



With the compliments of

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MR ALTY

cc Mr Lavelle (or)
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BA/BCAL

There has been this week a fair amount of activity on this subject. We heard on Monday evening that the Commission had written to BA and BCAL saying that they had received complaints about the proposed merger and giving their preliminary view that if the merger were to proceed in the form originally proposed it could constitute an abuse of a dominant position within the meaning of Article 86 of the Treaty. Copies of the letters from the Commission to the two companies are attached. The letters did not arrive in time to affect the decision over the merger which was finally set up on Monday afternoon. (Indeed the letter to BA was wrongly addressed!). Before the letter was sent there was contact between Mr Holmes of Department of Transport and Mr Sutherland and then thereafter between UKREP and Sutherland's Cabinet (see telno 4434). On Tuesday Mr Kenneth Clarke raised the issue with Mr Sutherland and the outcome of that is recorded in telno 4445.

2. Up to that point the sending of the letters had remained confidential, but details reached the press this morning (see FT report attached). Usefully Mr Clarke was able to record an interview yesterday's broadcast on this morning's "Today" programme, in which he took the line that there was no doubt that Commissioner Sutherland had the power under the Treaty to make enquiries; that it was for him to judge whether he should exercise these responsibilities

or not ; and that in the same way that BA had satisfied the Monopolies Commission it was to be hoped that they would be able to satisfy the European Commission. This line has the useful effect of making it clear that the initiative lies with BA, not with the Government at this stage.

3. BA have in fact already offered to talk with the Commission and indeed suggested going to see them before Christmas. The meeting will actually take place on Tuesday 5 January when the BA team will be lead by Robert Ayling, BA's Chief Legal Adviser and Company Secretary, who, as you will know, is an ex-member of DTI's legal staff. I have agreed with Mr Holmes, Mr Treadgold in DTI, Mr Wall and Mr Pratt that we will have a meeting among senior officials, under Mr Lavelle's chairmanship if he wishes, to review the legal and tactical position so that advice can be quickly given to Ministers. X (Mr Norgrove, whom I have kept in touch at each stage, tells me that the Prime Minister may want to suggest an early meeting of Ministers to take stock, for which the meeting officials would be necessary preparation. If possible should meet at the end of week beginning January 4 or ~~very~~ early in the week thereafter, depending on people's availability. We need to give chance for UKREP to attend.

4. The preliminary reaction of those to whom I have spoken is not to be overly concerned at events at this stage. Mr Pratt's first assessment of the Commission's preliminary investigation which was sent to BA and BCAL (copy also attached) is that there is prima facie a reasonable case for looking at the merger under Article 86 of the Treaty. But he points out that Commissioner Sutherland has not chosen at this stage to initiate procedures formally, a Statement of Objections being the first formal step which the Commission would take. Moreover both Department of Transport and DTI sense that while, because of the complaints received by the Commission, Commissioner Sutherland has to take action, getting as far as the ECJ

is not necessarily in his sights. Department of Transport's advice to BA has been to be ^{ready} and willing to get into open dialogue with the Commission with the aim of seeking to satisfy them. They hope that some small but significant concession by BA might be enough to give the Commission a satisfactory basis on which to return to the complainants.

5. Of course, if the Commission pursue matters further and demonstrate deeper concerns about abuse of a dominant position then there will be an increased risk of a clash between ^{their} ~~its~~ judgment on the one hand and that of the Monopolies Commission and the Secretary of State for Trade and Industry on the other. But Mr Pratt tells me that there ~~had~~ been storms of this sort threatened before and in each case they have passed, though not without help from both sides.

6. This brings us to the position the Government should take at this stage. BA is of course a private company and the merger has already been reviewed in this country under the quasi-judicial procedures of the Monopolies Commission. For the time being the Government, while keeping in very close touch with the position, must stand back and allow the dialogue between BA and European Commission to develop constructively. But there may come a point when it needs to give further counsel to BA and to make contact with the Commission on its own account, for instance to draw attention to particular arguments or facts in the Monopolies Commission Report. We can think more about this at the meeting of officials after the New Year holiday.

7. Meanwhile Mr Holmes is, at my instigation, today writing around to those concerned in FCO, DTI, Treasury and ourselves to summarise the state of play. I would be grateful if you would bring us up to date if there are other developments by January 4th.



JOHN HOLROYD

23 December 1987