EXEMPTION (AIR TRANSPORT): PROPOSED REGULATION

Subject: Exemption
Block exemption

Industry: Air Transport

Source: Commission Statement IP/03/284, dated 26 February 2003

(Note. It is understandable that the Commission should wish to have certain powers conferred on it under a proposal for a Council Regulation in the area of arrangements made between EU and non-EU air carriers. But it is less clear from the Commission statement that there is a serious gap in the application of Article 81 of the EC Treaty to infringements of the competition rules. It is questionable whether the Commission is right in saying that it has no jurisdiction in respect of alliances between EU and non-EU carriers; but it is certainly correct that regulations along the lines of the present rules applying to alliances between EU carriers would simplify the position. The proposed Regulation will be a Council Regulation; it will confer delegated powers on the Commission, including the power to make block exemption regulations. This follows the usual pattern.)

The Commission has adopted a proposal for a Regulation, which would give it clear powers to review cases relating to air transport between the Community and third countries. This would end the present anomaly where the Commission has jurisdiction on an all-European alliance, but not on an alliance with, for example, a US carrier. In the Commission's view, "putting an end to this anomaly is all the more urgent in view of the recent European Court open-skies ruling which recognises EU competence on air transport relations with third countries and is expected to lead to more consolidation in the sector".

The proposed regulation will give the Commission effective and efficient powers to examine alliances between EU and non-EU airlines, similar to those that it already has to review alliances between EU-based airlines. (The draft Regulation concerns air transport between the EU and third countries, which covers, for example, transatlantic airline alliances, but not mergers for which the Merger Regulation applies regardless of the origin of the airlines. Airline alliances are co-operative arrangements and cover often issues such as flight schedules and frequencies, pricing, code-sharing, the joint use of airport facilities and infrastructure and the pooling of frequent flyer programmes.)

The Commission is also proposing to have the power to grant block exemptions when justified. It hopes that, if approved, the new Regulation will come into force on 1 May 2004, at the same time as the new antitrust Regulation 1/2003, which lays down the rules and procedures to enforce Articles 81 and 82 of the EC Treaty.

At present, the Commission considers that it lacks adequate enforcement powers for the application of the European competition rules to air transport between the European Union and non-member states. This has so far been felt in particular in cases relating to transatlantic or other alliances between EU and non-EU carriers and is clearly an anomaly, given that the Commission was granted the power in the eighties (Regulation EEC/3975/87) to apply the competition rules to air transport between airports in the European Communities, including alliances between European airlines. No specific rules or procedures exist for cases relating to air transport between the Community and third countries.

One direct result of this, according to the Commission, is that the examination of such alliances can take years: six exactly in the case of the alliance between Lufthansa, SAS and United Airlines, on the one hand, and the alliance between KLM and Northwest, on the other. This does not mean that the airlines concerned had to wait six years before they put in place their code-sharing or revenue-sharing or pooled their frequent flyers programmes, which usually characterise these link-ups. But the fact that the Commission cannot reach a decision in a shorter period of time creates legal uncertainty.

The airline industry is the only sector where the Commission has no clear-cut powers to enforce the competition rules in so far as it involves non-EU carriers. For all other economic sectors, with a few minor exceptions, 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. Regulation EC/1/2003, which will replace Regulation 17/62 and the procedural provisions of Regulation EEC/3975/87, will not change this.

The Commission believes that the recent Court judgment in the "open skies" cases increases the need for a coherent European policy for international air transport. The Commission has in this regard proposed a package of measures on how to move forward and believes that competition is an essential part of the Community's policy for international air transport. The main purpose of the proposed Council Regulation is 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 the Commission is proposing the deletion of the provision in Regulation 1/2003, which currently excludes from its scope air transport between the EU and third countries, with the result that all enforcement rules in Regulation 1/2003 will also apply to such transport. The Commission is also proposing the repeal of Regulation 3975/87, as it will have practically no further meaning following the amendment to Regulation 1/2003 and the introduction of the proposed Regulation.

Finally, the Commission proposes that it should have the power to grant block exemptions, as it can already do at present in the case of air transport between European airports. There are two such block-exemption regulations already in force and they concern tariff consultation for interlining and the allocation of landing and take-off slots at airports. ■