Air Transport Competition in the European Economic Community: The Antitrust Procedures

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TABLE OF CONTENTS

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INTRODUCTION

Until 1987, the air transport sector in the European Economic Community was the only one of two sectors of the economy (the other being maritime) excluded from the common transport policy. The distinctive features of the industry entailed the necessary subjection to a separate corpus of rules, but it was not until 30 years later since the inception of the Treaty of Rome in 1957 that specific regulations to implement the competition principles of the Treaty began to emerge. Various Council Regulations had been adopted for transport in general before then, but the air transport sector was excluded for reasons that are beyond the present scope.[1]

Article 84(2) of the Treaty provides the legal basis for the Council to adopt specific regulations to implement the competition provisions of Articles 85 and 86. Article 84(2) states: "The Council may, [acting by a qualified majority] decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport."[2]

In the period prior to the introduction of specific regulations, enforcement of the competition principles was implemented through Articles 88 and 89 of the Treaty, also known as the "Transitional Articles." Article 88 vests in Member States the authority to enforce the competition principles. Article 89 on the other hand, empowers the Commission to exercise a broader default authority to initiate appropriate measures to require a violation of Articles 85 and 86 to cease. The 1986 decision in *Ministere Public v. Asjes*,[3] more commonly known as the *Nouvelles Frontieres' Case*, provided a significant impetus for the Council to exercise its authority provided in Article 84(2). Together with the continuing pressures arising from the liberalization and market harmonization commitment, the Council was left with little room to delay the adoption of some specific regulations. The following four measures were therefore adopted in 1987, comprising two Council Regulations, a Directive and a Decision:

(1) Council Regulation 3975/87 - lays down the general framework and the procedures for applying the competition provisions of Community law with respect to air transport.[4]

(2) Council Regulation 3976/87 - lays down the authority for the Commission to exempt certain categories of undertakings, agreements, decisions

1. *See* N. Argyris, *The EEC Rules of Competition and The Air Transport Sector*, 26 COMMON MKT. L. REV. 5 (1989).

2. Words in bracket amended by Single European Act 1986 (EEC), Art.16(5), 1987 O.J. (L 169) 1.

3. Joined Cases 209-213/84, 1986 E.C.R. 1425, 3 C.M.L.R. 173 (1986).

4. Council Regulation 3975/87, 1987 O.J. (L 374) 1; amended by, Council Regulation 1284/91, 1991 O.J. (L 122) 2.

and concerted practices from the competition rules.[5]

(3) Council Directive 87/601 - lays down the procedures for the submission and approval of air fares.[6]

(4) Council Decision 87/602 - lays down the provisions to regulate the sharing of passenger capacity between Community airlines and access to certain Community routes which the airlines do not already operate.[7]

The measure adopted by the Council for the concern of this brief comment is the core Regulation 3975/87 which details the antitrust rules of the European Community for the air transport sector. The further concern of the present note focuses on the subsequent provision adopted by the Commission empowered by Article 19 of Regulation 3975/87. The Commission adopted Regulation 4261/88 to give further and detailed effect to Articles 3, 5 and 16 of the core Regulation which deal with the procedures relating to complaints, applications and hearings.

COUNCIL REGULATION 3975/87

Several provisions of the core Regulation are worthy of note. The scope of the of the Regulation is restricted by Article 1 only to "international air transport between Community airports." This has the effect of excluding air services where one of its originating or destination point involves a non-Community airport. It also has the effect of excluding domestic air transport. This interpretation has recently been impliedly reinforced by a decision of the Court of Justice, which held that, "[i]t must be inferred. . .that *domestic air transport* and air transport to and from *airports in non-member countries* continue to be subject to the transitional provision laid down in Articles 88 and 89."[8]

Articles 3-5 detail the procedures for the submission of a complaint

5. Council Regulation 3976/87, 1987 O.J. (L 374) 9. This Regulation was subject to an expiry date, and it expired on January 31, 1991. The Council, however, felt it necessary in the transition to a more competitive environment to extend the exempting provisions. *See* now Council Regulation 2344/90, 1990 O.J. (L 217) 15. This regulation will now expire on December 31, 1992.

6. Council Directive 87/601, 1987 O.J. (L 374) 12. As with the exempting Regulation, this Directive expired on January 31, 1991. The Council has now adopted an amending Regulation to replace the Directive. *See* now Council Regulation 2342/90, 1990 O.J. (L 217) 1. This expires on December 31, 1992.

7. Council Decision 87/602, 1987 O.J. (L 374) 19. This Directive expired on January 31, 1991, and has now been re-adopted in the form of a Regulation. *See* Council Regulation 2343/90, 1990 O.J. (L 217) 8. This expires on December 31, 1992. For a fuller treatment of these provisions, in particular the shift from the use of a Directive and a Decision to Regulations which reflects the urgency of the harmonization process, *see* Jeffrey Goh, *Regulating The Skies of Europe: Air Transport Competition* 27 EUROPEAN TRANSPORT LAW 295 (1992).

8. Case 66/86, Ahmed Saeed Flugreisen & Silver Line Reiseburo v. Zentrale Zur Bekampfung Unlauteren Wettbewerbs, 1989 E.C.R. 803, 845, 4 C.M.L.R. 102, 131 (1990) (Emphasis added).

and its investigation process. Article 3 sets out the categories of complaint and complainants, which includes Member States and natural or legal persons with a legitimate interest. The Commission, however, reserves the right to initiate a complaint and "to initiate procedures to terminate any infringement of the provisions of Article 85(1) or 86 of the Treaty" following consultations with the Advisory Committee on Agreements and Dominant Positions in Air Transport.[9] It is further provided by Article 3(2) that undertakings or associations of these may apply to the Commission for a certification that the agreement or conduct concerned would not be prohibited under Article 85(1) or 86 of the Treaty.

Article 5, on other hand, provides for the procedures in which objections may be submitted by interested parties in the air transport sector. Where the Commission is satisfied from the evidence available that an enforcement order cannot be justified, then it must reject the complaint. In the event of a positive finding of an infringement, it may, by Article 4(1), issue a Commission Decision to require that the infringement be terminated.

The provisions for the hearings system are contained within Article 16 of the core Regulation. Before the Commission adopts a decision on the complaint, it shall "give the undertakings concerned the opportunity of being heard [and it] may also hear other natural or legal persons . . . when they show a sufficient interest."[10]

COMMISSION REGULATION 4261/88

The foregoing provisions create the general framework within which complaints for the violation of competition principles may be submitted. They also provide the general regulatory structure for the Commission to deal with applications under Article 3(2) with respect to their submission and determination. An implementing Regulation has since been adopted by the Commission for a detailed implementation of Articles 3(1), 3(2), 5, 16(1) and 16(2) of the core Regulation.

The aim of this Regulation seems to be three-fold. In the first place, it seeks to give a detailed effect yet by way of simplified procedures for the submission of *complaints* for a suspected infringement of the competition provisions (i.e. Article 3(1)) and the procedures for the submission of *applications* to the Commission for a certification that Article 85(1) or 86 does not apply to the agreement or conduct in question (i.e., Article 3(2)). The second objective of the Regulation is to seek to set up an effective hearings system for *applications* submitted in accordance with Article 3(2) to allow the other undertaking or undertakings to the agreement to

9. Council Regulation 3975/87, art. 8(3), 1987 O.J. (L 374) 1.
10. Council Regulation 3975/87, arts. 16(1)-(2), 1987 O.J. (L 374) 1.

put its case forward, given that some applications may have important legal consequences for each undertaking. Third, the Regulation sets up a mechanism for third-party participation provided, of course, sufficient interest can be established.

I. THE COMPLAINTS AND APPLICATIONS PROCEDURES

The Regulation contains two sections, the first dealing with the *complaints* and *applications* procedures whilst the second is concerned with the hearings procedures. The *complaints* provisions can be dealt with briefly. Article 1 sets out the requirement that complaints must be in writing and the range of complainants entitled to complain, namely, Member States or, natural or legal persons who claim a legitimate interest.

Articles 2 and 3 of Regulation 4261/88 are concerned with the *applications* procedures for a negative clearance or a disapplication of the competition rules. The negative clearance procedure under Article 2 is only available for the air transport sector, and it provides a useful means for an undertaking or undertakings to an agreement to seek the opinion of the Commission on whether the agreement in question or the behaviour of the arrangement is within the purview of Article 85(1) or 86. In the application to the Commission, the applicant will be required to provide reasons as to why Articles 85(1) and 86 are inapplicable, that is to say why the agreement does not have the object or effect of preventing, restricting or distorting competition within the Community to an appreciable extent, or that the agreement concerned does not entail a dominant position. On receiving an application for negative clearance, the Commission may certify to advise the undertaking concerned that, *on the basis of the facts in its possession*, there are no grounds on which the Commission will apply Article 85(1) or 86 against the agreement or its behaviour.

Notwithstanding that the negative clearance procedures provide an important channel for securing the opinion of the Commission, the Commission adopts a policy of discouraging such applications in cases where the agreements *clearly* do not come within the scope of either Article 85(1) or 86. In addition to simplifying procedures further, this attracts the benefits of expediency on matters relating to European competition. At any rate, where an application has been submitted, and the agreement is one which is clearly not within the competition rules, the Commission does not usually issue a negative clearance.[11]

11. A parallel concept was conceived in the United States when, in the 1930s, regulatory commissions were created to whom business undertakings could routinely turn for *advance advice* on the legality of a particular agreement or transaction.

> For many business managers, this was the great virtue of administrative regulation. Where litigation was formal and governed by elaborate rules of procedure, advance advice would be less formal and relatively unburdened by red tape. Where litigation

It may be useful to note that in an application, the Commission is often engaged in a process of negotiation with the applicant. This is true in cases where the Commission feels that the agreement would fall foul of the competition principles but that a negotiated settlement could be achieved by extracting assurances from the undertakings concerned. In most cases, obtaining those assurances are unlikely to be difficult since a disagreement will probably lead to the Commission applying its formal authority under the competition rules. A helpful illustration can be found in the British Airways and British Caledonian merger proposal in 1987. The merger had been the subject of an earlier investigation by the United Kingdom Monopolies and Mergers Commission (MMC). The European Commission was, however, of the opinion that the assurances obtained by the MMC were inadequate. It therefore attempted to obtain, and successfully so, further commitments from British Airways that the merger would not operate against the competition requirements of the European Community.[12]

Article 5 of Council Regulation 3975/87 is the parent provision for an undertaking or undertakings to an agreement to apply to the Commission to give effect to Article 85(3) of the Treaty in relation to the agreement in question. Article 85(3) states,

> The provisions of [Article 85(1)] may, however, be declared inapplicable in the case of-
>
> (a) any agreement or category of agreements between undertakings;
>
> (b) any decision or category of decisions by associations of undertakings;
>
> (c) any concerted practice or category of concerted practices;
>
> which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not-
>
> (a) impose on the undertakings concerning restrictions which are not indispensable to the attainment of these objectives;
>
> (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[13]

Articles 2 and 3 of Regulation 4261/88 therefore spell out the procedures to be adopted to allow agreements which restrict competition to continue on the ground that these agreements are capable of generating

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looked to past acts and toward punitive resolutions, advance advice looked to the future and sought to be preventive. Where litigation occurred spasmodically, advance advice went on continuously.

THOMAS K. MCCRAW, PROPHETS OF REGULATION (1984)

12. Press Release ISEC/7/88 (Mar. 10, 1988), Re the Merger of British Airways & British Caledonian Merger 4 C.M.L.R. 258 (1988).

13. Note that an application for an order to apply Article 85(3) is relevant only to cases which fall within the scope of Article 85 alone. An exemption cannot be obtained for Article 86 by this means.

some economic advantages, particularly those relating to technical and economic progress.[14] What, however, appears to be lacking is a guideline as to the degree of economic advantage required before the Commission would apply Article 85(3) of the Treaty. It could, nonetheless, be presumed that the Commission would be seeking economic benefits that are likely to be substantial such that they outweigh the benefits that may be derived from greater competition. In all cases, however, the Commission would be expected to deal with each application in accordance with its particular circumstances or merits.

The applicant will be required to state in the application form several reasons as to why the Commission should apply Article 85(3) to the agreement. In particular, the Commission will need to be informed of the ways in which the agreement in question would contribute to improving and/or promoting economic progress, and that the restrictive provisions of the agreement are necessary to achieve that progress. The applicant would also be required to indicate the level of benefits that could be enjoyed by the consumer, or user in the case of air transport.

The procedures adopted by the Commission in considering whether to apply Article 85(3) to the agreement concerned are two-fold.[15] Where the Commission does not entertain any serious doubts as to the applicability of Article 85(3), it need not take any further action. On this basis, Article 5(3) of the core Regulation provides that the applicant will be entitled to presume that the application to disapply Article 85(1) has been accepted, providing, however, 90 days has elapsed since the publication of that application in the *Official Journal of the European Communities*.

Where, however, there are serious doubts as to the applicability of Article 85(3), the Commission will be required to notify the applicant. In these cases, it is either because the Commission is not convinced of the economic advantages to be gained so as to apply Article 85(3), or because more information was required. Following a further consideration of the application and further representations, the Commission may decide either to uphold its original decision, or it may decide to apply Article 85(3) to the agreement concerned. In the latter situation, the Commission must stipulate what the period of that application is to be. In addition, the Commission may decide to impose obligations or attach conditions to its decision. At any rate, the Commission has the reserved authority to amend or revoke its decision, particularly in circumstances where the decision had been premised on incorrect information being supplied or where there has been a material change in the facts since its decision.

14. For recent examples see, Re Aer Lingus/Deutsche Lufthansa, 1990 O.J. (C 108) 8; Re SABENA World Airlines, 1990 O.J. (C 82) 7; Re British Midland Airways/SABENA, 1990 O.J. (C 29) 3; Re London City Airways/SABENA, 1989 O.J. (C 204) 12.

15. Commission Regulation 4261/88, Complementary Note, Part III, 1988 O.J. (L 376) 10.

In cases where the Commission is minded to apply Article 85(3), it must submit a preliminary draft of its final decision to the Advisory Committee on Agreements and Dominant Positions in Air Transport. This prior consultation is a mandatory pre-requisite before the Commission adopts its final decision. The final decision will then be published in the *Official Journal of the European Communities*.

II. The Hearings Procedures

Section II of the Commission Regulation 4261/88 deals with the hearings to be conducted by the Commission. The holding of a hearing process is mandatory on the part of the Commission prior to its consultation with the Advisory Committee so as to allow representations to be made by the applicant and other interested parties. This process has been designed for objections to be raised against the application, either in a case of negative clearance or an application of Article 85(3), and to allow the applicant to make further representations in the light of those objections.

Article 8 of this Regulation requires the Commission to afford third parties with a sufficient interest the opportunity to put forward their views. This representation, however, shall only be made in writing and not orally. A particularly interesting provision in the hearings procedures that provokes the mind is that relating to the conduct of the hearing itself. Article 12(3) stipulates that "hearings shall not be public." This allows the Commission to hear the cases of each party interested in the application behind closed doors. The basis for this approach seems to lie with the need to protect the legitimate interests of the parties and their business secrets. The Commission is therefore under a duty to ensure that the entire process does not unnecessarily prejudice the well-being of the parties involved in the hearing process. In order to expedite this process, the application form for a negative clearance or the disapplication of Article 85(1) or 86 is sectionalized so as to draw the attention of the Commission to the applicant's request to protect any of its interests that may be harmed. There is, however, a requirement to justify the request.

It must seem, from a first impression, that this lack of transparency, contrary to the widely adopted policy and practice in the Community, is legitimated only in so far as it furthers the objectives of professional secrecy. Short of this claim, it is unlikely that the absence of openness will withstand the criticisms that can be levied at a process buried in secrecy.

III. Supply of Information

A brief reference was made above to the supply of information by the applicant to the Commission. Some observations may be in order. The

Commission places considerable emphasis on the need to provide complete and accurate information. A decision either to issue a negative clearance or to declare the application of Article 85(3) is usually based on the facts that the Commission possesses. The effect of providing incomplete or incorrect information would render ineffective the order of negative clearance, or voidable in the case of a decision to apply Article 85(3) to the agreement. To ensure that the Commission is supplied with all available evidence, it is conferred with some very effective powers of enforcement. Article 12(1)(a) of Regulation 3975/87 allows the Commission to impose pecuniary sanctions from 100 ECUs to 5000 ECUs for the provision of incorrect or misleading information regardless of whether it had been provided intentionally or negligently. The enforcement authority of the Commission in this respect carries with it considerable significance, not least because it encourages greater vigilance on the part of the applicant seeking to obtain a decision in its favour from the Commission.

The Commission, however, is minded of the extensive scope that "intentionally and negligently" entails. The powers under this provision will be exercised only in circumstances where false or grossly inaccurate information has been supplied by the applicant; or in cases where there has been a suppression of information; or the deliberate provision of false opinions.[16]

CONCLUSION

This brief comment has been intended to shed some light on the technical requirements of Community provisions on antitrust procedures in air transport, namely, that relating to negative clearance and an application of Article 85(3) of the 1957 Treaty. Whilst this Commission Regulation represents only an implementing provision, its significance stems from the concern of the Community for achieving a very large degree of uniformity in competition matters relating to air transportation, at a time when the liberalization process is gaining momentum. In the move towards greater competition and eventually the harmonization of the various independent air transport markets, the Council and the Commission have adopted several provisions that necessarily reflect the urgency of wider compliance by member countries with the policy objectives of the Community in air transport competition. The journey towards that end has seen not only a proliferation of Community provisions to enable a more effective process of surveillance by Community and national institutions, but has also widened the scope of scrutiny by including parties with legitimate interests from other member countries.

The distinctive features of the air transport industry, illustrated in par-

16. *Id.*, at Part VI.

ticular by the concept of air space sovereignty and thus the control over market access by national governments, are issues of great importance in the move towards greater liberalization and harmonization. It is unlikely that member countries tended to adopt a protectionist philosophy would be prepared to surrender an important concept of national identity and sovereignty without raising objections of considerable magnitude.

To a large extent, it may be true that Community policy on competition has been designed to achieve greater market harmonization in preparation for the eventual political unity, but the political sensitivity of some issues attached to several sectors of the economy is likely to slow down that process. There is at the same time an equal truth that the Council and the Commission have not been slow to avail themselves to Community instruments with more significant impact, and thus to step up the gear for speedier harmonization. In particular, and incrementally, the Commission has been vested with more regulatory and investigatory authority in order to perform its increasingly central role of harmonizing the economies of the Community. And this Regulation, adopted by the Commission, represents only one of the several far-reaching steps taken to achieve greater uniformity on the one hand, with the consequential effect on the other hand of widening the range of participants in the regulation air transport competition.

APPENDIX

TREATY OF ROME 1957.

ARTICLE 84

(1) The provisions of this Title [Transport] shall apply to transport by rail, road and inland waterway.

(2) The Council may [acting by a qualified majority] decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

ARTICLE 85

(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which-

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

(3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of-

: any agreement or category or agreements between undertakings;
: any decision or category of decisions by associations of undertakings;
: any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not-

(a) impose on the undertakings concerning restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

ARTICLE 86

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in-

(a) directly or indirectly imposing unfair purchase or selling prices or unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of the consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

ARTICLE 87

(1) Within three years of the entry into force of this Treaty the Council shall, acting unanimously on a proposal from the Commission after consulting the Assembly, adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86.

If such provisions have not been adopted within the period mentioned, they shall be laid down by the Council, acting unanimously on a proposal from the Commission and after consulting the Assembly.

ARTICLE 88

Until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in Member States, shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86.

ARTICLE 89

(1) Without prejudice to Article 88, the Commission shall, as soon as it takes up its duties, ensure the application of the principles laid down in Articles 85 and 86. On application by a Member State or on its own initiative, and in co-operation with the competent authorities in the Member States, who shall give it their assistance, the Commission shall investigate cases of suspected infringement of these principles. If it finds there has been an infringement, it shall propose appropriate measures to bring it to an end.

(2) If the infringement is not brought to an end, the Commission shall rec-

ord such infringement of the principles in a reasoned decision. The Commission may publish its decision and authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.