

COMMISSION

COMMISSION DECISION

of 1 August 2006

initiating the investigation provided for in Article 4(3) of Council Regulation 2408/92 on access for Community air carriers to intra-Community air routes

(notified under document number C(2006) 3516)

(2006/547/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

— Alghero–Rome and Rome–Alghero

— Alghero–Milan and Milan–Alghero

Having regard to the Treaty establishing the European Community,

— Cagliari–Rome and Rome–Cagliari

— Cagliari–Milan and Milan–Cagliari

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 Articles 4(3) and 12 thereof,

— Olbia–Rome and Rome–Olbia

— Olbia–Milan and Milan–Olbia.

Whereas:

- (3) On 21 April 2006 the Commission published another notice concerning the public service obligations imposed by Decree No 36 (the ‘Notice of 21 April 2006’) ⁽²⁾ on the following 10 routes:

— Alghero–Bologna and Bologna–Alghero

— Alghero–Turin and Turin–Alghero

— Cagliari–Bologna and Bologna–Cagliari

— Cagliari–Florence and Florence–Cagliari

— Cagliari–Turin and Turin–Cagliari

— Cagliari–Verona and Verona–Cagliari

— Cagliari–Naples and Naples–Cagliari

— Cagliari–Palermo and Palermo–Cagliari

— Olbia–Bologna and Bologna–Olbia

— Olbia–Verona and Verona–Olbia.

I. The facts

(1) On 27 January and 28 February 2006, the Italian Republic transmitted to the Commission the Decrees Nos 35 and 36 of the Ministry of Infrastructure and Transport of 29 December 2005 (published in the *Gazzetta Ufficiale della Repubblica Italiana* on 11 January 2006) imposing public service obligations (PSOs) on a total of 16 routes between Sardinia and the main national airports and requested the Commission to publish a notice in the *Official Journal of the European Union* in accordance with Article 4(1)(a) of Regulation (EEC) No 2408/92.

(2) On 24 March 2006 the Commission published a notice concerning the public service obligations imposed by Decree No 35 (the ‘Notice of 24 March 2006’) ⁽²⁾ on the following six routes:

⁽¹⁾ OJ L 240, 24.8.1992, p. 8. Regulation as last amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council (OJ L 284, 31.10.2003, p. 1).

⁽²⁾ OJ C 72, 24.3.2006, p. 4.

⁽³⁾ OJ C 93, 21.4.2006, p. 13.

- (4) The main features of the PSOs published in the two notices are as follows:
- Each of the 10 routes published in the Notice of 21 April 2006 and the public service obligations imposed upon them must be accepted individually in their entirety and as a whole by the carrier concerned.
 - The two routes Alghero–Rome and Alghero–Milan (together) and the two routes Olbia–Rome and Olbia–Milan (together) constitute a single package which must be accepted in their entirety and as a whole by the carriers concerned without any compensation of any kind or origin. The routes Cagliari–Rome and Cagliari–Milan, on the other hand, must be accepted individually, in their entirety and as a whole by the carriers concerned without any compensation of any kind or origin.
 - Each single carrier (or leading carrier) which accepts to fulfill the public service obligations must provide a performance security for the purpose of guaranteeing the correct execution and continuation of the service. This security must amount to at least 5 % of the total estimated turnover evaluated by ENAC (the Italian Civil Aviation Authority) for the air services scheduled for each package of routes in question. The security shall be payable to ENAC, which will use it to ensure the continuation of the services concerned in the event of unjustified abandonment, and shall consist of a first request bank surety (50 %) and an insurance surety (for the remaining 50 %). To avoid the overcapacity which would result if several carriers were to accept a route subject to the obligations, considering the infrastructure limitations and conditions of the airports involved, ENAC, at the behest of the Autonomous Region of Sardinia, has the task of intervening in the public interest to control the accepting carriers' operating programmes so as to ensure that they are completely in line with the travel requirements underlying the obligations imposed. Such intervention should be aimed at a fair redistribution of routes and frequencies between the accepting carriers on the basis of the volumes of traffic on the routes (and packages of routes) in question, ascertained for each of them over the previous two years.
 - The minimum frequency, timetables and capacity to be offered for each route are specified under point '2. ORGANISATION OF THE PUBLIC SERVICE OBLIGATIONS' of the notices of 24 March 2006 and of 21 April 2006.
 - The minimum capacity of the aircraft to be used is stipulated under point '3. TYPE OF AIRCRAFT TO BE USED ON EACH ROUTE' of the notices of 24 March 2006 and of 21 April 2006.
 - The fare structure for all the routes concerned is given under point '4. FARES' of the notices of 24 March 2006 and 21 April 2006. In particular, regarding reduced fares, point 4.8 of both notices state that carriers operating on the affected routes are legally bound to apply the reduced fares (specified under point '4. FARES'), to at least people born in Sardinia, even if they do not live in Sardinia.
 - According to Decree No 35, sent to the Commission on 29 December 2005, published in the *Gazzetta Ufficiale della Repubblica Italiana* on 11 January 2006 and published in the *Official Journal of the European Union* on 24 March 2006, the start and end of the imposition for the routes concerned was 31 March 2006 and 30 March 2009. However, on 28 February 2006 the Italian authorities informed the Commission of the adoption on 23 February 2006 of a decree amending (Permanent Representation Letter with Protocol No 2321) these dates to 2 May 2006 and 1 May 2009. These were the dates subsequently published in the Official Journal.
 - According to Decree No 36, sent to the Commission on 29 December 2005, published in the *Gazzetta Ufficiale della Repubblica Italiana* on 11 January 2006 and published in the *Official Journal of the European Union* on 21 April 2006, the start and end of the imposition for the routes concerned were foreseen to be determined in the future. Therefore the publication in the Official Journal did not contain any definitive start and end dates for the imposition.

- Carriers intending to accept the public service obligations must present a formal acceptance to the competent Italian authority within 30 days of publication of the notice in the *Official Journal of the European Union*.
- (5) It should be noted that prior to imposing the public service obligations referred to in this Decision, the Italian Republic had imposed public service obligations by the Decrees of 1 August 2000 and of 21 December 2000 on six routes between the Sardinian airports and Rome and Milan. Those obligations were published in the *Official Journal of the European Communities* on 7 October 2000 ⁽¹⁾ (the 'Notice of 7 October 2000'). In accordance with Article 4(1)(d) of Regulation (EEC) No 2408/92, the routes concerned were put to tender to select the carriers authorised to operate them on an exclusive basis with financial compensation ⁽²⁾.
- (6) The carriers authorised to operate the routes in accordance with the public service obligations imposed were:
- Alitalia: Cagliari–Rome.
- Air One: Cagliari–Milan, Alghero–Milan and Alghero–Rome.
- Meridiana: Olbia–Rome and Olbia–Milan.
- (7) These arrangements were replaced by the public service obligations imposed by the Italian Decree of 8 November 2004 and published in the *Official Journal of the European Union* of 10 December 2004 (the 'Notice of 10 December 2004') ⁽³⁾. Following a decision of the Regional Administrative Tribunal of Lazio of 17 March 2005 which annulled partially the Decree of 8 November 2004, the Italian authorities informed the Commission that they had 'suspended' those obligations. A notice to this effect was published in the *Official Journal of the European Union* on 1 July 2005 ⁽⁴⁾. On 6 December 2005 the Italian authorities informed the Commission that the Decree of 8 November 2004 had been repealed with effect from 15 November 2004.
- (8) On 28 February 2006 the Italian authorities informed the Commission of the adoption on 23 February 2006 of a
- decreed amending Decree No 35, of 29 December 2005, whereby the Decrees of 1 August 2000 and 21 December 2000 were repealed as from 2 May 2006.
- (9) In a communication to the Commission dated 22 March 2005, the Italian authorities stated that the PSOs published in the Notice of 7 October 2000 were being applied 'on a voluntary basis'. This was the first time that the Italian authorities informed the Commission that those PSOs were still being applied.

II. Essential elements of the rules on public service obligations

- (10) The rules on public service obligations are laid down in Regulation (EEC) No 2408/92 (the 'Regulation'), which defines the conditions for applying the principle of freedom to provide services in the air transport sector.
- (11) Public service obligations are defined as an exception to the principle of the Regulation that 'subject to this Regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community' ⁽⁵⁾.
- (12) The conditions for imposing them are defined in Article 4. They are interpreted strictly and in accordance with the principles of non-discrimination and proportionality. They must be adequately justified on the basis of the criteria laid down in the same Article.
- (13) More precisely, the rules governing public service obligations provide that these may be imposed by a Member State in respect of scheduled air services to an airport serving a peripheral or development region in its territory or on a thin route to any regional airport, provided the route is considered vital for the economic development of the region in which the airport is located and to the extent necessary to ensure on that route the adequate provision of scheduled air services satisfying fixed standards of continuity, regularity, capacity and pricing, standards which air carriers would not meet if they were solely considering their commercial interest.

⁽¹⁾ OJ C 284, 7.10.2000, p. 16.

⁽²⁾ OJ C 51, 16.2.2001, p. 22.

⁽³⁾ OJ C 306, 10.12.2004, p. 6.

⁽⁴⁾ OJ C 161, 1.7.2005, p. 10.

⁽⁵⁾ Article 3(1) of Regulation (EEC) No 2408/92.

- (14) The adequacy of scheduled air services is assessed by the Member States having regard to the public interest, the possibility of having recourse to other forms of transport, the ability of such forms to meet the transport needs under consideration and the combined effect of all air carriers operating or intending to operate on the route.
- (15) Article 4 provides for a two-phase mechanism: in the first phase (Article 4(1)(a)) the Member State concerned imposes a public service obligation on one or more routes, which is open to all Community carriers, provided they meet the obligations. Where no carrier applies to operate the route on which the public service obligation has been imposed, the Member State can move on to a second phase (Article 4(1)(d)) which limits access to that route to only one carrier for a renewable period of up to three years. The carrier is selected by a Community tender procedure. The selected carrier can then receive financial compensation for operating the route in accordance with the public service obligation.
- (16) By virtue of Article 4(3) the Commission may decide, following an investigation, carried out either at the request of a Member State or on its own initiative, whether the public service obligation published should continue to apply. The Commission must communicate its decision to the Council and to the Member States. Any Member State may refer the matter to the Council which, acting by a qualified majority, may take a different decision.
- III. Elements raising serious doubts as to the conformity of the public service obligations imposed on routes between the Sardinian airports and the main national airports with Article 4 of Regulation (EEC) No 2408/92**
- (17) Article 4(1)(a) of the Regulation lists a certain number of cumulative criteria for imposing public service obligations:
- Type of route eligible: routes to an airport serving a peripheral or development region in the territory of the Member State concerned or on a thin route to any regional airport in that territory.
 - It must be recognised that the route is vital for the economic development of the region in which the airport served is located.
 - The principle of adequacy, assessed having regard to the existence of other means of transport or alternative routes, must be observed.
- (18) In addition, the public service obligations must comply with the basic principles of proportionality and non-discrimination (see, for example, Court of Justice decision of 20 February 2001, in case C-205/99, *Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and others v Administración General del Estado*, [2001] ECR p. I-01271).
- (19) In the case in point, the notices imposing public service obligations published in the *Official Journal* at the request of the Italian Republic contains several provisions which raise serious doubts as to their conformity with Article 4 of the Regulation. In particular:
- No adequate explanation has been provided in order to justify the appropriateness and the proportionality of the public service obligations in relation to the objective pursued.
 - It is not evident that the routes on which public service obligations have been imposed are vital for the economic development of the regions of Sardinia where the airports concerned are located; considering in particular:
 - The nature and the number of routes concerned.
 - The existence of alternative air routes which allow an adequate and continuous service to be provided to the airports concerned, via the main Italian hubs, linked in a satisfactory manner with Sardinia.
 - The relationship between the PSOs and the traffic between the different airports affected by the new routes.

- (20) The requirement that interested carriers operate six of the routes to which the public service obligations apply as packages may be particularly restrictive of the freedom to provide services. It seems to have no basis in Article 4(1) of the Regulation and could be in breach of the principles of proportionality and non-discrimination; considering in particular that:
- It is not established that bundling those routes together is vital for the economic development of the regions of Sardinia in which the airports concerned are located.
 - There does not seem to be any obvious legal basis or operational justification for these bundlings (e.g. in terms of the geographical location of the airports concerned), given that the imposition refers to non-compensated PSOs.
 - The risk of unjustified discrimination between carriers, where only the largest ones have the means to operate in such conditions.
- (21) The possibility mentioned in point 1.6 of both Notices that, if several carriers accept the operation of a route subject to PSOs, ENAC shall 'intervene' in order to avoid 'overcapacity' by 'redistributing routes and frequencies' among the carriers concerned appears to have no basis on Article 4(1) of the Regulation and could be contrary to Article 3(1) insofar as these measures restrict the freedom of each carrier to choose which routes and frequencies it wishes to serve. Furthermore, the existence of 'overcapacity' seems to indicate that there is no need of regulatory intervention to ensure that transport operators meet basic demand.
- (22) The requirement, in point 4.8 of both Notices, that reduced fares must be applied to passengers solely because of their place of birth (in this case Sardinia) does not appear to have a legitimate justification and may constitute prohibited indirect discrimination for reasons of nationality (see for example case C-338/01 *Commission v Italy* [2003] ECR p. I-00721).
- (23) No adequate explanation has been given in order to justify why:
- The fare structures are so different when compared to the PSOs published in the Notice of 10 December 2004. It is now specified that references to Rome and Milan should be understood as references to their respective airport systems, which means that the carriers which do not accept the PSOs cannot operate from any airport within these systems.
 - 50 % of the connections between Sardinian airports and Rome and Milan must be operated from and to Fiumicino and from and to Milan.
- #### IV. Procedure
- (24) Despite calls from the Commission drawing the attention of the Italian authorities to these problems and expressing doubts as to the conformity of the notices imposing public service obligations with the Regulation, the Italian Republic decided to have them published.
- (25) As soon as these were published, several interested parties contacted the Commission to informally express their concerns and complaints regarding the disproportionate and discriminatory nature of the public service obligations.
- (26) In the light of the above, and by virtue of Article 4(3) of the Regulation, the Commission may carry out an investigation to determine whether the development of one or more routes is unduly restricted by the imposition of public service obligations, in order to decide whether these obligations should continue to be imposed on the routes in question.
- (27) On 9 March 2006 the Commission requested the Italian authorities, as provided in Article 12 of the Regulation, to supply certain information with respect to the public service obligations in issue. The response provided by the Italian authorities on 22 March 2006 was incomplete.

HAS ADOPTED THIS DECISION:

Article 1

The Commission will carry out an investigation, as provided for in Articles 4(3) of Regulation (EEC) No 2408/92, in order to determine whether the public service obligations imposed on routes between the Sardinian airports and the main national airports, published at the request of the Italian Republic in *Official Journal of the European Union* C 72 of 24 March 2006 and C 93 of 21 April 2006, should continue to apply to these routes.

Article 2

1. The Italian Republic shall transmit to the Commission, within one month following the notification of this Decision, all the information necessary for examining the conformity of the public service obligations referred to in Article 1 with Article 4 of Regulation (EEC) No 2408/92.

2. In particular, the following shall be transmitted:

- An explanation of how the requirement to be born in Sardinia in order to qualify for a reduced fare will be enforced in practice.
- The justification for the requirement to provide the performance security and the method for establishing its amount.
- The justification for the differences between the new fare structures and those imposed by the public service obligations published on 10 December 2004.
- An explanation of the reasons why the public service obligations apply with respect to the airport systems of Rome and Milan, rather than with respect to individual airports within those systems, and of the reasons why 50 % of the connections between Sardinian airports and Rome and Milan must be operated from and to Fiumicino and from and to Milano–Linate.
- The legal basis and the justification for bundling together the following two sets of routes into packages:
 - Alghero–Rome, Rome–Alghero, Alghero–Milan and Milan–Alghero, and
 - Olbia–Rome, Rome–Olbia, Olbia–Milan and Milan–Olbia.
- A detailed explanation of the socio-economic objectives pursued by the imposition of the public service obligations referred to in Article 1 and a justification of how such obligations are adequate and proportionate in order to attain these objectives — in particular with respect to the new 10 routes not covered by the Notice of 7 October 2000.
- A detailed analysis of the economic relations between the regions of Sardinia and the other regions of Italy where the airports concerned by the public service obligations referred to in Article 1 are located.
- A detailed explanation of how the measures envisaged in point 1.6 of the two Notices referred to in Article 1 with a view to avoiding ‘overcapacity’ if several carriers accept a route subject to public service obligations will operate in practice and of their justification under Article 4(1) of Regulation (EEC) No 2408/92.
- A detailed analysis of the current supply of air transport between the Sardinian airports and the other Italian airports concerned by the public service obligations referred to in Article 1 including the supply of indirect flights, as well as an indication of when Decree No 36 entered into force.
- A legal analysis, with regard to Community law, justifying the different conditions contained in the public service obligations referred to in Article 1, and particularly:
 - A detailed analysis of the availability of other means of transport and their capacity to meet the transport needs under consideration.
- The justification for applying reduced fares to persons born in Sardinia, even if they do not live in Sardinia, particularly in view of the already existing available discounts for flights for students that fall within this category of passengers.

- An analysis of the current demand for air transport for each route concerned by these obligations, including the operating forecasts (passenger traffic, freight, financial forecasts, etc.) communicated by the carrier or carriers.
- A precise description of the journey times and frequency required to connect by road the different Sardinian airports concerned by these obligations.
- A description of the situation on the day of notification of this Decision regarding the operation of services in accordance with the obligations and the identity of the carrier or carriers operating services under the PSO regime.
- Any claims existing before the national courts on the day of notification of this Decision and the legal situation of the notice imposing the public service obligations.
- An explanation of whether the public service obligations published in the Notice of 7 October 2000 continued to

apply following the suspension and repeal of the obligations published in the Notice of 10 December 2004 and, if so, on which legal base, as well as of the reasons why the Italian authorities failed to inform promptly the Commission thereof.

Article 3

1. This Decision is addressed to the Italian Republic.
2. This Decision shall be published in the *Official Journal of the European Union*.

Done at Brussels, 1 August 2006.

For the Commission
Jacques BARROT
Vice-President