COMMISSION

COMMISSION DECISION

of 21 October 1992

examining, by virtue of Article 10 (4) of Council Regulation (EEC) No 2343/90 the application of Article 10 (3) of the same Regulation to the increase of frequencies on existing services on the route London (Heathrow)-Brussels

(Only the English, French and Dutch texts are authentic)

(92/552/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States [1], and in particular Article 10 (4) thereof,

Having regard to the requests of the Belgian Government,

Having given notice to the Member States involved to submit their comments,

Whereas :

I

(1) By letters of 27 and 31 August and of 2 September 1992, respectively registered by the Commission on 3 and 4 September 1992, the Belgian authorities, under the provisions of Article 10 (4) of Regulation (EEC) No 2343/90 (hereinafter referred to as the Regulation), requested the Commission to examine the application of Article 10 (3) of the same Regulation and specifically :

(a) to decide, that the Belgian authorities can refuse to increase the frequency of flights requested by British Midland for the route London (Heathrow)-Brussels-London (Heathrow), as long as Sabena is not authorized to increase, as requested, the frequency of its service on the same route ;

to this end, to consider that Article 10 (3) of the Regulation includes a reciprocity clause implying on a teleological basis, *a fortiori*, that a Member State (in this case Belgium) may take countermeasures against the company at the origin of the discrimination (British Midland), and not authorize the air transport company of the other Member State to operate the requested additional flights ;

(b) to rule immediately that the United Kingdom authorities are in contravention of the Regulation by refusing to act on the basis of Article 10 (3), and consequently to take all necessary measures to remedy such contravention or, more precisely, to oblige the United Kingdom authorities to apply the measure foreseen in Article 10 (3) ;

(c) in the event that the Commission fails to have this measure applied by the United Kingdom authorities, to authorize the Belgian authorities to take the measure foreseen in Article 10 (3) in order to limit the damage and guarantee the realization of the objectives of the same Article.

Further to these letters, the Commission by letters of 8 and 14 September 1992 informed the United Kingdom authorities of the Belgian authorities' position and asked them to submit their comments, tc enable the Commission to take the requested decision, within the one-month delay provided by the above Regulation.

(2) By letters of 15 and 18 September 1992, registered by the Commission on 16 and 21 September 1992 respectively, the Permanent Representation of the

[1] OJ No L 217, 11. 8. 1990, p. 8.

United Kingdom replied to the Commission's letter. The position of the United Kingdom authorities may be summarized as follows:

(a) Article 10 (3) of the Regulation does not provide for a reciprocity clause, implying that a Member State may take countermeasures against an air carrier licensed in the territory of another Member State.

Article 10 (3) of the Regulation should, therefore, be interpreted in the sense that it does not give scope for the Belgian authorities to deny access to British Midland in the manner they seek to do;

(b) the action by the Belgian authorities is *prima facie* contrary to Article 4 of the Regulation;

(c) the question whether the United Kingdom should be taking action to prevent British Midland from operating increased services to Brussels, does not fall within the competence of the Commission pursuant to Article 10 (4).

The facts of the case, as exposed by the United Kingdom authorities, do not support the Belgian authorities' contention that Sabena has been refused permission to increase frequencies on its London (Heathrow)-Brussels service in terms of Article 10 (3);

(d) furthermore, the United Kingdom authorities have alleged that British Midland is designated to operate scheduled services on the route London (Heathrow)-Brussels-London (Heathrow) under the terms of the bilateral Air Services Agreement between Belgium and the United Kingdom, and not under the terms of the Regulation. The United Kingdom authorities further point out that, under the terms of Article 13 (2) of the Regulation, the provisions of this Regulation cannot be used to make bilateral arrangements on market access more restrictive.

(3) By letter of 1 September British Midland complained to the Commission that the Belgian authorities had refused on 28 August 1992 to authorize the requested increase in daily frequency; on 1 September 1992 the Belgian authorities had, however, cancelled their refusal pending the Commission's decision on the basis of Article 10 (4) of the Regulation.

(4) Following their request, the Commission received on 23 September 1992 from the London Heathrow slot coordinator a copy of his correspondence with Sabena regarding the slot increase requested for September/October 1992.

II

(5) According to the information provided by the parties, British Midland and Sabena operate six and seven daily flights respectively between London (Heathrow) and Brussels. On 13 August 1992, the Belgian authorities learned from the press of British Midland's intention to increase its frequency from six to eight daily flights on the abovementioned route. For that purpose, British Midland planned to use slots at London (Heathrow) which were already at their disposal for other flights.

(6) It is alleged that on 31 July 1992, British Midland sent a fax requesting the Belgian authorities to increase their daily frequency from London (Heathrow) to Brussels. The Belgian authorities claim that they did not receive this note and that they received a copy of the original request on 20 August only. However, the United Kingdom authorities have stated that they have understood from British Midland that the fax received a 'transmit confirmation report'.

(7) Sabena also wished to increase their daily frequency on the same route, starting 31 August 1992. Accordingly, on 11 August, Sabena requested the London Heathrow airport coordinator to provide four additional slots (two in the morning and two in the late afternoon) in order to carry out one additional flight in the morning and one in the later afternoon. On the same day, the slot coordinator replied that he could not offer slots close to Sabena's requirements, but that he would keep on searching and might be able to offer some different slots. However, he acknowledged that these would not be close to Sabena's requirements.

According to the United Kingdom authorities, Sabena did not comply with Article 10 (1) of the Regulation since, under the appropriate published rules on slot allocation applying at London Heathrow, the deadline for initial submissions for summer season slots was 1 November 1991.

Following the reply of the Heathrow coordinator to Sabena, the Belgian authorities wrote to the United Kingdom authorities, requesting that the latter refuse the increase in frequency to British Midland on the basis of Article 10 (3) of the Regulation. The letter also indicated that if the United Kingdom authorities would not refuse, then the Belgian authorities would themselves take the decision to refuse the increase in frequency to British Midland.

On 26 August 1992, the Belgian authorities, having received no answer to their letter of 13 August 1992, wrote to the United Kingdom authorities seeking their decision on the increase of British Midland's slote. On the same day the United Kingdom authorities replied that there was no justification to refuse British Midland's request.

(8) On 26 August Sabena was offered by the London Heathrow coordinator new slots for the late afternoon flight (three alternative pairs of slots as of 31 August and two pairs as of 27 September). The slot coordinator stated that the slots offered were the best available at Heathrow. The slot coordinator was unable to offer slots for the morning flight.

On 28 August the Belgian authorities refused British Midland's request to increase the daily frequency. The same day, Sabena asked the Heathrow slot coordinator to remove their request from the waiting list; on 31 August, however, Sabena asked to reinstate their initial request. On 1 September 1992 the Belgian authorities cancelled their refusal to British Midland pending the Commission's decision on the basis of Article 10 (4) of the Regulation.

On 7 September 1992, the slot coordinator confirmed that he was still holding Sabena's initial request and repeated the offer made on 26 August. On 9 September 1992 Sabena asked to hold these slots as a starting base.

On 23 September, the Heathrow coordinator offered to Sabena four additional slots for the morning flight for the period 27 September to 24 October. According to the airport coordinator, these slots are the best available at Heathrow.

III

(9) The Commission considers that Article 10 (3) regulates the relations between a Member State and the air carriers it licensed. In fact, Article 10 (3) imposes, *inter alia*, the obligation on a Member State (A) to refrain from authorizing air carriers licensed on its territory to increase the frequency of an existing service between a specific airport of its territory and another Member State (B) for such time as an air carrier licensed by that other Member State (B) is not permitted, on the basis of paragraphs 1 and 2 of the same Article, to increase the frequency on an existing service to the airport concerned, pending the adoption by the Council and the coming into force of a regulation on a code of conduct for slot allocation.

(10) Article 10 (3) on the contrary does not provide for a Member State to take countermeasures against an air carrier licensed in another Member State (A), which has been authorized by the latter, in breach of the provisions of Article 10 (3), to operate additional flights to the first Member State (B). Such unilateral action carried out by a Member State (B) as a retortion measure against a decision taken by another Member State (A) in infringement of Article 10 (3) is not compatible with Community law. In such a case, in fact, besides the ordinary judicial remedy laid down in the EEC Treaty there is a specific action provided for by Article 10 (4) of the Regulation in defence of a Member State's rights which have been harmed by a measure adopted by another Member State in application of Article 10 (2) and (3).

Pursuant to Article 10 (4) it is the Commission's responsibility, upon request by a Member State, to examine the concrete application of the provisions of Article 10 (2) and (3), and decide whether another Member State's measure breaches the Regulation, and, therefore, has to be withdrawn.

The Belgian authorities' decision of 28 August 1992, consisting in not authorizing British Midland's increase in daily frequencies, clearly infringed the provisions of Articles 4 and 5 (1) of the Regulation.

IV

(11) As a matter of fact, the United Kingdom authorities have authorized British Midland to increase its frequency on the London (Heathrow)-Brussels route. British Midland did not have any problems to get the necessary slots at Brussels airport to exploit the additional flights since Brussels airport is not a congested airport.

On the other hand, Sabena, learning of such authorization for British Midland, wanted to match this increase in frequency to the same extent on the same route. Therefore, after having obtained authorization from the Belgian authorities, Sabena applied to the airport coordinator of London Heathrow to obtain the necessary slots. Such a request was necessary since London Heathrow airport, because of congestion problems, is a coordinated airport.

However, the slot coordinator was unable to provide slots close to those required by Sabena.

(12) In the light of the Regulation, this reply has to be interpreted as a limitation of the exercice of traffic rights, pursuant to Article 10 (2), on the grounds that the conditions in Article 10 (1), are not met.

Article 10 (1) provides that the exercise of traffic rights is subject, *inter alia*, to the allocation of slots, and to the condition that the airport or airport system concerned must have sufficient facilities to accommodate the service. The fact that the lack of slots is a condition under which a Member State may limit or refuse the exercise of traffic rights, pursuant to Article 10 (2), is substantiated by the letter of Article 10 (1): 'the exercise of traffic right is subject to ... rules relating to ... the allocation of slots'.

The wording 'subject to' is logically and grammatically equivalent to 'is conditioned by'. Furthermore, this interpretation is supported by the ninth and tenth recitals of the Regulation which respectively provide that problems relating to the availability of slots must be taken into account, and may cause limitation to the use of traffic rights, and that the exercise of traffic rights has to be consistent with the rules relating to the allocation of slots.

Moreover, the term 'sufficient facilities' in Article 10 (1) (a) includes certainly runway capacities, and therefore, even if indirectly, slot availability.

(13) On the basis of Article 10 (2), the United Kingdom authorities, before limiting or refusing Sabena the additional slots it had requested, should then have informed the Commission, providing it with all necessary elements.

The United Kingdom authorities have therefore failed to comply with their obligations pursuant to Article 10 (2).

V

(14) By virtue of Article 10 (3) of the Regulation:

'A Member State shall not authorize an air carrier:

(a) to establish a new service;

or

(b) to increase the frequency of an existing service between a specific airport in its territory and another Member State for such time as an air carrier licensed by that other Member State is not permitted, on the basis of paragraphs 1 and 2, to establish a new service or to increase frequencies on an existing service to the airport in question, pending the adoption by the Council and the coming into force of a Regulation on a code of conduct on slot allocation based on the general principle of non-discrimination on the grounds of nationality'.

(15) In order to interprete correctly Article 10 (3), it is necessary to refer, on the one hand, to the letter of the paragraph concerned, and, on the other hand, to the general principles set out by the Regulation.

Article 4, in particular establishes that:

'Subject to this Regulation, Community air carriers shall be permitted to exercise third- and fourth-freedom air services between airports or airports systems in one Member State and airports or airports systems in another Member State when these airports or airports systems are open for traffic between Member States or for international services'.

Moreover, pursuant to Article 13:

'This Regulation shall not prevent Member States from concluding between them arrangements which are more flexible than the provisions of Articles 6 (8) and 11 or from maintaining such arrangements in force.

This provisions of this Regulation shall not be used to make existing market access or capacity arrangements more restrictive.'

Finally, in the eight, tenth and fourteenth recitals of the Regulation, it is respectively stated that:

'Whereas increased market access will stimulate the development of the Community air transport sector and give rise to improved services for users; whereas as a consequence it is necessary to introduce more liberal provisions concerning multiple designation, third-, fourth- and fifth-freedom traffic rights;'

'Whereas the exercise of traffic rights has to be consistent with rules relating to safety, protection of the environment, allocation of slots and conditions concerning airport access and has to be treated without discrimination on grounds of nationality;'

'Whereas, taking into account the competitive market situation, provision should be made to prevent unjustifiable economic effects on air carriers;'

(16) In the light of the foregoing, Article 10 (3) is to be considered as an exception to the third- and fourth-freedoms expressly designated by the Regulation.

According to the general principles of the law, exceptions must be narrowly interpreted.

Article 10 (3) aims at balancing traffic rights between two carriers licensed by two different Member States and which operate the same route. The balance in traffic rights must be numerical. According to Article 10 (3), this numerical balance must be kept in the two situations envisaged in (a) and (b) of the same provision, respectively, the establishment of a new service, and the frequency increase of an existing service. In order to ensure the maintenance of such balance, Article 10 (3) must be interpreted as to embody the obligation for a Member State to withdraw the traffic rights already granted to an air carrier licensed by this State.

Article 10 (3) does not provide for a 'matching right' but for the right for an air carrier to see its competitor on a given route being refused the authorization *'inter alia'* to increase the frequency of an existing service if that carrier 'is not permitted ... to increase frequencies on an existing service to the airport in question'.

In practice this means that the air carrier *de quo* has, pursuant to Article 10 (3), no right to obtain a certain number of slots by the competent authority of the other Member State. This air carrier is entitled to claim that the authorities of that Member State refuse or withdraw the corresponding traffic rights that were granted to its competitor.

(17) The complainant alleges that the United Kingdom authorities should not have authorized British Midland to increase frequencies on the London (Heathrow)-Brussels-London (Heathrow) route as long as Sabena was not permitted to increase its frequencies on the same route by the allocation of a sufficient number of slots at Heathrow airport thereby allowing the Belgian carrier to exercise its traffic rights on that route.

(18) The complainant's request should therefore be accepted if it could be proved that either:

(a) no sufficient slots had been allocated by the Heathrow airport coordinator so that Sabena could not increase the frequencies of its existing service to and from that airport;

or

(b) the slots allocated were not the best available at the time of Sabena's request to the Heathrow airport coordinator. In this case it could be shown that local rules on allocation of slots have been implemented in such a way as to infringe the general principle of non-discrimination on the ground of nationality between the air carriers concerned.

In fact, the rule of the numerical balance of traffic rights between the two carriers concerned would be by-passed if the offer of slots made by the competent authority of that Member State to the carrier licensed in another Member State was not linked to objective and transparent rules.

An offer of slots by the authority of a Member State that are not the best available at the time of the request will in fact amount to discrimination, possibly indirect, in favour of the competing carrier licensed in the same Member State.

(19) As stated above, the United Kingdom authorities should have, pursuant to Article 10 (3) of the Regulation, offered in relation to the request, the best available slots to Sabena. Initially they did not make any concrete offer, but they stated that slots were available even if not near the requested time, waiting for Sabena's reaction. This reply can be considered as an offer. Concrete times were offered on 26 August with regard to the late afternoon slots, and on 23 September with regard to the morning slots.

VI

(20) It has to be examined whether the slots offered are, as stated above, sufficient to permit an increase in frequency. The slots offered by the Heathrow airport coordinator are not those requested by Sabena. It has to be noted that the Regulation does not establish that the slots offered at the time of the requests be exactly the ones requested. Moreover, Article 10 (3) does not give any conditions or criteria that the slots offered must immediately be economically viable. In fact, as observed above, pursuant to Article 10 (3) it is sufficient that a Member State offers the best slots which are available at the time of the request.

However, the slots offered to Sabena do not completely meet the airline's needs for efficient commercial operation. The morning departure and arrival slots are about two hours out of line compared to Sabena's request. The late afternoon slots are for the arrival time acceptable for Sabena, but only one departure slot per week is acceptable for Sabena, whereas on the other days the plane would sit too long on the ground at Heathrow to allow for an economical operation. Therefore, Sabena is still in a more unfavorable position than British Midland, which is able, starting of 31 August 1992, to use in a profitable way all its slots on the London (Heathrow)-Brussels-London (Heathrow) route. This situation clearly may lead to a *de facto* discrimination against Sabena which is unacceptable under Community law. Therefore, the slots already offered to Sabena should be considered, comparable to the situation in a slot allocation conference, as a starting point for further improvements.

In practice, the British authorities should try, in cooperation with Sabena, to improve as soon as possible Sabena's situation at London (Heathrow) Airport. That would mean that the slot coordinator has to put Sabena in front of the waiting list in order to provide Sabena eventually with slots which permit a commercial operation of the frequency increase. For the time being, however, the best available offer is sufficient to fulfil the criteria of Article 10 (3) of the Regulation.

VII

(21) The fact that Sabena had filed its request without observing the deadlines set forth in the published rules on slot allocation at London (Heathrow) airport is not relevant in the application of Article 10 (3), given that the interest of Sabena to increase its flights on the abovementioned route arose when it became acquainted with the authorization of British Midland to increase its flights to Brussels from London (Heathrow). Sabena's request was made in time before the starting point of the operation (31 August 1992).

VIII

(22) The Commission has examined the statement of the United Kingdom authorities that the designation of British Midland on the route London (Heathrow)-Brussels was authorized on the basis of a bilateral Air Services Agreement between Belgium and the United Kingdom.

The Commission recognizes that, pursuant to Article 13 (2) of the Regulation, the provisions of the Regulation cannot be used to make existing market access or capacity arrangements more restrictive. However, the parties have not provided the Commission with the text of this bilateral agreement and have not indicated or proved which clauses of the agreement make market access and capacity more liberal than the Regulation.

(23) The Commission has been provided by a third party (British Midland) with the text of the agreement entered into between Belgium and the United Kingdom on 10 October 1985. The Commission does not know whether the arrangement is still in force and, if so, whether the arrangement is the only one concluded by the two Member States.

Notwithstanding the foregoing, the Commission has examined the provisions of the abovementioned agreement relating to market access and capacity. Part II of the agreement states that 'Each aeronautical authority will allow an airline designated by the other to mount such capacity as the airline considers appropriate on any route referred to in paragraph 3 so long as the principal objective of the service is to provide adequate capacity at a reasonable load factor for third/fourth freedom traffic between its own country and the other country. However, each authority will retain the right to require consultations with the other in the event that it considers that the interests of any of its own airlines on a particular route or routes are being seriously damaged as a result of the capacity being mounted by the airline or airlines of the other country.'

(24) This agreement appears to include some stringent safeguard clauses (objective of the service is to provide adequate capacity at reasonable load factor), assuring that any increase in capacity must be based on a corresponding increase in traffic. Moreover, on the basis of its knowledge of the mechanisms for the resolution of airlines' conflicts, embodied in all the aeronautical bilateral agreements, the Commission is of the opinion that the part of the clause providing the right of each authority to require consultation with the other, is a reciprocity clause. Therefore, the Commission does not believe that the provisions of this arrangement are more liberal than those of the Regulation, and, therefore, Article 13 (2) does not apply to the present case.

IX

(25) Pursuant to Article 10 (4) the Commission has to examine the application of paragraph 2 and/or paragraph 3 and within one month decide whether the Member State may continue to apply the measure. The last request of the Belgian authorities is dated 3 September and was registered with the Commission on 4 September 1992. The Commission has not been able to take its decision by 4 October 1992 for the reason that it referred the complaint to the United Kingdom authorities to enable them to exercise their right of defence. The last reply from the United Kingdom authorities was registered on 21 September. Moreover, complete information on the offers of slots made was only faxed by the Heathrow airport coordinator on 23 September. Therefore, the deadline has been exceeded for the time strictly necessary to the Commission to take its decision,

HAS ADOPTED THIS DECISION:

Article 1

Article 10 (3) of Council Regulation (EEC) No 2343/90 does not permit the Kingdom of Belgium to take countermeasures against an air carrier licensed in another Member State (in this case British Midland).

The Belgian authorities cannot refuse British Midland, on the basis of Article 10 (3) of Regulation (EEC) No 2343/90, permission to increase its frequency for the route London (Heathrow)-Brussels-London (Heathrow) irrespective of whether, on the basis of Article 10 (1) and (2), Sabena is or its not permitted to increase frequencies on the same route.

Article 2

The United Kingdom authorities have not infringed Article 10 (3) of Council Regulation (EEC) No 2343/90 by not refusing British Midland to increase its frequency on the route London (Heathrow)-Brussels-London (Heathrow) so long as Sabena is unable to commercially operate the requested frequency increase.

The United Kingdom authorities shall consider the slots offered to Sabena as a starting basis and shall as soon as possible improve the offer in relation to Sabena's request.

Article 3

The United Kingdom authorities, by not communicating in due course to the Commission the limitation of the exercise of additional traffic rights requested by Sabena, have failed to fulfil their obligations pursuant to Article 10 (2) of the Regulation.

Article 4

The present decision is addressed to the United Kingdom and to the Kingdom of Belgium.

Done at Brussels, 21 October 1992.

For the Commission

Karel VAN MIERT

Member of the Commission