

**dti**

**PROPOSAL TO EXTEND THE  
SCOPE OF THE COMMUNITY'S  
COMPETITION IMPLEMENTING  
RULES TO COVER AIR SERVICES  
BETWEEN COMMUNITY  
AIRPORTS AND THOSE OF  
THIRD COUNTRIES**

**Consultation on a draft  
Council Regulation**

**COM (2003) 91**

**OCTOBER 2003**



The DTI drives our ambition of 'prosperity for all' by working to create the best environment for business success in the UK. We help people and companies become more productive by promoting enterprise, innovation and creativity.

We champion UK business at home and abroad. We invest heavily in world-class science and technology. We protect the rights of working people and consumers. And we stand up for fair and open markets in the UK, Europe and the world.

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Annex A List of consultees

Annex B Consultation criteria

The proposal itself is sent as a separate document.

## **1. Introduction**

1.1 This consultation seeks views on the proposal for a Council Regulation to extend the Community's competition implementing rules to cover air services between Community airports and those of third countries (commonly referred to as "extra-Community" air services).

1.2 It would end the current arrangements for the enforcement of Articles 81 and 82 of the EC Treaty in relation to extra-Community air transport services with effect from 1 May 2004. It would do this by extending the Community implementing rules on competition to bring extra-Community air services onto the same footing as intra-Community ones.

1.3 It also proposes that the Commission be given powers to grant block exemptions in relation to certain categories of agreements and practices relating to air transport between Community and third country airports.

1.4 The UK Government is supportive and believes that the proposed Regulation would:

- simplify existing competition law in this area;
- provide more consistency in the application of the Community competition rules in this sector; and
- provide greater legal certainty to Community airlines.

### **Next Steps**

1.5 The Regulation must be agreed and adopted by the Council of the European Union. We expect the negotiation process on the draft Regulation to begin later this year.

### **Regulatory Impact Assessment**

1.6 The Department has not prepared a Regulatory Impact Assessment. The proposal is not expected to impose additional costs on UK business given that the cost of complying with

current UK competition law and EC competition law will be unchanged.

### **Impact on UK law**

1.7 If adopted the UK will have to repeal the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001<sup>1</sup> as they apply to air transport services.

### **Responses**

1.8 Responses and queries should be sent to:

Jane Grady  
Consumer and Competition Policy Directorate  
Room 628  
Department of Trade and Industry  
1 Victoria Street  
London, SW1H 0ET

Fax + 44 (0)207 215 6726  
Tel + 44 (0)207 215 6778  
E-mail [jane.grady@dti.gsi.gov.uk](mailto:jane.grady@dti.gsi.gov.uk)

### **Closing date**

1.9 Responses must be received by 30 December 2003.

### **Confidentiality**

1.10 Your response to this consultation document may be made publicly available in whole or in part at the Department's discretion. If you do not wish all or part of your response (including your identity) to be made public, you must state in the response which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made

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<sup>1</sup> SI 2001/2916 as amended by EC Competition Law (Articles 84 and 85) Enforcement (Amendment) Regulations 2002, The Enterprise Act 2002 (Part 9 Restrictions on Disclosure of Information) (Amendment and Specification) Order 2003, The Enterprise Act 2002 (Consequential and Supplemental Provisions) Order 2003 and The Enterprise Act 2002 (Commencement No.2, Transitional and Transitory Provisions) Order 2003.

available to any enquirer, including enquirers outside the UK, or published by any means, including on the Internet.

## **Consultees**

1.11 We are sending this document to the consultees listed in Annex A. Please tell us if you know of others who would be interested in receiving this consultation.

## 2. Summary of Questions

Question 1: Have you any comments on the Commission's proposal to extend the scope of the Community's competition implementing rules to include air transport between Community airports and those of third countries?

Question 2: Have you any comments on the Commission's proposal that it should be empowered to grant block exemptions in respect of air transport services between Community airports and those of third countries?

### 3. Background

3.1 The scope of existing Council Regulation 3975/87<sup>2</sup>, which lays down implementing rules for EC competition law in the air transport sector, is limited to air transport between Community airports<sup>3</sup>. Council Regulation 1/2003<sup>4</sup>, which will replace the procedural provisions of Regulation 3975/87 as from 1 May 2004, does not change this.

3.2 This means that, with regard to air transport between the Community and third countries, the Commission has only limited powers to enforce the EC competition rules under the procedure provided for in Articles 84 and 85 of the EC Treaty. In particular it does not have the full range of investigative tools and lacks the powers to enforce decisions. As a result Member States' competition authorities, working in conjunction with the Commission, are left to rule and enforce decisions on the compatibility of agreements and abusive behavior under Articles 81 and 82 of the Treaty.

3.3 In the UK the EC Competition Law (Articles 84 and 85) Enforcement Regulations 2001 make provision for UK competition authorities to apply EC competition law to air transport service between the UK and third countries.

3.4 This proposal from the Commission would end the current arrangements for the enforcement of Articles 81 and 82 in relation to Community-third country air transport services with effect from 1 May 2004. It would do this by extending Community implementing rules on competition to bring extra-Community air services onto the same footing as intra-Community ones. (These would be the new arrangements that will take effect under Regulation 1/2003 from 1 May 2004,

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<sup>2</sup> OJ No L 374 of 31.12.1987, as amended by Council Regulation (EEC) No 1284/91 (OJ No L 122 of 17.5.1991, Council Regulation (EEC) No 2410/92 (OJ L 240 of 24.8.1992) and by Council Regulation (EC) 1/2003 of 16 December 2002 (OJ L 1, 04.01.03, p.1).

<sup>3</sup> Article 1 of the Regulation.

<sup>4</sup> OJ No L 1 of 04.01.2003, p.1. Article 32 excludes from its scope air transport between Community airports and third countries. The Government has published a consultation document on its proposals for giving effect to Regulation 1/2003 and for re-aligning the Competition Act 1998. This is available at <http://www.dti.gov.uk/ccp/consultpdf/compmodcon.pdf> and in hard copy by ordering from DTI Publications online at: <http://dti.gov.uk/publications/>

under which Article 81(3) of the EC Treaty will have direct application and the same enforcement regime in relation to individual cases (which will allow enforcement action by the competent authorities of Member States – in the UK, the Office of Fair Trading) would apply to breaches of Articles 81 and 82 as will apply generally.)

3.5 It also proposes that the Commission's power pursuant to Council Regulation No 3976/87<sup>5</sup>, to grant block exemptions in relation to certain categories of agreements and practices relating to air transport between Community airports, should be extended to cover air transport services between Community and third country airports.

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<sup>5</sup> OJ No 374, 31.12.1987, p.9, as most recently amended by Regulation (EEC) No 2411/92 (OJ No L 240, 24.8.1992, p.19).

#### 4. Proposals to extend the scope of the Community's competition implementing rules to include air transport between the Community and third countries

4.1 The Commission argues that the current situation is an anomaly in EC competition law terms and that for all other economic sectors – with a few minor exceptions – there are full Community implementing rules in place. It notes that the EC Merger Regulation<sup>6</sup> makes no differentiation between intra-Community and extra-Community air services.

4.2 It reflects on the difficulties it has experienced under existing arrangements in investigating and dealing with a number of alliance agreements between Community and US airlines, which raised competition concerns. While appropriate solutions were ultimately found for the competition issues identified, the Commission's lack of enforcement powers meant the investigative process was very cumbersome and protracted, and that any measures or remedies it considered necessary had to be taken by the competition authorities in the Member States involved. The Commission also notes that the regulatory regime does not provide the industry with the necessary level playing field or regulatory certainty it needs, as current practice does not fully ensure an effective and coherent application of Community competition law.

4.3 It views this situation as far from satisfactory and considers that an extension of the competition enforcement rules to include extra-Community air services, would provide more consistency in the application of the Community competition rules in this sector and provide greater certainty to Community airlines.

4.4 The Commission also cites the increasing pace of structural change in the airline industry as a particular reason for extending the reach of Community enforcement rules at this time, and the recent European Court ruling on the "open

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<sup>6</sup> Regulation (EEC) No 4064/89, as amended by Regulation (EC) No 1310/97 (OJ 180, 9.7.1997, p.1).

skies" cases<sup>7</sup>, which is further expected to accelerate the pace of change, and which it argues requires a more coherent Community policy for international air transport services, including competition policy.

4.5 To bring this change about the Commission is proposing that the following amendments be made by the new Regulation:

- repeal the substantive provisions of existing Regulation 3975/87, with the exception of Article 6(3) which provides a transitional provision allowing the Commission to revoke or amend existing exemption decisions; and
- amend Regulation 1/2003 by deleting Article 32 point (c), which excludes from its scope air transport services between the Community and third countries. This would have the effect that Regulation 1/2003 would cover all forms of air transport.

**Question 1:** Have you any comments on the Commission's proposal to extend the scope of the Community's competition implementing rules to include air transport between Community airports and those of third countries?

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<sup>7</sup> Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98.

## **5. Proposals to allow the Commission to grant block exemptions in relation to certain categories of agreements and practices relating to air transport between the Community and third countries**

5.1 The Commission already has powers to grant block exemptions in relation to air transport between Community airports pursuant to Council Regulation No 3976/87, and its experience is that these powers satisfy a genuine need for legal certainty on the part of air carriers and other market operators, while providing an incentive to abandon previous, more restrictive agreements.

5.2 The Commission considers that it should also have this power in respect of air transport between Community and third country airports. It is proposed, therefore, that the Commission be given new powers to grant block exemptions to airline agreements, decisions and concerted practices in respect of extra-Community air services too. These powers could be used to grant block exemptions in a range of situations including to airline agreements with respect to joint planning and co-ordination of schedules, operation of a joint service on a new or less busy route, and the development and operation of computer reservation systems. Any exemptions granted would be subject to certain conditions, time limited and subject to review.

5.3 The proposed Regulation will give effect to these changes by the deletion of the words "between Community airports" in Article 1 of Regulation No 3976/87.

**Question 2: Have you any comments on the Commission's proposal that it should be empowered to grant block exemptions in respect of air transport services between Community airports and those of third countries?**

## **ANNEX A**

### **List of consultees**

#### **Aviation Sector**

Airport Operators Association  
Air Transport Users' Council  
Air 2000  
Astraeus Limited  
Atlantic Air Transport  
Aurigny Air Services  
BAC Express Airlines  
BMI British Midland  
Britannia  
British Air Transport Association  
British Airways  
British European  
British Mediterranean  
Brymon Airways  
Centerline  
Channel Express  
Civil Aviation Authority  
DHL Air Limited  
EasyJet  
Emerald Airways  
European Aviation  
Excel Airways  
Flightline  
GB Airways  
General Aviation Manufacturers and Traders Association  
(GAMTA)  
Gill Airways  
Global Supply Systems  
JMC Airlines  
Loganair  
Maersk Air  
Manx Airlines  
Monarch  
MyTravel  
Ryanair  
Scot Airways  
Titan Airways  
Virgin Atlantic

#### **Individuals**

Simon Baker (RBB Economics)

Mark Furse  
Martin Howe (Europe Economics)  
Valentine Korah  
Jeremy Lever, QC  
Tom Sharpe, QC

**Lawyers & Barristers Representative Bodies**

British Institute of International and Comparative Law  
The City of London Law Society  
Competition Law Association  
International Law Society of Scotland  
Joint Bar/Law Society Working Group on Competition Law  
Law Society for Northern Ireland

**Business Representative Bodies**

Association of British Chambers of Commerce  
British Chamber of Commerce in Brussels  
Confederation of British Industry  
Federation of Small Businesses  
Institute of Directors  
International Chamber of Commerce

**Consumer Representative Bodies**

Consumers Association  
Consumers in European Community Group  
General Consumer Council for Northern Ireland  
National Consumer Council  
Scottish Consumer Council  
Welsh Consumers Council

**Employees Representative Bodies**

TUC

**Law Firms**

Allen & Overy  
Ashurst Morris Crisp  
Baker & McKenzie  
Clifford Chance  
Eversheds  
Freshfields Bruckhaus Deringer  
Hammonds  
Herbert Smith  
Latham & Watkins  
Linklaters  
Lovells  
Norton Rose

Olswang  
Richards Butler  
Simmons & Simmons  
Slaughter & May  
Taylor Wessing  
Travers Smith Braithwaite

**Government**

Competition Appeal Tribunal  
Competition Commission  
Department for Constitutional Affairs  
Department for Transport  
Foreign & Commonwealth Office  
HM Treasury  
Home Office

## ANNEX B

### The consultation criteria

1. Timing of consultation should be built into the planning process for a policy (including legislation) or service from the start, so that it has the best prospect of improving the proposals concerned, and so that sufficient time is left for it at each stage.
2. It should be clear who is being consulted, about what questions, in what timescale and for what purpose.
3. A consultation document should be as simple and concise as possible. It should include a summary, in two pages at most, of the main questions it seeks views on. It should make it as easy as possible for readers to respond, make contact or complain.
4. Documents should be made widely available, with the fullest use of electronic means (though not to the exclusion of others) and effectively drawn to the attention of all interested groups and individuals.
5. Sufficient time should be allowed for considered responses from all groups with an interest. Twelve weeks should be the standard minimum period for a consultation
6. Responses should be carefully and open-mindedly analysed, and the results made widely available, with an account of the views expressed, and the reasons for decisions finally taken.
7. Departments should monitor and evaluate consultations, designating a consultation co-ordinator who will ensure the lessons are disseminated.

The complete code is available on the Cabinet Office's web site, address <http://www.cabinet-office.gov.uk/regulation/Consultation/introduction.htm>.

### Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to

Mr Philip Martin, DTI Consultation Co-ordinator, Room 564, 1 Victoria Street, London SW1H 0ET or telephone him on 020 7215 6206 or email [philip.martin@dti.gsi.gov.uk](mailto:philip.martin@dti.gsi.gov.uk)