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(94/C 350/01)

Currency amount for one unit:

Belgian and Luxembourg franc	39,3831	United States dollar	1,21188
Danish krone	7,49488	Canadian dollar	1,67749
German mark	1,91538	Japanese yen	121,491
Greek drachma	295,481	Swiss franc	1,62453
Spanish peseta	160,320	Norwegian krone	8,33593
French franc	6,57325	Swedish krona	9,11711
Irish pound	0,791459	Finnish markka	5,91883
Italian lira	1977,94	Austrian schilling	13,4822
Dutch guilder	2,14503	Icelandic krona	83,6683
Portuguese escudo	195,852	Australian dollar	1,56533
Pound sterling	0,777096	New Zealand dollar	1,90998
		South African rand	4,31981

The Commission has installed a telex with an automatic answering device which gives the conversion rates in a number of currencies. This service is available every day from 3.30 p.m. until 1 p.m. the following day.

Users of the service should do as follows:

— call telex number Brussels 23789;

— give their own telex code;

— type the code 'cccc' which puts the automatic system into operation resulting in the transmission of the conversion rates of the ecu;

— the transmission should not be interrupted until the end of the message, which is marked by the code 'ffff'.

Note: The Commission also has an automatic telex answering service (No 21791) and an automatic fax answering service (No 296 10 97) providing daily data concerning calculation of the conversion rates applicable for the purposes of the common agricultural policy.

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(1) Council Regulation (EEC) No 3180/78 of 18 December 1978 (OJ No L 379, 30. 12. 1978, p. 1), as last amended by Regulation (EEC) No 1971/89 (OJ No L 189, 4. 7. 1989, p. 1).

Council Decision 80/1184/EEC of 18 December 1980 (Convention of Lomé) (OJ No L 349, 23. 12. 1980, p. 34).

Commission Decision No 3334/80/ECSC of 19 December 1980 (OJ No L 349, 23. 12. 1980, p. 27).

Financial Regulation of 16 December 1980 concerning the general budget of the European Communities (OJ No L 345, 20. 12. 1980, p. 23).

Council Regulation (EEC) No 3308/80 of 16 December 1980 (OJ No L 345, 20. 12. 1980, p. 1).

Decision of the Council of Governors of the European Investment Bank of 13 May 1981 (OJ No L 311, 30. 10. 1981, p. 1).

Communication of Decisions under sundry tendering procedures in agriculture (cereals)

(94/C 350/02)

(See notice in Official Journal of the European Communities *No L 360 of 21 December 1982, page 43)*

Standing invitation to tender	Weekly invitation to tender	
	Date of Commission Decision	Maximum refund
Commission Regulation (EC) No 1166/94 of 24 May 1994 opening an invitation to tender for the refund for the export of common wheat to all third countries (OJ No L 130, 25. 5. 1994, p. 15)	8. 12. 1994	Tenders rejected
Commission Regulation (EC) No 1081/94 of 10 May 1994 opening an invitation to tender for the refund for the export of barley to all third countries (OJ No L 120, 11. 5. 1994, p. 21)	8. 12. 1994	Tenders rejected
Commission Regulation (EC) No 1082/94 of 10 May 1994 on a special intervention measure for barley in Spain (OJ No L 120, 11. 5. 1994, p. 24)	—	No tenders received
Commission Regulation (EC) No 2305/94 of 26 September 1994 on an invitation to tender for the refund on export of wholly milled round grain rice to certain third countries (OJ No L 251, 27. 9. 1994, p. 7)	8. 12. 1994	Tenders rejected
Commission Regulation (EC) No 2306/94 of 26 September 1994 on an invitation to tender for the refund on export of wholly milled medium grain and long grain A rice to certain third countries (OJ No L 251, 27. 9. 1994, p. 9)	8. 12. 1994	Tenders rejected
Commission Regulation (EC) No 2307/94 of 26 September 1994 on an invitation to tender for the refund on export of wholly milled medium grain and long grain A rice to certain third countries (OJ No L 251, 27. 9. 1994, p. 11)	8. 12. 1994	ECU 285,00/tonne
		Maximum reduction
Commission Regulation (EC) No 2709/94 of 8 November 1994 opening an invitation to tender for the reduction in the levy on grain sorghum imported into Spain from third countries (OJ No L 288, 9. 11. 1994, p. 1)	8. 12. 1994	Tenders rejected
Commission Regulation (EC) No 2710/94 of 8 November 1994 opening an invitation to tender for the reduction in the levy on maize imported into Spain from third countries (OJ No L 288, 9. 11. 1994, p. 3)	—	No tenders received
Commission Regulation (EC) No 2711/94 of 8 November 1994 opening an invitation to tender for the reduction in the levy on maize imported into Spain from third countries (OJ No L 288, 9. 11. 1994, p. 4)	8. 12. 1994	ECU 52,97/tonne
Commission Regulation (EC) No 2712/94 of 8 November 1994 opening an invitation to tender for the reduction in the levy on grain sorghum imported into Spain from third countries (OJ No L 288, 9. 11. 1994, p. 5)	8. 12. 1994	Tenders rejected

Non-opposition to a notified concentration

(Case No IV/M.503 — British Steel/Svensk Stål/NSD)

(94/C 350/03)

(Text with EEA relevance)

On 7 November 1994, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6 (1) (b) of Council Regulation (EC) No 4064/89 [1]. Third parties showing a sufficient interest can obtain a copy of the decision by making a written request to:

Commission of the European Communities,
Directorate-General for Competition (DG IV),
Merger Task Force,
150, Avenue de Cortenberg,
B-1049 Brussels,
fax No (32 2) 296 43 01.

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[1] OJ No L 395, 30. 12. 1989. Corrigendum: OJ No L 257, 21. 9. 1990, p. 13.

Non-opposition to a notified concentration

(Case No IV/M.519 — Ericsson/Raychem)

(94/C 350/04)

(Text with EEA relevance)

On 21 November 1994, the Commission decided not to oppose the above notified concentration and to declare it compatible with the common market. This decision is based on Article 6 (1) (b) of Council Regulation (EEC) No 4064/89. Third parties showing a sufficient interest can obtain a copy of the decision by making a written request to:

Commission of the European Communities,
Directorate-General for Competition (DG IV),
Merger Task Force,
150, Avenue de Cortenberg,
B-1049 Brussels,
fax No (32 2) 296 43 01.

Prior notification of a concentration

(Case No IV/M.520 — Direct Line/Bankinter)

(94/C 350/05)

(Text with EEA relevance)

1. On 2 December 1994, the Commission received a notification of a proposed concentration pursuant to Article 4 of a Council Regulation (EEC) No 4064/89 [1] by which Direct Line Group Limited belonging to the group of The Royal Bank of Scotland plc, and Bankinter SA, acquire within the meaning of Article 3 (1) b of the abovementioned Regulation joint control of Bankinter Aseguradora Directa SA by way of purchase of shares in a newly created company constituting a joint venture.

2. The business sector concerned by the concentration is non-life insurance.

3. Upon preliminary examination, the Commission finds that the notified concentration could fall within the scope of Regulation (EC) No 4064/89. However, the final decision on this point is reserved.

4. The Commission invites interested third parties to submit their possible observations on the proposed operation to the Commission.

Observations must reach the Commission not later than 10 days following the date of this publication. Observations can be sent to the Commission by fax or by post, under reference number IV/M.520 — Direct Line/Bankinter, to the following address:

Commission of the European Communities,
Directorate General for Competition (DG IV),
Merger Task Force,
150, Avenue de Cortenberg,
B-1049 Brussels;
(telefax: (32 2) 296 43 01).

[1] OJ No L 395, 30. 12. 1989 (Corrigendum: OJ No L 257, 21. 9. 1990, p. 13).

Diplomas, certificates and other evidence of formal qualifications in architecture which are the object of mutual recognition by Member States

(94/C 350/06)

(Updating of communication 89/C 205/06 of 10 August 1989 [1])

On page 6, under the entry France, at the end of the first indent, the following is added:

'... and the DPLG awarded by the same Minister in the framework of further vocational training and social betterment (DPLG dans le cadre de la formation professionelle continue et de la promotion sociale).'

[1] OJ No C 205, 10. 8. 1989, p. 5.

APPLICATION OF ARTICLES 92 AND 93 OF THE EC TREATY AND ARTICLE 61 OF THE EEA AGREEMENT TO STATE AIDS IN THE AVIATION SECTOR

(94/C 350/07)

(Text within EEA relevance)

I. INTRODUCTION

I.1. Liberalization of the Community's air transport

1. Community air transport has been characterized by a high level of State intervention and bilateralism. Although a certain measure of competition between air carriers was not excluded, the potentially distorting effects of State aids were, in the past, outweighed by the economically more important rules on control of fares, market access and in particular capacity sharing which were enshrined in restrictive bilateral agreements between Member States.

The Council has, however, now completed its liberalization programme for Community air transport (1). Therefore, in a situation of increased competition within the Community there is a clear need for a stricter application of State aid rules.

2. The measures on market liberalization and competition, which are now in force, have fundamentally changed the economic environment of air transport. They are stimulating competition and have, to some degree, reduced the discretionary powers of national authorities as well as extended the possibilities for air carriers to decide, on the basis of their own economic and financial considerations, fares, new routes and capacities to be put on the market.

All these factors combined with increasingly aggressive competition on extra-Community markets have led several air carriers to undertake major structural changes which, in some instances, have involved State intervention.

In some cases, these changes have resulted in concentrations and strategic agreements with other airlines. In this respect is should be recalled that Articles 85 and 86 of the Treaty and Articles 53 and 54 of the EEA Agreement are fully enforceable in the aviation sector by virtue of Council Regulations (EEC) No 3975/87 and (EEC) No 3976/87 of 14 December 1987. Moreover, since 1990 the Commission has had at its disposal Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings to scrutinize such operations.

In the more competitive environment State aids might be of substantially increased strategic importance for governments looking for measures to protect the economic interest of their 'own' airlines. This could lead to a subsidy race which would jeopardize both the common interest and the basic objectives of the liberalization process.

I.2. The 1992 State aids report

3. In order to have an accurate view of the situation, the Commission undertook an inquiry in 1991 to 1992 which resulted in an inventory of existing State aids (2) in the air transport sector. This report was published in March 1992.

The report revealed that several airlines were benefiting from State intervention, often direct operating aids or aids aimed at improving the airline's financial structure. Several potential State aids in the form of exclusive rights concessions were also revealed.

(1) The so-called 'first package', adopted in December 1987, introduced new rules on air fares, capacity sharing and market access for intra-Community scheduled services between main airports. The 'second package', adopted in July 1990, allowed access to third and fourth freedom services between virtually all Community airports and significantly extended fifth freedom rights. It also contained important provisions on capacity sharing. Air cargo services were liberalized by regulation in February 1991. In July 1992 the Council adopted the third, and final, package of liberalization measures which allows free exercise of the freedoms of the air within the Community as of 1 January 1993; remaining restrictions on domestic air transport will be eliminated as of 1 April 1997. The package also abolishes passenger capacity sharing and allows the airlines freedom to set fares. In addition, the competition rules have been implemented in the air transport sector to keep pace with these developments and the relevant regulations (Regulations (EEC) No 3975/87 and (EEC) No 3976/87) have been amended in order to include competition within a Member State.

(2) See, Commission of the European Communities, 'Report by the Commission to the Council and the European Parliament on the evaluation of aid schemes established in favour of Community air carriers', Doc. SEC(92) 431 final, 19 March 1992.

It is the Commission's opinion that transparency requirements are not being satisfactorily implemented. In the course of the enquiry the Commission criticized in several cases the gaps in the information communicated. This situation has necessitated the Commission to request additional information in some cases to arrive at definite conclusions.

I.3. The 1994 Report of the Comité des Sages

4. In summer 1993, the Commission set up a committee of experts in the air transport sector ('Comité des Sages') for the purpose of analysing the situation of Community civil aviation and making recommendations for future policy initiatives. The final report was published on 1 February 1994. On State aids the recommendations of the Comité des Sages are as follows:

'*Recommendations:*

— In the interest of consumers and of the industry itself, financial injections to air carriers (or to airport handling services) in whatever form, should as a rule, be disapproved if they are incompatible with normal commercial practices.

— The European Commission is urged to strictly enforce Treaty provisions concerning State aids and to elaborate clear guidelines for evaluating any exceptional application of State aid.

— For a brief period, however, approval of State aids may be considered when this aid serves the Community's interest in a restructuring that leads to competitiveness in this context, support for the transition of an air carrier (or airport handling services) to commercial viability may be in the Community's interest if the position of competitors is safeguarded.

The conditions of such approvals should include, though not necessarily be limited to the following:

(a) a clear and genuine "one time, last time" condition;

(b) the submission of a restructuring plan leading to economic and commercial viability within a specified time frame, proven by access to commercial capital markets. The plan must attract significant interest from the private sector and ulitmately lead to privatization;

(c) the validity of such a plan and its chances of success being assessed by independent professionals hired by the European Commission to take part in the Commission's assesssment procedure. Results of this assessment should be made public in conjunction with any eventual Commission decision;

(d) the undertaking on the part of the government concerned to refrain from interfering financially or otherwise, in commercial decision making by the carriers concerned;

(e) the prohibition of the airline using public money to buy or to extend its own capacities beyond overall market development. Instead, reduction of capacity should be envisaged;

(f) acceptable proof that the competitive interests of other airlines are not negatively affected;

(g) careful monitoring, assisted by independent professional experts, of the implementation of such a restructuring plan.'

5. In general the Commission welcomes the Comite's assessment which in fact confirms in many issues its current policy. On some other issues the Commission is ready to follow the Comité's recommendations as described in the present guidelines. The Commission, for example, may decide in difficult cases whether it is necessary to seek expert advice and has published a call for tender to draw up a list of suitable aviation experts. The Commission has referred as much as possible to the Comité's recommendations in the individual chapters of these guidelines.

The Commission in executing its responsibilities pursuant to Article 92 and 93 of the Treaty already applies some of the principles recommended by the Comité des Sages. The Commission has for example always examined the impact of the aid on competition within the Community and has also followed the idea that State aids might only be acceptable if they ar linked to a comprehensive restructuring programme. The Commission has in recent cases imposed conditions aimed at restraining

the Government's interference in the management of the airline ([3]), and has forbidden the use of the State aid for buying shareholdings in other Community carriers ([4]). Some ideas of the Comité, however, cannot be accepted by the Commission. It is not possible for the Commission to change or disregard the EC Treaty. This means, in particular, that the conditions that the aid is the last one has, of course, to be interpreted in conformity with Community law. This implies that such a condition does not prevent a Member State from notifying a further aid to a company which has already been granted aid. According to the Court of Justice case law, in such a case the Commission will take all the relevant elements into account ([5]). An important element in the Commission's judgement will be the fact that the company has already been granted State aid (see Chapter V). Therefore, the Commission will not allow further aid unless under exceptional circumstances, unforseeable and external to the company. Moreover, given the fact that Article 222 of the Treaty is neutral with regard to property ownership, the Commission cannot impose the privatization of the airline as a condition of the State aid. However, the participation of private risk sharing capital will be taken into account in the Commission's analysis.

I.4. Objectives of the present guidelines

6. In 1984, the Commission, when outlining its liberalization programme for the air transport sector in the Civil Aviation Memorandum No 2, established a set of guidelines and criteria for the evaluation of State aids in favour of air carriers on the basis of Article 92 and 93 of the EC Treaty (Annex IV of Memorandum No 2) ([6]).

   The assessment of the State aids described in the 1992 report (see Chapter I.2) was based on the State aid rules of the Treaty and on the evalution criteria of Annex IV of Memorandum No 2. One of the purposes of the report was to provide the Commission with updated data that can be used for establishing revised guidelines adapted to the new situation of the European air transport sector.

7. The present new guidelines, which replace the guidelines set out in Memorandum No 2, respond to two main concerns:

   — to reflect the completion of the internal market for air transport,

   — to increase transparency, at different levels, of the evaluation process, in relation to, first, the data to be provided in the notification by the Member States and, second, to the criteria and procedures applied by the Commission.

8. In order to increase the competitiveness of European airlines, which remains the final goal of the Community ([7]), the Commission stresses that more commercial management is the only way to achieve better financial performance, taking fully into account in this context the employment dimension. State aids should be the exception rather than the rule as they are in principle excluded by Article 92 (1). The Commission is well aware that the Community air carriers are, for structural and other reasons, for the time being, in a difficult situation, and will take these factors into account. However, the present crisis requires serious efforts from carriers who need to adapt to a changing market. The Commission cannot know with certainty what the futures 'aviation landscape' will look like, nor does it have the intention to determine what should essentially be left to the market. The Commission wishes to establish a level playing field on which the Community air carriers can effectively compete. With these objectives in mind, the present guidelines should help to clarify the Commission's position on State aids to air carriers.

II. SCOPE OF THESE GUIDELINES

II.1. State aid for air carriers

9. On 1 January 1994 the Agreement on the European Economic Area (hereinafter the Agreement), concluded by EC and EFTA States, entered into force. The Agreement contains provisions on State aids (Articles 61) which essentially reproduce Article 92 of the Treaty. According to Article 62 of the Agreement the task of applying the State aid rules in the participating EFTA countries is attributed to the EFTA Surveillance Authority (ESA), while the Commission is competent to apply State aid rules in the EC Member States. In this communication the Commission will refer to the European Economic

([3]) Commission decision of 24 July 1991, Case C-21/91, ex N 204/91, Sabena (1991), OJ No L 300, 31. 10. 1991, p. 48.
Commission decision of 21 December 1993 — Case C-34/93, ex NN 557/93, Aer Lingus, OJ No L 54, 25. 2. 1994, p. 30.

([4]) Commission decision of 22 July 1992 Case N 294/92, Iberia.
Commission decision, Case C-34/93, ex NN 557/93, Aer Lingus.
Commission decision, Case C-21/91, ex N 204/91, Sabena (1991).

([5]) See Court of Justice, Case C-261/89, Italy v. Commission (Comsal), (1991) ECR, p. 4437, grounds 20 to 21.

([6]) Commission of the European Communities, 'Memorandum No 2 on civil aviation: progress towards the development of a Community air transport policy', Doc. COM(84) 72 final, 15 March 1994.

([7]) Commission communication of 1 June 1994. The way forward for civil aviation in Europe, COM(94) 218 final.
Commission decision of 27 July 1994, Case C-23/94, Air France, OJ No L 254, 30. 9. 1994.

Area as to the EEA and to airlines established in the EC and EFTA States as to the European airlines or European competitors.

10. These guidelines cover aid granted by EC Member States in favour of air carriers.

These may include any activities accessory to air transport, direct or indirect subsidization of which could benefit airlines such as flight schools (8), duty free shops, airport facilities, franchises, airport charges, within the limits which will be defined in the following chapters.

However, this communication does not intend to deal with subsidization of aircraft production (9). On the other hand, aids granted to airlines in order to promote acquisition or operation of certain aircraft are included in the scope of these guidelines.

Whether and on what conditions exclusive rights should be treated pursuant to Article 92 of the Treaty and 61 of the Agreement is discussed in some detail in Chapter VII.

II.2. Relations with third countries

11. The present communication applies to State aids granted by the Member States in the aviation sector. The Commission is aware that State aids granted by third countries to non-Community airlines may affect the Community carriers' competitive position on the routes upon with they compete. However, the fact that non-Community carriers may benefit from State aids cannot be brought forward as a reason for not applying the binding provisions of the Treaty on State aids. These provisions apply irrespective of whether third countries grant aid or not.

Moreover, the conditions for market access and limitation of competition as laid down in most bilateral agreements with third countries appear to be economically far more important than possible State aids.

Therefore, it is not the intention of the Commission to deal with State aids to third country airlines in this communication. If very low tariffs are made possible through State aid by third countries, such cases of tariff dumping must be addressed in the context of the Community's external policy towards third countries in the aviation sector.

II.3. State infrastructure investments

12. The construction of enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids (10). Infrastructure development decisions fall outside the scope of application of this communication in so far as they are aimed at meeting planning needs or implementing national environmental and transport policies.

This general principle is only valid for the construction of infrastructures by Member States, and is without prejudice to evaluation of possible aid elements resulting from preferential treatment of specific companies when using the infrastructure. The Commission, therefore, may evaluate activities carried out inside airports which could directly or indirectly benefit airlines.

II.4. Fiscal privileges and social aids

13. Article 92 of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims, but defines them in relation to their effects. Consequently, the alleged fiscal or social aim of a particular measure cannot shield it from the application of Article 92 (11) of the Treaty and Article 61 of the Agreement.

In principle, the reduction or the deferral of fiscal or social contributions does not constitute State aid within the meaning of Article 92 (1) of the Treaty and Article 61 (1) of the Agreement but a general measure, unless it confers a competitive advantage to specific undertakings to avoid having to bear costs which would normally have had to be met out of the undertakings' own financial resources, and thereby prevent market forces from having their normal effect (12).

The Commission has a positive approach towards social aid, for it brings economic benefits above and beyond the interest of the firm concerned, facilitating structural changes and reducing hardship and often only evens out differences in the obligations placed on companies by national legislations.

(8) Commission decision opening the Article 92 (2) procedure with regard to the acquisition by KLM of a pilot school, Case C-31/93, OJ No C 293, 29. 10. 1993.

(9) In this context, it should be mentioned that in the recent past, aircraft manufacturers have taken over from reluctant banks, the financing of a considerable part of aircraft investments. This source of financing has been of great value in particular for some new entrants who had particular problems to obtain access to financing through the banking system. In case aircraft manufacturers had received State aid, one might conclude that this aid has indirectly been of benefit to the aviation industry. The possible effects of State aid to the manufacturing sector on other sectors is, however, outside the scope of these guidelines and will be taken into account while examining these specific aids.

(10) Reply of the Commission to written question No 28 of Mr Dehousse of 10 April 1967, OJ No 118, 20. 6. 1967, p. 2311/67.

(11) Court of Justice, Case 173/73, Italy v. Commission, [1974] ECR, p. 709, ground 27 and 28 at 718 to 719.

(12) Court of Justice, Case 301/87, France v. Commission, [1990] ECR, p. 307 (Boussac case), ground 41 at 362.

III. OPERATIONAL SUBSIDIZATION OF AIR ROUTES

III.1. Operating aids

14. The raport on State aids in the aviation sector prepared by the Commission in 1991 to 1992 ([13]), revealed several direct aids aimed at supporting air services, mostly domestic, by covering their operating losses.

The introduction of consecutive cabotage from 1 January 1993 and the authorization of unrestricted cabotage from 1 April 1997 ([14]) has led the Council to clarify its position on subsidization of domestic routes. Such subsidization could be detrimental to the implementation of cabotage traffic rights as defined above. Direct aids aimed at covering operating losses are, in general, not compatible with the common market and may not benefit from an exemption. However, the Commission must also take into account the concern of Member States to promote regional links with disadvantaged areas.

With regard to regional aids, the main concern of the Commission is to preclude that the compensation received could allow the beneficiary companies to cross-subsidize between the subsidized regional routes and the other routes in which they are in competition with EEA air carriers. That is why the Commission considers that direct operational subsidization of air routes can, in principle, only be accepted in the following two cases.

III.2. Public service obligations

15. In the context of air transportation, 'public service obligation' is defined in Council Regulation (EEC) No 2408/92 on access for air carriers to intra-Community air routes ([15]) as 'any obligation imposed upon an air carrier to take, in respect of any route which it is licensed to operate by a Member State, all necessary measures to ensure the provision of a service satisfying fixed standards of continuity, regularity, capacity and pricing, which standards the air carrier would not assume if it were solely considering its economic interest'.

Council Regulation (EEC) No 2408/92 provides that such public service obligations may be imposed on scheduled air services to an airport serving peripheral or development regions in its territory or on a thin route to any regional airport in its territory provided that any such route is considered vital for the economic development of the region in which the airport is located. The Regulation also describes the procedure to be followed when a Member State decides to impose a public service obligation.

16. If no air carrier has commenced or is about to commence scheduled air services on a route in accordance with the public service obligations which have been imposed on that route, the Member State may limit access to that route to only one carrier for a period of up to three years after which the situation must be reviewed ([16]). The right to operate shall be offered to any Community air carrier entitled to operate such air services by the public tender procedure described in Article 4 of Regulation (EEC) No 2408/92 ([17]). When the capacity offered exceeds 30 000 seats per year it has to be noted that access to a route may be restricted to one carrier only if other forms of transport are unable to ensure an adequate and uninterrupted service (Article 4 (2)). The objective of this provision is to guarantee that adequate transport links to certain regions can be maintained particularly if the traffic volume is small and other transport modes cannot provide that service.

A Member State may thus reimburse the air carrier selected for carrying out the imposed public service obligation, according to Article 4 (1) (h) of the Regulation. Such reimbursement shall take into account the costs and revenue (that is the deficit) generated by the service. The development and the implementation of these schemes must be transparent. In this respect the Commission would expect the selected company to have an analytical

([13]) See Doc. SEC(92) 431 final.

([14]) Article 3 of Council Regulation (EEC) No 2408/92 of 23 June 1992 on access for Community air carriers to intra-Community air routes, OJ No L 240, 24. 8. 1992, p. 8.

([15]) Article 2 (o) of Regulation (EEC) No 2408/92.

([16]) Article 4 (1) (d) of Regulation (EEC) No 2408/92.

([17]) Community rules on public procurement contracts do not apply to the awarding by law or contract of exclusive concessions, which are exclusively ruled by the procedure provided for pursuant to Article 4 (1) of Regulation (EEC) No 2408/92.

accounting system sophisticated enough to apportion the relevant costs (including fixed costs) and revenues.

17. Article 77 of the Treaty and Article 49 of the Agreement, which provide that aids shall be compatible with the Treaty if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of public service, do not apply to air transport. Article 84 of the Treaty expressly excludes the application of these provisions to air transport and Article 47 of the Agreement provides that Article 49 applies to transport by rail, road and inland waterway. Therefore, the reimbursement of airlines' losses for fulfilling public service obligation requirements must be assessed on the basis of the general rules of the Treaty which apply to air transport [18]. The acceptability of the reimbursement shall be considered in the light of the State aid principles as interpreted in the Court of Justice's case law.

18. In this context it is important that the airline which has access to a route on which a public service obligation has been imposed, may be compensated only after being selected by public tender.

This bidding procedure enables the Member State to value the offer for that route, and make its choice by taking into consideration both the users' interest and cost of the compensation. In Regulation (EEC) No 2408/92 the Council has set out uniform and non-discriminatory rules for the distribution of air traffic rights on routes upon which public service obligations have been imposed. Furthermore, the criteria for calculation of the compensation have been clearly established. A reimbursement which is calculated pursuant to Article 4 (1) (h) of the Regulation, on the basis of the operating deficit incurred on a route, cannot involve any overcompensation of the air carrier. The new system set up by the third package, if correctly applied, excludes that reimbursement for public service obligations include aid elements. A compensation of the mere deficit incurred on a specific route (including a reasonable remuneration for capital employed) by an airline which has been fairly selected following an open bidding procedure, is a neutral commercial operation between the relevant State and the selected airline which cannot be considered as aid. The essence of an aid lies in the benefit for the recipient [19]; a reimbursement limited solely to losses sustained because of the operation of a specific route does not bring about any special benefit for the company, which has been selected on the basis of the objective criteria provided for pursuant to Article 4 (1) of the Regulation.

Therefore, the Commission considers that compensation for public service obligations does not involve aid provided that: the carrier has been correctly selected through a call for tender, on the basis of the limitation of access to the route to one single carrier, and the maximum level of compensation does not exceed the amount of deficit as laid down in the bid, in conformity with the relevant provisions of Community law and, in particular, with those of the third package.

19. Moreover, Article 4 (1) (i) of Regulation (EEC) No 2408/92 obliges the Member States to take the measures necessary to ensure that any decision pursuant to this Article can be reviewed effectively and speedily for an infringement of Community law or national implementing rules. It follows from this provision, as well as from the general distribution of tasks between the Community and its Member States, that it is in the first instance for the authorities of the Member States and, in particular, the national courts to ensure the proper application of Article 4 of the Regulation in individual cases. This is particularly true for a Member State which chooses, in the framework of a public tender, the carrier to serve the route which is subject to the public service obligation. It must also be stressed that the Commission may carry out an investigation and take a decision in case the development of a route is being unduly restricted (Article 4 (3) of the Regulation).

However, this last power as well as the rights and obligations of the national authority pursuant to the abovementioned Article 4 (1) (i) are without prejudice to the Commission's exclusive powers under the State aid rules of the Treaty itself (see also paragraph 15), which cannot be changed by provisions established in the Community's secondary legislation. In case there is clear evidence that the Member State has not selected the best offer, the Commission may request information from the Member State in order to be able to verify whether the award includes State aid elements. In fact, such elements are likely to occur where the Member State

[18] See Court of Justice, Case 156/77, Commission v. Belgium, [1978] ECR, p. 1881.

[19] See Case 173/73, Italian Government v. Commission, [1974] ECR, p. 709.

engages itself to pay more financial compensation to the selected carriers than it would have paid to the carrier which submitted the best (not necessarily cheapest) offer.

20. Article 4 (1) (f) of Regulation (EEC) No 2408/92 refers to the compensation required as just one of the criteria to be taken into consideration for the selection of submissions. The Commission considers however, that the level of compensation is the main selection criterion. Indeed, other criteria such as adequacy, prices and standards required are generally already included in the public service obligations themselves. Consequently, it is only in exceptional cases, duly justified, that the selected carrier could be other than the one which requires the lowest financial compensation.

21. It must be stressed that should the Commission receive complaints on alleged lack of fairness of the awarding procedure it would promptly request information from the Member State concerned. If the Commission concludes that the Member State concerned has not selected the best offer it will most likely consider that the chosen carrier has received aid pursuant to Article 92 of the Treaty and Article 61 of the Agreement. Should the Member State not have notified the aid pursuant to Article 93 (3) of the Treaty, the Commission would consider the aid, in the case that compensation has already been paid, as illegally granted and would open the procedure pursuant to Article 93 (2) of the Treaty. The Commission may issue an interim order suspending the payment of the aid until the outcome of the procedure ([20]). Within the context of the procedure the Commission may hire or may request the Member State concerned to hire an independent consultant to evaluate the different tenders.

22. Article 5 of Regulation (EEC) No 2408/92 allows for exclusive concessions on domestic routes granted by law or contract, to remain in force, under certain conditions, until their expiry or for three years, whichever deadline comes first. Possible reimbursement given to the carriers benefitting from these exclusive concessions may well involve aid elements, particularly as the carriers have not been selected by an open tender (as foreseen in the case of Article 4 (1) of Regulation (EEC) No 2408/92). The Commission stresses that such reimbursements must be notified in order to allow the Commission to examine whether they include State aid elements.

23. Compensation of losses incurred by a carrier which has not been selected according to Article 4 of Regulation (EEC) No 2408/92 will continue to be assessed under the general State aid rules. The same rule applies to compensations which are not calculated on the basis of the criteria of Article 4 (1) (h) of the Regulation.

This means that reimbursements for public services to the Greek islands and the Atlantic islands (Azores) ([21]) which, for the time being, are excluded from the scope of Regulation (EEC) No 2408/92, are nevertheless subject to Articles 92 and 93 of the Treaty and Article 61 of the Agreement. In its assessment of these compensations, the Commission will verify whether or not the aid diverts significant volumes of traffic or allows carriers to cross-subsidize routes — whether intra-Community, regional or domestic routes — on which they compete with other Community air carriers. This will not be considered to be the case if the reimbursement is based on the costs and the revenues (i.e. the deficit) generated by the service. Again, the Commission underline that such compensation must be notified.

III.3. **Aid of a social character**

24. Article 92 (2) (a) of the Treaty and 61 (2) (a) of the Agreement exempt aid of a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned. This provision which up to now has only rarely been used, may be of certain relevance in the case of direct operational subsidization of air routes provided the aid is effectively for the benefit of final consumers.

The aid must have a social character, i.e. it must, in principle, only cover specific categories of passengers travelling on a route (e.g. children, handicapped people, low income people). However, in case the route concerned links an underprivileged region, mainly islands, the aid could cover the entire population of this region.

The aid has to be granted without discrimination as to the origin of the services, that is to say whatever EEA air carriers operating the services. This also implies the absence of any barrier to entry on the route concerned for all Community air carriers.

([20]) See Cases C-301/87 France v. Commission, [1990] ECR I, p. 307; Case C-142/87 Belgium v. Commission [1990] ECR I, p. 959.

([21]) See Commission decision of 6 July 1994, Case C-7/93. Reimbursement of the deficit sustained by TAP on the routes to the Atlantic islands, OJ No C 178, 30. 6. 1993.

IV. DISTINCTION BETWEEN THE STATE'S ROLE AS OWNER OF AN ENTERPRISE AND AS PROVIDER OF STATE AID TO THAT ENTERPRISE

25. The Treaty establishes both the principle of neutrality with regard to the system of property ownership ([22]) and the principle of equality ([23]) between public and private undertakings.

There are two stages in the Commission's assessment. To determine whether aid is involved, the Commission, according to the market economy investor principle (see Chapter IV.1), evaluates in the first stage the circumstances of the financial transaction, as the same measure may constitute an aid or a normal commercial transaction. In case the Commission considers that the measure involves aid elements, the Commission will, in a second stage determine whether the aid is compatible with the common market under the derogations of Article 92 (3) of the Treaty and Article 61 (3) of the Agreement (see Chapter V).

The Commission shall come to a reasoned conclusion on the State aid character of the financial transaction. The Commission shall check the validity and coherence of the financial transaction and verify whether it is commercially reasonable.

26. It is not the Commission's task to prove that the programme financed by the State will be profitable beyond all reasonable doubt before accepting it as a normal commercial transaction. The Commission cannot replace the judgement of the investor, but must establish with reasonable certainty that the programme financed by the State would be acceptable to the market economy investor. If there are characteristics of the operation indicating that an owner would not risk his own capital in similar circumstances, such operations shall be considered as State aid.

In deciding whether any public funds to public undertakings constitute aid, the Commission will take into account the factors discussed below for each type of intervention covered by this communication. These factors are given as a guide to Member States on the Commission's attitude in individual cases. In conformity with the principle of neutrality, as a general rule the aid will be assessed as the difference between the terms on which the funds were made available by the State to the airline, and the terms which a private investor operating under normal market conditions would find acceptable in providing funds to a comparable private undertaking ([24]).

If the aid is used to write off part losses any tax credits attaching to the losses must be added to the amount of the aid. If those tax credits were retained to offset against future profits or sold or transferred to third parties the firm would be receiving the aid twice.

IV.1. Capital injections

27. Capital injections do not involve State aid when the public holding in a company is to be increased, provided the capital injected is proportionated to the number of shares held by the authorities and goes together with the injection of capital by a private shareholder; the private investor's holding must have real economic significance ([25]).

28. The market economy investor principle will normally be satisfied where the structure and future prospects for the company are such that a normal return, by way of dividend payments or capital appreciation by reference to a comparable private enterprise, can be expected within a reasonable period.

The Commission will accordingly analyse the past, present and future commercial and financial situation of the company.

In its assessment, the Commission will normally not limit itself to the short term profitability of the company. The behaviour of a private investor, with which the intervention of the public investor

([22]) Article 222 of the Treaty: 'This Treaty shall in no way prejudice the rules in Member States governing the systems of property ownership'.

([23]) See Court of Justice, 21 March 1991, Case 305/89, Italy v. Commission (Alfa Romeo case), [1991] ECR, p. 1603, ground 24 at 1641; Court of Justice, 21 March 1991, Case 303/88, Italy v. Commission (ENI-Lanerossi case), [1991] ECR, p. 1433, ground 20 at 1476; 'Commission communication to the Member States concerning public authorities holdings in company capital', 17 September 1984, Bulletin EC, 9-1984, point 1.

([24]) See Commission communication to the Member States on the application of Articles 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ No C 307, 13. 11. 1993, p. 7, point 11.

([25]) 'Commission communication to the Member States' of 17 September 1984, see point 3.2.

has to be compared, is not necessarily that of an investor who is placing his capital with a view to more or less short-term profitability. The correct analogy is a private company pursuing a structural policy and guided by profitability perspectives in the longer term according to its sector of operations ([26]).

A holding company may inject new capital to ensure the survival of a subsidiary temporary difficulties, but which, after a restructuring, if necessary, will become profitable again in the longer term. Such decisions can be motivated not only by the possibility of securing a profit, but also by other concerns such as maintaining the standing of a whole group or redirecting its activities ([27]).

In any case the State, in common with any other market economy investor, should expect within a reasonable time a normal rate of return on capital investments. If the normal return is neither forthcoming in the short term nor likely to be forthcoming in the long term, then it can be assumed that the company is being aided and the State is forgoing the benefit which a market economy investor would expect from a similar investment.

A market economy investor would normally provide equity finance if the present value ([28]) of expected future cash flows from the intended project (accruing to the investor by way of dividend payments and/or capital gains and adjusted for risk) exceed the new outlay.

29. To assess whether such a normal return on investment may be expected within a reasonable time, the Commission will need to examine the financial projections of the airline concerned. In examining if the financial projections are realistic, the Commission may assess the airline's situation in the following areas:

(a) Financial performance. Different indicators may be taken into account, for example:

— gearing ratios (debt/equity) and cashflow are important indicators for the standing of an individual company, as they permit an assessment of the company's ability to finance investments and ongoing operations, from its own resources ([29]),

— operating and net results may be analysed over a period of several years. Profitability ratios may be determined and the trends originated therein may be assessed,

— future capital values and future divident payments.

(b) Economic and technical efficiency. The indicators which may be considered are, for example:

— operating costs and labour productivity,

— fleet age could be an important element of the assessment. An airline whose fleet age is higher than the European average will certainly be handicapped due to the substantial investment required for fleet renewal. Furthermore, this situation is usually associated with a lack of investment or with previous inopportune investment and would be considered as a negative factor under the market economy investor principle.

(c) Commercial strategy for different markets

The trends of the different markets on which the company competes (the past, present and future situation), the market share held by the company over a sufficient period and the company's market potential may be evaluated and the projections carefully assessed.

The Commission is aware of the difficulties involved in making such comparisons between undertakings established in different Member States due in particular to different accounting practices or standards or the structure and organization of these

([26]) Court of Justice Case 305/89, Alfa Romeo, see ground 20; Case 303/88, ENI-Lanerossi, see ground 22; 'Report on the evaluation of aid schemes established in favour of Community air carriers', Doc. SEC(92) 431 final, see Annex 2 at 50.

([27]) Court of Justice Case 303/88, ENI-Lanerossi, see ground 21; judgement of 14 September 1994, Joined Cases C-278/92, C-279/92 and C-280/92, Spain v. Commission (Imepiel), ground 25, not yet published.

([28]) Future cash flows discounted at the company's marginal cost of borrowing or cost of capital.

([29]) Case 301/87, Boussac, see ground 40 at 361.

undertakings (e.g. importance of the freight transport). It will bear this in mind when choosing the appropriate reference points to be used as a comparison with the public undertakings receiving funds.

30. In applying the market economy investor principle, the Commission will take into account the general economic environment of the airline industry.

Following a short-term crisis, operating results of a company may deteriorate considerably. However, during normal periods with macroeconomic stability, the air transport industry has, like many other service sectors, always shown considerable growth. Consequently, despite short-term problems, a company whose structure is basically sound may have good prospects for the future despite a general down-turn in the performance of the industry.

31. In the case of loss-making undertakings, necessary improvements and restructuring measures are fundamental in the Commission's assessment. These measures must form a coherent restructuring programme. The Commission particularly appreciates situations where restructuring plans are established by external and independent financial advisers after a study. Following the Comité des Sages' recommendation (see Chapter I.3) the Commission may if necessary, seek the advice of an independent expert on the validity of the plan.

IV.2. **Loan financing**

32. The Commission will apply the market economy investor principle to assess whether the loan is made on normal commercial terms and whether such loans would have been available from a commercial bank. With regard to the terms of such loans, the Commission will take into account in particular both the interest rate charged and the security sought to cover the loan. The Commission will examine whether the security given is sufficient to repay the loan in full in the event of default and the financial position of the company at the time the loan is made.

The aid element will amount to the difference between the rate that the airline would pay under normal market conditions and that actually paid. In the extreme case where an unsecured loan is made to a company which under normal circumstances would be unable to obtain financing, the loan effectively equates to a grant and the Commission would evaluate it as such.

IV.3. **Guarantees**

33. As regards guarantees, these guidelines fully reflect the general Commission position. The Commission has communicated to the Member States its position *vis-a-vis* loan guarantees ([30]). According to this letter, all guarantees given by the State directly or by way of delegation through financial institutions, fall within the scope of Article 92 (1) of the EC Treaty. It is only if the guarantees are assessed at the granting stage that all the distortions or potential distortions of competition may be detected. The Commission will accept the guarantees only if they are contractually linked to specific conditions which may go as far as the compulsory declaration of bankruptcy of the benefiting undertaking or any similar procedure. An assessment of the aid element of guarantees will involve an analysis of the borrower's financial situation (see Chapter IV.1). The aid element of this guarantee would be the difference between the rate which the borrower would pay in a free market and that actually obtained because of the guarantee net of any premium paid. If no financial institution, taking into consideration the airline's poor financial situation, would lend money without a State guarantee, the entire amount of the borrowing will be considered aid ([31]).

34. Public enterprises whose legal status does not allow bankruptcy are in effect in receipt of permanent aid on all borrowings equivalent to a guarantee, when such status allows the enterprise in question to obtain credit on terms more favourable than would otherwise be available ([32]).

In the same context, the Commission considers that when a public authority takes a holding in an ailing company as a consequence of which, according to national law, it is exposed to unlimited liability instead of the normal limited liability, this is equivalent to giving an open-ended guarantee which artificially keeps the undertaking in operation. Such a situation has therefore to be regarded as an aid ([33]).

([30]) Letter to all Member States of 5 April 1989, as amended by letter of 12 October 1989.

([31]) Commission decision of 7 October 1994, Case C-14/94, Olympic Airways in OJ No L 273, 25. 10. 1994, p. 22.

([32]) 'Commission communication to the Member States on the application of Article 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector', see point 38.1.

([33]) 'Commission communication to the Member States on the application of Article 92 and 93 of the EC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector', see point 38.2.

V. EXEMPTIONS UNDER ARTICLE 92 (3) (a) AND (c) OF THE TREATY AND ARTICLE 61 (3) (a) AND (c) OF THE AGREEMENT

35. As mentioned under Chapter II.1 above, in cases where the Commision considers that the measures involve aid elements, the Commission shall determine if any of the exceptions provided by Article 92 (3) of the Treaty could apply in order to exempt the aid.

V.1. Regional aids on the basis of Article 92 (3) (a) and (c) of the Treaty and Article 61 (3) (a) and (c) of the Agreement

36. The Commission has set out its guidelines for the evaluation of regional aids mainly in its communication of 1988 which applies to air transport ([34]).

Regional aid for companies established in a disadvantaged region is the normal case which the above-mentioned communications refer to. Pursuant to Article 92 (3) (a) and (c) of the Treaty and Article 61 (3) (a) and (c) of the Agreement an exemption may be granted for investment aid to companies investing in certain disadvantaged areas, (e.g. the building of an hangar in an assisted region). Article 92 (3) (c) of the Treaty and Article 61 (3) (c) of the Agreement cannot be invoked to exempt any kind of operating aids, while subparagraph (a) may be used to grant exemptions in favour of companies established or having invested in the eligible regions in order to counterbalance particular difficulties. However, it should be noted that, in principle, Article 92 (3) (a) of the Treaty and Article 61 (3) (a) of the Agreement cannot be invoked to exempt operating aids in the transport sector (in exceptional cases, such as for example the reimbursement for public service obligations to the Portuguese islands which are for the time being not covered by the Third Package, the Commission may use these Articles to exempt operating regional aid; other forms of operating subsidization are also covered in Chapter III above).

The eligibility of regions for regional aid is made following the method and the principles which have been clearly established by the Commission. In its communication of 1988, the Commission has selected the eligible geographic areas according to the level of income per inhabitant and the level of unemployment. In function of this classification, a ceiling between 0 and 75 % applies to the net grant equivalent of the investment aid.

([34]) Commission's communication OJ No C 212, 12. 8. 1988; as modified by Commission communication, OJ No C 163, 4. 7. 1990, p. 6.

V.2. Exemptions for the development of certain economic activities under Article 92 (3) (c)

37. If, in assessing recapitalization programmes under the market economy investor principle, the Commission reaches the conclusion that aid is involved, it will, in particular, assess whether the aid may be considered as compatible with the common market under Article 92 (3) (c).

Article 92 (3) (c) which provides that aid may be considered compatible with the common market if it facilitates the development of certain economic acitivities is of particular interest in the evaluation of the relevant aids. Under this provision, the Commission may consider some restructuring aid as compatible with the common market if they meet the requirement that the aid does not adversely affect trading conditions to an extent contrary to the common interest ([35]). It is in the light of this latter requirement, to be interpreted in the context of the air transport industry, that the Commission has to determine the conditions ([36]) which will usually need to be met in order to be able to grant an exception.

38. The Commission, in line with the recommendations of the Comité des Sages, (see Chapter I.3 above), will continue with its policy to allow, in exceptional cases, State aid given in connection with a restructuring programme; and in particular, if the aid is given, at least partly, for social purposes facilitating the adaptation of the work force to a higher level of productivity, (e.g. early retirement schemes). However, the Commission's approval is subject to a number of conditions:

(1) aid must form part of a comprehensive restructuring programme ([37]), to be approved by the

([35]) Case 730/79, Philip Morris Holland, [1980] ECR 2671, at 2691 to 2692, grounds 22 to 26; Case 323/82, Intermills, see ground 39 at 3832; Case 301/87, Boussac, see ground 50 at 364.

([36]) Eighth report on Competition policy, point 176.

([37]) Cases 296 and 318/82, Leeuwarder, see ground 26 at 825; Case 305/89, Alfa Romeo, see ground 22; Case 303/88, ENI-Lanerossi, see ground 21; Case 323/82, Intermills, see ground 39 at 3832; Commission decision, Case C-21/91, Sabena.

Commission, to restore the airline's health, so that it can, within a reasonable period, be expected to operate viably, normally without further aid. Thus the aid must be of limited duration;

When evaluating the programme the Commission will be particularly attentive to market analysis and projection for developments in the different market segments, planned cost reductions, closing down of unprofitable routes, efficiency and productivity improvements, expected financial development of the company, expected rates of return, profits, dividends, etc.;

(2) the programme must be self-contained in the sense that no further aid will be necessary for the duration of the programme and that, given the objectives of the programme to return to profitability, no aid is envisaged or likely to be required in the future. The Commission normally requests the written assurance from the Government that the present aid will be the last cash injection from public funds or any other aid, in whatever form, in conformity with Community law ([38]). Therefore, restructuring aid should normally need only to be granted once;

The Commission is obliged, also in the future, to assess any possible aid and its compatibility with the common market. As stated above, in evaluating a second application for State aid, the Commission has to take into account all relevant elements, including the fact that the company has already received State aid ([39]). Therefore, the Commission will not allow further aid unless under exceptional circumstances, unforeseeable and external to the company.

Furthermore, the full completion of the common aviation market in 1997 will considerably increase competition within the common market. Under such circumstances, the Commission will not be able to authorize restructuring aid unless under very stringent conditions;

(3) if restoration to financial viability and/or the situation of the market require capacity reductions ([40]), this must be included in the programme;

(4) Aid granted in the aviation sector affects trading conditions between Member States. In order to avoid that the aid affects competition to an unacceptable extent, the difficulties of the airline receiving the aid must not be transferred to its competitors. Therefore, the programme to be financed by the State aid can only be considered not contrary to the common interest (Article 92 (3) (c)) if it is not expansive; that means that its objective must not be to increase the capacity and the offer of the airline concerned, to the detriment of its direct European competitors. In any case, the programme must not lead to an increase beyond market growth, in the number of aeroplanes, or the capacity (seats) offered in the relevant markets. In this context the geographic market to be considered may be the EEA as a whole, or specific regional markets particularly characterized by competition ([41]);

(5) the Government must not interfere in the management of the company for reasons other than those stemming from its ownership rights and must allow the company to be run according to commercial principles. The Commission may in specific cases require that the company's statute must be based on private commercial law ([42]);

(6) the aid must only be used for the purposes of the restructuring programme and must not be disproportionate to its needs. The company must for the period of the restructuring refrain from acquiring shareholdings in other air carriers ([43]);

(7) the modalities of an aid which conflict with specific provision of the Treaty, other than Articles 92 to 93, may be incontrovertibly linked

([38]) See Commission decision, Case C-23/94, Air France.

([39]) See Court of Justice, Case C-261/89, Comsal, grounds 20 to 21.

([40]) See Case 305/89, Alfa Romeo, see ground 22; Case 323/82, Intermills, see ground 36 at 3832; Joined Cases C-296/82 and 318/82, Leeuwarder, see ground 26 at 825.

([41]) See Commission decision, Case C-34/93, Aer Lingus.

([42]) See Commission decision, Case C-21/91, ex N 204/91, Sabena.

([43]) See Commission decision, Case C-23/94, Air France, OJ No L 254, 30. 9. 1994.

to the object of the aid such that it would not be possible to consider them in isolation (44). The aid must neither be used for anti-competitive behaviour or purposes, (e.g. violation of rules of the Treaty), nor be detrimental to the implementation of the Community liberalization rules in the air transport sector. A restrictive application of the freedoms guaranteed through the Third Package could create or increase substantial distortions of competition which might further reinforce the anti-competitive effects of the State aid;

(8) any such aids must be structured so that they are transparent and can be controlled.

39. As mentioned above (see Chapter I.3), the Commission cannot follow the recommendation of the Comité des Sages that the restructuring has to lead to privatization. This would be contrary to Article 222 of the EC Treaty which is neutral with regard to property ownership. However, the participation of private risk sharing capital will be taken into account (see also Chapter VI below).

40. The Commission will verify how the restructuring programme, which is financed with the help of the State aid, is realized. It will in particular check that the commitments and conditions, which are part of the Commission's, approval are fulfilled. Their verification is of particular interest if the aid is paid in instalments. The Commission will normally request that a progress report is submitted at regular intervals and, in any case, in sufficient time before the next payments are being made, in order to allow the Commission to make comments. The Commission may request the assistance of external consultants for this verification.

41. With the creation of the common aviation market as of 1 January 1993 the negative effects of State aids may seriously distort competition in the aviation sector of the EEA to a larger extent than in the past. Through the application of the abovementioned criteria, the Commission seeks to limit as far as possible these distortive effects, while acknowledging that there might be a need for State owned carriers, in particular, to become competitive with the help of a State financed restructuring programme. However, phasing out aids for restructuring over time is necessary to create a more level playing field for competition in the aviation sector. The full completion of the common aviation market in 1977 will considerably increase competition within the common market. Under such circumstances, the Commission will not be able to authorize restructuring aid, unless in very exceptional cases and under very stringent conditions.

42. As regards rescue aid, these guidelines follows the general Commission policy (45). Rescue aid for airlines may be justified for the development of a comprehensive restructuring programme in so far as this programme is acceptable under the present guidelines.

VI. PRIVATIZATIONS IN ACCORDANCE WITH ARTICLES 92 TO 93 OF THE TREATY AND 61 OF THE EEA AGREEMENT

43. As the EC Treaty is neutral on public or private ownership of companies, Member States are at liberty to sell their shareholdings in public companies. However, if the sales involve State aid elements, the Commission may become involved.

Following a number of decisions in the area of State aid and privatization, the Commission has developed a number of principles to be applied, to identify aid being paid, when the State shareholder disposes of its shareholding. These are set out below:

(1) Aid is excluded, and therefore notification is not required, if, upon privatization, the following conditions are fulfilled:

— the disposal is made by way of an unconditional public invitation to tender on the basis of transparent and non-discriminatory terms,

— the undertaking is sold to the highest bidder,

(44) See Court of Justice, Case C-225/91, Matra v. Commission, ground 41.

(45) Community guidelines on State aid for rescuing and restructuring firms in difficulty (Notice to the Member States), of 27 July 1994, not yet published.

— the interested parties have a sufficient period in which to prepare their offer and receive all the necessary information to enable them to undertake a proper evaluation.

(2) On the other hand, the following sales are subject to the pre-notification requirements of Article 93 (3) of the EC Treaty because there is a presumption that they contain aid:

— all sales by way of restricted methods or where the sale takes the form of a direct trade sale,

— all sales which are preceded by a cancellation of debts by the State, public undertakings or any other public body,

— all sales preceded by a conversion of debt into capital or by a recapitalization,

— all sales that are realized in conditions that would not be acceptable for a transaction between market economy investors.

Companies that are sold on the basis of the conditions under subparagraph 2 above must be valued by an independent expert who must indicate, under normal circumstances, a going concern value for the company and, if the Commission believes it necessary, a liquidation value. A report specifying the sales value, or values, and the sales proceeds raised must be provided to the Commission to enable it to establish the actual amount of aid.

In any case it should be noted that the sale of shares in companies being privatized must be effected on the basis of a non-discriminatory procedure having regard to the freedom of establishment of physical and legal persons and to the free movement of capital.

The Commission may find compatible an aid arising from a privatization under the criteria developed in Article 92 (3) of the Treaty and Article 61 (3) of the EEA Agreement ([46]).

([46]) See Commission Decision 92/329/EEC of 25 July 1990, Case IOR-Finalp, OJ No L 183, 3. 7. 1992.

VII. CONCESSION OF EXCLUSIVE RIGHTS FOR ACTIVITIES ACCESSORY TO AIR TRANSPORT

44. The grant of exclusive rights for activities which are accessory to air transport may involve considerable financial advantages for the exclusive grantee. A State or the entity entrusted with the operation of an airport infrastructure may grant such an exclusive concession to an airline for a price lower than the actual market value of the concession. In the case the grantee pays no rent for the exclusivity or pays a rent which is lower than the price that the grantor would demand under normal commercial conditions aid element is involved.

45. The accessory activities for which the granting of exclusive rights may bring about aids in favour of air carriers are mainly those related to duty free shops. In its inventory on State aids in the aviation sector ([47]) the Commission has pointed out that several duty-free shop concessions have been granted by the Member States to their national carriers, mostly by way of discretionary decisions, and without following transparent bidding procedures. In this sector accessory to air transport, there is at present no Community legislation harmonizing the procedures for the award of the concessions or opening the sector to competition. The exclusive grantee of a concession may, therefore, make monopoly profits.

In the light of the foregoing the Commission considers that in general terms no aid is involved where the grantee is selected in circumstances that would be acceptable to a normal concession grantor operating under normal market economy condition. However, in certain circumstances, for example, where the highest bidder is unreliable or where its solvency is precarious, the Commission would understand the Member State's acceptance of a lower bid.

These cases can be technically very difficult and therefore, it might be helpful to dispose of an independent study. For this purpose the Commission, in opening the Article 93 (2), procedure may request the Member State concerned to appoint an independent consultant, or may request independent advice itself.

([47]) Doc. SEC(92) 431 final, see points 12, 33, 35 and 36.

46. The Commission is about to develop common rules at Community level in the area of ground handling assistance and airport charges. Any abuse or infringement of competition rules in these areas will be considered under the relevant provisions of the Treaty particularly, Articles 85 to 90.

VIII. TRANSPARENCY OF FINANCIAL TRANSACTIONS

VIII.1. Lack of transparency

47. The Commission's Report on State Aids in the Aviation Sector carried out in 1991 to 1992 ([48]) clearly demonstrates that there is a need for both increased transparency and scrutiny in the light of State aid rules:

— in many cases, only capital injections and not other forms of public funds or aid schemes have been notified and thus examined under State aid rules,

— several guarantee schemes of different forms have not been notified or have not been reported with the accuracy requested by the Commission. The Commission has been obliged to request additional information particularly on the conditions and modalities of such guarantees and lists of the operations for which such guarantees have already been granted in past years,

— several cases of financial compensation by the Member States for the performance of public service obligations under different forms, including reduction of the fares financed by the State's budget, compensation of the operational losses of companies providing such services and subsidies to airports located in isolated areas, have been reported. However, in several cases, lack of information has prevented the Commission from assessing the situation and additional information has been requested on this subject, for example, a precise breakdown of the subsidized routes including traffic figures and details of existing competitors.

([48]) Doc. SEC(92) 431 final.

VIII.2. The transparency Directives 80/723/EEC and 85/413/EEC

48. In order to ensure respect for the principle of non-discrimination and neutrality of treatment, the Commission adopted in 1980, on the basis of Article 90 (3) of the Treaty, a Directive on the transparency of financial relations between Member States and public undertakings ([49]) which was amended by Directive 85/413/EEC ([50]) in order to include, among other sectors, the transportation sector previously excluded.

The Directive requires Member States to ensure that the flow of all public funds to public undertakings and the uses to which these funds are put are made transparent.

Although the transparency in question applies to all public funds, the following are particularly mentioned as falling within its scope:

— the setting-off of operational losses,

— the provision of capital,

— non-refundable grants or loans on privileged terms,

— the granting of financial advantages by foregoing profits or the recovery of sums due,

— the foregoing of a normal return on public funds used,

— compensation for financial burdens imposed by the public authorities.

According to Article 1 of the Directive, not only are the flows of funds directly from public authorities to public undertakings deemed to fall within the scope

([49]) Directive 80/723/EEC, OJ No L 195, 29. 7. 1980, p. 35.
([50]) OJ No L 229, 28. 8. 1985, p. 20.

of the transparency Directive, but also public funds made available by public authorities through the intermediary of public undertakings or financial institutions.

49. Article 5 of the Transparency Directive obliges, *inter alia*, Member States to supply the information required to ensure transparency where the Commission considers it necessary. The Commission will act accordingly. The Commission may examine the opportunity of extending the scope of Directive 93/84/EEC ([51]), which amends Directive 80/723/EEC, to air transport.

IX. ACCELERATED CLEARANCE PROCEDURE FOR AIDS OF LIMITED AMOUNT

50. In the interest of administrative simplification the Commission has decided to set out in this communication an accelerated clearance procedure for small aid schemes in the aviation sector ([52]).

The Commission will apply a more rapid administrative clearance procedure to new or modified existing aid schemes notified pursuant to Article 93 (3) of the EC Treaty if:

— the amount of the aid given to the same beneficiary is not higher than ECU 1 million over a three-year period,

— the aid is linked to specific investment objectives. Operating aids are excluded.

The Commission does not intend to limit the scope of this accelerated clearance procedure to small and medium-sized enterprises ([53]). Air carriers, even if they are relatively small do not meet the criteria established for SMEs.

The ceiling of ECU 1 million takes into account the characteristics of the air transport industry which is capital intensive. The price of an airplane, for example, largely exceeds the threshold of ECU 1 million. The objective of this accelerated clearance is to speed up the approval of the small aids given mainly for regional purposes not covered by public service obligations.

The Commission will decide on complete notifications within 20 working days.

X. APPLICATION AND FUTURE REPORTING

51. These guidelines will be applied by the Commission as from their publication in the *Official Journal of the European Communities.*

The Commission will publish at regular intervals reports on the application of State aid rules as well as inventories of existing aids. The next report shall be presented in 1993. The Commission will also decide at the appropriate time on an update of these guidelines.

([51]) Commission Directive 93/83/EEC of 30 September 1993, amending Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings in OJ No L 254, 12. 10. 1993, p. 16.

([52]) On 2 July 1992, the Commission adopted a communication on the accelerated clearance of aid for SMES (OJ No C 213, 19. 8. 1992, p. 10) which does not apply to aids in the transport sector.

([53]) See communication on the accelerated clearance of aid for SMEs.

Notification to the operators in the banana sector

(94/C 350/08)

1. Council Regulation (EEC) No 404/93 of 13 February 1993 on the common organization of the market in bananas [1], as amended by Commission Regulation (EEC) No 3518/93 [2], and Commission Regulation (EEC) No 1442/93 of 10 June 1993 laying down detailed rules for the application of the arrangements for importing bananas into the Community [3], as last amended by Regulation (EEC) No 2444/94 [4], apply to Austria, Finland and Sweden from their accession to the European Union on 1 January 1995.

2. It is therefore necessary to draw up a list of operators marketing in the new Member States bananas from third countries other than the ACP States, the ACP States and from the Community during the three years of the reference period, 1991, 1992 and 1993, and the quantities marketed by these operators during those years.

   Pending publication of the transitional detailed rules of application required by the accession of the new Member States, the operators referred to above, established in the Union as constituted on 31 December 1994, should make themselves known to the competent authorities of a Member State of their choice, as detailed below.

   A similar procedure shall be followed by the operators concerned in the new Member States under the responsibility of the authorities nominated by those Member States.

3. The operators concerned established in the Union should:

   (a) submit, preferably before 16 December, to the competent authorities:

      — an application for entry on the list or separate lists of Categories A and B operators referred to in Article 4 of Regulation (EEC) No 1442/93 where they are not already entered thereon;

      — the quantities of bananas (net weight) they have marketed in the new Member States, broken down on the basis of:

         (i) each of the activities defined in Article 3 (1) of Regulation (EEC) 1442/93,

         (ii) each of the origins referred to in Article 4 (2) (a) of that Regulation.

   (b) Keep at the disposal of the Member States, with the view to the necessary checks, any documentation establishing the quantities of bananas marketed and notified pursuant to (a) above and the carrying out of the activities specified. The relevant documents are specified in Article 7 of Regulation (EEC) No 1442/93. Where necessary, operators must be able to give the name of the sellers as well as the purchasers who carried out the other activities with respect to the quantities concerned.

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[1] OJ No L 47, 25. 2. 1993, p. 1.
[2] OJ No L 320, 22. 12. 1993, p. 15.
[3] OJ No L 142, 12. 6. 1993, p. 6.
[4] OJ No L 261, 11. 10. 1994, p. 3.

4. This notification is without prejudice to any transitional measures which might be adopted by the Commission to facilitate the application in the new Member States of the tariff quota arrangements for bananas. In particular, submission of the information by operators pursuant to point (a) does not imply acceptance thereof or recognition of rights under the import arrangements in question.

5. The authorities of the Member States responsible for compiling the list of operators and establishing the quantities marketed are as follows:

BELGIUM
Office central des contingents et licences
Rue de Mot 24/26
B-1040 Bruxelles

DENMARK
EF-Direktoratet
Nyropsgade 26
DK-1780 København K

GERMANY
Bundesamt für Ernährung und Forstwirtschaft
Referat 35
Adickesallee, 40
D-60322 Frankfurt am Main

SPAIN
Dirección General de Comercio Exterior
Paseo de la Castellana, 162 — planta 4
E-28071 Madrid

GREECE
Ministère de l'agriculture
DG de la production végétale
Direction 'Dentrokipeftikis'
2, rue Acharnon
GR-10176 Athens

FRANCE
Office de développement de l'économie agricole
dans les départements d'outre-mer
(Odéadom)
28-32, boulevard de Grenelle
F-75015 Paris

IRELAND
Department of Agriculture, Food and Forestry
Horticulture Division
Agriculture House (7W)
Kildare Street
IRL-Dublin 2

ITALY
Ministerio del commercio con l'estero
DG Import/Export — Div. IV
Viale Boston
I-00144 Roma

LUXEMBOURG
Ministère de l'agriculture
Administration des services techniques de l'agriculture
Service de l'horticulture
16, route d'Esch
BP 1904
L-1019 Luxembourg

NETHERLANDS
Produktschap voor groenten en fruit
Bezuidenhoutseweg 153
NL-2594 AG Den Haag
Postbus 90403
NL-2509 LK Den Haag

PORTUGAL
Ministério do Comércio e Turismo
Direcção-Geral do Comércio
Avenida da República 79
P-1000 Lisboa

UNITED KINGDOM
Intervention Board
External Trade Division
Lancaster House
Hampshire Court
UK-Newcastle, NE4 7YE