COMMISSION

COMMISSION DECISION

of 16 September 1998

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

(Case VII/AMA/11/98 — Italian traffic distribution rules for the airport system of Milan)

(notified under document number C(1998) 2625)

(Only the Italian text is authentic)

(Text with EEA relevance)

(98/710/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], as amended by the Act of Accession of Austria, Finland and Sweden, and in particular Article 8(3) thereof,

After consulting the Advisory Committee established under Article 11 of that Regulation,

Whereas:

BACKGROUND

I

(1) On 16 February 1998 the air carriers British Airways, Iberia, Lufthansa, Olympic Airways, Sabena, Scandinavian Airlines System and TAP Air Portugal submitted to the Commission a joint request asking for it to take a decision with the effect of:

(i) declaring the traffic distribution rules adopted by the Italian authorities for the airport system of Milan ('the Italian rules') incompatible with Community law, in particular with Regulation (EEC) No 2408/92;

(ii) requiring the Italian authorities not to apply those rules and to adopt other rules fully compatible with Community law.

(2) On 15 April 1998, Air France informed the Commission that it was joining the abovementioned carriers in their action against the Italian rules.

(3) On 22 April 1998, those carriers submitted to the Commission an additional request asking it to take an interim decision prior to any decision on the substance of the Italian rules in order to ensure that those rules are not put into effect until adequate transport links to Malpensa airport are established.

[1] OJ L 240, 24. 8. 1992, p. 8.

(4) On 27 May 1998, Austrian Airlines submitted to the Commission a separate request which had the same object as the initial and additional requests of the complaining carriers and was based on the same grounds.

II

(5) The airport system of Milan comprises the airports of Linate, Malpensa and Orio al Serio(Bergamo). The airport of Linate, located 10 km from the city centre, concentrates most of the intra-Community international and domestic traffic. Linate airport faces severe capacity problems since 14,2 million passengers used the airport in 1997 whereas its optimum capacity is estimated at around 8 million. The airport of Malpensa, located 53 km from the city centre, concentrates all intercontinental flights, since operating constraints prevent their operation at Linate airport. Only a few intra-Community flights are operated from that airport since passengers tend to favour Linate airport because of its location close to the city centre. Thus, Malpensa airport received only 3,9 million passengers in 1997 whereas its optimum capacity is estimated at around 6 million. Orio al Serio airport, located approximately 50 km from the city centre and close to Bergamo, is mainly used for cargo and charter traffic, although a limited number of scheduled passenger services are also operated from that airport.

(6) So far, the distribution of traffic between those airports has been market-driven, taking into account the abovementioned operational constraints. This has resulted in an inefficient use of the existing airport capacity, since Linate airport is overutilised and Malpensa airport underutilised. In addition, none of the airports of the system has been able to develop as a major hub for national, international and intercontinental flights. In fact, Alitalia has used Rome-Fiumicino airport as a hub. Hence, the offer of air services from the airport system of Milan, in particular in terms of intercontinental services, is clearly not adapted to the demand as passengers are frequently obliged to fly via hub airports such as Rome, London, Frankfurt and Paris. Moreover, the existing capacity will not be able to cope with short-term traffic volumes, which are estimated at around 20 million passengers and 300 000 tonnes of freight for the year 2000. Consequently, the present structure and organisation of the airport system of Milan is clearly inadequate for the needs of the area it serves, namely the city of Milan and the whole of northern Italy, which represents the third largest area in the Community in terms of population and economic activity.

(7) Accordingly, the Italian authorities decided to reorganise the airport system of Milan in order to create a hub at Malpensa and provide adequate airport capacity for the future. That objective is to be achieved through the extension and upgrading of Malpensa airport, known as the Malpensa 2000 project. This project is one of the 14 priority projects of the trans-European network under Decision No 1692/96/EC of the European Parliament and of the Council [1]. It is financially supported by the Community, the European Investment Fund and the European Investment Bank (EIB). Construction works for a new terminal started in 1990. A first section will be operating in 1998 with a yearly capacity of 12 million passengers (which will add to existing capacity of 6 million) and the terminal will be fully completed in 2000. The overall capacity of the airport (existing and new terminal) will, by then, reach 24 million passengers.

(8) The financial arrangements underlying the new Malpensa airport require a concentration of traffic at that airport. That necessarily involves a transfer of traffic from Linate airport. However, market forces alone would not ensure such transfer, as passengers generally

[1] OJ L 228, 9. 9. 1996, p. 1.

prefer to use Linate because of its location close to the city centre. On that basis, the Italian authorities decided to adopt mandatory traffic distribution rules aimed at ensuring a substantial transfer of traffic from Linate to Malpensa. In this regard, it is worth noting that the EIB made its financial assistance conditional on the adoption by the Italian authorities of traffic distribution rules resulting in a substantial transfer of traffic from Linate to Malpensa.

(9) On 1 July 1994, the Italian authorities adopted Decree-Law No 428, which later became Law No 505 on 8 August 1994, Article 3(2) of which empowered the Ministry of Transport to bring about the concentration of air traffic at the airport of Malpensa in time for the liberalisation of European air transport services, scheduled to be completed on 1 April 1997. On that basis and in order to attain that objective, the Italian Minister for Transport issued Decree No 46-T on 5 July 1996. That Decree lays down traffic distribution rules for the airport system of Milan as set out in points 9.1, 9.2 and 9.3.

9.1. Article 1(1) provides that from the date of the entry into service of priority structures at Malpensa 2000 (first section of the new terminal) which is to be determined by a further decree, all scheduled and non-scheduled services on intercontinental and intra-Community air routes (including domestic or international intra-Community air routes) shall be operated to and from Malpensa airport.

9.2. Article 1(2) provides that the same services can also be operated to and from Orio al Serio airport.

9.3. Article 1(3) and (4) provides that Linate airport may only be used for general aviation and for the operation of direct air services on routes serving Milan whose total annual passenger volume is equal to or more than 2 million in the year prior to the abovementioned date of entry into force of priority structures, or has reached an annual average of 1,75 million over the previous three-year period.

(10) On 13 October 1997, the Italian Government adopted Decree No 70-T, Article 1(1) of which provides that the priority structures referred to in Decree No 46-T are to enter into service on 25 October 1998. That date has been set without any prior information or consultation of the Commission.

(11) The effect of Decrees No 46-T and No 70-T is that from 25 October 1998 onwards, all air services to and from Milan will have to be operated either from Malpensa airport or Orio al Serio airport, with the exception of general aviation services and air transport services meeting the traffic thresholds defined by Article 1(4) of Decree No 46-T.

(12) In practice, the only route meeting those thresholds is Milan-Rome. No other air transport service will therefore be authorised at Linate airport.

(13) Between July 1997 and October 1997, contacts took place between the complainant carriers (with the exception of Austrian Airlines) and the Italian authorities. The carriers indicated that they considered the criteria and timing set out by the Italian rules to be incompatible with Community law. The Italian authorities did not agree with the arguments put forward by the carriers and confirmed both the criteria and timing of the traffic distribution rules.

(14) The requests formally presented to the Commission by the complainant carriers (hereinafter referred to as 'the carriers') are directed against both the criteria and the timing set out in Decree No 46-T and Decree No 70-T.

III

(15) In support of their complaint to the Commission against the Italian rules, the carriers rely on the arguments set out in points 15.1 and 15.2.

15.1. The Italian rules infringe Article 8(1) of Regulation (EEC) No 2408/92.

The carriers point out that Article 3(1) of that Regulation lays down a general principle of freedom of access and that in its Decision 95/259/EC [1] (Paris airport system), the Commission considered that this principle includes the right to choose between different airports of an airport system. However, this right remains subject to the possibility for the Italian authorities to distribute traffic between airports of an airport system on the basis of Article 8(1) of Regulation (EEC) No 2408/92. Article 8(1) provides that this right must be exercised without discrimination on grounds of nationality or identity of the air carriers. The carriers refer to Commission Decision 93/347/EEC [2] (Viva Air) which states that, like any exception to the general principle of freedom of access laid down by Article 3(1), the restrictions introduced by Member States on the basis of Article 8(1) must be based on transparent, objective, consistent and non-discriminatory criteria. According to the carriers there are two separate infringements.

15.1.1. First, the carriers point out that the Italian rules are discriminatory because in practice they favour Alitalia. In this regard, they cite Decision 95/259/EC in which the Commission stated that the principle of non-discrimination is also opposed to any measure which, without explicitly distinguishing by reference to the nationality or identity of a carrier, none the less produces, even indirectly, discriminatory effect in practice.

The application of the Italian rules will result in only the Milan-Rome route being operated from Linate; this route is presently operated by several Community air carriers, including Alitalia. From Milan, Alitalia operates an average of 28 flights per day to Rome which is the hub of its network. Alitalia currently operates direct long-haul services from Malpensa only to a limited number of destinations (New York, Los Angeles, Miami, Tokyo, Osaka and Beijing) as the majority of its services outside the EEA are operated from Rome-Fiumicino. The opening of Malpensa 2000 will not terminate the role of Rome-Fiumicino as a hub for both medium- and long-haul services of Alitalia.

The airline's draft programme for Winter 1998/1999 plans a considerable development of service to destinations outside the EEA from Malpensa to the detriment of Rome. Nevertheless, several destinations would continue to be served only from Rome and a greater number would be shared between Rome and Malpensa (for example on certain weekdays from one and on other weekdays from the other). On this basis, Alitalia can still rely in significant part on its Rome hub which it will be able to serve from Linate while non-Italian Community air carriers will no longer be able to serve their hubs from Linate airport as they will have to operate those services from Malpensa.

Malpensa is far less convenient than Linate because of its geographical location. The duration of the journey by car between Milan city centre and Malpensa is 50 to 70 minutes as opposed to 15 to 20 minutes for Linate. For the time being, there is no rail link to either of those airports and the cost of a taxi fare to Malpensa (ECU 67) is more than four times higher than to Linate (ECU 15).

As a result, Alitalia will enjoy a competitive advantage over non-Italian Community carriers for the provision of air transport services to long-haul and medium-haul destinations via its hub. In other words, passengers flying

[1] OJ L 162, 13. 7. 1995, p. 25.
[2] OJ L 140, 11. 6. 1993, p. 51.

from Milan to long-haul or medium-haul destinations via a hub will prefer to fly via the hub of Alitalia rather than via the hubs operated by other Community carriers.

In this context, the carriers contend that the primary objective of Decrees No 46-T and No 70-T is not to distribute the traffic within the airport system of Milan but to grant a competitive advantage to Alitalia.

In addition, the carriers consider that the discrimination which, as explained above, stems from the location of Malpensa airport is further reinforced by the fact that Malpensa will not be served by adequate transport links to the city centre at the time of the transfer of the services. None of the transport links between the city centre and the airport will be fully functional by 25 October 1998 whereas an additional 11 million passengers per year are expected to use the airport.

In particular, according to the carriers, the rail link will not be ready for passenger use before the end of 1999.

Substantial works still need to be completed on the A8 Milan-Lakes motorway, which will be the only high capacity/high standard road serving Malpensa airport. This motorway is already heavily congested. The works to be carried out involve the construction of an emergency lane and until their completion, scheduled for December 2000, the capacity of the motorway will be further reduced. In any case, even if the projected works somewhat improve the capacity of the motorway, it will remain insufficient to cope with the increase in traffic generated by the transfer of 11 million passengers from Linate to Malpensa.

Moreover, as taxi drivers from Milan will only be authorised, for administrative reasons, to drive passengers from the city to the airport and not from the airport to the city, a one way fare to the airport will be calculated on the basis of a return journey, resulting in a highly expensive fare (ECU 67,66).

The absence of adequate transport links will reinforce the inconvenience of Malpensa as compared to Linate and thus the discriminatory effect of the Italian rules.

15.1.2. Secondly, the carriers point out that the Italian rules are not proportionate to the objective sought by the Italian authorities. In this regard, they point out that in its Decision 94/290/EC [1] (TAT-Paris(Orly)-London), the Commission found that air-traffic distribution rules adopted by the French authorities infringed the principle of proportionality since the result they sought to achieve could have been achieved by measures which were less restrictive and less harmful to intra-Community trade.

The objectives of the Italian rules are to concentrate air traffic at Malpensa airport in order to promote its role as the intercontinental hub for northern Italy and at the same time to maintain Linate airport in operation. The eleventh recital of Decree No 46-T states that Linate airport will have to be kept in service anyway, given that, in terms of expected growing traffic, it would be contrary to economic logic to deprive the area of existing capacity in a sector like air transport.

[1] OJ L 127, 19. 5. 1994, p. 22.

The transfer of traffic envisaged by the Italian rules will result on the one hand in Linate airport being under-utilised (only 2 million passengers will use this airport whose optimum capacity is 8 million passengers) and on the other in Malpensa airport facing capacity problems in the medium term. According to the President of Società per Azioni Esercizi Aeroportuali (SEA), the company managing the airports of Milan, it is likely that in the next few years Malpensa will become saturated and that a proportion of flights will need to be moved back to Linate.

Consequently, the carriers consider that the Italian rules are not proportionate since the objectives sought could be attained without discrimination and with a more rational use of airport capacity avoiding both underutilisation of Linate and congestion at Malpensa. In this framework all Community air carriers should be allowed to operate services from Linate airport to their respective hubs.

15.2. The Italian rules are contrary to Commission Decision 97/789/EC ([1]) concerning aid granted by Italy to Alitalia. The discrimination resulting from the Italian rules constitutes a breach of the conditions imposed by Article 1(4) of that Decision in order to ensure the compatibility of the aid with the common market. Article 1(4) states that the aid is deemed to be compatible with the common market provided that Italy fulfils its undertaking 'not to give Alitalia priority in any way over other Community companies, in particular as regards the allocation of traffic rights (including those for third countries in the European Economic Area), slot allocation, ground-handling assistance and access to airport facilities where preferential treatment would be contrary to Community law'.

IV

(16) In order to permit a full investigation of this case under the procedure laid down by Article 8(3) of Regulation (EEC) No 2408/92 and to safeguard the rights of the defence, on 3 March 1998, the Commission transmitted the request lodged by the carriers to the Italian authorities and invited them to comment thereon within one month from that date.

(17) In reply, the Italian authorities sent a note to the Commission on 1 April 1998 setting out the considerations summarized in points 17.1 to 17.4.

17.1. The airport policy of a Member State falls within the competence of that Member State. On this basis, and in accordance with Decision 95/259/EC, a Member State must be free to decide which airport should be given priority for the development of an airport system.

In this framework, the Italian authorities indicate that the present structure of the airport system of Milan does not offer adequate capacity to meet the demand for transport services generated by Milan and its area. Maintaining this structure would not enable the Milan airport system to develop as an international connecting point as envisaged within the framework of the European common transport policy. For that very reason, the Community has included the Malpensa 2000 project in its list of priority projects for the trans-European networks. The success of this project requires the concentration of air traffic at Malpensa airport. In this regard, the European Investment Bank has agreed to finance part of the project on condition that the concentration of traffic at Malpensa airport is effective by the date of entry into service of its priority structures. On that basis, the Italian authorities adopted Decrees No 46-T and No 70-T which clearly aim at such concentration. In that framework, Linate will, as a complementary and subsidiary airport, handle specific traffic and continue to serve as a useful resource in the event that capacity were to prove insufficient in the future.

([1]) OJ L 322, 25. 11. 1997, p. 44.

17.2. As to the discriminatory effect of the Italian rules, the Italian authorities consider that no discrimination is involved since access to the Milan-Rome route is open to all Community air carriers in accordance with the applicable Community rules. It is presently operated by two carriers from Linate (Alitalia and Air One) and by two carriers from Malpensa (Alitalia and Meridiana).

The concentration of traffic at Malpensa will allow all Community air carriers to have access from this airport to all Community airports including Italian airports. Cabotage rights as well as fifth, sixth and seventh freedoms will therefore be freely accessible through Malpensa airport.

The fact that this route is the only route meeting the thresholds set by Decree No 46-T does not in itself give rise to any discrimination.

17.2.1. The setting of very high thresholds is intended to lead to the operation at Linate airport only of the most frequented air routes which are primarily used by point-to-point passengers who demand high frequencies. This is precisely the case for the Milan-Rome route which is the most frequented air route in Italy with the highest share of business point-to-point passengers. Traffic volume on this route far exceeds that on all other air routes operated from Milan, and this justifies a special treatment. Moreover, the Milan-Rome route does not play the role of a feeder route for the Alitalia hub in Rome-Fiumicino. This is evidenced by the fact that services are operated all day long and not only according to the few long-haul flight-waves operated by Alitalia from Rome-Fiumicino.

17.2.2. The discriminatory effect of the rules cannot be assessed on the basis of the present situation. The policy of Alitalia is clearly to develop hub operations at Malpensa. On this basis, Alitalia and other carriers will be offering new direct services from Milan which are not presently available. These services will be operated from Malpensa airport. As a result, passengers will no longer be obliged to travel to their final destination via hubs located elsewhere in the Community.

17.2.3. In any case, Malpensa is more convenient than Linate for the users. Work on access infrastructures has proceeded in accordance with the timetable indicated by the Italian authorities. In fact, it has always been considered that the necessary conditions for the transfer would be the completion of the SS336 (the road linking the existing terminal to the new terminal) which will be done by 25 October 1998. The existing road system is fully compatible with the amount of traffic to be transferred to Malpensa. In this regard, it is necessary to consider the entire catchment area for Malpensa and not only the city of Milan. On that basis, the number of passengers for whom the geographic location of Malpensa is more favourable than Linate more or less equals the share of passengers for which the reverse applies. With regard to the problem of excessive taxi fares, the Region of Lombardy has proposed to regulate taxi fares so that they remain at acceptable levels.

17.3. As regards the principle of proportionality, the Italian authorities consider that the traffic distribution rules are necessary to attain the objective of creating a hub at Malpensa and keeping Linate as a supplementary airport.

The high thresholds will make it possible to keep at Linate only those routes whose level of traffic would justify operations both from Linate and Malpensa. Linate will in fact be used for routes on which the traffic is predominantly 'point to point' in order to meet the demand of business and commuting passengers. The underutilisation of

Linate will be justified in order to achieve the objective of an operational hub at Malpensa; this objective presupposes that as many short-haul and medium-haul services as possible are integrated with long-haul services. That is necessary to ensure that the Malpensa hub can effectively be fed by passengers originating from diverse points within the Community (for example, London, Brussels, Lisbon, Frankfurt, Copenhagen, Rome, Palermo, Venice, Pantelleria and so forth). Similarly, it will still be possible to feed other European hubs from Rome, Milan and other Italian regional centres.

Any other consideration would in fact be discriminatory against the Malpensa hub.

17.4. As regards the breach of the conditions imposed by Decision 97/789/EC, the Italian authorities consider that such a reference is not relevant since that Decision was adopted after the Italian rules and made no reference to them.

V

(18) The Commission met with the carriers on 10 May 1998. The carriers stressed the urgency of the case as the allocation of slots for Milan airports was to be decided in the framework of the 102nd IATA Schedule Coordination Conference to be held in Montreal in June 1998.

(19) On the occasion of two meetings held in Brussels on 9 and 19 June 1998 and by letter of 25 June 1998, the Commission formally informed the Italian authorities of its position on this case, based on the facts currently in its possession, summarizing the reasons why it had doubts about the compatibility of the Italian rules with Article 8(1) of Regulation (EEC) No 2408/92. The Commission indicated that the Italian rules appeared to result in practice in discrimination in favour of Alitalia. It also indicated that they were in any case not proportionate to the objective sought. Both issues were in particular linked to the adequacy of the planned state of readiness of access infrastructures to Malpensa with the volume of traffic to be transferred to that airport. On that basis, the Italian authorities were invited to modify the rules so as to ensure full compatibility with Community law.

(20) By letters of 2 and 15 July 1998, the Italian authorities informed the Commission that they were not willing to consider any modification of the rules and made the observations set out in points 20.1 to 20.4.

20.1. The Italian authorities reiterated that the criteria adopted by Decree No 46-T for the distribution of traffic within the airport system of Milan do not involve any discrimination in favour of Alitalia. However, in order to reassure the Commission on this aspect, the Italian authorities mentioned that they might envisage conditions for the operation of the Milan-Rome route from Linate airport which would, *de facto,* prevent any feeding of the Alitalia hub at Rome-Fiumicino. For that purpose, the route could only be operated on the basis of shuttle services with restrictions on checked-in luggage and no through check-in (no issuing at Linate of the boarding pass for the connecting flight at Rome-Fiumicino).

20.2. The criteria adopted by Decree No 46-T were presented to the Commission in the framework of the various meetings of the 'Christophersen group', which was given responsibility for the follow up of the project, held between 1994 and 1997. At that time, the Commission did not raise any problem regarding the compatibility of those measures with Community law. Similarly, the Commission was always kept informed of the various schedules for the access infrastructure works.

20.3. In the course of the abovementioned meetings, only two access infrastructures were considered as 'minimal but sufficient' to ensure the transfer of traffic to Malpensa: the SS336 road and the modernised A8 motorway. Moreover, the Commission was always kept informed of the timing for the completion of the various works concerning access infrastructures to the airport.

20.4. The position expressed by the Commission threatens the achievement of creating a fully viable and operational hub at Malpensa. Therefore, it threatens the viability of a project of common interest which is one of the priority projects of the trans-European networks.

(21) On the occasion of a last meeting held in Brussels on 24 July 1998, the Italian authorities provided updated information to the Commission on the progress concerning the works on access infrastructures to Malpensa airport. The Commission informed the Italian authorities that it did not consider the imposition of shuttle type conditions on the Milan(Linate)-Rome(Fiumicino) route to be an adequate solution. Such conditions, which in any event are not part of the traffic distribution rules under consideration in this Decision, do not remove the potential for feeding the Fiumicino hub. Even if they could be introduced in the face of likely user and airline resistance, a ban on checking-in luggage and checking-through luggage would be difficult to enforce and would not deter travellers with only carry-on luggage from transferring. In any case, it would not address the problem of a lack of proportionality between the rules and their objective.

LEGAL ASSESSMENT

VI

(22) On the subject of the distribution of traffic between airports within an airport system, the Commission holds the powers conferred on it 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 l 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'.

(23) In view of the complaints lodged by the carriers, the Commission considers it necessary to use those powers to decide whether Italy can apply the traffic distribution rules for the airport system of Milan laid down by Decree No 46-T and Decree No 70-T whereby, from 25 October 1998 onwards, all air transport services must be operated at Malpensa airport with the exception of services meeting specific thresholds which may continue to be operated at Linate airport [1]. The Commission does so on its own initiative, as explicitly provided for in Article 8(3) of Regulation (EEC) No 2408/92, and its examination is in no way limited to the complaint and situation of the complaining carriers.

(24) In this regard, the fact that the Commission's services have given no indication on the compatibility of the contested Italian rules with Community law on the occasion of the meetings which took place in the framework of the Christophersen group cannot be considered as prejudging a formal position of the Commission on this matter. The Commission recalls that the object of those meetings, which in any event involved a larger audience than the Commission services, was the general follow up of the Malpensa 2000 project and not a detailed examination of the compatibility of the Italian rules with

[1] While access to Bergamo airport is still possible, the distant location of this airport and the lack of adequate access and technical infrastructure make this an even less attractive alternative to Linate.

Community law. Moreover, the Commission's services already at that stage insisted on the necessity of having adequate access infrastructures operational at the time of the transfer. Furthermore the Commission was never consulted about the timing for the application of the measures in question. In those circumstances the Italian authorities could have no legitimate expectations that the Commission would find the contested Italian rules to be in conformity with Community law. In any event, what is called into question in this procedure is, in particular, the application of the Italian rules in the situation where road and rail access to Malpensa is inadequate.

VII

(25) The principle of freedom to operate air services within the Community provided for in Article 3(1) of Regulation (EEC) No 2408/92 allows Community air carriers to operate at any airport located within an airport system according to their own commercial decisions. On this basis, the freedom of market access generally includes the right to choose between the different airports of an airport system. The Commission considers that this right is an essential element of the liberalisation process since, in most cases, the airports belonging to an airport system are not equally attractive in economic terms as was stated in Decisions 93/347/EEC and 95/259/EC ([1]).

(26) 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'.

(27) As the Commission has already indicated in Decisions 95/259/EC and 94/290/EC ([2]), any restriction adopted under that provision must comply with both the principles referred to in points 27.1 and 27.2.

27.1. The principle of non-discrimination as explicitly mentioned in Article 8(1)

This principle not only prohibits any form of discrimination based on the air carrier's nationality, thus reflecting the principle laid down by Article 6 of the Treaty, but also any form of discrimination based on the identity of the air carrier. In adopting Regulation (EEC) No 2408/92, the Council considered that the absence of discrimination on grounds of the carrier's nationality was not sufficient, in view of the structure of the air transport sector in the Community, to ensure the satisfactory working of the internal market in civil air transport and to ensure compliance with the principle of free access to the market laid down in Article 3(1) of that Regulation. Consequently, it added the principle of non-discrimination on the basis of the air carriers' identity, which was expressly referred to by the Court of First Instance of the European Communities in the Air Inter case ([3]).

27.2. The general principles governing the freedom to provide services are set out in the case-law of the Court of Justice of the European Communities ([4]).

In Regulation (EEC) No 2408/92, the Council set out, pursuant to Article 84(2) of the Treaty, the detailed rules for applying the principles laid down by Articles 59 and 62 of the Treaty in the air transport sector, thus harmonising all questions of market

([1]) At pp. 54-55 and at p. 30 respectively.
([2]) At pp. 30-31 and at pp. 28-31 respectively.
([3]) Case T-260/94 Air Inter v. Commission [1997] ECR II-997, paragraph 112.
([4]) See in particular Case C-288/89 Collectieve Antenne voorziening Gouda (Mediawet) [1991] ECR I-4007, paragraphs 10 to 15.

access by air carriers holding Community licences. As a result, it is henceforth necessary to refer directly to these principles, which have moreover been the subject of a Communication from the Commission [1], when interpreting Regulation (EEC) No 2408/92.

The principles governing the freedom to provide services go beyond the mere prohibition of any discrimination on grounds of nationality or on grounds of identity of the carrier. Even if national measures restricting that freedom apply without discrimination, they are still unacceptable if not warranted by mandatory requirements in the public interest, or if the same result can be obtained by less restrictive rules in accordance with the principle of proportionality.

VIII

(28) In the case at hand, the verification by the Commission on its own initiative of the compatibility with Article 8(1) of Regulation (EEC) No 2408/92 of the Italian rules involves an appreciation of the compatibility of those rules with the principle of non-discrimination and with the principle of proportionality.

The principle of non-discrimination

(29) The Commission considers that the criteria set out in Decree No 46-T, based on traffic volumes, are objective criteria which do not distinguish carriers by reference to their nationality or identity since they apply in the same way to all Community air carriers. The mere fact that those criteria are met only by the Milan-Rome route does not appear in itself to be a discrimination since, pursuant to Article 3(1) of Regulation (EEC) No 2408/92, that route is open to any Community air carrier without restrictions.

(30) However, as already stated by the Commission in Decision 95/259/EC [2], the principle of non-discrimination set out in Article 8(1) also precludes any measure which, even without explicitly making reference to the carrier's nationality or identity, none the less produces, even indirectly, discriminatory effects in practice.

(31) In order to determine whether the criteria set out in Decree No 46-T produce discriminatory effects in practice, it is necessary to examine the effects which will be produced by their application as of 25 October 1998, as provided for by Decree No 70-T.

(32) In this regard, the Commission notes that the operation of hub and spoke networks has become a common feature among Community air carriers. The networks of those carriers are based on hub airports which, because of the former division of the Community into several restricted markets and the existing regulatory constraints on the provision of air services between the Community and countries outside the EEA, are always located in the Member State where the carriers are established. For the time being, the largest carriers operating hub networks include Air France (at Paris-Charles de Gaulle), Alitalia (at Rome-Fiumicino), British Airways (at London-Heathrow and London Gatwick), Iberia at (Madrid-Barajas), Lufthansa (at Frankfurt), KLM (at Amsterdam-Schiphol), Sabena (at Brussels) and SAS (at Copenhagen-Karlstrup). The hub system allows them to achieve a comprehensive coverage of the Community air transport market by providing services between any two Community airports served from the hub airport without supporting the investments required by direct services. Similarly, the hub system also enables services to be provided between any Community airport served from the hub airport and airports located in third countries, thus providing an alternative to the prohibition of direct services laid down by bilateral agreements concluded between Member States and third countries.

(33) Although the hub system has increased competition between the abovementioned carriers, it does not always allow them to compete with each other on a particular route. Indirect

[1] OJ C 334, 9. 12. 1993, p. 3.
[2] At p. 32.

services are as a rule not substitutable for direct services because of the substantial difference in the duration of the journey, level of service (a stopover with a change of aircraft is less attractive to the user than a direct service) and price (indirect services are priced at a lower level than direct services). On this basis, competition on a particular route between direct and indirect services is very limited. Conversely, indirect services via hubs are usually substitutable, although this is not the case for all available indirect services. In this regard, the geographic location of the intermediate hubs needs to be taken into account, especially if the point of destination is located in Europe.

(34) In the case at hand, the information available to the Commission indicates that, for the time being, competition exists for the provision of air services from Milan to a number of airports located mainly outside the EEA (for example: Los Angeles, Dubai, Rio de Janeiro, and so forth) between services operated by Alitalia via its Rome-Fiumicino hub and services operated by other Community carriers via their respective hubs [1]. Hence, the Commission cannot accept the argument put forward by the Italian authorities according to which the Milan-Rome route does not play the role of a feeder route for the Alitalia hub in Rome-Fiumicino [2].

(35) The Commission does not consider that Alitalia's intention to progressively establish from 25 October 1998 onwards hub operations at Malpensa airport will put an end to this situation. It is true that the increasing availability of direct services from Malpensa may reduce the incentive for passengers to take indirect service [3]. However, all the evidence indicates that Alitalia's operations are and will continue to be split between two hubs: Rome-Fiumicino and Milan-Malpensa. This was one of the tenets of Alitalia's restructuring plan as notified by Italy to the Commission under the rules on State aid. In Decision 97/789/EC, it was stated that the Italian authorities had stressed the economic and financial validity of a strategy based on a network with two hubs; they stated that Rome-Fiumicino was to be seen 'as the Mediterranean terminal but maintaining a strong intercontinental emphasis'. Moreover, the hub strategy underlies the alliance agreement with KLM. Even though Alitalia's draft programme for Winter 1998/1999 plans a considerable development of services to destinations outside the EEA from Malpensa to the detriment of Rome, several destinations would continue to be served only from Rome and a greater number of destinations alternate between Rome and Malpensa (e.g. on certain weekdays from one and on other weekdays from the other).

[1] In 1997, 846 100 passengers flew from Milan to another airport via Amsterdam, Frankfurt, Paris, London, Madrid and Rome. 24,5 % of these passengers flew via Rome, 21,4 % via London, 17,4 % via Frankfurt and 15,1 % via Amsterdam. Out of this number:
— 73 399 passengers flew to a European airport (non domestic). 27,3 % of these passengers flew via Frankfurt, 24,4 % via Amsterdam, 21,3 % via London and 13,5 % via Rome,
— 169 626 passengers flew to an airport located in North America. 33,4 % of these passengers flew via London, 25,7 % flew via Amsterdam, 13,4 % flew via Rome and 11 % flew via Paris,
— 130 552 passengers flew to an airport located in South America. 41 % of these passengers flew via Madrid, 22 % via Rome, 16 % via Amsterdam and 7,8 % via Paris,
— 255 998 passengers flew to an airport located in the Far East. 32,2 % of these passengers flew via London, 22,2 % via Frankfurt, 18,3 % via Rome, and 15,2 % via Amsterdam,
— 71 282 passengers flew to an airport located in Africa. 65 % of these passengers flew via Rome, 12 % via Paris, 10 % via Frankfurt and 6,7 % via London.

[2] In 1997, 16,4 % of passengers flying between Milan and Rome (Fiumicino) connected to another flight departing from that airport. This represented a volume of 207 750 passengers of whom only 15 % connected on a domestic or European flight while 85 % connected on an intercontinental flight. These passengers generate proportionately more revenue because of the long-haul segment.

[3] Although even if Alitalia serves a particular destination by means of a direct flight and only from Malpensa, in particular price-sensitive passengers may still prefer to take connecting services through another hub. Convenient access to Linate is likely to incite such passengers to fly from Linate to Rome to connect with another airline offering for example a cheaper service than Alitalia's direct service, rather than from Malpensa to another hub in the Community.

Furthermore, even assuming that Alitalia's draft programme for winter 1998/1999 was final, there is no indication about the relative development of Malpensa and Rome-based services in future seasons; in view of the increasing activity at Malpensa, Fiumicino is unlikely to be phased out as a hub and may well become more important as congestion at Malpensa increases.

On this basis, it is evident that Alitalia still relies to a significant extent on its Rome hub which it will be able to serve from Linate while other non-Italian Community air carriers will no longer be able to serve their hub from that same airport as they will have to operate their services from Malpensa.

(36) The fact that by virtue of the Italian rules only the route Milan-Rome will continue to be operated at Linate airport implies that, as of 25 October 1998, Alitalia will be the only Community carrier able to access its hub at Rome-Fiumicino from Milan using either Linate airport or Malpensa airport. All the other abovementioned Community carriers will be able to access their respective hub from Malpensa airport only.

(37) Linate airport is located 10 km south-east from the city centre of Milan. Most Community airports serving cities of a similar or greater size are not located so close to the city centre. Because of this privileged location, the airport benefits both from the transport infrastructure network linking all major areas of the northern Italy basin to the city of Milan and from the transport infrastructure network of the city itself. A comprehensive network of motorways links Milan to Turin, Bergamo and Venice (A4), Varese (A8), Genoa (A7), and Bologna (A1). This network is complemented by an inner and an outer ring road, the latter serving directly Linate airport. The airport is therefore easily accessible both from the northern Italy basin and from the city of Milan. The short distance from Linate to the city centre makes a rail service superfluous.

(38) Malpensa airport is located 53 km north-west from the city centre of Milan. No other Community airport serving a city of a similar or greater size is located so far away from the city centre. Because of this location, it can only partially benefit from the transport infrastructure network linking the northern Italy basin to the city of Milan and from the transport infrastructure network of the city. In fact, the airport is accessible only by the A8 motorway linking Milan to Varese. However, the A8 motorway does not directly access Malpensa airport; from the motorway, a connection to the airport is ensured by the SS336 road. No direct link to the other motorways serving Milan exists for the time being. Moreover, despite the long distance from Milan, no direct rail service is currently available.

(39) Consequently, for the time being, access conditions to Malpensa airport are clearly not equivalent to those to Linate airport. Hence, these airports are not comparatively equally attractive.

(40) After 25 October 1998, this situation will remain unchanged and might even get worse as access infrastructures which are considered necessary for a transfer of traffic will not be ready. These infrastructures were clearly identified on the occasion of the meeting of 27 October 1997 of the Christophersen group for the follow up of the Malpensa 2000 project and comprise the elements referred to in points 40.l, 40.2 and 40.3.

40.1. An extended SS336 road

At present, the SS336 road linking the A8 motorway to the airport terminates at the existing North terminal and does not extend to the new terminal.

40.2. An upgraded A8 motorway

This motorway is presently highly congested. The situation will worsen once the transfer of traffic resulting from the Italian rules takes place. The following modernisation works are aimed at increasing the capacity of the motorway:

— the construction of one additional lane in each side,

— the construction of an emergency lane,

— the increase of the capacity of the toll-booths.

40.3. An operational direct rail service from Milan to the airport

(41) According to the information transmitted by the Italian authorities, while the extension of the SS336 should be completed by 25 October 1998, the works for the modernisation of the A8 motorway will not be completed until December 2000 (so far, only the additional lane has been constructed) and a direct rail service will probably not be operational until May 1999. This rail service will be a provisional service (two trains per hour — journey time: 39 minutes). The fully operational rail service ('Malpensa Express': four trains per hour — journey time: 30 minutes) will be available only in 2001. No formal commitment has been given by the Italian authorities about the respect of this timetable.

(42) Hence, the level of available access infrastructures to Malpensa airport from 25 October 1998 will not be compatible with the traffic which the airport will have to handle as a result of the transfer of traffic from Linate, on the one hand, and of market growth, on the other. On the basis of the information available to the Commission, it seems that this will be the case at least until December 2000, when all the abovementioned infrastructure is planned to be completed.

(43) However, even when those infrastructures are completed, the level will not necessarily be sufficient to offset the less favourable geographic location of this airport as compared to Linate airport. In this regard, it will be necessary to take into account both the availability of various transport links and the quality of these links.

(44) Given the existing differences between Linate airport and Malpensa airport with regard to access conditions, the Commission is of the opinion that these airports will not be comparable from the point of vue of their attractiveness until the level of access infrastructures to Malpensa offsets the geographic location of this airport as compared to Linate airport.

(45) In view of the foregoing and taking into account the competitive situation between Alitalia and the other Community air carriers, the criteria set out in Decree No 46-T, by permitting only Alitalia to serve its Rome-Fiumicino hub from Linate airport while other Community air carriers will be obliged to serve their respective hubs from Malpensa airport, will in fact afford Alitalia a competitive advantage. This competitive advantage will exist as long as Malpensa airport does not enjoy a level of access infrastructures such as to overcome the present situation which leads to consumer reluctance to use Malpensa airport.

(46) Therefore, the Commission considers that the application of the criteria set out in Decree No 46-T from 25 October 1998 by virtue of Decree 70-T will in practice produce discriminatory effects in favour of Alitalia. Consequently, the application of those criteria from 25 October 1998 is not compatible with the principle of non-discrimination on the grounds of the identity of the air carrier as provided for in Article 8(1) of Regulation (EEC) No 2408/92.

The principle of proportionality

(47) The Malpensa 2000 project, by extending and upgrading existing facilities at Malpensa airport, aims at creating a fully operational and viable hub at that airport. The Italian rules

contribute to that objective by ensuring that a sufficient amount of traffic will be transferred from Linate airport to Malpensa airport so as to ensure the viability of the hub. Article 8(1) of Regulation (EEC) No 2408/92 expressly recognises the legitimacy of an active airport planning policy. It must however comply with the general principles of Community law and, in particular, the third package of measures for the liberalisation of air transport (see Decision 95/259/EC, page 31).

(48) Under the Italian rules, air carriers will no longer be allowed to choose Linate airport for the operation of air routes other than those meeting specific thresholds. In practice, this will apply to all air routes except Milan-Rome. Consequently, these rules will restrict the freedom to provide air services in the Community to and from Milan. Even if these rules were not regarded as being discriminatory, according to the consistent case-law of the Court of Justice (see in particular the abovementioned judgment in Case C-288/89 Collectieve Antenne voorziening Gouda) 'the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive rules' (paragraph 15 of the judgment).

(49) In this regard, the Commission notes that it has not been proven that the creation of a viable operational hub and the success of the trans-European networks project make such restrictive measures necessary. The contrary seems to be established by the factors set out in points 49.1 and 49.2.

49.1. The operational viability of the Malpensa 2000 project (including the timely operation of all flights and the prerequisite normal access of travellers thereto) does not necessitate the complete transfer on 25 October 1998 of such a volume of traffic as that provided by the Italian rules. The application of the criteria laid down by those rules will result in an estimated transferred traffic of 11,7 million passengers while only 2,5 million passengers will remain at Linate airport.

The operational viability of the Malpensa hub necessitates the transfer of a volume of traffic which is compatible with the level of airport facilities and access infrastructures. Otherwise, the development and future positioning of Malpensa airport as a successful hub in the Community could be threatened. As already indicated above, the necessary access infrastructures to the airport will not be ready on 25 October 1998; hence, at that date, existing access infrastructures will not be compatible with the volume of traffic which will be transferred. This would seem to be the case at least until December 2000 when the upgrading of the A8 motorway and a provisional rail service are planned to be operational according to the information transmitted by the Italian authorities, provided that the level of traffic of the airport at that time does not make further improvements necessary to the access infrastructures.

49.2. The financial arrangements for the Malpensa 2000 project do not require that the transfer of traffic from Linate airport to Malpensa airport be completed by 25 October 1998. In fact, according to the contract entered into between the EIB and SEA for the financing of the project, the concentration of traffic from Linate to Malpensa needs to be completed by 31 December 2000 at the latest.

(50) In view of the foregoing, the Commission is of the opinion that the creation of a fully viable and operational hub does not necessarily presuppose the transfer of 11,7 million passengers from 25 October 1998. A postponement of the transfer or a gradual transfer of that volume from 25 October 1998 onwards would be better suited to that objective and would also reduce the effect on freedom to provide air services to and from Milan. Therefore, the Italian rules are not indispensable to secure the objective pursued by the Italian authorities which could be attained with rules less restrictive of the freedom to provide air services.

(51) Lastly the Italian authorities also justified the imposition of high thresholds for traffic permitted to remain at Linate by indicating that only at these levels would airline operations be justified both at Malpensa and at Linate and that this would concern routes where traffic was predominantly point-to-point.

If one of the objectives of Decree No 46-T was really to keep at Linate routes where traffic was predominantly point-to-point which indeed appears to be the intention since the 12th recital in the preamble to that Decree refers 'in particular' to services between Milan and Rome, then the Decree cannot be regarded as appropriate to achieving the objective of retaining such routes at Linate since they impose unnecessary restrictions on all routes other than Milan-Rome by actually excluding them from Linate altogether.

Further the imposition of restrictions resulting in an immediate and drastic reduction of activities at Linate from 14,2 million passengers per year in 1997 to 2,5 million after the new measures take effect would not appear to be an appropriate measure to attain the objective indicated in the 11th recital in the preamble to the Decree, namely that Linate airport should in any event be kept in service.

(52) Consequently, the Commission considers that the traffic distribution rules set out in Decree No 46-T and Decree No 70-T are not compatible with the principle of proportionality.

Conclusion

(53) In conclusion, the Commission considers that the traffic distribution rules set out in Decree No 46-T and Decree No 70-T are not compatible with Article 8(1) of Regulation (EEC) No 2408/92 in so far as their application is contrary to both the principle of non-discrimination and the principle of proportionality. It is therefore appropriate to decide, pursuant to Article 8(3) of Regulation (EEC) No 2408/92, that Italy may not apply these rules.

(54) This Decision in no way calls into question the right of Italy to pursue an active airport policy and, more specifically, the objective of creating a fully viable and operational hub at Malpensa airport. However, the traffic distribution rules necessary in order to achieve that objective must comply with the principles of Community law as set out above.

(55) Nor is this Decision incompatible with the fact that the Malpensa 2000 project is a project of common interest and has been identified as a priority project within the framework of the trans-European networks. In this regard, the Commission recalls that actions by Member States in support of priority projects in the framework of the trans-European networks or designed to create the conditions for the achievement of the objectives pursued by such projects must be fully compatible with Community law,

HAS ADOPTED THIS DECISION:

Article 1

Italy may not apply the traffic distribution rules for the airport system of Milan set out in Decree No 46-T of 5 July 1996 and Decree No 70-T of 13 October 1997.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 16 September 1998.

For the Commission
Neil KINNOCK
Member of the Commission