

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 13 March 1996

concerning fiscal aid given to German airlines in the form of a depreciation facility

(Only the German text is authentic)

(Text with EEA relevance)

(96/369/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 of the European Economic Area, and in particular Article 62 (1) (a) thereof,

Having given notice to the parties concerned to submit their comments in accordance with the said Articles, and having regard to those comments,

Whereas:

THE FACTS

I

Pursuant to Article 93 (1) of the Treaty the Commission asked the German Government, by letters dated 7 March 1988, 16 August 1988, 18 December 1988 and 9 April 1991, for information about aid granted in Germany to airlines. The German Government replied to these requests by letters of 13 April 1988, 1 March 1989 and 22 August 1991 respectively, describing, in particular, the special depreciation facility set up under Article 82f of the income tax regulation (*Einkommensteuereinführungsgesetz*).

verordnung). By letters of 5 May and 28 July 1992 the Commission asked the German authorities to provide further particulars of the inception, application, economic impact and beneficiaries of the Article 82f depreciation scheme. The German Government replied by letters of 16 June and 3 September 1992 respectively.

The information received has enabled the Commission to form a good picture of this depreciation scheme. It became part of German tax law in 1965 to boost the competitiveness of airlines exposed to international competition, as can be seen from the thirteenth report to the German Parliament (Bundestag) on subsidies dated 11 November 1991. It proved to be an effective financial support measure and was thus extended for a period of five years until 31 December 1994 by the *Steuerbereinigungsgesetz* of 1986. A further extension of five years to 31 December 1999 was notified to the Commission by letter of 8 September 1993 (see below).

The content and the conditions governing the application of Article 82f need to be explained. As in most other Member States, German tax law has two general systems of fixed asset depreciation, and the choice is left to the taxable company under certain conditions: straight-line depreciation and accelerated depreciation. Article 82f introduces a third system, albeit of more specific usage, which is additional to straight-line depreciation but excludes accelerated depreciation for the asset in question.

This special depreciation scheme applies to aircraft used for commercial purposes for the international transport of goods or passengers or for other service activities performed aboard. It relates solely to aircraft registered in Germany, which cannot, moreover, be disposed of for six years following acquisition. If all these conditions are met, the owners of the aircraft have the possibility of proceeding with special depreciation of not more than 30 % of the purchase price during the year following acquisition and the four subsequent years. This special depreciation amount may be used entirely during the first year or spread, at the airline's discretion, over the first five years.

This special depreciation facility, which is additional to the usual straight-line depreciation, has the effect of reducing the taxable amount for the year in question. It cannot, however, lead to a depreciation of the asset in question of more than 100 % of the purchase price and it does not affect the period of depreciation. When the special depreciation mechanism is used, the net book value of the asset will then be depreciated as a function of its probable remaining period of use. It should be remembered that depreciation of an asset is in principle based on a probable timetable for depreciation of that asset, the duration of which is left to the discretion of the taxpayer. The normal period of depreciation of an aeroplane varies between 10 and 15 years depending on the airline.

It should be noted that the provisions of Article 82f apply not only to aircraft but also, with less restrictive conditions than for aircraft, to merchant ships and fishing boats. The report to the Bundestag of 11 November 1991 concludes that the system is a good investment incentive in that it enables airlines to avoid excessive fluctuations in their financial results and tax liability. The report puts the annual tax saving to beneficiary airlines and shipping companies as a whole at DM 10 million. However, the German authorities have not been able to give a breakdown of this figure between the various companies concerned.

In the maritime sector the provisions of Article 82f have so far been covered by the Community guidelines on aid to shipbuilding. The last decision taken in this respect by the Commission (for 1995) dates back to 1 March 1995 and was sent to the German authorities on 6 March 1995 (Case N 641/93).

II

By letter of 21 April 1993 the Commission, acting on the basis of Article 93 (1) of the Treaty, informed the German Government that in its opinion the Article 82f special depreciation scheme amounted to fiscal aid affecting trade between the Member States and distorting competition within the common market. The letter was published in the *Official Journal of the European Communities* (1). It also found that this aid could not be regarded as compatible with the common market by virtue of Article 92 (2) and (3) of the Treaty. The Commission therefore proposed in that same letter that the German authorities should discontinue the aid, in the civil aviation sector only, by 1 January 1994 at the latest. In the absence of information showing that the aid in question is compatible with the common market, the Commission also pointed out to the German authorities that it reserved the right to initiate the procedure laid down in Article 93 (2) of the Treaty. The case has been registered under number E 4/93.

On 28 July 1993, the German Government replied to the Commission that it had no intention of discontinuing the Article 82f scheme because it regarded it as compatible with the common market by virtue of Article 92 (3). It pointed out that this scheme, which enables German airlines to spread their tax burden more evenly, forms part of the total German tax arrangements and that its abolition would unilaterally penalize German airlines in that similar measures were in force in the other Member States. The German Government also stated that this scheme was an incentive to airlines to buy new aircraft causing less pollution, thereby contributing to environmental protection and helping the Community aircraft manufacturing industry.

Then, by letter of 8 September 1993, the German Government notified the Commission, pursuant to Article 93 (3) of the Treaty, of a further extension of the Article 82f special depreciation scheme for the period from 1 January 1995 to 31 December 1999. This further extension, which derives from the provisions of Articles 1 and 8 of the *Standortsicherungsgesetz*, was regarded as notified aid and registered accordingly by the Secretariat-General of the Commission on 12 October 1993 under number N 640/93. In support of their notification the German authorities stressed their determination to keep Germany competitive in this field and to provide support for regional carriers. They again highlighted the role of

(1) OJ No C 289, 26. 10. 1993, p. 2.

this scheme as an incentive for the purchase of new aircraft which are more environment-friendly. They put the annual tax reduction brought about by the Article 82f scheme, for airlines alone, at DM 10 million, for the period of 1995 to 1999.

Under the circumstances, the Commission decided on 8 December 1993 to initiate the procedure provided for in Article 93 (2) of the Treaty in respect of both matters. The procedure initiated concerned both the extension of the tax arrangements in question to 31 December 1994 (Case E 4/93) and the further extension for the period from 1 January 1995 to 31 December 1999, as notified on 8 September 1993 (Case N 640/93). The Commission gave as reasons for its decision to initiate the procedure the fact that the tax measure established by Article 82f amounted to aid within the meaning of Article 92 (1) of the Treaty since it was a sectoral tax measure derogating from general German tax arrangements and that, *prima facie*, none of the exemptions provided for in Article 92 (3), and in particular point (c), seemed to apply in this instance.

By letter of 31 December 1993 the Commission informed the German Government of its decision to initiate the procedure and asked it to submit its comments. This letter was published in the *Official Journal of the European Communities*⁽¹⁾ and the other Member States and interested parties were asked to submit their comments pursuant to Article 93 (2) of the Treaty.

However, the Commission took no final decision on this dual case before 31 December 1994. Thus, the extension up to that date of the measure in question (Case E 4/93), which thus amounted to an existing measure, was accepted *de facto* by the Commission. The Commission sent a letter to this effect to the German authorities on 10 March 1995.

III

Following initiation of the procedure, Germany, by letters of 24 January 1994 (communication of 19 January 1994) and 28 February 1994 (communication of 18 February 1994), and four other interested parties, namely, Airbus Industrie, the British airline British Midland, the German association Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen (ADL) and the German company Hapag-Lloyd Fluggesellschaft mbH, submitted comments. Airbus Industrie refers to aid given to the American aeronautical industry through the system of 'foreign sales corporation' and recommends that the Commission exercise the utmost prudence in this matter. British Midland takes the view that Article 82f tax measure constitutes aid which is

incompatible with the common market because of the edge it gives German carriers in the liberalized Community market for civil aviation. In contrast, the German Government and the two other interested parties claim that the measure in question does not amount to aid within the meaning of Article 92 (1) of the Treaty and that it should, in any case, benefit from the derogation provided for by points (b) and (c) of Article 92 (3). They put forward several arguments in this connection, including some previously set out by the German Government, which can be summarized as follows:

- similar aid arrangements exist in other Member States. Consequently, the Commission cannot act against one Member State without violating the principle of equality,
- similar arrangements also exist in non-Community countries, in particular the United States, and the Committee of Wise Men set up by the Commission in 1993 specifically proposed measures to promote the accelerated depreciation of aircraft in the Member States to enable Community airlines to combat competition from airlines from non-Community countries,
- it is not an established fact that the measure distorts competition and affects trade between the Member States since it does not improve the position of German airlines on the Community market. Furthermore, compared with the systems in other Member States, the German tax system is, on the whole, not favourable to the companies,
- the special depreciation scheme in question does not give companies any advantage over straight-line or accelerated depreciation systems. In particular, the total amount depreciated is identical and the budget of the German State does not, in the final analysis, suffer any reduction in tax revenue since payment of the tax is simply deferred,
- Article 82f, which has similar effects to accelerated depreciation, is a general measure of German tax law,
- Article 82f is an inseparable part of the general German tax system and the Commission cannot call it into question by virtue of provisions governing State aid in the absence of tax harmonization at Community level, which in this instance would mean invoking Article 101 of the Treaty,
- the measure aims to protect the environment and promote civil aviation and the aeronautical industry in the Community by encouraging the purchase of new, less polluting aircraft.

The observations of the other interested parties have been brought to the knowledge of the German Government, which commented on them by letter to the Commission of 3 May 1994.

⁽¹⁾ OJ No C 16, 19. 1. 1994, p. 3.

The German Government also submitted further comments in this matter by letters of 11 August 1994, 12 January 1995 (communication of 18 October 1994), 2 February 1995 and 4 October 1995 (communication of 28 September 1995).

LEGAL ASSESSMENT

IV

On the extension of the measure in question up to 31 December 1994

Extension of the validity of the provisions of Article 82f up to 31 December 1994 for civil aviation, which led first of all to a proposal for appropriate measures and then to initiation of this procedure, amounts to existing aid within the meaning of Article 93 (1) of the Treaty. A final decision by the Commission with regard to existing aid takes effect only from the date of its adoption. Therefore, given that no final decision from the Commission was forthcoming in this matter before 31 December 1994, the procedure, which has become devoid of purpose, should be closed.

The result is that the German companies concerned can apply Article 82f as regards their taxable income for 1994, as declared in 1995.

V

On the extension of the measure in question from 1 January 1995 to 31 December 1999

Under Article 92 (1) of the Treaty and Article 61 (1) of the Agreement on the European Economic Area, aid granted by the States or by means of State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain companies or certain products is incompatible with the common market and with the Agreement to the extent that it affects trade between Member States and between the contracting parties.

In this case the special depreciation facility provided for by Article 82f of the *Einkommensteuerverordnung* enables beneficiary companies, where certain conditions are met, to reduce the amount of their taxable income and thereby the amount of tax that would normally be due any given year without recourse to these provisions. It therefore provides the beneficiary companies with a financial advantage the cost of which is directly borne by the budget of the German State.

The German authorities and two of the other interested parties claim that use of this special depreciation scheme does not have the effect of cancelling payment of the tax to the amount of the respective depreciation provision but simply of deferring it. However, as with the system of accelerated depreciation, the advantage gained in applying Article 82f is precisely the fact of deferring payment of tax. Whilst at the end of the period of depreciation of an asset the sum of the nominal amounts of tax paid to the German inland revenue over that period is identical regardless of the method of depreciation employed the same cannot be said of the sum of the present value of this tax which takes account of interest rates. All things being equal, in the final analysis the net financial advantage arising out of using accelerated depreciation or the Article 82f mechanism is indeed real, compared with straight-line depreciation, for companies making profits, even if this advantage is less than it seems at first sight.

The German authorities and the other interested parties also claim, even taking account of the present value of deferred taxation, that the overall gain from deferring payment of tax is not greater, using the Article 82f mechanism, than the gain produced by accelerated depreciation. Even if this is accepted to be true this argument takes no account of the enormous flexibility provided by the provisions of Article 82f. It is not always in companies' interests to opt for accelerated depreciation, especially companies running at a loss. Whereas the choice of accelerated or straight-line depreciation is made solely on acquisition of the asset, the special depreciation facility provided for in Article 82f can be employed at any time during the first five years following acquisition, and that is the real advantage of Article 82f compared with the systems of accelerated depreciation or, even more so, straight-line depreciation. This flexibility of use enables beneficiary airlines, for example, to make changes more readily in the management of their fleets. It permits them above all to increase the amount of depreciation at their discretion during highly profitable years. By juggling the depreciation provisions in this way between profit and loss-making years, companies cannot only spread but also reduce their taxable income and even cut out any taxation in some cases. Whilst German tax law allows companies to carry over indefinitely their losses to subsequent profit-making years it does not always authorize profits to be carried over to any future loss-making years. These can only be set against the non-distributed profits of the two previous years to an amount of DM 10 million. At the end of the day the advantages derived by companies through Article 82f, which introduces an extra possibility of depreciation in addition to accelerated and straight-line depreciation, cannot be denied.

The German authorities and other interested parties further claim that the method of depreciation provided for by Article 82f is a general measure of German tax law and that it is inseparable from the German tax system as a whole. It can therefore be examined only on the basis of Article 101 of the Treaty as part of harmonization at Community level and not on the basis of Articles 92 and 93 of the Treaty.

To differentiate between State aid and general measures the Treaty provides the Commission only with the criterion of specificity, aid being defined in Article 92 of the Treaty as measures 'favouring certain undertakings or the production of certain goods'. A comparison should therefore be made, within one and the same Member State, between the treatment of companies benefiting from the measure in question and the general system applied to companies which are in the same objective position. Whilst each measure has to be assessed on a case-by-case basis, the Commission, in the light of the rulings of the Court of Justice, takes the general view that measures which derogate from the general rule constitute State aid where such derogation is not justified by the nature or general scheme of the system (Judgment of 2 July 1974 in Case 173/73, *Italy v. Commission*)⁽¹⁾. In terms of taxation the Commission takes the view that measures derogating from the general rule do not qualify as State aid where they are economically justified in respect of the efficiency of the system. This is usually reflected in the fact that such measures are not applied solely to specific sectors, are based on objective and horizontal criteria or conditions, and are not limited in time.

In the case at issue it has to be said that the provisions of Article 82f have a strictly limited scope on several counts. First, they apply only to certain clearly defined depreciable assets (merchant ships, fishing boats and aircraft) to the exclusion of all other assets. Furthermore, where aircraft are concerned, the provisions subject application of the measure to compliance with three conditions: use for commercial purposes for the international carriage of goods or passengers or for other service activities provided abroad; registration in Germany; and non-disposal during a period of six years following acquisition. In view of these various restrictions Article 82f must be regarded as derogating from the general measures of accelerated or straight-line depreciation. The abovementioned report to the Bundestag also recognizes that the measure sets out to favour three sectors in the German economy (merchant shipping, fisheries and civil aviation) which are particularly exposed to international competition. Nor do these

sectoral provisions have indefinite temporal scope since they are periodically carried over for a number of years. They are not based on objective criteria and seem to be in no way indispensable to the smooth functioning of the German tax system. Neither the physical characteristics of the aircraft nor their conditions of use on the market nor any other factor warrants recourse to a method of depreciation other than accelerated or straight-line. The Commission therefore takes the view that the measure is not justified by the nature or general scheme of the system. Consequently, it can be examined on the basis of Article 92 of the Treaty.

Moreover, in its decision on the application of the provisions of Article 82f to the maritime sector, as addressed to the German Government on 11 November 1994, the Commission has already stated that the provisions in question amounted not to a general measure but to aid within the meaning of Article 92 of the Treaty and Article 61 of the EEA Agreement. This decision was not challenged by the German authorities.

The advantage deriving from Article 82f, which relates, moreover, exclusively to aircraft used on international flights, affects trade between Member States because of the very nature of air transport and its international dimension. This trade is affected more keenly since the entry into force on 1 January 1993 of Council Regulations (EEC) No 2407/92⁽²⁾, (EEC) No 2408/92⁽³⁾ and (EEC) No 2409/92⁽⁴⁾ liberalizing the Community market in civil aviation (the 'third air transport package'). Furthermore, the special depreciation facility provided for by Article 82f distorts competition within the common market in that it favours only German airlines' international services, and in particular their intra-Community operations, thereby putting them in a stronger competitive position over those of other Community carriers who do not receive any similar aid measures. Airlines not taxable in Germany are outside the scope of the scheme, as are companies licensed in Member States other than Germany, since Article 82f requires that the aircraft are registered in Germany. It should be recalled that the German authorities, like the authorities of the other Member States, require that air carriers to which they issue an operating licence should register their aircraft in their national register pursuant to Article 8 of Regulation (EEC) No 2407/92. However, since an operating licence may be issued by the German authorities only to undertakings with their principal place of business in Germany,

⁽¹⁾ ECR [1974], p. 709, paragraph 33.

⁽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.

pursuant to Article 4 of that Regulation, this means, in the final analysis, that only airlines which are not only subject to taxation in Germany but also have their principal place of business there can benefit from the provisions of Article 82f.

The Commission concludes from all the above points that the provisions of Article 82f amount to State aid within the meaning of Article 92 (1) of the Treaty and Article 61 (1) of the EEA Agreement. The fact that comparable tax measures might exist in the other Member States is of no consequence since any such measures could themselves be subject to the procedures laid down in Article 93 of the Treaty (Judgment of the Court of Justice of 22 March 1977 in Case 78/76, *Steinike & Weinlig v. Germany*)⁽¹⁾. According to the information in the Commission's possession, no Member State other than Germany has introduced a special depreciation system of this kind. Likewise without consequence is the fact that similar fiscal measures are said to exist in non-Community countries, which, moreover, has not been established, or that the Committee of Wise Men set up by the Commission, whose conclusions, however, are in no way binding on the Commission, recommended measures to promote accelerated depreciation of aircraft in the Member States of the Community since the measure in question favours only certain undertakings (Judgment of the Court of Justice of 7 June 1988 in Case 57/86, *Hellenic Republic v. Commission*)⁽²⁾.

It is important to recall in this connection that the Court has already ruled that the fact that by establishing a preferential rediscount rate in favour of certain products a Member State intended to align that rate on those practised in the other Member States does not change the fact that the measure in question amounts to aid (Judgment of the Court of Justice of 10 December 1969 in Joined Cases 6 and 11/69, *Commission v. France*)⁽³⁾.

The measure in question must therefore be examined in the light of Article 92 (2) and (3) of the Treaty and Article 61 (2) and (3) of the EEA Agreement.

VI

The provisions of Article 92 (2) of the Treaty and Article 61 (2) of the EEA Agreement do not apply to the Article 82f mechanism in that this is neither aid of a social nature granted to individual consumers nor aid to make good the damage caused by natural disasters or other exceptional occurrences. Nor is it aid granted to the economy of certain regions of Germany affected by the former division of Germany since it covers all of

Germany. Nor have the German authorities in any way invoked this provision.

The provisions of points (a) and (c) of Article 92 (3) of the Treaty and points (a) and (c) of Article 61 (3) of the EEA Agreement, as regards regional aid, cannot be applied in this instance because the aid is not intended to support the development of certain economic regions. As stated above, it has the nature of sectoral aid which applies uniformly throughout Germany, which in addition is one of the most prosperous Member States in the Community. Nor do the provisions of point (b) of Article 92 (3) apply as the aid in question is not intended to remedy a serious disturbance in the German economy.

In their comments the German authorities and two of the other interested parties state that the special Article 82f depreciation scheme should benefit from the exemptions provided for by the provisions of point (b) of Articles 92 (3) of the Treaty and point (b) of Article 61 (3) of the EEA Agreement since they promote the implementation of a major European project as well as by the provisions of point (c) of Article 92 (3) and point (c) of Article 61 (3), as regards sectoral aid. They point out that the aid in question constitutes investment aid to encourage the purchase of new, less polluting aircraft and to boost the Community aeronautical industry. They also put forward the need to support Community civil aviation and even the development of international air transport.

Nonetheless, the Commission does not believe that this type of fiscal aid can be regarded as compatible with the provisions of points (b) and (c) of Article 92 (3) of the Treaty and of points (b) and (c) of Article 61 (3) of the EEA Agreement. First, the aid in question is not allocated to a specific project or programme, any more than it is expressly reserved for the purchase of aircraft of a particular type or with specific environmental characteristics. Furthermore, the various objectives or beneficial effects of the measure, as set out by the German authorities and the other interested parties, appear to be above all the result of a measure taken unilaterally by the German State outside any framework for Community action. As regards point (b) of Article 92 (3) of the Treaty and point (b) of Article 61 (3) of the EEA Agreement, relating to an important project of common European interest, the Commission has made any benefit deriving from these provisions dependent on meeting all four of the following criteria:

- the aid must promote a project, 'promote' being taken to mean action which contributes to implementation of the project,
- it must be a specific, precise and clearly defined project,
- the project must be important both quantitatively and qualitatively, especially qualitatively,

⁽¹⁾ ECR [1977], p. 595, paragraph 24.

⁽²⁾ ECR [1988], p. 2855, paragraph 10.

⁽³⁾ ECR [1969], p. 523, paragraph 21.

— the project must be 'of common European interest' and as such be of benefit to the whole of the Community.

In this case the points put forward by the German authorities, even assuming that they can be described as a 'project', are neither precise nor clearly defined. The measure in question cannot therefore take advantage of the provisions in question.

As regards more particularly point (c) of Article 92 (3) of the Treaty and point (c) of Article 61 (3) of the EEA Agreement, as regards sectoral aid, restriction of the scope of the aid, on the one hand, solely to air carriers registered in Germany and with their principal place of business there and, on the other, solely to aircraft used for international transport, leads to the definite conclusion that in the instant case conditions of trade are altered in a fashion contrary to the common interest, given the growing importance of trade by air transport in the liberalized common market for civil aviation. It should be recalled that the third air transport package completes the liberalization effort undertaken for several years in the intra-Community civil aviation sector. It creates an internal market, the smooth operation of which is undetermined by a preferential tax scheme set up for the benefit of the airlines of a single Member State. Furthermore, in a communication concerning the application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aid in the aviation sector⁽¹⁾ the Commission defined precisely the conditions under which aid granted to an airline could be regarded as compatible with the common interest in accordance with the provisions of point (c) of Article 92 (3). This possibility is thus open only to aid granted to companies in difficulty in so far as this aid is an integral part of a programme of measures designed to restore the financial viability and competitiveness of the companies concerned within a reasonable period of time. In the instant case the aid is in no way intended to help rescue a particular company, nor does it accompany any restructuring or recovery plan for one or more clearly identified companies.

It follows from all the above that the aid measure in question does not satisfy the conditions attached to the exceptions provided for in Article 92 (2) and (3) of the Treaty or Article 61 (2) and (3) of the EEA Agreement. Germany should therefore be ordered to discontinue this aid which is incompatible with the common market.

Finally, the decision taken by the Commission on the same subject on 29 November 1995 and notified to the

German authorities on 15 December 1995 should be withdrawn as the German version contained numerous errors, although the substance was the same as this Decision,

HAS ADOPTED THIS DECISION:

Article 1

The extension from 1 January 1995 to 31 December 1999 of the provisions of Article 82f of the German tax law (*Einkommensteuereinführungsgesetz*) establishing a special depreciation facility for aircraft constitutes State aid which is incompatible with the common market within the meaning of Article 92 of the EC Treaty and Article 61 of the EEA Agreement.

Article 2

Germany is hereby called upon to discontinue the aid measure referred to in Article 1 as from 1 January 1995.

Article 3

Germany shall inform the Commission within two months of notification of this Decision of the measures it has taken in order to comply with it.

Article 4

The procedure relating to the provisions of the German tax law referred to in Article 1, in the version in force up to 31 December 1994, is terminated.

Article 5

The Commission Decision of 29 November 1995, notified to the German authorities on 15 December 1995, is hereby withdrawn.

Article 6

This Decision is addressed to the Federal Republic of Germany.

Done at Brussels, 13 March 1996.

For the Commission

Neil KINNOCK

Member of the Commission

⁽¹⁾ OJ No C 350, 10. 12. 1994, p. 5.