COMMISSION DECISION

of 26 July 1995

concerning aid granted by the Flemish Region to the Belgian airline Vlaamse Luchttransportmaatschappij NV

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(95/466/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

Having regard to the Agreement on the European Economic Area, and in particular Article 62 (1) (a) thereof,

Having given notice to the parties concerned to submit their comments, as it is required to do by those Articles, and having regard to those comments,

Whereas :

THE FACTS

I

On 25 March 1994 Cityflyer Express Ltd ('Cityflyer') lodged a complaint with the Commission against a State aid measure ; Cityflyer alleged that the Flemish Region had granted or was preparing to grant State aid to the airline Vlaamse Luchttransportmaatschappij NV ('VLM'), in the form of an interest-free loan of Bfrs 20 million. The Commission brought the allegation to the attention of the Belgian authorities, by letter dated 25 May 1994 ; in order to enable it to examine the transaction in the light of the State aid rules in Articles 92 and 93 of the Treaty, it asked them to answer the following questions :

— What is the content of the documents (statuten) setting up Vlaamse Luchttransportmaatschappij NV. Who holds the equity in the company ?

— On what terms (amount, rate of interest, duration, etc.) has the Flemish Region granted or does it propose to grant a loan to Vlaamse Luchttransportmaatschappij NV ? If the transaction has already taken place, please supply a copy of the loan contract and of any documents annexed to it (other conditions, decisions of the Flemish Region, etc.).

No reply was received within the one month allowed, and on 14 July 1994 the Commission sent the Belgian authorities a reminder.

By letter of 3 August 1994 the Belgian authorities sent the Commission answers to the questions set out above. In reply to the question regarding the founding documents, they supplied a copy of VLM's *statuten* or constitution. It appears that VLM is a public limited company set up under Belgian law, with its registered office at Van Tichelenlei 49, 2610 Wommelgem, Belgium. It was formed on 21 February 1992, for an unlimited duration, with an initial capital of Bfrs 10 million. The capital has since been increased on several occasions ; by the end of 1993 it stood at Bfrs 75 million. It is divided between nine shareholders, made up of five companies, governed by private law, and four individuals. It would thus appear to be an entirely private company. Its objects are stated to be 'the purchase, sale, exchange, leasing, operation, repair and maintenance of aircraft, on its own account and for others, in Belgium and abroad. The operation of aircraft on scheduled and non-scheduled services'.

Turning to the terms of the loan, the Belgian authorities' answer was as follows :

> 'Amount : Bfrs 20 million. Rate of interest : 0 %. Schedule of repayments : two, three, four, five and six years after payment of the loan, instalments of Bfrs 4 million each'.

No other documents were supplied ; in particular, there was no copy of the loan contract. It should be noted that the transaction had taken place without the Commission's being informed in advance, as is required by Article 93 (3) of the Treaty.

On 16 November 1994 the Commission decided to initiate proceedings pursuant to Article 93 (2) of the Treaty. The misgivings which motivated this step sprang from two considerations : an interest-free loan certainly constitutes State aid within the scope of Article 92 of the Treaty and Article 61 of the EEA Agreement, and on the face of if the loan in question here did not appear to qualify for any of the exemptions pursuant to Article 92 (2) and (3) and Article 61 (2) and (3).

On 6 December 1994 the Commission wrote to the Belgian authorities informing them that it was initiating proceedings, and giving them notice to submit their observations. This letter was published in the *Official Journal of the European Communities*, with an invitation to other Member States and interested parties to submit observations in accordance with Article 93 (2) (1).

II

Two interested parties, the airlines British Airways and Cityflyer, submitted observations following the publication of the notice in the *Official Journal of the European Communities*.

Both argued that the loan constituted State aid within the scope of Article 92 (1). Cityflyer enclosed copies of VLM's balance sheets and profit-and-loss accounts for 1992 and 1993, and contended that no rational private investor would have granted VLM such a loan, especially given its losses in 1993. According to both airlines the aid distorted competition on the routes operated by VLM, in particular the Antwerp-London route, where VLM was in competition with Cityflyer. They also submitted that VLM did not appear to have given any special guarantee of repayment of the loan, in the form of a security, mortgage or the like, and that the amount of aid involved was therefore not the total interest which VLM would have had to pay if the loan had been granted by an investor operating under normal market conditions, but rather the full amount of the loan itself.

British Airways and Cityflyer accordingly asked the Commission to find that the aid was incompatible with the common market. British Airways argued the aid did not qualify for any of the exemptions provided for in Article 92 (2) and (3). Cityflyer further asked the Commission to order the recovery of the aid.

The Commission wrote to the Belgian authorities on 1 February 1995 (in French) and 10 February 1995 (in Dutch), providing full details of the observations submitted by British Airways and Cityflyer, and suggesting that they, in turn, might wish to reply to those observations.

(1) OJ No C 359, 16. 12. 1994, p. 2.

III

By letter dated 23 January 1995 Belgium submitted its observations in response to the decision to initiate proceedings and to the Commission's letter of 6 December 1994.

First, Belgium contended that the loan did not constitute State aid pursuant to Article 92 (1), because it did not affect trade to an extent contrary to the common interest, and did not distort competition between Community airlines. The loan had indeed helped VLM to set up the connection between Antwerp and London (London City Airport), but that route constituted a market separate from the Antwerp-London (Heathrow) and Antwerp-London (Gatwick) routes, which were operated by Sabena and Cityflyer respectively. Belgium also argued that this was not restructuring aid intended to cover operating losses, but indirect aid to the initial investment made by a new regional airline. The measure was in reality a form of capital injection which satisfied the test of the national investor in a market economy: it did not bring a return in the form of interest or dividends, but it brought the Flemish Region indirect benefits in terms of employment and the improvement in the situation of business through the establishment of a direct link between Antwerp and London City Airport. The benefits exceeded the return a private investor could expect from a capital investment, and likewise exceed the benefit which might have been obtained from interest paid by VLM.

Secondly, Belgium argued that if the loan did contain an aid component the aid could be exempted, for two reasons. It was compatible with the common market pursuant to Article 92 (3) (c), being intended to facilitate the development of certain economic activities: that exemption necessarily covered investment in new airlines in a competitive and highly capital-intensive industry. Moreover, the aid involved was limited, being below the ceiling which the Commission had set for aid to small and medium-sized enterprises.

IV

On 2 May 1995 the Commission wrote to the Belgian authorities to ask them once again for a copy of the loan contract, and seeking further details of any guarantee given to the lender, the Flemish Region, by the borrower, VLM. It also asked the Belgian authorities for details of

VLM's turnover in 1992, 1993 and 1994, and for copies of its balance sheets and profit-and-loss accounts for the same years. No reply was received within the time allowed, and on 13 June the Commission sent the Belgian authorities a reminder.

Belgium answered the Commission's request for information in a letter dated 16 June. On the question of guarantees it had this to say:

'During the currency of the contract the company must obtain the Flemish Region's prior consent in order to transfer or mortgage its movable and immovable property or to transfer certain stated assets.

The same condition apples to any chage in the structure of shareholdings or reduction of the capital.

If these requirements are infringed the contract may be terminated immediately and immediately repayment of the advance demanded.'

The letter also supplied the draft of a submission putting forward the following main arguments:

— The transaction did not constitute State aid: the test of the rational investor in a market economy was satisfied, given the small size of VLM, the small scale of the investment and hence of the risk, and the company's good prospects of profitability.

— Even supposing that the transaction did constitute State aid, it was compatible with the common market, because it would enable a new entrant to compete against the established large companies in a market which had become highly competitive; because, owing to its small scale, it would not affect trade to an extent contrary to the common interest; and because it was in the interests of consumers and of the region. Lastly, it had to be allowed the benefit of the *de minimis* rule.

By letter of 14 July 1995 the Belgian authorities also sent copies of the balance sheets and profit-and-losss accounts to the Commission, as requested. In addition, on 24 July 1995 they supplied a copy of the loan contract. It was found to be dated 17 December 1993 and to stipulate that the money was to be made available to the beneficiary within 60 days thereafter.

LEGAL ASSESSMENT

V

According to Article 92 (1) of the Treaty and Article 61 (1) of the EEA Agreement, any aid granted by a State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States or Contracting Parties, be incompatible with the common market and the functioning of the Agreement.

The loan of Bfrs 20 million which the Flemish Region has granted to VLM constitutes 'aid' within the meaning of these provisions.

First, that the transaction is public in character is shown by the fact that the loan was granted by a regional authority, the Flemish Region. The Court of Justice has held that State aid includes all aid granted by central, regional or local authorities in a Member State, 'or by public or private bodies established or appointed by it to administer the aid' (1).

Secondly, the loan does distort competition, and does affect trade between Member States: it benefits a single company, whose business — air transport — extends over several Member States and potentially over the entire EEA, and which by its nature directly relates to trade. This is particularly so since the entry into force of the third air transport package, on 1 January 1993, which completed the process of liberalization and greatly increased the scope for competition. VLM is a Community airline company holding an operating licence granted in accordance with Council Regulation (EEC) No 2407/92 (2). Pursuant to Article 3 of Council Regulation (EEC) No 2408/92 (3) and Article 5 of Council Regulation (EEC) No 2409/92 (4), the Member State or Member States, concerned must, except where otherwise expressly provided in the same Regulations, permit VLM to exercise traffic rights on routes within the Community and setting its fares freely.

(1) Case 78/76, Steinike und Weinlig, [1977] ECR, p. 596, at paragraph 21.
(2) OJ No L 240, 24. 8. 1992, p. 1.
(3) OJ No L 240, 24. 8. 1992, p. 8.
(4) OJ No L 240, 24. 8. 1992, p. 15.

In its judgment of 21 March 1991 in Case C-303/88, Italy v. Commission (1), the Court of Justice held that 'aid may be such as to affect trade between the Member States and distort competition where the recipient undertaking competes with producers in other Member States, even if it does not itself export its products. Where a Member State grants aid to an undertaking, domestic production may thereby be maintained or increased with the result that undertakings established in other Member States have significantly less chance of exporting their products to the market in that Member State. Furthermore, even aid of a relatively small amount is liable to affect trade between Member States where there is strong competition in the sector in question (judgment in Case 259/85, *France* v. *Commission* [1987] ECR 4393, at paragraph 24)'. In the present case, given the intense competition in the liberalized Community air transport business, the fact that VLM may be the only airline operating on the Antwerp-London route into and out of London City Airport is irrelevant to the Commission's assessment: the aid received will in any event reduce the chances of competitors, actual or potential, who wish to penetrate the market in that particular route, and will thus distort competition to that extent at least. Nor is there anything to prevent VLM from making use of the assistance to launch operations on other routes. As for the Belgian authorities' claim that the transaction does not adversely affect the common interest, it seems clear that that argument is not relevant at this stage in the assessment, where the object is to ascertain whether the aid is within the scope of Article 92 (1) of the Treaty and Article 61 of the EEA Agreement.

Thirdly, there can be no doubt that there is an aid component: no private investor or bank operating under normal market conditions would grant an interest-free loan to a company in which it had no holding and which was in financial difficulties less than two years after its information. VLM's balance sheets and profit-and-loss accounts show that it made an operating loss of Bfrs 13 million in 1993, its first full year in operation. Its net losses in that year amounted to Bfrs 11,52 million, equal to 15 % of the equity. Nor can the Commission accept the Belgian authorities' argument that the benefit to the economy of the Flemish Region means that the test of the rational investor in a market economy is satisfied. The Flemish authorities, as public authorities, may wish to take account of the advantage to the Flemish economy of a direct connection between Antwerp and London City Airport; but that has nothing whatsoever to do with the behaviour of a rational investor operating in a market economy.

Turning to the amount of the aid, the Commission, in its communication entitled 'Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector' (2), considers that the aid component in such cases amounts to 'the difference between the rate that the airline would pay under normal market conditions and that actually paid. In the extreme case where an unsecured loan is made to a company which under normal circumstances would be unable to obtain financing, the loan effectively equates to a grant and the Commission would evaluate it as such'. That VLM should have made losses over its first year of operation, which were fairly moderate all things considered, is not unusual in air transport, given the special features of the business. In early 1994, such losses were not such as to prevent access to the financial market, especially as 1993 had been a particularly difficult year in civil aviation, and prospects for 1994 were brighter. VLM's losses did in fact fall to Bfrs 8,6 million in 1994, and its activities continued to develop. Furthermore, the lender has in fact a form of guarantee for its claim, because in return for the loan the Flemish Region is allowed to intervene in the running of the company: its consent must be obtained before certain assets can be transferred or mortgaged, and before any reduction in the capital of the company or any change in the structure of the shareholdings. It should be noted that by late 1993 VLM held tangible assets worth Bfrs 7,3 million and financial resources worth Bfrs 16 million. Furthermore, in 1994 a further increase of Bfrs 25 million in the company's equity capital has now brought the total up to Bfrs 100 million. It is clear from Articles 6 and 7 of the loan contract, first, that the transaction may be rescinded immediately should VLM fail to comply with the terms and conditions agreed in the contract, and secondly, that VLM is subject, for the duration thereof, to inspection by the Inspectorate of the Ministry of Economic Affairs of the Flemish Community and also by the Flemish Committee for the Supervision of Business Management (Vlaamse Commissie voor Preventief Bedrijfsbeleid). The Commission accordingly takes the view that the amount of aid is equal to the interest which VLM would have had to pay in normal market conditions.

For a six-year loan, the base rate in Belgium at the beginning of 1994 (Belgian State debt, entailing no risk) was 7,3 %. A risk premium would usually be added to this base rate, reflecting the characteristics of the company and the industry and the solidity of the guarantee offered for the claim. Inquiries made by the Commission in the

(1) [1991] ECR I, p. 1433, point 27.

(2) OJ No C 350, 10.12.1994, p. 5, point 32.

banking sector indicate that in the present case the risk premium could be estimated at 100 basic points, or 1 %, if the guarantee accepted by the Flemish Region gave it every assurance of recovering its claim. But that is not the case, because the claim is not secured against movable or immovable property, as it would be if there were a mortgage for example. The risk premium ought therefore to be estimated at 200 basic points, or 2 %. This gives a normal commercial rate of interest of 9,3 %. The amount of aid is consequently the sum of the interest payments which would be arrived at by applying this rate to the sum borrowed.

VI

The aid was not granted under any approved scheme of assistance, and ought to have been notified to the Commission in accordance with Article 93 (3) of the Treaty. By omitting to notify the measures in advance, that is to say before putting it into effect, Belgium failed to fulfil the obligations imposed on it by Article 93 (3). The aid was accordingly granted unlawfully.

VII

Let us now consider the compatibility of the aid with the common market pursuant to Article 92 (2) and (3) of the Treaty and Article 61 (2) and (3) of the EEA Agreement.

Points (a), (b) and (c) of Article 92 (2) and Article 61 (2) do not apply: the aid is not aid having a social character, granted to individual consumers, nor aid to make good the damage caused by natural disasters or exceptional occurrences, nor aid granted to the economy of certain areas in Germany.

Article 92 (3) and Article 61 (3) list forms of aid which may be considered to be compatible with the common market. The assessment has to be made in the context of the Community, and not of a single Member State. The exemptions provided for apply only where the Commission is satisfied that the unaided effects of market forces would not be enough to incite the recipient to undertake some action conducive to one of the objectives for which the exemptions exist.

In order to safeguard the proper operation of the common market, and the principles enshrined in Article 3 (g) of the Treaty, the exemptions from the prohibition in Article 92 (1) of the Treaty which are provided for in Article 93 (3) must be interpreted strictly in the assessment of any aid scheme or individual aid measure. Given the more intense competition which has come with the gradual liberalization of air transport as a result of the third air-transport package, the Commission must pursue a policy of rigorous control of State aid in order to prevent it from producing effects contrary to the common interest.

Article 92 (3) (a) and (c) of the Treaty and Article 61 (3) (a) and (c) of the EEA Agreement allow the exemption of aid to promote or facilitate the development of certain areas. The loan granted to VLM by the Flemish Region does not qualify for exemption under these provisions, because the arrondissement of Antwerp does not satisfy the tests of eligibility for regional aid, and because the loan is a one-off measure in respect of a single enterprise, rather than a part of a part of a general scheme for the benefit of all Flemish undertakings. Indeed, the Belgian authorities have not invoked these provisions.

Article 92 (3) (b) and Article 61 (3) (b) do not apply either, as the aid is not designed to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.

The Belgian authorities have relied on Article 92 (3) (c) of the Treaty and Article 61 (3) (c) of the EEA Agreement which allows the exemption of 'aid to facilitate the development of certain economic activities'. They contend that the loan must be regarded as facilitating the development of economic activities, because it benefits a new airline in a competitive and highly capital-intensive industry. The Commission cannot accept this argument. It is prepared to allow this exemption only in favour of aid to enterprises which are to be restructured [1], and even then there are a number of conditions which must be met, the main one being that there must be a restructuring programme which the Commission has approved. In this case the Belgian authorities have themselves said that the loan is not intended to assist restructuring; and they have made no reference to a restructuring programme. Thus the exemption provided for in Article 92 (3) (c) and Article 61 (3) (c) is in any event inapplicable here.

[1] See footnote 7, section V of that communication.

The Belgian authorities have also argued that the amount of the aid is below the ceiling set by the Commission for aid to small and medium-sized undertakings. Here they are doubtless referring to the Community guidelines on State aid for rescuing and restructuring firms in difficulty [1], which set a *de minimis* figure of ECU 50 000. But those guidelines specify that 'The *de minimis* facility is not available in sectors subject to special Community rules on State aid'. Air transport is indeed subject to spectal Community rules on State aid. Those special rules also set a *de minimis* figure, but only for procedural purposes, in order to determine whether a measure qualifies for an accelerated clearance procedure : the figure there has no bearing on whether a measure constitutes State aid or whether, if it does so, it qualifies for exemption. The Belgian authorities are therefore wrong in claiming that a *de minimis* rule might apply here.

Thus the measure does not fall within the scope of any of the exemptions provided for in Article 92 (2) and (3) and Article 61 (2) and (3). Belgium must accordingly be required to put an end to it.

VIII

If aid is not compatible with the common market, Article 93 (2) of the Treaty empowers the Commission to require the Member State to order its recovery, as the Court of Justice has confirmed in Case 70/72, *Commission* v. *Germany* [2] and Case 310/85, *Deufil* v. *Commission* [3]. The Belgian authorities should accordingly be required to recover the aid unlawfully granted to VLM, that is to say interest chargeable at a rate of 9,3 % on the amount of the loan, within two months. The aid is to be recovered in accordance with national law, including the rules concerning interest due for late payment of amounts owing to the government, the interest to run from the date of the award of the aid.

This measure is necessary in order to restore the status quo by withdrawing all the financial benefit which has unduly accrued to the recipient of the unlawful aid since the aid was granted,

HAS ADOPTED THIS DECISION :

Article 1

The interest-free loan of Bfrs 20 million granted by the Flemish Region to the airline Vlaamse Luchttransportmaatschappij NV ('VLM') in 1994 includes an aid component which is unlawful because it was granted in breach of the requirements of Article 93 (3) of the EC Treaty. The aid component is incompatible with the common market for the purposes of Article 92 of the Treaty and Article 61 of the EEA Agreement.

Article 2

Belgium is hereby required to order that interest at 9,3 % is henceforth payable on the loan of Bfrs 20 million granted to VLM by Flemish Region.

Article 3

Belgium is hereby required to order that the aid component, equal to interest charged at 9,3 % on the loan of Bfrs 20 million granted to VLM by the Flemish Region since the date on which the loan was granted, be repaid within two months of notification of this Decision. The money is to repaid in accordance with Belgian law, including the provisions concerning interest due for late payment of amounts owing to the State or public authorities. The rate of such interest is to be the reference rate used in the evaluation of regional aid measures, the interest running from the date on which the aid was awarded.

Article 4

Belgium shall inform the Commission within months of the date of notification of this Decision of the steps it has taken to comply with it.

Article 5

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 26 July 1995.

For the Commission

Neil KINNOCK

Member of the Commission

[1] OJ No C 368, 23.12.1994, p. 12, points 2.3 and 4.1.
[2] [1973] ECR, p. 813.
[3] [1987] ECR, p. 901.