II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 19 July 1995

on a procedure relating to the application of Council Regulation (EEC) No 2407/92 (Swissair/Sabena)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(95/404/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers [1], and in particular Article 4 (5) thereof,

Having regard to the request of the Belgian Government,

Whereas :

BACKGROUND

I

On 4 May 1995, the Belgian State and Swissair Société Anonyme Suisse pour la Navigation Aérienne (Swissair) entered into an agreement under which the latter was to acquire 49,5 % of the share capital of the Belgian air carrier Sabena SA (Sabena). The agreement sets out in detail the terms and conditions of that acquisition as well as the rights and obligations of the parties in the governance of Sabena.

By letter of 12 May 1995, registered with the Commission on 18 May, the Belgian Government requested the Commission under Article 4 (5) of Regulation (EEC) No 2407/92 to examine whether Sabena complies with the requirements of that Article, in particular as regards the ownership and control of Sabena and to take a decision on that question. The letter was accompanied by a technical note and copies of the agreement with Swissair and its exhibits, including drafts of Sabena's new articles of incorporation and of a cooperation agreement to be concluded between the two carriers.

By a supplementary letter of 15 June 1995, registered with the Commission on 16 June, the Belgian Government informed the Commission that the parties had concluded an addendum dated 12 June 1995 amending the agreement of 4 May and the draft cooperation agreement on a number of points.

The following outline of the entire transaction between the Belgian State, Swissair and Sabena is based on the information contained in the two letters of 12 May and 15 June 1995 as well as their enclosures.

II

Sabena is a public limited company *(société anonyme)* set up under the laws of Belgium and having its registered office in Brussels. It is fully subject to the general company law rules prevailing in Belgium. Its new articles of incorporation define the object of the company as the provision of domestic and international air services as well as any other activities ancillary to air transport.

[1] OJ No L 240, 24. 8. 1992, p. 1.

Sabena's shares are currently distributed as follows : the Belgian State holds some 61,6 %, either directly or indirectly through the Société fédérale d'Investissement (SFI), which is a public holding company ; 37,49 % of the shares are held by Air France via its subsidiary Finacta ; the remaining 0,9 % are in the hands of Belgian institutional investors and, to a marginal extent, former as well as current employees of the company.

The agreement between Swissair and the Belgian State of 4 May 1995 provides for three major capital transactions.

First, SFI is to purchase all the Sabena shares presently held by Finacta. The purchase is to be financed by a loan of Bfrs 4 billion granted to SFI by Swissair. Attached to that loan are 691 666 127 warrants which, under certain circumstances, will permit Swissair to purchase additional shares of Sabena.

Second, Sabena's share capital is to be increased by a total of Bfrs 9,5 billion, of which 2 billion is to be subscribed, at the initiative of the Belgian State, by Belgian institutional investors (divided into 895 323 084 shares), 1,5 billion by SFI (divided into 671 492 313 shares) and the remaining 6 billion by Swissair (divided into 2 685 969 251 shares). The capital increase will result in 49,5 % of Sabena's voting shares being owned by Swissair and the remaining 50,5 % by all other parties (corresponding to 2 740 283 257 shares of which at least 1 834 459 013 will be owned by the Belgian State and SFI). The agreement further provides that the institutional investors are to act through a single special-purpose vehicle established in Belgium under majority ownership and effective control of Belgian nationals. The Belgian State and SFI are to enter into a shareholders' agreement with that special-purpose vehicle containing voting arrangements and mutual rights of first refusal with respect to the shares in Sabena. Those arrangements will ensure, *inter alia,* that the joint views of the Belgian State and SFI will always prevail over those of the institutional investors.

Third, Swissair is to pay an additional Bfrs 0,5 billion in return for 223 830 770 special participation certificates issued by Sabena. Those certificates shall have the following characteristics :

— they will not be part of the capital stock of Sabena,

— they will be in registered from,

— they will not carry any voting rights,

— they will entitle their holder to the same dividend as ordinary capital shares but with a minimum of 5 % of their issue price,

— upon liquidation, they will entitle the holder to repayment of the original issue price prior to any repayment on capital stock, but to the exclusion of any share in liquidation surplus.

Both parties to the agreement are entitled, under certain conditions and subject to the right of first refusal of the other party, to sell or float all or part of their shares in Sabena. However, any such sale or flotation shall be carried out in a way which ensures that Sabena complies with the requirements of Regulation (EEC) No 2407/92. Moreover, Sabena's articles of incorporation provide that any transfer of shares is to be notified to the carrier's board of directors which, in turn, is to oppose such transfer if compliance with those requirements is affected.

III

In parallel to the implementation of the transactions described in Section II, Sabena is to terminate its structural link to Air France resulting from the 'protocole d'accord' of 10 April 1992 and is henceforth to be governed and managed by the parties to the agreement of 4 May 1995 in accordance with the rules set out below.

At a general meeting of Sabena's shareholders, voting rights correspond to the percentage of share capital held by each individual party. The general meeting is to decide, by a majority of 75 % of the votes cast, on any amendments to the company's articles of incorporation (including changes of legal form and corporate purposes), any increase or decrease of its share capital, as well as on any liquidation, merger or split-up of the company. Moreover, the general meeting is empowered to decide, by a simple majority of votes, on the following issues :

— distribution of dividends ;

— approval of the annual accounts of the company,

— appointment and dismissal of the members of the board of directors and the statutory auditors,

— discharging of the members of the board of directors and the statutory auditors,

— any other matter referred to the meeting by the board of directors on the ground that three or more of the board members have a conflict of interest.

Both the agreement of 4 May 1995 and Sabena's new articles of incorporation provide that, at any general meeting, the aggregate votes cast by non-Community (or assimilated) national or persons controlled by such nationals are always to account for less than 50 % of total votes.

Subject to the powers reserved to the general meeting, it is for the board of directors to determine the company's general policy and to decide on all strategic issues such as, for example, the adoption of the business plan and the annual budget, material fleet investments and material changes to network configuration. The board shall delegate day-to-day management to a chief executive officer (CEO), but such delegation shall not detract from the fullness of management powers of the board of directors which, therefore, always retains ultimate responsibility for decisions. The parties thus comply with the general rules provided for in Belgian company law.

The board is to comprise twelve members, including the chairman, who shall take all decisions by simple majority (provided that at least six members are present or represented). No board member shall retain a casting vote. Their appointment and dismissal by the general meeting is to be subject to the following conditions provided for in the agreement of 4 May 1995 :

— five board members are to be appointed in accordance with a proposal made by Swissair,

— six board members are to be appointed in accordance with a proposal made by the Belgian shareholders,

— the chairman is to be appointed upon a joint proposal made by both groups of shareholders. In case the parties cannot agree on a joint proposal within a certain time limit, Swissair's proposal is to prevail. In contrast to the two preceding groups of board members, however, the general meeting is to be free to accept or reject any such proposal ;

— any board member other than the chairman is to be dismissed upon the request of the shareholders on whose proposal he was appointed, unless his dismissal is opposed by a majority of 75 % at a general meeting,

— the chairman may be dismissed at any time by a majority vote at a general meeting.

The agreement further provides that at least the chairman and the six members appointed upon a proposal made by the Belgian shareholders shall be nationals of Member States or assimilated nationals, in order to safeguard Sabena's status as a Belgian air carrier under applicable Community legislation and Belgium's bilateral air service agreements.

Where a board member is dismissed or ceases to hold office on any other ground, his or her replacement is to be provisionally co-opted to the board upon a proposal by the relevant group of shareholders until definitive election by the general meeting. However, a new chairman may be co-opted only on a joint proposal by both groups of shareholders. The Belgian Government indicates in its letter of 12 May 1995 that, in the absence of an agreement on such a joint proposal, the position of chairman cannot be filled by co-option and, thus, will remain temporarily vacant.

As already indicated above, the day-to-day management of the company is to be entrusted to a CEO who, for the term of the addendum of 12 June 1995, is to be appointed and dismissed by the board of directors, acting by simple majority, upon a joint proposal of, first, the majority of the chairman and the six board members appointed upon a proposal of the Belgian shareholders and, second, the majority of the five board members appointed upon a proposal of Swissair. According to the agreement of 4 May 1995, the position of CEO can be combined with that of chairman of the board if the parties so agree. The Belgian Government states in its letter of 12 May 1995 that it does not intend to allow such combination in circumstances where this would concentrate management influence in the hands of a Swissair appointee.

The board of directors is also to be responsible for appointing and dismissing the chief financial officer and the other members of the executive management. Any such appointments are to be made upon a proposal by the CEO or, in the case of the chief financial officer, by Swissair.

IV

The agreement of 4 May 1995 also sets out some basic principles for the management of Sabena. Those principles include that the company is to be operated 'as a profit-oriented and competitive airline with a high-quality image' and that it is to cooperate closely with Swissair. To this latter end, the two carriers are to enter into a draft cooperation agreement which provides primarily for :

— the creation of common planning and verification processes on the basis of models developed by Swissair, as well as of joint planning functions in such areas as fleet investment and route network development,

— the establishment of joint system management functions with responsibility for the designing, selecting and marketing of the products of both carriers and overall network profitability,

— the assignment, within that cooperation framework, of planning and line management responsibility for two routes areas (Africa and Europe to and from Belgium) to Sabena and for the remaining route areas to Swissair, whereby such responsibilities are to be discharged in accordance with the standards and procedures defined by Swissair,

— the combination of parts of both parties' operations in the areas of marketing programmes, reservation systems and sales organizations.

At the same time, however, the relevant clauses of the draft cooperation agreement explicitly provide that each carrier is to retain its own functional responsibilities under any common planning and verification processes and that the joint functions are to submit the results of their work for prior approval to the board of directors of the respective carrier. In particular, it is stipulated that the joint system management functions do not imply a limitation of the responsibility of either carrier for its own financial result, nor a delegation of decision-making authority or a distribution of route operations between the carriers. The Belgian Government contends in its letter of 12 May 1995 that the draft agreement relates essentially to planning and management cooperation procedures and leaves the final determination of substantive issues to each carrier's board of directors.

The cooperation agreement is intended to be concluded for an initial term of 10 years and, unless terminated by either party, is to be extended automatically for periods of five years. Those clauses of the agreement relating to the application of common planning and verification processes and to the standards and procedures to be used in the planning and line management of route areas are to be reviewed by the parties at least every three years with a view to maximizing the efficiency and competitiveness of the two carriers.

V

Moveover, the agreement of 4 May 1995 provides for two different scenarios for future changes in the stucture of shareholdings in Sabena which go beyond the selling rights mentioned in Section II.

First, the Belgian State has the option of acquiring all the shares to be held by Swissair where its general interests are substantially prejudiced and no remedy can be found within a period of six months. Prior to the end of 1998, the price to be paid for the shares is to equal the price initially paid by Swissair, plus interest. After that date, it is to be determined by an international investment bank to be agreed upon by the parties.

Secondly, Swissair has the option of acquiring a majority of the voting rights of Sabena by exercising all of the warrants attached to the loan granted to SFI and, if necessary, requiring the Belgian State and SFI to sell parts of their holdings and/or to refrain from participating in any further increase of the capital of Sabena. Any exercise of this option is, however, dependent upon the entry into force of an agreement between the Community and Switzerland or a unilateral change of the relevant Community rules which would allow the implementation of such a transaction without Sabena losing its status as a Community air carrier under Regulation (EEC) No 2407/92. Moreover, the option cannot be exercised before the year 2000 and could, if requested by the Belgian State, imply such split-up of Sabena as is necessary to safeguard the carrier's continued designation under any applicable air service agreements with third countries. In view of those conditions and the uncertainty resulting therefrom, the Belgian Government takes the view that Swissair's option of acquiring a majority of voting rights should be without any current incidence on the corporate governance of Sabena and, thus, is not covered by the Government's present request.

Finally, it should be noted that the addendum of 12 June 1995 to the agreement of 4 May is to terminate automatically in the event that, due to a change in the regulatory environment, its provisions are no longer necessary to safeguard Sabena's status as a Community carrier under Regulation (EEC) No 2407/92.

LEGAL ASSESSMENT

VI

Regulation (EEC) No 2407/92 forms an integral part, together with Council Regulations (EEC) No 2408/92 [1] and (EEC) No 2409/92 [2], of the third aviation package of 23 July 1992 establishing the internal market in air transport. On the one hand, Article 3 (3) of the Regulation provides that no undertaking established in the Community shall be permitted within the territory of the Community to provide air transport services unless it has been granted the appropriate operation licence. The granting and maintenance of such a licence, in turn, is subject to the undertaking complying with the rules laid down in the Regulation. On the other hand, an air carrier licensed in accordance with those rules enjoys free access to all intra-Community routes under Regulation (EEC) No 2408/92 (see Commission Decision 93/347/EEC (Viva Air)) [3].

It must also be noted that, by virtue of Decision No 7/94 of the EEA Joint Committee [4], Regulation (EEC) No 2407/92 has ben included in the scope of application of the EEA Agreement with effect from 1 July 1994. For the purpose of applying that Regulation, the EFTA Member States participating in the EEA Agreement (and their nationals) must therefore be assimilated to Member States of the Community (and their nationals).

It is against this background that the present case has to be assessed.

VII

Article 4 of Regulation (EEC) No 2407/92 sets out four substantive requirements which the holder of an operating licence must respect:

— its principal place of business and, if any, registered office must be located in the licensing Member State,

— its main occupation must be air transport in isolation or combined with any other commercial operation of aircraft or repair and maintenance of aircraft,

— it must be owned and continue to be owned directly or through majority ownership by Member States and/or nationals of Member States,

— it must at all times be effectively controlled by such States or such nationals.

It is in the first instance for the national licensing authorities to verify whether an individual undertaking complies with the abovementioned requirements of Article 4. However, the fifth paragraph of that Article provides that the Commission, acting at the request of a Member State, is to examine compliance with those requirements and take a decision if necessary.

The Commission takes the view that any Member State, including the one responsible for the licensing of the undertaking in question, may make a request under Article 4 (5). For the purpose of that provision, the Belgian Government's letter of 12 May 1995 must therefore be considered as a request of a Member State which obliges the Commission to examine whether Sabena complies with the requirements of Article 4 under the agreement between the Belgian State and Swissair of 4 May 1995. That examination cannot comprise an analysis of Swissair's option to acquire a majority of voting rights since the exercise of that option is explicitly made subject to a change in the regulatory environment which would allow Swissair to acquire the majority ownership and effective control of Sabena. For the same reasons, it will be based on the text of the agreement of 4 May 1995 as amended by the addendum of 12 June 1995 and will not take account of any possible termination of that addendum.

It must further be noted that the transaction provided for in the agreement of 4 May 1995 is of considerable size and, thus, will have a significant impact on the air transport market. Moreover, the requirements of Article 4 have not, as yet, been subject to interpretation by either the Commission or the Court of Justice. In view of those circumstances and having regard to the particular importance of a uniform application of Article 4 for the proper functioning of the internal air transport market, the Commission considers that it is necessary to take a decision in the present case.

VIII

First of all, Sabena must comply with the requirements relating to its principal place of business and main occupation enshrined in Article 4 (1) of Regulation (EEC) No 2407/92. It can be noted in this respect that, under the agreement of 4 May 1995, Sabena is to remain a separate legal entity having its registered office and corporate headquarters in Belgium. Moreover, Sabena's new articles of incorporation define the company purpose as the provision of domestic and international air services as well as any other activities ancillary to air transport. The Commission therefore concludes that the agreement of 4 May 1995 does not affect Sabena's compliance with the two abovementioned requirements.

IX

Secondly, the Commission must verify whether Sabena also complies with the requirements of being majority owned and effectively controlled by Member States and/or nationals of Member States as provided for in Article 4 (2) of Regulation (EEC) No 2407/92.

[1] OJ No L 240, 24. 8. 1992, p. 8.
[2] OJ No L 240, 24. 8. 1992, p. 15.
[3] OJ No L 140, 11. 6. 1993, p. 51.
[4] OJ No L 160, 28. 6. 1994, p. 1.

The majority ownership and effective control requirements reflect, as the level of the Community, restrictions traditionally imposed on air carriers by virtue of international air service agreements. Those restrictions, initially justified on grounds of national security, are nowadays primarily designed to ensure that traffic rights exchanged under such agreements will be exploited effectively for the benefit of the partcipating parties and will not be exercised, either directly or through subsidiaries, by companies from third countries. Moreover, they prevent such third-country companies from operating from third countries. Moreover, they present such third-country companies from operating services wholly within a State or group of States through subsidiaries established in that State or group of States. The Commission therefore takes the view that the provisions of Article 4 (2) must be applied in the same light. Any such application must, in particular, take into account the overall objective of safeguarding the interests of the Community's air transport industry. This implies notably that companies from third countries must not be allowed to take full advantage, on a unilateral basis, of the Community's liberalized internal air transport market. In other words, such companies may benefit from the internal market by way of participations only within the ownership and control limits set out in Article 4 (2).

Each of the two requirements of majority ownership and effective control will be examined separately below in the light of the preceding considerations.

X

The Commission takes the view that the majority ownership requirement is complied with if at least 50 % plus one share of the capital of the air carrier concerned is owned by Member States and/or national of Member States. The remaining shares may indeed be held by one or more investors from third countries, and such shareholding must not in itself be considered incompatible with Article 4 (2). It should be emphasized, however, that the scale of the third-country investment as well as the distribution of the shares within each group of shareholders need to be taken into account in any assessing compliance with the effective control requirement enshrined in the same Article.

The Commission further considers that Article 4 (2) refers to a concept of ownership of an undertaking which is essentially based on the notion of equity capital. Holders of such capital normally have the right to participate in decisions affecting the management of the undertaking as well as to share in the residual profits or, in the event of liquidation, in the residual assets of the undertaking after all other obligations have been met (see Commission Decision 94/653/EC of 27 July 1994 concerning the notified capital increase of Air France [1]). The conditions for exercising those rights may, of course, vary according to the agreement of the participating parties. Therefore, the question whether a particular type of capital qualifies as equity capital and must therefore be taken into account under the ownership concept of Article 4 (2) can be answered only on a case-by-case basis in the light of all relevant circumstances, including any possible consequences for compliance with the effective control requirement. If, however, capital does not confer upon its holders any of the two abovementioned rights to an appreciable extent, it must generally be disregarded in determining the ownership situation of an undertaking.

In the present case, the financial transactions required under the agreement of 4 May 1995 will result in 2 685 969 251 shares of 49,5 % of the voting shares of Sabena being held by Swissair which, for the purposes of Regulation (EEC) No 2407/92, must be considered a third-country company (Swissair is itself subject to ownership and control restrictions under the applicable laws of Switzerland). The remaining 2 740 283 257 shares or 50,5 % of the voting shares of Sabena will be owned by the Belgian State, SFI, Belgian institutional investors and former as well as current employees of the company. At least 2 729 782 097 of those later shares and, thus, more than 50 % of total voting shares will be owned by the Belgian State, SFI and those institutional investors participating in the capital increase.

The agreement of 4 May 1995 also provides that Swissair is to receive 223 830 770 special participation certificates in return for an additional Bfrs 0,5 billion contribution to an undistributable surplus reserve of Sabena. Those certificate are, however, not to carry any voting rights, nor to entitle their holder to any share in the residual assets of the company in the event of its liquidation. On the contrary, they will be repaid in that event at their original issue price prior to any repayment on capital stock. Moreover, they generally give rise to a minimum return of 5 % of their issue price and, thus, exclude most of the financial risk for their holder. The Commission therefore takes the view that those special participation certificates are essentially a form of loan capital and, for present purposes, do not constitute equity capital. Consequently, they must not be added to the voting shares of Sabena when assessing the company's ownership situation under Article 4 (2).

[1] OJ No L 254, 30. 9. 1994, p. 73 (at p. 84, right-hand column, at the top).

Finally, it must be noted in this context that Swissair is to receive 691 666 127 warrants in return for the loan to be granted to SFI. Those warrants will entitle their holder to subsequently purchase additional shares of Sabena. However, the agreement of 4 May 1995 explicitly provides that, unless the regulatory environment has been changed so as to allow Swissair to acquire the majority ownership and effective control of Sabena, Swissair cannot exercise the warrants to increase its participation in Sabena above the initially envisaged level of 49,5 %. Thus, any exercice of the warrants is subject to the same conditions and restrictions as the exercise of the option to acquire a majority of voting rights enjoyed by Swissair. Consequently, the warrants cannot affect the ownership situation of Sabena to the extent that it is possible to make such an assessment within the framework of the present procedure.

In view of the preceding considerations, the Commission concludes that, as regards the agreement of 4 May 1995, Sabena complies with the majority ownership requirement enshrined in the first sentence of Article 4 (2).

XI

'Effective control' is defined in point (g) of Article 2 of Regulation (EEC) No 2407/92 as:

> 'a relationship constituted by rights, contracts or any other means which, either separately or jointly and having regard to the considerations of fact or law involved, confer the possibility of directly or indirectly exercising a decisive influence on an undertaking, in particular by:
>
> (a) the right to use all or part of the assets of an undertaking;
>
> (b) rights or contracts which confer a decisive influence on the composition, voting or decisions of the bodies of an undertaking or otherwise confer a decisive influence on the running of the business of the undertaking.'

The Commission considers that this definition of effective control must be interpreted and applied in the overall context of Article 4 (2), as discussed in Section IX. In particular, each and every individual case must be assessed in the light of the objective of safeguarding the interests of the Community's air transport industry which implies, in particular, that companies from third countries must not be allowed to take full advantage, on a unilateral basis, of the Community's liberalized internal air transport market. In other words, such third-country companies may benefit from the internal market by way of participations only within the ownership and control limits set out in Article 4 (2).

Accordingly, Article 4 (2) requires effective control to be exercised by Member States and/or nationals of Member States. They may do so by acting either individually or together with other Member States or nationals of Member States. In contrast, both the wording and the abovementioned objecives of Article 4 (2) exclude that effective control is exercised together with natural or legal persons from third countries. Such natural or legal persons must therefore not have a decisive influence, within the meaning of point (g) of Article 2, in the carrier concerned.

Having regard to the preceding considerations, the Commission takes the view that, essentially, Article 4 (2) requires Member States and/or nationals of Member States to have, either individually or acting together with other Member States or nationals of Member States, the ultimate decision-making power in the management of the air carrier concerned. They msut be able, either directly or indirectly through appointments to the decisive corporate bodies of the carrier, to have the final say on such key questions as, for example, the carrier's business plan, its annual budget or any major investment or cooperation projects. Such ability must not be substantially dependent upon the support of natural or legal persons from third countries. It must be emphasized, however, that point (g) of Article 2 requires those general principles to be applied by having regard to all the considerations of fact or law involved. This implies that each and every individual case must be assessed on its own merits and that, in a more general perspective, the effective control requirement can be applied only on a case-by-case basis.

It is on this basis that Sabena's compliance with the effective control requirement under the agreement of 4 May 1995 must be examined.

Voting arrangements between the Belgian shareholders

The Commission notes that the Belgian State, SFI and the Belgian institutional investors participating in the capital increase, which together are to hold the majority of the voting shares of Sabena, are to be bound by a shareholders' agreement containing voting arrangements to ensure that the joint views of the Belgian State and SFI always prevail. In practice, Sabena's majority shareholders will therefore always act as one single entity and, thus, be able to prevent Swissair from taking advantage of the existence of several shareholders on the Belgian side.

Sabena's corporate governance

As regards the corporate governance of Sabena, it must in the first instance be noted that the primary responsibility for the management of the company will be entrusted to its board of directors. The agreement of 4 May 1995 provides that the board shall have all powers to determine Sabena's general policy and to decide all strategic issues, including (but not limited to) the adoption of Sabena's business plan and its annual budget, material fleet investments and material changes to network configuration. Moreover, the envisaged delegation of day-to-day management to the CEO is not to detract from the fullness of the

management powers of the board of directors as a matter of Belgian company law. The Commission therefore considers the composition and voting rules of the board of directors to be of key importance in the present context.

Sabena's board of directors is to comprise 12 members who are to decide all questions by a simple majority. The Belgian shareholders will be entitled to appoint and, if necessary, dismiss six members, all of whom will be nationals of Member States, while Swissair is to have the same rights with respect to five members. Thus, only the board members representing the Belgian shareholders will jointly be able to veto decisions of the board without any further support from other board members.

Special rules govern the appointment and possible dismissal of the 12th member and chairman of the board who is also to be a national of a Member State. This 12th member is to be appointed upon a joint proposal made by both groups of shareholders or, where they cannot agree on such a joint proposal, upon a proposal by Swissair. However, the agreement of 4 May 1995 explicitly provides that the general meeting is to be free to accept or reject any such proposal and that the meeting can at all times dismiss the appointed chairman by majority vote. Since the Belgian shareholders will hold the absolute majority of votes in the general meeting, they will ultimately decide on the chairman. Even more important, they may at all times require the resignation of the chairman.

The Commission therefore takes the view that, while any proposal for the chairman needs to be endorsed by Swissair, he will essentially be dependent upon the continuing support of the Belgian shareholders when carrying out his duties. The Belgian shareholders' position is further reinforced by the fact that, in the exceptional case of a deadlock between the parties, their representatives will hold the absolute majority on the board of directors and, thus, be able to autonomously take decisions without the need for any further support. Consequently, the decision-making mechanism under the agreement of 4 May 1995 ensures that the interests of the Belgian shareholders will ultimately prevail in the decision taken by the board of directors.

Secondly, account must be taken of the fact that the CEO is to assume responsibility for the day-to-day management of the company only within the limits set out by the board of directors and that the latter may reserve any individual decision for itself. Thus, the delegation of management powers to the CEO may, for the purposes of the effective control requirement of Article 4 (2), be considered of secondary importance compared to the role of the board of directors. A possible strengthening of the CEO's position as a result of a combination of this post with that of the chairman of the board of directors is made subject to the agreement of the Belgian State. In this context, the Commission takes note of the Belgian Government's intention not to allow such combination in circumstances where this would concentrate management influence in the hands of a Swissair appointee. In any case, the rules governing the appointment of the CEO ensure that the Belgian shareholders enjoy veto powers at all stages of the selection process for this post.

Thirdly, the agreement of 4 May 1995 confers only rather limited powers on the general meeting of shareholders of Sabena. With the exception of the powers relating to the appointment and possible dismissal of the chairman of the board of directors, discussed above, the role of the general meeting is restricted to the protection of essential investment interests and does not interfere with the management of the company. Moreover, most of the issues reserved to the general meeting may be decided by a simple majority of votes and, thus, by joint action of the Belgian shareholders. Swissair retains only veto rights as regards any amendments to Sabena's articles of incorporation, increases or decreases of its share capital as well as any liquidation, meger or split-up of the company. However, such veto rights merely reflect a normal degree of minority shareholder protection as prescribed by the company laws of most Member States, including Belgium. The Commission therefore considers the veto rights which Swissair enjoys in general meetings of Sabena's shareholders to be without any incidence in the present context.

Having regard to the foregoing considerations, the Commission concludes that the terms of corporate governance of Sabena under the agreement of 4 May 1995 do not detract from the ultimate decision-making power of the Belgian shareholders and, thus, do not confer on Swissair any powers which would, in themselves, be incompatible with the effective control requirement of Article 4 (2).

Draft cooperation agreement

As regards the cooperation between Swissair and Sabena, it must first be noted that the two carriers are to enter into a comprehensive cooperation agreement which will have an initial term of 10 years and will be extended automatically for further periods of five years. The cooperation envisaged must therefore be qualified as being of a long-term strategic nature and as bringing about structural changes for both parties.

The Commission generally considers that, without prejudice to other rules of Community law, Article 4 (2) is not designed to prevent Community air carriers from cooperating with carriers from third countries on a long-term strategic basis. The provision must not be read as prohibiting a Community carrier from limiting its commercial freedom in the context of such long-term strategic cooperation. The carrier's compliance with the effective control requirement will be endangered only where the third-country carrier is empowered under the terms of the cooperation to substitute, on a substantial basis, its own decisions for those of the competent corporate bodies of its community partner. It must therefore be examined whether or not the clauses of the cooperation agreement to be concluded between Swissair and Sabena provide for such a transfer of decision-making powers.

The draft cooperation agreement annexed to the agreement of 4 May 1995 requires Sabena to follow certain planning and verification processes developed by Swissair and to respect the standards and procedures defined by Swissair for certain planning and line management activities. Swissair will further assume responsibility for such planning and line management in certain route areas presently served by Sabena such as, for example, the routes to North America. However, the relevant clauses of the draft cooperation agreement explicitly stipulate that any substantive proposal emerging from the joint planning activities is to be submitted to the board of directors of the respective carrier for prior approval. Similarly, any assignment of planning and line management responsibility is not to be understood as implying a delegation of decision-making authority or a distribution of actual route operations between the carriers. On the basis of the documents and information provided by the Belgian Government, the Commission thus takes the view that Sabena's abovementioned obligations under the draft cooperation agreement appear to be essentially of a procedural nature and do not include any transfer of decision-making powers on substantive issues to Swissair.

It should further be noted that the most important clauses of the draft cooperation agreement will be subject to a review by both parties at least every three years. Thus, Sabena has the possibility of influencing the standards and procedures to be followed in the cooperation with Swissair.

The Commission therefore concludes that the draft cooperation agreement in its present version does not include any terms which are incompatible with the effective control requirement of Article 4 (2).

General considerations

Finally, it is necessary to place the individual elements discussed in the preceeding paragraphs and the entire transaction as a whole in their respective contexts.

In the first instance, the Belgian State has the possibility of reversing the entire transaction by exercising its call option to acquire all the shares to be held by Swissair. While that possibility will probably be considered seriously only in the event of irreconcilable differences between the parties, it nonetheless represents a threat which may have the effect that Swissair systematically tries to avoid taking any action against the essential interests of the Belgian State. Equally, the agreement of 4 May 1995 explicitly requires Swissair to use its best efforts to avoid any action which would endanger Sabena's status as a Community air carrier under Regulation (EEC) No 2407/92. Moreover, several clauses of the agreement, particularly those on possible transfers of shares, stipulate that neither party may exercise its rights thereunder if such exercise jeopardizes that status of Sabena. The Commission considers all those elements to be additional safeguards against a possible dilution of the ultimate decision-making power of the Belgian shareholders in the management of Sabena.

Secondly, the Commission takes the view that any evaluation of the consequences of a substantial investment by a third-country air carrier in a Community carrier should also take into account the broader context in which that investment is taking place and, in particular, the Community's aviation relations with the third country in question. Such additional considerations are required in view of the purpose of the ownership and control requirements, as discussed in Section IX, of safeguarding the interests of the Community's air transport industry. This implies, in particular, that companies from third countries must not be allowed to take full advantage, on a unilateral basis, of the Community's liberalized internal air transport market.

The Swiss rules on ownership and control of air carriers require that at least 60 % of a carrier's share capital and at least two thirds of the seats of its managing bodies must be held by Swiss nationals, or any other persons assimilated to Swiss nationals by virtue of international agreements. Those requirements are largely comparable to those of Article 4 (2) of Regulation (EEC) No 2407/92. In particular, both the Swiss and the Community legislation provide for the possibility that more liberal arrangements are concluded with third countries on a reciprocal basis. On this latter aspect it must be noted that on 14 March 1995 the Council of the European Union adopted a deci-

sion authorizing the Commission to negotiate a comprehensive air transport agreement between the Community and Switzerland. The decision envisages that, subject to certain exceptions the rules governing the Community's internal air transport market shall be extended to Switzerland.

In view of this broader context, the agreements between the Belgian State and Swissair examined in this Decision appear essentially to be of a transitional nature. They provide an interim solution until the existing ownership and control restrictions between Switzerland and the Community are lifted on a reciprocal basis. An eventual elimination of those restrictions is already anticipated in the agreement between the parties of 4 May 1995 in so far as that agreement explicitly accords Swissair an option of acquiring a majority holding in Sabena.

On balance, the additional elements discussed in this Section provide further evidence in support of the conclusion that Sabena is effectively controlled by its Belgian shareholders under the agreement of 4 May 1995.

XII

Having regard to the preceding considerations and on the basis of the documents and information which the Belgian Government provided by letters of 12 May and 15 June 1995, the Commission concludes that with regard to the terms of the notified agreement between the Belgian State and Swissair of 4 May 1995, as amended by the addendum of 12 June 1995, Sabena complies with the requirements of Article 4 of Regulation (EEC) No 2407/92 and that it is necessary to take a decision to that effect,

HAS ADOPTED THIS DECISION:

Article 1

Under the terms of the notified agreement between the Belgian State and Swissair of 4 May 1995, as amended by the addendum of 12 June 1995, Sabena complies with the requirements of Article 4 of Regulation (EEC) No 2407/92.

Article 2

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 19 July 1995.

For the Commission

Neil KINNOCK

Member of the Commission