Commission proposes effective enforcement rules for air transport between the Community and third countries

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1. Introduction

On 24 February 2003 the Commission adopted a Proposal for a Council Regulation amending two existing regulations in the air transport sector (1) as well as amending Regulation (EC) No 1/2003 on the implementation of Articles 81 and 82 of the Treaty (2). The purpose of the proposed Regulation, which is based on Article 83 of the Treaty, is to create an effective framework for enforcing the EC competition rules with regard to air transport between the Community and third countries. Although there is no doubt that the EC competition rules fully apply to this field of air transport (3), effective enforcement rules are currently lacking. In particular the Commission’s experience in examining transatlantic aviation alliance cases under the EC competition rules has shown that there is an important need to restore this anomaly.

In this article the background of the Commission’s Proposal is explained, followed by a description of its main content and its most important differences with earlier proposals in this field.

2. Background

2.1. General

At the moment the Commission lacks effective enforcement powers for the application of the EC competition rules to air transport between the EU and third countries since Regulation (EEC) 3975/87, which implements the EC competition rules in the air transport sector, applies only to air transport between Community airports (Article 1). Regulation (EC) 1/2003, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, which will replace the procedural provisions of Regulation (EEC) No 3975/87 as from 1 May 2004, will not change this (4).

In concrete terms this means that for the assessment of cases relating to air transport between the Community and third countries (such as for example global aviation alliances like Star Alliance, Wings and Skyteam) the Commission will have to (continue to) rely on the proceedings of Article 85 (ex 89) of the Treaty. This provision empowers the Commission, if it finds that there has been an infringement of the EC competition rules, to propose appropriate measures to bring it to an end and, if this is not done, record such infringement in a reasoned decision. However, Article 85 does not provide the Commission with the appropriate fact-finding tools, nor does it enable the Commission to require undertakings to bring an end to infringements and to impose remedies and penalties. Clearly from a regulatory point of view this is an anomaly. For all other economic sectors, with a few minor exceptions in the field of maritime transport, procedural implementing regulations have been adopted and are fully applicable when the effects of anti-competitive agreements or abusive behaviour are felt on the EU market.

In the past, most recently in 1997 (5), the Commission has submitted various proposals with the aim to extend the scope of Regulation (EEC) No 3975/87 to cover also air transport between the Community and third countries and — in close relation to that — proposals empowering the Commission to issue block exemption regulations for such forms of transport. However, the Council has so far not decided on this important issue.

Recent developments have made the need for appropriate enforcement tools to apply the competition rules to air transport between the Community and third countries even more pressing. In particular, the number of international alliances and other forms of co-operation agreements in the aviation sector between Community airlines and carriers from third countries has increased significantly in recent years. The Commission’s investigation has so far primarily focussed on transatlantic aviation alliance cases and these investigations have clearly shown that the current procedural and administrative framework of

(1) That is Regulation (EEC) No 3975/87 laying down the procedure for the application of the EC competition rules in the air transport sector and Regulation (EEC) No 3976/87 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector.


(3) Nouvelles Frontieres (joint cases 209-213/84 [1986] ECR 1425). Obviously Community competition law would only apply if there is an effect on trade between Member States. Such an effect would have to be determined on a case-by-case basis.

(4) Article 32 point c of this Regulation excludes air transport between Community airports and third countries from its scope.
handing such cases is extremely complicated and time-consuming. Furthermore, it follows from the so-called ‘open skies’ judgments of the European Court of Justice of 5 November 2002 that there is a need for a coherent policy for international aviation, including an effective enforcement of the Community competition rules. This latter aspect is worth a few words of further explanation.

2.2. The implications of the ‘open skies’ judgments

In 1998 the Commission brought actions under Article 226(ex 169) of the Treaty against 8 Member States (1), charging them with breaches of Community Law as a result of the conclusion of bilateral agreements in the field of air transport services with the United States. In its judgments of 5 November 2002 (2) the Court ruled that the Community has exclusive competence in certain areas where the Community had included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries. The Court identified three specific areas of Community exclusive competence: airport slots (3), computer reservation systems and intra-Community fares and rates. Consequently, the Member States concerned, by including these provisions in their bilateral aviation agreements had infringed Community Law. Moreover, the Court held that the clause on ownership and control of airlines (4) in the bilateral agreements amounts to discrimination excluding air carriers of other Member States from the benefit of national treatment in the host Member State, which is forbidden by the Community rules on the right of establishment enshrined in Article 43 of the Treaty.

In its Communication of 19 November 2002 (5) on the consequences of the Court judgments for European air transport policy, the Commission emphasised the need to devise a comprehensive international policy for the aviation sector and identified some key principles and initial priorities for action, including measures to ensure that effective competition is preserved and promoted. Only by overcoming the limitations of the existing investigation and enforcement regime could a fully effective co-ordinated air transport policy be achieved (6). There is no longer any reason for competition rules applied to air transport within the Community to be different from those involving third countries. The Commission should have the same enforcement powers when dealing with, for example, intra-Community co-operation arrangements between airlines as with co-operation agreements between a Community carrier and a carrier from a third country.

There was therefore an urgent need to re-launch the 1997 proposals establishing effective enforcement rules for air transport between the Community and third countries. Given the changed context since 1997, it was held to be more appropriate to replace the 1997 proposals by a new Proposal, which although it differs in some aspects from the earlier proposals, has the same objective. The proposals submitted by the Commission in 1997 amending Council Regulations (EEC) No 3975/87 and No 3976/87 have been withdrawn accordingly.

3. Essence of the proposed regulation

3.1. Purpose

As is explained in further detail in the Explanatory Memorandum to the Proposal, the purpose of the proposed Council Regulation is primarily to ensure a more effective and efficient framework for anti-trust procedures with regard to air transport between the Community and third countries. To that end it is proposed to delete the provision in Regulation (EC) No 1/2003, which currently excludes from its scope air transport between the Community and third countries (that is, Article 32 point c). As a consequence, Regulation (EC) No 1/2003, would as from 1 May 2004, apply to this part of air transport like for intra-Community...
transport and practically all other fields of economic activity (1).

3.2. Repeal of Regulation (EEC) No 3975/87

Since Regulation (EEC) No 3975/87 will practically not have any further meaning following the amendments by Regulation (EC) No 1/2003 (2) and the proposed Regulation, it is proposed to use this opportunity to repeal Regulation (EEC) No 3975/87 in its entirety, with the exception of a specific transitional provision (3). Essentially the only remaining substantive provision in Regulation (EEC) No 3975/87 would be the exception for certain purely technical agreements in Article 2, which has been interpreted by the Commission in a very strict sense and has merely a declaratory character. Moreover, in appropriate cases, there would be alternative ways for the Commission to provide its views on purely technical provisions falling outside the scope of Article 81(1) of the Treaty, e.g. by deciding in an individual case on the inapplicability of Article 81, where the Community public interest so requires, or by possibly issuing a Commission notice. Consequently, there would be no need to retain Regulation (EEC) No 3975/87 and the Proposal therefore proposes to repeal Regulation (EEC) No 3975/87 in its entirety.

3.3. Increased scope enabling block exemption regulation

Finally, the proposed broadening of the Commission’s enforcement powers to air transport between the Community and third countries should logically be combined with the power of the Commission to grant also block exemptions in those cases, as it can already do at present in the case of air transport between Community airports pursuant to Council Regulation (EEC) No 3976/87. Therefore, the proposed Regulation extends the scope of Regulation (EEC) No 3976/87, which enables the Commission to issue block exemption regulations, in particular with regard to certain listed activities in the air transport sector.

The list in Article 2(2) of Regulation (EEC) No 3976/87 covers currently a number of activities, including joint planning and co-ordination of schedules, passenger tariff consultations and freight tariff consultations, joint operations on new less busy scheduled air services, slot allocation at airports and airport scheduling and common purchase, development and operation of computer reservation systems. In the past the Commission issued block exemptions for all of these activities, however over the years, when liberalisation in the air transport market advanced and competition came the main driving factor there was less and less need for such group exemptions. Consequently, most block exemptions were not renewed and at present the only remaining block exemptions in the air transport sector are those laid down in Regulation (EEC) No 1617/93, that is for IATA passenger tariff conferences and slot consultations. Both block exemptions have recently been renewed by the Commission until 30 June 2005, under certain additional obligations. Once the proposed Council Regulation has been adopted, it would seem logical to extend the scope of these block exemptions also to air transport between the Community and third countries.

3.4. Entry into force

In order to avoid a complicated transitional regime, the proposed Regulation is envisaged to become applicable as from the same date that Regulation (EC) No 1/2003 itself will apply, therefore as from 1 May 2004. This would ensure that as from that date the same competition enforcement rules apply to the whole air transport sector, regardless of whether intra-Community transport or transport between the Community and third countries is concerned.

4. Main differences compared to the 1997 proposals

As said above, although the purpose of the Proposal remains the same, it differs in a number of aspects from the proposals that were submitted to the Council in 1997. Naturally it takes into account new developments that took place in the meantime, such as the Commission’s increasing experience in assessing transatlantic alliance cases and the implications of the ‘open skies’ judgment

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(1) The exceptions for inland and maritime transport (Article 32 point a and b of Regulation (EC) No 1/2003 respectively) will however remain.

(2) Regulation (EC) No 1/2003 will, as from 1 May 2004, repeal all existing procedural provisions of Regulation (EEC) No 3975/87. As a result, Regulation (EEC) No 3975/87 will as from that date basically become an empty shell. It has to be noted that the situation for the other two Regulations in the transport sector, that is Regulation (EEC) No 1017/68 (inland transport) and Regulation (EEC) No 4056/86 (maritime transport), is different since these contain a number of important substantive provisions, such as e.g. a block exception for SME (article 4 of Regulation (EEC) No 1017/68) and a block exemption for liner conferences (Article 3 of Regulation (EEC) No 4056/86).

(3) That is, Article 6(3), providing for a transitional provision for revoking/amending exemptions granted under the Regulation before 1 May 2004.
of the Court of Justice. Furthermore the following differences are worthwhile mentioning:

First, the 1997 proposals contained a specific clause providing for a procedure in case of conflict between international law and EC competition law (1). The idea at the time was apparently in particular that bilateral aviation agreements which Member States concluded with third countries might contain clauses which infringe EC competition law and that a consultation procedure with the competent authorities of the countries concerned should be foreseen for such situations. However, strictly speaking a conflict of laws arises only in a situation where one jurisdiction requires a party to perform some action which another jurisdiction prohibits. It is questionable whether a conflict of laws clause in a specific transport Regulation serves a useful purpose. It seems unnecessary because Member States are not entitled to conclude agreements which would run counter to EC law or which would be of exclusive Community competence. In any event, after the Court’s ruling in the open skies cases and the Commission’s conclusion from that judgment that a new EU/US agreement should be negotiated to replace the existing bilateral agreements and the implications the judgment has for other bilateral relationships between EU Member States and foreign countries (2) the need for such a clause would be even less obvious. The Proposal does therefore not contain such a clause.

Secondly, in 1997 rather than amending Regulation (EEC) No 3976/87, the Commission proposed a new Council Regulation empowering the Commission to issue block exemptions with regard to certain activities relating to air transport between the Community and third countries. The proposed Regulation was largely similar to Regulation (EEC) No 3976/87, but differed from that Regulation in particular as concerns the list of activities for which the Commission could adopt block exemptions. On the one hand this list was more limited, not including activities such as consultations on cargo tariffs and computer reservation systems (3). On the other hand the list in the proposed Regulation went further, including also the sharing of revenues and co-ordination of capacity ’to take account of the situation on certain Community third country routes’. Although not entirely clear, the background for this was apparently that the bilateral aviation agreements that the Member States had concluded with some third countries might contain such clauses.

However, in the meantime the Commission’s further developed alliance policy has made it clear that revenue sharing and capacity co-ordination are activities which do not normally stand alone but are usually part of aviation co-operation agreements, comprising a range of activities on which participating carriers do no longer compete and which in principle are caught by Article 81(1) of the Treaty. The possibilities of granting an exemption to an aviation alliance covering such activities is then in principle assessed on a case-by-case basis. There seems to be no reason to treat alliances between EU carriers and carriers from third countries differently from intra-Community alliances in this respect. Therefore, in the absence of a clear justification for deviating from the activities listed in Regulation (EEC) No 3976/87 for air transport between the Community and third countries, a simple amendment of the scope of Regulation (EEC) No 3976/87 could achieve the envisaged powers to issue block exemptions for air transport between the Community and third countries.

Thirdly, as already mentioned rather than proposing to amend the scope of Regulation (EEC) No 3975/87 as was done in 1997, the Proposal makes the amendment through Regulation (EC) No 1/2003 which has been adopted in the meantime and proposes to repeal the remaining provisions of Regulation (EEC) No 3975/87.

In light of the above it was also possible to draft the new Proposal in such a way that there is just one Proposal instead of the two separate proposals that were prepared in 1997, providing for simplification, in line with the Commission’s general policy in this respect.

5. Conclusion

The Proposal has been submitted to the Council and the Parliament (consultation procedure) on 24 February 2003. In order to end the unsatisfactory present situation as soon as possible it would be particularly important to have the Proposal adopted in due time before Regulation (EC) No 1/2003 becomes applicable, i.e. before 1 May 2004.

(1) A similar provision is laid down in Article 9 of Regulation (EEC) No 4056/86, laying down rules for the application of Articles 81 and 82 of the Treaty to maritime transport. In the consultation paper on the review of this Regulation (available at the Competition DG’s website) the question has however been raised whether this provision serves a useful purpose.


(3) The Memorandum to the 1997 Proposal does not explain why these activities, included in Regulation (EEC) No 3976/87 were not taken over, however this might be explained by the fact that the Commission in the meantime held that there was no longer a need for group exempting such activities and accordingly had withdrawn or was considering to withdraw the respective block exemptions.