

**COMMISSION IMPLEMENTING DECISION (EU) 2015/2415****of 17 December 2015****on the approval pursuant to Article 19 of Regulation (EC) No 1008/2008 of the European Parliament and of the Council of modified traffic distribution rules for the airports Milan Malpensa, Milan Linate and Orio al Serio (Bergamo)***(notified under document C(2015) 9177)***(Only the Italian text is authentic)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EC) No 1008/2008 of the European Parliament and of the Council of 24 September 2008 on common rules for the operation of air services in the Community <sup>(1)</sup>, and in particular Article 19(3) thereof,

Whereas:

**1. PROCEDURE**

- (1) By letter of 21 April 2015, received by the Commission on 21 April 2015, the Italian authorities informed the Commission, pursuant to Article 19(3) of Regulation (EC) No 1008/2008, of the Ministerial Decree No 395 of 1 October 2014 amending Decree No 15 of 3 March 2000 on the distribution of air traffic within the Milan airport system, as amended <sup>(2)</sup> (hereinafter the 'Lupi Decree'). By letters of 5 November 2014 and 18 March 2015, the Italian authorities provided further information on the Lupi Decree. The Commission requested additional information by letter dated 5 September 2015 to which the Italian authorities replied by letter dated 25 September 2015.
- (2) The airport system of Milan comprises the airports of Malpensa, Linate and Orio al Serio (Bergamo).

**2. BACKGROUND AND DESCRIPTION OF THE MEASURE****2.1. The Bersani and Bersani 2 Decree**

- (3) By Commission Decision of 21 December 2000 <sup>(3)</sup>, the Commission declared the traffic distribution rules for the Milan airport system set out in the Decree of the Minister for Infrastructure and Transport of 3 March 2000 <sup>(4)</sup> (hereinafter the 'Bersani Decree') as compatible with Council Regulation (EEC) No 2408/92 <sup>(5)</sup>. This regulation has since been repealed and replaced by Regulation (EC) No 1008/2008. The Commission's decision was subject to these rules being amended as indicated by the Italian authorities in a letter of 4 December 2000. This amendment took place through the Decree of the Minister for Infrastructure and Transport of 5 January 2001 <sup>(6)</sup> (hereinafter the 'Bersani 2 Decree').
- (4) The objective of the Bersani Decree and Bersani 2 Decree was to ensure the realisation of the full development potential of Milan Malpensa airport as an international hub, whilst at the same time describing Milan Linate airport as a facility for point to point services. To this end, the Bersani Decree and Bersani 2 Decree contained several provisions; in particular they imposed, at Milan Linate airport, limitations on the number of daily return services to EU airports identified on the basis of passenger traffic volume, as follows:

- one daily return service per carrier for routes with traffic between 350 000 and 700 000 passengers,
- two daily return services per carrier for routes with traffic between 700 000 and 1 400 000 passengers,

<sup>(1)</sup> OJ L 293, 31.10.2008, p. 3.

<sup>(2)</sup> Italian Official Gazette No 237 of 11 October 2014.

<sup>(3)</sup> OJ L 58, 28.2.2001, p. 29.

<sup>(4)</sup> Italian Official Gazette No 60 of 13 March 2000.

<sup>(5)</sup> Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8). As regards this repeal, see Article 27 of Regulation (EC) No 1008/2008.

<sup>(6)</sup> Italian Official Gazette No 14 of 18 January 2001.

- three daily return services per carrier for routes with traffic between 1 400 000 and 2 800 000 passengers,
  - no limit for routes with traffic above 2 800 000 passengers.
- (5) From Linate, Community carriers may, with the arrangements set out immediately above, 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.
- (6) The Bersani 2 decree specifies that all European capitals will have at least one return trip connection per day with Linate and that 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,
- (7) The Bersani Decree and Bersani 2 Decree also restricted Milan Linate airport to single aisle aircraft for point-to-point scheduled connections within the EU only.

## 2.2. The Lupi Decree

- (8) The Lupi Decree changes the Bersani Decree and the Bersani 2 Decree by removing any limitations on the number of daily return services to EU airports identified on the basis of passenger traffic volume imposed at Milan Linate airport. The other limitations imposed at Milan Linate airport (single aisle aircraft, point-to-point scheduled connections within the EU) remain in place.
- (9) The Italian authorities explained that the reason for this change were the need to abolish restrictions based on criteria that are now obsolete and no longer appropriate and to allow operators holding slots at Milan Linate airport to use them as efficiently as possible. This should contribute to make Italy's and Europe's airport systems more efficient both for business and passengers.
- (10) The Lupi Decree (Ministerial Decree No 395) was signed on 1 October and published on 11 October 2014, just prior to the start of the winter 2014-2015 IATA scheduling period, which started on 26 October 2014. The Lupi Decree is applicable since the beginning of the 2014/2015 winter traffic season.
- (11) Italy did not consult interested parties prior to the adoption of the Lupi Decree.

## 3. OBSERVATIONS SUBMITTED TO THE COMMISSION BY INTERESTED PARTIES

- (12) The Commission published a summary of the modified traffic distribution rules notified by the Italian authorities in the *Official Journal of the European Union* <sup>(1)</sup> and invited interested parties to submit comments.
- (13) The Commission received comments from two interested parties, who wished to remain anonymous. The Commission sent a summary of the comments to the Italian authorities to allow the Italian authorities to comment.

### 3.1. The first interested party

- (14) The first interested party stated that the Italian authorities had not consulted all the airlines or airports concerned on the modified traffic distribution rules prior to their adoption. Consequently, according to the same interested party, only certain airlines which had been made aware of the imminent changes were able to use the flexibility introduced by the new Decree and to plan accordingly in sufficient time for the start of the winter 2014/2015 scheduling season.
- (15) The first interested party also pointed out that the Italian authorities did not respect their obligation under Regulation (EC) No 1008/2008 not to apply changes to traffic distribution rules before the Commission's approval.

<sup>(1)</sup> OJ C 183, 4.6.2015, p. 4.

- (16) Moreover, the first interested party also raised the issue of slots attribution at Milan Linate airport.

### 3.2. The second interested party

- (17) The second interested party indicated that the timing of the adoption of the Lupi Decree allowed some airlines to introduce new routes from Linate with immediate effect without any proper consultation of the other airlines operating at Linate airport having taken place or even prior information being provided to them.
- (18) The second interested party also highlighted that the notification to the Commission of the Lupi Decree was received more than 7 months after its publication.
- (19) Moreover, the second interested party considered that the Lupi Decree concerns a specific advantage to Etihad, Alitalia and its European Equity Partners as Alitalia holds the vast majority of slots and that the Lupi Decree has the potential to severely distort competition in favour of Alitalia. The second interested party asked the Commission to immediately repeal the Lupi Decree.

### 4. THE TERMS OF ARTICLE 19 OF REGULATION (EC) No 1008/2008

- (20) Article 19(2) of the Regulation (EC) No 1008/2008 provides that a Member State, after consultation with interested parties, may regulate, without discrimination among destinations inside the Community and on grounds of nationality or identity of air carriers, the distribution of air traffic between airports serving the same city of conurbation. Specific conditions for the distribution of traffic are set out in the same paragraph.
- (21) Article 19(3) of the Regulation (EC) No 1008/2008 provides that a Member State concerned shall inform the Commission of its intention to regulate the distribution of air traffic or to change an existing traffic distribution rule. It also provides that the Commission shall examine the application of Article 19(2) and, within six months of receipt of the information from the Member State, and after having asked the Committee set up in Article 25 of Regulation (EC) No 1008/2008 for opinion shall decide whether the Member State may apply the measures. It adds that the Commission shall publish its decision in the *Official Journal of the European Union* and that the measures shall not be applied before the publication of the Commission's approval.

### 5. ASSESSMENT

- (22) The Lupi Decree modifies the rules regarding traffic distribution for the airport system of Milan by removing limitations at Linate airport on the number of daily return services to EU airports identified on the basis of passenger traffic volume. Therefore, it constitutes a change to an existing traffic distribution rule within the meaning of Article 19(3) of Regulation (EC) No 1008/2008.
- (23) The Italian authorities consider that the Lupi Decree does not constitute a change to existing traffic distribution rules, as the Lupi Decree was not considered to be a measure aimed at modifying the air traffic within Milan airport system. The Lupi Decree merely removes a restriction to the provision of services.
- (24) The Commission does not follow this argument. The limitations on the number of daily return services to EU airports identified on the basis of passenger traffic volume form part of a traffic distribution rule, intended to allocate air services outside the limitations to another airport of the Milan airport system. The Commission approved this traffic distribution rule in 2000. Removing one element of this distribution rule therefore constitutes a change to that rule.
- (25) The Italian authorities have not consulted interested parties before adopting the Lupi Decree. They have therefore failed to comply with the obligation to do so, set out in Article 19(2) of Regulation (EC) No 1008/2008.
- (26) The Italian authorities consider that they did not need to consult interested third parties as Article 19(2) of Regulation (EC) No 1008/2008 would only require to consult interested parties when the Member State intends to 'regulate' traffic, i.e. before creating a traffic distribution rule, but not in case of its amendment. The Commission does not agree with this reasoning. The amendment of a traffic distribution rule means that the rule

after the amendment is different from the one applicable before. Having regard to the rationale of Article 19, such (intended) change in the legal situation is not fundamentally different from the change brought about by the introduction of a new rule. This change in legal situation constitutes the very justification for the national authorities' duty to consult interested parties, in the same way as it underpins the authorities' duty to notify the case to the Commission. Hence, the term 'regulate' in Article 19(2) has to be understood as also comprising the amendment of traffic distribution rules.

- (27) The Italian authorities argue that a consultation was not necessary from a substantial point of view as all air carriers holding slots at Linate airport equally benefitted from the Lupi Decree. The Commission notes that this argument anticipates upon the possible conclusions to be drawn in light of the observations interested parties are entitled to make. By definition, it cannot defeat Italy's obligation to consult interested parties first, before drawing any conclusions.
- (28) The Italian authorities indicated that they are prepared to carry out a consultation now. For the sake of clarity, however, it must be underlined that such a consultation would need to be followed by a new act, to be taken in light of the observations submitted. Such new act would be indispensable even if, following the consultation, the Italian authorities were to continue to consider that the rule as amended by the Lupi decree is appropriate.

## 6. CONCLUSION

- (29) Contrary to Article 19(2) of Regulation (EC) No 1008/2008, the Italian authorities have failed to consult interested parties before amending the traffic distribution rules for the Milan airport system.
- (30) The measures provided for in the Ministerial Decree No 395 of 1 October 2014 amending Decree No 15 of 3 March 2000 on the distribution of air traffic within the Milan airport system, as amended, notified to the Commission on 21 April 2015, can therefore not be approved.
- (31) This Decision is in accordance with the opinion of the Committee referred to in Article 25 of Regulation (EC) No 1008/2008,

HAS ADOPTED THIS DECISION:

### *Article 1*

Approval of the measures provided for in the Ministerial Decree No 395 of 1 October 2014 amending Decree No 15 of 3 March 2000 on the distribution of air traffic within the Milan airport system, notified to the Commission on 21 April 2015, is hereby denied.

### *Article 2*

This Decision is addressed to the Republic of Italy.

Done at Brussels, 17 December 2015.

*For the Commission*  
Violeta BULC  
*Member of the Commission*