II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 14 March 1995

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

(Case VII/AMA/9/94 - French traffic distribution rules for the airport system of Paris)

(Only the French text is authentic)

(Text with EEA relevance)

(95/259/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 established thereunder,

Whereas :

BACKGROUND

I

By letter of 5 December 1994, the United Kingdom Secretary of State for Transport asked the Commission to examine, on the basis of Article 8 (3) of Regulaton (EEC) No 2408/92, the application of certain provisions of a French decree of 15 November 1994 on the distribution of intra-Community traffic within the airport system of Paris. That letter was transmitted to the Commission by note of the UK Permanent Representation to the European Union of 7 December 1994, and was registered on 8 December.

In his letter, the UK Secretary of State considered Articles 4, 5 and 7 of the French decree of 15 November 1994 to be incompatible with Community law, and, in particular, with Aricle 8 (1) of Regulation (EEC) No 2408/92 as interpreted by the Commission in its Decision 94/290/EEC [2] (TAT — Paris (Orly)-London). The essential provisions of the French decree — including the contentious Articles 4, 5 and 7 — read as follow :

'Article 1 : This decree lays down the distribution of intra-Community air services among the airports forming part of the Paris airport system within the meaning of the abovementioned Regulation (EEC) No 2408/92, i.e. the airports of Orly, Charles-de-Gaulle and Le Bourget.

Article 3 : Provided that the exercise of the relevant traffic rights has been authorized in accordance with the abovementioned Regulation (EEC) No 2408/92, intra-Community air services shall be operated from the airports

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

[2] OJ No L 127, 19. 5. 1994, p. 22.

of Charles-de-Gaulle or Orly under the conditions provided for in Articles 4 and 5 of this decree.

Article 4: No carrier may operate more than four outward flights and four return flights per day between the airport of Orly and any other Community airport or airport system.

Article 5: The limits in Article 4 shall not apply where the carrier uses on the Orly pad for the operation of the services mentioned in the said Article between 07.00 and 09.30 local time and between 18.00 and 20.30 local time, only aircraft whose minimum size is fixed as follows on the basis of the annual traffic of such services:

Minimum size of aircraft (in number of seats provided to nearest 5 %)	Total annual traffic (in number of passengers)
40	fewer than 100 001
70	from 100 001 to 250 000
100	from 250 001 to 1 000 000
140	from 1 000 001 to 3 000 000
200	more than 3 000 000

The total annual traffic as fixed above is defined as the aggregate traffic from 1 January to 31 December for all air services between a given Community airport or, where appropriate, the airport system to which it belongs and the Paris airport system.

Following a reasonable trial period, these provisions shall be reviewed, and thereafter it will be necessary, where appropriate, to take account, for the purposes of the second and third paragraphs above, of the annual traffic defined as traffic between Orly airport on the one hand and any Community airport, or the airport system to which it belongs, on the other.

The annual traffic figures taken into account are given in an annex to this decree, which shall be revised annually.

Should a subsequent increase in traffic lead to the limits set out above being exceeded, air carriers shall comply with the provisions applicable as a consequence, within a period of six months following publication of the amended annex, unless those carriers comply with Article 4.

Should specific events cause a sudden major reduction in traffic on a route or set of routes, the Director-General for Civil Aviation may decide to reduce the capacity limits on the route or set of routes concerned without awaiting confirmation of the effect of these events on annual traffic. If so, the carriers concerned shall be notified accordingly.

Article 7: Any air carrier wishing to operate an air service from one of the airports belonging to the Paris airport system shall, when submitting its operating schedule, provide the information required by the competent authority to ensure compliance with the provisions of this decree and to verify, in particular, that the marketing conditions of the air services submitted to them affect neither directly nor indirectly the application of Articles 4, 5 and 6.'

The second recital of the decree indicates that the same rules are applicable in the broader context of the Agreement on the European Economic Area (EEA).

The annex referred to in the fourth paragraph of Article 5 of the decree states that in 1993 the only route having an annual traffic of more than 3 000 000 passengers was the one between Paris and London. The routes to Nice, Marseille, Toulouse, Bordeaux, Strasbourg and Montpellier were classified in the category having an annual traffic of between 1 000 000 and 3 000 000 passengers. In the category between 250 001 and 1 000 000 passengers, several domestic and other intra-Community destinations are listed, including the airport systems of Rome and Milan. The remaining airports and airport systems located in the Member States of the EEA are classified in one of the lower categories.

The decree has been fully applicable since 1 January 1995.

II

In support of his request, the UK Secretary of State submitted the following arguments:

— Articles 4 and 5 of the French decree of 15 November 1994 are not intended to bring about a genuine distribution of traffic between the various Paris airports, but simply to limit the exercise of traffic rights into Orly airport, in contravention of Article 3 (1) of Regulation (EEC) No 2408/92.

— Article 5 of the decree discriminates against carriers operating out of airport systems, since the minimum size of the aircraft is determined not by reference to the annual traffic between the airports actually served, but by reference to the traffic between the respective airport systems to which those airports belong. This amounts to systematically requiring the use of large aircraft where a carrier wishes to operate services between an airport belonging to an airport system and Orly Airport, even if the traffic between those two airports does not in itself justify the use of aircraft of such size. It is a definite constraint from the point of view of the conditions for operating the routes concerned. Such discrimination is all the more apparent as airport systems exist in only four Member States other than France. In particular, it appears that access to the Paris (Orly)-London route may be more restricted than access to any other route because of the different volumes of traffic at the London airports. In this connection, the UK authorities state that in 1993 annual traffic between Charles-de-Gaulle Airport and Heathrow was 2 911 546 passengers, compared with 470 611 to and from Gatwick and 168 837 to and from Stansted. Thus Article 56 indirectly favours services from Heathrow rather than from Gatwick and Stansted, even though the latter have more spare capacity.

— Still in connection with Article 5 of the decree, the various categories of minimum size of aircraft do not appear to be based on rational and justifiable criteria.

— Articles 4 and 5 of the decree have negative and discriminatory effects for many Community carriers, particularly those operating only small and medium-sized aircraft. Thus, the UK authorities consider that only one British company, British Airways, is currently capable of operating more than four frequencies between London and Orly Airport, whereas four French companies are in a position to do so. Moreover, the new distributive rules restrict competition by favouring large carriers over smaller ones and potential newcomers. Certain French companies already established on domestic routes, such as Air Inter and AOM, appear to benefit greatly from the new rules, whereas small companies such as Euralair find their development prospects limited.

— Another effect of Articles 4 and 5 is to restrict a carrier's ability to meet market requirements. The provisions on minimum aircraft size compel companies to use aircraft which do not correspond to traffic levels, which calls into question the commercial viability of their operations and limits *de facto* to four the number of daily services offered.

— The restrictions in Articles 4 and 5 of the decree cannot be justified either by environmental considerations or by congestion problems at Orly. First, the need to use aircraft of a certain size tends to increase polluting emissions and noise. Secondly, the restrictions imposed are not proportional to the problems they are supposed to solve since the French authorities, with the very aim of protecting the environment and local residents, have already limited, by decree of 6 October 1994, the maximum number of slots for Orly to 250 000 per year.

— In any event, problems associated with the environment and airport congestion can be resolved only by following the procedure laid down by Article 9 of Regulation (EEC) No 2408/92.

— Finally, the provisions of Article 7 of the decree cannot be justified on the basis of Regulation (EEC) No 2408/92, in particular Article 8 (1) thereof, in so far as they restrict opportunities for the joint marketing of services by air carriers established in the Member States of the EEA. Referring to Commission Decision 93/347/EEC (1) in the Viva Air case, the UK authorities consider in particular that any air carrier holding an operating licence must, under the first paragraph of Article 8 of the Regulation, be considered a carrier in its own right, there being no need to take account of any links with any other carrier.

III

By letter of 22 December 1994, the Commission informed the French authorities of the United Kingdom's request and asked them to reply to a number of questions and to submit, if they so wished, their observations on any of the abovementioned arguments. On the same day, the

(1) OJ No L 140, 11. 6. 1993, p. 51.

Commission further addressed a letter to the UK authorities in order to inquire into a number of factual elements and any information on the actual application of the traffic distribution rules of 15 November 1994.

The UK authorities replied to the Commission's request for additional information by letter of 16 January 1995, which can be summarized as follows:

— First of all, the letter records the experiences of two air carriers, by way of demonstrating the practical effects of the traffic distribution rules. Air UK is not allowed under the rules to operate five frequencies on one day of the week and three frequencies on another day, thus maintaining an average of four daily frequencies throughout the week. Manx Airlines points out that the rules prevent the operation of more than four frequencies on such routes as Southampton-Paris (Orly) with the type of aircraft the carrier would choose under normal commercial conditions (BAe J41). In general, the UK authorities consider it to be one of their key criticisms of the rules that they require the carriers to use aircraft which are larger than would be justified on purely commercial grounds.

— The letter does not enlarge further on the practical effects of the rules on routes other than the one between Paris and London. However, the UK authorities consider that a general assessment of the rules does not necessarily presuppose a detailed examination of their effects on other routes, but that they essentially lack a proper justification and are arbitrary in nature. For example, the UK authorities claim that there is no reason for treating the Paris-London route, which at present is the only route with an annual traffic volume of more than 3 000 000 passengers, separately.

— In any case, the combined effect of the traffic distribution rules and the limitation of attributable slots at the airport of Orly under the decree of 6 October 1994 is alleged to be disporportionate.

— The effects of the rules for air carriers operating out of airport systems are discriminatory in nature since, first, air services have always been operated in Europe on a national basis and, second, those carriers are restricted in their ability to operate consecutive cabotage services.

— The allegation that British Airways is at present the only UK carrier capable of opperating more than four daily frequencies on the route Paris (Orly)-London has been made by taking into account only carriers with a known interest in serving that route. In general, the traffic distribution rules favour existing carriers which have already established a client basis on a given route and are thus better able to operate larger aircraft.

— Finally, the UK authorities object that the wording of Article 7 of the decree of 15 November 1994 is too general and thereby gives a very broad scope to measures preventing air carriers from operating services to and from Orly, on vague commercial grounds. The UK authorities explicitly refer in this context to the concern of British Airways that the intention and main effect of the provision will be to prevent the continued use of its designator code by its subsidiary TAT European Airlines.

By letter of 24 January 1995, the French authorities replied to the Commission's request for information dated 22 December 1994. They stated firstly:

— that the airport of Orly has effectively been open since 1 January 1995 for all Community destinations and that this has already allowed new flights to Amsterdam, Brussels, Frankfurt and Vienna,

— that the traffic distribution policy followed within the Paris airport system aims, on the one hand, to encourage the development of Charles-de-Gaulle airport which has the potential for a sizeable expansion of capacity and, on the other, to control the development of traffic at the airport of Orly which, being situated in a dense urban environment, offers no possibilities for expansion.

In addition, the French authorities made the following points:

— The decree of 15 November 1994, which is the subject of this Decision, and the decree of 6 October 1994 limiting the number of slots at the airport of Orly, have complementary objectives. The decree of 6 October 1994 was adopted for reasons of environmental protection. The decree of 15 November 1994, for its part, distributes the traffic so as to optimize the use of the airport of Orly and its available capacity within the Parisian airport system, whilst taking into account environmental problems. In opening the airport to all Community traffic, it is necessary to avoid multiplying the number of frequencies operated by low-capacity aircraft, especially at peak hours. Without the decree of 6 October 1994, the provisions of the decree of 15 November 1994 would not be sufficient to limit the number of movements at Orly. Without the decree of 15 November 1994, the provisions of the decree of 6 October 1994 would not guarantee the optimal utilization of the Parisian infrastructure, especially at Orly.

— The planned operations of Air UK and British Midland have not been approved for the inclusion of more than four daily frequencies between Orly and the London airport system with aircraft having less than 200 seats. However, these two companies operate the routes concerned with four daily frequencies.

— The minimum size of aircraft pursuant to Article 5 of the decree of 15 November 1994 was determined on the basis of the traffic between airport systems as opposed to the traffic between individual airports because of the numerous Community flights which were not already operating to or from Orly at the time the decree was published. Additionally, in order to make the limits defined in the decree coherent, it was necessary to base the minimum size on traffic to or from the airport system of Paris. Furthermore, certain European cities are served by an airport system and others by a single airport. At the same traffic volumes, criteria based on the traffic between airports would give an advantage to the operation of services to cities with an airport system by lowering the minimum size required for these routes. This hypothesis, which would discriminate between services to cities having an airport system and to those having none, appears unacceptable. Moreover, it would make a major contribution to the saturation of Orly by allowing the multiplication of flights between Orly and the most important Community airport system (namely London) and thus rule out the opening-up of new routes to other Community airports.

— The review under the third paragraph of Article 5 of the decree of 15 November 1994 can only be carried out once traffic has stabilized on the new routes — that is, at the conclusion of the second consecutive summer season. It is at that moment that the determination of the minimum size of aircraft, based only on traffic between Orly and the other Community airport in question, can be considered.

— The minimum size of aircraft at peak hours defined in the decree of 15 November 1994 was based on experience and on a study in March 1994 of air routes throughout the world. The conclusions of this study allow the average aircraft capacity to be calculated for routes of comparable volumes. In order not to impose excessively restrictive limits on carriers, it was decided, in the decree of 15 November 1994, to fix the minimum size of aircraft at peak hours below the averages calculated in the study.

— Article 7 of the decree of 15 November 1994 is of general application. It does not specifically cover code-sharing but addresses any practice seeking to circumvent the decree of 15 November 1994. This could include cooperation agreements between companies in the form of franchising, code-sharing or any other type of agreements. To date, the Direction Général de l'Aviation Civile (DGAC) of the French Ministry of Transport has used the provisions of Article 7 only once. TAT European Airlines, having operated two flights between Orly and Heathrow under its own code, informed the DGAC of its intention to operate all its flights under the code of British Airways. This decision served to raise the number of flights operated under the BA code to five on Fridays, the aircraft operated at peak hours having a capacity of less than 200 seats, so the French authorities requested TAT to provide further information on its operations on the Orly-London route. It is not their intention to challenge the practice of code-sharing between British Airways and TAT but rather to ensure that the provisions of the decree of 15 November 1994 cited above are applied in a non-discriminatory manner between companies and groups of companies.

Finally, the French authorities stress that they have correctly used Article 8 of Regulation (EEC) No 2408/92 in the present case, since Article 9 thereof refers to single airports (and not airport systems) which face serious short term congestion or environmental problems.

LEGAL ASSESSMENT

IV

As regards national rules on the distribution of traffic between the airports of an airport system, the Commission is vested with powers by Article 8 (3) of Regulation (EEC) No 2408/92, which reads as follows :

'At the request of a Member State or on its own initiative the Commission shall examine the application of paragraphs 1 and 2 and, within one month of receipt of a request and after consulting the Committee referred to in Article 11, decide whether the Member State may continue to apply the measure ...'

For the purpose of that provision, the letter of 5 December 1994 from the UK Secretary of State for Transport must be regarded as a request of a Member State. Consequently, the Commission is under an obligation to pursue that request and to decide whether France may

continue to apply Articles 4, 5 and 7 of its decree of 15 November 1994. Since Regulation (EEC) No 2408/92 has been included, as from 1 July 1994 [1], within the scope of the EEA agreement by virtue of Decision No 7/94 of the EEA Joint Committee [2], the Commission's decision must cover all EEA Member States.

V

Article 3 (1) of Regulation (EEC) No 2408/92 establishes the principle of freedom to operate air services within the Community by providing that:

'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.'

Article 2 (f) of the same Regulation defines the term 'traffic right' as 'the right of an air carrier to carry passengers, cargo and/or mail on an air service between two Community airports'. In view of this definition, the Commission is of the opinion that Article 3 (1) generally allows an air carrier to operate at any airport located within an airport system according to its own commercial decisions [3]. In order words, the freedom of market access generally includes the right to choose between the different airports of an airport system. This right is an essential element of the liberalization process since, in most cases, the airports belonging to an airport system are not equally attractive to the carriers in economic terms.

Member States may, however, restrict the abovementioned freedom on the basis of Article 8 (1) of Regulation (EEC) No 2408/92, which reads 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.'

As the Commission has already indicated in Decision 94/290/EC on the case of TAT — Paris (Orly)-London, any restrictions adopted under that provision apart from the prohibition of the forms of discrimination explicitly mentioned in Article 8 (1) must further comply with the general principles governing the freedom to provide services as spelled out in the case-law of the Court of Justice [4]. Thus, the Court held in the case of Parliament v. Council [5] that the obligations laid upon the Council by Article 75 (1) (a) and (b) of the Treaty comprised the implementation of the freedom to provide services in the transport field, and that the scope of that obligation was clearly defined by the Treaty itself. According to the Court, the Council had no discretionary powers on this point since the desired outcome is already laid down in Articles 59, 60, 61 and 75 (1) (a) and (b) of the Treaty. Only the detailed rules for bringing about this outcome may provide an occasion for the exercise of a degree of discretion.

In the field of air transport, the same line of argument must be followed. In obliging the Community to adopt measures with the aim of progressively establishing the internal market before 31 December 1992, Article 7a of the Treaty explicitly refers to Article 84. Article 84 (2), in turn, makes a direct reference to the procedural provisions of Article 75. The freedom to provide air transport services within the Community was achieved, within the framework of the common transport policy, with the adoption of the third package of 23 July 1992, which has been in force since 1 January 1993. Regulation (EEC) No 2408/92 is a fundamental part of that package and, as indicated in its 19th recital, constitutes a measure fully harmonizing all questions of market access by air carriers licensed in the Community. By adopting that Regulation, the Council set out, pursuant to Article 84 (2), the detailed rules for applying the principles laid down by Articles 59 and 62 of the Treaty. As a result, it is necessary to refer directly to those principles, which have been the subject of a communication from the Commission [6], whenever the provisions of Regulation (EEC) No 2408/92 are to be interpreted [7].

The principles governing the freedom to provide services go beyond the mere prohibition of any discrimination on grounds of nationality. Even if national measures restricting that freedom apply without distinction to national providers of services and to those of other Member States, they are still unacceptable if they are not warranted by

[1] OJ No C 208, 28. 7. 1994, p. 7.
[2] OJ No L 160, 28. 6. 1994, p. 1.
[3] See Commission Decision 93/347/EEC of 28 May 1993 in the case of Air, OJ No L 140, 11. 6. 1993, pp. 54/55.
[4] Judgments of the Court of 25 July 1991, Cases C-288/89, *Mediawet*, [1991] ECR, p. 4007 and C-76/90, *Säger* v. *Dennemeyer*, [1991] ECR, p. 4221.
[5] Judgment of the Court of 12 May 1985, Case 13/83, *Parliament* v. *Council*, [1985] ECR, p. 1513; see also the judgments of the Court of 13 December 1985, Case C-49/89, *Corsica Ferries France* v. *Direction générale des douanes*, [1989] ECR, p. 4441, and of 5 October 1994, Case C-381/93, *Commission* v. *France*, [1994] ECR I, p. 5145.
[6] It may also be noted that air transport, like the other modes of transport, is subject to the general rules of the Treaty; see the judgments of the Court of 4 April 1974, Case 167/73, *Commission* v. *France*, [1974] ECR, p. 359, and of 30 April 1986, Joined Cases 209-213/84, *Ministère public/Asjes and others*, [1986] ECR, p. 1425.
[7] OJ No C 334, 9. 12. 1993, p. 3.

mandatory requirements in the public interest, or if the same result can be obtained by less restrictive rules (the proportionality principle). This means, as the Commission has already held in the cases of Viva Air and TAT — Paris (Orly)-London, that the measures are to be transparent, objective and constant over a certain period of time.

It should be noted that, with the entry into force of Regulation (EEC) No 2408/92 in the broader framework of the EEA Agreement, the abovementioned principles governing the freedom to provide air services within the Community are also applicable to situations falling within the scope of the EEA Agreement. Article 6 thereof explicitly provides that, without prejudice to future developments in case-law, the provisions of the Agreement shall, wherever they are identical in substance to the corresponding rules of the EC Treaty, be interpreted in conformity with the relevant rulings of the Court of Justice given prior to the date of signature of the Agreement. In the present context, reference must be made to Article 36 of the EEA Agreement, which mirrors Article 59 of the EC Treaty.

Articles 4, 5 and 7 of the French decree of 15 November 1994 thereof must be examined in the light of all the principles outlined above.

VI

The general scheme of the traffic distribution rules for the airport system of Paris, as contained in Articles 3, 4 and 5 of the decree of 15 November 1994, can be summarized as follows: Intra-EEA air services, whether domestic or international, may be operated at Charles-de-Gaulle and Orly airports (but, subject to certain very limited exceptions provided for in other provisions of the decree, not at Le Bourget airport). Access to Charles-de-Gaulle airport is not subject to any restrictions. On the other hand, each air carrier may only operate four daily frequencies between Orly and any other airport located in a Member State of the EEA, and it may do so in accordance with its own commercial preferences, including the choice of the aircraft. However, the frequency limitation does not apply if the carrier operates its peak hour services with aircraft of a certain minimum size. In that case, it may operate an unlimited number of daily frequencies (during or outside peak hours) on a route to and from Orly.

The UK authorities have put forward various arguments challenging those distribution rules.

The scope of Article 8 (1) of Regulation (EEC) No 2408/92

First of all, the UK authorities broadly deny that measures of such a nature can be adopted pursuant to Article 8 (1) of Regulation (EEC) No 2408/92, on the ground that it does not provide for a 'genuine' distribution of traffic between the airports of Paris, but simply limits access to the airport of Orly.

This first argument cannot be accepted. By allowing Member States to distribute traffic between the airports of an airport system, Article 8 (1) of Regulation (EEC) No 2408/92 recognizes in principle the legitimacy of an active airport planning policy which complies with the general principles of Community law and, in particular, the third aviation package. Such a planning policy may have regard to a large range of factors considered by the competent authorities to have priority. The concrete measures which must be taken for the implementation of airport planning policy may also differ from one airport system to another. All those implementing measures will, if they are to be effective, restrict to some extent access to the individual airports of the system.

It would be inconsistent with those considerations if the scope of Article 8 (1) were determined in such a way as to exclude *a priori* the possibility of pursuing a specific airport policy for a given airport system. For example, a Member State may legitimately wish to promote the development of one airport of an airport system at the expense of the other airports located therein. In such a case, the imposition of restrictions on access to those other airports alone may constitute a reasonable means of pursuing that objective. The Commission therefore takes the view that the scope of Article 8 (1) cannot be restricted to schemes which allocate different types of air services to the airports of an airport system on a mutually exclusive basis.

Consequently, the Commission considers that the measures contained in the French decree of 15 November 1994 constitute measures for the distribution of traffic between airports of an airport system within the meaning of Article 8 (1) of Regulation (EEC) No 2408/92.

The principles of non-discrimination and proportionality

Secondly, the UK authorities contend that the provisions of Articles 4 and 5 of the decree of 15 November 1994 indirectly discriminate against carriers operating out of airport systems, in particular against UK carriers based at one of the airports of the airport system of London, as well as against smaller carriers and potential new entrants which do not readily have at their disposal aircraft of the size required for the operation of additional services under Article 5 of the decree.

The Commission considers the provisions enshrined in Article 4 of the decree to be neither directly nor indirectly discriminatory as regards the nationality or identity of an air carrier since they apply in the same way to all airlines.

As far as Article 5 of the decree is concerned, it should be recalled that the minimum size of the aircraft to be used if the carrier wishes to operate more than four frequencies is modulated in relation to the annual traffic volume of the route in question. Such a modulation does not constitute an overt discrimination on grounds of the nationality or identity of the air carrier.

However, the principle of non-discrimination is also opposed to any measures which, without explicitly distinguishing by reference to carrier nationality or identity, nonetheless produce, even indirectly, discriminatory effects in practice (1). It is thus necessary to determine whether there is any evidence to show that the application of Article 5 of the decree will result in such discriminatory effects. In this respect, the UK authorities have provided further information in support of their complaint in order to demonstrate the existence of discrimination in favour of French carriers, and in particular the Air France Group, and against UK carriers apart from British Airways. The Commission is not, however, convinced of the relevance of this information, for the following reasons :

— contrary to the assertion of the UK authorities, other UK companies than British Airways possess aircraft capable of meeting the 200-seat criterion laid down in the decree, namely Virgin Atlantic, Monarch and Britannia,

— the UK authorities only considered the fleets of French and UK companies, thereby excluding fleets belonging to companies of other Member States of the EEA. Several companies from these countries could operate on the Orly-London route.

In addition, taking into account the composition of the respective fleets and the opportunities offered to all Community carriers to operate flights to and from Orly, and in the light of the information presented during the examination of this case, the Commission takes the view that the application of Article 5 of the decree of 25 November 1994 cannot result in any sort of discrimination in favour of French carriers. The Commission acknowledges, however, that given the rules set out in the decree air services operated out of an airport belonging to an airport system are created less favourably than services operated out of any other airport. This difference in treatment results from the fact that the size of the aircraft to be used during peak hours should the carrier wish to fly more than four frequencies is determined by reference to the annual traffic between Paris and the entire airport system. However, the term 'airport system' is explicitly defined in Regulation (EEC) No 2408/92. Moreover, such systems exist in seven different EEA Member States (including Norway) and are generally accessible to all air carriers of the EEA Member States.

With regard to discrimination on grounds of the identity of the carrier, none of the information in the possession of the Commission suggests that Article 5 of the decree in question might lead to such discrimination, as specifically defined in its Decision 94/291/EC (TAT — Paris (Orly-Marseilles and Paris (Orly-Toulouse) (2).

Therefore, the Commission takes the view that Article 5 does not violate the prohibition of any discrimination on grounds of nationality or identity of an air carrier.

Next, consideration needs to be given to whether the provisions of Articles 4 and 5 of the decree also comply with the principles governing the freedom to provide services, as explained in section V. In this respect, any restriction of the freedom to provide services must be justified on grounds of overriding considerations of public interest, proportionate to the objectives sought.

In this context, it should first be recalled that those provisions restrict access to Orly in so far as the operation of more than four frequencies per route and per carrier is made subject to the use, during peak hours, of aircraft of a certain minimum size. Thus the provisions do not impose any absolute restriction on either the maximum number of frequencies or the aircraft size to be used. Nonetheless, the provisions are capable of affecting the ability of air carriers to operate an unlimited number of services to and from Orly in accordance with their own commercial preferences, and hence obstruct the freedom of access to the market established by Regulation (EEC) No 2408/92. In view of the size of the airport and its role as the gateway to Paris and the hub of the domestic network (3), that market access barrier must also be considered to be appreciable.

In response to the Commission's request for information of 22 December 1994, the French authorities have explained the decree and have justified the restrictions in Articles 4 and 5 thereof by citing their general airport policy for the Paris region, which *inter alia* takes account of environmental protection and congestion problems at Orly. In particular, they have contended that the restrictions are aimed at optimizing the use of the limited capacity available at Orly and directing excess traffic to the airport of Charles-de-Gaulle which is said to have a large

(1) See Commission Decisions 94/290/EC of 27 April 1994 in the case of TAT — Paris (Orly)-London, OJ No L 127, 19. 5. 1994, p. 28 and 94/291/EC of 27 April 1994 in the case of TAT — Paris (Orly)-Marseilles and Paris (Orly)-Toulouse, OJ No L 127, 19. 5. 1994, p. 35.

(2) OJ No L 127, 19. 5. 1994, p. 35.

(3) See Commission Decision 94/290/EC of 27 April 1994 in the case of TAT — Paris (Orly)-London, OJ No L 127, 19. 5. 1994, p. 30.

potential for expansion and to be equipped with significant additional capacity. According to the French authorities, the restrictions are further supposed to improve the management of the additional traffic created by the opening of that airport to all intra-Community services.

The Commission has already indicated in its decision in the case of TAT — Paris (Orly)-London [1] that an active airport policy of the nature described above may constitute a mandatory requirement in the public interest which, in turn, may justify the imposition of traffic distribution rules pursuant to Article 8 (1) of Regulation (EEC) No 2408/92. The very existence of these provisions reveals the clear intentions of the Council in this matter. The information provided by the French and UK authorities in the context of the present proceeding confirms that the practical restrictions resulting from an application of Articles 4 and 5 of the decree are capable of contributing to the achievement of the objectives of that airport policy. By discouraging the air carriers from operating more than four frequencies each on a given route to and from Orly, the restriction prevents a concentration of services at that airport and provides an incentive for using slots for services to different destinations. Moreover, the measure is based on objective criteria (frequencies, size of aircraft).

Since, however, Articles 4 and 5 of the decree concern only the services to and from the airport of Orly, the annual traffic volume on any given route may only validly be used for determining the minimum aircraft size pursuant to Article 5 if such volume is defined as the total number of passengers travelling between that airport and any other airport located within the EEA. In particular, traffic volume cannot be defined in these circumstances by reference to the airport system of Paris, nor by reference to the airport system of which the other airport may be a part, without incurring the risk that, in practice, the application of Article 5 will result, in some cases, in disproportionate barriers to entry.

This can best be explained by comparing the situations of two different airports which are each served out of both Orly and Charles-de-Gaulle. Whilst the overall traffic volume between each of the former two airports and the airport system of Paris may be identical, the relative importance of the traffic into Orly on the one hand, and into Charles-de-Gaulle on the other may vary significantly. Although the traffic volume of one of the routes to and from Orly may represent only a fraction of the volume of the other route to and from that airport, both routes would fall within the same category of minimum aircraft size established under Article 5 of the decree. Thus, the carrier wishing to operate a new or low-capacity route between Orly and another EEA airport could risk being required to use large capacity aircraft that are inappropriate to the actual traffic on the route, solely for the reason that there is significant traffic between that latter airport and Charles-de-Gaulle.

The information provided by the UK authorities with respect to the route Paris (Orly)-London confirms that the risk is further increased by the fact that, where the airport at the other end of the route is part of an airport system, the traffic volume is defined by reference to that airport system. The application of Article 5 of the decree to that route would in fact result in a disproportionate restriction of additional services out of Gatwick and Stansted and, ultimately, in a redistribution of traffic within the airport system of London. Such traffic distribution cannot, however, be a legitimate objective of the French authorities' airport policy for Paris.

For those reasons, Article 5 (2) as it now stands cannot be regarded as proportionate to the objectives sought. That provision therefore needs to be amended so that the minimum aircraft size will henceforth be determined by reference to the annual traffic between Orly and any other individual airport located within the EEA. For the rest, Article 5 (3) of the decree provides for the revision of the existing rules in line with the actual traffic volumes. In response to the Commission's request for information of 22 December 1994, the French authorities have justified such a revision at a later stage on the ground that, at present, no traffic data is available for a large number of routes to and from Orly since these are being operated under the decree of 15 November 1994 for the first time. The Commission can accept that justification for the purpose of the present proceeding, and it therefore does not object to the French authorities' continuing to use the entire airport system of Paris as a point of reference for a limited period, until the necessary data for a revision of that reference is available. That limited period may not, however, exceed one calendar year, which the Commission regards as ample for the purposes of data collection.

Subject to this amendment as to the definition of the routes to be taken into account for the determination of traffic volume pursuant to Article 5 of the decree, the Commission is of the opinion that the restrictions imposed by Articles 4 and 5 of this decree are not disproportionate to the objectives sought by the French authorities as described above. In the present case, the restrictions are construed in such a way that, at least in principle, they do not actually prevent any air carrier from building up a commercially viable operation at the airport of Orly.

[1] OJ No L 127, 19. 5. 1994, p. 30.

By allowing an air carrier to operate four frequencies per route without any further restrictions, Article 4 of the decree generally ensures that even new carriers can commence new services to and from Orly in competition with incumbent carriers. The ability to operate four return frequencies is already sufficient to provide a viable service on most intra-Community routes to or from Orly. Of the 13 international Community routes to or from Paris (mainly Charles-de-Gaulle airport) having between 250 000 and 1 000 000 passengers, seven are operated with a maximum of four daily frequencies by the companies present on these markets. The other six, except in the special case of the Paris-Brussels route, are operated with five or six daily frequencies. Furthermore, all of the companies use on those 13 routes aircraft with a capacity of more than 100 seats, thus satisfying the condition in Article 5 of the decree as to additional frequencies, although the type of aircraft is not dictated by these provisions but remains the free commercial choice of the operators. It should be noted that the route to London (Heathrow) is the only international route starting from Orly airport which is likely to exceed the threshold of 1 000 000 passengers a year, thereby triggering the obligation to use aircraft with a capacity of more than 140 seats during peak times. In addition, the only domestic French routes on which the number of daily frequencies is more than five are the six routes on which traffic reaches or exceeds 1 000 000 passengers a year. Accordingly, the Commission takes the view that routes where additional frequencies appear necessary are very limited in number, and have substantial traffic volumes in excess of 500 000 passengers a year for which it does not appear unjustified to require the use of aircraft of a certain minimum size at peak hours.

It is necessary to bear in mind that, in the light of the amendment which is to be made to the definition of the route to be taken into account for the determination of traffic volumes, the practical effects of the provisions of Article 5 regarding the minimum size of aircraft at peak hours are slight or even negligible. No Community route to or from Orly at the present time exceeds the ceiling of 3 000 000 passengers per year. Only seven (London (Heathrow), Nice, Marseille, Toulouse, Bordeaux, Montpellier, Strasbourg) exceed or are likely to exceed the threshold of 1 000 000 passengers per year. Taking into account the tolerance of 5 %, the minimum size of aircraft required by Article 5 is fixed at 133 seats on these seven routes. Nearly all carriers operating or seeking to operate these seven routes have aircraft with a capacity of at least 133 seats available. As far as the routes where the traffic volume exceeds the limit of 250 000 passengers per year are concerned, they are already of sufficient size to require the use of jets and the majority of small capacity jets available in the market have more than 95 seats (A 319, Fokker 100).

As regards the possible impact of the French decree on smaller carriers, it should be recalled that the size of a carrier is not necessarily linked to the size of the aircraft it operates. Thus, in practice some smaller carriers do own large aircraft and certain large carriers only own aircraft of medium size. Moreover, Community companies — even the smaller ones — are able in the short term through the leasing explicitly authorized by Regulation (EEC) No 2407/92 [1], to obtain aircraft meeting the minimum size criteria of Article 5. On the other hand, large Community carriers, even though they possess a full range of aircraft, face operational constraints in the management of their fleets which do not always allow them to use immediately aircraft meeting those same criteria when operating on a given route. It is therefore not demonstrated that the measures in question impose greater restrictions on small carriers than on larger ones, nor, in any case, that the difference in the restrictions according to the size of the carrier is disproportionate to the objectives sought.

Finally, the fact that the minimum aircraft size is determined pursuant to Article 5 by reference to five different categories of routes and the flexibility provided for in the last two paragraphs of the Article seem to guarantee a reasonable overall balance between aircraft size and traffic volume, and thus prevent any disproportionate effects in the practical application of that provision.

The application of Article 9 of Regulation (EEC) No 2408/92

Thirdly, the UK authorities maintain that the restrictions in Articles 4 and 5 of the decree of 15 November 1994 cannot be justified on grounds of environmental or capacity problems at Orly airport and that, in any case, such problems can only be addressed by following the procedure pursuant to Article 9 of Regulation (EEC) No 2408/92.

As discussed in detail above, Article 5 of the decree does not comply with the principle of proportionality in so far as the determination of the size of the aircraft to be used during peak hours on routes to and from other airport systems is concerned. By contrast, all the other elements of Articles 4 and 5 are proportionate means of pursuing the active airport policy put forward by the French authorities for the airport system of Paris. This policy alone is a legitimate objective justifying the distribution of traffic following from the decree, and based on the provisions of

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

Article 8 (1) of Regulation (EEC) No 2408/92. Therefore the Commission takes the view that the decree could be adopted on the legal basis of those provisions alone.

That being so, it is necessary to examine whether those elements could also be justified by reference to any other objectives, such as environmental protection or capacity considerations. In particular, there is no need to extend this examination to the French decree of 6 October 1994 determining the maximum number of attributable slots at the airport of Orly. As it has already stated in the abovementioned case of Viva Air, the Commission considers that there is no legal link between the allocation of slots pursuant to Regulation (EEC) No 95/93 [1] and the granting of traffic rights under Regulation (EEC) No 2408/92 [2]. The abovementioned considerations, however, are without prejudice to the assessment of the legality of the latter decree.

It should further be recalled that Articles 4 and 5 of the decree of 15 November 1994 restrict access only to Orly. All air services falling within the scope of the third package may continue to be operated without any restrictions at Charles-de-Gaulle airport. In other words, the decree does not limit, in law or in practice, access to the entire airport system of Paris. Therefore, even if the decree were intended to address exclusively congestion or environmental problems, it could legally have been adopted only on the basis of Article 8 (1) of Regulation (EEC) No 2408/92 and the French authorities were not obliged to follow the procedure set out in Article 9 of that Regulation.

Conclusion

In conclusion, the Commission considers Articles 4 and 5 of the decree of 15 November 1994 to be compatible with the requirements of Community law on condition that, for the purpose of applying Article 5 of the decree, the minimum aircraft size shall henceforth be determined by reference to the annual traffic between Orly and every other individual airport within the EEA.

VII

Finally, the Commission is required by the request of the United Kingdom to examine Article 7 of the decree of 15 November 1994 which essentially obliges the air carriers wishing to operate at one of the airports of the Paris airport system to provide certain information to the French authorities.

Article 7 stipulates that the information to be submitted by the carriers shall allow the competent national authorities to verify whether the rules of the decree are complied with and, in particular, whether the marketing conditions of the air services do not in any way affect the application of Articles 4, 5 and 6. In other words, the authorities must obtain the necessary information in order effectively to enforce their traffic distribution rules and, if necessary, to prevent any forms of circumvention or abuse. This interpretation of the provision is fully confirmed by the observations submitted by the French authorities in response to the Commission's request for information of 22 December 1994.

The aim of preventing circumventions and abuses of national rules which have been validly adopted on the basis of one of the safeguard clauses of Regulation (EEC) No 2408/92 can generally be regarded as a legitimate objective under Community law. Article 7 is therefore compatible with the requirements of Community law to the extent that the subtantive traffic distribution rules of the decree of 15 November 1994 comply with Article 8 (1) of Regulation (EEC) No 2408/92.

In view of the abovementioned concern of the United Kingdom, the Commission would like to emphasize, however, that it does not considerer the joint marketing of air services as such to constitute a circumvention or abuse of the substantive rules and, in particular, of the frequency limitation in Article 4. In this respect, due regard should be given to the fact that the presentation and marketing of air services in whatever form is an integral part of the principle of free market access established by Regulation (EEC) No 2408/92. Consequently, evidence would be necessary in each case to justify the conclusion that a given cooperation between air carriers is set up with the objective of circumventing the measures in force and thus can result in the refusal of traffic rights. The Commission expects the French authorities to take those considerations into account is any application of that provision.

VIII

Having regard to all the foregoing considerations, the Commission concludes that, with the one exception dicussed in section VI of this Decision, Articles 4, 5 and 7 of the French decree of 15 November 1994 are compatible with the requirements of Community law. Consequently, the French authority may continue to apply those rules, on condition that, for the purpose of applying Article 5, the minimum aircraft size shall henceforth be determined by reference to the annual traffic between Orly and every other individual airport within the EEA.

[1] OJ No L 14, 22. 1. 1993, p. 1.
[2] OJ No L 240, 24. 8. 1992, p. 8.

The Commission further considers it neccesary to determine a deadline for the revision of Article 5 which, in turn, is dependent upon the availability of the necessary traffic data. While the existing data would allow some immediate amendments, it follows from the discussion in section VI that the revision can only be fully implemented once the data for all the individual routes to and from Orly is available. It would, however, be neither appropriate nor necessary to require the French authorities to amend the existing rules in several stages according to the availability of traffic data. Such a phased revision would deprive the rules of all consistency and thus negatively affect the ability of the carriers to plan their operations with a reasonable degree of certainty. For those reasons, the Commission takes the view that it suffices to require the necessary amendments to the rules to be implemented four weeks before the beginning of the summer scheduling season 1996 at the latest,

HAS ADOPTED THIS DECISION:

Article 1

France may continue to apply Articles 4, 5 and 7 of its decree of 15 November 1994 on the distribution of intra-Community traffic within the airport system of Paris, on condition that, for the purpose of applying Article 5, the minimum aircraft size shall henceforth be determined by reference to the annual traffic between Orly and every other individual airport located within the EEA.

France shall make the necessary amendments to Article 5 of the decree of 15 November 1994 no later than four weeks before the beginning of the summer scheduling season 1996.

Article 2

This Decision is addressed to the French Republic. It shall be communicated to the Council of the European Union, the Member States of the European Economic Area and the EFTA Surveillance Authority.

Done at Brussels, 14 March 1995.

For the Commission

Neil KINNOCK

Member of the Commission