COMMISSION DECISION

of 23 January 1985

relating to a proceeding under Article 11 (5) of Council Regulation No 17 (IV/C/31.163)

(Only the Greek text is authentic)

(85/121/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty [1], as last amended by the Act of Accession of Greece, and in particular Article 11 (5) thereof,

Whereas :

1. Olympic Airways AE is an airline wholly owned by the Greek Government and having its principal office at Avenue Sygros 96, Athens 404, Greece. Its main activity consists of the provision of air transport services. It also provides handling services for commercial aircraft and passengers at Greek airports. It enjoys a monopoly in the provision of these handling services. Handling services consist principally of coordinating and technical services required by an aircraft which lands and deposits passengers at an airport, such as baggage handling, marshalling of the aircraft to a point, the provision of electric power, of steps, cleaning facilities and so on.

2. On 28 February 1984 the Commission received a complaint from the Association des Compagnie Aériennes de la Communauté (hereinafter ACE) alleging that Olympic Airways, had, by increasing its charges for handling services by nearly 50 %, abused its dominant position. ACE also complained that the manner of implementation of this price increase discriminated arbitrarily between different classes of customers.

3. In order to determine whether the prices charged by Olympic Airways are so high as to be excessive or unfair and therefore abusive, Olympic Airways was requested, under Article 11 of Regulation No 17, to supply certain information on *inter alia* its costs, its monopoly or quasi-monopoly and the manner in which price increases were implemented. This letter was dated 8 May 1984, and a time limit of one month from date of receipt of the letter was indicated.

4. By letter dated 28 May 1984 Olympic Airways stated that they did not interpret Articles 85 and 86 of the Treaty as having as yet any force or application in the air transport sector. Consequently Olympic Airways could not have committed any infringement under those Articles. An incomplete and general reply was given to one of the questions asked.

5. 1. Regulation No 17 applies to these services since they do not form part of the transport market within the meaning of Council Regulation No 141 of 26 November 1962 exempting transport from the application of Council Regulation No 17 [2]. Regulation No 17 applies to all anti-competitive practices within the meaning of Articles 85 and 86 in the transport sector only in so far as Regulation No 141 does not exclude them. The anti-competitive practices excluded by Regulation No 141 were confined to certain practices consisting in the provision of air transport as such. This can be seen from the third recital of Regulation No 141 which states that 'the distinctive features of transport make it justifiable to exempt from the application of Regulation No 17 only agreements, decisions and concerted practices directly relating to the provision of transport services. Thus only certain agreements, decisions and concerted practices and, by analogy, anti-competitive practices within the meaning of Article 86, which consist in themselves in the provision of a transport service, are covered by Regulation No 141. Handling services are not as such a transport service and are therefore covered by Regulation No 17.

[1] OJ No 13, 21. 2. 1962, p. 204/62.

[2] OJ No 124, 28. 11. 1962, p. 2751/62.

2. There is no legal basis for claiming, as Olympic Airways claims, that Articles 85 and 86 do not apply to air transport.

Giving judgment in Case 167/73 (*Commission v. French Republic*)(1) the Court of Justice upheld the Commission's view that, although under Article 84 (2) sea and air transport were not covered by the provisions of Title IV relating to the common transport policy until such time as the Council decided to include them, nevertheless they were, on the same basis as other modes of transport, subject to the general provisions of the Treaty. The judgment in Case 156/77 (*Commission v. Belgium*)(2) confirms that these provisions include in particular the competition rules. The air transport sector is accordingly subject to the provisions of Articles 85 and 86.

6. Under Article 11 (1) of Regulation No 17, the Commission, in carrying out the duties assigned to it by Article 89 of the EEC Treaty, may obtain all necessary information from undertakings. By Article 11 (5) where an undertaking does not supply the information requested, or supplies incomplete information, the Commission shall by decision require the information to be supplied.

7. The information which the Commission requested from Olympic Airways by its letter dated 8 May 1984 is necessary within the meaning of Article 11 (1) of Regulation No 17 in order to enable the Commission to ascertain all the facts relevant to the suspected infringement and in particular to ascertain whether the undertaking is in a dominant position in a substantial part of the common market and whether the prices charged for handling services are excessive.

8. Having regard to the nature of the information required in its letter of 8 May 1984 and the time which Olympic Airways has already had to answer, the Commission considers it appropriate to set the time limit for the supply of information at four weeks from the date of notification of this Decision.

9. Under Articles 15 (1) (b) and 16 (1) (c) of Regulation No 17 the Commission may by decision addressed to undertakings :

(a) impose fines of from 100 to 5 000 ECU where, intentionally or negligently, they supply incorrect information in response to a request made pursuant to Article 11 (3) or (5) or do not supply information within the time limit fixed by a decision taken under Article 11 (5);

(b) impose periodic penalty payments of from 50 to 1 000 ECU per day, calculated from the date appointed by the decision, in order to compel them to supply complete and correct information which it has requested by decision taken pursuant to Article 11 (5).

In view of the size of Olympic Airways and the circumstances of its refusal to supply information the Commission considers that, subject to any written or oral observations from Olympic Airways, a periodic payment of 1 000 ECU for each day the infringement continues would by appropriate,

HAS ADOPTED THIS DECISION :

Article 1

Olympic Airways is required to provide, within four weeks of the date of notification of this Decision, the information set out in the Annex.

Article 2

This Decision is addressed to Olympic Airways AE, Avenue Sygros 96, Athens 404, Greece.

Proceedings against this Decision may be instituted in the Court of Justice of the European Communities in Luxembourg in accordance with Articles 173 and 185 of the Treaty.

Done at Brussels, 23 January 1985.

For the Commission

Peter SUTHERLAND

Member of the Commission

(1) 1974 ECR 359.
(2) 1978 ECR 1881.

ANNEX

1. Indicate the number of airports which are used by commercial airlines in Greece.

2. In how many of these does Olympic Airways alone provide handling services ?

3. Is it open to any other airline to provide handling services at any Greek airport for itself and *any other airline* ? If not, are the obstacles legal or economic ? If legal provide the text of the laws in question.

4. For the years 1982 and 1983 indicate the fixed and variable costs of providing handling services at Athens airport and at other Greek airports.

5. What provision is made, if any, for deducting the proportion of total costs attributable to providing handling services to Olympic Airways' own airplanes ?

6. Pricelist 'A' showing Basic Charges for Passenger Aircraft, effective from 1 April 1984, shows charges in basic handling services for heavier aircraft averaging 50 % above the 1983 price. Have costs incurred in providing these services increased by a similar amount ? What other reasons are there for these increases ?

7. On the other hand, handling services for small and light aircraft show increases for the period from 1 April 1984 by an average of 35 %. Can you explain why the average increase for smaller and lighter aircraft is so much lower than that for heavier aircraft ?

8. Can you explain why the proposed 50 % increase applied with effect from 1 January 1984 for some airlines and for others from 1 April 1984 ?