II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 27 April 1994

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

(Case VII/AMA/II/93 — TAT — Paris (Orly)-London)

(Only the French text is authentic)

(94/290/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European 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 (3) thereof,

After consulting the Advisory Committee,

Whereas :

BACKGROUND

I

On 10 September 1993 TAT European Airlines (whose registered office is at 47, rue Christiaan Huygens, 37100 Tours, France), sent a request to the Commission, based on Article 175 of the Treaty and Articles 3 (1) and 8 (1) and (3) of Regulation (EEC) No 2408/92, asking the Commission to :

(i) declare illegal the refusal by the French authorities to grant it traffic rights to operate on the Paris (Orly)-London route ;

(ii) call on the French authorities to grant it speedily the traffic rights in question ;

(iii) call on the French authorities to draw up and publish rules for access to the Paris airport system in order to put an end to the present discriminatory arrangements ;

(iv) take all steps necessary to give practical effect to the relevant provisions.

By letter of 26 July 1993 to the French Ministry of Transport's Directorate-General of Civil Aviation (hereinafter 'DGAC'), TAT European Airlines ('TAT'), pursuant to Article 3 (1) of Regulation (EEC) No 2408/92, requested permission to exercise traffic rights on the Paris (Orly)-London (Gatwick) route from 31 October 1993. TAT's operating schedule was enclosed with the letter. It showed that the airline wished to operate four return services daily on the Orly-Gatwick route using Fokker 100 aircraft with a capacity of 102 seats.

By letter of 18 August 1993 the DGAC replied to TAT that it was unable to approve the airline's application to operate. This refusal was based on Article 8 of Regulation (EEC) No 2408/92 which leaves Member States free 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. The Direc-

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

tor-General of Civil Aviation made clear that, as part of the airport allocation policy for the Paris region, scheduled international services to most European countries, and the United Kingdom in particular, had been authorized only from Charles-de-Gaulle airport ('CDG'). He added that consideration had been given to changing these rules, but this had not yet been done.

In a further letter of 26 October 1993 to TAT the French authorities confirmed that they were not able to approve the schedule filed by the airline for operation on the Paris (Orly)-London (Garwick) route for the winter season 1993/94. The letter also referred, however, to the speech by the French Minister of Transport to the Conseil Supérieur de l'Aviation Marchande on 14 October 1993 in which he expressed his intention to authorize the operation of services between Orly airport and London airports in April 1994, subject to certain conditions.

The complaint filed by TAT with the Commission on 10 September 1993 is directed against this refusal of permission by the French authorities on 18 August 1993, confirmed on 26 October 1993.

II

In support of its complaint to the Commission, TAT maintains that the French authorities have in this case misapplied the provisions of Article 8 (1) of Regulation (EEC) No 2408/92. It first points out in this connection that Article 3 (1) of that Regulation lays down a general principle of freedom of access and that any exception to this principle pursuant to Article 8 (1) of the same Regulation must be based on transparent, objective, consistent and non-discriminatory criteria. It then makes four separate submissions.

Firstly, it points to the discriminatory character of the difference in treatment between the Paris-London route and French domestic flights. According to the complainant there is no objective reason for making a distinction between French domestic routes, for which the French authorities permit use of both Orly and CDG, and the Paris-London route, for which the French authorities insist that all flights be concentrated on one airport, namely CDG. In particular neither the fact that there are competing surface means of transport, nor the relative importance of the routes in terms of passenger flows, nor yet the presence of several competing airlines can justify this difference in treatment. TAT adds that the rules for traffic distribution within the Paris airport system are in fact very flexible, since 36 international destinations, of which nine are Community destinations, are served direct from both Orly and CDG. For example, Pakistan Airlines was permitted to exercise fifth-freedom traffic rights on the Paris (Orly)-London (Heathrow) route for its weekly flight PK 781, Karachi-London via Paris.

Secondly, TAT points out that the French rules on traffic distribution within the Paris airport system, even assuming that they exist, cannot in any event be invoked against it because they have not been given any clear expression which is of general application, and have not been published.

Thirdly, the complainant points out that no express reasons, duly substantiated by practical or legal considerations, have been given for the refusal received by it, in so far as the letter of 18 August 1993 from the Director-General of Civil Aviation does no more than restate that Regulation (EEC) No 2408/92 does not affect the right of Member States to regulate the distribution of traffic between airports within the same airport system.

Lastly, TAT points out that no objective criteria, such as congestion at Orly airport, can justify the contested refusal. It makes clear that it has all the slots necessary to operate the route in question in accordance with the schedule submitted to the DGAC.

III

In order to enable it to investigate the complaint from TAT, the Commission asked the French authorities, by letter of 1 October 1993, to answer the following questions within 15 days:

— What are the present rules governing traffic distribution between the airports of the Paris airport system? Please supply a copy or copies of the instruments laying down these rules.

— Have these rules been published? If so, where?

— What are the grounds for the decision by the French authorities to prohibit the operation of scheduled air services between London and Orly airport? More generally, what are the justification and basis for the rules governing the distribution of traffic within the Paris airport system? Please supply all relevant information on this subject.

— Why did Pakistan Airlines obtain the right to operate scheduled air services between Paris (Orly) and London (Heathrow)? What is the frequency of this service? Do other airlines have similar rights?

Since no reply to this request for information reached the Commission within the time limit of 15 days, a letter of reminder, setting a fresh time limit of five days, was sent to the French authorities by the Commission on 22 October 1993. The required information was sent to the Commission by the French authorities by letter of 9 November 1993.

IV

The replies from the French authorities to the four questions put by the Commission in its letter of 1 October 1993 can be summarized as follows:

— As to the first and second questions: In his speech to the Conseil Supérieur de l'Aviation Marchande ('CSAM') on 14 October 1993 the French Minister of Transport stated that he had decided to clarify policy for the distribution of Community traffic between Orly and Roissy-Charles de Gaulle and to make it public in the form legally required by Community law. The draft decree on traffic allocation between Paris airports would accordingly be submitted for the opinion of the CSAM on 24 November 1993.

— As to the third question: The French authorities took the view that they could not grant the request from TAT to operate a scheduled air service between Paris (Orly) and London (Gatwick) because the rules applying to all carriers had not yet been published. The refusal was not discriminatory because at the time when it had been given to TAT no Community airline was authorized to serve that route.

— As to the fourth question: Pakistan Airlines' traffic rights on the Paris (Orly)-London (Heathrow) route resulted from the bilateral air transport agreement between France and Pakistan, which grants Pakistan Airlines fifth-freedom rights to London and other European capitals from Paris. The use of these fifth-freedom rights was characterized by a marked lack of regularity, with at present a frequency of one flight a week on the route in question. The French authorities were of the opinion that it would be unreasonable on these grounds alone to consider moving Pakistan Airlines to CDG. This airline has always served Orly and its services to London were — quite obviously — characterized by an insignificant, once-weekly frequency. Other non-Community airlines were in the same situation, though they were isolated cases with no impact on the internal market. For example, Aéromexico and Air Mauritius operated on the Paris (Orly)-Frankfurt route once a week. Other non-Community airlines held rights of this kind but were not using them at present.

V

On 6 December 1993 the French Minister of Transport did indeed adopt a decree on the distribution of intra-Community air traffic within the Paris airport system. Published in the *Official Journal of the European Communities* on 10 December 1993, it includes the following provisions:

'Article 1: This Decree lays down the distribution of intra-Community air services among the airports making up the Paris airport system as defined by the abovementioned Regulation (EEC) No 2408/92 — that is, Orly, Charles-de-Gaulle and Le Bourget airports.

Article 3: Air services to or from French airports situated either in metropolitan France or overseas Departments may be operated at Orly and Charles-de-Gaulle airports on condition that the exercise of the corresponding traffic rights has been authorized in accordance with the abovementioned Regulation (EEC) No 2408/92.

Article 4: Intra-Community international air services shall be operated at Charles-de-Gaulle airport.

Article 5: Notwithstanding Article 4, the following air services may be operated at Orly airport:

— scheduled air services to or from Spain, Greece and Portugal with a frequency exceeding three outward and return flights weekly for a period of not less than one IATA season,

— non-scheduled international air services to or from Community airports, performed by carriers whose principal place of business is Orly airport, limited to seasonal flights operating for less than four months a year or series of flights with a frequency not exceeding three outward and return flights weekly,

— scheduled international air services to or from Community airports performed, in accordance with applicable international agreements, by non-Community carriers allocated to Orly airport, provided that trade between Member States is not affected thereby.

Article 7 : This Decree will be revised not later than 31 March 1994 in order in particular to specify the conditions under which the operation of scheduled air services between Orly airport and airports within the London airport system may be authorized.'

An explanatory memorandum setting out the grounds for the Decree was also sent to the Commission by the French authorities, on 30 November 1993. It includes the following sections :

'1. All discussions and thinking on the subject clearly showed that it was well-nigh impossible in the short term to depart to any significant extent from current practice, for the following reasons :

— The first objective reason is that account must be taken of the existing situation.

The abrupt application of a new airport policy cannot be countenanced in view of previous investment, both in commercial and in physical terms, by the airlines concerned. Initially, therefore, a new policy approach can only be implemented with regard to new services, and to measures of an incentive and progressive nature.

— The second objective reason concerns the saturation of facilities at both Orly and Charles-de-Gaulle airports. Here it must be made clear that "capacity" means not just runway capacity but extends as well to the capacity of all other facilities : terminal buildings ; rows of check-in desks ; police and customs checkpoints, ramps (aprons) and contact stations ; baggage reclaim facilities ; etc. While Orly airport's saturation is well known owing to the impossibility of securing landing and take-off slots at certain times of day, Charles-de-Gaulle ("CDG") also has operating difficulties. The Paris airport system has no significant spare capacity at this time.

There will be spare capacity at CDG airport when an additional terminal-building module is opened (in 1997) and when a third runway is brought into service (winter 1997/98).

2. The French Government has made clear the long-term objectives of its airport policy :

— To make CDG "the gateway to Europe" and the airport for flight transfers.

— To confirm Orly in its role as "the gateway to Paris".

— To settle business aviation at Le Bourget airport.

Those general objectives relate as much to extra-Community services as to intra-Community services. In connection with intra-Community services, and in view of the constraints described at the beginning of this Memorandum, and the uncertainties affecting developments in traffic in the new context of the third Community air-transport package, it was clearly wise to give the airport allocation rules a limited life and make provision for them to be revised by 1 April 1997. That will be the conclusion of the transitional period under the third package ; 1997 is also the year in which the next significant capacity extension is scheduled to come into service.

3. Even before this new capacity is brought into service, however, the French Government firmly intends to move matters forward by 1997 along the policy lines already announced.

CDG airport, the gateway to Europe

— The French Government has decided that all intra-Community services may be operated at this airport from now on, in order to promote flight transfers.

In particular, the previous rule denying any one airline permission to operate on the same intra-Community route both from Orly airport and from CDG has been dropped.

Orly airport, the gateway to Paris

— The French Government has accordingly decided progressively to open up Orly Airport to high-density intra-Community routes (serving the principal cities of Europe). Initially the experiment should be limited to opening routes between Orly airport and airports within the London airport system, subject to certain conditions still to be laid down.

— Orly airport also remains open to scheduled international services now operated there, for any Community air carrier, of whatever nationality or identity. This applies to routes serving destinations in Spain, Greece and Portugal.

Airlines currently operating on these routes have not expressed any wish to transfer to CDG airport and there is no question of obliging them to do so.

It is likely that, as CDG becomes well established in its role as the airport for transfers (connecting flights), moves will be initiated to transfer part of that traffic there. Concurrently, new services or routes to the main cities of Europe could be developed at Orly airport for point-to-point traffic.

— Domestic routes are already open at CDG and Orly with no restrictions pursuant to Article 8 of Regulation (EEC) No 2408/92, subject to the related traffic rights being granted to the Community carriers concerned pursuant to Articles 3, 4 and 5 of that Regulation. Because point-to-point traffic is better suited to the facilities at Orly airport, however, it is in practice — and will remain — the hub of the domestic network.

With particular regard to low-density routes, which are regarded as vital to regional development in the economic and other spheres, the traffic generated by them chiefly terminates at Paris and is for passengers on same-day round trips.

The French authorities are of the opinion that it should be natural for Community carriers to use CDG when :

— the route generates heavy connecting traffic, despite the direct services developed elsewhere originating from large provincial airports,

— connecting traffic becomes preponderant owing to competition from other modes of transport for traffic to and from Paris.'

VI

By letter of 22 December 1993 TAT informed the Commission's Director-General of Transport, of its observations on the Decree of 6 December 1993. It pointed out that the Decree did not enable it to operate on the Paris (Orly)-London route, and consequently upheld the conclusions contained in its complaint; TAT also made two submissions regarding the provisions of Articles 3, 4 and 5 of the Decree :

— on the one hand, contravention of Articles 6 and 59 of the Treaty and infringement of Regulation (EEC) No 2408/92 in that, by allowing only international intra-Community air services to or from Spain, Greece and Portugal to be operated at Orly, the Decree discriminated between (a) Greek, Spanish and Portuguese carriers and (b) carriers from the other Member States,

— on the other hand, partiality inasmuch as the distinction between domestic routes, which may be operated at Orly and at CDG, and international intra-Community routes, which may be operated only at CDG, is based solely on the concept of a national frontier, which is precisely something which the Treaty aims to eliminate.

On 21 January 1994, moreover, TAT sent the Commission a supplement to its original request of 10 September 1993, also based on Article 6 and 59 of the Treaty, and explicity directed at the Decree adopted by the French Minister of Transport on 6 December 1993. In addition to its original request, TAT asked the Commission to :

(i) declare the Decree illegal;

(ii) call on the French authorities to bring the rules for access to the Paris airport system into line with the applicable Community provisions and to put an end to the present discriminatory arrangements.

In support of this supplement to its original complaint, TAT put forward the two submissions made in the above-mentioned letter of 22 December 1993. It added the following arguments :

— the Decree is a measure which applies distinctly within the Community according to the origin of the services or their provider and is a barrier to the freedom of TAT to offer its services on the London-Paris route from or to Orly airport in disregard of decisions of the Court of Justice on freedom to provide services,

— the rules for traffic distribution within the Paris airport system are not applied consistently because, on the one hand, 36 international destinations are at present served both from Orly and CDG airports, and, on the other hand, the intention to amend the Decree in order to authorize services between Paris (Orly) and London has already been announced,

— the conditions which the French authorities would lay down for authorization to operate on the Paris (Orly)-London route after 31 March 1994 are discriminatory (use of aircraft with more than 200 passenger seats; introduction of the concept of 'effective control').

VII

By letter of 24 January 1994 the Commission's Director-General of Transport sent the French authorities preliminary comments, taking into account the information in his possession, on the provisions of the Decree of 6 December 1993. This letter referred extensively to the distinction made in Articles 3, 4 and 5 of the Decree between, on the one hand, air services to or from airports in metropolitan France and French overseas departments, and, on the other hand, international intra-Community air services other than those to and from Greece, Portugal and Spain. The Director-General of Transport pointed out that it was difficult to accept this distinction because:

— it was based on the concept of a national frontier, while the Community air transport market constituted an area without internal frontiers, and it had not been established that the amount of transfer traffic differed substantially between French domestic air services and intra-Community international services,

— such sweeping and outright separation displayed disproportion between its extent and its desired effects,

— in conjunction with the provisions of Article 3 (2) of Regulation (EEC) No 2408/92, it resulted in discrimination between Spanish, Greek and Portuguese carriers, on the one hand, and on the other, carriers from other Member States.

In conclusion, the letter of 24 January 1994 asked the French authorities, if they so wished, to reply to the comments summarized above. It was also made clear that this correspondence arose in connection with the complaint made by TAT on 10 September 1993. In that connection, the Director-General of Transport wished to know whether Air France, which advertised scheduled flights between Paris (Orly) and London (Heathrow) in computerized reservation systems from 28 March 1994, had obtained the related traffic rights from the French authorities.

Furthermore, since lodging a supplementary complaint with the Commission on 21 January 1994, TAT had sent a further letter, dated 27 January 1994, to the French authorities. This set out the complainant's fresh submissions challenging the Decree of 6 December 1993. The French authorities were given a time limit of 15 days to supply their comments or all relevant data.

VIII

In reply to the letters of 24 and 27 January 1994 the French authorities sent the Commission on 16 February 1994 a memorandum containing the following points:

— the operation of scheduled air services between Orly airport and the London airports, originally scheduled to commence in April 1994, had been postponed. The reason given for the decision to defer them was the information conveyed to the French civil aviation administration, according to which airlines established in France, with the exception of TAT, were unable to obtain satisfactory time slots at London airports, especially Heathrow. A further reason cited was the Commission's delay in informing the French authorities of their comments on the substance of the Decree of 6 December 1993, which were not sent until 24 January 1994; this precluded a general amendment of the Decree;

— the arguments put forward by TAT were mostly inadmissible because the airline could not dispute the Decree of 6 December 1993 in the context of its complaint, having failed to establish any discrimination against it;

— no Community carrier, particularly Air France, had been authorized by the French authorities to operate services between Paris (Orly) and the airports in the London airport system. Air France had, moreover, removed from computer reservation systems any reference to flights between Orly airport and the London airports following the announcement that the inauguration of this service had been postponed. The complaint from TAT was consequently baseless;

— should the Commission call into question the Decree of 6 December 1993, this would lead the French authorities to draft new rules whose precise scope it was difficult to gauge at that point.

LEGAL ASSESSMENT

IX

On the subject of the distribution of traffic between the airports within an airport system, the Commission has the powers conferred upon it by Article 8 (3) of Council Regulation (EEC) No 2408/92. Having regard in particular to the complaint from TAT, the Commission believes it necessary to use its powers and decide whether France may continue to refuse Community carriers in general, and TAT in particular, traffic rights on the scheduled Paris (Orly)-London route on the basis of the Decree of 6 December 1993. It is important to emphasize that in doing so the Commission in acting on its own initiative, as explicitly provided for in the abovementioned provisions. In this connection, the Commission has full powers to verify the effects of the Decree on all Community carriers. It is in no way restricted to assessing the situation of TAT alone.

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

As the Commission expressly pointed out in Decision 93/347/EEC of 28 May 1993 on the Viva Air case [1] not disputed by France, application of these provisions may retrict the general principle of freedom of access to Community routes and airports laid down in Article 3 (1) of the same Regulation. Any such restriction must, like every exception to such a principle, be interpreted strictly and be based on criteria which are not only non-discriminatory but also transparent, objective and constant over a certain period. It is for Member States to provide all the relevant grounds.

The provisions of the Decree in question must be examined against these criteria.

Firstly, Articles 3, 4 and 5 (first and second indents) of the abovementioned Decree of 6 December 1993 draw a distinction between air services to or from airports in metropolitan France and French overseas departments, which may be operated concurrently at Orly and CDG airports, on the one hand, and, on the other hand, intra-Community international air services other than scheduled air services to or from Spain, Greece and Portugal, which may only be operated at CDG airport. Article 4 lays down a general prohibition on the operation of intra-Community international air services at Orly airport. Article 5 of the Decree lays down three exceptions to this general prohibition, including scheduled air services to or from Spain, Greece and Portugal. Consequently, Community carriers may not perform consecutive cabotage services between Orly and the French provinces when they are an extension of or preliminary to services between Orly and Member States other than France, Portugal, Spain and Greece.

Orly against takes the bulk of traffic between Paris and the French provinces. In economic terms, too, extension of intra-Community services by consecutive-cabotage services within France provides Community carriers other than those established in France, and particularly those from northern Europe, with a favourite means of penetrating the French domestic market. This is particularly so where the cabotage service is an extension of or preliminary to a service from or to the State of registration of the carrier. The reason is, firstly, that operation of French domestic routes by consecutive-cabotage services implies little investment by these carriers, secondly, that the main French domestic routes serve destinations in the southern half of France from Orly. In these circumstances, the Decree in question must be regarded as introducing, in practice, discrimination against Community carriers other than those established in France, and, to a lesser extent, other than Greek, Portuguese and Spanish carriers as regards the operation of French domestic routes terminating at Paris.

Furthermore, Article 3 (2) of Regulation (EEC) No 2408/92 provides that cabotage within Member States may be restricted until 1 April 1997 to services which are an extension of a service originating in the State of registration of the carrier or preliminary to a service to that State. France has made use of this restriction. In conjunction with this, the Decree of 6 December 1993 has the result of restricting consecutive-cabotage services on French domestic routes to departures or arrivals at CDG airport only, except where these services are extensions of or preliminaries to a service from or to Spain, Greece or Portugal. Ultimately, only French, Greek, Spanish and Portuguese carriers are actually able, until 1 April 1997, to operate scheduled air services between Orly airport and airports in the French provinces.

It results from the foregoing that the abovementioned provisions of the Decree of 6 December 1993 disregard the principle of lack of discrimination based on the nationality of the air carrier laid down in Article 8 (1) of Regulation (EEC) No 2408/92.

[1] OJ No L 140, 11. 6. 1993, p. 51.

Secondly, the measure is apparently neither objective nor consistent. It is, first of all, based solely on Member States' national frontiers and not based on duly established criteria which could warrant this choice of national frontiers as its basis. The reason: since 1 January 1993 national frontiers as such are no longer among the objective criteria for deciding the distribution of intra-Community traffic within an airport system, because Regulation (EEC) No 2408/92 aims specifically to establish an internal market as 'an area without internal frontiers'. Admittedly, the French authorities in their explanatory memorandum made the point, at least implicity, that the amount of transfer traffic was substantially greater on intra-Community international routes terminating at Paris than on French domestic routes serving Paris. The French authorities, however, have failed to provide data to justify this argument which, if soundly based for each route in isolation, could justify the choice of national frontiers as the criterion.

The allocation of most intra-Community international air services to CDG airport alone appears all the less objective because not only French domestic routes but also many extra-Community international services, including medium-haul services, are operated concurrently at Orly and CDG airports by French or by non-Community airlines. A total of 27 destinations outside the Community, seven of them medium-haul destinations, are served both from and to Orly and CDG airports.

Although routes between Paris and Mediterranean destinations are chiefly assigned to Orly, routes to and from Italy, for no apparent reason, may be served only at CDG.

In their explanatory memorandum of the Decree, the French authorities also state their intention of progressively opening up Orly to high-density intra-Community international routes. It emerges from Decision 93/347/EEC on the Viva Air case, however, that in the absence of clearly established, published rules, the only rule applicable up to 10 December 1993, the date on which the Decree of 6 December 1993 was published, was the rule of freedom of access pursuant to Article 3 (1) of Regulation (EEC) No 2408/92 and affecting both CDG and Orly airports. The principles of objectivity and consistency run counter to the French authorities' powers under Article 4 of the Decree of 6 December 1993 to suspend freedom of access to Orly airport in this way for a few months before progressively reintroducing it thereafter.

This applies particularly to the Paris (Orly)-London route, which is the subject of the complaint from TAT, for the authorization of which the French authorities intend to revise the Decree in question not later than 31 March 1994, as provided in Article 7 of the Decree. It is important to point out in this connection that restrictions which would apply to operating licences on this route, even assuming them to be non-discriminatory, objective and consistent, would not in any event be legal until a reasonable period of time had elapsed between their date of publication and their date of entry into force. Such a period of time would be intended to enable airlines to adapt to any such restrictions, and thus avoid any risk of discriminatory effects depending on the nationality or identity of carriers.

X

Furthermore, the Commission is of the opinion that the correctness of the restrictions imposed pursuant to Article 8 (1) of Regulation (EEC) No 2408/92 must also be examined on the basis of the principles governing the freedom to provide services as spelled out by decisions of the Court of Justice [1].

In its judgment on Parliament v. Council [2], the Court held that the obligations laid upon the Council by Article 75 (1) (a) and (b) of the Treaty included that of instituting freedom to provide services in the transport field and that the scope of that obligation was clearly defined by the Treaty itself, in Articles 59 and 60 in particular. Also according to the Court, the Council has no discretionary power on this point; since the desired outcome is laid down by Articles 59, 60, 61 and 75 (1) (a) and (b) in conjunction, only the detailed rules for bringing about this outcome may provide an occasion for the exercise of a degree of discretion.

In connection with air transport, the same line of argument must be followed. In providing for the Community to adopt measures with the aim of progressively establishing the internal market before 31 December 1992, Article 7a of the Treaty expressly cites Article 84. And Article 84 (2) makes a direct reference to the procedural provisions of Article 75. In air transport particularly, freedom to provide services within the Community was achieved, within the framework of the common transport policy, with the adoption of the third package, which has been in force since 1 January 1993. Regulation (EEC) No 2408/92 is entirely of a piece with the common transport policy and constitutes a measure fully harmonizing access for Community air carriers to intra-Community air routes. In adopting that Regulation, therefore, the Council determined, on the basis of Article 84 (2), the detailed rules for applying the principles laid down by Articles 59 and 62. As a result, on the subject of freedom of access to the

[1] Judgments of the Court of 25 July 1991, Cases C-288/89, Collectieve Antennevoorziening Gouda [1991] ECR I-4007 and C-76/90, Säger v. Dennemeyer, [1991] ECR I-4221.

[2] Jugdment of the Court of 12 May 1985 in Case 13/83, Parliament v. Council [1985] ECR 1513; see also the judgment of the Court of 13 December 1989, Case C-49/89, Corsica Ferries France v. Direction générale des douanes françaises, [1989] ECR 4441.

market for Community air carriers, it is henceforth necessary to refer directly to those principles (1), on which the Commission recently issued an imperative communication (2).

Here, the Commission would point out that measures restricting the free movement of services include measures affecting the ability of the service-provider to provide the service and measures preventing potential customers from availing themselves of such services as they wish. Furthermore, the concept of a restriction on the free movement of services goes beyond the prohibition of discrimination. Even where they apply without distinction to national service-providers and those from other Member States, barriers to the freedom to provide services are unacceptable if they are not warranted for objective and overriding grounds in the common interest or if the same result can be obtained by means of less-binding rules (the proportionality principle).

It is apparent, firstly, that the distinction made by Articles 3, 4 and 5 of the Decree of 6 December 1993 is a measure restricting the freedom to provide scheduled air services between the Paris airport system and airports in Member States other than Spain, Greece and Portugal. If affects both the ability of carriers to provide those services at Orly and users wishing to travel within the Community from or to Orly airport. The restriction is an important one, moreover, because customers prefer to use Orly airport, which is closer to the city centre. With about 25 million passengers in 1992, substantially equal to CDG's traffic level, Orly is also among the world's 15 leading airports. Besides this, in the explanatory memorandum introducing the Decree in question, quoted in paragraph V, the French authorities make clear that Orly is both the 'gateway to Paris' and the 'hub of the domestic network'. The measure thus erects barriers to freedom of trade not only between Paris and most of the Member States, but also between those Member States and the French provinces via the Orly hub.

In view of the discrimination on the grounds of carriers' nationality considered in section IX, these obstacles are incompatible with the freedom to provide services. Even aside from this discrimination, however, the Commission is of the opinon that the other requirements set out in the decisions of the Court are not fulfilled in this case.

In their explanatory memorandum, cited in section V, the French authorities pointed to the need to take account of the present situation and of prior investment by the airlines as justification for the provisions of the Decree of 6 December 1993. In the competitive environment for intra-Community air transport prevailing since 1 January 1993, however, it is for the economic operators alone to decide the optimum allocation of their resources, according in particular to the needs and wishes of their customers. And the liberalization measures which entered into force on 1 January 1993 were preceded by several successive stages from 1987 onwards — including the first and second air-transport packages, when Member States had time to make the necessary adjustments.

The French authorities have also put forward the saturation of facilities, the importance of CDG airport as a hub for transfers (connecting flights), and the long-term objectives of their airport policy. The Commission does not dispute these general objectives, nor the right of the French authorities to operate an airport policy in order to fulfil them. Saturation of facilities, and the pursuit of an airport policy, may be regarded as general overriding requirements such as may warrant traffic allocation measures including, where necessary, a restriction of access to Orly airport. The French authorities, however, did not provide any specific evidence to show that Orly airport was much more congested than CDG. On the contrary, they acknowledge that congestion problems occur at peak hours at both airports. Furthermore, overriding requirements of this kind must be reflected in measures which abide by the principle of porportionality. The Commission does not consider it to be so in this case.

The scope of the measure exceeds what is necessary to attain the objectives put forward by the French authorities in their explanatory memorandum, namely to limit saturation of facilities in the short term and, in the longer term, to promote CDG as a great European transit forum whilst developing Orly as the close-in airport for the Paris conurbation. The restriction in question is indeed drastic and, as pointed out earlier, imposes an important restriction on freedom of access to the market within the Community. About 85 % of French domestic traffic originating or terminating at Paris is concentrated at Orly airport, compared with only 15 % at CDG. Thus, even allowing for the cabotage opportunities available at Orly to Spanish, Greek and Portuguese carriers (only), the restriction imposed by Article 4 of the Decree of 6 December 1993 nullifies, in France, much of the practical effect of the introduction of the cabotage expressly desired and decided upon by the Council from 1 January 1993 towards.

The French authorities have not established, nor even alleged, that the outcome which they seek cannot be obtained by less binding measures and ones less harmful

(1) It must also be emphasized that air transport, like the other modes of transport, is subject to the general rules of the Treaty; see the judgment of the Court of 4 April 1974, Case 167/73, Commission v. France, [1974] ECR 359, and of 30 April 1986, Joined Cases 209 to 213/84, Ministère public v. Lucas Asjes and others [1986] ECR 1425.

(2) OJ No C 334, 9. 12. 1993, p. 3.

to intra-Community trade. The stated intention of the French authorities of progressively opening up Orly airport to high-density intra-Community international services tends, indeed, to show the opposite. Here, the Commission must take into consideration the continuation of charter services at Orly airport under Article 5 of the Decree of 6 December 1993, or again the continuation at Orly of many extra-Community international services — intercontinental services in particular — operated by airlines from non-Community countries or even by Air France. The Commission would also point out that French domestic services may also be operated without restriction by Air Inter from or to Orly airport, which in any case is far from being permanently saturated.

Having regard to all of the foregoing, the Commission is of the opinion that the French authorities have misapplied Article 8 (1) of Regulation (EEC) No 2408/92 by assigning intra-Community international air services to CDG airport alone, by the Decree of 6 December 1993. Consequently, they were wrong in refusing and continuing to refuse Community carriers, in particular TAT, traffic rights on the Paris (Orly)-London route. It is therefore appropriate to decide, pursuant to Article 8 (3) of Regulation (EEC) No 2408/92 that the French authorities may not continue to apply this measure regarding traffic allocation between Orly and CDG airports, as far as the Paris-London route is concerned. This Decision, however, in no way calls into question the rights of the French authorities to pursue an active airport policy, provided that policy complies with the principles of Community law as set out above,

HAS ADOPTED THIS DECISION:

Article 1

France may not continue to refuse Community carriers permission to exercise traffic rights on the Paris (Orly)-London route on the grounds that Article 4 of the Decree of 6 December 1993 provides that intra-Community international air services from or to Paris must be operated at Charles-de-Gaulle airport.

Article 2

This Decision is addressed to the French Republic. It shall be communicated to TAT European Airlines, the Council of the European Union, the Member States, the Kingdom of Norway and the Kingdom of Sweden.

Done at Brussels, 27 April 1994.

For the Commission

Abel MATUTES

Member of the Commission