COMMISSION DECISION
of 21 December 2000
on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case TREN/AMA/12/00 — Italian traffic distribution rules for the airport system of Milan)
(notified under document number C(2000) 4121)
(Only the Italian text is authentic)
(Text with EEA relevance)
(2001/163/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 pursuant to Article 11 of that Regulation,

Whereas:

BACKGROUND

I

(1) The airport system of Milan comprises the airports of Linate, Malpensa and Orio al Serio (Bergamo). Up to 1998 technical and economic reasons had prevented any of the three Milan airports from becoming a major hub airport for national, international and intercontinental flights. Most of the intra-Community traffic was concentrated at Linate airport. As a result the available airport capacity was used inefficiently, Linate airport being overused and Malpensa underused.

(2) To meet the needs of the city of Milan and northern Italy, the Italian authorities decided to reorganise Milan’s airport system so as to make Malpensa the main airport of the system and provide adequate airport capacity for the future. That objective was to be achieved by enlarging and upgrading Malpensa airport, and the project was given the name Malpensa 2000. This project was one of the 14 priority projects of the Trans-European Transport Network under Decision No 1692/96/EC of the European Parliament and of the Council (2). The original plan was to turn Malpensa into a major airport, and it was later decided to turn it into an effective hub as well. To achieve this there has to be a large volume of traffic at Malpensa in order to maintain a critical mass between the waves of aircraft arrivals and departures, and this inevitably means transferring traffic from Linate airport to Malpensa. However, such a transfer could not be left to market forces alone, since passengers generally prefer to use Linate because it is closer to Milan city centre. The Italian authorities therefore decided to adopt mandatory traffic distribution rules so as to secure the transfer of traffic from Linate to Malpensa needed to achieve this objective.

II

(3) Accordingly, by Decrees No 46-T of 5 July 1996 (hereinafter referred to as ‘Decree of 5 July 1996’) and No 70-T of 13 October 1997 (hereinafter referred to as ‘Decree of 13 October 1997’) the Italian authorities provided that from 25 October 1998 onwards all air services to and from Milan would be operated from either Malpensa airport or Orio al Serio airport, apart from general aviation services and flights on routes serving Milan in which total passenger numbers amounted to at least 2 million during the previous year or reached an annual average of 1.75 million over the previous three years. In practice, the only route reaching those thresholds was Milan-Rome, so it was no longer possible to allow any other scheduled air services at Linate.

(4) The Commission decided on 16 September 1998 that Italy could not apply the traffic distribution rules in the Decrees of 5 July 1996 and 13 October 1997 (3). In its Decision, after recalling among other things the general background to the case, the Commission said that the rules would in practice produce discriminatory effects favouring Alitalia, since:

‘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

It also considered that the rules at issue were incompatible with the principle of proportionality inasmuch as:

'a fully viable and operational hub does not necessarily presuppose the transfer of 11.7 million passengers on 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' (recital 50).

The conclusion of the Commission Decision was as follows:

'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.

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.

Nor is this Decision incompatible with the fact that the Malpensa 2000 project is 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' (recitals 53, 54 and 55).

(5) On 9 October 1998, taking into account the Commission Decision of 16 September 1998 the Italian Minister for Transport and Shipping adopted a Decree No 101-T (hereinafter referred to as 'Decree of 9 October 1998') laying down transitional measures regarding the distribution of traffic between the airports forming the Milan airport system. This Decree provided that:

— Malpensa 2000 would open on 25 October 1998,
— the Decree of 5 July 1996 concerning the distribution of traffic would not enter fully into force until after the work on improving the access infrastructures to Malpensa airport had been completed,
— from 25 October 1998 up to the date of completion of the work, the Community carriers at Linate would be able to continue operating there 34% of the flights they had operated in the previous season with a guaranteed minimum of 18 flights per week, provided that they used aircraft of similar capacity on the same routes,
— scheduled and non-scheduled intercontinental, international, intra-Community, national and regional services could be operated at Malpensa and Orio al Serio airports.

(6) The Decree of 9 October 1998 has entered into force and has been put into effect.

(7) The original plan was for the work on improving the access infrastructure to be completed by the end of 2000 and that was to be the end of the transitional period. However, considering that the access infrastructure for Malpensa airport was about to be completed, the Italian authorities decided on 12 October 1999 to transfer the flights concerned from Linate to Malpensa in two stages: the first was to take place on 15 December 1999 and concerned 236 weekly flights; the second, on 15 January 2000, concerned the 236 weekly flights remaining.

(8) On 25 November 1999 the Italian Minister for the Environment issued a Decree (hereinafter referred to as 'Decree of 25 November 1999') on assessment of the impact of Malpensa airport on the environment. From this Decree it can be seen in particular that the noise standards are not being complied with in the municipalities adjacent to the airport and that this situation would be exacerbated by the increased traffic caused by the proposed transfers of flights. Accordingly the Decree provides for various measures to reduce noise pollution, such as traffic restrictions, new procedures for runway use or prohibiting the use of certain types of aircraft. At the same time, the Italian authorities, in line with the wishes of the city of Milan and the Lombardy region, expressed an interest in Linate airport acting as a city-airport in the future, which would eventually mean bringing back flights from Malpensa to Linate.
(9) On 13 December 1999 the Italian Prime Minister adopted a Decree (hereinafter referred to as ‘Decree of 13 December 1999’), expressly referring to the Decree of 25 November 1999, in which on the one hand he confirmed the transfer of flights planned to take place as from 15 December 1999 and on the other hand he decided to implement a set of measures to reduce the environmental pollution caused by Malpensa airport. These measures are described in detail in Annexes A (Immediate measures regarding operating conditions), B (Immediate reduction and control measures), C (Later reduction and control measures) and D (Medium-term measures) to the Decree.

(10) On 14 December 1999 the Italian Government decided to suspend the transfer operations sine die.

II

(11) On 3 March 2000, the Italian Minister for Transport and Shipping adopted a Decree (hereinafter called ‘Decree of 3 March 2000’) determining the distribution of traffic between the airports belonging to the airport system of Milan.

(12) In the Decree, the Minister then considers that ‘the [Italian] Council of Ministers, at the same meeting on 25 February 2000, reaffirmed the strategic importance of Malpensa’s hub infrastructure’ and that ‘at the aforesaid meeting of the [Italian] Council of Ministers on 25 February 2000, and during the conclusion of the aforesaid programme framework agreement, the requirements set out in points A, B and C of the Annex to the aforementioned Prime Ministerial Decree of 13 December 1999 were endorsed’. He also considers that it is ‘expedient to realise the full development potential of the Milan Malpensa hub, and to identify Milan Linate as an infrastructure for point-to-point connections, by virtue of which Ministerial Decree No 46-T, which currently governs the distribution of traffic between the airports belonging to Milan’s airport system, needs to be supplemented and amended’.

(13) The operative provisions of the Decree of 3 March 2000 therefore read as follows:

‘Article 1

1. The provisions of this Decree on the distribution of air traffic within the airport system of Milan, following the endorsement of the requirements set out in points A, B and C of the Annex to the Prime Ministerial Decree of 13 December 1999 referred to in the preamble, shall be applicable as from 20 April 2000.

Article 2

1. Intercontinental, international, intra-Community, national and regional connections, both scheduled and non-scheduled, may be operated from the airports of Malpensa, Linate and Bergamo Orio al Serio, which belong to Milan’s airport system, within the limits of those airports’ individual operating capacity and in accordance with the provisions of Articles 3 and 4.

Article 3

1. Connections may be operated from Milan Malpensa taking into account the airport’s operating arrangements as indicated in the preamble.

Article 4

1. From Linate, Community carriers may, using narrow-body (single-aisle) aircraft, operate point-to-point scheduled connections with other airports in the European Union identified on the basis of passenger traffic volumes, both arriving and departing, registered within Milan’s airport system in the calendar year 1999, and not exceeding the limits set out below:

   (a) one daily return service per carrier, using two time slots, to airport systems or individual airports with passenger traffic exceeding 350 000 units and not exceeding 700 000 units;

   (b) two daily return services per carrier, using four time slots, to airport systems or individual airports with passenger traffic exceeding 700 000 units and not exceeding 1 400 000 units;

   (c) three daily return services per carrier, using six time slots, to airport systems or individual airports with passenger traffic exceeding 1 400 000 units and not exceeding 2 800 000 units;

   (d) no limit for connections to airport systems or individual airports with passenger traffic in excess of 2 800 000 units.

2. From Linate, Community carriers may, with the arrangements set out in paragraph 1, operate a daily return service using two time slots to airport systems or individual airports located in “Objective 1” regions which in the course of the calendar year 1999 registered passenger traffic of fewer than 350 000 units in Milan’s airport system.

3. Linate airport may be used for general aviation.’

(14) It is important to point out that the maximum handling capacity of the Milan region air traffic control centre at the time that the Decree was adopted amounted to 83 movements per hour for Malpensa and Linate airports together.
On 16 March 2000 the carriers Air France, Aer Lingus, British Airways, Finnair, Iberia, Lufthansa, Maersk Air, Olympic Airways, Sabena, Scandinavian Airlines System (SAS) and TAP Air Portugal (hereinafter referred to as ‘the carriers’) submitted to the Commission a joint request asking it to:

— oppose the implementation of the Decree of 3 March 2000 by the Italian authorities,

— declare that all European air carriers must be allowed to operate at Linate airport without restriction,

— in the alternative, require the Italian authorities to apply traffic distribution rules guaranteeing each European carrier at least the right to operate at Linate airport, the possibility of carrying out a sufficient number of flights there to be able to pursue a profitable economic activity, and the freedom to choose those routes on which it wishes to operate the number of flights allowed.

In support of their complaint the carriers maintain that the Decree of 3 March 2000 infringes both Article 8(1) of Regulation (EEC) No 2408/92 and the Decision of 15 July 1997 by which the Commission authorised the recapitalisation of Alitalia (4).

As regards, first, Regulation (EEC) No 2408/92, the carriers assert that the principles of proportionality and non-discrimination are being ignored by the Italian authorities, claiming that the proportionality principle is being disregarded primarily due to Malpensa airport’s inability to absorb all of the traffic assigned to it by the Decree of 3 March 2000. In short, they emphasise that:

— it is still unknown what impact the environmental restrictions introduced by the Decree of 25 November 1999 and the Decree of 13 December 1999 will have on the present and future capacity of Malpensa airport,

— even before the Decree of 25 November 1999 imposed environmental restrictions, the Italian Association of Air Traffic Controllers (LICTA) had put the true capacity of Malpensa airport at 58 movements per hour, taking into account safety restrictions. The ‘Ente Nazionale per l’Aviazione Civile’ (ENAC) and the ‘Ente Nazionale di Assistenza al Volo’ (ENAV), themselves bodies belonging to the Italian administration, also stated that a capacity of 70 movements per hour depended on a number of conditions being met,

— besides the impact of environmental measures, there are other factors which raise doubts as to Malpensa airport’s ability to absorb future traffic volumes. For example, the airport does not have enough boarding gates to deal with peak-time departures and arrivals. Also, the number of aircraft parking areas available is low compared with the airport’s claimed capacity of 70 movements per hour. In addition, most of the non-Community carriers previously assigned to Malpensa Terminal 2 to prevent congestion in Terminal 1 have been reassigned to Terminal 1, which can only add to the congestion.

The carriers conclude that the measures restricting the freedom to provide air transport services laid down in the Decree of 3 March 2000 are not necessary to attain the Decree’s objective, i.e. ‘to realise the full development potential of the Milan Malpensa hub’, for one thing because this potential itself is uncertain and disputed and for another because Malpensa airport is already being operated to its maximum capacity.

The carriers claim that the principle of proportionality is being disregarded secondly in that the objective of promoting Malpensa airport clashes with the criteria set out in the Decree of 3 March 2000. The Decree limits the number of flights operated by each carrier on a particular route, but not the total number of flights on the route. The Decree is therefore unlikely to change the total volume of traffic at Linate airport, as is clear from the flood of requests for slots at that airport. The carriers add that in any case the restrictions on operating at Linate airport, in particular the limit to one flight per day and per carrier on certain routes and to use of single-aisle aircraft, are disproportionate to the objective since they are tantamount to a ban on non-Italian companies from operating air services profitably at Linate. The objective could be achieved by rules which take better account of carriers’ rights.

With regard to the principle of non-discrimination, the carriers maintain that the disputed distribution rules are designed to allow Alitalia to continue operating the connection between Linate airport and its Fiumicino hub without restriction.

As regards, secondly, the Decision of 15 July 1997, the carriers recall that the Decree of 3 March 2000, in granting Alitalia priority at Linate airport, infringes the provisions of that Decision whereby Alitalia may not be given priority in any way over other Community carriers, in particular as regards traffic rights, slot allocation, ground-handling assistance and access to airport facilities.

The Commission formally acknowledged receipt of this joint request on 29 March 2000.

(*) OJ L 322, 25.11.1997, p. 44.
On 16 March 2000, Austrian Airlines submitted a separate request to the Commission asking it to:

- declare that the rules of traffic distribution between Milan's airports as laid down in the Decree of 3 March 2000 are incompatible with Community law, in particular with Regulation (EEC) No 2408/92,

- decide that the Italian authorities cannot apply these rules in respect of Austrian Airlines and must adopt other rules compatible with Community law,

- order the Italian authorities not to apply these rules in respect of Austrian Airlines at any rate until the Commission had pronounced on the merits of its complaint.

In support of its request, Austrian Airlines claims that the principles of non-discrimination and proportionality are being flouted by the Italian authorities.

As regards discrimination first of all, Austrian Airlines asserts that the rules of distribution laid down in the Decree of 3 March 2000, based on annual passenger thresholds for each destination, actually introduce discrimination between Community carriers. Thus, due to the minimum threshold of 350,000 passengers annually and although it has operated at Linate airport for more than 40 years, Austrian Airlines, together with the carrier SAS, will be the only Community company which can no longer connect Linate to one of its hubs. This is discrimination on grounds of identity of the carrier.

Then as regards proportionality, Austrian Airlines maintains that the thresholds laid down by the Decree of 3 March 2000 lack objectivity and are disproportionate. For example, connections with more than 2.8 million passengers annually can be operated without any restriction on the numbers of flights, with no flights at all allowed on routes with less than 350,000 passengers a year. The criterion favouring Objective 1 regions also lacks objectivity. The disproportionality is aggravated by the fact that the restrictions are fixed by carrier so that the number of flights on a route is potentially higher the more carriers there are present. Incidentally, it is questionable whether, in the light of the environmental measures provided for in the Decrees of 25 November and 13 December 1999, Malpensa airport has sufficient capacity to receive the additional traffic. The proposed reduction in the number of slots available at Linate will cause even more carriers to transfer their operations to Malpensa. In reality there is sufficient room at Linate airport for the traffic to be distributed fairly among all the carriers.

By letter dated 20 April 2000, the German authorities requested the Commission pursuant to Article 8(3) of Regulation (EEC) No 2408/92 to define its position with regard to the traffic distribution rules laid down in the Decree of 3 March 2000.

The Austrian, Danish and Swedish authorities addressed similar requests to the Commission on 26 April, 9 May and 11 May 2000 respectively. By letter dated 18 May 2000, received by the Commission on the 26 May 2000, the Norwegian authorities stated that they shared the concerns of the Danish and Swedish authorities.

Finally, on 12 July 2000 the Belgian authorities asked the Commission to comment as soon as possible on the complaints lodged by the airline companies.

As part of its examination of this case pursuant to the procedure laid down in Article 8(3) of Regulation (EEC) No 2408/92 and in order to safeguard the rights of defence, on 21 March 2000 the Commission sent the Italian authorities the complaints lodged by the carriers on 16 March 2000, asking them for their comments. For the same purpose, on 14 June 2000 the Commission sent the Italian authorities the requests made by Germany, Austria, Sweden and Norway.
By letter dated 5 April 2000, the Italian authorities sent the Commission their comments on the complaints lodged by the carriers on 16 March 2000. These comments include the following:

— within the framework of its powers pursuant to Article 8(3) of Regulation (EEC) No 2408/92, the Commission may not penalise a failure to comply with the principle of proportionality which is not referred to in paragraph 1 of that Article,

— the arguments developed by the carriers to call into question the capacity of Malpensa airport are unfounded. Thus:

— the model devised for utilisation of Malpensa airport is flexible enough to allow that airport to offer sufficient capacity to cope with the traffic envisaged by the Decree of 3 March 2000. The model may also be gradually improved, especially during the period from 26 March to 20 April 2000,

— the text itself of the Decree of 3 March 2000 indicates that the Decree was adopted after an initial positive examination of the impact of the environmental measures on the capacity of the airport. As regards noise in particular, a powerful mathematical forecast model was prepared,

— introducing the non-specialised use of runways and changing the take-off paths do not adversely affect the capacity of Malpensa airport. There are restrictions on using reverse thrust at most European airports,

— with the new equipment, especially the radar, and the new procedures applicable at Malpensa it will be possible to achieve the target capacity for utilisation of the airport,

— only an insignificant number of flights are affected by the curfew measure imposed at Malpensa and the curfew has no effect on the capacity of the airport,

— the capacity of an airport has to be assessed over a whole day (24 hours) and not by referring to its peak-time capacity. The transfer of certain non-Community companies from Terminal 1 to Terminal 2 does not make the situation any worse since it takes account of the fact that the Decree of 3 March 2000 keeps more traffic at Linate than that of 5 July 1996.

According to the Italian authorities, the principle of proportionality has not been disregarded, especially since there can be no doubt that the traffic distribution measure at issue is indispensable to the development of the Malpensa hub and that it is more favourable to all the air carriers than that previously envisaged by the Decree of 5 July 1996.

— In its Decision of 16 December 1998 concerning the Decree of 5 July 1996, the Commission considered the principle of proportionality to have been infringed solely because the road and rail access infrastructures to the airport had not been completed. This matter has now been resolved and the limitations to market access arising out of the Decree of 3 March 2000 are less severe than those imposed by the Decree of 5 July 1996. The Commission has, incidentally, never criticised the distribution criteria based on traffic thresholds. In fact, the distribution rules in the Decree of 3 March 2000 ensure that an optimum balance is kept between the imperative of developing the Malpensa hub and better utilisation of Linate airport for all European carriers.

— The traffic distribution measure at issue here is not discriminatory at all since the Community carriers enjoy better access to Linate airport than with the previous distribution rules, the work on improving the airport’s road and rail access infrastructures has been completed and Alitalia has made Malpensa airport the centre of gravity of its international and intercontinental operations.

— The Commission Decision of 15 July 1997 is not infringed by the distribution rules laid down in the Decree of 3 March 2000 since this Decree does not deal with slot allocation and the Commission has never disputed distribution criteria based on passenger traffic thresholds.

To enable it to decide on this case in full knowledge of the facts, on 13 June 2000 the Commission sought the assistance of an expert, having previously verified his independence in respect of all the parties to the case. The expert’s brief was on the one hand to determine the capacity of Malpensa airport taking into account the impact of the environmental measures resulting from the Decree of 13 December 1999, and on the other hand to ascertain whether the airport capacity so determined was compatible with the likely traffic growth. The expert submitted his report on 26 July 2000. The report basically shows that:

— several of the environmental measures laid down in the Decree of 13 December 1999, such as reducing the take-off thrust of aircraft, restricting the use of reverse thrust of engines and using runways alternately, are not or only partially being complied with in practice,
— reducing the take-off thrust of aircraft, though it may have safety implications, and excluding Chapter 3 aircraft have no effect whatever on the capacity of the airport,

— when no restrictions are placed on it by the environmental measures, in normal weather the capacity of Malpensa airport does not exceed 65 movements per hour during a three-hour period. A threshold of 70 movements per hour may be reached for one hour on one or two days during the summer peak period,

— the theoretical maximum capacity of Linate airport is 32 slots per hour and 8 million passengers annually considering the amount of space available at the airport. Capacity there is currently restricted to 13 movements per hour, due partly to the restrictions affecting the Milan region air traffic control centre and partly to the limited capacity of the terminal building.

— due to the range of choice and the cost of using the terrestrial access infrastructures to Malpensa airport, the location of this airport in relation to the centre of Milan can no longer be considered a handicap or a reason why users should prefer Linate airport,

— the capacity of the Milan region air traffic control centre should increase from 83 to 90/95 movements per hour in the next 12 months.

(35) In order to safeguard the rights of the defence (5), on 27 July 2000 the consultant’s report was sent to Italy. Those Member States which had requested the Commission to take action and the carriers that had lodged a complaint also received a copy.

(36) By letter dated 4 August 2000, the Italian authorities sent the Commission their comments on the expert’s report. These can be summarised as follows:

— in spite of the anti-noise measures taken at Malpensa airport, the delays recorded there are still compatible with those at the other Community airports,

— the present traffic at Malpensa is compatible with the minimum acoustic impact scenario as presented to the Italian Council of Ministers on 25 February 2000. The airport utilisation model is constantly changing to maintain an optimum balance between maximum capacity of the airport and compliance with the anti-noise measures. Other major airports use an alternating runway utilisation model like that at Malpensa. Neither the prohibition of night flights nor the reduction of take-off thrust is affecting airport capacity,

— works to make possible better utilisation of the Malpensa airport infrastructure, in particular the terminal building and air-side infrastructures, are planned at Malpensa over the next four years.

(37) By letter dated 31 August 2000, the carriers Air France, Aer Lingus, British Airways, Finnair, Iberia, Lufthansa, Maersk Air, Olympic Airways, Sabena, Scandinavian Airlines System (SAS) and TAP Air Portugal sent the Commission their comments on the expert’s report. On 14 September 2000, Austrian Airlines also communicated to the Commission its comments on the expert’s report.

IX

(38) After examining the preceding points and following contact between the Commission and the Italian authorities, the latter informed the Commission, by letter of 4 December 2000, of their intention to instruct the ENAC to increase the capacity at Linate airport to 18 movements per hour, given the increase in processing capacity of the air traffic control centre for the Milan area. The additional frequencies allocated as a result can be subject of code-sharing agreements. In that same letter, the Italian authorities also indicated that they were about to adopt a new decree on air traffic distribution between the airports that make up the Milan airport system. This new decree will amend the decree of 3 March 2000 as follows:

— all European capitals will now have at least one return trip connection per day with Linate,

— Community airports with annual traffic of more than 40 million passengers in 1999 will be connected to Linate by at least two return trips per day,

— by the end of 2001 Italy will check the functioning of the traffic distribution rules within the Milan airport system.

LEGAL ASSESSMENT

X

(39) As regards the distribution of traffic between airports in an airport system, the Commission holds the powers conferred upon 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 1 and 2 and, within one month of receipt of a request and after consulting the Committee referred to in Article 11, decide whether the Member State may continue to apply the measure …’.

For the purpose of applying these provisions, the letters addressed to the Commission on 20 April, 26 April, 9 May, 11 May and 12 July 2000 by the German, Austrian, Belgian, Danish and Swedish authorities have to be considered as requests from Member States. Accordingly, the Commission is obliged to examine these requests and to decide whether Italy can be authorised to continue applying the Decree of 3 March 2000 regulating the distribution of traffic within the airport system of Milan.

Moreover, irrespective of the requests submitted by these five Member States, the Commission considers it necessary to use those powers for the same purposes. Where the Commission does so on its own initiative, as explicitly provided for in Article 8(3) of Regulation (EEC) No 2408/92, its examination is no way limited to the requests of the carriers.

Because Regulation (EEC) No 2408/92 was brought within the scope of the EEA Agreement with effect from 1 July 1994 (45), the Commission's decision must cover all the countries of the European Economic Area. Norway has in any event approached the Commission.

The principle of freedom to operate air services within the Community provided for in Article 3(1) of Regulation (EEC) No 2408/92 generally means the right of Community air carriers to choose between the different airports of an airport system. Member States may, however, restrict the abovementioned freedom on the basis of Article 8(1) of Regulation (EEC) No 2408/92, which reads as follows:

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

As the Commission has already indicated in Decisions 98/710/EC, 95/259/EC and 94/290/EC (46) any restriction adopted under that provision must comply with the principle of non-discrimination and the general principles on the freedom to provide services.

In this context, the Commission has already had occasion to define the scope of Article 8(1) of Regulation (EEC) No 2408/92, stating in its Decision 95/259/EC that:

By allowing Member States to distribute traffic between the airports of an airport system, Article 8(1) of Regulation (EEC) No 2408/92 recognises in principle the legitimacy of an active airport planning policy which complies with the general principles of Community law [...] Such a planning policy may have regard to a large range of factors considered by the competent authorities to have priority. The concrete measures which must be taken for the implementation of airport planning policy may also differ from one airport system to another. All those implementing measures will, if they are to be effective, restrict to some extent access to the individual airports of the system. It would be inconsistent with those considerations if the scope of Article 8(1) were determined in such a way as to exclude a priori the possibility of pursuing a specific airport policy for a given airport system. For example, a Member State may legitimately wish to promote the development of one airport of an airport system at the expense of the other airports located therein. In such a case, the imposition of restrictions on access to those other airports alone may constitute a reasonable means of pursuing that objective.'

The principle of non-discrimination as explicitly mentioned in Article 8(1) 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 on grounds of 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 air transport 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 prohibition of discrimination on grounds of the air carrier's identity, which was expressly referred to by the Court of First Instance of the European Communities in the judgment it delivered on 19 June 1997 (Air Inter v Commission) (47).

Consequently, for the purposes of verifying whether the traffic distribution rules laid down in the Decree of 3 March 2000 comply with Article 8(1) of Regulation (EEC) No 2408/92, it falls first and foremost to the Commission to assess their compatibility with the principle of non-discrimination and with the principle of proportionality.


(*) Case T-260/94 cited in footnote 5, paragraph 112.
The Commission considers that the criteria set out in Article 4 of the Decree of 3 March 2000, 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 and the intra-Community connections concerned are open to all Community carriers without restriction pursuant to Article 3(1) of Regulation (EEC) No 2408/92. The same applies to the obligation to use only single-aisle aircraft for operating at Linate airport and the exception made by Article 4(2) of the Decree to the benefit of Objective 1 regions.

However, as already stated by the Commission in Decisions 95/259/EC and 98/710/EC, 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, in practice nonetheless produces discriminatory effects, even indirectly.

In order to determine whether the criteria set out in the Decree of 3 March 2000 produce discriminatory effects in practice, it is necessary to examine the effects which will be produced by their application from 20 April 2000 onwards.

In its Decision 98/710/EC, the Commission considered that the criteria laid down in the Decree of 5 July 1996 gave Alitalia a competitive advantage as the only company able to serve its hub at Rome-Fiumicino from Linate airport due to the differences in access conditions between Linate and Malpensa airports. From that it concluded that the measure at issue would continue to be discriminatory as long as the access infrastructures to Malpensa airport were not sufficient to overcome passengers’ reluctance to use Malpensa airport.

The Commission considers that with the road and railway works completed in recent years it can be said that access to Malpensa airport is no longer a handicap for users trying to reach Malpensa. The expert appointed by the Commission also stresses the fact that Linate airport is poorly served by the public transport networks and considers that Malpensa airport’s location in relation to Milan city centre is no longer to be regarded as a reason for users to prefer Linate airport. Given the assessment it already made of the situation with the two airports in its previous Decision 98/710/EC, the Commission has no new reasons to justify concluding that conditions for access to Linate airport offer an advantage compared with those for Malpensa.

Therefore, the Commission considers that the application of the criteria set out in the Decree of 3 March 2000 should not in practice produce any discriminatory effects and that these criteria are compatible with the principle of prohibiting discrimination on grounds of nationality or identity of the air carrier as provided for in Article 8(1) of Regulation (EEC) No 2408/92.

Nonetheless, the proportionality of the measure adopted by the Italian authorities on 3 March 2000 should still be verified. In this respect, it has to be ensured in accordance with settled case law that the provisions at issue are appropriate to ensure achievement of the intended aims and do not go beyond that which is necessary in order to achieve those objectives; in other words, it must not be possible to obtain the same results by less restrictive rules.

It is therefore important to recall the objectives pursued by the rules at issue. In adopting the Decree of 3 March 2000, the Italian authorities, having affirmed ‘the strategic importance of Malpensa’s hub infrastructure’, wished both to ‘realise the full development potential of the Milan Malpensa hub, and to identify Milan Linate as an infrastructure for point-to-point connections’. They therefore deemed it necessary to amend the rules laid down in the Decree of 5 July 1996, the sole purpose of which was to ensure the viability of the Malpensa hub in the framework of the Malpensa 2000 project.

As recalled above, the Commission recognised in its Decision 95/259/EC of 14 March 1995, that Article 8(1) of Regulation (EEC) No 2408/92 confirms the legitimacy of an active airport planning policy. Such a planning policy may have regard to a large range of factors considered by the competent authorities to have priority. The transformation of Malpensa airport into a fully operational and viable hub and the promotion of Linate airport as a privileged infrastructure for point-to-point connections are certainly objectives which can legitimise traffic distribution rules. This principle needs to be examined in the light of the two objectives in turn.

As a preliminary, rules establishing access thresholds based on traffic volumes may be needed to reduce the level of traffic at Linate and thus to meet the objective of promoting Malpensa as an economically viable hub while allowing Linate to be converted into an airport specialising in ‘point-to-point’ connections. As stated above, the Commission has already recognised, in its Decision 95/259/EC, the compatibility of such an approach with Regulation (EEC) No 2408/92.
As regards, secondly, promoting Linate airport as a privileged infrastructure for point-to-point connections, the Commission accepts that to reach this objective there may have to be criteria limiting the number of flights per route on the basis of traffic thresholds, such as those laid down in the Decree of 3 March 2000.

Independently of this observation, nothing prevents the Italian authorities from wanting to reserve Linate airport mainly for certain categories of traffic, in particular point-to-point traffic, and laying down distribution rules accordingly.

On a first examination, those criteria do not appear to the Commission, on the basis of their practical application, to be wholly adequate for achieving this objective. As the complaining carriers point out, the minimum traffic threshold of 350,000 passengers laid down in Article 4 of the Decree of 3 March 2000 does not allow arrivals or departures from Community airports as large as Vienna or Copenhagen to be handled at Linate airport. In addition, such an important airport as Frankfurt is only linked by one flight a day per carrier while no limit on the number of frequencies per carrier is foreseen on liaisons where traffic exceeds 2.8 million passengers.

However, the modifications to which the Italian authorities refer in their letter of 4 December 2000 have the effect of lifting the previous obstacles and are now in proportion to the objective of making Linate a destination for point-to-point traffic since the increase in the number of slots available will favour services to destinations other than Rome. In addition, these modifications will also mean that Vienna and Copenhagen will, from now on, be linked to Linate and the number of daily liaisons to Community airports with annual traffic of more than 40 million passengers in 1999 will be at least two. They therefore make the measure in question appreciably more adequate to satisfy the objective of making Linate a point-to-point destination linked to the principal destinations. Finally, the fact that the traffic distribution rules will be re-examined before the end of 2001 would allow account to be taken of the evolution of the situation at Linate and at Malpensa, and especially the future increase in the handling of capacity at the air traffic control centre in the Milan area. This makes the whole of the package proportionate to this evolution.

In these conditions, the Commission considers that the traffic distribution rules within the airport system of Milan, as amended in accordance with the measures announced by the Italian authorities in their letter of 4 December 2000, can be regarded as proportionate to the objectives sought. The Commission takes note of the commitment by Italy to reevaluate the situation before the end of 2001.

In conclusion, the Commission considers that the traffic distribution rules set out in the Decree of 3 March 2000, if they are amended as indicated in the Italian authorities' letter of 4 December 2000, are compatible with Article 8(1) of Council Regulation (EEC) No 2408/92. It is therefore appropriate to decide, pursuant to Article 8(3) of Regulation (EEC) No 2408/92, that Italy may apply those rules as thus amended.
HAS ADOPTED THIS DECISION:

Article 1

Italy may apply the traffic distribution rules for the airport system of Milan set out in the Decree of the Italian Minister for Transport and Shipping of 3 March 2000 on condition that these rules are modified, within fifteen days following the notification of this Decision, as indicated in the letter of 4 December 2000 from the Italian authorities to the Commission.

Article 2

This Decision is addressed to the Italian Republic.

Done at Brussels, 21 December 2000.

For the Commission

Loyola DE PALACIO

Vice-President