraph and 5 (4), 6 (3), 12 and 13, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission takes, or 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 by such persons to be heard shall be granted when they show a sufficient interest.

3. When the Commission intends to take a decision pursuant to Article 85 (3) of the Treaty, it shall publish a summary of the relevant agreement, decision or concerted practice in the *Official Journal of the European Communities* and invite all interested third parties to submit their observations within a period, not being less than one month, which it shall fix. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 17

Professional secrecy

1. Information acquired as a result of the application of Articles 9 to 11 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 16 and 18, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information of a kind covered by the obligation of professional secrecy and which has been acquired by them as a result of the application of this Regulation.

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

Article 18

Publication of decisions

1. The Commission shall publish the decisions which it adopts pursuant to Articles 3 (2), 4, 5 (3) second subparagraph, 5 (4) and 6 (3).

2. The publication shall state the names of the parties and the main contents of the decision; it shall have regard to the

legitimate interest of undertakings in the protection of their business secrets.

Article 19

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 Articles 3 (2) and 5 and the hearings provided for in Article 16 (1) and (2).

Article 20

Entry into force

This Regulation shall enter into force on 1 January 1988.

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

Done at Brussels, 14 December 1987.

For the Council

The President

U. ELLEMANN-JENSEN

ANNEX

List referred to in Article 2

- (a) The introduction 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 introduction 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 for the purpose of operating air services and the joint purchase of aircraft parts, provided that such arrangements are made on a non-discriminatory basis;
 - (d) the introduction, 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 or supplementary air transport operations, and the fixing and application of inclusive rates and conditions for such operations;
 - (h) the consolidation of individual consignments;
 - (i) the establishment or application of uniform rules concerning the structure and the conditions governing the application of transport tariffs, provided that such rules do not directly or indirectly fix transport fares and conditions;
 - (j) arrangements as to the sale, endorsement and acceptance of tickets between air carriers (interlining) as well as the refund, pro-rating and accounting schemes established for such purposes;
 - (k) the clearing and settling of accounts between air carriers by means of a clearing house, including such services as may be necessary or incidental thereto; the clearing and settling of accounts between air carriers 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.
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COUNCIL REGULATION (EEC) No 3976/87

of 14 December 1987

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 opinions of the European Parliament ⁽²⁾,

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

Whereas Council Regulation (EEC) No 3975/87 ⁽⁴⁾ lays down the procedure for the application of the rules on competition to undertakings in the air transport sector; whereas Regulation No 17 of the Council ⁽⁵⁾ lays down the procedure for the application of these rules to agreements, decisions and concerted practices other than those directly relating to the provision of air transport services;

Whereas Article 85 (1) of the Treaty may 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) should 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 is required 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 agreement between States and bilateral and multilateral

agreements between air carriers; whereas the changes required to this international regulatory system to ensure increased competition should be effected gradually so as to provide time for the air-transport sector to adapt;

Whereas the Commission should be enabled for this reason 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 it should be laid down under what specific conditions and in what circumstances the Commission may exercise such powers in close and constant liaison with the competent authorities of the Member States;

Whereas it is desirable, in particular, that block exemptions be granted for certain categories of agreements, decisions and concerted practices; whereas these exemptions should be granted for a limited period during which air carriers can adapt to a more competitive environment; whereas the Commission, in close liaison with the Member States, should be able to define precisely the scope of these exemptions and the conditions attached to them;

Whereas there can be no exemption if the conditions set out in Article 85 (3) are not satisfied; whereas the Commission should therefore have power to take the appropriate measures where an agreement proves to have effects incompatible with Article 85 (3); whereas the Commission should consequently be able first to address recommendations to the parties and then to take decisions;

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

Whereas the Heads of State and Government, at their meeting in June 1986, agreed that the internal market in air transport should be completed by 1992 in pursuance of Community actions leading to the strengthening of its economic and social cohesion; whereas the provisions of this Regulation, together with those of Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States ⁽⁶⁾ and those of Council Decision 87/602/EEC of 14 December 1987

⁽¹⁾ OJ No C 182, 9. 7. 1984, p. 3.

⁽²⁾ OJ No C 262, 14. 10. 1985, p. 44;
OJ No C 190, 20. 7. 1987, p. 182 and OJ No C 345, 21. 12. 1987.

⁽³⁾ OJ No C 303, 25. 11. 1985, p. 31 and
OJ No C 333, 29. 12. 1986, p. 27.

⁽⁴⁾ See page 1 of this Official Journal.

⁽⁵⁾ OJ No 13, 21. 2. 1962, p. 204/62.

⁽⁶⁾ See p. 12 of this Official Journal.

on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air service routes between Member States ⁽¹⁾, are a first step in this direction and the Council will therefore, in order to meet the objective set by the Heads of State and Government, adopt further measures of liberalization at the end of a three year initial period,

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 3975/87 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.

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:

- joint planning and coordination of the capacity to be provided on scheduled air services, insofar as it helps to ensure a spread of services at the less busy times of the day or during less busy periods or on less busy routes, so long as any partner may withdraw without penalty from such agreements, decisions or concerted practices, and is not required to give more than three months' notice of its intention not to participate in such joint planning and coordination for future seasons,
- sharing of revenue from scheduled air services, so long as the transfer does not exceed 1 % of the poolable revenue earned on a particular route by the transferring partner, no cost are shared or accepted by the transferring partner and the transfer is made in compensation for the loss incurred by the receiving partner in scheduling flights at less busy times of the day or during less busy periods,

- consultations for common preparation of proposals on tariffs, fares and conditions for the carriage of passengers and baggage on scheduled services, on condition that consultations on this matter are voluntary, that air carriers will not be bound by their results and that the Commission and the Member States whose air carriers are concerned may participate as observers in any such consultations,
- slot allocation at airports and airport scheduling, on condition that the air carriers concerned shall be entitled to participate in such arrangements, that the national and multilateral procedures for such arrangements are transparent and that they take into account any constraints and distribution rules defined by national or international authorities and any rights which air carriers may have historically acquired,
- common purchase, development and operation of computer reservation systems relating to timetabling, reservations and ticketing by air transport undertakings, on condition that air carriers of Member States have access to such systems on equal terms, that participating carriers have their services listed on a non-discriminatory basis and also that any participant may withdraw from the system on giving reasonable notice,
- 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. Without prejudice to paragraph 2, such Commission regulations shall define the categories of agreements, decisions or concerted practices to which they apply 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 any other conditions which must be satisfied.

Article 3

Any regulation adopted by the Commission pursuant to Article 2 shall expire on 31 January 1991.

⁽¹⁾ See p. 19 of this Official Journal.

Article 4

Regulations adopted pursuant to Article 2 shall include a provision that they apply with retroactive effect to agreements, decisions and concerted practices which were in existence at the date of the entry into force of such Regulations.

Article 5

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

Article 6

The Commission shall consult the Advisory Committee on Agreements and Dominant Positions in Air Transport established by Article 8 (3) of Regulation (EEC) No 3975/87 before publishing a draft Regulation and before adopting a Regulation.

Article 7

1. Where the persons concerned are in breach of a condition or obligation which attaches to an exemption granted by a Regulation adopted pursuant to Article 2, the Commission may, in order to put an end to such a breach:

- address recommendations to the persons concerned, and
- in the event of failure by such persons to observe those recommendations, and depending on the gravity of the

breach concerned, adopt a decision that either prohibits them from carrying out, or requires them to perform, specific acts or, while withdrawing the benefit of the block exemption which they enjoyed, grants them an individual exemption in accordance with Article 4 (2) of Regulation (EEC) No 3975/87 or withdraws the benefit of the block exemption which they enjoyed.

2. 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 an agreement, decision or concerted practice to which a block exemption granted by a regulation adopted pursuant to Article 2 (2) applies, nevertheless has effects which are incompatible with Article 85 (3) or are prohibited by Article 86, it may withdraw the benefit of the block exemption from those agreements, decisions or concerted practices and take, pursuant to Article 13 of Regulation (EEC) No 3975/87, all appropriate measures for the purpose of bringing these infringements to an end.

3. Before taking a decision under paragraph 2, the Commission may address recommendations for termination of the infringement to the persons concerned.

Article 8

The Council shall decide on the revision of this Regulation by 30 June 1990 on the basis of a Commission proposal to be submitted by 1 November 1989.

Article 9

This Regulation shall enter into force on 1 January 1988.

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

Done at Brussels, 14 December 1987

For the Council

The President

U. ELLEMANN-JENSEN

II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DIRECTIVE

of 14 December 1987

on fares for scheduled air services between Member States

(87/601/87)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 84 (2) and 227 (2) thereof,

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

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

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

Whereas more flexible procedures for approving scheduled passenger air fares for air services between Member States will give air carriers greater scope to develop markets and better meet consumer needs;

Whereas air carriers should be encouraged to control their costs, increase productivity and provide efficient and attractively priced air services;

Whereas common rules should be established laying down criteria for the approval of air fares;

Whereas, by virtue of Article 189 of the Treaty, Member States may choose the most appropriate means of implementing the provisions of the Directive, and in particular may apply the criteria laid down in Article 3 more precisely;

Whereas procedures should be established for the submission by air carriers of proposed air fares and their express of automatic approval by the Member States concerned; whereas air carriers should be free to propose air fares individually or after consultation with other air carriers for the purpose, in particular, of fixing the terms of interlining agreements, given the important benefits which they confer;

Whereas provision should be made for rapid consultation between Member States in the case of any disagreement and for procedures for settling such disagreements regarding approval of fares as are not resolved by consultations;

Whereas provision should be made for the regular consultation of consumer groups on matters relating to air fares;

Whereas the Heads of State and Government, at their meeting in June 1986, agreed that the internal market in air transport should be completed by 1992 in pursuance of Community actions leading to the strengthening of its economic and social cohesion; whereas the provisions of this Directive on fares are a first step in this direction and the Council will therefore, in order to meet the objective set by the Heads of State and Government, adopt further measures of liberalization in respect of air fares at the end of a three year initial period,

⁽¹⁾ OJ No C 78, 30. 3. 1982, p. 6.

⁽²⁾ OJ No C 322, 28. 11. 1983, p. 10 and OJ No C 345, 21. 12. 1987.

⁽³⁾ OJ No C 77, 21. 3. 1983, p. 26.

HAS ADOPTED THIS DIRECTIVE:

Scope and definitions

Article 1

This Directive shall apply to criteria and procedures to be applied with respect to the establishment of scheduled air fares charged on any route between an airport in one Member State and an airport in another Member State.

This Directive shall not apply to the overseas departments referred to in Article 227 (2) of the Treaty.

Article 2

For the purposes of this Directive:

- (a) scheduled air fares means the prices to be paid in the applicable national currency for the carriage of passengers and baggage on scheduled air services and the conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services;
- (b) zone of flexibility means a pricing zone as referred to in Article 5, within which air fares meeting the conditions in Annex II qualify for automatic approval by the aeronautical authorities of the Member States. The limits of a zone are expressed as percentages of the reference fare;
- (c) reference fare means the normal economy air fare charged by a third- or fourth-freedom air carrier on the routes in question; if more than one such fare exists, the average level shall be taken unless otherwise bilaterally agreed; where there is no normal economy fare, the lowest fully flexible fare shall be taken;
- (d) air carrier means an air transport enterprise with a valid operating licence to operate scheduled air services;
- (e) a third freedom air carrier means an air carrier having the right to put down, in the territory of another State, passengers, freight and mail taken up in the State in which it is registered;
 a fourth-freedom air carrier means an air carrier having the right to take on, in another State, passengers, freight and mail for off-loading in its State of registration;
 a fifth-freedom air carrier means an air carrier having the right to undertake the commercial air transport of passengers, freight and mail between two States other than its State of registration;
- (f) Community air carrier means:
 - (i) an air carrier which has its central administration and principal place of business in the Community,

the majority of whose shares are owned by nationals of Member States and/or Member States and which is effectively controlled by such persons or States, or

- (ii) an air carrier which, although it does not meet the definition set out in (i), at the time of adoption of this Directive:

A. either has its central administration and principal place of business in the Community and has been providing scheduled or non-scheduled air services in the Community during the 12 months prior to adoption of this Directive.

B. or has been providing scheduled services between Member States on the basis of the third- and fourth-freedoms of the air during the 12 months prior to adoption of this Directive.

The enterprises which meet the above criteria are listed in Annex I;

- (g) States concerned mean the Member States between which the scheduled air service in question is operated;
- (h) scheduled air service means a series of flights each possessing all the following characteristics:
 - (i) it passes through the air space over the territory of more than one Member State;
 - (ii) it is performed by aircraft for the transport of passengers or passengers and cargo and/or mail for remuneration, in such a manner that on each flight seats are available for purchase by members of the public (either directly from the air carrier or from its authorized agents);
 - (iii) it is operated so as to serve traffic between the same two or more points, either:
 - (1) according to a published timetable, or
 - (2) with flights so regular or frequent that they constitute a recognisably systematic series;
- (i) flight means a departure from a specified airport towards a specified destination.

Criteria

Article 3

Without prejudice to Article 5 (2), Member States shall approve air fares if they are reasonably related to the long-term fully allocated costs of the applicant air carrier, while taking into account other relevant factors. In this connection, they shall consider the needs of consumers, the

need for a satisfactory return on capital, the competitive market situation, including the fares of the other air carriers operating on the route, and the need to prevent dumping. However, the fact that a proposed air fare is lower than that offered by another air carrier operating on the route shall not be sufficient reason for withholding approval.

Procedures

Article 4

1. Air fares shall be subject to approval by the aeronautical authorities of the States concerned. To this end, an air carrier shall submit its fares in the forms prescribed by those authorities.

This shall be done either:

- (a) individually,
or
- (b) following consultations with other air carriers, provided that such consultations comply with the requirements of regulations issued pursuant to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector. ⁽¹⁾

Aeronautical authorities shall not require air carriers to submit their fares for approval more than 60 days before they come into effect.

2. Subject to Article 5, and without prejudice to Article 6, fares shall require approval by both the States concerned. If neither of the aeronautical authorities has expressed disapproval within 30 days of the date of submission of a fare, it shall be considered as approved.

3. An air fare, once approved, shall remain in force until it expires or is replaced. It may however be prolonged after its original date of expiry for a period not exceeding 12 months.

4. A Member State shall permit an air carrier of another Member State operating a direct or indirect scheduled air service, on giving due notice, to match an air fare already approved between the same city pairs. This provision shall not apply to indirect services which exceed the length of the shortest direct service by more than 20 %.

5. Only third- and fourth-freedom air carriers shall be permitted to act as price leaders.

Article 5

1. There shall be two zones of flexibility on any scheduled air service as follows:

- a discount zone which shall extend from 90 % to more than 65 % of the reference fare;
- a deep-discount zone which shall extend from 65 % to 45 % of the reference fare.

2. Within zones of flexibility, the States concerned shall permit third- or fourth-freedom air carriers to charge discount and deep-discount air fares of their own choice subject to the respective conditions set out in Annex II and provided those air fares have been filed with the States concerned at least 21 days prior to the proposed date for their entry into force.

3. If a fare which has been, or is, approved under the bilateral approval regime and which, as far as its conditions are concerned, qualifies for automatic approval in the deep-discount zone, is below the floor of that zone, there shall be additional flexibility as to the level of that fare. Such additional flexibility shall extend from 10 % below the bilaterally approved level of that fare to the ceiling of the deep-discount zone.

A fare which is entitled to additional flexibility in accordance with this paragraph shall be renewed in successive fare seasons at the request of the air carrier concerned at a level not lower than the percentage of the reference fare at which it stood at the end of the previous fare season, any change in level of the reference fare being duly taken into account. For the purpose of this paragraph, summer and winter fare seasons shall be treated separately.

Article 6

This Directive shall not prevent Member States from concluding arrangements which are more flexible than the provisions of Articles 4 and 5 or from maintaining such arrangements in force.

Article 7

1. When a State concerned (the first State) decides, in conformity with the above Articles, not to approve a scheduled air fare, it shall inform the other State concerned (the second State) in writing within 21 days of the fare being filed, stating its reasons.

2. If the second State disagrees with the decision of the first State, it shall so notify the first State within seven days

⁽¹⁾ See p. 9 of this Official Journal.

of being informed, providing the information on which its decision is based, and request consultations. Each State shall supply all relevant information requested by the other. Either of the States concerned may request that the Commission be represented at the consultations.

3. If the first State has insufficient information to reach a decision on the fare, it may request the second State to enter into consultations before the expiry of the 21-day period prescribed in paragraph 1.

4. Consultations shall be completed within 21 days of being requested. If disagreement still persists at the end of this period, the matter shall be put to arbitration at the request of either of the States concerned. The two States concerned may agree to prolong the consultations or to proceed directly to arbitration without consultations.

5. Arbitration shall be carried out by a panel of three arbitrators unless the States concerned agree on a single arbitrator. The States concerned shall each nominate one member of the panel and seek to agree on the third member (who shall be a national of a third Member State and act as panel chairman). Alternatively they may nominate a single arbitrator. The appointment of the panel shall be completed within seven days. A panel's decisions shall be reached by a majority of votes.

6. In the event of failure by either State concerned to nominate a member of the panel or to agree on the appointment of a third member, the Council shall be informed forthwith and its President shall complete the panel within three days. In the event of the Presidency being held by a Member State which is party to the dispute, the President of the Council shall invite the Government of the next Member State due to hold the presidency and not party to the dispute to complete the panel.

7. The arbitration shall be completed within a period of 21 days of completion of the panel or nomination of the single arbitrator. The States concerned may, however, agree to extend this period. The Commission shall have the right to attend as an observer. The arbitrators shall make clear the extent to which the award is based on the criteria in Article 3.

8. The arbitration award shall be notified immediately to the Commission.

Within a period of 10 days, the Commission shall confirm the award, unless the arbitrators have not respected the criteria set out in Article 3 or the procedure laid down by

the Directive or the award does not comply with Community law in other respects.

In the absence of any decision within this period, the award shall be regarded as confirmed by the Commission. An award confirmed by the Commission shall become binding on the States concerned.

9. During the consultation and arbitration procedure, the relevant existing air fares shall be continued in force until the procedure has expired and any new fare has entered into force.

General provisions

Article 8

At least once a year, the Commission shall consult on air fares and related matters with representatives of air-transport user organizations in the Community, for which purpose the Commission shall supply appropriate information to the participants.

Article 9

1. By 1 November 1989, the Commission shall publish a report on the application of this Directive, which shall include statistical information on the cases in which Article 7 has been invoked.

2. Member States and the Commission shall cooperate in the application of this Directive, particularly as regards the collection of the information referred to in paragraph 1.

3. Confidential information obtained in application of this Directive shall be covered by professional secrecy.

Article 10

Where a Member State has concluded an agreement with one or more non-member countries which gives fifth-freedom rights for a route between Member States to an air carrier of a non-member country, and in this respect contains provisions which are incompatible with this Directive, the Member State shall, at the first opportunity, take all appropriate steps to eliminate such incompatibilities. Until such time as the incompatibilities have been eliminated, this Directive shall not affect the rights and obligations *vis-à-vis* non-member countries arising from such an agreement.

Article 11

1. After consultation with the Commission, the Member States shall take the necessary steps to comply with this Directive by 31 December 1987.

2. Member States shall communicate to the Commission all the laws, regulations and administrative provisions which they adopt for the application of this Directive.

Article 13

This Directive is addressed to the Member States.

Done at Brussels, 14 December 1987

Article 12

The Council shall decide on the revision of this Directive by 30 June 1990, on the basis of a Commission proposal to be submitted by 1 November 1989.

For the Council

The President

U. ELLEMANN-JENSEN

*ANNEX I**Airlines referred to in Article 2 (f) (ii)*

The following airlines meet the criteria referred to in Article 2 (f) (ii) as long as they are recognized as a national carrier by the Member State which so recognizes them at the time of the adoption of this Directive:

- Scandinavian Airlines System,
 - Britannia Airways,
 - Monarch Airlines.
-

ANNEX II

Conditions for discount and deep-discount fares

DISCOUNT ZONE

1. To qualify for the discount zone all of the following conditions must be met:

- (a) round or circle trip;
- (b) maximum stay of six months;
and either
- (c) minimum stay of not less than Saturday night or six nights
or
- (d) if off-peak (as defined in the Appendix) advance purchase of not fewer than 14 days; reservation for the entire trip, ticketing and payment to be made at the same time; cancellation or change of reservation only available prior to departure of outbound travel and at a fee of at least 20 % of the price of the ticket.

DEEP-DISCOUNT ZONE

2. To qualify for the deep-discount zone, a fare must meet:

- either conditions 1 (a), (b) and (c) and one of the following conditions:
 - (a) reservation for the entire trip, ticketing and payment to be made at the same time; cancellation or change of reservation only available prior to departure of outbound travel and at a fee of at least 20 % of the price of the ticket;
 - (b) mandatory advance purchase of not fewer than 14 days; reservation for the entire trip, ticketing and payment to be made at the same time; cancellation or change of reservation only available prior to departure of outbound travel and at a fee of at least 20 % of the price of the ticket;
 - (c) purchase of the ticket only permitted on the day prior to departure of outbound travel; reservation to be made separately for both the outbound and inbound journeys and only in the country of departure on the day prior to travel on the respective journeys;
 - (d) passenger to be aged not more than 25 years or not less than 60 years;
- or, if off-peak (as defined in the Appendix), conditions 1 (a) and (b) together with:
 - either condition 2 (b) and one of the following conditions:
 - (e) passenger to be aged not more than 25 years or not less than 60 years;
 - (f) father and/or mother with children aged not more than 25 years travelling together (minimum three persons);
 - (g) six or more persons travelling together with cross-referenced tickets;
 - or
 - (h) mandatory advance purchase of not fewer than 28 days; reservation for the entire trip, ticketing and payment to be made at the same time; cancellation or change of reservation only available:
 - if more than 28 days before outbound travel, at a fee of at least 20 % of the price of the ticket, or
 - if fewer than 28 days before outbound travel, at a fee of at least 50 % of the price of the ticket.

*Appendix***Definition of 'off-peak'**

An air carrier may designate certain flights as 'off-peak' on the basis of commercial considerations.

When an air carrier wishes to use condition 1 (d) or any of conditions 2 (e) to (h), identification of the off-peak flights for each route shall be agreed between the aeronautical authorities of the Member States concerned on the basis of the proposal made by that air carrier.

On each route where the total activity of third- and fourth-freedom air carriers reaches a weekly average of 18 return flights, the air carrier concerned shall be allowed as a minimum to apply conditions 1 (d) or 2 (e) to (h) on up to 50 % of its total daily flights, provided that the flights to which these conditions may be applied depart between 10.00 and 16.00 or between 21.00 and 06.00.

COUNCIL DECISION

of 14 December 1987

on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States

(87/602/87)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 84 (2) and 227 (2) thereof,

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

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

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

Whereas flexibility and competition in the Community air-transport system should be increased;

Whereas the artificial constraints imposed on the capacity which air carriers may provide and on their access to the market should therefore be relaxed;

Whereas, taking into account the competitive market situation, provision should be made to prevent unjustifiable economic effects on air carriers; whereas Member States should accordingly be able to intervene if the capacity share of their carriers in a bilateral relationship would otherwise fall below a given percentage;

Whereas increased market access will stimulate the development of the Community air transport sector and give rise to improved services for users; whereas, however, in order to prevent undue disturbance of existing air traffic systems and to allow time for adaptation, it is appropriate to provide for some limitations on market access;

Whereas it is necessary to ensure that such limitations do not give an unfair advantage to any one air carrier;

Whereas it is necessary, in order to achieve a balanced set of opportunities, and taking account of the provisions of the measures as a whole, to redress the economic disadvantages of air carriers established in the peripheral Member States of the Community;

Whereas it is necessary, in particular, not to apply the opening of routes between hub airports of one State and regional airports of another State to a certain number of airports for reasons relating to airport infrastructure and in order to secure a gradual development of the Community policy of liberalization avoiding negative effects on the Community air transport system;

Whereas arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom in a joint declaration by the ministers of Foreign Affairs of the two countries, and such arrangements have yet to come into operation;

Whereas air carriers should be free from any State obligation to enter into agreements with other air carriers in respects of capacity and market access;

Whereas the Heads of State and Government, at their meeting in June 1986, agreed that the internal market in air transport should be completed by 1992 pursuant to Community actions leading to the strengthening of its economic and social cohesion; whereas the provisions of this Decision on capacity sharing and market access are a first step in this direction and the Council will therefore, in order to meet the objective set by the Heads of State and Government, adopt further measures of liberalization in respect of capacity sharing and market access including new fifth-freedom traffic rights between Community airports at the end of a three-year initial period,

⁽¹⁾ OJ No C 182, 9. 7. 1984, p. 1.

⁽²⁾ OJ No C 262, 14. 10. 1985, p. 44 and OJ No C 345, 21. 12. 1987.

⁽³⁾ OJ No C 303, 25. 11. 1985, p. 31.

HAS ADOPTED THIS DECISION:

Scope and definitions

Article 1

1. This Decision concerns:

- (a) the sharing of passenger capacity between the air carrier(s) of one Member State and the air carrier(s) of another Member State on scheduled air services between these States;
- (b) access for Community air carrier(s) to certain routes between Member States which they do not already operate.

2. This Decision shall not affect the relationship between a Member State and its own air carriers respecting capacity sharing and market access.

3. This Decision shall not apply to the overseas departments referred to in Article 227 (2) of the Treaty.

4. Articles 3 and 4 shall not apply to those services subject to Council Directive 83/416/EEC of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States⁽¹⁾, as amended by Directive 86/216/EEC⁽²⁾.

5. The application of this Decision to the airport of Gibraltar is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.

6. Application of the provisions of this Decision to Gibraltar airport shall be suspended until the arrangements in the joint declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 have come into operation. The Governments of Spain and the United Kingdom will so inform the Council on that date.

Article 2

For the purpose of this Decision:

- (a) capacity shall be expressed as the number of seats offered to the general public on a scheduled air service over a given period;

- (b) capacity share means the share of the air carrier(s) of a Member State expressed as a percentage of the total capacity in a bilateral relationship with another Member State, excluding any capacity provided under the provisions of Article 6 (3) or under the terms of Directive 83/416/EEC and also any capacity provided by a fifth-freedom air carrier;

- (c) air carrier means an air transport enterprise with a valid operating licence to operate scheduled air services;

- (d) a third-freedom air carrier means an air carrier having the right to put down, in the territory of another State, passengers, freight and mail taken up in the State in which it is registered;

a fourth-freedom air carrier means an air carrier having the right to take on, in another State, passengers, freight and mail, for off-loading in its State of registration;

a fifth-freedom air carrier means an air carrier having the right to undertake the commercial air transport of passengers, freight and mail between two States other than its State of registration;

- (e) States concerned mean the Member States between which the scheduled air service in question is operated;

- (f) Community air carrier means:

- (i) an air carrier which has its central administration and principal place of business in the Community, the majority of whose shares are owned by nationals of Member States and/or Member States and which is effectively controlled by such persons or States, or

- (ii) an air carrier which, although it does not meet the definition set out in (i) at the time of adoption of this Decision:

A. either has its central administration and principal place of business in the Community and has been providing scheduled or non-scheduled air services in the Community during the 12 months prior to adoption of this Decision,

B. or has been providing scheduled services between Member States on the basis of the third- and fourth-freedoms of the air during the 12 months prior to adoption of this Decision.
The enterprises which meet the above criteria are listed in Annex I.

- (g) scheduled air service means a series of flights each possessing all the following characteristics:

- (i) it passes through the air space over the territory of more than one Member State;

⁽¹⁾ OJ No L 237, 26. 8. 1983, p. 19.

⁽²⁾ OJ No L 152, 6. 6. 1986, p. 47.

- (ii) it is performed by aircraft for the transport of passengers or passengers and cargo and/or mail for remuneration, in such a manner that on each flight seats are available for purchase by members of the public (either directly from the air carrier or from its authorized agents);
- (iii) it is operated so as to serve traffic between the same two or more points, either:
 - (1) according to a published timetable, or
 - (2) with flights so regular or frequent that they constitute a recognizably systematic series;
- (h) flight means a departure from a specified airport towards a specified destination;
- (i) multiple designation on a country-pair basis means the designation by one Member State of two or more of its air carriers to operate scheduled air services between its territory and that of another Member State;
- (j) multiple designation on a city-pair basis means the designation by one Member State of two or more of its air carriers to operate a scheduled air service between an airport or airport system in its territory and an airport or airport system in the territory of another Member State;
- (k) hub airport means an airport included in the list in Annex II as a category 1 airport;

regional airport means a category 2 or 3 airport as listed in Annex II;
- (l) airport system means two or more airports grouped together as serving the same city.

Shares of capacity

Article 3

1. In the period between 1 January 1988 and 30 September 1989, a Member State shall allow any third- and fourth-freedom air carrier(s) authorized by the States concerned under the arrangements in force between them to operate routes between their territories to adjust capacity provided that the resulting capacity shares are not outside the range 55 % : 45 %.

2. Unless a different decision is taken under Article 4, the range within which a Member State shall allow the air

carrier(s) of another Member State to increase its (their) capacity share shall be extended to 60 % : 40 % from 1 October 1989.

3. In applying the provisions of paragraphs 1 and 2, unilateral cut-backs in capacity shall not be taken into account. In such cases, the basis for the calculation of capacity shares shall be the capacity offered in the previous corresponding seasons by the air carrier(s) of the Member State which has (have) reduced its (their) capacity.

4. Adjustments within the 55 % : 45 % range or the 60 % : 40 % range, as appropriate, shall be permissible in any given season, under the following conditions:

- (a) after the first automatic approval, the air carrier(s) of the Member State offering less capacity shall be authorized to increase its (their) own capacity up to the limit of the capacity approved for the air carrier(s) of the Member State offering the larger capacity;
- (b) if the latter air carrier(s) choose(s) to react to the above mentioned increase, it (they) shall receive automatic approval for one further increase, up to the level of its (their) first capacity filing(s) for that season, within the applicable range;
- (c) the carrier(s) of the Member State offering less capacity will then receive automatic approval for one increase up to the matching level;
- (d) any further increases during that season shall be subject to the applicable bilateral provisions between the two Member States concerned.

Article 4

1. At the request of any Member State for which the application of Article 3 (1) has led to serious financial damage for its air carrier(s), the Commission will carry out a review before 1 August 1989 and, on the basis of all relevant factors, including the market situation, the financial position of the carrier(s) and the capacity utilisation achieved, will take a decision on whether the provisions of Article 3 (2) should be applied in full or not.

2. The Commission shall communicate its decision to the Council which, acting by unanimity, may take a different decision within a period of two months of this communication.

Multiple designation

Article 5

1. A Member State shall accept multiple designation on a country-pair basis by another Member State but, subject to paragraph 2, shall not be obliged to accept the designation of more than one air carrier on any one route.

2. A Member State shall also accept multiple designation on a city-pair basis by another Member State:

- in the first year after the notification of this Decision, on routes on which more than 250 000 passengers were carried in the preceding year,
- in the second year, on routes on which more than 200 000 passengers were carried in the preceding year or on which there are more than 1 200 return flights per annum,
- in the third year, on routes on which more than 180 000 passengers were carried in the preceding year or on which there are more than 1 000 return flights per annum.

3. The provisions of this Article are subject to those in Articles 3 and 4.

Routes between hub and regional airports

Article 6

1. Subject to the provisions of Articles 3, 4 and 5, Community air carriers shall be permitted to introduce third- or fourth-freedom scheduled air services between category 1 airports or airport systems in the territory of one Member State and regional airports in the territory of another Member State. Airport categories are listed in Annex II.

2. (i) The provisions of paragraph 1 shall not apply:

(a) to regional airports exempted from the provisions of Directive 83/416/EEC;

(b) for the duration of this Decision to:

- the following airports which, at the time of notification of this Decision, handle fewer than 100 000 passengers per annum on international scheduled air services:

Aalborg, Seville,
Bergamo, Skrydstrup,
Billund, Sønderborg,
Bologna, Stauning,
Esbjerg, Thisted,
Karup, Tirstrup,
Odense,

- the following airports or airport systems which at the time of the notification of this Decision meet the criteria set out in Article 9:

Barcelona,
Malaga,
Milan — Linate/Malpensa.

(ii) In addition, in order to prevent major disturbance of existing air traffic systems and to allow time for adaptation, the following airports shall also be excluded from the provisions of paragraph 1 for the duration of this Decision:

Alicante, Salonica — Micra,
Athens, Turin,
Bilbao, Valencia,
Genoa, Venice.

3. Article 3 and 4 shall not apply to services between an airport in category 1 and a regional airport which are provided by aircraft with not more than 70 passenger seats.

4. Where an air carrier of one Member State has been authorized in accordance with this Article to operate a scheduled air service, the State of registration of that air carrier shall raise no objection to an application for the introduction of a scheduled air service on the same route by an air carrier of the other State concerned.

5. The provisions of this Article shall not affect a Member State's right to regulate the distribution of traffic between the airports within an airport system.

Combination of points

Article 7

1. In operating scheduled air services to or from two or more points in another Member State or States, a third- or fourth-freedom Community air carrier shall, subject to the provisions of Articles 3, 4 and 5, be permitted to combine scheduled air services, provided that no traffic rights are exercised between the combined points.

2. The provisions of paragraph 1 shall not apply within Spanish territory during the period of validity of this Decision. Similarly, air carriers registered in Spain may not avail themselves of those provisions during that period.

Fifth-freedom rights

Article 8

1. Without prejudice to Article 6 (2), a Community air carrier shall be permitted to operate a fifth-freedom

scheduled air service where third- or fourth-freedom traffic rights exist, provided that the service meets the following conditions:

- (a) it is authorized by the State of registration of the Community air carrier concerned;
- (b) it is operated as an extension of a service from, or as a preliminary of a service to, its State of registration;
- (c) without prejudice to paragraph 2 it is operated between two airports at least one of which is not a category 1 airport;

and

- (d) not more than 30 % of the carrier's annual capacity on the route concerned may be used for the carriage of fifth-freedom passengers.

2. Subject to paragraphs 1 (a), (b) and (d), Ireland and Portugal may each select one category 1, airport in each of the other Member States and may each designate an air carrier to carry fifth-freedom traffic on services between those airports, provided that neither of the air carriers so designated may exercise such rights at any one airport on more than one such route. The Member States concerned need not designate the same carrier for all routes but may for this purpose designate only one carrier to each other Member State.

3. This Article shall not apply during the period of validity of this Decision to routes to or from Spanish territory. Similarly, during the same period air carriers registered in Spain may not claim fifth-freedom rights on the basis of the provisions in this Article.

General provisions

Article 9

Notwithstanding Articles 5 to 8, a Member State shall not be obliged to authorize a scheduled air service in cases where:

- (a) the airport concerned in that State has insufficient facilities to accommodate the service;
- (b) navigational aids are insufficient to accommodate the service.

Article 10

1. This Decision shall not prevent Member States from concluding arrangements which are more flexible than the provisions of this Decision or from maintaining such arrangements in force.

2. The provisions of this Decision shall not be used to make existing capacity or market access arrangements more restrictive.

Article 11

Member States shall not require air carriers to enter into agreements or arrangements with other air carriers relating to any of the provisions of this Decision, nor shall they forbid them to do so.

Article 12

1. After consultation with the Commission, Member States shall take the necessary steps to comply with this Decision not later than 31 December 1987.

2. Member States shall communicate to the Commission all the laws, regulations and administrative provisions which they adopt for the application of this Decision.

Article 13

1. Before 1 November 1989, and every two years thereafter, the Commission shall publish a report on the implementation of this Decision.

2. Member States and the Commission shall cooperate in implementing this Decision, particularly as regards collection of information for the report referred to in paragraph 1.

3. Confidential information obtained within the framework of the implementation of this Decision shall be covered by professional secrecy.

Article 14

The Council shall decide on the revision of this Decision by 30 June 1990 at the latest, on the basis of a Commission proposal to be submitted by 1 November 1989.

Article 15

This Decision is addressed to the Member States.

Done at Brussels, 14 December 1987

For the Council

The President

U. ELLEMANN-JENSEN

*ANNEX I***Air carriers referred to in Article 2 (f) (ii)**

The following air carriers meet the criteria referred to in Article 2 (f) (ii) as long as they are recognized as national carriers by the Member State which so recognizes them at the time of the adoption of this Decision:

- Scandinavian Airlines System,
 - Britannia Airways,
 - Monarch Airlines.
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ANNEX II

List of airport categories

Category 1	BELGIUM:	Brussels-Zaventem
	DENMARK:	Copenhagen-Kastrup/Roskilde
	GERMANY:	Frankfurt/Rhein-Main, Düsseldorf-Lohausen, Munich-Riem
	SPAIN:	Palma-Mallorca, Madrid-Barajas, Malaga, Las Palmas
	GREECE:	Athens-Hellinikon, Salonica-Micra
	FRANCE:	Paris-Charles de Gaulle/Orly
	IRELAND:	Dublin
	ITALY:	Rome-Fiumicino/Ciampino, Milan-Linate/Malpensa
	NETHERLANDS:	Amsterdam-Schiphol
	PORTUGAL:	Lisbon, Faro
Category 2	UNITED KINGDOM:	London-Heathrow/Gatwick/Stansted, Luton
	GERMANY:	Hamburg-Fuhlsbüttel, Stuttgart-Echterdingen, Cologne/Bonn
	SPAIN:	Tenerife-Sur, Barcelona, Ibiza, Alicante, Gerona
	FRANCE:	Marseilles-Marignane, Nice-Côte d'Azur, Lyon- Satolas, Basle-Mulhouse
	IRELAND:	Shannon
	ITALY:	Naples-Capodichino, Venice-Tessera, Catania- Fontana Rossa
	LUXEMBURG:	Luxemburg-Findel
	PORTUGAL:	Funchal, Oporto
	UNITED KINGDOM:	Manchester-Ringway, Birmingham-Edmondson, Glasgow-Abbotsinch
Category 3	All other airports officially open to international scheduled services.	

Communication of the Government of the Federal Republic of Germany

The Council has received the following communication from the Government of the Federal Republic of Germany:

When depositing its instruments of ratification of the Treaties establishing the European Communities, the Government of the Federal Republic of Germany declared that these Treaties applied equally to Land Berlin. It declared at the same time that the rights and responsibilities of France, the United Kingdom and the United States in respect of Berlin were unaffected. In view of the fact that civil aviation is one of the areas in which the said States have specifically reserved powers for themselves in Berlin, and following consultations with the Governments of these States, the Government of the Federal Republic of Germany states that the Council Directive on fares for scheduled air services between Member States and the Council Decision on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States do not cover Land Berlin and that the Council Regulation laying down the procedure for the application of the rules on competition to undertakings in the air transport sector and the Council Regulation on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerned practices in the air transport sector are not applicable in Land Berlin.
