OPINION OF ADVOCATE GENERAL ALBER

delivered on 27 September 2001 [1]

I — Introduction

1. The Portuguese Supremo Tribunal Administrativo (Supreme Administrative Court) has asked the Court of Justice for an interpretation of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (hereinafter 'Regulation No 2408/92'). [2] The reference for a preliminary ruling relates in particular to whether the powers conferred on a Member State under Article 3(2) — namely the possibility of refusing cabotage rights — were restricted by an invitation to tender for an air route issued under Article 4, and, if so, whether that was the case in a situation where such an invitation to tender, because of a condition of aid granted to Portugal by the Commission in 1994, was issued at a time (in this instance 1995) when, but for the aforementioned condition, there would have been no need for the invitation to tender because of an exception applicable until 1997 or 1998. Specifically, it concerns flights from the Portuguese mainland to Madeira and the Azores.

1 — Original language: German.

2 — OJ 1992 L 240, p. 8.

II — Legal framework

(1) *Regulation No 2408/92*

'Article 1(1):

1. This regulation concerns access to routes within the Community for scheduled and non-scheduled air services.

...'

(Paragraphs 2 and 3 concern the application of the regulation to Gibraltar.)

'4. Airports in the Greek islands and in the Atlantic islands comprising the autonomous region of the Azores shall be exempted from the application of this

regulation until 30 June 1993.[3] Unless otherwise decided by the Council, on a proposal from the Commission, this exemption shall apply for a further period of five years and may be continued for five years thereafter.'[4]

Article 3

'1. Subject to this regulation, Community air carriers shall be permitted by the Member State(s) concerned to exercise traffic rights on routes within the Community.

2. Notwithstanding paragraph 1, before 1 April 1997[5] a Member State shall not be required to authorise cabotage traffic rights within its territory by Community air carriers licensed by another Member State, unless:

(i) the traffic rights are exercised on a service which constitutes and is scheduled as an extension of a service from, or as a preliminary of a service to, the State of registration of the carrier;

(ii) the air carrier does not use, for the cabotage service, more than 50% of its seasonal capacity on the same service of which the cabotage service constitutes the extension or the preliminary.

...'

Article 4

'1. (a) A Member State, following consultations with the other Member States concerned and after having informed the Commission and air carriers operating on the route, may impose a public service obligation in respect of scheduled air services to an airport serving a peripheral or development region in its territory or on a thin route to any regional airport in its territory, any such route being considered vital for the economic development of the region in which the airport is located, to the extent necessary to ensure on that route the adequate provision of scheduled air services satisfying fixed standards of continuity, regularity, capacity and

3 — The regulation as such entered into force on 1 January 1993, in accordance with Article 16.

4 — The exemption therefore applied to the Azores until 30 June 1998, the Council not having decided otherwise; there was no decision to continue the exemption, although, in theory, there could have been.

5 — That date accordingly applied to flights to and from Madeira.

pricing, which standards air carriers would not assume if they were solely considering their commercial interest. The Commission shall publish the existence of this public service obligation in the *Official Journal of the European Communities*.

(h) A Member State may reimburse an air carrier, which has been selected under subparagraph (f), for satisfying standards required by a public service obligation imposed under this paragraph; such reimbursement shall take into account the costs and revenue generated by the service.'

Article 5

...

'On domestic routes for which at the time of entry into force of this regulation an exclusive concession has been granted by law or contract, and where other forms of transport cannot ensure an adequate and uninterrupted service, such a concession may continue until its expiry date or for three years, whichever deadline comes first.'

(d) If no air carrier has commenced or is about to commence scheduled air services on a route in accordance with the public service obligation which has been imposed on that route, then the Member State may limit access to that route to only one air carrier for a period of up to three years, after which the situation shall be reviewed. The right to operate such services shall be offered by public tender either singly or for a group of such routes to any Community air carrier entitled to operate such air services. ...

(2) *Aid decision 94/698/EC*

Article 1(e) and (f) of Commission Decision 94/698/EC of 6 July 1994 concerning increase in capital, credit guarantees and

...

tax exemption in favour of TAP ('the aid decision') [6] read:

'The aid in favour of TAP... [is]... compatible with the common market provided that:

...

(e) the Portuguese Government fulfils its commitment to apply Article 4 of Council Regulation (EEC) No 2408/92 to the Atlantic Islands of Madeira and the Azores as of 1 January 1996 [7] at the latest, publishing public service obligations for the individual routes in question (see Chapter VIII, point 3);

(f) the Portuguese Government honours its commitments that the liberalisation of non-scheduled transports between all Community airports and the Azores refers to all services, as expressed in Regulation (EEC) No 2408/92, including the "seats-only" and "one-way charter";

...'

2. By way of grounds, Chapter VIII, point 3, of the aid decision states the following:

'The Commission takes du[e] note of the assurances and commitments given by the Portuguese Government regarding the implementation of the rules on access to the common aviation market and the interpretation to be given to certain provisions. The Commission is of the opinion that the removal of constraints protecting TAP from competition represents an appropriate compensatory justification for the granting of the aid, which serves the common interest pursuant to Article 92(3)(c) of the Treaty and Article 61(3)(c) of the Agreement. In particular, the Portuguese Government has:

— confirmed that the liberalisation of the non-scheduled transport between all Community airports and the Archipelago of the Azores refers to all the services, as expressed in Regulation

6 — OJ 1994 L 279, p. 29.

7 — The exception for Madeira applied until 1 April 1997 (see Article 3(2)) — and the exception for the Azores until 30 June 1998 (see Article 1(4) of Regulation No 2408/92 and footnote 5).

(EEC) No 2408/92, including the "seat-only charter" and "one-way charter". This means that these types of air services will be authorised notwithstanding that the Azores are temporarily excluded from the application of Regulation (EEC) No 2408/92,

— reaffirmed its determination and willingness to follow in 1995 a public tender procedure for the connections between the Portuguese mainland and the islands of Madeira and the Azores in accordance with Article 4 of Regulation (EEC) No 2408/92. Moreover, it is the intention of Portugal to inform the Commission during the first half of 1995 about the contents of the obligations of these public services, in order that they may be published in the *Official Journal of the European Communities*. In that respect the Commission recalls that Article 4 of that regulation means that the contents of the public service obligations are to be separately published in the *Official Journal of the European Communities*. Following publication, should no European carrier declare its readiness to fulfil these public service obligations, the right to operate such services shall be offered by public tender either singly or for a group of such routes to any European air carrier entitled to operate such air services.

...'

(3) *Invitation to tender pursuant to Article 4(1)(d)*

3. The invitation to tender under which TAP applied to operate the scheduled air services in question provided, *inter alia*, as follows. [8]

'3. Eligibility to tender

All air carriers holding a valid operating licence issued by a Member State pursuant to Council Regulation (EEC) No 2407/92 of 23.7.1992 on licensing of air carriers, as well as an adequate air-operator certificate, are eligible to tender.

However, as Portugal is applying the provision of Article 3(2) of Regulation (EEC) No 2408/92, carriers licensed by a Member State other than Portugal may not, until 1.4.1997, use for the cabotage service

8 — OJ 1995 C 223, p. 16.

with Portugal more than 50% of their seasonal capacity on the same service of which the cabotage service must be the extension or the preliminary.

...

11. Validity of the invitation to tender

In accordance with the first sentence of Article 4(1)(d) of Regulation (EEC) No 2408/92, this invitation to tender shall be valid on condition that no Community carrier who may be authorised to operate the routes applies by 1.11.1995 (allowing...) for authorisation to operate one or more of the routes in question with effect from 1.1.1996 in accordance with the public service obligation without receiving any financial compensation.

In any event, the invitation to tender shall remain valid just for those routes for which no carrier has tendered by 1.11.1995 under the abovementioned conditions.

...'.

III — Facts

4. In Commission Decision No 94/698/EC of 6 July 1994 (hereinafter the 'aid decision'), the Commission approved various forms of aid for the Portuguese State airline Transportes Aéreos Portugueses SA (hereinafter 'TAP') as part of a restructuring programme.

5. Approval was granted subject to certain conditions which are laid down in Article 1(a) to (h) of the aid decision. These include the requirement, under Article 1(e), that Portugal should fulfil its commitment to apply Article 4 of Council Regulation (EEC) No 2408/92 to the Atlantic Islands of Madeira and the Azores as of 1 January 1996 at the latest.

6. On 4 August 1995, a communication from the Commission stating that Portugal had decided, in accordance with the aid decision, to impose public service obligations in respect of air services operated on nine routes between continental Portugal and the Autonomous Regions and between the Autonomous Regions themselves was published in the Official Journal

in accordance with Article 4(1)(a) of Regulation No 2408/92. [9]

7. On 29 August 1995, an invitation to tender for those air routes was issued pursuant to Article 4(1)(d) of Regulation No 2408/92. The purpose of the invitation to tender was to select a single air carrier to operate all nine routes in accordance with the relevant public service obligations from 1 January 1996 to 31 December 1998 in return for financial compensation. Eligibility to tender was expressly made subject to the reservation in Article 3(2) of Regulation No 2408/92. It was a condition of the invitation to tender that, before 1 November 1995, no carrier capable of obtaining authorisation to operate some or all of the air services should have applied to do so without seeking financial compensation. The only airline to take part in the tender procedure was TAP, which was already exclusively entitled to operate the routes concerned until the end of 1995.

8. On 30 October 1995, and thus before the expiry of the time-limit for submission of tenders, Flightline Ltd (hereinafter 'Flightline'), an airline incorporated under English law which is established in the United Kingdom and has a British operating licence, did apply for authorisation to operate without financial compensation eight of the nine routes put out to tender. By decision of the State Secretary for Transport and Communications of 22 December 1995, that application was rejected on the ground that the tender related to cabotage services and the conditions laid down in Article 3(2) of the regulation were therefore not fulfilled.

9. The action brought against the refusal was unsuccessful. The judgment dismissing the action stated that neither the aid decision nor Article 4 of Regulation No 2408/92 precluded the application of Article 3(2). Otherwise, Article 3(2) would be largely emptied of its meaning. The aid decision merely referred to Article 4 of the regulation, in connection with which — according to the order for reference — an autonomous interpretation of the regulation would be sufficient.

IV — The reference for a preliminary ruling

10. Flightline appealed against that judgment to the Portuguese Supremo Tribunal Administrativo, which has referred the following questions for a preliminary ruling:

(1) Does the exercise by a Member State of the rights and powers provided for by Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 necessarily presuppose or mean that the

9 — OJ 1995 C 200, p. 3.

power provided for in Article 3(2) of that regulation of that Member State to be able to restrict, until 1 April 1997, competition in cabotage services within its territory is waived?

(2) May a Member State in a public tender procedure organised in 1995 for the provision of scheduled air services on a route subject to public service obligations imposed on such a route under Article 4 of the regulation require air carriers licensed by another Member State which submit bids to meet the conditions laid down in Article 3(2) of that same regulation?

(3) Must Article 1(e) of Commission Decision No 94/698/EC be interpreted as meaning that, by making approval of the aid for which it provides subject to the condition that Portugal honour the undertaking to apply Article 4 of Regulation (EEC) No 2408/92 to the Autonomous Regions, with effect from 1 January 1996, by publishing the public service obligations for the individual routes in question ('in accordance with Chapter VIII, point 3'), Portugal is precluded from exercising the power granted to Member States by Article 3(2)?

V — Submissions of the parties

(1) *Flightline*

11. Flightline complains that the questions referred are not the ones that need to be answered in the main proceedings. The issue is in fact whether it was permissible for Portugal to reject Flightline's tender on the ground that it did not fulfil the conditions laid down in Article 3(2).

12. In Flightline's opinion, it was not. The Commission approved measures to restructure TAP only on certain conditions, one of which being compliance with the requirement in Article 1(e) of the aid decision to issue a public invitation to tender and to publish the relevant public service obligations in the *Official Journal of the European Communities*. In return for the granting of aid, the Commission imposed on Portugal the condition that the constraints protecting TAP against competition should be removed. That makes it impossible for the invitation to tender to be made subject to the conditions laid down in Article 3(2).

13. Read together, it contends, Article 4 of the regulation and Article 1(e) of the aid

decision show that Portugal undertook not to rely on Article 3(2) of the regulation. This follows, on the one hand, from the fact that Portugal was to be subjected to an obligation to which it had not already been subject under Regulation No 2408/92 and, on the other hand, from the fact that Article 3(2) of the regulation applied only until 1 April 1997. The outcome of the invitation to tender, however, was effective up to 31 December 1998. It is inconceivable that, although the aid decision is aimed at gradual liberalisation, Portugal should be able to continue to restrict competition for a further year and nine months after the original deadline.

14. In Flightline's view, the respective scopes of application of Article 4 and Article 3 are different. Article 4 relates to routes for which no carrier has applied and on which there is therefore no competition, whereas Article 3(2) concerns restrictions on routes on which there is competition.

15. It submits that the exclusion of Article 3(2) on the routes covered by Article 4 of the regulation does not affect the possibility that existed up to 1 April 1997 of restricting competition on all domestic competitive routes.

16. Moreover, Article 3(2) does not require, but merely entitles, Member States to refuse cabotage.

17. Finally, exercise of the power granted in Article 3(2) entails discrimination on grounds of nationality as prohibited by Article 12 EC, since it means that only non-Portuguese carriers are excluded.

(2) *Transportes Aéreos Portugueses SA (TAP)*

18. Firstly, TAP considers the reference for a preliminary ruling to be inadmissible. Article 234 EC does not give the Court of Justice jurisdiction to decide on individual cases. In the light of the clear wording of the rules of Community law, the need for a preliminary ruling is doubtful.

19. On the substance of the case, TAP submits that the issue is essentially whether Portugal was obliged, on the basis of Articles 3(2) and 4(1)(d) of Regulation No 2408/92, and the invitation to tender published in the Official Journal, to accept Flightline's tender.

20. In TAP's view, it does not follow either from Article 4 of the regulation or from the aid decision that Portugal waived the rights provided for in Article 3(2). The wording and the scheme of Article 3(2) and Article 4 do not indicate that there is any connection between those provisions. Consequently, reliance on the rights available under Article 3 when applying Article 4 is not precluded.

21. The phasing-in of liberalisation in the air transport sector also needs to be taken into account. That process justifies protective measures such as those contained in Article 3(2). The Member States which imposed public service obligations retained the restrictions on freedom of air traffic for domestic flights.

22. Moreover, the Commission did not contest the implementation of the aid decision and therefore accepted the content of the invitation to tender.

(3) *The Portuguese Republic*

23. The Portuguese Government submits that Article 3(2) is not legally subordinate to the imposition of public service obligations under Article 4. Other Member States, such as France, which imposed similar obligations, have also applied Article 3(2) of the regulation. The process by which Regulation No 2408/92 was adopted shows that Article 3(2) reflects a balance between the liberalisation of air transport and protection of the specific situations of the national airlines of each Member State.

24. Furthermore, it contends, Article 1(4) of the regulation excluded the Autonomous Region of the Azores from the scope of the regulation until 30 June 1998. During the negotiations on the granting of aid, Portugal proposed, in spite of Article 1(4) of the regulation, that flights to the Azores should be made subject to the same rules as are applicable to Madeira, in order to ensure that TAP's accounts were transparent and that flows of money from the State to TAP could be monitored. Consequently, making flights to the Azores subject to Article 4 of the regulation does not mean that the protection clause in Article 3(2) of the regulation is waived.

25. Moreover, such a waiver must be expressly provided for, since it is a matter of fundamental national public interest. However, none of Portugal's negotiators was empowered to waive those rights on Portugal's behalf.

26. Portugal also points to Chapter VIII of the aid decision, which expressly states that the invitation to tender is to be offered to any European carriers 'entitled to operate such air services'. 'Entitled' also means having regard to the restriction in Article 3(2).

27. Like TAP, the Portuguese Government points out that the Commission has not objected to the implementation of the aid decision and has therefore accepted the content of the invitation to tender.

(4) *The Commission*

28. On the first and second questions, the Commission submits that the application of Articles 4 and 5 of Regulation No 2408/92 does not mean that the protective measures laid down in Article 3(2) must be waived first. Even though that provision contains an exception to the general principle of free access to Community routes enshrined in paragraph 1, it is clear from the recitals in the preamble that cabotage rights were to be introduced only gradually. Article 5 of the regulation also shows that air transport within the Member States was to be liberalised step by step.

29. Moreover, it follows from the wording of Article 4(1)(d) that, until 1 April 1997, access to the domestic routes on which public service obligations are imposed is confined to air carriers entitled to exercise such rights. That imposes the condition that the requirements laid down in Article 3(2) must also be fulfilled.

30. The expression 'any Community air carrier entitled to operate such air services' contained in Article 4 is used with the same meaning in Article 5(3)(c) of Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States. [10] In this context, regard must be had to Article 4(1), which limits access to routes subject to public service obligations to one carrier for a period of up to three years. Article 4, on the other hand, is not subject to any time-limit. The only requirement is that the public service obligations imposed must be periodically reviewed.

31. For the period from 1 January 1993 to 1 April 1997, a Member State can avail itself of the possibilities provided for in Article 4, even if it exercises its rights under

10 — OJ 1990 L 217, p. 8.

Article 3(2). Firstly, an invitation to tender in accordance with Article 4(1)(d) allows competition to be created between air carriers with an operating licence from the Member State concerned. Secondly, all Community air carriers which fulfil the conditions laid down in Article 3(2) of the regulation can apply.

32. On the third question, the Commission submits that it cannot be inferred from the general scheme of the decision or the circumstances in which it was adopted that the undertaking given by Portugal to apply Article 4 to the Autonomous Regions of the Azores and Madeira must be understood as meaning that the possibility provided for in Article 3(2) cannot be exercised. The expression 'entitled to operate such air services', which appears in both the regulation and the aid decision, must be interpreted in the same way in both cases. The interpretation given in points 3 and 11 of the public invitation to tender is correct.

33. The aid decision makes flights to the Autonomous Regions subject to Regulation No 2408/92. Any airline holding an operating licence issued by Portugal can apply for those routes, in particular Portugália. Air carriers registered in other Member States could have entered into competition with TAP if they had fulfilled the conditions laid down in Article 3(2). Competition is thus promoted even if the rights under Article 3(2) are retained.

34. Making flights subject to the regulation makes the financial compensation which Portugal pays for the public service obligations imposed more transparent. In particular, this ensures that the payments do not exceed the deficit found to exist on those routes.

35. Finally, the Commission points out that, in other decisions concerning compatibility with the common market, it has never required Member States to waive the possibilities under Article 3(2) prematurely.

VI — Assessment

(1) *Admissibility*

36. The objections raised against the admissibility of the reference for a prelimi-

nary ruling are not convincing. The questions referred concern the interpretation of the provisions of Articles 3 and 4 of Regulation No 2408/92. They are of general significance and transcend the individual case at issue. The reference is therefore admissible.

(2) *The first question*

37. The first question concerns the fundamental relationship between Article 3(2) and Article 4 of Regulation No 2408/92, that is to say to what extent the imposition of public service obligations in respect of the operation of air routes and the public invitation to tender for air routes in accordance with Article 4(1) mean that the possibility of restricting cabotage, available until 1 April 1997, is waived.

(a) Wording of Articles 3 and 4

38. Neither the wording of Article 3(2) nor the wording of Article 4(1) expressly provides for such a waiver. The two provisions make no reference to each other.

39. The Commission points out that, under Article 4(1)(d), an exclusive right which is put out to tender is to be offered to all Community air carriers 'entitled to operate such services'. It takes the view that only an air carrier that fulfils the conditions laid down in Article 3(2) is 'entitled'. It reaches this conclusion by comparing Article 4(1)(d) with its predecessor, Article 5(3)(c) of Council Regulation (EEC) No 2343/90 of 24 July 1990 on access for air carriers to scheduled intra-Community air service routes and on the sharing of passenger capacity between air carriers on scheduled air services between Member States. The latter provision referred expressly to Article 8 of Regulation No 2343/90, which contained a rule similar to Article 3(2) of Regulation No 2408/92.

40. The comparison between the provisions seems only partly capable of supporting the solution proposed by the Commission. The fact that Article 4 contains no reference — at least no specific reference — to Article 3 could also indicate that Regulation No 2408/92 was intended to go further in liberalising air transport than Regulation No 2343/90. As the third to the seventh recitals in the preamble to Regulation No 2408/92 show, Regulation No 2408/92 represents a further step towards the liberalisation of air transport and goes further than Regulation No 2343/90. To that extent, the wording of Article 4 of Regulation No 2408/92 might imply that the application of Article 3(2) is precluded.

41. Nor does the concept of entitlement necessarily refer to entitlement for the purposes of Article 3(2). It can also be read in conjunction with Article 2(b), which

defines the term 'Community air carrier' as 'an air carrier with a valid operating licence granted by a Member State in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers'. [11] Consequently, the term 'entitled' within the meaning of Article 4(1)(d) could also be understood as meaning 'in possession of a valid operating licence within the meaning of Regulation No 2407/92'. In that case, any Community air carrier would be able to take part in the tender procedure and could not be subjected to the restriction contained in Article 3(2). That solution has the advantage that it takes into account the fundamental idea of liberalisation enshrined in Article 3(1).

42. As an interim conclusion, it must be stated that the wording of the two provisions accommodates both interpretations. It cannot be concluded on the basis of their wording that Article 3(2) could not be applied in the context of Article 4.

(b) Overall legislative context

43. It must therefore be considered to what extent the overall legislative context yields an answer to the question referred.

44. In this respect, the Commission refers to Article 5, which concerns the temporary maintenance of exclusive transport rights. If such rights existed at the time when the regulation entered into force, i.e. on 1 January 1993 (see Article 16 of the regulation), they may continue to be exercised until they expire or for three years, i.e. until no later than 1 January 1996. Like Article 3(2), Article 5 provides for a temporary exception to the principle of freedom to provide air services which was introduced by Article 3(1). [12] In the Commission's view, it is 'clear' that the application of Article 5 does not preclude the application of Article 3(2). Consequently, it submits, Article 4(1) may likewise not mean that the application of Article 3(2) is waived.

45. Article 5 contains a provision similar to Article 4(1)(d). They both concern exclusive rights, and hence an exception to the freedom to provide air services introduced by Article 3(1), and they both impose a three-year time limit.

46. However, there are also fundamental differences between Articles 5 and 4. Sub-

11 — OJ 1992 L 240, p. 1.

12 — Judgment in Case C-70/99 *Commission* v *Portugal* [2001] ECR I-4845, paragraphs 21 and 22. See also, albeit less unambiguously, the judgment in Case C-361/98 *Commission* v *Italy* [2001] ECR I-385, paragraph 32.

stantively, they differ inasmuch as Article 5 protects the continued existence of exclusive rights granted before liberalisation on 1 January 1993, whereas Article 4 concerns the creation of new exclusive rights after that date. Old exclusive rights do not necessarily have to be treated in exactly the same way as new rights granted after the entry into force of the regulation. They also differ in terms of their temporal scope. There was little likelihood of conflict between Article 3(2) and Article 5. After all, exclusive rights could be maintained only until 1 January 1996 and until then at least there was no right of cabotage anyway. Consequently, any conflicts that did arise could only have done so between 1 January 1996 and 1 April 1997. In the case of Article 4, on the other hand, conflicts could arise throughout the entire period of application of Article 3(2), that is to say from 1 January 1993 to 1 April 1997. In view of those differences, it therefore seems questionable to what extent an argument for the interpretation of Article 4 can be derived from Article 5.

47. The systemic relationship between Article 4(1)(d) and Article 3(1) suggests that the application of Article 3(2) should be precluded. If, in contrast to the liberalisation sought, it was in fact possible for new monopolies to be introduced — at least temporarily for a maximum of three years — then all Community air carriers should have been able to compete, at least in the procedure for granting those exclusive rights. Moreover, that interpretation finds support in the fact that Article 3(2) represents an exception to the principle established in paragraph 1. As a provision creating an exception, Article 3(2) is to be interpreted restrictively.

48. In accordance with Article 4(1)(a), public service obligations are imposed primarily without any compensation for the air carrier. Accordingly, the text of the communication from the Commission under Article 4(1)(a) on public service obligations on scheduled air services within Portugal, published in the Official Journal, [13] expressly provided that 'carriers [were required] to apply to operate one or more services in accordance with the conditions laid down and without seeking compensation by 31 October 1995'. Compensation was thus expressly excluded.

49. That does not mean, however, that no compensation at all can be granted for the fulfilment of public service obligations. Firstly, exclusive rights can be granted in accordance with Article 4(1)(d). A monopoly position of this kind guarantees the

13 — OJ 1995 C 200, p. 3.

air carrier operating the routes a certain revenue. Furthermore, an air carrier which has been selected in such a tender procedure may be granted compensation in accordance with Article 4(1)(h). Such compensation offsets the difference between the costs incurred in complying with the standards laid down and the revenue raised from operating the service. [14] In accordance with that provision, paragraph 6 of the invitation to tender published in the Official Journal, on which TAP's application for the nine routes in question was based, expressly provided that financial compensation was to be granted and that the tenders submitted should therefore explicitly mention the sum required by way of compensation. [15]

50. According to Communication 94/C 350/07 from the Commission on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aids in the aviation sector, [16] compensation for the deficit is 'a neutral commercial operation between the relevant State and the airline'. Such 'compensation for public service obligations does not involve aid provided that: the carrier has been correctly selected through a call for tender, on the basis of the limitation of access to the route to one single carrier, and the maximum level of compensation does not exceed the amount of deficit as laid down in the bid'. [17]

51. As Commission Decision 94/666/EC of 6 July 1994 [18] shows, an air carrier, as well as benefiting from the compensation mechanism under Regulation No 2408/92, may also be granted aid. In that decision, which concerned compensation in respect of the deficit incurred by TAP on the routes to the Autonomous Regions of the Azores and Madeira, in other words the same routes as those to which the questions relate, the Commission stated that compensation in respect of public service obligations is to be regarded as aid in so far as it is not paid to an undertaking which has been selected by tender procedure. [19] However, since the liberalisation of air transport had been implemented only to a limited extent, the Commission declared the aid at the time to be regional and, as such, compatible with the Treaty. Consequently, even though aid for air transport is regarded by the Commission as being contrary to the Treaty, that decision shows that, in principle, compensation is possible even in the form of aid.

52. If the fulfilment of public service obligations is offset by the application of Article 4(1)(d) and (h), the question arises

14 — See paragraph 16 of Commission Communication 94/C 350/07 on the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to state aids in the aviation sector, OJ 1994 C 350, p. 5.

15 — OJ 1995 C 223, p. 16.

16 — OJ 1994 C 350, p. 5.

17 — Paragraph 18 of the Communication.

18 — Commission Decision 94/666/EC of 6 July 1994 concerning compensation in respect of the deficit incurred by TAP on the routes to the Autonomous Regions of the Azores and Madeira, OJ L 260, 8 October 1994, p. 27.

19 — Decision 94/666, point V, p. 30 (cited in footnote 18).

whether a restriction of competition, as provided for in Article 3(2), can still be considered lawful. Since Article 3(2), as an exception to the principle of liberalisation laid down in paragraph 1, is to be interpreted restrictively, Article 3(2) is arguably inapplicable in the context of Article 4(1)(d). This point will be considered in the next section.

53. If anything, therefore, the analysis of the systemic relationship between them indicates that Article 3(2) should be considered inapplicable in the context of Article 4(1)(d). However, that relationship does not provide a definitive answer to the question.

(c) Meaning and purpose of Articles 3 and 4

54. Finally, it must be considered whether the application of Article 3 in the context of Article 4 is precluded by the meaning and purpose of the provisions.

55. Article 3(1) introduces freedom to provide services throughout the air transport sector. Article 3(2) postpones the application of that principle in respect of cabotage. Cabotage is not permitted without restriction immediately upon the entry into force of the regulation on 1 January 1993 (see Article 16); rather, Member States may restrict that freedom until 1 April 1997, although only under the conditions laid down in Article 3(2). Any potential competition from the market is therefore restricted in so far as that right under Article 3(2) is exercised.

56. The situation under Article 4(1)(a) is entirely different. That provision grants Member States the power to impose minimum conditions under which an air carrier can apply for traffic rights. In the context of the competition opened up by Article 3(1), air carriers applying for authorisation to operate a particular route are required to ensure that the service they offer meets certain conditions in regard to frequency, scheduling, capacity offered, pricing, etc. Such a provision guarantees that particular routes enjoy an appropriate level of service which the market alone does not offer, or at least not to a sufficient extent. Since Article 3 and Article 4(1)(a) serve different purposes, it can therefore be said in principle that the two provisions stand alongside each other and are consequently neither mutually exclusive nor mutually dependent. To that extent, there

is no apparent reason why the power granted in Article 3(2) to restrict the freedom to provide services for a limited period cannot also be exercised in the application of Article 4(1)(a). The question is to what extent that assessment also holds good in the context of subparagraph (d), that is to say where compensation is provided for the fulfilment of public service obligations.

57. As this case shows, there are circumstances in which competition is restricted by the application of Article 3(2) in the context of Article 4(1)(d). Flightline has applied for authorisation to operate scheduled air services without compensation on eight of the nine routes put out to tender under Article 4(1)(d). If Article 3(2) were applicable in the context of Article 4(1), an independent bidder not fulfilling the conditions laid down in Article 3(2), like Flightline, would be replaced by a future monopoly holder. That is at odds with the meaning and purpose of the regulation, which is to liberalise air transport and create competition.

58. The notices published in the Official Journal in this case show how useful the possibility of restricting competition can also be for the Member State issuing the invitation to tender. The publication of the public service obligations in the Official Journal in accordance with Article 4(1)(a) contained no reference to Article 3(2). That suggests that the Portuguese Government would not necessarily have insisted on its application, if authorisation to operate the routes had been given pursuant to Article 4(1)(d). The possibility of restricting cabotage in accordance with Article 3(2) was exercised only in the context of the invitation to tender under Article 4(1)(d). Such conduct shows clearly that the fact of restricting participation in the invitation to tender for air traffic rights in accordance with Article 4(1)(d) and (h) by applying Article 3(2) on routes on which public service obligations are imposed in order to ensure an adequate level of service bears little relation to the rationale underpinning Regulation No 2408/92.

59. The granting of an exclusive right is diametrically opposed to the fundamental purpose of Regulation No 2408/92, as expressed in Article 3(1). Instead of the liberalisation sought, a new monopoly emerges, albeit only temporarily.

60. However, it must be borne in mind that Article 3(2) is only a transitional provision. It is a deliberate decision by the legislature

to make an exception to the principle of freedom to provide services in air transport. As is clear from the 10th recital in the preamble to the regulation, cabotage rights were to be phased in in order to encourage the development of the Community air transport sector and improve services for users.

61. Article 3(2) of the regulation strikes a balance between the liberalisation of air transport and the specific situation of national airlines in respect of cabotage rights. The reason such a balance is particularly necessary is that to grant cabotage rights is to open up to the highest degree a market which has hitherto been the exclusive domain of each individual State and its national airlines, as is clear from Article 7 of the Convention on International Civil Aviation, signed in Chicago on 7 December 1944 and ratified by all EC Member States. That provision expressly confers on each contracting State the right to refuse permission to the aircraft of other contracting States to take on in its territory passengers, mail and cargo carried for remuneration and destined for another point within its territory.

62. It must therefore be assumed that, as far as cabotage was concerned, the legislature deliberately granted Member States the possibility of postponing liberalisation from 1 January 1993 to 1 April 1997 at the latest. Such an intention on the part of the legislature should not be disregarded without good reason. Indeed every effort should be made to take that exception into account as much as possible when applying the other provisions of the regulation. That is particularly so given that liberalisation at Community level is more extensive than under international law. That consideration suggests that Article 3(2) is to be regarded as also being applicable in principle in invitations to tender under Article 4(1)(d).

63. It is true that this interpretation limits the scope of Article 4(1)(d) in that competition is restricted to authorised air carriers in the Member State concerned and carriers for which the routes put out to tender are feeder services. However, such restricted competition is still an improvement on a non-liberalised market.

64. Against that background, Flightline's view that Article 3(2) and Article 4 are mutually exclusive because of their respective scopes must be rejected. It is certainly true that the scope of Article 3(2) presupposes that several tenderers will apply, since it restricts the existing competition. However, it is not possible to raise in

opposition to that fact the further fact that Article 4 concerns only cases in which no tenderer offers the air services in question. Public service obligations may be imposed because it is found that the market alone does not adequately offer the services in question. However, that still does not mean that there is no competition. Furthermore, even if the restriction in Article 3(2) is applicable, Article 4(1)(d) actually creates competition by providing that the invitation to tender is to be re-issued at least every three years. The very obligation to re-issue the invitation to tender every so often guarantees competition and restricts any compensation paid under Article 4(1)(h) to the smallest deficit achievable on the market. There is no legal reason why the deliberate decision of the legislature to liberalise the sector gradually, including by providing for the possibility of delaying the introduction of cabotage, should not be taken into account in the context of Article 4(1). It can therefore be assumed that the application of Article 4(1) does not necessarily mean that the right under Article 3(2) must be waived.

65. Indeed, paragraph 11 in particular of the invitation to tender published in the Official Journal also shows that, in the application of Article 4(1)(d), independent competitors are given precedence over monopoly holders, even subsidised ones if there are any. The tender at issue was thus successful only in so far as no air carrier had applied for authorisation to operate one or more of the routes put out to tender by 1 November 1995. Only the remaining routes for which no independent competitors had applied could then be allocated in accordance with Article 4(1)(d).

66. The meaning and purpose of the provisions do not preclude the application of Article 3(2) in the context of Article 4. One must therefore follow the deliberate decision of the legislature to introduce the liberalisation of air transport gradually and not to liberalise cabotage until 1 April 1997, and allow Article 3(2) to be applied in the context of Article 4.

67. Finally it should also be pointed out that that solution does not infringe the prohibition on discrimination in Article 12 EC. The rules on freedom to provide services contained in Article 51 et seq. EC are special provisions which take precedence over the general prohibition on discrimination. According to Article 80(2) EC, they apply to air transport only in so far as the Council makes special provision to that effect. Regulation No 2408/92 is such a provision. If Article 3(2) of that

regulation states that discrimination on grounds of nationality, in this case the registration of an air carrier in another Member State, was admissible up to 1 April 1997, such discrimination is therefore compatible with the Treaty. Moreover, at the hearing, the agents for Flightline expressly abandoned the claim that Regulation No 2408/92, or at least Article 3(2) thereof, was incompatible with Article 12 EC.

68. I therefore propose that the first question should be answered as follows:

The exercise of the right conferred on a Member State by Article 4 of Council Regulation (EEC) No 2408/92 of 23 July 1992 does not necessarily presuppose or mean that the power provided for in Article 3(2) of the regulation to restrict competition in cabotage services in its territory until 1 April 1997 is waived.

(3) *Second question*

69. The answer to the second question follows essentially from the outcome of the considerations relating to the first. Since the invitation to tender under Article 4(1) does not mean that the possibility of restricting the grant of cabotage rights under Article 3(2) must be waived, it is not contrary to Community law for a Member State, in an invitation to tender, to require air carriers to apply in accordance with the conditions laid down in Article 3(2). In fact, in such circumstances, the Member State is actually exercising its rights under Article 3(2) of the regulation.

70. However, in so far as air carriers whose operating licences have been granted by another Member State are required to fulfil the conditions laid down in Article 3(2), the problem arises that, according to the invitation to tender at issue in the main proceedings, exclusive rights were to be granted for the period from 1 January 1996 to 31 December 1998 (see paragraph 8 of the invitation to tender). That period extends beyond the time-limit of 1 April 1997 attached to the possibility of restricting cabotage rights under Article 3(2). The question is therefore to what extent the restriction under Article 3(2) could be extended beyond 1 April 1997 by an invitation to tender organised in 1995 and relating to services to be provided between 1 January 1996 and 31 December 1998.

71. The rule in Article 3(2) is an exception to the principle of free access to Commu-

nity routes established in Article 3(1). As a provision creating an exception, it is to be interpreted restrictively, in accordance with general principles of interpretation.

72. Flightline takes the view that the restrictions should not in any event go further than indicated in the regulation. TAP and the Portuguese Government have not commented on this point. The Commission merely points out that exclusive rights may be granted for a maximum of three years.

73. The exclusive rights under Article 4(1)(d) may indeed be granted for a maximum of three years. That time-limit corresponds to the three-year period of protection provided for in Article 5 for the continued existence of exclusive concessions existing at the time of the entry into force of the regulation. However, the three-year time-limits in Article 4 and Article 5 are maximum limits. There is no obligation to take full advantage of them. In the context of the application of Article 4(1)(d), exclusive rights can also be granted for shorter periods, for example from 1 January 1996 to 31 March 1997. This is an indication that the three-year time-limits in Articles 4 and 5 must under no circumstances serve to extend the time-limit laid down in Article 3(2).

74. Moreover, the rule in Article 5 expired on 1 January 1996. It would be contrary to the meaning of that transitional provision to rely on it in order to argue that new exclusive concessions for the period 1 January 1996 to 31 December 1998 could have been granted under an invitation to tender issued at the end of 1995.

75. It is true that Article 4(1)(d) is of unlimited temporal application. However, there is nothing in it to indicate that it provides a means of preventing or delaying the application of other provisions in the regulation. Only an interpretation which does not extend the possibility of restricting cabotage beyond 1 April 1997, even when such a restriction occurs in the context of an invitation to tender under Article 4(1)(d), is consistent with the rationale of liberalisation as established in Article 3(1).

76. I therefore propose that the second question should be answered as follows:

In a public invitation to tender organised by a Member State in 1995 under Article 4 of the regulation for access to the provision of scheduled air services on a given route in accordance with the public service obligations applicable to that route, air carriers

whose operating licences were issued by another Member State could be required to apply under the conditions laid down in Article 3(2) of the regulation only until 1 April 1997. After that date, air carriers were and are allowed to apply without restrictions.

(4) *Third question*

77. By the third question, the referring court seeks to ascertain whether the aid decision, Commission Decision 94/698/EEC, in particular Article 1(e) thereof, under which Portugal undertook to apply Article 4 of Regulation No 2408/92 to the Autonomous Regions of the Azores and Madeira as of 1 January 1996, means that Portugal has no power to restrict cabotage in accordance with Article 3(2).

78. While Regulation No 2408/92 has been applicable to the Autonomous Region of Madeira since it entered into force, Article 1(4) excludes the Autonomous Region of the Azores from the scope of the regulation until 1 July 1993, which exclusion was later extended to 30 June 1998.

79. By virtue of the undertaking given by Portugal in Article 1(e) of the aid decision, however, Article 4 at least has been applicable to the Autonomous Region of the Azores since 1 January 1996, which is the very date from which the services put out to tender by Portugal were to be provided.

80. Since, however (as stated in connection with the first and second questions), the application of Article 4 does not preclude a Member State's power under Article 3(2), it must now be considered to what extent the aid decision means that exercise of the rights under Article 3(2) is waived from 1 January 1996.

81. The wording of Article 1(e) of the aid decision contains no express reference to Article 3(2) of the regulation. It must therefore be examined whether the grounds on which the aid decision is based show that the application of that provision was to be precluded.

82. Flightline points to the obligation incumbent on Portugal generally to remove the constraints protecting TAP from competition in return for the restructuring aid. That view finds support in Chapter VIII, point 3, of the grounds of the aid decision,

in which it is stated that, in the opinion of the Commission, the removal of constraints protecting TAP from competition is sufficient to justify the grant of aid.

83. On the basis of the foregoing, the exercise of the possibility of restricting cabotage within the meaning of Article 3(2) is in principle a measure which restricts competition. Since TAP was the only airline to apply for the nine routes put out to tender under Article 4(1)(d), the application of Article 3(2) had the effect of a measure which protected TAP from competition. Flightline did not fulfil the conditions laid down in Article 3(2) and could not therefore take part in the invitation to tender.

84. However, the measures mentioned in Chapter VIII, point 3, of the aid decision as examples of the steps Portugal needed to take in order, *inter alia*, to remove the protection against competition refer only, like Article 1(e) of the aid decision, to the issue of an invitation to tender in accordance with Article 4. Article 3(2), on the other hand, is not discussed (see Chapter VIII, point 3, second indent, of the aid decision). Nor is there any mention of Portugal's waiving the power to restrict cabotage provided for in Article 3(2).

85. It is true that the grounds of the decision also point out that, under Article 4(1)(a) of the regulation, the public service obligations which Portugal intends to impose in respect of the Autonomous Regions of the Azores and Madeira must be published in the *Official Journal of the European Communities*. They also state that the right to operate the services will be offered by public tender 'should no European air carrier declare its readiness to fulfil these public service obligations'. It might be concluded from this that the offer may not be restricted to undertakings which fulfil the conditions laid down in Article 3(2).

86. That view is supported by a comparison of the aid decision with the corresponding passage in Article 4(1)(d) of the regulation. That provision refers only in general terms to air carriers. The emphasis on 'European' undertakings might therefore deliberately imply a wider group of potential applicants.

87. Against such an understanding of the aid decision, however, is the fact that this would lead to an inconsistency between Article 4(1)(a) and (d). Some carriers would be permitted to apply for authorisation to operate routes in respect of which public service obligations have been imposed in accordance with Article 4(1)(a), but not to take part in a subsequent invitation to tender under Article 4(1)(d) in so far as they do not fulfil the conditions

laid down in Article 3(2). The aid decision — the wording of which in this respect is again the same way as that of Article 4(1)(d) of the regulation — also provides that, if no carrier declares its readiness to fulfil the public service obligations under Article 4(1)(a), the right to operate the services is to be offered by public tender under Article 4(1)(d) to any Community air carrier 'entitled to operate such air services'. Since the aid decision and the regulation may be assumed to have the same meaning as well as the same wording, it cannot be inferred from that expression that the application of Article 3(2) of the regulation is precluded, which conclusion is consistent with my findings in respect of the first question.

88. Moreover, no other conclusion can be drawn from Article 1(f) of the aid decision or Chapter VIII, point 3, first indent, of the grounds thereof. They do state that Portugal has confirmed that the liberalisation of non-scheduled air-transport between Community airports and the Azores includes 'all services' within the meaning of the regulation and that these types of air services are therefore authorised, notwithstanding that the Azores are temporarily excluded from the application of the regulation. However, that passage does not concern the scope of Article 4 of the regulation, which relates expressly to scheduled rather than non-scheduled flights. Furthermore, the word 'all' in this context refers to the type of services, as the list of seat-only and one-way charter flights indicates. It cannot therefore be construed as a reference to the liberalisation of cabotage services.

89. In conclusion, it cannot therefore be inferred from the grounds of the aid decision that it assumes that Portugal will remove all constraints protecting TAP, and in particular that the right under Article 3(2) of Regulation No 2408/92 is waived.

90. Moreover, contrary to Flightline's view, the application of Article 3(2) cannot be ruled out on the ground that the obligation under the aid decision to apply Article 4 would then be meaningless. The rebuttal against that view is that, if it had not been for the aid decision, Portugal would not have had to apply Article 4 to the Autonomous Region of the Azores until after 30 June 1998. Until then, neither Article 3 nor Article 4 would have been applicable to the Azores if it had not been for the aid decision. In that sense the aid decision contains provisions which encourage competition.

91. With regard to the Azores, the obligation to invite tenders is significant in so far as Portugália, in particular, was able to

compete with TAP, as the Commission submits. Also able to compete, as stated in the answer to the first question, were air carriers not registered in Portugal which fulfilled the conditions laid down in Article 3(2).

92. The interpretation of the aid decision put forward here is consistent with the Commission's practice to date. In its observations, it points out that it has never required Member States prematurely to waive their rights under Article 3(2) in other aid decisions. There is no reason to construe the aid decision in this case any differently. Moreover, the Commission has at no point called into question the lawfulness of the invitation to tender published in the Official Journal or the reference to the application of Article 3(2).

93. The interim conclusion must therefore be that it does not follow from Article 1(e) and (f) of the aid decision that Portugal has waived its rights under Article 3(2).

94. However, it must again be borne in mind within the context of the third question that the restrictions imposed on Article 4(1)(d) by the application of Article 3(2) must not extend beyond the limit laid down in the latter provision, i.e. 1 April 1997. The possibility of granting exclusive rights subject to a restriction on cabotage beyond those dates would be contrary to Article 3(1). It was therefore permissible for routes to be put out to tender on the condition that the requirements laid down in Article 3(2) of the regulation were met only up to and including 31 March 1997 in the case of those to the Autonomous Region of Madeira and only up to and including 30 June 1998 in the case of those to the Autonomous Region of the Azores. Regulation No 2408/92 entered fully into force on 1 April 1997 for Madeira and on 1 July 1998 for the Azores.

95. I therefore propose that the third question should be answered as follows:

Article 1(e) and (f) of Commission Decision 94/698/EC, which make approval of the aid for which they provide subject to the condition that Portugal fulfils the commitment to apply Article 4 of Regulation (EEC) No 2408/92 to the Autonomous Regions as of 1 January 1996 at the latest, by publishing the public service obligations imposed on the routes in question from that date, do not mean that Portugal was precluded from exercising the power granted to Member States by Article 3(2) of the regulation to refuse cabotage. However, the restriction on cabotage could be applied to Madeira only until 1 April 1997 and to the Azores only until 1 July 1998.

VII — Conclusion

96. I therefore propose that the questions referred should be answered as follows:

(1) The exercise of the right conferred on a Member State by Article 4(1)(d) of Council Regulation (EEC) No 2408/92 of 23 July 1992 does not necessarily presuppose or mean that the power provided for in Article 3(2) of the regulation to restrict competition in cabotage services in its territory until 1 April 1997 is waived.

(2) In a public invitation to tender issued by a Member State in 1995 under Article 4 of the regulation for access to the provision of scheduled air services on a given route in accordance with the public service obligations applicable to that route, air carriers whose operating licences were issued by another Member State could be required to apply under the conditions laid down in Article 3(2) of the regulation only until 1 April 1997. After that date, air carriers were and are to be allowed to apply without restrictions.

(3) Article 1(e) and (f) of Commission Decision 94/698/EC, which make approval of the aid for which they provide subject to the condition that Portugal fulfils the commitment to apply Article 4 of Regulation (EEC) No 2408/92 to the Autonomous Regions as of 1 January 1996 at the latest,

by publishing the public service obligations imposed on the routes in question from that date, do not mean that Portugal was precluded from exercising the power granted to Member States by Article 3(2) of the regulation to refuse cabotage. However, the restriction on cabotage could be applied to Madeira only until 1 April 1997 and to the Azores only until 1 July 1998.