II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 23 April 2007

on public service obligations on certain routes to and from Sardinia under Article 4 of Council Regulation (EEC) No 2408/92 on access for Community air carriers to intra-Community air routes

(notified under document number C(2007) 1712)

(Only the Italian text is authentic)

(2007/332/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 4(3) thereof,

Whereas:

I. FACTS

(1) On 27 January and 28 February 2006, the Italian Republic sent the Commission Decrees Nos 35 and 36 issued by the Ministry of Infrastructure and Transport on 29 December 2005 (published in the *Italian Official Gazette* on 11 January 2006) (Decrees Nos 35 and 36) providing for public service obligations (PSOs) on a total of 16 routes connecting the three airports in Sardinia with several national airports on mainland Italy, and asking the Commission to publish an opinion in the *Official Journal of the European Union*, in accordance with Article 4(1)(a) of Regulation (EEC) No 2408/92 on access for Community air carriers to intra-Community air routes (the Regulation).

(2) In its letter dated 28 February 2006 the Italian Republic specified that:

— Decree No 36 had been amended by the Decree issued on 8 February 2006 concerning the frequency, time slots and capacity of the Cagliari–Turin route,

— it also requested the publication in the *Official Journal of the European Union*, C series, of an opinion indicating that, in accordance with the imposed PSO and without requesting financial compensation, if within thirty days following the publication of the PSOs, no air carrier had agreed to provide scheduled air services on each of the routes listed in Decree No 36, Italy could limit access to these routes to a sole carrier and grant, via a tender procedure, the right to operate these services, under the procedure laid down in Article 4(1)(d) of Regulation (EEC) No 2408/92.

(3) On 24 March 2006, the Commission published in the *Official Journal of the European Union*, a notice on the PSOs provided for in Decree No 35 [2] on the following six routes:

— Alghero–Rome and Rome–Alghero,

— Alghero–Milan and Milan–Alghero,

— Cagliari–Rome and Rome–Cagliari,

[1] OJ L 240, 24.8.1992, p. 8. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

[2] OJ C 72, 24.3.2006, p. 4.

— Cagliari–Milan and Milan–Cagliari,

— Olbia–Rome and Rome–Olbia,

— Olbia–Milan and Milan–Olbia.

(4) On 21 April 2006, the Commission published in the Official Journal of the European Union a notice on the PSOs laid down in Decree No 36 ([1]) on the following 10 routes:

— Alghero–Bologna and Bologna–Alghero,

— Alghero–Turin and Turin–Alghero,

— Cagliari–Bologna and Bologna–Cagliari,

— Cagliari–Florence and Florence–Cagliari,

— Cagliari–Turin and Turin–Cagliari,

— Cagliari–Verona and Verona–Cagliari,

— Cagliari–Naples and Naples–Cagliari,

— Cagliari–Palermo and Palermo–Cagliari,

— Olbia–Bologna and Bologna–Olbia,

— Olbia–Verona and Verona–Olbia.

(5) On 22 April 2006, the Commission published in the *Official Journal of the European Union* an invitation to tender issued by Italy concerning the PSOs imposed under Decree No 36. This invitation stated that the Italian Republic intended to follow the procedure laid down in Article 4(1)(d) of Regulation (EC) No 2408/92 for each of the ten routes concerned by the Decree if no air carriers had committed themselves to accepting the PSOs on these routes. ([2])

(6) The main features of the PSOs published on 24 March and 21 April 2006 are as follows:

— the two routes Alghero–Rome and Alghero–Milan (together) and the two routes Olbia–Rome and Olbia–Milan (together) constitute a single package which must be accepted in their entirety and as a whole by the carriers concerned without any compensation of any kind or origin. The routes Cagliari–Rome and Cagliari–Milan, on the other hand, must be accepted individually, in their entirety and as a whole by the carriers concerned without any compensation of any kind or origin,

— each of the ten routes published in the notice of 21 April 2006 and the PSOs imposed upon them must be accepted individually in their entirety and as a whole by the carrier concerned,

— the carrier accepting to take on these obligations must provide a service over a period of 36 consecutive months and may not interrupt the service unless it provides notice of at least six months to ENAC (the Italian national civil aviation body) and to the Autonomous Region of Sardinia,

— the carrier (or main carrier) taking on these obligations must provide a performance security for the purpose of guaranteeing the correct performance and continuation of the service, the amount of which must be equal to at least 5 % of the total turnover of scheduled air services for all the connections concerned, evaluated by ENAC. The security is payable to ENAC, which will use it to ensure the continuation of the services concerned in the event of unjustified abandonment, and consists of a first request bank surety (50 %) and an insurance surety (for the remaining 50 %),

— to avoid the overcapacity which would result if several carriers were to accept a route subject to the obligations, considering the infrastructure limitations and conditions of the airports involved, ENAC, at the behest of the Autonomous Region of Sardinia, has the task of acting in the public interest to adjust the accepting carriers' operating programmes so as to ensure that they are completely in line with the mobility objectives of the obligations imposed. The purpose of this should be to redistribute routes and frequencies fairly between the accepting carriers on the basis of the volumes of traffic on the routes (or packages of routes) in question for each of them over the previous two years,

— the minimum frequency, time slots and capacity to be provided for each route are laid down in point 2 'Detail of the public service obligations' of the notices of 24 March and 21 April 2006,

— the minimum capacity of the aircraft used is set out in point 3 'Type of aircraft used for each route' of the notices,

— the fare structure for all the routes concerned is given under point 4 on 'Fares'. In particular, regarding reduced fares, point 4.8 of both notices state that carriers operating the routes concerned are legally bound to apply the reduced fares (specified under point 4 'Fares') at least to people born in Sardinia, even if they are not resident there,

([1]) OJ C 93, 21.4.2006, p. 13.
([2]) OJ C 95, 22.4.2006, p. 9 to 27, 30.

— in accordance with Decree No 35, sent to the Commission on 29 December 2005 and published in the *Italian Official Gazette* on 11 January 2006, the PSOs should apply to the routes concerned from 31 March 2006 to 30 March 2009. However, on 28 February 2006, the Italian authorities informed the Commission of the adoption on 23 February 2006 of a decree (Permanent Representation letter with the reference No 2321) amending these dates to 2 May 2006 and 1 May 2009. These dates were published on 24 March 2006 in the *Official Journal of the European Union*,

— in accordance with Decree No 36, sent to the Commission on 29 December 2005, published in the *Italian Official Gazette* on 11 January 2006 and published in the Official Journal of the European Union on 21 April 2006, the Italian Republic stated that the start and end of the validity period for the PSOs on the routes concerned would be set at a later date. Therefore the publication in the *Official Journal of the European Union* did not contain any definitive start and end dates,

— carriers intending to accept the public service obligations must submit a formal acceptance letter to the competent Italian authority within 30 days of publication of the notice in the *Official Journal of the European Union*.

(7) Before imposing the PSOs covered by this Decision, the Italian Republic had, by the Decrees issued on 1 August and 21 December 2000, imposed PSOs on six routes linking airports in Sardinia with Rome and Milan. These obligations were published in the *Official Journal of the European Union* on 7 October 2000 ([1]). In accordance with Article 4(1)(d) of the Regulation, the routes concerned were put out to tender to select the carriers authorised to operate them on an exclusive basis with financial compensation ([2]).

(8) The carriers authorised to operate the routes in accordance with the PSOs were:

— Alitalia for the Cagliari–Rome connection,

— Air One for the Cagliari–Milan, Alghero–Milan and Alghero–Rome connections,

— Meridiana for the Olbia–Rome and Olbia–Milan connections.

(9) This system was replaced by the PSOs imposed by the Italian Decree issued on 8 November 2004 and published in the *Official Journal of the European Union* on 10 December 2004 ([3]). Following a decision of the Regional Administrative Tribunal of Lazio of 17 March 2005, which partially annulled the Decree of 8 November 2004, the Italian authorities informed the Commission that they had 'suspended' those obligations. An opinion on this matter was published in the *Official Journal of the European Union* on 1 July 2005 ([4]). On 6 December 2005 the Italian authorities informed the Commission that the Decree of 8 November 2004 had been repealed with effect from 15 November 2004.

II. **PROCEDURE**

(10) The Commission wrote a letter to the Italian Republic on 9 March 2006 (registered as No 204756) voicing its concern about the PSOs imposed by Decrees Nos 35 and 36. It requested more detailed information on the grounds and methods for implementing the PSOs. The Italian Republic replied with an initial letter containing a draft reply on 22 March 2006, then by letter of 4 April 2006.

(11) The Commission wrote to ENAC on 27 April 2006 requesting further details and asking about the current status of the PSOs, before the new PSOs entered into force.

(12) ENAC replied by letter of 9 May 2006 confirming that the PSO regime applicable from Sardinia to Rome and Milan up to 2 May 2006 was the regime from 2000, which had remained in force since the 2004 Decree, which was due to amend the regime, had been repealed. The new regime provided for in Decree No 35 applies from 2 May 2006. The reply also explained that the PSOs applied in full to all the airports in Milan airport system, as laid down in the notice published in 2000.

(13) On 4 August 2006, the Italian Republic sent another reply to the Commission's letter of 9 March containing additional, but no significantly new, information.

(14) Acting on its own initiative, the Commission adopted the Decision to open an inquiry under Article 4(3) of the Regulation ([5]) on 1 August 2006. The Italian Republic was notified of this Decision on 1 August 2006 (Document No C(2006) 3516). In the same Decision the Commission asked the Italian authorities to provide answers to several points within a deadline of one month.

(15) The Italian authorities replied by letter of 31 August 2006. The reply covered most of the questions raised.

([1]) OJ C 284, 7.10.2000, p. 16.
([2]) OJ C 51, 16.2.2001, p. 12 to 22.
([3]) OJ C 306, 10.12.2004, p. 6.
([4]) OJ C 161, 1.7.2005, p. 10.
([5]) OJ L 215, 5.8.2006, p. 31.

(16) However the Commission requested further information in its letter to the Italian Permanent Representation of 2 October 2006.

(17) On 6 October 2006, the Italian Republic provided a long reply containing several points in reply to the additional questions from the Commission.

(18) The Commission (Unit TREN.F.1) held a meeting with the Italian authorities (Ministry of Transport, Permanent Representation, Government of Sardinia and ENAC) in Brussels on 17 October 2006.

(19) The reply confirmed, in particular, that the following routes were already operated in accordance with the PSOs imposed under Article 4(1)(a) of the Regulation:

— Olbia–Rome: Meridiana,

— Olbia–Milan: Meridiana,

— Alghero–Rome: Air One,

— Alghero–Milan: Air One,

— Cagliari–Rome: Air One and Meridiana,

— Cagliari–Milan: Air One and Meridiana,

— Cagliari–Bologna: Meridiana,

— Cagliari–Turin: Meridiana,

— Cagliari–Verona: Meridiana,

— Olbia–Bologna: Meridiana.

However no carrier had agreed to operate the six remaining routes under the regime provided for in Article 4(1)(a) of the Regulation. The Italian Republic therefore intended to launch a call for tenders in accordance with Article 4(1)(d). At present, the following carriers are eligible for the tender:

— Olbia–Verona: Meridiana,

— Alghero–Bologna: Air One,

— Alghero–Turin: Air One,

— Cagliari–Florence: Air One and Meridiana,

— Cagliari–Naples: Air One and Meridiana,

— Cagliari–Palermo: Air One and Meridiana ([1]).

However the Italian Republic explained that it had not yet allocated these routes due to the Commission's ongoing inquiry.

III. ANALYSIS

1. Legal framework

(20) The rules on PSOs are laid down in Regulation (EEC) No 2408/92, which defines the conditions for applying the principle of freedom to provide services in the air transport sector.

(21) PSOs are defined as an exception to the principle of the Regulation 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' ([2]).

(22) The conditions for imposing them are defined in Article 4. They are interpreted strictly and in accordance with the principles of non-discrimination and proportionality. They must be adequately justified on the basis of the criteria laid down in that Article.

(23) More precisely, the rules governing PSOs provide that these may be imposed by a Member State in respect of 'scheduled air services to an airport serving a peripheral or development region in its territory or on a thin route to any regional airport, any such route being considered vital for the economic development of the region in which the airport is located, to the extent necessary to ensure on that route the adequate provision of scheduled air services satisfying fixed standards of continuity, regularity, capacity and pricing, which standards air carriers would not assume if they were solely considering their commercial interest' ([3]).

(24) The adequacy of scheduled air services is assessed by the Member States 'having regard to the public interest, the possibility of having recourse to other forms of transport, the ability of such forms to meet the transport needs under consideration and the combined effect of all air carriers operating or intending to operate on the route' ([4]).

([1]) See the replies given by the Italian Republic dated 6 October and 15 November 2006 and the press release issued by ENAC on 23 May 2006.

([2]) Regulation (EEC) No 2408/92, 23 July 1992, Article 3(1).
([3]) Regulation (EEC) No 2408/92 of 23 July 1992, Article 4(1).
([4]) Regulation (EEC) No 2408/92 of 23 July 1992, Article 4(1)(b).

(25) Article 4 provides for a two-phase mechanism: in the first phase (Article 4(1)(a)) the Member State concerned imposes PSOs on one or more routes, which are open to all Community carriers, provided they meet the obligations. Where no carrier applies to operate the route on which the PSOs have been imposed, the Member State can move on to a second phase (Article 4(1)(d)) which limits access to that route to only one carrier for a renewable period of up to three years. The carrier is selected by a Community tender procedure. The selected carrier can then receive financial compensation for operating the route in accordance with the PSOs.

(26) Under Article 4(3) the Commission may decide, following an investigation, carried out either at the request of a Member State or on its own initiative, whether the PSO published should continue to apply. The Commission must communicate its decision to the Council and to the Member States.

2. **Type of route eligible**

(27) The Italian Republic based its intention to impose the PSOs on the need for the development of Sardinia, which has to overcome the disadvantages of being an island.

(28) In addition, the Autonomous Government of Sardinia has committed itself to promoting the mobility of its residents. Connections between Sardinia and mainland Italy are not operated evenly all year round, despite the fact that the mobility principle should adequately and continuously serve the residents of Sardinia all year round. Moreover, the Italian Republic has emphasised the length of journeys both in terms of distance and in terms of time between the various airports in Sardinia, a region that suffers from inadequate infrastructure. This is also the reason they give for the PSOs to cover all three airports in Sardinia.

(29) The Commission believes that Sardinia may be considered a peripheral region due to its island location and lack of real alternative methods of transport.

(30) In addition, Sardinia's development deficit compared to other Italian regions is well documented. Its isolation and low population, exacerbated by high emigration, explains why economically the island lags behind, putting it on a par with the *Mezzogiorno*.

(31) On the basis of the information available, the Commission's analysis does not call into question the vital need for the connections concerned, as emphasised by the Italian authorities.

3. **Adequacy of the PSOs**

3.1. *General considerations*

(32) In accordance with Article 4(1)(a) of the Regulation, Member States may only impose PSOs 'to the extent necessary to ensure on that route the adequate provision of scheduled air services satisfying fixed standards of continuity, regularity, capacity and pricing, which standards air carriers would not assume if they were solely considering their commercial interest'.

(33) The adequacy of the services is assessed having regard to the criteria laid down in Article 4(1)(b) of the Regulation:

— the public interest,

— the possibility, in particular for island regions, of having recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration,

— the air fares and conditions which can be quoted to users,

— the combined effect of all air carriers operating or intending to operate on the route.

(34) In addition, the public service obligations must comply with the basic principles of proportionality and non-discrimination (see, for example, Court of Justice judgment of 20 February 2001, in Case C-205/99 *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and others v Administración General del Estado* [2001] ECR I-01271).

(35) In this case, the Commission is of the opinion, based on the information provided by the Italian authorities, that imposing PSOs concerning frequency, capacity and fares may be necessary to ensure the adequate provision of services for the routes concerned.

(36) However, the Commission considers that some of the conditions imposed by Decrees Nos 35 and 36 are unduly restrictive or disproportionate.

3.2. *Obligation to submit acceptance of the PSOs within 30 days*

(37) Point 8 of the PSOs, as provided for in Decrees Nos 35 and 36, provides that 'carriers intending to accept the PSOs contained in the Annex must present a formal acceptance to ENAC within 30 days of publication in the *Official Journal of the European Union* of the Commission communication on imposing these public service obligations.' This obligation even constitutes a condition for excluding any carrier that sends their acceptance one day 'too late'. Thus carriers that do not send their acceptance of all the conditions of the PSO within this deadline risk being excluded for the whole period.

(38) The Commission considers that this condition has no legal basis under Article 4(1)(a) of the Regulation and deems it to be unduly restrictive. Article 4(1)(a) of the Regulation does not authorise Member States to limit the number of carriers that may have access to these routes, but merely to impose a general PSO applicable to all carriers operating or intending to operate those routes. The number of carriers may only be limited in this way under Article 4(1)(d).

(39) Thus, any carrier intending to accept the PSOs imposed under Article 4(1)(a) of the Regulation must be able to operate the route, regardless of the period in which it intends to commence service provision. If by a certain date no carrier has commenced scheduled air services on a route in accordance with the PSOs imposed on that route under Article 4(1)(a), Member States may limit access to that route in accordance with Article 4(1)(d). However if one or more operators have commenced operations within the deadline, Member States may not exclude from that route other carriers who declare their intentions to operate the route any time after the deadline. The entry of new operators may however require changes to be made to the PSOs imposed on each carrier (see Section 3.4 below).

3.3. *Obligation to operate the route for a three-year period*

(40) Point 5 of the PSOs as provided for in Decrees Nos 35 and 36 states that 'in accordance with Article 4(1)(c) of Regulation (EEC) No 2408/92, the carrier which accepts the public service obligations shall guarantee service for a period of at least 36 consecutive months and shall not suspend such service without giving a six-month prior notice to ENAC and the Autonomous Region of Sardinia'.

(41) The requirement of a minimum period of operation is in accordance, in the case in point, with Article 4(1)(c) which states that 'in instances where other forms of transport cannot ensure an adequate and uninterrupted service, the Member States concerned may include in the public service obligation the requirement that any air carrier intending to operate the route gives a guarantee that it will operate the route for a certain period, to be specified, in accordance with the other terms of the public service obligation'. The Commission considers that since Sardinia is an island and, in view of its distance from the mainland, other means of transport do not ensure an adequate alternative service.

(42) Nonetheless, the Commission considers that the minimum duration of three years set by Decrees Nos 35 and 36 is excessive and disproportionate.

(43) The Commission can understand the need to ensure continuity of service and to obtain a commitment from the carriers to operate for a certain period. However, as previously mentioned, it is not for the authorities responsible for implementing PSOs to sideline potential candidates from operating them. PSOs without an exclusive concession or compensation may in no event lead to the definitive or long-term closure of the market.

(44) Operation of routes characterised by high seasonal variations may be legitimately imposed for certain periods of the year. On these routes, carriers risk having the natural tendency to limit or concentrate their offer on the weeks in which there is a sufficient frequency to ensure that the service is profitable, and to abandon services at other times of the year. However the Commission considers that, under these circumstances, upholding the principle of proportionality should mean limiting to a maximum of one year the duration of the period during which a continuous service under the PSO regime under Article 4(1)(a) must be ensured.

(45) In addition, the Commission considers that there is nothing to stop the authority responsible for applying PSOs from regularly assessing the adequacy of this duration. As mentioned below, such reviews should be carried out in any case whenever a new carrier commences or is about to commence services on the route concerned.

3.4. *Distribution of routes and frequencies by ENAC*

(46) Point 1.6 of Decrees Nos 35 and 36 states that 'to avoid the overcapacity which would result if several carriers were to accept a route subject to the obligations, considering the infrastructure limitations and conditions of the airports involved, ENAC, at the behest of the Autonomous Region of Sardinia, has the task of acting in the public interest so as to adjust the accepting carriers' operating programmes to ensure that they are completely in line with the mobility objectives of the obligations imposed. The purpose of this should be to redistribute routes and frequencies fairly between the accepting carriers on the basis of the volumes of traffic on the routes (or packages of routes) in question for each of them over the previous two years'.

(47) By virtue of its powers, ENAC may arbitrate and promote an agreement between several carriers operating on the same route. For Sardinia, ENAC held a round table of operators interested in certain routes and defined with them the distribution of traffic.

(48) The Italian Republic defends this power of intervention which, in its opinion, ensures continuity of service whilst sheltering PSOs from the risks of other operators that may be less interested in accepting PSOs without any compensation from taking on and then abandoning services. In particular it cites the ruling of the Regional Administrative Tribunal of Lazio dated 17 March 2005, which held that it was 'perfectly legitimate that the Decree (of 2004) could define a scenario in which, for all routes subject to PSOs, there are several individual carriers in competition with each other. However such a possibility must be clearly stated and a minimum objective criterion must be provided for the prior allocation of time slots depending upon the number (one, two or more than two) of carriers accepting the PSOs in order to avoid detrimental overcapacity of supply and, above all, that the allocation of time slots does not result in the arbitrary introduction of and *de facto* exclusivity of operations, which the provisions of the Decree expressly rejected' ([1]).

(49) The PSOs imposed under Article 4(1)(a) must take account of all carriers operating or intending to operate the route concerned. This is confirmed in Article 4(1)(b) which states that 'the adequacy of scheduled air services shall be assessed by the Member States having regard to the combined effect of all air carriers operating or intending to operate on the route'.

(50) The Commission considers that this principle must be checked not only at the time of imposing the PSO but also throughout the whole duration of the regime. Thus, each time a new operator commences, or is about to commence, operating a route, the level of capacity and frequency imposed by the PSO on each operator must be adjusted, so that the total frequency and capacity offered on each route does not exceed that which is strictly necessary to provide an adequate service.

(51) With regard to the PSOs imposed under Article 4(1)(a) of the Regulation, carriers are not obliged to undertake to individually ensuring the level of frequency or capacity but all operators together may ensure that a minimum service is provided.

(52) The Commission recognises that it may be necessary for the authority responsible for the PSOs to ensure that the level of frequency and capacity enables the PSOs to be met. Nonetheless this authority must in no cases limit the possibility for carriers who wish to provide a higher level of service in terms of the capacity and frequency required under the PSOs, which should only be minimum obligations. As a result, in so far as the rules adopted by ENAC aim to prevent carriers from providing additional services, they are unduly restrictive and contrary to the Regulation.

(53) In this connection, the Commission welcomes the fact that the Italian Republic confirmed in its letter of 15 November 2006 that its administration would regularly assess the situation on an annual basis and would analyse any requests made by carriers willing to operate routes under the PSO regime ([2]). It notes that the Italian Republic confirmed that 'nothing stops a Member State from verifying (including during the validity period for PSOs) the adequacy and the need for the PSOs and as a result to amend and/or annul the PSOs, unless their usefulness or legitimacy is re-established' ([3]).

([1]) Ruling of the Regional Administrative Tribunal of Lazio No 2436 of 17 March 2005.

([2]) Letter of the Italian Republic dated 15 November 2006, p. 2.

([3]) Letter of the Italian Republic dated 15 November 2006, p. 11.

3.5. *Grouping of the routes Alghero–Rome and Alghero–Milan on the one hand and Olbia–Rome and Olbia–Milan on the other hand*

(54) The Italian Republic justifies grouping the routes Alghero–Rome and Alghero–Milan on the one hand and Olbia–Rome and Olbia–Milan on the other hand on the grounds that their operations are complementary and interdependent. According to the Italian authorities, the volume of traffic on these routes is objectively low for two-thirds of the year due to the highly seasonal nature of traffic flows. Considering that there is no provision for financial compensation for these routes, it is up to the administration to ensure that carriers' operations are sustainable despite not being economically attractive. Thus it is a question of putting into place 'a virtuous circle of operational interdependence' to enable 'aircraft to be rotated during the winter, given the scarcity of demand' whilst 'planning coupled routes helps to attract carriers willing to operate these routes'. Moreover, according to the Italian Republic, the supply required in the summer could be better met by jointly operating a group of routes. The Italian Republic lastly argues that the Regulation itself provides scope for combining fluctuations of demand, for example, within the same week. This grouping would therefore enable costs to be contained and capacity to be optimised, whilst better meeting the requirements of demand. Thus this grouping would not constitute a market restriction but conversely would be likely to attract more operators.

(55) The Commission believes that grouping routes is incompatible with Article 4(1)(a), (b) and (c) of the Regulation. The eligibility and adequacy criteria for the PSOs provided for therein explicitly mention, each time, 'the route', with no provision anywhere for groups of routes. Therefore each of these criteria must be assessed separately with regard to each individual route.

(56) In addition, this interpretation is in line with the principle of proportionality. Grouping routes in this way would enable Member States to impose PSOs on routes where they are not necessary to ensure an adequate provision of service. Thus Article 4(1)(d) does not provide scope for grouping routes, but states that the right to operate such services shall be offered by public tender 'either singly or for a group of such routes'. On the contrary, this clear mention in Article 4(1)(d) excludes the application of such a grouping to Article 4(1)(a), (b) and (c). If the market fails to produce a single air carrier that has commenced or is about to commence operating scheduled air services on a route, in accordance with the PSOs imposed on that route, the Member State may limit access to one carrier for a maximum period of three years and may publish a call for tender to cover a group of routes. To sum up, grouping several routes may be considered to be a response to a clear disruption of the market and a form of indirect compensation which, like direct compensation, is only eligible under Article 4(1)(d). In no cases under a PSO regime under Article 4(1)(a) may the purpose of grouping be to make two separate routes profitable so as to favour the operations of one or more carriers.

(57) What is more, the explanations put forward by the Italian authorities are not based on any technical or economic figures to support their analysis.

The following counter-arguments can be put forward:

— the capacity and frequency required must reflect the need, route by route, and not be organised in such a way that their efficiency can only be improved if the routes are grouped,

— the obligations in terms of frequency linked to the pairing of routes are so heavy that they dissuade many potential operators from accepting the PSOs and providing services to and from Sardinia but which, since their operations are not based in one of the two cities, are *de facto* denied the possibility to provide this service. Thus the effect of grouping is to block the market,

— it is clear that the PSOs grouped in this way would enable only a few existing operators to meet the requirements. Therefore applying PSOs has sidelined companies operating or intending to operate routes from Rome and Milan to each of the two airports concerned, Olbia and Alghero. Consequently, even if they had wanted to, these carriers were unable to apply to provide a service that would be too costly for their operations. Therefore these groupings are such that they sideline other potential operators.

These restrictive effects are magnified when account is taken of the size of the markets concerned (total number of passengers in 2005 — figures provided by the Italian Republic):

— Olbia–Rome and Olbia–Milan: 731 349 (390 186 in summer and 341 163 in winter).

— Alghero–Rome and Alghero–Milan: 502 820 (184 273 in summer and 318 547 in winter).

Under these circumstances, it is unlikely that these routes between Italy's two main cities and the Sardinian airports in Olbia and Alghero are so unattractive that they need to be grouped in order to attract operators.

(58) Therefore the Commission considers that grouping certain routes is incompatible with the Regulation and unduly restrictive.

3.6. *Preferential fares for persons born in Sardinia but not resident there*

(59) Decrees Nos 35 and 36 require carriers to apply preferential fares for persons born in Sardinia but not resident there. According to the estimates made by the Italian Republic, applying these provisions would affect a maximum of 220 000 persons, which in reality would be closer to 110 000 if 50 % of these people are estimated to travel once a year.

(60) In practice, such a measure favours European citizens of Italian nationality over citizens of other nationalities. Consequently it can be considered discriminatory at first sight on the grounds of nationality and therefore contrary to the Treaty. Such a measure may only be eligible as part of a PSO regime where differential treatment is based on objective considerations irrespective of the nationality of the persons concerned and proportionate to the legitimate objective pursued by national law.

(61) However the Italian Republic explains that the measure is necessary essentially to enable Sardinian emigrants to retain ties with their original cultural community [1]. However, even if such a goal may be a legitimate objective of public interest under Article 4(1)(b)(i) of the Regulation, the measure is clearly disproportionate. Firstly, the measure is applicable to all persons born in Sardinia, but not resident there, without it being necessary to show any remaining link, such as family ties, between the person concerned and their region of origin. Secondly, the measure is applicable irrespective of the financial means of each emigrant. Thirdly, unlike residents of Sardinia, who have to travel to the mainland regularly in order to receive certain basic services (education, health) or to carry out economic activities necessary for the development of Sardinia, emigrants only travel to Sardinia occasionally (a maximum of 50 % of persons potentially travel once a year, according to the Italian authorities). Therefore the total costs of occasional travel are relatively low compared to the costs incurred by residents of Sardinia and may be easily covered, in most cases, by the emigrants, without the need for the reduction provided for in Decrees Nos 35 and 36. Lastly, where certain emigrants lack the necessary means to pay the price of an annual trip to Sardinia, a more adequate and less restrictive measure would be to offer aid to the emigrants concerned.

(62) Under these circumstances, the Commission considers this measure to be disproportionate and incompatible with the Regulation.

3.7. *Application to all airports*

(63) Decrees Nos 35 and 36 provide for the application of the PSOs to all the airports in the Rome and Milan systems, as listed in Annex II to the Regulation, i.e.:

— Fiumicino and Ciampino airports for Rome,

— Linate, Malpensa and Bergamo for Milan.

(64) It should be noted that the PSOs for the year 2000 covered the airports of 'Rome (Fiumicino) and Milan'. By setting up the Milan airport system in accordance with Article 8 of and Annex II to the Regulation, Italy automatically extended the scope of the PSOs to the whole airport system concerned.

[1] Letter of the Italian Republic dated 6 October 2006, p. 72 to 74.

(65) The Italian Republic justified its choice solely on technical grounds, which automatically means that all the airport systems are covered. However it confirmed that the main interest of the PSOs covered the airports of Rome-Fiumicino and Milan-Linate, favoured by the beneficiaries of the PSOs due to their proximity with the city centre concerned, which justified the provision in the PSOs that 'subject to slot availability, at least 50 % of the connections scheduled from the Sardinian airports and Rome and Milan must be operated from and to Fiumicino and from and to Linate' ([1]).

(66) The Italian Republic acknowledged that it was 'objectively proven that Fiumicino airport for Rome and Linate airport for Milan were the destinations representing the highest level of convenience, service and attraction to users, being the closest airports with the best links to the respective city centres'. It also explained that 'in order to ensure a better service and better meet the demands of users, it was deemed important to prevent the carriers taking on the PSOs from having the freedom to totally abandon these airports in favour of other airports (less convenient and attractive to users) in the same system.' ([2]).

(67) The facts also showed that flights in winter only operated from Fiumicino and Linate.

(68) In this case, the Commission doubts the need for this measure, which it deems disproportionate to the objectives of ensuring mobility to the mainland and territorial cohesion. The direct effect of this measure is to sideline occasional carriers, without affecting the principle of the PSOs, and to contribute to a definitive closure of the market to new operators on competitive routes, notably during the summer.

(69) However the Italian Republic recognised that the airport hub of Malpensa played an essential role in international connections, whilst Ciampino and Bergamo airports, as a hub for low-cost companies, contributed to the EU principle of economic and social cohesion and to achieving the objective of territorial cohesion linking an island like Sardinia with other European regions. Therefore the Italian Republic has undertaken to amend Decree No 35 so that the PSO does not apply to Malpensa, Bergamo and Ciampino airports ([3]).

(70) The Commission considers that this commitment does allay the doubts that could be raised and that amending the Decree in this way would substantially help to reduce the impact of undue restrictions imposed by the PSOs by meeting the mobility needs of Sardinia without placing disproportionate restrictions on the markets concerned.

(71) Given this commitment made by the Italian Republic, the Commission does not intend to pursue its analysis of the disproportionate nature of applying the regime to all airports in Milan and Rome, whilst reserving the right, if necessary, to return to this aspect for current and future PSOs.

IV. **CONCLUSIONS**

(72) On the basis of the information provided by the Italian Republic, the Commission does not call into question the principle of applying a PSO to routes between Sardinia and mainland Italy, which, regarding frequency, capacity and fares, may be necessary to ensure an adequate provision of services on the routes concerned.

(73) Nonetheless, the Commission considers that some of the conditions imposed by Decrees Nos 35 and 36 of the Italian Republic are unduly restrictive or disproportionate.

(74) The Commission considers that, as a result of the PSOs imposed under Article 4(1)(a) of the Regulation, any carrier intending to accept the PSOs must be able to operate on this route, regardless of the period in which it intends to commence service provision. Therefore setting a deadline for submitting applications which from the outset excludes all operators submitting applications after that deadline is unduly restrictive and incompatible with the Regulation.

(75) Although it may appear legitimate to provide for a duration of continuity of services, the Commission considers that, to comply with the principle of proportionality, the duration must be set within reasonable limits and that a PSO regime under Article 4(1)(a) may not exceed one year.

(76) The Commission considers that the powers given to ENAC to coordinate the activities of operators to avoid overcapacity are unduly restrictive and incompatible with the Regulation.

([1]) Point 1.2 of the Notice of 24 March 2006.
([2]) Letter of the Italian Republic dated 6 October 2006, p. 78.
([3]) Letter of the Italian Republic dated 15 November 2006, p. 3.

(77) The Commission notes that grouping the routes Olbia-Rome and Olbia-Milan on the one hand and Alghero-Rome and Alghero-Milan on the other is unduly restrictive and incompatible with the Regulation.

(78) The Commission considers that the application of reduced fares for persons born in Sardinia but not resident there is disproportionate and incompatible with the Regulation.

(79) The Commission doubts the need to apply the PSOs to all airports in Rome and Milan, which it considers to be disproportionate to the objectives of ensuring mobility to the mainland and territorial cohesion. However, given the commitment made by the Italian Republic to amend Decree No 35 so that the PSOs do not apply to Bergamo, Malpensa or Ciampino airports, the Commission will not pursue its analysis, although it reserves the right, if necessary, to return to this aspect for current and future PSOs,

HAS ADOPTED THIS DECISION:

Article 1

1. The Italian Republic may continue to apply the public service obligations ('PSOs') imposed by Decrees Nos 35 and 36 issued by the Ministry of Infrastructure and Transport on 29 December 2005 (published in the *Italian Official Gazette* on 11 January 2006) on a total of 16 routes connecting the three airports in Sardinia with several national airports on mainland Italy, published respectively on 24 March 2006 (Decree No 35) and 21 April 2006 (Decree No 36) in the *Official Journal of the European Union*, in accordance with Article 4(1)(a) of Council Regulation (EEC) No 2408/92 on access for Community air carriers to intra-Community air routes, subject to compliance with the following conditions:

(a) All air carriers intending to accept the PSOs must be able to operate the route concerned, regardless of the period in which they notified their intention to commence service provision and whether or not notification was sent during or after the 30-day period set in the Decrees.

(b) Air carriers must not be obliged to provide a duration of continuity of service under the PSO regime in excess of one year.

(c) The Italian authorities must reassess the need to maintain a PSO on a route and the level of obligations imposed on each carrier as soon as a new carrier commences operations or gives notification of its intention to operate that route and, in any case, once a year.

(d) The Italian authorities must not prevent air carriers from providing a higher level of services on the routes than the minimum requirements provided for by the PSOs with regard to frequency and capacity.

(e) Air carriers must not be obliged to offer preferential fares to persons born in Sardinia but not resident there.

(f) The Italian authorities may not make the right to provide services on a route between two cities subject to an obligation to operate on another route between two cities.

2. The Italian Republic must notify the Commission of the measures taken to implement this Decision by 1 August 2007 at the latest.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 23 April 2007.

For the Commission
Jacques BARROT
Vice-President