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COMMISSION REGULATION (EEC) No 1617/93

of 25 June 1993

on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports

(OJ L 155, 26.6.1993, p. 18)

Corrected by:

►**C1** Corrigendum, OJ L 15, 18.1.1994, p. 20 (1617/93)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [1], as last amended by Regulation (EEC) No 2411/92 [2], and in particular Article 2 thereof,

Having published a draft of this Regulation [3],

Having consulted the Advisory Committee on Agreements and Dominant Positions in Air Transport,

Whereas:

(1) Regulation (EEC) No 3976/87 empowers the Commission to apply Article 85 (3) of the Treaty by regulation to certain categories of agreements, decisions or concentrated practices relating directly or indirectly to the provision of air transport services.

(2) Agreements, decisions or concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on tariffs and slot allocation at airports are liable to restrict competition and affect trade between Member States.

(3) Joint planning and coordination of the schedule of an air service can help to ensure the maintenance of services at less busy times of the day, during less busy periods or on less busy routes, and to develop onward connections, thus benefiting air transport users. However, any clauses concerning extra flights must not require the approval of the other parties or involve financial penalties. The arrangements must also allow parties to withdraw from them at reasonably short notice.

(4) Arrangements whereby a smaller airline receives marketing and financial support from another airline may help that smaller airline to operate air services on new or less busy routes. However, in order to avoid restrictions which are not indispensable to the attainment of that aim, the duration of such joint operations must be limited to the time necessary to gain sufficient commercial standing. The block exemption must not be granted to joint operations where both parties could reasonably be expected to operate the air service independently. Those conditions are without prejudice to the possibility, in appropriate cases, of an application made under Article 5 of Council Regulation (EEC) No 3975/87 [4], as last amended by Regulation (EEC) No 2410/92 [5], with a view to obtaining an individual exemption where the conditions are not met or where the parties need to extend the duration of the joint operation. In particular where the parties wish to avail themselves ►C1 , through a joint operation, of the market access ◄ opportunities created by Council Regulation (EEC) No 2408/92 [6] on routes which are neither new nor less busy, but which otherwise fulfil the condi-

[1] OJ No L 374, 31. 12. 1987, p. 9.
[2] OJ No L 240, 24. 8. 1992, p. 19.
[3] OJ No C 253, 30. 9. 1992, p. 5.
[4] OJ No L 374, 31. 12. 1987, p. 1.
[5] OJ No L 240, 24. 8. 1992, p. 18.
[6] OJ No L 240, 24. 8. 1992, p. 8.

▼B

tions set forth herein, an individual exemption may be warranted.

(5) 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 aim of facilitating interlining. Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services [1], is based on the principle of free pricing and therefore increases the possibility of price competition in air transport. Hence, competition may not be eliminated thereby. Consultations between air carriers on passenger and cargo tariffs may therefore be permitted for the time being, provided that they are limited to fares and rates which give rise to actual interlining, that the participation in such consultations is optional, that they do not lead to an agreement in respect of fares, rates or related conditions, that in the interests of transparency the Commission and the Member States concerned can send observers to them, and that air carriers participating in the consultation mechanism are obliged to interline with all other carriers concerned, at the tariffs applied by the carrying airline for the tariff category under discussion.

The Commission will reassess the effects of tariff consultations on price competition in the light of the operation of Regulation (EEC) No 2409/92 and in the light of the development of the Community air transport industry, and may make appropriate changes to the exemption in the course of its lifetime;

(6) Arrangements on slot allocation at airports and airport scheduling can improve the utilization of airport capacity and airspace, facilitate air-traffic control and help to spread the supply of air transport services from the airport. However, ►C1 if competition is not to be eliminated ◄, entry to congested airports must remain possible. In order to provide a satisfactory degree of security and transparency, such arrangements can only be accepted if all air carriers concerned can participate in the negotiations, and if the allocation is made on a non-discriminatory and transparent basis.

(7) In accordance with Article 4 of Regulation (EEC) No 3976/87, this Regulation should apply with retroactive effect to agreements, decisions and concerted practices in existence on the date of entry into force of this Regulation, provided that they meet the conditions for exemption set out in this Regulation.

(8) In conformity with Article 7 of Regulation (EEC) No 3976/87, this Regulation should also specify the circumstances in which the Commission may withdraw the block exemption in individual cases.

(9) No applications under Article 3 or 5 of Regulation (EEC) No 3975/87 need be made in respect of agreements automatically exempted by this Regulation. However, when real doubt exists, undertakings may request the Commission to declare whether their arrangements comply with this Regulation.

(10) This Regulation is without prejudice to the application of Article 86 of the Treaty,

[1] OJ No L 240, 24. 8. 1992, p. 15.

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HAS ADOPTED THIS REGULATION:

TITLE I

EXEMPTIONS

Article 1

Pursuant to Article 85 (3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 85 (1) of the Treaty shall not apply to agreements between undertakings in the air transport sector, decisions by associations of such undertakings and concerted practices between such undertakings which have as their purpose one or more of the following:

— joint planning and coordination of the schedule of an air service between Community airports,

— the joint operation of a scheduled air service on a new or on a low-density route between Community airports,

— the holding of consultations on tariffs for the carriage of passengers, with their baggage, and of freight on scheduled air services between Community airports,

— slot-allocation and airport scheduling in so far as they concern air services between airports in the Community.

TITLE II

SPECIAL PROVISIONS

Article 2

Special provisions for joint planning and coordination of schedules

The exemption concerning joint planning and coordination of the schedule of an air service shall apply only if the following conditions are met:

(a) the planning and coordination are intended

(i) to ensure by means of a non-binding arrangement a satisfactory supply of services at less busy times of the day, during less busy periods or on less busy routes; or

(ii) to establish by means of a binding arrangement schedules which will facilitate interline connections ►C1 for passengers or freight ◄ between services operated by the participants and minimum capacity to be provided for such schedules;

(b) the agreements, decisions and concerted practices do not include arrangements such as to limit, directly or indirectly, the capacity to be provided by the participants or to share capacity;

(c) the agreements, decisions and concerted practices do not prevent carriers taking part in the planning and coordination from introducing additional services, without incurring penalties and without being required to obtain the approval of the other participants;

(d) the agreements, decisions and concerted practices do not prevent carriers from withdrawing from the planning and coordination for future seasons without penalty, on giving notice of not more than three months ►C1 ———— ◄ to that effect;

(e) the agreements, decisions and concerted practices do not seek to influence the schedules adopted by carriers not participating in them.

Article 3

Special provisions for joint operations

The exemption concerning the joint operation of an air service shall apply only if the following conditions are met:

(a) the joint operation concerns the sharing, by one air carrier, of the costs and revenues of another air carrier in respect of a scheduled air service which the latter is operating;

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(b) (i) there was no direct air service between the two airports concerned during all of the four traffic seasons preceding the beginning of the joint operation; or

(ii) the capacity on the route covered by the joint operation does not exceed 30 000 seats per year in each direction; this capacity may be doubled on routes of over 750 kilometres on which there is at most a twice-daily direct air service;

(c) the air carrier operating the air service offers a capacity, in addition to the jointly operated air service, of no more than 90 000 seats per year at one of the airports involved;

(d) the revenues from air transport within the geographical scope of this Regulation for the air carrier operating the air service and for any other air carriers which directly or indirectly participate in a controlling shareholding in the operating air carrier, do not exceed ECU 400 million per year;

(e) neither party is prevented from operating additional air services on its own account between the two airports concerned nor from independently determining the fares, capacity and schedules of such air services;

(f) the duration of the joint operation does not exceed three years;

(g) either party can terminate the joint operation on giving notice of not more than three months, to expire at the end of a traffic season.

Article 4

Special provisions for consultations on passenger and cargo tariffs

1. The exemption concerning the holding of consultations on passenger and cargo tariffs shall apply only if the following conditions are met:

(a) the participants only discuss air fares and cargo rates to be paid by air transport users directly to a participating air carrier or to its authorized agents, for carriage as passengers or for the airport-to-airport transport of freight on a scheduled service, as well as the conditions relating to those fares and rates. The consultations shall not extend to the capacity for which such tariffs are to be available;

(b) the consultations give rise to interlining, that is to say, air transport users must be able, in respect of the types of fares or rates and of the seasons which were the subject of the consultations:

(i) to combine on a single transportation document the service which was the subject of the consultations, with services on the same or on connecting routes operated by other air carriers, whereby the applicable fares, rates and conditions are set by the airline(s) effecting carriage; and

(ii) in so far as is permitted by the conditions governing the initial reservation, to change a reservation on a service which was the subject of the consultations onto a service on the same route operated by another air carrier at the fares, rates and conditions applied by that other carrier;

provided that an air carrier may refuse to allow such combinations and changes of reservation for objective and non-discriminatory reasons of a technical or commercial nature, in particular where the air carrier effecting carriage is concerned with the credi worthiness of the air carrier who would be collecting payment for this carriage; in such case the latter air carrier must be notified thereof in writing;

(c) the passenger or cargo tariffs which are the subject of the consultations are applied by participating air carriers without discrimination on grounds of passengers nationality or place of residence or on ground of the origin of the freight within the Community;

(d) participation in the consultations is voluntary and open to any air carrier who operates or intends to operate direct or indirect services on the route concerned;

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(e) the consultations are not binding on participants, that is to say, following the consultations the participants retain the right to act independently in respect of passenger and cargo tariffs;

(f) the consultations do not entail agreement on agents' remuneration or other elements of the tariffs discussed;

(g) where filing of tariffs is required, each participant individually files each tariff which was not the subject of the consultations, with the competent authorities of the Member States concerned; in so doing it may act itself or through its filing agent or through its general sales agent.

2. (a) The Commission and the Member States concerned shall be entitled to send observers to tariff consultations. For this purpose, air carriers shall give the Member States concerned and the Commission the same notice as is given to participants, but not less than 10 days' notice, of the date, venue and subject matter of the consultations.

(b) Such notice shall be given:

(i) to the Member States concerned according to procedures to be established by the competent authorities of those Member States;

(ii) to the Commission according to procedures to be published in the *Official Journal of the European Communities*.

(c) A full report on these consultations shall be submitted to the Commission by or on behalf of the air carriers involved at the same time as it is submitted to participants, but not later than six weeks after those consultations were held.

Article 5

Special provisions for slot allocation and airport scheduling

1. The exemption concerning slot allocation and airport scheduling shall apply only if the following conditions are met:

(a) the consultations on slot allocation and airport scheduling are open to all air carriers having expressed an interest in the slots which are the subject of the consultations;

(b) rules of priority are established and supplied without discrimination, that is to say that they neither directly nor indirectly relate to carrier identity or nationality or category of service, take into account constraints or air traffic distribution rules laid down by competent national or international authorities and give due consideration to the needs of the travelling publics and of the airport concerned. Subject to paragraph (d), such rules of priority may take account of rights acquired by air carriers through the use of particular slots in the previous corresponding season;

(c) the rules of priority, once established are made available on request to any interested party;

(d) new entrants as defined in Article 2 (b) of Council Regulation (EEC) No 95/93 [1] are allocated 50 % of newly created or unused slots and slots which have been given up by a carrier during or by the end of the season or which otherwise become available, to the extent that those new entrants have outstanding slot requests;

(e) air carriers participating in the consultations have access, at the time of the consultations at the latest, to information relating to:

— historical slots by airline, chronologically, for all air carriers at the airport,

— requested slots (initial submissions) by air carriers and chronologically for all air carriers,

— allocated slots, and outstanding slot requests listed individually in chronological order, by air carriers, for air carriers,

[1] OJ No L 14, 22. 1. 1993, p. 1.

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— remaining slots available,

— full details on the criteria being used in the allocation.

If a request for slots is not accepted, the air carrier concerned shall be entitled to a statement of the reasons therefor.

2. (a) The Commission and the Member States concerned shall be entitled to send observers to consultations on slot allocation and airport scheduling held in the context of a multilateral meeting in advance of each season. For this purpose, air carriers shall give the Member States concerned and the Commission the same notice as is given to participants, but not less than 10 days' notice, of the date, venue and subject matter of the consultations.

(b) Such notice shall be given:

(i) to the Member States concerned according to procedures to be established by the competent authorities of those Member States;

(ii) to the Commission according to procedures to be published in the *Official Journal of the European Communities*.

TITLE III

FINAL PROVISIONS

Article 6

Withdrawal of the block exemption

The Commission may withdraw the benefit of the block exemption under this Regulation, pursuant to Article 7 of Regulation (EEC) No 3976/87 where it finds in a particular case that an agreement, decision or concerted practice exempted by this Regulation nevertheless has certain effects which are incompatible with the conditions laid down by Article 85 (3) or are prohibited by Article 86 of the Treaty, and in particular where:

(i) there is no effective price competition on any route or group of routes which was the subject of tariff consultations. In such cases the benefit of this Regulation shall be withdrawn ►C1 in respect of the route or group of routes in question, and from the air carriers which participated ◄ in the tariff consultations concerning such routes;

(ii) an air service which is jointly operated under Article 3 is not exposed to effective competition by direct or indirect air transport services between the two airports connected or between nearby airports, or by other modes of transport which offer speed, convenience and prices comparable to air transport between the cities served by the two airports connected. In such cases the withdrawal of the benefit of this Regulation shall be in respect of the jointly operated service in question;

(iii) the operation of Article 5 has not enabled new entrants to obtain such slots as may be required at a congested airport in order to establish schedules which enable those carriers to compete effectively with established carriers on any route to and from that airport, and where competition on those routes is thereby substantially impaired. In such cases the withdrawal of the benefit of this Regulation shall be in respect of the slot allocation at the airport in question.

Article 7

This Regulation shall enter into force on 1 July 1993.

It shall apply until 30 June 1998.

This Regulation shall apply with retroactive effect to agreements, decisions and concerted practices in existence when it enters into force, from the time when the conditions of application of this Regulation were fulfilled.

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