

EDITORIAL COMMENTS

Liberalising air transport

The Court of Justice's ruling in the *Asjes* case¹ concerning *Nouvelles Frontières*, annotated by Pieter Jan Kuyper in this issue, has led to intense activity in the civil aviation sector.

The Transport Council first postponed its planned debate on the Commission's new proposals for liberalisation and then, at its extra session of 30 June 1986, was able to reach only limited conclusions. The Council confirmed the need for a coherent Community air transport system based on a balanced set of instruments promoting increased competition in intra-Community air services as regards tariffs, capacity and market entry, in conformity with the competition rules of the Treaty. A gradual establishment of this system was agreed upon, with an initial period of application of three years, during which the Council should review developments and decide on further steps in order to achieve the objective of the completion of the internal market by 1992.

The Council was unable to take any concrete measures as a result of the divisions between the partisans of a thorough liberalisation – the United Kingdom, the Netherlands and Ireland – and the more cautious and unwilling reformers, including France and Germany.² The latter two Member States presented a joint document and coordinated their position in the Council debates. They agreed with the Commission in regard to a number of points concerning tariffs. Thus, airlines should be able to fix their tariffs unilaterally, in relation to real costs, and reduced and greatly reduced tariffs with automatic approval should be available within a system of tariff zones, with extra flexibility for certain tariffs situated outside these zones. There should also be rapid arbitration clauses.

However, there was major disagreement on the rates of reduction applicable to reduced tariffs. Thus, the Commission's proposal was

1. Judgment of the Court of 30 April 1986, Joined Cases 209–213/84, *Ministère Public v. Asjes and others*.

2. See *Europe*, 21 June 1986, pp. 13–4.

that tariff zone I (reduced tariffs) should consist of tariffs consisting of between 90 and 60% of the reference tariff, while France and Germany called for these tariffs to be between 90 and 65%. As regards tariff zone II (greatly reduced tariffs), the Commission's proposal was that tariffs should consist of between 60 and 40% of the reference tariff while the Franco-German position called for a bracket of 65 to 45%, with tickets subject to several conditions such as that they be for return flights only, have a minimum stay of six days and a maximum stay of six months.

The Council also discussed but could not agree on capacity shares. At issue was the Commission's proposal that an increase in capacity should be possible with a corresponding right of governments to intervene where an airline's share of total capacity falls below 25% or suffers a rapid reduction in capacity within one year below 45%. It appears that Germany and France sought a more cautious solution, preferring gradual change in an initial three-year experimental stage, with a minimum distribution spread of 45/55.

For its part, the British delegation favoured liberty for airlines to introduce new tariffs, with a system of unilateral notification, rapid arbitration and a system of tariff zones. Companies should be free to modulate their capacity share, there should be free access to markets and the Treaty competition rules should be applied.

The failure of the Council to come to an agreement is not surprising. The reported divisions would appear to mirror almost exactly the positions adopted by the Member States within the European Civil Aviation Conference which, in the period immediately before the Transport Council, adopted measures which came very close to the Franco-German position outlined above. In that forum too, the EC Member States were unable to adopt a common position, despite a Commission request earlier this year that they should do so.

The legislative stalemate still continues at the time of writing. It would seem that the Commission's policy is still broadly that put forward in its Civil Aviation Memorandum No 2.³ It is known that the Commission remains committed to a political solution to this problem. On the competition front, the Commission would probably prefer a Council block-exemption regulation. As regards market access, the

3. Bull. of the EC 2 – 1984, point 2.1.149.

Commission outlined its draft proposals on inter-regional air services on 22 July 1986 envisaging an amendment of Council Directive 83/416⁴ which would relax many of the restrictions applying at present to inter-regional air traffic. Access to major airports, a far more important issue, does not seem to be a Commission concern at the moment, probably because agreement on this sensitive issue is unlikely, at least for now.

It is against this background that one should see the decision of the Commission to open procedures against ten airlines of nine Member States under Article 89 of the Treaty for infringement of the competition rules.⁵ It is understood that the Commission, in letters of 18 July 1986, identifies specific practices of given airlines in relation to tariffs, pooling and capacity revenue. Access to airports and other more technically-related matters are not dealt with.

The airlines have two months to present their comments and to inform the Commission of the measures which they intend using to bring the infringements to an end. If the infringements are not eliminated, Article 89(2) of the Treaty empowers the Commission to record that infringement in a reasoned decision, which it may publish, and to authorise Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation.

It is clear that the Commission's initiative is both a carrot and a stick to encourage a decision by the Council.⁶ The problem with the procedure from the Commission's point of view is that it relies on the Member States for enforcement or presumably, in default, on a Court judgment should a Member State fail to carry out enforcement measures. The procedure could be long and unsatisfactory. Thus, in a sense, the Commission's action is a bluff. For the Member States, the advan-

4. Council Directive 83/146 of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States (OJ 1983, L 237, p. 19).

5. *Europe*, 11 July 1986.

6. See the joint statement by Mr. Clinton Davis and Mr. Sutherland, the Commissioners for Transport and Competition: "The Commission has decided to act under Article 89 of the Treaty. We hope that this will stimulate real momentum at the Council of Transport Ministers to conclude expeditiously its negotiations for the liberalisation of air transport". *Europe*, 11 July 1986.

tage of a political solution is that the adoption of an instrument on the basis of Article 87 of the Treaty would effectively render the present Article 89 proceedings devoid of object.

The Commissioner responsible for Transport, Mr. Clinton Davis, has called for a meeting of the Transport Council in September to discuss air transport.⁷ The impetus for change is now the responsibility of Mr. Moore, the new British President of the Transport Council. Although the United Kingdom is committed to liberalisation, the mere fact that it is in the Presidency is probably by itself not decisive, as the experience of the Dutch presidency shows. Indeed, by all accounts, the Commission itself is divided on this issue.

Nevertheless, it is necessary to stress the importance of a real liberalisation in air transport, and the need for a speedy Council decision, hopefully by the end of the year. This is not just because civil aviation is an important sector. Air fares and better services are of general interest, as the publicity generated by this issue shows, and satisfactory Community action on this front can only serve to better the public perception of the Community.

A decision by the Council should take account of different factors. Profitability and market-sensitivity should not be the only goals of an air-transport policy: the public interest is served also by the existence of sometimes uneconomic but nevertheless essential routes, for example, those linking remote regions of the Community; safety levels must be upheld; further investment should be stimulated. It is to be hoped that the Commission's initiative will promote accord amongst the Member States and that a satisfactory solution may be reached by the end of the year. Otherwise, the *Asjes* case will have changed the picture hardly at all.

7. *Europe*, 14/15 July 1986, p. 8.