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(Acts whose publication is obligatory)

COUNCIL REGULATION (EEC) No 2342/90

of 24 July 1990

on fares for scheduled air services

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 84 (2) thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas it is important to adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 as provided for in Article 8a of the Treaty; whereas the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;

Whereas Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States (4) made a first step towards the liberalization in respect of air fares, necessary to achieve the internal market in air transport; whereas the Council agreed to take further measures of liberalization;

Whereas it is appropriate to establish clear criteria according to which the Member States' authorities have to evaluate proposed air fares;

Whereas a system of double disapproval of air fares remains an objective to be achieved by 1 January 1993 whereas an important element in achieving further liberalization consists in gaining experience of this system during the interim period;

Whereas it is desirable to introduce a more flexible, simpler and more efficient system of zones within which air fares meeting particular conditions qualify for automatic approval by the aeronautical authorities of the States concerned;

Whereas, in the case of double approval and double disapproval of air fares, it is appropriate to provide for a procedure according to which Member States may ask the Commission to examine and decide on whether a proposed air fare conforms with the criteria laid down; whereas in case of excessively high or low air fares, the Commission must be able to suspend the application of an air fare during its examination;

Whereas, in the case of double approval of air fares, provision should be made for rapid consultation between Member States in the case of any disagreement and for procedures for settling such disagreements that are not resolved by consultations;

Whereas this Regulation replaces Directive 87/601/EEC; whereas it is therefore necessary to revoke that Directive;

Whereas it is desirable that the Council adopts further measures of liberalization in respect of air fares by 30 June 1992,

HAS ADOPTED THIS REGULATION:

SCOPE AND DEFINITIONS

Article 1

This Regulation shall apply to criteria and procedures to be applied with respect to the establishment of scheduled air fares charged on routes between Member States.

Article 2

For the purposes of this Regulation:

(a) scheduled air fares means the prices to be paid in the applicable national currency for the carriage of passengers and baggage on scheduled air services and the conditions under which those prices apply, including remuneration and conditions offered to agency and other auxiliary services;

(1) OJ No C 258, 11. 10. 1989, p. 3; and OJ No C 164, 5. 7. 1990, p. 7.
(2) OJ No C 96, 17. 4. 1990, p. 59.
(3) OJ No C 112, 7. 5. 1990, p. 17.
(4) OJ No L 374, 31. 12. 1987, p. 12.

(b) scheduled air service means a series of flights each possessing all the following characteristics:

(i) it passes through the air space over the territory of more than one Member State;

(ii) it is performed by aircraft for the transport of passengers or passengers and cargo and/or mail for remuneration, in such a manner that on each flight seats are available for individual purchase by members of the public (either directly from the air carrier or from its authorized agents);

(iii) it is operated so as to serve traffic between the same two or more points, either:

1. according to a published timetable; or

2. with flights so regular or frequent that they constitute a recognizably systematic series;

(c) flight means a departure from a specified airport towards a specified destination airport;

(d) air carrier means an air transport enterprise with a valid operating licence from a Member State to operate scheduled air services;

(e) Community air carrier means:

(i) an air carrier which has and continues to have its central administration and principal place of business in the Community, the majority of whose shares are and continue to be owned by Member States and/or nationals of Member States and which is and continues to be effectively controlled by such States or persons: or

(ii) an air carrier which, at the time of adoption of this Regulation, although it does not meet the definition set out in (i):

1. either has its central administration and principal place of business in the Community and has been providing scheduled or non-scheduled air services in the Community during the 12 months prior to adoption of this Regulation;

2. or has been providing scheduled air services between Member States on the basis of third- and fourth-freedom traffic rights during the 12 months prior to adoption of this Regulation.

The air carriers which meet the criteria set out in this point (ii) are listed in Annex 1;

(f) a third-freedom traffic right means the right of an air carrier licensed in one State to put down, in the territory of another State, passengers, freight and mail taken up in the State in which it is licensed;

a fourth-freedom traffic right means the right of an air carrier licensed in one State to take on, in the territory of another State, passengers, freight and mail for off-loading in the State in which it is licensed;

a fifth-freedom traffic right means the right of an air carrier to undertake the air transport of passengers, freight and mail between two States other that the State in which it is licensed;

(g) States concerned means the Member States between which a scheduled air service is operated;

(h) zone of flexibility means a pricing zone as referred to in Article 4, within which air fares meeting the conditions in Annex II qualify for automatic approval by the aeronautical authorities of the States concerned. The limits of a zone are expressed as percentages of the reference fare;

(i) reference fare means the normal one way or return, as appropriate, economy air fare charged by a third- or fourth-freedom air carrier on the route in question; if more than one such fare exists, the arithmetic average of all such fares shall be taken unless otherwise bilaterally agreed; where there is no normal economy fare, the lowest fully flexible fare shall be taken.

CRITERIA

Article 3

1. Member States shall approve scheduled air fares of Community air carriers if they are reasonably related to the applicant air carrier's long-term fully-allocated relevant costs, while taking into account the need for a satisfactory return on capital and for an adequate cost margin to ensure a satisfactory safety standard.

2. In approving air fares pursuant to paragraph 1, Member States shall also take into account other relevant factors, the needs of consumers and the competitive market situation, including the fares of the other air carriers operating on the route and the need to prevent dumping.

3. Notwithstanding Article 4 (4) and (5), Member States shall disapprove any fare that does not meet the terms of Article 4 (3) and that is, in relation to the criteria defined in Article 3 (1), excessively high to the disadvantage of users or unjustifiably low in view of the competitive market situation.

4. The fact that a proposed air fare is lower than that offered by another air carrier operating on the route shall not be sufficient reason for withholding approval.

5. A Member State shall permit a Community air carrier of another Member State operating a direct or indirect scheduled air service within the Community, having given due notice to the States concerned, to match an air fare already approved for scheduled services between the same city-pairs on the basis that this provision shall not apply to indirect air services which exceed the length of the shortest direct service by more than 20 %. Member States may also permit a Community air carrier of another Member State operating a direct scheduled air service to match prices already accepted or published for a non-scheduled air service operated on the same route provided that both products are equivalent in terms of quality and conditions.

6. Only Community air carriers shall be entitled to introduce lower fares than the existing ones when they operate on the basis of third- and fourth-freedom traffic rights and, in the case of fifth-freedom traffic rights to introduce such lower fares only where they comply with Article 4 (3).

PROCEDURES

Article 4

1. Scheduled air fares shall be subject to approval by the Member States concerned. To this end, an air carrier shall submit its proposed air fares in the form prescribed by the aeronautical authorities of such Member States.

2. Aeronautical authorities shall not require air carriers to submit their fares in respect of routes within the Community more than 45 days before they come into effect.

3. (a) Until 31 December 1992, Member States shall, within zones of flexibility, permit third- and/or fourth-freedom and/or fifth-freedom air carriers to charge air fares of their own choice, subject to the respective conditions set out in Annex II and provided those air fares have been filed with the States concerned at least 21 days prior to the proposed date for their entry into force.

(b) There shall be three zones of flexibility on any scheduled air services as follows:

— a normal economy fare zone which shall extend from 95 to 105 % of the reference fare,

— a discount zone which shall extend from 94 to 80 % of the reference fare,

— a deep-discount zone which shall extend from 79 to 30 % of the reference fare.

4. A fully flexible fare above 105 % of the reference fare for a route within the Community shall be considered as approved unless, within 30 days of the date of its submission, both Member States have notified in writing their disapproval to the applicant air carrier, stating their reasons. The Member States shall also inform each other. At the request of either Member State, consultations shall take place between the States concerned within the 30-day period.

5. Until 31 December 1992, fares not complying with the terms of paragraphs 3 and 4 shall require approval by both States concerned. If neither of the Member States has expressed disapproval within 21 days of the date of submission of a fare, it shall be considered as approved.

6. A fare for a route within the Community, once approved, shall remain in force until it expires or is replaced. It may, however, be prolonged after its original date of expiry for a period not exceeding 12 months.

Article 5

1. A Member State which claims a legitimate interest in the route concerned may request the Commission to examine whether an air fare which does not meet the terms of Article 4 (3) complies with Article 3 (1) or whether a Member State has fulfilled its obligations under Article 3 (3). The Commission shall forthwith inform the other Member State(s) involved and the air carrier concerned and give them the apportunity to submit their observations.

2. The Commission shall, within 14 days of receipt of a request under paragraph 1, decide whether the air fare shall remain in force during its examination.

3. The Commission shall give a decision on whether the air fare complies with Article 3 (1) as soon as possible and in any event not later than two months after having received the request. This period may be prolonged to the extent necessary in order to obtain sufficient further information from the Member State concerned.

4. The Commission shall communicate its decision to the Member States and to the air carrier concerned.

5. Any Member State may refer the Commission's decision to the Council within a time limit of one month. The Council, acting by a qualified majority, may take a different decision within a period of one month.

CONSULTATION AND ARBITRATION SCHEME

Article 6

1. When a State concerned (the first State) decides, in accordance with Article 4 (5), not to approve a scheduled air fare, it shall inform the other State concerned (the second

State) in writing within 21 days of the fare being filed, stating its reasons.

2. If the second State disagrees with the decision of the first State, it shall so notify the first State within seven days of being informed, providing the information on which its decision is based, and request consultations. Each State shall supply all relevant information requested by the other. Either of the States concerned may request that the Commission be represented at the consultations.

3. If the first State has insufficient information to reach a decision on the fare, it may request the second State to enter into consultations before the expiry of the 21-day period prescribed in paragraph 1.

4. Consultations shall be completed within 21 days of being requested. If disagreement still persists at the end of this period, the matter shall be put to arbitration at the request of either of the States concerned. The two States concerned may agree to prolong the consultations or to proceed directly to arbitration without consultations.

5. Arbitration shall be carried out by a panel of three arbitrators unless the States concerned agree on a single arbitrator. The States concerned shall each nominate one member of the panel and seek to agree on the third member (who shall be a national of a third Member State and act as panel chairman). Alternatively they may nominate a single arbitrator. The appointment of the panel shall be completed within seven days. A panel's decisions shall be reached by a majority of votes.

6. In the event of failure by either State concerned to nominate a member of the panel or to agree on the appointment of a third member, the Council shall be informed forthwith and its President shall complete the panel within three days. In the event of the Presidency being held by a Member State which is party to the dispute, the President of the Council shall invite the Government of the next Member State due to hold the presidency and not party to the dispute to complete the panel.

7. The arbitration shall be completed within a period of 21 days of completion of the panel or nomination of the single arbitrator. The States concerned may, however, agree to extend this period. The Commission shall have the right to attend as an observer. The arbitrators shall make clear the extent to which the award is based on the criteria in Article 3.

8. The arbitration award shall be notified immediately to the Commission.

Within a period of 10 days, the Commission shall confirm the award, unless the arbitrators have not respected the criteria set out in Article 3 or the procedure laid down by the Regulation or the award does not comply with Community law in other respects.

In the absence of any decision within this period, the award shall be regarded as confirmed by the Commission. An award confirmed by the Commission shall become binding on the States concerned.

9. During the consultation and arbitration procedure, the relevant existing air fares shall be continued in force until the procedure has expired and any new fare has entered into force.

GENERAL PROVISIONS

Article 7

This Regulation shall not prevent Member States from concluding arrangements which are more flexible than the provisions of Article 4 or from maintaining such arrangements in force.

Article 8

At least once a year, the Commission shall consult on scheduled air fares and related matters with representatives of air transport user organizations in the Community, for which purpose the Commission shall supply appropriate information to the participants.

Article 9

In carrying out the duties assigned to it under this Regulation, the Commission may obtain all necessary information from the Member States and air carriers concerned.

Article 10

1. The Commission shall publish a report on the application of this Regulation by 31 May 1992 and every second year thereafter.

2. Member States and the Commission shall cooperate in implementing this Regulation, particularly as regards collection of information for the report referred to in paragraph 1.

3. Confidential information obtained in application of this Regulation shall be covered by professional secrecy.

Article 11

Where a Member State has concluded an agreement with one or more non-member countries which gives fifth-freedom rights for a route between Member States to an air carrier of a

non-member country, and in this respect contains provisions which are incompatible with this Regulation, the Member State shall, at the first opportunity, take all appropriate steps to eliminate such incompatibilities. Until such time as the incompatibilities have been eliminated, this Regulation shall not affect the rights and obligations *vis-à-vis* non-member countries arising from such an agreement.

Article 12

With a view to achieving the objective of a double-disapproval system for fares by 1 January 1993, the Council shall decide on the revision of this Regulation by 30 June 1992 at the latest, on the basis of a Commission proposal to be submitted by 31 May 1991.

Article 13

Directive 87/601/EEC is hereby revoked.

Article 14

This Regulation shall enter into force on 1 November 1990.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 July 1990.

For the Council
The President
C. MANNINO

ANNEX I

Air carriers referred to in Article 2 (e) (ii)

The following air carriers meet the criteria referred to in Article 2 (e) (ii) as long as they are recognized as a national carrier by the Member State which so recognizes them at the time of the adoption of this Regulation:

— Scandinavian Airlines System,

— Britannia Airways,

— Monarch Airlines.

ANNEX II

Conditions for discount and deep-discount fares

Discount zone

1. To qualify for the discount zone, a fare must meet the two following conditions:

   — round or circle trip travel,

   and

   — reservation for the entire trip, ticketing and payment to be made at the same time, except that reservation for the return trip may be made at a later time; cancellation only permissible prior to departure of outbound travel and at a fee of at least 20 % of the price of the ticket; change of reservation only permissible at a fee equal to the difference between the fare paid and the next higher applicable fare.

Deep-discount zone

2. To qualify for the deep-discount zone, fares must meet the following conditions:

   1. round or circle trip travel; and

   2. any two of the following:

      (a) minimum stay of not less than the 'Sunday rule' or six days;

      (b) (i) reservation for the entire trip, ticketing and payment to be made at the same time; cancellation or change of reservation only permissible prior to departure of outbound travel and at a fee of at least 20 % of the price of the ticket;

      or

      (ii) mandatory advance purchase of not less than 14 days; reservation for the entire trip, ticketing and payment to be made at the same time; cancellation or change of reservation only permissible prior to departure of outbound travel and at a fee of at least 20 % of the price of the ticket;

      or

      (iii) purchase of the ticket only permitted on the day prior to departure of outbound travel; reservation to be made separately for both the outbound and inbound journeys and only in the country of departure on the day prior to travel on the respective journeys;

      (c) passenger to be aged not more than 25 years or not less than 60 years or father and/or mother with children aged not more than 25 years travelling together (minimum three persons);

      (d) off-peak;

      provided that:

      1. the condition at (c) may not be combined with the condition at (d) alone; and

      2. where the condition at (b) (i) is combined only with the conditions at (c) or (d), the zone of flexibility shall not extend below 40 % of the reference fare.

Appendix to Annex II

1. **Notes on the zonal scheme referred to in Article 4 (3) (b) and (4)**

   (i) *Reference fare for 1990/91*

   the reference fare referred to in Article 2 (i) applicable on 1 September 1990.

   (ii) *Reference fare for 1991/92*

   the reference fare referred to in Article 2 (i) applicable on 1 September 1991.

2. **Definition of 'off-peak'**

   An air carrier may designate certain flights as 'off-peak' on the basis of commercial considerations.

   When an air carrier wishes to use condition 2 (2) (d), identification of the off-peak flights for each route shall be agreed between the aeronautical authorities of the Member States concerned on the basis of the proposal made by that air carrier.

   On each route where the total activity of third- and fourth-freedom air carriers reaches a weekly average of 18 return flights, the air carrier concerned shall be allowed as a minimum to apply condition 2 (2) (d) of annex II on up to 50 % of its total daily flights, provided that the flights to which these conditions may be applied depart between 10.00 and 16.00 or between 21.00 and 06.00.