JUDGMENT OF THE COURT
30 April 1986 *

In Joined Cases 209 to 213/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the tribunal de police [Local Criminal Court], Paris, for a preliminary ruling in the action pending before that court between

Ministère public

and

(1) Lucas Asjes and Others;

(2) Andrew Gray and Others;

(3) Andrew Gray and Others;

(4) Jacques Maillot and Others;

(5) Léo Ludwig and Others;

on the interpretation of Article 84 (2) and Article 85 *et seq.* of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling, K. Bahlmann (Presidents of Chambers), G. Bosco, O. Due, Y. Galmot, C. N. Kakouris and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Jacques Maillot, the accused in the main proceedings in Cases 211, 212 and 213/84, at the oral procedings by Patrick Montier, of the Paris Bar;

* Language of the Case: French.

Nouvelles Frontières SA, the party bearing civil liability in the main proceedings in Cases 211, 212 and 213/84, in the written procedure by Patrick Montier, of the Paris Bar, and in the oral proceedings by G. Selnet, of the Paris Bar;

Compagnie nationale Air France and Koninklijke Luchtvaart Maatschappij NV (KLM), the parties bearing civil liability in the main proceedings in Cases 212/84 and 209/84 respectively, by Édouard Marissens, of the Brussels Bar;

the Government of the French Republic, by Gilbert Guillaume, acting as Agents, and Sophie-Caroline de Margerie, acting as Assistant Agent;

the Government of the Italian Republic, by Ivo Maria Braguglia, avvocato dello Stato, acting as Agent;

the Government of the Netherlands, in the written procedure by I. Verkade, Secretary General at the Ministry for Foreign Affairs, acting as Agent, and in the oral proceedings by M. Bos;

the United Kingdom, in the written procedure by J. R. J. Braggins, of the Treasury Solicitor's Office, acting as Agent, and in the oral proceedings by T. J. G. Pratt, acting as Agent, assisted by Professor F. Jacobs;

the Commission of the European Communities, by Jean Amphoux, Legal Adviser, acting as Agent, assisted by Frederick Grondman, a Netherlands civil servant seconded to the Commission's Legal Department in the framework of the exchanges with national civil servants;

after hearing the Opinion of the Advocate General delivered at the sitting on 24 September 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By five judgments of 2 March 1984, received at the Court on 17 August 1984, the tribunal de police de Paris referred to the Court a question on the interpretation of certain provisions of the EEC Treaty for a preliminary ruling under Article 177 of that Treaty in order to enable it to appraise the compatibility with those provisions of the compulsory approval procedure laid down by French law for air tariffs.

2 That question was raised in several criminal proceedings against the executives of airlines and travel agencies who had been charged with infringing Articles L 330-3, R 330-9 and R 330-15 of the French Civil Aviation Code when selling air tickets by applying tariffs that had not been submitted to the Minister for Civil Aviation for approval or were different from the approved tariffs.

3 Article L 330-3 provides that air transport may be provided only by undertakings approved by the Minister for Civil Aviation. Those undertakings must also submit their tariffs to the Minister for approval. Article R 330-9 specifies what items must be submitted when approval is sought. The second paragraph of Article R 330-9 provides that foreign undertakings are also covered by the rules. Under Article R 330-15 infringements of those rules are punishable by a prison sentence of between 10 days and one month or a fine of between FF 600 and FF 1 000 or both. A decision approving the tariff proposed by an airline therefore has the effect of rendering that tariff binding on all traders selling tickets of that company in respect of the journey specified in the application for approval.

4 When the cases came before it, the tribunal de police de Paris considered the issue of the compatibility of the system set up by the aforementioned provisions with the EEC Treaty, and in particular with Article 85 (1), in so far as in the tribunal's view the French rules made provision for concerted action between the airlines that was contrary to Article 85. The tribunal also dismissed the objection that Article 85 was not applicable to air transport by virtue of Article 84 (2) on the ground that the aim of that provision was merely to leave the organization of a common policy in that sector to be decided by the Council, without removing it from the ambit of other rules in the Treaty such as Article 85.

5 The tribunal de police de Paris thereupon decided to stay the proceedings and ask the Court for a 'ruling as to whether Articles L 330-3, R 330-9 and R 330-15 of the code de l'aviation civile are in conformity with Community law'.

6 Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Nouvelles Frontières SA in Cases 212 and 213/84, by Compagnie nationale Air France (Air France) in Case 212/84 and by Koninklijke Luchtvaart Maatschappij NV (KLM) in Case 209/84, those three companies being the parties bearing civil liability in the main proceedings, by the Governments of the French Republic, the Italian Republic and the Kingdom of the Netherlands, by the United Kingdom and by the Commission of the European Communities.

7 By order of 26 September 1984 the Court decided, pursuant to Article 43 of the Rules of Procedure, to join the cases for the purposes of the procedure and the judgment.

A — Jurisdiction of the Court to give a reply to the question referred to it for a preliminary ruling

8 Air France, KLM and the French and Italian Governments have raised certain objections to the Court's jurisdiction to reply to the question referred to it by the tribunal de police.

9 Firstly, Air France and KLM, supported by the French Government, point out that it would be superfluous for the Court to give a reply to the question since the tribunal de police has already adopted a position, in its judgments requesting a preliminary ruling, both on the applicability of Article 85 to the air transport sector and on whether the concerted action on tariffs which underlies the tariffs at issue in the main proceedings is void under Article 85 (2).

10 It should be pointed out that the Court has consistently held that in the context of the division of jurisdiction between national courts and the Court of Justice under Article 177 of the Treaty, it is for the national court to appreciate, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment (see in particular judgment of 14 February 1980, Case 53/79 *ONPTS* v *Damiani* [1980] ECR 273).

11 Secondly, Air France and KLM submit that there are mistakes in the description of the French legislation contained in the judgments requesting a preliminary ruling in so far as the tribunal de police has not taken account of the provisions of international agreements on the matter.

12 It should be pointed out in the first place that since the preliminary ruling procedure under Article 177 is not concerned with the interpretation of national laws or regulations (see judgment of 13 March 1984, Case 16/83 *Prantl* [1984] ECR 1299), any inaccuracies in the description of the relevant national provisions given by the national court in its judgment requesting a preliminary ruling cannot have the effect of denying the Court of Justice's jurisdiction to reply to the question referred to it by the national court.

13 As to the implications of international civil aviation agreements for the appraisal, from the point of view of Community law, of national provisions of the kind referred to by the tribunal de police in these cases, it should be pointed out that the existence of such agreements is not a factor such as to preclude the Court's jurisdiction under Article 177 of the EEC Treaty to interpret the relevant provisions of Community law.

14 Thirdly, Air France, KLM and the Italian Government point out that the tribunal de Paris has failed to specify the provision of Community law in the light of which the Court is to appraise the validity of the French legislation in question.

15 It suffices to observe in this respect that it is clear from reading the judgments requesting a preliminary ruling that the question is raised in connection with the Treaty rules on competition.

16 The objections as to the jurisdiction of the Court to reply to the question referred to it for a preliminary ruling by the tribunal de police in these cases must therefore be rejected.

17 However, the question must be understood as asking whether and to what extent it is contrary to the Member States' obligations to ensure that competition in the common market is not distorted, laid down by Article 5, Article 3 (f) and Article 85 (in particular paragraph (1] of the EEC Treaty, to apply the provisions of a Member State which lay down a compulsory procedure for the approval of air tariffs and which make non-compliance with those approved tariffs punishable, *inter alia* by criminal penalties, where it is found that those tariffs are the result of an agreement, a decision or a concerted practice contrary to Article 85.

B — International rules on air transport

18 In order to put the French legislation referred to by the tribunal de police in its proper legal context, the French Government in its written observations has traced the general outline of the international agreements concerning civil aviation. It has referred to the basic convention, the Convention on International Civil Aviation signed at Chicago on 7 December 1944 (United Nations Treaty Series, Volume 15, p. 296) and all the other international agreements derived from it.

19 Article 6 of the Chicago Convention provides that: 'No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.' It does not contain any provision regarding tariffs since the contracting States were unable to come to an agreement on the matter.

20 On the basis of Article 6, which re-affirms the principle of each State's sovereignty over the airspace above its territory, a network of bilateral agreements has been set up whereby the States have authorized the establishment of one or more air routes between their respective territories.

21 Some bilateral agreements drawn up on the basis of standard models, such as the 'Bermuda II' agreement between the United States of America and the United Kingdom, concluded on 13 July 1977, specify the authorized routes and landings in the countries concerned and provide that each signatory State shall designate which airlines are authorized to take advantage of the rights conferred by that agreement. Under those agreements all authorized airlines can exploit those routes on the same terms. The agreements also provide that the tariffs for air services will be fixed by the companies that are authorized to operate the routes envisaged by each agreement. Those tariffs are subsequently subject to the approval of the authorities of the signatory States. In that type of bilateral agreement, however, the signatory States indicate their preference that the tariff should be fixed by common accord by the authorized companies and, if possible, should be negotiated in the framework of the International Air Transport Association (IATA).

22 IATA is an association under private law set up by the airlines at a conference which they held in Havana in April 1945. One of its activities is to offer airlines operating services on routes in one region a framework within which they can agree on coordinated tariffs. Those tariffs are subsequently submitted for the approval of the States concerned in accordance with the requirements of the various bilateral agreements.

23 A system for fixing tariffs similar to that of the bilateral agreements referred to above is laid down by the International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services concluded on 10 July 1967 under the aegis of the Council of Europe and ratified by some of the Member States.

24 The French Government points out that the French legislation and rules at issue in the main proceedings were adopted in the international context described above. However it has not claimed that the said international agreements obliged the Member States which signed them not to respect the competition rules in the EEC Treaty.

25 This aspect of the French Government's argument is largely supported by the other parties which in the observations they have submitted in these cases have also drawn attention to the international context described by the French Government.

26 In those circumstances the international agreements referred to by the French Government and by the other parties do not prevent the Court from examining the question raised by the tribunal de police in the light of the provisions of Community law to which that court refers.

C — Applicability of the competition rules in the Treaty to air transport

27 Construed as indicated above, the tribunal de police's question calls on the Court to determine whether Community law entails obligations for the Member States under Article 5 of the Treaty regarding competition in the air transport sector. To that end it is necessary to ascertain as a preliminary point whether the competition rules laid down by the Treaty are, as Community law now stands, applicable to undertakings in this sector.

28 The starting point for this analysis is Article 84, the last article in Title IV (on transport) of Part Two of the EEC Treaty.

29 Article 84 reads as follows:

'(1) The provisions of this Title shall apply to transport by rail, road and inland waterway.

(2) The Council may, acting unanimously, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.'

30 In their observations Nouvelle Frontières, the United Kingdom and the Commission submit that Article 84 does not render the Treaty rules on competition, in particular Article 85, inapplicable to air transport.

31 They rely in this respect on the judgment of 4 April 1974 (Case 167/73 *Commission* v *French Republic* [1974] ECR 359). In that judgment the Court held that, far from excluding the application of the Treaty to sea and air transport, Article 84 (2) provided only that the special provisions of the Title relating to transport should not automatically apply to them and that therefore sea and air transport remained, like other modes of transport, subject to the general rules of the Treaty.

32 They submit that the general rules of the Treaty include the rules on competition which are, therefore, applicable to air transport whether or not there exists any decision on the part of the Council under Article 84 (2).

33 The French Government takes the opposite view.

34 It submits that the solution propounded by the Court in the aforementioned judgment was referring only to the rules contained in Part Two of the Treaty on the foundations of the Community and cannot therefore be transposed to the competition rules which are contained in Part Three of the Treaty concerning the policy of the Community.

35 It should be noted that Article 74, the first article in the Title on transport, provides: 'The objectives of this Treaty shall, in matters governed by this Title, be pursued by Member States within the framework of a common transport policy.'

36 It is clear from the very wording of Article 74 that the objectives of the Treaty, including that set out in Article 3 (f), namely the institution of a system ensuring that competition in the common market is not distorted, are equally applicable to the transport sector.

37 Article 61 of the Treaty provides that freedom to provide services in the field of transport is governed not by the provisions of the chapter on services but by the provisions of the Title relating to the common transport policy. In the transport sector, therefore, the objective laid down in Article 59 of the Treaty of abolishing during the transitional period restrictions on freedom to provide services should have been attained in the framework of the common policy provided for in Articles 74 and 75.

38 However, no other provision in the Treaty makes its application to the transport sector subject to the realization of a common transport policy.

39 As regards the competition rules in particular, it should be noted that under Article 77 aids are compatible with the Treaty 'if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service'. Such a provision clearly presupposes that the Treaty competition rules, of which the provisions on State aids are part, are applicable to the transport sector whether or not a common transport policy has been established.

40 It should also be noted that where the Treaty intended to remove certain activities from the ambit of the competition rules, it made an express derogation to that effect. That was done in the case of the production of and trade in agricultural products to which, under Article 42, the competition rules apply 'only to the extent determined by the Council within the framework of Article 43 (2) and (3) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39'.

41 As regards transport there is no provision in the Treaty which, like Article 42, excludes the application of the competition rules or makes it subject to a decision by the Council.

42 It must therefore be concluded that the rules in the Treaty on competition, in particular Articles 85 to 90, are applicable to transport.

43 As regards air transport in particular, it should be noted that, as is clear from the actual wording of Article 84 and its position in the Treaty, that article is intended merely to define the scope of Article 74 *et seq.* as regards different modes of transport, by distinguishing between transport by rail, road and inland waterway, covered by paragraph (1), and sea and air transport, covered by paragraph (2).

44 The Court ruled in its judgment of 4 April 1974 (*supra*) that Article 84 (2) serves merely to exclude, so long as the Council has not decided otherwise, sea and air transport from the rules of Title IV of Part Two of the Treaty relating to the common transport policy.

45 It follows that air transport remains, on the same basis as the other modes of transport, subject to the general rules of the Treaty, including the competition rules.

D — Consequences in the air transport sector of the absence of rules implementing Articles 85 and 86

46 In their written obserations Air France and KLM, and also the French, Italian and Netherlands Governments and the Commission, drew attention to the fact that at present there are in the air transport sector no rules as provided for in Article 87.

47 In those circumstances the French and Italian Governments takes the view that the application of Articles 85 and 86 to the air transport sector is a matter for the national authorities referred to in Article 88 of the Treaty. Subject to the conditions laid down in Article 85 (3), those authorities may grant exemptions from the prohibition in Article 85 (1).

48 The Netherlands Government also considers that in the absence of any measure giving effect to Articles 85 and 86, it is for the national authorities referred to in Article 88, but also for the Commission by virtue of Article 89, to ensure that those provisions are complied with. It submits that in proceedings for a preliminary ruling, such as those now before the Court, it is not possible to make a finding that the Treaty has been infringed.

49 The Commission, on the other hand, considers that the absence of the implementing measures referred to in Article 87 does not mean that national courts cannot, where the matter arises, be called upon to rule on the compatibility of an agreement or a particular practice with the competition rules since those rules have direct effect.

50 It should be observed that under Article 87 (1) the Council, acting unanimously within three years after the entry into force of the Treaty, or by a qualified majority after that time, is to 'adopt any appropriate regulations or directives to give effect to the principles set out in Articles 85 and 86'. As is stated in the first recital in the preamble to Regulation No 17 of the Council of 6 February 1962 (Official Journal, English Special Edition 1959-1962, p. 87) the adoption of those regulations or directives is necessary 'in order to establish a system ensuring that competition shall not be distorted in the common market' and 'to provide for balanced application of Articles 85 and 86 in a uniform manner in the Member States'.

51 However, although the Commission has submitted a proposal on the matter (Official Journal 1982, C 78, p. 2), the Council has not yet adopted any such rules applicable to air transport. Regulation No 141 of 26 November 1962 (Official Journal, English Special Edition 1959-1962, p. 291) exempted transport from the application of Regulation No 17 and since then such rules have been adopted only for transport by rail, by road and by inland waterway (see Regulation (EEC) No 1017/68 of the Council of 19 July 1968, Official Journal, English Special Edition 1968 (I), p. 302).

52 In the absence of rules as referred to in Article 87 of the Treaty, Articles 88 and 89 continue to apply.

53 Article 88 provides: 'Until the entry into force of the provisions adopted in pursuance of Article 87, the authorities in Member States shall rule on the admissibility of agreements, decisions and concerted practices and on abuse of a dominant position in the common market in accordance with the law of their country and with the provisions of Article 85, in particular paragraph 3, and of Article 86.'

54 That article therefore imposes on 'the authorities in Member States' the obligation to apply Article 85, in particular paragraph (3), and Article 86 so long as rules within the meaning of Article 87 have not been adopted.

55 As the Court held in its judgment of 30 January 1974 (Case 127/73 *BRT* v *SABAM* [1974] ECR 51), the term 'authorities in Member States' in Article 88 refers to either the administrative authorities entrusted, in most Member States, with the task of applying domestic legislation on competition subject to the review of legality carried out by the competent courts, or else the courts to which, in other Member States, that task has been especially entrusted.

56 Construed in that way, the term 'authorities in Member States' within the meaning of Article 88 does not include the criminal courts whose task is to punish breaches of the law.

57 It is clear from the documents before the Court in these cases that the concerted action on tariffs underlying the criminal charges at issue in the main proceedings has not been the subject of any decision taken under Article 88 by the competent French authorities on the admissibility of that agreed action in accordance with the French competition rules and with Article 85, in particular paragraph (3). The French Government itself has denied that any such decision can be read into the measure approving the tariffs in question.

58 Article 89 regulates the powers of the Commission during the period before the entry into force of the provisions referred to in Article 87. Under Article 89 the Commission may, on application by a Member State or on its own initiative, investigate 'cases of suspected infringement' of the principles laid down by Articles 85 and 86 and, if it finds that there has been an infringement, it may propose 'appropriate measures to bring it to an end'. If the infringement is not brought to an end, Article 89 (2) empowers the Commission to record that infringement 'in a reasoned decision', which it may publish, and to 'authorize Member States to take the measures, the conditions and details of which it shall determine, needed to remedy the situation'.

59 However, the Commission does not profess to have exercised, as regards the concerted action on tariffs in question, its powers under Article 89, in particular the power under Article 89 (2) to record by a reasoned decision the existence of an infringement of Article 85.

60 The question therefore arises whether, in the absence of regulations or directives applicable to air transport adopted by the Council pursuant to Article 87, a national court which is not one of the authorities in the Member States referred to in Article 88 none the less has jurisdiction to rule, in proceedings like the main proceedings, that concerted tariff practices between airlines are contrary to Article 85 although no decision has been taken pursuant to Article 88 by the competent national authorities and no decision has been taken by the Commission pursuant to Article 89, in particular Article 89 (2), regarding those concerted practices.

61 It should be borne in mind that, as the Court held in its judgment of 6 April 1962 (Case 13/61 *Bosch* v *Van Rijn* [1962] ECR 45), 'Articles 88 and 89 are, however, not of such a nature as to ensure a complete and consistent application of Article 85 so that their mere existence would permit the assumption that Article 85 had been fully effective from the date of entry into force of the Treaty'.

62 In fact Article 88 envisages a decision by the authorities of Member States on the admissibility of agreements, decisions and concerted practices only when these are submitted for their approval within the framework of the laws relating to competition in their countries. Under Article 89 the Commission is empowered to record any infringements of Articles 85 and 86 but it does not have the power to declare Article 85 (1) inapplicable within the meaning of Article 85 (3).

63 In those circumstances the fact that an agreement, decision or concerted practice may fall within the ambit of Article 85 does not suffice for it to be immediately considered to be prohibited by Article 85 (1) and consequently automatically void under Article 85 (2).

64 Such a conclusion would be contrary to the general principle of legal certainty, which, as the Court held in its said judgment of 6 April 1962, is a rule of law that must be upheld in the application of the Treaty, since it would have the effect of prohibiting and rendering automatically void certain agreements, even before it is possible to ascertain whether Article 85 as a whole is applicable to those agreements.

65 However, it must be recognized that, as the Court stated in the aforesaid judgment of 6 April 1962, until the entry into force of a regulation or directive giving effect to Articles 85 and 86 within the meaning of Article 87, agreements and decisions are prohibited under Article 85 (1) and are automatically void under Article 85 (2) only in so far as they have been held by the authorities of the

Member States, pursuant to Article 88, to fall under Article 85 (1) and not to qualify for exemption from the prohibition under Article 85 (3) or in so far as the Commission has recorded an infringement pursuant to Article 89 (2).

66 The Commission submits, however, that the principles resulting from the said judgment of 6 April 1962 cannot be extended to agreements, decisions and concerted practices in the field of air transport. It argues that the circumstances in which that judgment was given, such as the fact that agreements concluded before the entry into force of the Treaty and notifiable under Article 5 of Regulation No 17 were at issue and that the regulation was in existence at the time when that case was heard, do not exist in the case of agreements, decisions and concerted practices in the air transport sector.

67 Those arguments cannot be accepted. The rules set out in the judgment of 6 April 1962 continue to apply so long as no regulation and no directive provided for in Article 87 has been adopted and consequently no procedure has been set in motion to give effect to Article 85 (3).

68 It must therefore be concluded that in the absence of a decision taken under Article 88 by the competent national authorities ruling that a given concerted action on tariffs taken by airlines is prohibited by Article 85 (1) and cannot be exempted from that prohibition pursuant to Article 85 (3), or in the absence of a decision by the Commission under Article 89 (2) recording that such a concerted practice constitutes an infringement of Article 85 (1), a national court such as that which has referred these cases to the Court does not itself have jurisdiction to hold that the concerted action in question is incompatible with Article 85 (1).

69 It should be pointed out, however, that until rules for the sector in question as provided for by Article 87 are adopted, if such a ruling or recording has been made, either on the initiative of the national authorities under Article 88, or on that of the Commission under Article 89 (2), the national courts must draw all the necessary conclusions therefrom and in particular conclude that the concerted action on tariffs in respect of which such a ruling or recording has been made is automatically void under Article 85 (2).

E — Compatibility with Community law of a national approval procedure for air tariffs

70 It is necessary to examine in the next place the question whether and to what extent it is contrary to the Member States' obligations under Article 5 of the EEC Treaty, in conjunction with Article 3 (f) and Article 85, to apply national provisions of the type referred to by the tribunal de police, which lay down for air tariffs a compulsory approval procedure and which prescribe penalties, including criminal penalties, for non-compliance with those approved tariffs, where, in the absence of any regulations or directives within the meaning of Article 87, it has been found in accordance with the forms and procedures laid down in Article 88 or Article 89 (2) that those tariffs are the result of an agreement, a decision by an association of undertakings, or a concerted practice contrary to Article 85.

71 The Court has consistently held that while it is true that Articles 85 and 86 of the Treaty concern the conduct of undertakings and not laws or regulations of the Member States, none the less the Treaty imposes a duty on Member States not to adopt or maintain in force any measure which could deprive those provisions of their effectiveness (judgment of 16 November 1977, Case 13/77 *INNO* v *ATAB* [1977] ECR 2115).

72 Such would be the case, in particular, if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article 85 or to reinforce the effects thereof.

73 Air France, KLM and the French Government maintain that the concerted action in the matter of tariffs taken by airlines is not the result of the existence of a compulsory approval procedure for tariffs, such as that applying in France, but stems from decisions taken in complete independence by the airlines of the various countries within the framework of IATA or some similar framework.

74 The United Kingdom and the Commission, on the other hand, consider that although the national provisions regarding approval of air tariffs are not in themselves measures requiring undertakings to contravene their obligations under Article 85, the position would be different where the national authorities were to request that airlines should submit to them only tariffs that the airlines have agreed upon between themselves, for example in the framework of IATA, and to refuse to approve tariffs submitted independently.

75 In that respect it should be pointed out that any appraisal in the light of Community law of the application of national provisions of the kind referred to by the national court must take account of the nature of the approved tariffs and of their compatibility with Community law.

76 Where a decision has been taken by the competent national authorities under Article 88 or by the Commission under Article 89 (2) ruling that the concerted action leading to the establishment of the air tariffs was incompatible with Article 85, it is contrary to the obligations of the Member States in the field of competition to approve such tariffs and thus to reinforce their effects.

77 It should therefore be stated in reply to the question put by the tribunal de police that it is contrary to the obligations of the Member States under Article 5 of the EEC Treaty, read in conjunction with Article 3 (f) and Article 85, in particular paragraph (1), of that Treaty, to approve air tariffs and thus to reinforce the effects thereof, where, in the absence of any rules adopted by the Council in pursuance of Article 87, it has been found in accordance with the forms and procedures laid down in Article 88 or Article 89 (2) that those tariffs are the result of an agreement, a decision by an association of undertakings, or a concerted practice contrary to Article 85.

Costs

78 The costs incurred by the French, Italian and Netherlands Governments, by the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in reply to the question submitted to it by the tribunal de police, Paris, by judgment of 2 March 1984, hereby rules:

It is contrary to the obligations of the Member States under Article 5 of the EEC Treaty, in conjunction with Article 3 (f) and Article 85, in particular paragraph (1), of the EEC Treaty, to approve air tariffs and thus to reinforce the effects thereof, where, in the absence of any rules adopted by the Council in pursuance of Article 87, it has been found in accordance with the forms and procedures laid down in Article 88 or Article 89 (2) that those tariffs are the result of an agreement, a decision by an association of undertakings, or a concerted practice contrary to Article 85.

Mackenzie Stuart Koopmans Everling Bahlmann

Bosco Due Galmot Kakouris O'Higgins

Delivered in open court in Luxembourg on 30 April 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President