COMMISSION

COMMISSION DECISION

of 28 May 1993

on a procedure relating to the application of Regulation (EEC) No 2408/92

(Case VII/AMA/I/93 — Viva Air)

(only the French text is authentic)

(93/347/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (1), and in particular Article 8 thereof,

After consulting the Advisory Committee established under the said Regulation,

Whereas :

I. BACKGROUND

I

On 25 January 1993 Viva Air, whose head office is at Calle Zurbano, 41, 28010 Madrid, Spain, requested the Commission to investigate the legality of the decision by which the French authorities refused Viva Air a licence to operate the Paris (Charles De Gaulle) — Madrid route and to issue a decision based on Article 8 (3) of Regulation (EEC) No 2408/92.

Viva Air wanted to operate a new schedule air service between Madrid and Paris (Charles De Gaulle) airport from 2 January 1993 at a rate of two return flights a day. In a telex message of 28 October 1992 it therefore applied to Paris (CDG) for slots, which the appropriate airport authorities granted by telex message of the same date.

In a telex message dated 25 November 1992, the Spanish civil aviation authority informed its French counterpart of its decision to authorize Viva Air to operate the service in question and requested the French authorities to do so too. As no reply was received from the French autorities, the Spanish civil authority confirmed the terms of the first communication in a second telex message on 16 December.

By letter of 2 December 1992 Viva Air itself informed the French authorities of its intention to operate on the route concerned, referred to the authorization issued by the Spanish authorities and gave the flight numbers, the UTC schedules, the airports of departure and arrival, the frequencies, the period of operation and the type of aircraft that would be used. When no reply was received from the French authorities in spite of a meeting with a French civil aviation authority official on 4 December 1992, Viva Air repeated its application in a letter dated 18 December and emphasized the amount it had invested in order to be able to operate the service concerned.

The French civil aviation authority replied by telex message on the same date stating that Viva Air's application was still under examination. The authority added that the application should have been lodged two months prior to the date on which the service was to start, as required by the Decree of 12 September 1980 which was still in force.

Viva Air replied to this telex message in a letter of 22 December 1992 pointing out that the exercise of third-freedom and fourth-freedom intra-Community traffic rights had been completely liberalized by Community rules and that Member States no longer had any discretion in these matters. It therefore objected to the application of the cumbersome procedures provided for in the Decree of 12 September 1980 which, in any case, applied only to non-French carriers. Viva Air added that, on the one hand, the French authorities had been informed of its intention to operate the service in question as long ago as October 1992 when the airline lodged its request for air slots and, on the other, Viva Air was unaware of any

(1) OJ No L 240, 24. 8. 1992, p. 8.

rules governing traffic allocation within the Paris airport system. Viva Air again emphasized the losses it would sustain if it was unable to operate the service from the planned date in view of the investments it had made and the undertakings it had given passengers.

To this the French authorities replied in a letter addressed to the chairman of Viva Air, dated 28 December 1992, refusing Viva Air authorization to operate the planned service between Madrid and Paris (CDG). But they added that there was nothing to prevent the service operating between Madrid and Paris (Orly). The refusal was based on the fact that Article 8 (1) of Regulation (EEC) No 2408/92 allows Member States to regulate the distribution of traffic between airports within an airport system and on the rule that 'the French Government does not allow an airline to operate services on the same medium-haul international route into both Paris (Orly) and Paris (CDG)'. In the case in point the French authorities considered Viva Air to be part of the Iberia Group, which already operates on the Madrid-Paris (Orly) route. Consequently, Viva Air's proposed services on the Madrid-Paris (CDG) route would not be independent of those operated by Iberia on the Madrid-Paris (Orly) route, an interpretation further supported by the fact that it was Iberia-Paris that had lodged Viva Air's schedules with the French civil aviation authority.

In the said letter of 28 December 1992 the French authorities also reiterated their position that the traffic rights referred to in Article 3 (1) of Regulation (EEC) No 2408/92 had to be granted explicitly by the Member States concerned and that, under the various safeguard measures provided for in the Regulation, the Member States retained the right to refuse or restrict traffic rights, or impose conditions subject to which rights might be exercised. The French authorities therefore considered that the national provisions on lodging schedules (adopted by the Decree of 12 September 1980), remained in force and were in no way contrary to Community law.

The said authorities added that the application for slots which Viva Air lodged with the coordinator for Paris (CDG) airport could not be regarded as complying with the requirements.

By telex message of 30 December 1992 the French civil aviation authority informed the Spanish counterpart of its position stating, in particular, that 'if one company or two companies belonging to the same group were to serve the same European city from two airports in the Paris system, this would create a precedent which would undermine the present system of allocating airport facilities.'

The subject of this Decision, the objection that Viva Air lodged with the Commission on 25 January 1993, is directed against the French authorities' refusal of 28 December 1992 to grant an authorization.

II

In its objection Viva Air asks the Commission to examine the legality of the French authorities' refusal and to take a decision based on the provisions of Article 8 (3) of Regulation (EEC) No 2408/92.

In support of its application, Viva Air stressed two aspects, namely that the procedure imposed by the French authorities is incompatible with the provisions of Regulation (EEC) No 2408/92 and that Article 8 (1) of that Regulation has been applied in an inappropriate and discriminatory manner.

(a) *the authorization procedure*

Viva Air considers that Article 3 (1) of Regulation (EEC) No 2408/92 does not leave the Member States any discretion to refuse traffic rights, other than the exceptions provided for therein. If the principle of freedom to exercise rights embodied in the Regulation is not to be undermined, this means that explicit authorization is not needed and that the formalities needed to enable Member States to operate exceptions, where appropriate, be kept to a strict minimum.

According to Viva Air, the current French rules do not fulfil these conditions, which must be considered in the light of the principle of proportionality. For instance, contrary to the requirements of Community law, the French rules are discriminatory since the provisions applicable to French airlines differ from those applied to non-French Community airlines. What is more, an application for slots lodged with an airport should be regarded as equivalent to giving the national authorities prior information, particularly as the application specifically refers to a particular route. Consequently, once slots are allocated this is equivalent to a Member State granting an authorization since slot allocation is an instrument used to implement a general policy on sharing out traffic between airports. Finally, the two months required for examining applications is clearly excessive since, for example, Article 5 of Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services [1] provides that such fares are to be submitted not more than 24 hours before they are to take effect.

(b) *implementation of Article 8 (1) of Regulation (EEC) No 2408/92*

Viva Air considers that Member States should apply the provisions of Article 8 (1) of Regulation (EEC) No 2408/92 in line with objective, non-discriminatory criteria and with a view to organizing airports more efficiently. In this instance no such criteria were used since :

[1] OJ No L 240, 24. 8. 1992, p. 15.

— the traffic allocation rule quoted by the French authorities applies only to intra-Community international routes and not to domestic French routes or routes to non-member countries;

— this rule gives Air France an advantage since it operates a service from Paris (CDG) to Madrid whilst Air Inter provides an indirect service from Paris (Orly) to Madrid via Toulouse, Bordeaux and Lyons;

— the French authorities' refusal means that Air France remains in a monopoly position on the Paris (CDG)-Madrid route.

Furthermore, Viva Air considers that the French authorities were incorrect in concluding that Iberia and Viva Air are part of the same company since Viva Air, in spite of being a subsidiary of Iberia, nevertheless has its own legal personality and commercial identity, its own commercial policy and its own licence. Viva Air was founded in 1985 and should therefore be regarded as a genuine Community air carrier within the meaning of Article 2 (b) of Regulation (EEC) No 2408/92. What is more, the French authorities' interpretation leads to further discrimination since the French airline Euralair, which provides a direct service between Paris (Orly) and Madrid, is in fact dependent on the Air France group for most of its work.

III

To enable it to take a decision on the objection lodged by Viva Air, the Commission, in a letter of 4 February 1993, requested the French authorities to reply to the following questions within a fortnight:

1. Do the French authorities intend to repeal the provisions of the Decree of 12 September 1980 on scheduled, intra-Community air services, or to amend them in the near future?

2. Is the period the French authorities require for examining an application two months, as indicated in the letter of 28 December 1992 from the French civil aviation authority to Viva Air, or 90 days, as provided for in Article 3 of the Decree of 12 September 1980?

3. The Decree of 12 September 1980 refers to foreign companies only. What procedure applies to companies, including the flag carrier, established in France and wishing to start new services?

4. What are the rules currently governing the allocation of traffic between the airports at Orly and Paris (CDG)?

5. As the said letter of 28 December 1992 states, the French Government does not allow airlines to operate services on the same medium-haul international route into both Paris (Orly) and Paris (CDG). Why does this prohibition apply to medium-haul international flights only and not to long-haul and domestic flights? Is it not the case that, in this instance, the prohibition militates against the expansion of CDG airport sought by the French authorities?

6. In the said letter of 28 December 1992, the reason given for refusing Viva Air permission to operate into Paris (CDG) was that Iberia and Viva Air were part of the same group and that their respective services would therefore not be independent of each other. What general criteria do the French authorities use to decide whether two companies are in fact members of the same group or a single company for the purposes of applying the rules governing the allocation of traffic to Orly and CDG? In this connection, how is the interdependence between companies determined?

As the Commission did not receive a reply by the deadline given, the French authorities were sent a reminder on 5 March 1993, allowing five days for the authorities to reply. In a letter dated 11 March 1993 and logged in at the Commission on 17 March, the French authorities sent the Commission the information it had requested.

IV

The replies of the French authorities to the six questions the Commission put in its letter of 4 February 1993 may be summarized as follows:

— Questions one and two: the provisions of Article 3 of Regulation (EEC) No 2408/92 do not prevent application of the procedure established by the Decree of 12 September 1980. Nevertheless, it is intended to amend the Decree so as to reduce to one month the period required for notification — it having already been reduced to two months.

— Question 3: since the entry into force of Council Regulation (EEC) No 2407/92 [1], all French carriers, including the flag carrier, have to meet the same requirements to obtain an operating licence, a process which involves an opinion from the *Conseil supérieur de l'Aviation Marchande* (CSAM) and the lodging of a programme one month prior to start-up.

[1] OJ No L 240, 24. 8. 1992, p. 1.

— Question 4 : the Ministerial decisions allocating traffic to the various airports in the Paris system are not issued as formal documents but are based on the principles formulated by the French Government when setting out its air transport policy. These principles were analysed in detail when Paris (CDG) airport was built and again more recently. A Ministerial decision collating all the rules on allocating traffic to the Paris airport system should be issued shortly.

— Question 5 : the decision to apply the principle of not allowing the same airline to serve both Paris (Orly) and Paris (CDG) to medium-haul international flights only was taken because of the type of market involved.

Where long-haul services are concerned, airlines cannot reasonably consider duplicating a service unless they operate more than one daily flight and can afford two landings a day in Paris.

In the case of domestic services and in view of the heavy competition from surface transport, duplication of services is encouraged in order to allow airlines wishing to do so to improve their services to Paris. This also encourages the expansion of Paris (CDG) airport.

In the case of medium-haul international services, and taking into account the relatively low flows, intensified by the fact that several carriers are in competition, concentrating the flights of one airline at one airport will ensure the best possible service for users and the optimization of airport capacity use. To avoid discrimination, all carriers serving the same route are directed to Paris (CDG) where possible.

However, the capacity available at Paris (CDG) means that not all international intra-Community services can operate into that airport and that, temporarily, all carriers established on routes between Paris and the Iberian peninsula are still based at Paris (Orly). They will be transferred to Paris (CDG) as and when capacity at that airport is developed. Air France has therefore already transferred its Iberian services to Paris (CDG) and Iberia has the choice but has not yet decided.

— Question 6 : the decision was made on the basis of the form of control Iberia exercices over Viva Air and the relevant criteria set out in various Community regulations on effective control. In this instance Iberia has a majority holding in Viva Air and effectively controls the latter, a point never contested by either company.

II. LEGAL ASSESSMENT

V

In this case, the Commission's main task is to decide whether the French authorities have correctly applied the provisions of Article 8 (1) of Regulation (EEC) No 2408/92 in refusing Viva Air authorization to operate the Madrid-Paris route from Paris (CDG). This means first examining the scope of Article 3 (1) of Regulation (EEC) No 2408/92 in order to determine how much discretion the Member States still have to authorize or refuse traffic rights and what formalities the Member States may still impose in connection with any authorization procedure.

VI

Article 3 (1) of Regulation (EEC) No 2408/92 states as follows : 'Subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community'.

The Commission considers that this provision constitutes the statement of a general principle of freedom of access for all Community air carriers to all intra-Community routes, including those within Member States, i.e. of freedom of access for all carriers in possession of an operating licence granted in accordance with the provisions of Regulation (EEC) No 2407/92.

Nevertheless, these provisions do not in themselves authorize Community air carriers to exercise traffic rights. As the French authorities maintain, authorization to exercise these rights remains the province of the Member States concerned which, if they so wish, may impose a formal authorization procedure. This is confirmed by the words, 'shall not be required to authorize', in Article 3 (2) of Regulation (EEC) No 2408/92. Nevertheless, this phrase also means that, on the contrary, under normal circumstances — i.e. where none of the restrictions or constraints provided for in Article 3 (2), Article 3 (4) or Articles 4 to 10 of Regulation (EEC) No 2408/92 is capable of applying — the Member States concerned are required to allow carriers to exercise traffic rights. Here, authorization is automatic and Member States no longer have any discretion in the matter.

The automatic granting of rights arises out of the general principle of freedom of access. It is also in line with the recitals in the preamble to Regulation (EEC) No 2408/92 which refer specifically to Article 8a of the Treaty, to the freedom to provide services in an internal market without internal frontiers and to the abolition of all restrictions regarding designation and traffic rights. It is also in line with the freedom to set fares and rates granted by Regulation (EEC) No 2409/92 since, from the economic point of view, the elimination of all rigidity on prices should also mean the elimination of all rigidity on quantities (or access to the market), if an unbalanced outcome is to be avoided.

The fact that the right to exercise traffic rights has become automatic may not, however, prevent the Member States exercising their right to apply the transitional restrictive clauses provided for in Article 3 (2), Article 3 (4) and Article 5 or the definitive restrictive clauses of Articles 4, 6, 8, 9 and 10 of Regulation (EEC) No 2408/92. Member States may therefore require carriers to lodge applications providing various items of information prior to an authorization being granted. Nevertheless, to prevent such requirements from undermining freedom of access to the market established by Regulation (EEC) No 2408/92, they must be kept to the minimum necessary to allow the Member States to operate the abovementioned restrictive clauses, where appropriate.

Also, where a Member State imposes a formal notification and authorization procedure, the deadlines for replying to airlines' applications for authorization must be kept very short for three reasons. First, the very principle of freedom of access to the market, established by Article 3 of Regulation (EEC) No 2408/92, assumes that carriers will be informed quickly of the decision on their application. Secondly, in view of the heavy investment involved in starting up a new service, particularly for small airlines, the element of uncertainty must be reduced. Thirdly, it does not take long to examine applications in the light of whether to apply the various measures restricting access to the market provided for in the Regulation.

Still with a view to reducing the amount of uncertainty for airlines and since the right to exercise the freedom is now the rule and refusal the exception, it should also be the rule that, where no reply is received by the stated deadline, authorization to operate is implicit. Further, all refusals should, on the one hand, be expressly and clearly justified in fact and in law and, on the other hand, be open to legal challenge. The Member States should therefore include appropriate provisions in their internal regulations.

On air slots, the Commission considers that air slot allocation, which is covered by Council Regulation (EEC) No 95/93 [1], is legally distinct from the question of granting of traffic rights, which is covered by Regulation (EEC) No 2408/92. Consequently, an airline's application for traffic rights may not be refused for the simple reason that the airline does not have the necessary air slots to be able to provide the service covered by the application. Knowing or not knowing whether an airline has the appropriate air slots therefore has no bearing on the matter and airlines must therefore not be asked to provide this information.

Similarly, a carrier who has, or can obtain, the slots he needs to operate a given service may not assume that this authorizes him to exercise traffic rights in respect of the service — unless, that is, the Member State concerned does not impose any special formalities in respect of obtaining such rights. Viva Air's argument that its application for a slot allocation at Paris (CDG) was equivalent to the French authorities issuing an authorization should therefore be rejected.

Finally, the Commission stresses that, contrary to the French rules which are still in force, no Member State may undermine the fundamental principle of non-discrimination on the basis of nationality by differentiating between its own licensed carriers and those licensed by other Member States in the formalities it lays down with regard to the examination of applications for traffic rights under Regulation (EEC) No 2408/92.

VII

Article 8 (1) of Regulation (EEC) No 2408/92 states as follows : 'This Regulation shall not affect a Member State's right to regulate without discrimination on grounds of nationality or identity of the air carrier, the distribution of traffic between the airports within an airport system'.

When applied, these provisions could restrict the general principle of freedom of access to routes and Community airports provided for in Article 3 of the Regulation. The Commission considers that, like any exception to a general principle, any such restriction must be interpreted strictly and that the interpretation must be based on transparent and objective criteria which remain constant over a given period and are non-discriminatory. It is then the responsibility of the Member States to put forward all the relevant grounds.

[1] OJ No L 14, 22. 1. 1993, p. 1.

The Commission also considers that the aforementioned wording of Article 8 (1) implies that rules must be laid down which are transparent and regulatory in nature, i.e. having general, and not individual, effect. This, in turn, means that the rules must be published. Only if they are published, will they meet the requirement of transparency since the reasons for, and basis of, current policy on airports will then be clear. Publication would also enable airlines to work out in advance, with a minimum of uncertainty, the airport to which they were likely to be allocated in view of their intended routes, in accordance with the freedom the Community rules sought to confer on carriers.

The fact remains that the French rules by which traffic is allocated within the Paris airport system, and particularly the rules used against Viva Air, have not been published. The Commission therefore concludes that the rules do not apply. What is more, under French law an unpublished regulatory instrument cannot be enforced against persons to whom it purports to apply. Hence, it cannot be used as a basis for an individual decision against such persons.

The fact that the decision to refuse authorization was taken on 28 December 1992, i.e. before the entry into force on 1 January 1993 of Regulation (EEC) No 2408/92, does nothing to alter the foregoing assessment since Article 9 of Council Regulation (EEC) No 2343/90 [1], which was in force prior to Regulation (EEC) No 2408/92, already included similar provisions and since the decision of 28 December 1992 continued to affect the situation after 31 December 1992.

Also, according to the information available to the Commission, as corroborated by the replies set out above which the French authorities provided on 11 March 1993, the latter have pursued a policy for the last 15 years or so — and more particularly the last five years — of promoting the expansion of Paris (CDG) Airport which is to become both the main continental European gateway and a large hub airport. It is a fact that, compared with the situation at other European airports, the physical potential for expanding this one is considerable and that, in March 1993, capacity at Paris (CDG) increased considerably when terminal 2C came into operation.

On the question of allocating traffic to airports, the policy has been gradually to transfer to Paris (CDG) all airlines formerly operating through Orly. For instance, in October 1980, once the CDG 2 terminal came into operation, the French authorities decided to transfer foreign (particularly Community) airlines from Orly-West to terminal CDG 1.

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

It therefore has to be said that the refusal of the authorities to allow Viva Air to operate the Madrid-Paris (CDG) service runs counter to their policy on these airports so far.

The grounds given for the refusal were that the French Government operated a rule by which it did not allow airlines to run services on the same medium-haul international route from both Paris (Orly) and Paris (CDG). One wonders why this rule applies only to medium-haul international traffic and not also to domestic and to international long-haul services. The French authorities say that this differentiation is due to the type of market involved.

Turning first to long-haul services, the Commission would nevertheless note that only the French flag carrier operates an international long-haul service with departures from both Orly and CDG (Paris-New York) at frequencies comparable with those of many intra-Community airlines.

Taking the medium-haul services next, the Commission cannot accept at face value the explanations provided by the French authorities, namely that, as opposed to the situation in domestic French flights, intra-Community international flights operated by a single company may not serve both Orly and CDG because of the low level of competition with surface transport, the low level of traffic flows and the existence of several competing companies. In the first place, such a general and complete separation of national and international intra-Community flights is contrary to the very principle of a single Community market. Secondly, on several domestic French routes — and not the shortest either — there is little competition from surface transport whereas there is such competition on major intra-Community international routes departing from Paris. Thirdly, the difference in the size of traffic flows is not so great as to justify different treatment and it should be pointed out that the Paris-London route is the busiest of all intra-Community routes. Lastly, domestic French flights are now also open to competition since the Community rules establishing a single internal market in civil aviation came into force on 1 January 1993.

In any case, even supposing that the rule governing traffic allocation could be regarded as justified under the provisions of Article 8 (1) of Regulation (EEC) No 2408/92, the Commission considers that, for the purposes of applying the rule, Viva Air should be regarded as separate from Iberia since Article 2 (b) of the Regulation simply defines a Community air carrier as one with a valid operating licence issued by a Member State in accordance with Regulation (EEC) No 2407/92, without any reference to the question of control. Even though both Iberia and Viva Air are incontestably members of the same group, Viva Air was founded well before the date of the contested application for traffic rights and has not only its own

operating licence but also its own staff, its own commercial image and its own fleet. Furthermore, the French authorities have not alleged, nor has the Commission found, any abuse of the law or fraudulent action on the part of Viva Air or the Iberia Group.

In view of the foregoing, the Commission therefore considers that, in this case, the French authorities applied the provisions of Article 8 (1) of Regulation (EEC) No 2408/92 incorrectly. They were therefore wrong to refuse Viva Air authorization to exercise traffic rights on the Madrid-Paris (CDG) route from 2 January 1993. In accordance with the provisions of Article 8 (3) of Regulation (EEC) No 2408/92, the decision must therefore be that the French authorities may not continue to apply this measure, without any need to examine whether or not the other points submitted by Viva Air are well founded, that is to say those based on the discriminatory nature of the measure as shown in particular by the fact that Euralair — which operates a direct flight from Madrid to Paris (Orly) — is in fact part of the Air France group which itself operates the Madrid-Paris (CDG) route,

HAS ADOPTED THIS DECISION:

Article 1

France may not continue to apply the decision of 28 December 1992 by which it refused Viva Air authorization to exercise traffic rights on the Paris (CDG)-Madrid route, giving as the reason that one airline could not provide medium-haul international services from both Paris (Orly) and Paris (CDG).

Article 2

This Decision is addressed to the French Republic. It shall be communicated to Viva Air, the Council and the Member States.

Done at Brussels, 28 May 1993.

For the Commission

Abel MATUTES

Member of the Commission