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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 411/2004

of 26 February 2004

repealing Regulation (EEC) No 3975/87 and amending Regulations (EEC) No 3976/87 and (EC) No 1/2003, in connection with air transport between the Community and third countries

(Text with EEA relevance)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 83 thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Parliament [2],

Whereas:

(1) Neither Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector [3], nor Regulation (EC) No 1/2003 itself applies to air transport between the Community and third countries.

(2) Consequently, the Commission does not enjoy powers of investigation and enforcement with regard to infringements of Articles 81 and 82 of the Treaty in respect of air transport between the Community and third countries equivalent to those enjoyed as regards air transport within the Community. In particular, the Commission lacks the requisite fact-finding tools and the powers to impose remedies which are necessary to bring infringements to an end or to impose penalties in respect of proven infringements. Furthermore, the specific rights, powers and obligations assigned to national courts and the competition authorities of the Member States by Regulation (EC) No 1/2003 do not apply to air transport between the Community and third countries; the same holds true for the mechanism for cooperation between the Commission and the competition authorities of the Member States provided for in Regulation (EC) No 1/2003.

(3) Anti-competitive practices in air transport between the Community and third countries may affect trade between Member States. Since the mechanisms enshrined in Regulation (EC) No 1/2003, the function of which is to implement the rules on competition under Articles 81 and 82 of the Treaty, are equally appropriate for applying the competition rules to air transport between the Community and third countries, the scope of that regulation should be extended to cover such transport.

(4) When Articles 81 and 82 of the Treaty are applied in proceedings on the basis of Regulation (EC) No 1/2003 and in accordance with the case-law of the Court of Justice, air services agreements concluded between the Member States and/or the European Community on the one hand and third countries on the other hand should be duly considered, in particular for the purpose of assessing the degree of competition in the relevant air transport markets. This Regulation does, however, not affect the rights and obligations of the Member States under the Treaty with respect to the conclusion and application of such agreements.

(5) Article 2 of Regulation (EEC) No 3975/87 is of a purely declaratory nature and should therefore be deleted. With the exception of Article 6(3), which should continue to apply to decisions adopted pursuant to Article 81(3) of the Treaty prior to the date of application of Regulation (EC) No 1/2003 until the date of expiry of those decisions, Regulation (EEC) No 3975/87 will, following the deletion of most of its provisions by Regulation (EC) No 1/2003, cease to serve any further purpose; it should therefore be repealed.

(6) By the same token, an equivalent amendment should also be made to Council Regulation (EEC) No 3976/87 of 14 December 1987 on the application of Article 81(3) of the Treaty to certain categories of agreements and concerted practices in the air transport sector [4]. That regulation, which empowers the Commission to declare by way of regulation that the provisions of Article 81(1) do not apply to certain categories of agreements between undertakings, decisions by associations of undertakings and concerted practices, is at present explicitly limited to air transport between Community airports.

[1] Proposal of 24 February 2003.
[2] Opinion of 23 September 2003 (not yet published in the Official Journal).
[3] OJ L 374, 31.12.1987, p. 1. Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).
[4] OJ L 374, 31.12.1987, p. 9. Regulation as last amended by Regulation (EC) No 1/2003.