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Secretary of State for Trade and Industry

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17 March 1986

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David Norgrove Esq  
Private Secretary to the  
Prime Minister  
10 Downing Street  
LONDON  
SW1

Prime Minister

Content that the Director  
should issue? (Subject to colleagues)

Dear David,

Yes [initials]

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BRITISH AIRWAYS : US ANTI-TRUST SUITS

This is give notice of action which my Secretary of State proposes to take tomorrow to exercise his powers under the Protection of Trading Interests Act in relation to anti-trust cases in which British Airways is currently involved in the US Courts.

2 As will be known from discussions in MISC 112, two cases have been brought in the wake of the Laker collapse four years ago. Both are private suits, one alleging British Airways' involvement in anti-competitive practices in the air ticket agency market. Both may well be largely or wholly dismissed on grounds of "standing" (ie that British Airways has no case to answer).

3 It was with the prospect of such cases in mind that the then Secretary of State (Mr Brittan) made his statement on 11 December 1985 (Cols 623-624):

"I therefore intend to exercise powers under the Act to whatever extent is necessary if proceedings under the anti-trust laws were to be taken in the future in United States Courts against any United Kingdom 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".

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In both the present cases the question of discovery of documents arises. With the possibility of the cases being dismissed on grounds of "standing" my Secretary of State had been very reluctant to exercise his powers under the Protection of Trading Interests Act, both because the powers are controversial and because British Airways' case could be prejudiced. But factors brought to his attention late this week persuade him that there is no alternative to doing so; and with apologies for the shortness of notice - he accordingly proposes to act tomorrow.

4 There are two reasons for this step. The first relates to the US procedures, and British Airways' position. Up to now British Airways have felt justified in not shipping documents to the United States, despite requests for discovery, on the grounds that they are protected by an existing direction under the Act (made in connection with an earlier Laker action). But that direction will shortly expire (probably tomorrow if there is final settlement of the earlier action); and officials in this Department were told late last week that, in the absence of any fresh direction, British Airways would feel bound to begin the process of shipment of documents to the United States.

5 The second reason relates to British Airways' privatisation, and the reliance placed on Mr Brittan's December statement by their financial advisers, when framing estimates of British Airways' likely liabilities from anti-trust suits. The existing level of provision (which is matched by a substantial insurance element) is only just below the threshold of materiality. If the Government were to show reluctance to use the Protection of Trading Interests Act, with the consequences that this might have in facilitating the progress of suits against British Airways, British Airways' estimated liabilities would be revised producing an increase which could well raise them above the materiality threshold, with implications for any future flotation prospects. This would have serious consequences for any future chances of privatising British Airways.

6 Exercise of powers under the Protection of Interests Act is never easy. Use of the powers raises controversial issues of UK/US relations; and the consequences in terms of US Court procedures can never be predicted with complete certainty. However, taking account of the two issues set out above my Secretary of State believes that it is now right to take the steps indicated in Mr Brittan's statement of last year; and the Secretary of State for Transport has endorsed this view. My Secretary of State therefore proposes to give appropriate Directions under the Act, subject to

*Strongly, I am told.*

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any views which other MISC 112 colleagues may have (for which he would be grateful by 1 pm tomorrow on 18 March). The Directions would then be signed tomorrow afternoon.

7 I am sending copies of this minute to Robert Culshaw (FCO), Philip Wynn Owen (Treasury), Richard Allan (Transport), Henry Steel (Law Officers' Department) and Michael Stark (Cabinet Office).

*Yours ever,*

*Michael*

MICHAEL GILBERTSON  
Private Secretary

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