II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 26 February 1992

relating to a procedure pursuant to Articles 85 and 86 of the EEC Treaty (IV/33.544, British Midland v. Aer Lingus)

(Only the English text is authentic)

(92/213/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to 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 (1),

Having regard to the complaint lodged by British Midland Airways Limited on 26 April 1990 against Aer Lingus plc,

Having regard to Commission Decision of 4 June 1991 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission, pursuant to Article 16 (1) of Regulation (EEC) No 3975/87, read in conjunction with Commission Regulation (EEC) No 4261/88 of 16 December 1988 on the complaints, applications and hearings provided for in Council Regulation (EEC) No 3975/87 (2),

After consulting the Advisory Committee on Agreements and Dominant Positions in Air Transport,

(1) OJ No L 374, 31. 12. 1987, p. 1.
(2) OJ No L 376, 31. 12. 1988, p. 10.

Whereas :

I. FACTS

A. The parties

(1) Aer Lingus is the national airline of Ireland. It operates a fleet of 31 jet (all but three of which are used for short- and medium-haul services) and turboprop aircraft. In 1990, it carried over 4 million scheduled revenue passengers (over 3 million on European services) and performed in excess of 4 billion revenue passenger kilometers (more than 1,7 billion on European services). It employs over 7 000 workers. Total revenues from air transport over 1990 amounted to almost US$ 700 million, out of a total turnover in excess of US$ 1,2 billion, and net profits were over US$ 8 million (as compared with US$ 52 million during 1989).

(2) British Midland is the main operating company of the Airlines of Britain Holdings plc which for 25 % belongs to SAS. It operates a fleet of 23 jet aircraft, all for services within the United Kingdom and to the neighbouring Member States. It employs about 2 000 workers. In 1990 it carried over 3 million passengers. Total revenues over 1990 exceeded US$ 300 million but the company lost several million US$. British Midland is among the fastest-growing European airlines.

B. The refusal to interline

(3) Interlining is hailed as one of IATA's major achievements. It essentially consists of an agreement *(Multilateral Interline Traffic Agreement — MITA,* defined in IATA Resolution 780), pursuant to which airlines are authorized to sell each other's services. As a result a single ticket can be issued which comprises segments to be performed by different airlines. Applicable tariffs and conditions are those of the party over whose route the passenger is to be carried. The airline which issues the ticket collects the price for all segments from the passenger. The issuing airline then pays the fare due to the carrying airline (less a 9 % interline service charge as compensation for expenses incurred in selling, handling, servicing and processing interline traffic) through the IATA clearing house.

In order to become a party to the MITA an interested airline (which must not necessarily be an IATA member) makes an application to IATA which is circulated to all participating airlines. Traditionally agreement or 'concurrence' to an application is hardly ever refused, the exception being where currency convertibility or the financial stability of the applicant are not assured. In the latter case airlines may conclude specific agreements, providing e.g. for unilateral interlining (i.e. that the applicant accepts the flag carriers' authority to issue tickets on its behalf but not vice versa).

The interlining system benefits from the participation of the vast majority of the world's airlines, accounting for approximately 95 % of all scheduled traffic.

(4) In addition airlines accept to change tickets at passengers' request. This technically relates to 'voluntary changes' rather than 'interlining' (it is governed by IATA Resolution 736 on voluntary changes to tickets) but normally operates in conjunction with interlining. Where the carrier making the change is not the issuing carrier or the carrier designated as carrier for the segment concerned, an endorsement is required from the issuing or designated carrier. However, many airlines have agreed to waive the requirement of endorsement between each other.

(5) The main advantages of the multilateral interline and voluntary change system (jointly referred to hereafter, for the purpose of this Decision, as 'interline system') are that passengers can buy a single ticket providing for transportation by different carriers (e.g. leaving on the issuing airline and returning on another airline serving the same route, or leaving on the issuing airline and continuing to destinations not served by that airline), and that passengers can easily change the reservations, routings or airlines mentioned on the ticket.

Airlines value that the interlining system enables them to complement their networks and frequencies. Even though they would lose some passengers to other airlines as the result of interlining, they would also expect to win some from other airlines.

The interline system is a very significant part of worldwide air transport. It is estimated that approximately 20 % of passengers on intra-Community flights in one way or another use interline facilities and that depending on the airline issuing the ticket, about half of passengers hold tickets enabling them to change onto flights operated by other airlines.

(6) In practice airlines and their personnel do not always insist on compliance with the interline and waiver of endorsement agreements. If a travel agent issues a ticket for travel of an airline without proper authority arising out of an interline agreement, the carrying airline's personnel may accept the ticket and will bill the issuing airline. Where billing would be complicated or uneconomical, the carrying airline may renounce billing on the assumption that the issuing airline probably has similar claims on the carrying airline. Likewise an airline's employees at an airport may accept voluntary changes made to a ticket without insisting on endorsement by the issuing or designated carrier. However, any flexibility which may exist in practice is marginal and of limited usefulness; it is likely to inconvenience personnel and passengers and is no satisfactory substitute for an actual agreement to interline.

The absence of an agreement to interline may be a serious handicap for the airlines suffering from it. In particular business travellers (normally travelling

at the more expensive unrestricted C and Y fares and typically generating about 60 % of an airline's revenue from passenger services) often make trips combining several destinations and airlines, and they need to be able to change travel plans with minimal constraints. They highly value the convenience and flexibility offered by a single interlinable ticket, rather than having to purchase separate tickets for each flight and having to return some of these unused, if they have had to change their plans. In addition, travel agents cannot issue a ticket on an airline's paper if certain flights on that ticket are operated by another airline which refused to interline with the first airline; this would prevent a travel agent e.g. from issuing a ticket with an outward journey on British Midland and a return journey on Aer Lingus. Agents prefer to avoid the loss of time and the extra work involved in issuing separate tickets. In addition a passenger holding a non-interlinable ticket is more likely to return it unused (because he may have had to change his plans and to buy another ticket), in which case the travel agent would lose his commission.

(7) Since 1964, Aer Lingus concurred with British Midland's participation in the MITA.

After having been awarded the right to operate a London (Heathrow) — Dublin service, British Midland announced on 22 February 1989 its intention to commence services on that route from 28 April 1989. On 7 April 1989 Aer Lingus gave notice that it terminated its concurrence with British Midland's participation in MITA, effective 7 May. Furthermore Aer Lingus did not accept interchangeability of its and British Midland's tickets on the London (Heathrow)-Dublin route. British Midland was able to interline with British Airways until the latter's withdrawal from the route at the end of March 1991.

Aer Lingus did not cancel its interline agreement with the other airline operating on the route, British Airways.

In statements to the press issued at that time, Aer Lingus declared:

'We have established ourselves as the dominant carrier on the routes between the two capitals, and intend to remain so ... British Midland does not have the resources to offer a similar frequency or service, so they want us to provide product for them via an interline agreement.' *(Airline World,* 24 April 1989).

C. Tariff consultations

(8) On 7 and 8 February 1991 Aer Lingus attended the Special Composite Meeting of Cargo and Passenger Tariff Coordinating Conferences, organized by IATA in Geneva.

At the opening of the Conference, the Aer Lingus representative stated that the company would not participate in consultations concerning the routes from Dublin to Amsterdam, London and Paris. The Conference proceeded to discuss the continuation of the exceptional fare increases (IATA Resolutions 003 w and 003 ww, 003 m and 003 mm) which had been discussed at the IATA Special Conferences on 29 August and 31 October 1990. These discussions covered all transport worldwide, including intra-Community transport. The conclusion of the conference was to file for an extension of the existing resolutions.

Notwithstanding Aer Lingus' statement, it took part in the conference discussions and the final vote.

D. The markets concerned

(i) *Provision of air transport*

(9) When British Midland in March 1989 announced its intention to start a London (Heathrow) — Dublin service, only Aer Lingus and British Airways were present on the route. At that time Aer Lingus accounted for approximately 75 % of passengers carried [1], Biritsh Airways for 25 %.

In the year following British Midland's entry on the route, it obtained an average 15 % market share; Aer Lingus and British Airways both lost about one-seventh of their market share and averaged 64 and 21 %. In the second year following its entry British Midland's market share grew to 21 %, Aer Lingus' remained fairly stable and British Airways' decreased to 17 %.

[1] About 10 to 20 % of the passengers carried continue beyond London or Dublin. Excluding these connecting passengers in order to isolate true 'origin/destination' passengers would not significantly change the respective shares of the airlines.

British Airways terminated its London (Heathrow) — Dublin service in March 1991. At that time British Airways concluded a marketing agreement with Aer Lingus which Aer Lingus expected to enable it to capture 160 000 passengers annually (i.e. about 10 % of market volume). In the period from April to June 1991, Aer Lingus recovered its initial 75 % share of passengers carried.

Between 1989 and the middle of 1991, the UK and Irish authorities did not allow airlines other than Aer Lingus, British Airways and British Midland to operate scheduled services between London (Heathrow) and Dublin.

(10) There are a number of services operated between Dublin and London airports other than Heathrow:

— at the time of the refusal to interline, both Aer Lingus and Dan Air operated Dublin-London (Gatwick) services. Aer Lingus had an 80 % share of that traffic and maintained an interline agreement with Dan Air. Dan Air withdrew in April 1990, and now Aer Lingus is the sole airline on that route,

— at the time of the refusal to interline, Aer Lingus operated a service from Dublin to London (Stansted). Since that time the service has been transferred to Ryan Air which is the sole airline on that route,

— a service between Dublin and Luton was operated for a few months by Capital and, until the middle of 1991, by Ryan Air. At the present time that service is not provided.

The total annual number of passengers travelling by air between the four London airports, on one hand, and Dublin, on the other hand, is in the 2 to 2,5 million range and in recent years often grew by over 20 % annually. In 1990 about 75 % passed through Heathrow, 13 % through Luton, 10 % through Gatwick and 2 % through Stansted. Aer Lingus' share of all London — Dublin traffic, at the time of the refusal to interline, amounted to 66 %, has decreased in 1990 and now is estimated to be back to 66 %.

(11) In 1989, both Aer Lingus and British Airways operated on relatively high load factors on the route of around 75 % (as compared to an average for the European network of 66 % for these airlines and of 62 % for the industry). Their load factors in early 1990 decreased to a still high 70 %. British Midland was in the 45 to 50 % range. At the busiest times in 1991, Aer Lingus operated 18 daily return services between London (Heathrow) and Dublin and British Midland 8. By its own admission Aer Lingus is incurring heavy losses on the service.

(ii) *Sale of air transport*

(12) The airlines' share of passengers carried on the London (Heathrow) — Dublin route corresponds closely to their share of ticket sales in the United Kingdom and Ireland. The airlines tend to have a stronger position in their home market than in the other market.

About 15 to 20 % of sales are made to business travellers having bought tickets at the higher unrestricted fares (mainly C or Y).

(13) Tariffs applied by British Airways and by Aer Lingus and, with a significant number of exceptions, by British Midland on the Dublin — London (Heathrow) and (Gatwick) services are essentially identical. Ryan Air applied significantly lower tariffs on the Dublin — London (Stansted) and Luton routes.

II. LEGAL ASSESSMENT

A. Article 86

(a) *Dominant position*

(i) Relevant markets

(14) Aer Lingus' conduct has effects on the markets for the provision and sale of air transport between Dublin and London (Heathrow).

The characteristics of surface transport (speed, convenience, several changes of transport means) on this route are sufficiently different to preclude substitutability of demand by most travellers. Some travellers — in particular some price-conscious leisure travellers — may consider that surface transport and air transport at the lowest, very restricted faces are interchangeable. However, the supply of air transport at those fares is limited. Furthermore, many travellers — and not only those that cannot afford to spend a day travelling between Dublin and London — are not interested in slow surface transport or in air travel at very restrictive conditions, and they do not take the view that both modes of transport are substitutable. There is considerable specific demand for fast, flexible and convenient travel between the two cities which can only be met by air transport. These travellers pay prices which are significantly higher than the price of surface transport, and there is no evidence that the availability of surface transport at lower prices acts as a constraint on the marketing of air travel at those higher fares. It is precisely for the same travellers that the possibility to interline is most important.

Even though air travel between Dublin and other London airports than Heathrow could sometimes be substituted to travel to Heathrow, that is not so for a large number of travellers. In particular business travellers traditionally prefer Heathrow, among other reasons because other London airports are not served as frequently as Heathrow, and because they do not offer a similar range of connections and therefore will be less suited to onward travel beyond London. In addition, it must be considered that at the time the sale is made, some passengers will be able to select other airports in the area than London (Heathrow). However, the refusal by Aer Lingus to accept changes from or to British Midland bookings affects passengers already holding a ticket for transport between London (Heathrow) and Dublin, and for those a change of airport may be impossible (e.g. if their car is parked at Heathrow) and will usually be very inconvenient (because they have to change arrangements or because it will take more time to reach their final destination). In any event, including other London airports than Heathrow in the relevant product market would not reduce Aer Lingus' market share to a point where dominance can be excluded.

Supply substitutability is also limited. From 1989 to the middle of 1991, no other airlines were authorized to operate scheduled services between London (Heathrow) and Dublin. In addition, Heathrow airport is notoriously congested; if slots can be obtained at all to operate a service to Dublin, their opportunity cost would be very high.

(15) For the purpose of assessing the effect of the refusal to interline on sales of airline tickets, the UK and Ireland are two separate geographic markets. The distribution of air transport services is still very much organized on a national level: travel agents operate under essentially the same conditions at national level; airlines organize their marketing departments on a national level; fares are quoted in local currencies; promotional fares and discount conditions may be restricted to certain countries; crossborder sales are rare and where they do occur, airlines tend to resist them; tickets are processed through the IATA bank settlement plans which are organized on a national basis; and the distribution of market shares for route groups very much tends to be determined on a country-by-country basis, with flag carriers having a very high share in their home countries but a much lower share in other countries.

In the present case, there are significant price differences between the fares ex Ireland and ex UK, varying from 90 to 130 % of the level applied in the other Member State. The distribution of market shares also varies considerably: Aer Lingus' share of sales of the London (Heathrow) — Dublin service in the UK is only three-quarters of its share of its home market. The market share achieved by the UK airlines in Ireland is less than two-thirds of their share in their home market.

(16) Consequently, the Commission assesses the abuse on the markets for the provision of London (Heathrow) — Dublin air transport and for the sale of London (Heathrow) — Dublin air transport in both Ireland and in the UK.

(ii) Substantial part of the common market

(17) The London (Heathrow) — Dublin service is one of the busiest in the Community. The number of passengers on the route amounts to approximately 1,7 million annually. Consequently there is a significant volume of travel affected by the refusal to interline.

Both the UK and Ireland are substantial parts of the common market. The volume of sales of the Dublin — London (Heathrow) service in each country is significant (in the ECU 50 to 100 million range annually).

(iii) Dominance

(18) Aer Lingus enjoys market shares which are unusually high, even in an oligopolistic industry such as air transport:

— its share of passengers carried on the London (Heathrow) — Dublin service at the time of the refusal to interline amounted to 75 %, subsequently decreased to the 60 to 65 % range, and following British Airways' exit from the route in March 1991 recovered to exceed 75 %. Most of British Airways' market share at that point was captured by Aer Lingus. Including other London airports will not have a material impact on Aer Lingus' market share,

— its share of ticket sales corresponds closely to its share of passengers carried and in both geographic markets exceeded 50 %. Even though the

Commission does not possess data on market shares following British Airways' exit from the route, the fact that Aer Lingus' share of traffic between London (Heathrow) and Dublin increased significantly implies that its share of sales increased in a similar proportion.

(19) In addition, under the UK and Irish policies in effect between 1989 and the middle of 1991 no other airlines besides Aer Lingus, British Midland and British Airways were authorized to operate third- and fourth-freedom services between London (Heathrow) and Dublin. There were no fifth-freedom services. Furthermore Heathrow is a notoriously congested airport and demand for slots considerably exceeds supply. Therefore airlines operating out of Heathrow will tend to use slots for the services which make the largest contribution to profits. Using Heathrow slots for additional services to Dublin, a route which is already relatively well served and which at present is not profitable, would in most cases imply a high opportunity cost.

While there are services to other London airports, the importance of Heathrow is such, particularly for business travellers and for connecting passengers, that competition arising from these services has only a limited impact on the service to Heathrow. In any event, including these other airports would leave Aer Lingus with a still high two-thirds of the market.

(20) The very high share of the relevant market enjoyed by Aer Lingus, and the presence of barriers to entry on the route concerned are indicative of dominance. Furthermore Aer Lingus is the national Irish airline and would be the preferred choice of most passengers on the route, who are Irish nationals. Aer Lingus has the most extensive network out of Ireland and accounts for a very large share of air transport out of the country. This position gives it commercial power in the local market which smaller, foreign-based airlines do not possess.

(21) The mere fact that Aer Lingus was able to disregard the complaints of travel agents and business travellers suffering from the refusal to interline suggests that Aer Lingus enjoys considerable freedom of action.

When British Midland announced its intention to commence operations on the London (Heathrow) — Dublin route, Aer Lingus took certain measures such as improving its service and aligning certain fare categories on British Midland's. However, this action has been quite limited : Aer Lingus confined its reaction essentially to matching certain British Midland leisure-type fares. More importantly, Aer Lingus' action was essentially in anticipation of British Midland's arrival ; after an initial period of preparing for that event, Aer Lingus' reaction was much attenuated.

(22) Even though British Midland has been able to obtain a significant market share in the years following entry on the route, its presence does not negate the evidence of dominance by Aer Lingus.

Aer Lingus maintained and even increased the absolute number of passengers carried on the route. Its share of passengers carried and of sales relative to that of other airlines on the route decreased following British Midland's entry, but only by a fairly small margin and recovered again after British Airways' exit. British Midland's success appears to be due to a large extent to its ability to benefit from the significant growth of the number of passengers on the route between 1989 and 1990 by providing extra capacity at a time when there was demand for it.

(23) All of this indicates that Aer Lingus has an appreciable freedom of action. While Aer Lingus has been exposed to a certain amount of competition, it has been able to contain that competition successfully at relatively low cost to itself.

(b) *Abuse*

(24) Abusive conduct is defined as 'practices which are likely to affect the structure of a market where, as a result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods differing from those governing normal competition in goods or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition existing on the market' (Judgment of the Court of Justice of 13 February 1979 in Case 85/76, Hoffmann-La Roche v. Commission, [1979] ECR 541).

(25) Refusing to interline is not normal competition on the merits. Interlining has for many years been accepted industry practice, with widely acknowledged benefits for both airlines and passengers. A refusal to interline for other reasons than problems with currency convertibility or doubts about the creditworthiness of the beneficiary airline is a highly unusual step and has up to now not been considered by the European airline industry as a normal competitive strategy. Aer Lingus itself has maintained interline agreements with the other airlines competing with it on London – Dublin services, British Airways and Dan Air.

Aer Lingus has argued that, whereas interlining in most circumstances is beneficial to all participating airlines, it would suffer from interlining with British Midland by losing several points of market share to the new entrant. Even if this could be demonstrated, the argument that interlining would result in a loss of revenue would not in itself make the refusal legitimate. Aer Lingus has not argued that interlining with British Midland would have a significant effect on its own costs, whereas there is evidence that a refusal to interline would impose a significant handicap on British Midland.

(26) Both a refusal to grant new interline facilities and the withdrawal of existing interline facilities may, depending on the circumstances, hinder the maintenance or development of competition. Whether a duty to interline arises depends on the effects on competition of the refusal to interline; it would exist in particular when the refusal or withdrawal of interline facilities by a dominant airline is objectively likely to have a significant impact on the other airline's ability to start a new service or sustain an existing service on account of its effects on the other airline's costs and revenue in respect of the service in question, and when the dominant airline cannot give any objective commercial reason for its refusal (such as concerns about creditworthiness) other than its wish to avoid helping this particular competitor. It is unlikely that there is such justification when the dominant airline singles out an airline with which it previously interlined, after that airline starts competing on an important route, but continues to interline with other competitors.

(27) When an airline commences a new service, it will normally expect to incur some losses during an initial period, during which it will have to organize economic operation of its service and to attract sufficient interest from the travel trade and from travellers. It cannot expet to attain the load factors and the revenue necessary to ensure profitable operations from the beginning of the service. Therefore new entry will always be difficult.

Denying interline facilities is likely to increase that difficulty. A new entrant without interlining facilities is likely to be considered in this respect as a second-rate airline by travel agents and by travellers alike, which will make it more difficult to attain the commercial standing required to operate profitably. Travel agents wish to avoid the loss of time, the extra work and the potential loss of revenue caused by issuing tickets for transort on an airline without interline facilities. Furthermore a significant number of passengers consider the possibility to change tickets and to organize complex journeys on a single ticket as necessary; a refusal to interline will have the effect of diverting many of these passengers away from the new entrant airline. In this respect, a refusal to interline affects in particular the well-informed business travellers who require fully flexible tickets and who make a disproportionately large contribution to the revenue of the new entrant; significantly reducing this revenue will have a serious effect on the economics of the new entrant's operations.

A review of British Midland's performance on the Dublin — London (Heathrow) route confirms that these effects in this case are significant. British Midland's load factors are appreciably lower than Aer Lingus' on the same route. The difference to a large extent reflects British Midland's handicap in carrying interline passengers. This implies that passengers wishing to make use of interline facilities on the London (Heathrow) — Dublin service and unable to do so because of Aer Lingus' refusal to interline with British Midland, prefer to play safe and use the service of the airline with the highest frequency, i.e. Aer Lingus. The resulting loss of revenue to British Midland may be estimated at several million ECU per year.

(28) A refusal to interline also hinders the maintenance or development of competition when it imposes a significant cost on competitors. If an incumbent airline operates at high frequency on a route accounts for a very large share of capacity and refuses to interline with a new entrant on that route, the latter will have a choice. It can either start a low frequency service in order to minimize initial losses, but will then face a long unprofitable start-up period. Alternatively a new entrant can operate a high frequency from the beginning, even though this may not be warranted by its initial market share, so as to attract (in particular business) travellers who require high frequencies in order to be able to organize their journey with maximum flexibility. In both situations a new entrant will face higher start-up costs.

In the present case British Midland could not reasonable confront Aer Lingus by operating at low frequency: it would then relegate itself to the role of an airline of minor importance and could not hope to attract many business travellers which it needs to improve the revenue of the service. As a result British Midland would be unlikely to develop into a strong competitor and might not even be interested in continuing its service to Dublin because it could make better use of its Heathrow slots.

(29) It is true that Aer Lingus' strategy in the event has not resulted in British Midland's departure from the route, and that British Midland has succeeded in building up a reasonable schedule and in obtaining a significant market share. It is also true that the refusal to interline does not entirely preclude British Midland from attracting business travellers: notwithstanding the refusal to interline by Aer Lingus, British Midland passengers on the Dublin — London (Heathrow) service can still change their tickets to a reasonable number of flights operated by British Midland itself (and by British Airways until that airline withdrew from the route); in addition British Midland carries some passengers who travel on tickets issued by other airlines than Aer Lingus (by British Airways, until that airline withdrew from the route, and by others — e.g. third country airlines carrying passengers to London from where they continue to Dublin on British Midland). However, if Aer Lingus had continued to accept interlining, British Midland would have incurred lower costs, it would have earned higher revenues, its services would have been more attractive to its passengers and it would have been a stronger and more successful competitor than it now is.

The fact that British Midland has been able to continue operations notwithstanding the handicap imposed on it by Aer Lingus, is due in the first place to British Midland's determination to succeed in the face of unusual difficulties; it does not mean that the refusal had no effect on competition. There is no doubt that at the time the practice was implemented, the refusal to interline was intended and was likely to hinder the development of competition. The lawfulness of the refusal at the time when it occurred cannot depend on whether the competitor was later willing and able to remain on the route in spite of the disadvantages imposed on it.

(30) Consequently, Aer Lingus has pursued a strategy which (even if not wholly effective) is both selective and exclusionary and restricts the development of competition on the London (Heathrow) — Dublin route.

The refusal to interline in this case essentially consists in the imposition, contrary to normal industry practice, of a significant handicap on a competitor by raising its costs and depriving it of revenue. Aer Lingus has not been able to point to efficiencies created by a refusal to interline nor to advance any other persuasive and legitimate business justification for its conduct. Its desire to avoid loss of market share, the circumstance that this is a route of vital importance to the company and that its operating margin is under pressure do not make this a legitimate response to new entry.

(c) *Effect on trade between Member States*

(31) The refusal to interline concerns airlines from two Member States and relates to an air transport service of considerable importance between those States. It affects the possibility for travellers throughout the Community to benefit from interlining, and it prevents travel agents throughout from issuing interlining tickets. Therefore the effects of the refusal to interline are not confined to a single Member State, but affect trade between Member States.

(d) *Conclusion*

(32) The Commission considers that the withdrawal by Aer Lingus of British Midland's authority to:

(i) issue or complete transportation documents for carriage between London (Heathrow) and Dublin in accordance with Aer Lingus' tariffs and other applicable provisions as laid down in IATA Resolution 780,

and

(ii) effect changes to its transportations documents in accordance with generally applicable procedures as laid down in IATA Resolution 736,

constitutes an infringement of Article 86.

B. Article 85

(33) The Special Composite Meeting of Cargo and Passengers Tariffs Coordinating Conference organized by IATA on 7 and 8 February 1991, was attached by about 50 airlilnes from all over the world, including Aer Lingus and the flag carriers from 10 other Member States. The agenda for the meeting was to review the latest developments in operating costs. The object of the meeting was to resubmit an agreement to governments (in respect of new passenger fares and cargo rates) based on the most recent situation.

This exchange of information on airline costs and tariff objectives with a view to preparing a common position on passengers' fares and cargo rates, constitutes and agreement, or at least a concerted practice between undertakings, by which they coordinate their pricing decisions. Tariff consultations are therefore a restriction of competition as contemplated by Article 85 (1). Since they cover air transport between Member States, they also affect trade between Member States. Therefore the tariff consultations are caught by Article 85 (1).

(34) Air carriers have nevertheless been authorized to hold tariff consultations under the conditions set forth in Article 3 of the group exemption laid down in Commission Regulation (EEC) No 84/91 [1] which entered into force on 1 February 1991. In that Regulation, the Commission took the view that consultations on passenger and cargo tariffs may contribute to the generalized acceptance of interlinable fares and rates to the benefit of air carriers as well as air transport users.

However, consultations must not exceed the lawful purpose of facilitating interlining. In particular, air carriers participating in the consultation mechanism are obliged to interline with all other carriers concerned, as specified in Article 3 (1) (b) and (d) of the Regulation.

These provisions oblige participants in passenger and cargo consultations to interline in respect of their Community networks with other carriers which operate or have applied to operate direct or indirect services on the routes concerned by the consultations.

(35) Even though Aer Lingus was present at the consultation in early February 1991, it stated at the beginning of the meeting that it would not participate in the consultations concerning the routes from Dublin to Amsterdam, London and Paris [2]. Presumably this statement was intended to protect Aer Lingus from having to interline on those routes by excluding them from the discussion. However, other carriers operating those services (in particular Air France, British Airways and British Midland) did not make this reservation and Aer Lingus did not physically withdraw from the meeting. In the event, there was no specific discussion of those routes but there was a general discussion on tariffs which concerned those routes in the same way as all other routes. Even if Aer Lingus did not express any views about these routes specifically, it learned about its competitors' intentions in general and therefore also in respect of these routes, Aer Lingus would have heard them. Aer Lingus contributed to the general discussion and participated in the vote on whether to apply a two or three per cent increase on European routes. Therefore the conclusions of the conference apply to the routes referred to by Aer Lingus; its statement has not had any impact on the identity of those attending or voting, or on the contents or on the outcome of the consultations. The routes 'excluded' by Aer Lingus were therefore covered by the consultations.

(36) In addition, even if it were accepted that the routes from Dublin to Amsterdam, London and Paris were outside the consultations at which Aer Lingus was present, this would not have been sufficient to avoid a duty to interline with British Midland. The tariff consultation concerned routes between Dublin and certain destinations served directly by

[1] OJ No L 10, 15. 1. 1991, p. 14.

[2] That statement was followed by a statement by a Commission representative explaining the conditions imposed by Regulation (EEC) No 84/91 and confirming that carriers not wishing to accept the obligation to interline should not be present at the consultations.

Aer Lingus and indirectly by British Midland, either with a change of aircraft at London (Heathrow) (e.g. Birmingham, East Midland) or with a change of aircraft and airport in London (e.g. Channel Islands, Brussels). Furthermore, British Midland has applied to operate to certain destinations in respect of which Aer Lingus has not made a reservation. e.g. London (Heathrow) to Brussels, Copenhagen, Dusseldorf, Frankfurt, Malaga, Milan, Palma and Rome. Its Dublin — London (Heathrow) service would enable the company to offer indirect service from Dublin to these destinations.

(37) Consequently, Aer Lingus has not respected the conditions specified in Article 3 (1) (b) and (d) of Regulation (EEC) No 84/91.

The Commission considers that Aer Lingus' participation in the tariff consultation of 7 and 8 February 1991 without granting British Midland the authority to :

(i) issue or complete transportation documents for carriage over its Community network in accordance with Aer Lingus' tariffs and other applicable provisions as laid down in IATA Resolution 780 ;

and

(ii) effect changes to its transportation documents for carriage over its Community network in accordance with generally applicable procedures as laid down in IATA Resolution 736

constitutes an infringement of Article 85 (1).

Aer Lingus did not attend the next tariff consultations on 2 to 11 September 1991 which discussed tariffs for effect from 1 April 1992.

C. Article 12 (2) of Council Regulation (EEC) No 3975/87 [1]

(38) In the light of the considerations set out above, the Commission considers that there are grounds for finding that Aer Lingus has infringed Articles 85 (1) and 86.

(39) Pursuant to Article 12 (2) of Regulation (EEC) No 3975/87, the Commission may impose fines of from ECU 1 000 to 1 000 000, or a sum in excess thereof but not exceeding 10 % of the turnover in the preceding business year of the undertakings participating in the infringement, where either intentionally or negligently they infringe Article 85 (1) or Article 86 of the Treaty. In fixing the amount of the fine, regard must be had both to the gravity and to the duration of the infringement.

(40) The Commission considers that Aer Lingus has infringed Article 85 (1) by participating in a tariff consultation without respecting the conditions set forth in Regulation (EEC) No 84/91.

This infringement has taken place on 7 and 8 February 1991 and its effects continued at least until the fares discussed at the next tariff consulations take effect, i.e. until 1 April 1992.

(41) The Commission considers that Aer Lingus has infringed Article 86 by withdrawing British Midland's authority to :

(i) issue or complete transportation documents for carriage between Dublin and London (Heathrow) in accordance with Aer Lingus' tariffs and other applicable provisions as laid down in IATA Resolution 780 ; and

(ii) effect changes to its transportation documents in accordance with generally applicable procedures as laid down in IATA Resolution 736.

This infringement has lasted from 7 April 1989 to the present date.

(42) The Commission considers that the imposition of a fine on Aer Lingus is justified in so far as the infringement relates to Article 86. In view of the fact that Regulation (EEC) No 84/91 had only just entered into force when the infringement relating to Article 85 was committed, the Commission does not consider it appropriate to impose a fine on account of the parallel violation of Article 85.

In fixing the amount of the fine, it takes into account the fact that Aer Lingus' conduct is intended to affect the structure of competition by penalizing a competitor entering an important market and therefore is particularly serious. The Commission also considered that Aer Lingus' conduct has not succeeded in eliminating British Midland as a competitor on the London (Heathrow) — Dublin route, although there is not doubt that British Midland enjoys a considerably less successful operation than if Aer Lingus had continued to interline.

[1] OJ No L 374, 31. 12. 1987, p. 1.

D. Article 4 of Regulation (EEC) No 3975/87

(43) The refusal to interline by Aer Lingus up to the present time has deprived British Midland of the opportunity to compete with Aer Lingus on equal footing, without suffering from a significant handicap. Therefore the Commission requires Aer Lingus to bring the refusal to interline to an end and orders Aer Lingus to grant British Midland the authority to interline within two months from the date when this Decision is notified.

This order does not merely require Aer Lingus to enter into an arrangement giving British Midland the possibility to interline in respect of the London (Heathrow) — Dublin route, but also to refrain from any conduct (such as refusing reservations or confirmations which it would accept from other interline partners) which would be an obstacle to the normal implementation of that arrangement.

(44) However, the Commission accepts that Aer Lingus is not obliged to interline permanently with British Midland on this route. If a dominant airline has been able to develop a high frequency, that is a legitimate competitive advantage which it need not necessarily share with rivals. Furthermore, new entrants should not be able to rely forever on their competitors' frequencies and networks, but they must be encouraged to build up extensive networks and high frequencies by themselves and to gain commercial standing in order to attract sufficient interest from travel agents and passengers. Therefore the Commission considers that the duty to interline may be limited in time to a duration which is necessary for British Midland to develop its service without suffering from an undue handicap imposed by its dominant competitor contrary to the industry's and that competitor's normal practice.

In the present case there are a number of obstacles which make it difficult for British Midland to establish itself on the route. Aer Lingus enjoys considerable commercial strength in its home country and it accounts for a very high share of passengers and frequencies as compared to British Midland's. Because of the scarcity of available slots at Heathrow, British Midland could not increase the frequency of its Dublin service rapidly without lowering the frequency of some of its other services. If British Midland wants to obtain a comparable position to Aer Lingus and also operate a very high-frequency service between London (Heathrow) and Dublin, it would need sufficient time to build up commercial strength and an adequate schedule. Therefore the Commission considers that the duty to which Aer Lingus was subjected in 1989 makes it reasonable now, in the light of the circumstances which have occurred, that a duty to interline should be imposed for a two-year period.

If the circumstances on the market change substantially during this period, the Commission will reconsider its order. In the light of the market conditions which will prevail at the expiry of this period, of British Midland's efforts to establish itself and of the obstacles it will have encountered, the Commission will consider whether this duty needs to be extended,

HAS ADOPTED THIS DECISION:

Article 1

1. Aer Lingus plc has infringed Article 86 of the EEC Treaty by withdrawing, on 7 May 1989, British Midland's authority to:

(i) issue or complete transportation documents for carriage between Dublin and London (Heathrow) in accordance with Aer Lingus' tariffs and other applicable provisions as laid down in IATA Resolution 780;

and

(ii) effect changes to its transportation documents in accordance with generally applicable procedures as laid down in IATA Resolution 736;

2. Aer Lingus plc has infringed Article 85 of the EEC Treaty by participating in a tariff consultation on 7 and 8 February 1991 without granting British Midland Airways Limited the authority to:

(i) issue or complete transportation documents for carriage over its Community network in accordance with Aer Lingus' tariffs and other applicable provisions as laid down in IATA Resolution 780;

and

(ii) effect changes to its transportation documents for carriage over its Community network in accordance with generally applicable procedures as laid down in IATA Resolution 736.

Article 2

Aer Lingus plc shall within two months from the date when this Decision is notified, put an end to the infringement established in Article 1 (1) and shall, for two years from that date, grant British Midland Airways Limited the authority to:

(i) issue or complete transportation documents for carriage between Dublin and London (Heathrow) in accordance with its own tariffs and other applicable provisions as laid down in IATA Resolution 780; and

(ii) effect changes to its transportation documents in accordance with generally applicable procedures as laid down in IATA Resolution 736.

Aer Lingus shall notify the Commission of all measures it takes in order to comply with this order.

Article 3

For the infringements established in Article 1 (1), a fine of ECU 750 000 is hereby imposed on Aer Lingus plc.

The fine shall be paid within three months of the date of notification of this Decision to account No 310-0933000-43 with Banque Bruxelles Lambert, agence européenne, rond-point Schuman 5, B-1040 Bruxelles.

On expiry of that period, interest shall automatically be payable at the rate charged by the European Monetary Cooperation Fund on its ecu operations on the first working day of the month in which this Decision was adopted, plus 3,5 percentage points, i.e. 13,75 %.

Should payment be made in the national currency of the Member State where the bank nominated for payment is situated, the exchange rate applicable shall be that prevailing on the day preceding payment.

Article 4

This Decision is addressed to Aer Lingus plc, Dublin Airport, Dublin, Ireland.

This Decision is enforceable pursuant to Article 192 of the EEC Treaty.

Done at Brussels, 26 February 1992.

For the Commission

Leon BRITTAN

Vice-President