

“Member State shall ensure that distribution of traffic rights among eligible Community air carriers [happens] on the basis of a non-discriminatory and transparent procedure.”

Promise that the EC Regulation 847/2004 made. Is the procedure non-discriminatory and transparent? Does it even matter?

A detailed view of the French, English and the Portuguese procedures.

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Abstract

This paper provides a comprehensive overview of the procedures adopted by France, Portugal and the United Kingdom in distributing the air traffic rights to Community air carriers in accordance with the terms of EC Regulation 847/2004. Particularly, this paper will examine and analyze whether these procedures are non-discriminatory and transparent. In doing so, this paper will provide an overview of the international air law regime and then focus specifically on the European, and the national rules of the Member States that have an impact on the distribution of the air traffic rights. Lastly, this paper will consider whether important matters like airport congestion and airline policy in the EU hinders the practical application of these procedures by the Member States.

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1. Introduction

Distribution of air traffic rights in the *European Union*, hereafter referred to as the EU, for Community air carriers¹ is a relatively new concept since distribution of air traffic rights has always been, and still remains in the major part of the world, a State matter towards *its own national air carriers*, rather than something that is addressed for ‘Community air carriers’. Article 5 of Regulation 847/2004², hereafter referred to as the Regulation deals with the issue of distribution of air traffic rights in the following way:

“Where a Member State concludes an agreement...that provide for limitations on the use of traffic rights or the number of Community air carriers eligible to be designated to take advantage of traffic rights, that Member State shall ensure a distribution of traffic rights among eligible Community air carriers on the basis of a non-discriminatory and transparent procedure.”

Thus, Member States have the power to distribute air traffic rights among eligible Community air carriers, for as long as the procedures that the Member States adopt are non-discriminatory and transparent. There is no requirement for procedures of every Member State to be the same. Furthermore, the procedures adopted by each Member State only applies in the case where the bilateral air services agreement, hereafter referred to as the BASA, provides for limitation on the use of traffic rights i.e. where the demand for capacity on a route between a Member State and a third country exceeds the capacity which is available under the agreement. Accordingly, the procedure adopted by the Member States does not need to be applied where the BASA provides for unlimited designation, for example in an *Open Skies* type agreement³, or where the demand does not exceed the available capacity.

This paper will analyze whether the procedures adopted by Member States are in compliance with Article 5 of the Regulation, in that *are they non-discriminatory and transparent?* According to Article 6 of the Regulation, Member States are obliged to inform the Commission without delay, of the procedures that they shall apply for the purposes of Article 5. These procedures are published in the Official Journal of the EU. Accordingly, the analysis carried out henceforth is based on the information that the author has obtained from the Official Journal of the EU.

In considering the research question of this paper, the author researched the procedures adopted by 13 Member States⁴. However the scope of this paper is limited in providing detailed

¹ ‘Community air carrier’ means an air carrier with a valid operating licence granted by a competent licensing authority in accordance with the rules laid down in Regulation (EC) No. 1008/2008 hereafter referred to as Regulation 1008/2008.

² Regulation (EC) No 847/2004 of the European Parliament and of the Council of 29 April 2004 on the negotiation and implementation of air services agreements between Member States and third countries.

³ Open Skies Agreement means an agreement that would allow multiple designations, loosening of the ownership clause, unlimited traffic rights of the third, fourth and fifth freedoms, free use of foreign equipment, free decision on frequencies and applied capacity and free price organization. For more detail on this topic, see B.F. Havel, *Beyond Open Skies: A New Regime for International Aviation* (2009)

⁴ These Member States being France, UK, Portugal, Germany, Netherlands, Italy, Greece, Austria, Finland, Denmark, Romania, Czech Republic and Spain. See, Spanish national procedure for the allocation of restricted air traffic rights, OJ 2012/C 341/05, Romanian national procedure for the allocation of limited air traffic rights, OJ 2007/C 213/03, Danish national procedure for the allocation of limited air traffic rights, OJ 2009/C 37/07, Finland national procedure for the allocation of limited air traffic rights, OJ 2006/C 127/06, Austrian national procedure for the allocation of restricted air traffic rights, OJ 2009/C 183/10, Greek national procedure for the

analysis of three Member States in France, Portugal and the UK. The author has chosen these three Member States over others because these States provided the most detailed⁵ procedures on the Official Journal of the EU, and also because, as the subsequent sections of this paper will indicate, the procedures aids the author in best providing with a critical analysis of whether the adopted procedures of Member States are non-discriminatory and transparent.

2. Background Information

Before addressing the main research question of this paper, this section provides a background that led to the distribution of air traffic rights in the EU.

2.1. The international regime

Sovereignty plays a central role in aviation.⁶ This is confirmed by the Chicago Convention on international civil aviation of 1944⁷, hereafter referred to as the Chicago Convention which has laid down the foundations for civil aviation. Article 6 of the Chicago Convention states:

“No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization.”⁸

Accordingly, each State may decide which airline may or may not enter its airspace.⁹ An international treaty regarding commercial operations can bind the contracting States and create the desired reliability.¹⁰ Such a treaty may be multilateral, regional or bilateral in nature. Since multilateral treaties governing this particular area of international aviation never gained sufficient support, a network of bilateral agreements prevailed¹¹. The main objective of these BASAs is to guarantee, on the basis of reciprocity, specific *air traffic rights* in support of commercial air services.¹² *However*, an important reiteration must be made, that since these BASAs are negotiated between States, whatever air traffic rights¹³ that are negotiated between the concerned States, are intended to be distributed, principally and historically, amongst the air carriers which

allocation of limited air traffic rights, OJ 2007/C 278/03, Italian national procedure for the allocation of limited air traffic rights, OJ 2008/C 19/07, Netherlands national procedure for the allocation of limited air traffic rights, OJ 2007/C 213/04, Czech national procedure for the allocation of limited air traffic rights, OJ 2006/C 313/04, German national procedure for the allocation of limited air traffic rights, OJ 2009/C 112/04.

⁵ For example, the content available on the Official Journal of the EU relating the distribution of air traffic rights for States like Finland, Denmark, Sweden, Ireland and Czech Republic is only over page.

⁶ The unequivocal proclamation of the principle of sovereignty has a military background. The rise of military aircraft during the two major world wars caused a need for strict control. Thus, reliance on sovereignty served as a tool to safeguard national airspace and security. See, I.H. Ph. Diederiks-Verschoor & P.M.J. Mendes de Leon, *An Introduction to Air Law*, 11 (2012).

⁷ 15 United Nations Treaty Series 296-361 (1948).

⁸ Article 6 of the Chicago Convention.

⁹ S. Hobe, N. von Ruckteschell & D. Heffernan, *Cologne Compendium on Air Law in Europe*, 215 (2013).

¹⁰ *Ibid*

¹¹ *Ibid*

¹² *Ibid*

¹³ States are free to negotiate air traffic rights the way they want to. Accordingly, they may negotiate traffic rights in a liberal sense, for example, allowing multiple designations i.e. more airlines to operate services or negotiate in a restrictive sense, by agreeing to only single designation or imposing restrictions on capacity. See, E.M. Giumulla & L. Weber, *International and EU Aviation Law, Selected Issues*, 23 (2011)

are designated by those States in order to operate the agreed international air services. Airlines can only be designated if they comply with the “Ownership and Control” clause that exists in almost all BASAs which allows a contracting State to reject issuance of the operating authorization for air services to the air carrier designated by the other contracting State when such air carrier fails to provide proof that the majority of its ownership and control belongs to the nationals or incorporations of the designating State.

2.2. The EU regime

2.2.1. Intra-EU Liberalization

Prior to 1992, the EU air transport market was a collection of national markets, dominated by mostly state-owned “legacy” or “national flag carriers” and regulated by national laws, which varied significantly in the degree to which competition was permitted or promoted.¹⁴ After the Intra-EU liberalization, the operation of intra-Community air services by a Community air carrier¹⁵ was not subject to any BASAs.¹⁶

As far as the distribution of air traffic rights is concerned, a Member State may regulate the distribution of air traffic between airports,¹⁷ but for the purposes of this paper, the author will not consider these provisions in detail as the primary attention of this paper will be in relation to the distribution of air traffic rights in EU’s external aviation policy.

2.2.2. External Aviation Policy of the EU

After the internal EU liberalization was accomplished, the EU began to seek liberalizing the EU Member States’ bilateral relations with third countries.¹⁸ To make the single air transport market

¹⁴ See, L. Weber, *supra* 10, at 171. The First Package, adopted in 1987, allowed multiple designation of carriers on country-to-country routes and high volume city-to-city routes, fifth freedom rights on city-to-city routes up to 30 percent of capacity, automatic approval of discount fares up to 55 percent, and a double approval of full fares; The Second Package, adopted in 1990, included a double-disapproval provision for full fares and an extension of fifth freedom right; The Third Package, implemented in 1993, granted full access to all routes including cabotage. In 2008, the Third Liberalization Package was renewed and adopted in a form of Regulation (EC) No. 1008/2008 which consolidated the previous packages into one single text.

¹⁵ ‘Community air carrier’ means an air carrier with a valid operating licence granted by a competent licensing authority in accordance with the rules laid down in Regulation (EC) No. 1008/2008 hereafter referred to as Regulation 1008/2008.

¹⁶ Article 15(2) of Regulation 1008/2008.

¹⁷ The exercise of traffic rights shall be subject to published Community, national, regional and local operational rules relating to safety, security, the protection of the environment and the allocation of slots. A Member State, after consultation with interested parties including the air carriers and airports concerned, may regulate, without discrimination among destinations inside the Community or on grounds of nationality or identity of air carriers, the distribution of air traffic between airports satisfying the following conditions: the airports serve the same city or conurbation, 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, the airports are linked to one another and to the city or conurbation they serve by frequent, reliable and efficient public transport services, and the airports offer necessary services to air carriers, and do not unduly prejudice their commercial opportunities. See Article 19 of Regulation 1008/2008.

¹⁸ European Commission White Paper- Roadmap to a Single European Transport Area- Towards a competitive and resource efficient Transport System, COM 144 Final, at 16. (2011)

function as a fully integrated entity, nationality restrictions in these BASAs had to be removed.¹⁹ The Commission addressed this particular issue in the famous *Open Skies cases*.²⁰

Particularly, the Commission criticized several Member States for entering into bilateral “Open Skies” agreements with the US. According to these agreements, *only* air carriers that were majority owned by nationals of the *individual Member State* were entitled to be designated to exercise the traffic rights granted by these agreements.²¹ The then European Court of Justice, hereafter referred to as the CJEU, ruled that the nationality clause in these agreements breaches EU law since it violates a basic principle of the EC Treaty, being the freedom of establishment under what is now Article 49 of the Treaty of the Functioning of the European Union, hereafter referred to as the TFEU as it discriminates against Community air carriers which have an establishment in another Member State.²² Accordingly, these agreements had to be amended to bring them in accordance with EU law.

Two methods were developed to solve the issues identified by the CJEU i.e. amending the existing BASAs to allow ‘Community carriers’ instead of ‘national’ carriers to be designated for traffic rights.²³ Firstly, Member States could negotiate themselves with the third countries, bringing their agreement in accordance with the EU law or secondly, negotiation could take place as a single ‘horizontal’ or ‘vertical’ agreement, with the Commission acting on a mandate from EU Member States.²⁴

The standard designation clause in these agreements which replaces the traditional nationality clause basically stipulates that a third country shall treat the designation by a Member State of any Community carrier of whatever EU nationality as if that Community carrier is a national carrier of that designating State.²⁵

3. Consideration of the national procedures

Amendment of the existing BASAs by Member States and negotiation of horizontal or vertical agreements brought the BASAs in line with the EU law, however, since, now the designation, was open to ‘Community’ air carriers, instead of ‘national’ air carriers, established in the relevant Member State, regulation was necessary to establish procedures dealing with the

¹⁹ S.V. Gudmundsson, *European Air Transport Regulation: Achievements and Future Challenges*, at 37 (2015)

²⁰ Judgments in Cases C-466/98, C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98 and C-476/98-Commission v United Kingdom, Denmark, Sweden, Finland, Belgium, Luxembourg, Austria and Germany.

²¹ The Commission argued that, by reserving *traffic rights* for national carriers, these countries are preventing free competition.

²² *Ibid*

²³ EU External Aviation Policy- Horizontal Agreements:

http://ec.europa.eu/transport/modes/air/international_aviation/external_aviation_policy/horizontal_agreements_en.htm (last visited 5th May 2016)

²⁴ Up until 2015, 73 bilateral agreements were re-negotiated through Member States individually, and 41 agreements using the Horizontal Agreements. See, http://ec.europa.eu/transport/modes/air/international_aviation/external_aviation_policy/horizontal_agreements_en.htm (last visited 5th May 2016)

²⁵ P. van Fenema, *EU Horizontal Agreements: Community Designation and the ‘Free Rider’ Clause*, *Air and Space Law* (2006)

distribution of such traffic rights. This led to the formation of Article 5 of the Regulation, the text of which has already been stated in Section 1 of this paper above.

These national procedures only apply, in accordance with the *Open Skies* judgments, to Community air carriers *established* in another Member State. Thus, a Community air carrier that is not established, in accordance with the EU law in another Member State cannot apply for the air traffic rights in that Member State. However, this paper does not address the potential issues that may exist in defining *establishment*²⁶ or any further legal issues that may arise in that context since the purpose of this paper is to *only* consider whether the adopted procedures by the Member States are non-discriminatory and transparent.²⁷

To provide a coherent understanding of the procedures, the author will consider each Member State separately. In doing so, section on each Member State will be divided in following two substantive sub-parts:

- The pre-designation procedure; and
- The designation criteria.

3.1. France

The pre-designation procedure

Community air carriers established in France are required to submit their applications within fifteen days of the publication of the availability of traffic rights.²⁸ Only applications accompanied by a complete file either in French or, if the originals are in a language other than French, accompanied by a French translation shall be examined.²⁹ The application must include the undertaking's operating license, the air operator's certificate, hereafter referred to as the AOC, the justification for the carrier's establishing itself in France, a description of the planned service and elements enabling assessment of the applicant air carrier's operational and financial capacity to operate the intended services.³⁰

In order to fulfill its responsibilities, the civil aviation authority of France may ask for additional information, and where appropriate, hold hearings.³¹

²⁶ Regulation 847/2004 provides that an establishment on the territory of a Member State implies the effective and real exercise of air transport activity through stable arrangements. The legal form of such an establishment, whether a branch or a subsidiary with a legal personality, should not be the determining factor in this respect. Recital 10 of the Regulation.

²⁷ See, on this matter, P. Mendes de Leon, Establishment of air transport undertakings-Towards a more holistic approach, *Journal of Air Transport Management* (2009)

²⁸ French national procedure for the allocation of limited air traffic rights, hereafter referred to as the French Order or the Order, Article 4, OJ 2006/C 242/11 (2006).

²⁹ Article 2 of the French Order.

³⁰ Ibid

³¹ Article 5 of the French Order. Furthermore, In the event of competing applications and the limitation of either the traffic rights or the number of Community air carriers permitted to exercise these rights, files shall be assessed within two months, as long as the applications meet the conditions under Article 2.

The designation criteria

The Minister responsible for civil aviation considers the designation of competing applications based on the following criteria:

- Provisions of the relevant BASA;
- Satisfaction of air transport demand;
- Tariff policy;
- Quality of the service;
- Contribution to creating a satisfactory level of supply-side competition;
- Intended date for the launch of the service;
- Development of connecting flights for passengers;
- Seniority of the application;
- Potential for developing tourism in France; and
- Existence of a French language sales service.³²

3.2. Portugal

The pre-designation procedure

The operation of non-Community scheduled air services is subject to an authorisation from INAC, I.P, hereafter referred to as the National Civil Aviation Institute or NCAI.³³ Community air carriers must submit an application in Portuguese, identifying the details of the scheduled air services, intended date of commencement of operations and details of the nature of the traffic to be transported.³⁴ The application must also be supported by a valid AOC and documents establishing the applicant's situation with respect to social security and tax contributions in accordance with the Portuguese law.³⁵

Applications must be submitted at least 60 working days ahead of the start of the IATA season except in the case of limited traffic rights where the minimum notice period is 120 working days.³⁶

The designation criteria

The following aspects will be assessed on a regular basis as part of the allocation procedure for competing applications:

- Satisfaction of air transport demand;
- Tariff policy;

³² Article 6 of the French Order.

³³ Portuguese national procedure for the allocation of limited air traffic rights, hereafter referred to as the Portuguese Decree-Law, Article 3, OJ 2013/C 70/07 (2013).

³⁴ Article 5(1) of the Portuguese Decree-Law

³⁵ Article 5(2) of the Portuguese Decree-Law. The application must further contain the traffic forecast, tariff structure, reservation systems and details of any alliances.

³⁶ Article 5(8) of the Portuguese Decree-Law.

- Quality of the service offered, particularly with regard to the type and layout of the aircraft and the existence of sales offices;
- Development of connecting flights for passengers; and
- Contribution to the promotion of the business location, including tourism.³⁷
- Existence of a Portuguese-language sales service;
- Majority of the cabin crew able to speak and understand Portuguese; and
- Air carrier's situation with regard to payment of aeronautical taxes in Portugal.³⁸

3.3. United Kingdom

The pre-designation procedure

Where the Secretary of State believes that within 6 months there will be scarce capacity on a route, the information must be made available to the Civil Aviation Authority, hereafter referred to as the CAA who must then publish it within one month.³⁹ A qualifying carrier⁴⁰ wanting to operate must apply in writing to the CAA, for a scarce capacity allocation certificate. The CAA must publish that they have received the application in accordance with the application rules.⁴¹ The publication must state the period within which objections may be made against the application. A public hearing is then organized in order to decide whether the scarce capacity should be allocated to the applicant.⁴² The CAA must decide whether to grant, refuse or revoke the scarce capacity allocation, in case where there has been a hearing, immediately after the hearing and where there has not been a hearing, after the closing date for the application.⁴³

The designation criteria

The CAA must allocate scarce capacity in a manner, which it considers is best calculated to:

- Secure that qualifying air carriers provide the air transport services which satisfy all substantial categories of public demand at the lowest charges consistent with a high standard of safety;
- Further the reasonable interests of users of air transport services;
- Ensure that qualifying air carriers compete as effectively as possible with other airlines in providing air transport services on international routes; and
- Ensure the most effective use of airports within the UK.⁴⁴

³⁷ Article 11(4) of the Portuguese Decree-Law.

³⁸ Article 11(5) of the Portuguese Decree-Law.

³⁹ National procedure of the United Kingdom for the allocation of limited air rights, hereafter referred to as the UK Guidelines, Article 4, OJ 2008/C 67/06 (2008).

⁴⁰ A qualifying carrier is defined as an undertaking which has been granted an air transport licence in accordance with Section 65 of the Civil Aviation Act 1982 or a Community air carrier as defined in Section 69A(8) of the Act, which has either obtained its operating licence from the CAA, or is established in the United Kingdom in accordance with Article 43 TFEU. See, Article 2 of the UK Guidelines.

⁴¹ Article 4(4) of the UK Guidelines

⁴² Article 13 of the UK Guidelines

⁴³ Article 17 of the UK Guidelines

⁴⁴ Article 9 of the UK Guidelines

3.4. Application of the rules

Having designation criteria ensures certainty to the extent that the relevant aviation authorities would know *what* rules to apply. However, different provisions can be applied differently based on one's interpretation of those provisions. Accordingly, help can be sought from case law in order to know the exact position that the relevant authorities have adopted relating provisions of designation. Furthermore, having assistance from precedents would also ensure in better analyzing whether the provisions indeed are non-discriminatory and transparent. Unfortunately, after carrying an extensive research on finding case law on distribution of air traffic rights, the author was unable to find anything under the French and the Portuguese system. There have been, however over 15 publications of case law on distribution of scarce traffic rights by the UK.⁴⁵ These publications address the designation criteria as has been stated above in Section 3.3, but as far as this paper is concerned, they serve no or little significance since *all of them* concern distribution of traffic rights to airlines from the UK⁴⁶, thus making it very difficult for the author to understand whether there is any "discrimination." Thus, any analysis carried out henceforth on finding whether the provisions in the national procedures are non-discriminatory and transparent will be done in the absence of any useful case law.

4. Are the provisions non-discriminatory and transparent?

In order to analyze whether the above-stated procedures are non-discriminatory and transparent, one has to first consider the meaning of both these terms under EU law.

4.1. Understanding non-discrimination and transparency

Under EU Law, the principle of non-discrimination prohibits not only direct or overt discrimination on grounds of nationality but also all covert forms of discrimination that, by the application of other distinguishing criteria, lead to the same result.⁴⁷ Accordingly, unless objectively justified and proportionate to its aim, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect the nationals of other Member States more than the nationals of the State whose legislation is at issue and if there is a consequent risk that it will place the former at a particular disadvantage.⁴⁸ National legislation is objectively justified and proportionate *only* if it genuinely reflects a concern to attain that objective in a consistent and systematic manner.⁴⁹

Transparency is not an easy term to define.⁵⁰ This is because the precise meaning of transparency depends on the context in which it is used and the function that it is expected to

⁴⁵ See, <https://www.caa.co.uk/Commercial-Industry/Airlines/Licensing/Requirements-and-guidance/Airline-licensing-decisions/> (Last visited 21 July 2015)

⁴⁶ Ibid

⁴⁷ Case 212/99, Commission v Italy [2001] ECR I-4923, paragraph 24. Also see Case C-224/00, Commission v Italy [2002] ECR I-2965, paragraph 15.

⁴⁸ Case C-212/05, Hartmann [2007] ECR I-6303.

⁴⁹ Ibid

⁵⁰ A. Buijze, *The Principle of Transparency in EU Law*, at 28 (2013).

fulfill.⁵¹ Furthermore, in spite of the fact that this term has gained significant attention in the EU law since the nineties, there is no single definition of it under EU law.⁵² Since the meaning of transparency depends on the context in which it is used, the author has recognized the following definition which complements this paper's content in the best way:

“Transparency is concerned with the quality of being clear, obvious, and understandable without doubt or ambiguity.”⁵³

4.2. Application of the principles of non-discrimination and transparency

After considering the published provisions of the three above-mentioned Member States, the author is of the opinion that *generally*, these provisions comply with the requirements laid down in Article 5 of the Regulation. However, there is still concern relating some provisions.

Potential discriminatory provisions

Both Portugal and France require that the applications must be made in Portuguese and French respectively.⁵⁴ The first thing to point out here is, that EU law does not explicitly protect against discrimination by way of language.⁵⁵ However, that does not mean that discrimination cannot occur by way of language since, as has already been stated in Section 4.1 above, the relevant question to ask is whether the *covert form of provision is such that it indirectly leads to discrimination*. It is clear that even though these provisions ask for the same thing from *every* undertaking i.e. making the application in their national language, it favors more the nationals from their respective countries as they will have a better hold on the language. However, for indirect discrimination to exist, it must also be shown that there is in fact a *consequent risk that will place the undertakings of another Member State at a disadvantage*.⁵⁶ According to the author, it is very difficult to practically determine whether there is *in fact* a disadvantage for air carriers from other Member States because one can easily argue that such administrative matters like making of an application are carried out by the legal teams either externally hired or employed by the airlines who would have enough professional experience to deal with this, but one can also make a valid contradictory point that air carriers from other Member States may have to spend more time and money than national air carriers of these States in making this application thus placing them at a disadvantage. Thus, the compliance of this provision with the Regulation may be based on facts of the relevant case.⁵⁷

Another tricky provision that needs attention is the consideration under the Portuguese Decree-Law of the existence for Portuguese-speaking cabin crew as one of their deciding criteria for

⁵¹ A. Alemanno, Unpacking the principle of openness in EU Law: transparency, participation and democracy, *European Law Review*, 39(1), 72-90 (2014).

⁵² V. Karageorgou, Transparency Principle as an evolving principle in the EU Law: Regulative contours and implications (2014).

⁵³ Opinion of AG Ruiz-Jarabo Colomer in C-110/03, *Commission v Belgium*, [2005] ECR I-2801, at 44.

⁵⁴ See, Article 5(1) of the Decree-Law and Article 2 of the French Order.

⁵⁵ See, *European Anti-Discrimination Law Review*, at 15 (2011)

⁵⁶ Case C-212/05, *Hartmann* [2007] ECR I-6303.

⁵⁷ So, where the facts are such that it places the economic efficiency of an undertaking from another Member State at a consequent risk, this provision may be found as discriminatory.

granting traffic rights.⁵⁸ The relevant provisions require that a *majority* of the cabin crew is able to speak and understand Portuguese. According to the author, the primary justification for having this requirement is to ensure the comfort of passengers flying out from Portugal since some of them may only speak Portuguese, thus in case where such a passenger needs assistance, it is crucial that the cabin crew could do that with ease. However, according to the author, despite this justification, this provision is directly or indirectly discriminatory because such provisions favor the air carriers that have their primary establishment⁵⁹ in Portugal more than other Community air carrier primarily established in another Member State, hence placing them at a place of disadvantage. Furthermore, the author is of the opinion that even in a case where a passenger may need assistance, it is sufficient that any one member or some members of the cabin crew speak Portuguese so as to assist a passenger but to require the *majority* of the cabin crew to speak and understand Portuguese not only imposes a high threshold on non-Portuguese airlines but also, according to the author, disturbs the fundamental principle of free movement of workers across the EU.⁶⁰

Another troubling provision is contained in the French Order where Article 6 states that when assessing the competing applications for designation, the civil authority may consider *‘the potential for developing tourism in France’* as one of the deciding factors. According to the author, this provision is also indirectly discriminatory because clearly a French airline like Air France would find it much easier to develop tourism in France, by for example marketing various tourist destinations in France that Air France flies to from French airports, or even by offering different excursion plans with its partners in France⁶¹ but another Community air carrier that is not primarily established in France may find difficulty in doing the same, and in any case, even if it makes an effort in developing tourism; if it then comes up against Air France for the same designation, the Minister responsible for distributing the air traffic rights may choose Air France as it offers *more* significant terms of developing tourism in France.⁶²

A similar provision is contained in the UK Guidelines where Section 9 states that when allocating scarce capacity, the CAA may consider whether the allocated undertaking *‘ensures the most effective use of airports within the United Kingdom.’* Again, like the provision in the French Order, it is far more likely that an English air carrier like British Airways which has its

⁵⁸ Article 11 of the Decree-Law

⁵⁹ A primary establishment exists in a particular Member State if that is where the central management and control of the company rests. See, Case C-81/87, Daily Mail [1988] ECR 5483, at paragraph 12.

⁶⁰ See, P. Craig & G. De Burca, EU Law, Text, Cases, and Materials, Fifth Edition, at 715 (2011). Also see, EU’s policy on Equal Treatment at <http://ec.europa.eu/social/main.jsp?catId=462&langId=en> (last visited 21 May 2016), which requires that all EU citizens have the same right to work in another EU country as nationals of that country without any restrictions. Although language skills may be imposed, but such imposition must be reasonable and necessary for the post.

⁶¹ See, for example <http://www.airfrance.co.uk/GB/en/common/resainfovol/services/tourisme.htm>, (last visited 21 May 2016) where Air France in fact offers an extensive set of tourism options for passengers with its partners like Disneyland, Ceetiz, Atout France, and Paris & Co. On the other hand, as a matter of example, English air carrier like British Airways does not provide for the same extensive tourism options in France except showing options for Hotels stay in French Cities. See, for example, at <http://www.britishairways.com/en-gb/destinations/europe/france> (Last visited 21 May 2016).

⁶² Also see on the same point, B.F. Havel, Beyond Open Skies: A New Regime for International Aviation, at 488 where the author of the book also implies that this provision is discriminatory in that *‘they favor carriers with deeper integration into the French policy.’* (2008).

primary establishment⁶³ in the UK would ensure a more effective use of airports within the UK since they would have more flights within the UK than other Community air carriers.⁶⁴

The existence of these provisions, according to the author, not only goes against Article 5 of the Regulation, but also disturbs the EU's external policy which aims to overcome continued fragmentation and restricted market access.⁶⁵

Transparency issues

The litmus test under this sub-heading, as has already been stated in Section 4.1 above, is whether the concerned provision is *clear, obvious and understandable without doubt or ambiguity*.

Article 2 of the French Order requires the undertaking to submit with its application *the justification for the carrier's establishing itself in France*. This provision lacks the necessary transparency because of two reasons. Firstly, the Order fails to mention *what* may amount to a valid justification for an air carrier to establish in France. This raises another question of whether there *is there a list of valid exhaustive justifications with the Minister*. If yes, then are those justifications non-discriminatory? For example, is it sufficient for the French air carrier to merely submit that its justification for establishing in France is that it is a French company? Crucially, can any non-French air carrier give a similar justification in that it is a Community air carrier, thus it is allowed to establish itself in France, or would it have to give a more significant justification than merely stating that it is a Community air carrier? Secondly, the author fails to understand the importance of this requirement since according to the author, any air carrier wanting to establish in another Member State would only do so to carry commercial operations, and thus having such a requirement only establishes *doubt and ambiguity* for the applicant.

Furthermore, the French and the Portuguese procedures also consider the *intended date for the launch of the service* as one of the deciding criteria for granting traffic rights. Again, it is unclear in *what* context is this information relevant. Is it relevant, for example, in encouraging competition on that particular route or is it relevant in satisfying the air traffic demand on that route or both? The procedures do not address these questions in this context at all. One must note that the consideration of these questions is not merely academic but rather very important for the competing airlines applying for that relevant route since if they know exactly why this information is sought, they could make an early decision in whether or not they should apply for that route. For example, if the intended date for launch is relevant so as to encourage competition, then an airlines who may already be operating on that particular route could

⁶³ Defined in, Case C-81/87, Daily Mail [1988] ECR 5483, at paragraph 12.

⁶⁴ This is, for example, true for British Airways as it serves 25 airports in the UK i.e. flights from one city in the UK to another. See, <http://www.britishairways.com/en-gb/information/flight-information/our-route-network#pageMenu> (Last visited, 21 May 2016). Thus, in a scenario where British Airways is competing for the scarce capacity certificate against, for example, Lufthansa, it would have a much stronger claim, as it can make the submission that after landing in London from the non-EU country, it will fly those passengers to other cities in the UK, thus ensuring an effective use of airports within the UK, whereas Lufthansa may want to fly them into German airports rather than English airports.

⁶⁵ See, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, The EU's External Aviation Policy-Addressing Future Challenges, at 2 (2012).

decide at a very early stage that perhaps they should not spend their time and money on seeking further traffic rights on that route since giving the remaining traffic rights to them would not encourage competition.

5. Conclusion

Whilst the procedures adopted by the three considered Member States are *generally* in compliance with Article 5 of the Regulation, there is still concern in relation to the compliance of specific provisions. Clearly Member States should introduce amended provisions to rectify their positions and bring it in compliance with Article 5 of the Regulation however a practical question to ask is, *does it even matter?*²

Major airports⁶⁶ in the EU are classified as Level 3 airports⁶⁷, i.e. congested airports by International Air Transport Association, hereafter referred to as IATA. This means that even though, a Community air carrier from one Member State gets distributed air traffic rights under the BASA of another Member State with a non-EU country, there is no guarantee that the relevant Community air carrier would actually be able to perform the granted traffic rights since it may not get the slot allocated to it at the airport or may only get it at a time which does not commercially make sense to the air carrier.⁶⁸ Indeed, the difference between traffic distribution and slot allocation is recognized by Member States too.⁶⁹

Further to this, do Community air carriers operating with a hub-and-spoke policy⁷⁰ want to disturb their practice to operate from a different Member State's airport? This can be explained

⁶⁶ This includes airports like London Heathrow, Paris-Orly & Paris-Charles De Gaulle, Berlin, Frankfurt, Amsterdam, Lisbon and Porto. For more details, <http://www.iata.org/policy/infrastructure/slots/Pages/slot-guidelines.aspx> (Last visited 19th May 2016)

⁶⁷ A Level-3 airport is one where the demand for airport infrastructure significantly exceeds the airport's capacity during the relevant period. See IATA Worldwide Slot Guidelines, 7th Edition (2015)

⁶⁸ For more details on slot allocation and the problems associated with it, see, A.I. Czerny, P. Forsyth, D. Gillen & Others, *Airport Slots* (2008). Also see P.S Dempsey, *Airport Landing Slots: Barriers to Entry and Impediments to Competition*, *Air and Space Law*, 26 (2001), P.P.C Haanappel, *Airport Slots and Market Access: Some Basic Notions and Solutions*, 19 *Air and Space Law* (1994).

⁶⁹ See, for example the German national procedure for the allocation of limited air traffic rights. Section 3 of the procedure states "Traffic rights should be differentiated from available slots at coordinated airports [i.e. Level-3 airports. Slots are allocated on a different legal basis and using a different procedure. A slot allocated by an airport coordinator does not, therefore entitle an air carrier to exercise a traffic right. Nor does an allocated traffic right confer an entitlement to a specific airport slot." This thus supports the author's conclusion that an allocated traffic right does not mean that the slot has been allocated too. Also see, on the same matter, P. Mendes de Leon, *Some Questions on the Relationship between Slots and Traffic rights*, *European Air Law Association Conference Papers* (2000) where the author of that paper rightly points out that the traditional position should be that slots are the part and parcel of traffic rights without having a stand-alone status but that since airports have become congested, that traditional position is no longer straightforward, i.e. allocation of traffic rights does not always mean the allocation of slots too and vice versa and that the situation indeed is 'complex'.

⁷⁰ A hub and spoke system is explained in the following way: A system, which provides air service to a wide geographic area and many destinations. Passengers departing from any non-hub (spoke) city bound to another spoke in the network are first flown to the hub where they connect to a second flight to the destination. Inbound and Outbound flights are tightly timed and coordinated to minimize connection time. See, G.N. Cook & J. Goodwin, *Airline Networks: A Comparison of Hub-and-Spoke and Point-to-Point Systems*, *Journal of Aviation/Aerospace Education & Research* (2008).

through the following example: British Airways operates with a hub-and-spoke policy,⁷¹ in that it flies passengers from one country into London, and then distribute that passenger traffic to many other countries from London. Now, if British Airways gets distribution to operate their flight from and to Paris with the same non-EU country, would it be able to distribute its passenger traffic from Paris in the same way it does from London? Theoretically, it can, by firstly establishing a hub in Paris so that it acquires the necessary means to distribute that passenger traffic to different parts of other countries, but a more challenging issue could be to get further distribution of traffic rights from the Minister responsible for allocating traffic rights in France to the non-EU country which British Airways now wants to fly to from Paris.⁷² Thus, the commercial reality is for British Airways to simply operate flights using London as its hub like it does now, instead of spending money in establishing another hub in another Member State and going through the administrative process of getting scarce traffic rights.

Another practical matter which limits the significance of “distribution” of air traffic rights under the Regulation is the “neighborhood agreement” that the EU has concluded. These Common Aviation Area Agreements hereafter referred to as the CAA Agreements have been successfully concluded with Jordan, Georgia, Israel, Morocco, Western Balkans and Moldova.⁷³ For the purposes of this paper, conclusion of these agreements has the effect that there is free access for Community air carriers to fly to these countries.⁷⁴ Thus, there is an *open skies* type agreement in place, which eliminates any question of “distribution” of air traffic rights under the Regulation.⁷⁵

Also, the emergence of code-share agreements and alliances in the last decade has been so significant that it completely supersedes the need for any “distribution” of air traffic rights. For example, Air Berlin offers “special” prices from London to multiple destinations like Johannesburg⁷⁶ and New Delhi.⁷⁷ Under the Regulation, if Air Berlin were to fly these routes directly, it must apply to the UK CAA for “distribution” of the air traffic rights, but such is the nature of code-share agreements and alliances, Air Berlin in reality does not fly to these routes at all, i.e. it only markets them and instead has code-share agreements or alliance with Etihad and British Airways that perform these routes.

⁷¹ See, <http://centreforaviation.com/profiles/airlines/british-airways-ba> (last visited 21 May 2016), which details London Heathrow, Gatwick Airport and London City Airport as the three hubs from which British Airways operates.

⁷² Obviously, this problem will not exist if there is an *Open Skies* agreement between France or the EU with the non-EU country, like the USA, but those agreements have not yet become common in aviation.

⁷³ See, http://ec.europa.eu/transport/modes/air/international_aviation/external_aviation_policy/neighbourhood_en.htm (Last visited 25 July 2016)

⁷⁴ Ibid

⁷⁵ Legally, although there is a free access for carriers from either side, these agreements, according to the EU are an extension to the Open Skies agreement with the US because these agreements, in addition to traffic rights also implement provisions relating high standards in terms of safety and security. See, http://ec.europa.eu/transport/modes/air/international_aviation/country_index/eca_en.htm (Last visited 25 July 2016)

⁷⁶ See, <https://flights.airberlin.com/en-GB/flights-to-johannesburg> (Last visited 25 July 2016)

⁷⁷ See, <https://flights.airberlin.com/en-GB/flights-to-new-delhi> (Last visited 25 July 2016)

Thus, given the existence of such practical matters, the author concludes this paper by again asking the question, *does it even matter that the provisions are discriminatory and not transparent?*⁹ The author remains of the opinion that nothing should constitute as a valid justification for not complying with any law. Thus the same should be true for the provisions introduced in the Regulation. Whether such compliance makes any difference is a completely different matter and perhaps one which deserves the attention of the drafters of the Regulation.

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