II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 4 April 1995

amending the Decision of 27 July 1994 concerning the subscription by CDC-Participations to bonds issued by Air France (93/C 334/04)

(Only the French text is authentic)

(Text with EEA relevance)

(95/367/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to the Agreement establishing the European Economic Area, and in particular Article 62 (1) (a) thereof and Protocol 27 thereto,

Whereas :

I

On 27 July 1994, the Commission decided that the subscription by CDC-P, a subsidiary of the French public entity Caisse des Dépôts et des Consignations, to bonds issued by Air France constituted illegal aid incompatible with the common market and the EEA Agreement. The bonds at issue were bonds redeemable in shares (*Obligations remboursables en actions* or 'ORAs') and progressive interest subordinated notes with warrants (*Titre subordonnés à intérêt progressif assortis de bons de souscription d'actions* or 'TSIP-BSAs') with a total value of FF 1 497 415 290. Article 2 of the Decision requested France to ensure that the aid was reimbursed within two months of the date of publication of the Decision in the *Official Journal of the European Communities,* which took place on 6 October 1994. Article 2 also stipulated that the reimbursement had to include the interest legally applicable from the date of granting of the aid, less any interest already paid on the bonds by Air France to CDC-P.

On 26 October 1994, France appealed against the Decision to the Court of Justice of the European Communities and, in a parallel action, Air France appealed to the Court of First Instance of the European Communities with a view to obtaining its annulment.

On 14 December 1994, representatives from Air France and the French Government held a meeting in Brussels with representatives of the Commission. The French authorities informed the Commission that they were facing difficulties in implementing the Decision and that they intended to submit to the Commission an interim recovery scheme in the light of those difficulties.

On 21 December 1994, the French authorities sent a note to the Commission explaining the steps they intended to take to comply with the Decision.

II

The note sent to the Commission on 21 December 1994 proposes that, as the decision is being challenged before the Court of Justice, the recovery should be subject to an interim scheme whereby Air France deposits the amount to be repaid on a blocked bank account where it will

remain for the duration of the judicial proceedings. If the Decision is upheld, Air France will transfer to CDC-P the principal increased by interest accruing from 1 May 1993 until 27 July 1994. If the Decision is annulled, Air France will close the blocked account and have full access to the funds.

The note further stresses that the scheme should be implemented in January 1995 and specifies the nature of the account, being a special account entailing, by virtue of the account-opening agreement, obligations on Air France and the bank. Under this agreement Air France will not be allowed to withdraw the funds for the duration of the proceedings and the bank will ensure that the account is constantly credited with the amount deposited.

Moreover, the scheme provides that the interest earned will be added to the sum deposited and that the Commission will be informed at regular intervals of the movements recorded on the account.

The French Government justified the proposed scheme in the course of the abovementioned meeting of 14 December 1994 by technical difficulties Air France would encounter in the repayment of the aid to CDC-P. Those difficulties, arising from French law, can be summarized as follows:

(a) repayment of the amount subscribed by CDC-P entails a breach of the subscription contract CDC-P has concluded with Air France. According to the contract, ORAs are exclusively reimbursable in shares and cannot be reimbursed in cash. In order to prevent Air France from breaching the subscription contract, the contract could be amended and adapted in order to comply with the repayment requirement. However, such a modification would prejudice CDC-P, and its agreement, which is indispensable, is unlikely to be obtained;

(b) repayment of the amount subscribed by CDC-P obliges Air France to cancel the whole subscription and therefore to reimburse the amount subscribed by private investors whose participation in the operation is legitimate and does not constitute aid. Therefore, Air France would be obliged to breach the contract it has concluded with private investors or to amend it, thereby encountering the same problems as those faced with CDC-P;

(c) repayment of the amount subscribed by CDC-P would prejudice the position of all third parties who have in the past subscribed to ORAs, TSIP-BSAs or similar bonds issued by Air France as they have not been offered the same possibility for the reimbursement of their bonds. They could initiate legal action against Air France on the basis of the principle of equality of treatment and ask for reimbursement in cash. Alternatively, these shareholders could also consider that the early reimbursement of the price paid by CDC-P and the private investors, with interest, is contrary to their interests.

Moreover, the French Government asserts that the cancellation of the whole subscription which is necessary in order to permit the recovery of the amount subscribed by CDC-P and ther subsequent repayment of the amounts subscribed by private investors would be definitive and irreversible. If the Decision is annulled, Air France would not legally be able to impose on the participants the obligation to reinvest the same amount under the same conditions. Therefore, the French authorities consider that, in the meantime, the proposed scheme offers the best solution and ensures the effectiveness of the Commission Decision as Air France will be deprived of access to the amount corresponding to the aid.

III

On 1 February 1995, the Commission sent a letter to the French Government, containing its comments on the neutrality of the scheme. The Commission stressed that its letter did not prejudge its position with regard to the compatibility of the scheme with its Decision of 27 July 1994. In this regard, by letters of 14 February 1995 and of 30 March 1995, the French authorities have agreed on some modifications to their initial proposal.

IV

France asserts that the difficulties encountered in the implementation of the Commission Decision and referred to above at (a), (b) and (c) stem from the French legal system. However, the Court of Justice considers that a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with its obligations arising under Community law [1]. Therefore, these legal difficulties as such do not justify the failure to ensure that the aid is repaid. Moreover, these difficulties are not encountered by France but by Air France alone. Provisions of French law render the repayment difficult only for Air France as they oblige it to amend or breach the contract concluded with CDC-P and with other investors, and to infringe the principle of equality of treatment. However, these provisions do not prevent France from taking any step whatsoever to ensure that Air France repays the aid to CDC-P.

[1] See Case 215/83, *Commission* v. *Kingdom of Belgium* (1985) ECR 1045.

Nevertheless, the Court of Justice considers that, if in giving effect to a Commission Decision ordering the recovery of aid, a Member State encounters unforeseen and unforeseeable difficulties or perceives consequences overlooked by the Commission, it must submit those problems for consideration to the Commission together with proposals for suitable amendments to the Decision in question. In such a case, the Commission and the Member State concerned must respect the principle underlying Article 5 of the Treaty, which imposes a duty of genuine cooperation on the Member States and the Community institutions and requires them to work together in good faith with a view to overcoming difficulties whilst fully observing the Treaty rules, and in particular those on aid (1).

The difficulties and consequences linked to the implementation of the Commission Decision led France to submit to the Commission an interim recovery scheme. By virtue of Article 5 of the Treaty, the Commission is obliged to examine this scheme in the light of the abovementioned principles and to verify whether amendments to its Decision of 27 July 1994 are needed.

Taking into account the special features of the aid, which took the form of particularly complex financial instruments involving both public and private investors, it appears that the implementation of the contested decision before a final decision of the Court would bring about irreversible consequences overlooked by the Commission. If an immediate repayment of the aid to CDC-P is made, and the entire subscription operation is therefore cancelled, it will be impossible to reestablish the *status quo ante* if the decision is annulled by the Court of Justice. Taking into account the abovementioned consequences, the Commission considers that the arrangements for implementing its Decision of 27 July 1994 should be reexamined.

In this context, steps must be taken to ensure that the abovementioned decision is effective. Such effectiveness requires an evaluation of the recovery scheme from an economic standpoint, in the light of the final objective of the decision : reestablishing the *status quo ante.* In this regard, the aim of the recovery of aid is to deprive the recipient of the economic advantage stemming from the granting of the aid. Such an objective is usually attained by the repayment to the entity which has granted the aid. Such an objective is usually attained by the repayment to the entity which has granted the aid. By ensuring that Air France is deprived of access to the amount corresponding to the aid and that lack of access is mentioned in the company's published accounts, the aim pursued by the repayment is attained : the competitive advantage enjoyed by Air France over its competitors is removed. The fact that CDC-P does not receive the amount immediately does not affect the effectiveness of the Commission Decision, and the scheme has the same economic effect for Air France as an immediate repayment to CDC-P.

The Commission therefore authorizes the interim recovery scheme proposed by the French authorities, thus amending its Decision of 27 July 1994, which contains the following elements :

— France will ensure that the funds remain blocked on the account for the duration of the proceedings initiated before the Court of Justice and that the funds are released directly to CDC-P by the bank if the Commission Decision is confirmed by the Court of Justice or if the proceedings are withdrawn,

— the amount credited to the account will always have to correspond to the amount of the aid to be recovered, increased by the corresponding interest. If, for any reason, the amount credited to the account is lower, Air France will be obliged to make up the difference without delay,

— in order to reflect the correct accounting treatment of the sums concerned, a clear statement indicating the particular circumstances linked to the blocked account must be included in Air France's published accounts for the duration of the judicial proceedings,

— following the adoption by the Commission on 1 February 1995 of a communication concerning the applicable interest for the recovery of illegal aid, the interest rate referred to in Article 2 of the Commission Decision of 27 July 1994, is the lower of either the legal rate fixed by the relevant French authorities for liabilities of the State or the average rate taken from the quarterly survey of the Banque de France for the cost of credit for undertakings in the long or medium term,

— the abovementioned interest will accrue from the date of granting of the aid until actual repayment to CDC-P is made.

The Commission will monitor the functioning of the account and will be provided with the account-opening agreement as well as a final statement on the closure of the account. The account-opening agreement will expressly provide that Air France cannot have access to the funds deposited for the duration of the proceedings before the Court of Justice and the Court of First Instance and that the bank will transfer the funds to CDC-P if the abovementioned courts finally uphold the Commission Decision or if the cases are withdrawn from the Court registers,

(1) See Case 94/87, *Commission* v. *Federal Republic of Germany* (1989) 175, point 8 at p. 191 ; see also Case 349/93, *Commission* v. *Italy*, not yet published in the ECR.

HAS ADOPTED THIS DECISION:

Article 1

The Commission Decision of 27 July 1994 (93/C 334/04) is amended as follows:

1. Article 2 is replaced by the following:

'*Article 2*

1. France shall ensure that the aid of FF 1 497 415 290 and interest on arrears running from the date the aid was granted until the date the aid is effectively recovered is deposited on a blocked bank account within one month of the transmission of this Decision to France. France shall ensure that the funds remain on the account until final judgment in Cases C 282/94 and T 358/94 is delivered or until deletion of those cases from the registers of the Court of Justice and the Court of First Instance.

2. France shall ensure that the aid and interest as arrears referred to in paragraph 1 are reimbursed, less any interest already paid by Air France to CDC-Participations, within one month of the date of final judgment upholding this Decision in cases C 282/94 and T 358/94 or within one month of deletion of those cases from the registers of the Court of Justice and the Court of First Instance. The recovery of the aid must take place in accordance with the relevant provisions of national law.

3. The rate applicable to the interest on arrears referred to in paragraphs 1 and 2 shall be the lower of either the legal rate fixed by the relevant French authorities in the case of liabilities to the State or the average rate taken from the quarterly survey of the Banque de France for the cost of credit for undertakings in the long or medium term.

4. Air France will have no access to the funds it deposits on the account. The bank will release the funds directly either to CDC-Participations if the Commission's decision is finally upheld in the cases referred to in paragraph 1 or if those cases are deleted from the registers of the Court of Justice and the Court of First Instance, or to Air France if the Commission's Decision is finally annuled in the cases referred to in paragraph 1.

5. The funds to be deposited in the account comprise the principal referred to above and the interest due until the opening of the account. Interest accruing from the date the account is opened until the date the account is closed will be deposited on the account in due time in order to ensure that the account is permanently credited with the sums to be repaid by virtue of paragraph 1.

A clear statement, indicating that Air France has no access to the funds deposited on the blocked account and specifying the arrangements for the operation of that account, will be included in the accounts published by Air France for the duration of the proceedings for annulment in the cases referred to in paragraph 1.'

2. Article 3 is replaced by the following:

'*Article 3*

France will provide the Commission with the account-opening agreement within one month of the publication of this Decision and with a final statement on the closure of the account.'

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 4 April 1995.

For the Commission

Neil KINNOCK

Member of the Commission