

## COMMISSION DECISION

of 21 January 1998

concerning aid granted by the Flemish Region to the company Air Belgium and the tour operator Sunair in connection with the use of Ostend Airport

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(98/337/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

Having served notice on the interested parties, in accordance with the provisions of the abovementioned Articles, to pass on their comments, and in view of those comments;

Whereas:

## THE FACTS

## I

In letters dated 1 and 20 June 1995 respectively the Belgian Tour Operators' Association lodged a complaint with the Commission against the subsidies granted by the Flemish Region to tour operators and airlines operating non-scheduled flights to and from Ostend Airport. As a result of the complaint the Commission conveyed that information to the Belgian authorities by mail on 15 September 1995 and then asked them to answer the two following questions in order to enable the Commission to examine the matter in the light of Articles 92 and 93 of the Treaty with regard to State aids.

- What action has the Flemish Region taken in order to assist tour operators and airlines using Ostend Airport? On what date did that action take effect? Would you please supply a copy of the regulations or decisions introducing such action.
- Since such action was initiated what amounts have been paid to the tour operators and airlines using Ostend Airport? Would you please supply a detailed table of the amounts in question, broken down according to recipient company, for each year involved.

In its letter of 17 October 1995 the Belgian Government sent the Commission a detailed answer to those questions. It emerged from this that the action by the Flemish Region to assist tour operators and airlines using Ostend Airport was intended to promote charter flights from that airport. It was the outcome of an agreement reached on 1 March 1994 between (a) the Flemish Region and (b) the airline Air Belgium NV and the tour operator Sunair NV. Under that agreement Air Belgium and Sunair undertook to implement a minimum programme of 36 charter flights (corresponding to an estimated 5 202 passengers) between Ostend Regional Airport and Majorca, Alicante and Monastir during the 1994 summer season, namely between June and September. Among other things they also undertook to provide a comparable schedule of flights in 1995 and 1996. In return 'in view of the importance in economic and tourism terms of the expansion of charter flights from Flemish airports' the Flemish Region confers the following advantages (Article 3 of the agreement, paragraphs 1 to 4), more particularly in order to provide the flights in question with:

- for 1994, an exemption from landing and parking fees (Article 3(1)),
- solely for 1994 and within the limit of 7 000 passengers carried, a subsidy calculated in such a way that Air Belgium and Sunair may offer each passenger a discount of BEF 1 000 as compared with the normal fare charged at Brussels-National Airport (Article 3(2)),
- a programme promoting the flights in question, covering a maximum figure of BEF 4,5 million (2,5 million for 1994 and 1 million each for 1995 and 1996). That programme, drawn up jointly with Air Belgium and Sunair, will take the form of advertisements, posters and other activities intended to promote the regional Flemish airports of Ostend and Antwerp in general. In 1995 and 1996 it could also take the form of a further exemption from landing and parking fees (Article 3(3)),
- for 1994 only, a subsidy intended to compensate Air Belgium for the additional cost of using Ostend

Airport. That subsidy amounts to a maximum of 50 % of the real extra cost, as demonstrated by invoice and restricted to BEF 2 million (Article 3(4)).

In its reply the Belgian Government also stated:

- that the subsidy granted in 1994 in order to offer every passenger using Ostend Airport a competitive advantage of BEF 1 000 over Zaventem Airport, provided for in Article 3(2) of the contract of 1 March 1994, ultimately rose to BEF 1 426 680, or 2 124 actual passengers. That amount has so far neither been paid by the Flemish Region nor even been claimed by the joint parties to the contract,
- that the subsidy intended to compensate for the extra costs in 1994, provided for by Article 3(4) of the contract of 1 March 1994, ultimately amounted to BEF 528 693, or 15 passenger-carrying flights. The amount was claimed by Air Belgium but has still not been paid by the Flemish Region.

In view of this information the Commission, on 13 March 1996, decided in this instance to initiate the procedure provided for by Article 93(2) of the Treaty. The Commission's doubts that prompted that initiation were based on the two following factors: the exemption from landing and parking fees, and the two subsidies described above most certainly constitute State aids within the meaning of Article 92(1) of the Treaty and of Article 61(1) of the Agreement on the European Economic Area (hereinafter referred to as the 'EEA Agreement'); the absence, at first sight, of any scope for exemption under paragraphs 2 and 3 of the said Articles. In its decision to initiate the procedure the Commission also expressed the wish to obtain all of the necessary information on the content of the flight-promotion programme for 1994, 1995 and 1996, amounting to a maximum of BEF 4,5 million.

In a letter of 29 March 1996 the Commission brought its decision to initiate the procedure to the attention of Belgium and served notice on that country to comment. That letter was published in the *Official Journal of the European Communities*<sup>(1)</sup>, and the other Member States and interested parties were also invited to comment in accordance with Article 93(2) of the Treaty.

## II

No Member State other than Belgium and no interested party has commented following publication in the *Official Journal of the European Communities*.

However, in a letter dated 13 May 1996, Belgium passed on its comments following the decision to initiate the procedure, and in response to the Commission's letter of

29 March 1996. It covered the four measures identified by the Commission, and stated that:

- ultimately the exemption from the landing and parking rights for 1994 and the two following years, as provided for by Article 3(1) of the contract of 1 March 1994, had not been granted to Air Belgium NV,
- the subsidy of BEF 1 426 680 granted in 1994 in order to offer each passenger a discount of BEF 1 000 as compared with Zaventem Airport, as provided for by Article 3(2) of the contract of 1 March 1994, had so far not been claimed by the tour operator Sunair NV, which had therefore still not received that amount,
- the maximum of BEF 4,5 million intended to finance a flight-promotion programme in 1994, 1995 and 1996, as provided by Article 3(3) of the contract of 1 March 1994, was used by Ostend Airport in order to raise public awareness of the airport among passengers on non-scheduled flights. For this commercial purpose and in order to reach the holidaymakers concerned in a highly targeted manner, the airport chose to channel the advertising via the publications and publicity campaigns conducted by the tour operator Sunair NV,
- the subsidy intended to compensate for the extra cost of using Ostend Airport, as provided for by Article 3(4) of the contract of 1 March 1994, was reduced from BEF 528 683 to BEF 270 116 after negotiations had taken place. That subsidy has still not been paid.

In that same correspondence, the Belgian authorities stressed that the action by the public authorities proved, in the final event, to be narrower in scope than that intended by the contract of 1 March 1994, owing to the success of the advertising campaigns, particularly for the non-scheduled winter flights. Moreover, no other contract has been concluded since then. They added that the two subsidies amounting to BEF 1 426 680 and BEF 270 117 respectively would only be paid if authorised by the Commission.

In a letter of 10 July 1996 the Commission informed the Belgian authorities that the information contained in their letter of 13 May 1996 did not enable it to deliver a final opinion on this matter. It therefore asked them to supply (a) a copy of the amendments made to the contracts with regard to the exemption from landing and parking fees and (b) further information on the activities and amounts involved as part of the flight-advertising programme. The Belgian authorities sent the Commission the information in question on 29 July 1996.

Finally, in its letter of 17 September 1997 the Belgian authorities noted that:

<sup>(1)</sup> OJ C 121, 25. 4. 1996, p. 8.

- the landing and parking fees were paid in the normal way by Air Belgium (Article 3(1) of the contract of 1 March 1994),
  - the subsidy provided for by Article 3(2) of the contract of 1 March 1994 was claimed, and involved BEF 984 600 — an amount which is still to be examined by the Flemish region and which will only be paid if approved by the Commission,
  - the cost of the advertising campaign of BEF 4,5 million was paid back to Sunair SA,
  - the subsidy of BEF 270 116 provided for by Article 3(4) of the contract of 1 March 1994 was claimed by Air Belgium SA, but will only be paid if approved by the Commission.
- the granting, in 1994, of a subsidy calculated as a function of the number of passengers carried and intended to confer a competitive advantage on the use of Ostend airport as compared with Zaventem airport (Article 3(2) of the contract),
  - the financing of a flight-advertising programme in 1994, 1995 and 1996 for a maximum amount of BEF 4,5 million (Article 3(3) of the contract),
  - the granting, in 1994, of a subsidy intended to compensate for the additional cost of using Ostend airport (Article 3(4) of the contract).

## LEGAL ASSESSMENT

### III

#### *On the exemption from landing and parking fees for the years 1994, 1995 and 1996*

It is clear from the information in the Commission's possession that the measure consisting in the exemption of the companies Air Belgium NV and Sunair NV from the fees charged for landing and parking aircraft at Ostend airport, as stipulated by paragraph 1 and the final indent of paragraph 3 of Article 3 of the contract of 1 March 1994 concluded between the two companies in the Flemish Region was ultimately withdrawn and never took effect. It is therefore appropriate to terminate the procedure on this matter, which has become irrelevant.

#### *On the other three measures at issue*

Pursuant to Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement 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 is, in so far as it affects trade between Member States or the Contracting Parties, incompatible with the common market and with the EEA Agreement. 'State aids' must be taken to mean aid granted by the central, regional or local authorities in a Member State or by public or private bodies set up or designated by these in order to manage aid (judgment of the Court of Justice of the European Communities of 22 March 1977, Case 78/76, Steinike & Weinlig v. Federal Republic of Germany<sup>(1)</sup>).

The three measures set out below, covered by the above-mentioned contract of 1 March 1994, should be examined in the light of those provisions:

It would seem, turning first of all to the flight-advertising programmes in 1994, 1995 and 1996 that, according to the information in the Commission's possession, the programme included publicity features and advertisements in the catalogues produced by the tour operator Sunair NV which also illustrated the position occupied by Ostend airport among Belgium's airports. They constitute a simple advertising vehicle that benefits Ostend airport and forms part of the normal activity of the Flemish region, which owns and manages Ostend airport, in order to publicise that airport. Neither its aim nor its effect was to confer an advantage on the tour operator Sunair NV, which had received BEF 4,5 million, which corresponded to the cost of that advertising campaign, above and beyond the profits which the owner/manager of the airport was likely to expect in return. It follows that the measure is not State aid within the meaning of Article 92(1) of the Treaty or Article 61(1) of the EEA Agreement. No objection should therefore be raised to this.

Next, as far as the two subsidies provided for by paragraphs 2 and 4 of Article 3 of the contract of 1 March 1994 and claimed by Air Belgium, to the tune of BEF 984 600 and BEF 270 116 respectively, are concerned: those measures constitute State aids within the meaning of Articles 92(1) and 61(1) referred to above. First, their public nature means that the action was taken, in a contractual manner, by a regional authority. Secondly, the existence of aid arises (a) from the reality of financial transfers in the form of direct subsidies, and (b) from the specific nature of those measures, which only concern two companies. Thirdly, the aids affect trade between Member States inasmuch as they apply to two companies whose air-transport business, which by its very nature directly affects trade, extends to several Member States and may cover the entire EEA. This has been particularly true since the entry into force, on 1 January 1993, of Council Regulations (EEC) No 2407/92<sup>(2)</sup>, (EEC) No 2408/92<sup>(3)</sup> and (EEC) No 2409/92<sup>(4)</sup> ('third aviation package'), which liberalise the Community civil-aviation market. Furthermore, two of the destinations specifically mentioned by

<sup>(2)</sup> OJ L 240, 24. 8. 1992, p. 1.

<sup>(3)</sup> OJ L 240, 24. 8. 1992, p. 8.

<sup>(4)</sup> OJ L 240, 24. 8. 1992, p. 15.

<sup>(1)</sup> [1977] ECR 596, at paragraph 21.

the Belgian authorities are located within another Member State of the Community. Fourthly, the aids distort competition since they are granted only to two companies that are in direct competition with other Community companies within the common market. It must be pointed out here that the agreement concluded on 1 March 1994 between (a) the Flemish region and (b) the companies Air Belgium NV and Sunair NV stipulates that the flight schedule may be discontinued and that the Flemish region would then suspend its financial involvement if, during 1994 to 1995, other companies were to provide flights departing from Ostend to the same destinations and if Air Belgium and Sunair consequently suffered demonstrable financial losses. This latter clause clearly illustrates the exclusive nature of the measure. Indeed, the Belgian authorities have not challenged the description of the two subsidies in question as aid.

#### IV

The Commission should have been notified of the two abovementioned aid packages, which are not covered by the approved aid systems, in accordance with Article 93(3) of the Treaty. By omitting to give notification of that aid in advance, that is to say, before providing it, Belgium has failed to meet the obligations imposed upon it by Article 93(3). The aid has thus been granted illegally and is unlawful.

#### V

The two aid packages should be examined in terms of their compatibility with the common market, bearing in mind the provisions of Article 92(2) and (3) of the Treaty and Article 61(2) and (3) of the EEA Agreement.

The provisions of points (a), (b) and (c) of Article 92(2) of the Treaty and of points (a), (b) and (c) of Article 61(2) of the EEA Agreement do not apply to the aid in question, since it represents neither aid having a social character, granted to individual consumers without discrimination as to product origin, nor aid intended to make good the damage caused by natural disasters or other exceptional occurrences; still less is it aid granted to the economy of certain areas of Germany.

Article 92(3) of the Treaty and Article 61(3) of the EEA Agreement list the forms of aid which may be considered compatible with the common market. That compatibility

is to be assessed from a Community point of view and not that of a single Member State.

In order to safeguard the proper functioning of the common market and in view of the principles set out in point (g) of Article 3 of the Treaty, the exemptions from the provisions of Article 92(1), as defined in paragraph 3 of that Article, must be interpreted strictly when any system of aid or any individual measure is examined. In addition, in view of the sharper competition resulting from the gradual liberalisation of air transport under the third set of measures, the Commission must maintain a stringent policy of checking State aids in order to prevent them from having effects that run counter to the common interest<sup>(1)</sup>.

Points (a) and (c) of Article 92(3) of the Treaty and points (a) and (c) of Article 61(3) of the EEA Agreement contain exemptions for aid intended to promote or smooth the development of certain regions. The aid in question had been granted by the Flemish Region, was *ad hoc* in nature, and could not benefit from the abovementioned exemptions since (a) it was operating and not investment aid, and (b) did not meet the eligibility criteria concerning the regional aid under point (a) of Article 92(3) of the Treaty or point (a) of Article 61(3) of the Agreement.

The provisions of point (b) of Article 92(3) of the Treaty and point (b) of Article 61(3) of the EEA Agreement likewise do not apply in this instance since the aid at issue is not intended to promote the execution of a European project or to remedy a serious disturbance in the economy of a Member State.

The exemptions under point (c) of Article 92(3) of the Treaty and point (c) of Article 61(3) of the EEA Agreement as regards aid intended to ease the expansion of certain economic activities applies even less to this instance in that, as was said earlier, the various types of aid in question are direct, operational aids and not aids intended to spur investment. Moreover, the Commission is only prepared to grant such an exemption to aid that accompanies a company restructuring process<sup>(2)</sup>. However, it would seem that Air Belgium and Sunair are not currently undergoing any restructuring nor that the aid in question is being granted as part of any restructuring. In any case, the Belgian authorities have never pleaded that provision.

Finally, it needs again to be pointed out that in general terms the Commission limits the scope for direct aid in providing aviation services to two highly specific cases<sup>(3)</sup>:

— first of all, where a Member State invokes the provisions of Article 4 of Regulation (EEC) No 2408/92 on public-service obligations. That is in no way the case here,

<sup>(1)</sup> Application of Articles 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ C 350, 10. 12. 1994, p. 5).

<sup>(2)</sup> See footnote 6, Chapter V(2).

<sup>(3)</sup> See footnote 6, Chapter III.

— secondly, where point (a) of Article 92(2) of the Treaty and point (a) of Article 61(2) of the Agreement are applied. It has already been stated earlier that this exemption could not apply to the present instance.

It emerges from the above that the two subsidies in question are not covered by any of the cases provided for by Article 92(2) and (3) of the Treaty or Article 61(2) and (3) of the EEA Agreement. It is therefore appropriate to order Belgium to cease providing these aids, which are incompatible with the common market,

HAS ADOPTED THIS DECISION:

*Article 1*

The two subsidies provided for by, respectively, paragraphs 2 and 4 of Article 3 of the contract concluded on 1 March 1994 between (a) the Flemish Region, and (b) the air transport operator Air Belgium NV and the tour operator Sunair NV, and claimed by Air Belgium NV for amounts of BEF 984 600 and BEF 270 116, constitute illegal State aid, since they were granted in breach of point (a) of Article 93(3) of the EC Treaty. The aid 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*

Belgium is ordered to cancel payment of the two subsidies referred to in Article 1.

*Article 3*

Within two months from notification of this Decision, Belgium shall inform the Commission of the action that it has taken in order to comply therewith.

*Article 4*

The Commission has no objection to the payment of BEF 4,5 million to the tour operator Sunair NV in order that the Flemish Region may in general finance the advertising of the regional airports at Ostend and Antwerp, as provided for by paragraph 3, first indent, of Article 3 of the contract of 1 March 1994, referred to in Article 1 of this Decision.

*Article 5*

The procedure concerning the exemption from landing and parking fees provided for in paragraph 1 and the final indent of paragraph 3 of Article 3 of the contract of 1 March 1994 referred to in Article 1 of this Decision is terminated.

*Article 6*

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 21 January 1998.

*For the Commission*

Neil KINNOCK

*Member of the Commission*