II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 April 1997

concerning aid granted by Spain to the aerospace company Construcciones Aeronáuticas, SA (Casa)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(97/807/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 establishing the European Economic Area, and in particular point (a) of Article 62 (1) thereof,

Having given the Member States and the parties concerned the opportunity to submit their comments, in accordance with the abovementioned Articles,

Whereas:

I

Aid granted by Spain

This Decision relates to aid of PTA 7 210 million granted to Construcciones Aeronáuticas, SA (Casa) in the period 1991-93 for the Casa-3000 programme, a project to develop a 70/80-seater turboprop aircraft.

The original plan was to extend the project until 1998, but it was terminated in 1994.

II

Decision of 27 September 1994

By letter dated 20 October 1994, the Commission informed the Spanish authorities of its decision of 27 September to initiate the procedure under Article 93 (2) of the EC Treaty [1] with regard to State aid of Pta 32 897 million (approximately ECU 209 million) for Casa. The decision described the project, the financial assistance from the Spanish Government and the considerations which led to the initiation of the procedure.

To investigate the State aid, the Commission asked the Spanish authorities for information by letter dated 17 February 1992 (reply from the Spanish authorities, 7 April). Further information was requested by letter dated 26 May (reply, 7 July) and by letter dated 12 October (reply, 6 November).

Subsequently, a meeting between the Commission and the Spanish authorities was held on 8 July 1993. Further information was requested on 12 August (reply, 13 September) and 6 October (reply, 29 October), and an additional letter dated 4 August 1994 was reviewed from the Spanish authorities.

The information thus obtained, the main elements of which were presented when the procedure was initiated, shows that on 27 December 1991 a cooperation agreement was signed between Casa and the then Ministry of Industry, Commerce and Tourism in respect of the Casa-3000 proejct. The purpose of the project was to develop a 70/80-seater turboprop aircraft.

[1] OJ C 63, 14. 3. 1995, p. 4.

Casa operates in the aerospace sector and is involved in the desgin, development, manufacture, assembly and certification of civil and military aircraft. It also co-operates, on an associate or subcontracting basis, with the world's principal manufacturers of aircraft in designing, manufacturing and certifying aircraft components, in particular large units made of non-metallic materials, satellite components and structures for launch vehicles. The company also carries out aircraft maintenance for the Spanish and US armed forces. Other significant activites of Casa are the Ariane satellite programme, participation in Airbus and in the Eurofighter project.

The agreement of 27 December 1991, following approval by the Spanish Cabinet at its meeting of 20 December, provided for the granting of repayable loans for the feasibility, definition and development stages of the Casa-3000 programme for the abovementioned amount of Pta 32 837 million, to be paid in annual instalments during the development of the aircraft in the period 1991 to 1997. The loans were set at this amount to cover 70 % of Casa's development costs for the project.

The feasibility study and definition of the aircraft were carried out during 1991, 1992 and the first quater of 1993, which amounts to a delay of three months compared with the timetable in the agreement. This first phase of the project comprised the definition of the product and its components, the testing of critical elements including aerodynamics and wind tunnels tests, the search for industrial subcontractors and the search for launch customers.

Article 3 of the agreement provided for the possibility of amendment when the feasibility study and definition phase were finished in order to allow the Government to decide, on the basis of the study results obtained, to continue or stop the support for the project. If the project were continued, the Government could approve by means of the said amendment an updated cost estimate and timetable for the project.

In view of the outcome of the feasibility and definition study, the Government decided on 7 May 1993 to proceed with the rest of the project, i.e. to commence the second or development phase. To this end, on 1 June, Casa and the Ministry of Industry, Commerce and Tourism signed a supplement to the original agreement of 27 December 1991. This agreement confirmed the previously estimated total loan of Pta 32 897 million and that the loan would cover 70 % of the costs to be incurred. It rescheduled the activities and extended the project to 1998, which led to an adjustment of each of the individual annual instalments of the loan to be paid by the Spanish authorities.

Activities under the second phase were carried out from 1993 until the project was terminated in 1994. The conclusion must be that the project had failed technically.

It was confirmed in the decision initiating the procedure that the loan of Pta 32 897 million would be equivalent to a financing of 44,3 % of the projects' costs (Pta 32 897 million as a proportion of the total project cost of Pta 74 263 million (approximately ECU 468 million)), as indicated in the letter from the Spanish authorities dated 29 October 1993.

The Commission was of the opinion that an aid intensity of 40 % in the event of the failure of the project was acceptable and it therefore raised no objections to an initial financing of 40 %. Consequently, the decision of 27 September 1994 accepted the aid up to the level of 40 % and initiated the procedure for the rest (4,3 %).

III

Observations of third parties

Two Member States (the Netherlands and Sweden) submitted observations following the opening of the procedure, and comments were received from two private organizations. Some observations concerned the method of calculating the aid elements containing loans based on industrial and intellectual property rights. One of the responses questioned whether a strict application of aid policy in the aerospace industry was appropriate in view of the problems facing European aircraft manufacturing, while another argued for a strict policy in order to prevent Member States competing on subsidies.

These reactions were transmitted to Spain by letter dated 17 July 1995, and the Spanish authorities replied by letter dated 20 September. The authorities were in favour of higher aid for the aerospace industry, given its specific features and its difficulties, and argued that aid should not be reduced before the restructuring of the European aircraft industry had taken place.

IV

Observations of the Spanish Government

After initiating the procedure, the Commission received additional information from the Spanish authorities by letter dated 12 December 1994. The Commission asked the Spanish authorities by letter dated 24 February 1995 to say what progress had been made, as press articles had

revealed that the project had been terminated because of unfavourable market forecasts. A reminder was sent on 22 May; the Spanish autorities replied on 15 June that they had not granted any funds in 1994 for the project, that none were earmarked for 1995 and that the project was suspended.

Further information, in particular on the aid intensity the Spanish authorities considered applicable, was requested by letter dated 3 October; a reply was received by letter dated 29 November. Following a meeting in Brussels on 24 January 1996, the Spanish authorities confirmed by letter dated 12 June that the project had been terminated, and supplied information on the actual costs of the project and the funds the Spanish State had put at Casa's disposal.

Finally, the Commission asked by letter dated 17 September for more details of the R&D activities carried out by Casa and of the related costs. The answer was transmitted by letter dated 1 October.

V

State aid

Even before the procedure was initiated, the Spanish authorities argued that the case was not a matter of State aid within the meaning of Article 92 (1) of the EC Treaty, because the loan could be likened to the contribution of risk capital to a company. The Spanish authorities referred to point 3.2 (vi) of the Commission communication of 1984 on government capital injections (1). As Casa is a State-owned company, the communication is applicable to the contribution of public capital to the company. Point 3.2 states that no State aid is involved where fresh capital is contributed in circumstances that would be acceptable to a private investor operating under normal market economy conditions. One of these circumstances is where the strategic nature of the investment in terms of markets or supplies is such that acquisition of a shareholding could be regared as the normal behaviour of a provider of capital, although profitablity is delayed.

The Spanish authorities also referred to point 5 of the communication: 'Member States also use certain forms of intervention which, while not having all the features of a capital contribution in the form of acquisiton of a public holding, resemble this sufficiently to be treated in the same way. This is the case notably with capital contributions taking the form of convertible debenture loans or of loans where the financial yield is, at least in part, dependant on the company's financial performance'.

They added that Casa had the obligation to repay the loan with interest at the Bank of Spain base rate that the Government would acquire the intellectual and industrial property rights resulting from the development of the aircraft.

Assessment

Although it is possible to assimilate a loan to a capital contribution, it still has to be determined whether, in the present case, a private investor would have made a loan in similar circumstances Given the risk and the expected return on the project, this is not the case and the Commission is therefore entitled to regard the loan not as an investment but as an aid measure which has to be dealt with under the specific rules for aid to R&D.

Regarding the risk of the project, it has to be pointed out that, as the repayment of the loan was subject to the commercial success of the aircraft (it depended on the number of aircraft sold), the likelihood of repayment would be reduced. The Spanish authorities confirmed the high risk of the project on several occasions (letters of 7 April and 6 November 1992, 12 December 1994 and 12 June 1996), declaring that the risk was due to the long-term nature of the project, the choice of the most modern technology and low market demand, which was already foreseeable at the time given the market situation, especially as regards overcapacity.

The expected return on the project must also be taken into account. The Spanish authorities have not provided any evidence that the loan would yield any prospect of a return commensurate with the risk. On the contrary, the calculation by the Spanish authorities of the rate of return on the loan for the Spanish Government gave, under certain assumptions regarding the interest rate and the payback, a return of less than 6 %. This must be considered as too low, especially when the risk-free, long-term (ten-year) borrowing rate was above 12 % in 1992 and 1992. Adding a commensurate risk premium would definitely put the return at above 20 %.

Although the Spanish authorities argue in their letter dated 12 December 1994 that market demand had improved from 1992 onwards, the fact that the project was cancelled shows that it was a high-risk venture.

(1) Competition law in the European Communities, Volume IIA, Rules applicable to State aid, 1995, p. 103.

The loan was not granted therefore under conditions similar to those obtaining on the private market and thus constituted aid within the meaning of Article 92 (1), bearing in mind also that it would most probably benefit Casa to the detriment of other European aircraft manufacturers. Such loans are a typical instrument of State support for R&D projects of a long-term nature, with their attendant risks, regardless of whether the recipient is a public or private undertaking.

The Community framework for State aid for research and development (the 1996 framework) [1], which replaced the previous, 1986 framework [2], is applicable to this case. The Spanish authorities referred to the applicability of the 1996 framework in their letter dated 12 June 1996. The cost of the project and the maximum aid intensity have to be assessed in the light of the 1996 framework and the Commission's usual policy. The 1996 framework establishes the principles which have to be applied to aid intensities for the purposes of Article 92 (3) (c), the Article which authorizes aid to facilitate the development of certain economic activities where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

Had the 1986 framework been used, the result as regards aid intensity would have been the same as if the 1996 framework had been applied.

VI

Cost of the project

The total cost of the project is Pta 8 973 million (ECU 57 million), and the total subsidy Pta 7 210 million (ECU 45 million). The 1996 framwork distinguishes between industrial reserach (point 5.3), precompetitive development (point 5.5) and technical feasibility studies preparatory to either type of activity (point 5.4). The 1986 framework only made a distinction between industrial research and precompetitive development. The 1996 framework introduced the concept of feasibility studies, where the aid intensity may be higher than for industrial research or precompetitive development.

In the table below, the costs are classified in accordance with the 1996 framework. The activities under the heading 'feasibility study' correspond mainly to the first phase ('feasibility study and definition'), whereas the two other categories correspond to the second phase ('development phase'). Also indicated in this table are the positions of the Spanish authorities and the Commission regarding the aid intensity; these will be discussed in section VII.

Although the project has been terminated, the Spanish authorities, according to the data available to the Commission, have not yet asked for reimbursement of part of the loan. If (partial) reimbursement is not requested, the aid intensity would then be 80 % (Pta 7 210 million — the amount of the loan — divided by costs of Pta 8 973 million), which is higher than the aid intensity when the procedure was initiated (44,3 %) and also higher than the financing authorized on that occasion (40 %).

Table

Costs and aid intensity

	Feasibility study	Industrial research	Pre-competitive research	Permissible aid (%)	Aid to be paid back (ESP million)	Aid to be paid back (ECU million)
Costs: Pta 8 973 million	6 392	398	2 183			
Spanish authorities	75 %	52 %	50 %	6 092 (68 %)	1 118	7
Commission	65 %	67 %	40 %	5 293 (59 %)	1 917	12

The Pta/ecu conversion rate used is the rate applicable in the month of the decision to initiate the procedure (September 1994): 158,855

[1] OJ C 45, 17. 2. 1996, p. 5.
[2] OJ C 83, 11. 4. 1986, p. 2.

The allowable aid intensity can be calculated as 100 % × (65 % × 6 392 + 67 % × 398 + 40 % × 2 183)/8 973 = 59 %.

The above table shows the costs incurred for each of the three different phases — feasibility study, industrial research and precompetitive development. The figures indicate that two-thirds of the cost of the project are accounted for by the aircraft feasibility study.

Feasibility study		
— definition of the type of aircraft and technical specifications	[...]	
— flight technologies for configuration of the aircraft	[...]	
— aerodynamics and wind tunnel tests	[...]	
— operational requirements and flight mechanics	[...]	
— definition of the propulsion system	[...]	
— definition and measurement of flight test and aircraft certification	[...]	
— design and structural calculations for variants	[...]	
— design of auxiliary systems	[...]	
— appraisal and planning of the structural tests in the development phase	[...]	
— analysis of aircraft mass and balance	[...]	
— analysis of the integration of cabin systems, aerials, radiation/light protection and engineering simulations	[...]	
		6 392
Industrial research		
— application of carbon-fibre or metallic materials, moulding technologies, noise and concurrent engineering analysis to identify technologies for the construction of the Casa-3000 aircraft		398
Precompetitive research		
— specific design of the aircraft or parts thereof	[...]	
— wind tunnel tests	[...]	
— tests on structures and systems	[...]	
— development simulators	[...]	
— studies on construction and certification	[...]	
		2 183
Total project cost		8 973.

VII

Aid intensity

In accordance with the 1986 and 1996 frameworks and the Commission's administrative practice, aid for industrial research may be granted up to 50 %, and for precompetitive development up to 25 %. The 1996 framework added feasibility studies to these categories. Feasibility studies for industrial reserach may be allowed 75 %, those relating to precompetitive development 50 %. The Spanish authorities classify the feasibility study in accordance with the 1996 framework as a 'technical feasibility study preparatory to industrial research', so that, in their opinion, an intensity of 75 % should be authorized.

The national authorities want to give the precompetitive development activity an intensity of 50 %, claiming that the termination of the project promotes the Commission's policy, which is to take account of excess production capacity and to stimulate the integration of projects of different Community producers. They refer, notably, to point 5.6 of the 1996 framework, according to which a higher aid intensity may be allowed in the event of the failure of the project. The Spanish authorities also mention three past decisions, in which the Commission authorized an increase in the basic intensity of 25 % for high-risk development projects, and justify the 50 % intensity in the case of precompetitive development by the high risk of the project.

The Spanish authorities propose to apply the normal rate of 50 % to industrial research activities. Because some of the industrial research (1 %) has been carried out in a 92

(3) (a) region (an area where the standard of living is abnormally low or where there is serious underemployment), they argue that an increase of 10 percentage points should be granted to work carried out in this region.

The position of the Spanish authorities is reflected in the above table. Only Pta 60 million of the amounts intended for industrial research activities has been allocated to assisted regions. Application by the Spanish authorities of the regional increase of 10 percentage points raises the average total allowable intensity for development activities from 50 % to 52 %.

The above table shows that the methodology of the Spanish authorities would lead to an average allowable aid intensity of 68 % and to a reimbursement of approximately ECU 7 million.

The present Spanish position differs from the commitment the Spanish authorities made before the inititation of the procedure. In their letter of 13 September 1993 they stated:

'Quite apart from what is stipulated in the cooperation agreement and its supplement, Casa will, where necessary, have to make appropriate repayments to the State, so that, if any of the objectives of the development phase are not achieved, the State aid does not exceed an intensity of 40 % plus the percentage allowed for programmes located in less-favoured regions or involving small and medium-sized enterprises (SMEs), as laid down in point 5.4 of the Community framework for State aid for research and development (86/C 83/02)'.

If the Commission accepts this position, which was adopted when the Spanish authorities did not yet know that the project would be terminated, the authorized intensity would only be 40 % (no activity by SMEs and practically none in assisted areas), and the reimbursement would be ECU 23 million.

Assessment

The Commission agrees with the Spanish authorities that, in order to assess the maximum allowable aid intensity, the different types of activities must be taken into consideration.

As regards precompetitive development, a 40 % aid intensity was authorized when the procedure was initiated. It was considered that this was based on the practice regarding repayable loans for development projects; the importance of the aerospace industry, which might justify the aid, was also taken into account, although the need to limit the aid was recognized, given the overcapacity in the regional aircraft market.

The effective allowable aid intensity for precompetitive development would thus reach 40 % in the event of the project failing, whereas the admissible base rate for such projects is 25 %. The bonus in the event of the research failing is specified in point 5.6 of the 1996 framework. Such an increase has so far been applied restrictively in the Commission's decisions, being limited to research and development programmes relating to precompetitive research financed by advances [1]. The distortive market effect of aid for an unsuccessful project must be regarded as slight, if a higher aid intensity is to be be accepted.

The Commission cannot accept the claim by the Spanish authorities that the 25 % base rate for precompetitive development should be increased, given the risk of the project. The Spanish authorities refer to a series of Commission decisions relating to other programmes where this increase was allowed. It is correct that, in various cases with a high level of risk, the Commission took the decision to allow a higher aid intensity than the basic 25 %. It did so, specifically, in the (unpublished) decision (1987) on an Italian aerospace research programme and in that on a similar programme in Germany (original decision 1988, extension 1992). However, both decisions concerned programmes containing many projects, not just a single one as in the case of Casa-3000, where the aid is more distortive on account of its volume and its particular impact on the market, given the prevalence of intra-Community trade in the sector and the obvious presence of excess production capacity. Moreover, since then, the Commission has not authorized any further application of a risk bonus and has accordingly decided not to allow such an increase in the 1996 framework.

The proposal by the Spanish authorities that in this case an aid intensity of 50 % should be allowed for industrial research is consistent with the 1996 framework (point 5.6). However, ESP 60 million was allocated to industrial research carried out in assisted regions pursuant to Article 92 (2). According to point 5.10.2 of the 1996 framework, an increase of 10 % may be granted to R&D carried out in assisted regions. Applying the 10 % increase to industrial research carried out in such regions leads to an overall increase of 2 % in the aid intensity for such activities.

[1] See the (unpublished) Commission Decisions for aid schemes E 7/87 (Prototypes, Belgium, Decision of 28 October 1988), NN 7/87 (ANVAR, France, Decision of 5 July 1989), N 297/89 (TOK, the Netherlands, Decision of 28 March 1990), N 463/90 (Atout-PUMA, France, Decision of 24 October 1990).

Moreover, in the specific case of Casa-3000, a higher aid intensity may be allowed not only for precompetitive development as described above but also for industrial research and the feasibility study. The specific circumstances relate in particular to the characteristics of the aerospace industry, which has high research and development costs for a limited number of aircraft sold, long product life-cycles (over 20 years) and uncertain market prospects, the latter depending on a relatively small number of competitors and the development of global demand. Moreover, because Casa-3000 has failed technically, the Commission considers that in view of the very special situation of the project the failure bonus for industrial research and the feasibility study may be accepted.

The admissible aid for industrial research is thus 67 % (50 % base rate, plus a 2 % increase due to the applicability of point 5.10.2 of the 1996 framework, plus a higher aid intensity because of failure, which in this case may be 15 %).

As regards the feasibility study, the Spanish authorities claim that this is a study prior to industrial research which, according to the 1996 framework, would give an intensity of 75 % (point 5.4). Casa-3000, however, is a development and not an industrial research project, which means that the feasibility study cannot be a study preparatory to industrial research. The type of work described above as a 'feasibility study' is the typical feasibility work to be carried out before the detailed development of any product. In accordance with point 5.4 of the 1996 framework, the aid intensity for feasibility studies preparatory to precompetitive development is 50 %. As explained, a higher aid intensity because of failure is also acceptable for the feasibility study in this case, so that the total allowable aid intensity for the feasibility study becomes 65 %.

The 1996 framework allows other increases in aid intensity where certain conditions are fulfilled. Thus, an increase of 10 percentage points is allowed in the case of SMEs (point 5.10.1). Casa is not an SME, and the increase is thus not applicable.

An increase of 15 percentage points is provided for in the 1996 framework (point 5.10.3) where the research project is in accordance with the objectives of a specific project or programme undertaken as part of the Community's framework programme for R&D. The research projects in the third framework programme for R&D provided for in Council Decision 90/221/Euratom, EEC [1] and in the fourth framework programme for R&D provided for in European Parliament and Council Decision 1110/94/EC [2] foster the technological base of all European aerospace companies, including Casa. No direct link can be established between the Casa-3000 project and the programmes. The increase cannot be allowed, therefore.

The case does not involve cross-border cooperation, cooperation between industry and the public research sector or wide-scale dissemination of the results and so does not qualify for the application of the increase provided for by point 5.10.4 of the 1996 framework.

Point 5.13 of the 1996 framework is not applicable either; this provides for alignment up to the aid levels which are provided for in the WTO's Agreement on Subsidies and Countervailing Measures (75 % for industrial research and 50 % for precompetitive research). Moreover, the higher aid intensity can only be considered where the Commission has evidence that in the specific case of a third-country competitor higher aid has been allowed. This condition is not met in the present case, nor has the Spanish Government requested such an alignment. And even if it were met, the Commission would have to take into account that the regional aircraft market is dominated by intra-Community competition, which could rule out the application of such an increase in aid intensity.

The conclusion of the foregoing is that:

— an aid intensity of 65 % may be authorized in respect of the feasibility studies preparatory to precompetitive development,

— the industrial research may be allowed an intensity of 67 %,

— an aid intensity of 40 % is allowed for the precompetitive development activities (25 % basic rate, plus 15 percentage points on account of the failure of the project).

Accordingly, the average allowable intensity can be put at 59 % (see table above).

VIII

Conclusion

The financial support of Pta 7 210 million was committed and paid without being notified beforehand to, and approved by, the Commission. The Commission was not

[1] OJ L 117, 8. 5. 1990, p. 28.

[2] OJ L 126, 18. 5. 1994, p. 1.

able to submit its comments on the aid measure before it was implemented. The granting and payment of aid without prior notification is in breach of Article 93 (3) and is therefore illegal.

This conclusion is not altered by the fact that the last instalment of Pta 3 085 million in 1993 was paid to the company under the agreement of 1 June 1993, which it was possible to amend as a result of the application of the Community competition rules. As the aid has nevertheless been paid, the Commission regards such a clause as not sufficient to make up for the illegal character of the payment.

The decision of 27 September 1994 accepted that 40 % of the total costs of Pta 8 973 million could be covered by the loan. This part of the loan (Pta 3 589 million, or ECU 22 million) can thus be considered to be approved by that decision.

The part of the loan which covered 19 % of the costs (Pta 1 704 million, or ECU 11 million), being the difference between the maximum allowable aid intensity of 59 % and the 40 % authorized by the decision of 27 September 1994, can be accepted under the 1996 framework. It should be noted, however, that this result would not be different under the 1986 framework.

Reimbursement has to be requested for the part of the loan which covered 21 % of the costs (Pta 1 917 million, or ECU 12 million), being the difference between the actual 80 % aid intensity and the allowable 59 %,

HAS ADOPTED THIS DECISION:

Article 1

Aid for Pta 3 621 million paid by Spain in the period 1991 to 1993 to Construcciones Aeronáuticas, S.A. is illegal. Pta 1 704 million is compatible with the common market and Pta 1 917 million is incompatible.

Article 2

Spain shall recover from Construcciones Aeronáuticas, SA the amount of Pta 1 917 million, with interest from the date of granting the illegal aid until the date of repayment, calculated in accordance with national rules. The interest rate is the reference interest rate for Spain used by the Commission for the evaluation of the aid element in regional investment aid.

Article 3

Spain shall inform the Commission within two months of the notification of this Decision of the measures taken to comply herewith.

Article 4

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 30 April 1997.

For the Commission

Karel VAN MIERT

Member of the Commission