

COMMISSION DECISION

of 27 April 1994

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

(Case VII/AMA/IV/93 — TAT — Paris(Orly)-Marseille and Paris(Orly)-Toulouse)

(Only the French text is authentic)

(94/291/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2408/92 of 23 July 1992, on access for Community air carriers to intra-Community air routes⁽¹⁾, and in particular Article 8 (3) thereof,

After consulting the Advisory Committee,

Whereas :

made explicit reference to the provisions of Regulation (EEC) No 2408/92, which applied from 1 January 1993, and in particular Article 8 of that Regulation.

In a letter dated 21 July the Director-General of Civil Aviation replied that he was unable to grant TAT's application, basing his refusal on Article 5 of the above Regulation. The Director-General of Civil Aviation wrote : 'Article 5 of this Regulation allows the exclusive concession granted on these routes by virtue of the agreement between the State and Air Inter to be maintained for three years with effect from 1 January 1993. At the current time the Minister has decided to take advantage of this possibility for a large part of the Air Inter network, including the routes in question. I cannot therefore grant your request.'

BACKGROUND**I**

On 28 September 1993 TAT European Airlines (whose registered office is at 47, rue Christiaan Huygens, 37100 Tours, France) requested the Commission to :

- (i) find that, by refusing TAT European Airlines a licence to operate on the Paris-Toulouse and Paris-Marseille routes to and from Orly airport, the French authorities and the Air France Group infringed Council Regulation (EEC) No 2408/92 ;
- (ii) take all necessary steps to put an end to repeated violations and abuse by the authorities and the group concerned and to give the measures in question their full effect.

By letter of 21 June 1993 the General Manager of TAT European Airlines (hereinafter referred to as "TAT") asked the Director-General of Civil Aviation in the French Ministry of Transport to clarify the position of his administration with regard to operation on the Paris(Orly)-Toulouse and Paris(Orly)-Marseille routes by TAT, routes on which his company had applied to operate. The letter

The complaint formally recorded was lodged with the Commission by TAT on 28 September 1993 and by the Commission's Directorate-General for Transport on 29 September, disputes the French authorities' refusal of 21 July 1993.

II

In support of its complaint to the Commission, TAT claimed that there was an infringement of Articles 3 (f), 86 and 90 of the EC Treaty, failure to comply with the Agreement of 30 October 1990 between the Commission of the European Communities, the French Government and Air France following the latter's takeover of UTA (Union des Transports Aériens), and an infringement of Regulation (EEC) No 2408/92. The various submissions made by TAT include the following which are pertinent to this Decision :

- French domestic traffic rights for flights out of Paris are normally granted by the French authorities for all airports in the Paris airport system designated for the operation of scheduled traffic rights, namely Orly and Charles de Gaulle (CDG). As far as domestic services are concerned, the French authorities want to encour-

⁽¹⁾ OJ No L 240, 24. 8. 1992, p. 8.

rage duplication of services, to Orly and CDG, in order to allow airlines wishing to do so to improve their services to Paris. By refusing to allow the same flexibility on the more important routes such as Paris-Marseille and Paris-Toulouse, the French authorities are effectively cornering the truly profitable French air-transport market for the Air France Group — and for Air Inter in particular,

- the Air France Group's monopoly of the Paris(Orly)-Toulouse and Paris(Orly)-Marseille routes should have expired on 1 March 1992; point 1.1.1 of the abovementioned Agreement of 30 October 1990 states that: 'in the light of the applications submitted, the French authorities shall designate at least one airline established in France other than Air France on the following domestic routes: ... Paris-Marseille, Paris-Toulouse ... These routes shall be opened up to multiple designation with effect from the date of entry into force of this arrangement ... the French authorities shall issue the required authorizations by 1 March 1992 at the latest'. Article 5 of Regulation (EEC) No 2408/92 has not altered the necessary interpretation of those provisions,

- Article 5 of Regulation (EEC) No 2408/92 does not apply to the Paris(Orly)-Marseille and Paris(Orly)-Toulouse routes because:

- either the term 'routes' to which the exclusive rights apply within the meaning of Article 5 refers to the routes involving the Paris airport system — in which case Air France does not hold an 'exclusive' concession under Article 5 over the Paris-Toulouse and Paris-Marseille routes, as it is precisely TAT which provides the service on the CDG-Toulouse and CDG-Marseille routes under the terms of the abovementioned agreement of 30 October 1990,

- or the Orly-Toulouse and Orly-Marseille routes should be regarded as the routes to take into account for the purposes of Article 5 — in which case other forms of transport can ensure an 'adequate and uninterrupted service', such as Air Inter and TAT services on the CDG-Toulouse and CDG-Marseille routes. In this case the exclusive concession can no longer be continued,

- the discrimination against TAT cannot be justified by Article 8 (1) of Council Regulation (EEC) No 2408/92.

By letter dated 13 October 1993 to the Director-General of the Commission's Directorate-General for Transport, TAT added further to its previous submissions. It stated

that the effect and intention of the French authorities' misapplication of Article 5 of Regulation (EEC) No 2408/92 was to maintain discriminatory rules governing traffic allocation within the Paris airport system in relation to the Paris-Marseille and Paris-Toulouse routes. According to the complainant, the application of Article 5 was even less justifiable in this case as that Article was only intended to apply to city-city rather than airport-airport routes. TAT therefore requested the Commission to adopt a Decision on the basis of Article 8 (3) of the Regulation concerned, without prejudice to any other action which the Commission might take against the French authorities.

III

The Commission's Director-General of Transport notified the French authorities by letter of 22 October 1993 of his position on this case based on the facts currently in his possession. In this letter he stated explicitly that the provisions of Article 5 of Regulation (EEC) No 2408/92 did not apply to the Paris-Marseille and Paris-Toulouse routes as they should have been opened up to multiple designation by 1 March 1992 at the latest and because Air Inter, as a subsidiary of Air France, could not therefore be regarded as holding an exclusive concession to the two routes. He further stated that the French authorities' refusal to grant TAT traffic rights to the two routes in question to and from Orly airport amounted to discrimination in the allocation of traffic within the Paris airport system, contrary to the provisions of Article 8 (1) of the said Regulation (EEC) No 2408/92.

Furthermore, as part of an examination of the same case in relation to the Community's competition rules, the Commission's Directorate-General for Competition sent a copy of TAT's complaint to the French authorities and to Air France asking for their comments, if any. The two procedures are being dealt with on a completely separate basis.

In reply to the aforementioned correspondence, France's Permanent Representative to the European Communities sent to the Commission the French authorities' observations on the substance of the complaint by TAT, in a letter dated 21 December 1993 which was formally recorded by the Commission's Secretariat-General on 23 December. With reference to the application of Article 5 of Regulation (EEC) No 2408/92, the French authorities first stated that, with the exception of the Paris-Nice route, the abovementioned agreement of 30 October 1990 only laid down multiple designation status for certain French domestic routes to or from CDG. They further

pointed out that the Paris(Orly)-Marseille and Paris(Orly)-Toulouse routes met the criteria laid down for application of the said Article 5, inasmuch as they were domestic routes, Air Inter had been granted an exclusive concession in a clearly identified legal instrument referring explicitly to the routes in question and, lastly, no other forms of transport capable of providing an adequate and uninterrupted service were available on those routes. It should be pointed out here that the French authorities made no reference to Article 8 of Regulation (EEC) No 2408/92 at this stage.

IV

In order to permit a full investigation of this case under the procedure laid down by Article 8 (3) of Regulation (EEC) No 2408/92 and to safeguard the rights of the defence, on 21 January 1994 the Commission sent a further letter to the French authorities in which it set out the arguments made by TAT concerning the alleged failure to observe the provisions of Article 8 (1) of Regulation (EEC) No 2408/92 as follows: 'TAT European Airlines maintain that by the misapplication of Article 5 to the two routes to and from Orly airport alone, the French authorities have acted in a discriminatory manner to the advantage of Air Inter in the allocation of traffic between the airports within the Paris airport system. In this respect TAT European Airlines have pointed out that Article 5 refers to city-city rather than airport-airport links. The company therefore asks the Commission to take a decision based on Article 8 (3) of the Regulation concerned'. The Commission requested the French authorities, in conclusion, to send their comments on the points made by TAT as summed up in the letter, as well as any other information they considered pertinent, within the next two weeks.

In reply to the aforementioned letter of 21 January 1994, the French authorities sent a note to the Commission on 16 February 1994 which included the following points:

- the Commission's document entitled 'Principles of interpretation for the application of Article 5', which was sent to the Member States on 23 September 1993, only represents the Commission's opinion and not the applicable law as it now stands,
- for more than 30 years the French domestic air transport system has been organized in the main around Air Inter's capacity for balancing profitable and unprofitable routes, which it has been granted an exclusive concession to operate. Too rapid a transition from this system to another would jeopardize the future of several domestic services in France and would therefore be at odds with the French authori-

ties' desire to maintain uniform, balanced development of the national territory,

- the concept of 'route' within the meaning of Article 5 of Regulation (EEC) No 2408/92 refers to airport-airport rather than city-city routes, as other Articles in the same Regulation would seem to bear out,
- the Commission's action in applying a procedure on the basis of Article 8 (3) of Regulation (EEC) No 2408/92 is unfounded in this case because there are no grounds for claiming non-compliance with the provisions of the first paragraph of that Article,
- Article 5 of Regulation (EEC) No 2408/92 is applicable to the Paris(Orly)-Marseille and Paris(Orly)-Toulouse routes because: (a) the word 'form' used in that Article refers to modes of transport other than aircraft; and (b) the agreement of 30 October 1990 between the Commission, Air France and the French authorities provides for the routes in question to be opened up to competition only to and from CDG airport.

V

At this point it should be stated that on 6 December 1993 the French Minister of Transport issued a decree, on the allocation of intra-Community traffic within the Paris airport system. Under the terms of Article 3 of this decree, which was published in the *Official Journal of the French Republic* of 10 December 1993: 'Air services to or from French airports, either in metropolitan France or in overseas Departments, may be operated at Orly and Charles-de-Gaulle airports, provided that exercise of the corresponding traffic rights has been authorized pursuant to the abovementioned Regulation (EEC) No 2408/92'.

LEGAL ASSESSMENT

VI

The Commission holds powers for the allocation of traffic between airports within an airport system which are conferred by Article 8 (3) of Council Regulation (EEC) No 2408/92. As far as the complaint lodged by TAT is concerned, the Commission considers it necessary to use those powers to decide whether France may continue to apply the measure refusing Community carriers and TAT in particular, traffic rights on the scheduled routes between Paris(Orly)-Marseille and Paris(Orly)-Toulouse on the grounds that operation of the Paris-Marseille and Paris-Toulouse routes is only authorized from and to CDG airport, as the French authorities have applied Article 5 of the Regulation in question to the same two routes to and from Orly.

Under Article 8 (1) of Regulation (EEC) No 2408/92, '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 expressly pointed out in its Decision 93/347/EEC of 28 May 1993 on the Viva Air case⁽¹⁾, which was not contested by France, the application of these provisions could restrict the general principle of freedom of access to Community air routes and airports laid down in Article 3 (1) of the same Regulation. Any such restriction must, like any exception to a general principle, be interpreted strictly and be based on transparent, objective criteria which remain constant over a given period and are non-discriminatory. It is then for Member States to put forward all the relevant grounds. These grounds must both be based on factual, objective determinants and comply with the principle of proportionality to the scope of the measure.

With particular regard to the principle of non-discrimination, a distinction must be drawn between discrimination on grounds of the carrier's nationality and discrimination on grounds of the carrier's identity.

The prohibition of any form of discrimination based on the carrier's nationality, embodied in Regulation (EEC) No 2408/92, is laid down by Article 6 of the Treaty establishing the European Community. It has given rise to many decisions of the Court of Justice.

In adopting Regulation (EEC) No 2408/92, however, 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 principle of non-discrimination on the basis of the air carrier's identity.

The Commission considers that the principle of non-discrimination on grounds of the air carrier's identity prevents a Member State, without objective grounds, from withholding from one or more carriers, whether already operating on a route or applying to do so, the traffic rights granted to a limited number of other carriers who are or can be precisely identified to operate the same service on comparable terms; or, conversely, from gran-

ting to one or more carriers traffic rights a limited number of other carriers who are or can be precisely identified to operate the same service on comparable terms. The limited number and identity of Community carriers who benefit from, or, conversely, are penalized by, the discriminatory measure may emerge directly from that measure or may be ascertained indirectly from the *de facto* circumstances.

These considerations should be taken into account in examining the measure by which the French authorities continue to refuse Community carriers in general, and in particular TAT, traffic rights on the Paris(Orly)-Marseille and Paris(Orly)-Toulouse routes.

First, it has to be said that this measure breaches the principle of non-discrimination on grounds of the carrier's identity as specified above. The French authorities have stated that the operation of scheduled services by Community airlines between Paris and Marseille and between Paris and Toulouse was fully authorized for flights from and to CDG airport in accordance with the provisions of Article 3 (1) of Regulation (EEC) No 2408/92. TAT does in fact operate scheduled services on the Paris(CDG)-Toulouse and Paris(CDG)-Marseille routes, as does Air Inter. However, the French authorities maintain an exclusive concession of Air Inter on the same routes to and from Orly airport under Article 5 of the same Regulation. In doing so they refuse to allow any Community airline other than Air Inter to serve Orly airport as part of its operation of scheduled air services between the Paris airport system and Toulouse or Marseille. This is clearly a case of discrimination to the advantage of Air Inter alone in the allocation of traffic between the airports within the Paris airport system.

Another question to be examined is whether France could legally derogate from the non-discrimination principle laid down by Article 8 (1) of Regulation (EEC) No 2408/92 by applying the provisions of Article 5 of the same Regulation. On this point, the Commission considers that the correct application of Article 5 of the Regulation could not possibly lead to discrimination on the grounds of the carrier's identity as prohibited by Article 8. As will be demonstrated below, maintaining the exclusive concession in question is in fact a roundabout means of allocating traffic within the Paris airport system through the incorrect application of Article 5 of Regulation (EEC) No 2408/92.

According to Article 5 of Regulation (EEC) No 2408/92: 'On domestic routes for which at the time of entry into force of this Regulation an exclusive concession has been granted by law or contract, and where other forms of

⁽¹⁾ OJ No L 140, 11. 6. 1993, p. 51.

transport cannot ensure an adequate and uninterrupted service, such a concession may continue until its expiry date or for three years, whichever comes first'.

In the Commission's opinion, by allowing certain scheduled routes that had previously been operated on an exclusive basis a period of grace in which to adjust to market forces, this Article is designed to ensure the survival of adequate transport services between two points (cities or regions) within the same Member State. The other forms of transport referred to in Article 5 therefore take into account all other facilities for transport between two cities, including intermodal means — that is, mainly transport by train or by bus. It may also include transport by plane in the case of indirect flights or where an alternative airport is available. Here it should be noted that in the wording of Article 5 the expression 'forms of transport' is used rather than 'modes of transport'. In other words, exclusive rights may only be maintained under Article 5 where there is no other way of travelling from one city to another by an adequate and uninterrupted means. In the case of an airport system serving a single town or region, therefore, exclusive rights to a route terminating in that airport system would only serve their purpose where such rights applied to all the airports in the system. They cannot therefore be maintained under Article 5 unless they expressly refer to an entire airport system and not just to a single airport.

In this particular case, moreover, the Agreement of 5 July 1985 by which the French State granted concessions to Air Inter on certain routes, including the two concerned here, itself defines these routes as point-to-point rather than airport-to-airport routes and includes no reference to the different airports of the Paris airport system.

By authorizing TAT to operate on the Paris-Marseille and Paris-Toulouse routes to and from CDG airport with effect from 1 March 1992 and, more recently, by raising no objection to other Community airlines' operating on the same routes, therefore, the French authorities have put an end to the exclusive rights that Air Inter might otherwise have enjoyed between Paris and Marseille or Toulouse. In effect, the measure used against TAT, based on Article 5 which does not apply in this case, appears to be simply a rule governing the allocation of traffic between Orly and CDG airports.

Furthermore, the Commission considers that Article 5 of Regulation (EEC) No 2408/92 is not applicable in this case since, on 1 January 1993 — the date of entry into force of the Regulation — Air Inter did not hold an

exclusive concession for the Paris-Marseille and Paris-Toulouse routes from either airport in the Paris airport system. Firstly, in the case of the Paris-Marseille route, the abovementioned Agreement of 5 July 1985 gave express permission to UTA and Air Afrique to operate the self-same route at the same time as Air Inter, thereby eliminating the exclusive nature of the concession held by that airline. Secondly, as regards the Paris-Toulouse route, and also by extension, Paris-Marseille, the consequence of the provisions of point 1.1.1 of the Agreement of 30 October 1990 referred to in section II, which makes no reference to airport allocations, is that Air Inter's exclusive concession to operate the route ended on 1 March 1992 at the latest.

In view of all the foregoing, the Commission considers that the French authorities have carried out the allocation of traffic rights in the Paris airport system in a discriminatory manner and have therefore infringed the provisions of Article 8 (1) of Regulation (EEC) No 2408/92 by misapplying Article 5 of the Regulation in question and that they have maintained an exclusive concession for Air Inter on the Paris-Marseille and Paris-Toulouse routes to and from Orly airport alone.

It should also be noted here that, even if the concept of 'route' in Article 5 were to be interpreted differently, the conclusion would be the same. Given that an exclusive concession could be properly defined within the meaning of Article 5 on the scheduled air services between Orly and Marseille or Toulouse — an approach rejected by the Commission — there are other forms of transport besides airlines which could ensure an adequate and uninterrupted service between Paris and Marseille and between Paris and Toulouse: the existing direct air services between Paris (CDG) and Marseille and between Paris (CDG) and Toulouse, each of which includes five daily return flights, fulfil the 'adequate and uninterrupted' criteria. This fact, which precludes the use of Article 5 in the case of departures or arrivals at Orly alone on the two routes concerned, also demonstrates that it is impossible to apply Article 5 in respect of these routes except to the entire Paris airport system.

It should finally be stressed that the effects of the discrimination at issue here are considerable. Orly airport is the travellers' choice and accounts for between 85 % and 90 % of all French domestic traffic to and from Paris. The split of domestic traffic between Orly and CDG has been stable for several years at approximately 85 % and 82 % in Orly's favour on the Paris-Marseille and Paris-Toulouse routes respectively. With a regular annual flow

of some two million passengers each, these routes are amongst the busiest in the Community. It is also more expensive to operate them from CDG airport than from Orly, partly for geographical reasons.

To sum up, the Commission considers that the French authorities incorrectly applied Article 8 (1) of Regulation (EEC) No 2408/92 by refusing to allow Community carriers to exercise traffic rights on the Paris-Marseille and Paris-Toulouse routes to and from Orly airport. Consequently it must be decided, in accordance with Article 8 (3) of Regulation (EEC) No 2408/92, that the French authorities may not continue to apply the measure concerned for allocating traffic between Orly and CDG airports. This Decision is not, however, intended in principle to prevent the continuation of an exclusive concession for Air Inter on routes fulfilling the conditions laid down in Article 5, as these are made clear above. It is also important to reiterate that the provisions of Regulation (EEC) No 2408/92, and Article 4 on public service obligations in particular, are a way of ensuring continuity of services throughout the domestic route networks in the Member States, and of serving the objectives of regional development policy. However, since in the particular circumstances of this case this Decision may have major repercussions on the structure and organization of the routes in question, the Commission considers it advisable to allow a delay for adjustment, expiring on 27 October 1994,

HAS ADOPTED THIS DECISION:

Article 1

France may not continue to refuse Community air carriers traffic rights on the Paris(Orly)-Marseille and Paris(Orly)-Toulouse routes on the grounds that the French authorities were applying Article 5 of Regulation (EEC) No 2408/92 on these routes.

Article 2

This Decision is addressed to the French Republic. It shall be communicated to TAT European Airlines, the Council of the European Union, the Member States, the Kingdom of Norway and the Kingdom of Sweden.

Article 3

France is required to give effect to this Decision by 27 October 1994 at the latest.

Done at Brussels, 27 April 1994.

For the Commission

Abel MATUTES

Member of the Commission