OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 28 April 1988 *

Mr President,
Members of the Court,

A — Facts

1. The request for a preliminary ruling made by the Bundesgerichtshof (Federal Court of Justice) on which I am delivering my Opinion only today because it appeared to be necessary in view of the legislative activity of the Council to continue the oral procedure, is concerned once again with the question of the extent to which in the present state of Community law agreements in restraint of competition concluded by airlines are still protected against non-compliance by third parties.

2. The following facts underlie the main proceedings before the German courts.

3. According to the order of the Bundesgerichtshof submitting the request for a preliminary ruling, the firms Ahmed Saeed Flugreisen and Silver Line Reisebüro GmbH, defendants and appellants on a point of law ('the defendants'), sell in the Federal Republic of Germany airline tickets which undercut sometimes by more than 60% the tariffs approved by the Federal authorities. To that end the defendants purchased airline tickets in a country outside the Federal Republic at the tariffs ruling locally for a journey which according to the ticket started from that foreign country and passed via a German airport to an airport in yet another country. The purpose of those ticket purchases is to exploit the currency and tariff differentials which exist between the Federal Republic of Germany and other countries as a result of the growing gap between the International Air Transport Association (IATA) selling prices and the official exchange rates.

4. In the Federal Republic of Germany such a practice is alleged to be contrary to Paragraph 21 of the Luftverkehrsgesetz (law concerning air transport) as interpreted by notices sent by the Federal Minister for Transport on 15 April 1981 and 9 February 1982 respectively to Deutsche Lufthansa and to all foreign airlines. All transport tariffs approved by the Federal Minister for Transport under Paragraph 21 of the Luftverkehrsgesetz for journeys beginning in the Federal Republic are, it stated, approved and binding only as prices in German marks. They are to be applied to all journeys whose actual point of departure is in the Federal Republic of Germany. At the hearing the defendants' representatives stated that 'in practice the operating approvals granted to foreign airlines . . . in

* Original language: German.

the case of intermediate landings [are] linked to Lufthansa's prices'.

5. These proceedings against those business practices of the defendants were brought, not by the Federal Minister for Transport, Lufthansa or the airlines whose tickets were sold at less than the (German) price, but by the plaintiff, an association whose chosen object is to dissuade, and bring court proceedings against, infringements of the Gesetz gegen den unlauteren Wettbewerb (law against unfair competition). On its application German courts of first and second instance prohibited the defendant in future from 'offering for sale or selling flight tickets for international scheduled flights actually beginning in the Federal Republic of Germany at prices below the tariffs approved by the Federal Minister for Transport even where the ostensible point of departure indicated on the flight ticket is an airport outside the Federal Republic of Germany'.

6. According to the request for a preliminary ruling of 30 January 1986, the main proceedings are concerned both with the sale in the Federal Republic of Germany of air tickets for flights from a German airport at prices below the approved tariff and with the sale of tickets issued outside the Federal Republic which entitle the holder to fly from another country via the Federal Republic to yet another country.

7. The Bundesgerichtshof states in the request for a preliminary ruling that the defendants' appeal on a point of law would have to be dismissed on the basis of German law alone. However, the Bundesgerichtshof has doubts as to whether the tariff system for scheduled flights is compatible with Community law. The tariffs approved by the Federal Minister for Transport are based on tariff agreements concluded between airlines either, as is usually the case, multilaterally under the auspices of IATA or bilaterally. As a result, price competition between the airlines is largely eliminated. For that reason it is necessary to examine whether the tariff agreements in question are compatible with Article 85(1)(a) and (b) of the EEC Treaty and whether the carriage of passengers on scheduled air services exclusively at tariffs agreed bilaterally or multilaterally constitutes an abuse of a dominant position in the common market (Article 86 of the EEC Treaty). It should also be clarified whether it is compatible with the second paragraph of Article 5 and Article 90(1) of the EEC Treaty for the authorities of the Member States to approve agreed tariffs for scheduled flights and whether examination of that question falls within the exclusive competence of the Commission under Article 90(3) of the Treaty.

8. On those grounds the Bundesgerichtshof referred the following questions to the Court of Justice of the European Communities for a preliminary ruling:

'Are bilateral or multilateral agreements regarding airline tariffs (for example, IATA resolutions) to which at least one airline with its registered office in a Member State of the European Economic Community is a party void for infringement of Article 85(1) of the EEC Treaty as provided for in Article 85(2), even if neither the relevant authority of the Member State concerned (Article 88) nor the Commission (Article 89(2)) has declared them incompatible with Article 85?

Does charging only such tariffs for scheduled flights constitute an abuse of a dominant position in the common market within the meaning of Article 86 of the EEC Treaty?

Is the approval of such tariffs by the competent authority of a Member State incompatible with the second paragraph of Article 5 and Article 90(1) of the EEC Treaty and therefore void, even if the Commission has not objected to such tariff approval (Article 90(3))?'

9. The defendants in the main proceedings and the Commission of the European Communities submitted observations on those questions in writing and at the hearing on 6 May 1987.

10. Following the issue by the Council on 14 December 1987 of a series of instruments dealing with international air transport *within* the Community, the parties had a further opportunity to comment in writing and orally.

11. I shall examine in my Opinion the parties' statements and the content of the documents which the Commission of the European Communities submitted to the Court after the first hearing. For the rest, I would refer to the Report for the Hearing.

B — Opinion

12. As I have already mentioned, at the end of 1987 the Council issued a number of instruments dealing with international air transport within the Community.[1] In my estimation it is appropriate in answering the questions referred for a preliminary ruling by the Bundesgerichtshof to examine the legal situation as regards scheduled air services within the Community separately from that of scheduled air services to and from non-member countries.

1. *The first question*

13. In its first question the Bundesgerichtshof asks essentially whether Article 85 of the EEC Treaty is directly applicable even if no action has been taken either by an authority of a Member State under

1 — 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; 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; Council Directive 87/601/EEC of 14 December 1987 on fares for scheduled air services between Member States; Council Decision 87/602/EEC of 14 December 1987 on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States (Official Journal 1987, L 374, pp. 1, 9, 12 and 19, respectively).

Article 88 of the Treaty or by the Commission under Article 89(2).

(a) Air transport services within the Community

14. As long ago as 6 April 1962 in its judgment in Case 13/61 [2] the Court of Justice recognized in principle that Article 85 of the EEC Treaty has been applicable since the time of entry into force of the Treaty. Then in its judgment of 30 January 1974 in Case 127/73 [3] the Court expressly held that the competence of the national courts to apply the provisions of Community law derives from the direct effect of those provisions. As the prohibitions of Article 85(1) and Article 86 of the Treaty tend by their nature to produce direct effects in relations between individuals, those articles create direct rights in respect of the individuals concerned which the national courts must safeguard.

15. The doubts which induced the Court in the judgment of 6 April 1962 in Case 13/61 (cited above) and later in the judgment of 30 April 1986 in Joined Cases 209 to 213/84 [4] to restrict the practical effectiveness of the finding as to the direct applicability of Article 85 have now had their basis removed as a result of the issue of the instruments of 14 December 1987. Since then Article 5 of Regulation No 3975/87 has governed the application of Article 85(3) of the EEC Treaty; furthermore, Article 2 of Regulation No 3976/87 empowers the Commission to exempt from the prohibition laid down in Article 85(1) certain groups of agreements and concerted practices in the air transport sector. Article 85 has therefore been applicable since 1 January 1988 to intra-Community *transfrontier* air services generally. This means that the agreements and decisions referred to in Article 85(1) are void under Article 85(2) unless they have been granted exemption under Regulations Nos 3975/87 and 3976/87.

16. This is not impeded by the fact that Regulation No 3975/87 contains no transitional provisions on pre-existing agreements on the lines of Article 5 of Regulation No 17. Since the Court has already decided in its judgment of 4 April 1974 in Case 167/73 [5] that, so long as the Council has not decided otherwise, air transport, albeit excluded from the rules on the common transport policy, is however certainly subject to the general rules of the Treaty, it has long been established that the Treaty provisions on competition also apply to air transport. Moreover Community airlines could not have remained unaware of that fact, since the Commission initiated investigations pursuant to Article 89 of the EEC Treaty in order to check on the compatibility of the airlines' conduct with the EEC Treaty. In addition, the legislative procedure for issuing implementing regulations in

2 — Judgment of 6 April 1962 in Case 13/61 *Kledingsverkoopbedrijf de Geus en Uitdenbogerd* v *Robert Bosch GmbH and Others* [1962] ECR 45

3 — Judgment of 30 January 1974 in Case 127/73 *BRT* v *Sabam* [1974] ECR 51

4 — Judgment of 30 April 1986 in Joined Cases 209 to 213/84 *Ministère public* v *Asjes and Others* [1986] ECR 1457

5 — Judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359

accordance with Article 87 of the EEC Treaty for the air transport sector had been set in train as long ago as 1981,[6] and hence the airlines concerned had to reckon on the adoption of corresponding rules.

17. Also, Article 85 of the Treaty does not cease to be of direct effect as a result of Council Regulation No 3976/87 on block exemptions. Admittedly, under Article 2(2) of the regulation the Commission may exempt from the prohibition set out in Article 85(3) of the Treaty particular groups of agreements, decisions and concerted practices; this also applies to consultations on matters relating to tariffs.[7] At the hearing the Commission stated that it intended to do so.

Even though Article 4 of the regulation provides that such exemptions are to be retroactive, at present it is impossible to say what their content will be or whether they will be adopted at all. In any event, the Commission is under no duty to adopt them. If, however, they should be issued they would have to be taken into account.

18. The question as to the effect of a possible application for exemption under Article 85(3) of the Treaty on the prohibition set out in Article 85(1) during the period when the application was made but no decision had yet been taken on it need not be considered here, since according to the Commission up to the time of the hearing of 17 March 1988 no such application had been made.

19. The situation remains therefore that the prohibition set out in Article 85(1) is operative in the field of application of Regulation No 3975/87, that is to say with regard to international air services between airports in the Community.

(b) Air transport services to and from non-member countries

20. Moreover, this prohibition is not restricted only to international flights *within* the Community; it also applies to agreed tariffs for the *international stretches within the Community of scheduled flights to or from non-member countries* where on account of intermediate landings made at airports within the Community tariffs are given for individual portions of the route within the Community. In particular its application is not precluded by Regulation No 3975/87 since it can be seen from the legislative background to the regulation, as the Commission has cogently shown, that the sphere of application of Article 85 *et seq.* in the air transport sector has not been dealt with definitively by that regulation.

21. As I stated in my Opinion of 24 September 1985 in Joined Cases 209 to 213/84,[8] Community competition law can also be applied to circumstances involving

6 — See the Commission's proposal of 10. 11. 1981, OJ 1981, C 291, p. 4.

7 — See the third indent of Article 2(2) of Regulation No 3976/87.

8 — In particular in Sections 5 and 6 of Part B [1986] ECR 1425, at p. 1451 *et seq.*

connections with non-member countries where the relevant agreements or concerted practices may have effects within the Community.

22. Such effects on trade between Member States can be caused not only by conduct affecting competition in air transport services within the Community, but also by conduct relating to air services between the Member States and non-member countries. For example, tariff agreements relating to transport between a given airport in a non-member country and airports within the Community may possibly lead to traffic being displaced within the Community.[9] However, it is the duty of the courts in the Member States to investigate and establish such effects.

23. According to the Court's judgment of 30 April 1986 in Joined Cases 209 to 213/84, as far as the area of scheduled flights to and from non-member countries is concerned, the peculiarity applies that Article 85 cannot apply until an authority in a Member State acting under Article 88 has ruled, or the Commission acting under Article 89(2) has recorded, that the relevant tariffs are the result of an agreement, a decision by an association of undertakings, or a concerted practice contrary to Article 85.

9 — Agreements as to the tariffs applicable to the London—New York and Brussels—New York routes or else Copenhagen—Zurich and Copenhagen—Basel/Mulhouse (with one airport in the Community) are given as theoretical examples.

2. *The second question (abuse of a dominant position)*

24. As regards the Bundesgerichtshof's second question it must first be observed that the Court of Justice is not empowered in proceedings brought under Article 117 of the EEC Treaty to apply Community law to the actual facts of the case described by the court making the reference. Instead it must confine itself to giving the national court criteria to enable it to decide the actual case itself. Besides, in this instance the Court would not be able to reach a conclusive decision since it lacks a large part of the facts which it would need in order to apply Article 86 of the Treaty.

(a) Scheduled air services within the Community

25. According to Article 1 of Regulation No 3975/87, the regulation lays down *inter alia* detailed rules for the application of Article 86 of the Treaty to international air transport between Community airports. Consequently if the foregoing observations on Article 85 are applied *mutatis mutandis* it must be held that Article 86 is to be applied by the national courts as directly applicable law.

26. I would make the following remarks with regard to the detailed application of Article 86. It is for the German courts to find whether operating licences for foreign airlines are indeed linked to Lufthansa's tariffs, in which case Lufthansa alone would

in fact determine (under the supervision of the Federal Minister for Transport) what fares applied to and from airports in the Federal Republic of Germany.

27. However, even if the foreign airline has a say, it is clear simply from the wording of Article 86 that a dominant position in the common market can be held by several undertakings jointly. For instance, members of a cartel or parties to agreements contrary to Community law under Article 85 may jointly occupy a dominant position. [10] In any event, the fact that Article 85 is applicable does not exclude the applicability of Article 86.

28. It is somewhat more difficult to judge how the relevant market should be determined. According to the case-law, in making the assessment the possibilities of competition must be judged in the context of the market comprising the totality of the products which, with respect to their characteristics, are particularly suitable for satisfying constant needs and are only to a limited extent interchangeable with other products. The determination of the relevant market is useful in assessing whether the undertaking concerned is in a position to prevent effective competition from being maintained and behave to an appreciable extent independently of its competitors and customers and consumers. [11]

29. In the light of those criteria the Commission's view that the relevant market is the market in transport services in the sector of scheduled flights seems correct. The bulk of the demand for those services comes from 'regular' passengers, in particular businessmen, officials and politicians who frequently need to travel to particular destinations at particular times of the day. As far as they are concerned neither charter flights nor other means of transport (especially over long distances) constitute a viable alternative. As a result, scheduled flights are scarcely in competition with other forms of transport.

30. The relevant market from the geographical point of view is determined in this case by paragraph 21 of the Luftverkehrsgesetz. It is the market in scheduled air services between an airport in the Federal Republic of Germany and other Member States or non-member countries. [12]

31. Next, the national court will have to consider whether those routes together constitute a substantial part of the common market. The Commission suggested that this question should be answered in the light of quantitative criteria, such as the size of, the number of persons carried from and the economic importance of the States linked by the routes in question, and the ratio of the number of passengers arriving and leaving

10 — See the judgment of 16 December 1975 in Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Coöperatieve Vereniging 'Suiker Unie' and Others* v *Commission* [1975] ECR 1663, at pp. 2011 and 2013.

11 — See the judgment of 9 November 1983 in Case 322/81 *NV Nederlandsche Banden-Industrie Michelin* v *Commission* [1983] ECR 3461, at p. 3504 *et seq.*

12 — Domestic air transport services do not come within the scope of the directive of 14 December 1987.

by those routes to the total number of passengers in the Community carried on scheduled flights.

32. If according to the case-law of the Court even the medium-sized Member States can be regarded as a substantial part of the Community,[13] scheduled flights starting from the Federal Republic of Germany are probably also to be regarded as constituting a substantial part of the market in scheduled air services in the Community.

33. It must also be pointed out that the situation described in the Federal Republic of Germany does not exist in isolation; comparable practices are to be found in other Member States. From Joined Cases 209 to 213/84 this is known to be the case as far as France is concerned; moreover, it appears from the documents submitted to the Court by the Commission that similar tariff agreements also exist at least in Belgium, Denmark, Greece, Ireland, Italy, the Netherlands and the United Kingdom.

34. To date, in each case, rights to use the aforementioned transfrontier routes have generally been granted to only two carriers, that is to say to one from each of the States concerned; this enables them jointly to dominate the relevant market. Since as a result the airlines act *vis-à-vis* users of transport services to a large extent as a unit, the existence of a dominant position on the market can probably be assumed to exist.

35. Since through their tariff agreements the participating airlines substantially eliminate not only competition in the field of prices and conditions as such but also, in view of the restricted access to the individual routes, any other possible competition, to the disadvantage of the consumer — apart perhaps from a measure of competition as regards the services provided — that in itself can be regarded as constituting an abuse of a dominant situation. Support for this view is forthcoming from the case-law, since in its judgment of 21 February 1973 in Case 6/72[14] the Court held that the mere fact that competition was substantially fettered on the relevant market by a dominant undertaking or dominant undertakings acting together constituted an abuse, regardless of the means and procedure by which it was achieved.

36. If this principle were taken as the basis it would be unnecessary to show the existence of a standard case covered by Article 86, in particular the direct or indirect imposition of unfair purchase or selling prices or other unfair trading conditions within the meaning of subparagraph (a) of the second paragraph of Article 86. However, if in addition airfares on routes within the Community were to be compared with fares on North-Atlantic routes, which are not based on tariff agreements, this price comparison might also reveal the

13 — See judgment of 27 March 1974 in Case 127/73 *BRT v Sabam* [1974] ECR 313 and of 9 November 1983 in Case 322/81, cited above

14 — Judgment of 21 February 1973 in Case 6/72 *Europemballage Corporation and Continental Can Company Inc. v Commission* [1973] ECR 215, at p. 245 *et seq*

existence of an abuse of a dominant position.

37. There must be scarcely any doubt that the alleged abuse of a dominant situation is also capable of affecting trade between Member States. In so far as the agreed tariffs are applied on routes linking two or more Member States, intra-Community trade in services, which is covered by Article 86, [15] is directly affected.

(b) Scheduled air services to and from non-member countries

38. The question now arises as to whether the same principles applying to international scheduled air services between airports in the Community can also hold good for scheduled air services to and from non-member countries.

39. The Commission has expressed the view that the principles set out in the judgment in Joined Cases 209 to 213/84 on Article 85 of the Treaty should also be applied to scheduled air services *to and from non-member countries* as regards Article 86, which would mean that Article 86 would be incapable of having direct effects as long as the authorities in the Member States or the Commission had not taken action pursuant to Article 88 or Article 89(2) respectively.

40. In view of the structural differences between Article 85 and 86 I am not convinced by that view.

41. On the one hand, it must be observed that, as the Court held in its judgment of 30 April 1974 in Case 155/73, [16] Article 86 is directly applicable. Direct application is the immediate consequence of contravening the prohibition set out in that article and it is not necessary for there to have been a prior decision. In addition, unlike in Article 85(3) no provision is made in the EEC Treaty for any exemption from the prohibition on abuses of dominant provisions [17] nor is any such exemption conceivable: abuses cannot be approved, or at any rate not in a community which recognizes the rule of law as its highest principle. Even a Council regulation which categorized certain modes of conduct as compatible with Article 86 would have to be assessed against the criterion of Article 86. Consequently, the train of ideas as to the merely partial applicability of Article 85 which the Court developed in its judgment of 6 April 1962 in Case 13/61 and took up again in its judgment of 30 April 1986 in Joined Cases 209 to 213/84 cannot be applied to Article 86, which is structured differently.

15 — Judgment of 14 July 1981 in Case 171/80 *Züchner v Bayerische Vereinsbank AG* [1981] ECR 2021, at p. 2032.

16 — Judgment of 30 April 1974 in Case 155/73 *Giuseppe Sacchi* [1974] ECR 409, at p. 431.

17 — Judgment of 21 February 1973 in Case 6/72, cited above, at p. 246 *et seq.*

42. Even if the principle of legal certainty is taken into account, the result will be no different. Since there is no possibility of exemption from the prohibition laid down in Article 86, there remains, apart from any rules on the application of sanctions, which are not however in point in this case, only the need to settle the procedure for granting negative certification. As far as *intra-Community* air transport is concerned, *negative certification* is dealt with in Article 3(2) of Regulation No 3975/87, as follows:

'Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or concerted practice.'

43. As far as air transport to and from countries *outside the Community* is concerned, Articles 89 and 155 of the EEC Treaty apply. Under those provisions the Commission may, if it considers it necessary, deliver an opinion on whether a particular tariff arrangement infringes Article 86.

44. Neither a certification under Article 3 of Regulation No 3975/87 nor an opinion delivered under Articles 155 and 89 of the Treaty is capable of binding the courts, unlike a declaration of exemption under Article 85(3) of the Treaty. Even rules on this question with regard to air services to and from countries outside the Community could scarcely reach a different outcome. Consequently the absence of such rules cannot impede the application of Article 86.

45. In any event, an application for negative certification and the issue of such by the Commission are conceivable even in the absence of any specific provisions and so it is not necessary to have legislation in this area in order to apply Article 86 in full.

46. Another sector of the competition rules of the EEC Treaty has been constantly applied in practice even though corresponding implementing regulations have not been issued: the rules on State aids contained in Article 92 *et seq.* Although the Council has not issued the appropriate regulations for the application of Articles 92 and 93 referred to in Article 94, Articles 92 and 93 have been applied by the Community institutions, and not only in relations between the Community institutions and the Member States but also in relation to third-party recipients of aid or even their business partners, as can be seen from for instance the judgments of 10 July 1986 in Cases 234/84 and 40/85,[18] which were concerned with the recovery of capital subscribed to undertakings contrary to Community law. The rationale is that in a Community the activities of which include 'the institution of a system ensuring that competition in the common market is not distorted'[19] State aids distorting competition cannot be tolerated, at least not 30 years after its establishment.

18 — Judgment of 10 July 1986 in Case 234/84 *Kingdom of Belgium* v *Commission* [1986] ECR 2263; judgment of 10 July 1986 in Case 40/85 *Kingdom of Belgium* v *Commission* [1986] ECR 2321

19 — EEC Treaty, Article 3 (f)

47. The same observations also apply to an abuse of a dominant position in the common market. Such an abuse cannot be approved. Rules covering the granting of certificates certifying that there are no grounds for action may be advantageous for the circles concerned but their absence cannot prevent a provision from being applied which forms one of the bases of the common market.

48. The judgment of 30 April 1986 in Joined Cases 209 to 213/84 does not preclude this view of the law since it refers only — as we have already seen — to Article 85, which is a different matter. Accordingly it cannot be extended to this case.

49. In any event, as far as Article 86 is concerned, I consider that it can be applied even though the Community has not made use of its powers under Article 87 of the Treaty, the Member States have not made use of their powers under Article 88, and the Commission has not made use of its powers under Article 89.

3. *The third question*

50. According to the grounds of the request for a preliminary ruling, in its third question the Bundesgerichtshof essentially wishes to know whether the approval of agreed tariffs for scheduled flights by Member State authorities is compatible with the second paragraph of Article 5 of the Treaty in conjunction with Article 90(1) and, if it is not, what legal consequences ensue. In addition, it wishes to know whether the approval of tariffs for scheduled flights contrary to Community law is exclusively subject to the supervision of the Commission or whether it may also be challenged before the national courts if the Commission does not take action against it. In other words, what is to be established is whether as far as State approval is concerned Article 90 of the Treaty brings special rules to bear which diverge from the general rules laid down in Articles 85 and 86.

51. As far as the first part of the question is concerned, reference is to be made to the now established case-law of the Court to the effect that the Member States are under a duty not to adopt or maintain in force any measure which could deprive the competition rules for undertakings of their effectiveness. [20] This also applies with regard to public undertakings — whether public undertakings are involved in this case is for the courts in the Member States to establish — since Article 90 is only a particular application of certain general principles which bind the Member States, and hence is declaratory in nature. [21]

52. According to the judgment of 30 April 1986 in Joined Cases 209 to 213/84, for the period in respect of which no implementing measure has been issued pursuant to Article

20 — Judgment of 30 April 1986 in Joined Cases 209 to 213/84, cited above; judgment of 1 October 1987 in Case 311/84 *Vereniging van Vlaamse Reisbureaus* v *Social Dienst van de plaatselijke en gewestelijke Overheidsdiensten* [1987] ECR 3801.

21 — Judgment of 16 November 1977 in Case 13/77 *GB-Inno-BM* v *Vereniging van der Kleinhandelaars in Tabak* [1977] ECR 2115, at p. 2146.

87 of the Treaty for the air transport sector, the Member State is in breach of its obligations under Articles 3(f), 85 and 90(1) of the Treaty only if the authorities in the Member States have made a formal ruling under Article 88 or the Commission has formally recorded under Article 89 that the agreements are incompatible with Article 85. This is the case as regards approvals in general granted before 1 January 1988 and as regards approvals of airline tariffs for routes to and from non-member countries granted after that date, since corresponding rulings or recordings have not yet been made.

53. Where tariffs were approved after 1 January 1988 for international air services between airports in the Community, the instruments adopted by the Council on 14 December 1987 must now be observed, in particular the provisions of Directive 87/601/EEC on fares for scheduled air services between Member States. Now, under Article 4 of the directive scheduled air fares are to be subject to approval by the aeronautical authorities of the Member States concerned. Under Article 2(a) 'scheduled air fares' means the prices to be paid in the applicable national currency for the carriage of passengers and baggage. Since therefore in each case airfares will as a rule have to be approved in two different currencies, in future Member States will be debarred from authorizing binding airfares in their own currency only.

54. The Commission has proposed extending the solution found for Articles 5, 3(f), 40 and 85 of the Treaty also to the situation where a Member State infringes its obligations under Article 5 in conjunction with Articles 3(f), 90(1) and 86. However, in view of the conclusions which I have reached in the second part of my answer to the second question I am unable to agree with that suggestion. In my view, a Member State infringes those obligations as soon as the undertakings concerned fall within the terms of Article 86 and the Member State grants approval all the same; there is, in my opinion, no need for a formal ruling or recording as to the infringement of Article 86.

55. This finding leads me to the answer to the second half of the Bundesgerichtshof's third question. As soon as it is clear that a provision of domestic law infringes Article 5(2) of the Treaty it may no longer be applied by the national courts. This must apply equally to any national legal measures which are based on such a provision of domestic law.

56. In my estimation there seems to be no need to apply Article 90(3) of the Treaty in this case as, under Article 90(1), the general competition rules apply and according to the case-law which has become established in the mean time Article 90(2) is not capable of direct effect.[22] Article 90(3) merely

22 — Judgment of 14 July 1971 in Case 10/71 *Ministère Public of Luxembourg* v *Hein, née Muller* [1971] ECR 723, at p. 730, judgment of 10 March 1983 in Case 172/82 *Syndicat national des fabricants raffineurs d'huile de graissage* v *Groupement d'intérêt économique 'Inter-Huiles' and Others* [1983] ECR 555, at p. 567

confers additional powers on the Commission; it does not however preclude the applicability of the general rules of the Treaty.

4. *Temporal applicability of an order restraining the defendants' future conduct*

57. The defendants in the main proceedings and the Commission have asked the Court to declare in the judgment that any order restraining future conduct may no longer be valid if Community law is altered in future. That there are certainly grounds for taking this view can be seen from the above observations, from the fact that Regulation No 3975/87 is probably not definitive, and from Article 8 of Regulation No 3976/87, Article 12 of Directive 87/601 and Article 14 of Decision 87/602, which provide that the Council is to decide on revisions of those instruments *by 30 June 1990.* In addition, the Commission and the authorities in the Member States may take action under Articles 85, 86, 88 and 89 of the Treaty with regard to air transport to and from non-member countries and thereby create the conditions for the application of Articles 85 and 86 of the Treaty by the courts in the Member States. That new Community law might not be consistent with the legal situation on which the order restraining future conduct was based and would take precedence over it. It is for the German courts to take this into account.

C — Conclusion

In the light of the whole of the foregoing I propose that the Court should answer the questions submitted by the Bundesgerichtshof as follows:

58. '(1) In the present state of Community law, bilateral and multilateral agreements regarding airline tariffs to which at least one airline with its registered office in a Member State of the Community is a party are void for infringement of Article 85(1) of the EEC Treaty as provided for in Article 85(2):

(i) if they relate to international air transport between airports in the Community,

(ii) if they relate to air transport to and from non-member countries and, in addition, it has been ruled or recorded in the form and according to the procedure laid down in Article 88 or Article 89(2) of the EEC Treaty that those tariffs are the result of agreements between undertakings, decisions by associations of undertakings or concerted practices contrary to Article 85 of the EEC Treaty.

(2) At the same time, charging only such tariffs for international scheduled flights between airports in the Community or to and from non-member countries may, where the conditions of Article 86 of the EEC Treaty are fulfilled, constitute an abuse of a dominant position within the common market; under Article 86 the charging of such tariffs for travel to and from non-member countries is prohibited even if there has been no ruling or recording made in the form and according to the procedure laid down in Article 88 or Article 89(2) of the EEC Treaty.

(3) In so far as approvals relate to scheduled airline tariffs which are contrary to Community law having regard to the answers to Questions 1 and 2, they constitute an infringement of the obligations incumbent upon the Member States under Article 5(2) of the EEC Treaty in conjunction with Articles 3(f), 85, 86 and 90, without the Commission having specifically to record that infringement pursuant to Article 90(3) of the Treaty.