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CCBG

FINANCIAL SECRETARY TO THE TREASURY

Treasury Chambers, Parliament Street, SW1P 3AG

Richard Allan Esq
Private Secretary to
Secretary of State for Transport
2 Marsham Street
LONDON
SW1P 3EB

NBPM.

26 November 1985

Dear Richard

APPLICATION OF US ANTI-TRUST LAW TO US CIVIL AVIATION

This is to confirm that, as I told you on the telephone, the Financial Secretary and the Chancellor had no objection to your Secretary of State going ahead with the statement outlined in his minute of 22 November to the Prime Minister.

I am copying this letter to the Private Secretaries, to members of MISC 112 and to Michael Stark (Cabinet Office).

Yours ever

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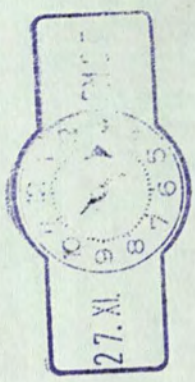
Aerospace: Future of BA A4



CONFIDENTIAL

DG2APK
cc B. Griffiths

10 DOWNING STREET

From the Private Secretary

26 November 1985

Dear Richard,

APPLICATION OF US ANTI-TRUST LAW TO INTERNATIONAL CIVIL AVIATION

The Prime Minister has seen and noted the draft Written Answer attached to your Secretary of State's minute of 22 November. The Prime Minister also saw the Foreign Secretary's minute of 25 November.

I am copying this letter to the Private Secretaries to members of MISC 112 and to Michael Stark (Cabinet Office).

Yours ever,

David

David Norgrove

Richard Allan, Esq.,
Department of Transport.

CONFIDENTIAL

PM/85/98

PRIME MINISTER

Application of US Anti Trust Law to International Civil Aviation

1. I have seen Nick Ridley's minute of 22 November to which he attached a draft answer to an inspired parliamentary question on our policy on the unilateral application of the US Government's domestic competition laws to civil aviation.

2. I can accept the text that Nick Ridley proposes but I am concerned that we should minimise the risk of provoking an adverse reaction in Washington. Ideally I should prefer a statement to issue just before the Christmas recess in order to avoid the risk of stirring up an adverse reaction in the White House Anti-Trust Task Force due to report in early or mid December. I understand that Nick wishes to have the statement issued very quickly. All the more important that we should explain in Washington both to the White House and to the State Department, what we are doing. I therefore propose to instruct HM Ambassador in Washington to see the appropriate people on the day this question is answered. We shall also arrange to brief the US Embassy in London.

/3. Given

3. Given the responsibility of Leon Brittan for the PTI Act, I believe that in the circumstances it would be preferable for him to deliver the Answer.

4. I am copying this minute to the recipients of Nicholas Ridley's minute.

(GEOFFREY HOWE)

Foreign and Commonwealth Office

25 November 1985


25. XI.
AM 8 5

CC NO

PRIME MINISTER

APPLICATION OF US ANTI-TRUST LAW TO INTERNATIONAL CIVIL AVIATION

The paper I circulated to MISC 112 under cover of my letter to the Foreign Secretary of 18 September outlined the general approach I intended to follow in resuming discussions with the US Government on civil aviation arrangements. In the light of Michael Spicer's meeting with Mrs Dole last month, I have been considering further what means we might use to persuade the US Government of the strength of our concern about the unilateral application of anti-trust laws to civil aviation. There is a clear risk that further law suits, however mischievously inspired, could seriously damage any of our North Atlantic operators, because of the diversion of management effort to which such suits give rise, and the fact that costs cannot be recovered even if the claims are dismissed.

The cost of BA and BCal of settling the Laker liquidator's action out of court has been substantial. It appears that discussions between airlines about tariffs, capacity and so on, which we would regard as a perfectly proper way of facilitating the smooth operation of the Bermuda 2 agreement can give rise to anti-trust claims under American law. The uncertainty which the Americans' unilateral application of anti-trust law to civil aviation has created could at any time be extended by their courts to other aspects of co-operation between airlines, such as interlining or even the activities of the Heathrow scheduling committee for example. It is commonly believed that the Government's wish to privatise BA at an early opportunity makes them an easy target for American contingency fee lawyers.

With the end of the Laker-inspired litigation in sight, I intend to resume discussion with the Americans about the application of competition rules to civil aviation on which we can both agree, and shall be raising the subject with Mrs Dole about the end of the year. If we are to succeed, the Americans will need to be convinced that this is indeed a serious problem to which a solution must be found, and that we are prepared to defend our interests vigorously if necessary.

One method of registering our concern would be to remind the Americans of the powers we have taken under the Protection of Trading Interests Act and the use we have made of them to frustrate American legal processes in anti-trust cases by blocking discovery of documents and evidence. My officials

have been considering with those of the DTI, FCO and Law Officers' Department whether the existing order and direction under S1 would provide the necessary authority to block discovery in any further civil aviation anti-trust suit. The position is not entirely clear, but in any event my officials' advice is that a firm public statement of HMG's policy and intentions in this area would meet our objectives as effectively as a fresh order or direction made to anticipate the consequences of possible further anti-trust suits.

The form which the statement should take needs to ensure that our intentions are placed firmly on the public record, without appearing unnecessarily provocative to the Americans. There is also a judgment to be made about whether the statement should be made in advance of the negotiations or during the course of them. I believe that the Americans will never treat this as a serious problem which has to be solved, unless we take steps to confront them with it as early as possible, and I therefore think that the statement should be made before I see Mrs Dole. The presentation of this to the US Government will need careful handling and my officials are in touch with the FCO about how this should best be done and about the timing. As to the form of the statement a written Parliamentary answer would get the position on to the public record, and could quite naturally be made now in view of the publicity which the American courts' provisional approval for the Laker class action has attracted. A draft answer is attached.

Since this is a matter of international civil aviation policy, I should be happy to make the statement if colleagues agree. But the PTI Act is the responsibility of the Secretary of State for Trade and Industry, and Leon Brittan may wish to comment on this point. Unless I hear by 10 am Tuesday 26 November I shall assume that colleagues are content.

I am copying this minute and enclosure to other members of MISC 112 - Nigel Lawson, Geoffrey Howe, Leon Brittan, Patrick Mayhew (in Michael Havers' absence) and John Moore - and to Sir Robert Armstrong.

NR

NICHOLAS RIDLEY

22 November 1985

CONFIDENTIAL

QUESTION

To ask the Secretary of State for Transport, in the light of the recently announced provisional settlement of the class action relating to the collapse of Laker Airways, what is HMG's policy towards the unilateral application of the US Government's domestic competition laws to civil aviation matters?

DRAFT ANSWER

HMG has consistently maintained the view that in so far as the activities of airlines are authorised and regulated in accordance with an air services agreement, the domestic laws of a Contracting Party may not be used to constrain or regulate those activities unless this is provided for expressly or is necessary in order to implement the agreement, or the laws can be applied in a manner which is compatible with the agreement. Regulation under the agreement by the Contracting Parties jointly of matters such as market access, capacity and tariffs necessarily displaces the unilateral application of the domestic competition laws of each Party which implement the national economic philosophy of each country and are not designed to deal with the special characteristics and needs of international civil aviation.

In particular it is the view of HMG that the unilateral application of US anti-trust law to air services operated under the UK/US Air Services Agreement ('Bermuda 2') is not only incompatible with the United Kingdom's rights under the Agreement but is damaging to the trading interests of the United Kingdom. In 1983 the then Secretary of State for Trade and Industry exercised his powers under the Protection of Trading Interests Act 1980 so as to prohibit compliance by persons carrying on business in the United Kingdom with requirements for the enforcement of US anti-trust laws in relation to activities of UK airlines and concerning the operation of air services under Bermuda 2.

HMG intend to maintain this position. My Rt Hon and Learned Friend the Secretary of State for Trade and Industry therefore intends to exercise his powers under the Act to whatever extent is necessary if proceedings under the anti-trust laws are begun in the future in US Courts against any UK airline in relation to air services operated by it under Bermuda 2, and would not envisage consenting to requests to comply with discovery orders made by US courts in such cases.

While maintaining this position HMG's longer term objective is to reach mutually acceptable arrangements as appropriate with foreign governmentsto deal with anti-competitive behaviour by airlines. As a first step we have indicated to the US Government that we are ready to discuss these issues with them.

Aerospace: Future of BA A4