II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 24 July 1991

on aid to be granted by the Belgian Government in favour of the air carrier Sabena

(Only the Dutch and French texts are authentic)

(91/555/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular the first subparagraph of Article 93 (2) thereof,

Having given notice to the parties concerned to submit their comments as provided for in Article 93,

Whereas,

I

By letter of 5 April 1991 the Belgian Government, in conformity with Article 93 (3) of the EEC Treaty, notified the Commission of its intention to grant aid to Sabena.

According to this notification the Belgian Government intends to support the restructuring of the Belgian air carrier Sabena with a package of measures including:

— a transfer of Bfrs 16,2 billion into Sabena's capital which had been granted by the State over the period 1949 to 1981,

— a capital increase of Bfrs 10 billion by subscription of shares and immediate payment,

— a capital reduction with cancellation of ordinary shares held by the Belgian State amounting to Bfrs 30,2 billion and made up of:

— wiping out losses of Bfrs 22,6 billion,

— provision for restructuring Bfrs 7,6 billion.

Furthermore, the Belgian Government intends to inject an additional amount of Bfrs 9 billion in the context of a second stage of recapitalization. It is foreseen that new industrial partners and private Belgian shareholders will contribute with an amount of Bfrs 10 billion to the completion of the recapitalization programme. After the completion of this recapitalization programme, it is foreseen that Sabena will have the following ownership structure:

— Belgian State:	26,7 %,
— Belgian shareholders:	26,7 %
— Industrial partners:	40,0 %
— Staff:	6,0 %.

The Belgian Government has also announced its intention to base its participation in restructuring Sabena on the double condition that the company:

— is commercially viable in future,

— finds a reliable industrial partner (airline) for future cooperation.

The Belgian Government has furthermore informed the Commission of Sabena's intention to reduce its permanent staff from 12 180 in 1991 to about 9 000 towards the end of 1993.

II

On the basis of the information in the notification, the Commission carried out an assessment of the compatibility of these measures with Article 92 of the EEC Treaty. This led to the conclusion that, at that stage, the aid measures were not compatible with the common market and could not, on the basis of the available information, qualify for one of the exceptions set out in Article 92 (2) and (3).

This preliminary conclusion of the Commission was mainly based on a lack of sufficient guarantees with regard to the one-off character of this operation, doubts on the commercial viability of the restructuring concept, a lack of clarity regarding the conditions to be accepted by the companies concerned and the substance of new company statutes. Finally, the Commission felt that the Belgian Government had not given sufficient assurances that no other measure would be established or maintained in order to favour Sabena in relation to other companies established in or being active to and from Belgium.

Accordingly, the Commission decided on 8 May 1991 to initiate the Article 93 (2) procedure. The Belgian Government was informed by letter dated 13 May 1991. The notice was published in the *Official Journal of the European Communities*(1). Interested parties were invited to present their observations within one month of the publication date.

III

By letter dated 5 June 1991 the Belgian Government presented its observations on the Commission's decision to initiate the official examination procedure as laid down in Article 93 (2) of the EEC Treaty.

In this letter the Belgian Government specifically confirmed the one-off character of the proposed measures and confirmed its intention to abstain from granting any further aid in favour of Sabena. The Belgian Government reiterated its two-step approach aiming, during the first phase, at deleting debts and other commitments accumulated during the past and, during the second phase, at improving the financial structure of the company. The Belgian Government explicitly confirmed that the Belgian State will not participate in any capital increase for the second phase if Sabena fails to find an industrial partner (i.e. another airline) willing to take a financial share.

In this letter the Belgian Government reiterated its intention to establish a new company statute based on private commercial law. However, details of this new statute were not given. In addition, the Belgian Government, in its initial reaction, failed to outline in full detail the financial arrangements with other existing shareholders and the proposed new shareholders including an airline partner, and to give precise information on the latest economic and financial developments which is essential to carrying out a realistic assessment of the company's current financial standing. Furthermore, the Belgian Government did not comment explicitly on the Commission's request not to maintain or to introduce other new measures with the effect of favouring Sabena in relation to other carriers operating to and from Belgium. Finally, the Belgian Government announced its intention to provide more detailed confidential information.

In view of these outstanding questions, a meeting with representatives of the Belgian authorities took place on 4 July 1991.

At this meeting, clarifying a number of questions related to the financial arrangements, it became evident that arrangements with new private partners, including an airline partner have not yet been finally concluded.

In the context of negotiations with potential investors the substance of a new company statute does play a major role. The Belgian authorities committed themselves to make the full text available to the Commission immediately after the completion of these negotiations.

The representatives also confirmed that the State-held shares ('actions privilégiées') will be transformed into normal capital during the first phase of the restructuring programme. The other shares, however, will continue to enjoy a special status ('actions préférentielles') including a guaranteed dividend until the end of 1995. Until that date, these shareholders will have the option to return the shares to the State or to accept their conversion into normal risk capital.

Existing shareholders agreed to accept a reduction of the level of the guaranteed dividend from 10 to 8 %, i.e. from Bfrs 50 per share to Bfrs 40. This will in practice mean that the company will, irrespective of its financial situation, have to pay guaranteed dividends totalling Bfrs 1,3 billion during the restructuring programme, i.e. between 1992 and 1995. Other existing financial guarantees will, however, be phased out immediately.

(1) OJ No C 138, 29. 5. 1991, p. 3.

The Belgian authorities stressed their view that no other measures apart from the proposed State aid, which favour Sabena in relation to other air carriers operating to and from Belgium, exist nor are envisaged. They specifically contested the view that exclusive rights in the area of ground handling at Zaventem airport and catering represent a privileged treatment.

The Belgian authorities also underlined that the aeronautical authorities are already going beyond Community requirements when designating other air carriers to scheduled flights inside the Community.

By letter dated 9 July 1991 the Belgian Government gave written explanations and clarifications on these points, including an update of the latest financial development and the most recent operational results.

Following the publication in the Official Journal, two other air carriers, an airline association, a consumer organization and two Member States presented their observations.

IV

In view of the accumulated debts and the costs of the restructuring programme, no investor apart from the State would at present be prepared to take part in the restructuring programme of Sabena. Therefore, the proposals notified by the Belgian Government have to be considered as State aid within the meaning of Article 92 (1) of the EEC Treaty.

The setting up of a common aviation marked by gradually phasing out bilateral restrictions on market access and capacity sharing and by relaxing rules on air fares has increased potential competition on many of the routes incorporated in Sabena's network. This trend should continue in the years to come. Consequently the aid to Sabena distorts or threatens to distort competition between this airline and other air carriers in the Community.

Article 92 (3) of the Treaty specifies the types of aid which may be considered to be compatible with the common market. Such compatibility must be determined in the context of the Community and not of a single Member State. Article 92 (3) provides for exceptions from the principle set out in Article 92 (1): but in order to ensure that the common market functions properly, and in the light of Article 3 (f) of the Treaty, those exceptions must be strictly construed when an aid scheme or a particular application of such exceptions is being examined.

In particular, those exceptions are applicable only in cases where the Commission is able to establish that, without the aid, market forces alone would not be sufficient to persuade the future recipient of aid to act in such a way as to help achieve one of the objectives of those exceptions.

Article 92 (3) (a) and (c) provides for exceptions in respect of aid to promote or facilitate the development of certain regions. The proposed aid scheme, however, does not qualify for the exceptions provided for in Article 92 (3) (a) since, in Belgium, the standard of living is not abnormally low nor is there serious underemployment. Nor can the aid scheme be described as intended 'to facilitate the development... of certain economic areas' (Article 92 (3) (c), since it does not serve the purposes of any earlier investment or of job creation as is stipulated in the Commissions's 1979 communication on regional aid systems [1]. In any case, the Belgian Government has put forward no regional arguments in support of the proposed aid.

As for Article 92 (3) (b), the evidence suggests that the aid in question was not intended to promote the execution of an important project of common European interest nor to remedy a serious disturbance in the Belgian economy. Moreover, the Belgian Government has not invoked this.

With regard to the exception under Article 92 (3) (c) for 'aid to facilitate the development of certain economic activitites', the Commission may consider some restructuring aid as compatible with the common market if it meets a number of conditions [2]. These conditions must be seen in the context of the two principles enunciated in Article 92 (3) (c) — i.e. that the aid must be required for developing the activity from the standpoint of the Community and that the aid may not adversely affect trading conditions to an extent contrary to the common interest [3].

These criteria have been interpreted in a sectoral (aviation) context in Memorandum No 2 which stipulates that the Commission may in certain cases decide in accordance with Article 92 that aid may be granted to individual airlines which have serious financial difficulties, provided certain conditions are met:

[1] OJ No C 31, 3. 2. 1979, p. 9.
[2] Eigth report on competition policy, point 176.
[3] See the Judgment of the Court of Justice of 17 September 1980 in Case No 730/79 — Philip Morris — [1980] ECR, p. 2671.

(a) The aid must form part of a programme, to be approved by the Commission, to restore the airline's health, so that it can, within a reasonably short period, be expected to operate viably without further aid. Thus the aid must be of limited duration. If the restoration of financial viability requires capacity reductions, this would be included in the programme. Any alterations in the programme would also have to be approved by the Commission. Naturally any proposed changes to the aid would also have to be notified to the Commission.

(b) The aid in question must not transfer the difficulties from that Member State to the rest of the Community.

(c) Any such aid must be structured so that it is transparent and can be verified.

In the case of Sabena it must at first be concluded that the company is, if assessed by normal commercial standards, in a difficult financial position. On the basis of the latest figures submitted on 9 July 1991 by the Belgian Government, the debt-equity ratio of about 4 : 1 is, against normal standards of the airline industry, very poor. The operations of the airline (Sabena World Airlines) led in 1990 to a net loss of Bfrs 7 462 billion on a total turnover of Bfrs 42 055 billion. Additional losses totalling Bfrs 259 million have been suffered by the subsidiaries Sabena Catering and Sabena Technics.

This weak financial situation results from various reasons among which low labour productivity and high personnel costs have played a major role.

In the short run the crucial point for Sabena will be, on the one hand, to make full use of the market potential Brussels offers and, on the other hand, to keep cost factors under control.

The intention of the air carrier Sabena to reduce the staff by 29 % and the willingness of the Belgian State to compensate for the cost of these lay-offs can be seen, under these circumstances, as important steps for regaining commercial viability.

In addition, the Government's request to develop a new commercially-oriented company statute and to increase substantially the share of private risk capital suggests a political willingness to restrict the role of the State to that of a normal shareholder and to abstain from (potentially cost-increasing) interventions for other than commercial reasons.

However, the contents of Sabena's new company statute must be clarified.

The fact that the decisions on the company's new statutes have yet to be taken has to be considered as an uncertainty in relation to the company's and the Belgian State's effective commitment to put the company on a genuine commercial footing and to solve, thereby, one of the most important underlying reasons for the developments during the past. Any decision of the Commission approving the measures must, therefore, be linked to the modification of the company statutes of Sabena.

It is also essential to ensure that new shareholders do not enjoy privileges and guarantees. Such guarantees could only be taken as a lack of confidence on behalf of private investors in the possibility of re-establishing long-term viability. Since arrangements with new shareholders have yet to be concluded, approval by the Commission would necessitate checking the Belgian State's commitment in this field. Only the provision of genuine risk capital sufficiently indicates the commercial viability of the restructuring concept. It is, therefore, necessary to oblige the Belgian Government to report regularly on the substance of decisions taken in this context.

The aid in question must be granted degressively and be clearly linked to the restructuring process.

The two-step approach envisaged by the Belgian Government can be seen as some form of degressive support. The Belgian Government has committed itself in a sufficiently clear way not to go ahead with the second capital injection of Bfrs 9 billion if an airline partner has not been found and if private shareholders will not contribute at least Bfrs 10 billion to Sabena's restructuring process. Major private investments following a massive 'clean-up' of the burden resulting from the past can be seen as ensuring the degressive nature of the whole operation.

The intensity of the aid must be reasonably related to the size of the underlying problems in order to keep possible distortions of competition to a minimum.

The question whether the proposed support for Sabena will go beyond the level required for the purpose of restoring the company, needs to be assessed in a broader context taking into account the aeropolitical environment.

The Belgian Government has, in the past, taken cautious steps to open up the Belgian market and to grant, to a limited extent and only on an individual case-by-case basis, licences for scheduled air transport to other carriers, namely to TEA.

The question whether the proposed aid amounts exceed the level required for achieving the objectives of the restructuring process also depends on the use of the additional funds.

The business plans presented by the company concerned indicate that these resources will largely be used for two purposes.

Firstly for writing off accumulated debts. Between 1984 and 1990 financial debt had increased from Bfrs 17 to 43 billion. The corresponding poor debt-equity ratio will be improved in order to re-establish commercial viability.

Secondly, resources will be used to fulfil modernization needs. The fleet modernization will require investments amounting to Bfrs 46 250 billion until 1995. The new equipment is required in order to lower operating costs and to comply with stricter noise emission rules as established by Community legislation.

These investments will not increase the capacities offered by Sabena. The restructuring of Sabena's network towards profitable routes will initially lead to a reduction of the capacities measured as available ton-kilometres (ATK) from nearly 2 000 million in 1990 to about 1 300 million ATKs in 1993. Afterwards an increase in line with the overall development of traffic volume is expected.

However, the aid could at the end of the restructuring process eventually lead to improving Sabena's financial standing (i.e. debts-equity ratios) above levels actually achievable by some of Sabena's competitors.

Information made available to the Commission suggests that the Belgian authorities and the company concerned envisage a debt-equity ratio of about 1 : 25 as an objective to be achieved by the end of the recapitalization process.

In a normal micro-economic and sectorial environment this level can be considered as indicating a well-balanced financial situation in line with standards of the industry.

At present however, certain Community air carriers have, due to the general difficult situation of the aviation industry, a less sound financial structure.

Under these circumstances the financial support is justifiable only under the condition that the Belgian Government commits itself to avoid all forms of privileged treatment in areas determining the competitiveness of companies operating to and from Belgium.

V

In the light of the foregoing, the Commission considers that the exception laid down in Article 92 (3) (c) of the EEC Treaty can be applied to the aid measures proposed by the Belgian Government for supporting the restructuring programme of the air carrier Sabena if a number of conditions are fulfilled in order to ensure that the aid does not adversely affect trading conditions to an extent contrary to the common interest,

HAS ADOPTED THIS DECISION :

Article 1

The aid in favour of the air carrier Sabena, as notified on 5 April 1991 by the Belgian Government to the Commission :

— transfer of Bfrs 16,2 billion State debt into Sabena's capital,

— direct capital injection totalling Bfrs 19 billion, thereof Bfrs 10 billion during the first phase and Bfrs 9 billion during the second phase,

— capital reduction with cancellation of ordinary shares held by the Belgian State mounting to Bfrs 30,2 billion and made up of :

  — wiping out losses of Bfrs 22,6 billion,

  — provision for restructuring Bfrs 7,6 billion,

are compatible with the common market within the meaning of Article 92 (3) (c) of the EEC Treaty, under the condition that the Belgian Government :

— complies with its undertaking to abstain from granting any further aid or other new measures favouring directly or indirectly the air carrier Sabena or lowering the commercial risks of its shareholders,

— complies with its undertaking not to grant any form of privileged treatment of Sabena in relation to other Belgian air carriers in the area of designation for traffic rights and in relation to all Community air carriers in the areas of slot scheduling, ground handling, catering and other airport-related activities,

— complies with its undertaking to transform privileged shares 'actions privilégiées' with effect from 31 December 1992 at the latest into normal risk shares 'parts sociales',

— complies with its undertaking to base the new company statutes on private commercial law excluding the possibility of the Belgian State to intervene for other than commercial reasons, and to forward the new statutes to the Commission upon their adoption,

— complies with its undertaking to implement the restructuring plan by the end of 1995 in accordance with the procedures notified to the Commission and in particular the undertaking not to subscribe to the increase in capital provided for during the second stage of the restructuring plan unless an industrial partner subscribes to a significant proportion of that increase.

The Belgian Government shall inform the Commission on a yearly basis, and in particular before initiating the second phase of the restructuring programme, of the economic and financial performance of the carrier Sabena, strategic decisions including cooperation and major investments.

Article 2

The Belgian Government shall inform the Commission within two months of the date of notification of this Decision of the measures taken to comply herewith.

Article 3

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 24 July 1991.

For the Commission

Karel VAN MIERT

Member of the Commission