JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

6 October 1999 *

In Case T-123/97,

Salomon SA, a company incorporated under French law, established in Pringy France, represented by Loraine Donnedieu de Vabres and Jean-Pierre Jouyet, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, acting as Agent, assisted by Ami Barav, of the Paris Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

supported by

Republic of Austria, represented by Christine Stix-Hackl, acting as Agent, with an address for service in Luxembourg at the Austrian Embassy, 3 Rue des Bains,

and by

HTM Sport- und Freizeitgeräte AG, a company incorporated under Austrian law, established at Schwechat, Austria, represented by Wolfgang Knapp, Avocat, Brussels and Rechtsanwalt, Frankfurt am Main, and by Till Müller-Ibold, Rechtsanwalt, Frankfurt am Main, with an address for service in Luxembourg at the Chambers of Arendt & Medernach, 8-10 Rue Mathias Hardt,

interveners,

APPLICATION for annulment of Commission Decision 97/81/EC of 30 July 1996 concerning aid granted by the Austrian Government to Head Tyrolia Mares in the form of capital injections (OJ 1997 L 25, p. 26),

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

composed of: A. Potocki, President, K. Lenaerts, C.W. Bellamy, J. Azizi and A.W.H. Meij, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 24 March 1999,

gives the following

Judgment

Legal background to the dispute

1 Article 92(3) of the EC Treaty (now, after amendment, Article 87 EC) provides:

'The following may be considered to be compatible with the common market:

...

(c) 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....'

2 For the purposes of application of that provision, the Commission has drawn up Community Guidelines on State Aid for Rescuing and Restructuring Firms in Difficulty (94/C 368/05) (OJ 1994 C 368, p. 12, hereinafter 'the Guidelines').

Facts

3 The Austrian company Head Tyrolia Mares (hereinafter 'HTM') comprises undertakings producing and marketing winter sports, tennis, diving and golf articles. In 1994, HTM had a turnover of about ATS 5 200 million, or about ECU 390 million, 45% of which was achieved in Western Europe. In June 1995, the group employed about 2 700 people. HTM's production centres are in the United States of America and in Europe (Germany, Austria, Italy, Czech Republic and Estonia). The Austrian locations are at Kennelbach (536 employees), Hörbranz (279 employees), Schwechat (395 employees) and Neusiedl (80 employees).

4 In 1993, the public holding company Austria Tabakwerke ('AT') acquired the controlling stake in HTM for a price of USD 20 million (about ECU 16 million). AT immediately recapitalised HTM with USD 100 million (about ECU 80 million). The same year HTM obtained from AT a non-preferential shareholder loan to replace its own capital, amounting to DEM 82.25 million (about ECU 45 million).

5 In spite of the announced rationalisation, diversification and new investment programmes, HTM incurred heavy losses in 1993 and in 1994, mainly due to the severe decline in the world ski market since the end of the 1980s and highly negative performance in branches such as sportswear and golf equipment. High financial charges and some restructuring and extraordinary items further depressed the financial performance.

6 After being approached by AT in January 1995 to draw up a plan to turn HTM round, the merchant bank SBC Warburg (hereinafter 'Warburg') was instructed, in March 1995, to draw up a plan for HTM's privatisation and in May 1995 Warburg started a procedure to select potential buyers.

7 In order to avoid HTM's becoming insolvent, AT was forced, in April 1995, to inject ATS 400 million (about ECU 30 million) into the group and to convert the shareholder loan of about ECU 45 million granted in 1993 into new equity.

8 Salomon SA (hereinafter 'Salomon') produces in particular alpine skis, cross-country skis, snowboards, ski-boots and ski-bindings as well as golf clubs. Its turnover in 1995 was approximately FF 4 000 million (about ECU 620 million), of which 62% was on the winter sports alone (about ECU 386 million). As a direct competitor of HTM on the market in winter sports articles, Salomon asked the Commission, by letter of 21 June 1995, to investigate the State aid which it thought had been granted by AT to HTM.

9 In July 1995 a restructuring plan was drawn up for HTM to enable it to return to viability by 1997. To finance this plan and to ward off the possibility of an insolvency procedure, the Austrian Ministry of Finance, in August 1995, approved AT's decision to inject further capital of up to ATS 1 500 million (about ECU 112 million) into HTM, to be paid in tranches between 1995 and 1997.

10 On 8 August 1995, the Austrian authorities informed the Commission of AT's intentions. On 1 September 1995, the Commission submitted a request for information to the Austrian Government, to which it responded on 21 September 1995.

11 On 30 September 1995, HTM received payment of a tranche of ATS 373 million (about ECU 28 million) from AT. During September 1995, owing to the deterioration in HTM's situation, the restructuring was abandoned in favour of immediate sale. On Warburg's advice, AT's board of directors decided to accept the preliminary offer of a group of international investors led by Johan Eliasch (hereinafter 'the Eliasch Group') and to negotiate an immediate privatisation of the entire HTM Group.

12 The agreement concluded with the Eliasch Group stipulated a sales price of ATS 10 million (about ECU 0.7 million) and a capital grant to HTM of ATS 1 190 million (about ECU 88 million) by AT, to be paid in several instalments. The Eliasch Group committed itself to injecting a further ATS 300 million (about ECU 22 million), of which ATS 25 million (about ECU 2 million) was to be paid as soon as AT's measures were approved by the Commission.

13 AT was to receive 15% of any capital gain that the Eliasch Group might realise on the total or partial sale of HTM to third parties, by means of a sale of shares or a public offering. Finally, the Eliasch Group was to maintain HTM's activities in Austria for at least three years and to maintain employment at the Schwechat plant at 50% of the then current level and at 80% of the current level at the Hörbranz and Kennelbach plants.

14 In the last week of November 1995, the Commission was informed that the banks had agreed to contribute, after the change of ownership, to the restructuring of HTM by means of a debt write-off of ATS 630 million (about ECU 47 million) and by debt rescheduling.

15 By decision of 20 December 1995, amended on 13 March 1996, the Commission initiated, pursuant to Article 93(2) of the EC Treaty (now Article 88(2) EC), the procedure for examining the compatibility with the common market, as restructuring aid for HTM, of capital injections totalling ATS 190 million (about ECU 30 million) made in April 1995 (see paragraph 7 above) and ATS 1 190 million (about ECU 88 million) (see paragraph 12 above) already made or planned by AT in accordance with the sale agreement with the Eliasch Group.

16 The Commission also considered that, after its conversion into a loan repayable at the market rate, the total amount of ATS 1 273 million (about ECU 95 million), of which 773 million (about ECU 58 million) (see paragraphs 7 and 11 above) had already been paid to HTM, could be authorised as rescue aid.

17 For that purpose, the Commission published a communication addressed to the Member States and other interested parties, pursuant to Article 93(2) of the Treaty, concerning aid granted by the Federal Austrian Government in the form of capital injections to the company HTM (OJ 1996 C 124, p. 5).

18 At the beginning of February 1996, the Commission was informed that the conclusion of the share purchase agreement had actually taken place by the transfer of the share ownership in HTM from AT to the Eliasch Group.

19 In the examination procedure, Salomon submitted its observations by a document dated 21 May 1996.

20 By Decision 97/81/EC of 30 July 1996 concerning aid granted by the Austrian Government to HTM in the form of capital injections (OJ 1997 L 25, p. 26, hereinafter 'the Decision'), the Commission concluded that the capital injections of ATS 400 million (about ECU 30 million) (see paragraph 7 above) and ATS 1 190 million (about ECU 88 million) (see paragraph 12 above), or ECU 118 million, constituted State aid but, subject to certain conditions, that aid could be declared compatible with the common market as restructuring aid.

21 In the Decision the Commission observes that the alpine ski market is saturated, that it has substantial overcapacity and that a concentration of a small number of large manufacturers is to be expected. In the Commission's opinion, the same trend is underway on the market for ski-bindings and ski-boots.

22 According to the Decision, the restructuring plan envisages a return by HTM to its core activities (tennis, skis, bindings, boots and diving equipment) with the emphasis, in the short term, on the Head brand, on marketing initiatives, on innovative and high-technology products and on the US market. Once restructuring is completed, long-term objectives include extending activities by entering new product markets (through licensing arrangements) and new geographical areas. The restructuring plan envisages operational breakeven in 1996, return to profitability by 1997 and, as an ultimate objective, HTM's flotation on the stockmarket in 1998 or 1999.

23 The restructuring plan has the following points:

— adapting production capacity to the decline in the markets for winter-sports equipment (skis, boots and bindings) and tennis racquets. This includes use of outsourcing and the transfer of labour-intensive manufacturing processes to East European locations to bring down manufacturing costs;

— phasing-out of unprofitable product lines and reduction of stock-keeping;

— rationalisation and reduction of fixed costs of the sales and administrative organisation, including the merger of legal entities;

— development and installation of a logistics system to facilitate centralised control of inventory management, inventory and shipping as well as modernisation of internal management systems and manufacturing processes.

24 The restructuring plan envisages in particular annual capacity reductions of 39% for skis, 59% for ski-bindings, 9% for ski-boots and 38% for tennis racquets. Slimming-down of staffing levels is planned in these various sectors of activity.

25 The direct cost of the restructuring measures to be carried out from 1995 to 1997 is forecast to be USD 159 million (about ECU 127 million). The main cost items are the closure of the golf business, the closure of the sportswear business, production capacity reductions and the reorganisation of the facilities at Kennelbach, Schwechat and Hörbranz. In addition, there will be severance pay for the personnel made redundant.

26 The recapitalisation plan, which is part of the restructuring programme, provides, in addition to the capital injections by AT and debt forgiveness and interest waiver by the banks of ATS 630 million (about ECU 47 million) (see paragraph 14 above), for two capital injections from the Eliasch Group of about ECU 2 million and about ECU 20 million respectively (see paragraph 12 above) by 1998 and an international public offer which should earn USD 60 million (about ECU 48 million). Since the projected equity ratio of HTM in 1998 (7%) was regarded as being too low to compete successfully with its international competitors, the final equity contribution of the Eliasch Group and the public offer are considered vital to HTM's capital structure by further reducing the company's debts.

27 Article 1 of the operative part of the Decision provides that the grants from Austria Tabakwerke AG to Head Tyrolia Mares in the form of capital injections amounting to ATS 1 590 million (about ECU 118 million) (see paragraph 20 above) constitute State aid within the meaning of Article 92(1) of the Treaty. That aid is considered compatible with the common market pursuant to Article 92(3)(c) as it facilitates the development of certain economic activities without adversely affecting trading conditions to an extent contrary to the common interest.

28 Payment of that sum of ATS 1 590 million, which includes the sum of ATS 1 273 million (about ECU 95 million) already approved by the Commission as rescue aid (see paragraph 16 above), was effected in the following way: ATS 400 million

(about ECU 30 million) was paid in April 1995 (see paragraph 7 above) and ATS 373 million (about ECU 28 million) on 30 September 1995 (see paragraph 11 above). Finally, provision is made for the payment of an amount of ATS 27 million (about ECU 2 million) and the staggering of payment of the balance from 31 December 1995 to 31 March 1998.

29 In Article 2, the Decision states that, in order to ensure the compatibility of the aid with the common market, the Commission requires the Austrian Government to undertake to guarantee that the following conditions are met:

— the restructuring plan is to be carried out as submitted to the Commission. By the end of August and the end of February each year until 1999, HTM has to deliver a report on the progress of the restructuring, showing the economic development and financial results of the company and their compliance with the restructuring plan. It must also submit the annual accounts of the companies in the group for the years 1995 to 1999 by the end of June of the following year at the latest,

— the capacity reductions provided for in the restructuring plan are to be carried out on an irreversible basis;

— the capital injection into HTM by the Eliasch Group of ATS 25 million (about ECU 2 million) (see paragraph 12 above) is to be effected within one month of the date of the Decision;

— the capital injection into HTM by the Eliasch Group of ATS 275 million (about ECU 20 million) (see paragraph 12 above) is to be effected by 31 December 1998;

— an additional contribution of fresh equity capital of at least ATS 600 million (about ECU 48 million) (see paragraph 26 above) by way of an international public offer of HTM on the capital market or by means having the same effect is to be completed by the end of 1999;

— past losses of ATS 1 590 million (about ECU 118 million) may not be used to reduce taxable profits.

30 Finally, Article 3 provides that the Decision is addressed to the Republic of Austria.

31 The Decision was notified to the Austrian Government on 21 August 1996 and published on 28 January 1997.

Procedure before the Court

32 By application lodged on 18 April 1997, Salomon brought an action for annulment of the Decision.

33 By orders of 26 November 1997, the Republic of Austria and HTM were granted leave to intervene in the proceedings in support of the Commission.

34 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber, Extended Composition) decided to open the oral procedure without any preparatory inquiry. However, it asked the parties to answer certain questions in writing.

35 The parties presented oral argument in reply to the Court's questions at the hearing on 24 March 1999.

Procedure before the Court

36 Salomon claims that the Court should:

— Annul the Decision;

— Order the Commission to pay all the costs.

37 The Commission contends that the Court should:

— Dismiss the action as inadmissible and, in any event, as unfounded;

— Order the applicant to pay the costs.

38 The Republic of Austria submits that the Court should:

— Dismiss the action;

— Order the applicant to pay the costs.

39 HTM submits that the Court should:

— Declare the action inadmissible as being out of time, or

— Dismiss the action as manifestly unfounded;

— Order the applicant to pay the costs, including HTM's costs.

Admissibility

40 The Commission, supported in substance by the intervening parties, contends that this action, brought on 18 April 1997, is out of time since the period for commencing proceedings began to run from the day on which the applicant learned of the existence of the Decision. Since the Decision was reported in the

press at the time of its adoption, on 30 July 1996, the applicant should then have asked the Commission to communicate the Decision to it and should have brought its action within two months following the date on which it became aware of the contents of the Decision. The subsequent publication of the Decision in the *Official Journal of the European Communities* did not start that period of time running again.

41 Salomon, on the other hand, considers that it brought its action in good time. It is only in the absence of publication or notification of the decision in question that the period for bringing proceedings begins to run from the date when the act in question came to the knowledge of the applicant. Where, however, as in this case, a decision has not been notified to the applicant so as to allow the applicant to know its content precisely but was published in the Official Journal, the period for bringing proceedings starts to run from the date of publication, irrespective of its optional character, which is also confirmed by litigation practice in the matter of State aid.

42 It is sufficient for the Court to observe here that, according to the actual wording of the fifth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC), the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point for the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (judgment of the Court of Justice in Case C-122/95 *Germany* v *Council* [1998] ECR I-973, paragraph 35).

43 Moreover, the Commission has committed itself to publishing in the L Series of the Official Journal the complete text of decisions granting conditional authorisation for State aid taken, as in this case, at the end of the procedure provided for by Article 93(2) of the Treaty [see *Droit de la Concurrence dans les Communautés Européennes*, Volume II A, 'Règles applicables aux aides d'État', 1995, p. 43, paragraph 53, and p. 55, paragraph 90(d)].

44 Since the Decision was published in Official Journal L 25 of 28 January 1997, it is that latter date which started the period running as against the applicant.

45 The argument that the action is inadmissible must therefore be dismissed.

Substance

Scope of the Court's review of the compatibility of the restructuring aid in question

46 Acts of the Community institutions are presumed to be valid (see, to this effect, the judgment of the Court of Justice in Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 10). It is for parties seeking their annulment to rebut that presumption by producing evidence to cast doubt on the assessments made by the defendant institution.

47 It is also established in case-law that the Commission enjoys a broad discretion in the application of Article 92(3) of the Treaty. Since that discretion involves complex economic and social appraisals, the Court must, in reviewing a decision adopted in such a context, confine its review to determining whether the Commission complied with the rules governing procedure and stating of reasons, whether the facts on which the contested finding was based are accurately stated and whether there has been any manifest error of assessment or any misuse of

powers. In particular, it is not for the Court to substitute its own economic assessment for that of the author of the decision (judgment in Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 79).

48 Furthermore, in the context of an action for annulment under Article 173 of the Treaty, the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted. In particular, the complex assessments made by the Commission must be examined solely on the basis of the information available to it at the time when those assessments were made (see, to this effect, *British Airways and Others* v *Commission*, cited above, paragraph 81).

49 Finally, the mere assertion that one of the conditions for the authorisation of aid will not be complied with cannot cast doubt on the legality of the decision to authorise the aid. In general, the legality of a Community act cannot depend on the possible existence of opportunities for circumvention or on retrospective considerations of its efficacy (*British Airways and Others* v *Commission*, cited above, paragraph 291).

50 The pleas and arguments raised by the applicant must therefore be examined in the light of the principles mentioned above.

The financial transactions not taken into consideration by the Decision in authorising the restructuring aid in question

51 Without claiming that the capital grant made in 1993 by AT in favour of HTM amounting to approximately ECU 80 million (see paragraph 4 above) constitutes State aid within the meaning of Article 92 of the Treaty, Salomon alleges that,

under Article VI of the General Agreement on Tariffs and Trade (hereinafter 'GATT') and Article 23 of the Free Trade Agreement between the European Economic Community and the Republic of Austria (OJ 1972 L 300, p. 2, hereinafter 'the Free-Trade Agreement') then in force, aid likely to distort competition was prohibited. The grant made in 1993 should therefore never have been made and that fact should have been taken into consideration by the Commission in its assessment of the aid arrangements from which HTM has benefited since 1993.

52 The Commission, supported in substance by the intervening parties, considers that Salomon's argument is inadmissible: it neither challenged the decision opening the procedure in that it drew no consequence from that capital injection nor put forward that argument during the investigation procedure.

53 In reply, Salomon states that the decision to open the procedure constituted a step in the investigation preparatory to the final decision which, as such, was not open to an action for annulment. Salomon observes, secondly, that the Commission was aware of the capital grant in 1993, since the applicant had mentioned it in its aforementioned letter of 21 June 1995.

54 The Court observes first of all that a decision initiating the investigation procedure provided for in Article 93(2) of the Treaty produces legal effects and is thus an actionable measure only if it involves designation of aid as existing or new aid and a choice of the applicable rules of procedure (see, to this effect, the judgment in Joined Cases T-126/96 and T-127/96 *BFM and EFIM* [1998] ECR II-3437, paragraph 43).

55 Secondly, it would not be admissible for the applicant to rely on factual arguments which were unknown to the Commission and which it had not notified to the latter during the examination procedure (see, to this effect, the judgment of the Court of Justice in Joined Cases C-278/92, C-279/92 and

C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31, and the judgment of the Court of First Instance in Case T-37/97 *Forges de Clabecq* v *Commission* [1999] ECR II-859, paragraph 93). On the other hand, nothing prevents the interested party from raising against the final decision a legal plea not raised at the stage of the administrative procedure which was opened in respect of the aid in question by the measure of 20 December 1995, as subsequently modified (see, to this effect, *Forges de Clabecq* v *Commission*, cited above, paragraph 93).

56 In those circumstances, the objection of inadmissibility raised by the Commission must be dismissed.

57 On the merits, the Commission, supported in substance by the intervening parties, objects that the capital injection carried out in 1993 has no bearing on the assessment of the compatibility with the common market of the amount of aid authorised, which was based on a specific analysis of the capital grants in question and not on a comparison with earlier interventions, whose legality is not challenged (*Spain* v *Commission*, cited above, paragraph 71). Furthermore, Article 92 of the Treaty was not applicable *ratione temporis* to the amount paid by AT to HTM in 1993. Finally, the measures adopted at that time by AT for the benefit of HTM were not contrary to either the GATT or the Free-Trade Agreement.

58 It is sufficient for the Court to point out that, at the time when the Commission opened the examination procedure in question (see paragraph 15 above), Article VI of GATT and Article 23 of the Free Trade Agreement could no longer constitute the legal basis for assessing the compatibility with the common market of the capital injections granted by AT to HTM. Moreover, Article VI of the GATT, relating to anti-dumping and compensating duties, was irrelevant and Article 23 of the Free-Trade Agreement merely gave the contracting parties the power to intervene against public aid.

59 To that extent, the Commission was not in any way bound, under the aforesaid two provisions, to take into consideration the capital grant made in 1993 in its assessment of the restructuring aid in question (hereinafter 'the Aid').

60 In any event, in assessing the proportionality of the Aid, the Commission could only compare the capital injections made with the restructuring plan of which they constituted the necessary *quid pro quo* and support.

61 Moreover, the time which elapsed between the payments in 1993 and the capital injections granted from April 1995 (see paragraph 7 above) and authorised by the Decision meant that it would not have been appropriate to include them in the same single assessment of HTM's financial situation in the context of the procedure for the examination of the Aid.

62 In any event, as part of its calculations Salomon takes into account the shareholder loan of approximately ECU 45 million (see paragraph 4 above) granted by AT to HTM in 1993 and its conversion into equity in April 1995 (see paragraph 7 above).

63 The Court finds that the shareholder loan was from the outset, irrespective of the way in which it was described in HTM's accounts, a non-preferential loan to replace its equity capital. Owing to HTM's serious overindebtedness at the time when the loan was formally converted into equity, repayment of the loan was *de facto* excluded and the loan could not therefore be regarded as a debt of HTM *vis-à-vis* AT, the remission of which would have constituted an additional advantage in reality.

64 It follows that, in so far as the conversion of the loan into equity involved AT's waiver of repayment of an irrecoverable debt, it did not in itself procure HTM any economic advantage in the form of a transfer of public resources at AT's expense.

65 Consequently, the Commission did not commit any error in law in not treating that loan conversion as State aid.

66 Finally, Salomon points out that the banks agreed to waive their debts amounting to approximately ECU 47 million (see paragraph 14 above). To that extent, the applicant may have intended to argue that the waiver comprised elements of State aid and that it therefore had to be taken into consideration for the purposes of the Decision.

67 The Court observes that, in response to one of its questions, the Commission explained that the consortium of banks made both the waiver of part of their debts totalling ATS 2 000 million (about ECU 150 million) and the rescheduling of the sums remaining due subject to the provision of guarantees, which included approval by the Commission of the notified capital injections.

68 Since, in the event of HTM's insolvency, the banks were liable to lose a still greater amount of their debts, and in the absence of a veto by the private banks, which represented a third of all the members of the bank consortium, it does not appear, as the Commission found, that the waiver by the public banks comprised elements of State aid.

69 Consequently, the Commission did not commit any error of law in finding that it was not established that the waiver by the banks comprised elements of State aid.

70 In those circumstances, the Commission did not commit any error of law in not taking into consideration the financial transactions in question, for the purposes of authorising the Aid.

The first plea: the Aid was not a single package

71 Salomon maintains that, in spite of the Guidelines, the series of capital injections, which did not all meet the same objectives, cannot all be regarded as a single aid measure. In particular, the payment of approximately ECU 30 million (see paragraph 7 above), made by AT four months before a restructuring plan was put in place, could not form an integral part of it and was a response to the need to ward off HTM's insolvency. The amounts of approximately ECU 28 million received by HTM during the summer of 1995 (see paragraph 11 above) were paid as part of the independent restructuring plan put in place at the time in order to ward off an insolvency procedure. After that plan was abandoned in favour of an immediate sale owing to the deterioration of HTM's situation, fresh capital injections were decided upon in order to meet that new situation.

72 The Commission, supported in substance by the intervening parties, considers essentially that the applicant has put forward no argument to refute the existence of a single package of aid.

73 It is clear from the account of the facts (see paragraphs 15 and 16 above) that the capital injections in question were originally approved as rescue aid, without prejudice to their subsequent authorisation as restructuring aid. It was under this new characterisation that they were authorised at the end of the examination procedure, on condition that the restructuring plan approved by the Decision was put into effect.

74 It follows that this plan covers the capital injections in question, irrespective of their initial approval as rescue aid, the legality of which is not the subject of this action.

75 Since they are part of the restructuring plan approved by the Decision, their payment in successive tranches does not change the nature of the Aid as a single package.

76 In those circumstances, the plea must be dismissed.

The second plea: improper reference to the oligopolistic structure of the markets in winter sports articles

77 Salomon observes that the Commission's position, which is that the disappearance of HTM would have strengthened the oligopolistic structure of the markets in winter sports articles, amounts to an assertion, contrary to the intention of the authors of the EC Treaty and the letter of its provisions applicable to State aid, that such aid is justified where an oligopolistic market exists.

78 The Commission denies that such a conclusion can be derived from the Decision.

79 It does not appear to the Court that the Commission came to the conclusion that the Aid was compatible with the common market simply in view of the oligopolistic nature ascribed to the markets in question. As is clear from the last paragraph of section 8.2 of the Decision, this market structure was taken into account by the Commission only in order to buttress its argument that the amount of the Aid, having regard to the cost of the restructuring measures which HTM was required to undertake in return, was not liable to cause undue distortions of competition, contrary to the common interest within the meaning of Article 92(3)(c) of the Treaty.

80 In those circumstances, the plea must be dismissed.

The third plea: wrong analysis of the markets in question

81 First of all, Salomon criticises the Commission for having adopted a global approach to the markets concerned when it should have given separate consideration to the sector of winter sports articles, in which HTM generates 45% of its turnover.

82 The Court observes that the Commission duly proceeded, in section 4 of the Decision, to undertake an analysis of the situation and of trends on the three winter sports articles markets (skis, bindings and ski-boots) and found, in section 8.2, that measures had been adopted to prevent as far as possible undue distortions of competition on each of those markets.

83 To that extent, the Commission, contrary to the applicant's contention, analysed separately the sectors of winter sports articles and the other sectors in which HTM was active.

84 It should be added that, for the purposes of reviewing whether HTM's restructuring plan was appropriate and whether the aid was compatible with the common market, the Commission could only carry out an overall assessment of all the sectors of activity of the recipient undertaking.

85 Secondly, Salomon, whilst accepting that the market in ski-bindings is dominated by five undertakings, criticises the Commission for having considered, wrongly in its view, that the markets in skis and ski-boots were characterised by the presence

of a restricted number of competitors, so that the disappearance of HTM, by causing an even tighter oligopoly to emerge, would have been harmful to the structure of the market.

86 It contends that the market in winter sports equipment is, on the contrary, extremely competitive and this characteristic is strengthened by the emergence of new competing products. The Commission's error of assessment is even more significant given that the crisis on this market presents a degree of seriousness significantly higher than that taken into account in the Decision.

87 The Commission, supported by HTM and the Republic of Austria, maintains, in substance, that the relevant markets are largely dominated by a small number of undertakings and that the contraction of those markets is not as acute as the applicant alleges.

88 From the evidence before it, it does not appear to the Court that the Commission committed a manifest error of assessment in taking the view that the structure of the relevant markets was oligopolistic. In particular, the documents which Salomon has itself annexed to its application do not undermine the Commission's assessment.

89 Furthermore, the data taken into account by the Commission in assessing the seriousness of the contraction of the ski market during the five years preceding the adoption of the Decision do not appear to be fundamentally different from the figures advanced by the applicant.

90 To that extent, no manifest error of assessment has been demonstrated in respect of the analysis of the relevant markets carried out by the Commission.

91 The plea must therefore be dismissed.

The fourth plea: the restructuring plan was inadequate

92 Salomon contends first of all that the restructuring plan came after several capital injections and that it is spread out over a lengthy period of time. Secondly, it appears quite clearly that the undertaking's return to viability rests almost exclusively on the aid received and on the aid which it will receive until 1999. Salomon's third criticism is that the Commission did not take account of the situation of HTM's competitors, which, like the applicant, were compelled by the crisis on the market to take radical internal and external restructuring measures without the benefit of capital grants from the State. In view of the examination of the options on which HTM's forecasts were based, the Commission must have been aware that the measures envisaged by HTM were linked, not to its restructuring effort, but to the crisis affecting the market and that they were therefore nothing exceptional. Fourthly, Salomon considers that the token price of about ECU 0.7 million (see paragraph 12 above) paid by the Eliasch Group for HTM shows that no financial risk was assumed by the buyer.

93 The Commission, supported in substance by the intervening parties, contends essentially that the period of three to four years allowed in this case is a reasonable period for an undertaking like HTM. After examining the restructuring plan, the Commission took the view that the draconian internal measures envisaged would be sufficient to enable HTM to restore its viability in the long term, in accordance with the requirements of the Guidelines.

94 In response to the first complaint, the Court observes that the various tranches of the Aid are to be regarded as forming a single aid package. Furthermore, it does not appear that a period of three to four years is a manifestly excessive period for HTM's return to long-term viability. The applicant has itself pointed out HTM's very poor financial situation and its return to viability is thus bound to take some time. In any event, it is clear from the actual text of the Decision that the restructuring plan envisages that HTM will be stable in operating terms by 1996 and will have returned to profitability by 1997. Only the final objective of the plan, a stock market flotation, is envisaged in 1998 or 1999.

95 Salomon's second objection rests on a false premiss. The date for the payment of the last tranche of the Aid is fixed by the Decision at 31 March 1998 and the new capital contribution of about ECU 48 million (see paragraph 26 above) planned for the end of 1999 will not come from State resources. In so far as Salomon contends that HTM's return to viability will be the result almost entirely of the Aid, this objection must be examined in connection with the plea that the Aid was disproportionate (see paragraph 123 et seq. below).

96 In response to the third complaint it is sufficient to observe that the adequacy of an undertaking's restructuring measures depends above all on its individual situation (see, to this effect, *British Airways and Others* v *Commission*, cited above, paragraph 286).

97 Besides, the costs of Salomon's restructuring operations, which Salomon itself evaluated at FRF 90 million (about ECU 14 million) are of a quite different order of magnitude than the total costs occasioned by HTM's restructuring. In those circumstances, the applicant cannot validly argue that the measures envisaged by HTM are nothing exceptional.

98 It must also be borne in mind that the Decision makes approval of the Aid subject to HTM's abandoning marginal product lines, the refocusing on its core

activities, reduction of administration, manufacturing and distribution costs and reductions in the workforce.

99 Owing to HTM's overindebtedness, an alignment of its restructuring plan with the plans implemented by its competitors would have jeopardised HTM's survival, which was, however, considered necessary in order to maintain a competitive structure on the relevant markets.

100 Finally, in looking exclusively, in its fourth complaint, at the purchase price of about ECU 0.7 million paid for HTM by the Eliasch Group (see paragraph 12 above), the applicant overlooks the fact that, in addition to that sum, the Eliasch Group undertook irrevocably to inject into HTM about ECU 2 million once the Commission approved the measures taken by AT and about ECU 20 million before 31 December 1998 (see paragraphs 12 and 29 above).

101 It follows that it has not been demonstrated that the Commission committed a manifest error in assessing the suitability of the restructuring plan for restoring HTM's long-term viability within a reasonable period of time.

102 In those circumstances, the plea must be dismissed as unfounded.

The fifth plea: the capacity reductions and abandoning of production imposed on HTM are insufficient

103 Salomon does not consider that the capacity reductions required by the Decision will lead, in a sector with overcapacity and in decline, to a reduction in HTM's

market shares to the advantage of its competitors or that HTM's withdrawal from certain niche markets and the abandoning of certain activities will allow those competitors to strengthen their position on those markets so as to offset the grant of aid.

104 Although capacity reductions may be brought about by changes in production techniques, they can be irreversible, under the Guidelines, only if they are closely associated with a significant slimming-down of staff or a reduction or irreversible closure of production capacity. However, following the negotiations between AT and the Eliasch Group, the capacity reductions and staff reductions were abandoned. The Austrian production plants were maintained for the sake of social or political considerations. Furthermore, permanent exploitation of the Tallin plant following the transfer of ski-boot production to Estonia enables HTM to reduce its costs but does not bring about the capacity reductions which are needed for a better organisation of the sector.

105 The restructuring plan should have ensured implementation of a draconian reduction in production and not only reductions in production capacity and the workforce, which do not automatically lead to lower production. The planned reductions in production, notably at the Austrian plants, will not be implemented in order to meet the concern of the Austrian authorities about maintaining a certain level of employment.

106 According to articles in the Austrian press, HTM's turnover, far from having fallen, has increased in winter sports lines, with the exception, perhaps, of ski-bindings. HTM has also announced increases in its production of skis and ski-bindings for the 1997/1998 season in comparison with its production in 1996/1997. HTM has thus developed, with the help of public resources, an aggressive marketing policy offering prices consistently lower than those of its competitors. Two offers of cooperation made by HTM to its competitors show that the capacity reductions which should have been made have not been made.

107 In any event, the applicant contends that, if the capacity reductions are actually carried out at the end of the planned three-year period, they cannot in any way be regarded as proportionate having regard to the amount of the Aid.

108 The Commission, supported by the intervening parties, observes essentially that it asked HTM to carry out significant capacity reductions.

109 In examining the measures taken in order to prevent undue distortions of competition, the Commission duly took into consideration the effect of the fall in demand during recent years.

110 Salomon's allegation that the Aid allowed HTM to adopt an aggressive marketing policy is vague and unsupported by facts. HTM is, on the contrary, seeking to increase its profits by concentrating on products generating large margins.

111 The Court finds first of all that the equating by the applicant of capacity reductions with contractions in workforce is based on a false premiss. The relationship between the number of employees and production capacity depends on a number of factors, in particular the products manufactured and the technology used. In particular, the employment guarantees, limited to three of the group's sites and to a period of three years, did not prevent the closure of the assembly plant at Neusiedl.

112 In any case, the allegation that planned reductions in staff were abandoned is not substantiated. The Republic of Austria has, on the contrary, stated, without being contradicted on this point by the applicant, that the reductions in workforce at the Austrian plants represented 20 to 50% of their workforce, in accordance with the forecasts contained in the Decision (section 2, 11th paragraph, last sentence) and that the staff reductions carried out since 1995 have been significant.

113 The Court finds, secondly, that the applicant has not provided any factual support for its claim concerning the abandoning of capacity reductions even though the restructuring plan which incorporates those capacity reductions must, according to the very terms of the second paragraph of Article 2 of the Decision, be implemented as it was submitted to the Commission.

114 It must be emphasised in particular that the essential aim of transferring to Estonia ski-boot production relying heavily on inexpensive labour was to reduce manufacturing costs but it does not in any way exclude capacity reductions.

115 The Court observes, thirdly, that the increase in HTM's turnover and the aggressive marketing policy which Salomon claims that HTM is pursuing, even supposing that they have been established, are matters which postdate the adoption of the Decision. The complex assessments carried out by the Commission must be examined only in the light of the information which it had at the time when it made them (*British Airways and Others* v *Commission*, cited above, paragraph 81).

116 In any event, to prevent any possibility of an aggressive sales policy on HTM's part, the Decision specified that its total turnover had to fall until 1996 when it could begin to increase slightly but that in 1998 it had to be lower than in 1994.

117 Finally, the Court considers that the applicant has not adduced any persuasive evidence to show that the capacity reductions of 9 to 59% required of HTM on the markets marked by structural overcapacity (skis, ski-bindings, ski-boots and tennis racquets), of which the greater part was planned to take place during the very first year of the restructuring, are manifestly unsuitable for allowing the small number of competitors to strengthen their position on the markets in question, on which HTM held, in 1994, shares of 11 to 32% worldwide.

118 In any event, Salomon itself stated in the observations which it submitted during the examination procedure that the reorganisation plan had one positive point for the sector as a whole in that it actually results in the diminution of HTM's production capacities in relation to both alpine skis (cut of 25% announced) and alpine ski-bindings (cut of 42% announced). For those two markets, the Decision specifies capacity reductions of 39% and 59% respectively.

119 Besides the capacity reductions, which, in the operative part of the Decision, are stipulated to be irreversible, it is also necessary to take into consideration other restructuring measures required by the Decision, such as the closure of the golf business, the gradual elimination of non-profitable lines, the closure of the sportswear business, the reduction in the ranges of products, and the withdrawal from certain niche markets, such as touring skis and rented skis.

120 The Court finds that the four sectors exposed to overcapacity to which the capacity reductions related represent more than 60% of HTM's turnover in 1994 and that the complete closure of certain businesses by HTM entails a loss of turnover of USD 245 million, or about ECU 196 million. The Court cannot therefore exclude the possibility that even more severe reorganisation measures could have jeopardised HTM's return to viability.

121 It follows that the applicant has not demonstrated that the Commission made a manifest error in considering HTM's capacity reductions and its closure of some of its product lines to be sufficient.

122 The plea must therefore be dismissed.

The sixth plea: the Aid is disproportionate

123 Salomon considers that the amount of the Aid (about ECU 118 million — see paragraph 20 above) is disproportionate in that it represents more than 90% of the restructuring costs estimated by the Decision to be about ECU 127 million. That demonstrates the imbalance between HTM's own efforts and the costs borne by the Austrian State. In its view, the amount of the Aid is also disproportionate in relation to the commitments undertaken by the Eliasch Group, not to mention their uncertain nature, the sale price of HTM being, as the Commission itself has stated, well below the amount of the Aid.

124 The Commission, supported in substance by the intervening parties, replies that the amount of about ECU 118 million is absolutely necessary in order to enable HTM to implement the measures envisaged in its restructuring plan. The Aid will be used only in order to reduce HTM's short-term debt and to restructure the sectors concerned.

125 HTM states that it is not necessary to take into consideration the financial commitments undertaken by the investors, which are merely additional to its own efforts. It adds that, contrary to what Salomon claims, its own efforts are significant in relation to the value of HTM determined during the process of sale to the highest bidder.

126 The Court observes that the direct restructuring costs evaluated by the Commission at approximately ECU 127 million in section 8.2 of the Decision represent only part of the total amount of the costs of restructuring HTM envisaged in section 8.3 of the Decision.

127 In response to questions from the Court, the Commission explained that, in addition to the direct restructuring costs, there are other expense items related to HTM's financial restructuring, such as investments to achieve rationalisation, the repayment and the restructuring of debt.

128 The Commission also explained that the total amount of the restructuring costs is financed from four different sources: Eliasch's capital injection of approximately ECU 22 million (see paragraph 12 above), the partial write-off by the banks of their debts and interest amounting to ECU 47 million (see paragraph 14 above), the Aid (approximately ECU 118 million) (see paragraph 20 above) and, finally, HTM's contribution from its own resources, amounting to 36% of the entire restructuring costs.

129 It follows that the total amount of the restructuring costs is in fact more than ECU 290 million and that the amount of the Aid is less than half of that sum.

130 In those circumstances, the Court finds that it is not established that the Commission committed a manifest error in its assessment of the proportionality of the amount of the Aid in relation to the total costs of restructuring HTM.

The seventh plea: failure to observe the conditions for authorisation of the Aid

131 Salomon doubts that HTM is implementing its obligations in connection with the restructuring plan. First, HTM has announced a diversification of its businesses, whereas under the Decision it was obliged to concentrate on its core businesses, without penetrating new market segments. Secondly, HTM has offered to supply Salomon with ski-boots. Finally, it seems that HTM has entered into a contract with the company Kästle to produce skis for that company.

132 The Commission, supported in substance by the intervening parties, states that the way in which the Decision is implemented has no bearing at all on its legality, since all the facts on which Salomon bases its allegations postdate its adoption. The diversification of HTM's activities is not prohibited under the restructuring plan approved by the Commission nor is it incompatible with that plan.

133 The Court considers that the legality of the Decision cannot depend on the possibility of its being circumvented in the future (see, to that effect, the judgment in *British Airways and Others* v *Commission*, cited above, paragraph 291).

134 In any event, leaving aside the speculative nature of the plea, the Court does not find that it has been established that HTM diversified its activities in a way which is contrary to the conditions on which the Aid was authorised.

135 First of all, the press cutting produced by Salomon in support of its allegations shows that HTM only announced its intention, which has not been confirmed, to put a new generation of products onto the in-line roller-blade market and that it had entered upon production of a new type of ski. Whilst the Decision envisages

that initially HTM will return to its core activities, the Decision also envisages marketing activities and the manufacture of innovative and high-technology products and then, once restructuring is completed, the expansion of marketing activity towards new products (section 5 of the Decision) as far as the resources arising from restoration of the undertaking's viability allow.

136 The applicant has not shown how the offer made by HTM to produce skis and ski-boots for its competitors constitutes in itself a breach of the conditions laid down by the Decision for authorisation of the Aid.

137 In those circumstances, the plea must be dismissed.

The eighth plea: incapacity of the Commission to review implementation of the Decision

138 Salomon claims that, since the amounts of capital injected into HTM are staggered, the Commission is not able effectively to check their effect, since it has not made the payment of each new tranche subject to compliance with the conditions imposed for the payment of the previous tranche.

139 The Commission and the intervening parties observe that the defendant institution was not obliged to make the payment of the remaining amounts of the Aid subject to prior approval and that authorisation of the latter is governed by conditions the observance of which the Commission has power to ensure.

140 The Court observes that, according to the first paragraph of Article 2 of the Decision, HTM must deliver twice a year a report on the progress of its restructuring, showing the economic development and financial results of the company and their compliance with the restructuring plan. Furthermore, HTM must submit the annual reports of the companies of the group for the years from 1995 to 1999 by the end of June of the following year.

141 In any event, if it became clear that the conditions for authorisation of the Aid had not been respected, the Commission would be entitled, under the second paragraph of Article 93(2) of the Treaty, to refer the matter directly to the Court of Justice by way of derogation from Article 169 of the EC Treaty (now Article 226 EC) (see, to this effect, Case C-294/90 *British Aerospace and Rover* v *Commission* [1992] ECR I-493, paragraph 11).

142 The plea must therefore be dismissed.

The ninth plea: insufficient reasoning

143 Salomon alleges that the Decision does not establish the oligopolistic character of the market or demonstrate how HTM's capacity reductions will enable other competitors to benefit from new markets. No reason is given to justify the failure to take into account the technical and marketing changes which are sweeping through the wintersports equipment sector or the provision of the employment guarantee. The Decision contains no information on the various items of restructuring costs. The greatest confusion which exists is over the question of the proportionality of the Aid. The Commission gave no reasons for the lack of control over the use of the aid for the purposes of diversifying into product segments still more highly competitive than the recipient's traditional product segments. Finally, HTM claims that the nature, details, effects, scope or

sanctioning of HTM's restructuring plan cannot be determined from the reasons stated in the Decision.

144 The Commission, HTM and the Republic of Austria consider, on the contrary, that the Decision is in conformity with the requirements laid down in case-law as regards the statement of reasons.

145 The Court observes that the statement of reasons required by Article 190 of the EC Treaty (now Article 253 EC) must explain clearly and unambiguously the reasoning of the Community institution which drew up the contested decision so as to enable the persons concerned to ascertain the matters justifying the measure adopted so that they can defend their rights and so that the Community judicature can carry out its review. However, it is not necessary for the reasoning to go into all the relevant facts and points of law. In particular, the Commission may confine its reasoning to the setting out of the facts and legal considerations having decisive importance in the context of decisions which it has to take in order to ensure that the competition rules are applied (see, to this effect, Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraphs 64 and 65).

146 The Court finds that, as is clear from its examination of the preceding pleas, the statement of the reasons on which the Decision is based clearly and unequivocally reveals the Commission's reasoning in accordance with the requirements of Article 190 of the Treaty, having regard to the clarification which the Commission provided in its written submissions and in its answers to the Court's questions. The statement of reasons thus enabled the applicant to know the reasons justifying the measure adopted so that it could defend its rights and ascertain whether or not the Decision was well founded and also enabled the Court to exercise its power of review in this regard (see, to this effect, Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 93).

147 Consequently, the plea must be dismissed.

148 It follows from all the foregoing arguments that the action must be dismissed in its entirety.

Costs

149 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, it must, having regard to the forms of order sought by the Commission and the intervener, HTM, be ordered to pay the costs incurred by those two parties.

150 Pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure the Member States and institutions which intervened in the proceedings are to bear their own costs. The Republic of Austria must therefore bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the application;

2. **Orders the applicant to pay the costs incurred by the Commission and by the intervener Head Tyrolia Mares;**

3. **Orders the Republic of Austria to bear its own costs.**

Potocki Lenaerts

Bellamy Azizi Meij

Delivered in open court in Luxembourg on 6 October 1999.

H. Jung
Registrar

A. Potocki
President

Summary