JUDGMENT OF THE COURT
11 April 1989 *

In Case 66/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesgerichtshof (Federal Court of Justice) for a preliminary ruling in the action pending before that court between

(1) Ahmed Saeed Flugreisen

(2) Silver Line Reisebüro GmbH

and

Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V. (Registered Association for the campaign against unfair competition)

on the interpretation of the second paragraph of Article 5 and Articles 85, 86, 88, 89 and 90 of the EEC Treaty,

THE COURT

composed of: O. Due, President, T. Koopmans, R. Joliet, T. F. O'Higgins and F. Grévisse (Presidents of Chambers), Sir Gordon Slynn, G. F. Mancini, C. N. Kakouris, F. A. Schockweiler, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Diez de Velasco and M. Zuleeg, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH, the appellants in the main proceedings, by Dr H. Kroitzsch, Rechtsanwalt of Karlsruhe;

* Language of the case: German.

Zentrale zur Bekämpfung unlauteren Wettbewerbs e. V., the respondent in the main proceedings, by Dr R. Friedrich, Rechtsanwalt of Karlsruhe;

the United Kingdom, by Stephan Richards, acting as Agent, assisted by D. Donaldson QC, in the oral proceedings;

the Commission of the European Communities, by B. van der Esch and B. Jansen, members of its Legal Department, acting as Agents;

having regard to the Report for the Hearing, as supplemented further to the hearings on 6 May 1987, 17 March and 15 November 1988,

after hearing the Opinions of the Advocate General delivered at the sittings on 28 April 1988 and 17 January 1989,

gives the following

Judgment

1 By an order of 30 January 1986, received at the Court on 6 March 1986, the Bundesgerichtshof (Federal Court of Justice) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Articles 5, 85, 86, 88, 89 and 90 of the Treaty with a view to judging the compatibility with those provisions of certain practices in connection with the fixing of the tariffs applicable to scheduled passenger flights.

2 The questions were raised in proceedings between Zentrale zur Bekämpfung unlauteren Wettbewerbs e.V., a German association campaigning against unfair competition (hereinafter referred to as 'the Association'), and two travel agents who obtained from airlines or travel agents established in another State airline tickets made out in the currency of that State. Although the starting point for the journey mentioned in those tickets was situated in that State, passengers who bought the tickets actually boarded their flight at a German airport where the scheduled flight made a stopover. It was maintained that by selling such tickets the

two German travel agents contravened the third sentence of the second subparagraph of paragraph 21 of the Luftverkehrsgesetz (law concerning air transport) which prohibits the application in German territory of air tariffs not approved by the competent federal minister. It was further alleged that their actions also constituted unfair competition, inasmuch as the prices of the airline tickets which they sold undercut the approved tariffs applied by their competitors.

3 The first-instance and appeal courts upheld the Association's application and prohibited the travel agents on pain of penalties from continuing to sell the tickets in question. The Bundesgerichtshof, on an appeal on a point of law, considered that the travel agents' conduct was contrary to the relevant provisions of German law. However, it wondered whether those provisions were not contrary to Community law and in particular to the rules relating to competition in the EEC Treaty.

4 In those circumstances, the Bundesgerichtshof stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Are bilateral or multilateral agreements regarding airline tariffs applicable to scheduled flights (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))?'

5 It should be pointed out that when the written procedure in this case was still in progress the Court delivered its judgment of 30 April 1986 in Joined Cases 209 to 213/84 *Ministère public* v *Asjes and Others* [1986] ECR 1457 in which it held that in the absence of rules on the application of Article 85 of the EEC Treaty to air transport, to be adopted by the Council pursuant to Article 87, agreements betweeen undertakings and decisions by associations of undertakings could be prohibited under Article 85(1) and automatically void under Article 85(2) only in so far as they had been held by the authorities of the Member States, pursuant to Article 88, to fall under Article 85(1) and not to qualify for exemption under Article 85(3) or in so far as the Commission had recorded an infringement pursuant to Article 89(2). It follows that in the absence of implementing rules relating to air transport the transitional provisions set out in Articles 88 and 89 have continued to be applicable.

6 After an initial hearing in this case, the Council adopted, on 14 December 1987, a series of measures concerning in particular the application of the rules on competition to undertakings in the air transport sector. In view of that development the Court reopened the oral procedure with a view to enabling the parties to express their views on the effect of those new rules on the answers to be given to the national court.

7 On the basis of those rules adopted by the Council, the Commission adopted, on 26 July 1988, regulations on the application of Article 85(3) of the Treaty to certain categories of agreements between undertakings, decisions of associations of undertakings and concerted practices.

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the applicable national legislation, the course of the proceedings and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 In order to assess the relevance, as regards the resolution of the issues raised by the questions referred to the Court for a preliminary ruling, of the new rules on the application of competition law to air transport it is appropriate first to consider the content of those rules, whose compatibility with the Treaty is moreover not at

issue in these proceedings. Subsequently, it will be necessary to give separate consideration to the two subjects covered by the questions, namely bilateral or multilateral agreements concluded by the airlines, on the one hand, and the approval of the tariffs resulting from such agreements by aeronautical authorities, on the other. That examination will lead the Court to consider in turn the interpretation of Articles 85 (first question) and 86 (second question) as regards the conduct of the undertakings, and thereafter the interpretation of Articles 5 and 90 (third question), which are concerned more especially with the role of the public authorities.

(a) The new rules

10 The measures adopted by the Council on 14 December 1987 are as follows: Regulation No 3975/87 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), Regulation No 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector (Official Journal 1987, L 374, p. 9), Directive 87/601/EEC on fares for scheduled air services between Member States (Official Journal 1987, L 374, p. 12) and Decision 87/602/EEC 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 (Official Journal 1987, L 374, p. 19).

11 All those measures apply only to international air transport between Community airports (Article 1(2) of Regulation No 3975/87; Article 1 of Regulation No 3976/87; the first paragraph of Article 1 of Directive 87/601; Article 1 of Decision 87/602). Air transport services between airports in a given Member State and those between a Member State and a non-member country are therefore excluded from the new rules.

12 Regulation No 3975/87, cited above, lays down the procedure for the application of the rules on competition set out in the Treaty to the sector as defined above. According to its preamble it aims in particular to give the Commission the means for investigating cases of suspected infringement of Articles 85 and 86 in this sector and powers to take decisions and impose appropriate sanctions in order to put an end to infringements recorded by the Commission. Articles 8 to 18 of the regulation contain a number of provisions relating to investigations by the Commission, collaboration between the Commission and the authorities in the Member States, the fines and periodic penalty payments which may be imposed and the procedure which is to be followed.

13 The application by the Commission of Article 85(3) is dealt with in Articles 5 to 7 of the regulation, which provide for a special 'objections' procedure. Undertakings and associations of undertakings seeking exemption under that provision must submit an application to the Commission, which, after establshing that the application is admissible and is accompanied by all the requisite evidence and that no infringement procedure has been initiated against the agreement, decision or concerted practice in question, is to publish a summary of the application in the Official Journal. Exemption is to be deemed to have been granted unless the Commission notifies the applicants within 90 days of the publication of the summary in the Official Journal that there are doubts as to the possibility of granting an exemption. The exemption thus granted is retroactive and valid for six years from the date of publication in the Official Journal. However, the Commission may decide, after expiry of the 90-day time-limit, but before expiry of the six-year period, that the conditions for applying Article 85(3) are not satisfied and that the prohibition set out in Article 85(1) applies. In certain cases specified in the regulation (second subparagraph of Article 5(3)) such decision may be retroactive.

14 Regulation No 3976/87, cited above, empowers the Commission to declare by way of regulation under Article 85(3) that the prohibition set out in Article 85(1) does not apply to certain categories, as defined by the regulation, of agreements, decisions and concerted practices (Article 2(2)). According to the preamble, the regulation is based on the idea that the air transport sector has to date been governed by a network of international agreements, bilateral agreements between States and bilateral and multilateral agreements between air carriers and that the changes required to that system to ensure increased competition should be effected gradually so as to provide time for the air transport sector to adapt.

15 The Commission has used that power to adopt Regulations Nos 2671, 2672 and 2673/88 of 26 July 1988 (Official Journal 1988, L 239, pp. 9, 13 and 17). Those regulations grant block exemptions, pursuant to Regulation No 3976/87, to categories of agreements, decisions and concerted practices relating, in the first case, to joint planning and coordination of capacity, sharing of revenue and consultations on tariffs on scheduled air services and slot allocation at airports, secondly, to computer reservation systems for air transport services and, thirdly, to ground handling services.

16 As far as fares for scheduled air services are concerned, Council Directive 87/601/EEC, cited above, sets out to establish common rules laying down criteria for the approval of air fares by the aeronautical authorities of the Member States and to establish procedures for the submission by air carriers of proposed air fares. According to the fifth recital in its preamble the directive is based on the idea that 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 advantages which such agreements confer. The directive provides for the automatic approval of discount and deep-discount fares which satisfy the conditions laid down in Article 5 of the directive.

17 Commission Regulation No 2671/88, cited above, in addition to exempting consultations for the joint preparation of proposals on tariffs, lays down the conditions in which the tariff consultations in question may qualify for exemption. In particular, the consultations must not lead to an agreement in respect of tariffs and any proposals which may result must not be binding on participants, which must retain the right to put forward different tariff proposals and apply such tariffs after they have been approved (Article 4(1)(a), (e) and (f)).

18 The application of the competition rules laid down in the Treaty to the agreements referred to by the national court has to be considered in the light of all those provisions.

(b) Article 85

19 The preliminary questions refer to agreements concluded between two or more air carriers with a view to fixing the tariffs applicable to scheduled flights on a particular route or routes. It must be stated in the first place that such agreements constitute agreements which directly or indirectly fix purchase or selling prices for a certain transaction within the meaning of Article 85(1)(a) of the Treaty. They may even have the effect of completely eliminating on the routes to which they relate all price competition between the various passenger-carrying airlines.

20 However, as the Court held in the judgment of 30 April 1986, cited above, subject to the application of Articles 88 and 89 of the Treaty, price agreements within the meaning of Article 85(1) are not liable to be automatically void under Article 85(2) until after the entry into force of Community rules adopted pursuant to Article 87 with a view to organizing the Commission's powers to grant exemptions under Article 85(3) and hence to conduct the competition policy sought by the Treaty.

21 As has already been mentioned, the Community rules which have been adopted with regard to air transport apply only to international air transport services between Community airports. It must be inferred from this that domestic air transport and air transport to and from airports in non-member countries continue to be subject to the transitional provisions laid down in Articles 88 and 89, and that with respect to those air transport services the system described in the judgment of 30 April 1986 still applies.

22 It must therefore be considered in what circumstances agreements falling within the new rules adopted by the Council, that is to say agreements relating to tariffs for scheduled flights between airports in the various Member States, are liable to be automatically void.

23 In that connection it must first be observed that such agreements cannot qualify for block exemption under the Commission regulations, since Council Regulation No 3976/87 makes no provision for such a possibility. Moreover, Article 4(1)(f) of Commission Regulation No 2671/88 expressly provides that the exemption granted in respect of the category of agreements on consultations on tariffs applies only if the consultations do not entail agreement on agents' remuneration or 'other elements of the tariffs discussed'.

24 It follows that tariff agreements in respect of international intra-Community flights are automatically void under Article 85(2), subject, however, to the application of Article 5 of Council Regulation No 3975/87, governing objections.

25 An airline may, in fact, consider that an agreement in respect of tariffs is part of a more comprehensive arrangement which may, in view of its beneficial economic effects, qualify for an individual exemption under Article 85(3), and the airline may make an application to the Commission to that effect under Article 5(1) of Regulation No 3975/87. Under the procedure set out in Article 5(2) to (4) of that regulation, the agreement is to be deemed to qualify for exemption if 90 days have elapsed following publication of the application in the Official Journal and the Commission has not notified doubts as to the applicability to the agreement of Article 85(3).

26 Consequently, such an agreement is liable to be automatically void only in one of the following three eventualities:

(i) no application has been submitted to the Commission under Article 5;

(ii) the application received a negative response from the Commission within the aforesaid 90-day time-limit;

(iii) the time-limit expired without any response on the part of the Commission but the six-year period of validity of the exemption has expired or the Commission withdrew the exemption within that six-year period.

27 Admittedly, it may be difficult to determine whether an arrangement between two airlines in respect of scheduled flights on a particular route must be regarded as involving an agreement in respect of prices prohibited by Article 85 or as merely involving consultations on tariffs, which are permitted by Council Directive 87/601/EEC and exempted from the application of Article 85(1) by Commission Regulation No 2671/88. However, the provisions of Regulation No 2671/88 contain a number of points which may serve as guidance in this regard. Thus, according to Article 4 of the regulation, consultations must be intended solely to prepare jointly tariff proposals, which cannot be binding on participants, since the latter are to retain the right to put forward different tariff proposals to the aeronautical authorities concerned and to apply such tariffs after they have been approved. In addition, participation in the consultations must be open to any air carrier with an interest in the route concerned.

28 It should be added that, in the case of tariffs for scheduled flights covered by the new rules, that is to say international flights between Community airports, the relevant agreements or decisions of associations will still be liable to affect trade between Member States.

29 As far as the application of Article 85 of the Treaty is concerned, it must therefore be stated in reply to the national court that bilateral or multilateral agreements regarding airline tariffs applicable to scheduled flights are automatically void under Article 85(2):

(i) in the case of tariffs applicable to flights between airports in a given Member State or between such an airport and an airport in a non-member country: where either the authorities of the Member State in which the registered office of one of the airlines concerned is situated or the Commission, acting under Article 88 and Article 89 respectively, have ruled or recorded that the agreement is incompatible with Article 85;

(ii) in the case of tariffs applicable to international flights between airports in the Community: where no application for exemption of the agreement from the prohibition set out in Article 85(1) has been submitted to the Commission under Article 5 of Regulation No 3975/87; or where such an application has been made but received a negative response on the part of the Commission within 90 days of the publication of the application in the Official Journal; or again where the 90-day time-limit expired without any response on the part of the Commission but the period of validity of the exemption of six years laid down in the aforesaid Article 5 has expired or the Commission withdrew the exemption during that period.

(c) Article 86

30 The first matter to be considered is whether for the purposes of the application of Article 86 the same distinction has to be made as in the case of Article 85, that is to say between international flights between airports in the Member States and other flights.

31 The Commission and the United Kingdom propose that that question should be answered in the affirmative. They argue that, as in the case of Article 85, in the

absence of the necessary provisions for the systematic implementation of Article 86 action may be taken against abuses of a dominant position only under Articles 88 and 89 of the Treaty. They base their view on the wording of Articles 88 and 89, which draw no distinction between Articles 85 and 86, and on the nature of the assessments which are to be made of undertakings' anti-competitive behaviour, assessments which are substantially similar in both cases.

32 That argument cannot be upheld. The sole justification for the continued application of the transitional rules set out in Articles 88 and 89 is that the agreements, decisions and concerted practices covered by Article 85(1) may qualify for exemption under Article 85(3) and that it is through the decisions taken by the institutions which have been given jurisdiction, under the implementing rules adopted pursuant to Article 87, to grant or refuse such exemption that competition policy develops. In contrast, no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty and it is for the competent national authorities or the Commission, as the case may be, to act on that prohibition within the limits of their powers.

33 It must therefore be concluded that the prohibition laid down in Article 86 of the Treaty is fully applicable to the whole of the air transport sector.

34 The second problem raised by the second preliminary question is whether the application of a tariff may in principle constitute an abuse of a dominant position where it is the result of concerted action between two undertakings which, itself, is capable of falling within the prohibition set out in Article 85(1).

35 In that connection it should be pointed out in the first place that according to the case-law of the Court Article 85 does not apply where the concerted practice in question is between undertakings belonging to a single group as parent company and subsidiary if those undertakings form an economic unit within which the subsidiary has no real freedom to determine its course of action on the market (see, most recently, the judgment of 4 May 1988 in Case 30/87 *Corinne Bodson* [1988] ECR 2479). However, the conduct of such a unit on the market is liable to come within the ambit of Article 86.

36 In contrast, the typical example of an agreement, decision or concerted practice falling within Article 85 is where two undertakings which are economically independent of each other engage, by concerted action, in price-fixing or other restrictions of competition on the relevant market.

37 Those considerations do not exclude the case where an agreement between two or more undertakings which simply constitutes the formal measure setting the seal on an economic reality characterized by the fact that an undertaking in a dominant position has succeeded in having the tariffs in question applied by other undertakings. In such a case, the possibility that Articles 85 and 86 may both be applicable cannot be ruled out. Moreover, the new Council regulations are based on the same interpretation of Articles 85 and 86 in so far as they provide that Article 86 may be applicable to a concerted practice which was initially granted a block exemption (Article 7(2) of Regulation No 3976/87) or an individual exemption under the objections procedure (second subparagraph of Article 5(3) of Regulation No 3975/87).

38 Consequently, in certain cases Article 86 may cover the application of tariffs for scheduled flights on a particular route or routes where those tariffs were fixed by bilateral or multilateral agreements concluded between air carriers, provided that the conditions laid down in that article are satisfied. It is necessary therefore to look for the interpretative criteria which might enable the national court to apply Article 86 in an appropriate case.

39 In order to determine whether an airline operating scheduled flights has a dominant position on the market it is necessary first to define the relevant market in transport services. In that regard, two possible approaches emerged during the hearings before the Court: the first is that the sector of scheduled flights constitutes a separate market; the second that alternative possibilities, such as charter flights, the railways and road transport, should be taken into account, as well as scheduled flights on other routes which might serve as substitutes.

40 The test to be employed is whether the scheduled flight on a particular route can be distinguished from the possible alternatives by virtue of specific characteristics as a result of which it is not interchangeable with those alternatives and is affected only to an insignificant degree by competition from them.

41 The application of that test does not necessarily yield identical results in the various cases which may arise; indeed, some airline routes are in a situation where no effective competition is likely to arise. In principle, however, and in particular as far as intra-Community routes are concerned, the economic strength of an airline on a route served by scheduled flights may depend on the competitive position of other carriers operating on the same route or on a route capable of serving as a substitute.

42 Where the competent national authority finds that an air carrier has a dominant position on the relevant market, it must then consider whether the application of tariffs imposed by that undertaking on other air carriers operating on the same route constitutes an abuse of that dominant position. Such an abuse may be held to exist in particular where such imposed tariffs must be regarded as unfair conditions of transport with regard to competitors or with regard to passengers.

43 Such unfair conditions may be due in the first place to the rate of tariffs imposed being excessively high, or, in order to eliminate from the market undertakings which are not parties to the agreement, excessively low. Certain interpretative criteria for assessing whether the rate employed is excessive may be inferred from Directive 87/601/EEC, which lays down the criteria to be followed by the aeronautical authorities for approving tariffs. It appears in particular from Article 3 of the directive that tariffs must be reasonably related to the long-term fully allocated costs of the air carrier, while taking into account 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.

44 Unfair conditions may also consist in the exclusive application of only one tariff on a given route. Where the exclusive application of only one tariff arises because of the conduct of an undertaking in a dominant position, and not because of the policy of the aeronautical authorities, it enables that undertaking to eliminate all price competition by means of an abusive practice.

45 If it is found that an undertaking has abused its dominant position on the market and that trade between Member States may be affected, the conduct of the undertaking concerned falls under the prohibition laid down in Article 86. In the absence of action by the Commission, pursuant to its powers under the Treaty and the rules implementing the Treaty, to put an end to the infringement or impose sanctions, the competent national administrative or judicial authorities must draw the inferences from the applicability of the prohibition and, where appropriate, rule that the agreement in question is void on the basis, in the absence of relevant Community rules, of their national legislation.

46 As regards the application of Article 86 of the Treaty, it should therefore be stated in reply to the questions referred to the Court for a preliminary ruling that the application of tariffs for scheduled flights on the basis of bilateral or multilateral agreements may, in certain circumstances, constitute an abuse of a dominant position on the market in question, in particular where an undertaking in a dominant position has succeeded in imposing on other carriers the application of excessively high or excessively low tariffs or the exclusive application of only one tariff on a given route.

(d) Articles 5 and 90

47 The third question is concerned with the legality of approval by the supervisory body of a Member State of tariffs contrary to Article 85(1) or Article 86 of the Treaty. The national court asks in particular whether such approval is not incompatible with the second paragraph of Article 5 and Article 90(1) of the Treaty, even if the Commission has not objected to such approval under Article 90(3).

48 In that connection it should be borne in mind in the first place that, as the Court has consistently held, while it is true that the competition rules set out in Articles 85 and 86 concern the conduct of undertakings and not measures of the authorities in the Member States, Article 5 of the Treaty nevertheless imposes a duty on those authorities not to adopt or maintain in force any measure which could deprive those competition rules of their effectiveness. That would be the case, in particular, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or reinforce their effects (see, most recently, the judgment of 1 October 1987 in Case 311/85 *Vereniging van Vlaamse Reisbureaus* v *Sociaale Dienst van de plaatselijke en gewestelijke Overheidsdiensten* [1987] ECR 3801).

49 It must be concluded as a result that the approval by the aeronautical authorities of tariff agreements contrary to Article 85(1) is not compatible with Community law and in particular with Article 5 of the Treaty. It also follows that the aeronautical authorities must refrain from taking any measure which might be construed as encouraging airlines to conclude tariff agreements contrary to the Treaty.

50 In the specific case of tariffs for scheduled flights that interpretation of the Treaty is borne out by Article 90(1) of the Treaty, which provides that in the case of undertakings to which Member States grant special or exclusive rights — such as rights to operate on an air route alone or with one or two other undertakings — Member States must not enact or maintain in force any measure contrary to the competition rules laid down in Articles 85 and 86. Moreover, it is stated in the preambles to Council Regulations Nos 3975 and 3976/87 that those regulations do not prejudge the application of Article 90 of the Treaty.

51 Admittedly, in the preamble to Regulation No 3976/87 the Council expressed a desire to increase competition in air transport services between Member States gradually so as to provide time for the sector concerned to adapt to a system different from the present system of establishing a network of agreements between Member States and air carriers. However, that concern can be respected only within the limits laid down by the provisions of the Treaty.

52 Whilst, as a result, the new rules laid down by the Council and the Commission leave the Community institutions and the authorities in the Member States free to encourage the airlines to organize mutual consultations on the tariffs to be applied on certain routes served by scheduled flights, such as the consultations provided for in Directive 87/601/EEC, the Treaty nevertheless strictly prohibits them from giving encouragement, in any form whatsoever, to the adoption of agreements or concerted practices with regard to tariffs contrary to Article 85(1) or Article 86, as the case may be.

53 The national court also refers to Article 90(3), but that provision appears to be of no relevance for the purpose of resolving the problems raised by this case. That provision places the Commission under a duty to ensure the application of the provisions of Article 90 and to address, where necessary, appropriate directives or decisions to Member States; it does not, however, preclude the application of paragraphs (1) and (2) of that article where the Commission fails to act.

54 In contrast, Article 90(2) might entail consequences for decisions by the aeronautical authorities with regard to the approval of tariffs. That provision provides *inter alia* that undertakings entrusted with the operation of services of general economic interest are to be subject to the competition rules contained in the Treaty, in so far however as the application of such rules does not obstruct the performance of the particular tasks assigned to them.

55 That provision may be applied to carriers who may be 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. It is necessary in each case for the competent national administrative or judicial authorities to establish whether the airline in question has actually been entrusted with the task of operating on such routes by an act of the public authority (judgment of 27 March 1974 in Case 127/73 *Belgische Radio en Televisie* v *Sabam* ('BRT-II') [1974] ECR 313).

56 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.

57 Indeed, where there is no effective transparency of the tariff structure it is difficult, if not impossible, to assess the influence of the task of general interest on the application of the competition rules in the field of tariffs. It is for the national court to make the necessary findings of fact in that connection.

58 It follows from the foregoing considerations that it should be stated in reply to the third question submitted by the national court that Articles 5 and 90 of the EEC Treaty must be interpreted as:

(i) prohibiting the national authorities from encouraging the conclusion of agreements on tariffs contrary to Article 85(1) or Article 86 of the Treaty, as the case may be;

(ii) precluding the approval by those authorities of tariffs resulting from such agreements;

(iii) not precluding a limitation of the effects of the competition rules in so far as it is indispensable for the performance of a task of general interest which air carriers are required to carry out, provided that the nature of that task and its impact on the tariff structure are clearly established.

Costs

59 The costs incurred by the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesgerichtshof, by order of 30 January 1986, hereby rules:

(1) Bilateral or multilateral agreements regarding airline tariffs applicable to scheduled flights are automatically void under Article 85(2):

(i) in the case of tariffs applicable to flights between airports in a given Member State or between such an airport and an airport in a non-member country: where either the authorities of the Member State in which the registered office of one of the airlines concerned is situated or the Commission, acting under Article 88 and Article 89 respectively, have ruled or recorded that the agreement is incompatible with Article 85;

(ii) in the case of tariffs applicable to international flights between airports in the Community: where no application for exemption of the agreement from the prohibition set out in Article 85(1) has been submitted to the Commission under Article 5 of Regulation No 3975/87; or where such an application has been made but received a negative response on the part of the Commission within 90 days of the publication of the application in the Official Journal; or again where the 90-day time-limit expired without any response on the part of the Commission but the period of validity of the exemption of six years laid down in the aforesaid Article 5 has expired or the Commission withdrew the exemption during that period.

(2) The application of tariffs for scheduled flights on the basis of bilateral or multilateral agreements may, in certain circumstances, constitute an abuse of a dominant position on the market in question, in particular where an undertaking in a dominant position has succeeded in imposing on other carriers the application of excessively high or excessively low tariffs or the exclusive application of only one tariff on a given route.

(3) Articles 5 and 90 of the EEC Treaty must be interpreted as:

(i) prohibiting the national authorities from encouraging the conclusion of agreements on tariffs contrary to Article 85(1) or Article 86 of the Treaty, as the case may be;

(ii) precluding the approval by those authorities of tariffs resulting from such agreements;

(iii) not precluding a limitation of the effects of the competition rules in so far as it is indispensable for the performance of a task of general interest

which air carriers are required to carry out, provided that the nature of that task and its impact on the tariff structure are clearly established.

Due Koopmans Joliet O'Higgins Grévisse

Slynn Mancini Kakouris Schockweiler

Moitinho de Almeida Rodríguez Iglesias Diez de Velasco Zuleeg

Delivered in open court in Luxembourg on 11 April 1989.

J.-G. Giraud
Registrar

O. Due
President