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

12 September 2007 *

In Case T-68/03,

Olympiaki Aeroporia Ypiresies AE, formerly Olympiaki Aeroporia AE, established in Athens (Greece), represented initially by D. Waelbroeck and E. Bourtzalas, lawyers, J. Ellison and M. Hall, Solicitors, and A. Kalogeropoulos, C. Tagaras and A. Chiotelis, lawyers, and subsequently by P. Anestis, lawyer, and T. Soames, Solicitor,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou and J.L. Buendía Sierra, acting as Agents, and A. Oikonomou, lawyer,

defendant,

* Language of the case: Greek.

APPLICATION for annulment of Commission Decision 2003/372/EC of 11 December 2002 on aid granted by Greece to Olympic Airways (OJ 2003 L 132, p. 1),

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

composed of J. Pirrung, President, A.W.H. Meij, N.J. Forwood, I. Pelikánová and S. Papasavvas, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 29 November 2006,

gives the following

Judgment

Background to the dispute

I — *The 1994 decision*

1 On 7 October 1994, the Commission adopted Decision 94/696/EC on the aid granted by Greece to Olympic Airways (OJ 1994 L 273, p. 22; 'the 1994 decision').

According to Article 1 of that decision, the restructuring aid granted, or proposed to be granted, to Olympic Airways (Olympiaki Aeroporia Ypiresies AE, formerly Olympiaki Aeroporia AE; 'OA' or 'the applicant') was compatible with the common market pursuant to Article 87(3)(c) EC, provided that the Greek Government complied with 21 commitments set out in that article. That aid consisted of:

— loan guarantees extended to OA up to 7 October 1994 pursuant to Article 6 of Greek Law No 96/75 of 26 June 1975 (FEK A' 154/26.7.1975);

— new loan guarantees totalling USD 378 million for loans to be contracted before 31 December 1997 for the purchase of new aircraft;

— easing of the undertaking's debt burden by GRD 427 billion;

— conversion of GRD 64 billion of the undertaking's debts to equity;

— a capital injection of GRD 54 billion in three instalments of GRD 19, 23 and 12 billion in 1995, 1996 and 1997 respectively.

2 The last four of those five aid measures formed part of a recapitalisation and restructuring plan for OA for the years 1994 to 1997, which had initially been submitted to the Commission.

3 However, Article 1 of the 1994 decision made the compatibility of the five aid measures conditional on compliance with the 21 commitments, which were given by the Hellenic Republic to ensure that the aid did not adversely affect trading conditions to an extent contrary to the common interest. According to certain of those commitments, which concerned both OA and its subsidiary Olympic Aviation, the Hellenic Republic was required, inter alia:

'(a) ... to repeal by 31 December 1994, Article 6 of Greek Law No 96/75 which permitted the Greek State to extend guarantees for the loans contracted by OA;

(b) ... not to interfere in the management of OA except within the strict limits of its role as shareholder;

(c) ... to give OA, by 31 December 1994, the fiscal status of a public limited company comparable to that of Greek undertakings under ordinary law, except, however, for exonerating OA from any taxes likely to affect the recapitalisation

operations envisaged in the recapitalisation and restructuring plan communicated to the Commission;

...

(e) ... not to grant any further aid to OA in any form whatsoever, in conformity with Community law;

(f) ... to have adopted immediately the legislation necessary for the effective implementation of the salary, social and financial aspects of the [restructuring] plan;

...

(h) ... first, to submit to the Commission each year, at least four weeks before payment of each instalment of the capital increase scheduled in January 1996 and January 1997, a report on the implementation of the [restructuring] plan to enable the Commission to comment and to postpone by four weeks payment of those instalments should the Commission wish to submit the report in question for scrutiny by an independent consultant;

(i) ... not to carry out the capital increases scheduled in 1995, 1996 and 1997 if the objectives of the restructuring plan, as set out in Part IV of [the 1994 decision], had not been attained for the previous years;

...

(p) ... to ensure that OA does not act as price leader on the scheduled routes Athens-Stockholm and Athens-London during the period 1994 to 1997 inclusive ...;

...

(s) ... [to ensure] that throughout the entire duration of the [restructuring] plan, the number of seats offered by OA on scheduled flights in the EEA, ... excluding services between continental Greece and the Greek islands, will not exceed that offered by OA in the EEA market in 1993 (3 518 778 seats), taking account, however, of a possible increase proportional to the growth of the market in question.

(t) ... [to ensure] that the remaining loan guarantees extended to OA and the new guarantees to be extended before 31 December 1997 explicitly provided for in the [restructuring] plan to the amount of USD 378 million, comply with the conditions set out in the letter of 5 April 1989 from the Commission to the Member States.

...'

4 In 1995, the first instalment of capital provided for under the 1994 decision, amounting to GRD 13 billion, was paid to OA.

II — *The 1998 decision*

5 In 1996, since the Commission considered that the Hellenic Republic was in breach of some of the commitments set out in Article 1 of the 1994 decision, and entertained doubts as to the compatibility of new and non-notified aids with Article 87 EC, it opened the procedure laid down in Article 88(2) EC. In July 1998, the Hellenic Republic transmitted a revised restructuring plan to the Commission. In order to take account of unlawful aid to OA, that revised plan provided for a reduction in the amount of the second and third instalments of capital under the 1994 decision, which had not yet been paid.

6 That procedure led to the adoption of Commission Decision 1999/332/EC of 14 August 1998 on aid granted by Greece to Olympic Airways (OJ 1999 L 128, p. 1; 'the 1998 decision'), in which the Commission accepted the revised plan mentioned above. In Article 1(1) of that decision, the Commission declared that the loan guarantees, the reduction of debt and its conversion to equity, which had been approved in 1994, were compatible with the common market, as were new loan guarantees for loans to be contracted before 31 December 2000 for the purchase of new aircraft. It reduced the capital injection of GRD 54 billion, provided for in the 1994 decision, to GRD 40.8 billion, to be paid in three instalments of GRD 19, 14 and 7.8 billion in 1995, 1998 and 1999 respectively.

7 The grant of that aid was coupled with a revised restructuring plan for the period from 1998 to 2002 ('the restructuring plan' or 'the 1998 restructuring plan') and was subject, under Article 1(1) of the 1998 decision, to compliance by the Hellenic Republic with the following commitments:

'(a) ... [to fulfil] the [21] undertakings referred to in Article 1 ... of the [1994] decision;

(b) ... [to ensure] that OA does not act as price leader on the scheduled Athens-Stockholm and Athens-London routes during the period 1998 to 2002 inclusive;

(c) ... [to ensure] that until 31 December 2002 inclusive, the number of seats offered by OA on scheduled flights in the [European Economic Area], including additional and seasonal flights and including services between continental Greece and the Greek islands, will not exceed that offered by OA in the [European Economic Area] market in 1997 (7 792 243 seats), taking into account, however, a possible increase proportional to the growth of the market in question;

(d) ... [to ensure] that by 1 December 1998, OA will have implemented a fully operational and adequate management information system [and] shall submit by 1 December 1998 a report to the Commission on this matter'.

8 According to Article 1(2) of the 1998 decision, the payment of the last instalment of GRD 7.8 billion (approximately EUR 22.9 million) was subject to compliance with all the conditions imposed in order to secure the compatibility of the aid with the common market and the actual implementation of the 1998 restructuring plan and achievement of the expected results, in particular as regards cost and productivity ratios. At least 10 weeks before the release of the last instalment planned for 15 June 1999 and by the end of the months of October 1999, March 2000 and October 2000, the Hellenic Republic was to submit a report to the Commission on the fulfilment of all the conditions imposed to secure the compatibility of the aid and the implementation of the 1998 restructuring plan and achievement of the planned results.

III — *OA's development following the 1998 decision*

9 In September 1998, the Hellenic Republic paid OA the second instalment of capital, in the amount of GRD 14 billion (approximately EUR 41 million), provided for in the 1998 decision and issued to it part of the authorised loan guarantees.

10 By letter of 7 May 1999, the Hellenic Republic submitted a report to the Commission concerning the implementation of the 1998 restructuring plan. By letters of 12 May and 19 May 1999, the Commission asked the Greek authorities for certain information. In June 1999, they supplemented the abovementioned report by a memorandum. That report was scrutinised by an independent expert (Deloitte & Touche) in accordance with the provisions of the 1998 decision (Article 1 of the decision and Article 1(h), of the 1994 decision).

11 By letter of 27 July 1999, the Commission transmitted to the Greek authorities the analysis of the alleged failures concerning the implementation of the 1998 restructuring plan, set out in the Deloitte & Touche report of 21 July 1999. In that letter, the Commission, in particular, called upon the Greek Government to submit to it an updated restructuring plan for OA so that the Commission could consider it from the point of view of the conditions surrounding the third and final instalment of capital, an amount of EUR 22.9 million. In its reply to the Commission of 26 August 1999, the Hellenic Republic accepted that the restructuring plan would have to be revised to meet the planned results and to allow the Commission to consider positively the granting of the last instalment.

12 By letter of 7 July 1999, the Greek authorities informed the Commission of their intention to appoint, through an international open tender, an experienced international management company to run OA. Speedwing, the consultancy subsidiary of British Airways, was awarded the contract. That contract also provided for an option for British Airways to purchase a stake of up to 20% in OA within one year from signing the management contract.

13 After a meeting in Brussels on 3 August 1999 between the new management team formed by Speedwing and Commission officials, the Greek authorities submitted, by letter of 18 November 1999, a revised restructuring plan prepared by Speedwing ('the Speedwing plan'). It is apparent from the file that the revised plan was accompanied by a business plan and covered the years 2000 to 2004. Implementation of the Speedwing plan was begun without awaiting the outcome of the Commission's consideration thereof. Deloitte & Touche expressed concerns in regard to certain aspects of the plan in its initial report. The major difference between this plan and that of 1998, implemented in 1998 and the beginning of 1999, was the emphasis placed on increasing revenue and expanding the company's activities.

14 By letter of 20 March 2000, the Commission submitted the final Deloitte & Touche report on the Speedwing plan, dated March 2000, confirming the initial concerns to the Greek authorities. Speedwing contested the conclusions of the report and departed from the management of OA in mid-2000. By letter of 29 August 2000 to the Commission, the Greek authorities confirmed that OA had no official results for 1999 in the form of audited accounts and committed themselves not to grant the last capital injection. The Hellenic Republic asked the Commission to abstain from adopting a decision in regard to that matter.

15 In autumn 2000, the consultancy PricewaterhouseCoopers was asked by OA to provide a compilation report on the unaudited preliminary consolidated balance sheet as of 31 December 1999, so as to provide a sound basis for future restructuring. The Greek authorities appointed Crédit Suisse First Boston as financial adviser with a view to privatising OA.

IV — *The 2000 decision*

16 By letter of 17 July 2000, the Hellenic Republic notified the Commission of its intention to use the remaining authorised aid for new loan guarantees to be contracted before the end of 2000, for investment in relation to the relocation of OA from Elliniko airport to the new Athens airport at Spata, and to extend the deadline for the loan guarantees to 31 March 2001. By then, the Greek State had issued loan guarantees totalling USD 201.6 million for the purchase of four Airbus 340s.

17 On 4 October 2000, the Commission decided not to raise any objections to that project and amended Article 1(1) of the 1998 decision accordingly. Consequently, new loan guarantees totalling USD 378 million which had been approved by the 1998 decision, for the purchase of new aircraft and for investment necessary for the relocation of OA to the new airport at Spata could be issued by 31 March 2001.

V — *HACA's complaints and the formal review procedure*

18 On 12 October 2000, the Hellenic Air Carriers' Association ('HACA') lodged a complaint in which it claimed that the Greek State was still granting various aids to OA, contrary to what had been provided for in the 1994 and 1998 decisions. The Greek authorities submitted their observations on that complaint by letter of 19 February 2001. On 24 July 2001, HACA lodged a further complaint, to which the Greek authorities responded by letters of 25 October, 7 November and 11 December 2001.

19 Following complaints, the Commission, by decision of 6 March 2002 (OJ 2002 C 98, p. 8), initiated the procedure laid down in Article 88(2) EC, on the ground that the restructuring plan had not been implemented and that some of the conditions laid down by the 1998 decision had not been fulfilled. In addition, the decision required the Hellenic Republic to provide the Commission with information pursuant to Article 10 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1).

20 The Hellenic Republic submitted its answers to the Commission by letter dated 11 April 2002.

21 On 9 August 2002, the Commission addressed to the Hellenic Republic a second request to provide information. The Greek authorities replied by letter of 30 September 2002.

22 In November 2002, the Greek authorities transmitted to the Commission two reports drawn up by Deloitte & Touche: the 'Report on the Limited Review of Olympic Airways' Performance as compared to its 2002 Financial Plan (July 2002)', and a report on OA entitled 'Restructuring and Privatisation (November 5th, 2002)'.

VI — *The contested decision*

23 On 11 December 2002, the Commission adopted Decision 2003/372/EC on aid granted by Greece to Olympic Airways (OJ 2003 L 132, p. 1; 'the contested decision'). It finds therein that most of the objectives of the 1998 restructuring plan had not been attained, that the conditions imposed by the 1998 approval decision had not been fully met and that the restructuring aid had therefore been wrongly implemented.

24 In addition, the Commission refers to the existence of new non-notified aid, which consists, in essence, in the tolerance by the Greek State of the non-payment, or deferment of the payment dates of social security contributions, value added tax

(VAT) on fuel and spare parts, rent payable to airports, airport charges and a tax imposed on passengers on departure from Greek airports, called 'spatosimo'. The Commission regarded that aid as unlawful, being incompatible with the common market. It considered that the grant of that aid infringed the Greek State's commitment not to grant any further aid to OA and was a breach of the 'one-time, last-time' principle. In addition, while not respecting the 1998 restructuring plan, OA still has no alternative restructuring plan that would allow the Commission to conclude that the company will return to viability in the medium and long term.

25 The Commission required the recovery of the aid declared incompatible. However, with regard to reconstruction aid, it considered as follows (recital 229):

'[I]t cannot be excluded that the positive decision of the Commission in 1998 has created some kind of expectations that the aid package of 1994 was unproblematic. Consequently, in the light of the very specific circumstances of this case, no recovery is necessary for the aid granted before 14 August 1998.'

26 The operative part of the contested decision is worded as follows:

'*Article 1*

The restructuring aid granted by Greece to [OA] in the form of:

(a) loan guarantees extended to the company until 7 October 1994 pursuant to Article 6 of Greek Law No 96/75 ...;

(b) new loan guarantees totalling USD 378 million for loans to be contracted before 31 March 2001 for the purchase of new aircraft and for investment necessary for the relocation of [OA] to the new airport in Spata;

(c) easing of OA's debt burden by GRD 427 billion;

(d) conversion of GRD 64 billion of the undertaking's debt to equity;

(e) a capital injection of GRD 54 billion reduced to GRD 40.8 billion in three instalments of GRD 19, 14 and 7.8 billion in 1995, 1998 and 1999 respectively,

is considered to be incompatible with the common market within the meaning of Article 87(1) [EC], as the following conditions, under which the initial authorisation of the aid has been granted, are no longer met:

(a) the full implementation of the restructuring plan aimed at the achievement of the long-term viability of the company;

(b) the observance of 24 specific undertakings attached to the authorisation of the aid; and

(c) the regular monitoring of the implementation of the restructuring aid.

Article 2

The State aid which Greece has implemented in the form of tolerance of a persistent non-payment of social security obligations, of VAT on fuel and spare parts payable by Olympic Aviation, of rentals for different airports, of airport charges payable to Athens International Airport and other airports, of [s]patosimo tax is incompatible with the common market.

Article 3

1. Greece shall take the necessary measures to recover from the beneficiary the aid of GRD 14 billion (EUR 41 million) referred to in Article 1 which is not compatible with the Treaty and the aid referred to in Article 2 and unlawfully made available to the beneficiary.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which the aid was at the disposal of the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 4

The Hellenic Republic shall inform the Commission within a period of two months from the date of notification of the present decision of the measures to be taken to comply with it.

...'

Procedure and forms of order sought

27 By application lodged at the Registry of the Court of First Instance on 24 February 2003, the applicant brought the present action.

28 The applicant claims that the Court should:

— annul the contested decision in whole or in part;

— order the Commission to pay the costs;

— order any measure of organisation of procedure or means of giving or obtaining evidence which it considers necessary;

— order any other measure it considers appropriate.

29 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

30 Upon hearing the report of the Judge-Rapporteur, the Court (Second Chamber, Extended Composition) decided to open the oral procedure without any prior measures of inquiry.

31 The parties presented oral argument and answered questions put by the Court at the hearing on 29 November 2006.

Law

32 The applicant contests the contested decision in so far as it finds that the reconstruction aid authorised by the 1998 decision and the alleged new aid are incompatible with the common market and requires the aid to be recovered.

33 Before examining the two parts of the application, and the plea alleging a misuse of powers, common to both parts, the Court considers it appropriate to set out, first and by way of preliminary remark, the legal framework in which the applicant's claims regarding the reversal of the burden of proof, infringement of procedural rules and the right to be heard and, second, to consider immediately the plea alleging an infringement of the applicant's right to be heard.

I — *Preliminary remarks on the burden of proof, the procedural obligations of the parties and the claims concerning the infringement of the right to be heard*

34 The applicant rightly argues that it is, in principle, for the Commission to provide proof, in the contested decision, both of the misapplication of the restructuring aid and the grant of new aid. It follows from the provisions of Article 88(2) and (3) EC that, if that is not established, the existing aid is covered by the earlier decision approving it and the new measures cannot be regarded as State aid within the meaning of Article 87(1) EC (see, with regard to the burden of proof in cases of misappropriation of previously approved aid, Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and Zemag* v *Commission* [2005] ECR II-1579, paragraph 86, and, with regard to the burden of proof in cases where new aid has been granted, Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraph 23). On the other hand, the burden of proof of the compatibility of aid with the common market, by way of derogation from Article 87(1) EC, is borne principally by the Member State concerned, which must show that the conditions for that derogation are satisfied.

35 However, it should be pointed out that that apportionment of the burden of proof is subject to compliance with the procedural obligations imposed on the Commission

and the Member State concerned in the course of the exercise by that institution of its powers to cause the Member State to provide it with all the necessary information.

36 In particular, it follows from the case-law that, in order to obtain approval of new or modified aid by way of derogation from the Treaty rules, the Member State concerned must, in order to fulfil its duty under Article 10 EC to cooperate with the Commission, provide all the information necessary to enable that institution to verify that the conditions for the derogation from which it seeks to benefit are satisfied (see, to that effect, Case C-364/90 *Italy* v *Commission* [1993] ECR I-2097, paragraph 20; Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 129; and Case T-17/03 *Schmitz-Gotha Fahrzeugwerke* v *Commission* [2006] ECR II-1139, paragraph 48). In addition, the Commission is empowered to adopt a decision on the basis of the information available when it is faced with a Member State which fails to comply with its obligation of cooperation and refuses to provide information requested from it either for the purpose of assessing the compatibility of new or modified aid with the common market or of verifying whether aid previously approved has been properly applied. Before taking such a decision, however, the Commission must order the Member State to provide it, within the time-limit it lays down, with all the documentation, information and data necessary to carry out its review. It is only if the Member State, notwithstanding the Commission's order, fails to provide the information requested that the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the questions whether or not aid has been granted and if it has, whether or not that aid is compatible with the common market (Case C-301/87 *France* v *Commission* [1990] ECR I-307 ('*Boussac*'), paragraph 22, and *Germany and Pleuger Worthington* v *Commission*, cited at paragraph 34 above, paragraph 26), or on deciding that aid previously approved had been properly applied (*Saxonia Edelmetalle and Zemag* v *Commission*, cited at paragraph 34 above, paragraph 93, and Case T-318/00 *Freistaat Thüringen* v *Commission* [2005] ECR II-4179, paragraph 73).

37 Those procedural obligations are binding both on the Member State concerned and on the Commission in order to permit the latter to carry out its review on the basis of sufficiently clear and precise information while ensuring respect for the right of

the Member State concerned to be heard. It should be pointed out that, according to settled case-law, observance of the rights of the defence is, in all procedures initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any specific rules (see, by analogy, Joined Cases C-48/90 and C-66/90 *Netherlands and PTT Nederland* v *Commission* [1992] ECR I-565, paragraph 44, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 121).

38 The abovementioned procedural obligations have been taken up and made specific by Article 2(2), Article 5(1) and (2), Article 10, Article 13(1) and Article 16 of Regulation No 659/1999.

39 In this case, the applicant complains, essentially, that the Commission failed to identify and call for essential evidence which would have resolved the doubts as to the nature of the measures being considered or the compatibility of the aid with the Treaty. The defendant institution thereby reversed the burden of proof and infringed the Hellenic Republic's right to be heard. The infringement of that right directly influenced the outcome of the procedure (*Boussac*, cited at paragraph 36 above, paragraph 31, and Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959 ('*Tubemeuse*'), paragraph 48). In addition, it adversely affects the right to be heard of the applicant, which is entirely owned by the State, and which was the only possible source of the essential evidence which the Commission regarded as lacking.

40 It follows from that argument that by invoking an infringement of the right of the Member State concerned to be heard, and its own right in that regard, the applicant is complaining, more specifically, that the Commission warned neither the Hellenic

Republic nor itself of important factors in regard to which that institution continued to entertain doubts and to have refrained from asking for additional information on those factors before the adoption of the contested decision.

41 The claims concerning the reversal of the burden of proof and the related infringement of the Hellenic Republic's right to be heard, put forward by the applicant in regard to the restructuring aid and the various alleged new aids which were declared incompatible with the common market in the contested decision, must be considered in the light of the abovementioned procedural principles.

II — *The plea alleging an infringement of the applicant's right to be heard*

42 With regard to the plea alleging an infringement of the applicant's right to be heard, it should be pointed out from the outset that Article 88(2) EC permits interested parties, including the beneficiaries of the measure under consideration, to submit their observations. That provision has been interpreted as meaning that interested parties have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 60, and *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited at paragraph 37 above, paragraph 125). Respect for the procedural rights of interested parties, as so defined, is an essential procedural requirement violation of which can have the result that the contested decision should be annulled. That is the case, in particular, where the beneficiaries of aid to be recovered have not, in practice, been able to submit their observations in the course of the formal review procedure because they had not been identified by the Commission in the initiating decision or at a later stage and where it cannot be excluded that had it not been for such an irregularity, the outcome of the procedure might have been different (see, to that effect, Case T-34/02 *Le Levant 001 and Others* v *Commission* [2006] ECR II-267, paragraphs 82 to 95 and 137).

43 However, in so far as the procedure in regard to State aid is instituted solely against the Member State concerned, interested parties cannot, in principle, avail themselves of the right to a fair hearing enjoyed by the individuals against whom a procedure has been instituted, who are entitled to engage in a discussion with the Commission, such as that engaged in with the Member State concerned (*British Airways and Others* v *Commission*, cited at paragraph 42 above, paragraph 60; *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited at paragraph 37 above, paragraphs 122 and 125; Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraph 192; and *Schmitz-Gotha Fahrzeugwerke* v *Commission*, cited at paragraph 36 above, paragraph 54).

44 In this case, it must be stated that the applicant invokes no circumstance in particular which suggests that it was not involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case. The only fact put forward by the applicant, namely that it was the sole possible source of the evidence which the Commission considered necessary, does not justify that institution asking it for information. As has already been pointed out (see paragraph 36 above), it is in principle for the Member State concerned to provide the Commission, at its request, with all the necessary information. Under those circumstances, the applicant's procedural rights can be affected neither by the Commission's alleged failure to identify the essential evidence necessary to still its doubts nor by the absence of requests for additional information on the part of that institution (see paragraph 40 above). Those claims will therefore be considered solely in the context of the plea alleging an infringement of the Hellenic Republic's right to be heard, also relied on by the applicant.

45 Moreover, it must in any event be considered that the applicant was able to take part indirectly in the administrative procedure, through the intermediary of the Member State concerned, which is its sole shareholder. In addition, it is apparent from the file that the OA's management took part in the meetings between the Commission's staff and the Greek authorities throughout the administrative procedure.

46 For all of those reasons, the plea alleging an infringement of the applicant's right to be heard must be dismissed as unfounded.

III — *The restructuring aid (Articles 1, 3 and 4 of the contested decision)*

47 The applicant denies the factors on which the Commission based itself in the contested decision when declaring the existing restructuring aid incompatible with the common market. First, it criticises the Commission's contention that the 1998 restructuring plan was not implemented. It then claims that the Hellenic Republic fulfilled its obligations under Article 1(1)(d) of the 1998 decision to implement a management information system ('MIS'). In addition, the Hellenic Republic fulfilled its obligations under Article 1(2) of the 1998 decision concerning the submission of reports in relation to the implementation of the conditions laid down in that decision. Finally, the conditions set out in Article 1(b), (c) and (e) of the 1994 decision have also been fulfilled.

A — *The failure, alleged in the contested decision, to implement the restructuring plan properly*

48 The applicant considers that the implementation of the 1998 restructuring plan was aimed at achieving the long-term viability of OA. It claims, first, that the Commission's conclusions on the implementation of the plan did not take account of the fact that it had been amended and that, consequently, they are vitiated by an error of fact, a manifest error of assessment and/or a failure to state reasons.

Secondly, the Commission did not duly consider whether the aid approved in 1998 could be regarded as compatible with Article 87(3)(c) EC, on the basis of the amended restructuring plan, applicable at the time that the contested decision was adopted. The contested decision was therefore vitiated by a manifest error of assessment and an infringement of Article 87(3)(c) EC. Thirdly, the Commission committed a manifest error of assessment by concluding that no step had been taken to restructure OA.

1. The claim that the amendment of the restructuring plan was not taken into account

(a) Arguments of the parties

49 On the one hand, the applicant claims that the Commission committed an error of fact and a manifest error of assessment in failing to take into account the amendments to the 1998 restructuring plan, which had been approved, according to the applicant, by the Commission in the context of a single, prolonged restructuring process and which OA had successfully put into effect. The Commission reviewed OA's compliance with its restructuring obligations on the basis of the initial, 1998, version of the restructuring plan. However, when the contested decision was adopted, the amended plan called for the privatisation of a majority stake in OA, cost-cutting measures and a sell-off of non-core business. The only interruption in the restructuring process was due to the events of 11 September 2001. The first part of the privatisation process had already been carried out at the date of the contested decision.

50 On the other hand, the contested decision is vitiated by a failure to provide adequate reasons, inasmuch as the Commission did not analyse the amended plan but based

its findings on the unamended 1998 plan. Consequently, the Commission did not provide relevant reasons supporting its conclusion that the restructuring plan (as amended) did not achieve the long-term viability of OA.

51 In support of the abovementioned pleas, the applicant contests the Commission's claim in the contested decision (recital 173) that the Hellenic Republic did not propose the amendments to the restructuring plan that it considered necessary. It alleges that it was obvious to all the parties concerned during the administrative procedure that the restructuring plan had been amended.

52 The Commission accepted as early as 1999 that the restructuring plan should be amended. It encouraged amendments to the plan under the management of Speedwing, as can be seen from its letters to the Greek Government of 12 May, 27 July and 23 August 1999. It was informed in advance of that first proposed amendment by letters from the Greek Government dated 7 May, 23 June and 7 July 1999. The extremely detailed Speedwing plan was thus the first amendment to the restructuring plan. It was submitted to the Commission on 18 November 1999 under cover of a letter from the Greek Government. In its letter to the Hellenic Republic of 29 March 2000, the Commission accepted that the Speedwing plan had already been implemented.

53 Since the Commission did not approve the Speedwing plan, the Greek Government informed it in 2000, in particular by letters of 29 August and 6 September 2000, of a second amended version of the restructuring plan providing for the privatisation of OA, as can be seen inter alia from recitals 73 and 175 in the contested decision. Detailed information on the privatisation process was submitted to the Commission, in particular, in a memorandum drawn up by Crédit Suisse First Boston in December 2000 and in a letter from the Greek Government dated 16 May 2001.

54 It is clear from correspondence exchanged that, from 2000, the restructuring plan consisted of the privatisation of a majority stake in OA, cost-cutting measures and a sell-off of non-core business. The applicant points out that the cost-cutting measures, accepted by the Commission as may be seen from the contested decision (recitals 106 and 174), began in 1998, in accordance with the 1998 decision.

55 Several statements by the Commission confirm that it accepted that the 1998 plan had been amended to adapt it to the new situation and that the restructuring of OA necessarily involved privatisation. In its decision of 4 October 2000 formally authorising amendment of the 1998 plan, the Commission did not express its concerns as to the progress of restructuring but referred explicitly to privatisation, indicating, in particular, that '... the current management is transitional, pending [OA's] privatisation early next year ...'.

56 In addition, the Commission recognised that active steps had been taken towards privatisation, in particular in a letter to the Greek authorities dated 25 April 2001 and in a letter from the Vice-President of the Commission responsible for transport, Ms Loyola de Palacio, to the Greek Minister for Transport and Communications dated 5 July 2001. That letter referred to a meeting, held on 29 May 2001, between Commission officials and members of Ms Loyola de Palacio's Cabinet, on the one side, and the Greek Government's financial and legal advisers, on the other, 'on the issue of the [then] ongoing privatisation process of [OA]'.

57 Moreover, the fact that the final instalment of the aid approved in the 1998 decision (EUR 22.9 million) was not paid demonstrates that the Greek Government and the Commission accepted that the 1998 restructuring plan had been amended as early as 1999 to take account of the state of the aviation market and OA's situation. Having

regard to that amendment or alleged abandonment of the restructuring plan, represented, in particular, by the non-payment of the last instalment of the aid, the contested decision, which concluded that the 1998 restructuring plan had not been respected and ordered recovery of the second instalment of the aid, also infringes the principle of the protection of legitimate expectations, essential procedural requirements and the *ne bis in idem* principle. The Commission should have indicated, before it adopted the contested decision, that it did not accept the abovementioned amendment. In addition, the Commission should have taken into account the non-payment of the last instalment of the aid in determining the amount of aid to be recovered.

58 The implementation of the second amended restructuring plan was interrupted by the events of 11 September 2001. By letter of 1 February 2002, the Greek Government notified the Commission of the new measures adopted by OA under that amended restructuring plan to deal with the general reduction in air traffic. The privatisation of a majority stake in OA, cost-cutting measures and a sell-off of non-core business constitute genuine and appropriate restructuring measures in the light of the circumstances.

59 The present privatisation process was successfully begun in 2002, as may be seen from the Greek Government's letter to the Commission of 22 February 2002. In 2002, OA's business significantly improved. The Hellenic Republic informed the Commission of the state of the privatisation process and cost-cutting measures, in particular in its replies of 11 April 2002 to the Commission's first request for information, in its letter of 16 July 2002 and its replies of 30 September 2002 to the Commission's second request for information, and of 9 August 2002. In those replies, it confirmed, in particular, the sale of a 58% stake in its subsidiary, Olympic Catering.

60 The minutes of the meeting held on 16 October 2002 prove that the Commission was once again informed of the situation on that occasion. It was expressly stated that the 1998 restructuring plan (in the form approved in 1998) was 'no longer current' (last paragraph of point 2, entitled 'Commercial and Financial Presentation'). The minutes also indicate (Annex II, paragraph 16) that Ms Loyola de Palacio had met Mr Verelis, the Greek Minister for Transport and Communications, on 2 and 3 October 2002 and had asked for a new restructuring plan to be drawn up before the end of 2002.

61 Moreover, the 'Report on the Limited Review of Olympic Airways' Performance as compared to its 2002 Financial Plan (July 2002)', which was transmitted to Ms Loyola de Palacio's chef de cabinet on 5 September 2002, and sent to the Commission's staff on 14 November 2002, referred to a significant improvement in OA's operating results in 2002. Under those circumstances, the postponement until after the end of 2002 of the privatisation of a majority stake in the flying operations was of no significance.

62 On 21 November 2002, the detailed report of 5 November 2002 on the restructuring and privatisation of OA was transmitted to the Commission. That report set out the privatisation proposal in great detail, to the level of detail of numbers of staff, and included financial projections for flying operations from 2003 to 2005 demonstrating that the undertaking was viable.

63 By letter from the Greek Minister for Transport and Communications dated 2 December 2002, the Member of the Commission responsible for transport was informed that six private investors had expressed an interest in acquiring a majority stake in OA (see recital 9 in the contested decision).

64 In that context, contrary to what the Commission alleges, the second amended restructuring plan was submitted 'in all relevant detail', in accordance with point 3.2 of the Community guidelines of 1999 on aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2; 'the Guidelines'). In particular, the report dated 5 November 2002, mentioned above, contains all the 'data, hypotheses, forecasts, measures, objectives and conditions' required and its title clearly indicates that it is a restructuring plan. In addition, the abovementioned Guidelines merely state, in point 3.2.4, that a Member State may 'ask' the Commission to agree to changes being made to the restructuring plan. In this case, therefore, the copious correspondence between the Hellenic Republic and the Commission constitutes a valid request. Moreover, the second amended restructuring plan was submitted to the Commission in accordance with the same procedure as was followed in regard to the Speedwing plan and with which the Commission seemed to be satisfied.

65 For its part, the Commission contends that the plea of fact put forward by the applicant, namely that the privatisation plan was submitted to, and approved by, the Commission was never put forward by OA or the Greek authorities during the administrative procedure, whether as a request for further aid or as a new restructuring plan replacing that of 1998. Even at the meeting of 16 October 2002, it was pointed out that the Commission would examine the Hellenic Republic's compliance with the commitments imposed by the 1998 decision. The applicant cannot therefore rely on that plea as a new fact (see, *a contrario*, the Opinion of Advocate General Darmon in *Germany and Pleuger Worthington* v *Commission*, cited at paragraph 34 above, points 33 and 107, and the judgments in *British Airways and Others* v *Commission*, cited at paragraph 42 above, paragraph 81, and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 88). With regard to the substance, the Commission denies that OA was the subject of a 'single, prolonged, restructuring process' based on an amended restructuring plan. It alleges that the Speedwing plan was completely different from a privatisation plan. In addition, following the abandonment of the Speedwing plan, no restructuring plan was submitted to it, much less approved by it.

66 The Commission argues that, according to settled case-law (*BFM and EFIM* v *Commission*, cited at paragraph 65 above, paragraphs 98 to 100), a mere declaration of intent is not sufficient to amend a restructuring plan. The formal submission of an amended plan (accompanied by data, hypotheses, forecasts, measures, objectives and conditions) for the Commission's consideration is necessary. The Greek authorities were also clearly aware of the applicable procedure inasmuch as they followed it both in the case of the adaptation of the 1994 plan, which the Commission approved in the 1998 decision, and in regard to the Speedwing plan.

67 In this case, the correspondence referred to by the applicant can in no way be regarded as fulfilling the conditions for an amended restructuring plan. In particular, the report entitled 'Report on the Limited Review of [OA's] Performance as compared to its 2002 Financial Plan (July 2002)' is based on unconfirmed information and hypotheses and on data which have sometimes been shown to be incorrect and incomplete. The report of 5 November 2002 on the restructuring and privatisation of OA presents the privatisation process as a 'concept' although it had been submitted to the Commission in November 2002, that is to say, two months before the expiry of the restructuring plan approved in 1998. Moreover, neither of those reports was expressly submitted as a revised plan.

68 Finally, the argument that non-payment of the last instalment of the aid proved that the 1998 plan had been amended by common accord is out of time since it was not raised during the administrative procedure. In addition, it is unfounded. It is also in contradiction to the observations which the Greek authorities submitted on 21 November 2002 according to which payment of the last instalment was not approved by the Commission, thereby preventing the plan from bearing fruit.

69 In those circumstances, since the plan approved by the 1998 decision was reaching the end of its validity, the Commission was required to assess that plan.

(b) Findings of the Court

70 The objection of inadmissibility raised by the Commission against the applicant's argument regarding the amendment of the restructuring plan must be considered before dealing with the pleas alleging, on the one hand, a failure to state reasons and, on the other, an error of fact and a manifest error of assessment.

The Commission's objection of inadmissibility

71 The Commission contends that the applicant's argument based on the alleged submission of a privatisation plan amending the 1998 restructuring plan is inadmissible inasmuch as it was not put forward during the administrative procedure.

72 The Court points out that in the context of an action for annulment brought under Article 230 EC, the legality of a Community measure must 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 assessments made by the Commission must be examined solely on the basis of the information available to it at the time when the assessments were made (*British Airways and Others* v *Commission*, cited at paragraph 42 above, paragraph 81, and Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 142).

73 Consequently, an applicant may not, in principle, on pain of inadmissibility, rely on factual arguments which are unknown to the Commission and which it has not notified to the latter during the formal investigation procedure. On the other hand, there is nothing to prevent the interested party from raising against the final decision a plea in law not raised at the stage of the administrative procedure (Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 102, and *Saxonia Edelmetalle and Zemag* v *Commission*, cited at paragraph 34 above, paragraph 68).

74 In this case, the Commission does not deny that the question of privatising OA, raised, in particular, in its exchanges of correspondence with the Greek authorities and in some of the reports transmitted to it by those authorities, on which the applicant bases its plea concerning the existence of an amended restructuring plan approved by the Commission, was made known to that institution during the administrative procedure.

75 However, the question whether a privatisation plan amending the 1998 restructuring plan was properly submitted to the Commission for approval in accordance with the applicable procedural rules is a matter for judicial assessment, on the basis of the abovementioned facts which no party denies were made known to the Commission.

76 Since, therefore, the submission is a plea in law and not a purely factual argument, the applicant's argument as to the alleged existence of a privatisation plan replacing the 1998 restructuring plan is admissible, regardless of whether or not it was raised during the administrative procedure.

77 For the same reasons, the objection of inadmissibility raised by the Commission against the applicant's legal argument that the failure to pay the final instalment of the aid approved by the 1998 decision proves that the 1998 restructuring plan was amended with the Commission's agreement must also be rejected.

The plea alleging a failure to state reasons

78 As a preliminary point, the scope of the applicant's argument concerning the failure to state reasons must be considered.

79 The Court points out that the duty to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure. Claims and arguments intended to deny that the measure is well founded are thus of no effect in the context of a plea alleging the lack or inadequacy of a statement of reasons. The statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraphs 35 to 38; *Corsica Ferries France* v *Commission*, cited at paragraph 72 above, paragraphs 52 and 59; and *Schmitz-Gotha Fahrzeugwerke* v *Commission*, cited at paragraph 36 above, paragraphs 70 and 71).

80 Moreover, according to settled case-law, the question whether the statement of reasons for a decision meets the requirements of Article 253 EC must be assessed in the light of not only its wording but also its context and all the legal rules governing the matter in question (*British Airways and Others* v *Commission*, cited at paragraph 42 above, paragraph 94, and *Freistaat Thüringen* v *Commission*, cited at paragraph 36 above, paragraph 202).

81 In this case, the applicant complains, essentially, that the Commission failed to state the reasons, in the contested decision, for its conclusion concerning OA's lack of viability under the amended restructuring plan.

82 It is true that, in the contested decision, the Commission reviewed the effective implementation of the restructuring plan compared to the plan provided for in the 1998 decision. None the less, in recital 173 in that decision, it stated that the reason for that approach was the absence, as it saw it, of a specific proposal on the part of the Greek State, OA's sole shareholder, to amend the 1998 restructuring plan following the Commission's rejection of the Speedwing plan. In the third indent of recital 116, it had already pointed out that although the red line of 50% loss of the share capital had been crossed in 1999, the share capital had not been increased and 'important adaptations' to the restructuring plan had not been undertaken in time.

83 In order to determine whether that explanation actually constitutes an adequate statement of reasons, it must be assessed in the context of the procedure which led to the adoption of the contested decision. The Court points out that in its decision of 6 March 2002 to initiate the formal investigation procedure, the Commission indicated, in particular, that the 1998 restructuring plan, on which the 1998 decision approving the restructuring aid under consideration was based, had not been implemented as planned and that the existence of serious doubts as to the compatibility of OA's current economic and financial situation with the operational and financial indicators of the plan at issue justified a re-examination of the 1998 decision with regard to the correct implementation of that plan. In addition, nothing in the file indicates that the Greek authorities submitted a formal and explicit request to the Commission, whether after the abandonment of the Speedwing plan, and before the adoption of the contested decision, on 11 December 2002, to amend the 1998 restructuring plan in order to undertake the necessary adaptations to that plan, namely by privatising OA.

84 In those circumstances, it must be decided that the Commission was not required to set out more extensively, in the contested decision, the reasons why it considered that it should review the implementation of the 1998 restructuring plan in its initial version.

85 It follows that the plea alleging failure to state the reasons for that decision in regard to whether the amended restructuring plan, referred to by the applicant, made it possible to restore the long-term viability of OA within a reasonable timescale is without foundation.

86 The claims concerning the failure to take account of the amended restructuring plan must now be considered in the context of the applicant's pleas alleging an error of fact and a manifest error of assessment.

The pleas alleging an error of fact and a manifest error of assessment

87 The applicant relies on four sets of arguments to show that the 1998 plan was revised after the Speedwing plan was abandoned. The legal framework in which the question at issue arises must be set out before considering each of the applicant's arguments based, first, on the restructuring of OA, which it regards as a single, prolonged process and the need to update the 1998 plan, secondly, on the non-payment of the last instalment of the aid, thirdly, on the decision of 4 October 2000 and, fourthly, on the correspondence between the Greek authorities and the Commission and the reports transmitted to the latter during the administrative procedure.

— Legal framework and question raised in this case

88 According to settled case-law, to be declared compatible with the common market under Article 87(3)(c) EC, aid to undertakings in difficulty must be linked to a viable

restructuring plan which must be submitted in all relevant detail to the Commission (Case C-17/99 *France* v *Commission*, cited at paragraph 79 above, paragraph 45; *BFM and EFIM* v *Commission*, cited at paragraph 65 above, paragraph 98; and *Technische Glaswerke Ilmenau* v *Commission*, cited at paragraph 43 above, paragraph 151). The Guidelines, applicable in this case, confirm that the restructuring plan must restore the long-term viability of the firm within a reasonable timescale and that it must be submitted in all relevant detail (point 3.2.2(b)).

89 In addition, the Guidelines provide that following approval of restructuring aid, the company must fully implement the restructuring plan that has been accepted by the Commission and must discharge any other obligations laid down in the Commission decision (point 3.2.2(f)). The implementation of the restructuring plan is carried out under the supervision of the Commission, which must be put in a position to make certain that the restructuring plan is being implemented properly, through detailed regular reports communicated by the Member State concerned (point 3.2.2(g)).

90 The Guidelines (point 3.2.4) also provide that where restructuring aid has been approved, the Member State concerned may, during the restructuring period, ask the Commission to agree to changes being made to the restructuring plan and the amount of the aid. The Commission may allow such changes after verifying that they meet certain conditions. In particular, the revised plan must still show a return to viability within a reasonable timescale.

91 It follows from the combined effect of the provisions of Article 87(3)(c) EC and Article 88(2) and (3) EC, as interpreted in the abovementioned cases and implemented by the provisions of the abovementioned Guidelines, that any significant amendment to a restructuring plan accepted by the Commission

requires, in principle, that the Member State concerned submit a revised plan in all relevant detail so as to permit the Commission to assess its compatibility with the common market, having regard to the conditions set out in point 3.2.4 of the Guidelines.

92 On the level of procedure, the case-law shows that if one of the conditions to which approval of an aid was subject is not satisfied, the Commission may normally adopt a decision derogating from that condition without reopening the procedure under Article 88(2) EC only in the event of relatively minor deviations from the initial condition (Case T-140/95 *Ryanair* v *Commission* [1998] ECR II-3327, paragraph 88). In particular, when the adaptation of a restructuring plan raises doubts as to the compatibility of the aid, the Commission must carry out a formal reconsideration of the compatibility of the aid with the common market.

93 Those procedural rules confirm that, in the absence of complete implementation of a restructuring plan accepted in the decision approving restructuring aid, the Commission may authorise a significant amendment of the plan, if such is necessary, only on the basis of a formal, thorough consideration of the conformity of the revised plan submitted by the Member State concerned with the abovementioned conditions laid down in the Guidelines. Consequently, where the Member State concerned does not submit a revised restructuring plan, the Commission — when it assesses the compatibility of the aid — is neither required to, nor is it in a position to, take account of any significant modifications which may have been made to the initial plan on the basis of mere declarations of intent on the part of the Member State concerned.

94 In this case, it must therefore be verified whether, in the absence of a formal second request to amend the restructuring plan after the first revised plan notified to the Commission, namely the Speedwing plan, was abandoned (see paragraphs 13 and 83

above), the various factors referred to by the applicant none the less make it possible to consider that a second request to amend the 1998 restructuring plan was submitted to the Commission in all relevant detail to permit it to assess the compatibility of the aid.

— Consideration of the arguments concerning the single, prolonged process of restructuring OA and the need to update the 1998 restructuring plan

95 It should be pointed out, first of all, that the applicant's argument that OA underwent a single, prolonged restructuring process during which the 1998 restructuring plan was amended is, in any event, irrelevant. Whatever the nature of the restructuring measures implemented or envisaged, once the competent national authorities wished to obtain, as in this case, a major adaptation of the initial 1998 plan (see paragraph 97 below), they were required to submit a revised plan for the Commission's approval in accordance with the abovementioned provisions of the Guidelines, so as to permit that institution to review the compatibility of the aid with the common market in the light of the revised plan. In particular, it was not sufficient to ask the Commission to examine OA's financial situation independently of the actual implementation of the 1998 restructuring plan, as the Greek authorities did on many occasions, according to the contested decision (recital 184). It should also be noted that the restructuring of OA began in 1994, as is pointed out in the final report drawn up by Deloitte & Touche on the Speedwing plan in March 2000, and that an updating of the 1994 plan, and an extension of the restructuring period, necessary to allow OA to redress the situation with regard to the achievement of the objectives provided by the initial plan, was authorised by the Commission in the 1998 decision following notification by the Hellenic Republic in July 1998 of a revised restructuring plan accompanied by a detailed implementation plan (see recitals 40, 46, 78 and 85 in that decision). The goal of the 1998 restructuring plan was to re-establish OA's long-term viability through the full implementation of the restructuring measures already provided for in the 1994 plan, together with additional restructuring measures intended to take account of the deterioration in OA's financial results for 1997.

96 Moreover, the various measures for restructuring OA implemented during the period in which the 1998 restructuring plan applied were parts of different strategies, thereby creating a lack of continuity in the restructuring process. As the Greek authorities admitted, in particular in their replies of 11 April 2002 to the information request of 6 March 2002, 'the philosophy of [the Speedwing] plan was far distant from the philosophy of the ... plan [authorised in 1998] since it was mainly focusing on expansion and revenue maximisation [rather] than on the cost side'. The Speedwing plan, accompanied by a business plan, was notified to the Commission in November 1999 (see paragraph 13 above). However, the implementation of that plan had been commenced in August 1999, without the Commission's approval. The implementation of the 1998 restructuring plan was thus suspended from August 1999 until the departure of Speedwing in the middle of 2000 and a new phase of cost cutting and the revival of the 1998 restructuring plan were able to commence in the summer of 2000.

97 In this case, however, it was obvious as early as 1999 that a substantial revision of the 1998 restructuring plan was necessary to achieve the long-term viability of OA, as the Greek Government had pointed out, inter alia, in the Speedwing plan, referring in particular to the Deloitte & Touche report of 21 July 1999 on the implementation of the 1998 restructuring plan (see paragraph 11 above). In that report, attention was drawn to OA's poor financial situation and the deterioration of market conditions making additional measures to achieve the company's long-term viability indispensable. The inadequacy of OA's financial results expected under the 1998 restructuring plan had already been revealed in the report on the implementation of that plan transmitted to the Commission on 7 May 1999 (see paragraph 10 above), in which the authorities explained that, after the adoption of the 1998 decision, the actual 1997 results as indicated in the audited balance sheet 'exceeded the most pessimistic estimate made in late February 1998 when the restructuring plan and the associated business plan were formulated'. Finally, it may be seen from the Commission's minutes of a meeting of 16 October 2002 between Commission officials and the Greek Government's legal advisers that the latter confirmed that the 1998 restructuring plan had not been up to date since 1999 by reason of the important divergences which had occurred right from the first year of the plan.

98 Having regard to the scale of the amendments which the two parties considered necessary, the abovementioned requirements (see paragraphs 91 and 93 above) concerning the submission by the Member State concerned of a revised restructuring plan during the restructuring period for thorough consideration by the Commission cannot be modified by the mere fact that the Commission encouraged — as it itself points out — the amendment of the 1998 restructuring plan. The Commission encouraged the amendment of that plan, first, during the period of Speedwing's management, as can be seen inter alia from its letters of 27 July and 23 August 1999, and from the contested decision (recital 29) and later, after the Speedwing plan had been abandoned, as may be seen, for example, from its letter of 29 March 2000, the letter from Ms Loyola de Palacio, the Member of the Commission responsible for transport, dated 5 July 2001, and the fact that, at meetings on 2 and 3 October 2003 with Mr Verelis, the Greek Minister for Transport and Communications, Ms Loyola de Palacio expressed the Commission's doubts concerning OA's viability and the urgency of having a new restructuring plan in place before the expiry of the current plan, as may be seen from Annex II to the minutes of the meeting of 16 October 2002.

99 In addition, it is apparent from the file that, on many occasions, and in particular in its abovementioned letter of 23 August 1999, although it was in favour of amending the 1998 restructuring plan, the Commission insisted that it would need to assess the new plan in detail before taking a final position on the compatibility of the aid. Previously, the Commission had pointed out inter alia that the competent national authorities should give priority to the definition of revised financial projections covering the entire period of the plan (see the Commission's letter of 12 May 1999 to the Greek authorities).

100 In that context, the existence of a consensus between the Greek authorities and the Commission during the administrative procedure as to the need to update the 1998 restructuring plan does not, of itself, make it possible to suppose that a new, revised plan, meeting the abovementioned requirements (see paragraphs 91 and 93 above), had been submitted to the Commission for its approval.

— Consideration of the argument concerning the non-payment of the last instalment of the aid

101 It is clear from the file that the reason for the non-payment of the third and final instalment of the aid was the failure to implement the 1998 restructuring plan. The 1998 decision (Article 1(2)) made payment of that instalment of EUR 22.9 million subject to compliance with all the conditions imposed by the decision in order to secure the compatibility of the aid with the common market, the actual implementation of the 1998 restructuring plan and the achievement of the expected results (particularly with regard to cost and productivity ratios). However, following submission by the Greek authorities, on 7 May 1999, of the report, previously cited, provided for in Article 1(2) of the 1998 decision before payment of the last instalment, the Commission indicated to the Greek authorities, in particular in its letter of 27 July 1999, mentioned above, that the analysis of the failings in the implementation of the 1998 restructuring plan, set out in the Deloitte & Touche report of 21 July 1999 (see paragraphs 10 and 11 above), shows that it could not adopt a decision favourable to payment of the final instalment. As the Court has already pointed out (see paragraph 98 above), the Commission called upon the Greek Government, in that letter, to submit an updated plan for the restructuring of OA so that the Commission might determine whether the payment of capital in the amount of EUR 22.9 million was justified. In its letter of 18 November 1999 notifying the Speedwing plan to the Commission (see paragraph 13 above), the Greek Government asked that institution to be permitted to pay the last instalment of the aid following its review of the revised plan. However, by letter of 17 December 1999, it asked the Commission to delay its decision on payment of the last instalment to enable the Greek authorities to carry out an assessment of the likely impact of the process of allowing private investment in OA, which had just been initiated, and to develop an optimal plan for securing OA's viability. The contract with Speedwing gave British Airways an option to buy, before July 2000, 20% of OA's share capital. In that context, it is all the more difficult to explain the failure to pay the last instalment of the aid by the fact that the Greek Government and the Commission considered that the 1998 restructuring plan had been revised since the Speedwing plan had been definitively abandoned following transmission by the Commission to the Greek authorities, by letter of 20 March 2000, of the final, unfavourable, report drawn up by Deloitte & Touche in March 2000 (see paragraph 14 above).

102 Subsequent developments in the case also do not make it possible to consider the non-payment of the last instalment of the aid as evidence that the 1998 restructuring plan had been amended. Since British Airways had not made an offer to purchase OA before July 2000, the Greek Government informed the Commission, by letter of 29 August 2000, of its decision to make an international call for tenders so as to find a strategic investor. In that letter, it repeated its request that the Commission delay its decision on authorising payment of the last instalment until OA 'had assessed the results of this attempt' at privatisation. Those facts merely prove that the Commission was informed of the plan to privatise a majority stake in OA in order to facilitate achievement of the restructuring plan's objectives (see paragraph 106 below). Consequently, although in their answers of 11 April 2002 (point 1.9) the Greek authorities presented the 'freeze' of the last instalment of the aid as the result of their compromising approach towards the Commission, that 'freeze' cannot be interpreted, in the context set out above, as resulting from the submission of a request to revise the restructuring plan, accompanied by a plan revised in accordance with the Guidelines. The freeze flows exclusively from the implementation by the Commission of Article 1(2) of the 1998 decision (see paragraph 101 above).

103 It follows that, contrary to the applicant's allegations, the non-payment of the final instalment of the aid may not be regarded as evidence that the 1998 restructuring plan was amended or that a request had been made to the Commission to amend that plan, accompanied by a second revised plan, following the abandonment of the Speedwing plan.

104 Consequently, notwithstanding the failure to pay the last instalment of the aid, the 1998 restructuring plan remains fully valid and is still fully binding on the applicant, in accordance with the provisions of the Guidelines (see paragraph 89 above). In particular, contrary to the applicant's allegations, the Commission was not required to indicate, before it adopted the contested decision, that it did not accept the alleged modification of the plan, represented by the non-payment of the final instalment of the aid. In addition, when, in the contested decision, it reviewed

compliance with the 1998 restructuring plan and adopted a position regarding recovery of the aid already paid which it regarded as incompatible with the common market, it was not required to take account of the abovementioned alleged modification and non-payment of the final instalment of the aid since it had not been properly notified of any amendment to the 1998 restructuring plan. It follows that the additional pleas, invoked by the applicant in connection with the argument concerning the non-payment of the final instalment, alleging infringement of the principle of the protection of legitimate expectations, of essential procedural requirements, and the *ne bis in idem* principle, must also be rejected as being without foundation.

— Consideration of the argument concerning the decision of 4 October 2000

105 Similarly, the reference — in the Commission's decision of 4 October 2000 not to raise any objection to the amendment of the 1998 decision — to the transitional nature of OA's management while awaiting privatisation at the beginning of 2001 does not allow it to be supposed that a second amended restructuring plan, incorporating the privatisation of OA, had been submitted to the Commission after the abandonment of the Speedwing plan. In that context of the decision of 4 October 2000, the abovementioned reference merely constitutes one of the reasons for the Commission's decision to extend the time-limit for the use of new loan guarantees approved in the 1998 decision (see paragraphs 16 and 17 above). Contrary to the applicant's allegations at the hearing, only the minor amendment constituted by the extension of the abovementioned time-limit for the use of new loan guarantees was regarded, in the decision of 4 October 2000, as raising no doubts as to the compatibility of the aid, in accordance with case-law, as illustrated by the judgment in *Ryanair* v *Commission* (see paragraph 92 above).

106 It follows that the decision of 4 October 2000, relied on by the applicant, may not be interpreted as meaning that it contains evidence of submission to the Commission of a second revised plan, incorporating the privatisation process, and of approval of that plan.

— Consideration of the arguments based on the correspondence between the Greek authorities and the Commission, and the reports submitted to that institution

107 First of all, it is important to bear in mind that neither the information regularly supplied to the Commission concerning the implementation of the plan to privatise a majority stake in OA, in particular the progress of the two successive privatisation processes begun in the summer of 2000 and February 2002 respectively, nor the meetings which took place on that subject between the Greek Government's advisers and Commission officials could dispense the Greek authorities from the obligation to submit, in all relevant detail, any significant amendment of the 1998 restructuring plan for the Commission's approval.

108 It must therefore be verified whether the correspondence and the various reports referred to by the applicant make it possible to consider that a request to amend the restructuring plan, accompanied by a revised plan, was submitted to the Commission in accordance with the requirements of the Guidelines, be it in connection with the first privatisation process or the second.

109 With regard to the first privatisation process, following the adoption, in September 2000, of the decision needed to permit the privatisation of a majority stake in OA, a call for tenders was made in the following December according to the Greek authorities' answers dated 11 April 2002 to the Commission's information request of 6 March 2002 (points 2.7.4 and 2.19.2). The Greek Minister for Transport and Communications pointed out in a letter to Ms Loyola de Palacio, dated 6 September 2000, that, according to comments received by Crédit Suisse First Boston from private investors, there would be interest only if a majority stake was for sale and only if OA's financial parameters were 'clear'. Crédit Suisse First Boston's memorandum of 20 December 2000, transmitted to the Commission, was intended to assist a limited number of companies which had expressed an interest in acquiring OA to decide whether or not to carry out additional investigations into that company's situation. It contained, in particular, the report drawn up by PricewaterhouseCoopers (see paragraph 15 above). The question of adapting the

1998 restructuring plan with a view to re-establishing OA's viability was raised neither in that memorandum nor in the abovementioned correspondence or answers.

110 The same is true of the letter sent to the Commission by the Greek authorities on 16 May 2001 in reply to a letter of 25 April 2001 from that institution. In the latter letter, which referred to preliminary discussions which had taken place since December 2000 between the Greek Government's advisers and Commission officials concerning the privatisation of OA, the Commission expressed doubts as to the compatibility of the tendering procedure with its position on privatisations set out in its *XXIIIrd Report on Competition Policy 1993* (paragraphs 402 and 403). In addition, the Commission pointed out in that same letter that compliance with the restructuring plan and OA's return to viability were key conditions under the 1994 and 1998 decisions.

111 On the latter point, the Greek authorities, in the abovementioned reply of 16 May 2001, merely referred to their observations of 19 February 2001 on HACA's complaint (see paragraph 18 above), without even mentioning a possible amendment of the 1998 restructuring plan. In addition, on the subject of the privatisation process, they merely informed the Commission that three proposals had been received within the deadline and announced that it would receive formal notice of the transaction after informal consultations with its officials. It can also be seen from that exchange of correspondence of 25 April and 16 May 2001 that, at that stage, no request to revise the restructuring plan had been submitted to the Commission.

112 By letter of 1 February 2002, the Greek authorities informed the Commission of the ongoing discussions with one of the bidders. In addition, they informed that institution of the measures intended to cut costs, rationalise OA's network, improve productivity by reducing fares and apply productivity management techniques.

Those additional measures, adopted to deal with the crisis in the air transport market following the events of 11 September 2001 and fully compatible with the 1998 restructuring plan, were not, however, accompanied by a request to amend that plan.

113 It follows that neither the letters and documents referred to by the applicant nor any of the other items in the file reveal that a request, however implicit, that the 1998 restructuring plan be revised was ever submitted to the Commission during the first privatisation process, interrupted in February 2002 by the incapacity of the preferred bidder to demonstrate its financial solidity.

114 With regard to the second privatisation process, the Greek Government informed the Commission, by letter of the Minister for Transport and Communications dated 22 February 2002, that the privatisation process was entering a new phase during which a plan for the reorganisation of OA would be implemented with a view to launching, within a few months, a viable new air carrier. At the same time, OA would cease all air carrier operations. All OA's assets and subsidiaries would be sold within approximately two years. The privatisation plan and the detailed business plan for the new carrier were to be submitted to the Commission within the following weeks.

115 It is very clear from the documents submitted to the Commission by the Greek authorities that the purpose of the second process intended to privatise OA was to achieve the principal objective laid down in the 1998 decision, namely, to re-establish the company's viability. Those documents will thus need to be examined in order to determine whether they may be regarded as containing, even if only implicitly, a revised restructuring plan.

116 In their replies of 11 April 2002 to the Commission's information request dated 6 March 2002, the Greek authorities pointed out that, since the summer of 2000, the restructuring effort for OA had been twofold, namely, the process aimed at privatising a majority stake in the company through which its long-term restructuring would be achieved and, in parallel, the rationalisation of its operations (in particular, through reductions in capacity and costs) in a way that would not jeopardise the ongoing privatisation process (points 2.7.5, 2.3.13 and 2.7.1). They explained that since the implementation of OA's restructuring had been delayed by various internal and external factors, recourse to privatisation was intended to expedite the restructuring effort (point 1.6). They briefly indicated that the objectives of privatisation were, in particular, the following: New Olympic Airways (NOA) should operate solely as an airline; Athens International Airport, in Spata, would be NOA's principal hub; NOA should have the necessary financial strength and the capacity to be financially viable in the long term; the exposure of the Hellenic Republic and the OA Group to any risks and liabilities which remain within the OA Group following its restructuring should be minimised and, finally, sale proceeds should be maximised (point 2.19.8).

117 In their replies of 11 April 2002, the Greek authorities pointed out, in particular, that privatisation of OA was not one of the conditions for the authorisation of the aid under consideration and that it represented an additional assurance for the Commission that the Greek Government was strongly committed to restructuring the company. They emphasised that privatisation constituted an essential element for the restructuring and the long-term viability of OA. Mr Verelis provided Ms Loyola de Palacio with the initial information in summer 2000 concerning the first privatisation process, which interrupted in February 2002 and was followed up at a meeting on 2 October 2000. Since then, the Greek Government's privatisation advisory team have held a number of meetings with members of Ms Loyola de Palacio's Cabinet and Commission officials to update that information, in particular since the publication of the request for an expression of interest in acquiring OA and the abovementioned information memorandum of 20 December 2000 (see paragraph 109 above), with a view to ensuring that the privatisation process would be approved by the Commission and, most importantly, that the restructuring objective would be met (points 2.19.3 to 2.19.7).

118 By letter of 16 July 2002, the Greek Government informed the Commission that the sale of Olympic Catering would be finalised by the end of the following month. It indicated that the privatisation of OA, its subsidiaries and its branches would be completed 'by the end of [next] October'.

119 In their replies of 30 September 2002 to the second information request, dated 9 August 2002, the Greek authorities drew attention to the implementation of measures to cut costs and reduce services. In addition, they pointed out that the revival in financial and operational terms of OA in 2002 showed that the undertaking's flying operations were viable in the long term once it could strengthen its own capital, in particular, through the privatisation process. They explained that privatisation had two objectives, namely, the immediate constitution of liquid assets through the sale of the group's shares, shareholdings and branches, and the entry of private capital into the company. A report on the result of negotiations with potential investors was to be submitted before the end of October 2002. Finally, the Greek authorities informed the Commission that if that attempt failed, the flying operations would be separated from the group and given to an OA subsidiary, NOA. They explained that the preference for that solution was due to NOA's healthy situation, which allowed it to borrow and to the fact that the new contracts of employment for NOA flight crews were in accordance with market conditions. They indicated that the NOA financial plan called for a bank loan secured by the company's shares. In short, NOA had the following characteristics: a restructured and profitable network without any structurally loss-making routes; a homogeneous and more modern fleet, adapted to the restructured network; and labour agreements corresponding to market conditions.

120 In addition, as has already been pointed out (see paragraph 97 above), it can be seen from the minutes of the meeting of 16 October 2002 that the Greek Government's legal advisers confirmed that the 1998 restructuring plan had not been up to date since 1999 and that reference should be made to the real and current figures in order

to judge OA's viability. However, no mention is made of a request to make a specific amendment to the 1998 restructuring plan, accompanied by a revised plan taking account of the ongoing privatisation process.

121 The documents which have just been considered above show only that the Commission was kept abreast of the progress of the privatisation process. It is clear in particular from those documents that the privatisation process was initiated by the Greek authorities as a measure complementary to the implementation of restructuring measures — in particular, cost-cutting and service reductions — which formed part of the measures already provided for in the 1998 restructuring plan. It follows from the 1998 decision that the purpose of the plan in question was precisely to re-establish OA's viability through a reduction in operating costs achieved by a reorganisation of cost structures, an improvement in productivity and the reorganisation of the company. It is common ground that, as early as 1999, the plan had turned out to be incapable of ensuring OA's viability, in particular because of the deterioration of the company's financial situation. In that context, as may be seen from the abovementioned replies of 30 September 2002 to the second information request, the purpose of the reorganisation and privatisation of OA was inter alia, on the one hand, to create immediate additional liquidity by the sale, individually and separately, of non-essential assets and ancillary activities, so as to absorb OA's debts, and, on the other, to regroup and privatise the majority of the flying operations carried out up to that time by OA and its subsidiaries, Macedonian Airlines and Olympic Aviation, so as to permit the reconstitution of the company's own funds by means of an injection of capital into the future private airline.

122 In the abovementioned documents, however, the Greek authorities refrained from proposing a specific adaptation of the 1998 restructuring plan in a clear and precise manner. On the contrary, they merely suggested that the Commission abandon the 1998 restructuring plan, emphasising in particular the fact that the privatisation of OA — the detailed arrangements for which it intended to submit to the Commission

for its approval (see paragraphs 110, 111, 114 and 117 in fine above) — confirmed the Hellenic Republic's firm commitment to restructuring the company (see paragraphs 117 and 120 above). However, as has already been pointed out, in so far as the 1998 restructuring plan was binding, in particular, on the beneficiary undertaking, the Member State concerned could obtain amendment of it only by submitting a revised plan to the Commission for its approval (see paragraphs 89 to 93 above).

123 It must however be noted that the two Deloitte & Touche reports, sent by the Greek authorities to the Commission in November 2002, also did not contain any information which could be understood as a request to revise the 1998 restructuring plan, accompanied by a revised plan.

124 Although it is true that the Deloitte & Touche report, referred to above, on the limited review of OA's performance as compared to its 2002 financial plan, transmitted to the Commission as an annex to the abovementioned letter of 13 November 2002, confirmed that there had been a relative improvement in OA's operating results in 2002 compared to earlier years, the report did not contain any request to update the 1998 restructuring plan in regard, in particular, to the financial indicators and the estimated duration of the restructuring, so as to take account of that improvement and the effect of the ongoing privatisation process. That report expressly indicated that its sole objective was a limited review of OA's estimated operating results, excluding Olympic Aviation and Macedonian Airlines, for the eight-month period from January to August 2002, prepared solely for the purpose of assisting OA's management in its assessment of the reasonableness of the forecast financial results for 2002. It was pointed out that OA's 2002 financial plan summarised the effects of a wide range of organisational, operational and commercial changes intended — amongst other factors — to control capacity, increase prices and, where possible, control costs (paragraph 2.1). In that report, the privatisation process which had begun in 2002 was mentioned only as background to the context in which the 2002 financial plan was developed. The report indicated in that regard that it was expected that the sale of non-essential assets and the restructuring/privatisation of flying operations, to take place in parallel with the

ongoing strategy of reducing capacity and costs while improving revenue and productivity would have produced more favourable financial results in 2002 than in previous years. It contained no projection of OA's results for 2003 and 2004, during which the privatisation of the OA Group continued.

125 In the Deloitte & Touche report of 5 November 2002 on the restructuring and privatisation of OA, transmitted to the Commission as an annex to the letter of 21 November 2002, the Greek authorities merely developed some information previously supplied to that institution concerning the second privatisation process. That report, which referred neither to the 1998 restructuring plan nor to OA's financial situation, contained a summary of the estimated results for the future airline NOA and estimated accounts for 2003, 2004 and 2005. However, it was not accompanied by the submission, announced in the letter of 22 February 2002 (see paragraph 114 above), of a real business plan for that new company. The report merely indicated that the objective of the privatisation effort was to set up a private airline based on the current OA Group, during 2003. The new approach consisted of restructuring the OA Group so as to bundle all flight operations and unbundle all other operations. The search for private investors was to be carried out separately for the various operations. NOA was to be a profitable airline, not burdened by the financial problems of the past. The private majority shareholder was to inject fresh equity capital into NOA and assume its management. The report called, in particular, for the acquisition from the OA Group of all assets required by the new airline at market prices (aircraft, brand, commercial relationships, slots at airports in the Community, buildings), and the engagement by NOA of OA Group staff on the basis of new competitive employment contracts. The Macedonian Airlines subsidiary was to serve as a platform for NOA. The new airline would operate a smaller and inherently profitable network. The report contains information on the routes to be served, the number of aircraft and the staff reductions to be carried out. The privatisation process itself was to be carried out in two phases: phase A, already under way, would be completed by the selection of a private investor and phase B consisted of negotiations with that investor. NOA would become operational ('take off') before the winter of 2003. With regard to operations other than flying operations, separate privatisation of the various subsidiaries were to be completed in June 2003 and privatisation of the business divisions in June 2004.

126 Examination of its content thus shows that the abovementioned report cannot be interpreted as containing an implicit request to make a specific amendment to the 1998 restructuring plan so as to take account of the reorganisation and privatisation of the OA Group. Even though that reorganisation and privatisation, intended to restore OA's long-term viability within a reasonable time, necessarily implied an adaptation of the 1998 restructuring plan, the Greek authorities were required to propose in a clear and precise manner the specific adaptations that they wished not merely in regard to the additional restructuring measures intended to reduce costs and capacity but also the financial projections for the period covered by the revised plan. However, no forecast is made, either in the abovementioned report on the restructuring and privatisation of OA or in the other documents in the file, of the effect that the additional restructuring measures and privatisation were expected to have on OA's financial indicators, as set out in the 1998 decision, and in particular on OA's long-term viability, especially on its capacity to clear its debts and become financially independent (see paragraph 121 above). Essentially, the abovementioned report contains only a reference to the sale of Olympic Catering for EUR 16 million and a calendar of the probable dates for the sale of the other subsidiaries and business divisions, to be carried out in two phases, the second of which was to be completed in June 2004.

127 Consequently, the report of 5 November 2002 on the restructuring and privatisation of OA, completed by the additional information, mentioned above, provided to the Commission during the administrative procedure, may not be regarded as implicitly containing a revised restructuring plan. In all of those documents, the emphasis is on the viability of the proposed new airline, NOA, which was to be free of all debt, and there is no other specific and precise indication as to particular measures intended to remedy the problems specific to OA (see, to that effect, *BFM and EFIM* v *Commission*, cited at paragraph 65 above, paragraph 88).

128 Moreover, in the absence of sufficiently precise information concerning the privatisation process itself, the abovementioned report may also not be regarded

as containing a request to approve a detailed privatisation plan, notification of which had also been announced to the Commission by letter of 22 February 2002 (see paragraphs 114 and 122 above). Under those circumstances, and bearing in mind that review of the detailed arrangements for the privatisation of OA is different from review of the implementation of the restructuring aid under consideration, the Court notes that the information concerning solely the process for privatising OA contained in the abovementioned report on the restructuring and privatisation of that company may also not be regarded as containing a specific request to revise the 1998 restructuring plan, extending the restructuring period so as to take into account the expected results of the reorganisation and privatisation of OA, intended to re-establish the long-term viability of the company, inasmuch as the detailed arrangements for privatisation had not yet themselves been clearly defined.

129 In that context, the information provided to the Commission by the Greek Government in a letter dated 2 December 2002 that six candidates which had provided proof of their financial strength had expressed an interest in acquiring OA, and that a preferred bidder would be selected within a few days with a view to concluding negotiations within a short period of time, also cannot be understood as containing an implicit request to make a specific amendment to the 1998 restructuring plan.

130 For all of those reasons, the letters, information and documents transmitted to the Commission cannot be regarded as implicitly containing a request to update the 1998 restructuring plan, accompanied by a revised plan, as required by the abovementioned provisions of the Treaty and the Guidelines (see paragraphs 90 and 91 above).

131 It follows from the above considerations that the applicant has not shown that the Commission had made an error of assessment in concluding, in the contested decision (recital 173), that no new request for a specific amendment to the

restructuring plan had been submitted to it during the administrative procedure, following the abandonment of the Speedwing plan, and in considering the compatibility of the aid under consideration with the 1998 restructuring plan.

132 It should be added that it cannot be seen from the file, and the applicant does not claim, that the Greek authorities suggested to the Commission, following transmission to it of the Deloitte & Touche reports in November 2002, that they would shortly thereafter submit to that institution an updated restructuring plan, complementary to those reports.

133 Under those circumstances, it cannot be concluded that the Commission exceeded its discretion by adopting the contested decision, on 11 December 2002, on the basis of a restructuring plan which had not been updated.

134 For all of those reasons, the pleas alleging an error of fact and a manifest error of assessment must be dismissed as unfounded.

2. The alleged infringement of Article 87(3)(c) EC and manifest error of assessment

(a) Arguments of the parties

135 The applicant considers that the Commission did not adequately consider whether the aid at issue, approved in 1998, could be regarded as compatible with the common market under Article 87(3)(c) EC.

136 It alleges that the Commission should have based itself on the restructuring plan as submitted on 11 December 2002, taking account of the probability of privatisation, cost-cutting measures and the improvement of operating results in 2002, in which case it would have concluded that the aid approved in 1998 could once again be approved.

137 The applicant claims that the four conditions for the approval of restructuring aid set out in the Guidelines (point 3.2.2) were fulfilled in this case, contrary to the Commission's conclusions in the contested decision (recitals 182 to 185).

138 First of all, with regard to the condition concerning viability, the applicant contests, in particular, the Commission's analysis (recitals 103 to 117 in the contested decision) that OA's operating results remained weak. That analysis ignores the assessments made in the abovementioned Deloitte & Touche report on the limited review of OA's performance as compared to its 2002 financial plan. According to that report (page 16), 'there has been a remarkable improvement in the "Ebitda" [earnings before interests, taxes and depreciation of assets] evolution since 1999 and despite a very negative climate in the aviation industry as a whole', and '[t]his implies that the OA operational performance ... is heading toward the right direction'. The report states in that regard (page 18) that, based on the most likely scenario for 2002, OA would make a small operating loss of EUR 39.1 million. When that figure is compared to the estimated loss for 2001 of EUR 148.75 million, it represents, according to the report, a transformation of the company which is all the more remarkable when the effect of the EUR 26.5 million in additional charges at Athens International Airport (AIA) is taken into account. The applicant points out that that improvement is all the more obvious when account is taken of the various factors which pushed down the earnings of most of the major European airlines in the 1998 to 2002 period. In particular, the entire sector was faced with a drop in European demand from 1998, especially after 11 September 2001.

139 In addition, by regretting that the exceptional gains were a 'one-shot operation' (recital 113 in the contested decision), and by analysing OA's capital situation as a whole (recital 116 in the contested decision) so as to conclude that the company had suffered a 'total financial collapse' (recital 184 in the contested decision), the Commission overlooked the fact that OA was in the process of being privatised.

140 However, a detailed and solid programme, set out in the report of 5 November 2002 on the restructuring and privatisation of OA, mentioned above, was put into place. It called for privatisation of a majority stake, cost-cutting measures and the separate sell-off of non-core business in order to permit OA's durable return to viability within a reasonable time, as required by the Guidelines. Most of the flying operations should have been sold in a single transaction, with a private investor providing a substantial injection of capital. They would have been profitable from the outset, as is demonstrated by the financial results and the summary profit and loss accounts in the abovementioned report. Privatisation would have begun with the sale of 58% of the equity in Olympic Catering and went forward with six expressions of interest in the acquisition of a majority stake in OA's flying operations. According to the privatisation plan, OA's remaining debts would be absorbed by the product of the separate sale of the various ancillary activities and by liquidity. The question to be asked is not whether OA was viable in its present form but whether, having regard to the improvement in operating results noted by Deloitte & Touche and to the privatisation process under way on 11 December 2002, the undertaking (in all its many parts) was viable. In particular, OA has not claimed that exceptional circumstances, such as sales, were relevant to the ongoing viability of OA's flying operations. Those circumstances merely contributed to providing OA with additional liquidity, enabling the group to implement privatisation.

141 In any event, the Commission erred in its analysis of the evidence concerning exceptional items. Contrary to its claim (recital 115 in the contested decision), precise information was supplied to it concerning exceptional gains of a value of around EUR 112 million in the abovementioned report on the limited review of OA's performance as compared to its 2002 financial plan (page 73). In addition, the

Commission did not take account of the fact that OA decided, at the end of October 2000, to no longer serve Australia, which should have improved the result by EUR 20 million per year, according to the abovementioned report (page 15). Finally, it disregarded the fact that OA had initiated arbitration proceedings in order to obtain additional compensation of about EUR 55 million for its early eviction from the former Athens airport (Elliniko) (see recitals 160 and 35 to 37 in the contested decision).

142 With regard to the calendar for the privatisation process, the applicant claims that, contrary to the Commission's proposed interpretation of the Greek Government's letter of 16 July 2002, mentioned above, it is clear from the general context and from the context of that letter that the Greek Government indicated that privatisation would be completed in October 2003 — not October 2002. That coincides with the abovementioned report of 5 November 2002 (pages 17 and 21) which calls for the sale of flying operations 'before winter 2003' and the sale of most subsidiaries and business divisions in the course of 2003. In any event, because of the general slowdown in air traffic in Europe after 1998 and the consequences of the force majeure events of 11 September 2001, the Guidelines justified a delay with regard to amendments 'for reasons outside the company's or the Member State's control'.

143 The applicant also points out that the amended restructuring plan calls for a reduction in flying operations on the market in order to prevent undue distortions of competition. In addition, aid was limited to a minimum. However, the contested decision did not consider those points.

144 Moreover, the requirements concerning amended restructuring plans (point 3.2.4 of the Guidelines) were also fulfilled. Finally, the restructuring plan, as submitted on 11 December 2002, also complied with the guidelines of 10 December 1994 on the application of Articles [87 EC and 88 EC] and Article 61 of the EEA Agreement to State aids in the aviation sector (OJ 1994 C 350, p. 5).

145 For its part, the Commission objects that the applicant's allegations are based on the hypothesis that the privatisation plan was submitted to it for review and approval. However, the plan was not submitted to it, whether as a revised plan amending the 1998 restructuring plan or as a request for additional aid.

146 In any event, after having gone through, without success, various stages, the last of which should have been completed at the end of October 2002 according to the Greek Government's letter of 16 July 2002, the privatisation process was still being presented in the report of 5 November 2002 on the restructuring and privatisation of OA as a 'concept', that is to say, a theoretical eventuality.

147 Moreover, there were no certified financial data for 2001 — which rendered an assessment of OA's real financial situation difficult — and, in their report on the 2000 financial year, the auditors indicated that their certificate was accorded 'on the express premiss that the company would continue to exercise its activities as a group of active undertakings'. The Deloitte & Touche report on the limited review of OA's performance as compared to its 2002 financial plan (points 1.1, 1.3 and 1.5) mentions that the information available on OA had not been verified and had in some cases proved to be inconsistent or incomplete, even if the differences were minor.

148 In that context, the Commission analysed information for the entire period from 1998 to 2002 and closely examined the developments which had taken place in the course of 2002.

149 The Commission denies the applicant's arguments based on the improvement in OA's operating results in 2002. It contends that the assessment of a restructuring plan must cover its entire duration, in this case, 1998 to 2002. Moreover, a

significant part of the exceptional profits were made from 2000 onwards, which reduced OA's losses. The Commission adds that the low level of the probable operating results for 2002 remained unacceptable. Notwithstanding the probable relative improvement in the indicators for 2002, OA was still in serious financial difficulty and, since the end of 2000, has relied exclusively on borrowed funds to finance its activities.

(b) Findings of the Court

150 First of all, it should be noted that, according to settled case-law, the Commission enjoys a wide discretion in the application of Article 87(3) EC. Since the Community Court may not substitute its assessment of economically complex facts and circumstances for that of the Commission, the Court's review must therefore be limited to verifying compliance with procedural rules and the obligation to state reasons, as well as the material accuracy of the facts, and ensuring that there has been no manifest error of assessment or misuse of powers (*Ryanair* v *Commission*, cited at paragraph 92 above, paragraph 90; *Technische Glaswerke Ilmenau* v *Commission*, cited at paragraph 43 above, paragraph 148; *Corsica Ferries France* v *Commission*, cited at paragraph 72 above, paragraphs 137 and 138; and *Schmitz-Gotha Fahrzeugwerke* v *Commission*, cited at paragraph 36 above, paragraph 41).

151 In this case, the applicant does not contest that the 1998 restructuring plan was not fully implemented. It points out in its written pleadings that, on the contrary, that plan had not been relevant for a long time. As the Commission points out in the contested decision (recital 181), although the Greek Government claimed during the administrative procedure that all the objectives fixed by the 1994 and 1998 decisions had been achieved or were close to being achieved, it itself pointed out — in its report entitled 'Synopsis of the Government of the Hellenic Republic's Case for [OA] on Key Issues', enclosed with its letter of 21 November 2002 to the Commission (pages 5 and 32) — that no plan for the restructuring of OA ever had a chance of being fully implemented due to both internal and external obstacles.

152 In this case, the applicant claims, essentially, that the aid under consideration, approved in 1998, should have been declared compatible with the common market under Article 87(3)(c) EC inasmuch as the undertakings, and, in particular, the new airline which would emerge from the separate privatisation of the various parts of OA's activities would be viable, having regard to the cost-cutting measures, the improvement in OA's financial performance in 2002 and the ongoing privatisation process.

153 It should be borne in mind that, since no request to make a specific amendment to the 1998 restructuring plan had been submitted in accordance with the provisions of the Guidelines, the Commission was fully entitled to examine the compatibility of the restructuring aid in the light of the 1998 restructuring plan relative to the 1998 to 2002 period (see paragraph 131 above), and therefore not to consider an extension of the restructuring period, and particularly the forecasts linked to the subsequent implementation of the privatisation plan, made, in particular, in the Deloitte & Touche report of 5 November 2002, mentioned above, and the other information brought to the knowledge of that institution during the administrative procedure.

154 It follows that the applicant's arguments based on the expected effect of the privatisation of OA on the viability of the various undertakings that would emerge from that process are irrelevant for the purposes of assessing whether the contested decision is well founded.

155 It follows, in particular, that the Commission did not exceed the limits of its discretion by failing to take into account, inter alia, the injection of capital which was expected to accrue from the privatisation of a majority stake in the flying activities of the group, brought together in a single undertaking, which was to be completed, according to the Greek Government's forecast, before winter 2003, and the constitution of liquidity which would result, in particular, from the separate privatisation of the various subsidiaries and business divisions accessory to OA, in so far as that privatisation had not already been implemented.

156 It should be pointed out that at the time that the contested decision was adopted, only the sale of the Olympic Catering subsidiary — confirmed in the Greek authorities' answers of 30 September 2002 — had been carried out. With regard to the process of privatising flying activities, although it is not contested that six financially sound candidates had expressed their interest in acquiring OA, as can be seen from the Greek Government's letter of 2 December 2002 (see paragraph 129 above), the fact remains that only the first stage of that process had been completed. No bidder had been selected and negotiations had not begun, with the result that a tangible outcome could not be foreseen in a sufficiently precise and credible manner. In addition, as has already been pointed out (see paragraph 128 above), the privatisation announced by the Greek authorities had not yet been carried out.

157 In those circumstances, contrary to the applicant's allegations, the Commission was, in any event, fully justified, having regard, in particular, to its exceptional profits and the level of its share capital, in assessing OA's actual financial situation in December 2002 and not in the perspective of future privatisation operations.

158 Moreover, it should be emphasised that, in the contested decision, the Commission did not base itself exclusively on the failure to implement the 1998 restructuring plan when concluding that OA's viability could not be re-established.

159 It is true that the Commission considered that, in the absence of any request from the Member State concerned to increase the aid or adapt the plan after the departure of the Speedwing management team in summer 2000, it could only assess the full implementation of the restructuring of OA on the basis of the plan envisaged in the 1998 decision (recital 173 in the contested decision).

160 Under those circumstances, and after noting that the principal financial indicators laid down in the 1998 decision had not been complied with, the Commission concluded that OA's failure to implement the restructuring plan from 1999 made it impossible to meet the objectives initially set, in particular the primary one, namely re-establishment of the company's viability (recitals 179, 181 and 184 in the contested decision).

161 However, the Commission added, essentially, that even if it had assessed OA's financial situation, irrespective of the full implementation of the 1998 restructuring plan, it would have been impossible to show that the company was viable, in the short term or in the long term, because of its total financial collapse. OA had no funds, only debts (recital 184 in the contested decision).

162 The applicant objects that that assessment is contradicted by the remarkable improvement in its operating results in 2002 compared to previous years, particularly 2001, in a very unfavourable business climate in the entire European aviation sector.

163 The Court points out that in the contested decision (recitals 116, 172 to 174 and 179), the Commission based itself, in particular, on the following data, not contested by the applicant. First, during the period from August 1999 to summer 2000, the restructuring efforts, and in particular, cost containment, which, along with OA's improved profitability, was a key element in the 1998 restructuring plan, were suspended in order to put the Speedwing plan into effect (see paragraph 96 above). Second, after the departure of Speedwing, a new phase of cost containment started in mid-2000. Third, in the interim, the company had lost 50% of its share capital by 1999. Moreover, the succession of cost reduction phases (1998 to early 1999) and expansion phases (late 1999 to early 2000) created a situation of unrest in the company. Fourth, the financial indicators for 1998 to 2002 (considered in recital 105 in the contested decision) diverged considerably from the principal indicators laid down in the 1998 decision. Fifth, in 2000, the company's own funds were almost nil. Based on non-audited figures for 2001, they had decreased to EUR 136 million.

Sixth, at 31 December 2002, notwithstanding the very positive impact of exceptional income on OA's situation, the shareholders' equity remained in any event negative. Own funds were EUR 139 million in the 'most likely case' envisaged by Deloitte & Touche in its abovementioned report on the limited review of OA's performance as compared to its 2002 financial plan, referred to above. Seventh, OA has relied since the end of 2000 only on borrowed money to finance its activities. In 2001, borrowings financed not only the whole fixed assets of the company but also the negative shareholders' equity. Eighth, by reason of a lack of liquidity, OA's current liabilities increased from EUR 116 million in 1999 to EUR 252 million in 2000 and to EUR 342 million in 2001. Ninth, among the indicators provided by the 1998 decision, the gearing, calculated as the total of all debts owed by the company divided by the shareholders' equity and which, according to the 1998 decision, should have remained between 2.22 and 2.76, arrived at 303 at the end of 2000, when the equity had almost vanished. The gearing cannot be calculated for later years due to the negative level of the equity. Finally, tenth, if the exceptional gains foreseen for 2002 could have been realised, a gearing ratio of 2.76 (equal to that allowed for 2000), put in relation to a total debt level of EUR 575 million at the end of 2000 and EUR 825 million at the end of 2001, would require that OA's net equity represent at least EUR 200 to 300 million. To compensate for the negative equity in 2001 a capital injection of EUR 340 to 450 million would therefore be necessary, supposing that as of 2003 OA will at least break even.

164 In this case, the positions of the parties diverge as to the analysis of the financial results for 2002, with regard, in particular, to the evolution of the Ebitda and the operating results, on the one hand, and, on the other, the exceptional gains.

165 With regard, first of all, to the evolution of the Ebitda and OA's operating results, it should be noted that in OA's financial plan for 2002, dated July 2002, the Ebitda was

estimated at a positive figure of EUR 11 million. However, it can be seen from the Deloitte & Touche report on the limited review of OAs' performance as compared to its 2002 financial plan that, in the most likely scenario, the Ebitda would reach a negative amount of EUR 39.1 million (page 16). The applicant rightly points out in that regard that, under unfavourable trading conditions, that figure none the less represents a significant improvement compared to the negative Ebitda amounts of EUR 148.8 million in 2001 and EUR 132.4 million in 2000.

166 However, in the contested decision (recitals 110 and 111), the Commission pointed out that the Ebitda has to cover the depreciation of fixed assets and interest charges. The sum of those two cost components amounted to about EUR 52 million in 2002, according to figures supplied to the Commission by OA. The Commission therefore pointed out, without being contradicted by the applicant, that deducting that amount from the Ebitda would bring the operating results or earnings before taxes and exceptional gains (EBT) to a loss of more than EUR 41 million according to the 2002 financial plan and to EUR 92 million according to the most likely scenario on the basis of the study carried out by Deloitte & Touche in the abovementioned report. However, the 1998 decision called for a positive operating result of EUR 24.9 million for 2002. None the less, the Commission accepted that the abovementioned losses probably constituted a relative improvement compared to earlier years. However, it considered that improvement to be insufficient.

167 It must be stated, in particular, that the decision to cease serving Australia, mentioned by the applicant, and which, according to the abovementioned Deloitte & Touche report (pages 15 and 54), would have the effect of reducing losses by EUR 2.9 million in 2002 and would later improve operating results by approximately EUR 20 million per year, was one of the cost containment measures implemented after the abandonment of the Speedwing plan and taken into account in the contested decision (recital 175). Under those circumstances, the Commission cannot be criticised for not specifically considering the reductions in costs linked to the decision to cease serving Australia, all the less so as the relevant reductions,

namely, those expected to be realised during the period of validity of the restructuring plan under consideration, estimated at EUR 2.9 million in 2002, were not in themselves capable of having a significant impact on OA's financial results for 2002.

168 With regard to assessing the impact of the events of 11 September 2001 and the unfavourable trading environment in the civil aviation sector in Europe since 1998 and particularly the evolution of the Ebitda since September 2001, the Commission pointed out in the contested decision (recital 177) that it could hardly verify, not being in possession of the audited accounts for 2001, what the real impact of the attacks of 11 September 2001 had had on OA's financial situation. It considered, nevertheless, that the failure to comply with the 1998 restructuring plan could be identified as early as 1999 and confirmed in the following years, irrespective of the impact of the 11 September attacks and the compensation (in the sum of EUR 5 million in 2002) received by OA following those attacks and the closure of airspace, which were considered separately (recital 114).

169 It should be pointed out that the applicant provided no evidence that the failure to implement the 1998 restructuring plan was even partly due to the attacks of 11 September 2001. In addition, even if it were accepted that, in any event, the failure to implement the plan was not the fault of OA or the Hellenic Republic — which has not been established in this case — that would not dispense the Hellenic Republic from the obligation to submit a request to amend the 1998 restructuring plan to the Commission.

170 Secondly, with regard to the analysis of the exceptional gains, the Commission pointed out in the contested decision (recital 113) that a significant part of those gains generated since 2000 were linked to disposals of non-core assets. It indicated that, in 2002, the amount of the exceptional gains (consisting of a last instalment of the compensation for moving to Spata airport of EUR 6 million, gains from the sale

of tangible fixed assets and financial fixed assets such as shares in participation) was forecast to be EUR 60 million. Although it accepted that those gains could contribute to an improvement in OA's financial situation, it emphasised that they had no impact on the company's cost structure. It rightly considered that only operating profit may in the long run allow the survival of OA.

171 In addition, the Commission, in the contested decision (recital 115), did not regard as reliable, in the absence of final proof, the figures concerning the additional exceptional income of EUR 112 million expected in 2002. It indicated that, according to the information supplied to it by OA at the abovementioned meeting on 16 October 2002, the amount could amount to as much as EUR 37 million from the sale of OA's shares in the catering and reservations systems activities, with the remainder (EUR 75 million) coming from the sale and leaseback of aircraft.

172 The applicant's allegation that the Commission erred in its analysis on that point, having regard to the information contained in the abovementioned Deloitte & Touche report (page 73), must be rejected. That report contains no additional details concerning the exceptional gains under consideration. It merely mentions the proceeds from the sale of the Olympic Catering subsidiary (estimated at EUR 11 million after deduction of OA's contribution to Olympic Catering's social charges), the expected proceeds (not estimated) from the sale of the Galileo Hellas subsidiary, and the expected proceeds from the sale and leaseback of aircraft, estimated by OA at EUR 75 million. However, all that emerges from the Deloitte & Touche report on the restructuring and privatisation of OA is that Galileo International expressed a 'very strong' interest in acquiring Galileo Hellas and that, according to the estimated time plan, the privatisation process, which began in November 2002, was to finish in January 2003. Moreover, with regard to the abovementioned estimates concerning the proceeds from the sale of aircraft, neither of the two Deloitte & Touche reports transmitted to the Commission in November 2002 contains an explanation justifying those estimates in comparison, on the one hand, with the net book value (after depreciation) of the aircraft, given as EUR 41 million — according to information appearing in the contested decision (recital 115) and not contested by

the applicant — in OA's last balance sheet dated 31 December 2001 and, on the other, with the level of selling prices for second-hand aircraft. In that regard, the Deloitte & Touche report on the limited review of OA's performance as compared to its 2002 financial plan (page 73) merely states that, according to OA, those estimates are based on 'market' offers it received for those aircraft.

173 With regard to the compensation paid by the Greek State for moving from Elliniko airport to Spata airport, the abovementioned Deloitte & Touche, report stated (page 21) that compensation in the amount of EUR 138.7 million had been paid (and that operating costs were significantly higher at Spata airport). It is clear from the contested decision (recitals 160 and 200) that the Commission considered that compensation of EUR 138.7 million was not excessive and did not involve any State aid. It pointed out in that regard that the Hellenic Republic is no longer asking for the additional amount of EUR 55 million requested by OA. In that connection, and contrary to the applicant's claims (see paragraph 141 above), the Commission cannot be criticised for not taking account of the additional amount of EUR 55 million requested, even though the Greek authorities, in their replies of 11 April 2002 (point 2.17.10), had informed it of OA's decision to contest the final amount of the compensation fixed by the Greek Government. The applicant indicated in its written pleadings neither the stage — at the time that the contested decision was adopted — which the arbitration proceedings which it had initiated had reached nor whether it had supplied precise information to the Commission on that subject. In the absence, at that time, of the arbitrator's award, the Commission can in no way be criticised for not taking account of the mere possibility of additional compensation. In addition, it should be pointed out that, in any event, the possible award of additional compensation is, in principle, subject to review by the Commission, in order to establish that it did not involve State aid (recital 35 in the contested decision).

174 Having regard to all the foregoing considerations, it must be decided that the arguments put forward by the applicant do not lead to the conclusion that the

Commission committed a manifest error of assessment in considering, not merely in regard to the divergence of OA's operating results from the indicators provided in the 1998 decision during the period considered and in particular in 2002 (see paragraph 166 above), but particularly by reason of the scale of the company's debts and its lack of funds (see paragraphs 161 and 163 above), that, notwithstanding a probable improvement in operating results for 2002 compared to earlier years, OA's short-term and long-term viability had not been re-established and in declaring the aid incompatible with the common market.

175 Under those circumstances, there is no need to consider the conditions relating to the prevention of distortion of competition and to the limitation of the amount of the aid to a minimum which, as the applicant has pointed out, were not taken into account in the contested decision.

176 For all of those reasons, the plea alleging an infringement of Article 87(3)(c) EC must be dismissed as unfounded.

3. The manifestly erroneous nature of the assessment that no restructuring measure had been undertaken

(a) Arguments of the parties

177 The applicant contests the finding that no restructuring measure was undertaken in good time and/or that the plan was not amended (recitals 172 to 181 in the contested decision). The full process of privatising a majority stake, cost cutting and

sale of assets, corresponding to the amended restructuring plan of 2000, was begun in 2000 and was carried on continuously until 11 December 2002. The Commission was regularly informed of the restructuring measures, as can be seen from the contested decision (recitals 73, 106, 172 and 175).

178 The cost-cutting measures applied by OA can be seen in particular from the documents transmitted to the Commission, such as the Greek Government's letter of 1 February 2002, its reply of 11 April 2002 to the Commission's first information request, its reply of 30 September 2002 to the second request and its observations of 21 November 2002 entitled 'Synopsis of the Hellenic Republic's Case for [OA] on Key Issues'.

179 The Commission contends that that argument should be rejected.

(b) Findings of the Court

180 It should be pointed out, first of all, that the applicant's claims are based on a misreading of the contested decision. Contrary to the applicant's allegations, although the Commission concluded that the objectives fixed by the 1998 decision, particularly in regard to re-establishment of OA's viability, had not been achieved, it did not consider that no restructuring measure had been undertaken. With regard, more particularly, to cost-cutting measures, it can be clearly seen from the contested decision (recitals 172 to 175) that the Commission considered the policies that were successively applied by OA. After pointing out that, from 1999, the expected results had not been obtained at the end of the first cost-cutting phase (1998 to early 1999), which was followed by an expansion phase under Speedwing management, the Commission pointed out that a new cost-cutting phase was initiated after the departure of Speedwing in accordance with the 1998 restructuring plan.

181 It should also be borne in mind that, in the contested decision, the restructuring measures undertaken were considered in the light of the 1998 restructuring plan. As has already been decided (see paragraph 131 above), the Greek authorities made no request for a specific amendment to the plan, as is required by the relevant provisions of the Guidelines. Consequently, the Commission failed to consider the measures provided for in the privatisation plan, in so far as they had not taken specific form during the period of validity of the plan. On the other hand, it should be noted that the Commission took account of the impact, particularly on OA's financial situation, of privatisation measures that had actually been implemented at the time that the contested decision was adopted, such as the sale of a 58% stake in the Olympic Catering subsidiary.

182 It is thus clear from the contested decision that the Commission assessed the implementation of the restructuring plan on the basis of all the measures adopted during the period of validity of the plan, in order to verify whether the plan's objective of achieving the undertaking's long-term viability had been met.

183 It follows that the claim that the Commission considered that no restructuring measure had been undertaken must be rejected as unfounded.

B — *The Hellenic Republic's alleged failure to fulfil its obligation to put in place a fully operational and adequate MIS, set out in Article 1(1)(d) of the 1998 decision*

1. Arguments of the parties

184 The applicant points out that, in the contested decision (recital 118), the Commission confirms that the Hellenic Republic put an MIS in place. All that is

at issue is the 'operational and adequate' nature of the MIS. The Commission has also admitted (recital 186 in the contested decision) that the time-limit fixed for the implementation of such a system, fixed at 1 December 1998 by Article 1(1)(d) of the 1998 decision, was insufficient.

185 The applicant considers that the fact that the MIS did not cover all of OA's subsidiaries does not mean that it was not operational and adequate. The Commission confused the question of the operational and adequate nature of OA's MIS with the broader, but very different, question of the modernisation and transformation of OA's subsystems for transmitting financial data. It is accepted that the quality of the latter influences the quality of the results of the MIS, but not the quality of its conception or its operational capacity strictly speaking. The Commission's experts recognised the quality of the MIS's conception and its practicality. However, the quality of the results of the MIS depended on the progressive modernisation and improvement of the subsystems for the collection of data concerning OA's spending and income. That procedure, carried out in stages, was not just a matter of ensuring the compatibility of a plethora of incompatible software systems — no less than 44 — but also involved training a very large number of staff involved in data collection and the absorption of a considerable backlog of data whose processing had been delayed. The fact that the Commission fixed at 1 December 1998, only three and a half months after the adoption of the 1998 decision, the date for the implementation of a 'fully operational and adequate' MIS is sufficient to show that the provisions of Article 1(1)(d) of the 1998 decision did not apply to the adoption of the subsystems.

186 Under those circumstances, the decision is vitiated by a manifest error of assessment inasmuch as it claims that the Greek authorities did not fulfil the obligation laid down in Article 1(1)(d) of the 1998 decision.

187 In addition, the decision is vitiated by the fact that the Commission has not complied with its duty to adduce evidence concerning the situation of OA's MIS. The Commission adopted a decision concerning the MIS which, by its own account (recital 187 in the decision), is based on inadequate evidence.

188 In particular, the Commission infringed both the Hellenic Republic's right to be heard and that of the applicant. It asked for no additional information concerning the MIS and warned neither the Hellenic Republic nor the applicant of its persistent doubts concerning the operational and adequate nature of the MIS.

189 The applicant points out that it provided details of the situation of the MIS in its reply of 11 April 2002 to the Commission's first information request of 6 March 2002. In the report on the situation of the MIS in April 2002, joined to those observations as Annex 39, a clear distinction is drawn between the improvement of OA's (very high-quality) MIS and the need to modernise the many subsystems for the transmission of data in the MIS. It confirmed that the preparation of the MIS was terminated in August 2000 and that the MIS was installed for 34 users in OA in October 2000, and that the development of the secondary systems was terminated (revenue in 1999, payroll in 2000 and Oracle Financials in 2001). The Commission made no further reference to the MIS in the second information request.

190 For its part, the Commission contends that OA and its subsidiaries did not have, at the time that the contested decision was adopted, a reliable MIS, with the effect that it would not have been possible to base its assessment of the management of OA on valid data or to obtain reliable information. That is corroborated by the comments of the auditors in the certificate accompanying OA's 2002 accounts.

2. Findings of the Court

191 The Court considers it appropriate to consider, first, in the light of the principles set out above (paragraphs 34 to 41), the pleas alleging a failure to discharge the burden

of proof and an infringement of the applicant's right to be heard with regard to the Hellenic Republic's alleged failure to fulfil its commitment to ensure that OA had a fully operational and adequate MIS in place by 1 December 1998.

192 It is clear from the first information request (recitals 51 to 53, 88 and 90) that the Commission considered in detail the question whether an operational and adequate MIS had been put in place, particularly in the light of the conclusion drawn in a report prepared in 1999 by the independent consultants Alan Stratford and Associates, and that the Hellenic Republic was asked to provide all information necessary to determine the compatibility of the aid.

193 It can be seen from the contested decision (recital 118), the first information request and the summary of Alan Stratford and Associates' report, mentioned above and joined to Annex 39 to the Greek authorities' reply of 11 April 2002, that the report in question had highlighted some potential weak spots in the MIS. It pointed out, in particular, that the effectiveness of the system was subject to 'contracting and efficient implementation of a new revenue accounts system', that the MIS did not apply to the Olympic Aviation subsidiary, and that certain key management information was not yet included, which reduced management's ability to obtain a true overview of its aviation business.

194 In the light of the abovementioned questions concerning the MIS, raised in Alan Stratford and Associates' report and taken up in the first information request, it was up to the Greek authorities, as part of their duty of cooperation, to provide all the information necessary to establish the operational and adequate nature of the MIS. In the second information request, the Commission once again asked the Hellenic Republic to provide all information necessary to consider the compatibility with

Article 87 EC of the aid measures referred to in the decision of 6 March 2002 and made very clear its intention to adopt a definitive decision on the basis of the available information (recitals 7, 9 and 10).

195 Under those circumstances, the Commission could legitimately have adopted the contested decision on the basis of the answers supplied to it by the Greek authorities.

196 The plea alleging breach of the Hellenic Republic's right to a fair hearing is therefore unfounded. The same is true of the plea alleging breach of OA's right to a fair hearing, as has already been pointed out (see paragraph 46 above).

197 Secondly, it must be verified whether the Commission has established to the requisite legal standard that, having regard to the information at its disposal, the commitments concerning the MIS had not been met.

198 It should be noted, first of all, that it is clear from the contested decision (recital 186) that since the Hellenic Republic stated that the MIS had been put in place in October 2000, the Commission accepted that the four-month time-limit for implementing the system, fixed in the 1998 decision, was not sufficient.

199 Moreover, as the Commission points out in the contested decision (recitals 46 and 47), the setting-up of the MIS was imposed by the 1998 decision to allow the management of OA to receive adequate information to monitor the results of the 1998 restructuring plan and further amend that plan if necessary. In the 1998

decision (recital 85), the Commission found that the MIS then in use did not provide such information in a reliable way. The Greek authorities had themselves pointed out in the report of 7 May 1999 on the implementation of the restructuring plan that it had not been possible to attain some of the objectives provided for in the 1998 decision in time because 'the actual 1997 results [had] exceeded the most pessimistic estimate made in late February 1998'.

200 Under those circumstances, and contrary to the applicant's allegations, the commitment concerning the putting into place of a fully operational and adequate MIS set out in the 1998 decision may not be interpreted as referring solely to the creation of a system which is considered in itself to be high performance but which is not yet linked to all the computer subsystems for the collection of data concerning, in particular, the revenue and expenditure of the OA Group. Moreover, it should be pointed out that the application of the MIS to all subsidiaries was essential to enable the Greek State to have exact data in order to prepare consolidated accounts for OA and its subsidiaries, as was required by the 1998 restructuring plan.

201 However, as the Commission pointed out in the contested decision (recital 120), it is not clear from the information provided by the Greek authorities, specifically in Annex 39 to their replies of 11 April 2002, that the abovementioned requirements concerning the full implementation of the MIS had been fulfilled whether with regard to access to the system or to its application to all the subsidiaries.

202 In the absence of evidence to the contrary submitted by the Greek authorities in the course of the administrative procedure, the Commission rightly considered, in the contested decision (recitals 121 to 137 and 141), that the failure to put into place an operational and adequate MIS is attested to, in particular, by the qualifications appearing in the audit reports for 1998, 1999 and 2000 linked to failings in the

accounting, management and internal control system, and significant delays in the presentation of audited accounts. The Commission also pointed out in the contested decision (recital 136) that the Deloitte & Touche report on the limited review of OA's performance as compared to its 2002 financial plan stated that '[a]s we have noted in previous reports, management information relies on manual systems that are, in some cases, unreliable or inconsistent'.

203 In addition, and in any event, the applicant does not contest that at the time that the contested decision was adopted access to the MIS was still limited and the system did not cover OA's subsidiaries, notably Olympic Aviation and Macedonian Airlines.

204 It follows from all of the foregoing that the pleas alleging a failure to discharge the burden of proof, an infringement of the right to be heard and a manifest error of assessment must be rejected.

C — *The Hellenic Republic's alleged failure to fulfil its obligation to submit reports*

1. Arguments of the parties

205 The applicant claims that it submitted reports to the Commission on compliance with the conditions laid down to ensure the compatibility of the aid with the

common market and the implementation of the 1998 restructuring plan, and on the realisation of the expected results in accordance with Article 1(2) of the 1998 decision.

206 In particular, the Commission's assessment concerning the failure to fulfil the obligation to submit reports in March and October 2000 (recital 180 in the contested decision) should be annulled as being a manifest error of assessment. Those reports, intended to review OA's compliance with the details of the 1998 restructuring plan, were without purpose following the amendment of that plan, in so far as OA had no means of avoiding losses until 2000. In its abovementioned letter to the Hellenic Republic of 29 March 2000, the Commission stated that '... as long as OA is operating on the basis of a different restructuring plan, that report should highlight the measures adopted since November 1999 for the purpose of implementing the new Speedwing plan'. However, since the Commission did not accept the Speedwing plan, which was suspended, and then finally abandoned in summer 2000, a report on the state of progress in the implementation of that plan in March 2000 would have been useless.

207 The Commission's position should be regarded as excessively formalistic. In March 2000, it received the detailed Deloitte & Touche report on the Speedwing plan and thereby had at its disposal an economic assessment of OA's situation at that period of the year. After the departure of Speedwing during summer 2000, the Hellenic Republic submitted the second amended restructuring plan — calling for the full privatisation of OA — which it had discussed at length with the Commission. OA's financial situation and its capacity to comply with this plan were examined by Crédit Suisse First Boston in an information memorandum of 160 pages transmitted to the Commission on 20 December 2000.

208 In any event, even supposing that the applicant failed to fulfil its obligation to submit reports in March and October 2000, which it denies, the sanction imposed for that failure, namely, the recovery of a large part of the aid, is disproportionate.

209 The Commission considers that that argument should be rejected. It points out that the failure to submit the necessary reports in March and October 2000, in parallel with the delay in presenting the company's audited accounts (recitals 132 and 133 in the contested decision), prevented it from verifying whether the commitments set out in the 1998 decision had been met, whether the restructuring plan had been implemented and whether the results expected on the basis of the indicators fixed in the 1998 decision had been realised. In addition, since OA had not put an operational MIS into place, the information supplied to the Commission was not based on an appropriate system for the management of accounting data.

2. Findings of the Court

210 It should be pointed out at the start that the assessments of OA's economic situation appearing in the Deloitte & Touche report of March 1999 on the revised restructuring plan drawn up by Speedwing and in the Crédit Suisse First Boston memorandum of December 2000, mentioned above (see paragraph 109), cannot be regarded as valid substitutes for the reports that the Hellenic Republic was required to submit to the Commission in March and October 2000 on compliance with all the conditions imposed by the 1998 decision in order to ensure the compatibility of the aid and the implementation of the 1998 restructuring plan.

211 Because of their very purpose, those two documents, dealing with the Speedwing plan and the privatisation process respectively, did not relate to the 1998 restructuring plan. However, in so far as the Speedwing plan was ultimately

abandoned and the Greek authorities did not subsequently submit any new, revised restructuring plan, as can be seen from earlier remarks (see paragraph 131 above), the abovementioned documents relied on by the applicant are irrelevant in this case.

212 It is true that in its abovementioned letter of 29 March 2000, the Commission stated that the report to be submitted to it under the 1998 decision at the end of March 1998 should highlight the measures adopted in the context of the Speedwing plan — which had been applied without having obtained the Commission's approval. However, the need to update the plan to restructure OA in order to attain the objectives which that plan sought to achieve did not deprive the reports provided for in the 1998 decision of their purpose as long as the 1998 restructuring plan had not been amended, and approved by the Commission. In the abovementioned letter, the Commission emphasised the need to submit a report on compliance with all the conditions imposed by the 1998 decision.

213 In that context, it is clear that the obligation to submit reports in March and October 2000 was not fulfilled.

214 In addition, in the abovementioned context and having regard to the reasons for the contested decision, it cannot be considered that recovery of the aid is disproportionate, as the applicant claims in the alternative. In any event, Article 3 of the contested decision requires the Hellenic Republic to recover the second instalment of the aid on the ground that the 1998 restructuring plan and certain conditions to which the initial approval was made subject were not complied with and not on the sole ground that the obligation to submit reports in March and October 2000, set out in Article 1(2) of the 1998 decision, had been infringed, with the result that the implementation of the restructuring aid could not be regularly monitored.

215 It follows that the pleas alleging a manifest error of assessment and the infringement of the principle of proportionality must be rejected.

D — *The Hellenic Republic's alleged failure to meet its commitments under Article 1(b), (c) and (e) of the 1994 decision*

1. The Hellenic Republic's alleged failure to meet its commitments under Article 1(b) of the 1994 decision

(a) Arguments of the parties

216 The applicant claims that the Commission committed a manifest error of assessment and failed to provide an adequate statement of reasons and/or erred in law in concluding in recital 204 in the contested decision that the application of Greek legislation to the applicant infringed Article 1(b) of the 1994 decision requiring the Greek Government to meet 'commitments' not to interfere in the management of OA except within the strict limits of its role as shareholder.

217 The applicant contests the Commission's claims, in recitals 59, 60, 146, 203 and 204 in the contested decision, that although OA is no longer a DEKO, that is to say, an undertaking subject to Greek Law No 2414/96 applicable to 'public utility undertakings' (recital 144), but an ordinary private company providing a public service, it continues to enjoy the benefit of the provisions of the special Greek

legislation generally applied to DEKOs (Laws Nos 2271/94, FEK A' 229/23.12.1994; 2190/94, FEK A' 28/3.3.1994; 2527/97, FEK A' 206/8.10.1997; and 2602/98, FEK A' 83/16.4.1998), which is contrary to Greek law.

218 The applicant claims that the application to OA of some provisions of the abovementioned special legislation is fully in accordance with Greek law. Law No 2271/94 provides that OA and its subsidiaries are no longer to be subject to the legislation applicable to undertakings in the public sector (DEKO), with the exception of Articles 1 to 24 of Law No 2190/94. The fifth indent of Article 14(1) of Law No 2190/94 provides that that law applies not merely to undertakings coming with the definition of DEKOs but also to private law companies belonging to the Greek State. OA was 100% owned by the Greek State at that time. Consequently, the provisions concerning recruitment and staff management contained in Laws Nos 2271/94, 2190/94, 2527/97 and 2602/98 continue to apply normally to OA.

219 In particular, Law No 2602/98, already applicable when the 1998 decision was adopted, makes the recruitment of all categories of permanent OA staff subject to the procedures laid down in its general staff regulations, which, in practice, gives full power to the board of directors. Seasonal staff was the subject of a specific recruitment procedure laid down in Law No 2190/94 as amended by Law No 2527/97, which provided for some flexibility. In its 1998 decision (recital 66(a)), the Commission accepted that that new procedure, derogating from that applicable to permanent staff, provides for 'the required flexibility, while allowing for transparency'. It follows that the Commission concluded that the abovementioned provisions were not contrary to Article 1(b) of the 1994 decision.

220 The abovementioned legislative provisions were not amended after the adoption of the 1998 decision. In the absence of any explanation of the implicit change in the Commission's assessment concerning the compatibility of those provisions, the

contested decision is vitiated by an inadequate statement of reasons. In addition, the Commission's conclusions in recitals 203 and 204 in the contested decision contradict recital 192, which states that the abovementioned laws do not contravene the commitments mentioned in Article 1(b), (c) and (f) of the 1994 decision.

221 In any event, the Commission erred in law in concluding that the allegedly cumbersome nature of the legislation concerning recruitment conferred an advantage on OA within the meaning of Article 87(1) EC.

222 For its part, the Commission considers that the applicant is basing itself on an erroneous interpretation of the contested decision. In any event, it regards as being without effect the fact that the Greek legislation expressly provides for the application of certain special provisions to private undertakings owned by the State. In the contested decision (recital 146), it pointed out that, according to the Greek authorities, OA is no longer a DEKO and hence is subject only to the general provisions of Greek Law No 2190/1920 regarding public limited companies. It concluded that certain provisions of Greek Laws Nos 2271/94 and 2602/98 should have been adapted accordingly. In the absence of any such adaptation, OA constitutes an exceptional case, as the Commission noted in recital 203 in the contested decision.

(b) Findings of the Court

223 The Commission correctly contends that the applicant's claims are based on an erroneous interpretation of the statement of the reasons on which the contested decision is based.

224 It should be pointed out, at the outset, that the Commission acknowledged in the contested decision (recital 138) that the provisions of the Greek legislation under consideration concerning recruitment and staff management (Laws Nos 2271/94, 2602/98, 2527/97 and 2414/96) had been approved in the context of the 1998 decision. At that time OA was a DEKO. However, after the adoption of the 1998 decision, its status was changed. It is common ground that, since 1999, OA is no longer subject to the provisions of Greek Law No 2414/96 on DEKOs, but to general law on public companies, with the exception of some provisions of the abovementioned legislation which remain applicable to it (recitals 144 and 146 in the contested decision).

225 In that new context, the Commission points out, also in the contested decision (recital 192), that the clarifications transmitted by the Greek authorities confirm that the legislation referred to above does not contravene the commitments referred to in Article 1(b), (c) and (f) of the 1994 decision. It concludes (recital 225) that the doubts prompting it to initiate the formal investigation procedure, set out, in particular, in recitals 59 and 60 in the contested decision, had been allayed as far as the commitments mentioned in Article 1(b) and (f) of the 1994 decision were concerned.

226 It is undeniably clear from point (b) in the second paragraph of Article 1 of the operative part of the contested decision — which provides that the condition concerning the observance by the Hellenic Republic of 24 specific undertakings attached to the authorisation of the restructuring aid had not been met — interpreted in the light of the reasons for that decision, in particular, the conclusions drawn in recitals 192 and 225, that the Commission did not conclude, in the contested decision, that there had been an infringement of Article 1(b) of the 1994 decision.

227 Under those circumstances, the claims put forward by the applicant in regard to an alleged failure by the Hellenic Republic to fulfil its obligations under Article 1(b) of the 1994 decision are without purpose.

228 In addition, it is manifestly clear from Article 2 of the contested decision, which sets out the new aid which is declared incompatible and does not refer to the abovementioned laws, that the application of those laws to OA was in fact not regarded by the Commission as new aid.

229 It follows that the pleas alleging a manifest error of assessment, failure to give adequate reasons and error in law must be dismissed.

2. The Hellenic Republic's alleged failure to meet its commitments under Article 1(c) of the 1994 decision

(a) Arguments of the parties

230 The applicant claims, first, that the Commission's conclusion concerning an infringement of Article 1(c) of the 1994 decision is based on an erroneous interpretation of that article. The reference in that article to 'fiscal status' under the ordinary law and the exoneration from taxes due in the context of the restructuring of OA shows that it in no way referred to aspects such as the publication of OA's annual accounts or the level of its own funds. It concerns only the question whether OA is subject to the same tax legislation as other private law companies. That question is expressly dealt with in the passages in the 1994 and 1998 decisions relating to Article 1(c).

231 In addition, even supposing that the interpretation of Article 1(c) of the 1994 decision proposed by the Commission was correct, which the applicant does not accept, the contested decision would be vitiated by a manifest error of assessment and an inadequate statement of reasons.

232 First of all, the delay in the publication of OA's accounts since 1999 resulted from the need to establish a solid accounting base for restructuring by privatising the undertaking, which was commenced in 2000. The delay has regularly been reduced. The annual accounts for 2001 were published in June 2003 and those for 2003 were terminated in October 2003.

233 The applicant points out, in particular, that the contested decision has not established that its accounts were not properly kept in accordance with Greek tax law. In addition, if the Commission's argument is accepted, a mere infringement of Greek tax law on the part of the applicant would constitute an infringement of Article 1(c) of the 1994 decision. However, that article dealt solely with the question whether or not the applicant is subject to the same Greek fiscal legislation as any other private law undertaking. The Commission has not shown that that is not the case.

234 Moreover, the Commission's argument that the absence of accounts published by the applicant prevents review of compliance by the Hellenic Republic with the commitments set out in the 1994 and 1998 decisions has manifestly nothing to do with the 'fiscal status of a public limited company ... under ordinary law' referred to in Article 1(c) of the 1994 decision.

235 Secondly, the Commission analysed Greek Law No 2190/1920 in an erroneous manner. With regard, first, to its lack of sufficient funds, the applicant alleges that that law does not lay down sanctions which can be imposed on a limited company whose funds fall below 50% of its capital but whose shareholders do not wind up the

undertaking or take other appropriate measures to remedy that situation. The fact that such sanctions were not imposed on OA cannot therefore constitute an infringement of Article 1(c) of the 1994 decision. In any event, OA's shareholder, namely, the Greek Government, implemented significant measures to remedy OA's negative capital situation, in particular complete privatisation, accompanied, inter alia, by the sale of non-core activities.

236 With regard, secondly, to the delay in presenting and publishing annual accounts, the applicant submits that Article 48a of Law No 2190/1920 provides that an air carrier's licence may be revoked if it does not submit annual accounts, approved by the general meeting of shareholders, to the competent authorities for at least three years. That is not so in this case. In addition, the modest amount of the fine (EUR 146) laid down in the abovementioned law in case of late presentation of the annual accounts to the Greek authorities indicates that the Greek legislature does not consider such a delay to be a serious infringement of company law.

237 Thirdly, the sanction of revoking an air carrier's licence, provided for in Articles 3(1) and 5(5) of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (OJ 1992 L 240, p. 1), is intended to ensure 'dependable and adequate service' and 'high safety levels', which are referred to in the preamble to the regulation. That regulation leaves it to each Member State to determine whether such a sanction should or should not be imposed in the light of information on the air carrier's financial situation. In this case, the delay in presenting and publishing OA's accounts for 1999 to 2001 does not justify that sanction which, in any event, would be disproportionate. During that period, the Greek authorities had sufficient information to assess whether the abovementioned objectives in the public interest which Regulation No 2407/92 sought to achieve had been compromised by OA's financial situation.

238 Finally, the applicant explains that it refers neither to Article 48a of Law No 2190/1920 nor to the Greek regulation on the provision of air transport services because neither of those provisions were mentioned in the contested decision.

239 The Commission objects first that the applicant's argument that the publication of accounts is not a fiscal matter was not put forward during the administrative procedure. In addition, that argument favours form over substance.

240 The Commission also points out that, contrary to the applicant's claim, it stated in the contested decision (recital 126) that the applicant had not kept proper accounts. The auditors' certificate dated 1 December 2003, accompanying the 2002 balance sheet (Annex I to the rejoinder), confirms that the applicant did not comply with the provisions laid down in the fiscal legislation, in particular the accounting code concerning bookkeeping and documents. Consequently, the data in many receivables and payables accounts were not coordinated and it was thus impossible to confirm the balance of those accounts. In the absence of reliable data on the company's results, it was impossible to verify the Hellenic Republic's compliance with its undertakings and the actual implementation of the 1998 restructuring plan.

241 Under those circumstances, the applicant's arguments based on an alleged error on the part of the Commission in the analysis of Law No 2190/1920 are of no effect. The Commission pointed out, in recital 195 in the contested decision, that OA's fiscal status is different from that of other private law companies in so far as the Hellenic Republic tolerated OA's failure to present its accounts in time and to publish audited accounts, and also the applicant's insufficient capital.

242 The Commission adds that Article 48 of Law No 2190/1920 provides for the revocation of the deed constituting a company if the company's funds are less than one tenth of its share capital, which was the case here.

243 In addition, the contested decision (recital 195) refers not only to infringements of Greek Law No 2190/1920 and Regulation No 2407/92, but also to the Hellenic Republic's practice of not using the remedies provided for under national law or of not revoking the air carrier's licence in accordance with the Greek regulation on setting up airlines and the provision of air transport services. That regulation provided for the revocation of the licence of any air carrier which failed to submit periodic data, failed to pay landing and parking charges or whose losses exceeded two thirds of its paid-up capital, conditions which were all fulfilled in OA's case, as was stated several times in the decision.

244 With regard to Regulation No 2407/92, the Commission contends that OA's failure to fulfil the air carrier's obligation to provide to the authorities every year the audited accounts relating to the previous financial year, laid down in Article 5(6) of that regulation, constitutes a ground for revoking the air carrier's operating licence.

245 In any event, contrary to the applicant's argument, Article 5(5) of Regulation No 2407/92 permitted the Greek licensing authority to revoke OA's licence, having regard to the situation of financial collapse in which that company found itself (see recitals 116 and 195 in the contested decision).

(b) Findings of the Court

246 In accordance with the abovementioned case-law (see paragraphs 72 and 73 above), the objection of inadmissibility raised by the Commission to the applicant's argument that the publication of accounts was not a part of 'fiscal status' must first be rejected. That argument is based on a legal assessment which is not based on new facts.

247 With regard, first of all, to the interpretation of the concept of 'fiscal status of a public limited company comparable to that of Greek undertakings under ordinary law' referred to in Article 1(c) of the 1994 decision, it should be pointed out that the 1994 and 1998 decisions contain no express definition of that concept. However, it can be seen explicitly from the 1994 decision (page 9) that, in the context of the discussions on OA's status during the oral procedure terminated by that decision, the Greek Government claimed that OA was subject to the normal rules of the law, in particular in social, accounting and financial matters, and that the only subsisting derogation in favour of OA was in fiscal matters.

248 In that context, an interpretation of the abovementioned concept of 'fiscal status under ordinary law' which excludes, inter alia, issues related to the publication of annual accounts and the level of funds, as the applicant proposes, cannot be accepted. The Greek State's commitment in regard to fiscal status is based exclusively on the premiss that, in other domains, particularly in accounting and financial matters, OA was in principle subject to the ordinary law. It is clear from the 1994 and 1998 decisions that, by way of the commitments entered into by the Greek State, they seek in particular to exclude in principle any derogation in favour of OA. Article 1(c) of the 1994 decision must therefore be understood as requiring the Hellenic Republic to align the rules applicable to OA on those applicable to ordinary limited companies and to actually apply those rules in practice.

249 In addition, it follows from the Commission's argument, not contradicted on this point by the applicant, that the inability of the undertaking to publish, over a long period, its accounts at the proper time also implies an infringement of the obligation to establish and record accounts in the books and documents which the law requires to be maintained.

250 It must therefore be considered whether the Commission committed a manifest error of assessment in concluding in the contested decision (recitals 141 and, in particular, 195) that Article 1(c) of the 1994 decision had not been complied with on the ground that the Greek authorities had tolerated — without imposing the sanctions provided for in Greek Law No 2190/1920 and in Regulation No 2407/92 — OA's delay in publishing its annual accounts and the inadequate level of the company's funds.

251 The Commission explains in the contested decision (recital 195) that that tolerance demonstrates that the Hellenic Republic allowed OA to prolong its activities after 2000 without further restructuring measures whereas, under normal conditions, a company should have stopped trading.

252 It is for the Court to verify, in the light of the national rules as set out by the parties and of Regulation No 2407/92, on which the Commission based the contested decision, whether that institution exceeded the limits of its power of assessment by considering that the Hellenic Republic had granted OA a derogation contrary to the commitment set out in Article 1(c) of the 1994 decision by permitting that company to prolong its activity without further restructuring measures notwithstanding the regular delays in the publication of its audited accounts and OA's seriously deteriorated financial situation.

253 The Court notes, first, that the applicant is right to indicate that no reference is made in the contested decision either to Article 48 of Greek Law No 2190/1920 or to the Greek regulation on setting up airlines and the provision of air transport services, invoked by the Commission before the Court (see paragraphs 242 and 243 above). That decision refers only to Article 47 of Law No 2190/1920 and to the provisions of that law concerning the publication of accounts and to the relevant provisions of Regulation No 2407/92 (recitals 49 and 195).

254 However, according to case-law, the reasons for a decision must appear in the actual body of the decision and that, save in exceptional circumstances, explanations given ex post facto by the Commission cannot be taken into account. It follows that the decision must be self-sufficient and that the reasons on which it is based may not be stated in written or oral explanations given subsequently when the decision in question is already the subject of proceedings brought before the Community judicature (*Corsica Ferries France* v *Commission*, cited at paragraph 72 above, paragraph 287).

255 Under those circumstances, it must be considered whether those ex post facto factual explanations must be rejected in this case.

256 In so far as the Commission's conclusion concerning the infringement of Article 1(c) of the 1994 decision is based, in particular, on the failure to apply the sanctions laid down in national law and it is not clear from the file that the question concerning, in particular, the alleged infringement of Article 48 of Greek Law No 2190/1920 and of the abovementioned Greek regulation was discussed between the parties during the administrative procedure, the Commission is required to specify in the contested decision the provisions of the national rules to which it is referring or at least to specify their content. Consequently, the additional reasons based on those national rules cannot be taken into account.

257 Moreover, the auditors' certificate, dated 1 December 2003, accompanying the balance sheet for the accounting year ending in 2002 must also be rejected from the start inasmuch as it is subsequent to the adoption of the contested decision. According to settled case-law, in an action for annulment under Article 230 EC, the legality of a Community measure falls to be assessed on the basis of the matters 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 the Commission at the time when those assessments were made (*British Airways and Others* v *Commission*, cited at paragraph 42 above, paragraph 81, and *Corsica Ferries France* v *Commission*, cited at paragraph 72 above, paragraph 142).

258 Following those preliminary observations, the parties' arguments concerning the sanctions laid down in Article 47 of Greek Law No 2190/1920 and in the provisions of Regulation No 2407/92 where there is a serious deterioration in the financial situation of an air carrier must be considered first. It is common ground that, when an undertaking's funds are reduced to less than 50% of its share capital, Article 47 of Greek Law No 2190/1920 requires the board of directors to call a general meeting of the shareholders within six months from the end of the preceding financial year in order to decide to wind up the company or adopt other appropriate measures to remedy the situation.

259 In that connection, having regard, in particular, to the need to adjust the 1998 restructuring plan, which was accepted as early as 1999, the fact, referred to by the applicant, that Greek law does not sanction the failure on the part of the general meeting of shareholders to adopt the abovementioned measures does not prevent the lack of reaction on the part of the Greek State, OA's sole shareholder, from being regarded, in appropriate circumstances, as significant evidence raising a presumption that OA had been accorded special treatment. The applicant's argument that significant measures, in the form of privatisation of OA, had been adopted to restore that company's financial situation is not sufficient to consider that the Commission committed a manifest error of assessment. As has already been pointed out, no revised restructuring plan was submitted to the Commission and no privatisation plan was notified to it (see paragraphs 128 and 130 above).

260 Moreover, Article 5(5) of Regulation No 2407/92 permits licensing authorities, whenever there are clear indications that financial problems exist with an air carrier, to assess its financial performance and suspend or revoke the licence if they are no longer satisfied that the air carrier can meet its actual and potential obligations for a 12-month period. Contrary to the interpretation put forward by the applicant, that article read together with the seventh recital in the preamble to that regulation, which states that 'it is necessary to ensure that an air carrier is at all times operating at sound economic and high safety levels', permits the abovementioned authorities to revoke an air carrier's licence when the latter has been dependent on loans for more than 12 months to finance not just all its fixed assets but also its negative share capital, as was OA's case according to information contained in the contested decision and not contested by the applicant (see paragraph 163 above). Although the failure to make use of that possibility cannot, of itself, constitute sufficient evidence of privileged status, it may be regarded as additional evidence thereof, even though it seems to be relatively weak.

261 Secondly, with regard to sanctions for delays in presenting and publishing audited accounts, it is clear from the applicant's arguments, and is not expressly contested by the Commission (see paragraphs 236 and 241 above), that the delays which may be imputed to OA are punished under Greek law only by a fine of EUR 146.

262 However, having regard to the process for the restructuring of OA, under way since 1994, to the financial problems with which the company had been confronted for years and to the fact that the group was 100% owned by the Greek State, the mere fact that Greek law does not lay down significant sanctions for the abovementioned delays does not make it possible to consider that the Commission committed a manifest error of assessment in considering that the systematic delays in the presentation of accounts, which prevented the consistent implementation and rigorous supervision of OA's restructuring plan, constituted evidence that OA enjoyed privileged treatment compared to other private law limited companies,

contrary to the commitment flowing from Article 1(c) of the 1994 decision, as pointed out in paragraph 248 above.

263 In addition, as the Commission points out, it is clear from Article 3(1) of Regulation No 2407/92, read in conjunction with Article 5(6) thereof, that the Member States may revoke the licence of an air carrier which does not provide the licensing authority, in each financial year and without undue delay, with the audited accounts for earlier financial years. In the context of this case, it cannot be considered that the Commission exceeded the limits of its discretion in considering that the failure to apply that provision, even if it was only an option, also constituted, in this case, further evidence of favourable treatment of OA.

264 For all of those reasons, it cannot be considered that the Commission committed a manifest error of assessment in basing itself on the body of evidence examined above and concluding that the commitment mentioned in Article 1(c) of the 1994 decision had not been met.

265 The contested decision contains a sufficient statement of the reasons on which it is based in regard to that point inasmuch as it states clearly that the Greek authorities' tolerance of OA's infringement of the abovementioned provisions of Greek law and Regulation No 2407/92 proves that that company enjoyed a special status (see paragraphs 251 and 253 above).

266 It follows that the pleas alleging a manifest error of assessment and an erroneous or insufficient statement of reasons must be rejected.

3. The Hellenic Republic's alleged failure to comply with the provisions of Article 1(e) of the 1994 decision

(a) Arguments of the parties

267 The applicant claims that the Commission committed an error of assessment, an error of law and failed to provide a sufficient statement of the reasons on which the contested decision is based by concluding that the Hellenic Republic had infringed Article 1(e) of the 1994 decision concerning the obligation not to grant any further aid to OA (recital 196 in the contested decision).

268 It points out first that the Commission's conclusion (recitals 203 and 204 in the contested decision) that Article 1(b) of the 1994 decision had been infringed had been included in error in point 6.2 of the contested decision dealing with 'alleged new aid'. An infringement of that article constitutes an infringement of a condition connected with existing aid and not with the grant of new aid. That conclusion is therefore vitiated by an error of assessment and an error of law.

269 The Commission has admitted in its defence that the supposedly privileged treatment enjoyed by OA under Laws Nos 2190/1920, 2271/94, 2602/98 and 2414/96 was not included in the new aid mentioned in Article 2 of the contested decision. The aforementioned Greek laws thus do not infringe Article 1(e) of the 1994 decision. Article 1 of the contested decision should therefore be annulled, in so far as it is based on that alleged infringement.

270 The applicant also contests the alleged further infringement of the condition laid down in Article 1(e) of the 1994 decision. It points out that it would develop its arguments in that regard in the context of a consideration of Article 2 of the contested decision dealing with the alleged new aids.

271 In this case, the Commission, in the contested decision, did not consider whether the complete recovery of the restructuring aid, approved in 1999, on the ground of an infringement of Article 1(e) of the 1994 decision was in accordance with the principle of proportionality.

272 Moreover, even supposing that the measures referred to in Article 2 of the contested decision constitute aid, which the applicant denies, the Commission should have verified whether they could be regarded as compatible with the common market under Article 87(3)(c) EC. However, in this case, the Commission did not explain the reasons why the 'principle of one-time, last-time aid' within the meaning of the Guidelines is infringed by the grant of new aid. In fact, the events of 11 September 2001 constituted 'exceptional and unforeseeable circumstances for which the company is not responsible', justifying, according to point 48 of the Guidelines, the authorisation of new aid.

273 The applicant denies that most of the alleged new aid in the contested decision pre-dates 11 September 2001. In the present case, the contested decision does not indicate clearly at what moment the 'tolerance' of a private creditor ends in regard to non-payment of the debts in question. It is thus impossible to determine from what payment that alleged tolerance began to become unlawful aid. However, the major part of the alleged new aid occurred in a period close to 11 September 2001. In any event, the Commission ought to have considered whether the alleged aid was in accordance with Article 87(3) EC. In that connection, it is required to verify whether the abovementioned principle of one-time, last-time aid was applicable.

274 The Commission rejects those allegations. With regard to the applicant's allegations concerning the 'principle of one-time, last-time aid', it objects that the applicant did not ask it to approve the new aid in question, on the basis, for example, of exceptional circumstances under point 48 of the Guidelines. In addition, most of the aid granted by the Hellenic Republic of which it complains pre-dates 11 September

2001 (recitals 147, 150, 152, 155 and 156 in the contested decision). The Commission refers in regard to those questions to its comments concerning consideration of Article 2 of the contested decision.

(b) Findings of the Court

275 It is sufficient to point out that the Commission concluded that the Hellenic Republic had not met its commitment under Article 1(e) of the 1994 decision not to grant further aid to OA on the ground that a series of new aid measures had been granted to the airline. In so far as the Commission's conclusions concerning the grant of new aid are contested by the applicant in the second part of its application, the applicant's claims concerning the alleged failure to comply with Article 1(e) of the 1994 decision cannot be the subject of separate consideration, as the applicant itself admits (see paragraph 270 above).

276 It should however be pointed out at the start that whatever may be the outcome of consideration of the claims concerning the grant of new aid, it can have no influence on the amount of restructuring aid to be recovered. In particular, complete recovery of the second instalment of the restructuring aid, an amount of EUR 41 million, is, in any event, in accordance with the principle of proportionality, on which the applicant relies. Article 3 of the contested decision requires recovery of that amount on the basis of the failure to implement the restructuring plan — of itself a sufficient ground for recovery — and of the failure on the part of the Greek State to meet certain commitments, including that of refraining from granting new aid.

277 With regard to the applicant's claims concerning the Commission's consideration, in respect of the infringement of Article 1(b) of the 1994 decision, of the application to OA of certain provisions of Greek law normally applied only to public undertakings

in the context of the chapter of the contested decision dealing with new aid (see paragraphs 268 and 269 above), it is sufficient to recall that, in any event, the Commission did not regard those measures in the operative part of the contested decision either as existing aid or new aid (see paragraphs 226 to 228 above). Those claims must be rejected as being without purpose.

278 Moreover, it should be noted that the plea put forward by the applicant in the alternative that the alleged new aid ought, in any event, to have been declared compatible with the common market under Article 87(3)(c) EC (see paragraphs 272 and 273 above) was not contained in the second part of the application. In addition, that plea is, in any event, without foundation inasmuch as the Greek authorities did not ask the Commission to approve the grant of new aid in the light, in particular, of the effect of the attacks of 11 September 2001 on the air transport market. In the absence of any such request, accompanied by a revised restructuring plan, the Commission was neither required to consider, nor was it in a position to consider, whether that further aid granted during the restructuring period could be declared compatible with the common market under Article 87(3)(c) EC. The Commission was therefore entitled to conclude in the contested decision (recitals 223 and 224) that, in any event, the alleged new aid did not fulfil the conditions for the exception provided for in Article 87(3)(c) EC.

279 Consequently, the pleas alleging an infringement of the principle of proportionality, of Article 87(3)(c) EC and an insufficient statement of reasons must be rejected.

280 The applicant's pleas contesting the characterisation of the contested measures as new aid must now be considered.

IV — *The alleged new aid (Articles 2, 3 and 4 of the contested decision)*

281 The applicant contests the finding in the contested decision that new aid was granted in the form of a tolerance of persistent non-payment of airport charges due to AIA, non-payment of VAT on fuel and spare parts, rentals and airport charges due to airports other than AIA, the tax called 'spatosimo' and social security contributions, and that that aid must be recovered. It claims, in particular, that the Commission failed to identify with precision the alleged new aid which the contested decision required to be recovered and it contests the Commission's interpretation of that decision.

282 Before dealing successively in regard to each of the alleged new aid measures with the applicant's other claims, consideration must first be given to the aforementioned claim concerning the failure to identify the new aid to be recovered and the interpretation of the contested decision, always bearing in mind, as a preliminary issue, the content of the private creditor criterion, the scope of the Court's review of the application of that criterion and the requirements in regard to the statement of the reasons on which the contested decision is based.

A — *Preliminary observations concerning the private creditor criterion, the scope of the Court's review and the requirements in regard to the statement of reasons*

283 With regard, first of all, to the private creditor criterion and the review of the application of that criterion by the Court, it should be borne in mind that, according to case-law, the mere fact that payment facilities are accorded in a discretionary manner by a public creditor is not sufficient to characterise such facilities as State aid. The payment facilities accorded must also be clearly greater than those which would have been accorded by a private creditor in a comparable situation in regard to his debtor, having regard, in particular, to the size of the debt, the legal remedies

available to the public creditor, the chances that the debtor's situation will recover if he is allowed to continue to operate and to the risks to the creditor of seeing his losses increase in the latter case (see the judgment in Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 30; the Opinion of Advocate General Mischo in Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, points 34 to 37; and the judgment in Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraph 95).

284 It must also be noted that State aid, as defined in the Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Community judicature must in principle, having regard both to the specific features of the case before it and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 159).

285 However, when the assessment by the Commission of the question whether an investment satisfies the private investor criterion involves a complex economic appraisal, in regard to which it enjoys a wide discretion, judicial review is limited to verifying whether the Commission complied with the relevant rules governing procedure and the statement of reasons, whether the facts on which the contested finding was based have been accurately stated and whether there has been any manifest error of assessment or a misuse of powers. In particular, the Court is not entitled to substitute its own economic assessment for that of the Commission (*HAMSA* v *Commission*, cited at paragraph 284 above, paragraph 127).

286 With regard, secondly, to the obligation to state reasons, the applicant rightly argues that the statement of reasons cannot be limited to a finding that the measure constitutes State aid but must refer to the specific facts in such a way as to enable the parties concerned to express their views on the accuracy and relevance of the

alleged facts and circumstances and to permit the Court to exercise its power of review (Case T-323/99 *INMA and Itainvest* v *Commission* [2002] ECR II-545, paragraph 57).

287 It is not however necessary for the statement of reasons to specify all the relevant matters of fact or of law, since the question whether the statement of reasons for a measure satisfies the requirements of Article 253 EC 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 (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, cited at paragraph 37 above, paragraph 279).

B — *The claim concerning the failure to identify the new aid to be recovered and the interpretation of the contested decision*

288 The applicant claims that the statement of reasons in the contested decision does not make it possible to identify precisely the new aid considered incompatible with the Treaty and which the Commission therefore requires to be recovered. The Hellenic Republic cannot therefore determine the amount of aid which it must recover. In this case, the Commission should have determined in regard to each aid considered the financial advantage which OA obtained through the tolerance of persistent non-payment of its debt. That advantage does not necessarily correspond to the amount due. It is constituted by the monetary gain resulting from the difference between the theoretical conduct of a private creditor and the actual conduct of the Greek Government in each case. The Commission should therefore have been required to identify the conduct which a private creditor would have adopted by indicating, for example, the length of the delay following which he would have brought legal proceedings.

289 The contested decision thus does not contain a statement of reasons and infringes the principle of legal certainty in regard to the amount of the alleged new aid to be recovered.

290 The Court points out that the applicant's argument set out above has already been rejected by the Court of Justice in Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875.

291 In that judgment, the Court of Justice granted the Commission's application under Article 88(2) EC for a declaration that the Hellenic Republic had failed to take all the measures necessary for the repayment of aid found to be unlawful and incompatible with the common market, except that relating to the contributions to the Greek social security body ('IKA'). In particular, with regard to the new aid — with the exception of contributions to IKA — which the contested decision required to be recovered, the Court rejected the Hellenic Republic's argument that the decision could not be implemented by reason of the lack of precise indications as to the amount to be recovered. It points out in paragraphs 39 to 41 of that judgment that no provision of Community law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the recipient to work out that amount himself, without overmuch difficulty. The Court concluded that the Commission was therefore able legitimately to confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amounts to be repaid, which could be established by reading Article 2 in the contested decision in conjunction with recitals 206 to 208 therein.

292 In this case, it is clear that, contrary to the applicant's argument, the Commission was not required to determine, for each new aid, the time at which a private creditor

would have ceased to tolerate delays in payment, the precise steps that he would have taken and their consequences so as to permit the Member State concerned to quantify in each case the advantage obtained by OA.

293 It must be pointed out that the advantage to the debtor of tolerance of non-payment or delayed payment of his debt is constituted precisely by the exemption from, or delay in, payment of the debt from the time at which it fell due. That advantage does not necessarily coincide with the amount which the creditor could have recovered if he had ceased to tolerate the default or delay in payment.

294 In particular, to establish whether OA had enjoyed an advantage, the Commission merely had to verify whether, at the latest, at the time that the contested decision was adopted, a private creditor in the same situation would clearly not have continued to tolerate the default or delay in payment, having regard to the criteria laid down in the case-law mentioned above (see paragraph 283 above). In this case, that consideration did not require it to determine the precise moment at which a private creditor would have ceased to tolerate the default or delay in payment and would have taken steps to obtain payment of the debt.

295 It follows that the pleas alleging lack of an adequate statement of reasons and infringement of the principle of legal certainty in relation to the alleged lack of identification of the new aid to be recovered must be rejected as unfounded.

296 In addition, the applicant claims that it is clear from the contested decision (recital 229) that no new aid had been granted up to the date of adoption of the 1998 decision.

297 That interpretation of the contested decision is erroneous. It is expressly stated in the decision (recital 230) that the Commission required full recovery of the new illegal aid inasmuch as, unlike the restructuring aid already considered in the 1998 decision, there is no decision concerning the new aid that could create any expectation that the aid would not be recovered. Consequently, only the first instalment of the restructuring aid, granted before 14 August 1998, was exempt from the obligation to recover (see paragraph 25 above).

C — *The alleged tolerance of persistent non-payment of airport charges due to AIA*

298 In the applicant's view, the conduct in dispute cannot be attributed to the Greek State and does not involve the transfer of State resources. In addition, the Commission reversed the burden of proof and infringed both the applicant's and the Hellenic Republic's right to be heard. Finally, the contested decision is vitiated by the lack of an adequate statement of reasons and a manifest error of assessment in regard to the application of the private creditor criterion.

1. Arguments of the parties concerning the alleged imputability of the conduct to the Greek State

299 The applicant claims that the alleged tolerance of persistent non-payment of airport charges due to AIA cannot be imputed to the State. It points out first of all that, in the contested decision, the Commission did not distinguish between the physical entity constituted by AIA, located in Spata, and the legal entity which operates that airport, Athens International Airport SA ('AIA Ltd'), a private company 55% of which is owned by the State and 45% by private undertakings. AIA Ltd is governed

by its memorandum and articles of association and by the contract for the development of the airport concluded between the Greek State and the three private undertakings holding 45% of its capital. Those two texts were ratified by Law No 2338/95.

300 In that context, the Commission committed an error of fact in impliedly basing itself in the contested decision (recital 210) on the fact that the Hellenic Civil Aviation Authority ('HCAA') managed AIA so as to impute the alleged tolerance to the State. HCAA is a public authority of the Ministry of Transport in charge of the development and supervision of air transport in Greece.

301 In any event, even if the contested decision is not based on the idea that AIA is managed by HCAA, which the applicant denies, the decision lacks an adequate statement of reasons and is vitiated by a manifest error of assessment in regard to the imputation of the alleged tolerance to the Greek State.

302 The applicant does not deny that AIA Ltd might be part of the 'public sector', having regard, in particular, to the provisions of Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35). That fact does not make it possible to conclude, however, that the measures under consideration may be imputed to the Greek State. According to the Court of Justice in Case C-482/99 *France* v *Commission* [2002] ECR I-4397 ('*Stardust Marine*'), paragraphs 52 and 55, it is necessary to examine whether the public authorities must be regarded as having been involved, in one way or another, in the adoption of the measures at issue.

303 The applicant considers that the evidence relied on by the Commission in that regard should be rejected. First of all, the mere fact that the Greek State owns 55% of AIA Ltd, appoints four of the nine members of the board of directors and appoints

its president is irrelevant to the way in which that company decided to take the measures under consideration. Under the abovementioned contract for the development of the airport, responsibility for operational management of AIA Ltd is in the hands of the board of directors and each director is required to act in complete independence of the shareholders. The office of president may be regarded as, at most, symbolic. Under those circumstances, contrary to the Commission's allegations, the facts in this case differ widely from those at issue in the order of the President of the Court of Justice in Joined Cases 67/85 R, 68/85 R and 70/85 R *Van der Kooy* v *Commission* [1985] ECR 1315. In *Van der Kooy* v *Commission*, the Netherlands State held 50% of the shares and appointed half the members of the board of directors of the undertaking (Gasunie) which granted the State aid in question. However, the Netherlands Minister for Economic Affairs is empowered to approve tariffs and made use of that power. The Court concluded that those various factors 'considered as a whole' meant that Gasunie's actions could be attributed to the Netherlands State. In this case, on the other hand, the Greek State exercised no direct control over the fixing of charges by AIA Ltd. Finally, the debt settlement agreement was in fact part of the responsibilities of the managing director of AIA Ltd.

304 Secondly, the Commission has not explained why the fact that, according to the convention for the development of the airport, nobody other than the Greek State is permitted to own 50% or more of the shares in AIA Ltd (Article 2.8.1) or that the latter cannot hold shares in an undertaking engaging in an activity other than that for which AIA Ltd was established (Article 3.1.3) leads to the conclusion that the Greek State was implicated in the tolerance of delayed payment of charges owed to AIA Ltd by OA. The same is true of the fact that the Greek State is empowered, under certain conditions, to suspend operation of the airport (Article 11.1 of the abovementioned convention), in particular for 'reasons of national defence'. Such rights intended to protect an unusual investor are irrelevant in this case.

305 Thirdly, the rights or privileges granted to OA under Article 13.4.2 of the convention for the development of the airport have no connection with the matters being considered in this case. Those provisions deal principally with OA's right to

use the airport. AIA Ltd was required to treat OA as a third party in regard to its debt, without granting it any preference. That principle is illustrated by Article 13.4.2(c), which requires AIA Ltd to grant OA certain rights at the airport but states expressly that the corresponding rents and charges are to be calculated 'on the same basis ... as for any other air transport operator'. It is also stipulated in Article 13.4.2(e) that, in the exercise of the activities and the provision of the services referred to in Article 13.4.2(c), OA 'is subject to the general rules applicable thereto'.

306 Fourthly, the fact that the Greek State is empowered, under certain conditions, to make a contingent, unguaranteed, loan to AIA Ltd if OA is unable to pay the charges due to AIA Ltd (Article 13.4.3 of the convention for the development of the airport) also does not lead to the conclusion that the Greek State was involved in either of the two measures in question. The Commission dwelt at length on the abovementioned Article 13.4.3 in its analysis of the possible implications in terms of State aid of the arrangements for such a loan, approved on 12 June 1996 (Case NN 27/96). It concluded that the mechanism did not result in aid to OA's advantage. That provision is all the less relevant in this case because it was never claimed that AIA Ltd made use of it.

307 Fifthly, the tax exemptions granted to AIA Ltd under Article 25 of the convention for the development of the airport apply irrespectively of the conclusion or implementation of a debt settlement agreement with OA and are part of the arrangements approved by the Commission in 1996.

308 Under those circumstances, the applicant points out that in the *Stardust Marine* judgment, cited at paragraph 302 above, the Court of Justice considered none of the facts imputable even though the relationship between the French State and Altus/

SBT (specifically, owner of 100% of the shares and represented on Altus's board of directors) was at least as close, perhaps more so, as the relationship between the Greek State and AIA Ltd (owner of 55% of the shares represented on the board of directors, the other shareholders being powerful private companies).

309 The Commission denies that it based its findings on the fact that AIA operated under HCAA's responsibility.

310 To demonstrate that the measures are imputable to the State, the Commission argues that it is enough to show that the undertaking concerned could not take the decision at issue 'without taking account of the requirements of the public authorities' (Opinion of Advocate General Jacobs in *Stardust Marine*, cited at paragraph 302 above, points 51 to 78).

311 In this case, the imputability of the aid measures considered to AIA is shown by the large amount of evidence showing that the Greek State had influence in the adoption of certain decisions of particular interest, such as the question of OA's accumulated debts towards AIA.

2. Findings of the Court

312 The pleas alleging an error of fact, a failure to state reasons and a manifest error of assessment in regard to the imputability to the Greek State of the alleged tolerance of the failure to pay airport charges due to AIA must be considered consecutively.

313 In recital 210 in the contested decision, the Commission considered that the five alleged new aids were imputable to the Greek State on the basis of the criteria laid down in the *Stardust Marine* judgment, cited at paragraph 302 above. It put forward three reasons in that regard. First of all, the Commission pointed out that 'there are no doubts that it is the State itself, which tolerates the constant deferral, non-payment of different charges, taxes due by OA, as well as the infringement of Community and Greek law'. Secondly, it stated that '[a]s far as airports are concerned, the Greek authorities have stated that all airports run by the HCAA are funded by the State budget and all income derived from their activities goes to the State budget' and that '[a]irports in Greece are not autonomous financially, nor is the HCAA'. Thirdly, the Commission gave special consideration to the imputability of the failure to pay contributions to IKA.

314 In this case, on the basis of the second reason mentioned above, the applicant claims that the Commission justified imputing to the Greek State the tolerance of failure to pay charges due to AIA on the erroneous idea that AIA was run by a public authority, HCAA.

315 That plea alleging an error of fact cannot be accepted inasmuch as the second reason mentioned above has no effect in regard to AIA. Contrary to the applicant's allegations, the absence of a precise reference in the contested decision to AIA Ltd, the operator of AIA, located in Spata, in no way demonstrates that the Commission regarded that airport as being run by HCAA. In its decision (recitals 92, 156 and 207, and Article 2 of the operative part), the Commission systematically refers to AIA as 'Spata airport', thereby referring to the legal entity constituted by the abovementioned company and not merely designating the airport infrastructure located in Spata.

316 In addition, the Commission uses the term 'airports' to designate airports other than AIA (recitals 92, 151, 152 and 209, and Article 2 of the operative part). The term is

also used in the same sense in the second reason in recital 210, mentioned above in paragraph 313. That interpretation is the only plausible one both in terms of the structure of the contested decision and of the content of the second reason, which specifically refers to the lack of budgetary autonomy of airports other than AIA, which are run by HCAA.

317 It must be pointed out in regard to the statement of the reasons on which the contested decision is based that even if account is taken of the context of the present dispute, in particular of the fact that the Greek State was directly involved in the management of the applicant, the first reason given for that decision, which states that 'there are no doubts that it is the State itself, which tolerates the constant deferral ...', merely sets out the Commission's conclusion, without supporting a single part of the statement of reasons. The mere setting-out of that conclusion does not give the applicant a real opportunity to express its views as regards the reality and relevance of the Commission's argument that the State was involved in the tolerance of the failure to pay charges due to AIA, nor does it permit the Court to exercise its powers of review in accordance with settled case-law (see paragraphs 286 and 287 above).

318 It follows that the contested decision must be annulled on the ground that the statement of reasons is inadequate in regard to the alleged tolerance of persistent non-payment of airport charges due to AIA.

319 Under those circumstances, there is no longer any need to verify whether the Commission's assessment concerning the imputability of the conduct under consideration to the Greek State is vitiated by a manifest error of assessment, nor to consider the other questions raised in the present context concerning the alleged transfer of State resources, the burden of proof and the application of the private creditor criterion.

D — *The alleged tolerance in regard to persistent non-payment of VAT on fuel and spare parts*

1. The alleged new aid concerning VAT on fuel

(a) Arguments of the parties

320 First of all, the applicant denies the allegation that Olympic Aviation did not pay VAT on fuel from January to May 2001 and from November to December 2001.

321 Payment is attested to, at least for March and April 2001, by the debit notes (including VAT) presented by OA to Olympic Aviation for the supply of fuel for those two months which were included in the Hellenic Republic's observations of 11 April 2002.

322 The Commission failed to take account of the Hellenic Republic's general explanation, contained in its observations of 25 October 2001 and 11 April 2002, concerning the mechanism through which Olympic Aviation paid for its purchases of fuel.

323 The Commission in fact based itself on the monthly VAT declarations made by the applicant and Olympic Aviation. In particular, it is clear from the table in Annex 29 to the replies of 11 April 2002 to the first information request that Olympic Aviation did not pay any VAT to the State during the seven months in dispute.

324 However, VAT payments to the State were made solely for months in which the VAT collected on sales exceeded the VAT paid for purchases. In addition, Olympic Aviation's monthly VAT declarations transmitted to the Commission covered all types of purchases and sales and not merely purchases of fuel (or spare parts).

325 In this case, the monthly VAT declarations supplied to the Commission as Annex 9 to the Hellenic Republic's observations of 25 October 2001, and later as Annex 53 to the replies of 11 April 2002, merely show that the VAT paid by Olympic Aviation on purchases between January and May 2001 exceeded VAT receipts from sales subject to VAT. The same is true in regard to the VAT declarations for November and December 2001.

326 Under those circumstances, the Commission committed a manifest error of assessment in considering that the lack of evidence of payment of VAT for the seven months at issue led to the conclusion that Olympic Aviation had not paid VAT on fuel during that period.

327 The applicant claims, secondly, that the Commission did not discharge the burden of proof and infringed the right of the applicant and of the Hellenic Republic to be heard on the subject of VAT on fuel.

328 The Hellenic Republic replied correctly and in good faith to all requests for information on the part of the Commission, in particular the two requests. Notwithstanding the abovementioned debit notes transmitted to it, the Commission never indicated to the Hellenic Republic that it considered that evidence inadequate or that it considered that it lacked evidence concerning payment of VAT on fuel by Olympic Aviation for the seven months in question.

329 The Commission denies, first of all, that the contested decision is vitiated by a manifest error of assessment in regard to the evidence of payment by Olympic Aviation of VAT on fuel.

330 Contrary to the applicant's claim, the Commission never implied that it was certain that Olympic Aviation had paid VAT on fuel outside of the seven months of 2001 in dispute. It pointed out in the contested decision (recitals 150 and 206) that no evidence had been provided of payments from January to May and November to December 2001.

331 The general explanation concerning the system whereby Olympic Aviation paid VAT, referred to by the applicant, is irrelevant because it does not constitute proof of payment.

332 The Commission points out that the monthly VAT declarations merely indicate the VAT declared as paid and collected. The applicant should have proved that Olympic Aviation had in fact paid it the VAT in question for the supply of fuel during the seven months in dispute and thereby cleared the corresponding debit notes. However, the applicant had supplied it with no proof of payment. In addition, if, during the seven months in dispute, Olympic Aviation's receipts from VAT on sales subject to that tax had been superior to VAT paid on purchases, Olympic Aviation would have had to pay the difference to the State. Consequently, the applicant should have provided specific evidence, for each of the seven months in question, of Olympic Aviation's receipts from VAT on sales and the amounts of VAT actually paid on purchases.

333 Moreover, as the applicant itself has indicated, the monthly VAT declarations in no way make clear that account was taken of VAT on fuel for the seven months in dispute.

334 Finally, contrary to the applicant's allegations, cross-checking by the tax authorities of the monthly TVA declarations submitted by OA and Olympic Aviation does not guarantee accuracy. It can be seen from a document prepared by OA's tax adviser, provided as Annex 1 to the Hellenic Republic's observations of 11 April 2002, that OA's accounts were not up to date in regard to VAT.

335 Secondly, the Commission infringed the rules concerning the burden of proof and infringed the right to be heard of both the applicant and the Hellenic Republic. In the two information requests, it asked for all necessary information.

(b) Findings of the Court

336 The Commission found in the contested decision (recitals 150 and 206) that there was no evidence that Olympic Aviation had paid VAT on fuel for the periods from January to May 2001 and November to December 2001. It merely concluded that 'it cannot exclude that it constitutes State aid'. On the other hand, outside of the abovementioned period of seven months, it does not deny that VAT was paid on fuel.

337 To arrive at that conclusion in regard to the period in dispute, the Commission based itself, in particular, on the table entitled 'VAT payments 2001' — mentioned in recital 150 in the contested decision — contained in Annex 29 to the Hellenic Republic's replies of 11 April 2002. It also follows from the summary of the Greek authorities' observations in the contested decision (recital 91) that the evidence on which the Commission based itself was the VAT declarations submitted to those authorities.

338 It is clear from the abovementioned summary table, which contains only the amount of VAT paid by Olympic Aviation for each month of 2001 and with a dash alongside the seven months in dispute, that Olympic Aviation did not pay any VAT during those seven months.

339 The monthly VAT declarations submitted by Olympic Aviation for January to August 2001, which were transmitted to the Commission during the administrative procedure, explain the absence from the abovementioned table of a VAT debt on the part of Olympic Aviation for the months concerned. They show that the amount of VAT paid by that company on its purchases during the months of January to May 2001 exceeded the VAT receipts coming, essentially, from the sale of airline tickets, with the effect that Olympic Aviation's account was in credit.

340 Moreover, the Commission also had at its disposal during the administrative procedure the debit notes, including VAT, addressed to Olympic Aviation by OA for the supply of fuel for March and April 2001. The two debit notes show only that VAT on the fuel was certainly invoiced by OA.

341 It is common ground that the debit notes for January, February, May, November and December 2001, and Olympic Aviation's VAT declarations for November and December 2001, were not communicated to the Commission during the administrative procedure. In accordance with settled case-law, therefore, they should not be taken into account (see paragraphs 72 and 73 above).

342 It must first be considered, in this context, whether on the basis of the abovementioned documents, in particular the table in Annex 29 to the replies of 11 April 2002 and the VAT declarations for January to May 2001, on which the

Commission based itself in the contested decision, that institution was fully entitled to regard as new aid the tolerance of persistent non-payment of VAT on fuel owed by Olympic Aviation.

343 The applicant rightly points out that Olympic Aviation's monthly VAT declarations provide no indication of the amount of VAT paid on fuel by way of input tax. Those declarations do not make it possible to identify the VAT declared on fuel. They mention, grouped by the applicable tax rate, only the total amounts declared of sales on which the undertaking charged VAT by way of output tax (and the corresponding amounts of VAT) and the total amounts declared of purchases subject to VAT made by the undertaking (and the corresponding amounts of VAT).

344 Moreover, according to the applicant's explanation, which is not contradicted by the Commission, the fact that Olympic Aviation paid no VAT during the period in dispute, as can be seen from the abovementioned table, is caused by the existence of a VAT credit balance or a nil balance during that period, which could have been verified on the basis of the available monthly declarations, at least for the months of January to May 2001 (see paragraph 325 above).

345 It follows that the abovementioned table and the monthly declarations for five of the seven months in dispute, which clearly show a credit balance, were no more and no less good evidence than the VAT declarations from outside the period in dispute showing a VAT debt.

346 Moreover, it should be pointed out that, contrary to the applicant's allegations, the Commission took account in the contested decision (recital 91) of the system whereby Olympic Aviation paid for its purchases of fuel, set out in the Hellenic

Republic's observations of 25 October 2001 and in its replies of 11 April 2002. Under that system, OA purchased fuel on behalf of Olympic Aviation and later invoiced the full purchase price of that fuel, including VAT, to the latter.

347 In accordance with the principles governing the collection of VAT, the VAT owed by Olympic Aviation on its purchases of fuel could not in any circumstances be paid directly by that company to the State but rather to its supplier, namely, OA, which was liable to the State for the VAT thus collected and was required to declare it in its VAT receipts (output tax charged).

348 In that context, the contested decision contains no statement making it possible to understand the Commission's reasoning. In particular, recital 150, which refers to the lack of 'evidence that Olympic Aviation has paid the concerned VAT to the fiscal authorities' during the period in dispute, cannot be regarded as containing an understandable statement of reasons inasmuch as it appears to be inconsistent, having regard to the circumstance that, in recital 91 in the contested decision, the Commission took account of the fact that OA billed Olympic Aviation for the price of the fuel, including VAT.

349 In the light of all of the foregoing considerations, and having regard to the fact that compliance with the obligation to state reasons is a substantive procedural requirement infringement of which the Community Courts may raise of their own motion, it is sufficient to hold that the contested decision is inadequately reasoned in so far as it concludes that there was tolerance of Olympic Aviation's failure to pay VAT on fuel for the periods from January to May 2001 and November to December 2001. Consequently, it is not necessary to examine the applicant's other pleas in that regard.

2. The alleged new aid concerning VAT on spare parts

(a) Arguments of the parties

350 The applicant points out that purchases of spare parts for Olympic Aviation are made by OA in accordance with a centralised procedure. In its capacity as an international air carrier, OA is exempt from VAT. Olympic Aviation is not exempt because it operates only within the country. The applicant admits that, by mistake, Olympic Aviation committed a technical breach of the Greek VAT legislation in not paying VAT on spare parts to the Greek State.

351 However, that fact does not constitute aid within the meaning of Article 87(1) EC inasmuch as Olympic Aviation obtained no advantage from non-payment of VAT on spare parts. If Olympic Aviation had paid that VAT, it would simply have reduced by the same amount its monthly VAT bill to the Greek State.

352 According to the Commission, the applicant's argument concerning the absence of an advantage was not put forward during the administrative procedure and is therefore inadmissible.

353 In addition, in this case, the applicant has provided no evidence in support of the approximate calculations it makes. It has specified neither the exact amount of the VAT in question nor indicated what parts were purchased or what periods were under consideration.

354 It is clear from the Hellenic Republic's letter to the Commission dated 26 June 2003 that the Hellenic Republic expressly admits that, in 1988, OA did not receive from Olympic Aviation a specific amount of VAT (EUR 202 694.53) in respect of the sale of spare parts and that it did not include it in the corresponding VAT declaration. The Hellenic Republic claimed to the Commission that the applicant had submitted in that regard a supplementary VAT declaration for the 1998 fiscal year in 2003. According to the expert opinion of OA's tax adviser, annexed to the Hellenic Republic's replies of 11 April 2002 to the first request, OA's VAT accounting records were up to date. Checking the applicant's VAT data against that of Olympic Aviation was thus not possible when the tax authorities checked the monthly VAT declarations.

355 The situation of Olympic Aviation's accounts was no better. The accounts for 1998, 1999, 2000 and 2001 had been published late. Moreover, in the certificate accompanying the accounts for 2001, the auditors drew attention to inconsistencies in the accounts relating to transactions between Olympic Aviation and its parent company and the absence, in regard to those transactions, of the supporting documents provided for under the tax legislation.

356 In the light of those factors, the Commission considers that by not paying VAT which it is required to pay, Olympic Aviation obtained a real financial advantage over its competitors, regardless of whether or not the amount which was actually not paid was included in the VAT declarations concerned.

(b) Findings of the Court

357 The objection of inadmissibility raised by the Commission against the applicant's argument regarding the absence of advantage must be rejected from the outset.

Since that is a legal argument, it cannot, in accordance with well-settled case-law (see paragraphs 72 and 73 above), be considered out of time regardless of whether or not it was raised during the administrative procedure.

358 In addition, in accordance with case-law (see paragraph 254 above), there is no reason to take account of the Hellenic Republic's letter of 26 June 2003, submitted by the applicant and relied on by the Commission, inasmuch as it is subsequent to the adoption of the contested decision.

359 In this case, the contested decision (recitals 150 and 206) refers to non-payment by Olympic Aviation of VAT on spare parts from January to May 2001 and from November to December 2001. The applicant admits that Olympic Aviation did not pay that VAT.

360 The applicant's argument that that failure to pay VAT on spare parts did not give Olympic Aviation any advantage must now be considered.

361 It should be borne in mind that, in principle, VAT is neutral in regard to competitive position. VAT paid by a taxable person could be deducted as input tax immediately or refunded within a short period. The only advantage of which Olympic Aviation could benefit by virtue of not paying VAT on spare parts would be, perhaps, a cash-flow advantage arising from the temporary disbursement of the input tax (see, to that effect, the Opinion of Advocate General Kokott in Case C-369/04 *Hutchison 3G UK and Others* [2007] ECR I-5247, points 137 and 138).

362 It should be noted that Article 10 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended, provides that VAT becomes chargeable when the goods are delivered or the services are performed. By way of derogation, Member States may provide that the tax is to become chargeable, for certain transactions or for certain categories of taxable person, either no later than the issue of the invoice, or no later than receipt of the price. By virtue of Article 17(1) of that directive, the right to deduct arises at the time when the deductible tax becomes chargeable.

363 In that context, Olympic Aviation's failure to pay VAT on spare parts is not, in principle, sufficient to raise a presumption that that company enjoyed an advantage within the meaning of Article 87(1) EC. It is the Commission's duty to verify whether, in the circumstances of the case, that non-payment conferred a cash-flow advantage on the person concerned.

364 In the contested decision (recital 206), the Commission based itself exclusively on the failure to pay that VAT in order to conclude that there was State aid. It failed to consider whether that non-payment offered Olympic Aviation a real economic advantage and thus came within the scope of Article 87(1) EC.

365 It follows that the contested decision is vitiated by an infringement of Article 87(1) EC inasmuch as it finds that the tolerance of non-payment of VAT on spare parts constitutes State aid.

E — *The alleged tolerance of persistent non-payment of rents and airport charges due to airports other than AIA*

366 In the applicant's view, the Commission reversed the burden of proof and infringed both the applicant's and the Hellenic Republic's right to be heard. In addition, the contested decision is vitiated by a manifest error of assessment concerning the analysis of the set-off agreement concluded between the Greek State and OA on 24 June 1999 and ratified by Law No 2733/99 (FEK A' 155/30.7.1999; 'the set-off agreement of 24 June 1999' or 'the set-off agreement'). Finally, that decision is vitiated by a serious error of assessment and an inadequate statement of reasons in regard to application of the private creditor criterion.

367 Before considering each of those three claims in turn, it should be pointed out, first of all, that, in the contested decision, the Commission considered, on the one hand, the set-off of airport charges and rents due for different periods between 1994 and 1998 to various Greek airports other than AIA (recitals 151 to 153 and 209) and, on the other, rents in the amount of EUR 2.46 million due to those airports for different periods between 1998 and 2001 (recitals 154 and 206).

368 The abovementioned agreement provided for the setting-off of OA's debts to the Greek State in the form of rents and airport charges due at 31 December 1998 against the State's debts to OA for the same period. It is clear from that agreement that the amount of the mutual debts set-off was EUR 28.9 million. OA's debts to the HCAA consisted of charges due between November 1994 and 31 December 1998 and of rent due between 1996 and 1998.

369 In the contested decision (recitals 152 and 209), the Commission considered, essentially, that Law No 2733/99 and the set-off agreement were imprecise,

particularly with regard to the period to which the State's debts related, and were not accompanied by sufficient relevant evidence concerning the calculation of the mutual debts. In the absence of evidence concerning the amounts set off, the set-off did not therefore, according to the Commission, demonstrate the absence of State aid.

370 Moreover, with regard to the abovementioned rents in the amount of approximately EUR 2.46 million (EUR 1.6 million for OA and EUR 860 000 for Olympic Aviation) for various periods, according to the contested decision, between 1998 and 2001, the Commission considered that no proof of payment had been provided. Contrary to the applicant's allegations, it is clear from the statement of reasons in the contested decision, in conjunction with Article 2 thereof, that the Commission considered that tolerance of non-payment of those rents constituted incompatible State aid.

1. The burden of proof and the right to be heard

(a) Arguments of the parties

371 The applicant claims that the Commission adopted the contested decision without the essential evidence concerning, first, the amounts covered by the set-off agreement and, second, the payment of rents in the amount of EUR 2.6 million for various periods between 1998 and 2001. In addition, the Hellenic Republic did not have an opportunity to make its views known on those questions.

372 With regard, first, to the validity of the set-off agreement or its scope, the Hellenic Republic has replied to HACA's complaints. It transmitted an analysis of the debts

which were the subject of the set-off agreement in its observations of 19 February 2001 on the first complaint. Following the Commission's letter of 5 July 2001 asking for 'appropriate information' and 'confirmation that airport charges ... have been duly paid by OA', further information was provided in the Hellenic Republic's observations of 25 October 2001 on HACA's second complaint. The Commission never asked for any further specific information.

373 The first information request did not deal with the rents and charges covered by the set-off agreement but with debts of that sort in the period between 1998 and 6 March 2002. None the less, the Hellenic Republic supplied in its replies of 11 April 2002, in particular, an analysis of the debts covered by the set-off agreement. Following those replies, the Commission asked no further questions concerning that agreement. In the second information request, it asked for '[p]recise and quantitative information on the payment of the operating costs OA did not meet in 2001 (further enlightening the charges for the year 2001 and the charges for the previous years)'. That request did not cover the rents and airport charges relating to the period before the end of 1998.

374 Secondly, with regard to the payment of an amount of EUR 2.46 million due by way of airport charges for various periods between, according to the contested decision, 1998 and 2001, the applicant points out in its rejoinder that it can be seen from Annex 18 to the Hellenic Republic's observations of 11 April 2002 that that amount of EUR 2.46 million actually covered various airport rents owed by OA and Olympic Aviation for various periods from January to April 2002. It argues that the information establishing that that amount had not yet been paid was transmitted to the Commission in the context of the Hellenic Republic's replies of 11 April 2002 to the first request. In the second request, the Commission sought information on the plan to repay debts from 1 January 2002. However, no data were supplied on that subject in the Hellenic Republic's replies of 30 September 2002 because no such repayment plan existed at that time.

375 For its part, the Commission considers that both in regard to information for calculating the Greek State's debts to OA and the rents which the latter had left unpaid, it expressly requested the necessary evidence, in particular in its two requests.

(b) Findings of the Court

376 With regard to the plea alleging an infringement of the applicant's right to be heard, it is sufficient to note immediately that that plea has already been rejected for reasons already set out above (see paragraphs 42 to 46).

377 At this stage, it must be verified whether the rules concerning the burden of proof and the Hellenic Republic's right to be heard have been complied with.

378 With regard, first of all, to the mutual debts covered by the set-off agreement of 24 June 1999, neither the observations of the Greek authorities of 19 February 2001 on HACA's first complaint, to which was annexed, in particular, an internal OA note of 15 February 2001, nor their observations of 25 October 2001 on the second complaint or the annexes thereto contain any justification concerning the amount of the rents in dispute and that of the State's debts to OA covered by the set-off agreement. The Commission was merely informed of the set-off agreement and the abovementioned internal note of 15 February 2001 mentioning Law No 2733/99 ratifying that agreement, which contained only a table of the mutual debts being set off.

379 Moreover, it should be pointed out that, in paragraph 72 E of the decision of 6 March 2002 initiating the formal investigation procedure, the Commission pointed out that the set-off agreement did not provide, in an objective, relevant, transparent, neutral and non-discriminatory manner, the data relating to the accumulated debt of both parties and, for that reason, it expressed doubts concerning the way in which the amounts set off had been calculated.

380 In particular, in the first information request, addressed to the Hellenic Republic in the abovementioned decision of 6 March 2002, the Commission asked in particular for a list and details of payment by OA of airport charges at Elliniko airport and AIA and all rents, taxes, duties and subscriptions due to Elliniko airport, AIA and all other Greek airports from 1998 to the date of the request. Contrary to the applicant's allegations, that request clearly referred to all rents and charges still outstanding at that date, including, therefore, unpaid debts for the period from 1994 to 1998.

381 Although the supporting evidence provided by the Hellenic Republic in its replies of 11 April 2002 to the first request covered airport charges fully, as the Commission admitted in the contested decision (recital 152), it is not clear from the documents in the file that those replies or their annexes also covered rents and the Greek State's debts to OA.

382 In the second information request, the Commission requested both the data which had been asked for in the first request but which had not been provided and some further data. In particular, it called upon the Hellenic Republic to provide it, first of all, with precise figures concerning the payment of operating costs by OA in 2001, specifying which charges were for 2001 and which were for earlier years, and, secondly, the plan for the repayment of debts from 1 January 2002. However, in their replies of 30 September 2002 to the second request, the Greek authorities provided no evidence concerning the debts which had been set off, in particular, rents in the

amount of EUR 1.49 million and the method by which the Greek State's debts to OA had been calculated.

383 In that context, inasmuch as it was for the Greek authorities to identify clearly all of the mutual debts set off in the agreement of 24 June 1999, and in particular after the first information request and even more so after the second request, the Commission was fully entitled to base itself on the available information and adopt the contested decision without asking for further information to complete the missing data.

384 With regard, secondly, to the airport rents in the amount of EUR 2.46 million due for various periods from 1998, it must be pointed out at the start that the fact that the contested decision erroneously refers to the period from 1998 to 2001, although the debt at issue also includes rents for various periods between January and April 2002 — as the applicant points out and as can be seen from Annex 18 to the Hellenic Republic's replies of 11 April 2002 to the first request — is not relevant in this case. The contested decision very clearly refers to a lack of evidence concerning the payment of the total rent amounting to EUR 2.46 million mentioned in Annex 18 which, in reality, relates to various periods between 1998 and April 2002, and not between January 2001 and April 2002, as the applicant argues. In particular, the contested decision sets out the total amounts concerning OA and Olympic Aviation respectively, mentioned in Annex 18.

385 It is thus sufficient to hold that the Commission was entitled to base itself, in the contested decision, on the information supplied by the applicant in its replies of 11 April 2002 according to which the amount of EUR 2.46 million corresponding to

that rent had not been paid. In its later observations, in particular its replies of 30 September 2002 to the second request, the applicant did not revisit this issue.

386 It follows that the pleas alleging an infringement of the rules concerning the burden of proof and of the Hellenic Republic's right to be heard must therefore be rejected as unfounded.

2. The analysis of the set-off agreement of 24 June 1999

(a) Arguments of the parties

387 The applicant claims that the analysis of the set-off agreement of 24 June 1999 in the contested decision is vitiated by a manifest error of assessment.

388 It alleges that one of the Commission's complaints, in recital 153 in the contested decision, concerns an alleged inconsistency between the figure of GRD 3 402 729 422 (approximately EUR 9.99 million), referred to in Article 2(2)(a) of the set-off agreement of 24 June 1999, and the figure of GRD 2 443 981 910 (approximately EUR 7.17 million), mentioned in Annex II to that agreement, which both relate to debts owed by HCAA to OA.

389 The applicant explains that the difference between these two amounts (GRD 958 747 512) is interest on the abovementioned debt of GRD 2 443 981 910. After the second amount, Annex II to the set-off agreement contained a reference to 'interest' of GRD 958 747 512.

390 Furthermore, the question of interest on other debts owed by the State, not covered by the set-off agreement, is not relevant in assessing whether that agreement implies State aid. OA continued to be liable for the amount of that interest. In any event, the Commission's complaints should have been made during the administrative procedure.

391 The Commission objects that Annex II to the set-off agreement refers to the State's debts to OA from different sources, including HCAA, up to 31 December 1998. It is therefore implied that the interest relates to all the debts mentioned above. In any event, it was for the applicant to explain why there was no interest on debts not related to HCAA.

(b) Findings of the Court

392 It should be pointed out that the text of the set-off agreement refers to mutual debts which have been set off, without specifying the amounts of those debts, interest included.

393 On the other hand, it is explicitly stated in Annex I to the set-off agreement of 24 June 1999 concerning OA's debts to the Greek State that the amount of EUR 28.9 million corresponding to those debts includes interest — more precisely, 'arrears' provided for under the Code for the recovery of public claims — up to 31 May 1999 for that part of OA's debt registered with the competent administration as public revenue.

394 In addition, all that is clear from the figures in the table in Annex II to the abovementioned agreement concerning the Greek State's debts to OA is that the amount of those debts taken into account in the set-off agreement covers seven categories of debts owed to OA by the Greek State, plus 'interest'. The abovementioned table contains the amount of debts which have been set-off from seven distinct sources, such as ministries or bodies of general interest. Under those circumstances, the mere fact, relied on by the applicant, that the debts owed by HCAA were mentioned in seventh place, before the interest, mentioned in eighth place and followed by the total does not lead to the conclusion that the interest related only to HCAA's debt.

395 However, the fact remains that the applicant provided no information during the administrative procedure as to the basis, or the method of calculating, the interest taken into account for the purposes of the set-off. In addition, even supposing the interest under consideration related exclusively to HCAA's debts, which has not been established, the applicant failed to provide information on the payment of interest on other debts not covered by the agreement.

396 In that context, the Commission was fully entitled to consider, in the contested decision, that the set-off agreement contained an inconsistency inasmuch as the breakdown of the State's debts in Annex II to the set-off agreement shows HCAA's debt to be approximately EUR 7.17 million (GRD 2 443 981 910) and not EUR 9.99 million, as indicated in Article 2(2)(a) of that same agreement.

397 In any event, it should be noted that the contested decision (recital 153) is not based solely on the abovementioned inconsistency in the figures concerning HCAA's debt but, more generally, on the failure to specify the periods of time concerned and the lack of evidence of the amount of the State's debts to OA in the form of airline tickets or invoices.

398 Under those circumstances, the Commission's assessment that the set-off did not establish the absence of State aid cannot be regarded as vitiated by a manifest error of assessment.

399 Accordingly, the plea alleging manifest error of assessment must be dismissed as unfounded.

3. The private creditor criterion

(a) Arguments of the parties

400 First, the applicant maintains that the contested decision is vitiated by a failure to state adequate reasons in regard to the private creditor criterion inasmuch as it is generic in nature. The statement of reasons does not identify the facilities granted to OA at the relevant periods in regard to rents and charges. It also does not answer the question as to when a private creditor would have initiated proceedings, nor what alternatives he had to the set-off agreement or forcing payment of airport rents of EUR 2.46 million by levying execution thereof, having regard in particular to the amounts which he owed to the applicant.

401 Secondly, the applicant points out, in support of its plea that there has been a manifest error of assessment, that the Commission should have considered whether it was 'manifest' that a private creditor 'in the same position' as the public creditor would not have concluded the set-off agreement of 24 June 1999 and would have

used all lawful means to obtain immediate payment of the amounts due by way of rents and charges covered by the agreement, as well as the abovementioned rents, amounting to EUR 2.46 million, for various periods between, according to the applicant, January 2001 and April 2002.

402 In the context of the consideration intended to determine whether it was 'manifest' that a private creditor would not have concluded the set-off agreement, it was not appropriate to take account of the applicant's financial situation in 2002. That consideration should have been based on the situation in June 1999, that is to say, the time at which the agreement was concluded.

403 In this case, the Commission did not establish in the contested decision that a private creditor would not have accepted a similar set-off of mutual debts. The Commission's argument that the payment of interest for delay does not eliminate the advantage drawn from late payment of the debts is irrelevant in assessing the conduct of a private creditor. In addition, that argument is inconsistent in a situation in which debts are set off, as in this case. The hypothetical advantage obtained by late payment is cancelled by the disadvantage caused by the late payment of the other party's debts.

404 Moreover, the Commission did not take account of payment by the applicant of an amount of approximately EUR 11.9 million in respect of rents and charges during the period between 5 January 1999 and 26 September 2001. Those payments show that the applicant could be regarded as a 'regular and diligent payer'. The EUR 2.46 million in unpaid airport rents for the period 'from 1998 to 2001' represents only a tiny fraction of the amount mentioned above, paid by the applicant during that period for the use of airports, namely, EUR 6 454 528 (an amount attested to by the evidence of payment contained in Annex 30 to the observations of 11 April 2002) and EUR 5 426 832 (an amount attested to by the evidence of payment contained in Annex 17 to the Hellenic Republic's observations of 11 April 2002). Moreover, the applicant also paid the whole of its rents and airport charges during the period from

1996 to 1998, an amount of approximately EUR 6 050 376, which were not covered by the set-off agreement of 24 June 1999, which covered, inter alia, rents in the amount of EUR 1.49 million, in respect of which the Commission considered, in the contested decision, that no clarification had been provided.

405 In that connection, the applicant complains that the Commission did not verify, in the contested decision, whether it is manifest that, after consideration of the advantages and disadvantages of the legal remedies available for the recovery of the amounts due, a private creditor would have used 'all lawful means'. In particular, the applicant points out that if, as the Commission alleges, the State's debts have priority in seizure or bankruptcy proceedings, a private creditor would not be concerned about accumulating debts of inferior rank. Moreover, irrespective of the probable success of the restructuring plan, all Greek airports except AIA, which belong to the State, would have prematurely lost their principal customer if OA had been forced into insolvency.

406 For its part, the Commission admits that a set-off does not as such involve State aid. In this case, the claims relating to the set-off agreement concern the lack of data on the calculation of the Greek State's debts to OA. Consequently, account could not be taken of the set-off agreement. Under those circumstances, having regard to the scale of the facilities granted to OA and to the latter's difficult financial situation, a private creditor would have sought, by means of every available remedy, to obtain payment of the amounts due or would have enforced the guarantees.

407 The Commission points out that neither the specific data in Annex 30 to the Hellenic Republic's reply of 11 April 2002, invoked by the applicant, nor OA's general financial situation allowed the applicant to be regarded as a regular and

diligent payer. The data in Annex 30 were fragmentary and vague. In particular, a large number of invoices in respect of rents were not accompanied by proof of payment.

408 In addition, the Commission regarded as unpaid rents for 1998 to 2001 only the rents mentioned above, in the amount of EUR 2.46 million.

(b) Findings of the Court

409 With regard, first, to the set-off of OA's debts to airports other than AIA, represented by rents and charges for various periods prior to 31 December 1998, it seems undeniable that a private creditor would not have consented to a set-off agreement like the one concluded between the Greek State and OA on 24 June 1999 unless its own debts of which account was taken for the purposes of the set-off were certain and their amounts clearly determined.

410 In this case, however, it is clear from the file that the periods covered by a considerable part of the mutual debts (rents owed by OA for the period from 1996 to 1998 and the debts of ministries and bodies of general interest) taken into account in the set-off agreement of 24 June 1999 were not specified by the Greek authorities. Moreover, those authorities did not provide evidence (airline tickets or invoices) of all of the State's debts to OA during the administrative procedure.

411 Under those circumstances, it cannot be considered that the Commission exceeded the limits of its discretion in considering, in the contested decision, that the abovementioned set-off agreement could not be taken into account in assessing the conduct which a private creditor would have adopted in a comparable situation to recover the abovementioned debts consisting of airport charges and rents in the amount of EUR 28.9 million, covering various periods between 1994 and 1998.

412 Consequently, in applying the private creditor criterion to unpaid rents and charges covered by the set-off agreement, the Commission was entitled to take account of the applicant's financial situation during the entire period covered by the debts, namely from 1994 to 2002, rather than basing itself on OA's financial situation at the date on which the set-off agreement was concluded, as the applicant suggests.

413 With regard to the airport rents in the amount of EUR 2.46 million in respect of various periods between 1998 and 2002 (see paragraph 384 above), it should be pointed out that the applicant admitted during the administrative procedure that that debt had not been paid.

414 In that context, having regard to the large amount of unpaid rents and charges owed by OA for various periods between 1994 and 2002, to the fact that part of that debt had long been due and to the risk that the creditor might not recover that amount or even suffer further losses, bearing in mind the applicant's seriously deteriorated financial situation, it cannot be said that the Commission committed a manifest error of assessment in considering that a private creditor would clearly not have accepted the persistent non-payment of his debts.

415 It must be pointed out that the contested decision contains a statement of reasons which is to the requisite legal standard. Recitals 151 to 154, 206 and 209 contain detailed data concerning the unpaid airport rents and charges. In that context, the general, but precise, explanations concerning the application of the private creditor criterion set out in recital 212 emphasise OA's financial situation, permitting the persons concerned to assess the reasons for the decision with regard, in particular, to the abovementioned charges and rents and permitting the Court to exercise its powers of review. In particular, contrary to the applicant's allegations, it is not necessary for that purpose that the Commission should determine, for example, the precise moment at which a private creditor placed in a comparable situation would have ceased to tolerate the default or delay in payment (see paragraphs 290 to 295 above).

416 It follows that the pleas alleging a manifest error of assessment or an insufficient statement of reasons must be dismissed as unfounded.

F — *The new aid allegedly resulting from the tolerance of persistent non-payment of so-called 'spatosimo' tax*

1. Arguments of the parties

417 The applicant claims that the contested decision should be annulled in regard to the alleged aid resulting from the tolerance of persistent non-payment of so-called 'spatosimo' tax for the months from December 2000 to February 2002 and the month of March 1999, imposed by the Greek Government on airline tickets for the purpose of financing the development of airports. It contends that the Commission did not discharge the burden of proof which it bore and infringed the right to a fair hearing of both the Hellenic Republic and OA.

418 The applicant alleges that if the Commission had looked for the 'missing' evidence, it would have concluded that out of the disputed amount of EUR 61 million, the amount outstanding for December 2000 to April 2001 had been paid (EUR 19.3 million) and the balance of so-called 'spatosimo' tax owed by the applicant was the subject of a debt settlement agreement in accordance with Greek law which was mentioned in the Hellenic Republic's letter of 13 November 2002. In addition, the applicant would have been able to provide proof of payment of so-called 'spatosimo' tax for March 1999.

419 The applicant considers that the Hellenic Republic replied sufficiently and in good faith to the Commission's requests for information. With regard to payment of so-called 'spatosimo' tax during 1999 and for the period between December 2000 and February 2002, the Hellenic Republic provided a complete answer in its reply of 11 April 2002 to the first information request, except in regard to proof of payment of the tax for March 1999 and for the period between December 2000 and April 2001. However, as a result of a mistake, that evidence was not transmitted. Consequently, the Hellenic Republic did not transmit additional information on those payments in its reply to the second information request. That reply did, however, include a table of payments made in 2001. It mentioned so-called 'spatosimo' tax of EUR 19.36 million and EUR 27.3 million which had not been paid as at 31 December 2001, but of which payment was 'imminent'.

420 In the absence of any requests for additional information, the Hellenic Republic and the applicant were totally unaware of the Commission's doubts in regard to payment of so-called 'spatosimo' tax for March 1999 and for the period between December 2000 and February 2002. Moreover, about seven weeks before the adoption of the contested decision, the Commission did not examine the evidence which had been transmitted to it, as can be seen from an internal Commission note of 18 October 2002, entitled 'Annex II — Background', which has been mentioned above.

421 Moreover, with regard to the debt settlement agreement concerning payment of so-called 'spatosimo' tax, concluded in November 2002, the applicant points out that, in their observations of 13 November 2002, the Greek authorities confirmed to the Commission that the amount of EUR 31 million referred to had been the subject of a settlement in accordance with the applicable law and procedure and that the relevant decision would be sent to them a short time later.

422 The applicant rejects the Commission's implicit conclusion that the debt settlement agreement constituted State aid. It had to be determined whether a private creditor would have concluded such an agreement. However, inasmuch as the Commission states that it has no evidence of the conclusion of, or compliance with, a debt settlement agreement and, clearly, no evidence as to the details of that agreement, it cannot claim that it is clear that a private creditor would not have adopted the same course of conduct as the Greek State.

423 In any event, the debt settlement agreement stipulated that the amount of so-called 'spatosimo' tax owed by the applicant is subject to interest on arrears at a monthly rate of 5% up to a maximum of 300%. Interest at such a high rate would have been taken into account, in conjunction with other factors, by a private creditor. It is thus not clear that a private creditor would not have entered into the abovementioned agreement.

424 The Commission considers that that argument should be rejected. It denies that it should have asked for further data to complete the missing information as a result of the replies to the two requests.

2. Findings of the Court

425 In the contested decision (recitals 155 and 208), the Commission takes the fact that no evidence of payment had been adduced for the total amount of approximately EUR 61 million due for the month of March 1999 as the basis for presuming that the tolerance of a persistent non-payment of the tax in the abovementioned amount constitutes State aid.

426 With regard to the plea alleging an infringement of the applicant's right to be heard, it is sufficient to note from the start that it must be rejected for the reasons already set out above (see paragraphs 42 to 46 above).

427 It must first be verified, therefore, whether the Commission has discharged the burden of proof and respected the Hellenic Republic's right to a fair hearing on this point, having regard to the requests for information addressed to the Greek authorities during the procedure and the replies furnished by those authorities.

428 In the first information request, the Commission asked for a list and details of payment by OA of so-called 'spatosimo' tax. In the second request, dated 9 August 2002, it called upon the Greek authorities to provide both the data already called for in the first request which had not been supplied and some additional information, such as precise figures concerning the payment of OA's operating costs for 2001, setting out more clearly the charges for 2001 and for previous years, and concerning the plan for the payment of debts with effect from 1 January 2002.

429 The applicant admits that, in reply to that request, it failed to prove payment of amount due by way of so-called 'spatosimo' tax for March 1999 and of an amount of EUR 19.3 million due for the period between December 2000 and April 2001.

430 Moreover, following the second information request, the Greek authorities merely transmitted, in their replies of 30 September 2002, a table of payments made in 2001. In addition, they indicated that payment of so-called 'spatosimo' tax in the amount of EUR 27.3 million, which had not been paid at 31 December 2001, was 'imminent'. However, neither the abovementioned table nor the declaration concerning imminent payment of the outstanding amount of the tax due for 2001 cannot be regarded as evidence.

431 Under those circumstances, the Commission was fully entitled to conclude that it could not reasonably suppose that when the Greek authorities and the applicant provided, in reply to the second information request, a table of the amounts of 'spatosimo' tax unpaid at 31 December 2001 and a document announcing payment, they reasonably considered that they had provided all the evidence which had been asked for.

432 Finally, it is clear from the parties' arguments and the documents on the file that, in the Hellenic Republic's letter of 13 November 2002, the Commission was merely informed of the conclusion in accordance with Greek law of a debt settlement agreement concerning so-called 'spatosimo' tax in the amount of EUR 31 million.

433 Under those circumstances, in the absence of any evidence of the conclusion of that debt settlement agreement and any detailed information concerning the periods or airports concerned, the interest to be paid, the timetable for making payments, and

the question whether any payment whatsoever had been made, the Commission cannot be blamed for not taking account of that agreement in the contested decision in determining whether the amount of 'spatosimo' tax under consideration had been paid.

434 It follows that the Commission was fully entitled to conclude that persistent non-payment of that amount had been tolerated without there being any need to verify beforehand whether a private creditor would or would not have entered into the agreement for the settlement of the alleged debts.

435 For all of the foregoing reasons, it must be held that that the Commission neither failed to discharge the burden of proof nor infringed the Hellenic Republic's right to a fair hearing by adopting the contested decision on the basis of the information which had been transmitted to it by the Greek authorities in response to the two information requests.

436 It was for the applicant to provide adequate information in reply to the first request and, even more so, to the second. In this case, contrary to the applicant's allegations, the fact that the Commission did not ask the Greek authorities supplementary questions cannot be attributed to an insufficient knowledge of the case. The content of the internal note referred to by the applicant provides no indication of such a situation.

437 It follows from that that the pleas alleging a failure to discharge the burden of proof and an infringement of the Hellenic Republic's right to a fair hearing must be dismissed as unfounded.

G — *The new aid allegedly resulting from the tolerance of persistent non-payment of social security contributions to IKA*

1. Arguments of the parties

438 The applicant denies that it received aid in the form of tolerance of non-payment of social security contributions by reason of the fact that, according to the Commission, it did not pay contributions to IKA from 1993 to 2001; that IKA and OA concluded a debt settlement agreement in April 2001 providing for the payment of contributions in 24 monthly instalments with a fixed amount as down payment; and that OA infringed that agreement by failing to pay contributions which fell due after the conclusion of the agreement in respect of the months of October to December 2001, with the result that the entire debt fell due.

439 The applicant claims, first, that the Commission did not satisfy the burden of proof and infringed both OA's and the Hellenic Republic's right to be heard.

440 Notwithstanding the absence of any request concerning IKA in the first information request, the Greek Government drew particular attention to the conclusion of the debt settlement agreement in its replies of 11 April 2002. It transmitted to the Commission proof that OA had made payments to IKA under the agreement and also transmitted the IKA document of 3 April 2001 which created that agreement and which had already been annexed to the Hellenic Republic's observations of 25 October 2001 on the second complaint.

441 The Hellenic Republic provided further information in Annex III to its replies of 30 September 2002 to the second request. That annex indicated that OA's unpaid contributions to IKA at 31 December 2001 amounted to approximately EUR 6

million and that that amount had been paid in January 2002. Moreover, as the second request concerned only operating expenses 'unpaid' by OA in 2001 and as the Commission had not indicated that the replies of 11 April 2002 did not, in its view, permit it to establish that contributions which fell due after the conclusion of the agreement in respect of the months of October to December 2001 had been paid to IKA, the applicant could not have interpreted that request as referring to those new contributions, inasmuch as they had been paid.

442 Following those replies, the Commission did not indicate that it still had doubts concerning the payment of new social security contributions due in respect of the period from October to December 2001 or the steps taken by IKA to give effect to the debt settlement agreement of April 2001.

443 The real reason why the Commission did not give the Hellenic Republic and the applicant a chance to provide the evidence that it regarded as missing is because, until a very late stage of the procedure, it was unaware of the content of its own files. That can be seen from the Commission's internal note of 18 October 2002 and the annex thereto mentioned above entitled 'Background'.

444 Secondly, the applicant contests the Commission's argument that the evidence transmitted to it was vague and erroneous.

445 It claims, in particular, that the contested decision is vitiated by an error of fact inasmuch as the Commission wrongly supposed that the applicant had not paid the social security contributions it owed to IKA for the period from October to December 2001. It claims that the information appearing on the payment order attached in Annex 31 to the Hellenic Republic's observations of 11 April 2002

indicated that the applicant had made the payment for December 2001, even though that document cannot be regarded as conclusive proof of payment. In the lower frame of the top right-hand corner of the payment order is a reference composed of the acronym for the National Bank of Greece (ETE) and the number of the bank cheque (20825222) that the applicant had used to pay its social security contributions for December 2001. The same bank cheque number also appears on the bank statement issued by that bank and annexed to the application.

446 In addition, the contested decision is vitiated by a manifest error of assessment and an error of fact inasmuch as the Commission concluded that the applicant had not paid fines or penalties in connection with its unpaid contributions during the various periods between 1993 and 2001.

447 The applicant explains that, before the conclusion of the debt settlement agreement of April 2001, the interest which had accrued on the unpaid contributions, which amounted to approximately EUR 21 million, had neither been calculated nor paid. However, when that agreement was concluded, the interest on the above amount which was the subject of the agreement was calculated in accordance with the provisions of the Greek legislation applicable to the imposition of interest on late social security payments and added to that amount. The total amount of approximately EUR 32 million covered by the debt settlement agreement thus included the interest due at the date of the agreement. The agreement also provided for further interest for the 24 months which it covered, the amount of which was approximately EUR 13 million, with the result that a total payment of approximately EUR 45 million was made on the basis of the agreement.

448 With regard to the abovementioned interest of EUR 21 million which had fallen due at the date of the agreement, the applicant criticises the Commission's argument that the surcharge of 120% provided for in the Greek legislation was reached after

three years. It alleges that 99.7% of the abovementioned amount relates to contributions due during the period between November 2000 and January 2001.

449 Finally, the applicant contests the Commission's argument concerning the lack of specific information as to the amounts due at various times and concerning the calculation of interest. The Commission cannot raise in the contested decision questions which it did not raise during the procedure under Article 88(2) EC.

450 Thirdly, the applicant claims that the contested decision is vitiated by a manifest error of assessment and an insufficient statement of reasons in regard to the application of the private creditor criterion.

451 In this case, the Commission should have determined whether it was clear that a private creditor in IKA's position would have used all lawful means to obtain immediate payment of the total sum owed to him under the debt settlement agreement following the first delay in the payment of contributions due for the month of October 2001 — something which the applicant contests — or whether it is clear that such a creditor would not have entered into the debt settlement agreement in April 2001.

452 The following facts should have been taken into consideration. First, according to the relevant Greek legislation, where a debt settlement agreement is violated, IKA's debtor may ask for a new debt settlement agreement for the payment of the contributions owed.

453 Secondly, a private creditor would certainly have taken account of the seizure of OA's real property carried out in July 2001 in respect of an amount of EUR 21 million. He would have obtained a guarantee of an amount corresponding at the time of the seizure to approximately 85% of the debt still outstanding under the debt settlement agreement of April 2001.

454 Thirdly, a private creditor would have considered the advantages and disadvantages of recourse to the fullest extent of the law compared to the conclusion of a second debt settlement agreement. Thus, recourse to the fullest extent of the law would have driven OA into bankruptcy, in which case the amounts due under the debt settlement agreement would not have been paid and the private creditor would have deprived himself of any later payment of social security contributions by OA.

455 Fourthly, OA has already made considerable payments under the debt settlement agreement and has continued to pay contributions which fell due after the conclusion of the agreement. It has thus demonstrated that it was a regular and serious debtor.

456 The Commission contends that that argument should be rejected. On the basis of the data provided in the Hellenic Republic's replies of 11 April 2002 to the first request, it reached the conclusion that OA had violated the debt settlement agreement by failing to pay contributions due for the months of October to December 2001.

457 Moreover, the Commission points out that the interest for late payment which the applicant claims is included in the abovementioned amount of EUR 32 million was charged only after the conclusion of the debt settlement agreement. Bearing in mind the annual capitalisation of interest, the maximum surcharge of 120% would have

been reached in almost three years of late payments. Consequently, some amounts were not subject to interest for approximately five of the eight years of late payment between 1993 and 2001.

458 With regard to the total amount of the payment provided for in the debt settlement agreement of April 2001, approximately EUR 45 million, the Commission complains that the applicant mentioned neither the various amounts of unpaid social security contributions due at different times, which constitute the capital due, nor the rules for calculating interest, so as to allow the accuracy of the calculation to be checked, nor the fines levied on OA as a result of the delay.

459 With regard to the application of the private creditor criterion, the Commission considers that the aid consists both of persistent tolerance of non-payment of contributions for the period from 1993 to 2001 and of the absence of steps to recover all the contributions due once the debt settlement agreement had come to an end.

460 In that context, even supposing, for whatever reason, that a private creditor would have been forced to tolerate non-payment of contributions over a continuous period of eight years and that, at the end of that period, a debt settlement agreement was entered into which was almost immediately breached and if the debtor's financial situation was in a state of total collapse, he would have availed himself of every legal remedy at his disposal to recover the amount owed to him.

2. Findings of the Court

461 The contested decision (recitals 147 to 149 and 205) refers to the applicant's failure to pay obligatory social security contributions for periods between 1993 and 2001

without fines being levied on it or other measures being taken, such as sales by auction, provided for in the Greek legislation and the rules concerning IKA and settlement of debts. It bases itself, in particular, on the finding that after the conclusion of a debt settlement agreement between OA and IKA in April 2001 in respect of an amount of EUR 45 million consisting of the amount of the abovementioned contributions and the accrued interest thereon, OA did not fulfil that agreement with the effect that the full amount of the debt, EUR 45 million, became immediately payable.

462 The Commission took note in the contested decision of the amount of EUR 45 million mentioned in the debt settlement agreement. In particular, it did not question the amount of interest included in that EUR 45 million. After finding that, of this amount of EUR 45 million, an amount (in 2002) of EUR 17.6 million had been paid, it considered that the balance of EUR 27.4 million was immediately payable, to which default interest should be added (recitals 149 and 205 in the contested decision).

463 It therefore clearly follows from the contested decision that the aid which results, in the Commission's view, from the tolerance of non-payment of social security contributions consists precisely of the tolerance of the default in the payment of the amount of EUR 27.4 million. On the other hand, the debt settlement agreement concluded in April 2001 is not regarded, in the contested decision, as constituting State aid. In that decision, however, the Commission considered the fact that no actions — fines, sales by auction — were undertaken during the period of eight years from 1993 to 2001 following the failure to pay social security contributions during that period reinforces the presumption that, during all of those years, IKA manifestly did not behave as a private creditor would have done in a comparable situation.

464 Bearing in mind the content of the contested decision which has just been set out, all that are relevant are the parties' claims and arguments in regard to the alleged failure

to comply with the debt settlement agreement and IKA's failure to undertake any step permitting it to obtain payment of the amount in dispute, namely, EUR 27.4 million, plus interest. In particular, the applicant's claims that the conclusion of the debt settlement agreement in itself was regarded as involving State aid are devoid of purpose. Moreover, the Commission's argument concerning the calculation of the interest included in the amount of EUR 45 million fixed in the debt settlement agreement must also be regarded as totally irrelevant, having regard to the content of the contested decision.

465 The first things to be considered, therefore, are the pleas alleging a failure to discharge the burden of proof, the infringement of the right to a fair hearing and error of fact in relation to the Commission's conclusion that OA 'appears not to have paid social security contributions for the months of October to December 2001, thus being in breach with the settlement' (recital 205 in the contested decision).

466 The Court finds that, having regard to the precise requests concerning OA's payment of its social security contributions made by the Commission in its two information requests, it was for the applicant to provide all necessary evidence concerning, in particular, the implementation of the abovementioned debt settlement agreement without it being necessary for the Commission to seek further information regarding contributions for the months of October to December 2001.

467 It is clear from the first information request, contained in the decision of 6 March 2002 opening the formal investigation procedure, that the Commission had required the Hellenic Republic to provide 'all necessary information' to permit an assessment of the alleged new aid, among which it mentioned the tolerance of non-payment or delayed payment of social security contributions owed by OA. In the same decision (point 38), the Commission pointed out, in particular, that, in their replies to the

second complaint, the Greek authorities had, inter alia, confirmed the delays in payment by OA of social security contributions for the period between March and December 2001.

468 In addition, in the second information request, the Commission asked both for the information already requested in the first request and not provided, and for precise figures concerning the payment of OA's operating costs. In the abovementioned context, the formulation of that second request, which referred to 'payment of the operational costs OA did not meet in 2001' clearly had to be interpreted as meaning that it referred, in particular, to proof of payment of new contributions to IKA.

469 However, it is clear from the file that, with regard to payment to IKA of new contributions for the months of October to December 2001, the only document which the Hellenic Republic transmitted to the Commission during the administrative procedure was the abovementioned payment order (see paragraph 445 above) concerning contributions for the month of December 2001. However, that payment order is unsigned and the applicant itself admits moreover that it is not 'conclusive proof'.

470 The other evidence relied on by the applicant and transmitted to the Commission in annex to the replies of 11 April 2002 to the first request relates, in particular, to the payment in instalments provided for in the agreement and to the payment of new contributions for the months of April to September 2001.

471 In addition, the evidence relating to payment of contributions for the months of November and December 2001, produced for the first time before the Court, cannot be taken into account in accordance with settled case-law (see paragraph 72 above).

472 In any event, it must be pointed out that the default in paying contributions for October 2001 was sufficient under Greek law to invalidate the debt settlement agreement.

473 Under those circumstances, in the absence of proof of payment of contributions owed to IKA for the months of October to December 2001, it cannot be considered that the Commission reversed the burden of proof or exceeded the limits of its discretion in presuming that the abovementioned contributions had not been paid.

474 It must therefore be verified, secondly, whether a private creditor, entitled to claim payment of the entire balance of OA's debt as a result of the default in paying contributions for the months of October to December 2001, would have tolerated a default in payment of the balance of EUR 27.4 million, plus interest.

475 To that end, account must be taken, on the one hand, of the fact that the seizure of OA's real property, carried out by IKA in July 2001, covered merely one sixth of the balance of OA's debt and, on the other, of the lack of any indication that IKA had actually taken any steps to obtain payment of the amount corresponding to the value of the property seized. Under those circumstances, having regard to the fact that the debt covered by the debt settlement agreement was old, relating, according to the information provided by the Commission, to the period from 1993 to 2001, and to the risk to the creditor of not recovering part of his debt or even suffering further losses, given the applicant's seriously deteriorated financial situation, it cannot be said that the Commission committed a manifest error of assessment in considering that a private creditor would clearly not have tolerated non-payment of the balance of OA's debt, amounting to EUR 27.4 million.

476 For all of those reasons, the pleas based on the reversal of the burden of proof, the infringement of the right to a fair hearing, error of fact and a manifest error of assessment must be rejected as unfounded.

V — *The plea alleging misuse of powers*

A — *Arguments of the parties*

477 The applicant claims that the contested decision is vitiated by a misuse of powers. It alleges that the decision was adopted in haste and the statement of the reasons on which it is based is weak in regard, in particular, to the alleged new aid.

478 Moreover, the contested decision is clearly based on a desire — in the context of reducing the number of airlines in Europe — to 'finish off' OA or to weaken it rather than a desire to envisage its restructuring correctly so as to determine whether that restructuring would make the undertaking viable. In particular, the Commission sanctioned OA on the ground that it did not act in accordance with the 1998 restructuring plan. However, the failure to carry out the plan was the fault of that institution inasmuch as it refused to accept that the conditions for freeing the last instalment of the aid had been met. In addition, the Commission avoided the essential question of determining whether the plan to restructure OA, as submitted on 12 December 2002, complied with the 1999 Guidelines on restructuring and, consequently, with Article 87(3)(c) EC.

479 The contested decision was adopted on 11 December 2002, before the end of the period covered by the 1998 restructuring plan. However, in December 2002, the first part of the privatisation had been carried out. Olympic Catering had been sold and there had been six expressions of interest in regard to OA's flying activities.

480 Finally, although the contested decision does not identify the amount of each alleged new aid and left it to the Greek State to determine that amount, the Commission's press release mentions an amount of EUR 194 million. That figure was cited in the press and caused substantial damage to OA.

481 For its part, the Commission contends that it exhausted all the means at its disposal to obtain the necessary level of cooperation with the Greek authorities.

482 It points out that the administrative procedure was initiated on 12 October 2000 by a complaint lodged by HACA.

483 In this case, the restructuring plan was not put into effect and the applicant did not succeed in providing the necessary data for payment of the third instalment of the aid, amounting to EUR 22.9 million. It was for it to indicate what measures it would have been able to take during the 19 days remaining between the adoption of the contested decision and 31 December 2002 in order that, as it claims, 'the amended restructuring plan would bear fruit ... within the period of validity of the initial plan'. Moreover, the unlawful new aids had already been granted much earlier (since 1993, for example, in the case of IKA).

B — *Findings of the Court*

484 According to case-law, a decision may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent evidence, to have been

taken with the sole, or at least the decisive, aim of achieving purposes other than those stated (Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 84, and *Schmitz-Gotha Fahrzeugwerke* v *Commission*, cited at paragraph 36 above, paragraph 81).

485 In this case, it must be pointed out that the applicant does not rely on any evidence which provides grounds for supposing that the Commission made a particularly rigorous application of Community State aid rules for the purpose, in particular, of reducing the number of airlines in Europe and that it failed to follow the procedure and employed the applicable criteria in accordance with its usual practice and the relevant rules of the Treaty and secondary legislation both with regard to the restructuring aid and the new aid under consideration.

486 With regard to the restructuring aid, it should be pointed out that the Commission refused to authorise payment of the last instalment of the aid in accordance with Article 1(2) of the 1998 decision which made payment of that instalment subject to compliance with all the conditions imposed by that decision particularly in order to secure the achievement of the expected results under the 1998 restructuring plan. Since those results were not achieved, something the applicant does not deny, the Commission was not entitled under the 1998 decision to adopt a decision favourable to payment of the last instalment of the aid, as has already been pointed out (see paragraphs 101 to 103 above). It cannot therefore be argued that it obstructed the implementation of the restructuring plan by finding that the conditions for payment of that final instalment had not been met.

487 As has already been decided (see paragraphs 131 to 133, 155 to 157 and 174 above), the applicant's arguments concerning the alleged infringement of Article 87(3)(c) EC in verifying the implementation of the restructuring plan, in particular the claims

concerning the alleged failure to take account of the process for the privatisation of OA, and the adoption of the contested decision before the expiry of the 1998 restructuring plan, are unfounded.

488 Moreover, the irregularity of the contested decision, found by the Court to exist in regard to the alleged new aid concerning VAT on fuel and spare parts (see paragraphs 349 and 365 above), cannot of itself constitute an indication of a misuse of powers. Similarly, with regard to the other new aid under consideration, the insufficient nature of the statement of reasons, the Commission's failure to fulfil its obligations in regard to the burden of proof and the infringement of the right to a fair hearing, on which the applicant relies as evidence of a misuse of powers, are irrelevant for that purpose in the absence of any indication permitting it to be supposed that the contested decision was adopted for any purpose other than the one stated. For the rest, and in any event, those pleas have been rejected as being unfounded.

489 The Commission's press release, indicating a precise amount of new aid to be recovered by the national authorities in implementation of the contested decision, is of no legal value. In addition, indication of that amount in the press release does not constitute evidence that the Commission was seeking to achieve, in the contested decision, any purpose other the application of the Treaty rules concerning State aid.

490 The plea alleging misuse of powers must therefore be rejected as being unfounded.

491 It follows that the contested decision must be annulled in so far as it concerns tolerance of persistent non-payment of airport charges due to AIA Ltd and VAT on fuel and spare parts. The remainder of the application must be dismissed.

Costs

492 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Where there are several unsuccessful parties, the Court is to decide how the costs are to be shared.

493 Since both parties have been partially unsuccessful and the parties have agreed that the unsuccessful party is to pay the costs, the applicant is to pay 75% of the costs and the Commission is to pay 25% thereof, in accordance with the parties' pleadings.

On those grounds,

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

hereby:

1. **Annuls Articles 2 and 3 of Commission Decision 2003/372/EC of 11 December 2002 on aid granted by Greece to Olympic Airways in so far as they concern tolerance of persistent non-payment of airport charges owed by Olympic Airways to Athens International Airport and of value added tax owed by Olympic Aviation on fuel and spare parts;**

2. **Dismisses the remainder of the application;**

3. **Orders Olympiaki Aeroporia Ypiresies AE to pay 75% of its own costs and of those of the Commission and orders the Commission to pay 25% of its own costs and of those of Olympiaki Aeroporia Ypiresies.**

Pirrung Meij Forwood

Pelikánová Papasavvas

Delivered in open court in Luxembourg on 12 September 2007.

E. Coulon J. Pirrung

Registrar President

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