COUNCIL REGULATION (EEC) No 2343/90

of 24 July 1990

on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 84 (2) thereof,

Having regard to the proposal from the Commission (1),

Having regard to the opinion of the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas it is important to adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992 as provided for in Article 8a of the Treaty; whereas the internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured;

Whereas Decision 87/602/EEC (4) made a first step towards the liberalization in respect of sharing of passenger capacity and access to the market, necessary to achieve the internal market in air transport; whereas the Council agreed to take further measures of liberalization at the end of a three-year initial period;

Whereas it is necessary to implement principles governing relations between States of registration and air carriers licensed in their territory by 1 July 1992 on the basis of common specifications and criteria;

Whereas arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom in a joint declaration by the Ministers of Foreign Affairs of the two countries, and such arrangements have yet to come into operation;

Whereas the development of the air traffic system in the Greek Islands and in the Atlantic Islands comprising the autonomous region of the Azores is at present inadequate and for this reason airports situated on these islands should be temporarily exempted from the application of this Regulation;

Whereas the infrastructure at Porto airport is still being expanded to enable it to cope with the growth in scheduled services; whereas, consequently, that airport should be exempted temporarily from the application of this Regulation until the expansion of this infrastructure is completed;

Whereas it is necessary to make special provision, under limited circumstances, for air services on new routes between regional airports and for public service obligations necessary for the maintenance of services to certain regional airports;

Whereas increased market access will stimulate the development of the Community air transport sector and give rise to improved services for users; whereas as a consequence it is necessary to introduce more liberal provisions concerning multiple designation, third-, fourth- and fifth-freedom traffic rights;

Whereas, taking into account problems relating to airport infrastructure, navigational aids and availability of slots, it is necessary to include certain limitations concerning the use of traffic rights;

Whereas the exercise of traffic rights has to be consistent with rules relating to safety, protection of the environment, allocation of slots and conditions concerning airport access and has to be treated without discrimination on grounds of nationality;

Whereas bilateral rules concerning capacity shares are not compatible with the principles of the internal market which should be completed by 1993 in the air transport sector; whereas therefore the bilateral restrictions must be diminished gradually;

Whereas it is especially important to encourage the development of inter-regional services in order to develop the Community network and to contribute to a solution of the problem of congestion at certain large airports; whereas, therefore, it is appropriate to have more liberal rules with respect to capacity sharing these services;

Whereas in view of the relative importance for some Member States of non-scheduled traffic *vis-à-vis* scheduled traffic, it is necessary to take measures to alleviate its impact on the opportunities of carriers of Member States receiving such traffic; whereas the measures to be taken should not be aimed at limiting non-scheduled traffic or subjecting it to regulation;

(1) OJ No C 258, 11. 10. 1989, p. 6; and OJ No C 164, 5. 7. 1990, p. 11.
(2) OJ No C 96, 17. 4. 1990, p. 65.
(3) OJ No C 112, 7. 5. 1990, p. 17.
(4) OJ No L 374, 31. 12. 1987, p. 19.

Whereas, taking into account the competitive market situation, provision should be made to prevent unjustifiable economic effects on air carriers;

Whereas this Regulation replaces Directive 83/416/EEC (1), as last amended by Directive 89/463/EEC (2), and Decision 87/602/EEC; whereas it is therefore necessary to revoke that Directive and that Decision;

Whereas it is desirable that the Council adopt further measures of liberalization including cobotage in respect of market access and capacity sharing by 30 June 1992,

HAS ADOPTED THIS REGULATION:

Scope and definitions

Article 1

1. This Regulation concerns:

(a) access to the market for Community air carriers;

(b) the sharing of passenger capacity between the air carrier(s) licensed in one Member State and the air carrier(s) licensed in another Member State on scheduled air services between these States.

2. The application of this Regulation to the airport of Gibraltar is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.

3. Application of the provisions of this Regulation to Gibraltar airport shall be suspended until the arrangements in the joint declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 have come into operation. The Governments of Spain and the United Kingdom will so inform the Council on that date.

4. Airports in the Greek islands and in the Atlantic islands comprising the autonomous region of the Azores shall be exempted from the application of this Regulation until 30 June 1993. Unless otherwise decided by the Council, on a proposal of the Commission, this exemption shall apply for a further period of five years and may be continued for five years thereafter.

The airport of Porto shall be exempted from the application of this Regulation until 31 December 1992. This derogation shall be rescinded as soon as the Portuguese Republic judges that the economic conditions of the airport have improved.

To this end, the Portuguese Republic shall inform the Commission. The Commission shall communicate this information to the other Member States.

Article 2

For the purposes of this Regulation:

(a) air carrier means an air transport enterprise with a valid operating licence from a Member State to operate scheduled air services;

(b) a third-freedom traffic right means the right of an air carrier licensed in one State to put down, in the territory of another State, passengers, freight and mail taken up in the State in which it is licensed;

a fourth-freedom traffic right means the right of an air carrier licensed in one State to take on, in the territory of another State, passengers, freight and mail for off-loading in the State in which it is licensed;

a fifth-freedom traffic right means the right of an air carrier to undertake the air transport of passengers, freight and mail between two States other than the State in which it is licensed;

(c) States concerned means the Member States between which a scheduled air service is operated;

(d) State of registration means the Member State in which the licence mentioned in paragraph (a) is issued;

(e) Community air carrier means:

(i) an air carrier which has and continues to have its central administration and principal place of business in the Community, the majority of whose shares are and continue to be owned by Member States and/or nationals of Member States and which is and continues to be effectively controlled by such States or persons, or

(ii) an air carrier which, at the time of adoption of this Regulation, although it does not meet the definition set out in (i):

1. either has its central administration and principal place of business in the Community and has been providing scheduled or non-scheduled air services in the Community during the 12 months prior to adoption of this Regulation;

2. or has been providing scheduled air services between Member States on the basis of third- and fourth-freedom traffic rights during the 12 months prior to adoption of this Regulation.

The air carriers which meet the criteria set out in this point (ii) are listed in Annex I;

(1) OJ No L 237, 26. 8. 1983, p. 19.
(2) OJ No L 226, 3. 8. 1989, p. 14.

(f) scheduled air service means a series of flights each possessing all the following characteristics:

(i) it passes through the air space over the territory of more than one Member State;

(ii) it is performed by aircraft for the transport of passengers or passengers and cargo and/or mail for remuneration, in such a manner that on each flight seats are available for individual purchase by members of the public (either directly from the air carrier or from its authorized agents);

(iii) it is operated so as to serve traffic between the same two or more points, either:

1. according to a published timetable; or

2. with flights so regular or frequent that they constitute a recognizably systematic series;

(g) flight means a departure from a specified airport towards a specified destination airport;

(h) multiple designation on a country-pair basis means the designation by a State of registration of two or more of the air carriers licensed by it to operate scheduled air services betwen its territory and that of another Member State;

(i) multiple designation on a city-pair basis means the designation by a State of registration of two or more of the air carriers licensed by it to operate a scheduled air service between an airport or airport system in its territory and an airport or airport system in the territory of another Member State;

(j) regional airport means any airport other than one listed in Annex II as a category 1 airport;

(k) airport system means two or more airports grouped together as serving the same city, as indicated in Annex II;

(l) capacity shall be expressed as the number of seats offered to the general public on a scheduled air service over a given period;

(m) capacity share means the share of a Member State expressed as a percentage of the total capacity calculated according to Article 11 in a bilateral relationship with another Member State excluding any capacity provided by fifth-freedom services;

(n) public service obligation means any obligation imposed upon an air carrier to take, in respect of any route which it is licensed to operate by a Member State, all necessary measures to ensure the provision of a service satisfying fixed standards of continuity, regularity and capacity which standards the carrier would not assume if it were solely considering its commercial interest.

Relations between the States of registration and their air carriers

Article 3

1. This Regulation shall not affect the relationship between a Member State and air carriers licensed by that State regarding market access and capacity sharing.

2. The Council shall adopt, for implementation not later than 1 July 1992 on the basis of a Commission proposal concerning common specifications and criteria, to be submitted not later than 31 May 1991, rules governing the licensing of air carriers and route licensing.

Third- and fourth-freedom traffic rights

Article 4

Subject to this Regulation, Community air carriers shall be permitted to exercise third- and fourth-freedom air services between airports or airport systems in one Member State and airports or airport systems in another Member State when these airports or airport systems are open for traffic between Member States or for international services.

Relations between a Member State and air carriers of other Member States

Article 5

1. Subject to Article 6, a Member State shall authorize air carriers licensed in another Member State, which have been authorized by their State of registration, to

— exercise third- and fourth-freedom traffic rights as provided for in Article 4,

— use, within the Community, the same flight number for combined third- and fourth-freedom services.

2. Where an air carrier of one Member State has been licensed in accordance with this Article to operate a scheduled air service, the State of registration of that air carrier shall raise no objection to an application for the introduction of a scheduled air service on the same route by an air carrier of the other State concerned.

3. (a) A Member State, following consultations with other States concerned, may impose a public service obligation in respect of air services to a regional

airport in its territory on a route which is 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 air services satisfying fixed standards of continuity, regularity, capacity and pricing which standards carriers would not assume if they were solely considering their commercial interest.

(b) The adequacy of air transport services shall be assessed having regard to:

(i) the public interest;

(ii) the possibility of having recourse to other forms of transport and the ability of such forms to meet the transport needs under consideration;

(iii) the air fares and conditions which can be quoted to users.

(c) Notwithstanding paragraph 2, a Member State is not obliged to authorize more than one carrier to serve a route to which a public service obligation applies, provided the right to operate that service is offered by public tender for a period of up to three years to any air carrier with an operating licence issued in the States concerned and to any Community air carrier which, in accordance with Article 8, is entitled to exercise fifth-freedom traffic rights on the route. The submissions made by air carriers shall be communicated to the other States concerned and to the Commission.

(d) Subparagraph (c) shall not apply in any case in which the other Member State concerned proposes a satisfactory alternative means of fulfilling the same public service obligation.

(e) This paragraph shall not apply to routes with capacity of more than 30 000 seats per year.

4. Notwithstanding paragraph 2, a Member State, which has authorized one of the air carriers licensed by it to operate a passenger service on a new route between regional airports with aircraft of no more than 80 seats, is not obliged to authorize a reciprocal air service for a period of two years, unless it is operated with aircraft of no more than 80 seats, or it is part of a service operated under the terms of Article 7 in which not more than 80 seats are available for sale between the two regional airports in question, on each flight.

5. At the request of any Member State which considers that the development of a route is being unduly restricted by the terms of paragraph 3 or 4, or on its own initiative or where disagreement arises regarding the application of paragraph 3, the Commission shall carry out an investigation and, on the basis of all relevant factors, shall take a decision within two months of commencing its investigation on whether paragraph 3 or 4 should continue to apply in respect of the route concerned.

6. The Commission shall communicate its decision to the Council and to the Member States. Any Member State may refer the Commission's decision to the Council within a time limit of one month. The Council, acting by a qualified majority, may take a different decision within a period of one month.

Multiple designation

Article 6

1. A Member State shall accept multiple designation on a country-pair basis by another Member State.

2. It shall also accept multiple designation on a city-pair basis:

— from 1 January 1991, on routes on which more than 140 000 passengers were carried in the preceding year, or on which there are more than 800 return flights per annum,

— from 1 January 1992, on routes on which more than 100 000 passengers were carried in the preceding year or on which there are more than 600 return flights per annum.

Combination of points

Article 7

In operating scheduled air services to or from two or more points in another Member State or States other than its State of registration, a Community air carrier shall be permitted by the States concerned to combine scheduled air services and use the same flight number. Traffic rights between the combined points may be exercised according to Article 8.

Fifth-freedom rights

Article 8

1. Community air carriers shall, in accordance with this Article, be permitted to exercise fifth-freedom traffic rights between combined points in two different Member States on the following conditions:

(a) the traffic rights are exercised on a service which constitutes and is scheduled as an extension of a service from, or as a preliminary of a service to, their State of registration;

(b) the air carrier cannot use, for the fifth-freedom service more than 50 % of its seasonal seat capacity on the same third- and fourth-freedom service of which the fifth-freedom service constitutes the extension or the preliminary.

2. (a) The air carrier may, for a fifth-freedom service, use an aircraft which is different to but not larger than the aircraft which it uses for the third- and fourth-freedom service of which the fifth-freedom service is an extension or a preliminary.

(b) When more than one fifth-freedom service is operated as an extension of or as a preliminary to a third- or fourth-freedom service, the capacity provision in paragraph 1 (b) shall represent the aggregate seat capacity available for the carriage of fifth-freedom passengers on those fifth-freedom services.

3. An air carrier operating a fifth-freedom service in accordance with this Article shall furnish on request to the Member States involved all relevant information concerning:

(a) the seasonal seat capacity on the third- and fourth-freedom service of which the fifth-freedom service constitutes the extension or the preliminary; and

(b) in the case of fifth-freedom services to which Article 8 (2) (b) applies, the seasonal capacity utilized on each service.

Conditions for the exercise of traffic rights

Article 9

This Regulation shall not affect a Member States' right to regulate without discrimination on grounds of nationality, the distribution of traffic between the airports within an airport system.

Article 10

1. Notwithstanding Article 5 (2), the exercise of traffic rights is subject to published Community, national, regional or local rules relating to safety, the protection of the environment and the allocation of slots, and to the following conditions:

(a) the airport or airport system concerned must have sufficient facilities to accommodate the service;

(b) navigational aids must be sufficient to accommodate the service.

2. When the conditions in paragraph 1 are not met, a Member State may, without discrimination on grounds of nationality, impose conditions on, limit or refuse the exercise of those traffic rights. Before taking such a measure, a Member State shall inform the Commission and provide it with all the necessary elements of information.

3. Without prejudice to Article 9 and except with the agreement of the other Member State(s) concerned, a Member State shall not authorize an air carrier:

(a) to establish a new service; or

(b) to increase the frequency of an existing service

between a specific airport in its territory and another Member State for such time as an air carrier licensed by that other Member State is not permitted, on the basis of paragraphs 1 and 2, to establish a new service or to increase frequencies on an existing service to the airport in question, pending the adoption by the Council and the coming into force of a Regulation on a code of conduct on slot allocation based on the general principle of non-discrimination on the grounds of nationality.

4. At the request of any Member State, the Commission shall examine the application of paragraph 2 and/or paragraph 3 in any particular case and within one month decide whether the Member State may continue to apply the measure.

5. The Commission shall communicate its decision to the Council and to the Member States. Any Member State may refer the Commission's decision to the Council within a time limit of one month. The Council, acting by a qualified majority, may take a different decision within a period of one month.

Shares of capacity

Article 11

1. From 1 November 1990, a Member State shall permit another Member State to increase its capacity share for any season by 7,5 percentage points compared to the situation during the previous corresponding season, it being understood that each Member State may in any event claim a capacity share of 60 %.

2. The Council shall adopt, for implementation not later than 1 January 1993, on the basis of a Commission proposal

to be submitted by 31 December 1991, provisions to abolish capacity sharing restrictions between Member States.

3. Capacity sharing limitations shall not apply to a service between regional airports irrespective of aircraft capacity.

4. In applying paragraph 1, unilateral cut-backs in capacity shall not be taken into account. In such cases, the basis for the calculation of capacity shares shall be the capacity offered in the previous corresponding seasons by the air carrier(s) of the Member State which has (have) reduced its (their) capacity.

Article 12

1. At the request of any Member State for which the application of Article 11 has led to serious financial damage for the air carrier(s) licensed by that Member State, the Commission shall carry out a review and, on the basis of all relevant factors, including the market situation, the financial position of the air carrier(s) concerned and the capacity utilization achieved, shall take a decision on whether the capacity sharing on the routes to or from that State should be stabilized for a limited period.

2. At the request of a Member State whose scheduled air services are exposed to substantial competition from non-scheduled services and where a situation exists whereby the opportunities of carriers of that Member State to effectively compete in the market are unduly affected, the Commission, having examined all relevant factors, including the market situation and the capacity utilization achieved, and having consulted the other Member States concerned shall, within two months of having received the request, decide whether the 7,5 percentage points referred to in Article 11 (1) shall be reduced for that bilateral relationship.

3. The Commission shall communicate its decision to the Council and to the Member States. Any Member State may refer the Commission's decision to the Council within a time limit of one month. The Council, acting by qualified majority, may take a different decision within a period of one month.

General provisions

Article 13

1. This Regulation shall not prevent Member States from concluding between them arrangements which are more flexible than the provisions of Articles 6, 8 and 11 or from maintaining such arrangements in force.

2. The provisions of this Regulation shall not be used to make existing market access or capacity arrangements more restrictive.

Article 14

1. The Commission shall publish a report on the implementation of this Regulation every two years and for the first time not later than 31 May 1992.

2. Member States and the Commission shall cooperate in implementing this Regulation, particularly as regards collection of information for the report referred to in paragraph 1.

3. Confidential information obtained in application of this Regulation shall be covered by professional secrecy.

Article 15

The Council shall decide on the revision of this Regulation by 30 June 1992 at the latest, on the basis of a Commission proposal to be submitted by 31 May 1991.

Article 16

Decision 87/602/EEC and Directive 83/416/EEC are hereby revoked.

Article 17

This Regulation shall enter into force on 1 November 1990.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 24 July 1990.

For the Council

The President

C. MANNINO

ANNEX I

Air carriers referred to in Article 2 (e) (ii)

The following air carriers meet the criteria referred to in Article 2 (e) (ii) as long as they are recognized as national carriers by the Member State which so recognizes them at the time of the adoption of this Regulation:

— Scandinavian Airlines System,

— Britannia Airways,

— Monarch Airlines.

ANNEX II

List of category 1 airports

BELGIUM:	Brussels-Zaventem
DENMARK:	Copenhagen-Kastrup/Roskilde
FEDERAL REPUBLIC OF GERMANY:	Frankfurt-Rhein-Main, Düsseldorf-Lohausen, Munich-Riem
SPAIN:	Palma-Mallorca, Madrid-Barajas, Malaga, Las Palmas
GREECE:	Athens-Hellinikon, Salonica-Micra
FRANCE:	Paris-Charles De Gaulle/Orly
IRELAND:	Dublin
ITALY:	Rome-Fiumicino/Ciampino, Milan-Linate/Malpensa
NETHERLANDS:	Amsterdam-Schiphol
PORTUGAL:	Lisbon, Faro
UNITED KINGDOM:	London-Heathrow/Gatwick/Stansted, Luton