JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
30 April 1998 *

In Case T-214/95,

Vlaams Gewest (Flemish Region), represented by Alfred L. Merckx, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Duro and Lorang, 4 Boulevard Royal,

applicant,

v

Commission of the European Communities, represented by Pieter Van Nuffel and Anders Christian Jessen, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 95/466/EC of 26 July 1995 concerning aid granted by the Flemish Region to the Belgian airline Vlaamse Luchttransportmaatschappij NV (OJ 1995 L 267, p. 49),

* Language of the case: Dutch.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: R. García-Valdecasas, President, V. Tiili, J. Azizi, R. M. Moura Ramos and M. Jaeger, Judges,

Registrar: A. Mair, administrator,

having regard to the written procedure and further to the hearing on 25 September 1997,

gives the following

Judgment

Legal background

1 Article 92(1) of the Treaty establishing the European Community (hereinafter 'the Treaty') reads as follows:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

2 Article 92(3)(c) of the Treaty permits the Commission, by way of derogation, to declare to be compatible with the common market 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

3 On 20 May 1992 the Commission adopted Community guidelines on State aid for small and medium-sized enterprises (SMEs) (OJ 1992 C 213, p. 2). Point 3.2 provides an exemption from the obligation of notification laid down by Article 93(3) of the Treaty for aid in respect of a given type of expenditure of an absolute amount of less than ECU 50 000 over a three-year period. Point 1.6, however, excludes from the scope of those guidelines aid for enterprises in sectors subject to special Community rules on State aid, one of which is the transport sector.

4 The Commission laid down the provisions applicable to State aid for undertakings in the aviation sector in its communication 94/C 350/07 entitled 'Application of Articles 92 and 93 of the EC Treaty and Article 61 of the [Agreement on the European Economic Area] to State aids in the aviation sector' (OJ 1995 C 350, p. 5, hereinafter the 'Aviation Guidelines'). Point 50 (Chapter IX) of the Aviation Guidelines confirms that the procedure for accelerated clearance of aid for SMEs does not apply to aid in the transport sector.

5 The Aviation Guidelines cover aid granted by Member States in favour of Community air carriers (point 10, Chapter II). Point 51 (Chapter X) states that the Commission will apply the Aviation Guidelines as from their publication in the *Official Journal of the European Communities* and will decide at the appropriate time on an update of them.

6 Point 8 (Section I.4.) includes the statement that the Commission 'wishes to establish a level playing field on which the Community air carriers can effectively compete'.

7 At point 14 (Chapter III), it is specifically stated: 'Direct aids aimed at covering operating losses are, in general, not compatible with the common market and may not benefit from an exemption.'

8 In Chapter V, which relates, *inter alia*, to exemptions for the development of certain economic activities which may be granted under Article 92(3)(c) of the Treaty and Article 61(3)(c) of the Agreement on the European Economic Area (hereinafter the 'EEA Agreement'), the Aviation Guidelines provide that restructuring aid may be declared compatible with the common market only under certain conditions. One such condition is that the aid must form part of a comprehensive restructuring programme to be approved by the Commission (point 38(1) of the Aviation Guidelines). The programme to be financed by the State aid can only be considered 'not contrary to the common interest' if its objective is not to increase the capacity and the offer of the airline concerned, to the detriment of its direct European competitors (point 38(4)).

9 Finally, at point 50 (Chapter IX), in the interest of administrative simplification, the Aviation Guidelines introduce an accelerated clearance procedure for small aid schemes in the aviation sector. It is explained that 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 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 being excluded.

Factual background

10 Vlaamse Luchttransportmaatschappij NV (hereinafter 'VLM') is a private airline established in Antwerp. It was set up on 21 February 1992 with an initial capital of BFR 10 million. The capital was subsequently increased several times; it reached BFR 75 million at the end of 1993 and was increased to BFR 100 million during 1994. Since 1993 VLM has provided scheduled flights *inter alia* between Antwerp and London (London City Airport) and between Rotterdam and London (London City Airport).

11 The Antwerp-London route is also served by other airlines, in particular the British company Cityflyer Express Ltd (hereinafter 'Cityflyer'), into and out of Gatwick Airport.

12 On 17 December 1993, without prior notification to the Commission, the Flemish Region granted VLM an interest-free loan of BFR 20 million, repayable in annual instalments of BFR 4 million from the second year.

13 The contract granting the loan provides as follows:

'*Artikel 1: Voorwerp*

De begunstigde verbindt zich tot de verdere uitbouw en exploitatie van meerdere Europese vliegroutes.

Ter ondersteuning van deze activiteit verleent het Gewest de begunstigde een terugbetaalbaar renteloos voorschot.

...

Artikel 3: Voorwaarden

Voor de duur van het contract is voor de vervreemding of hypothekering van onroerend en roerend patrimonium en het handelsfonds van de zaak alsook voor de vervreemding van bepaalde activa van de begunstigde vooraf instemming nodig van het Gewest.

Bij wijziging van de aandeelhoudersstructuur is vooraf de instemming van het Gewest vereist.

Het kapitaal van de onderneming mag tijdens de duur van het contract niet worden verlaagd zonder voorafgaande toestemming van het Gewest.

Indien deze voorwaarden niet worden nageleefd, is de overeenkomst onmiddellijk opzegbaar en wordt het voorschot onmiddellijk opeisbaar.

...'

(*'Article 1: Subject-matter*

The recipient undertakes to develop and operate several European air routes.

The Flemish Region grants the recipient a repayable interest-free loan in order to support that activity.

...

Article 3: Conditions

For the duration of the agreement, the prior consent of the Flemish Region is necessary for the disposal of, or granting of security over, any moveable or immoveable property or the goodwill of the business and for the disposal of certain assets of the recipient.

The consent of the Flemish Region is also required for any modification of the shareholding structure.

The share capital of the undertaking may not be reduced during the term of the agreement without the prior consent of the Flemish Region.

If these conditions are not complied with, the agreement may be terminated immediately and the loan is repayable forthwith.

...').

14 In response to a complaint by Cityflyer the Commission initiated the procedure under Article 93(2) of the Treaty on 16 November 1994 (OJ 1994 C 359, p. 2).

15 Cityflyer and British Airways submitted comments. They asked the Commission to declare that the interest-free loan constituted aid incompatible with the common market.

16 On 23 January 1995 the Belgian Government also submitted comments.

17 At the end of the procedure, on 26 July 1995, the Commission adopted Decision 95/466/EC concerning aid granted by the Flemish Region to the Belgian airline Vlaamse Luchttransportmaatschappij NV (hereinafter 'the contested decision'). That decision was notified to the Belgian Government on 25 September 1995 and was published in the Official Journal on 9 November 1995 (OJ 1995 L 267, p. 49).

18 In that decision the Commission concluded that the loan granted by the Flemish Region to VLM included an aid component which was unlawful because it was granted to the undertaking in breach of the requirements of Article 93(3) of the Treaty. It also considered that the aid component was incompatible with the common market for the purposes of Article 92 of the Treaty and Article 61 of the EEA Agreement (Article 1 of the contested decision). It consequently required Belgium to order that interest at the rate of 9.3% be paid on that loan (Article 2) and that

the aid component, equal to interest charged at that rate on the amount borrowed since the date on which the loan was granted, be repaid (Article 3). The rate of 9.3% was obtained by adding together a base rate of 7.3% applicable to Belgian State debt in 1994 and a risk premium of 2% (last paragraph in Chapter V of the contested decision).

Procedure

19 The application initiating proceedings was lodged on 27 November 1995 and registered the following day.

20 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fifth Chamber, Extended Composition) opened the oral procedure. The parties presented oral argument and replied to the oral questions of the Court at the hearing on 25 September 1997.

Forms of order sought

21 The applicant claims that the Court should:

— annul the contested decision; and

— order the defendant to pay the costs.

22 The defendant contends that the Court should:

— dismiss the application as unfounded; and

— order the applicant to pay the costs.

23 At the hearing the defendant claimed that the application was inadmissible.

Admissibility

Arguments of the parties

24 According to the defendant, the action is inadmissible under the second paragraph of Article 173 of the EC Treaty because the applicant is not a Member State. The application is also inadmissible under the fourth paragraph of Article 173 of the Treaty on the grounds that the applicant was not directly and individually affected by the contested decision, which was not addressed to it. Furthermore, it does not have an interest of its own in bringing proceedings in respect of the contested decision. Its interest in bringing proceedings is based on the fact that it granted the aid in question and, as such, is not distinct from that of the Belgian State (Case 282/85 *DEFI* v *Commission* [1986] ECR 2469).

25 The applicant considers that, in its capacity as an autonomous legal person with power to grant the loan in question, it is directly and individually concerned for the purposes of the second paragraph of Article 173 of the Treaty in the same way as the Kingdom of Belgium, to which the contested decision is addressed (Joined Cases 62/87 and 72/87 *Exécutif Régional Wallon and Glaverbel* v *Commission* [1988] ECR 1573).

Findings of the Court

26 The Court of First Instance has jurisdiction at first instance only in actions for annulment under the fourth paragraph of Article 173 of the Treaty (Council Decision 94/149/ECSC, EC of 7 March 1994 amending Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom of 24 October 1998 establishing a Court of First Instance of the European Communities (OJ 1994 L 66, p. 29)). It has no jurisdiction to take cognisance of actions brought pursuant to the second paragraph of Article 173 of the Treaty by a Member State, the Council or the Commission.

27 According to the fourth paragraph of Article 173, any natural or legal person may institute proceedings against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former.

28 In this case, the contested decision was addressed to the Kingdom of Belgium. In that respect, it should be noted that it is apparent from the general scheme of the Treaties that the term Member State, for the purposes of the institutional provisions and, in particular, those relating to proceedings before the courts, refers only to government authorities of the Member States of the European Communities and cannot include the governments of regions or autonomous communities, irrespective of the powers they may have (orders in Case C-95/97 *Région Wallonne* v *Commission* [1997] ECR I-1787, paragraph 6 and C-180/97 *Regione Toscana* v *Commission* [1997] ECR I-5245, paragraph 6). The Flemish Region is therefore not entitled to bring proceedings pursuant to the second paragraph of Article 173 of the Treaty. By contrast, since it has legal personality under Belgian national law it must, on that basis, be treated as a legal person within the meaning of the fourth paragraph of Article 173 of the Treaty (orders in *Région Wallonne* v *Commission*, cited above, paragraph 11, and *Regione Toscana* v *Commission*, cited above, paragraph 11; see also the Opinion of Advocate General Lenz in *Exécutif Régional Wallon and Glaverbel* v *Commission*, cited at paragraph 25 above, ECR 1573, 1581, 1582).

29 The contested decision has a direct and individual effect on the legal position of the Flemish Region. It directly prevents it from exercising its own powers, which here consist of granting the aid in question, as it sees fit, and requires it to modify the loan contract entered into with VLM.

30 It follows that it has an interest of its own in challenging the decision. Its situation cannot be compared to that of the Committee for the Development and Promotion of the Textile and Clothing Industry in *DEFI* v *Commission*, cited at paragraph 24 above. In that case, the French Government had the power to determine that committee's management and policies and hence also to define the interests which that organisation had to protect (paragraph 18). In this case, however, it does not appear that the Belgian Federal Government is in a position to determine the manner in which the Flemish Region exercises its own powers, in particular those according it the discretion to grant aid to undertakings.

31 It follows from the foregoing that the application must be held admissible.

Substance

32 The applicant raises three pleas in law in support of its application, based on:

— infringement of Article 92(1) of the Treaty;

— infringement of Article 92(3)(c) of the Treaty; and

— breach of the duty to state reasons laid down in Article 190 of the Treaty.

The third plea falls into three parts:

— insufficient reasoning in the contested decision relating to the application of Article 92(1) of the Treaty (first part);

— insufficient reasoning rejecting the arguments concerning exemption for small aid schemes in the aviation sector (second part);

— insufficient reasoning relating to the application of Article 92(3)(c) of the Treaty (third part).

33 As the first two parts of the third plea are based on breach of the duty to state reasons as regards the conditions for application of Article 92(1) of the Treaty, the Court will examine them immediately after the first plea.

The first plea: infringement of Article 92(1) of the Treaty

Arguments of the parties

34 The applicant considers that when the amount of the aid is so small that it does not strengthen the recipient's competitive position with respect to that of its competitors on the relevant market, it does not distort competition or affect trade between Member States.

35 In this case, the amount of the aid was so insignificant that it had no impact on VLM's costs or tariff structure. The aid amounted to only a few Belgian francs per passenger. Consequently it did not procure any benefit for VLM which strengthened its competitive position with respect to that of other airlines with which it competes on the intra-Community air transport market. Nor, it follows, is the aid likely to affect trade between Member States.

36 In the applicant's submission, in order to conclude that there was an effect on trade between Member States, the defendant should have established that the aid in question procured a benefit for VLM which strengthened its competitive position (in comparison with that of its competitors). However, it gave no indication whatsoever of how VLM had derived any benefit from the loan received.

37 First, the defendant's observations concerning the characteristics of the air transport sector and the fact that it was informed of the aid by a complaint from a competitor is not relevant in that respect. Next, the fact that State aid is granted to an undertaking whose activities by their very nature consist of trade between different Member States does not mean that the recipient derives a benefit from it in comparison with its competitors. Furthermore, the applicant disputes that the operation of the Antwerp-London City route by VLM discourages other companies from operating that route themselves, since the market has been liberalised and the liberalisation measures provide for a special procedure for the grant of slots to new arrivals on the market. Finally, it denies that VLM was in financial difficulties when the loan was granted and even two years thereafter, since it is perfectly normal for a new airline to incur losses connected with starting up.

38 The applicant concludes that the aid in question did not procure any benefit for VLM in comparison with competing companies, since the latter receive several thousand million Belgian francs under restructuring programmes approved by the Commission or, like the complainant Cityflyer, are members of a franchise

network which enables them to be indirectly subsidised by the group to which they belong. In that respect, the applicant cannot understand how the Commission can maintain that an amount which it estimates at most at BFR 1 860 000 *per annum*, would enable VLM not to increase its fares, to maintain its position on the market with respect to its competitors and to avoid greater losses and even insolvency.

39 Finally, the defendant infringed Article 92(1) of the Treaty by overestimating the amount of the aid. It calculated the aid on the basis of a risk premium of 2% on the ground that the loan in question was not accompanied by any guarantee directly linked to moveable or immoveable property. That risk premium should have been 1%, since Article 3 of the loan contract granted the applicant the right to veto the constitution of any security and the transfer of assets and authority to constitute a first mortgage. Consequently the amount of the aid is equal to the total amount of interest resulting from application of a rate of 8.3% and not 9.3%.

40 The defendant claims that the plea should be dismissed and maintains that all the conditions for application of Article 92(1) of the Treaty were satisfied in this case. The loan in question was granted by a State authority (the Flemish Region) and procured a benefit for its recipient with respect to its competitors in a sector where competition is intense. It therefore distorts competition and affects trade between Member States, as a large proportion of European air transport is intra-Community, particularly in Belgium.

Findings of the Court

41 It is necessary to consider whether the defendant was justified in concluding that the aid in question distorted or threatened to distort competition and affected trade between Member States.

A — Distortion of competition

42 The aid in question is intended to facilitate the development and operation of several European air routes (Article 1 of the loan contract; see paragraph 13 above), on which the recipient competes with other airlines, including companies established in other Member States. The loan contract does not therefore require the aid to be used to finance specific expenditure. The fact that no interest was charged on the loan thus relieves VLM of normal costs which form an integral part of its day-to-day activity.

43 The Court of Justice and the Court of First Instance have held that operating aid, that is to say aid which, like the aid in question, is intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities, in principle distorts competition (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 48 and 77, and the case-law cited therein).

44 In the fifth paragraph of Chapter V of the contested decision, the defendant stated: 'In the present case, given the intense competition in the liberalised Community air transport business, the fact that VLM may be the only airline operating on the Antwerp-London route into and out of London City Airport is irrelevant to the Commission's assessment: the aid received will in any event reduce the chances of competitors, actual or potential, who wish to penetrate the market in that particular route and will thus distort competition to that extent at least. Nor is there anything to prevent VLM from making use of the assistance to launch operations on other routes.' In that respect, it should be noted that the applicant has not disputed that the air transport sector is highly competitive in the Community.

45 The applicant does not deny that the loan in question procured a benefit for VLM because it was granted on an interest-free basis. It denies, however, that the benefit to VLM strengthened its competitive position in comparison with that of competing airlines.

46 Where a public authority favours an undertaking operating in a sector which is characterised by intense competition by granting it a benefit, there is a distortion of competition or a risk of such distortion. Where the benefit is limited, competition is distorted to a lesser extent, but it is still distorted. The prohibition in Article 92(1) of the Treaty applies to any aid which distorts or threatens to distort competition, irrespective of the amount, in so far as it affects trade between Member States.

47 It follows that it was legitimate for the defendant to consider that the aid in question distorted or threatened to distort competition.

B — Effect on trade between Member States

48 According to settled case-law, the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that intra-Community trade might be affected (Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 43, and Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraphs 40 to 42).

49 Even aid of a relatively small amount is liable to affect trade between Member States where, as here, there is strong competition in the sector in which the recipient operates (Cases 259/85 *France* v *Commission* [1987] ECR 4393, paragraph 24, and C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27).

50 When State financial aid or aid from State resources strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (Case 730/79 *Philip Morris* v *Commission* [1980] ECR 2671, paragraph 11).

51 In this case, the defendant considered that 'the loan does distort competition, and does affect trade between Member States: it benefits a single company, whose business — air transport — extends over several Member States and potentially over the entire EEA, and which by its nature directly relates to trade. This is particularly so since the entry into force of the third air transport package, on 1 January 1993, which completed the process of liberalisation and greatly increased the scope for competition. VLM is a Community airline company holding an operating licence granted in accordance with Council Regulation (EEC) No 2407/92. Pursuant to Article 3 of Council Regulation (EEC) No 2408/92 and Article 5 of Council Regulation (EEC) No 2409/92, the Member State or Member States concerned must, except where otherwise expressly provided in the same Regulations, permit VLM to exercise traffic rights on routes within the Community and setting its fares freely' (fourth paragraph of Chapter V of the contested decision).

52 Those considerations and those reproduced at paragraph 44 above are entirely founded. The aid in question benefits an undertaking which is geared to international trade, since it provides transport between towns situated in different Member States and competes with airlines established in other Member States. As stated in paragraph 42 above, it is designed to facilitate the development and operation of European routes, so that its potential to affect trade between Member States is increased.

53 It follows that it was legitimate for the defendant to conclude that the aid in question affected trade between Member States.

C — Effect of aid granted to competitors of VLM

54 The fact that competitors of VLM receive State aid, even illegal aid, is irrelevant in classifying aid for the purposes of Article 92(1) of the Treaty. No breach by a Member State of an obligation under the Treaty in connection with the prohibition

laid down in Article 92 can be justified by the fact that other Member States are also failing to fulfil this obligation (Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 24).

D — Calculation of the amount of the aid

55 The applicant's assertion that the defendant infringed Article 92(1) of the Treaty by overestimating the amount of the aid must be rejected. The applicant has failed to establish that, because of the rights deriving from Article 3 of the loan contract, VLM would have been able to obtain the loan in question at 8.3% which, in its opinion, is the rate which should have been applied.

E — Conclusion

56 In view of the foregoing, the applicant has not established that the defendant incorrectly applied Article 92(1) of the Treaty. The plea must therefore be rejected.

The first part of the third plea: insufficient reasoning concerning the application of Article 92(1) of the Treaty

Arguments of the parties

57 The applicant points out that, according to settled case-law, the statement of reasons required by Article 190 must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in

question, in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Court to exercise its power of review (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, and the case-law referred to therein, and Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651, paragraph 52).

58 In order to determine that aid distorts competition and affects intra-Community trade, the Commission must establish in a clear and unequivocal fashion that the aid benefitted the recipient in such a way as to enable it to strengthen its position compared to competitors in intra-Community trade (*Philip Morris* v *Commission*, cited at paragraph 50 above).

59 It is true that the contested decision demonstrates that it is not impossible that aid (even of a relatively small amount) may affect trade between Member States. However, it does not follow that the aid in question actually procures a significant competitive advantage for VLM, thus affecting trade between Member States. The defendant's reasoning was abstract, and did not take specific account of the modest amount of the aid, the particular characteristics of the aviation sector and the fact that VLM's share of the relevant market was minimal.

60 Finally, the decision did not indicate whether the defendant considered the impact of the aid in question on the structure of costs, fares or other aspects of VLM's operation.

61 The defendant disputes that it is required to give such an extensive statement of reasons and considers that the reasoning set out in the fifth and sixth paragraphs of Chapter V of the contested decision entirely satisfies the requirements of Article 190 of the Treaty. It therefore claims that this part of the plea should be rejected.

Findings of the Court

62 According to settled case-law, the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question, in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Community judicature to exercise its power of review (Case T-471/93 *Tiercé Ladbroke* v *Commission* [1995] ECR II-2537, paragraph 29 and the case-law cited therein, and Joined Cases T-551/93, T-231/94, T-232/94, T-233/94 and T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 140 and the case-law cited therein).

63 It is not, however, necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86; Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 17; and Case T-266/94 *Skibsvaeftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 230). In giving its reasons for the decisions it takes in order to ensure compliance with the rules on competition, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision (Case T-44/90 *La Cinq* v *Commission* [1992] ECR II-1, paragraph 41 and the case-law cited therein, and *Siemens* v *Commission*, cited at paragraph 43 above, paragraph 31).

64 When applied to the classification of aid, that principle requires the Commission to indicate the reasons why it considers that the aid in question falls within the scope of Article 92(1) of the Treaty. In that respect, even in cases where it is clear from the circumstances in which the aid has been granted that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons

for its decision (Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 15, and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 52 and the case-law cited therein).

65 In this case, the defendant stated in the second paragraph of Chapter V of the contested decision that the loan constituted aid within the meaning of Article 92(1) of the Treaty and Article 61(1) of the EEA Agreement. It is apparent from the contested decision, particularly the first sentence of the fourth paragraph and the third sentence of the fifth paragraph of Chapter V, the relevant extracts of which are reproduced at paragraphs 51 and 44 above respectively, that the defendant's assessment of the effects of the aid in question on competition and intra-Community trade was not merely abstract. As regards the condition concerning distortion of competition, the contested decision states that the aid granted to VLM distorts or threatens to distort competition because it reduces the chances for competitors to penetrate the market on the Antwerp-London route and increases VLM's chances of capturing other markets, in a sector where competition is intense. As regards the condition concerning the effect on trade between Member States, the decision notes that, since VLM's activities extend to several Member States and could cover the whole of the EEA, that condition is also satisfied.

66 It follows from that reasoning that the defendant considered whether the conditions for the application of Article 92(1) of the Treaty were satisfied. In so doing, the defendant set out the facts and the legal considerations of fundamental importance in the scheme of the decision. The statement of reasons informs the applicant and the Community judicature of the defendant's reasons for considering that the conditions for application of Article 92(1) of the Treaty were satisfied in this case.

67 The applicant cannot criticise the defendant for not having examined the specific effects of the aid in question on trade between Member States. First, that argument lacks any factual basis, as is apparent from paragraphs 44, 51, 65 and 66 above. In this case, the Commission was not required to carry out an extremely detailed economic analysis of the figures since it had explained the respects in which the

effect on trade between Member States was obvious. Nor was it required to demonstrate the real effect of aid which had not been notified. If it were required in its decision to demonstrate the real effect of aid which had already been granted, that would ultimately favour those Member States which grant aid in breach of the duty to notify laid down in Article 93(3) of the Treaty, to the detriment of those which do notify aid at the planning stage (Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 33).

68 It follows from the foregoing that the arguments put forward by the applicant in the context of the first part of the third plea must be rejected.

The second part of the third plea: insufficient reasoning rejecting the arguments concerning exemption for small aid schemes in the aviation sector

Arguments of the parties

69 The applicant submits that the existence of the procedure for accelerated clearance under Article 93(3) of the Treaty, provided for at point 50 of the Aviation Guidelines, demonstrates that, in the eyes of the Commission, aid below that ceiling in the aviation sector must be considered *prima facie* compatible with the common market.

70 The reasoning in the contested decision is insufficient on that point, since it does not contain any information from which the Community judicature and the applicant could assess to what extent the defendant sought to determine whether the limited aid received by VLM could benefit from an exemption as a small aid in the aviation sector.

71 Furthermore, the contested decision is defective because it gives a misleading representation of the comments formulated in that respect by the Flemish Region on 23 January 1995.

72 In its reply, the applicant maintains that the defendant exceeded the limits of its discretion by considering that the exemption for aid schemes of minor importance could not be applied in the air transport sector, where there is keen intra-Community competition and a large number of undertakings are in difficulties, on the ground that aid, even of a modest amount, would result in serious distortions of competition. It would be illogical if new companies who succeeded in penetrating the air transport market following liberalisation of the sector were unable to receive a modest amount of investment aid, like small and medium-sized enterprises in other sectors, when the majority of national airlines receive large amounts of aid. In that respect, the defendant failed to note that, in the air transport sector, the rules permit the Commission to approve aids of a very high level.

73 The defendant claims that this part of the plea should be rejected and points out that the very fact that the accelerated clearance procedure exists demonstrates that aid below the specified ceiling cannot be considered *prima facie* compatible with the common market.

Findings of the Court

74 It cannot be inferred from the accelerated clearance procedure for small aid schemes provided for at point 50 of the Aviation Guidelines that aid of an amount below the ceiling laid down therein escapes the prohibition in Article 92(1) of the Treaty or should normally be considered compatible with the common market.

75 As the defendant correctly points out, the very fact that the procedure exists demonstrates that that cannot be so. Consequently, the defendant was in no way required to consider whether the aid in question could benefit from an exemption in so far as it was of an amount below the ceiling laid down at point 50 of the Aviation Guidelines.

76 Even supposing that aid of an amount below that ceiling could be considered compatible with the common market, it is none the less clear from the decision that the defendant considered that, in this case, the aid could not be held compatible with the common market (see paragraphs 44 and 51 above).

77 The claim that the defendant gave an incorrect account of the applicant's comments in the contested decision must be rejected. Reference is made to those comments in the context of a response to the applicant's argument that the State measure in question could benefit from an exemption pursuant to point 50 of the Aviation Guidelines (eighth paragraph of Chapter VII of the contested decision). That response does not constitute a fundamental aspect of the reasoning in support of the operative part of the contested decision. That is apparent, furthermore, from the conclusion that the defendant's assessment, according to which Article 92(1) of the Treaty applies to the aid in question, is sufficiently reasoned (see paragraphs 65 to 67 above). Therefore, even if an inaccurate account was given of the applicant's comments, the claim cannot be successful.

78 Finally, by its claim in the reply that the defendant exceeded the limits of its discretion in applying Article 92(1) of the Treaty, the applicant has raised a plea in the course of the proceedings which is distinct from the plea based on a breach of the duty to state reasons. As that plea is not based on matters of law or of fact which came to light in the course of the procedure, it must, having regard to Article 48(2) of the Rules of Procedure, be held inadmissible.

79 That claim is, in any event, unfounded. In this case, the defendant applied the Guidelines. In that respect, it should be recalled that the Commission may lay down for itself guidelines for the exercise of its discretionary powers by way of documents such as the Aviation Guidelines, provided that they contain directions on the approach to be followed by that institution and do not depart from the Treaty rules (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 34 and 36; Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57; see also Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 61). The applicant has not demonstrated that the Aviation Guidelines depart from the Treaty rules. Furthermore, as noted in paragraph 54 above, the fact that VLM's competitors receive State aid, even illegal aid, is irrelevant in classifying aid for the purposes of Article 92(1) of the Treaty.

80 It follows from the foregoing that the arguments put forward by the applicant in the context of the second part of the third plea must be rejected.

The second plea: infringement of Article 92(3)(c) of the Treaty, which permits the Commission to declare aid granted to facilitate the development of certain economic activities to be compatible with the common market

Arguments of the parties

81 According to the applicant, even if the aid in question fell within Article 92(1) of the Treaty, it would be covered by Article 92(3)(c) of the Treaty. When considering the possibility of authorising the aid under the latter provision, the defendant committed a manifest error of assessment and clearly exceeded the limits of its discretion.

82 By adopting the Aviation Guidelines, the Commission did not exhaust its discretion. It should examine in each individual case whether aid may be considered compatible with the common market under Article 92(3)(c) of the Treaty. The Aviation Guidelines cannot give rise to a *prima facie* assumption that situations not referred to therein are manifestly illegal and cannot be considered compatible with the common market pursuant to Article 92(3) of the Treaty. If a particular form of aid is not mentioned in the Aviation Guidelines, the Commission cannot, according to the applicant, merely refer to them.

83 In this case, the defendant failed to comply with that obligation by not considering whether the aid granted to VLM could, having regard to its amount, benefit from an exemption as aid intended to facilitate the development of certain types of activity within the meaning of Article 92(3)(c) of the Treaty. It should have considered that question in the light of point 8 of the Aviation Guidelines (which highlights the need for Community air carriers to compete on a level playing field) and the fact that, since the entry into force of the third package of aviation measures, new airlines such as VLM must compete with other companies the vast majority of which benefit from a programme of subsidies approved by the Commission.

84 In the applicant's submission, the defendant also wrongly considered, first, that the aid in question constituted operating aid, second, that it was not accompanied by any condition concerning the use of the aid and, third, that the applicant had not obtained any security and that VLM was in financial difficulties at the time the loan was granted. In reality, the aid in question is investment aid, since it was to be used for the development of various European routes.

85 The defendant claims that the plea should be rejected and points out that it strictly applied the Aviation Guidelines which it adopted within the framework of its discretion.

Findings of the Court

86 Article 92(3)(c) of the Treaty gives the Commission a discretion by providing that the aid specified therein 'may' be considered to be compatible with the common market when it does not affect conditions of trade to an extent contrary to the common interest (see *Philip Morris* v *Commission*, cited at paragraph 50 above, paragraph 17).

87 The applicant cannot claim that the defendant exceeded the limits of its discretion by failing to consider whether the aid in question could benefit from an exemption as an aid intended to facilitate the development of certain types of activity. In the seventh paragraph of Chapter VII of the contested decision, the defendant expressly considered that question and responded to the arguments put forward by the Belgian authorities during the administrative procedure. In particular, it stated that it was 'prepared to allow this exemption only in favour of aid to enterprises which are to be restructured ... In this case the Belgian authorities have themselves said that the loan is not intended to assist restructuring; and they have made no reference to a restructuring programme. Thus the exemption provided for in Article 92(3)(c) [of the Treaty] and Article 61(3)(c) [of the EEA Agreement] is in any event inapplicable here.' By holding that the aid in question was not intended to assist restructuring, the defendant expressly referred to the Aviation Guidelines, which reserved the benefit of an exemption for the development of economic activities under Article 92(3)(c) to aid intended to assist restructuring (points 37 and 38 of the Aviation Guidelines).

88 Since the amount of the aid does not constitute a criterion for assessment laid down by Article 92(3)(c) of the Treaty or by the Aviation Guidelines applicable in this case, the defendant was under no obligation specifically to consider whether, in view of its amount, the aid could benefit from an exemption under that provision.

89 In the context of the broad discretion it enjoys in applying Article 92(3)(c) of the Treaty, the defendant is justified in relying on the criteria it considers to be most appropriate in order to determine whether an aid can be considered compatible with the common market, provided that those criteria are relevant having regard to Articles 3(g) and 92 of the Treaty. In that respect, it can specify the criteria it intends to apply in guidelines which are consistent with the Treaty (see paragraph 79 above). The adoption of such guidelines by the Commission is an instance of the exercise of its discretion and requires only a self-imposed limitation of that power when considering the aids to which the guidelines apply, in accordance with the principle of equal treatment. By assessing specific aid in the light of such guidelines, previously adopted by it, the Commission cannot be considered to exceed the limits of its discretion or to waive that discretion. On the one hand, it retains the power to repeal or amend any guidelines if the circumstances so require. On the other, the Aviation Guidelines concern a defined sector and are based on the desire to follow a policy established by it.

90 Contrary to what is claimed by the applicant, it follows from point 10 of the Aviation Guidelines that they cover the aid in question. Point 14 (Chapter III) states that direct operational subsidisation of air routes can, in principle, only be accepted where the aid is designed to enable the recipient to carry out its public service obligations (points 15 to 23, Section III.2) or has a social character (point 24, Section III.3). Points 37 to 42 list a number of conditions to be satisfied by recipients of aid which may be authorised for the development of certain economic activities pursuant to Article 92(3)(c) of the Treaty. It follows from the scheme of the relevant points that only restructuring aid may be authorised.

91 In the alternative, the applicant considers that the defendant committed a manifest error of assessment by not considering the question in the light of point 8 of the Aviation Guidelines, which highlights the Commission's desire that air carriers should be able to compete on a level playing field. By this claim, the applicant implies that, since other airlines have obtained State aids, the aid in question must be authorised in order to enable VLM to compete on a level playing field with those companies in receipt of State aid.

92 In that respect, it should be pointed out that the authorisation of State aid granted to certain airlines does not automatically mean that other airlines are entitled to a derogation from the principle that aid is prohibited. It is for the Commission, within the framework of its discretion, to consider each proposal for aid individually. It must do so in the light, first, of the specific circumstances surrounding the aid and, second, of general principles of Community law and the Aviation Guidelines. Even if companies established in other Member States have received illegal aid, that is irrelevant for the purposes of assessing the aid in question (see paragraph 54 above).

93 The Commission's discretion cannot, in any event, be overridden by the sole fact that it authorised aid intended for a competitor since, if that were so, it would deprive the provisions of the Treaty granting it that power of all useful effect.

94 The applicant cannot criticise the defendant for having considered that the aid in question constituted operating aid, that it was not accompanied by any condition concerning its use, that the applicant had not received any security and that VLM was in financial difficulties at the time the loan was granted. The loan contract does not require the aid to be used to finance any specific expenditure (see paragraph 42 above), so that it relieves VLM of costs which form an integral part of its day-to-day activity. Consequently, the aid in question constitutes operating aid (in that respect, see the judgment in *Siemens* v *Commission*, cited at paragraph 63 above, paragraph 77) and not restructuring or investment aid.

95 In the contested decision, the defendant did not state that the applicant had not obtained any security for the loan. It stated, in the seventh and eighth paragraphs of Chapter V, that 'the lender has in fact a form of guarantee' and that 'the claim is not secured against moveable or immoveable property, as it would be if there were a mortgage', which is confirmed by Article 3 of the loan contract.

96 Finally, the defendant did not state that VLM was in financial difficulties less than two years after its formation (sixth paragraph of Chapter V) when assessing the aid

in question with regard to Article 92(3)(c) of the Treaty but, rather, when applying the criterion of a private investor operating under market conditions in order to determine whether the loan in question constituted aid for the purposes of the Treaty. In that respect, the applicant has not established that the defendant incorrectly applied that principle, so that even if the contested statement lacks nuance, that in itself cannot result in the annulment of the contested decision.

97 It follows from the foregoing that the defendant was justified in refusing to grant an exemption under Article 92(3)(c) of the Treaty.

The third part of the third plea: insufficient reasoning concerning the application of Article 92(3)(c) of the Treaty

Arguments of the parties

98 According to the applicant, the Commission cannot, in an individual decision, simply lay down guidelines transposing its policy in the relevant sector or declare that the conditions laid down in those guidelines are not satisfied. It must carry out an individual assessment of whether the aid in question cannot fall within the exception in Article 92(3)(c) of the Treaty.

99 In this case, the reasoning put forward in the decision does not make it possible to ascertain whether the defendant took account of all the matters of fact and of law which might have justified granting an exemption from the prohibition on State aid. The inadequacy of the reasoning is all the more patent because the Aviation Guidelines referred to by the defendant in its decision do not necessarily restrict the benefit of Article 92(3)(c) of the Treaty to restructuring aid.

100 In particular, the reasoning in the decision does not make it possible to evaluate the extent to which the defendant actually considered whether the aid in question satisfied the criterion set out in the third paragraph of Chapter VII of the contested decision, according to which the exemptions provided for in Article 92(3) of the Treaty and Article 61(3) of the EEA Agreement apply only where the Commission can establish that without the aid in question, the effects of market forces would not have been enough to incite the future recipient to undertake some action conducive to one of the objectives for which the exemptions exist.

101 The defendant considers that it gave an adequate explanation in its decision of its reason for not authorising the aid in question, by pointing out in particular that the aid did not form part of a restructuring programme approved by the Commission in advance. Consequently, it claims that the third part of the plea should be rejected.

Findings of the Court

102 By recalling the criteria laid down in the Aviation Guidelines and holding that those criteria were not satisfied in the present case (seventh paragraph of Chapter VII of the contested decision), the defendant gave sufficient reasons for its decision. The recipient of the aid, interested third parties and the Community judicature are perfectly able to identify the defendant's reasons for refusing to grant an exemption under Article 92(3) of the Treaty.

103 The applicant cannot criticise the defendant for not having considered whether or not, without the aid in question, the effects of market forces would have been

enough to incite the future recipient to undertake some action conducive to one of the objectives for which the exemptions envisaged in Article 92(3)(c) of the Treaty and Article 61(3) of the EEA Agreement exist (see the third paragraph of Chapter VII of the contested decision). It was sufficient for the Commission to hold that just one of the conditions laid down in the Aviation Guidelines for the authorisation of aid under Article 92(3)(c) of the Treaty (here, the absence of a restructuring goal) was not satisfied to conclude on sufficient grounds that the aid could not be authorised under that provision.

104 Consequently the third part of the third plea is also unfounded.

105 It follows that the application must be dismissed in its entirety.

Costs

106 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and since the defendant applied for costs, the applicant must be ordered to pay the costs of the defendant in addition to its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition)

hereby:

1. Dismisses the application;

2. Orders the applicant to bear the costs.

García-Valdecasas Tiili Azizi

Moura Ramos Jaeger

Delivered in open court in Luxembourg on 30 April 1998.

H. Jung J. Azizi

Registrar President

Summary