

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 7 April 2004

relating to a proceeding pursuant to Article 81 of the EC Treaty concerning case COMP/A.38284/D2

Société Air France/Alitalia Linee Aeree Italiane SpA ⁽¹⁾

(notified under document number C(2004) 1307)

(Only the English text is authentic)

(2004/841/EC)

On 7 April 2004, the Commission adopted a decision which grants an individual exemption under Article 81 (3) of the Treaty to a cooperation agreement between Air France and Alitalia.

A public version of this decision is available in English, French and German (only the English text is authentic) on DG COMP's website at http://europa.eu.int/comm/competition/index_en.html

1. SUMMARY OF THE PROCEEDINGS

(1) On 12 November 2001, Air France (AF) and Alitalia (AZ) notified to the Commission a number of cooperation agreements and applied for negative clearance under Article 3(2) of Council Regulation (EEC) No 3975/87 and/or exemption under Article 5 of the same Regulation ⁽²⁾.

operations for the routes at issue, provided that barriers to entry are removed through adequate remedies.

(3) A letter of serious doubts was notified by the Commission to the Parties on 1 July 2002, informing them that their cooperation agreements could not be approved in their current form.

(2) On 8 May 2002, a summary of the notified agreements was published in the *Official Journal of the European Union* inviting interested third parties to send their comments within 30 days in accordance with Article 5(2) of Regulation (EEC) No 3975/87 ⁽³⁾. In response to this publication, several airlines expressed their interest in starting

(4) On the basis of the reservations expressed by the Commission and after intensive discussions, the Parties proposed commitments which were published for comment in the *Official Journal* on 9 December 2003 in a notice pursuant to Article 16(3) of Regulation (EC) No 3975/87 ⁽⁴⁾. In the light of the comments received, the Parties accepted to improve further their commitments.

⁽¹⁾ Report for the hearing published in OJ C 305, 9.12.2004.

⁽²⁾ Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition in the air transport sector (OJ L 374, 31.12.1987, p. 1). Regulation as last amended by Regulation (EC) No 1/2003 (OJ L 1, 4.1.2003, p. 1).

⁽³⁾ OJ C 111, 8.5.2002, p. 7.

⁽⁴⁾ OJ C 297, 9.12.2003, p. 10.

- (5) The improved commitments, combined with the fact that there are several entrants on the markets concerned, are satisfactory from a competition policy point of view. Provided the Parties comply with these commitments, the Commission decided to exempt their cooperation agreements for a six-year period.

2. THE COOPERATION AGREEMENT

- (6) Through their cooperation, the Parties seek to establish a far-reaching, long-term strategic bilateral alliance, the main objectives of which are as follows:

— *creation of a European multi-hub system* based on the Parties' hubs at Paris Charles de Gaulle, Rome Fiumicino and Milan Malpensa airports, in order to interconnect their worldwide networks,

— *coordination of the Parties' passenger service operations*, including extensive use of code-sharing, coordination of their scheduled passenger network, sales, revenue management, mutual recognition of the respective frequent flyer programmes, marketing coordination and share of lounge usage,

— *cooperation in other areas*, such as cargo operations, passenger handling, maintenance, purchasing, catering, information technology, fleet development and purchase, crew training and revenue accounting.

- (7) As the aim of the alliance between Air France and Alitalia is to create a multi-hub system in order to interconnect their worldwide networks, the cooperation will be closer on the France-Italy 'bundle' which includes all the routes between France and Italy operated by Air France and/or Alitalia, excluding beyond and behind flights, whether domestic or international. On the France-Italy bundle, in addition to the overall coordination of their passenger service operations as described above, the Parties also agree on frequencies and share their capacities and their earnings.

3. ASSESSMENT

- (8) The activities affected by the agreement are scheduled air transport of passengers, air transport of goods and

ground-handling services. The draft exemption decision only addresses the first area of cooperation, i.e. scheduled air transport of passengers. Air transport of cargo is excluded from the scope of the draft decision as the Parties are still negotiating the scope of their cooperation in that field. The draft decision does not address ground handling services either, which do not fall within the scope of Regulation (EEC) No 3975/87⁽¹⁾.

- (9) The Commission accepts that, overall, the alliance contributes to improving the production and distribution of transport services and to promoting technical and economic progress. The cooperation agreement is likely to generate benefits in terms of creating a more extensive worldwide network which would offer customers better services in terms of an increased number of direct and indirect flights. While an increase in the airlines' size does not necessarily lead to a cost reduction because of constant economies of scale, savings may be realised due to an increase in traffic throughout the network, better planning of frequencies, a higher load factor, etc.

- (10) However, the consumer will only have a fair share from the expected cost reductions in the form of reduced prices if the Parties remain subject to a sufficient competitive constraint on the markets where competition is restricted by the alliance.

- (11) It results from the Commission's assessment under Article 81 that there is a risk that the alliance eliminates competition in respect of a substantial part of air passenger services on seven 'origin and destination'⁽²⁾ pairs i.e. Paris–Milan, Paris–Rome, Paris–Venice, Paris–Florence, Paris–Bologna, Paris–Naples and Milan–Lyon. Prior to the alliance, Air France and Alitalia were the two main operators on these affected overlap markets, competing head-to-head. At the time of the notification, they had very high market shares on these seven O & D pairs. This goes for time-sensitive and flexibility-focused passengers as well as for price-sensitive passengers⁽³⁾.

⁽¹⁾ This decision is therefore without prejudice to any further competition assessment of these aspects under Article 81 of the Treaty.

⁽²⁾ To establish the relevant market in air transport, the Commission has developed the point-of-origin/ point-of-destination (O & D) pair approach. According to this approach, every combination of point-of-origin and point-of-destination should be considered to be a separate market from the customer's point of view.

⁽³⁾ There is one exception for this second category of passengers on the Milan–Lyon city-pair, in view of the constraining effects of existing competition from other transport modes (road transport).

(12) Moreover, the Parties' overall strong market position is protected against potential entry by significant entry barriers, due for instance to the scarcity of slots at the airports concerned, to the number of frequencies operated by the Parties, to their high share of time-sensitive customers and to the pooling of their frequent flyer programs.

(13) The cooperation agreement can therefore only be accepted on the basis of adequate remedies, the main purpose of which is to remove existing entry barriers for competitors and to ensure that affected consumers obtain a fair share of the benefits resulting from the cooperation.

4. COMMITMENTS

(14) On the basis of the reservations expressed by the Commission in its letter of serious doubts, the Parties proposed commitments which were published for comment on 9 December 2003. Several airlines and the United Kingdom Office of Fair Trading commented on them. In the light of these comments, the Parties accepted to improve further their commitments. In particular, the conditions on the spread of slots at Paris CDG airport were substantially amended and the limitation on the number of slots to be released at Orly airport was removed. The main principles of these commitments are summarised below.

Number of slots to be surrendered

(15) In order to remedy the slot shortage at congested airports, the Parties are required to make available to competitors a number of slots aimed at supporting new services on the seven routes where the Commission has identified competition concerns. The maximum number of slots to be released by the Parties is specified per route in the Annex to the decision.

(16) On the basis of the Commission's extensive investigation on the France-Italy market and after having assessed the comments made by third parties in response to the publication of the Commission Notice pursuant to Article 16(3) of Regulation (EEC) No 3975/87, the number of slots that the Parties have accepted to release on each of the affected routes is considered sufficient to allow point-to-point carriers to compete effectively against the Parties on these routes. The remedies are targeted to allow competitors to transport point-to-point traffic and in particular, to compete with

the Parties for the transport of O & D time-sensitive and flexibility-focused passengers.

(17) Considering that it is more effective to add frequencies to an existing service than to start a new service from scratch and that time-sensitive and flexibility-focused passengers need a sufficient number of daily frequencies, the slots will be made available on a preferential basis to the competitor which will operate, in total, the highest number of frequencies on the route (including its existing services).

Slot releases at Paris and Milan airports

(18) It results from the Commission's investigation on the France-Italy market that Paris Charles de Gaulle (CDG) and Orly (ORY) airports are substitutable from the point of view of the demand for transport services by O & D passengers on the routes in question. The same applies with respect to the Milan Linate and Malpensa airports.

(19) The application of the principle of proportionality would normally imply that the Parties are allowed to choose at which airport to surrender slots, provided that this is sufficient to solve the competition concerns. However, in the present case, the Commission has considered that, with respect to the Paris airports, in order to ensure the effectiveness of the remedies proposed, slots should also, under certain conditions, be surrendered at Orly to competitors who already offer services on the affected routes out of this airport, in order to allow them to increase their number of services. This explains why the commitments provide that a competitor is entitled to obtain slots at Orly if it already operates flights on an affected route out of Orly and if it has all its scheduled flights serving Paris operated out of this airport.

(20) For the same reasons, the commitments provide that the Parties shall be required to release slots at Milan Linate airport only to a competitor which already operates services on an affected route out of Linate and wishes to add additional frequencies on this route.

Other remedies

(21) In addition to slots, other remedies are aimed at removing the additional entry barriers identified in the draft decision.

- (22) Some of them will enhance the inter-changeability from the customer point of view between the flights operated by the Parties and the flights operated by competitors on the affected routes and will help new entrants to obtain a minimum number of passengers necessary to start operations on these routes. They provide notably that the Parties will have to allow new entrants to participate in their frequent flyer programmes, if they so wish. Another commitment relates to interlining and special prorate agreements and will allow passengers to fly with the Parties and return with a competitor or conversely on a given journey, based on a single ticket.
- (23) The Parties also committed to facilitate intermodal passenger agreements, whereby they provide air transport services as part of an itinerary that includes surface or sea transportation, in order to ensure greater choice and better multimodal transport services for consumers. This, for instance, could allow time-sensitive customers to combine a one way railway trip with a return flight at attractive conditions.

- (24) Finally, the commitments impose on the Parties an obligation to maintain a frequency freeze (regulation of frequency increases) during a start-up period to ensure that new entrants are not squeezed out of the market shortly after entry.

5. CONCLUSION

- (25) On the basis of the above, the commitments submitted by the Parties are sufficient to solve the competition concerns in the markets identified during the investigation by allowing and facilitating third parties' entry.
- (26) The Commission has therefore decided that pursuant to Article 81(3) of the EC Treaty, and provided that the parties comply with the commitments listed in the Annex, Article 81(1) of the EC Treaty is inapplicable to the cooperation agreement between Air France and Alitalia notified to the Commission on 12 November 2001 for the period from 12 November 2001 to 11 November 2007.