

COMMISSION IMPLEMENTING DECISION (EU) 2016/707**of 10 May 2016****on the approval pursuant to Article 19 of Regulation (EC) No 1008/2008 of modified traffic distribution rules for the airports Paris Charles-de-Gaulle, Paris Orly, and Paris Le Bourget***(notified under document C(2016) 2635)***(Only the French 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 ⁽¹⁾, and in particular Article 19(3) thereof,

Whereas:

1. PROCEDURE

- (1) By letter of 28 September 2015 the French authorities informed the Commission, pursuant to Article 19(3) of Regulation (EC) No 1008/2008, of a project to amend the rules currently set out in Decree of 15 November 1994 on the distribution of intra-Community air traffic within the Paris airport system (hereinafter the 'intended amendments') ⁽²⁾. By letter of 10 November 2015 the Commission requested additional information to which the French authorities replied by letter dated 30 November 2015.
- (2) The Commission published a summary of the intended amendments in the *Official Journal of the European Union* on 2 December 2015 and invited interested parties to submit comments ⁽³⁾.

2. BACKGROUND AND DESCRIPTION OF THE MEASURE**2.1. THE DECREE OF 15 NOVEMBER 1994**

- (3) The city of Paris is served by the airports Charles-de-Gaulle, Orly, and Le Bourget, for which traffic distribution is regulated collectively by the Decree of 15 November 1994.
- (4) In response to a complaint the Commission, by Commission Decision 95/259/EC ⁽⁴⁾, declared the traffic distribution rules for the Paris airport system set out in the French Decree of 15 November 1994 as compatible with Council Regulation (EEC) No 2408/92 ⁽⁵⁾. This regulation has since been repealed and replaced by Regulation (EC) No 1008/2008. The Commission's decision was conditional on the Decree being amended as indicated in the decision. The French authorities complied with the requirement through an amendment to the Decree on 1 March 1996.
- (5) The Decree of 15 November 1994 as amended (hereinafter the '1994 Decree') applies only to intra-EEA traffic. It provides that non-scheduled air services to and from EEA airports provided with an aircraft having a capacity of 25 seats or less, for which the seats are not marketed individually to the public, either directly by the carrier or

⁽¹⁾ OJ L 293, 31.10.2008, p. 3.

⁽²⁾ The intention is to bring about the relevant changes by way of a new decree, replacing the 1994 decree.

⁽³⁾ OJ C 400, 2.12.2015, p. 4.

⁽⁴⁾ Commission Decision 95/259/EC of 14 March 1995 on a procedure relating to the application of Council Regulation (EEC) No 2408/92 (Case VII/AMA/9/94 — French traffic distribution rules for the airport system of Paris) (OJ L 162, 13.7.1995, p. 25).

⁽⁵⁾ 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), repealed by Article 27 of Regulation (EC) No 1008/2008 (recast).

indirectly, must operate from/to Le Bourget. All other intra-EEA traffic may be operated from/to Charles-de-Gaulle and Orly airports. Access to Orly is restricted to four daily frequencies on routes between Orly and other EEA airports during certain times of the day. During peak hours the restriction at Orly does not apply, if services are provided with aircraft of a certain minimum size.

2.2. THE INTENDED AMENDMENTS AND UNDERLYING CONSIDERATIONS

- (6) The intended amendments to the existing traffic distribution rules for airports serving Paris remove existing restrictions applied to Orly airport, in terms of daily frequencies, depending also on aircraft size at Orly airport, currently enshrined in Articles 4 and 5 of the 1994 Decree, quoted in full in Section I of Decision 95/259/EC.
- (7) These restrictions imposed specifically at Orly were aimed at optimising limited capacity at the airport and preventing air carriers from operating more than four frequencies per carrier on a given route, thereby encouraging the use of slots for different destinations. The restrictions also had the effect of optimising the use of scarce slots by preventing the use of aircraft below a certain threshold size on routes which had enough passenger traffic justifying the use of larger aircraft, merely in order to fulfil slot use requirements. The size thresholds were set according to the amount of passenger traffic on a given route.
- (8) According to the French authorities, those particular restrictions are no longer necessary. The French authorities seem to be satisfied with the current situation of slot usage at Orly, as they have stated that slot use has been naturally optimized since the introduction of the 1994 Decree. Since all slots at Orly are currently being used, the possibility for other services to acquire slots at the airport is very limited. Operators now also use larger aircraft in order to maximise capacity and therefore optimise slot usage in their own interest in ways that also benefit the optimal use of capacity at Orly airport.
- (9) Concerning the remaining provisions of the 1994 Decree the intended amendments also extend the application of the traffic distribution rules, currently applicable to intra-EEA services only, also to extra-EEA services as explained in the two following paragraphs.
- (10) Le Bourget only receives non-scheduled services provided by aircraft having a capacity of 25 seats or less for which the seats are not marketed individually to the public. The effect of the intended amendments will be that extra-EEA traffic on scheduled services, services provided on aircraft with 25 seats or more, and in case the seats are marketed individually to the public, directly by the carrier or indirectly will be excluded from Le Bourget. The upper limit of seats is subject to possible derogations by the competent minister, in duly justified cases. At present, these restrictions are applicable exclusively to intra-EEA-services.
- (11) All other services are directed to Orly and Charles-de-Gaulle. The intended amendments have the effect of restricting extra-EEA traffic on non-scheduled services provided by aircraft with 25 seats or less, unless the seats are marketed individually to the public or, subject to prior authorisation, unless the aircraft in question carries connecting passengers. This corresponds to the existing restrictions for intra-EEA services ⁽¹⁾.
- (12) The French authorities foresee the following impact on the traffic distribution as it is at the moment ⁽²⁾:
 - Regarding intra-EEA traffic the rules remain essentially the same and there is no real impact.
 - The rules will introduce a prohibition on scheduled extra-EEA services at Le Bourget, however no such services are operated at Le Bourget at the moment anyway.
 - The rules will also introduce a prohibition of non-scheduled extra-EEA flights on large aircraft at Le Bourget, however the current number of those services is small (130 flights out of 54 000 in 2014).

⁽¹⁾ Under the current rules, applicable to intra-EEA-services only, the more favourable treatment of connecting flights is not automatic, as a default position, but may be granted by way of derogation.

⁽²⁾ Explained in a letter from the French authorities from 30 November 2015.

- Non-scheduled extra-EEA services provided by aircraft having a capacity of 25 seats or less for which the seats are not marketed individually to the public will be prohibited at Orly and Charles-de-Gaulle. However due to the limited availability of slots there is currently only a very limited number of non-scheduled services provided by aircraft having a capacity of 25 seats or less at Orly airport. As regards Charles-de-Gaulle, operators of non-scheduled services provided by aircraft having a capacity of 25 seats or less today already prefer Le Bourget because of its proximity to the city and its classification as a business aviation airport.
- (13) The French authorities explained that the current restrictions imposed by the 1994 Decree insofar as it concerned aircraft with 25 seats or less for which the seats were not marketed to the public (Article 6 of the Decree) were justified by the need to optimise the use of limited capacity at Charles-de-Gaulle and Orly. According to the French authorities, in order to achieve this optimisation it was necessary to ensure a homogenisation of aircraft type, which allows for regular flight movements at identical distances of time and space between movements. Smaller, and thus potentially slower, aircraft disrupt the regular sequence, as small aircraft require more space and time between flight movements. Therefore, these non-scheduled services provided on aircraft having a capacity of 25 seats or less, for which the seats are not marketed individually to the public, are directed to Le Bourget, in order to not disrupt the regular sequence.
- (14) Non-scheduled services provided on aircraft having a capacity of 25 seats or less for which the seats are marketed to the public, on the other hand, must operate to/from Orly and Charles-de-Gaulle. According to the French authorities this is due to the fact that Le Bourget, for reasons explained in the next paragraph, does not accept any service marketed to the public. However, due to the fact that these services are limited and subject to finding an available ad hoc slot at Orly and Charles-de-Gaulle they are not considered disruptive in these airports.
- (15) Concerning the air traffic accepted at Le Bourget, the French authorities stated that a choice has been made to reserve the airport for business and general aviation and as a show room for certain international air and space events. The airport infrastructure is adapted to this end, and therefore directing any commercial services, scheduled services or any non-scheduled services on large aircraft to Le Bourget would require prior investment in order to adapt the infrastructure to those types of services. In addition, scheduled services and services on large aircraft would have environmental impacts on the residents.
- (16) According to the French authorities, the abovementioned considerations, relevant to each of the airports concerned, also pertain to traffic to and from non-EEA countries. Since such traffic has been widely liberalised on the basis of new air services agreements, it has witnessed a considerable increase since the entry into application of the 1994 Decree. Hence, the French authorities state that it is necessary to apply the restrictions referred to above to all traffic.

2.3. CONSULTATION CONDUCTED BY THE FRENCH AUTHORITIES

- (17) The French authorities conducted a consultation process prior to the notification of the intended amendments to the Commission ⁽¹⁾:
- a notice of new draft rules was published on 19 May 2015 on the public consultations website of the Ministry for Ecology, Sustainable Development and Energy,
- an alert about the intention to modify the existing traffic distribution rules for the Paris airport system was published in the Official Journal of the French Republic of 21 May 2015 with a link to the draft text,
- the period for public consultation ended 21 July 2015.
- (18) Prior to the public consultation the French authorities had orally consulted the air transport associations FNAM (Fédération Nationale de l'Aviation Marchande), SCARA (Syndicat des Compagnies Aériennes Autonomes) and EBAA (European Business Aviation Association), which expressed their support to the modifications, having regard in particular to the intended consistency of the treatment of intra- and extra-EEA services.

⁽¹⁾ Detailed in a letter from the French authorities from 30 November 2015.

- (19) The French authorities received submissions from three interested parties, which were taken into account in the draft text.
- (20) The initial draft rules included a provision to allow non-scheduled services provided on aircraft having a capacity of 25 seats or less to operate to/from Orly and Charles-de-Gaulle where these flights carry connecting passengers without the need to obtain a prior derogation. This provision was rejected by *aéroports de Paris* (ADP), and subsequently excluded from the draft text. It was considered that permitting blanket access of these flights to Charles-de-Gaulle and Orly airports could have a detrimental effect on the scheduled traffic at those airports.

3. CONSULTATION CONDUCTED BY THE COMMISSION

- (21) In response to the publication of a summary of the intended amendments in the *Official Journal of the European Union*, the Commission received comments from one interested party.
- (22) The interested party argued that the restriction on the type of services that may operate to/from Le Bourget is excessive and contrary to the interests of consumers, the region and the airport. Further, the party pointed out that no study was carried out to assess the economic impact and the effect on air traffic of the intended amendments, as compared to the existing traffic distribution rules.
- (23) The party claimed that the distinction based on scheduled or non-scheduled services and the size of the aircraft is arbitrary and unjustified. The party suggested that the new rules could be interpreted as turning air traffic away from Le Bourget where the terminal services are managed by seven independent operators, and pushing it towards Charles-de-Gaulle and Orly airports where the terminals are operated by a monopoly.
- (24) Lastly, the party stated that the consultation process was discriminatory. It claimed that unlike other stakeholders, the party was not invited to meetings where the intended amendments were discussed and assessed. It therefore was only able to make a written contribution.

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

- (25) 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 satisfying the following conditions:
 - (a) the airports serve the same city or conurbation;
 - (b) the airports are served by adequate transport infrastructure providing, to the extent possible, a direct connection making it possible to arrive at the airport within 90 minutes including, where necessary on a cross-border basis;
 - (c) the airports are linked to one another and to the city or conurbation they serve by frequent, reliable and efficient public transport services; and
 - (d) the airports offer necessary services to air carriers, and do not unduly prejudice their commercial opportunities.
- (26) Further, the distribution of air traffic between the airports concerned shall respect the principles of proportionality and transparency, and shall be based on objective criteria.

- (27) 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 6 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

- (28) The amendments modify the rules regarding traffic distribution for the airports serving Paris by extending the scope of application of the existing rules to extra-EEA services, which has the effect of restricting access of certain types of services to/from each of the airports.
- (29) This constitutes a change to an existing traffic distribution rule within the meaning of Article 19(3) of Regulation (EC) No 1008/2008. According to its terms, this provision is not limited to traffic within the EU or (in view of incorporation of the Regulation into the EEA Agreement) within the EEA. Moreover, under a number of agreements with certain third countries which are currently applied, such as those with the Swiss Confederation or the United States of America, Union air carriers and air carriers from those third countries are entitled to provide services between any point in the Union and the territory of the third country concerned. Lastly, carriers of any given Member State having a secondary establishment in another Member State are entitled to benefit without discrimination from rights flowing from bilateral agreements concluded by the latter Member State, in accordance with the Court's jurisprudence ⁽¹⁾.
- (30) Another change to an existing traffic distribution rule, within the meaning of Article 19(3) of Regulation (EC) No 1008/2008, resides in the fact that certain restrictions regarding the Orly airport are lifted, as explained in recital 11 above.

5.1. CONSULTATION

- (31) The Commission notes that the French authorities conducted an official public consultation by notice of 19 May 2015 to which any interested party was invited to reply. The Commission has no indications that the replies were not taken into consideration by the French authorities. On the contrary, it observes that the draft rules were changed following the consultation. Therefore, the Commission considers that interested parties were adequately consulted as required by Article 19(2) of Regulation (EC) No 1008/2008.

5.2. COMPLIANCE OF THE THREE AIRPORTS IN QUESTION WITH THE CRITERIA SET OUT IN ARTICLE 19(2), FIRST SUBPARAGRAPH, OF REGULATION (EC) No 1008/2008

- (32) The Commission is satisfied that the three airports in question, Orly, Charles-de-Gaulle and Le Bourget satisfy the requirements of Article 19(2).
- (33) The airports serve the conurbation of Paris, they are accessible through adequate road transport infrastructure as well as public transportation within 35 minutes to about an hour, the airports are linked to one another and the city of Paris by frequent and reliable public transportation, and the airports offer necessary services to air carriers, namely air traffic control, ground-handling and the processing of passengers.

5.3. NON-DISCRIMINATION

- (34) The rules as amended would not display any discrimination among destinations inside the Union, nor on grounds of nationality or identity of air carriers.

⁽¹⁾ Case C-467/98, *Commission v Denmark*, paragraphs 122 et seq.

- (35) Hence, the amendments comply with the criteria of non-discrimination set out in Article 19(2).

5.4. JUSTIFICATION AND PROPORTIONALITY

- (36) The abolition of the limitations regarding Orly simply undoes existing restrictions, without creating any new ones. The restrictions were introduced in order to encourage the use of slots for different destinations and to prevent carriers from using aircraft below a certain size threshold on routes with large amounts of passenger traffic, just to satisfy slot use requirements. However, given the circumstances described in recital 8 above, the rules have become unnecessary.
- (37) In regard to the other effects of the intended amendments, the new restrictions created are the following:
- at Orly and Charles-de-Gaulle, non-scheduled, extra-EEA services provided on small aircraft, for which the seats are not marketed individually to the public, will be prohibited,
 - at Le Bourget, scheduled extra-EEA flights and extra-EEA flights provided on large aircraft will be prohibited.
- (38) The interested party states that the restrictions are excessive. The Commission does not agree. The traffic distribution rules serve two purposes:
- On the one hand the intention is to optimise the use of limited airport capacity at Orly and Charles-de-Gaulle. Therefore non-scheduled services provided on aircraft having a capacity of 25 seats or less where the seats are not individually marketed to the public are directed to Le Bourget in order not to disrupt the regular traffic sequence at Orly and Charles-de-Gaulle.
 - On the other hand the intention is to confine traffic to and from Le Bourget to non-scheduled services provided on aircraft having a capacity of 25 seats or less for which the seats are not individually marketed to the public, since accommodating other types of services would require prior investments in order to adapt the airport's infrastructure.
- (39) Therefore, the distinctions envisaged by the French Authorities, based on types of services (their scheduled or non-scheduled character, as well as the way in which seats are marketed) and size of aircraft, appear capable of achieving the objectives pursued.
- (40) Likewise, the measure does not appear to go beyond what is necessary to achieve those objectives.
- (41) To the extent that certain extra-EEA services are intended to be reserved to Charles-de-Gaulle and Orly airports, nothing suggests that the objective has been to procure advantages to the company operating those airports (ADP), rather than to achieve the abovementioned optimisation. In this context the Commission also observes that the French authorities initially intended to give small aircraft carrying connecting passengers general access to Orly airport, a solution which ADP itself contested.
- (42) The Commission thus considers that the intended amendments are objectively justified and proportionate.

5.5. OBJECTIVE CRITERIA

- (43) The intended amendments are based on objective criteria (size and type of service, as explained above) and necessary in order to pursue the abovementioned aims of the traffic distribution rules.

5.6. TRANSPARENCY

- (44) Lastly, the intended amendments will be published, as are the rules currently applicable, and will thus be transparent.

6. CONCLUSION

- (45) In conclusion, the Commission considers that the intended amendment to the traffic distribution rules as set out in Decree of 15 November 1994 on the distribution of intra-Community air traffic within the Paris airport system, are compatible with the requirements in Article 19 of Regulation (EC) No 1008/2008.
- (46) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee referred to in Article 25 of the Regulation,

HAS ADOPTED THIS DECISION:

Article 1

The intended amendment to the traffic distribution rules set out in the Decree of 15 November 1994 'on the distribution of intra-Community air traffic within the Paris airport system', notified to the Commission on 28 September 2015, is hereby approved.

Article 2

This Decision is addressed to the Republic of France.

Done at Brussels, 10 May 2016.

For the Commission
Violeta BULC
Member of the Commission
