

COUNCIL DECISION

of 14 December 1987

on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States

(87/602/87)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 84 (2) and 227 (2) thereof,

Having regard to the proposal from the Commission ⁽¹⁾,

Having regard to the opinions of the European Parliament ⁽²⁾,

Having regard to the opinion of the Economic and Social Committee ⁽³⁾,

Whereas flexibility and competition in the Community air-transport system should be increased;

Whereas the artificial constraints imposed on the capacity which air carriers may provide and on their access to the market should therefore be relaxed;

Whereas, taking into account the competitive market situation, provision should be made to prevent unjustifiable economic effects on air carriers; whereas Member States should accordingly be able to intervene if the capacity share of their carriers in a bilateral relationship would otherwise fall below a given percentage;

Whereas increased market access will stimulate the development of the Community air transport sector and give rise to improved services for users; whereas, however, in order to prevent undue disturbance of existing air traffic systems and to allow time for adaptation, it is appropriate to provide for some limitations on market access;

Whereas it is necessary to ensure that such limitations do not give an unfair advantage to any one air carrier;

Whereas it is necessary, in order to achieve a balanced set of opportunities, and taking account of the provisions of the measures as a whole, to redress the economic disadvantages of air carriers established in the peripheral Member States of the Community;

Whereas it is necessary, in particular, not to apply the opening of routes between hub airports of one State and regional airports of another State to a certain number of airports for reasons relating to airport infrastructure and in order to secure a gradual development of the Community policy of liberalization avoiding negative effects on the Community air transport system;

Whereas arrangements for greater cooperation over the use of Gibraltar airport were agreed in London on 2 December 1987 by the Kingdom of Spain and the United Kingdom in a joint declaration by the ministers of Foreign Affairs of the two countries, and such arrangements have yet to come into operation;

Whereas air carriers should be free from any State obligation to enter into agreements with other air carriers in respects of capacity and market access;

Whereas the Heads of State and Government, at their meeting in June 1986, agreed that the internal market in air transport should be completed by 1992 pursuant to Community actions leading to the strengthening of its economic and social cohesion; whereas the provisions of this Decision on capacity sharing and market access are a first step in this direction and the Council will therefore, in order to meet the objective set by the Heads of State and Government, adopt further measures of liberalization in respect of capacity sharing and market access including new fifth-freedom traffic rights between Community airports at the end of a three-year initial period,

⁽¹⁾ OJ No C 182, 9. 7. 1984, p. 1.

⁽²⁾ OJ No C 262, 14. 10. 1985, p. 44 and OJ No C 345, 21. 12. 1987.

⁽³⁾ OJ No C 303, 25. 11. 1985, p. 31.

HAS ADOPTED THIS DECISION:

Scope and definitions

Article 1

1. This Decision concerns:

- (a) the sharing of passenger capacity between the air carrier(s) of one Member State and the air carrier(s) of another Member State on scheduled air services between these States;
- (b) access for Community air carrier(s) to certain routes between Member States which they do not already operate.

2. This Decision shall not affect the relationship between a Member State and its own air carriers respecting capacity sharing and market access.

3. This Decision shall not apply to the overseas departments referred to in Article 227 (2) of the Treaty.

4. Articles 3 and 4 shall not apply to those services subject to Council Directive 83/416/EEC of 25 July 1983 concerning the authorization of scheduled inter-regional air services for the transport of passengers, mail and cargo between Member States⁽¹⁾, as amended by Directive 86/216/EEC⁽²⁾.

5. The application of this Decision to the airport of Gibraltar is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.

6. Application of the provisions of this Decision to Gibraltar airport shall be suspended until the arrangements in the joint declaration made by the Foreign Ministers of the Kingdom of Spain and the United Kingdom on 2 December 1987 have come into operation. The Governments of Spain and the United Kingdom will so inform the Council on that date.

Article 2

For the purpose of this Decision:

- (a) capacity shall be expressed as the number of seats offered to the general public on a scheduled air service over a given period;

- (b) capacity share means the share of the air carrier(s) of a Member State expressed as a percentage of the total capacity in a bilateral relationship with another Member State, excluding any capacity provided under the provisions of Article 6 (3) or under the terms of Directive 83/416/EEC and also any capacity provided by a fifth-freedom air carrier;

- (c) air carrier means an air transport enterprise with a valid operating licence to operate scheduled air services;

- (d) a third-freedom air carrier means an air carrier having the right to put down, in the territory of another State, passengers, freight and mail taken up in the State in which it is registered;

a fourth-freedom air carrier means an air carrier having the right to take on, in another State, passengers, freight and mail, for off-loading in its State of registration;

a fifth-freedom air carrier means an air carrier having the right to undertake the commercial air transport of passengers, freight and mail between two States other than its State of registration;

- (e) States concerned mean the Member States between which the scheduled air service in question is operated;

- (f) Community air carrier means:

- (i) an air carrier which has its central administration and principal place of business in the Community, the majority of whose shares are owned by nationals of Member States and/or Member States and which is effectively controlled by such persons or States, or

- (ii) an air carrier which, although it does not meet the definition set out in (i) at the time of adoption of this Decision:

- A. either has its central administration and principal place of business in the Community and has been providing scheduled or non-scheduled air services in the Community during the 12 months prior to adoption of this Decision,

- B. or has been providing scheduled services between Member States on the basis of the third- and fourth-freedoms of the air during the 12 months prior to adoption of this Decision.
The enterprises which meet the above criteria are listed in Annex I.

- (g) scheduled air service means a series of flights each possessing all the following characteristics:

- (i) it passes through the air space over the territory of more than one Member State;

⁽¹⁾ OJ No L 237, 26. 8. 1983, p. 19.

⁽²⁾ OJ No L 152, 6. 6. 1986, p. 47.

- (ii) it is performed by aircraft for the transport of passengers or passengers and cargo and/or mail for remuneration, in such a manner that on each flight seats are available for purchase by members of the public (either directly from the air carrier or from its authorized agents);
- (iii) it is operated so as to serve traffic between the same two or more points, either:
- (1) according to a published timetable, or
 - (2) with flights so regular or frequent that they constitute a recognizably systematic series;
- (h) flight means a departure from a specified airport towards a specified destination;
- (i) multiple designation on a country-pair basis means the designation by one Member State of two or more of its air carriers to operate scheduled air services between its territory and that of another Member State;
- (j) multiple designation on a city-pair basis means the designation by one Member State of two or more of its air carriers to operate a scheduled air service between an airport or airport system in its territory and an airport or airport system in the territory of another Member State;
- (k) hub airport means an airport included in the list in Annex II as a category 1 airport;
- regional airport means a category 2 or 3 airport as listed in Annex II;
- (l) airport system means two or more airports grouped together as serving the same city.

Shares of capacity

Article 3

1. In the period between 1 January 1988 and 30 September 1989, a Member State shall allow any third- and fourth-freedom air carrier(s) authorized by the States concerned under the arrangements in force between them to operate routes between their territories to adjust capacity provided that the resulting capacity shares are not outside the range 55 % : 45 %.

2. Unless a different decision is taken under Article 4, the range within which a Member State shall allow the air

carrier(s) of another Member State to increase its (their) capacity share shall be extended to 60 % : 40 % from 1 October 1989.

3. In applying the provisions of paragraphs 1 and 2, unilateral cut-backs in capacity shall not be taken into account. In such cases, the basis for the calculation of capacity shares shall be the capacity offered in the previous corresponding seasons by the air carrier(s) of the Member State which has (have) reduced its (their) capacity.

4. Adjustments within the 55 % : 45 % range or the 60 % : 40 % range, as appropriate, shall be permissible in any given season, under the following conditions:

- (a) after the first automatic approval, the air carrier(s) of the Member State offering less capacity shall be authorized to increase its (their) own capacity up to the limit of the capacity approved for the air carrier(s) of the Member State offering the larger capacity;
- (b) if the latter air carrier(s) choose(s) to react to the above mentioned increase, it (they) shall receive automatic approval for one further increase, up to the level of its (their) first capacity filing(s) for that season, within the applicable range;
- (c) the carrier(s) of the Member State offering less capacity will then receive automatic approval for one increase up to the matching level;
- (d) any further increases during that season shall be subject to the applicable bilateral provisions between the two Member States concerned.

Article 4

1. At the request of any Member State for which the application of Article 3 (1) has led to serious financial damage for its air carrier(s), the Commission will carry out a review before 1 August 1989 and, on the basis of all relevant factors, including the market situation, the financial position of the carrier(s) and the capacity utilisation achieved, will take a decision on whether the provisions of Article 3 (2) should be applied in full or not.

2. The Commission shall communicate its decision to the Council which, acting by unanimity, may take a different decision within a period of two months of this communication.

Multiple designation

Article 5

1. A Member State shall accept multiple designation on a country-pair basis by another Member State but, subject to paragraph 2, shall not be obliged to accept the designation of more than one air carrier on any one route.

2. A Member State shall also accept multiple designation on a city-pair basis by another Member State:

- in the first year after the notification of this Decision, on routes on which more than 250 000 passengers were carried in the preceding year,
- in the second year, on routes on which more than 200 000 passengers were carried in the preceding year or on which there are more than 1 200 return flights per annum,
- in the third year, on routes on which more than 180 000 passengers were carried in the preceding year or on which there are more than 1 000 return flights per annum.

3. The provisions of this Article are subject to those in Articles 3 and 4.

Routes between hub and regional airports

Article 6

1. Subject to the provisions of Articles 3, 4 and 5, Community air carriers shall be permitted to introduce third- or fourth-freedom scheduled air services between category 1 airports or airport systems in the territory of one Member State and regional airports in the territory of another Member State. Airport categories are listed in Annex II.

2. (i) The provisions of paragraph 1 shall not apply:

(a) to regional airports exempted from the provisions of Directive 83/416/EEC;

(b) for the duration of this Decision to:

- the following airports which, at the time of notification of this Decision, handle fewer than 100 000 passengers per annum on international scheduled air services:

Aalborg, Seville,
Bergamo, Skrydstrup,
Billund, Sønderborg,
Bologna, Stauning,
Esbjerg, Thisted,
Karup, Tirstrup,
Odense,

- the following airports or airport systems which at the time of the notification of this Decision meet the criteria set out in Article 9:

Barcelona,
Malaga,
Milan — Linate/Malpensa.

(ii) In addition, in order to prevent major disturbance of existing air traffic systems and to allow time for adaptation, the following airports shall also be excluded from the provisions of paragraph 1 for the duration of this Decision:

Alicante, Salonica — Micra,
Athens, Turin,
Bilbao, Valencia,
Genoa, Venice.

3. Article 3 and 4 shall not apply to services between an airport in category 1 and a regional airport which are provided by aircraft with not more than 70 passenger seats.

4. Where an air carrier of one Member State has been authorized in accordance with this Article to operate a scheduled air service, the State of registration of that air carrier shall raise no objection to an application for the introduction of a scheduled air service on the same route by an air carrier of the other State concerned.

5. The provisions of this Article shall not affect a Member State's right to regulate the distribution of traffic between the airports within an airport system.

Combination of points

Article 7

1. In operating scheduled air services to or from two or more points in another Member State or States, a third- or fourth-freedom Community air carrier shall, subject to the provisions of Articles 3, 4 and 5, be permitted to combine scheduled air services, provided that no traffic rights are exercised between the combined points.

2. The provisions of paragraph 1 shall not apply within Spanish territory during the period of validity of this Decision. Similarly, air carriers registered in Spain may not avail themselves of those provisions during that period.

Fifth-freedom rights

Article 8

1. Without prejudice to Article 6 (2), a Community air carrier shall be permitted to operate a fifth-freedom

scheduled air service where third- or fourth-freedom traffic rights exist, provided that the service meets the following conditions:

- (a) it is authorized by the State of registration of the Community air carrier concerned;
 - (b) it is operated as an extension of a service from, or as a preliminary of a service to, its State of registration;
 - (c) without prejudice to paragraph 2 it is operated between two airports at least one of which is not a category 1 airport;
- and
- (d) not more than 30 % of the carrier's annual capacity on the route concerned may be used for the carriage of fifth-freedom passengers.

2. Subject to paragraphs 1 (a), (b) and (d), Ireland and Portugal may each select one category 1, airport in each of the other Member States and may each designate an air carrier to carry fifth-freedom traffic on services between those airports, provided that neither of the air carriers so designated may exercise such rights at any one airport on more than one such route. The Member States concerned need not designate the same carrier for all routes but may for this purpose designate only one carrier to each other Member State.

3. This Article shall not apply during the period of validity of this Decision to routes to or from Spanish territory. Similarly, during the same period air carriers registered in Spain may not claim fifth-freedom rights on the basis of the provisions in this Article.

General provisions

Article 9

Notwithstanding Articles 5 to 8, a Member State shall not be obliged to authorize a scheduled air service in cases where:

- (a) the airport concerned in that State has insufficient facilities to accommodate the service;
- (b) navigational aids are insufficient to accommodate the service.

Article 10

1. This Decision shall not prevent Member States from concluding arrangements which are more flexible than the provisions of this Decision or from maintaining such arrangements in force.

2. The provisions of this Decision shall not be used to make existing capacity or market access arrangements more restrictive.

Article 11

Member States shall not require air carriers to enter into agreements or arrangements with other air carriers relating to any of the provisions of this Decision, nor shall they forbid them to do so.

Article 12

1. After consultation with the Commission, Member States shall take the necessary steps to comply with this Decision not later than 31 December 1987.

2. Member States shall communicate to the Commission all the laws, regulations and administrative provisions which they adopt for the application of this Decision.

Article 13

1. Before 1 November 1989, and every two years thereafter, the Commission shall publish a report on the implementation of this Decision.

2. Member States and the Commission shall cooperate in implementing this Decision, particularly as regards collection of information for the report referred to in paragraph 1.

3. Confidential information obtained within the framework of the implementation of this Decision shall be covered by professional secrecy.

Article 14

The Council shall decide on the revision of this Decision by 30 June 1990 at the latest, on the basis of a Commission proposal to be submitted by 1 November 1989.

Article 15

This Decision is addressed to the Member States.

Done at Brussels, 14 December 1987

For the Council

The President

U. ELLEMANN-JENSEN

*ANNEX I***Air carriers referred to in Article 2 (f) (ii)**

The following air carriers meet the criteria referred to in Article 2 (f) (ii) as long as they are recognized as national carriers by the Member State which so recognizes them at the time of the adoption of this Decision:

- Scandinavian Airlines System,
 - Britannia Airways,
 - Monarch Airlines.
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ANNEX II

List of airport categories

<i>Category 1</i>	BELGIUM:	Brussels-Zaventem
	DENMARK:	Copenhagen-Kastrup/Roskilde
	GERMANY:	Frankfurt/Rhein-Main, Düsseldorf-Lohausen, Munich-Riem
	SPAIN:	Palma-Mallorca, Madrid-Barajas, Malaga, Las Palmas
	GREECE:	Athens-Hellinikon, Salonica-Micra
	FRANCE:	Paris-Charles de Gaulle/Orly
	IRELAND:	Dublin
	ITALY:	Rome-Fiumicino/Ciampino, Milan-Linate/Malpensa
	NETHERLANDS:	Amsterdam-Schiphol
	PORTUGAL:	Lisbon, Faro
	UNITED KINGDOM:	London-Heathrow/Gatwick/Stansted, Luton
<i>Category 2</i>	GERMANY:	Hamburg-Fuhlsbüttel, Stuttgart-Echterdingen, Cologne/Bonn
	SPAIN:	Tenerife-Sur, Barcelona, Ibiza, Alicante, Gerona
	FRANCE:	Marseilles-Marignane, Nice-Côte d'Azur, Lyon- Satolas, Basle-Mulhouse
	IRELAND:	Shannon
	ITALY:	Naples-Capodichino, Venice-Tessera, Catania- Fontanařossa
	LUXEMBURG:	Luxemburg-Findel
	PORTUGAL:	Funchal, Oporto
	UNITED KINGDOM:	Manchester-Ringway, Birmingham-Elmdon, Glasgow-Abbotsinch
<i>Category 3</i>	All other airports officially open to international scheduled services.	

Communication of the Government of the Federal Republic of Germany

The Council has received the following communication from the Government of the Federal Republic of Germany:

When depositing its instruments of ratification of the Treaties establishing the European Communities, the Government of the Federal Republic of Germany declared that these Treaties applied equally to Land Berlin. It declared at the same time that the rights and responsibilities of France, the United Kingdom and the United States in respect of Berlin were unaffected. In view of the fact that civil aviation is one of the areas in which the said States have specifically reserved powers for themselves in Berlin, and following consultations with the Governments of these States, the Government of the Federal Republic of Germany states that the Council Directive on fares for scheduled air services between Member States and the Council Decision on the sharing of passenger capacity between air carriers on scheduled air services between Member States and on access for air carriers to scheduled air-service routes between Member States do not cover Land Berlin and that the Council Regulation laying down the procedure for the application of the rules on competition to undertakings in the air transport sector and the Council Regulation on the application of Article 85 (3) of the Treaty to certain categories of agreements and concerned practices in the air transport sector are not applicable in Land Berlin.
