

COMMISSION DECISION**of 11 December 2002****concerning State aid scheme C 42/2002 (ex N 286/2002) which France proposes to implement to assist French airlines***(notified under document number C(2002) 4833)***(Only the French text is authentic)****(Text with EEA relevance)****(2003/196/EC)**

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having invited interested parties to submit their comments in accordance with the aforementioned Articles ⁽¹⁾,

Whereas:

air space were closed for several days. This was particularly true of United States air space, which was entirely off limits from 11 to 14 September 2001 and was only gradually reopened to navigation as of 15 September 2001. Other States were prompted to take similar measures on all or part of their territory.

(6) Accordingly, during this initial period, airlines were forced to cancel flights using the air space concerned. In addition, they suffered losses as a result of disruption to other traffic and the impossibility of routing some passengers to their final destination.

I. PROCEDURE

- (1) By fax dated 11 April 2002, recorded on 12 April 2002 (TREN (2002) A/56617), France notified the Commission of a compensation scheme for losses in the aviation sector for the period starting on 15 September 2001.
- (2) By letter dated 5 June 2002, the Commission informed France of its decision to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the said aid.
- (3) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽²⁾. The Commission invited interested parties to submit their comments on the aid in question.
- (4) The Commission received no comments on this matter from interested parties.

(7) In view of the scale and sudden nature of these events, and the costs they engendered for the airlines, the Member States were prompted to envisage special compensation arrangements.

(8) France's compensation scheme for losses sustained from 11 to 14 September 2001 received Commission approval ⁽³⁾. The decision was taken on the basis of Article 87(2)(b) of the Treaty and the guidelines set out 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). The budget authorised for France was EUR 54,9 million.

New scheme notified by France

II. DETAILED DESCRIPTION OF THE AID*Background*

- (5) As a result of the terrorist attacks perpetrated in the United States on 11 September 2001, certain parts of

(9) The notified scheme covered by the present decision is an extension of the scheme approved for the period ending on 14 September 2001. It provides compensation for losses for the period from 15 to 19

⁽¹⁾ OJ C 170, 16.7.2002, p. 11.

⁽²⁾ See footnote 1.

⁽³⁾ Decision of 30 January 2002 on aid N 806/2001 (OJ C 59, 6.3.2002, p. 25).

⁽⁴⁾ COM (2001) 574 final, 10.10.2001.

September 2001 sustained by scheduled airlines and charter companies, and from 15 to 30 September 2001 by business airlines.

Losses relating to other airline activities, such as maintenance or the provision of on-board services, are not eligible under this measure.

- (10) In support of their notification, the French authorities contend that the closure of United States air space had direct consequences for airlines beyond 14 September 2001, as it was only as of 20 September that the scheduled airlines were able to resume a stabilised flight schedule while complying with the new security measures imposed by the American authorities as a condition for entering their air space. Similar restrictions are claimed to have affected business airlines until the end of September 2001.
- (11) In point 2.1 of the notification, the French authorities specify that the new scheme does not alter the budgetary allocation of EUR 54,9 million approved in the Commission's decision regarding the compensation scheme for losses following the closure of air space from 11 to 14 September 2001.
- (12) The eligible airlines are air carriers with a licence to operate as such or an air transport authorisation issued by the French authorities and valid on 11 September 2001. To qualify for compensation, operating losses sustained by airlines must be directly linked to the access restrictions to United States air space applied over the period from 15 to 19 September 2001 ⁽⁵⁾ following the attacks of 11 September 2001, and must relate to one of the following:
- the airline's inability to carry out a flight owing to the restrictions imposed by the United States,
 - the disruption those restrictions caused to the operation of the other flights of that airline or other airlines,
 - the fact that some passengers on other flights of that airline or other airlines were unable to reach their final destination.
- (13) However, losses resulting from flight cancellations at the airline's own initiative, or from journey cancellations by passengers on personal grounds, are not considered to qualify for compensation.
- (14) Only activities linked to public passenger transport or freight transport may be considered for compensation.
- (15) The maximum compensation provided is to be calculated with reference to those of the airline's routes or networks on which incurred operating losses may be compensated. Nonetheless, loss of turnover eligible for compensation under the scheme may relate to airlines' entire networks, in both North America and in Europe or in other parts of the world.
- (16) For these routes or networks, the calculation will take into account:
- loss of turnover recorded during the period from 15 to 19 September 2001 ⁽⁶⁾ compared with the situation which would have been considered normal had the events of 11 September 2001 not occurred; loss of turnover is to be calculated by comparing the traffic recorded by each airline during the five days in question with that recorded by the same airline over the same five days of the first week of September, adjusted to take account of the trend seen in the corresponding period in 2000;
 - costs which would have been incurred had activity not been affected by the events of 11 September 2001, and which were avoided;
 - additional operating costs borne by the airlines as a result of the suspension of their activity, and which are not covered by insurance.
- (17) The maximum amount of compensation may not exceed 5/365ths of an airline's turnover.
- (18) The French authorities indicate that they consulted all the eligible airlines. As a result of this process they propose to grant compensation to eight Community French airlines for a total of around EUR 20,96 million ⁽⁷⁾. They also indicate that they envisage compensation for extra-Community French airlines based in French Polynesia ⁽⁸⁾ should the individual aid planned for the Community airlines be accepted by the Commission.

⁽⁵⁾ From 15 to 30 September 2001 for business airlines.

⁽⁶⁾ From 15 to 30 September 2001 for business airlines.

⁽⁷⁾ [...].

⁽⁸⁾ [...].

- (19) France told the Commission that this detailed information on each proposed recipient has been sent to allow a case-by-case examination; the French authorities believe this approach to be in line with that laid down by the Transport Council on 16 October 2001⁽⁹⁾ for assessing compensation beyond 14 September 2001.
- (20) The Commission decided to initiate the formal examination procedure in the light of doubts as to the compatibility of such an aid scheme with the Treaty, not just because it extends beyond the period stipulated in paragraph 35 of the communication of 10 October 2001, but also, and above all, because of the absence of exceptional occurrences and the different nature of the losses being compensated after 14 September 2001.

III. COMMENTS FROM INTERESTED PARTIES

- (21) No interested third party submitted comments to the Commission within the allotted one month period.

IV. COMMENTS FROM FRANCE

- (22) The French authorities submitted no further comments to the Commission within the one-month period stipulated by the decision to initiate the procedure or within the additional one-month period they requested by fax dated 3 July 2002, registered by the Commission under the number TREN (2002) A/61839. The Commission also notes that at 1 November 2002 no comments had been received.

V. ASSESSMENT OF THE AID

Existence of aid

- (23) Pursuant to Article 87(1) of the Treaty, 'save as otherwise provided ..., any aid granted by a Member 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, be incompatible with the common market.'
- (24) Subventions to airlines constitute an allocation of State resources to those airlines and thus represent a definite economic advantage for them.
- (25) The measure covered by this decision and relating to air transport is by nature selective. Moreover, the eight

airlines due to receive aid under the scheme have been explicitly identified (see recital 18 and footnote 6).

- (26) In the context of an air market liberalised since the 'third package' entered into force on 1 January 1993⁽¹⁰⁾, a Member State's airlines find themselves competing with other airlines from other Member States. Specifically, the eight airlines eligible for the aid operate actively on the Community market. The subsidies proposed for them, and the advantage this would give them, would affect trade between Member States and are liable to affect competition.
- (27) These measures, which constitute State aid, are compatible with the common market only if they qualify for one of the derogations provided for.

Legal basis for assessing the aid

- (28) Having examined the scheme in question in the light of its provisions and its possible application to the eight potential recipients identified (see recital 18 and footnote 6), the Commission does not consider any of the derogations provided for in Article 87(2) and (3) to be applicable in this instance.
- (29) The derogations provided for in Article 87(2)(a) and (c) of the Treaty do not apply because the aid in question is neither aid of a social character granted to individual consumers nor aid granted to certain areas of the Federal Republic of Germany.
- (30) The derogations provided for in Article 87(3)(a) and (c) of the Treaty cannot be considered as the aid is neither aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment nor aid to facilitate the development of certain economic activities or of certain economic areas.
- (31) Lastly, the derogations provided for in Article 87(3)(b) and (d) of the Treaty, for aid to promote the execution

⁽⁹⁾ See recital 40.

⁽¹⁰⁾ Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ L 240, 24.8.1992, p. 1), and Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (OJ L 240, 24.8.1992, p. 8).

of an important project 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, respectively, are not relevant in this instance.

(32) Pursuant to Article 87(2)(b) of the Treaty, 'aid to make good the damage caused by natural disasters or exceptional occurrences' is compatible with the common market. In the communication of 10 October 2001 ⁽¹¹⁾, the Commission considers that the events of 11 September 2001 may be described as exceptional occurrences within the meaning of Article 87(2)(b) of the Treaty.

(33) In point 35 of the communication of 10 October 2001, the Commission sets out the conditions it believes must be met in order for compensation relating to these events to be considered to be in line 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 a given Member State,
- 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 4/365ths of the airline's turnover.'

Compatibility within the meaning of Article 87(2)(b) of the Treaty

(34) The notified scheme is designed to compensate for losses during the period up to 19 September 2001 for scheduled airlines and up to 30 September 2001 for business airlines. It thus clearly exceeds the frame considered admissible in the communication of 10 October 2001 for applying Article 87(2)(b) of the Treaty, that frame being limited to the period from 11 to 14 September 2001 and confined to losses, directly linked to the closure of air space and already approved, sustained during that period.

(35) While the Commission has already stated, in point 35 of the communication of 10 October 2001, that the closure of United States air space from 11 to 14 September 2001 and the compatibility of compensation for losses resulting from that closure constitute an 'exceptional occurrence', it has not said the same of other damage indirectly linked to the said closure. This is the case, for instance, of losses sustained by airlines following the reopening of air space on 15 September.

(36) The Commission explained in the communication of 10 October 2001 that losses eligible for compensation must concern 'only the costs incurred ... during the days 11 to 14 September 2001 following the grounding of air traffic decided by the American authorities.' In their notification, the French authorities describe in detail the additional security measures imposed by the American authorities, including searching of hold baggage at check-in, close surveillance of aircraft and screening of staff, plus the checks those authorities intended to make on the implementation of these measures, and indicate that 'the deadlines for implementing these measures prevented the airlines from resuming all their flights on 15 September.'

(37) The French authorities thus recognise that, after 14 September 2001, the situation was no longer marked by traffic disruption but by tighter operating arrangements for airlines in terms of security measures. Though unusual, such additional costs cannot be considered to be exceptional occurrences within the meaning of Article 87(2)(b) of the Treaty. Similar additional costs or operating constraints have arisen or persist where conflicts in certain geographical areas result in an overflying ban, e.g. the Balkans, or in respect of air services to countries posing a specific political risk, without this giving rise to any eligibility for aid.

⁽¹¹⁾ See point 33 of the communication.

- (38) The Commission cannot therefore accept that the indirect repercussions of the attacks of 11 September 2001, such as difficulties in operating air routes as of 15 September, be placed on the same level as the direct repercussions, i.e. the complete closure of some air space until 14 September and the impossibility of operating routes which used that space. The indirect repercussions of the attacks were felt, and continue to be felt, in many sectors of the world economy to differing degrees, but as with any other economic or political crisis, these difficulties, however burdensome, cannot be looked upon as exceptional occurrences such as would allow application of Article 87(2)(b) of the Treaty.
- (39) Moreover, the compensation ceiling of 5/365ths of an airline's annual turnover, while corresponding in spirit to the 4/365ths ceiling the Commission specified for the four days from 11 to 14 September, would lead to a given airline being able to receive maximum compensation of 9/365ths of its annual turnover. The limits set in the communication of 10 October 2001 would thus be exceeded very significantly, and this would also mean that the circumstances referred to in Article 87(2)(b) of the Treaty could not be deemed to obtain.
- (40) Regarding the conclusions of the Transport Council of 16 October 2001, to which France refers in support of its notification, the Commission points out that these only have indicative policy value and are not legally binding in the context of examining the compatibility of aid. Moreover, while in point 7 of the conclusions the Council invites the Commission, for the period following 14 September, to examine 'on a case by case basis the compensation which could be granted on the basis of objective criteria to make up for restrictions imposed to European airlines by the country of destination,' it also indicates that 'any aid or compensation may not lead to distortion of competition between operators.' In assessing equality of treatment between operators, which it must ensure, the Commission thus notes that no other proposal for an

equivalent period has been notified by the other Member States for their air operators. What is more, the Commission, in its decisions in this area ⁽¹²⁾ has yet to authorise any compensation beyond the period ending on 14 September 2001.

VI. CONCLUSIONS

- (41) In view of the foregoing, the Commission concludes that the notified measure is incompatible with the common market and is not eligible for the derogation provided for in Article 87(2)(b), as interpreted in the communication of 10 October 2001,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which France proposes to implement in favour of French airlines to provide compensation beyond 14 September 2001 for the losses those airlines sustained on account of the partial closure of air space is incompatible with the common market.

For that reason, the aid may not be implemented.

Article 2

France shall inform the Commission within two months of the notification of this decision of the measures taken to comply with it.

Article 3

This decision is addressed to the French Republic.

Done at Brussels, 11 December 2002.

For the Commission
Loyola DE PALACIO
Vice-President

⁽¹²⁾ See the Decisions of 12 March 2002 on aid N 854/2001 granted by the United Kingdom and 2 July 2002 on aid N 269/2002 granted by Germany, available for consultation at: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/transport.htm.