

conferences, competing with them on a normal commercial footing and, (b) that new members could join the conferences on the same terms as existing members, i.e. the cargoes they are allocated enable them to operate viably. Conditions of entry for new members should obviously be compatible with the general principle of non-discrimination on grounds of nationality laid down in the EEC Treaty, and should therefore not be based on any criteria which might be considered discriminatory within the Community, e.g. the ship's flag or the origin of her cargo.

*Voting*

For: 25, Against: 52, Abstentions: 16.

2. The following parts of the Section's opinion were deleted in the discussion:

**Page 3, point 1.1.3**

'As regards the proposed legal basis for the rules applying Articles 85 and 86 to sea transport, the Section considers that the proposed Regulation should be based solely on Article 84 (2) in view of its importance for this sector.'

*Voting*

For: 16, Against: 84, Abstentions: 9.

**Page 8, Article 3, end of point 2.3.3**

'... the structure of these conferences is defined, including fair conditions of admission for non-member shipping companies'.

*Voting*

Rejected unanimously.

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**Opinion on the proposal for a Council Regulation applying Articles 85 and 86 of the Treaty (rules on competition applying to undertakings) to air transport**

The text referred to the Committee has been published in *Official Journal of the European Communities* No C 291 of 12 November 1981, page 4, and No C 317 of 3 December 1981, page 3.

**A. LEGAL BASIS FOR THE OPINION**

On 27 August 1981 the Council referred the abovementioned proposal to the Economic and Social Committee in accordance with Articles 4 and 87 of the Treaty establishing the European Economic Community.

**B. OPINION OF THE ECONOMIC AND SOCIAL COMMITTEE**

The Economic and Social Committee prepared its opinion on the above matter at its 204th plenary session held in Brussels on 26 and 27 January 1983.

The full text of the opinion is as follows:

## THE ECONOMIC AND SOCIAL COMMITTEE,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 84 and 87 thereof,

Having regard to the request made by the Council on 27 August 1981 for an opinion on the proposal for a Council Regulation applying Articles 85 and 86 of the Treaty (rules on competition applying to undertakings) to air transport <sup>(1)</sup>,

Having regard to Council Regulations No 17 of 6 February 1962 <sup>(2)</sup>, No 141 of 26 November 1962 <sup>(3)</sup> and (EEC) No 1017/68 of 19 July 1968 <sup>(4)</sup>,

Having regard to the programme of priorities for air transport approved by the Council in June 1978, which includes an examination of the extent to which the rules of competition are applicable to air transport,

Having regard to the Commission's memorandum of 16 July 1979 to the Council entitled 'Contribution of the European Communities to the development of air transport services' and the Committee's opinion thereon of 3 July 1980 <sup>(5)</sup>,

Having regard to the decision taken by the Committee chairman on 9 September 1981, instructing the Section for Transport and Communications to draw up an opinion on the said proposal (Article 22 of the Rules of Procedure),

Having regard to the opinion adopted by the said Section at its 146th meeting, held on 10 November 1982,

Having regard to the report submitted by the rapporteur, Mr Bos,

Having regard to the discussions on 27 January 1983, during the 204th plenary session, held on 26 and 27 January 1983,

## HAS ADOPTED THE FOLLOWING OPINION

by a majority vote (six votes against and four abstentions):

The Committee approves the Commission's proposal, subject to the following general and specific comments:

## 1. General comments

## 1.1. Legal basis

1.1.1. The Committee examined the scope of Council Regulations No 17 of 6 February 1962, No 141 of

<sup>(1)</sup> OJ No C 317, 3. 12. 1982, p. 3.

<sup>(2)</sup> OJ No 13, 21. 2. 1962, p. 204/62.

<sup>(3)</sup> OJ No 124, 28. 11. 1962, p. 2751/62.

<sup>(4)</sup> OJ No L 175, 23. 7. 1968, p. 1.

<sup>(5)</sup> OJ No C 230, 8. 9. 1980, p. 30.

26 November 1962 and (EEC) No 1017/68 of 19 July 1968 and noted that, pursuant to the abovementioned Regulations No 141 and (EEC) No 1017/68, Regulation No 17 (the first Regulation implementing Articles 85 and 86) does not apply to air and sea transport.

1.1.2. According to the Court of Justice rulings of 4 April 1974 and 12 October 1978 in Cases 167/73 and 156/77, air and sea transport are, however, subject to the provisions of Articles 85 and 86, although under Article 84 (2) they are not covered by the provisions of Title IV relating to the common transport policy until such time as the Council decides to include them. In the light of this interpretation, the Commission bases its proposals for applying Treaty Articles 85 and 86 to air transport solely on Article 87, which states, *inter alia*, that such provisions shall be 'laid down by the Council, acting by a qualified majority on a proposal from the Commission'.

1.1.3. Without going into all the details and legal nuances raised in the course of its discussions, the Committee considers that the Council should adopt a dual legal basis for its proposal, namely Articles 84 (2) and 87, in view of the fact that rules applying Articles 85 and 86 to air transport are very important for this sector.

1.1.4. To back up this view, the Committee recalls that, since the publication of the memorandum on air transport in 1979, the Commission has submitted to the Council a series of proposals, some of which have been adopted. All of these Council decisions were based on Article 84 (2). The Committee therefore wonders why the Commission, in an area so important as competition in sea and air transport – which *ipso facto* has repercussions beyond the Community – has not adopted the same approach as in the past.

## 1.2. Scope of and case for competition rules in air transport

1.2.1. The Committee considers that a Commission proposal on competition should take special account of the specific problems of transport, and particularly those of international commercial air transport.

1.2.2. The Committee notes with regret, however, that (a) there has so far been no common transport policy or common air transport policy, (b) the present proposal lays down more than mere procedural rules without formulating a coherent competition policy and, (c) there has so far been no common social policy for the employees of airlines and of airport operators. Any attempt to regulate sub-sectors is doomed to failure from the outset because there are no principles governing the

areas in question. The Committee is therefore more than sceptical in its attitude to the present version of the Commission proposal.

1.2.3. The Committee considers that it does not make sense either to regulate certain aspects of intra-Community air transport without reference to the international air transport organizations (ICAO, IATA, ECAC).

1.2.4. The Committee can support rules to ensure orderly competition in air transport only on the following conditions:

- existing international agreements/agreements with third countries must be taken into account,
- the aim of transport policy or competition policy measures should be to seek to balance out the interests of all concerned,
- the measures must not be implemented at the expense of either air safety or the safeguarding of employment or the possible creation of new jobs,
- air transport policy measures must take due account of problems in the areas of energy and environmental protection,
- measures for increasing productivity and/or reducing tariffs which would have a negative effect on working conditions are to be rejected.

## 2. Specific comments on the individual Articles

### 2.1. Article 1

2.1.1. According to Article 1, the proposed Regulation is to apply to 'international air transport from or to one or more Community airports'. Under this Article, the Regulation may affect agreements between EC airlines as well as agreements between EC airlines and non-EC airlines. It is understood, in the light of Articles 85 and 86 of the Treaty, that such agreements may only be effected if they involve distortion of competition in air transport between EC Member States and between Member States and third countries. Such situations on route segments outside the Community, however, can certainly have an impact on the overall calculation of tariffs for subsequent or preceding route segments in the Community.

2.1.2. The Committee assumes that the Commission wishes the Regulation to apply also to travel agents if they

offer services which normally come within the province of airlines.

2.1.3. The Committee would, however, express its deep concern in view of the apparent risk of the EC taking unilateral measures which could affect the interests of consumers, workers, airlines and third countries.

2.1.4. It also considers that air transport as carried out so far in the Community is predominantly a manifestation of national sovereignty (public service obligations, use of airspace, safeguarding of employment, tariff coordination, etc.) and therefore cannot simply be the subject of competition rules according to which supply and demand should be the sole factors governing the market. Unqualified approval of the latter idea would be bound to lead to the ruin of many airlines and result in the disappearance of a number of jobs and unprofitable routes that the Member States consider it necessary to maintain on overriding grounds.

2.1.5. The Committee thinks that competition rules can only be introduced in stages in this sector and that this process must go hand in hand with reforms in areas such as the following:

- harmonization of cost structures and social conditions in airlines,
- rules governing the transparency of State subsidies,
- recovery of the air transport market.

2.1.6. Finally, in view of the international character of air transport, this sector should qualify for a series of exemptions, since otherwise the international air transport system as we have known it up to now would break down or be exposed to serious dangers.

2.1.7. The Committee considers that the term 'international air transport' should at all events be more precisely defined and cover in particular the following spheres:

- (a) scheduled commercial air transport;
- (b) non-scheduled commercial air transport;
- (c) general aviation (in so far as this crosses frontiers);
- (d) airports;
- (e) ground handling;
- (f) travel agents and shipping agents offering air transport services or acting as intermediaries in this sphere;
- (g) air transport to and from third countries.

2.1.8. Since the activities listed above under (a) to (f) are carried out in different forms in the Member States and Article 85 of the Treaty does not take into account the problem of third countries, the scope of the Regulation should be defined all the more precisely.

### 3.2. Article 2

2.2.1. On the basis of the present wording of Article 2, the Committee takes the view that the Commission proposal goes far beyond a Regulation of an essentially procedural nature. The omission of:

- (a) certain criteria to be observed by the Commission in applying the rules on competition with regard to specific agreements, decisions or concerted practices; and
- (b) specific exemptions relating to current types of commercial agreement

would lead in practice to policy-making (which ought to be the role of the Council) by *ad hoc* investigations and decisions.

2.2.2. Some of the types of 'technical agreement' listed in Article 2 are not purely technical either, since they also have commercial implications. In practice, some of them are related to, or based upon, agreements of a commercial nature. The Committee would like to know how far consequences of this kind would be covered by the proposed Regulation.

2.2.3. The Committee also notes that the list of exemptions in Article 2 does not mention the two main types of agreement which currently exist, namely pooling agreements and tariff agreements. Besides a number of competition-limiting elements, these types of agreement have significant advantages for users and for airlines.

2.2.4. The fact that pooling agreements and tariff agreements are not exempted in the proposed Regulation could give rise to uncertainty among the airlines which are parties to such agreements. There is therefore an urgent need for the Commission to decide what effect the application of the rules on competition will have on pooling agreements and tariff agreements. In this respect the Commission is asked to take into account the advantages of these types of agreement and is requested to explain how it sees these advantages being safeguarded, should these types of agreement be prohibited.

2.2.5. As regards the exemptions provided for in Article 2, the Commission should consider whether the agreements to be exempted are possible in the absence of agreed fare structures and levels. The Commission has already indicated its wish to preserve the interlining and prorate features of the present system through the exemptions of Article 2 (f) and (g).

2.2.6. To sum up, the Commission has not recognized the essential linkage between the benefits for the passenger, which it rightly wishes to protect, and fares which are known and accepted among several different airlines. IATA could certainly act as a forum here.

2.2.7. The above comments have attempted to show that the coordination of fares on a multilateral basis (which the Commission is not willing to exempt at this stage) is an essential prerequisite for some elements of the present system (which the Commission is willing to exempt) which are of benefit to the passenger. It is evident that if certain effects are to be exempted, then the necessary cause of these effects should also be exempted.

2.2.8. In the Committee's view there are the following arguments in favour of pooling agreements:

- when there are two or more airlines operating on a route it makes objective sense for them to coordinate their flights. This provides a better spread of services for the passenger, coupled with reduced costs for the airlines, for the airports and for air traffic control,
- the sharing of revenue (in strictly limited ratios) is intended to compensate one airline for providing services at the less-popular slots,
- tight limits on revenue transfer preserve the competitive stimulus between the airlines involved.

2.2.9. The Committee thinks that subparagraphs (a) and (b) should be changed to provide for an obligation to obtain approval.

2.2.10. On the basis of collective agreements operative at national level it is often impossible for the trade unions and the competent supervisory authorities, too, to influence the kind of behaviour prohibited by Article 85 of the Treaty.

2.2.11. The Committee also has certain reservations about subparagraph (f), which provides for an indirect reversal of the prohibition of Article 85 (1) and an automatic exemption.

2.2.12. The Committee also asks that the present text of Article 2 be revised in both content and wording, with reference to the text of Article 2 of the proposal for a Regulation on competition in sea transport.

### 2.3. Article 3

2.3.1. The Committee suggests that the various language versions of Article 3 (b) be revised, since it is obvious that the parties entitled to submit complaints are not clearly defined. The Committee considers that provision should at all events be made for the submission of complaints by entrepreneurs, consumers' associations and trade unions as well as other persons and associations claiming a legitimate interest.

### 2.4. Article 4

2.4.1. The Committee considers that if the Commission finds that there has been an infringement it must require those concerned to bring the infringement to an end. The present text states that the Commission 'may . . . require', i.e. it gives the Commission powers of discretion unlimited by any legal provisions, with the result that this Article loses significance.

### 2.5. Article 5

2.5.1. The Committee takes the view that paragraph 2 of Article 5 should be amended to read:

'If on the basis of the evidence *at its disposal* the Commission judges an application admissible . . . it shall publish *forthwith* in the Official Journal . . . business secrets.'

The present wording 'in possession of *all* the available evidence' could lead to unnecessary delay.

2.5.2. The Commission must also effect publication without culpable delay, i.e. *forthwith* and not 'as soon as possible'.

### 2.6. Article 6

No comments.

### 2.7. Article 7

2.7.1. The Committee thinks that the second paragraph 'the authorities of the Member States . . . first subparagraph of Article 5 (3)' should be deleted, since it is superfluous.

2.7.2. It considers that the Court of Justice will in any case review the Commission's decision on application. The Member States are also obliged under the EEC Treaty to ensure observance of Community acts and are in any case supervisory authorities.

### 2.8. Article 8

2.8.1. The Committee takes the view that it should be laid down in this Article that the Commission is to consult not only the Advisory Committee on Restrictive Practices and Dominant Positions in the Transport Industry but also a technical body composed of the interest groups in this sector, e.g. the governments of the Member States, undertakings, consumers and trade unions. In addition to specialist knowledge, such a body could provide the necessary balance of interests.

2.8.2. The Committee referred to in Article 8 is composed merely of two officials per Member State. If this committee were consulted before any decision, the balance of interests mentioned earlier would by no means be guaranteed. A technical body is necessary, however, to prevent the Court of Justice from being overloaded. The composition of that committee should be laid down separately.

### 2.9. Article 9

The term 'air transport sector' (paragraph 3) should accord with the definition in Article 1 (2).

### 2.10. Article 10

The employment situation should form an additional factor in assessing the trends in air transport. It would be quite conceivable for an undertaking to get into financial straits but be obliged by law or under collective agreements to continue to employ its staff. Such situations should be taken into account especially in view of the numbers of unemployed in the industry and in the Member States.

### 2.11 to 2.17. Articles 11 to 17

No comments.

2.18. *Article 18*

2.18.1. Independently of the technical body called for in connection with Article 8, specific mention should be made of the trade unions in paragraphs 1 and 2 of Article 18.

2.18.2. Article 18 (3) of the English version contains the term 'negative clearance'. This is, however, a mistake. The text should refer to the exemption which can be provided under Article 85 (3) of the Treaty.

2.19 to 2.22. *Articles 19 to 22*

No comments.

3. **Final comments**

In general, the Commission proposal, as it stands, hampers the decision-making process. A competition Regulation that takes more account of the political aspects and overall Community transport policy is an absolute necessity.

Given the current restrictions of competition, it is essential to clarify the basic principles in the field of air transport from the political and competition angles.

Done at Brussels, 27 January 1983.

*The Chairman*  
*of the Economic and Social Committee*  
François CEYRAC

APPENDIX

to the opinion of the Economic and Social Committee

1. **Rejected amendments**

The following amendments, tabled in accordance with the Rules of Procedure, were rejected by the Committee during plenary session discussions:

**Page 3, point 1.1.3.**

Replace 'Article 84 (2)' in point 1.1.3 by 'Article 87'.

*Reasons*

The Court of Justice of the Community has decided that air and sea transport fall under Articles 85 and 86 of the Treaty.

*Voting*

For: 16, Against: 84, Abstentions: 9.

**Pages 4 and 5, points 1.2.2, 1.2.3 and 1.2.4**

Replace points 1.2.2, 1.2.3 and 1.2.4 by the following text:

1.2.2. Notwithstanding serious reservations about Article 2, which can be regarded as the core of the document, the Committee concurs with the Commission's proposal, which seeks to bring about reasonable competition in the international air transport sector; it considers that the proposal is a step in this direction.

1.2.3. The Committee is also of the view that for the first time rules have been laid down, in the Commission proposal, which make it possible to implement the principle of free competition in air transport, while paying due regard to the legitimate interests of users.

1.2.4. The proposal can help to bring about a balance between the airlines on the one hand and users on the other.'

*Reasons*

See above.

*Voting*

For: 13, Against: 60, Abstentions: 9.

**Pages 6, 7 and 8 – points 2.1.2, 2.1.4, 2.1.5, 2.1.6, 2.1.7 and 2.1.8**

Delete all the above points and replace them by the following:

'2.1.2. Having regard to the remarks made under point 2.1.1, the Committee endorses the scope of the proposal for a Regulation.'

*Reasons*

So many conditions and objections are listed in the original text that the end result is maintenance of the status quo. The text now proposed endorses the Commission's proposal.

*Voting*

For: 3, Against: majority, Abstentions: 0.

2. The following passage in the Section opinion was replaced in the course of the discussions:

**Page 3, point 1.1.3**

'As regards the proposed legal basis for the rules applying Articles 85 and 86 to air transport, the Section considers that the proposed Regulation should be based solely on Article 84 (2) in view of its importance for this sector.'

*Voting*

For: 16, Against: 84, Abstentions: 9.

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**Opinion on the proposal for a Council Directive on tariffs for scheduled air transport between Member States**

The text referred to the Committee has been published in *Official Journal of the European Communities* No C 78 of 30 March 1982, page 6.

**A. LEGAL BASIS FOR THE OPINION**

On 11 November 1981 the Council referred the abovementioned proposal to the Economic and Social Committee in accordance with Article 84 of the Treaty establishing the European Economic Community.