Commission Regulation (EC) No 1459/2006 of 28 September 2006 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports

COMMISSION REGULATION (EC) No 1459/2006

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on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation at airports

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European 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)], and in particular Article 2 thereof,

Having published a draft of this Regulation[(2)],

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Whereas:

(1) Since 1 May 2004, the air transport sector has been subject to the generally applicable provisions of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[(3)].

(2) Regulation (EC) No 1/2003 provides that agreements which fall under Article 81(1) of the Treaty which satisfy the conditions of Article 81(3) are not prohibited, no prior decision to that effect being required. In principle, undertakings and associations must now assess for themselves whether their agreements, concerted practices and decisions are compatible with Article 81 of the Treaty.

(3) Regulation (EEC) No 3976/87 empowers the Commission to apply Article 81(3) of the Treaty by Regulation to certain categories of agreements, decisions or concerted practices relating directly or indirectly to the provision of air transport services on routes between Community airports and on routes between the Community and third countries.

(4) Agreements, decisions or concerted practices concerning consultations on passenger tariffs on scheduled air services and slot allocation and airport scheduling are liable to restrict competition and affect trade between Member States.

(5) However, since such agreements, decisions or concerted practices may benefit air transport users and/or air carriers, 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[4] declared that Article 81(1) of the Treaty did not apply, *inter alia*, to certain agreements, decisions or concerted practices concerning consultations on tariffs and slot allocation at airports for air services between Community airports. Regulation (EEC) No 1617/93 expired on 30 June 2005.

(6) In June 2004 the Commission initiated a consultation on the revision of Regulation (EEC) No 1617/93 to determine whether the block exemption should be discontinued, maintained in its original form or extended in scope. The Commission received responses from Member States, airlines, travel agents and consumer groups.

(7) In view of the results of the consultation and the directly applicable exception system introduced by Regulation (EC) No 1/2003, there are not sufficient grounds to continue to declare by Regulation Article 81(1) inapplicable to consultations on slot allocation and airport scheduling agreements or to consultations on tariffs for the carriage of passengers, with their baggage, on scheduled air services between Community airports. However, the airline industry should be allowed sufficient time to adapt to the new situation and to assess for themselves whether their agreements and practices are compatible with Article 81 of the Treaty and, if necessary, to amend them. Since Regulation (EEC) No 1617/93 has already expired, it is necessary to adopt a new block exemption regulation for a transitional period.

(8) Arrangements on slot allocation at airports and airport scheduling can improve the efficient utilization of airport capacity and airspace, facilitate air-traffic control and help to spread the supply of air transport services from the airport. Entry to congested airports must remain possible if competition is not to be eliminated. In order to provide a satisfactory degree of security and transparency, arrangements in this respect 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.

(9) A block exemption should be granted until 31 December 2006 in respect of consultations on slot allocation and airport scheduling in so far as they concern air services the point of origin and/or point of destination of which is located in the Community. After 31 December 2006, the airline industry should assess for itself whether agreements and concerted practices between undertakings and decisions of associations of undertakings caught by Article 81(1) of the Treaty satisfy the conditions of Article 81(3). The assessment should, *inter alia*, consider whether all carriers concerned can participate in the consultations on slot allocation and airport scheduling, and whether these consultations are conducted in a non-discriminatory and transparent manner. This Regulation is without prejudice to Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports[5].

(10) Consultations on passenger tariffs may contribute to the generalised acceptance of interlinable passenger tariffs to the benefit of air carriers as well as air transport users. However, consultations must not exceed the aim of facilitating interlining.

(11) The results of the consultation initiated by the Commission in June 2004 for the review of Regulation (EEC) No 1617/93 indicate that the intra-Community air transport market

has evolved in such a way that the degree of assurance that consultations on tariffs will continue to meet all the criteria of Article 81(3) of the Treaty is declining.

(12) A block exemption should therefore be granted until 31 December 2006 in respect of consultations on tariffs for the carriage of passengers, with their baggage, on scheduled air services between Community airports. After that date, the airline industry should assess for itself whether agreements and concerted practices between undertakings and decisions of associations of undertakings caught by Article 81(1) of the Treaty satisfy the conditions of Article 81(3) of the Treaty.

(13) Since 1 May 2004, the Commission has been empowered to apply Article 81(3) of the Treaty by Regulation in respect of air services on routes between the Community and third countries, as well as on routes between Community airports.

(14) In contrast to intra-Community air-traffic, air services between Member States and third countries are, in general, governed by bilateral air services agreements. The nature and level of detail of regulatory requirements set out in these agreements vary widely. Without prejudice to Community law, including Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air service agreements between Member States and third countries[6], it is common for air services agreements to restrict and/or regulate market access and/or pricing, which may impede competition between air carriers on routes between the Community and third countries. Moreover, it is common for air services agreements to restrict the ability of carriers to enter into the kind of bilateral cooperation agreements which provide consumers with alternatives to the International Air Transport Association (IATA) interlining system.

(15) On routes between the Community and third countries, the proportion of passenger journeys involving a connection is appreciably higher than on intra-Community international flights. Therefore, the benefits of interlining for consumers obtained through tariff consultations should be greater on routes between the Community and third countries.

(16) It can be assumed with sufficient certainty that consultations on tariffs for the carriage of passengers, with their baggage, on scheduled air services between points in the Community and points in third countries currently satisfy the conditions of Article 81(3) of the Treaty. However, markets for air transport are undergoing rapid developments. A short block exemption should therefore be granted in respect of such consultations until 31 October 2007.

(17) The competent authorities in the United States of America and Australia are reviewing their respective antitrust policies in respect of IATA tariff conferences. These reviews are likely to be completed by June 2007. It is, therefore, appropriate that the Commission should review the block exemption for passenger tariff conferences with respect to routes between the Community and these countries by that time.

(18) Data should be collected to enhance the Commission’s knowledge on the relative use of the passenger tariffs set in the consultations and their relative importance for actual interlining on scheduled services between the Community and third countries. The data

should also enable the Commission to better assess the effects of regulatory restrictions flowing from bilateral air services agreements. Air carriers participating in consultations should therefore be required to collect data for all fare classes in which interlinable fares are agreed, for each IATA season starting from 1 May 2004.

(19) 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.

(20) Community law in the field of civil aviation that is relevant for the internal market was extended to the area comprising the Community and Norway, Iceland and Liechtenstein through the Agreement on the European Economic Area. Therefore, flights between the Community and Norway, Iceland and Liechtenstein should be treated in the same manner as intra-Community flights. Community legislation is extended to the territory covered by the EEA Agreement through decisions by the EEA Joint Committee. For the purposes of this Regulation, however, it is necessary to stipulate that the block exemption provided for in respect of extra-Community flights does not apply to flights between points in the Community and points in Norway, Iceland and Liechtenstein.

(21) Community law in the field of civil aviation that is relevant for the internal market was extended to the area comprising the Community and Switzerland through the Agreement between the European Community and the Swiss Confederation on Air Transport[7]. As long as that agreement remains in force, therefore, flights between the Community and Switzerland should be treated in the same manner as intra-Community flights. Community legislation is extended to the territory covered by the Agreement through decisions by the Joint Committee set up under the Agreement. For the purposes of this Regulation, however, it is necessary to stipulate that the block exemption provided for in respect of routes between the Community and third countries does not apply to flights between points in the Community and points in Switzerland.

(22) This Regulation is without prejudice to the application of Article 82 of the Treaty,

HAS ADOPTED THIS REGULATION:

Article 1

Exemptions

Pursuant to Article 81(3) of the Treaty and subject to the provisions of this Regulation, it is hereby declared that Article 81(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:

(a) the holding of consultations on slot allocation and airport scheduling in so far as they concern air services the point of origin and/or point of destination of which is located in the Community;

(b) the holding of consultations on tariffs for the carriage of passengers, with their baggage, on scheduled air services between points in the Community or between points in the Community, on the one hand, and points in Switzerland, Norway, Iceland or Liechtenstein, on the other;

(c) the holding of consultations on tariffs for the carriage of passengers, with their baggage, on scheduled air services between points in the Community, on the one hand, and points in Australia or the United States of America, on the other;

(d) the holding of consultations on tariffs for the carriage of passengers, with their baggage, on scheduled air services between points in the Community, on the one hand, and points in third countries other than those referred to in points (b) and (c), on the other.

Article 2

Slot allocation and airport scheduling

1 Article 1(a) shall apply only if the following conditions are fulfilled:

a the consultations 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 applied without discrimination, whether direct or indirect, on the grounds of carrier identity, nationality or category of service, which 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 point (c), 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 slots are allocated to new entrants, as defined in Article 2(b) of Regulation (EEC) No 95/93 as follows:

(i) at Community airports, a 50 % share 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 enable new entrants to be able to compete effectively with established carriers on routes to/from the airport in question; the share allocated to new entrants may be less than 50 % if requests by new entrants represent less than 50 % of all applications for such new slots;

(ii) at third country airports, a sufficient share of such available slots for entry at congested airports to remain possible on routes between such airports and points located in the Community;

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

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

(i) historical slots by air carrier, in chronological order, for all air carriers at the airport;

(ii) requested slots (initial submissions) by air carrier, in chronological order, for all air carriers;

(iii) allocated slots, and outstanding slot requests listed individually in chronological order, by air carrier, for all air carriers;