rights — such as rights to operate on an air route alone or with one or two other undertakings — enact or maintain in force any measures contrary to the competition rules laid down in Articles 85 and 86.

7. Article 90(2) of the Treaty may be appicable to air carriers who are obliged, by the public authorities, to operate on routes which are not commercially viable but which it is necessary to operate for reasons of the general interest. However, for it to be possible for the effect of the competition rules to be restricted pursuant to Article 90(2) by needs arising from performance of a task of general interest, the national authorities responsible for the approval of tariffs and the courts to which disputes relating thereto are submitted must be able to determine the exact nature of the needs in question and their impact on the structure of the tariffs applied by the airlines in question.

REPORT FOR THE HEARING
delivered in Case 66/86 *

I — Facts and Procedure

In general, air tariffs for international routes are fixed by common accord by the airlines exploiting each particular route within the framework of the International Air Transport Association (IATA) or through direct negotiations.

Under the bilateral or multilateral agreements concluded between the various States in the field of civil aviation and the legislation of the various States, those tariffs are subsequently subject to the approval of the competent national authorities. In the territory of each State only the approved tariffs may be applied.

However, for any given route, several tariffs are laid down by the airlines concerned, depending on the State where the tariffs are to be applied. Consequently, it frequently occurs that for a given route the tariffs approved in one State are not the same as the tariffs approved in another State.

There are two reasons why tariffs differ from one State to another. First, agreement is reached within the framework of IATA not only on tariffs but also on the rates of conversion of the various national

* Language of the case: German.

currencies. However, over time those rates may diverge from actual exchange rates. If the actual exchange rates of particular currencies fall below the exchange rates fixed for those currencies in the framework of IATA, passengers from countries with strong currencies stand to gain by purchasing their airline tickets in a country with a weak currency.

Secondly, the airlines tend to fix special or reduced rates differently depending on the State in which they are to be applied, in order to take account of the specific characteristics of each national market.

The resulting difference between the tariffs applied in a country with a strong currency and those applied in a country with a weak currency for a given route may be so great that a passenger from a country with a strong currency may find it profitable to purchase his air ticket in a country whose currency is weak even if, in order to do so, he has to purchase a ticket for a longer route starting in the country with the weak currency, providing for a stopover in the territory of the country of the passenger and having, as final destination, the place where the passenger actually intends to go. Generally, passengers opting for such a system renounce from the outset the initial part of the route and board their flight directly at the stopover in their country. Even so, they sometimes save as much as 60% of the price that they would have paid in their own country for an air ticket to the destination in question.

Two travel agents based in Frankfurt am Main, Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH (hereinafter referred to as 'the travel agents') offered air tickets of the type described above (for example Lisbon-Frankfurt am Main-Tokyo) to customers seeking to fly from a German airport to a foreign destination. They obtained the tickets from a travel agency in London.

An action was brought before the German courts against the travel agents by Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V., an association campaigning against unfair competition. The travel agents were accused, on the one hand, of having infringed German legislation stipulating that only air tariffs approved pursuant to the second subparagraph of Paragraph 21 of the Luftverkehrsgesetz (law concerning air navigation) by the competent Federal Minister may be applied in German territory and, secondly, of having been responsible for unfair competition by selling air tickets at prices undercutting the approved tariffs which, because they were approved, were applied by their competitors.

The first- and second-instance courts found, on the basis of German law, in favour of Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. They therefore prohibited the travel agents from continuing to offer tickets of the type at issue for sale on pain of payment of a penalty.

When the case was brought before it on an appeal on a point of law, the Bundesgerichtshof upheld the judgments of the lower courts with regard to the incompatibility with German law of the conduct with which the travel agents were charged, and asked whether the provisions of German law which were claimed to have been infringed in this case were consistent with Community law and, in particular, with Articles 85 to 90 of the EEC Treaty.

The Bundesgerichtshof points out in that connection that the air tariffs applied in the various States and in particular in the Federal Republic of Germany are, in general, fixed by the airlines multilaterally under the auspices of IATA or bilaterally, and that such concerted action with respect to tariffs could fall foul of the prohibitions laid down in Articles 85 or 86 of the EEC Treaty.

Accordingly, by order dated 30 January 1986, the Bundesgerichtshof stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Are bilateral or multilateral agreements regarding airline tariffs (for example, IATA resolutions) to which at least one airline with its registered office in a Member State of the EEC is a party void for infringement of Article 85(1) of the EEC Treaty as provided for in Article 85(2), even if neither the relevant authority of the Member State concerned (Article 88) nor the Commission (Article 89(2)) has declared them incompatible with Article 85?

(2) Does charging only such tariffs for scheduled flights constitute an abuse of a dominant position in the common market within the meaning of Article 86 of the EEC Treaty?

(3) Is the approval of such tariffs by the competent authority of a Member State incompatible with the second paragraph of Article 5 and Article 90(1) of the EEC Treaty and therefore void, even if the Commission has not objected to such tariff approval (Article 90(3))?'

The order of the Bundesgerichtshof was registered at the Court Registry on 6 March 1986.

In pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations have been submitted by the travel agents, represented by Dr H. Kroitzsch, Rechtsanwalt at Karlsruhe, and by the Commission of the European Communities, represented by B. van der Esch, Legal Adviser, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

The first question

As far as the travel agents are concerned the answer to the first question follows from the Court's judgment of 30 April 1986 in Joined Cases 209 to 213/84 *Ministère public* v *Asjes and Others* [1986] ECR 1425.

In the view of the Commission, that question comprises two distinct sub-questions.

First, the national court seeks to establish whether bilateral or multilateral agreements regarding airline tariffs infringe the prohibition laid down in Article 85(1) of the Treaty. Secondly, the national court asks whether a possible infringement of the prohibition set out in Article 85(1) causes the said agreements to be automatically void pursuant to Article 85(2). In the Commission's opinion, the answer to those two sub-questions is determined by the aforementioned judgment of 30 April 1986.

As regards the first sub-question, the Commission merely stresses that the existence of a State approval procedure for air tariffs does not stop the concerted action by which those tariffs were set from being an agreement prohibited by Article 85(1). The Commission further points out that the restriction on competition resulting from such concerted action is significant since it completely abolishes competition between airlines with regard to prices and the other air-transport conditions covered thereby. The concerted action may also affect trade between Member States whether it relates to an intra-Community route or to a route between a Member State and a non-member country. The fact that no airline based in the Community is a party to such a concerted action does not preclude the applicability of Article 85(1) (see the judgment of 25 November 1971 in Case 22/71 *Béguelin Import Co. and Others* v *SA G. L. Import Export and Others* [1971] ECR 949, the judgments of 15 June 1976 in Cases 51/75, 86/75 and 96/75 *EMI Records Ltd* v *CBS United Kingdom Ltd, EMI Records Ltd* v *CBS Grammofon A/S* and *EMI Records Ltd* v *CBS Schallplatten GmbH* [1976] ECR 811, 871 and 913, and the judgment of 20 June 1978 in Case 28/77 *Tepea BV* v *Commission* [1978] ECR 1391).

As regards the second sub-question, the Commission observes that, in the light of the Court's judgment of 30 April 1986, cited above, the agreements on tariffs referred to by the national court must be regarded, for the time being, as valid from the point of view of the civil law.

The second question

The travel agents contend that the second question must be answered in the affirmative since, as a result of the combined effect of the concerted action with respect to tariffs concluded under the auspices of IATA and the German legislation on air navigation, Deutsche Lufthansa is in a dominant position within the meaning of Article 86 of the Treaty to which all the other airlines operating in German territory must submit.

The Commission also considers that the second question ought to be answered in the affirmative.

In the Commission's view, in the present case the relevant market for the purposes of determining whether the airlines have a dominant position is in actual fact the market in scheduled flights, since users of such flights (businessmen, officials, etc.) cannot contemplate taking charter flights, which could not guarantee to bring them to their intended destinations at a definite time. Geographically, each air route between a Member State and another or between a Member State and a non-member country constitutes a separate market in so far as users invariably choose the shortest route and do not consider alternative but

longer routes. However, the Commission considers that as a general rule the basis taken should be all the air routes agreed by a Member State in the context of a bilateral agreement with another Member State or with a non-member country.

Moreover, in the Commission's view, in order to establish whether those routes constitute a substantial part of the common market it is necessary to employ quantitative criteria, such as the population and economic importance of the States served by the route in question, the number of passengers, etc. Only transport on routes of a certain significance can be regarded as constituting a substantial part of the common market.

In the Commission's opinion, airlines authorized to serve a route which satisfies those requirements occupy, on that route, a joint dominant position, since price competition is eliminated by the concerted action with regard to tariffs, and other sorts of competition, for example with respect to capacity, frequently suffer the same fate as well under agreements concluded between the airlines.

The Commission considers that the exploitation of the dominant position of the airlines is an abuse within the meaning of Article 86 of the Treaty. The fact that the airlines have abolished all competition in the relevant market must always be regarded as an abuse (see the judgment of 21 February 1973 in Case 6/72 *Europemballage Corporation and Continental Can Company Inc.* v *Commission* [1973] ECR 215). That conclusion is borne out by the excessively high tariffs fixed by the airlines for intra-Community flights in comparison with the tariffs applied to equivalent flights on routes within the United States or on the North-Atlantic route between the Community and the United States.

The third question

The travel agents consider that the third question must be answered in the affirmative on the ground that the German legislation reinforces the effects of the tariff agreements concluded under the auspices of IATA.

The Commission refers to the Court's judgment of 30 April 1986, referred to above. It points out that in the absence of a decision taken under Article 88 of the Treaty by the competent national authorities and of a decision by the Commission under Article 89, the national courts have no jurisdiction to contest the validity of the approval granted to air tariffs by the competent authorities of the various Member States.

III — Answers to questions put by the Court

By letter dated 17 November 1986 the Court asked the Government of the Federal Republic of Germany to answer the following questions in writing before the hearing:

'(1) What authorities in the Federal Republic of Germany have jurisdiction in the field of civil aviation to decide, pursuant to national law and the provisions of Article 85 and 86 of the EEC Treaty, on the permissibility of agreements between undertakings,

decisions and concerted practices and on abuses of dominant positions?

(2) What action have the authorities with the jurisdiction over civil aviation taken in the light of the Court's judgment of 30 April 1986 in Joined Cases 209 to 213/84 (see paragraph 54 thereof)?'

By letter received at the Court Registry on 2 February 1987 the Federal Government answered those questions in the following terms:

In reply to the *first question* the Federal Government states that the competent authority is the Bundeskartellamt (Federal Cartel Office), which is also responsible for maintaining competition in the field of civil aviation.

In reply to the *second question* the Federal Government states that the problems addressed by the judgment of the Court referred to in that question cannot be resolved at the national level, by a single Member State, or in the short term. Accordingly, the Federal Government is in favour of action by the Community legislature in this field in line with the proposals submitted by the Commission to the Council. For its part, the Federal Government has taken the following measures:

(a) it has amended the standard agreement applied by the German authorities in bilateral relations with other States in the field of civil aviation so as no longer to require the airlines involved to coordinate their tariffs or align their tariffs with the tariffs agreed within the framework of IATA;

(b) on 19 December 1986, it, together with the other member States of the European Civil Aviation Conference (ECAC), signed a memorandum of understanding relating to the provisional application of the draft international agreement on the procedure for fixing tariffs for scheduled flights within Europe; Article 3 of that draft agreement provides that tariff agreements as between airlines are no longer necessary in order to obtain approval of the relevant tariffs in the various signatory States; provision is also made for increased use of special tariffs by means of an automatic approval system, provided that certain conditions are fulfilled;

(c) it supports the proposed adoption of Community rules on airline tariffs and capacity and in particular the proposals currently submitted to the Council in that regard.

By letter of 17 November 1986 the Court asked the Commission to answer the following question in writing before the hearing:

'What action has been taken by the Commission as a result of the Court's judgment of 30 April 1986 in Joined Cases 209 to 213/84 (see paragraph 58 thereof), that is to say to ensure the application of the principles laid down by Articles 85 and 86 and to investigate on its own initiative under Article 89 of the EEC Treaty cases of suspected infringement of those principles in the sphere of civil aviation?'

By letter received at the Court Registry on 2 February 1987 the Commission states that on 18 July 1986 it accused 10 airlines from the Member States, pursuant to Article 89(1), of having infringed Article 85(1), without the conditions for exemption within the meaning of Article 85(3) having been fulfilled, by maintaining agreements and concerted practices with regard to capacity, profit and cost sharing, shared undertakings and tariffs. The airlines in question have been requested to delete the contested provisions from their agreements within two months; the Commission reserves the right, if they fail to take such action, to issue reasoned decisions pursuant to Article 89(2). To that end, the airlines have been asked to notify the measures which they plan to take in order to put an end to the infringements alleged by the Commission or to notify their observations with regard to the existence of such infringements.

All the airlines have responded to the Commission's request. Certain of them have proposed to the Commission that they should adapt their agreements or have discussions with it to that end. Others have contested the legality of the procedure under Article 89 and have refused to amend their agreements or to discuss them with the Commission.

The Member States to which those airlines belong have been informed of the Commission's action and have been asked, by letters dated 18 September 1986, to notify to it the wording of any agreements concluded by their airlines of which the Commission has not yet had intelligence. Five of the 10 governments have responded to that request.

IV — Continuation of the written and oral proceedings

By letter dated 22 January 1988 the parties were notified that the President of the Court had decided to give the parties to the main proceedings, the Member States, the Commission and the Council a further opportunity to submit written observations and to continue the oral proceedings on 17 March 1988 in view of the possibility that the adoption by the Council of a series of measures concerning, in particular, the application of the rules on competition to undertakings in the air transport sector (Official Journal L 374, 31.12.1987) would affect the relevant legal situation.

Written observations have been submitted by the travel agents, represented by Dr H. Kroitzsch, Rechtsanwalt at Karlsruhe, and by the Commission of the European Communities, represented by B. Jansen, a Member of its Legal Department. Those observations can be summarized as follows:

1. The travel agents point out in the first place that Article 4 of Council Directive 87/601/EEC of 14 December 1987 provides that air fares are to be subject to approval by the aeronautical authorities of the States concerned, and that where an air carrier submits its fares following consultations with other air carriers, those consultations must comply with the requirements of regulations granting exemption, issued pursuant to Council Regulation 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. Those regulations are to define the concerted practices exempted pursuant to Article 85(3).

Consequently, the answer to the first question referred to the Court for a preliminary ruling should be that in future bilateral or multilateral agreements regarding airline tariffs for scheduled flights must be individually exempted in so far as they are not authorized by regulations granting block exemptions and, where the conditions for the application of Article 85(3) are not fulfilled, the Commission adopts a decision declaring Article 85(1) to be applicable.

Moreover, since under Article 4 of Directive 87/601/EEC fares are subject to approval by both the States concerned, authorization of the Federal Minister for Transport alone will no longer be sufficient.

The travel agents observe in addition that Council Directive 87/601/EEC has settled the whole problem of soft-currency air tickets as far as flights between cities in the Member States, only, are concerned. The German aeronautical authorities will no longer be able to require foreign air carriers to comply with Lufthansa's tariffs in the case of stopovers in the Federal Republic of Germany. Since approval may not be withheld from foreign carriers on the ground that a proposed air fare is lower than that offered by another air carrier operating on the route (third sentence of Article 3 of Directive 87/601/EEC), foreign carriers will be able to determine their fares solely on the basis of official exchange rates so that a currency differential, which constituted the reason for purchasing soft-currency tickets, cannot occur.

In view of the rules in force there is no need to answer Questions Nos 2 and 3.

As far as air traffic with non-member countries is concerned there can be no individual or block exemptions. However, Article 10 of Directive 87/601/EEC provides that, where a Member State has concluded an agreement giving fifth-freedom rights for a route between Member States to an air carrier from a non-member country which contains provisions which are incompatible with the directive, it must, at first opportunity, take all appropriate steps to eliminate such incompatibilities.

The travel agents conclude by stating that, independently of the foregoing, however, the principles set out by the Court in its judgment of 30 April 1986 in Joined Cases 209 to 213/84 *Ministère public* v *Asjes and Others*, should be applied.

2. In the first place, the Commission observes that the action in question seeks to restrain the defendants in the main proceedings from acting in a particular way with regard to competition in the future. However, the significance of an alteration in the existing legal situation is different in the context of an application restraining future conduct than it is in the context of criminal proceedings relating to the past (Joined Cases 209 to 213/84 *Ministère public* v *Asjes and Others*).

Turning to the consequences of the entry into force of the new Council measures, the Commission states that the requisite conditions for the direct application of Article 85(1) and (2) and the first paragraph of Article 86 are now met. The Commission points out in that connection that 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 (Official Journal 1987, L 374, p. 1) does not contain transitional provisions applicable to 'existing agreements', and hence Article 85(1) and (2) has become applicable, without restriction, to agreements, decisions and concerted practices in existence as at 1 January 1988.

However, it must be borne in mind that that direct effect may only apply within the field of application of Regulation No 3975/87, and Article 1(2) of that regulation provides that it is to 'apply only to international air transport between Community airports'.

In the Commission's view, the answer given to the preliminary question must therefore draw a distinction between cases in which the agreements with regard to tariffs are covered by Regulation No 3975/87 and cases falling outside the field of application of that regulation (domestic flights within a Member State and flights between a Member State and one (or more) non-member countries).

As regards agreements on fares not falling within the scope of Regulation No 3975/87, the Commission considers that the procedural rules laid down in Articles 88 and 89 of the Treaty continue to apply. Regulation No 3975/87 is not exhaustive. It cannot be argued that Articles 85 and 86 are no longer applicable to infringements in the field of competition other than those falling within that regulation, since no intention to restrict the scope of Articles 85 and 86 can be discerned from the wording of, the background to or the objective of Regulation No 3975/87. In particular, as regards the objective of that regulation, it is clear that the fact that it does not apply to air transport between Member States and non-member countries does not provide a definitive answer to the question of the field of application of the competition rules in the air transport sector.

The Commission therefore considers that the rules of interpretation identified by the Court in the judgment in Joined Cases 209 to 213/84 continue to apply. It must be assumed that Article 85(1) and (2) cannot have direct effect outside the field of application of Regulation No 3975/87.

The Commission adds that the new measures also have a bearing on the questions concerning the applicability of Articles 86, 5 and 90. There, too, a distinction must be made between agreements falling within the field of application of Regulation No 3975/87 and agreements not falling within that regulation. In particular, whereas in the first case conflicting provisions of national law have no longer been able to be applied by the relevant national courts as from 1 January 1988, the legal situation remains unchanged as regards international air transport between airports in Member States and airports in non-member countries.

Lastly, the Commission considers that the national court's attention should be expressly drawn to the fact that, owing to the primacy of Community law, a national judgment delivered pursuant to national legislation declaring that a party must refrain from certain conduct must become ineffective at the latest when the legal situation determined by Community law changes.

The Commission suggests that the Court should answer the questions referred for a preliminary ruling in the following terms:

'*Question 1*

Bilateral or multilateral agreements regarding airline tariffs to which at least one airline with its registered office in a Member State of the European Economic Community is a party and which relates to international air transport between airports in the Member States are automatically void under Article 85(2) of the EEC Treaty in so far as they infringe the prohibition set out in Article 85(1) and they are not exempted from the prohibition set out in Article 85(1) by virtue of Article 85(3) and the procedural rules set out in Regulations (EEC) Nos 3975/87 and 3976/87.

Where the aforementioned agreements relate to international air transport between airports situated in the Member States, on the one hand, and in non-member countries, on the other, the national judicial authorities are not empowered to declare such agreements void provided that neither the procedure provided for in Article 88, nor the procedure provided for in Article 89 has been applied in the specific case in question or, if so, it has not resulted in a formal finding that an infringement has taken place.

Question 2

Within the scope of Regulation (EEC) No 3975/87, the national courts themselves have jurisdiction to declare that the first paragraph of Article 86 of the EEC Treaty has been infringed and are empowered to draw the necessary conclusions as regards national law.

Where an abuse of a dominant position in the air transport sector falls outside the scope of Regulation (EEC) No 3975/87, the national judicial authorities are not empowered to declare that the first paragraph of Article 86 of the Treaty has been infringed, provided that in the specific case in question neither the procedure provided for in Article 88 nor the procedure provided for in Article 89 of the EEC Treaty has been applied or, if so, it has not resulted in a formal finding that an infringement has taken place.

Question 3

The approval by the competent authority of a Member State of air fares and conditions of carriage applicable to scheduled flights has no effect on the legal situation resulting from the answers to Questions 1 and 2 unless the Commission has declared that Article 90(2) applies and the approval falls within that declaration.'

G. Bosco
Judge-Rapporteur