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Prime Minister

BA PRIVATISATION AND US ANTI-TRUST SUITS

My minute of 4 December set out the problems for the BA privatisation presented by current and possible future anti-trust suits in the US courts. These were discussed at a meeting chaired by the Foreign Secretary on 6 December. The Attorney General, the Financial Secretary and the Parliamentary Under Secretary of State for Trade and Industry were also present.

The heart of the problem is that the Directors of BA and the Government must disclose in the prospectus all the information they have in their possession which could have a material effect on BA's financial prospects. While it is intolerable that our airlines should be subject to huge potential damages in the US courts for actions which we argue are legitimate under the Anglo/US Air Services Agreement, we have no means of removing these potential liabilities provided our airlines are to continue to trade in the US.

BA are fighting the liquidator's suit now. His maximum claim is \$1bn. They believe that they have a good case, but no one can predict the outcome if, as seems certain in the absence of a settlement, it goes to a US jury. Fighting the case to the end would take a long time. Moreover, unless the case is stopped very soon, other anti-trust liabilities (both of BA and BCal), will be exposed by the US processes of document discovery. The only possible way to stop this discovery would be for all

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the defendants (including US, UK and European airlines) to reach a global settlement with the liquidator. BA are pursuing this possibility urgently.

When we discussed this, we were undecided as to whether BA should seek an early settlement, on acceptable terms, in respect of all defendant airlines, or whether it would be better for BA to fight the actions, with a prospect of success, but equally a prospect of substantial damages. The consequences to BA and BCal of a further disclosure of documents (which cannot be prevented if the case continues) is serious. Present estimates, which can only be tentative, are that the cost of a global settlement (including Corporation Tax) could be of the order of £100m, of which BA's share might be of the order of £75m. BA's negotiations continue, in order to determine the shape of a final package - and indeed whether a global settlement is possible - but the results will not be clearer until later this week, at the earliest.

Our plan has been to have the offer for sale in mid-February. To meet this, our advisers Hill Samuel need to take public steps now. My colleagues and I agreed that the risks of doing so in present circumstances would be far too great, since we can have no assurance that a satisfactory prospectus could be written. We agreed therefore that we must delay. The proceeds for sale cannot therefore be realised in the financial year 1984-85. The Financial Secretary is considering urgently whether other assets could be sold, to avoid disturbance to the Government's public expenditure plans.

BA are also facing a class action in the US courts, along with two US airlines. Their exposure to damages could be as high as \$240m. This action is at an early

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stage, and there is no possibility of a settlement at present. It would therefore have been necessary for the prospectus to refer to BA's potential liabilities arising from this and (subject to final legal advice from the Attorney General) to the possibility of other new actions against them in respect of violations of anti-trust law. BA are pursuing urgently the question of insuring against some at least of these liabilities.

Until very recently, BA had taken the firm position that, with the liquidator's case settled, the Directors would be able to sign a prospectus which dealt satisfactorily with the anti-trust cases. Lord King spoke to my Permanent Secretary on Friday to say that having taken further legal advice, he saw no way in which the Board could sign a prospectus in the foreseeable future unless the Government were prepared to give them a general indemnity against all liabilities which may arise from anti-trust actions, including the liquidator's suit, the present class actions, and any others. BA were unable to give my officials any indication of what the potential liability to the taxpayer might be as a result of the indemnity they have proposed. The indemnity would have to cover liabilities from actions from 1977 onwards. It therefore seems to me that the upper limit of the potential liability we would be assuming could be considerably greater than the proceeds we expect from privatisation.

For reasons I gave in my minute of 4 December, I find the idea of an indemnity very unattractive. I do not see how we could ask Parliament to approve it, particularly as we could not define its potential extent and could not adequately explain the reasons for it. It would, moreover, remove from BA any incentive to fight the cases and settle on the best possible terms. We are all agreed in recommending firmly against it.

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I find the behaviour of the BA Board completely indefensible. Either they knew of the potential risks which they, and therefore the Government, were running and chose to conceal them, or they were negligent in not considering until well after the eleventh hour what liabilities they, as Directors, would have to disclose.

We shall now have to consider what courses are open to us. I think that an indemnity is most unattractive. There is a strong case for leaving BA to deal with the actions. We shall be able to see more clearly whether there is a middle way when we have a better assessment of the prospects and price of a settlement of the liquidator's action. I should have a clearer assessment of that later this week. We will also need to assess whether the remaining risks are insurable. I will report to you, and my other colleagues concerned, as soon as those further assessments can be made.

If the liquidator's case cannot be settled quickly on acceptable terms, they will have to continue to fight it. This will not only expose them to the possibility of other legal actions, but could also put at risk the future of BCal's US operations and possibly the airline itself. If such risks were in prospect, we should, in my view, be bound to take a much tougher stand with the US administration, including possible measures to recover any damages awarded or retaliatory action. But we are not at that point yet.

At present, we cannot assess how long it may be necessary to delay privatisation. I do not want to lose the momentum we have towards the earliest feasible offer for sale. If we have to delay we could justify that by saying that we had decided to wait until anti-trust problems had been cleared up.

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I propose:

- (i) that I should be authorised to tell Lord King and Hill Samuel that we have decided to delay privatisation to allow time for the prospects of a settlement of the liquidator's suit to be fully explored, and any consequential decisions taken. I should wish to choose the time of telling them carefully, and would at the same time say publicly only that the delay in clearing up the uncertainties about the application of anti-trust law had led us to let the timetable slip;
- (ii) that I should assess, as soon as possible, the prospects of a settlement with Lord King and my advisers and should report to you as soon as possible on that and on the options then open.

Copies of this minute go to the Foreign Secretary, the Chancellor of the Exchequer, the Secretary of State for Trade and Industry, the Attorney General, and to Sir Robert Armstrong.

*Dinah Nichols*  
*Private Secretary*

pp NICHOLAS RIDLEY  
10 December 1984

*(Approved by the Secretary  
of State & signed in his absence)*



AEROSPACE PT3  
future of BA

10 DEC 1984

