II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION
of 30 April 2003
on State aid C 65/2002 (formerly N 262/2002) from Austria to Austrian air carriers

(notified under document number C(2003) 1307)

(Only the German text is authentic)

(Text with EEA relevance)

(2003/637/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, in particular the first paragraph of Article 88(2),

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

Having invited interested parties to submit their comments in accordance with the said Articles [1],

Whereas:

I. PROCEDURE

(1) In accordance with Article 88(3) of the EC Treaty, Austria informed the European Commission, by letter dated 5 April 2002, registered on 10 April 2002 under No SG(2002) A/3826, of a scheme to grant compensation to airlines. On 2 May 2002 an initial request for additional information was sent to the Austrian authorities (letter DG TREN D(2002) 7022). A reply was received from Austria by letter dated 24 May 2002, registered by the Commission under No TREN A/59420. The Commission sent a second request for additional information on 5 July 2002 (letter DG TREN D(2002) 11286). Austria replied by letter of 7 August 2002, registered on 13 August 2002 under No SG (2002) A/8235.

(2) By letter of 16 October 2002, the Commission informed Austria of its decision to consider part of the notified scheme, in respect of four measures amounting to a maximum of EUR 1 419 000, as compatible with the common market and to initiate the procedure provided for in Article 88(2) of the Treaty in respect of the other measures envisaged in the aid scheme [2].

(3) The Commission Decision to initiate the procedure was published in the *Official Journal of the European Communities*. The Commission has invited interested parties to submit their comments on the aid in question.

(4) The Commission has not received any comments on this subject from interested parties.

II. DESCRIPTION OF THE AID

Background

(5) As a result of the terrorist attacks in the United States of America on 11 September 2002, some parts of airspace were closed for several days, in particular US airspace, which was completely closed between 11 and 14 September 2002, and was only gradually reopened to air traffic from 15 September 2001. Other States saw fit to take similar measures for all or part of their own airspace.

[1] OJ C 309, 12.12.2002, p. 5.

[2] See footnote 1.

(6) During this period, air carriers had to cancel flights affected by the closure of the airspace concerned. In addition, they suffered losses due to the disruption of other traffic and the fact that some passengers were unable to travel to their final destinations.

(7) The extent and suddenness of these events as well as the costs sustained by air carriers prompted the Member States to consider special compensation schemes.

The scheme notified

(8) In this connection, Austria proposed to introduce a scheme to compensate Austrian air carriers for operational losses sustained during the period between 11 and 14 September 2001.

(9) All air carriers which hold an air carrier's licence issued by the Austrian authorities in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers ([3]) are eligible for compensation. The measures notified are solely in respect of losses notified to the Austrian authorities by companies of the Austrian Airlines group, i.e. Austrian Airlines, Tyrolean Airlines, Lauda Air and Rheintalflug. However, Austria has confirmed to the Commission that other air carriers which hold a licence issued by the Austrian authorities are eligible for compensation under the scheme.

(10) The maximum amount of compensation may not under any circumstances exceed four 365ths of the company's total annual turnover.

(11) The eligible losses determined in this manner must be verified and certified by the accountants of the company concerned on the basis of the specified eligibility criteria.

(12) Austria has assured the Commission that it will submit a report on payments made during the six months following the approval of the scheme.

(13) On 16 October 2001 the Commission decided that a scheme providing for compensation for losses sustained during the period between 11 and 14 September 2001 was partly compatible with the common market. This decision is based on Article 87(2)(b) of the Treaty and the guidelines defined in the Communication from the Commission to the European Parliament and the Council 'The repercussions of the terrorist attacks in the United States on the air transport industry' ([4]) (hereinafter the Communication of 10 October 2001). Austria was authorised to pay the sum of EUR 1 419 000 for this purpose.

(14) The notified scheme to which this Decision refers provides for two further measures in respect of which a formal investigation was opened by the decision of 16 October 2002:

— the first, referred to as Measure 2b in the abovementioned decision, provides for compensation for the cancelled transatlantic flight on 15 September 2001 (amount notified: EUR 55 727);

— the second, referred to as Measure 3, is intended to provide compensation for loss of revenue on all flights except those to the USA. For this purpose, the average number of passengers per day and route between 11 and 14 September 2001 was compared with the number for the period between 1 and 10 September. The deficit of 8 630 passengers was multiplied by the average income per passenger on these routes to obtain the sum concerned. The amount notified was EUR 1 908 128.

(15) The Commission decided to open a formal investigation since it doubts whether this aid scheme is compatible with the common market. With regard to Measure 2b, which covers 15 September 2001, its doubts concern not only the fact that the period referred to in point 35 of the Communication of 10 October 2001 was exceeded, but also and above all the fact that there were no special events and that the nature of the eligible losses changes after 14 September 2001. With regard to Measure 3, which involves the greatest amount financially, the Commission doubts whether this measure is compatible with the common market concern in particular since Austria has failed to demonstrate the direct link which, according to point 35 of the abovementioned Communication, must exist between the eligible costs and the closure of airspace, as well as the fact that the measure obviously concerns geographical areas which were not affected by the closure.

III. **COMMENTS FROM INTERESTED PARTIES**

(16) The Commission has not received any comments from third parties within the period of one month.

([3]) OJ L 240, 24.8.1992, p. 1.
([4]) COM(2001) 574 final, 10.10.2001, available on: http://europa.eu.int/eur-lex/de/com/cnc/2001/com2001_0574de01.pdf

IV. COMMENTS BY AUSTRIA

(17) Austria sent the Commission further comments by letter of 16 December 2002, registered by the Commission under No TREN (2002) A/72621.

(18) With regard to Austrian Airlines' transatlantic flight cancelled on 15 September (Measure 2b), Austria stated that this flight was cancelled following its original decision to put armed security guards on the flight. Authorisation could not be obtained from the US authorities in good time, and so the necessary preparations for the flight could not be made. Austria further stated that, in its view, flights restarted only gradually, which the Commission itself recognised in its decision, and that such cancellations show that the situation remained chaotic even after 14 September 2001.

(19) Finally, Austria confirmed that it intends to pay the sum of EUR 55 727, which was already disputed when the investigation started, pursuant to Measure 2b.

(20) Austria has justified the general compensation scheme for the entire network of routes (Measure 3), to which the Commission had raised objections, by reference to its interpretation of the Communication from the Commission of 10 October 2001 and the letters from Commission departments to the Member States of 14 November 2001, and not by reference to previous decisions taken by the Commission in respect of other Member States ([5]), to which the Commission had drawn Austria's attention. Austria also made other statements about the proposed compensation scheme.

(21) Austria first of all calculated the actual losses, based on the averages for August 2001, for transfer passengers in the Austrian Airlines' network who did not board their onward flight because the company's transatlantic flights were cancelled between 11 and 14 September 2001. These losses amount to EUR […].

(22) Austria furthermore calculated that about […] % of passengers on Austrian Airlines' transatlantic flights cancelled between 11 and 14 September 2001, for which compensation for losses was approved by the decision of 16 October, were on the outward part of their journey, and that these passengers' return flights were also cancelled. Austria confirmed that this component had not been taken into consideration in its first notification and provided an exact estimate based on figures for the previous month, putting the loss at EUR 1 235 700.

(23) Further losses relating to passengers who were similarly in transfer on the other parts of Austrian Airlines' network and whose return flights were cancelled were calculated as described in recital 21 and estimated at EUR […].

(24) Finally, the Austrian Airlines group sustained similar losses of EUR […] for transfer passengers arriving for transatlantic flights by other air carriers which had to be cancelled on the same days.

(25) Finally, Austria confirmed that, instead of the amount of EUR 1 908 128 stated in the original notification, it planned to pay the sum of EUR 1 983 333 under this measure, the total of the four amounts indicated in recitals 21 to 24.

V. ASSESSMENT OF THE AID

Existence of the aid

(26) Article 87(1) of the Treaty states that 'save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources […] which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.

(27) The aid to the air carriers is being granted from State resources and therefore gives them an economic advantage.

(28) The scheme for air carriers to which this Decision refers is selective in nature. Furthermore, the four air carriers for which the aid is primarily intended are expressly named (see recital 9).

([5]) See similar Decisions concerning France (N 806/2001 of 30 January 2002), the United Kingdom (N 854/2001 of 12 March 2002) and Germany (N 269/2002 of 2 July 2002), available at: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/transports.htm

(29) Since the opening up of the air transport market on 1 January 1993 following the entry into force of Council Regulation (EEC) No 2407/92 and Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes [6], as amended by the Act of Accession of Austria, Finland and Sweden, air carriers in the individual Member States are in competition with each other. The four air carriers for which the aid is intended operate in the Community market. The proposed aid and the resulting advantages for the undertakings concerned affect trade between the Member States and could distort competition.

(30) These measures, which constitute State aid, are only compatible with the common market if they are covered by one of the four proposed derogations.

Legal basis for assessment of the aid

(31) The derogations provided for in Article 87(2)(a) and (c) of the Treaty do not apply since the aid concerned is neither aid having a social character, granted to individual consumers, or aid granted to the economy of certain areas of the Federal Republic of Germany.

(32) The derogations provided for in Article 87(3)(a) and (c) of the Treaty also do not apply since the aid is neither to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, nor is it to facilitate the development of certain economic activities or of certain economic areas.

(33) Similarly, the provisions of Article 87(3)(b) and (d) of the Treaty also do not apply, since these concern aid to promote important projects of common European interest or to remedy a serious disturbance in the economy of a Member State and aid to promote culture and heritage conservation.

(34) In accordance with Article 87(2)(b) of the Treaty, aid to make good the damage caused by natural disasters or exceptional circumstances is compatible with the common market. In paragraph 33 of its Communication of 10 October 2001, the Commission expresses the view that the events of 11 September 2001 can be regarded as exceptional occurrences within the meaning of Article 87(2)(b) of the Treaty.

(35) In paragraph 35 of its Communication of 10 October 2001, the Commission explains the conditions which it believes must be fulfilled for compensation relating to such events to be compatible with Article 87(2)(b) of the Treaty:

'The Commission considers that the costs arising directly from the closure of American airspace between 11 and 14 September 2001 are a direct consequence of the events of 11 September. They may therefore give rise to compensation by Member States in accordance with Article 87(2)(b) of the Treaty on the following conditions:

— compensation is paid in a non-discriminatory manner to all airlines in the given Member States,

— it concerns only the costs incurred during the days 11 to 14 September 2001 following the grounding of air traffic decided by the American authorities,

— the amount of compensation is calculated accurately and objectively by comparing the traffic recorded by each airline during the four days in question with that recorded by the same airline in the preceding week, adjusted to take account of the development in the corresponding period of 2000. The maximum amount of compensation, which must take account in particular both of the actual costs incurred and those avoided, is equal to the loss of revenue duly recorded during these four days. It must of course be less than four 365ths of the airline's turnover.'

Compatibility in accordance with Article 87(2)(b) of the Treaty

(a) *Measure 2b (Transatlantic flight on 15 September 2001)*

(36) The notified scheme clearly surpasses the framework considered permissible in the Communication of 10 October 2001 as regards the application of Article 87(2)(b) of the Treaty, namely a restriction to the period between 11 and 14 September 2001 and to losses which arose during this period and have been approved and which are due to the closure of airspace.

[6] OJ L 240, 24.8.1992, p. 8.

(37) In paragraph 35 of its Communication of 10 October 2001, the Commission did state that the closure of American airspace between 11 and 14 September 2001 was an 'exceptional occurrence' and that compensation for losses due to this closure is permissible, but in the Commission's view this does not apply to losses which are only indirectly related to the closure of the airspace. This applies in particular to losses sustained by air carriers following the reopening of airspace on 15 September.

(38) In its Communication of 10 October 2001, the Commission explained that compensation may be paid 'only for the costs incurred following the grounding of air traffic decided by the American authorities'. The explanations given by the Austrian authorities, however, make it quite clear that the flight concerned was unable to be operated due to its own decision to take a special measure and to use armed personnel. That measure required the approval of the US authorities, which Austria failed to receive in good time. The Austrian authorities therefore recognise that the decisive factor after 14 September 2001 was not the grounding of air traffic, but more restrictive operations on the air routes concerned.

(39) The Commission is therefore unable to share the view that the indirect effects of the attacks of 11 September, such as operational difficulties faced by air carriers after 15 September, can be considered to be the same as the direct effects, by which is meant the complete closure of certain parts of airspace until 14 September which made it impossible to operate on the routes concerned. The indirect effects of the attacks were felt for a longer or shorter time in many sectors of the global economy, and even continue to be felt, but these difficulties, as serious as they may be, can no more be regarded as exceptional occurrences justifying the application of Article 87(2)(b) of the Treaty than other economic or political crises.

(40) The Commission would also draw attention to the fact that, as part of its task of ensuring the equal treatment of undertakings, it has not authorised compensation in any of its relevant decisions [7] for a period after 14 September 2001.

(41) The Commission therefore concludes that Measure 2b for an amount of EUR 55 727 as compensation for losses incurred after 14 September 2001 is not compatible with the common market, and in particular that it does not fall within the scope of the derogation provided for in Article 87(2)(b) of the Treaty, according to the interpretation made in the Communication of 10 October 2001.

(b) *Measure 3 (other planned compensation)*

(42) The Commission notes that all air carriers which hold an air carrier's licence issued by the Member State concerned are eligible for compensation. It is therefore obviously a non-discriminatory measure.

(43) The Communication of 10 October 2001 approves the principle of compensation for the direct consequences of the closure of airspace by the US authorities. The detailed arrangements for the application of the Commission Communication were set out in letters dated 14 November 2001 from the relevant Commission departments to the Member States. These letters referred in particular to the direct link which must exist between the closure of the entire US airspace and the resulting disturbances in European airspace. In this context, this measure provides, in accordance with the information given by Austria in its reply to the initiation of the procedure, for compensation only for networks and routes which were affected by the closure of airspace and by the resulting disturbances in other networks, such as passengers not being able to be carried to their final destination. The Commission takes the view that this measure therefore corresponds to the position laid down in its Communication of 10 October 2001, in particular as regards the direct link which must exist between the costs eligible for compensation and the closure of airspace.

(44) This measure applies only for the period between 11 and 14 September 2001 and is confined to losses arising during this period which are directly due to the closure of airspace. It therefore complies with the restrictions laid down by the Commission in this respect.

(45) The method used to calculate the operational losses for which compensation may be paid is based on the method laid down by the Commission in its Communication, the details of which were explained in the letters of 14 November 2001 from the Commission departments to the Member States. The loss of revenue during the four days in question was determined on the basis of the companies' most recent figures at the time of the attacks. In particular, Austria considered only losses of revenue due to the actual cancellation of transatlantic flights or the corresponding transfers.

[7] In addition to the decisions referred to in footnote 5, see also the final negative Decision 2003/196/EC (OJ L 77, 24.3.2003, p. 61) concerning State aid C 42/2002 which France proposed to implement and which was intended to extend beyond 14 September 2001 the compensation for costs incurred initially authorised by Decision N 806/2001.

With regard to the loss of revenue per passenger, Austria made it clear in its reply that no variable costs had to be deducted for these flights since they were all operated in the normal manner.

Lastly, the maximum amount of four 365ths of turnover applied by the Member State corresponds to the maximum laid down by the Commission.

The Commission therefore considers that this calculation is within the framework of the maximum amount it laid down in its Communication of 10 October 2001, corresponding to the net loss of revenue on these four days.

(46) In accordance with the detailed rules of application indicated in the abovementioned letters of 14 November 2001 from the Commission departments, the Member State has undertaken to inform the Commission, following the initial notification, of the conditions for the application of this aid scheme within six months of its approval.

(47) The Commission therefore concludes that the supplementary measure taken by Austria in respect of air carriers following the closure of airspace between 11 and 14 September 2001 for the sum of EUR 1 983 333 corresponds to the rules laid down in its Communication of 10 October 2001, and can therefore be regarded as compatible with Article 87(2)(b) of the Treaty.

VI. **CONCLUSIONS**

(48) The Commission concludes that the notified measure for an amount of EUR 55 727 as compensation for losses after 14 September 2001 is not compatible with the common market and in particular does not fall under the derogation provided for in Article 87(2)(b) of the Treaty, as interpreted in the Commission Communication of 10 October 2001. However, the Commission takes the view that the additional measure taken by Austria in respect of air carriers following the closure of airspace between 11 and 14 September 2001 amounting to EUR 1 983 333 complies with the rules laid down in its Communication of 20 October 2001 and can therefore be regarded as compatible with the common market in accordance with Article 87(2)(b) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The State aid amounting to EUR 55 727 which Austria intends to pay to an Austrian air carrier as compensation for losses sustained after 14 September 2001 following the closure of certain parts of airspace is not compatible with the common market.

The aid concerned may therefore not be paid.

Article 2

However, the aid amounting to EUR 1 983 333 which Austria intends to pay to Austrian Airlines is compatible with the common market in accordance with Article 87(2)(b) of the Treaty.

Payment of this aid is therefore approved.

Article 3

Austria shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with this Decision.

Article 4

This Decision is addressed to the Republic of Austria.

Done at Brussels, 30 April 2003.

For the Commission
Loyola DE PALACIO
Vice-President